COPY

ARBITRATION PROCEEDINGS

PURSUANT TO AN APPOINTMENT BY THE

NATIONAL MEDIATION BOARD

REGARDING A DISPUTE INVOLVING

UNION PACIFIC RAILROAD COMPANY)
)
and)
)
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
)
)
INTERNATIONAL ASSOCIATION OF MACHINISTS)
)
)
)

Before

Preston J. Moore
Arbitrator

THE QUESTIONS PRESENTED:

1. Are the subject notices proper under Article 1, Section 4 of the New York Dock Conditions?
2. If the answer to Question one is in the affirmative, what shall be the terms of the applicable implementing agreements?

I. THE PARTIES

The Union Pacific is a common carrier by rail, subject to both the Interstate Commerce Act (ICA) and the Railway Labor Act (RLA). The Brotherhood of Maintenance of Way Employees (BMWE) is and was, for all times relevant to this proceeding, the duly designated representative of the craft or class of maintenance of way employees of the Union Pacific Railroad and its rail subsidiaries or predecessors, including the Missouri Pacific Railroad Company (MP), the Missouri-Kansas-Texas Railroad Company (MKT), the Oklahoma-Kansas and Texas Railroad Company (OKT) and the Galveston, Houston and Henderson Railroad Company (GH&H). The International Association of Machinists and the American Railway and Airline Supervisors Association likewise represent certain of the Carrier's employees who are part of the class or craft of machinists and subordinate officials, respectively. The American Railway and Airline Supervisors Association refused to participate in this matter.

II. BACKGROUND TO THE DISPUTE

A. Finance Docket No. 30800

On May 13, 1988 the Interstate Commerce Commission rendered its Decision and Order in Finance Docket 30800, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control -- Missouri-Kansas-Texas Railroad Company, et al, 4 ICC 2d. 409. The Commission authorized the acquisition of control by Union Pacific Corporation, Union

Pacific Railroad Company, and Missouri Pacific Railroad Company of Missouri-Kansas-Texas Railroad Company and its subsidiaries, subject to certain conditions. In Finance Docket 30800 (Sub No. 1) the proposed merger of the Oklahoma-Kansas and Texas Railroad Company into the Missouri-Kansas-Texas Railroad Company was exempted from the requirements of 49 U.S.C. Section 11343, et seq. Further, in Finance Docket 30800 (Sub No. 2), the acquisition of control by the Union Pacific Corporation, Union Pacific Railroad Company, and the Missouri Pacific Railroad Company of the Galveston, Houston and Henderson Railroad Company was exempted purusant to 49 U.S.C. Section 10505 from the requirements of 49 U.S.C. 11343, et seq.

With regard to labor issues, the Commission ordered that:

> all authority granted in Finance Docket 30800 and and Finance Docket 30800 (Sub Nos. 1, 2, 3, 4, and 5) is subject to the conditions for the protection of applicants' rail employees enunciated in New York Dock Ry. -- Control -- Brooklyn Eastern Dist. 36 ICC 60 (1979), unless an agreement is entered prior to consolidation, in which case protection shall be at the negotiated level (subject to our review to assure fair and equitable treatment of affected employees).

In addition, the ICC stated that:

> the Commission has exclusive and plenary jurisdiction over railroad consolidations, including the effects on labor arising from such transactions. This authority is based on several legal grounds. One source of this authority is Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. Section 11341 (a) which provides that the Commission's authority over combinations as exclusive, and 'that (an) approved or exempted transaction is exempt from the anti-trust laws and all other law . . . as necessary to let that person carry out the transaction, hold maintain and operate property, and exercise control or franchises acquired through the transaction.' Section 11341 (a) enables the Commission to ensure the implementation of approved transactions and the realization of their benefits.

