

Arbitration Pursuant to Article I, Section 11
of New York Dock Labor Protective Conditions
Imposed by the Interstate Commerce Commission in
Its Decision in Finance Docket No. 28917

PARTIES	UNITED TRANSPORTATION UNION)	
)	
TO	AND)	AWARD
)	
DISPUTE	THE SAN DIEGO AND ARIZONA EASTERN)	
	TRANSPORTATION COMPANY)	

STATEMENT OF CLAIM:

Claim of the employees of the San Diego and Arizona Eastern Railway, listed below, for the appropriate benefits payable according to the New York Dock Railway Conditions, imposed by the Interstate Commerce Commission in Finance Docket No. 28917:

Jerry D. Anderson
Sherman L. Buchanan
Victor C. Bobrowski
A. P. McGreevy
J. P. Dyrang
J. L. Ridenour

PRELIMINARY STATEMENT:

The foregoing claim is before this Arbitration Committee for adjudication pursuant to Article I, Section 11 of the New York Dock Conditions, Appendix III to the Decision of the Interstate Commerce Commission (ICC) in New York Dock Railway--Control--Brooklyn Eastern District, 360 I.C.C. 60 (1979), imposed by the ICC as part of its Decision in Finance Docket No. 28917 served August 22, 1979. By virtue of the authority granted in the latter Decision the San Diego and Eastern Railway Company (SD&AE), a wholly owned subsidiary of the Southern Pacific Transportation Company (SPT), was replaced as owner and operator of a line of

railroad running eastward from San Diego through Baja California, Mexico, to El Centro, California in the Imperial Valley. SD&AE employees eventually lost their positions. Some of the road service employees, who are represented by the United Transportation Union (Organization), are the Claimants in this case.

The ultimate question to be decided in this case is whether Claimants are entitled to the New York Dock Conditions. The claim has generated a number of procedural or jurisdictional issues which bear directly upon that question. First, the issue has been raised as to whether the individual claims are by their terms so vague and uncertain as to render them invalid. Secondly, there is the question of whether Claimants were affected by a "transaction" as defined in Section 1(a) of the Conditions. This in turn raises the issue of whether and to what extent the parties have met the evidentiary burdens imposed upon them by Section 11(e) of the Conditions with respect to that question. If these issues are resolved in Claimants' favor, there remains the issue of whether Claimants who were on furlough or similar status at the time SD&AE employee positions were lost qualify for protection under the Conditions.

BACKGROUND:

In September 1976 tropical storm "Kathleen" damaged large sections of the railroad necessitating that through traffic be rerouted over the Atcheson, Topeka and Santa Fe Railway Company (Santa Fe) through Los Angeles, California. Facing extraordinary rehabilitation costs the SD&AE at the behest of SPT applied to the ICC in 1978 for authority to

abandon all of the railroad line except the easternmost portion between El Centro and Plaster City, California, a distance of 18.4 miles. The application was denied by the ICC on October 26, 1978.

In late 1978 the San Diego Metropolitan Transit Development Board (MTDB), a public agency responsible for transit planning and design in San Diego, proposed to purchase the railroad and institute light rail service on the western portions of the line. As a condition SPT was to restore the washed out eastern portions of the line. To implement these plans applications were filed with the ICC on March 16, 1979 which were passed upon by the ICC in its Decision in Finance Docket No. 28917. SPT sought to purchase and operate the line between Plaster City and El Centro, California and to acquire joint use with MTDB of slightly over one half mile of the railroad. MTDB was to own the remainder of the railroad and Kyle Railways, Inc. (Kyle), a short line carrier, sought authority to manage and operate the railroad for the MTDB. Kyle created a subsidiary, the San Diego and Arizona Eastern Transportation Co. (SD&AET) to perform those functions. The ICC approved the applications on August 20, 1979.

