Arbitration Pursuant to
Article I, Section 11 of the
New York Dock Conditions Imposed
by the ICC in Its Decision in
FD No. 32000

PARTIES TO DISPUTE

SOUTHERN PACIFIC TRANSPORTATION COMPANY
(EASTERN & WESTERN LINES)
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY

AND

TRANSPORTATION-COMMUNICATIONS INTERNATIONAL
UNION

DECISION

EMPLOYES' QUESTION AT ISSUE:

Can the Carrier unilaterally change the calculation of test period average hours and earnings as set forth in Article I, Section 5 of the New York Dock protective provisions by not including the total compensation received by the employe and total time for which the employe was paid during the test period?

CARRIER'S ISSUES TO BE RESOLVED:

1. The Organization has failed to progress the claim in accordance with the requirements in Section Q of the Implementing Agreement and Rule 26 of the Southern Pacific Transportation Company (Eastern Lines) Agreement.

2. The Organization has not met its burden of proof since it failed to establish a causal nexus between the RGI Control Case in FD 32000 and the alleged adverse affect on claimants' earnings.

3. Abnormal overtime claimed herein is not properly included in test period average earnings.

HISTORY OF DISPUTE:

In September 1988 the Interstate Commerce Commission (ICC) issued its Decision in Finance Docket No. 32000 approving the purchase and control by Rio Grande Industries, the parent company of the Denver and Rio Grande Western Railroad (D&RGW) of the assets of the Southern Pacific Transportation Company (SPT). In its Decision the ICC imposed the employee protective conditions of New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979) hereafter referred to as the New York Dock Conditions.

On July 6, 1989 the Carriers served notice pursuant to Article I, Section 4 of the New York Dock Conditions to transfer certain functions of the Accounting, Distribution Services (Marketing and Sales) and Management Services Departments of all Carriers to San Francisco, California. Further pursuant to Article I, Section 4 the parties entered into an implementing agreement on November 28, 1989 (November 28 Agreement).

In February 1990 the Carriers began to rearrange their employee forces in connection with the transfer of functions. That action resulted in furloughs, displacements and transfers which generated claims for protective benefits under the New York Dock Conditions.

Employees requested test period earnings from the Carriers for purposes of computing allowances due under the New York Dock Conditions. Some employees challenged the correctness

of the figures furnished by the Carriers. Eventually a dispute developed between SPT and fifteen employees who had worked in the Zone Accounting Department and Crew Dispatching Center in Houston, Texas prior to the transfer of functions to San Francisco and who questioned the accuracy of their test period earnings as furnished by the Carrier. The parties were unable to resolve that dispute, and the Organization invoked the arbitration provisions of Article I, Section 11 of the New York Dock Conditions.

A hearing was held in this case in Houston, Texas on September 10, 1990. All parties appeared, made written submissions and advanced oral argument in support of their respective positions. The parties agreed to extend the time provided in Article I, Section 11(c) of the New York Dock Conditions for a Decision in this case.

FINDINGS:

At the outset SPT challenges the ripeness of this case for adjudication by this Committee on the basis of Section Q of the November 28, 1989 Agreement which provides in pertinent part that a claim which has been denied initially by a Carrier:

> . . . shall be handled in accordance with the Agreement on the respective property. However, this shall not preclude the individual or the representative from submitting the matter directly to arbitration in accordance with Article I, Section 11 of the New York Dock Conditions. Should the matter be submitted directly to arbitration, it will be done within ninety (90) days from the date of such denial.

SPT emphasizes that representatives of the Organization met with SPT concerning the claims of the fifteen employees only once, on June 14, 1990. Thereafter, emphasizes SPT, the Organization did not follow the procedures of the applicable agreement for processing grievances but immediately invoked arbitration under Article I, Section 11 of the New York Dock Conditions.

The Organization denies the correctness of SPT's position and cites that portion of Section Q which the Organization contends allows its direct handling of the matter in arbitration. Moreover, emphasizes the Organization, it was the SPT's highest officer designated to handle disputes such as the one with the fifteen employees who met with the Organization on June 14, 1990 and denied that the SPT had miscomputed the test period earnings of the fifteen employees. The Organization argues that it would be a futile act to appeal the dispute within SPT eventually to the same individual who already has rejected the Organization's position.