Following the Commission's Decision, the Railway Labor Executives' Association, an unincorporated association consisting of the chief executive officers of a number of standard railway labor organizations (including BMWE), filed suit in the Court of Appeals for the District of Columbia Circuit in an action styled Railway Executives' Association v. Interstate Commerce Commission, 883 F.2d 1079 (CA DC 1989), modified on rehearing 929 F.2d 742 (1991). The RLEA attacked the Commission's statement of the scope of its power regarding the application of Section 11341 (a) immunity to subsequent operational changes made in carring out the transaction. The Court of Appeals determined the matter was not yet ripe for review, finding that:

> . . . the ICC has not determined -- and was not asked to determine -- whether an exemption from the RLA was necessary to effectuate the UP-MKT consolidation. Rather, when approving the consolidation the Commission merely restated the statutory scope of Section 11341(a) without making any factual findings. Nor did the Commission purport to make findings about necessity that would foreclose future labor union arguments that the exemption did not attach to a particular operating change. It is therefore clear that the I.C.C.'s blanket pronouncement that the UP-MKT transaction is exempt from the RLA has no present or future legal force or effect.

On or about March 21, 1989 the Union Pacific Railroad served a notice purporting to be based upon Article I, Section 4 of the New York Dock conditions, and the authority granted in F.D. 30800, seeking to effectuate the "transfer and consolidation" of certain maintenance of way work. The changes proposed included, inter alia, placing OKT, MKT and GH&H employees under the UP collective bargaining agreement and modifications to maintence of way

seniority districts. Then, following negotiations which failed to result in an implementing agreement, the Union Pacific moved to have the matter taken up before a neutral arbitrator. However, by letter dated August 7, 1989 the Union Pacific withdrew its March 21, 1989 notice informing the organization that:

> ". . . There will be no basis to conduct the arbi- which was scheduled for Tuesday, August 15, 1989."

B. RAILWAY LABOR ACT BARGAINING

The Union Pacific and the BMWE were parties to a round of Railway Labor Act negotiations which commenced in 1988 through the service of Section 6 Notices. The notices were referred to the parties' respective conference committees for progression through multi-carrier bargaining. The parties' unresolved disputes were among those considered by Presidential Emergency Board No. 219 (PEB-219). Following the issuance of the recommendations of PEB-219 BMWE and the Carrier's conference committee failed to reach a voluntary agreement disposing of their Section 6 Notices. Subsequently the Congress of the United States imposed the recommendations of PEB-219 as the new agreement between the parties, as if voluntarily negotiated under the Railway Labor Act (Public Law 102-29). Later those recommendations were reduced to imposed agreement terms necessary to implement the report and recommendations of PEB-219.

One provision of the imposed agreement embodied a PEB recommendation which granted a carrier demand regarding the combining or realigning of seniority districts. Pursuant to the provisions of PEB-219 the carriers sought and received a contract

term which would allow for changes to the size or configuration of seniority districts. The resulting provision of the imposed agreement is found in Article XII - Combining and Realigning Seniority Districts:

> SECTION 1 - NOTICE
>
> The carrier shall give at least thirty (30) days written notice to the affected employees and their bargaining representative of its desire to combine or realign seniority districts, including all carriers under common control, specifying the nature of the intended changes. The protection of the Interstate Commerce Act will continue to apply to all such combinations or realignments.
>
> SECTION 2 - ARBITRATION
>
> If the parties are unable to reach agreement within ninety (90) calendar days from the serving of the original notice, either party may submit the matter to final and binding arbitration in accordance with Article XVI.
>
> Nothing in this Article is intended to restrict any of the existing rights of a carrier.
>
> This Article shall become effective ten (10) days after the date of this Agreement except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative on or before such effective date.

In turn, ARTICLE XVI provides as follows:

> ARTICLE XVI - ARBITRATION PROCEDURES - STARTING TIMES, COMBINING OR REALIGNING SENIORITY DISTRICTS, AND REGIONAL AND SYSTEM WIDE GANGS.
>
> Section 1 - Selection of Neutral Arbitrator
>
> Should the parties fail to agree on selection of a neutral arbitrator within five (5) calendar days from the submission to arbitration, either party may request the National Mediation Board to supply a list of at least five (5) potential arbitrators, from which the parties shall choose the arbitrator by alternately striking names from the list. Neither party shall oppose or make any objection to the NMB concerning a request for such a panel.

