

In the Matter of Arbitration

UNION PACIFIC RAILROAD COMPANY)	Pursuant to Article I-
WESTERN PACIFIC RAILROAD COMPANY)	Section 4 of the New
SACRAMENTO NORTHERN RAILWAY COMPANY)	York Dock Conditions
)	
and)	ICC Finance Docket
)	No. 30,000
UNITED TRANSPORTATION UNION)	
SACRAMENTO NORTHERN)	
UNITED TRANSPORTATION UNION)	
WESTERN PACIFIC)	

REFEREE: WALTER L. PHIPPS

APPEARANCES:

For the Union Pacific Railroad Company
A. C. Hallberg, Director of Labor Relations
R. R. Gentry, Assistant Director Labor Relations
Diana R. Woolsey, Labor Relations Officer

For the United Transportation Union
Ken Levin, Vice President
Norman Lucas, General Chairman, Sacramento
Northern
C. D. Grimshaw, S. N. Vice Local Chairman
Harley A. Siler, General Chairman, Western
Pacific
Monte G. Nelson, Vice General Chairman,
Western Pacific

OPINION AND AWARD

Background

On October 20, 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 (WP). The ICC in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 ICC 60 (1979). Specifically stating:

"we find that the protection of New York Dock is appropriate for the protection of applicants' employees affected by this proceeding without modification. *****"

The ICC further summarized:

"in New York Dock, 360 ICC 60, we described the minimum protection to be afforded those employees affected by a consolidation, absent a voluntarily negotiated agreement. The protections of New York Dock include a mandated 90-day notice of employment actions; negotiated implementation of employment changes; resulting from consolidation with compulsory arbitration disputes; compensation of dismissed employees and differential compensation of displaced employees, at the rate of their last year of employment for six years after impact (or for their period of employment if less than six years); reimbursement of moving expenses; and protection against loss from the sale of a home."

Accordingly, by letter of May 24, 1983, the Carrier served notice upon the General Chairmen, UTU:

"Pursuant to Section 4 of the New York Dock Conditions imposed by the Interstate Commerce Commission in Finance Docket Nos. 28614 and 30,000, mentioned above, notice is hereby given of the intent of Union Pacific Railroad Company, Western Pacific Railroad Company and Sacramento Northern Railway to transfer all Sacramento Northern train service employees, together with all work now performed by said employees, to Western Pacific Railroad Company. It is further intended upon consummation of said transaction that the employees so transferred will thereby establish an employment relationship with Western Pacific Railroad Company, and, as such, will be subject to the agreements governing the rates of pay, rules and working conditions of train and yard service employees of Western Pacific Railroad Company, and will be incorporated into Western Pacific Railroad Company's train and yard service seniority rosters in a manner to be determined."

Initial conference was held on this notice June 14, 1983, followed by a number of subsequent conferences without

producing agreement. On September 13, 1984, the Carrier requested that the National Mediation Board appoint a referee pursuant to Section 4(1) of the New York Dock Conditions.

On October 3, 1984, the National Mediation Board appointed the undersigned Neutral to serve as Referee.

On November 13, 1984, a joint preliminary meeting was held in Sacramento, California to discuss procedures and options pursuant to New York Dock. At this meeting the parties agreed to exchange submissions on the matter, followed by an exchange of rebuttal submissions and selected January 10, 1985 as the date for hearings to commence.

Hearings were held in Sacramento, California January 10 and 11, 1985. Therefore, January 10, 1985 becomes the date of commencement of the hearing for the purpose of computation of the 30-day period within which the decision of the Referee must be rendered. Because of the many questions to be considered, the parties agreed to a 30-day extension of this time limit should it be needed.

QUESTIONS AT ISSUE

It is noted there are questions pertaining to the jurisdiction of the Referee raised by the parties, which must, of course, be resolved along with those "Questions at Issue" properly before this Referee for decision.

QUESTION # 1. TRANSACTION

The Western Pacific General Committee in its submission on page 2 asks:

"Will the coordination of the SNR and WP as determined by this Board of Arbitration qualify as a transaction within the meaning of that term as referred to in Article 1, Section 4 of NYD conditions?"

The ICC, in its Definitions says a "transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." The Sacramento Northern General Committee in its' rebuttal submission on page 1. states: "it is clearly understood and agreed to by all parties that the proposed coordination is a transaction under the provisions of the New York Dock Conditions."

Clearly the answer to the question must be answered in the affirmative.

