

**ARBITRATION PURSUANT TO
INTERSTATE COMMERCE COMMISSION
FINANCE DOCKET NOS. 31880, 31882 AND 32043
ARBITRATION OPINION AND AWARD
RICHARD R. KASHER, ARBITRATOR
JANUARY 9, 1993**

In the Matter of a New York Dock Arbitration Between

**CHICAGO AND NORTH WESTERN TRANSPORTATION
COMPANY**

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

and

UNITED TRANSPORTATION UNION

Appearances

For the Chicago North Western Transportation Company

Paul A. Lundberg

Vice President, Labor Relations

John M. Raaz

Assistant Vice President, Labor Relations - Operating

For the Brotherhood of Locomotive Engineers

G.R. Debolt

Vice President

Bruce D. MacArthur

General Chairman

For the United Transportation Union

Clinton J. Miller, III, Esquire

General Counsel

Paul C. Thompson

International Vice President

David R. Haack

General Chairman

Introduction

The Interstate Commerce Commission (hereinafter the "ICC") imposed certain labor protective conditions, commonly and hereinafter referred to as the "New York Dock conditions", for the protection of employees of the Chicago and North Western Transportation Company (hereinafter the "Carrier" or the "CNW"), who might be adversely affected by the transactions authorized in ICC Finance Docket Nos. 31880, 31882 and 32043.

In these proceedings the ICC (1) authorized the Wisconsin Central (hereinafter the "WC") to purchase 97.03 miles of line between Cameron and South Itasca, Wisconsin from the CNW [Finance Docket No. 31880], (2) approved WC's granting of overhead trackage rights to the CNW of 141 miles of WC's line between points at Cameron, Ladysmith, Wisconsin Rapids and Junction City, Wisconsin [Finance Docket No. 31882], and (3) authorized a so-called "Joint Relocation Project Exemption" which involved relocating CNW's trackage rights over WC's lines between Gordon and Ladysmith, Wisconsin [Finance Docket No. 32043].

The Carrier notified its employees, including those represented by the Brotherhood of Locomotive Engineers (hereinafter the "BLE") and the United Transportation Union (hereinafter the "UTU"), on or about June 3, 1991 of its applications to the ICC to sell the 97.03 miles of track to the WC and to acquire overhead trackage rights between Cameron and Wisconsin Rapids, Wisconsin via Ladysmith, Wisconsin.

By letter dated September 16, 1992 to the UTU and BLE General Chairmen, the Carrier advised that it intended to affect the transaction described in its June 3, 1991 notice. In this letter the Carrier noted that a number of meetings had been held with the involved labor organizations in order to establish an implementing agreement in accordance with Article I, Section 4 of the New York Dock and Mendocino Coast protective conditions. The Carrier further advised that as no agreement had been reached regarding implementation of the transactions that it intended to submit the matter to arbitration pursuant to Article I, Section 4(a) of the protective conditions.

The parties agreed upon the selection of the below-signed Arbitrator to hear and resolve the dispute, and an arbitration hearing was conducted on November 11, 1992 at the Westin Hotel in Rosemont, Illinois.

Prior to the hearing the parties provided the Arbitrator with detailed pre-hearing written submissions in which they articulated their respective positions and to which they attached a substantial number of exhibits.

At the hearing on November 11, 1992 all three parties were given full opportunity to supplement their written positions with oral argument and additional evidence.

The hearing was transcribed, and the parties were encouraged during the period of time required for development of the transcript to meet and discuss in an effort to effect a

settlement. As those efforts failed, the matter is now before the Arbitrator ripe for adjudication.

Background Facts

The lines of track involved are triangular. At the northern apex of the triangle is Itasca. In 1982 the CNW acquired trackage rights from Itasca to the "twin cities" of Minneapolis-St. Paul from the Burlington Northern, and these trackage rights constitute a north to southwest run which represents the left side of the triangle. The right side of the triangle consists, in part, of CNW trackage which was sold to the WC and CNW trackage rights which were relocated in ICC Finance Docket No. 32043 and additional CNW trackage rights which were acquired from the WC as a result of Finance Docket No. 31882. This right hand side of the triangle runs from Itasca at the north through Gordon, Ladysmith and Junction City, Wisconsin. The bottom side of the triangle, viewing it from a west to east perspective runs from the Twin Cities through Altoona, Wisconsin to Adams, Wisconsin and then on to Chicago, Illinois.