Section 2 - Fees and Expenses

The fees and expenses of the neutral arbitrator should be borne equally by the parties, and all other expenses shall be paid for by the party incurring them.

Section 3 - Hearings

The arbitrator shall conduct a hearing within thirty (30) calendar days from the date on which the dispute is assigned to him or her. Each party shall deliver all statements of fact, supporting evidence and other relevant information in writing to the arbitrator and to the other party, no later than five (5) working days prior to the date of the hearing. The arbitrator shall not accept oral testimony at the hearing, and no transcript of the hearing shall be made. Each party, however, may present oral arguments at the hearing through its counsel or other designated representative.

Section 4 - Written Decision

The arbitrator shall render a written decision which shall be final and binding within thirty (30) calendar days from the date of the hearing.

In accordance with the moratorium of the imposed agreement, both BMWE, the General Chairmen and those carriers which were represented by the National Carriers Conference Committee (including the Union Pacific) served Section 6 Notices on or about November 1, 1994. The BMWE notices sought to modify Article XII of the imposed Agreement. The Carrier's notice, likewise, sought to change provisions dealing with the combination or realignment of seniority districts, seeking to eliminate those remaining restrictions embodied in the imposed agreement's rule.

By letter dated September 13, 1994 the Union Pacific served three (3) notices, pursuant to Section 4 of the New York Dock conditions imposed by the Interstate Commerce Commission in Finance Docket 30800. The BMWE General Chairmen responded by

letter noting the Union's disagreement with the Carrier's contention that the Interstate Commerce Act provides any authority for the proposed consolidations. In Exhibit 6 the General Chairman stated that:

> ". . . the changes you have identified in your notices, if implemented, would not constitute a 'transaction' within the meaning of the New York Dock conditions. Further, assuming for the sake of argument that the proposed changes would constitute a 'transaction' (and BMWE contends that they are not), the carrier cannot show the 'necessity' of implementing its proposal some six years after it commenced to consummate its acquisition or control over the Missouri, Kansas and Texas Railroad and its subsidiaries. Indeed, BMWE agreements did not impede that transaction. Since the procedures of Article I, Section 4 of the New York Dock conditions have not been properly invoked, BMWE does not concede that by meeting it is engaging in discussions or negotiations under New York Dock"

The General Chairman went on to write that the Carrier's notice sought to implement a combination and realigning of seniority districts, adding:

> ". . . the carrier's demand for a ruling allowing it to combine and realign seniority districts would have been superfulous if you possessed the statutory right to make the desired changes . . . At this time, absent voluntary agreement, Article XII of the imposed agreement is the only avenue available to the carrier, should it desire to acquire the authority to implement its desire to combine or realign seniority districts, as that agreement is subject to a moratorium provision."

Subsequently the BMWE General Chairman met with the Carrier regarding the three putative New York Dock notices. In response to the Union's inquiries regarding the Carrier's view as to how it saw the proposed changes as "necessary" in order to achieve the consolidations authorized under Finance Docket 30800

and the public transportation benefits gained thereby, the Carrier's representatives offered perfunctory observations regarding "efficiencies" which would be achieved if its proposals were implemented. BMWE offered to discuss the proposed changes with an eye toward exploring voluntary agreement under the Railway Labor Act. The Carrier was not so inclined, and no further negotiations took place.

Finally the Carrier requested that the National Mediation Board appoint a neutral arbitrator to hear this dispute. BMWE refused to participate in the selection of a neutral arbitrator on the grounds that the Carrier notices were not proper under the New York Dock conditions. Subsequently the National Mediation Board, in an exercise of what it deemed its ministerial responsibilities, assigned Preston J. Moore to hear the instant dispute.

ISSUE

Are the matters covered by Carrier's notices dated September 13, 1994 to consolidate certain Carrier operations an appropriate subject for consideration under Article I(4) of the New York Dock Conditions as imposed in Finance Docket 30,800?

