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IN THE MATTER OF THE DISPUTE BETWEEN

UNITED TRANSPORTATION UNION

and

SOO LINE RAILROAD COMPANY

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DANA EDWARD EISCHEN
Neutral Referee

APPEARANCES

For the Union: HIGHSAW & MAHONEY, P.C.
by WILLIAM G. MAHONEY, ESQ.
JOHN O'B. CLARKE, JR., ESQ.
DONALD F. GRIFFIN, ESQ.,
of Counsel

For the Company: BARRY MC GRATH, ESQ.
Assistant General Counsel-Labor

CATHRYN S. FRANKENBERG
Vice President-Labor Relations

PROCEEDINGS

In January 1988 the United Transportation Union (UTU or Union) and the Soo Line Railroad Company (Company or Carrier) agreed to arbitrate two (2) issues in dispute concerning the interpretation and application of the Soo-UTU Employee Protective Agreement (EPA), effective July 1, 1985. Article II, § 13 of the EPA incorporates by reference arbitration procedures set forth in Article I, § 4(1)-(4) of the New York Dock Conditions (NYDC) 360 ICC 60 (1979). The Parties jointly designated Dana Edward Eischen to serve as Neutral Referee to hear and decide the questions at issue in this arbitration.

A hearing date originally was jointly established for April 29, 1988 at Washington, DC, with exchange of pre-hearing briefs and reply briefs prior to that date. The Parties jointly adjourned that hearing, sine die, due to supervening litigation of related issues in the United States District Court, Northern District of Illinois, Eastern Division. Thereafter, in January 1989 the Parties resumed arrangements for these arbitration proceedings and, following exchange of pre-hearing briefs and reply briefs, the hearing was held at Minneapolis, Minnesota on April 6, 1989.

Both Parties were represented by Counsel at the hearing and afforded full opportunity to present oral and documentary evidence in support of their positions. The record was held open for receipt of additional information and precedent decisions, with closing of the record in mid-July 1989. The Parties jointly stipulated to a relaxation of the time limits set forth in the NYDC procedures.

QUESTIONS AT ISSUE

The Parties jointly stipulated that the following questions are presented for determination by the Neutral Referee in this arbitration proceeding; but that the question of remedial damages or liability, if any, is not before the Neutral Referee for determination at this time. Moreover, the Parties stipulated that the following two (2) questions are independent of one another and require separate answers, even though some of the evidence and arguments may be similar:

1. Is the sale and implementation of that sale of the Lake States Transportation Division by the Soo Line Railroad Company to Wisconsin Central Limited a "Transaction" as that term is defined in the Employee Protective Agreement for employees in service as Trainmen, Yardmen and Conductors on the Soo/Milwaukee Operating System represented by the United Transportation Union effective July 1,1985?

2. *Do gross ton miles in the decline in business formula in* Appendix 3 of the above Agreement exclude ton miles attributable to portions of the Soo which the Soo sold to Wisconsin Central Limited?

CITED AGREEMENT PROVISIONS

EMPLOYEE PROTECTIVE AGREEMENT

This is an agreement between Soo Line Railroad Company, The Milwaukee Road Inc. and employees represented by the United Transportation Union (UTU) in service as yardmen, trainmen, and conductors.

The purpose of this agreement is to provide pursuant to 49 U.S.C. Section 11347 of the Interstate Commerce Act, as amended, for fair and equitable arrangements to protect the interests of employees adversely affected by the proceeding known as *Finance Docket 28640 (Sub. No. 9M)*; and to provide for expedited changes in services, facilities, operations, seniority districts and existing collective bargaining agreements to enable the expanded railroad system created by the Soo Line's acquisition of the Core Assets of the Milwaukee Road to be operated in the most efficient manner, as one completely integrated railroad.

ARTICLE I

Definitions. Whenever used in this agreement unless its context requires otherwise:

(a) "Railroad" means the Soo Line Corporation and its subsidiaries or affiliates, either before or after the acquisition of the Core Assets of the Milwaukee Road.

(b) "Milwaukee Road" means the Estate of the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

(c) "Core Assets" means the property acquired by the Railroad from the Milwaukee Road on February 19, 1985.

(d) "Employee" means a person with an employment relationship with the Railroad or Milwaukee Road, as of February 19, 1985, including an employee dismissed and later reinstated with seniority unimpaired, whose rates of pay, rules and working conditions are subject to the UTU's schedule agreement.

(e) "Transaction" means a change in operations, services or facilities of the Railroad arising from or growing out of the Acquisition.

(f) "Protected Employee" means an Employee of the Railroad or the Milwaukee Road who had an employment relationship on February 19, 1985, with either the Railroad or the Milwaukee Road (including such Employees who are furloughed or on leave of absence with right to return to service) and who performed Compensated Service for either carrier within the twelve (12) calendar month period of February, 1984 through January, 1985; provided, however, that any employee who did not perform Compensated Service within said 12 month period by reason of being out of service due to injury, illness, discipline, leave of absence for military service, or official duties with the Railroad or UTU, and who are subsequently returned to service with full seniority, or any Employee with a seniority date prior to April 1, 1978, and who was in active service on lines east of the Milwaukee Road on January 31, 1982, shall be a Protected Employee.