As noted above the ICC imposed the New York Dock Conditions in Finance Docket No. 28917. However, in anticipation of the imposition of those conditions and in anticipation of the transaction contemplated by the application, notice was served June 29, 1979 upon the SD&AE employees pursuant to Article I, Section 4 of the Conditions. Also pursuant to Article I, Section 4 the parties entered into an implementing agreement on October 15, 1979. SD&AE employees became employees of the SD&AET, which commenced operation of the railroad on November 1, 1979.

Beginning in 1980 there were a number of changes made in the operation of the railroad. In connection with its take-over of the Plaster City--El Centro segment of the railroad line, SPT annexed a job at Plaster City which had belonged to the SD&AE employees. MTDB embargoed the main line between San Diego and San Ysidro, California between the hours of 7:00 a.m. and 7:00 p.m. six days a week in order to prepare that segment of the line for use in suburban transit. Pursuant to that operation weigh scales were relocated and were inoperative for a period of time. Team tracks were eliminated in the San Diego Yard due to the sale of the SPT freight house and adjacent tracks.

From 1980 through 1982 there were a number of occurrences which impacted operation of the railroad. Fires and floods damaged bridges and trestles on the Mexican portion of the line, again forcing traffic to be diverted over the Santa Fe through Los Angeles. The demand of foreign markets for copper concentrate shipped by the railroad substantially diminished. Less wheat moved across the line due to U. S. Government policies. There were periodic devaluations of the Mexican Peso thus inflating freight rates on the Mexican portion of the line.

At the same time the railroad was experiencing the foregoing operational changes and external developments, business declined substantially. Employee forces were reduced. In late 1983 there was only one road crew in service.

On November 21, 1983 SD&AE, owned by MTDB, and SD&AET jointly petitioned the ICC for authority to abandon the railroad. On February 27, 1984 MTDB approved the substitution of Railtex Corporation (Railtex) for

Kyle as operator of the railroad through a subsidiary of Railtex, the San Diego and Imperial Valley Railway Company (SD&IV).

By decision of April 25, 1984 the ICC denied the joint petition of the SD&AE and SD&AET to abandon the line. However, on May 14, 1984 SD&IV filed an application with the ICC for authority to operate the railway which was granted by the ICC on August 9, 1984 by its Decision in Finance Docket 30457. The ICC did not impose labor protective conditions upon MTDB, Kyle, SD&AET, Railtex or SD&IV.

On October 4, 1984 MTDB formally notified Kyle that its operating contract was being terminated. On October 5 and 11, 1984 SD&AET notified its employees that as a result of the termination of the operating contract there would be no further work assignments for them. SD&IV did not employ any of the SD&AET road service employees. SD&AET's final day of operation was October 12, 1984. On October 15, SD&IV commenced operation of the railroad.

On October 19, 1984 the individual Claimants in this case filed claims seeking benefits under the New York Dock Conditions. The claims were denied.

On November 7, 1984 interested labor organizations, including the UTU, petitioned the ICC to reopen the proceeding in Finance Docket No. 30457 in order to obtain employee protection for SD&AET employees who lost their positions as a result of substitution of the SD&IV as the operator of the railway. The petition is pending.

FINDINGS:

This Arbitration Committee was created pursuant to the provisions of Article I, Section 11(a) of the New York Dock Conditions to resolve the dispute raised by the claim in this case. Hearings were held on May 28 and 29, 1985 in San Diego, California. The Organization and the Carrier appeared at the hearing and were given ample opportunity to present documentary and testimonial evidence and argument. The parties agreed to extend the date for a decision beyond the 45 days from the close of the hearing and the record specified in Article I, Section 11(c) of the New York Dock Conditions.

a. Sufficiency of the Claims

The Carrier attacks the sufficiency of the claims on the ground that they are vague and uncertain. The Organization argues that when the claims are read against the factual background of this case they are clear and unambiguous and thus sufficient to evoke the benefits of the New York Dock Conditions.

Each Claimant wrote virtually an identical letter on October 19, 1984 stating as follows:

As a protected employee, upon receipt of the protective benefits, including the lump sum payment, specified in Section 7 of the New York Dock Railway conditions, I am prepared to resign my seniority on the San Diego and Arizona Eastern Transportation Co.

