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

Background

On January 26, 1979, the Southern Pacific Transportation Company (SP) 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 Railroad Company, the Tucumcari line 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 SP 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 to move freight to St. Louis, the rights to use such track having been granted by the ICC on October 10, 1982, in Finance Docket No. 30000. This work was performed by employees of the Western Lines of the SP.

The Organization, representing the SP Eastern Line 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 SP 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 statement 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. The parties agreed that since the Carrier had raised several procedural issues, those issues would be decided first by the Committee and thereafter, after the filing of additional briefs by each side, the Committee would consider an award on the merits.

On October 10, 1985, the Committee rendered its procedural award. Thereafter on October 11, 1985, the Carrier asked for clarification of that award, which was made by Supplemental Decision dated October 14, 1985.

Both the Carrier and the Organization have had an opportunity and have filed additional briefs on the merits. The matter is now ready for decision.

Discussion

In order to fully discuss all of the problems which have been raised by the parties, it will be necessary to discuss each of the proposed sections of the implementing agreement submitted for consideration by the Organization. Accordingly, each section will be taken up in turn. The matters discussed will be taken in

the order proposed by the Organization followed by a discussion of several Carrier proposals.

The entire Implementing Agreement will be attached hereto as an appendix to the decision and will be binding on the parties in accordance with Section 4 of Appendix III of New York Dock II.

Preamble

The Oranization has requested the inclusion of certain "whereas" clauses which give background to the reasons for the implementing agreement. The Carrier did not specifically object to the inclusion of these paragraphs. They shall, accordingly, be included in the Agreement.

Article I

The Organization has proposed and the Carrier has not objected to the inclusion of this article which sets forth the applicability of the New York Dock II conditions to this case.

Article II

The Organization has proposed certain notice requirements which the Carrier finds objectionable. While the proposal contains three subsections, much of the objection centers around the requirment to send by registered mail notice of the transaction, a copy of the award in this case, and a list of affected employees. Additionally, the Carrier indicates that it believes that the burden of proof to show displacement is upon

the individual employee and not the Carrier.

The Carrier has stated its position in regard to notice as follows:

> The proposed language in Article II, Section 1 goes far beyond NYD II notice requirements, i.e., NYD II Section 4(a) only requires the posting of notices on bulletin boards convenient to interested parties and registered mail notice to the representatives of such interested employees. This Committee lacks the authority to change or expand notice requirements. Such plenary authority is vested only in the I.C.C.

This Committee cannot agree with the quoted statement of the Carrier. Section 4(a) of New York Dock II provides for the posting of notice before the event and Section 4(b) provides that there shall be "no change in operations" until after agreement is reached or the decision of a referee rendered. In this case, for whatever reason, the Carrier failed to provide the required notice. To now maintain that ex post facto it need only do what it should have done earlier is to allow the Carrier to disregard the intent of New York Dock II by complying with its form but not its substance. This Committee does not agree that the suggestions offered by the Organization expand or change the notice requirements set forth by the ICC. Rather they attempt to effectively give the notice that the I.C.C. intended. Accordingly, the Implementing Agreement will contain language which directs that employees in a cut off or furlough receive actual notice of the transaction, including notice that they may obtain a copy of the Implementing Agreement.

The Organization in subsection 2 requests that copies of the

Implementing Agreement be sent by registered mail to all employees in a cut off or furlough status. The Committee does not believe that this is necessary. If the notice provided in subsection 1 is given, the individual employees may be provided with copies of the Implementing Agreement in the same way that copies of newly agreed upon collective bargaining agreements are distributed or inquiring employees may either contact their bargaining representative or may request the Carrier to send them a copy of this Agreement.

Finally, in subsection 3, the Organization has requested that the Carrier give its General Chairman, by a date certain, a list or lists of all affected employees. The Carrier on the other hand has indicated that it believes that the only way that there can be a determination as to entitlement to protective benefits is where an individual employee has progressed or will progress a claim and that the Carrier is under no obligation to provide the Organization with a list of employees who may be making claims. The Carrier indicates that to do otherwise would fly in the face of the provisions of Article I, Section 11 of New York Dock II.

Article I, Section 4 of New York Dock II provides for notice and states:

> 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.

Another Committee has construed this requirement to include a

"list [of] the positions to be abolished, the names of the regular occupants, hours of assignment and rest days." (Southern Railway and Railroad Yardmasters, Robert E. Peterson, Arbitrator, May 24, 1982.)

