In the Matter of Arbritration between United Transportation Union and Southern Pacific Transportation Company Pursuant to Article IV of the New York Dock II Conditions	Decision

Background

On January 26, 1979, the Southern Pacific Transportation Company and its subsidiary, the St. Louis Southwestern Railway Company, filed application with the Interstate Commerce Commission for permission to purchase from the Chicago, Rock Island and Pacific the Tucumcari line of railroad between Santa Rosa, New Mexico, and St. Louis, Missouri, via Hutchison, Kansas, and Kansas City, Missouri. The application was approved by the ICC on June 6, 1980 in Finance Docket No 28799, which imposed the employee protective conditions contained in New York Dock II, Appendix III, 360 ICC 60 (1979).

On January 6, 1983, subsequent to an extensive rehabilitation program and pursuant to the ICC authorization, the Southern Pacific instituted the routing of traffic, formerly carried from El Paso, Texas, to the St. Louis gateway via Corsicana, Texas, over the acquired Tucumcari line from Santa Rosa, New Mexico, to Kansas City, Missouri. It then used Missouri Pacific track, the rights to use such track having been granted by the ICC on October 10, 1982, in Finance Docket No.

3000 to move freight to St. Louis. This work was performed by employees of the Western Lines of the Southern Pacific.

The Organization, representing the Southern Pacific Eastern Lines employees, contended that such employees were afforded employee protection pursuant to the ICC decision in Finance Docket No. 28799 and requested that the Carrier cease rerouting traffic until expiration of a ninety-day notice pursuant to Article I, Section 4 of New York Dock II. The Carrier denied that these employees were afforded protection under the ICC decision, stating that the decision applied only to St. Louis Southwestern Railway employees and notice was never served on the Eastern Lines employees.

Subsequently, the question of coverage of the Southern Pacific Eastern Lines employees was submitted to arbitration on the basis of differing statements by the Carrier and the Organization. On February 4, 1985, Chairman Harold M. Weston found that either statment caused coverage to exist under New York Dock II

Thereafter, negotiations were held between March 11, 1985, and June 12, 1985, in an attempt to write an implementing agreement. On July 15, 1985, as a result of its belief that an impasse had been reached, the Organization requested the National Mediation Board to appoint an arbitrator pursuant to the provisions of Article 1, Section 4 of New York Dock II for the purpose of rendering a decision to resolve the merits of the dispute.

On July 30, 1985, the National Mediation Board designated

Robert O. Harris to sit as the neutral to resolve the dispute. Thereafter, the parties agreed to a hearing on October 2, 1985, at the Carrier's offices in Houston, Texas. At that time briefs were submitted by both sides and oral argument was heard.

Position of the Parties

At the hearing on October 2, 1985, it was the Carrier's position that the Organization, by its proposal, was expanding the scope of New York Dock II. The Carrier further stated that although the parties could agree any protection of employees they liked, where the provisions of New York Dock II conditions were to be set by arbitral award, the arbitrator was limited to the literal words contained in the Appendix to New York Dock II. The Carrier accordingly requested a procedural award to determine which subjects that had been raised in the Organization's proposal were includable in an arbitral award under New York Dock II. The Carrier indicated a willingness after the procedural award to move on to a merits hearing and award.

The Organization, on the other hand, interested in a final resolution of the dispute, took the position that as part of its award the Committee could make such exclusions from its suggested provisions as were appropriate, without having the delay inherent in a bifurcated process.

Procedure to be Followed

The Committee obtained the agreement of the parties to an expedited decision of the Committee on the procedural issues, as

requested by the Carrier, with an opportunity thereafter for the filing of additional briefs by each side on the language to be included in the subsequent award. Time limits were agreed to for the procedural award, the filing of a brief on the merits by the Carrier, as well as a reply brief by the Organization, and a final decision by the Committee.

Discussion

Because of the nature of this procedural award, each of the Carrier's objections to subjects raised by the Organization will be discussed in turn. However, before doing so a few general comments seem appropriate.

As is clearly indicated by the Carrier's submission, and noted earlier, operations began via the Tucumcari line and the Missouri Pacific trackage to East St. Louis on January 6, 1983. At that time and until the Weston award of February 4, 1985, the Carrier took the position that Southern Pacific Eastern Line employees were not covered by the protective provisions of New York Dock II because of operations routed over the Tucumcari line. Thereafter, the Carrier began bargaining with the Organization in accordance with Article I, Section 4 of the New York Dock II conditions. However, many of the provisions of subsection (a) of Section 4 were not adhered to and subsection (b) was clearly not followed. This, then, is not the usual New York Dock II case where in accordance with subsection (b):

> No change in operations, service, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

Rather, these operations had continued for more than two years prior to the Weston award.

In order to unscramble the egg and afford the Eastern Lines employees the protection which the Weston decision found the ICC gave them, it will be necessary to make sure that the employees have knowledge of the rights that they would have had, had the notice required by the first paragraph of Section 4(a) of New York Dock II been given to them ninety days before the commencement of the new operations. Accordingly, as will be detailed more fully below, the Committee finds that it will be necessary to include in the award provisions which might well be outside the scope of an award which was rendered after the terms of Section 4 had been strictly followed.