There is a home terminal in Altoona, and, significantly in terms of the instant dispute, there is a home terminal for UTU-represented trainmen and BLE-represented engineers at Spooner, Wisconsin.

The Spooner home terminal is located on a line of track which essentially bisects the triangle. Viewed from north to

south this line of track runs from Itasca through Spooner, Cameron, Eau Claire and to a point on the east-west side of the triangle.

As a result of the 1982 acquisition of trackage rights from the Burlington Northern (in Finance Docket Nos. 29732 and 30871, the so-called "White Bear line"), which trackage rights ran from Itasca to the Twin Cities, and as a further result of the instant transactions involving the WC, there is no significant traffic which originates or terminates in or at Spooner.

Accordingly, after conclusion of the proceedings before the ICC, which resulted in the acquisition of the authorizations in the above-referenced Finance Dockets, the Carrier sought to relocate the Spooner home terminal to Itasca, a distance of approximately 67 miles. The Carrier sought to make this change because of the regular necessity to deadhead or transport train crews between Spooner and Itasca and return.

As will be more fully discussed in the positions of the parties, recited below, the BLE and the UTU objected on the basis that such change would involve the improper extra-legal "reconstruction" of existing collective bargaining agreements.

Position of the Carrier

The Carrier submits that the Arbitrator has jurisdiction to effect the proposed change of home terminals under Article I, Section 4 of the New York Dock protective conditions, which

provide, inter alia, 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". The Carrier further contends that pursuant to Article I, Section 4 of New York Dock an arbitrator has the authority to amend or alter any provisions of an existing collective bargaining agreement which would prevent an ICC-approved transaction from being effectuated, provided that such change was "necessary" to facilitate and implement the efficiencies of the transaction. In support of this contention, the Carrier cites an arbitration decision involving Article I, Section 4 of the Mendocino conditions, substantially the same conditions as those found in the New York Dock protective provisions, in which the arbitrator concluded that the Carriers (Norfolk and Western, Interstate and the Southern Railway) could put into effect changes in order to "realize the advantages" of a joint operation authorized by the ICC in Finance Docket No. 30582 (Sub-No. 1), (N&W et al. and UTU, Ables, September 25, 1985).

The Carrier points out that it proposed an implementing agreement, which it withdrew at the arbitration hearing, that contained conditions that exceeded the changes necessary to effectuate the transaction; and that now it is proposing, only, that any employee adversely affected by the transaction, which

would eliminate Spooner as a home terminal and establish Itasca as a new home terminal, be entitled to the protective conditions in New York Dock and Mendocino.

The Carrier next reviews the so-called White Bear agreements, and points out that those agreements provided that the work of operating between Itasca and the Twin Cities will be done by the Spooner pool, operating first in, first out of Itasca and the Twin Cities. The Carrier asserts that the only effect its current proposal will have upon those agreements is to eliminate the need to deadhead or transport crews between Spooner and Itasca; and that the operation will remain the same.

The Carrier maintains that the change it proposes is one for which the protective conditions imposed by the ICC are "tailor-made"; in that employees required to change their residence because of the home terminal relocation will be provided the moving expense benefits of New York Dock and Mendocino, and that employees who are adversely affected in terms of compensation by the home terminal relocation will be eligible for displacement or dismissal allowances.

The Carrier argues that changing the home terminal is required to effectuate the efficiencies the ICC approved, which included the CNW's geographic departure from Spooner. The Carrier points out that the CNW no longer maintains any facilities at Spooner or any track into or out of Spooner. The Carrier further points out that it is currently deadheading or

transporting employees between Spooner and Itasca at a rate that annualizes to approximately 1,800 man trips per year. The Carrier maintains that this represents totally unproductive and inefficient use of time and that it adversely affects the Carrier's ability to meet the requirements of the hours of service laws.