Under no circumstances do I resign my seniority on the Southern Pacific Transportation Company, as provided for in the agreement, between the United Transportation Union and the Southern Pacific Transportation Co. identified as SDAE TRN-1-1213.

I have designated Vice General Chairman Dan E. Johnson as my representative to serve this notification by telegram this day 10-19-84.

The claim letters were addressed to the SD&AET which had informed Claimants that there would be no further job assignments for them. The first paragraph of the claim letters specifically states that the Claimants seek benefits under the New York Dock Conditions. It is clear that SD&AET understood the claims were being made with respect to a transaction arising out of the authority granted by the ICC in Finance Docket No. 28917. At page 10 of its written submission to this Committee the Carrier states:

The abandonment notices triggered a plethora of correspondence between UTU and Kyle, SP, MTDB, Railtex and SDIV in which UTU appeared to take the position that the abolishments during the period of transportation's (SD&AET) control were the result of the 1979 transfer of ownership from SPT to MTDB.

By letter of November 20, 1984 the Carrier took the position that SD&AET was not responsible for protecting its employees from their loss of employment due to substitution of SD&IV for SD&AET as the operator of the railway.

This Committee must conclude that while there was a clear dispute as to the merits of the claims, there was no genuine vagueness or lack of clarity in the mind of the Carrier concerning the claims.

Accordingly, we must deny the Carrier's motion to dismiss the claim on this basis.

b. Transaction

The Organization argues that even though the work assignments of SD&AET employees were not lost until October 1984 that loss was a

direct result of a transaction undertaken pursuant to the authority granted by the ICC in Finance Docket No. 28917 with respect to which the ICC imposed the New York Dock Conditions. Specifically, the Organization contends that the Claimants were adversely affected when MTDB replaced SPT as the owner and operator of the railroad through SD&AET and the employees became those of SD&AET. The Organization urges that had it not been for this change the employees would have continued their employment relationship with SPT. Furthermore, urges the Organization, SPT would not have instituted such operational changes as embargoing the main line which inevitably discouraged shipping, and SPT would have had the financial resources and equipment Kyle did not have to service shippers adequately.

The Organization also contends that SD&AET employees were affected by the transaction undertaken pursuant to authority granted in Finance Docket No. 30457 whereby Railtex replaced Kyle as the operator of the railroad. The Organization argues that Railtex and Kyle are in the nature of joint tortfeasors. However, urges the Organization, this second transaction was simply the ultimate affect of a chain of events initiated by the first transaction, and MTDB's displacement of SPT as the owner and operator of the railway actually was responsible for the employees' loss of their assignments.

The Organization points to Article I, Section 1(a) of the New York Dock Conditions which defines a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed," and argues that MTDB's takeover of the railroad clearly meets the definition. The Organization also cites the interpretation

placed upon the burden of proof provision of the Amtrak C-I Conditions by then Secretary of Labor, J. D. Hodgson, that an employee would meet his burden of proof if he established he was affected by a transaction even though he also was affected by other factors. The Organization notes that the wording of the C-I burden of proof provision is identical to that of Section 11(e) of the New York Dock Conditions and urges that by analogy Secretary Hodgson's interpretation is also applicable. The Organization contends that it has established that Claimants were affected by a transaction undertaken pursuant to Finance Docket No. 28917 and accordingly, even if they were affected by other factors, they have sustained their burden under Section 11(e).

The Carrier denies that the employees lost their positions as the result of a transaction undertaken pursuant to the authority granted in Finance Docket No. 28917. Rather, argues the Carrier, such loss was the result of a transaction undertaken pursuant to the authority granted in Finance Docket No. 30457 with respect to which the ICC did not impose protective conditions. The Carrier maintains that the Organization has exercised the only remedy available to it under the circumstances of this case which is to petition the ICC to reopen Finance Docket No. 30457 and impose protective conditions. The Carrier contends that by doing so the Organization is precluded from seeking protective conditions in the instant proceeding, and the Carrier urges that the claim be dismissed on that basis.

