Arbitration pursuant to Article I - Section 4 of the employee protective conditions developed in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) as provided in ICC Finance Docket No. 30,000

PARTIES TO DISPUTE	Union Pacific Railroad Company) Western Pacific Railroad) and) American Train Dispatchers) Association)	DECISION

QUESTIONS AT ISSUE:

1. Is the transfer of train dispatching work from Sacramento, California, to Salt Lake City, Utah, as set forth in the Union Pacific Railroad Company's letter of August 17, 1983, to the American Train Dispatchers Association subject to arbitration under Article I, Section 4 of the New York Dock Conditions?

2. If the answer to Question No. 1 is in the affirmative, what provisions shall be contained in an arbitrated implementing arrangement rendered pursuant to Article I, Section 4 of the New York Dock conditions with respect to the transfer of dispatching work as set forth in Carriers' letter of August 17, 1983?

BACKGROUND:

On September 24, 1982, the Interstate Commerce Commission (ICC) rendered its Decision in Finance Docket No. 30,000 approving the merger of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (WP), 366 ICC 362. The ICC in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979) (New York Dock Conditions).

By letter of August 17, 1983, UP notified the General Chairman of the American Train Dispatchers Association (ATDA) pursuant to Article I, Section 4 of the New York Dock Conditions of UP's intent:

> . . . to transfer all train dispatching work associated with the territory between the East Switch at Burmester (approximately M.P. 897.8) and Salt Lake City (both Union Pacific North Yard and D&RGW Roper Yard), to the Union Pacific train dispatchers located at Salt Lake City.

The letter also stated that the dispatching work transferred to the UP dispatchers at Salt Lake City, Utah, would be taken from WP dispatchers at Sacramento, California. The notice stated further that although the territories for which the WP dispatchers in Sacramento are responsible might be restructured, the Carrier did not intend to transfer any WP dispatcher from Sacramento to Salt Lake City with the work, nor did the Carrier anticipate a reduction of train dispatcher positions at Sacramento or any adverse impact on any train dispatchers as a result of the transfer.

The parties met on September 6, 20, and 21, 1983, concerning the transfer of dispatching work. However, neither those meetings or substantial correspondence between the UP and ATDA concerning them produced agreement.

By letter of October 24, 1983, the Carrier requested the National Mediation Board (NMB) to appoint a referee pursuant to Article I, Section 4 of the New York Dock Conditions. ATDA opposed the Carrier's request on the ground that the dispute between the parties was not within the scope of Article I, Section 4, a position ATDA had taken consistently in its meetings and correspondence with the Carrier. However, by letter of January 23, 1984, the NMB appointed the undersigned as Referee pursuant to Article I, Section 4.

On January 25, 1984, the UP withdrew its request for appointment of a Referee for the stated purpose of conducting further negotiations with ATDA in an attempt to resolve the dispute. However, the dispute remained unresolved and the Carrier reapplied to the NMB for appointment of a Referee. On March 26, 1984, the NMB reappointed the undersigned as Referee.

On April 11, 1984, ATDA requested that this proceeding be bifurcated in order that the jurisdictional issues raised by the Organization would be heard and decided separately from the merits of the dispute. By letter of April 19, 1984, the undersigned Referee denied the Organization's request on the ground that compliance with such request would make it difficult it not impossible to comply with the time strictures of Article I, Section 4. The ruling made clear, however, that while one hearing would be conducted on all outstanding issues, the Decision resulting from the hearing would address and resolve all jurisdictional issues before addressing issues involving the merits of the dispute if such Decision was necessary.

Hearing was held in this matter in Sacramento, California, on April 27, 1984.

FINDINGS:

At issue in this proceeding is the transfer of the dispatching work of one half of one employee. Both the Carrier and the Organization agree that the transfer is desirable for organizational and operating efficiency. However, the Organization vigorously contests the right of the Carrier to make the transfer pursuant to Article I, Section 4 of the New York Dock Conditions without agreement by the Organization.

1. Jurisdiction

The threshold issue which must be resolved is whether the transfer of dispatching work from WP Dispatchers in Sacramento to UP Dispatchers in Salt Lake City is properly justiciable under Article I, Section 4 of the New York Dock Conditions. The Organization maintains that no such jurisdiction exists, even to decide the jurisdictional question. The Carrier on the other hand maintains that the proposed transfer raises issues properly within the province of a Referee acting under Article I, Section 4 and seeks an arbitrated implementing arrangement as provided in Article I, Section 4 in resolution of the parties' impasse.

a. Organization's Position

The Organization maintains that the transfer of work is excluded from Article I, Section 4 by the very terms of that provision. First, Article I, Section 4 applies only to ". . . a transaction which is subject to these (New York Dock) conditions. . . ." The Organization argues that the transfer of work is not a transaction defined in Article I, Section 1(a) of the conditions as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." The Organization contends that the Commission never authorized the transfer of work and in fact excluded the transfer from the scope of the transaction authorized in its Decision in Finance Docket 30,000. The Organization argues further that the proposed transfer of work, by the Carrier's own admission in the August 17, 1983, notice, will not

". . . cause the dismissal or displacement of any employees or rearrangement of forces, . . ." nor involve a ". . . selection of forces . . ." as provided in Article I, Section 4. In fact, emphasizes the Organization, the notice states that no employees will be affected whereas Article I, Section 4 provides that the notice shall include ". . . an estimate of the number of employees of each class affected by the intended changes."