Based upon the foregoing facts and arguments, the Carrier submits that the Arbitrator should issue an award which adopts the CNW's proposal, which would permit the relocation of the Spooner home terminal to Itasca and which would result in the provision of fair, equitable and substantive protective conditions for employees who might be adversely affected by such move.

Position of the UTU

After reviewing the method of operations in the "triangle" area described above, and certain provisions of the applicable collective bargaining agreements, the UTU maintains that the Carrier is seeking to achieve in an implementing agreement arbitration what it was unable to achieve in direct negotiations with the Organization.

The UTU suggests that a review of the applicable Finance Dockets discloses that the ICC did not, in any way, authorize the abolition of a 1982 Memorandum of Agreement under which the Spooner Chain Gang with a home terminal of Spooner was described,

as it had existed for many years under prior collective bargaining agreements with the former labor organizations that now constitute the UTU.

The UTU contends that the Carrier's attempt to move the home terminal of Spooner to Itasca for the operation of through freight trains between Itasca and the Twin Cities and Itasca and Adams is inconsistent with the requirements of Article X of a July 22, 1971 System Agreement, which provides that in order to establish an interdivisional run an agreement must be reached with the involved labor organization.

Referring to Article X of the above-described agreement, the UTU submits that the Carrier is attempting to evade its responsibility under that agreement by having the Arbitrator change the collective bargaining agreement. The UTU cites several awards of special boards of adjustment established under the Railway Labor Act in support of its contention that the Carrier is obligated to negotiate the type of change it seeks in the instant case. The UTU also cites decisions by other arbitrators in matters involving the implementation and application of ICC-imposed protective conditions, which cases it argues support the position that the ICC, while authorizing changes in operations, did not authorize changes in "working agreements".

Based upon the foregoing facts and arguments, the UTU requests that the Arbitrator render an award which maintains the

sanctity of the involved schedule rules, particularly the provisions of Article X of the July 22, 1971 System Agreement.

Position of the BLE

The BLE devoted a substantial amount of its submission to the question of the propriety of the CNW's elimination of Altoona as a terminal. It became clear at the outset of the arbitration hearing that the Carrier was not proposing the elimination of Altoona as a home terminal. Accordingly that issue was not joined.

The BLE, in discussing the movement of the Spooner home terminal to Itasca, acknowledged that the line sale of track between Itasca and Wisconsin Rapids and the trackage rights associated with that line sale were addressed in the subject ICC Finance Dockets and were properly before the Arbitrator for consideration.

The BLE pointed out that, as a result of the so-called White Bear Line agreement, BLE-represented employees had been deadheaded from Spooner to Itasca for use on the trackage rights the Carrier acquired from the Burlington Northern, which trackage rights ran from Itasca to the Twin Cities. The BLE submits that the instant case does not differ substantially from the White Bear Line arrangement; that is, the Carrier proposes to operate from Itasca to Adams over the WC line, and the BLE argues that there is no actual need to eliminate Spooner as a home terminal

and disrupt the lives of the employees and their families in order to accomplish the proposed operation.

The BLE points out that it engaged in intensive negotiations with the Carrier regarding the relocation of the Spooner and Altoona home terminals in May through October, 1992, without success, although the BLE asserts that the parties were "close" to agreement.

The BLE then submits proposals, which include, among other items, the establishment of a "provisional terminal" at Marshfield and an overtime provision, which the Organization suggests would be appropriate, if, in fact, the Spooner home terminal was relocated to Itasca.

The BLE argues that the CNW's proposal to operate from Itasca to Adams involves an interdivisional run, and as such would be subject to an April 17, 1972 Memorandum of Agreement and the award of Arbitration Board No. 458 which established the June 1, 1986 BLE National Agreement which contained conditions regarding interdivisional service in Article IX. The BLE maintains that the provisions of these agreements require negotiations and agreement with the Organization before such an interdivisional run may be established.

The BLE cites several arbitration awards involving ICC-imposed protective conditions, which, the BLE argues, establish that an arbitrator does not have the authority to set aside applicable collective bargaining agreements in the context of an

implementing agreement arbitration conducted pursuant to New York Dock or other similar protective conditions.