QUESTION NO. 2 SELECTION AND REARRANGEMENT OF FORCES

Sacramento Northern questions 1 and 2, Western Pacific questions 1, 4 and 5, and Carriers questions 1 and 2 pertains to the selection and rearrangement of forces as contemplated under Section 4 of NYD and is clearly within this Referee's jurisdiction. These questions all deal with the subject of integration of the employees seniority; dovetail or top and bottom, and what prior rights, if any, to be established. Quoted below the questions on the matter

first raised by the Sacramento Northern Committee:

- (1) Will Sacramento Northern Conductors and Brakemen seniority rosters be "dovetailed" into the respective Western Pacific Conductors and Brakemen seniority rosters?
- (2) If the Sacramento Northern Conductors and Brakemen are not "dovetailed", what prior rights will they have to assignments and/or territories that they currently serve including combination runs, if later established?

Mr. Norman J. Lucas, General Chairman, UTU, representing the Sacramento Northern Employees, states in his submission to the Referee at page 31:

"Accordingly, for all the reasons set forth in our submission, we respectfully request that the Arbitrator find and accept that the proposals as set forth in either "SN Employees Exhibit #20" or "S. N. Employees Exhibit #21" be the required New York Dock implementing agreement for the action described in the Carrier's notice of May 24, 1983."

S. N. Exhibit #20, Section 2 reads:

"On the effective date of this agreement, the Sacramento Northern Train Service employees will transfer to the operation of the Western Pacific Railroad Company, and their names shall be "dovetailed" into the respective Western Pacific Consolidated Conductors and Consolidated Brakemen's seniority roster in proper place in seniority order. The Sacramento Northern employees transferring to the Western Pacific Railroad Company under the provisions of this agreement will thereby become Western Pacific employees."

S. N. Exhibit #21, Section 2 reads:

"On the effective date of this agreement, the Sacramento Northern Conductors and Brakemen holding seniority on the Sacramento Northern Railway will be defined as "prior rights S. N. Employees," and their names shall be placed at the bottom of the Western Pacific Railroad Company consolidated Conductor's and consolidated Brakeman's seniority rosters in the order of their standing on the current S.N. rosters."

Likewise, at the effective date of this agreement, all Western Pacific Conductors and Brakemen holding seniority on the Western Pacific Conductor and Brakemen seniority rosters will be defined as "prior rights W. P. employees" and their names shall be placed at the bottom of the Sacramento Northern Railway Conductor and Brakemen seniority rosters in the order of their standing on the current W. P. rosters.

All affected employees shall be identified by an asterisk or other such notation on the respective seniority rosters as "prior rights SN" or "prior rights WP", and shall continue to retain prior rights on their "home road" as identified in this agreement.

S. N. Exhibit #21, Section 4 reads:

"It is understood and agreed that prior rights Sacramento Northern work shall include any work, either assigned or extra, which has been protected by Sacramento Northern crews and is recognized as Sacramento Northern work. Such work shall include any work on present Sacramento Northern trackage which may subsequently develop thereon."

"Likewise, it is understood and agreed that prior rights Western Pacific work shall include any work, either assigned or extra, which has been protected by Western Pacific crews and is recognized as Western Pacific work. Such work shall include any work on present Western Pacific trackage which may subsequently develop thereon."

S. N. Exhibit #21, Section 5 reads:

"In connection with the consolidation of Sacramento Northern train service employees into the Western Pacific Railroad Company, former Sacramento Northern trainmen will have prior rights on the following assignments:

- a) West Sacramento Yard Assignments, road switchers assignments or locals, assigned or extra, which perform ANY former SN work, including former SN protected branch lines.
- b) Any assignment performing service at Yuba City, Marysville, Chico, or the Sutter-Tarke, Live Oak and Pearson Branches.

- c) Pittsburg Local
- d) Chico Local
- e) Pittsburg Road Switcher, or any assignment protecting the Pittsburg-Port Chicago/Clyde Branch Lines.
- f) Vacaville Local
- g) Any like assignments established which would have been clearly recognized as former Sacramento Northern Assignments.

Nothing in this agreement is intended to restrict the Carrier from establishing new or additional prior rights Sacramento Northern assignments at Pittsburg, Sacramento, Yuba City, Marysville or Chico."

S. N. Exhibit #21, Section 6 reads:

"On and after the date of implementation of this agreement any vacancy on a prior rights Sacramento Northern assignment shall be protected from the Sacramento extra board. Vacancies on assignments which may be operated at Yuba City, Marysville, Chico, Sacramento, or Pittsburg will be protected from the Sacramento extra board."

Mr. H. A. Siler, General Chairman, UTU, Western Pacific Railroad Company, presents his answer to the above-quoted questions in his Exhibit Q - pertinent parts quoted below:

ARTICLE 1 (SENIORITY)

"Seniority rights of conductors, trainmen and switchmen whose names appear on the system seniority rosters of the Western Pacific Railroad Company, and conductors and trainmen whose names appear on the system seniority rosters of the former Sacramento Northern Railway Company are consolidated on a top-and-bottoms basis, effective on the date of this Agreement, subject to the following conditions:"

Section 1.