Employees furloughed or on leave of absense for reasons other than those specified herein shall be entitled to applicable benefits under the New York Dock Conditions if entitled thereunder.

(g) "Acquisition" means the acquisition on February 19, 1985, of the Core Assets of the Milwaukee Road by the Railroad pursuant to the Order of the Reorganization Court entered subsequent to the ICC proceedings referred to above.

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ARTICLE II

1. After February 19, 1985, all Employees of the Milwaukee Road are Employees of the Railroad, and are no longer subject to Milwaukee Road Wage Reduction provisions.

2. After the effective date of this agreement, so long as a Protected Employee is unable in the normal exercise of the Employee's seniority under existing agreements, rules or practices, to obtain a position producing Compensation equal to or exceeding that Protected Employee's monthly Job Security Allowance, the Protected Employee shall be entitled to a monthly guarantee payment equal to the difference between Compensation received for the month and the Protected Employee's Job Security Allowance (partial months shall be calculated on a pro rata basis); provided, however, that the Protected Employee's Job Security Allowance due in any month shall be reduced in an amount equal to 50% of the amount by which total Compensation for the preceding 12 months has exceeded total Job Security Allowances due during the same period. Until a 12-month history exists, actual existing months shall be used.

* * *

10. The right of Protected Employees to a Job Security Allowance shall be reduced due to a decline in business as determined by the formula established by Appendix 3 hereto. Those Protected Employees whose benefits have been reduced will have them restored in accord with the same formula.

* * *

12.(a) When the Railroad contemplates that effectuation of a Transaction may cause the dismissal or displacement of Employees or rearrangement of forces involving such Employees, it shall give at least ten (10) days written notice of such Transaction by posting a notice on bulletin boards convenient to the interested Employees of the Railroad and by sending certified mail notice to the duly authorized General Chairman of such Employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected, including an estimate of the number of Employees of each class affected by the intended changes.

(b) At the request of either the Railroad or the representatives of such interested Employees, negotiations for the purpose of reaching agreement with respect to the application of the terms and conditions of this agreement shall commence immediately and continue for not more than twenty (20) days from the date of the notice. Each Transaction which may result in a dismissal or displacement of Employees, or rearrangement of forces involving such Employees, shall provide for the selection of forces from all Employees involved on a basis accepted as appropriate for application in the particular case and in accordance with Section 3 of this Article II, and the permanent assignment of Employees made necessary by the Transaction shall be made on the basis of Section 3 of this Article II. If at the end of the twenty (20) day period there is a failure to agree, any party to the dispute may submit it for resolution in accordance with the procedures set forth in Section 13 of this Article.

(c) Notwithstanding any of the foregoing provisions of this Agreement, at the completion of the applicable notice period provided for in paragraph (a) above, the Railroad may effectuate the changes proposed in the transaction whether or not an Agreement has been reached on the terms of the applicable Implementing Agreement. If a proceeding under *paragraph (b) of this section results in displacement,* dismissal, rearrangement, etc. other than as proposed by the Railroad at the time of the Transaction, pending the outcome of such proceeding, all Employees affected by the Transaction during the pendency of the proceeding shall be made whole;

* * *

16. At the time adversely affected by any Transaction, any Employee, including an Employee who has returned from leave of absence for Northeastern Illinois Regional Commuter Railroad Corporation, who is a dismissed or displaced employee as those terms are defined in the New York Dock Conditions, may make a one time election to receive the payments to which he or she would be entitled thereunder, in lieu of a Job Security Allowance or any other payment hereunder; provided, however, such New York Dock payments shall be subject to the following modifications:

(a) The Employee shall not be required to exercise *seniority to a position at a work* location that would require a Change of Residence in order to continue eligibility for payments.

(b) The Employee shall not be entitled to any moving expense, Relocation Allowance or other payment for any Change of Residence that is not approved in writing in advance by the Railroad.

(c) The Railroad, at its discretion, shall have the right to require any dismissed employee, or displaced employee who has not achieved 60% of his or her displacement allowance in each month of the three consecutive calendar months immediately preceding receipt of notification to relocate to a work location selected by the Railroad, in which event the Employee will be entitled to a Relocation Allowance.

If after receiving a Relocation Allowance hereunder, a Protected Employee voluntarily elects to exercise seniority to a work location other than that to which the employee was relocated, the Protected Employee shall be deemed to have earned compensation based on the earnings which the Employee could have made at the work location to which he or she was relocated or the work location to which the Employee voluntarily transfers, whichever is greater.

(d) The Employee shall be entitled to refuse the transfer and elect one of the alternatives established by Section 11 hereof.

