AWARD NO. 1
CASE NO. 1

ARBITRATION COMMITTEE
ESTABLISHED UNDER NEW YORK DOCK PROTECTIVE CONDITIONS

In the Matter of an Arbitration Between UNITED TRANSPORTATION UNION (C&T) and UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific-Upper Lines)	FINDINGS & AWARD

QUESTIONS AT ISSUE:

"1. Since six (6) of twenty (20) senior employees recalled on October 10, 1983, failed to respond to such recall, are six (6) additional employees needed to make a full complement of twenty (20) entitled to protected status under New York Dock Conditions?

2. Is New York Dock protected status due those employees who were recalled and protected the extra board at Kansas City while awaiting the senior recalled employees to report for active duty?

3. Are other employees not covered by Questions 1 and 2 above entitled to New York Dock protective benefits?"

BACKGROUND:

On October 20, 1982, the Interstate Commerce Commission (the "ICC") rendered its Decision in Finance Docket No. 30,000, approving the merger of Union Pacific Railroad Company (the "UP"), Missouri Pacific Railroad Company (the "MP"), and Western Pacific Railroad Company (the "WP") (collectively, the "Carrier"). The merger was effective December 22, 1982. In its Decision and Order the ICC imposed employee protective conditions as set forth in New York Dock Railway - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979).

On March 18, 1983, the Carrier, pursuant to Article I, Section 4, of the New York Dock Conditions, served notice on representatives of the United Transportation Union (the "Organization") of the intent to consolidate operations in the Kansas City Terminal. This notice read as follows:

"The Kansas City Terminals of UP and MP will become a single, combined and coordinated terminal operation con-

trolled by MP with all work performed under the applicable MP schedule rules.

The present MP and UP Yards in Kansas City will be used to the extent necessary and for the purposes needed to achieve maximum efficiency and flexibility in the operation of the coordinated terminal.

Trains originating and terminating at Kansas City may operate into and/or out of any yard in the coordinated terminal. Initially, eastbound and southbound trains shall, for the most part, operate out of Neff Yard. Initially, westbound and northbound trains shall primarily operate out of 18th Street Yard. Run through trains may use any yard in the coordinated terminal."

When, after extensive negotiations, it became evident that the Carrier and the Organization were not going to be able to reach amicable agreement relative to the Carrier notice, the dispute was submitted in pursuance of Article I, Section 4, of the New York Dock Conditions to arbitration.

An opinion and award in the dispute was rendered by Arbitrator Nicholas H. Zumas on September 9, 1983. It read as follows:

"Findings and Conclusions

After careful examination of the written submissions of both parties and a review of the arguments presented at the hearing, this Arbitrator has promulgated an Award which includes the three separate documents described above. Those documents are identified as follows:

(1) Basic Implementing Agreement - Pages 1-7

(2) Terminal Collective Bargaining Agreement - Pages 8-24

Other Attachments - Pages 25-37

(3) Questions and Answers - Pages 38-44

The 'Other Attachments' are the allocation formula for regular assignments and a copy of the New York Dock conditions.

This Arbitrator is satisfied, having considered all the circumstances and able arguments of both parties, that the attached Award fairly and equitably provides an appropriate basis for the selection and assignment of forces made necessary by the consolidation of the Kansas City Terminal.

Award

The parties are directed and ordered to adopt and imple-

ment the attached implementing agreement."

Subsequent to receipt of the aforementioned arbitration award, the Carrier notified the Organization and affected employees that consolidation of the terminal would occur on November 1, 1983. In this connection, it advised that all assignments at Kansas City (both MP and UP) were abolished at the end of tours of duty on October 31, 1983 and new assignments were established to be effective November 1, 1983. The notice also advised that the two separate extra boards were combined into one consolidated extra board effective November 1, 1983.

Meantime, on or about October 20, 1983, or some 20 days prior to the date of consolidation of the terminal, it was determined that there was need to increase the UP extra board by 20 additional employees, and employees were thus recalled from furlough. In this connection, the UP crew clerks proceeded to go down the list of furloughed employees on the roster until 20 employees had been contacted who indicated a willingness and availability to report and work immediately, it being the intent that as and when the 20 senior-most employees finally reported and marked up, the junior employees used on an interim basis would return to a furloughed status.

A total of 14 of the 20 senior-most employees subject to recall did subsequently mark-up for service, with 12 having marked up on or before November 1, 1983 and two reporting later during the month of November 1983. The remaining six senior-most employees never did report for a variety of reasons.

