Arbitration under Article I - Section 11 of the employee protective conditions developed in New York Dock Ry., 360 I.C.C. 60 (1979) as provided in Finance Docket No. 28905 (Sub. No. 1) and related proceedings.

PARTIES Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees

TO vs.

DISPUTE Union Pacific Railroad Company

ISSUES IN DISPUTE:

1. Was the joint withdrawal of Union Pacific Railroad Company and the Atchison Topeka and Santa Fe Railroad Company from the St. Joseph Terminal Railroad Company a transaction subject to the New York Dock Conditions imposed by the ICC in Finance Docket No. 30,000?

2. If the answer to Question No. 1 is in the affirmative, were the employes affected by the June 7, 1984, Agreement eligible to have their St. Joseph Terminal Railroad Company seniority dovetailed on Union Pacific Railroad and/or Missouri Pacific Railroad Company seniority rosters? If so, to what remedy if any are the employes entitled?

BACKGROUND

The St. Joseph Terminal Railroad Company (SJTRC) is a terminal operating company jointly owned by the Union Pacific Railroad (UP) and the Atchison Topeka and Santa Fe Railroad Company (Santa Fe). The terminal performed support, including clerical, for the UP and the Santa Fe and handled interchange between many carriers and the owner railroads.

On September 15, 1980, the UP and the Missouri Pacific Corporation (MP) filed with the Interstate Commerce Commission (ICC) applications seeking authority to merge the companies. In 1980 the General Chairman of the Brotherhood of Railway and Airline Clerks (BRAC) came upon a copy of a Merger Handbook detailing potential future operations if the ICC should approve a merger between the UP, the MP and the Western Pacific Railroad (WP). The document is replete with examples of consolidations throughout the systems.

About the SJTRC the document stated:

> At St. Joseph, terminal operations of the two railroads will be consolidated, resulting in faster delivery of UP cars to local customers served by the UP.

The General Chairman believed that this would be done and, upon the advise of counsel, filed a merger impact statement concerning the terminal with the ICC. This statement went unchallenged at the ICC.

In 1982 the ICC approved the merger. It imposed the New York Dock labor protection provisions upon the merging carriers. Clearly the ICC contemplated closing of the SJTRC. Its decision approving the merger countenances an operating plan which contemplated the MP performing most of the work for UP that had previously been done by the SJTRC.

UP did not immediately withdraw its operations from the terminal. It notified the labor organizations, including BRAC, that it would cease terminal operations in 1984. The Director of Non-Ops for the UP suggested that a meeting between himself and BRAC representatives take place. The General Chairman for BRAC agreed to the meeting, but he reserved his position that the closing of the SJTRC was merger related and was covered by the ICC's imposition of the New York Dock labor provisions

The Director, Non-Ops, asserted that the closure was not merger related and was owing to a lack of business for the terminal. Under the standard protection, the February 7th. Job Stabilization Agreement, the UP would not be responsible for protection because of the closure for lack of business. The position of the UP was that seven hours and twenty minutes of work at the terminal was being performed for the UP and that this work would be transferred. The meeting between BRAC and the UP was held, BRAC holding that the meeting was without prejudice to its position that the closure was merger related. The UP maintained its position, but stated that the Carrier was eager to close the terminal and advanced an agreement designed to meet the

needs of the effected employees.

Later the parties again met to discuss any questions about the UP's proposed agreement. The UP proposed that the transferred work would go to Atchinson, Kansas and to Marysville, Kansas. Shortly thereafter the BRAC representatives met with the effected employees to discuss the terms of the proposed agreement. The clerical employees of the SJTRC approved the agreement and it was signed and executed by the parties on June 7, 1984. When the UP removed its operation from the terminal one employee of the SJTRC held seniority on the UP and was allowed to exercise it and follow the work to Marysville.

On December 14, 1984, a lawsuit was filed by certain of the employees who were beneficiaries of the agreement. The suit alleges that the closure of the SJTRC was merger related and should have been covered by the provisions of New York Dock. Under this, BRAC and UP convened this Arbitration Board under Article I, Section 11 of the New York Dock provisions to determine whether the transaction was one covered by the provisions and, if so, what remedy, if any, should be prescribed.

FINDINGS

The decision for issues presented before this Board depends upon a complex set of relationships. We must first ascertain whether the closure of the SJTRC was merger related. If we find that it was merger related, we must decide whether the agreement made, an agreement made under the auspices of the Railway Labor Act, is binding on the parties.

Was the closure merger related? The General Chairman of BRAC was secretly given a copy of a 1980 Merger Handbook. This handbook was a complicated document which outlined steps to be taken if the proposed merger should be approved by the ICC. The document was replete with plans for

consolidation of terminals when the merger was consummated. Specifically, it addressed the SJTRC and said:

> At St. Joseph, terminal operations of the two railroads will be consolidated, resulting in faster delivery of UP cars to local customers served by UP.