"Those employees identified above whose names appear on the system seniority roster of the Western Pacific and those employees whose names appear on the

system seniority roster of the former Sacramento Northern Railway Company as of the date of this agreement shall be placed on a consolidated Western Pacific, former Sacramento Northern seniority roster and will be ranked in accordance with their date of hire on their original seniority district or districts."

Section 2.

"Employees whose names appear on the consolidated system seniority roster of the Western Pacific Railroad Company and the system seniority roster of the former Sacramento Northern Railroad Company, as of the date of this agreement, shall have protected seniority rights on assignments allocated to their respective districts, and shall have prior rights in exercising such seniority in acquiring and holding assignments allocated to their respective districts, also, in holding positions on extra boards in both road and yard service, including other alternate sources of supply to such seniority districts."

The Union Pacific Railroad Company (UP) in its

"EXHIBIT P" likewise states in Section 2:

"On the effective date of this agreement, the SN train service employees will transfer to the operation of the WPRR and their names shall be placed at the bottom of the WPRR consolidated seniority roster of train and yard service employees. Those employees shall be identified by an asterisk or other such notation on the WPRR consolidated roster as "prior rights S.N.," and shall continue to retain the prior rights to S.N. work as identified in this agreement. The SN employees transferring to the WPRR under the provisions of this agreement will thereby become WP employees.

The transfer of the SN employees to the WPRR shall not constitute a break in continuity of service or curtailment of vacation or sick benefits, if an applicable."

A review of the above exhibits reveals a "consensus" that the appropriate basis for the selection and rearrangement of forces pursuant to the notice or transaction which gave rise to this proceeding shall be a consolidation of

seniority rosters on a "top and bottom" basis with retention of "prior rights" to work customarily performed by the respective employees.

This constitutes the Referee's determination and is reflected in the attached Implementing Agreement.

QUESTION NO. 3. - Section 4 or Section 11 - JURISDICTION

Additional questions asked by Sacramento Northern Committee:

1. Preservation of Health and Welfare.
2. How will decline in business be treated for purposes of computing employee protection?
3. Shall burden of proof under a decline in business allegation be Carriers?
4. How shall hourly protection be applied?
5. What method must Carrier use to notify its employees in advance of existence of higher paid job sequences?
6. In applying the guarantee, shall the displacement of junior employees from higher paid assignments be limited to one for one for off-set purposes?
7. Shall authorized individuals who lost time in their test period in order to conduct or participate in United Transportation Union business be qualified to claim these days as earnings throughout his test period?
8. How shall employees test period be determined?
9. When shall employees be required to move their residence to preserve their full guarantee?
10. How will NYDC apply to employees affected by the transfer of work between Southern Pacific and Sacramento Northern under reciprocal switching agreement at Sacramento Port?
11. Will Sacramento Northern employees who are furloughed at the time of the transaction be protected under the terms of NYDC?
12. Will those employees who became furloughed as a result of the reciprocal service agreement with the Southern Pacific be entitled

to protection under this proceeding?

Additional questions asked by Western Pacific

Committee:

1. Must a "Displaced Employee" exercise his seniority to an equal or higher paying job to which he would be entitled in order to qualify for displacement allowance?
2. If an employee cannot hold a position which does not require a change of residence, will he be required to change his residence to ensure receiving his displacement or dismissal allowance if that change will trigger a claim for guarantee payment to junior employees?
3. Is an employee hired after the effective date of the coordination agreement eligible for protection under this agreement under any circumstances?
4. Assuming the coordination of operations covered by the Implementing Agreement is effective May 1, 1985. An employee attains status as a "Displaced Employee", as a result of the coordination on January 1, 1986. When does his protection expire?
5. A job is available to more than one protected employee with higher posted earnings than any of their guarantees. Will the earnings of the higher, posted assignment be charged against the guarantees of all such employees?
6. An employee performs service as Extra Conductor, both prior to and subsequent to the effective date of the coordination. How will such service be computed?
7. Is it necessary that an employee be displaced from his assignment or position in order to establish eligibility for protective benefits under New York Dock.
8. To arrive at the displaced employees monthly guarantee, shall all compensation earned during his test period be included to arrive at the Employees "Test Period Earnings"?