(e) The original claim made under the New York Dock conditions shall be presented in writing to the Railroad within 120 days of the effective date of the Transaction or shall be absolutely barred.

provided, however, in no event shall any Employee be entitled to any payment of an amount greater than his or her Job Security Allowance.

13. In the event the Railroad and its Employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provisions of this agreement, it may be referred by any party to an arbitration board for resolution in accord with the provisions of Article I, Section 4(1)-(4) of the New York Dock Conditions.

* * *

APPENDIX 2

N E W   Y O R K   D O C K

Finance Docket No. 28250

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

* * *

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

* * *

Appendix 3

DECLINE IN BUSINESS

The total gross ton miles in freight and passenger service on the Railroad and the Milwaukee Road for each month shall constitute the monthly business level. The total gross ton miles in freight and passenger service on the Railroad and the Milwaukee Road in any month during the 12 calendar month period of February, 1984 to January, 1985, inclusive, shall constitute the minimum monthly business level for that calendar month. If the Railroad abandons lines subsequent to February of 1985, the minimum monthly business levels for each month shall be reduced by the amount of gross ton miles attributable to traffic originated or terminated on the abandoned trackage during the test period.

During the first three year period after the effective date of this agreement, in the event of a decline in the monthly business level in excess of 5% from the minimum monthly business level for the same calendar month, all Job Security Allowances due that month shall be eliminated; in the event of any such decline during any calendar month in the next two year period, any employee's Job Security Allowance due that month shall be reduced by 50%; provided, however, that at any time Job Security Allowances are either eliminated or reduced hereunder, any Employee adversely affected by a Transaction shall be entitled to those benefits to which he or she would have been entitled under New York Dock Conditions, subject to all terms and conditions of the New York Dock Conditions. In any subsequent month in which the decline in business is 5% or less, all Job Security Allowances due shall be reinstated. At the end of the five year period following the effective date of this Agreement, there shall be no further reduction to any Job Security Allowance for any decline in business under this formula.

BACKGROUND

Following two earlier bankruptcies and unsuccessful attempts at reorganization, in December 1977 the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee") filed a petition for reorganization under the Bankruptcy Act of 1898. By 1980, the Milwaukee was abandoning and selling some 7,000 miles of track and was reduced to reorganizing and operating just the 2,500 mile "core" of its former 9,800 miles of track. Between 1981 and 1984 the Milwaukee, under the aegis of the Reorganization Court and the Interstate Commerce Commission (ICC) conducted negotiations with various rail carriers for the sale of these remaining "core" assets.

In 1983, the Soo Line Railroad Company (Soo) submitted a bid to the Reorganization Court to acquire the former Rock Island line from Minneapolis-St. Paul to Kansas City. Soo was unsuccessful in its effort to acquire this line which was instead sold to the C&NW. In January 1984 the Soo filed an asset acquisition plan with the ICC for the purchase of the Milwaukee's Core Assets. At that time, Soo operated 4,400 miles of track in the states of Michigan, Wisconsin, Minnesota, South Dakota, North Dakota, Montana and Illinois. The principal through traffic routes over Soo territory were Portal, North Dakota to Chicago, Illinois via Minneapolis-St. Paul; Noyes to Glenwood, Minnesota; Minneapolis to Sault Ste. Marie, Michigan; Duluth-Superior to Owen, Wisconsin and Argonne to Neenah, Wisconsin. Soo's traffic base consisted primarily of farm products, paper and pulp wood, and chemicals. In 1983 Soo had gross revenues of $293,230,000 and net income of $13,659,000.

On September 26, 1984 the ICC stated its preference for either Soo's acquisition or reorganization applications over those of the C&NW and the Grand Trunk. The ICC noted that Soo's acquisition proposal would permit a newly formed subsidiary to purchase Milwaukee's Core Assets for $150.2 million in cash plus assumption of Milwaukee liabilities totalling $420 million. Following ICC approval of Soo's application, the Reorganization Court directed the Milwaukee trustee to convey the Core Assets to either Soo or its subsidiary pursuant to a proposed purchase agreement between the parties. The actual purchase price totalled some $658 million, comprising $186 million in cash and the remainder in assumption of Milwaukee liabilities. Soo financed the cash portion of the Acquisition price by borrowing $125 million under a newly renegotiated Revolving Credit Commitment with several financial institutions.

On February 19, 1985 the Soo consummated its purchase of the Milwaukee Core Assets and shortly thereafter began negotiations with labor unions, including the UTU on labor protective conditions. The Milwaukee bankruptcy judge had imposed New York Dock protective conditions for employees affected by changes in operations resulting from the Acquisition. However, the Employee Protective Agreement (EPA) negotiated between the Soo and the UTU provided effective July 1, 1985 protective benefits which in many respects exceeded those contained in New York Dock.