The Carrier argues that the Organization has failed to sustain its burden of proof under Article I, Section 11(e) of the Conditions in

that it has failed to identify the transaction which has adversely affected the employees and the pertinent facts with respect to that transaction relied upon to sustain the claim. The Carrier argues that changes in its operating and economic circumstances, which were not transactions pursuant to Finance Docket No. 28917, caused Claimants to lose their assignments. Accordingly, the Carrier argues, it has met its burden under Article I, Section 11(e) by establishing that factors other than a transaction, i.e. changes in economic and operating circumstances, caused the Claimants to lose their assignments. The Carrier cites a recent on-property award of an Article I, Section 11 Arbitration Committee, United Transportation Union and San Diego and Arizona Eastern Transportation Company, July 24, 1984 (Vernon, Neutral), denying a claim by a road employee for benefits under the New York Dock Conditions on the ground that the employee was affected by changes in operating and economic circumstances and not a transaction pursuant to Finance Docket No. 28917. The Carrier urges that case is so similar to the instant case that the same result is compelled.

Article I, Section 1(a) of the New York Dock Conditions defines a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." Article I, Section 11(e) provides in pertinent part:

In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Here the Organization has identified the transaction which adversely affected Claimants as a chain of events beginning with MTDB's purchase and operation of the railroad authorized by the ICC in Finance Docket No. 28917 with respect to which the ICC imposed the New York Dock Conditions. MTDB's purchase and operation of the railroad meets the definition of a transaction in Section 1(a) of the Conditions. The real question is whether the record in this case establishes the causal nexus between that transaction and Claimants' loss of their assignments or whether, as the Carrier urges, such loss was caused by factors other than the transaction as provided in Section 11(e) of the Conditions.

The Vernon Award bears directly upon the question now before this Committee. In that case the Organization also argued that MTDB's purchase and operation of the railroad had caused the Claimant to be adversely affected and thus entitled the Claimant to the benefits of the New York Dock Conditions. The Carrier's defense was that any adverse effect upon Claimant was the result of a decline in business brought about by many of the factors raised by the Carrier in this case. The Committee in the Vernon Award found that no causal nexus existed between the transaction and the adverse effect upon Claimant. Despite the Organization's attempt to distinguish the Vernon Award from the instant case, we find it quite similar to the instant case. The Award is not patently erroneous. We find it highly persuasive.

In the final analysis we believe the record in this case does not establish a causal nexus between MTDB's assumption of ownership and operation of the railroad and Claimants' loss of their assignments.

Rather, the record shows that Claimants lost their assignments when SD&IV became the operator of the railroad. In its Decision in Finance Docket No. 28917 the ICC specifically noted that separate and additional authority would be required to substitute another operator for Kyle. When MTDB decided upon such action it petitioned the ICC for authority to do so which was granted in Finance Docket No. 30457. Inasmuch as Claimants' loss of their assignments resulted from the substitution of Railtex for Kyle, which was accomplished pursuant to the authority granted by the ICC in Finance Docket No. 30457, the loss of assignments was not the result of a transaction pursuant to the authority granted in Finance Docket No. 28917. The Organization has petitioned the ICC to reopen Finance Docket No. 30457 in order to obtain protective conditions. We believe the Carrier has a valid argument that the ICC must be the forum for the relief sought by the Organization in this case.

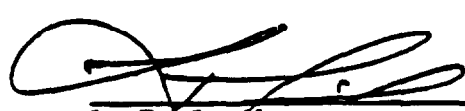
In view of the foregoing, we do not reach the issue of whether furloughed employees are entitled to protection.

AWARD

Claim denied.


William E. Fredenberger, Jr.
Neutral Member

James L. Thornton
Organization Member


L. T. Cecil
Carrier Member

DATED: