

In the Matter of the Arbitration Between

UNITED TRANSPORTATION UNION

-and-

CSX TRANSPORTATION, INC.

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Appearances:

For the UTU:            Larry R. Davis  
                          Virgil V. Elswick  
                          Randy Sargent

For the Carrier:        Howard S. Emerick  
                          Patricia A. Madden

Questions at Issue:

Carrier's Questions:

Has the Organization sustained its burden of proving that:

- 1) a transaction as defined in I.C.C.-imposed protective conditions has occurred?
- 2) employees have been adversely affected by a transaction?

Employees' Questions:

1. Is the diversion of traffic by CSXT from the former Chesapeake and Ohio Railway East/West route to a North/South thence East/West route over from Richmond, Fredericksburg and Potomac, Western Maryland and Baltimore and Ohio between Richmond, Virginia and Chicago, Illinois a TRANSACTION pursuant to the authority granted by the I.C.C. in Dockets 28905 and 31954?

2. If the answer to question Number 1 is in the affirmative, should the Carrier be required to restore the status quo of December 12, 1991, apply the terms and conditions required by ICC Finance Dockets 28905 and 31954

and make whole all Employees who were affected by the rerouting of traffic from C&O to RF&P, WM and B&O routing?

3. If the answer to questions Number 1 or Number 2 is affirmative, are the affected Employees' as asserted by the Organization and listed on Attachment "A" entitled to the protective benefits set forth in I.C.C. Finance Dockets 31954 and 28905?

Background:

On September 25, 1980 the ICC, in Finance Docket 28905, approved the application of CSX to acquire control of the railroad subsidiaries of the Chessie System, Inc. and Seaboard Coast Line Industries (SCLI). The Chessie System included the Chesapeake and Ohio Railway Co. (C&O), the Baltimore and Ohio Railroad Co. (B&O) and the Western Maryland Railway Co. (WM) along with other railroads. These subsidiary carriers were to remain as separate corporate entities. Although not fully owned by CSX, it also acquired control of the Richmond, Fredericksburg and Potomac Railroad Co. (RF&P) in Finance Docket 28905 by virtue of the fact that Chessie and SCLI each owned 40 percent of Richmond-Washington Co., a non-carrier holding company which owned 65.9 percent of the voting stock of RF&P. The RF&P was managed separately after the effective date of Finance Docket 28905.

In Finance Docket 31954, with a service date of October 31, 1991, the ICC granted CSX Corporation a corporate family transaction exemption for the acquisition of the railroad assets and operation of RF&P Railroad by the CSXT formed and owned RF&P Railway. In CSX's application for this exemption it stated in part:

... At some time following consummation of

the proposed acquisition of RF&P Railroad, CSXT and RF&P Railway may seek to take advantage of opportunities for operating efficiencies or cost savings that may become more practicable to achieve as a result of CSXT's acquisition of 100 percent control of RF&P's rail operations. These efforts may include consolidation of certain administrative functions, closer coordination of train operations, maintenance of way, equipment repair and allocation, and other functions....

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...RF&P Railroad's main line between Richmond and Arlington represents an important component of CSXT's north-south rail operations. The proposed acquisition will enable CSXT to exercise its existing control over RF&P rail operations more directly, and eliminate the transactions and accounting costs associated with its present exercise of less-than-complete control through intermediate corporate entities having substantial non-CSX shareholders....

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As noted, CSX at present has not developed plans for implementing any significant changes in RF&P rail operations or employment conditions following consummation of the proposed transaction, but anticipates that some changes eventually may result from efforts to take advantage of post-consummation opportunities for coordinating CSXT and RF&P Railway operations and achieving cost efficiencies. Neither the scope of any such future changes in operations, nor the possible impact of these changes on rail employees, can be assessed with any degree of precision at this time.

Nonetheless, CSX and its affiliates acknowledge that any present RF&P Railroad employees (or CSXT employees) who should be adversely affected by such potential future operating changes will be entitled to protections under the New York Dock conditions to the extent that the adverse effects are proximately caused by the transaction that is the subject of this Notice of Exemption.