Financial and marketing projections upon which Soo had predicated its ICC application for the Milwaukee Core Assets indicated an increase in net cash flow as a result of the Acquisition. Due to a number of factors these expectations were not realized. Actual revenue apparently was insufficient to provide cash to cover the day-to-day operating requirements of the Company which was already heavily burdened by the Acquisition borrowing. Soo resorted to traditional methods such as employee reduction, service curtailment and tighter fiscal policies and also established a separate business unit within the Soo system in February 1986, called the Lake States Transportation Division (LSTD). That division was 1,800 miles of track comprised of substantial portions of extremely low density lines in the state of Wisconsin and upper Michigan. After formation of the LSTD Soo entered into discussions with several labor organizations, including the UTU, in an effort to obtain new work rules and lower rates of pay for employees in the LSTD operation. At the same time Soo's revenue shortfall situation intensified to the point that its creditors required immediate action. The efforts to obtain work rule and pay concessions did not succeed and within this economic and financial framework the Soo and its creditors renegotiated the Revolving Credit Commitment at the insistence of the bankers. By the end of 1986, the Soo identified "all transportation assets not essential to the core business of the Company" and developed marketing programs for selling these properties. Among other assets the Soo sold its headquarters building in Minneapolis, Minnesota. In December 1986 and January 1987 the Soo retained Shearson Lehman Brothers to market the LSTD assets. On April 2, 1987, after negotiations with several interested parties, the Soo signed a purchase agreement with Wisconsin Central Limited (WCL) to sell approximately 1,800 miles of track in Wisconsin, upper Michigan, northern Illinois and eastern Minnesota, most of which had been part of LSTD. Following review by the ICC, the sale of LSTD to WCL was consummated on October 11, 1987.

The Soo did not treat the sale of LSTD as a "Transaction" under the EPA. According to the Soo, UTU employees on the LSTD were given an opportunity to work for WCL, to separate from the Soo through a voluntary separation plan available in December 1987, or to remain with the Soo and relocate to a point where their services are needed. Soo records indicate that some 14 UTU employees accepted employment at WCL, 83 accepted the "voluntary" separation plan, 52 "exercised seniority to core", 13 are on railroad disability, 4 are on leave of absence, and 105 were "direct relocated under EPA to core".

The UTU made timely invocation of the arbitration provisions of the EPA, contesting the Soo's determination that the sale of LSTD to WCL was not a "Transaction". In January 1988 the Soo and the UTU agreed to arbitrate the two (2) issues which have been submitted to me in this proceedings. Thereafter, the arbitration proceedings were postponed while the UTU pursued efforts to obtain injunctive relief requiring the Soo and WCL to negotiate an implementing agreement prior to conveyance of LSTD. The U.S. District Court for the Northern District of Illinois granted Soo's motion to dismiss the UTU complaint and later amended its decision reversing an implied holding that the questions presented before were not arbitrable. RLEA v. Soo Line Railroad Co., No. 87-C-5293 (July 19, 1988, amended November 22, 1988). Thereafter, these arbitration proceedings went forward in the hearing at Minneapolis on April 6, 1989. In the meantime, on October 19, 1988 the Soo commenced litigation against the WCL alleging failure to comply with the Asset Purchase Agreement (APA) dated April 2, 1987. Under date of December 28, 1988 the WCL counter claimed against the Soo in this litigation in the U.S. District Court, District of Minnesota, Fourth Division. Civil File No. 4-88-900. It should be noted that nothing in this arbitration Opinion or Award under the EPA is intended to express or imply an opinion or finding regarding the issues in dispute in that Federal Court litigation.

POSITIONS OF THE PARTIES

Union

Question No. 1: The UTU submits that Soo's sale of the Lake States Division to WCL was a "transaction" as defined in the Protective Agreement. UTU maintains that this sale clearly constituted a change in the operations of the SOO as a result of the Milwaukee Acquisition.

Additionally, the sale of the Lake States Division "grows out of" Soo's acquisition of the Milwaukee's core assets. The lines sold to WCL were all made redundant by better alternate routes obtained by the purchase of the core assets. Beside these redundancies in rail lines discussed above, Soo also became heavily indebted as a result of the acquisition. The sale of the Lake States Division generated $133 million for Soo that was directed almost entirely to reducing the debt assumed as part of the acquisition and operation of the core assets.

In order to establish this causal link between the acquisition of the core assets and the sale of the Lake States Division to WCL, UTU need only show a "reasonable relationship" between the acquisition and sale. Essentially, UTU must show that the acquisition was a factor in Soo's sale of the Lake States Division. The causal link is not severed if Soo can show that other factors than the acquisition <u>also</u> motivated the sale. In order for Soo to destroy the causal link, it must show that the acquisition <u>was not</u> a factor in the sale of the Lake States Division. (Emphasis in original.)

UTU submits that this causation standard is mandated by the statutorily mandated employee protections contained in 49 U.S.C. §11347. Those protections comprise the basis upon which the Protective Agreement rests. Although the Protective Agreement provides benefits greater than the statutory minimum, UTU submits that the statutory causation standards remain applicable to this AGreement. Any contention that the more stringent causation standards contained in recent ICC decisions should be applied is in error. However, even if those erroneous standards are applied to this dispute, UTU submits that the sale was "caused" by the acquisition of the core assets.

