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In the Matter of Arbitration	:	
Between	:	
United Transportation Union	:	
("Organization")	:	
And	:	<u>OPINION AND AWARD</u>
The Atchison, Topeka and	:	
Santa Fe Railway Company	:	
("Carrier" or "Santa Fe")	:	
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BACKGROUND: The dispute before this Arbitration Committee arose because the Carrier, in February 1989, sold a small segment of its railroad system identified as the Peoria Subdivision.

The significant events leading to the dispute began on December 17, 1980 when the Interstate Commerce Commission (the "ICC") in Finance Docket No. 29217 approved the application by the Santa Fe Railroad to purchase the remaining outstanding shares of the Toledo, Peoria and Western Railroad Company (the "TP&W"). As a result, the Santa Fe became the sole owner of the TP&W. As a condition for the Carrier to exercise its authority to purchase the TP&W, the ICC imposed employee protective conditions set forth in New York Dock RY - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) ("New York Dock"). The TP&W operated as a bridge carrier between eastern and western railroads, operating from Keokuk, Iowa to Logansport, Indiana and, in general, serviced Peoria and Central Illinois. Although the TP&W was then wholly owned by the Santa Fe, it was operated as a separate subsidiary corporation. Subsequently, in August 1983, the Santa Fe and the TP&W filed a "Notice of exemption " with the ICC, proposing to merge their systems. This proposal was approved by the ICC in Finance Docket No. 30249 dated August 23, 1983. Thereafter, the TP&W became the Carrier's "Peoria District". It was agreed that employees would be protected in their service. The ICC, as it had done earlier on December 17, 1980 when it granted the Carrier authority to acquire control of the TP&W, imposed New York Dock conditions for the protection of any employees affected by the transaction.

Directly in anticipation of the merger, the Organization (the United Transportation Union ("UTU")), the TP&W and the Carrier all entered into negotiations pursuant to Article 1, Section 4 of the New York Dock conditions for an Implementing Agreement. Subsequently, on September 14, 1983, the parties executed a document titled "Memorandum of Agreement" to be effective December 31, 1983. It reads, in pertinent part:

MEMORANDUM OF AGREEMENT between the Atchison, Topeka and Santa Fe Railway Company and the Toledo, Peoria and Western Railroad Company and their employees represented by the Brotherhood of Locomotive Engineers and United Transportation Union.

In connection with the contemplated merger of Santa Fe and TP&W, it is agreed:

Since neither TP&W nor Santa Fe contemplates discontinuance of any service or operation over the other party's territory there will be no dismissal or displacement of any employees, or rearrangement of forces as result of the Santa Fe-TP&W merger. As indicated, present TP&W will simply become another seniority district, to be known as the "Peoria District", and each employee will continue to protect the service to which now entitled.

Also, the Carrier has no desire to make any changes, in whole or in part, in any of the current Agreement rules or seniority rights of any party on either TP&W or Santa Fe. Even though, an implementing agreement is not required under the provisions of Section 4 of the New York Dock conditions when a merger does not cause the dismissal or displacement of any employees, or rearrangement of forces, the Carrier agrees the New York Dock conditions will be applicable to Santa Fe and TP&W train, engine and yardmen holding seniority, as such, as of the effective date of the Santa Fe-TP&W merger. If at some future date Santa Fe-TP&W undertakes a transaction, that causes dismissal or displacement of employees, or rearrangement of forces, the parties will meet to implement application of New York Dock conditions, and existing time limit rules will apply in the interim.

On January 1, 1984, the merger was consummated. On September 4, 1987, the TP&W Acquisition Corporation ("TPWA") filed with the ICC a "Notice of Exemption" to acquire and operate the Peoria District, which by then had been designated as the Peoria Subdivision. The

TP&W, at that point, was not a rail carrier. Six days later, on September 10, 1987, the Organization (Local 1815) filed a request with the ICC for a "stay to revoke, and/or for an investigation" of TPWA's exemption request. This request included a provision which essentially sought employee protective conditions and sought a stay until meetings with the seller and buyer could be arranged concerning major issues of concern to the Organization. The record shows that on September 9, 1987 the Railway Labor Executive's Association ("RLEA") and the Organization's National Legislative Director respectively joined in the request for a stay of TPWA's exemption. (The RLEA Protest of September 9, 1987 is not in the record, but was referenced by the National Legislative Director in his letter of September 15, 1987 to the ICC which is of record.)