In many of the cases cited by the Carrier it was clear which employees were affected because of the abolition of a particular facility. In this case, however, because of the nature of the change in operations it is not clear exactly which jobs will be affected. Accordingly, any list that the Carrier might make will only be an estimate of those affected and cannot be considered to be a finding on the part of the Carrier that an individual employee was in fact affected. However, despite the Carrier's reluctance to admit that the change in operations had any affect on the employees of the Eastern Lines, it is clear that the rerouting of traffic must have had some affect and that New York Dock II requires a best faith estimate by the Carrier. The Agreement will require a list or lists of affected employees.

Article III

The Organization requests that Section 1 contain a requirment for posting on all employee bulletin boards of "potential earnings of all yard and road assignments on the involved seniority districts in $50.00 increments to be used as a guide for employees to evaluate seniority and compensation." The Carrier objects to the section as unnecessary, yet as pointed out by the Organization, Section 5(b) of Article I of New York Dock

II provides for offset where a displaced employee fails to exercise seniority and changes his place of residence. Accordingly, such a provision will be included.

The Carrier objects to proposed Section 2 because it would require the Carrier to furnish to the Organization information on test period earnings for individual employees. The Carrier would furnish the test period earnings where there is a disputed claim; however, it indicates that to do so in all cases would violate the employees' right to privacy. The Committee believes that this argument is without merit, since the Organization is the duly chosen collective bargaining representative of all employees in the craft or class.

The Carrier indicates that it will agree with the Organization proposal for Section 3, if the claim is denied by the "highest designated officer". This suggestion of the Carrier has merit and will eliminate controversy as to when and why a claim is denied.

In Section 4, the Organization wishes the Carrier to make available where there is a dispute as to the accuracy of computation of "average monthly compensation" or average monthly time paid for", certain records so as to "make a determination with regard to the dismissal or displacement allowance due." The Carrier claims that it "is under no legal obligation to grant the Organization carte blanche access to its records". It states it will accept the type of language contained in AMTRAK Case No. 12. The Organization on the other hand states: "There is no

valid rason for the Carrier's objection as Local Chairman now have access to the referenced records." The Committee will direct that appropriate records be made available to the Organization to ensure that disputes over test period earnings may be resolved. As noted earlier in this decision, this case is unusual in that the notice of events is occuring three years after the events actually took place and is not prospective as was intended by the ICC when it imposed New York Dock II conditions on the transaction.

The Carrier further objects to proposed Sections 4(a) and (c) as being in the way of penalties. The Organization counters with the statement that these sections "will merely make the employees whole until such time as the Carrier complies with the requirements of NYD II." In the Committee's view, any payments which may be made must be made either at the volition of the Carrier or because of an adjudication in accordance with Article I, Section 11 of New York Dock II. Accordingly, these subsections will not be included in the Implementing Agreement.

The Organization proposed in Section 4(b) that in order to maximize seniority, the Carrier will advertise all assignments for seniority choice for a period of seven days. The Carrier made no comment on this suggestion and it is therefore included in the Implementing Agreement.

Article IV

Sections 1, 2, and 3 of this article deal with the elections

that an individual employee must make if entitled to two benefits. The Carrier objects to the Organization's statement of these provisions which are contained in Section 3 of Article I of New York Dock II. The Carrier does not object to the statment of Section 4 which indicates that there shall be no duplication of protective benefits by any employee.

Since these are a restatement of the actual language of New York Dock II, the Committee believes it will be best if the actual language of New York Dock II speaks for itself.

In Section 5 of the proposed article the Organization attempts to deal with the method of determining the "average monthly compensation" and the "average monthly time paid for" of "Carrier Officers, supervisory officials or organizational representatives" who are forced to exercise seniority rights. The Carrier objects to the inclusion of language regarding company officials and cites a decision by Referee Lamont Stallworth involving Michael J. Topolosky and the Union Pacific Railroad as precident for its views. That case is inapposite. It deals with the question of who is an "employee" for purposes of coverage under New York Dock II. The provision requested by the Organization concerns the determination of income where management officials wish to exercise their "bumping rights" because of a covered transaction. Likewise, the Organization's wish to clarify the same question regarding organization representatives is objected to by the Carrier for several reasons. First, the Carrier states that the compensation is

clearly that for "service performed by the employee for the company..."; second, that there is "no provision for the substitution of another employee's earnings in order to calculate the earnings of a union representative or any other employee"; and finally, "union representatives serve of their own volition and the Carrier is under no obligation to subsidize them for wages lost through their own voluntary actions."