Based upon the causation standards set forth above, there can be no reasonable dispute that the sale of the Lake States Division "grows out of" the acquisition of the core assets. Therefore, the sale was a "transaction" as defined in the Protective Agreement.

Question No. 2: UTU also submits that the gross ton miles attributable to the Lake States Division must be subtracted from the monthly business level test period contained in Appendix 3 of the Protective Agreement. The sale of the Lake States Division was not a decline in business suffered by the Soo due to economic factors beyond its control. Instead, the sale of the Lake States Division was a volitional act on Soo's part that provided a substantial cash and operational benefit to Soo. This type of transaction is the antithesis of those events that ordinarily comprise a decline a business.

Further, any analysis of the Protective Agreement that characterized the sale of the Lake States Division as a decline in business would be unreasonable and defeat the purpose of that Agreement. The decline in business formula contained in Appendix 3 was a recognition by both parties that if events beyond Soo's control made the protective obligations contained in the

Agreement unduly burdensome, Soo could obtain partial relief from those obligations. If abandoned property is to be removed from the base, surely property which is sold as a growing concern must also be removed from the base.

Company

Question No. 1: Although it is a fact that considerable debt was taken on when the Soo purchased the Milwaukee Road in February, 1985, that debt was manageable based on the traffic and revenue projections made to the ICC. The revenue shortfall crisis detailed herein which led to the decision to sell Lake States resulted from intense rate competition, the changing rail transportation marketplace, and erosion of expected carloads. The Soo's failure to achieve the debt-equity ratio (leverage ratio) required in the various financial commitments was caused by deteriorating rates and revenue all of which deviated significantly from what had been projected by the Soo. The sale of Lake States was disposal of assets to generate cash to meet current financial obligations. Selling Lake States was a responsible business decision made two and one-half (2½) years after the Acquisition based on a financial crisis growing out of revenue shortfalls in an intensely competitive midwestern marketplace.

The facts clearly demonstrate that the Lake States sale to WCL was wholly independent and distinct from the Milwaukee acquisition. It neither arose from nor grew out of that transaction, and had no connection with it nor was a result of it. The record is replete with evidence that the application to the Interstate Commerce Commission by Soo in seeking its approval to acquire the Milwaukee road assets and the evidence in support of the application did not contemplate the Lake States sale. As a matter of fact, it was contemplated by Soo that the lines incorporated in the Lake States property would continue to be operated as part of the merged system, and as reflected in revenue and traffic projections furnished to the Commission, it was anticipated that substantial contributions would be forthcoming from those lines. It was not until well after the February 1985 Milwaukee acquisition that it became apparent those projections were overly optimistic and that largely due to market conditions, revenues were dropping precipitously, requiring Soo to dispose of the Lake States property to generate sufficient cash to meet its operating needs. It was not until late 1986 and early 1987 that lending institutions and investment rating organizations put pressure on Soo to generate more cash from sale of assets to meet its current obligations.

In resolving similar issues, the ICC and arbitration tribunals have ruled on the meaning of the term "Transaction", which is used in a very similar context in the so-called New York Dock Conditions currently imposed by the ICC in merger and related transactions under the Interstate Commerce Act, 49 USC Sec. 11347. Thus, it is clear that the parties intended that applicable ICC precedence in applying the Act should have a bearing upon the outcome of interpreting and applying this agreement. The ICC's decision in reviewing an arbitration award in Finance Docket No. 28490, Atlantic Richfield Co. and Anaconda Co. - Control - Butte, A. & Pac. RR. etc. (decided February 17, 1988, served march ;2, 1988) is especially pertinent to the issue.

There can be no question that "Transaction" as defined in the EPA should be interpreted and applied in the same way. The events must arise from or grow out of the acquisition transaction to fit the definition. In other words, there must be a causal nexus, which is wholly absent here.

Question No. 2: By its express terms the only exception to the calculation of the decline in business formula is gross ton miles attributable to abandoned trackage, there being no exception arising from line sales. Thus, line sales, as in the instant case, are wholly omitted from the description exception. The sale of assets such as Lake States is permitted in accordance with 49 U.S.C. Section 10901, and line abandonments are covered by an entirely different section, 49 U.S.C. Section 10903. They are treated as entirely separate and distinct events under the Interstate Commerce Act, which mandates the practice in the industry. Clearly, then, it was the intention of the parties to except only abandonments from the base comparison, since such occurrences truly reflect at the outset a discontinuance of rail operations, services and employment; whereas, line sales contemplate continuation of those economic factors.

It is submitted, therefore, that this Arbitrator should abstain from rewriting the decline in business formula and confine the parties to the express language in their agreement. Although UTU may not have foreseen the Lake States line sale when they agreed to this formula, it is not up to this Committee to rewrite it to satisfy the organization's concepts of equity. The Arbitrator's jurisdiction is confined solely to interpreting and applying the EPA, not to writing a new one.