Citing New York Dock Ry. v United States, 609 F.2d. 83 (2 Cir. 1979) and Ry. Labor Executives Assn. v United States, 339 U.S. 142 (1949) for the proposition that labor protective conditions imposed by the ICC were intended to protect the interests of employees and not the railroads, the Organization argues that the use of Article I, Section 4 to implement the transfer of work would constitute a misapplication of the New York Dock Conditions to enhance the Carrier's position at the expense of the employees. In essence, argues the Organization, UP would acquire the right to take action adversely affecting WP employees which WP did not have prior to the merger.

The Organization maintains that the proposed transfer of work pursuant to Article I, Section 4 is prohibited by Article I, Section 2 of the New York Dock Conditions which provides:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The Organization points to the Mediation Agreement of April 7, 1976, known as the Sacramento County Agreement, between the ATDA and WP which

the Organization contends prohibits the WP from transferring Sacramento dispatchers or their work without agreement by the Organization. Emphasizing that the agreement was entered into under the Railway Labor Act, 45 U.S.C. §151, et seq., with its statutory scheme of voluntary settlement of disputes concerning the making or amending of collective bargaining agreements, the Organization contends that the implementation of the transfer of work in this case under Article I, Section 4 of the New York Dock Conditions would constitute the imposition of binding or compulsory arbitration which would violate the Mediation Agreement and contravene rights guaranteed by the Railway Labor Act. Accordingly, such action would violate Article I, Section 2 of the New York Dock Conditions.

The Organization also alleges that the transfer of work in this case would violate Article I, Section 3 of the New York Dock Conditions providing in pertinent part:

> 3. Nothing in this appendix (the New York Dock Conditions) shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employees may have under existing job security or other protective conditions or arrangements; . . .

Section 3 also provides that employees may elect the benefits of New York Dock or any superior protective agreement or arrangement applicable to them. The Organization points to the provision in the April 7, 1976, Mediation Agreement for the cancellation of the prohibitions on the transfer of employees and work in the event the Mediation Agreement of June 16, 1966, Case No. A-7460, a national job security agreement applicable to dispatchers, is amended. The Organization argues that

in view of the interrelationship of the two Mediation Agreements, the April 7 Mediation Agreement is a job security agreement or arrangement superior to New York Dock, protected by Article I, Section 3, which may not be abrogated by any proceeding under Article I, Section 4.

The Organization maintains that an Article I, Section 4 proceeding implementing transfer of the work in this case would violate Section 17 of the ICC Decision in Finance Docket 30,000, 366 ICC at 654, which provides that all authority granted by the Commission in that case is subject to the New York Dock Conditions ". . . 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)." The Organization contends that the previously negotiated Mediation Agreement of April 7, 1976, was entered into prior to the consolidation, takes precedence over the New York Dock Conditions and thus cannot be abrogated by any proceeding under Article I, Section 4.

As noted above the Organization urges that the proposed transfer of work in this case was not authorized by the Commission in its Decision in Finance Docket 30,000 and in fact was excluded by the Commission from the scope of that Decision. The Organization points to the Carrier's position taken before the Commission in that case specifically disavowing plans to transfer the work in the instant case. The Organization also points out that in its Decision the Commission denied the Organization's request for a special notice provision regarding any transfer of dispatchers' work on the ground that the record contained no evidence such transfer was

in fact planned by the Carrier. Accordingly, the Organization urges, the Commission's Decision may only be read as specifically excluding such transfer from any transaction contemplated by the Commission to which the New York Dock Conditions should apply. Thus, the transfer is not subject to implementation through an Article I, Section 4 proceeding.