If so, what are the appropriate conditions to be included in an implementing agreement?

POSITION OF THE CARRIER

The Union Pacific contends that its transaction is much broader than a coordination under the Washington Job Protection Agreement. In support of this position the Carrier points out that a decision by Arbitrator LaRocco recognized that a "New York Dock transaction is any activity which is a coordination under the Washington Job Protection Agreement or any other action taken pursuant to the ICC's authorization." The Carrier thus urges that so long as the proposed changes are done pursuant to and in furtherance of the goals of the ICC authorization, it is a "transaction" within the meaning of the New York Dock decision.

The Carrier urges that its first notice to consolidate various portions of the MKT and OKT railroads within the seniority districts of the MP would allow its employees to work anywhere in that combined terminal and would allow for a much more efficient use of its work force.

The Carrier contends that the Supreme Court, in Norfolk & Western Railway Company v. American Train Dispatchers Association, 499 U.S. 117, 113 L.Ed. 2d. 95 (1991) held:

> "We hold that, as necessary to carry out a transaction approved by the Commission, the term 'all other law' in §11341(a) includes any obstacle imposed by law. In this case, the term 'all other law' in §11341(a) applies to the substantive and remedial laws respecting enforcement of collective bargaining agreements.
>
> The immunity provision does not exempt carriers from all law, buy rather from all law necessary to carry out an approved transaction."

The Carrier has also cited an award by Referee Fredenberger involving the UP/MP/WP merger, which held:

> "In another proceeding involving Finance Docket 30,000 decided October 9, 1983, the ICC also determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the commission may be effectuated. Given the commission's ruling noted above with respect to the specific transfer of work in this case this Referee concludes that neither the Railway Labor Act or existing protective and schedule agreements, even when considered in the context of Sections 2 and 3 of the New York Dock Conditions, impair the Referee's jurisdiction under Article 1, Section 4 of the New York Dock Conditions to resolve the impasse concerning transfer of the work in this case."

The Carrier also cited a decision by Referee LaRocco involving the Consolidated Rail Corporation and Monongahela Railway Company and the United Transportation Union which addressed the following issue:

> "Does the Referee have the authority under New York Dock to determine whether the Conrail or the MGA Schedule Agreement will apply on the consolidated operation."

The Carrier then notes that Referee LaRocci ruled that an arbitrator had that authority and held as follows:

> "In 1991, the United States Supreme Court definitively resolved the decade long dispute over whether or not the ICC and arbitrators, who fashion implementing agreements under Section 4 of the New York Dock conditions had the authority to change, alter or abrogate existing collective bargaining agreements. In Norfolk and Western Railway Company v. American Train Dispatchers CXS Transportation, Inc. v. Brotherhood of Railway Carmen, the Court unequivocally ruled that Section 11341(a) of the Interstate Commerce Act permits the ICC and New York Dock arbitrators to exempt railroads from existing collective bargaining agreements to the extent necessary to carry out ICC approved transactions."

The Carrier also recognizes the contentions of the Unions that the Carrier has not shown any necessity of implementing the proposed changes some six years after the merger was approved by

the ICC. The Carrier recognizes an award cited by the BMWE wherein Referee Eischen was dispositive of the present case. In support thereof the Carrier urges that Referee Eischen refused to consider the efficiencies and economies which would accrue as a result of the consolidation but found the notice was not "a transaction" within the meaning of that quoted term under New York Dock Conditions. The Carrier notes that this decision has been appealed to ICC which has made no decision. The Carrier further urges that even if that award is upheld, it would not have any application to the present case.

On the foregoing basis the Union Pacific requests that the arbitrator find that the subject notices are proper under Article 1, Section 4 of the New York Dock Conditions.