OPINION OF THE ARBITRATOR

Question 1 - The "Transaction" Issue

The starting point for determination of this issue is the contractual definition of "transaction" upon which the Parties agreed in Article I(e) of the EPA: "Transaction means a change in operations, services or facilities of the Railroad arising from or growing out of the Acquisition".

It can hardly be gainsaid that the sale of LSTD to WCL to by Soo meant a "change in the operations, services and facilities" of the Soo Line Railroad. According to Soo's 1987 Shareholders Annual Report, the LSTD sale to WCL was "by far the largest asset sale "of (sic) the Corporation in its history". Nearly 2,000 miles of former Soo Line track in four (4) states, together with associated buildings, facilities, signals, adjoining property, vehicles, tools, equipment, rolling stock and inventory all were sold to WCL. Those rail lines had been a part of the Soo Line system for over a century. The sale terminated all Soo Line operations in the State of Michigan and disposed of nearly all of Soo Line pre-Acquisition track in the State of Wisconsin. Fourth and fifth generation customers and employees found themselves no longer doing business with or employed by the Soo Line Railroad. There is no question that this sale and implementation of the sale crosses the threshold conditional phrase of Article I(e) of the EPA. The critical question of fact and law presented in the case, however, is whether the October 1987 sale and implementation was a change covered by the restrictive adjectival phrase "arising from or growing out of" the February 1985 Milwaukee Acquisition by Soo Line.

There can be no reasonable doubt that a causal connection or link must be demonstrated between a subsequent change in operations or facilities by the Soo and the February 1985 Acquisition in order for the change to come within the definition of "transaction" covered by the EPA. In terms borrowed from the Law of Torts, learned counsel for the Parties have contested in this arbitration proceeding whether the appropriate causation test under Article I(e) of the EPA should be "but for" or "proximate" causation. That precise question has been addressed and answered by the Interstate Commerce Commission (ICC or Commission) in several recent cases involving disputes over the New York Dock definition of "Transaction". See Finance Docket No. 28490, Atlantic Richfield Co. and Anaconda Co. - Control -

Butte, A. & Pac. Railroad, etc., February 17, 1988 ("BAP"); Finance Docket No. 30965, Delaware and Hudson Railway Co. - Lease, etc. - Springfield Terminal, February 17, 1988 ("Springfield Terminal"); Finance Docket No. 28538 (Sub. No. 24), Burlington Northern, Inc. - Control and Merger - St. Louis & San Francisco Railway Co., June 8, 1988 ("Frisco").

The New York Dock definition was extrapolated by the ICC from 49 U.S.C. 11347, to wit: "Transaction means any action taken pursuant to authorization of [the ICC] upon which [the New York Dock] provisions have been imposed." UTU correctly points out that the ICC did not impose New York Dock provisions upon the Acquisition nor did the ICC formally approve the EPA. In lieu of imposition of New York Dock, the Parties voluntarily negotiated the EPA which differs in many respects from New York Dock, specifically including the express wording of the definition of "Transaction". UTU therefore urges that I reject these ICC precedents on grounds that the EPA was not imposed or approved by the ICC and, arguendo, that the ICC has erred in its interpretation of the statutory language and associated Congressional intent of 49 U.S.C. 11347.

One need not admire the ICC's recent heavyhanded intrusions into grievance arbitration proceedings under the Railway Labor Act nor necessarily agree with the Commission's preemptive interpretations of voluntarily negotiated agreements. However, it would be both inappropriate and quixotic for an arbitrator to reject out of hand the Commission's recent rulings on the issue of causation in New York Dock cases. The recent decision of the U.S. Court of Appeals for the Eighth Circuit reversing the ICC decision in Frisco was in my judgment correctly critical of the ICC's deviation from normal standards of review of arbitration awards. But that reversal does not negate the appropriateness of the "reasonably direct causal connection" standard of causation in MPA cases. BLE v. ICC, Civil Action No. 88-2120, 1989, U.S. App. Lexis 13796 (C.A. 8th, September 13, 1989).

Even though, technically, the ICC did not ultimately impose New York Dock upon the Acquisition nor formally approve the EPA, that Agreement by its literal terms rests upon 49 U.S.C. 11347. Further, the EPA is permeated with references and incorporations of provisions from New York Dock. Quite independent of the line of ICC decisions, per se, the better reasoned and more recent arbitral decisions in this arena also have tended to require a real and discernible causal nexus between the subsequent adverse effect (e.g., the 1987 sale of LSTD) and the earlier event out of which such protection was generated (e.g., the 1985 Acquisition). See In the Matter of Arbitration Between Missouri Pacific Railroad Company and American Train Dispatchers Association, Finance Docket No. 27773 (Arbitrator Nicholas Zumas, July 31, 1981); In the Matter of Arbitration Between United Transportation Union and Maine Central Railroad Company, Finance Docket No. 29720 (Arbitrator Robert M. O'Brien, August 10, 1984); In the Matter of Arbitration Between United Transportation Union and Norfolk & Western Railway Company, Finance Docket No. 29430

(Arbitrator Robert E. Peterson, August 29, 1986); _In the Matter of Arbitration Between United Transportation Union and Chicago and Northwestern Transportation Company_, Finance Docket No. AB-36 (Sub No. 2) (Arbitrator Gil Vernon); _In the Matter of Arbitration Between Brotherhood of Maintenance of Way Employees and Maine Central Railroad Company_, Finance Docket No. 29720 (Arbitrator I. M. Lieberman, February 26, 1985). In sum, I am convinced from the language "arising from or growing out of" used by the Parties in Article I(e) that they intended to connote a causal link less speculative or conjectural than mere "but for" causation.