We think the Organization's arguments have merit. The language of Section Q is clear and unambiguous. It states that although claims ". . . shall be handled in accordance with the Agreement on the respective property . . ." that requirement ". . . shall not preclude the individual or representative from submitting the matter directly to arbitration in accordance with Article I, Section 11 of the New York Dock Conditions . . . ." (emphasis supplied) The authors of Section Q were sophisticated

and experienced individuals in the field of railroad labor relations familiar with the parties' grievance procedures and problems attendant thereto.

We must conclude that the language of Section Q was intended to have its clear meaning. We recognize that the SPT officer who participated in the negotiations which produced the November 28 Agreement maintains that the disputed language was intended only to eliminate the first few steps of normal grievance handling and not the appellate process. However, we believe his position is inconsistent with the guaranteed right of the Organization or individual to submit a claim directly to arbitration. Inasmuch as Section Q was the product of knowledgeable and sophisticated negotiators, we believe that had they intended the interpretation placed upon it by the SPT's negotiating representative the language would have reflected more clearly such intention. Additionally, we believe it is significant that the highest officer of SPT designated to handle such disputes made the initial determination that this case had no merit. We agree with the Organization that it would be an exercise in futility to go through the process of appeal only to have the same individual render ultimate judgment upon the validity of the claim.

In view of the foregoing we must conclude that the Organization's handling of this dispute was in accordance with Section Q of the November 28 Agreement and is ripe for determination by this Committee.

The Carrier attacks the sufficiency of the Organization's proof under Article I, Section 11(e) of the New York Dock Conditions which provides:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Of the fifteen employees who challenged the accuracy of the test period earnings furnished them by SPT, eight appear on Attachment C to the November 28 Agreement which lists positions to be abolished in the Houston Zone Accounting Department and the incumbents of those positions. Moreover, the positions occupied by those eight employees were listed in a letter of April 5, 1990 from SPT's Manager of Labor Relations for SPT listing the positions of those eight employees as having been abolished. The Organization's submission in this case contains detailed infomration showing that the other seven employees were in the direct chain of displacements generated by the abolishment of positions as part of the rearrangement of forces in connection with the transfer of functions to San Francisco.

SPT has devoted much of its submission in this case to a review of numerous arbitration awards which hold that in order for an employee, or Organization representing that employee, to

satisfy the burden imposed by Article I, Section 11(e) of the New York Dock Conditions the employee or Organization must identify the transaction and cite such "pertinent facts" relating to the transaction as will establish that the adverse effect experienced by the employee was caused by or a result of the transaction. In short, the employee or Organization must establish a causal nexus between the transaction and the adverse effect without which the claim will fail.

We believe the foregoing facts establish the requisite causal nexus between the displaced status of the fifteen employees for whom the Organization challenges the accuracy of the test period earnings furnished by the Carrier and the transfer of functions from Houston to San Francisco. Accordingly, we believe the Organization met its burden under Article I, Section 11(e). The burden thus shifted to SPT to prove that factors other than the transfer of functions affected the fifteen employees. The record in this case is devoid of such proof.

We turn now to the gravamen of the dispute before this Committee, i.e., whether SPT properly excluded overtime from the test period earnings of the fifteen employees utilized for the purpose of calculating the displacement allowances due those employees under Article I, Section 5 of the New York Dock Conditions.

In its Decision of June 20, 1990 in Finance Docket No. 28905 (Subm-No. 24), ATDA and CSX Transp., Inc., the ICC made clear that this is a factual question for determination in arbitration

in the first instance with the process of appeal of such determination to the ICC available as a safeguard to insure consistency of the arbitral decision with the New York Dock Conditions. There is considerable arbitral authority on this question, as evidenced by the submissions and arguments of both parties in this case. Those authorities generally hold that overtime which is regular, recurring or casual is to be included in test period earnings but overtime which is extraordinary and related to an impending transaction is not to be included in such earnings. The question for this Committee is the nature of the overtime excluded by the SPT in this case.

The record in this case establishes that the overtime worked by the fifteen employees was in the Houston Zone Accounting Department and in the Crew Dispatching Center in Houston.