POSITION OF BROTHERHOOD OF MAINTENANCE OF WAY

The BMWE relies principally on decision and awards in support of the instant case. The Union first points to the ICC's decision in Denver & Rio Grande Western Railroad -- Trackage Rights, 1983. On remand from the District of Columbia Court of Appeals the Commission explained in Finance Docket 28905 in part as follows:

> "We (do not) assert that any authority conferred by 11341 may be exercised without regard to Section 11347 of the labor protective conditions. To the contrary, we believe our authority with respect to modifications of CBAs is defined by that section and those conditions. And, as we have explained, Section 11347 permits arbitrators appointed under the New York Dock conditions as a result of Section 4 of the conditions to modify provisions of CBAs 'preserved' by Section 2 of the conditions when necessary to permit mergers, but only after an appropriate analysis balancing the respective rights of labor and management. In short, we do

> not believe that Congress intended that contracts protected by Section 2 should always be overridden to facilitating merger, as various arbitrators appear to have ruled following our decisions on DRGW and Maine Central . . . We reject both labor's view that CBAs cannot be modified in any respect without resort to RLA procedures and management's view (albeit based upon an interpretation of our own pronouncements) that CBAs are overridden if inconvenient to implementation of a merger. Contract rights do not disappear, but must be respected or 'preserved.' . . . The difficult question is the extent of such modification in light of Section 2 requirement of general preservation. Put another way, collective bargaining agreements may be changed, but to what degree? . . . We assume that any changes in CBAs will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute.' 6 ICC 2d at 752.

The Union urges that in Norfolk and Western v American Train Dispatchers Association, 499 U.S. 117 (1991) the Supreme Court assumed, without deciding, that the Commission had properly considered the public interest factors of 11344(b)(1) in deciding to approve the subject transaction. The Union points up the Court also assumed, but without deciding, that the "decision to override the Carrier's obligation is consistent with the labor protective requirements of Section 11347. . ."

The Union further urges that under appropriate circumstances Section 11341(a) could provide the basis for an ICC override of CBAs enforceable under the Railway Labor Act but stated the override was necessary to the implementation of the transaction in the meaning of Section 11341(a). The foregoing decision was made by the Supreme Court in Norfolk and Western v. American Train Dispatchers Association, 499 U.A. 117 (1991).

The BMWE then cites a case decided by the Court of Appeals for the District of Columbia decided RLEA v. United States. Therein

the Court stated in part:

> ". . . The Commission may not modify a CBA 'willy-nilly': Section 11347 requires that the Commission provide ' a fair arrangement.' The Commission itself has stated that it may modify a collection bargaining agreement under Section 11347 only as 'necessary' to effectuate a covered transaction. . . We agree that whatever else a 'fair arrangement' entails, the modification of the CBA must, at minimum be necessary to effectuate a transaction . . . In this case, the Commission reasonably interpreted the standard to mean 'necessary to effectuate the provisions of the transaction.' If the purpose of the lease transactions were merely to abrogate the terms of a CBA, however, then 'necessity' would be no limitation at all upon the Commission's authority to set a CBA aside. We look, therefore, for the purpose for which the ICC is given its authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in this light, we do not see how the agency can be said to have shown the 'necessity' for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing in the underlying transaction . . ."

The BMWE then urged that the decision of the Court of Appeals for the District of Columbia in Train Dispatchers v. ICC 26 F.3d 1157 (CA DC 1994) supported the foregoing decision.

The BMWE also relies on a recent decision involving the Union Pacific in a case between the Union Pacific Railroad and the Brotherhood of Railway Signalmen, December 9, 1994. Therein Arbitrator Dana Edward Eischen determined he had no jurisdiction as an arbitrator under Article 1, Section 4 of the New York Dock Conditions to consider items contained in the Carrier's notice.

The BMWE concludes by urging that the Carrier has failed to establish a causal relationship between a transaction authorized by the ICC and the changes embodied in the Carrier's notices.

POSITION OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

The IAM takes the same position as the BMWE but also points up that PEB 219 set forth the provisions for the consolidation of seniority districts. The IAM contends those provisions were followed by the parties, and agreement was reached and placed in the CBA. The IAM contends that the proposed changes by the Carrier do not constitute a transaction.