For all of the foregoing reasons, I find that the appropriate standard of causation under EPA Article I(e) is essentially that utilized under _New York Dock_ cases:

> Before an employee is entitled to benefits ... there must be a reasonably direct causal connection between the transaction and the injury sustained; in other words the transaction must be the proximate cause of the injury .... If an employee is dismissed or displaced for reasons not connected with the transfer he is not entitled to the benefits.

See _BAP_, _Springfield Terminal_ and _Frisco_, _supra_. In terms specific to the present case, I find that if the overall record clearly and convincingly shows a reasonably direct causal connection between the 1985 Acquisition and the 1987 Sale of LSTD; in other words if the Acquisition was the proximate cause of the Sale of LSTD, then Question No. 1 must be answered in the affirmative. On the other hand, if the Sale of LSTD was caused not by the Acquisition but rather by wholly new intervening or superceding developments or events, then Question No. 1 must be answered in the negative.

Application of the foregoing standards to the overall record of evidence before me compels a conclusion that the UTU has demonstrated persuasively the existence of a reasonably direct causal connection between the Acquisition and the Sale of LSTD. Proximate causation does not necessarily mean the subsequent event must be intimately linked in temporal or spatial terms to the precipitating event. Therefore, the fact that the Sale of LSTD occurred some two (2) years after the Acquisition does not obviate a causal nexus, so long as it is proven that the Sale arose from or grew out of the Acquisition. Nor does the existence of other causative factors which might well have played a contributory or accelerating role in the Sale serve to sever the causal nexus, so long as it is demonstrated that the Sale is directly, primarily, and proximately linked to the Acquisition.

The UTU has demonstrated persuasively that the redundancy of the acquired Milwaukee lines and the former Soo Lines in the four-state Great Lakes area made severance and eventual sale of LSTD a viable business decision for Soo. Standing alone, however, the redundancy evidence smacks too much of the "but for" standard and would be insufficient, without more, to forge the direct causal link or nexus required under the "proximate causation" standard. However, the record also persuasively shows that the possibility or opportunity generated by this trackage redundancy in 1985 ripened into a realistic necessity to sell off

LSTD and many other severable Soo Line assets in 1986-87, primarily, if not exclusively, because of the enormous credit burden undertaken by Soo in 1985 to finance the Acquisition.

A real and direct causal nexus between the 1986-87 financial straits of the Soo Line, which necessitated the Sale of LSTD, and the Acquisition of the core assets in 1988 is clearly and convincingly proven by the preponderance of evidence in the record before me. Other factors, such as unanticipated post-deregulation intramodal competition, falling revenues, and inability to obtain economic concessions from some labor organizations may well have been contributory factors in the final decision to sell off LSTD. But from the evidence before me these were subsidiary to the primary proximate cause of the Sale, i.e., the debilitating debt load burden undertaken by Soo Line in 1985 to finance purchase of the Milwaukee core assets.

In that connection, unrefuted record evidence including specifically ICC Finance Dockets, financial reports from Soo Line auditors and Soo Line annual stockholder reports for 1985, 1986 and 1987, conclusively establish the following financial nexus:

1. In 1984, the last full year before the Acquisition, Soo Line had no borrowings against its available Revolving Credit Commitment with several financial institutions and long term debt comprised only 26% of Soo's capitalization;

2. To acquire the core assets, Soo paid a total purchase price of $658,000,000, comprising $186,000,000 in cash and the

remainder in assumption of current and long term liabilities of the bankrupt Milwaukee Railroad;

3. Soo financed the cash portion of the Acquisition purchase price by borrowing $125,000,000 under the new $150,000,000 Revolving Credit Commitment, with the remaining $25,000,000 paid from internal cash available;

4. In 1985, the year of the Acquisibion, long term debt doubled from 26% to 55% of Soo Line's capitalization. Conspicuously included in this "long term debt" accounting was the $125,000,000 in cash Soo Line borrowed against the Revolving Credit Commitment to finance the Acquisition. The 1986 Soo Line stockholders annual report states: "The increase over 1984 debt levels represent debt incurred to purchase the Milwaukee Railroad";

5. Early in 1986 Soo Line created LSTD as a "stand-alone" division comprising some 2,000 miles of now redundant pre-1985 Soo Line trackage, together with the Wisconsin River Valley and North Milwaukee to Green Bay, Wisconsin lines of the former Milwaukee Railroad purchased in the Acquisition;

6. By mid-1986 Soo Line was compelled to raise cash b selling off all severable assets, including its Minneapolis headquarters building. In late 1986 and early 1987, Soo Line initiated the sale of LSTD for the avowed purpose of reducing long term debt;

7. Of the $133,000,000 cash proceeds of the LSTD Sale, Soo ;ed some $98,000,000 to pay down the $125,000,000 in bank loans

it had borrowed under the Revolving Credit Commitment to finance the 1985 Acquisition.