The Organization urges that in the final analysis the Carrier has not sustained its burden of establishing jurisdiction under Article I, Section 4 of the New York Dock Conditions for an arbitrated arrangement implementing the proposed transfer of work from Sacramento to Salt Lake City. Accordingly, this proceeding should be dismissed.

b. Carrier's Position

The Carrier contends that the transfer of work proposed in the instant case is appropriate for implementation under Article I, Section 4 of the New York Dock Conditions notwithstanding ATDA's "jurisdictional/procedural" arguments to the contrary. The Carrier argues that while it does not anticipate any adverse effect upon employees, the transfer of work "may" result eventually in the dismissal or displacement of employees or rearrangement of forces. Accordingly, the transfer falls within the scope of Article I, Section 4. The Carrier cites ICC and court decisions which it contends reject the arguments advanced by the Organization in this case. Specifically, the Carrier alleges the ICC has affirmed that the Railway Labor Act and existing collective bargaining agreements and arrangements must give way to a transaction authorized by the Commission at least to the extent that they block or

impede implementation of the transaction. Furthermore, the Carrier contends, in its Decision of September 24, 1982, the ICC specifically refused to burden the Carrier with notice provisions concerning the transfer of work at issue in the instant case and actually authorized such transfer subject to the New York Dock Conditions.

The Carrier argues that Article I, Section 2 of the New York Dock Conditions is inapplicable to the instant case. The Carrier cites the history of that Section pointing to its inception in the Amtrak C-1 conditions. The Carrier contends that Section 2 was meant to apply to a single carrier assuming the employment, and the employment contracts, of many employees from several different carriers. The Carrier contends it was not meant to apply to transactions between two carriers such as the instant case.

With respect to Article I, Section 3 the Carrier denies that the Mediation Agreement of April 7, 1976, is an employee protective agreement because it does not specifically preserve the income or employment of the WP dispatchers. Conceding that the Mediation Agreement of June 16, 1966, is an employee protective agreement or arrangement, the Carrier contends that the April 7, 1976, Mediation Agreement, although conditioned upon continuance of the 1966 agreement unamended, does not take on the same character as the latter agreement. Furthermore, argues the Carrier, the terms of the April 7 Mediation Agreement do not prohibit or restrict the transfer of work at issue in this proceeding. Nor, urges the Carrier, does Section 17 of the ICC's Order in Finance Docket 30,000 preserve the April 7 Mediation Agreement in view of the fact it is not a protective agreement or arrangement.

Emphasizing the need for finality in merger and consolidation cases, and the need to prevent organizations from gaining veto power over such transactions, the Carrier points out that Article I, Section 4 is a clear statement by the ICC that mandatory arbitration shall be the method for resolving disputes concerning the failure to agree to procedures for implementing transactions under the New York Dock Conditions. Accordingly, the Referee must exercise jurisdiction in this case in order to facilitate the scheme of the New York Dock Conditions.

The Carrier denies that it intentionally misled either the ICC or the Organization with respect to the transfer of work from Sacramento to Salt Lake City during the proceeding which culminated in the Commission's Decision in Finance Docket 30,000. It contends that it truthfully represented no plans existed to transfer the work. However, the Carrier contends that this should not preclude future transfer of the work which is involved in this case. The Carrier contends the ICC specifically recognized this in its Decision.

The Carrier disputes the Organization's contention that the Carrier would receive powers not previously held by virtue of an Article I, Section 4 proceeding in this case. The Carrier argues that the same result could have been accomplished under the Washington Job Protection Agreement by abandonment proceedings. However, proceeding under New York Dock affords the employees a higher level of protection.

The Carrier contends that the Organization's construction of the ICC's Decision and Order in Finance Docket 30,000 renders it a static

rather than the dynamic instrument it was intended to be. The Carrier contends that the ICC recognizes not all transactions are foreseeable or contemplated at the time the Commission authorizes a merger or consolidation and accordingly Carriers are given authority to undertake a transaction in the future with the protection of the New York Dock Conditions for affected employees.

The Carrier contends that what the Organization actually seeks now and has sought from the outset of this proceeding is attrition protection for WP dispatchers which this Organization and others have sought unsuccessfully to obtain from the ICC. The Carrier states that inasmuch as the New York Dock Conditions do not provide for such level of protection, the Carrier refused to agree. Accordingly, the Carrier urges that its proposal for an implementing arrangement, which is based on New York Dock, should be adopted by the Referee in this case.

c. Discussion

Of the arguments advanced and authorities relied upon by both the Carrier and the Organization with respect to the jurisdictional question in this case, the most relevant and accordingly the most persuasive are those based upon or relating to the ICC's pronouncements. As the author of the New York Dock Conditions the Commission's interpretations of those conditions, if directly on point, are binding upon a Referee in an Article I, Section 4 proceeding. Even if not directly on point they are persuasive if relevant.