The Committee does not believe that these arguments stand up to careful analysis. Clearly, it was the intention of the ICC to protect all employees of the Carrier who are affected by a covered transaction. Individuals who are on leave of absence or other arrangements voluntarily entered into by the Carrier with its Organizations do not lose their status as employees, yet the Carrier by its argument would have them lose many of the advantanges of that status. The Committee cannot believe that this could have been the intention of the ICC. Accordingly, the suggested coverage contained in Section 5 will be included in the Implementing Agreement; however, the same rules will apply to all employees and there will not be a special formula to compensate "other than 'full time' organization respresentatives".

Article V

The Organzation proposes the manner in which claims under the Implementing Agreement will be handled. The Carrier objects to the second section because it allows direct appeal to Labor Relations. It provided alternative language to which the

Organization objects.

It is the Committee's view, consistent with like decisions in other similar cases, (see UTU and ICG, Kasher, referee), that the collectively bargained provisons will be applicable.

Article VI

The Organization proposes certain reimbursement of expenses and compensation for the sale of a home by an employee, which the Carrier finds to be objectionable as changes in the substantive benefits contained in Article I, Section 12 of New York Dock II.

The Committee finds merit to the Carrier's position and Article VI as proposed by the Organization will not be included in the implementing Agreement. The provisions of Article I, Section 12 will govern payments caused by losses from home removal.

Article VII

This article was found to be procedurally barred in the Committee's earlier award. It will not be considered here.

Carrier proposals

The Carrier in its Procedural Submission raised the definitional question of what consitutes a "dismissed employee". The Committee finds that this is a question which is better left to the working of individual arbitration awards in

accordance with Section 11 of Article I of New York Dock II.

The Carrier next proposes certain language regarding furloughed employees. The Organization objects to the language as being outside the scope of New York Dock II. The Committee believes that this language would substantively modify the protections offered to employees by the ICC and therefore cannot adopt it.

Finally, the Carrier asks that this Committee rule that the Implementing Agreement rendered herewith apply only to those employees holding seniority on the effective date of this Award. As indicated in the early Award of this Committee, that matter is one to be determined under a Section 11 proceeding and not under this Award.

Award

The text of the arbitrated Implementing Agreement provided for in accordance with Article I, Section 4 of New York Dock II as directed by the ICC in Finance Docket No .28799 is attached hereto as an appendix to this award.

Robert O. Harris
Neutral Referee

C. L. Little
Organization Member
(Concur/~~Dissent~~)

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

December 23, 1985

Implementing Agreement

Arrived at through Arbitration pursuant to
Section 4, Appendix III, New York Dock II

WHEREAS, On December 29, 1978, the St. Louis Southwestern Railway Company and its Corporate parent, the Soutern Pacific Transportation Company, filed application pursuant to 49 USC 11343 to purchase a portion of line of railroad from the bankrupt Chicago, Rock Island and Pacific Railroad Company. This portion of railroad line extends from Santa Rosa, New Mexico, to St. Louis, Missouri, via Kansas City, Missouri, a total distance of nine hundred sixty-five and two-tenths miles;

AND WHEREAS, On June 6, 1980, the Interstate Commerce Commission approved the preceding application pursuant to ICC Finance Docket No. 28799;

AND WHEREAS, The ICC Order imposed employee protective conditions as set forth in New York Dock Ry, Control - Brooklyn Eastern District, 354 ICC 399 (1978), as modified in 360 ICC 60 (1979), copy attached as Appendix A;

AND WHEREAS, On January 6, 1983, the Southern Pacific Transportation Company implemented a modified operation pursuant to the above described transaction and the authorization contained in ICC Finance Docket No. 30000, without written notice of the transaction to the employees or their representatives;

AND WHEREAS, On February 4, 1985, an Arbitration Committee established under the provisions of New York Dock II decided that Southern Pacific Eastern Lines employees, represented by the United Transportation Union, are subject to the protective conditions pursuant to ICC Finance Docket No. 28799.