OPINION

The arbitrator has carefully studied all of the court decisions, ICC decisions and awards cited by the parties.

PEB 219's recommendations regarding the consolidation of seniority districts were approved by the Congress. Pursuant to those directions, the parties reached a provision in the CBA for consolidation of seniority districts.

In order to reach a decision regarding the question of the arbitrator's jurisdiction, it became necessary to study and consider the notices by the Union Pacific regarding purpose, intent and the effect of such changes.

An award by Arbitrator Eischen (12-9-94) between the Union Pacific Railroad Company and the Brotherhood of Railroad Signalmen appears to be squarely in point with this case. Therein Arbitrator Eischen stated: "This dispute concerns Carrier's attempt to incorporate an existing Union Pacific seniority into existing Missouri Pacific seniority districts." The same circumstances exist in this case, with the addition that the Union Pacific is attempting to require some employees who are represented by the IAM to merge with employees of another carrier and then be represented by the BMWE.

The arbitrator recognizes that the decision by Arbitrator Eischen is on appeal to the ICC. This arbitrator has a practice of not overruling a decision by another arbitrator who has a distinguished record and demonstrated qualifications. The only exception to this practice would be if the award is, on its face, palpably erroneous.

On the foregoing basis the arbitrator finds that the Union Pacific has failed to establish a causal nexus between the proposed actions and the ICC's merger authorization.

AWARD

The arbitrator does not have jurisdiction

Preston J. Moore, Arbitrator

April 3, 1995

APPENDED TO AWARD NO. 267

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SERVICE DATE

JUL 31 1996

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SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 30800 (Sub-No. 30)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL--MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.
(Arbitration Review)

Decided: July 17, 1996

This proceeding is an appeal of an arbitrator's decision holding that the Union Pacific Railroad Company (UP or the carrier) may not invoke New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), to arbitrate the implementation of the merger of maintenance-of-way operations and seniority districts pertaining to lines that had been operated separately by the carriers owning them before they came under common control. We will grant the appeal and remand the matter to the parties for further proceedings consistent with our findings herein.

BACKGROUND

In Union Pacific Corp. Et Al.--Cont.--MO-KS-TX Co. Et Al., 4 I.C.C.2d 409 (1988) (Union Pacific--Control--MKT), docketed as Finance Docket No. 30800 and sub-numbered proceedings, the ICC authorized Union Pacific Corporation and its wholly owned rail carrier affiliates Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) to acquire control of the Missouri-Kansas-Texas Railroad Company (MKT), and the former Oklahoma-Kansas-Texas Railroad Company (OKT). The ICC also authorized the merger of the OKT into the MKT. The authority granted in Union Pacific--Control--MKT was subject to the employee protective conditions set forth in New York Dock, which implemented the ICC's mandate to provide such protection under former 49 U.S.C. 11347.

Under New York Dock, employment changes that are related to ICC-approved transactions are established by implementing agreements negotiated before the changes occur. If the parties cannot reach an implementing agreement, the issues are resolved by arbitration. Arbitration awards may be appealed to the Board under the Lace Curtain standard of review adopted by the ICC.[2]

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (continued...)

The Board (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction. The changes for which an override is sought must be a necessary part of, or causally linked to, a New York Dock-conditioned transaction. This qualification allows parties contesting proposals that we exercise our authority to override collective bargaining agreements to argue that a particular change is not related to, or necessary for effectuating the purposes of, the New York Dock-conditioned transaction. Under New York Dock, employees adversely affected when a collective bargaining agreement is overridden must be compensated pursuant to the formula established therein, which provides comprehensive displacement and termination benefits for up to 6 years.

This proceeding has arisen because of UP's attempt to make an employment change that is allegedly related to, and necessary to realize the operational benefits from, UP's 1988 acquisition of control over MKT and OKT in Union Pacific--Control--MKT. The changes proposed by UP were made via three notices served under New York Dock. The notices pertained to three crafts, as follows:

1. In the first notice, UP proposes to merge the rail and tie gang operations and related seniority districts of the former MKT and OKT railroads with those of the MP. This craft is currently represented by the Brotherhood of Maintenance of Way Employees (BMWE) on all three carriers through three different committees. All affected maintenance-of-way employees would work under the existing collective bargaining agreement between MP and BMWE.