Based upon the foregoing facts and arguments, the BLE submits that the ICC did not authorize the changes sought by the Carrier, and therefore the Arbitrator should not provide the Carrier with the right to implement such changes. Alternatively, the BLE suggests that if the Arbitrator finds that the Spooner home terminal should be relocated to Itasca, then the labor protective conditions of New York Dock and the terms of the Carrier's final proposal of October 22, 1992 should be implemented.

Findings and Opinion

A substantial part of the arbitration hearing held in Chicago, Illinois on November 11, 1992 was devoted to a presentation by the Carrier's Vice President of Transportation, Mr. Jeffrey H. Koch, who explained, using illustrative maps and charts, the efficiencies of service which the CNW expected to realize as a result of the authorizations obtained in ICC Finance Docket Nos. 31880, 31882 and 32043. Vice President Koch's presentation had, as its primary focus, the elimination of Spooner as a home terminal. Vice President Koch's explanations were clear and thorough, and his conclusion that the relocation of the Spooner home terminal to Itasca would result in significant operational efficiencies was convincing.

The following relevant excerpts from Vice President Koch's presentation demonstrate, to this Arbitrator's satisfaction, that retaining Spooner as a home terminal makes no operational sense:

MR. KOCH: (explaining the new operation)

. . .

The existing operation that we have now is, as Paul [Vice President of Labor Relations Lundberg] stated, all CNW tracks originating and terminating in Itasca operate via the Burlington Northern from Itasca down the Burlington Northern into the Twin Cities.

At Twin Cities they split east through Eau Claire, and down through Necedah and down into Adams.

ARBITRATOR KASHER: What does the Carrier do with the trackage that it has between Cameron and Eau Claire?

MR. KOCH: We have once a week wayfreight service. There are no overhead trains that operate on this route anymore. We have a wayfreight that works one day a week and performs the wayfreight and switching service between Eau Claire and Cameron.

ARBITRATOR KASHER: And the train and engine service that do that --

MR. KOCH: They come out of Hayward.

ARBITRATOR KASHER: Okay.

MR. KOCH: Now there is one train that operates on the Wisconsin Central. We have a wayfreight assignment who is headquartered at Hayward, the train takes the cars that are generated at Hayward and operates to what we call Springbrook, and at Springbrook we made a connection of our line that extends between Hayward and Trego, and we connected to the Wisconsin Central line.

. . .

As Paul [Vice President of Labor Relations Lundberg] stated, our operation today and our operation with the Wisconsin Central using the Wisconsin Central route will be totally different.

Before when we had the operation via Spooner, our trains operated from Eau Claire to Spooner.

And we had a crew change at Spooner. We then had an assignment that worked from Spooner to Itasca and back to Spooner. That was the manifest train that originated out of Chicago called PRITA. (From transcript pages 15 through 17)

* * *

MR. HAACK: All right. But back to the question, the wayfreight, what you are saying at Hayward, you transport them from Hayward to Eau Claire, and they operate north to Cameron once a week?

MR. KOCH: That is correct.

MR. HAACK: Who do you service them with the rest of the week?

MR. KOCH: Who do we service with what?

MR. HAACK: The plastics plant between Altoona and Cameron.

MR. KOCH: We just have once a week service on the line. Very few cars on the line, hardly any business on the line at all. (From transcript pages 19 through 20)

* * *

MR. KOCH: (explaining the new operation over WC lines)

* * *

It is very obvious why we want to operate via this route. The route miles are less. The use of the track we do not pay the Wisconsin Central to haul empties over the track.

We only pay on a loaded car mile basis which makes the operation certainly less expensive than our previous operation.

And from a fuel standpoint, from a labor standpoint, the operation is less expensive.

What we are talking about today is Spooner.

If you look at Spooner and what the operation will be via the Wisconsin Central versus the way it was when we operated our trains over our lines that we sold, Spooner just does not fit in with the operation, with the crews being home terminal at Spooner, each one would have to be deadheaded up to Itasca and then operate a train 260 miles to Adams.