9. In the computation of a displaced employee's monthly guarantee, are "hours worked" to be considered in connection with compensation earned to arrive at the employees monthly guarantee, as well as the hourly guarantee?
10. Will designated UTU representatives who were required to lose time during his "test period" in the conduct of such Union business be entitled to claim such days as earnings in his "test period" to arrive at his monthly guarantee?
11. In computing monthly guarantees, may a protected employee be charged with voluntary absence when directed or summoned by the Company to attend investigation, or court?
12. What is the meaning of "change in residence"?
13. Do Sections 9 and 12 of Article I also apply in the case of a "required" change of residence in the exercise of seniority on the employee's own seniority district?
14. When an employee files a claim for guarantee payment, does that claim have to be supported by proof of adverse affect?

We are now compelled to consider whether the above-listed questions are appropriate for handling under an Article I, Section 4 proceeding, and therefore fall within this Neutral's jurisdiction.

Section 11 of the New York Dock Conditions in pertinent part reads:

11. Arbitration of disputes - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days,

select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed and failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

The Referee notes that Section 11 is broad in scope and applies to any dispute or controversy with respect to the interpretation or application of any provision of the New York Dock Conditions except Sections 4 and 12. There is markedly differentiation in structure between Sections 4 and 11. Section 4 provides for the appointment of a neutral referee and for a specific expedited time schedule. Section 11 provides for a tripartite committee and sets forth its own time schedule to determine disputes arising under that Section. The opinion of the ICC in Finance Docket No. 28250 which initially imposed the New York Dock Conditions referred to Article I Section 4 as, in effect, an individualized provision specifically structured for disputes within its orbit.

The opinion stated at page 18:

We note here that Article I, Section 4, embodies a highly structured plan with specified time limits for notice, negotiation arbitration and decision. This is so, to assure that the parties reach the necessary agreement prior to the consummation, but within a reasonable period so as not to delay unduly consummation of the transaction.

The above-listed questions pertain to the "interpretation, application or enforcement of the various provisions of the New York Dock Conditions. Article 11 provides the machinery to settle such disputes should they arise in the future. The hypothetical questions stated above may or may not become an issue in the application of employee protective conditions under New York Dock.

The Organization in its Response Submission at page 7 states:

"The Carrier's position that only certain questions of the 13 are proper issues to be arbitrated under Article I of Section 4 of New York Dock is not well founded. In a recent Award in the matter of arbitration between the UPRR Company and the MPRR Company versus UTU C&T under Article I, Section 4, Referee Nicholas Zumas held in pertinent part which supports our contention that the Board does have such authority."

The Organization goes on to cite the Arbitrator's language in support of their position:

"The parties are in agreement that this Arbitrator is to issue an award which will provide for a fair and equitable method of combining UP and MP work in the Kansas City Terminal and that the appropriate procedure to accomplish this by following the three-document concept, ****" (emphasis added)

The above-quoted language clearly reiterates what this arbitrator directed to the parties attention at the

hearing; that any question can be dealt with by the Arbitrator when directed to do so by the very language relied upon in the Zumas Award which provides "The Parties are in agreement" that the Arbitrator should follow a certain appropriate procedure and promulgate an Award containing three separate documents.

In this instance however, this Arbitrator has no agreement between the parties to stray beyond the strict limits of Section 4, so the award relied upon by the organization cannot be deemed precedential.

The Referee is, therefore, compelled to the conclusion that the above-listed questions raised by the Organizations are not properly before this Section 4 proceeding and if the need arises must be raised before a committee as provided in Section 11.

The answer therefore, to Question No. 3 is that this Referee without specific authority from the parties does not have jurisdiction over the matters enumerated therein.

QUESTION NO. 4 - Questions pertaining to "other matters" not necessarily directed to the Interpretation or Application of New York Dock.

During the course of the handling of this case; submissions, rebuttal and hearing, a multitude of additional issues, some of which can be characterized as self-serving, have arisen. Including, but not limited to, such things as 30 day notices, guaranteed

extra boards, one tour at outlying points, arbitraries for certain duties, combination service, extension of yard limits, application of crew consist agreement, etc. There are others, but suffice it to say such issues are covered by the various collective bargaining agreements. The Carrier is right on point in this regard in their Rebuttal Brief on page 10 stating: "the SN Agreement, if preserved by this Board, should be preserved as is and not in some enriched form." Likewise this should be equally applicable to the other parties.

Therefore, matters arising under Question No. 4 are not within the jurisdiction of this proceeding and will not be addressed in the Implementing Agreement.

QUESTION NO. 5 - Authority to abrogate or revise an existing Collective Bargaining Agreement.

The question of authority of the Arbitrator, in this regard, has been raised first in S. N. question 1) and later restated in Carriers submission as Issues Nos. 3 and 4, reading as follows:

ISSUES NOS. 3 and 4

- (3) Does the Arbitrator in a Section 4, Article I NYDC arbitration have the authority to abrogate or revise an existing collective bargaining agreement?