IN THE MATTER OF ARBITRATION BETWEEN

UNION PACIFIC RAILROAD COMPANY and
MISSOURI PACIFIC RAILROAD COMPANY

and

UNITED TRANSPORTATION UNION (C&T)

Pursuant to Section 4 of Article I
of the New York Dock Conditions
Imposed by the Interstate Commerce
Commission in Finance Docket
Nos. 30,000, 30,396, 30,398 and 30,410

QUESTIONS AT ISSUE

1. Does this committee, in applying the New York Dock Conditions to the UP/MP merger, have jurisdiction to transfer work from the MP to the UP and place the transferred work under the operating rules and collective bargaining agreements of the UP?

2. Does a New York Dock arbitration award which provides for the transfer of work from carrier A to carrier B and places the transferred work under the operating rules and collective bargaining agreements of carrier B constitute a fair and equitable basis for the selection and assignment of forces made necessary by New York Dock transactions?

BACKGROUND

On October 20, 1982, the Interstate Commerce Commission issued its formal decision in Finance Docket 30,000 authorizing the consolidation of the Union Pacific Railroad Company, Missouri Pacific Railroad Company and the Western Pacific Railroad Company. Among its findings, the ICC held "that the protection of New York Dock is appropriate for the protection of applicants' employees affected by this proceeding without any modification" and imposed New York Dock conditions as a part of its order.

The ICC decision in Finance Docket 30,000 approving the consolidation and coordination of Union Pacific and Missouri Pacific facilities and operations included the following language:

Common Point Consolidations

> To maximize operating savings and service efficiencies, applicants propose numerous coordinations and consolidations of facilities. . . .
>
> . . . consolidations are planned at the remaining common points of . . . Salina, McPherson, Beloit and Kanapolis, KS, and Hastings . . . NE . . .
>
> The cost savings resulting from the above consolidations of facilities are due to reduced equipment needs, lower car hire and car maintenance expenses, reduced labor force, and lower terminal company charges, and amount to almost $5 million annually.

In its Finance Docket 30,398, ICC on January 29, 1984, approved Notice of Exemption as follows:

"Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) jointly filed a notice of exemption concerning the conveyance by MP to UP of a portion of MP's railroad and underlying realty known as the Hastings Subdivision, extending from milepost 574.7 near Muriel to milepost 580.3 at Hastings, in Adam County, NE. UP will operate over the trackage after conveyance of the line."

On February 3, 1984, in Docket 30,396, ICC issued its order of approval of the following:

"On January 19, 1984, Missouri Pacific Railroad Company (MP) and Union Pacific Railroad Company (UP) filed a notice of exemption pursuant to 49 C.F.R. 1180.2(d) (3) of the proposed acquisition by UP

from MP of that portion of MP's Crete Subdivision extending from milepost 467.9 near Hickman to milepost 486.8 at Crete, in Lancaster and Saline Counties, NE. The transaction involves conveyance of main track, side tracks, right of way, and other land between the right of way west of Hickman and the end of the line at Crete."

On February 24, 1984, ICC in Docket No. 30,410 authorized the following:

"Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP), wholly-owned subsidiaries of Pacific Rail Systems, Inc., have filed a notice of exemption for UP to purchase a portion of an MP rail line known as Hutchinson Subdivision between milepost 537.9 and milepost 538.5 at Kanapolis, Ellsworth County, KS. The transaction involves main and side track, right-of-way, and other land. UP will operate over the line after conveyance.

"The transaction will result in operating economies for both railroads. UP will perform switching service to each shipper presently served by both UP and MP. MP will no longer need to operate between Genesco and Kanapolis. Line haul service will be more efficient and expeditious."

Each of the ICC decisions relative to notice of exemption contained the following proviso:

"As a condition to use of this exemption, any employee affected by the transfer shall be protected pursuant to New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)."