(page 16)

In Finance Docket 31954 the ICC provided New York Dock protection as follows:

As a condition to the use of this exemption, any employees adversely affected by the transaction will be protected by the conditions set forth in New York Dock Ry.--Control --Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

Some three and one half weeks after the service date of Finance Docket 31954, notice was served on RF&P, B&O and WM general chairmen of the intent of CSXT and Richmond, Fredericksburg and Potomac Railway to coordinate the road freight operations and services between Richmond, VA, Philadelphia, PA and Brunswick, MD and all road territory in between on or after February 1, 1992. The notice stated that this transaction was covered by ICC Finance Docket Nos. 28905 and 31954 and related proceedings.

Six weeks after the service date of Finance Docket 31954, on December 12, 1991, CSXT's General Manager-Service Design, Mr. J.R. Bradley, sent from Jacksonville, FL to operating officers the following memo, which stated in part:

Per the conference call held yesterday afternoon, below you will find proposed profiles for the first phase of the CSXT merchandise reroute that will begin with class tracking changes going into effect on Monday, December 26 and the profiles starting at each end of the railroad on Tuesday, December 27. In this phase traffic between Chicago, Michigan, and Willard going to or from the Eastern Seaboard South of Potomac Yard will be routed via Cumberland and the former RF&P rather than via Russell and the old C&O main stem. Phase two is planned to start in mid-January and will move traffic between the Northwestern part of CSX (St. Louis, Louisville, Chicago and Michigan) and the former Clinchfield and the Ohio River Chemical Belt via Cincinnati rather than via Russell.... (emphasis added)

On December 13, 1991 the Operations Center sent the following notice, which stated in part:

Reference correspondence in last several days concerning Merchandise reroute affecting Russell. There have been proposed schedules sent, however, there were some mistakes in times as well as a change or two in the blocking. These have been corrected and actual schedules and class tracking changes will be in the S&C changes for this week. The following are some points that may be helpful next week in implementing these changes:

R300-17 -actual operation should be from Chicago to Columbus only with Russell block moving on R691. However, R-300's schedule will stay in effect for several days in case it is necessary to operate the train on thru to Russell or Richmond. Note.. there will be no cars schedule for R-300 south of Columbus and this train will only be used as an overflow.

R-301-17 -actual operation should be from Columbus to Chicago with connections from R690 at Columbus. R-690 from Russell will be handling blocks that R-301 handled previously from Russell. These blocks will be made up from connections of R303 which will include the auto parts from South Charleston to Janesville. Note.. R301's schedule will remain in place to operate if necessary, but there are no cars scheduled to train.

!!!!Next week for a few days it may be necessary to operate 300 and 301 all the way between Chicago and Richmond to get the traffic cleaned up and be ready for Holiday. Supts and Senior Managers Perf watch this close and as soon as traffic drops off annul these trains between Columbus and Richmond and after the Holidays if all is ok then we will take them out of system. I do not want 300 and 301 operated between Rocky Mount 414-412-413 and 411 can take care of this traffic!!!!...

As information, the above is only the 1st phase of changes that will eventually result in the manifest hump at Russell being closed. The 2nd phase will not take place until about mid January and will involve further changes to 300, 301, 690, 691, 405 and 406 (these two trains will operate via Brunswick and the Old Main Line), 696, 697, 316, 317, 509 and 408....

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The General Chairman of the UTU-C&O Proper Committee was informed of the contemplated discontinuance of Trains Nos. R-300 and R-301 in a telephone conversation with the Carrier's Senior Director of Labor Relations on December 13, 1991. The General Chairman wrote to the Senior Director, CSXT on January 2, 1992, stating in part:

As you are aware this traffic was formerly routed C&O (Proper) between Richmond, Virginia and Columbus, Ohio thence via the C&O-P/B&O/C&O-N coordinated territory between Columbus Ohio and Chicago and operated on a daily basis.