The allowable subjects to be included in the award will place the employees in the same position as if there had been the required notice prior to any action having been taken by the Carrier.

By the same token, it is clear that the agreement which is part of the award must speak for itself. It cannot have clarifications appended thereto in the form of side letters. Nor is it appropriate for an award to answer hypothetical questions. The Organization and the Carrier may jointly, or if necessary, separately inform the employees of their rights and the way that the agreement will be implemented. However, questions regarding the interpretation of the award will have to be referred back to the Committee which rendered it and the actual decision as to its application to a particular situation

can be finally resolved only through the use of Article I, Section 11.

Specific Procedural Points Raised by the Carrier

In its brief, the Carrier raised questions about certain sections of the agreement proposed by the Organization as follows:

Article I and Side Letter 1:

The Carrier claims that the use of the side letter expands the coverage to "future" employees.

As noted earlier, side letters are not part of an award, whatever use they may have when the parties write an agreement. The side letter will not be considered in writing the award. The question of whether a "future" employee is covered on an individual basis is one for determination under a Section 11 proceeding. The definition of employee referred to by the Carrier in Section 11343 of the Interstate Commerce Act does not preclude argument regarding the employees covered, since the Carrier itself delayed implementing it for several years after the ICC decision.

Article III:

The Carrier claims that this article, which deals with displacement and loss of earnings, goes beyond the scope of New York Dock II by requiring the posting of earnings and the assessment of a penalty if such earnings are not posted.

Section 4(a) places certain requirements upon a carrier when a transaction which is subject to New York Dock II conditions is contemplated. For reasons which were fully expressed by the Carrier and reflected in Referee Weston's decision of February 4, 1985, the Carrier took the position that the transaction(s) in question was/were not subject to New York Dock. The Organization's proposal attempts to rectify the failure to give notice prior to the implementation of the use of the Tucumcari line. The question is not whether the Organization's approach is correct, but rather whether it may be part of an agreement.

It should be noted that the Carrier argues that employees are required to maximize their seniority prior to protection; however, this assumes that the entire transaction is prospective. Here the Carrier has already acted and will have to bear the burdens as well as the benefits of that action.

It is the Committee's view that whether the posting of earnings is proper in this case is a matter which goes to the substance of the award and cannot be ruled out as a procedural matter. See the Seidenberg award in Amtrak No. 1 and the Dolnick award in Amtrak No. 12. The assessment of a penalty is beyond the scope of an arbitrated agreement. If there is a failure to live up to the agreement, there are other procedures for enforcing it.

Article IV:

The Carrier objects to this article because it may limit employee claims, change levels of protective benefits, and

address issues reserved to a Section 11 procceding.

Insofar as this article limits the length of time for the filing of claims, it would appear that such a limitation is possible. See the Seidenberg and Dolnick awards referred to above. While there may be disagreement at to the nature of the limitation, it is properly a subject includable in the award. Likewise, the material regarding the treatment of Carrier and Organization officials is procedurally proper. Material contained in a side letter may not be so contained in an arbitral award.

Article V:

The Carrier objects to the award under Section 4 containing a description of the method a dismissed employee shall use to file a claim as being in conflict with Article I, Section 6 of New York Dock II and states it is therefore not includable in an arbitral award.

Referee Van Wart in C & O Railway and the BLE. and UTU., which is cited in the Carrier's brief, provided in his appendix for similar information to be provided. While it may be duplicative, it is not procedurally barred.

Article VI:

The Carrier claims that the Organization proposal limits offers of comparable employment to the same craft in a specific seniority district.

The rights of displaced employees are set forth in Section 6

of Article I of New York Dock II. Since this article is an attempt to change those rights, it is not properly before this Committee.

Article VIII:

The Carrier states, "This provision would act to change the definition of a dismissed employee under New York Dock II in instances where the collective bargaining agreement does not require an employee to exercise seniority."

To the extent that this provision has the effect stated by the Carrier, it is outside the scope of an arbitrally imposed award and therefore is procedurally barred.

Side Letter 5:

The Carrier indicates that nowhere in New York Dock II is a provision which allows an Organization the right to examine Carrier records to establish a basis for a claim for protective benefits.

As noted earlier, side letters are procedurally improper in an arbitrated award. However, in view of the Carrier's failure in this case to follow the provisions of Section 4 of Article I of New York Dock II, the Committee will as a substantive matter consider how to rectify that failure, so that the employees will receive the protection which the Interstate Commerce Commission ordered them to receive.

Award

The Committee finds that for procedural reasons the Side Letters, the Questions and Answers and Articles VI and VIII are barred. As discussed in the decision matters which are contained in the Side Letters may properly be substantively raised before the Committee. The Committee reserves judgment on the substantive matters to be contained in the award to be made under the provisions of Article I, Section 4 of the New York Dock II conditions until the parties have submitted their briefs in accordance with the previously agreed upon schedule.

Robert O. Harris
Chairman

C. L. Little
Organization Member
(Concur/[redacted])

C. R. Huntington
Carrier Member
(Concur/Dissent)

October 10, 1985