With respect to the transfer of WP dispatching work or WP dispatchers the ICC rejected ATDA's request to condition such transfer

upon prior notice, opportunity for hearing and order of the Commission saying:

> . . . there is no evidence of record that applicants have any intention of transferring the dispatchers in question. Moreover, we do not believe it would be appropriate to fetter applicants' operating capabilities by precluding it from acting in the future in ways necessary to enhance labor productivity. Imposition of a notice and hearing requirement in this context would be unduly burdensome on these carriers. Again, in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protection we have imposed here. 366 ICC at 622

Thus, while the ICC noted no record evidence that a transfer such as the one in this case was intended by the applicants, the statement immediately following that notation clearly establishes that the Commission intended that such transfers would be allowed with application of the New York Dock Conditions. The ICC's pronouncement is clear, unequivocal, directly on point and highly persuasive if not determinative that jurisdiction exists under Article I, Section 4 to resolve the impass in this case.

In another proceeding involving Finance Docket 30,000 decided October 19, 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 I, Section 4

of the New York Dock Conditions to resolve the impasse concerning transfer of the work in this case.

Accordingly, Question No. 1 is answered in the affirmative

2. Terms of Arbitrated Implementing Arrangement

There remains the question of what terms should be included in the arbitrated implementing arrangement applicable to the transfer of work.

This case involves the unique situation, as noted above, whereby no employees are anticipated to be affected by the transfer of work, nor will there be a rearrangement of forces. Accordingly, no selection of forces is involved.

The Carrier contends that the arbitrated implementing arrangement need provide only for the application of the New York Dock Conditions in the unlikely event that an employee may be affected or forces may be rearranged as a result of the transfer of work. However, the Organization argues that the arbitrated implementing arrangement should provide that no employee will be adversely affected nor will forces be rearranged as a result of the transaction.

The Organization's proposal is but another version of its position, argued in greater detail with respect to the jurisdictional issue in this case, that no work should be transferred without its agreement. The Organization's position frustrates binding or compulsory arbitration under Article I, Section 4 to resolve the impasse between the parties and thus is not proper for inclusion in the arbitrated implementing arrangement.

The Carrier's proposal is consistent with and would facilitate the purposes of Article I, Section 4. Accordingly, it will be adopted.

The attached arbitrated implementing arrangement is hereby made a part of this Decision and constitutes this Referee's determination under Article I, Section 4 of the New York Dock Conditions as to the appropriate arrangement for this particular case. The arbitrated implementing arrangement is to be treated as if signed and fully executed by the parties and their representatives. This Decision and the implementing arrangement are intended to resolve all outstanding issues in this proceeding as provided in Article I, Section 4 of the New York Dock Conditions.

Wm. E. Fredenberger, Jr.

William E. Fredenberger, Jr.
Referee

DATED: May 21, 1984

ARBITRATED IMPLEMENTING ARRANGEMENT

Between

UNION PACIFIC RAILROAD COMPANY
(WESTERN PACIFIC RAILROAD)

And

AMERICAN TRAIN DISPATCHERS' ASSOCIATION

- - - - - - - - - - - - - - - -

The Interstate Commerce Commission (ICC) approved, in Finance Docket No. 30000, and selected subdockets 1 through 6, the merger of Union Pacific Railroad Company (UP), Missouri Pacific Railroad Compnay, (MP), and Western Pacific Railroad Company (WP), effective December 22, 1982. The ICC, in its approval of the aforesaid Finance Docket, has imposed the employe protection condition set forth in New York Dock Ry. - Control - Brooklyn Eastern District Terminal 354 ICC 399 (1978), as modified at 360 ICC 60 (1979) (New York Dock Conditions).

Therefore, to effect consolidation of all train dispatching functions now being performed at Sacramento, California by WP train dispatchers for the trackage from Salt Lake City (including both UP North Yard and the D&RGW Roper Yard) to the East Switch at Burmester to UP train dispatchers at Salt Lake City:

IT IS AGREED:

ARTICLE I - PURPOSE:

All of the train dispatching now being performed by both UP and WP train dispatchers from Salt Lake City to Smelter, Utah (UP M.P. 766.4, WP M.P. 911.44) and by WP train dispatchers from Smelter, Utah to the East Switch at Burmester, Utah (WP M.P. 897.8) will be consolidated into a single combined train dispatching operation with all work being performed by UP train dispatchers at Salt Lake City, Utah.

ARTICLE II - Any re-alignment of assigned territories or change in assignments with respect to assigned hours, off days, etc., as a result of the transfer of work described herein will be accomplished in accordance with the terms of the existing collective bargaining agreement.

ARTICLE III - The transfer of work described herein will not result in the transfer of any of the train dispatchers at Sacramento, California, to Salt Lake City, Utah, nor is it anticipated that such transfer will result in any reduction of train dispatcher positions at Sacramento.

ARTICLE IV - Employes directly affected by the transfer of work described herein will be subject to the protective benefits of the New York Dock Conditions as prescribed by the Interstate Commerce Commission in Finance

Docket No. 30000. It is also understood there shall be no duplication of benefits under this Agreement and/or any other agreement or protective arrangement. A copy of the New York Dock Conditions is attached as Attachment "A".