The merger was approved in September, 1982, however the UP did not remove its operation from the terminal until 1984. Before this removal, the aforementioned agreement was made between UP and BRAC.

The UP argues to us that the Merger Handbook was developed in 1979 when business was reasonably good and began to seriously decline after that year. Statistics show that business of the terminal dropped markedly each year thereafter. However, the UP did not withdraw its business until almost five years after the serious decline was underway. The UP's position is that the decision was not made until the completion of a study in 1984. It has held the position since then that its terminal operations could be withdrawn without financial consequence for protection payments because of the exception in the agreement for relief due to a decline in business.

Depositions taken in the discovery process of the lawsuit revealed some factors that were apparently unknown to the BRAC at the time of the making of the agreement. The argument to us is that the testimony and documents produced under the discovery proceedings established that much of the terminal work was to be performed by the MP, hence conclusively establishing that the removal of the work was merger related.

A document heavily relied on by the BRAC was an internal memorandum dated February 28, 1984, from the Director, Non-Ops to senior management which stated:

> In the worst case situation, New York Dock Conditions would be strictly applied. New York Dock protective benefits are generally more costly than those provided under the February 7, 1965 Job Stabilization

> Agreement as amended. Because affected St. Joseph Terminal employes do not hold seniority rights on any of the proprietary Carriers, they would probably draw full wages for a period of six (6) years. Of course, our liability could be reduced if any affected employe opts to accept a New York Dock separation allowance.
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> In a best case situation the UP, MP and ATSF would serve a joint notice under New York Dock of their desire to dissolve the Terminal Company and abolish all the jobs. In the ensuing negotiations, we would attempt to gain some leverage with respect to the February 7, 1965 Protection Agreement and could seek the right to transfer employes to the UP-MP or ATSF. In the transfer options, etc., to reduce our six year liability. In either event, we could force the dissolution through New York Dock arbitration if necessary.

Before this Board the rationale given by the Director, Non-Ops, is that BRAC had insisted from the beginning that the withdrawal of business was merger related. Indeed, in and before the negotiations about the withdrawal the General Chairman had held steadfast to that position. His statement was that he was predicting a best and worst situation if the BRAC should prevail under a New York Dock arbitration. Even if the withdrawal of business went to a New York Dock arbitration, he was saying that the dissolution could be forced under that procedure with exposure to the aforementioned costs.

We find nothing that would contradict the rationale of the Director, Non-Ops. In the light of the tenacity of BRAC's holding to the merger related doctrine, there was always the possibility that BRAC would compel arbitration and might succeed. Even if the Director assumed that the withdrawal was not covered by New York Dock, his belief would not be conclusive of the matter.

Before the merger approval and the subsequent withdrawal of UP operations from the terminal, the employees had gathered a few waybills that showed some diversion of freight from the path normally taken by the UP which usually led to the SJTRC. These waybills are stated to be evidence that the

UP was attempting to divert freight away from the SJTRC to build statistics to show a decline in business. We do not find a few waybills conclusive of such motives. The Board will take judicial notice that the years in question were unfavorable for the industry and the action of a Carrier of shortening the mileage of a trip, as here, was economically justified and is evidence of that alone.

This Board was furnished days of deposition tapes and has carefully reviewed these tapes. There are statements that the work formerly performed at SJTRC is now being performed at many locations on the MP and the UP. Primarily these statements concern electronic communication between either people or machines. Since this is the only evidence before this Board that the work has been so scattered, we must accept it as credible evidence. However, the evidence also establishes that no new jobs have been established at these locations.

Clearly, the Merger Handbook and the ICC decision contemplated that the UP would have its newly merged company, the MP, do for it the work that had been performed by the SJTRC. These studies confirmed the plans of the Handbook and established that good operating and financial practices would not have dictated otherwise. An extensive study of the terminal operations was being made in 1983 between the managers of the Santa Fe and the UP. This study was undoubtedly instrumental in the withdrawal of business from the terminal. It verified that the quantity of business had been steadily diminishing for several years. The economies of withdrawal coming out of the study and the plan to be followed closely parallel the scheme described in the ICC decision and the Merger Handbook. The thrust of the study is that the former terminal operations would be distributed between the merged carriers.

Although the evidence is circumstantial, we find that the pre-merger

plans and the post-merger plans so closely parallel each other that the withdrawal of the UP business and the later cessation of operations by the SJTRC must be attributed to the merger. There is some evidence that the SJTRC still exists de jure because it apparently has a Board of Directors. This does not mean that for purposes of employee protective rights the terminal has not been de facto closed.