You should arrange to provide this office with the following information:

1. Total number of cars handled by Train R-300 each month beginning with December 1990.
2. Total number of cars handled by Train R-301 each month beginning with December 1990.
3. Total miles paid to former C&O Proper employees operating Trains R-300 and R-301 between Chicago and Richmond beginning with December 1990.
4. The number of regular assignments abolished and the employees displaced and/or dismissed as a result thereof.
5. The number of pooled assignments abolished and the employees displaced and/or dismissed as a result thereof.
6. Route that traffic now traverses between Richmond and Chicago.

Furthermore, this transaction has resulted in the displacement and/or dismissal of employees and the rearrangement of forces throughout the Chicago/Richmond Route and you should arrange to furnish this office with a complete record of all displacements and/or dismissals of the employees affected....

The Senior Director Labor Relations responded in a letter dated January 18, 1992 that the discontinuance of Trains R-300 and R-301 was

not the result of a "transaction," but caused by a general decline in merchandise business that the Carrier is suffering, associated with the recession. He further stated:

... Trains R-300 and R-301's discontinuance were part of an overall effort to utilize excess capacity on existing trains. The excess capacity resulted from the loss of traffic, not from any effort on CSXT's part to effect any new consolidation or coordination of its business. All traffic is moving by pre-existing rights of the Carrier and we have, therefore, not violated your agreement or taken any action requiring notice....

The Senior Director explained how the freight is to be handled; and pointed out:

... Additionally, much of this freight going through Willard can be traced to historic B&O traffic patterns. Therefore, this activity cannot be considered the rerouting of C&O freight and in turn a transaction as you imply in your letter....

He declined the General Chairman's request for information as follows:

... There has been no direct and predominating relationship between this activity and the cited Finance Dockets that would either require the Carrier to serve notice under an I.C.C. Finance Docket or establish a basis for protective benefits for employees who may have been involved in the discontinuance of Trains R-300 and R-301.

Your request for certain data is also inappropriate....

In CSXT's Employee News Service, Midweek Report, July 22, 1992 it was reported:

RF&P INTEGRATION ALMOST FINISHED: Integration of the 113-mile RF&P Railway into CSXT is virtually complete. Merger of the RF&P, a strategic line between Alexandria and

Richmond, Va., provides CSXT with an immediate impact of nearly \$25 million in revenue and cost savings, as well as significant operating efficiencies, said Tom Schmidt, RF&P Railway president and CSXT's vice president-engineering.

The RF&P was turned over to CSXT April 1, providing an important link between the northern and southern halves of the CSXT rail network. Schmidt directed integration of the RF&P beginning in late 1991 and completed the merger in 5 1/2 months. Acca Yard in Richmond, a major interchange point between RF&P and CSXT for north-south traffic, will continue to be used. CSXT also plans to consolidate its roadway equipment repair facilities at the Bryan Park Terminal Shops, RF&P's locomotive and car repair shops in Richmond.

#### Findings and Award:

Prior to Finance Docket 31954, traffic heading north from Richmond and south through Potomac Yard had to be interchanged with the RF&P, a railway which CSX acquired control of in Finance Docket 28905 in 1980. The RF&P, however, was under separate management; and there was less than complete control because intermediate corporate entities had substantial non-CSX shareholders. CSX had to pay the RF&P overhead trackage rights; and interchange points were at Potomac Yard and Richmond. As a result of Finance Docket 31954, with a service date of October 31, 1991, CSXT began the integration of the RF&P into CSXT in late 1991, and according to CSXT's Employee News Service, the merger was completed in some five and one half months, with an immediate impact of some \$25,000,000 in revenue and costs savings, as well as significant operating efficiencies. Presently, for the first time in the history of CSX, former B&O crews can be brought into Richmond and former RF&P employees can operate on the B&O. The B&O and WM never had trackage rights between Washington D.C. and Richmond. As a result



of this coordination initiated under authority of Finance Docket Nos. 28905 and 31954 with initial notice given November 25, 1991, very significant new operating rights and efficiencies now exist for CSXT.