2. In the second notice, UP proposes to merge the operations of the work equipment mechanics[3] and related seniority districts on MP and former MKT/OKT lines. This craft is currently represented by BMWE on the MP and by the International Association of Machinists (IAM) on former MKT/OKT lines. All affected employees would work under the existing MP/BMWE collective bargaining agreement covering such employees.

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[2](...continued)
(1987), aff'd sub nom., International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988), popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Board (1) does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error" and (2) limits its review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Id. at 735-36. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), the ICC elaborated on the Lace Curtain standard as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

[3] These employees repair the machines used by maintenance-of-way workers.

3. In the third notice, UP proposes to consolidate the "roughrider" craft[4] on MP and former MKT/OKT lines under UP's collective bargaining agreement with the American Railway and Airway Supervisors' Association (AR&ASA). This craft is currently represented by BMWE on MP and AR&ASA on former MKT/OKT lines. The change would affect three employees, who would be transferred from Texarkana, AR, to UP's rail plant at Denison, TX.

BMWE and IAM refused to participate in the negotiation of an implementing agreement under New York Dock concerning the aforementioned three notices. These unions argued that the changes proposed in the three notices could be adopted only pursuant to negotiations under the Railway Labor Act (RLA), and not under New York Dock. UP then advised BMWE and IAM that it would seek arbitration under New York Dock and requested that they participate in the selection of an arbitrator. After BMWE and IAM unions refused to meet for this purpose, the National Mediation Board appointed Preston Moore as an arbitrator to hear the issues. AR&ASA did not take exception to UP's three notices.

Evidence was submitted to Arbitrator Moore, and an oral hearing was held on March 28, 1995. In his decision dated April 3, 1995, Arbitrator Moore declined to accept jurisdiction over the changes proposed in the three notices. The arbitrator's explanation of his decision is as follows (Decision, p.6):

> An award by Arbitrator Eischen (12-9-94) between the Union Pacific Railroad Company and the Brotherhood of Railroad Signalmen appears to be squarely in point with this case. Therein Arbitrator Eischen stated: 'This dispute concerns Carrier's attempt to incorporate an existing Union Pacific seniority into existing Missouri Pacific seniority districts.' The same circumstances exist in this case, with the addition that the Union Pacific is attempting to require some employees who are represented by the IAM to merge with employees of another carrier and then be represented by the BMWE.
>
> The arbitrator recognizes that the decision by Arbitrator Eischen is on appeal to the ICC. This arbitrator has a practice of not overruling a decision by another arbitrator who has a distinguished record and demonstrated qualifications. The only exception to this practice would be if the award is, on its face, palpably erroneous.

On May 13, 1995, UP filed an appeal to the decision of Arbitrator Moore.[5] On June 26, 1995, BMWE filed its reply to UP's appeal.[6] In its reply, BMWE moves to strike the verified statement of Wayne E. Naro, attached as Appendix B of the carrier's appeal filed May 13, 1995. On July 17, 1995, UP filed a motion for leave to file a tendered reply to BMWE's reply. UP's tendered reply contains, inter alia, a reply to BMWE's motion to strike witness Naro's affidavit. On August 28, 1995,

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[4] This craft oversees the loading of welded rail at UP's rail weld plant at Denison, TX, and its unloading at work sites.

[5] Under 49 CFR 1115.8, UP's appeal was due by April 24, 1995. By decision entered on April 19, 1995, and served on April 25, 1995, UP's deadline for filing its appeal was extended to May 15, 1995.

[6] By decision entered on May 31, 1995, and served on June 1, 1995, BMWE had been granted an extension of the 20-day deadline for filing its reply to June 26, 1995.

BMWE filed a reply to UP's July 17, 1995 motion for leave to file a reply to a reply.