The SPT contends that the overtime worked in the Crew Dispatching Center was the result of employees filling vacancies on other assignments. Such vacancies, urges SPT, were the direct result of a temporary manpower shortage and SPT being unwilling to fill the vacancies knowing that manpower would become available to fill them when all accounting functions were transferred from Houston to San Francisco. The Carrier attributes the overtime in the Zone Accounting Department to the fact that in anticipation of and as a result of the impending transfer of functions to San Francisco SPT engaged in an active employee separation program and maintained a hiring freeze. Moreover, urges SPT, it had

consolidated the accounting functions of the St. Louis Southwestern Railway, a wholly owned subsidiary, from Tyler, Texas to the Houston facility. Those developments, SPT argues, caused a temporary shortage of clerks and resulted in excessive abnormal overtime. Additionally, SPT notes, employees in the Zone Accounting Department began slowing their work pace after the announcement was made that the functions of the department would be transferred to San Francisco thereby leaving considerable work which only could be done on an overtime basis. Thus, concludes the Carrier, the overtime worked by the fifteen employees was extraordinary or unusual and directly related to the transfer of functions to San Francisco and thus properly was excluded from the test period earnings for those employees.

The Organization vigorously disagrees that there was anything extraordinary or unusual about the overtime worked by the fifteen employees. The Organization has furnished gross earnings for those employees for the years 1988 and 1989. According to those figures the employees' earnings were substantially the same for both years. Moreover, urges the Organization, many of the fifteen employees involved in this case did not work in the Zone Accounting Office the functions of which were transferred which demonstrates that the overtime earnings for those employees could not have been related to the transaction.

We believe the record in this case more supports the Carrier on this point than it does the Organization. While the

gross earnings of the fifteen employees involved in this case may not have varied substantially for the years 1988 and 1989, that does not debunk the SPT's demonstration that the overtime was generated by the relocation of the functions of the Zone Accounting Department to San Francisco. Nor does that showing detract from SPT's demonstration as to how overtime in the CDC was generated by the transfer of the functions of the Zone Accounting Department.

In the final analysis we must conclude that the disputed overtime in this case was extraordinary and was performed in connection with the transfer of the functions of the Zone Accounting Department from Houston to San Francisco. Accordingly, it was proper for the Carrier to exclude such overtime from the test period earnings of the fifteen employees.

AWARD

The Organization's Question is answered in the affirmative.

The Carrier's Issues 1 and 2 are resolved in the negative. Carrier Issue No. 3 is resolved in the affirmative.

Wm. E. Fredenberger, Jr.
William E. Fredenberger, Jr.
Chairman and Neutral Member

D. A. Porter
Carrier Member

J. C. Campbell
Employee Member

DATED:

Article I Section 11 Arbitration - New York Dock
Finance Docket 32000 - Referee Fredenberger

DISSENT

The decision issued in this matter unfairly and improperly deprives the fifteen claimants of their legal entitlement to New York Dock benefits. The decision is made of whole cloth and is palpably erroneous.

Article I Section 11(e) of New York Dock places the primary burden of proof upon the employe (or Organization) to show the transaction which affected the employe. In the dispute presented to the referee the proof was irrefutable, as evidenced by the fact that **each** claimant was so informed by the carrier and **each** claimant was given test period computations prepared by the carrier.

Article I Section 11(e) goes on further to state that once the employee (or Organization) has fulfilled its burden of proof obligation, the burden of proof then **shifts** to the carrier:

> "It shall then be the railroad's burden to prove that factors other than a transaction affected the employe."

The award blatantly ignores this provision of New York Dock because the carrier did not even attempt to prove, much less provide probative evidence, that **factors other than a transaction affected the fifteen claimants.** Rather, the referee chose to ignore the fact of the unrefuted transaction and permitted the carrier to enter unsubstantiated statements, void of any credible evidence, that went **not** to the burden to show that **factors other than a transaction affected the claimants**, but rather went to wholly unrelated matters, in themselves unsupported by credible evidence, that **predated** the 1990 transaction.

Notwithstanding the fact that the undersigned presented argument and letters in the carrier's own hand which showed that the carrier had impeached itself in statements it presented in this dispute, the referee chose to adhere to the ill-reasoned award.

The most troubling feature of this award is that the neutral's findings are not based on any standard of evidence previously found in arbitration. Awards such as this only exacerbate relations between the parties and solve nothing. The award is an affront to reason and is palpably erroneous.

I dissent.

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Employe Member