On December 12, 1991, some six weeks after the service date of Finance Docket 31954, the CSXT spelled out the first phase of its "merchandise reroute." Traffic between Chicago and Willard, Ohio, going to or from the Eastern Seaboard south of Potomac Yard, was routed via Cumberland, Maryland and the former RF&P rather than via Russell and the old C&O main stem. Finance Docket 31954 provided that as a condition of the use of the exemption, any employees adversely affected by the transaction will be protected by the New York Dock conditions. Finance Docket 28905 also provided New York Dock protective conditions. The UTU-C&O Proper Committee contends that its C&O Proper employees adversely affected by the transaction involving the diversion of traffic over the RF&P, WM and B&O from the C&O Proper route are entitled to New York Dock protection. The Carrier disagrees.

Exhibit 1 to this award sets forth the routing of Trains 90 and 91 between Chicago, Illinois and Richmond, Virginia, with this "historical" routing between Chicago and Richmond being over the C&O through Cottage Grove, Cincinnati, Russell, Clifton Forge and Richmond. Effective January 13, 1986 Trains 90 and 91 were rerouted between Chicago and Russell, operating in part over former B&O territory through Willard and Columbus. Employees represented by the UTU whose positions were abolished or who were displaced as a result of the 1986 transaction were given test period averages, and allowed to file claims under applicable protective conditions. Trains 90 and 91 were renamed R-300 and R-301 respectively in 1989. Trains R-300 and R-301 were cancelled in December of 1991 at the same time the Carrier rerouted

Richmond-Chicago merchandise cars via Cumberland, Maryland and the former RF&P, rather than through Columbus, Russell and then over the "old C&O main stem."

The Carrier, on pages 15 and 16 of its Submission, states:

The movement of certain freight through Willard, thence over the RF&P, was a pre-existing right of the Carrier. There is no freight that belongs to the former C&O for its exclusive handling. More importantly, there was no joint action between CSXT and the RF&P to effect the change. CSXT and the predecessor roads had used RF&P as a bridge route for many years. To route the cars over RF&P did not require any new I.C.C. authority as UTU infers. The "transaction" contemplated by the parties in I.C.C. Finance Docket 31954 was not a prerequisite to the merchandise freight restructuring and, therefore, was not a factor entering into the Carrier's decisions associated therewith. Finance Docket 28905, forming CSX, likewise did not serve as the means to effect the merchandise freight restructuring. The Carrier's right to make changes predated that matter, and furthermore, no former Seaboard lines are involved in the rerouting that UTU argues provides "New York Dock" protective benefits for train service employees.

1. The Carrier states that there was no joint action between CSXT and the RF&P to effect the change. In the arbitration pursuant to Section 11 of New York Dock conditions and ICC Finance Docket 28905 between CSX Inc. (C&O) and UTU and BLE (Cluster) dated May 26, 1988, a substantial amount of traffic was diverted or rerouted from C&O's mountainous western corridor from Clifton Forge to Doswell and/or Washington, where it interchanged with RF&P, to its water-level eastern corridor from Clifton Forge to Richmond, there to be interchanged to the RF&P for delivery to Washington or Possum Point in order to save fuel and for greater efficiency of locomotive usage. The Arbitrator saw the issue as follows:

The issue is whether the "action" - in this case, the diversion of traffic - was taken because C&O and RF&P came under the common control of CSX as a result of ICC Docket 28905, as alleged by the Organization; or whether the action was an independent decision of C&O for reasons not related to the ICC authorization, not planned by or participated in by CSX, and not taken in coordination with RF&P, as alleged by the Carrier.

The Arbitrator determined in part that:

Other than the fact that RF&P is a subsidiary carrier of CSX, as C&O is, there is no evidence that RF&P acted jointly with C&O to bring about the rerouting which gave rise to this dispute. Nor is there evidence that CSX exercised its overall control over both subsidiaries to bring about the rerouting as part of a plan to benefit the CSX community. Statements by RF&P and C&O representatives are to the contrary....

And, the Arbitrator concluded:

There is insufficient evidence in the case at hand to show that the rerouting was planned and implemented by both the C&O and the RF&P, or by CSX. Since it is not established by substantive evidence, as contrasted with mere inference, that the rerouting was a product of joint action, taken pursuant to the authorization of CSX control in Docket 28905, the rerouting was not a transaction within the meaning of Paragraph 1(a) of the New York Dock Conditions.