PRELIMINARY MATTERS

We will deny BMWE's motion to strike the verified statement of witness Naro. Contrary to what BMWE maintains, Naro's statement does not expand the record before the arbitrator. A comparison of Naro's statement with UP's arbitration submission[7] reveals that the statement merely summarizes evidence that was submitted to the arbitrator. BMWE does not specify what new facts were supposedly introduced by Naro's statement.

We will deny admission of UP's tendered reply to BMWE's reply, except for the portion of UP's tendered reply that responds to BMWE's motion to strike the statement of witness Naro. Admission of UP's reply to a reply would prejudice BMWE, unless BMWE were given an opportunity to respond to the arguments raised therein.[8] Our result does not depend on admission of UP's tendered reply to a reply. Thus, no purpose would be served by delaying this proceeding to admit UP's pleading and give BMWE an opportunity to file a reply.

DISCUSSION AND CONCLUSIONS

We will hear this appeal on its merits under our Lace Curtain standard of review. The appeal in this case raises the same important issues with respect to the showing of necessity and nexus required to enable a carrier to resort to the process for modification of collective bargaining agreements contained in Article I, section 4 of our New York Dock conditions as are presented in an arbitration case in Finance Docket No. 30000 (Sub-No. 48) which we have recently agreed to review and, following review, have vacated.

Arbitrator Moore's decision must also be vacated and remanded. It is not based on factual findings derived independently from the record. Arbitrator Moore conducted no analysis at all of the record and made no independent findings of fact. Arbitrator Moore merely noted a recent decision of Arbitrator Eischen (involving a consolidation of signal maintainer seniority districts) following ICC approval of a different transaction[9] and stated that he "has a practice of not overruling a decision by another arbitrator who has a distinguished record and demonstrated qualifications." We have vacated Arbitrator Eischen's decision, the only authority cited by Arbitrator Moore, and have remanded that proceeding to the parties for further action consistent with our decision. See our decision in Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company--Control--Missouri Pacific Corporation and Missouri Pacific Railroad Company (Arbitration Review), Finance Docket No. 30000 (Sub-No. 48) (STB served [to be inserted], 1996) (UP--Control--MOPAC).

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[7] UP's submission to the arbitrator is reproduced in Appendix C of UP's petition.

[8] In its response filed on August 28, 1995, BMWE raises substantive arguments in response to the arguments raised in UP's tendered reply to a reply, but BMWE strongly implies on pp. 11-12 therein that it would discuss arguments raised by UP in greater detail in any response that it would be entitled to file if UP's reply to a reply were admitted.

[9] Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982).

Administrative agencies, and persons acting under their authority,[10] must adequately explain their decisions and resolve issues independently based on the records before them. An explanation that merely relies on the expertise of another arbitrator in a different proceeding with respect to a different transaction and does not independently analyze the facts of record concerning the proceeding and the transaction out of which the need for arbitration arose, is not an adequate explanation. Contrary to what BMWE maintains, we cannot affirm the arbitrator's decision on the grounds that it involves the factual issue of causation under Lace Curtain because, even if we were to agree that causation is the issue, the arbitrator made no independent factual findings.

We are remanding Arbitrator Moore's decision to the parties for action consistent with our decision herein. We encourage the parties to reach an agreement by negotiation. If that fails, they may seek further arbitration consistent with this decision and with UP--Control--MOPAC.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The decision of Arbitrator Moore is vacated, and the proceeding is remanded to the parties for further action consistent with our findings.

2. This decision is effective on July 31, 1996.

3. A copy of this decision will be served on Arbitrator Moore at the following address:

Mr. Preston Moore
6421 North Grandview Drive
Oklahoma City, OK 73116

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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[10] In ruling on a petition to stay arbitration in Indiana Railroad Company--Lease and Operation Exemption--Norfolk and Western Railway Company, Finance Docket No. 31464 (ICC served July 30, 1990), the ICC held:

> It is well settled that the Commission has broad authority to stay its own action, and arbitration is essentially an extension of Commission action. Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987). [Emphasis added.]