ARTICLE I

The labor protective conditions set forth in the New York Dock Railway Control, Brooklyn Eastern District, 360 ICC 60 (1979), hereafter referred to as New York Dock II, imposed by the Interstate Commerce Commission in Finance Docket No. 28799 (Sub. No. 1) and related proceedings, and which are attached and made a part hereof as Appendix A shall be applicable to employees determined to be "displaced employees" or "dismissed employees" as a result of the transaction.

ARTICLE II

Section 1. On the effective date of this Agreement, the Southern Pacific Transportation Company will give written notice of the transaction by posting a notice on all employee bulletin boards convenient to the interested employees and by sending, registered mail, notice to the representatives of the interested employees. Separate notice will also be sent to each interested employee in a cut off or furloughed status. Such notice shall contain a full and adaquate statement of the changes effected by the transaction, including an estimate of the number of employees of each class of service affected by the changes.

Section 2. The Carrier shall make available copies of this implementing Agreement at all on and off duty points to employees working in the affected seniority districts. It shall also make available, upon request, copies of this implementing Agreement to all employees in a cut off or furloughed status.

Section 3. The Carrier shall, as soon as feasible, furnish the General Chairman, representing the covered employees, a list of the positions affected as well as the names of the regular employees it believes to have been affected by the transaction.

Article III

Section 1. The Carrier shall post on all employee bulletin boards, as soon as feasible, the potential earnings of all yard and road assignments on the involved seniority districts in $50.00 increments to be used as a guide for employees to evaluate seniority and compensation. Such information will be only for the guidance of protected employees and will not be construed as a guarantee that any assignment will earn the amount specified.

Section 2. The Carrier shall, as soon as feasible, furnish to each individual employee, and the General Chairman representing the covered employees, a statement or statements setting forth the "average monthly compensation" and the "average monthly time paid for" as those terms are defined in New York Dock II, Appendix III, Article I, Section 5(a) and Section 6(a) for the employees listed by the Carrier as affected employees under Article II, Section 3, of this implementing Agreement.

Section 3. The Carrier shall within ten (10) days of receipt of a claim form from any employee claiming a "displacement allowance" or "dismissal allowance" furnish to the employee submitting the claim form, and to the General Chairman representing the covered employee, a statement or statements setting forth the "average monthly copmpensation" and the "average monthly time paid for" as these terms are defined in New York Dock II, Appendix III, Article I, Section 5(a) and Section 6(a), as well as the total hours paid for during the claim month.
Any claims declined or adjusted may be appealed to the highest designated officer who shall upon review include a specific statement as to the reason or reasons for such declination or adjustment.

Section 4. Should a dispute arise as to certification of any employee(s), or as to the accuracy of computation of "average monthly compensation" and "average monthly time paid for" or calculation of monthly compensation or total hours paid for, the Carrier shall make available to the General Chairman representing the employee(s) such company records as shall be needed, and not otherwise available to the General Chairman, to make a determination with regard to the dismissal or displacement allowance due. Unnecessary and arbitrary requests for information shall be avoided.

To insure that all employees will have the opportunity to maximize their seniority, the Carrier will, on the date the potential earnings of all yard and road assignments on the involved seniority districts are posted, advertise all assignments for seniority choice for a period of seven (7) days.

Article IV

Section 3 of New York Dock II shall apply to Carrier Officers, supervisory officials and organizational representatives who are forced to exercise seniority rights subsequent to a transaction covered by this agreement in the same manner as to other "displaced" or "dismissed" employees. Any individual who exercises such seniority shall have his average monthly compensation and average monthly time paid for calculated as the average of the two (2) protected employees immediately above and below him on the same seniority roster. In the event that an employee's actual monthly compensation or average monthly time paid shall be higher than the average of the individuals above and below him on the seniority roster, such individual shall have the right to have his actual monthly compensation or actual average monthly time paid for utilized to calculate his allowance.

Article V

Section 1. Each affected employee shall submit to the Carrier, in the same manner time returns are submitted, a "monthly claim form" for each month benefits are claimed. The form utilized shall be one mutually agreed upon, similar to the form submitted by the Organization in this proceeding.

Section 2. Claims for benefits under New York Dock II, Appendix III and this Agreement will be handled under the respective time limits on claims rule applicable to each craft or class of service the same as with respect to other claims or grievances.

Section 3. The time limit on claims rule applicable to the respective crafts or classes of service will not apply to claims presented for protective benefits for months prior to this implementing Award until the effective date of this Award.