I think from Spooner up to Itasca it is 67 miles, something like that. So Spooner is out of the way and it is not in line with the operation that we are proposing via the Wisconsin Central.

Itasca also fits in well with our operation. We will still operate some trains from Itasca to the Twin Cities via the Burlington Northern.

. . .

ARBITRATOR KASHER: I gather some of the traffic that presently runs over the Itasca to Altoona track will now be diverted to run over the Wisconsin Central?

MR. KOCH: Again, right now, there is nothing running [in that] direction.

ARBITRATOR KASHER: There is nothing running in that direction?

MR. KOCH: There is no overhead traffic from Itasca to Altoona. It always runs via the Burlington Northern.

ARBITRATOR KASHER: So Spooner is sitting out there on that — Altoona and Itasca is essentially there as a home terminal because at one point in time there was traffic flow over there?

MR. KOCH: Right. [That] used to be our route from Itasca to Adams through Spooner. Now the trains operate via the Burlington Northern because of the sale to the Wisconsin Central. (From transcript pages 44 through 47)

. . .

MR. KOCH: (offering further comments regarding the operation)

. . .

Right now, the crews at Spooner require a three-hour call. When you call a crew for Itasca that is at Spooner, it requires three hours advance call for the crew to report up to Itasca.

As you can see, because of the mileage it becomes a very inefficient operation. And our operation from Itasca to Adams as I previously stated will be operating 262 miles. And for our crew and with the hours of service being 12 hours by having the crew on duty at Spooner and driving up to Itasca it eats significantly into our hours of service.

It makes the operation between Itasca and Adams very difficult to compete with other railroads when you have every crew that is 67 miles away from the origin point of the train.

We will be operating schedules of about 8-1/2 to 10 hours on the trains, and that includes, that does not include the terminal time at Itasca in making up the train, making up the air tests, etcetera, nor the terminal time at Adams.

So the hours of service becomes very critical for us in order to gain the efficiency of the route and to perform against the Wisconsin Central, Burlington Northern, and Soo Line. (From transcript pages 48 through 49)

* * *

MR. HAACK: But when you say it is a three-hour call, that is not for the hours of service, is it?

MR. KOCH: That is the notification call.

MR. HAACK: But for the hours of service, I wanted to clarify that. It takes you about an hour and a half to get the crew from Spooner to Itasca, right?

MR. KOCH: Right.

MR. HAACK: So the other hour and a half is basically under the rule of calling?

MR. KOCH: Correct. (From transcript page 52)

While questioning by Representatives of the UTU and the BLE of Mr. Koch regarding the nature of the operation and the maintaining of the home terminal in Spooner appeared to establish that the "inefficiencies" of service were not as great as suggested by the Carrier, the bottom line is that retaining a home terminal in Spooner makes no operational sense.

The evidence of record clearly establishes that, beginning with the trackage rights agreement with the Burlington Northern in 1982, the so-called White Bear Line agreement, and culminating with the authorizations obtained in ICC Finance Docket Nos. 31880, 31882 and 32043, maintaining Spooner as a home terminal,

when there is virtually no traffic that originates or terminates at that point, is counter-productive to the best interests of the Carrier and its employees, who depend upon the Carrier's financial viability for their livelihoods.

If this case was being decided in the context of an "interest" arbitration, and if this Arbitrator was free to exercise discretion based upon sound principles of operating efficiency and appropriate equitable protective conditions for employees, then there is no question that the Carrier should have the right to relocate the Spooner home terminal to Itasca, provided New York Dock protections were afforded to employees who might be adversely affected.

However, as was pointed out in the Organizations' written submissions and in the oral argument, there is a substantial question as to whether a New York Dock arbitrator has carte blanche in terms of revising collective bargaining agreements subsequent to the issuance of authorizations from the ICC which impact changes in rail operations.