The instant case is not one based on inference. The evidence is crystal clear that CSXT, in the exercise of the overall control over the railroads, planned and directed the diversion of Chicago merchandise traffic from the C&O main stem to the former RF&P, the WM and the B&O for the benefit of the CSXT community of interest. (Please see the CSXT's General Manager-Service Design's December 12, 1991 notice.) Absent the control by CSXT over the above stated railroads

contemplated and sanctioned by Finance Dockets 28905 and 31954, the diversion of the Chicago merchandise traffic would not have been cooperatively carried out by the above-mentioned carriers.

An assertion that joint action must be established between CSXT and RF&P in order to have a transaction is rejected. CSXT exercised its overall control over the railroads involved in directing the diversion in question, an action contemplated and sanctioned by the Finance Dockets 28905 and 31954.

2. It is recognized that RF&P was a bridge for north-south traffic for many years and that certain fixed costs existed for CSX resulting from shared responsibility for the operation and maintenance of Potomac Yard. The record does not disclose that CSX routed Chicago merchandise cars over the RF&P through Cumberland to Chicago prior to December 1991.

The operational rights and efficiencies accruing to the Carrier as a result of Finance Docket 31954 are substantially improved from the rights existing prior to Finance Docket 31954, when the RF&P served as a bridge to north-south traffic and where CSX railroads had to interchange with the RF&P and pay overhead trackage rights to that carrier. Operational efficiencies stemming from the integration of the RF&P into CSXT under Finance Docket 31954, including the right to initiate coordination and later the coordination itself of the RF&P, B&O and WM road freight operations between Richmond and Brunswick, which rights at present fruition allow for the first time in the history of CSX former B&O crews to be brought into Richmond and RF&P crews to operate on the B&O. The CSXT General Manager-Service Design had to have full knowledge of the operational efficiencies, both actual and

potential, in the planning and application of the diversion or re-routing of the Chicago merchandise cars in question. CSXT, then, in the exercise of its overall control of the railroads in question, the RF&P, WM, B&O and the C&O, planned and directed the diversion of the Chicago merchandise traffic from the C&O main stem to the former RF&P, WM and B&O for the benefit of the CSXT community. Without the control by CSXT over the above railroads contemplated and sanctioned by ICC Finance Dockets Nos. 28905 and 31954, this diversion could not have been carried out. Such was a transaction under Paragraph 1(a) of the New York Dock conditions.

## I

### Answer to Employees' Question 1 and Carrier's Question 1

The answer to the Carrier's Question 1 is in the affirmative in that a transaction as defined in ICC-imposed protective conditions has occurred.

The answer to the Employees' Question 1 is "yes." The diversion of traffic by CSXT from RF&P, the WM and the B&O between Richmond and Chicago is a transaction pursuant to authority granted by the ICC in Docket Nos. 28905 and 31954.

## II

### Answer to Employees' Question 2

Employees' Question 2 asks that the Carrier be required to restore the status quo of December 12, 1991, apply New York Dock terms and conditions and make all employees whole who were affected by the

transaction.

Under Section 4 of the New York Dock conditions, notice should have been posted on bulletin boards for employees to see and Union representatives should have been sent the notice by registered mail. And the parties should have negotiated an implementing agreement or obtained an arbitrated implementing agreement before the changes took place. In the context of the record before me in this case, where there has not been a demonstrated pattern of <sup>avoidance of</sup> obligations under ICC Finance Dockets, and a good faith dispute existed between the parties, the answer to the Employees' Question 2 is that the Carrier need not restore the status quo of December 12, 1991 during the limited period of time during which it is following the procedures it is obligated to follow under Section 4 of the New York Dock conditions, including the notice, negotiating and, if need be, arbitration process to reach an implementing agreement. The resulting implementing agreement must contain a provision making whole all employees who were adversely affected by the transaction retroactive to the first date of the reroute in December 1991; and such affected employees shall not be deemed to have forfeited any rights or benefits as a consequence of decisions made prior to the effective date of the implementing agreement. Should CSXT itself decide to return the Chicago merchandise traffic to the C&O main stem rather than pursue an implementing agreement under Section 4, then all employees adversely affected by the diversion of Chicago merchandise traffic in December of 1991 shall be made whole for all time lost as a result of the Carrier's having affected a transaction without following the provision of Section 4 of the New York Dock conditions as was its obligation; and standards applicable to the resolution of New York Dock conditions shall apply.