Pursuant to that portion of New York Dock Conditions, Article I, Section 4-(a), reading:

> "Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner: . . .",

carriers issued, on the indicated dates and involving the indicated location, notices as follows:

CRETE

February 27, 1984

All work between Aldo Junction and Crete (Milepost 467.9 to Milepost 486.8) will be performed by UP under applicable UP Schedule Rules. All traffic moving from and to Aldo Junction will be handled in the manner achieving maximum efficiency.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Firemen		1
Conductor	2	1
Brakemen	4	2

HASTINGS

February 1, 1984

All work now performed by either MP or UP at Hastings, Nebraska and between Milepost 574.7 and Milepost 580.3 will be performed by UP under applicable UP Schedule Rules. All

traffic moving to and from Hastings will be handled in the manner achieving maximum efficiency.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Firemen	1	1
Conductor	1	1
Brakemen	2	2

KANAPOLIS

February 13, 1984

All work now performed by either MP or UP at Kanapolis, Kansas, and between Milepost 537.9 and Milepost 538.5 will be performed by UP under applicable UP schedule rules. All traffic moving to and from Kanapolis will be handled in the manner achieving maximum efficiency.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Firemen	0	1
Conductors	0	1
Brakemen	0	2

TOPEKA

January 27, 1984

All UP and all MP traffic moving between Kansas City and Topeka and Topeka and Kansas City may be handled by UP. UP may perform any and all switching at Topeka and necessary interchange movements with other carriers.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors		1
Brakemen		2
Switchmen	21	

SALINA

March 21, 1984

All UP and all MP switching at Salina, all UP and MP switching on the east and west legs of the MP wye at Salina and all work south of Salina may be performed by UP.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors		1
Brakemen		2
Switchmen	12	

MCPHERSON

March 21, 1984

The present UP Salina-McPherson Local and the present MP McPherson-El Dorado Local may be combined into a single local operating Salina-El Dorado.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors	1	1
Brakemen	2	2

BELOIT

March 21, 1984

All work west of Concordia, Kansas now performed by MP may be performed by UP. This includes, but is not limited to, work in the following territories: Concordia-Downs, Downs-Tenora, Downs-Stockton and Jamestown-Burr Oak.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors	1	3
Brakemen	2	6

The parties met in conference on the following dates to discuss such notices: February 8, 1984 (Crete and Hastings only), April 17-18, 1984, and June 4-5, 1984. At each conference, the carriers submitted proposed implementing agreements; however, the parties were unable to reach agreement on any notice for any location, and at the conclusion of the June 4-5 conference, UP Director of Labor Relations R. D. Meredith notified the organization's representatives of the carriers' intention to invoke arbitration to resolve the dispute.

On June 19, 1984, MP UTU(C&T) General Chairman Irving Newcomb and MP UTU(E) General Chairman R. D. Hogan wrote Mr. Meredith and MP Assistant Vice President O. B. Sayers, advising it was their position that arbitration could not alter existing MP collective bargaining agreements. Specifically, they stated:

> "Furthermore, let the record reflect from the outset our position that any arbitration proceedings lack any authority whatsoever under Article I, Section 4 of the New York Dock conditions to alter rates of pay, the working rules, and other terms and conditions of our collective bargaining agreements as those have been explicitly preserved by Article I, Section 2 of the same. See the Matter of Arbitration between Baltimore & Ohio Railroad Company, Newburgh & South Shore Railway Company and Brotherhood of Maintenance of Way Employes and United Steel Workers of America, I.C.C. Finance Docket No. 30095, August 31, 1983, Seidenberg; N&W, IT-UTU, December 29, 1981, Edwards; N&W-IT-RYA, December 30, 1981, Sickles; N&W-IT-BLE, February 1, 1982, Zumas; and Southern Ry-Ky Term., Brotherhood of Railway Signalmen, October 5, 1982, Fredenberger."

The carriers formally notified the organization on June 25, 1984 of their desire to arbitrate the disputes concerning the consolidation at Crete, Hastings and Kanapolis.

Between June 25, 1984 and July 16, 1984, Mr. Meredith and UTU Vice President H. G. Kenyon discussed this dispute. Mr. Kenyon indicated the dispute might be resolved short of arbitration, and another negotiation session was scheduled for July 25 and 26, 1984. Both UTU(E) and UTU(C&T) representatives were scheduled to attend those sessions.