On September 23, 1987, the ICC released its decision, dated September 16, 1987, on the Organization's September 10, 1987 petition (Finance Docket No. 31113). The ICC denied the petition for a stay and in pertinent part stated:

There is no evidence that petitioner will suffer irreparable harm if we deny this stay petition, or that TPWA and ATSF will not be substantially harmed if we grant it. UTU has also failed to demonstrate that it will likely prevail on the merits or that the relief petitioner seeks will be in the public interest. Indeed, UTU's position fails even to address any of the relevant stay criteria. Consequently, UTU's request for a stay of the effective date of this exemption notice will be denied.

However, because this decision did not address the requests made by RLEA and the Organization's National Legislative Director concerning this matter (noted earlier), the ICC served Finance Docket No. 31113 on November 9, 1987. The ICC concluded that it would not "institute an investigation" or "impose labor protection".

Because the issues of concern to the RLEA and the labor organizations it represented were not resolved, the RLEA threatened to call a strike over the Carrier's entire system. The Carrier, on November 16, 1987, sought a court ordered injunction against the threatened strike. Two days later, in the same court, the RLEA and others sued the Carrier

and TPWA. In relevant part, they sought an injunction against the sale of the Peoria Subdivision pending resolution of the issues that could affect the employees. The RLEA and others also requested the court to impose New York Dock protective conditions on the Peoria Subdivision.

Following a series of court orders and opinions, the Santa Fe's position essentially prevailed. However, in the interim, on November 13, 1987, the Organization wrote to the Carrier and asserted that, in accordance with the Memorandum of Agreement dated September 14, 1983, a meeting was in order to "implement application" of the New York Dock conditions for its members.

There followed a series of letters between the parties and meetings without resolution of the Organization's claim. Thereafter, the matter was progressed to this Arbitration Committee for a decision on the following questions:

ORGANIZATION QUESTION

Was the Santa Fe's sale of its Peoria Subdivision (encompassing the former Toledo, Peoria and Western Railroad Company) a "transaction" contemplated within the meaning of the September 14, 1983 merger agreement between the Organization and the Carrier?

CARRIER QUESTION

Was Santa Fe's sale of its Peoria Subdivision (which encompassed properties of the former Toledo, Peoria and Western Railroad Company) on February 3, 1989, a "transaction" within the meaning of the Interstate Commerce Act, the New York Dock conditions and the September 14, 1983 merger agreement between the Organization, The Atchison, Topeka and Santa Fe Railway Company, and the Toledo, Peoria and Western Railroad Company, so as to have been subject to the New York Dock conditions where yard, train and engine service employees were concerned?

POSITION OF THE PARTIES:

The Organization: The Organization's position in this dispute is based on its perspective on the history of the events leading to the Parties' September 14, 1983 Memorandum of Agreement. It points out that the ICC, in its approval of the 1984 merger of the Carrier and TP&W, clearly

imposed New York Dock protective conditions. Therefore, because of the Carrier's "adamant" position at the time and its assurance that the 1984 merger with the TP&W would not cause any dismissal, displacement of employees or other rearrangement of forces, a standard New York Dock Implementing Agreement was not required. Nonetheless, at the insistence of the Organization, the parties conferred and formulated the September 14, 1983 Agreement. Although the Organization submits that the 1983 Memorandum of Agreement is not the "standard" New York Dock Implementing Agreement, the Organization contends that the Agreement was a voluntarily negotiated document which has been incorporated as part of the Schedule Labor Agreement. Finally, it argues that this Agreement shows the mutual intent of the parties to reach an Agreement beyond the requirements imposed by the ICC. To support this contention, the Organization cites what it calls the clear language of the September 14 agreement which states that "...if at some future date the Santa Fe-TP&W undertake a transaction that caused dismissal or displacement of employees, or rearrangement of forces, the parties will meet to implement application of New York Dock Conditions ...".