Answer to Employees' Question 3 and Carrier's Question 2

Carrier's Question 2 asks has the Organization sustained its burden of proof that employees have been adversely affected by a transaction? The Employees' Question 3 asks are the affected employees as asserted by the Organization and listed in Attachment "A" entitled to protective benefits set forth in ICC Docket Nos. 31954 and 28905?

Both parties cited a UTU and SSW (2-2486 O'Brien) arbitration award in their Submissions. The Organization cited the case to show that the Arbitrator stated that the "transaction" in question was the diversion of trains from one route to another. (Organization's Submission at page 20.) And, in that case the carrier itself served notice under Section 4 of the protective conditions in question that it was contemplating a diversion of two trains daily from one route to another route. CSXT submitted the case as authority for its position that the Arbitrator lacks authority to certify any employees who have neither filed claims nor explained why they have been adversely affected by any transactions in question. (Carrier's Submission at pages 21 and 22.)

This arbitration was set up by the parties to answer the questions set forth under the Questions at Issue. The parties did not develop an Arbitration Agreement for the instant arbitration; and the Arbitrator's authority is limited to resolving the Questions at Issue.

The Organization sought certain information from the Carrier in its January 2, 1992 letter. The Carrier declined to provide that information. Before the Arbitrator, the Carrier asserted that the

Organization had access to most of the information, but the record indicates that the source relied on by the Carrier for its position, the computer, only goes back some ninety days. The parties must now meet and obtain an implementing agreement under Section 4. It is anticipated that the requested information will be provided in the Section 4 process.

After the implementing agreement is in place and should a dispute arise under Section 11(e) as to whether or not an employee is affected by the transaction involving the diversion of Chicago merchandise traffic from the C&O main stem route to the former RF&P, WM and B&O route then, if the matter is taken to arbitration under Section 11(e), the Organization has the obligation of specifying the pertinent facts of that transaction relied upon as to each individual claimant. And, it is then the burden of the railroad to prove that factors other than a transaction affected the employee. Many arbitration decisions set forth the obligations of the parties in this regard. In the O'Brien award, cited by the parties and discussed above, it was stated in part:

... This Committee subscribes to the reasoning pronounced by previous arbitration committees that have been called upon to resolve disputes under the New York Dock conditions. For instance, it has been held that loss of earnings and/or abolishment of positions, by themselves, do not entitle employees to labor protective benefits. Rather, it must be established that there existed a causal nexus between a "transaction" and the adverse impact experienced by employees who are claiming the protective benefits set forth in the New York Dock conditions. In the absence of such causal nexus, the employees are not entitled to the New York Dock benefits even though they may have suffered some loss of earnings; or that their positions were abolished subsequent to the "transaction" in question. The test is not whether the employees were in the service of the Carrier on the date of the transaction, but whether they

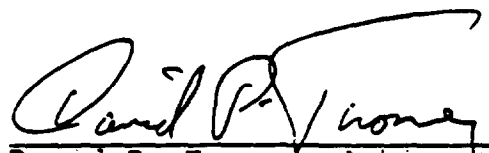


can demonstrate that they were adversely affected by it.

(O'Brien, pages 8 and 9)

In the context of the lack of information available to the Organization and the unfulfilled obligations under Section 4, and the lack of ripeness under Section 11(e), no determination can be made as to Question 3 on whether the employees listed in Attachment "A" of the Employees' Submission are entitled to protective benefits as asked by the Organization nor should a determination be made as to the Carrier's Question 2 on whether the Organization has sustained its burden of proof that employees have been adversely affected by a transaction.

Signed: \_\_\_\_\_

  
David P. Twomey, Arbitrator

Dated: \_\_\_\_\_

2/5/93