At the July 25, 1984 negotiating session, the carriers and the UTU(E) representatives reached agreements concerning Crete, Hastings and Kanapolis. (Agreements relative to operations at Crete, Hastings, Kanapolis and Topeka have been reached with Brotherhood of Locomotive Engineers). However, it remained General Chairman Newcomb's position that an arbitration proceeding would lack jurisdiction to alter MP collective bargaining agreements. Thus, even though carriers' representatives and UP(C&T) General Chairman F. A. Garges were willing to negotiate, all the parties recognized arbitration was necessary. The parties agreed all seven common point consolidations would be at issue.

The undersigned referee was selected by the parties to serve as the neutral member of the Arbitration Committee. This committee met in Omaha on October 4, 1984 and the parties presented comprehensive submissions setting forth their respective positions. Thereafter,

post-hearing briefs as well as replies thereto were submitted. We consider the issues in the light of all such submissions.

ISSUE NUMBER ONE

Does this Committee, in applying the New York Dock Conditions to the UP/MP merger, have jurisdiction to transfer work from the MP to the UP and place the transferred work under the operating rules and collective bargaining agreements of the UP?

DISCUSSION

The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.

The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive. Cf. Mo. Pac. R. Co. v. UTU Gen. Com. of Adj. 580 F. Supp. 1490 and B. of L.E. v. Chicago & North Western Railway Co. 314 F. 2d at 431.

And indeed, without such authority vested in some board or agency it is not reasonable to expect that matters such as those before us

could ever be resolved, since it is clearly in the interest of one or more partisans to maintain the status quo in one or more details. In this proceeding, the UTU C&T General Committee on the UP (F. A. Garges, Chairman) concedes the jurisdiction of this committee to transfer work from the MP to its jurisdiction. As aforenoted, MP C&T General Chairman Newcomb challenges our jurisdiction to transfer work away from members of his committee. We consider the arguments advanced in support of this challenge.

The main thrust of the challenge centers on the claim that Article I, Section 2, of New York Dock Conditions preserves inviolate all existing collective bargaining rights as such apply to individual employees and to territory. The provision reads as follows:

> 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.

Standing alone, outside the context of inclusion in labor protective conditions which provide something less than it purports to promise, this clause would render impractical the majority of consolidations of carriers as not economically feasible. In truth, it would be impossible to effect a meaningful merger without some changes in "working conditions and collective bargaining . . . rights . ." And it is just for such reason that labor protective conditions are adopted to compensate employees adversely affected by such changes.

Moreover, the clause itself does not freeze the status quo as it relates to the rights, privileges and benefits which it notices. It speaks of "future collective bargaining agreements", and in Section 4 of Article I provision is made for negotiation of individual issues with alternative compulsory arbitration, and it speaks of "applicable statutes", not "future applicable statutes", which would be an exercise of superfluity in expression.

There are two separate questions involved in this first issue. The first is whether or not we have jurisdiction to transfer work from the MP to the UP in applying the New York Dock Conditions to the UP/MP merger.

We would again stress that this arbitral committee is necessarily the arm and instrument of the ICC in accomplishing its purpose in authorizing such merger. And in its decision in Finance Docket 30,000 dated October 19, 1983 in response to the petitions of the BLE and UTU seeking clarification of its original decision therein, ICC made it clear that the Railway Labor Act as well as existing collective bargaining agreements must give way to overriding considerations necessary to implement consolidations and coordinations attending an authorized merger.

In the proceeding culminating in the ICC October 19, 1983, decision the arguments of UTU and BLE were identical to those before us now. Great reliance was placed on the five arbitral awards cited above in our qotation of Chairman Newcomb's letter of June 19, 1984. A study of such awards in the light of ICC's clarification of October

19, 1983, however, can only lead to the conclusion that ICC is telling us that each of the distinguished referees who wrote those awards misinterpreted Section 2 of Article I of New York Dock and failed to appreciate his authority derived from ICC, and it can scarcely be doubted that the remand to the parties of the most crucial issues of consolidation (ie. selection of forces and applicability of bargaining agreement) ill-served the ultimate objective of merger.

We have earlier noted that the concluding phrase, "applicable statutes" in Section 2, Article I of NY Dock, means more than "future legislation", and we think such phrase is explicated in the following language in the ICC October 19, 1983, decision:

> "As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11317 preserve conditions and agreements in the context of the authorized transaction.(Emphasis ours)

The decision then explains the necessity which gives rise to the circumstances involved:

"Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The decision further disposed of arguments identical to those made by Chairman Newcomb's committee herein. For example,

"...A dispute...arose between the involved railroads and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that this Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize D&RGW and MKT to operate over MP lines using their own crews."