With respect to the question of whether the sale by the Carrier of the former TP&W was a "transaction" as that term is used in New York Dock and within the meaning and intent of the parties' September 14, 1983 Agreement, the Organization argues that an acquisition having as its objective the operation of a railroad property or line of road which requires ICC approval can have no other meaning. When so contending, it also relies upon certain past Awards which have dealt with similar facts and circumstances as found in this dispute. The subject of the disputes in those Awards, the Organization observes, rested on the notion that, "but for the merger", the Carriers would not have sold segments of the merged line. In this instance, the Organization relies upon a sequence of related events over a period of time to show that the Carrier's lack of action in certain situations caused a deterioration of TP&W operations. Specifically, on this point, the Organization states that when Conrail in July 1981 cancelled joint rates and routes with TP&W (an action it also took with other rail Carriers over other routes), the Carrier did not appeal the action to the ICC. However, the other

affected Carriers appealed the Conrail decision affecting their routes and, on appeal, obtained successful court decisions to overturn the ICC ruling. The Organization argues that, had the Carrier joined the other Carriers in their protest, the Carrier also would have received a favorable decision, finding that Conrail failed to establish that its July 1981 cancellation was consistent with the public interest. Therefore, it argues, that "but for" the merger of the TP&W and the Carrier, the TP&W would have remained viable and independent in its role as a "bridge carrier" because the ICC would have required restoration of the routing via Logansport. In effect, the Organization claims that because the Carrier did not attempt to overturn the ICC's 1982 decision, the TP&W's "integrity as a bridge route Carrier was destroyed". The Carrier's indifference to the Conrail route cancellation, the Organization maintains, was the major factor in the loss of the Peoria Subdivision traffic base.

In summary, it argues, for all of the foregoing reasons, that the questions at issue here should be decided in the Organization's favor.

The Carrier: At the outset, the Carrier contends that there were two major events wholly unrelated to the merger and beyond its control that caused it to make the decision to sell the Peoria Subdivision to TPWA. The first was that, after Conrail cancelled joint rates and routes with the TP&W, there was a steady decline in carloadings. And second, the Organization refused to agree to work rule changes that may have lowered the cost structure of the Peoria Subdivision. Moreover, in an effort to enhance the overall profitability of the Peoria Subdivision, the Carrier notes that it sold a former portion of the TPW (the "Keokuk line") to a noncarrier. However, it points out that the Keokuk sale, which resulted in the abolishment of one regular train run and four jobs, did little to resolve the overall problem. The Keokuk line divestiture was made pursuant to the ICC's basic jurisdiction under Interstate Commerce Act, Section 10901, the same section under which the sale of the Peoria Subdivision was sanctioned by the ICC. The Carrier also points out the ICC refused to impose labor protective conditions in the Keokuk line sale as it did later in the Peoria Subdivision sale. Additionally, it argues that its major reason for its sale of the Peoria Subdivision was the loss of traffic and revenue

and that this contention is bolstered by a January 23, 1987 New York Arbitration Committee decision (AT&SF and UTU: Fredenberger) which held that the cancellation of two regular Peoria Subdivision trains had no causal nexus to the 1984 merger. That Award further held that the two trains were halted because of a decline in business. The Carrier, therefore, maintains that given this finding of fact and holding, this Arbitration Committee should embrace the doctrine of "collateral estoppel" and deny the claim on that basis.

With respect to the Organization's reliance upon the September 14, 1983 Agreement, the Carrier basically contends that, because this Committee was constituted under Article 1, Section 11 of New York Dock conditions, it is bound by the terms of those conditions. One of those conditions requires us to determine whether or not a particular employee was affected by a "transaction" as that work is defined in the conditions themselves.

The Carrier contends that the 1983 Agreement must be viewed in the context in which the Agreement actually was negotiated. It submits that the Agreement came about entirely because of the August 23, 1983 ICC order. Therefore, the September 1983 Agreement was executed in anticipation of a statutory "transaction", meaning an action subject to ICC approval and upon which New York Dock conditions would be placed. It argues that the Organization's assertion that the September 1983 Agreement is the only controlling authority in this matter is erroneous.

Finally, the Carrier maintains that because TPWA (the purchaser of the Peoria Subdivision) was not a railroad holding or operating company before the sale, the sale was an exempt Interstate Commerce Act, Section 10901 short line transfer to a "noncarrier". If this is the case, then with respect to the Organization's request for employee protection, the Carrier argues that those portions of the ICA which apply in mergers between two existing railroads are not applicable in this case, i.e., New York Dock Conditions do not apply. In summary, the Carrier maintains that by executing the 1983 Agreement there was no intent to protect employees against the consequences of other future developments which do not carry with them employee protection.