In oral argument, Clinton Miller, Esquire, UTU General Counsel, submitted that a carrier cannot "use the Interstate Commerce Act to accomplish a collective bargaining result, particularly where as here no requisite showing of necessity has been made". Mr. Miller further argued that the involved ICC

Finance Dockets were not concerned with the Carrier's previous acquisition of trackage rights over the Burlington Northern, which allowed the CNW to run from Itasca to the Twin Cities and then east to Altoona. Mr. Miller submitted that when the Carrier acquired these trackage rights in 1982, which permitted the Itasca to the Twin Cities run, there was no requirement or necessity that the home terminal at Spooner be changed, and, in fact, it was not. Finally, Mr. Miller asserted that the traffic "currently moves from Itasca, Twin Cities, Altoona using deadhead crews out of the home terminal at Spooner", and that "All that we are talking about here is a different triangle".

Reluctantly, this Arbitrator finds substantial merit in the arguments made by the Organizations; that is, that the Carrier has failed to establish, by sufficient evidence, that the movement of the home terminal from Spooner to Itasca falls within the Interstate Commerce Act's exemption authority, as decided by the United States Supreme Court in Norfolk & W.R. v Train Dispatchers, 113 L.Ed 2d 95 (1991). The Court held, in addressing the "narrow question [of] whether the exemption in Section 11341(a) [of the Interstate Commerce Act] from 'all other law' includes a carrier's legal obligations under a collective-bargaining agreement", that "By its terms, the exemption applies only when necessary to carry out an approved transaction."

A review of the record evidence, including the submissions made to the ICC, indicates that the Carrier advised in its presentations that "It is anticipated that crews will have their home terminal at Itasca and will operate to Adams" [part of Carrier submission in Finance Docket Nos. 31880 and 31882]. There is insufficient showing to persuade this Arbitrator that the ICC extended its exemption authority to the Spooner to Itasca home terminal relocation based upon a finding that that move was "necessary" to carry out the transaction.

As further support for this Arbitrator's conclusion that movement of the home terminal from Spooner to Itasca was not a necessary ingredient in the Carrier's 1991-1992 change in operations, as the result of acquisition of trackage rights from the WC, is the fact that for approximately ten years, from 1982 to 1992, the Carrier operated over the White Bear Line trackage rights arrangements deadheading or transporting crews from Spooner to Itasca; albeit those arrangements were, obviously, less efficient and productive than if Itasca had been established as a home terminal in 1982.

Based upon the foregoing elements of evidence, this Arbitrator concludes that the Carrier's proposal to move the home terminal from Spooner to Itasca, while it is, as the Carrier contends, "tailor-made" for a protective conditions arrangement,

does not fall, in light of the facts, within the clear authority of this New York Dock Arbitrator.

Accordingly, the Arbitrator is constrained to conclude that the Carrier's proposal cannot be granted/implemented under the jurisdiction which this Arbitrator has by virtue of the provisions of the New York Dock protective conditions.

The Arbitrator has used the words "reluctantly" and "constrained" in the context of sustaining the position of the Organizations, because this Arbitrator is firmly convinced that retaining Spooner as a home terminal, when over the last ten years it has clearly become obsolete as a point of operations, is clearly counter-productive to the best interests of the employees in the long term. Increasing the Carrier's costs of transporting crews from Spooner to Itasca, when Itasca is the logical home terminal, plays into the hand of competing rail carriers and other modes of transportation.

The rail industry provides the broadest, most detailed and richest form of protective conditions for employees who are adversely affected by a change in operations. This change, moving the Spooner home terminal to Itasca, should be made. The Carrier has proposed providing substantial protective benefits, in the context of making such a change.

While this Arbitrator does not find jurisdiction to mandate such a change, the parties should recognize that their long-term

best interests are served by effecting the change the Carrier has proposed.

Award: The Arbitrator does not have the jurisdiction, in the absence of a showing that moving the home terminal from Spooner to Itasca is "necessary" to carry out the "approved transaction", to change existing collective bargaining agreements regarding the establishment of Spooner as a home terminal. Nevertheless the parties are strongly encouraged to meet and discuss in the interests of preserving the CNW as a viable rail entity and to reach some accommodation regarding the movement of Spooner, which has become obsolete as a home terminal, to Itasca.

This Award was signed this 9th day of January, 1993.

Richard R. Kasher
Richard R. Kasher, Arbitrator