We do not doubt that the business of of the carriers had been seriously effected by the poor economic times of the period. However, it is obvious that the shifting of business to a foreign carrier has few of the economic advantages of shifting business to a merged partner. The motivation of the UP to withdraw its business and to divert it to its new partner, later forcing the closure of the terminal, was much more compelling after the merger.

At the time of the meeting of the General Chairman and the Director, Non-Ops, the summary of business decline was furnished to BRAC. BRAC was told that the one job attributed to the UP business at the SJTRC would be transferred to the UP system and that the senior man, who had UP seniority, would be allowed to follow it. The next issue for this Board to resolve is whether the General Chairman would have concurred to that agreement if he had known the facts later divulged at the deposition hearings.

The agreement between BRAC and UP provided that all affected employees were given the option to elect either separation pay under the terms of the Washington Job Protection Agreement or to accept a position on the UP. The positions offered on the UP were in Omaha/Council Bluffs and were junior on the roster. New York Dock does not have a separation provision. This provision of the agreement is superior to New York Dock in this respect. Although the agreement does not allow for dovetailing of seniority, the

employee is guaranteed his rate whether he works or works at a job that would normally carry a lower rate. There is no limitation on the time of protection; it is until he reaches age 65 or voluntarily ceases employment or is discharged for cause. Under the terms of New York Dock, an employee of a terminal company, as here, must accept an offer of employment with a carrier owner without the "lifetime" protection.

Payment of moving expenses for those employees electing the employment route was provided and those provisions, which included a generous lump sum of transfer allowance, is superior to the provisions of New York Dock. Furthermore, the employee was given the option of electing the difference in the sale price of his home and its fair market value and/or loss from an unexpired lease or a cash stipend. New York Dock only encompasses the first of these elements.

The seniority rights, now contested, would be no greater under New York Dock than under the signed agreement. We have previously stated that no jobs have been added to the MP and that the nature of the work could encompass only minute portions of an existing employee's work day. This Board finds that there is no authority under New York Dock to allow an affected employee to exercise seniority over an existing employee for a de minimis portion of that employee's work.

Accepting the severance provisions of the agreement, eleven of the employees elected the separation allowance. Four of the employees elected to transfer to the UP at Omaha and each elected to receive an $11,000 transfer allowance.

Based upon the disclosed "worst case" analysis of the Director, Non-Ops, in which he hypothesis that perhaps the employees could elect not to make a change in residence and receive up to six year's pay when unemployed, there may now be confusion about the rights of an employee who has been affected by

a transaction that comes under the purview of New York Dock. There is a paucity of awards about the rights of the employee in this situation. We find that the correct view was expressed by Referee Fredenberger in the International Association of Machinists and Aerospace Workers and the Baltimore and Ohio Railroad Company/ the Louisville and Nashville Railroad Company (January 19, 1983). He points out that the ICC was requested by the Organizations to expand the definition in New York Dock of a dismissed employee to include such an employee who had to relocate. This request was not granted by the ICC. Arbitral Boards should not ignore this important part of legislative history.

Moreover, the protective provisions upon which New York Dock was modeled are Appendix C-1 and C-2 to the Amtrak Agreement which contain specific provisions about a change in residence. No such reference can be found in the terms of New York Dock. In the facts of this case, the employees who elected severance would have been compelled to either accept the Omaha positions offered by the UP with all the aforementioned protections accompanying the acceptance of such positions or would have forfeited their rights to any protective benefits.

After a complete examination of the record, the briefs of the parties, and the oral and written information revealed from the depositions, the Board finds that the General Chairman of BRAC is bound by the agreement that he signed and which was approved by the affected employees. We find this because in our view he negotiated an agreement superior to the protective benefits which we would be enabled to award under the terms of New York Dock and because nothing disclosed by the depositions constitutes fraud to null an otherwise valid agreement. In our view it was most reasonable for the General Chairman to refrain from invoking a New York Dock arbitration, although he

reserved that position at the time, before he heard the proposal of UP about these affected employees. After he had heard the proposal, there was no justification for such an invocation. We have found nothing from the deposition discoveries that would empower this Board to change the agreement. Although we could add to an agreement if it did not meet the terms of New York Dock, as is not the case here, nothing prohibits the carrier from making a more generous proposal than we could award.

AWARD:

As certified to this Board, the answer to the first question is "yes". The answer to the second question is "no". We find that the de facto closure of the SJTRC was merger related, but we find that the quantum of work transferred was sufficient to support only one position and that position has been filled by one of the effected SJRTC employees.

D. D. Willey, Employee Member

R. D. Rosenbohm, Carrier Member

T. Page Sharp, Chairman
and Neutral Member

Dated Februray 4, 1986.