It contends that the Organization's arguments must fail because the New York Dock conditions imposed at the time of the 1984 Santa Fe

and TP&W merger do "not carry over" to the sale of the Peoria Subdivision several years later, because the sale was separately approved by the ICC under Interstate Commerce Act, Section 10901, a class of transaction which did not impose employee protective conditions.

FINDINGS: In arriving at our Findings and the Award, the Committee has carefully reviewed and considered the submissions of the Parties, the various arbitral Awards and other related holdings and decisions as well as the skillfully presented and forceful arguments of the parties' advocates.

As properly argued by the Organization, the key question here is whether the sale of the Peoria Subdivision was a "transaction" within the "meaning and intent" of the September 14, 1983 Agreement. It is apparent that, but for that document, the Organization's claims would not have been progressed. Specifically, the language in that Agreement which states that "... if at some future date Santa Fe -TP&W undertakes a transaction, or rearrangement of forces, the parties will meet to implement application of New York Dock Conditions ..." provides the main basis for the Organization's position. Certainly, its arguments have demonstrated a rational basis for its position in this matter. However, it was not able to overcome what we view as convincing evidence which supports the Carrier's posture in this dispute.

The evidence is clear and convincing that throughout the handling of the case the Organization has unsuccessfully sought New York Dock protective benefits. This is shown by a series of opinions and orders in the record before the Board. Moreover, in its initial appeal of November 13, 1987, which triggered the formal appeal process to this Committee, the Organization requested a meeting to implement application of New York Dock conditions. Therefore, throughout the handling of this matter with the ICC, the courts and the exchange of correspondence on the property as well as meetings on the property, the evidence shows that parties thought in terms of New York Dock conditions. Therefore, on that basis and because this body has been constituted under Article 1, Section 11 of the New York Dock Conditions, we are compelled to apply and measure the key factual event within the framework of New York Dock.

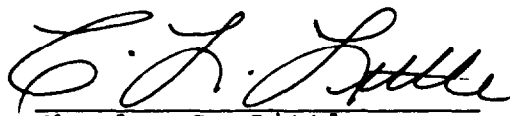
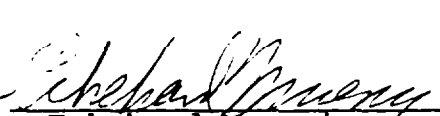
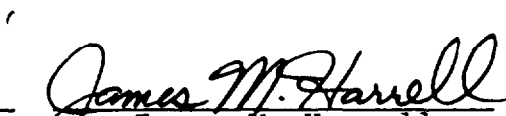
These facts show that the cause of job or earning loss was the sale of the Peoria Subdivision on February 3, 1989. Accordingly, the question is whether that sale was a "transaction" as that term is defined by the ICA and New York Dock conditions. Over many years, a "transaction" has been well-defined to mean any action taken pursuant to an authorization of the ICC on which the New York Dock conditions were imposed. In the case at hand, the purchaser of the Peoria Subdivision was a "noncarrier" corporation. It was a sale governed by Interstate Commerce Act, Section 10901, a property exchange and, thus, not a "transaction" subject to regulation under Chapter 113, Subchapter 111 of the Interstate Commerce Act, 49 U.S.C. 11341-11351. This sale, like the Keokuk line sale, was governed by Section 10901 which also did not provide protection benefits to the employees. We note that the Keokuk line was also a part of the former TPW so that the September 1983 Agreement would have had the same application or meaning as for the Peoria Subdivision sale. However, no claims for New York Dock protection were filed when the Keokuk line was sold. Additionally, we note that the record establishes that a series of court opinions and orders have rejected employee protection with respect to the sale of the Peoria Subdivision.

In summary therefore, we find that TPWA was a noncarrier corporation, that the sale that caused this dispute was taken under Interstate Commerce Act, Section 10901 and that the ICC expressly and specifically refused to apply the conditions of New York Dock. Therefore, there was no "transaction" as that term is used under New York Dock.

In light of the above, this Arbitration Committee must deny the claim of the Organization.

AWARD

The claim is denied.

		
Charles L. Little	Eckehard Muessig	James M. Harrell
Organization Member	Neutral Member	Carrier Member

Dated: January 9, 1991