This evidence of record persuasively demonstrates that the redundancy of lines arising from or growing out of the Acquisition made it viable for Soo to sell the LSTD and the financial burden arising from or growing out of the Acquisition made it necessary for Soo to sell the LSTD. Thus, I am persuaded that the Sale of LSTD is causally linked in a reasonably direct and proximate way to the Acquisition. Accordingly, I find that the Sale of LSTD was a "Transaction" as that term is defined in Article I(e) of the EPA.

Question 2 - "The Decline in Business" Issue

As with most railroad industry protective labor agreements negotiated by the Parties or imposed by the ICC, the EPA contains a "decline-in-business" provision which grants Carrier a limited escape clause from the financial onus of job security allowance benefits should future business volume decline from "test period" levels. Appendix No. 3 of the EPA is typical of such provisions. The first paragraph of Appendix No. 3 defines the "test period" and the "minimum monthly business levels" for each month, against which future monthly business is measured to determine whether Carrier can escape its job security allowance liability in a given month. The last sentence of the first paragraph of Appendix No. 3 constitutes an express caveat upon Carrier's utilization of the "escape hatch", however, in the case of an abandonment of lines by Soo subsequent to the Acquisition. In the event of such an abandonment, the test period months minimum business levels are reduced by the amount of traffic attributable to the abandoned lines, thus making it less likely Carrier could escape job security allowance payments consequent to an abandonment.

In this particular case, UTU acknowledges that the sale of LSTD was not an "abandonment" per se; but maintains that for purposes of Appendix No. 3 the sale should be treated the same way as an abandonment. The Organization maintains that Soo should be required to exclude LSTD gross ton miles from the decline in business calculations, on grounds of "reasonableness, fairness and equity".

The problem with the interpretive approach urged by the Organization is that this is a board of arbitration not a court of chancery and the language of the Agreement is quite clear. Appendix No. 3 expressly and specifically excepts "abandonment" from the calculation of decline in business formula but says nothing about "sales". The Interstate Commerce Act treats "abandonment" and "sales" as separate and distinct events, Cf. 49 U.S.C. §10903 and 49 U.S.C. §10901. It is neither unrealistic nor unreasonable to conclude that the able and experienced negotiators of the EPA knew and understood the legal and practical distinctions between the terms of art: "abandonment" and "sales". Arbitrators have long applied the principle that negotiators are charged with knowledge of the terms of their agreement and when negotiators expressly include one or more distinct members of a class in a written instrument they presumably intend the exclusion of others. See Great A&P Tea Company, 46 LA 372, 374 (Scheiber, 1966) and other cases collected in Elkouri & Elkouri, How Arbitration Works, 4th edition (Washington, DC: 1985), p. 355.

The alleged "equities" of the situation do not really come into play in such a case as this. Where the intent of the Parties is clear from the use (or non-use) of certain specific language, the Arbitrator must not legislate new language, for to do so would usurp the exclusive prerogative of the Parties to negotiate their own contract language. See Clean Coverall Supply Company, 47 LA 272, 277 (F. Witney, 1966); Arbitration Between Brotherhood of Railroad Carmen and Illinois Central Gulf Railroad Co. (J. LaRocco, June 27, 1986).

Based upon all of the foregoing, therefore, I find that the gross ton miles in the decline in business formula of Appendix No. 3 of the EPA does not exclude ton miles attributable to the LSTD sale by Soo to WCL.

AWARD

1. The sale and implementation of that sale of the Lake States Transportation Division by the Soo Line Railroad Company to Wisconsin Central Limited is a "Transaction" as that term is def   in the Employee Protective Agreement for employees in service as Trainmen, Yardmen and Conductors on the Soo/Milwaukee Operating System represented by the United Transportation Union effective July 1, 1985.

2. Gross ton miles in the decline in business formula in Appendix 3 of the above Agreement do not exclude ton miles attributable to portions of the Soo which the Soo sold to Wisconsin Central Limited.

Dated: Sept 27, 1989

Signed: Dana E. Eischen
Dana E. Eischen
Arbitrator

STATE OF NEW YORK
COUNTY OF Tompk. } SS:

On this 27 day of Sept 19 89 before me personally came and appeared DANA E. EISCHEN, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Elizabeth C. Wesman
ELIZABETH C. WESMAN
Notary Public, State of New York
No. 4652438
Qualified in Tompkins County
Term expires ~~March 30~~ Feb. 28, 19 90