* * *

"...BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA). BLE further asserts that trackage rights operations by D&RGW and MKT using

their own crews constitute a unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation."

"UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements."

* * *

"UTU makes further arguments regarding purported violations of the RLA, collective bargaining agreements, and the New York Dock conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, operations using the tenants' crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. UTU also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the NW-BN and New York Dock conditions."

* * *

"The various arguments of BLE and UTU are all based essentially on the assertion that the proposed trackage rights

operations which we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the New York Dock and NW-BN conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings."

These arguments were treated with by the Interstate Commerce Commission as follows: "The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA."

and, to repeat, in the following holding:

"The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction."

(We have quoted most liberally from the ICC October 19, 1983, decision because we believe that such decision is squarely on-point and most instructive in treating with the situation herein involved.)

As aforeindicated, this arbitral committee is an instrument of the Interstate Commerce Commission. Our jurisdiction and authority are derived from the powers of such body, and our raison d'etre derives from the ICC's language contained in its prescribed New York Dock Conditions. Section 4 of Article I requires that the parties undertake negotiation of an implementing agreement relative to any proposed transaction subject to NY Dock Conditions, and it provides for compulsory arbitration of any issues which are not resolved by negotiation. (We are not impressed by semantic skirmishing over the meaning of "transaction"; using the word in its broadest sense would appear to be in the interest of common sense and justice.) The key language follows:

> Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

The Newcomb Committee has voiced its fears that the carriers may somehow be allowed to unilaterally impose an implementing agreement upon the unions. This fear is not well-founded. The "basis accepted

as appropriate" for the selection of forces means the basis accepted by mutual agreement of the parties or accepted by the arbitrator(s) as appropriate, taking into account all the relevant facts and endeavoring to give effect to the applicable ICC decisions. Some arbitrators in the past have found at least partial justification for their unwillingness to assume responsibility for making comprehensive decisions in these cases, by classifying comprehensive disposition of the matter as interest arbitration. In fact, such is the case to some degree. It should be noted, however, that the arbitrator(s) are furnished guidelines for reaching fair decisions.

FINDING NUMBER ONE

We therefore conclude and find that this committee has jurisdiction to transfer work from the MP to the UP if such is deemed appropriate in giving effect to the ICC decisions in the several dockets herein involved. We further find that should the circumstances reflect that placing the transferred work under the UP collective bargaining agreements would be the most appropriate means for giving effect to such decisions, this committee has the jurisdiction to do so.

ISSUE NUMBER TWO

Does a New York Dock arbitration award which provides for the transfer of work from carrier A to carrier B and places the transferred work under the operating rules and collective bargaining agreements of carrier B constitute a fair and equitable basis for the selection and assignment of forces made necessary by New York Dock transactions?

DISCUSSION

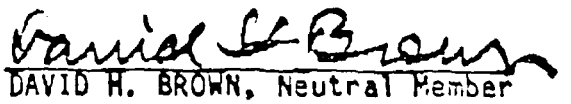
This is essentially a hypothetical question which contains insufficient assumptions to justify a comprehensive answer. Whether or not it is fair and equitable to transfer work from carrier A to carrier B would depend on unknown circumstances, and whether or not placing such work under the collective agreement in effect on carrier B would depend on other unrevealed circumstances.

Arguments and submissions to this board indicate that certain of the parties desired a ruling on certain proposed agreements, with the committee adopting such agreements as proposed, or making modifications thereof. In some instances we are asked to remand issues for further negotiation. We must conclude, however, that under the present posture of this case we cannot render an award which would endeavor to finally dispose of all matters. In fact, even if the questions were more specific, under the state of the record before us we would require more evidence before we could judge whether or not several of the proposed agreements should be accepted as appropriate or be able to write an acceptable substitute agreement.

FINDING NUMBER TWO

Our finding in regard to Question Number One addresses this question and will serve as our answer to this question.

Rendered January , 1985.



DAVID H. BROWN, Neutral Member

R. D. MEREDITH, Carrier Member

HOWARD G. KENYON, Union Member

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JAMES L. THORNTON, Union Member