In the circumstances, there remained marked up and in active service on the date of consolidation (November 1, 1983) certain employees who had been recalled under the aforementioned interim procedure. In this same regard, the Carrier submits that some of the junior recalled employees had not actually reported for service until subsequent to November 1, 1983.

The Carrier also says that a formal written recall letter was "erroneously" issued on November 4, 1983, or four days after the consolidation, to 10 additional junior furloughed employees; five of the 10 employees reported for work later in November; and, the five employees who reported for work were shortly thereafter cut off and returned to the furloughed list.

POSITION OF THE ORGANIZATION:

The Organization maintains that the Carrier is totally responsible for the chain of events as they unfolded and that employee protection is due the employees who were actively employed on October 31, 1983 in addition to those who should have been recalled in proper seniority order.

It says the junior employees who reported during October and were working on October 31, 1983 at the time of implementation became "displaced employees" as defined in the New York Dock Conditions.

The Organization contends that regardless of the manner in which the employees had been returned to service they were working on the date of the coordination and they were directly affected as a result of the transaction and thereby entitled to protective benefits.

The Organization also maintains, with respect to Question at Issue No. 3, that former UP employees are entitled to protective benefits due to the fact that the proper number of employees were not recalled to service prior to October 31, 1983. In support of such position, the Organization directs attention to data which had been presented to the Carrier during the on property handling of the dispute. It says that such data demonstrates that the total manpower requirements had not been met by the Carrier and that the Carrier gave no consideration to the six and seven day job assignments when making their computations and which would, the Organization says, have increased the manpower requirements substantially.

Lastly, the Organization asserts that in anticipation of the consolidation or transaction that the Carrier opted to work with less than the required number of employees in order to circumvent payment of protective benefits for affected employees and that it should be required to protect all employees who were actively in the employ of Carrier on October 31, 1983.

POSITION OF THE CARRIER:

As concerns Question at Issue No. 1, it is the Carrier's position that it is not automatically obligated to protect an additional six employees by virtue of the fact that six of the original 20 senior recalled employees actually never reported for such recall. It says the recall was simply a result of service requirements related to an influx of business on the Marysville Subdivision at the time in question which had caused UP yard service employees at Kansas City to gravitate to road service, and, Carrier suggests, due to employees who were fearful of the effect of the impending consolidation of Kansas City Terminal.

The Carrier says that all six of the employees who would stand to become protected under an affirmative answer to this question were employees who had been furloughed for a period in excess of two years prior to the date of recall.

It says that neither the Claimants nor the Organization have offered any substantive evidence or sufficiently demonstrated the "causal nexus" necessary to establish entitlement of Claimants to protective status under the New York Dock Conditions.

The Carrier also informed the Board that during discussion of this dispute on the property it had offered to the Organization that it would certify the additional six employees encompassed by this question if that concession would resolve this dispute in its entirety, but that such offer was rejected by the Organization.

In regard to Question at Issue No. 2, Carrier reiterates argument advanced in response to Question No. 1. It also says that all of the employees comprehended by Question at Issue No. 2 had been furloughed on the UP for a period of time in excess of two years prior to being utilized on an interim basis and that when all the confusion had ended regarding their temporary recall, and the 20 positions had been filled, the employees covered by this Question No. 2 returned to a furloughed status for another extended period of time.

It maintains that the status of these employees would never have changed had it not been for the need to use them on an interim basis to protect the extra board during the period of time it took to get the 20 senior employees marked up and into active service. Thus, Carrier says these employees were not placed in a worse position with respect to their compensation as a result of the consolidation.

As concerns Question at Issue No. 3, Carrier submits that some of those employees who have submitted claims were were furloughed during the entire period of time that the events discussed herein took place and are claiming protected status by virtue of the fact their name existed on a seniority roster at Kansas City at the time the events covered by this case were unfolding. Other employees, the Carrier states were actually contacted , either by telephone or written recall notice, but those instructions were rescinded before they ever actually reported for duty. It says there is no support what ever for considering these employees as being entitled to protected status merely by virtue of their name having appeared on a seniority roster.

FINDINGS AND OPINION OF THE BOARD:

As observed in a prior New York Dock dispute (Brotherhood of Railway Carmen vs. the Maine Central RR and Portland Terminal Railroad) by this Arbitrator:

> "Protective benefits under the ICC prescribed New York Dock Conditions are for the purpose of protecting employees who can demonstrate that they have been adversely affected by a transaction, or an action taken by a carrier that is pursuant to that which is authorized by the ICC in a consolidation, merger or analogous type transactions. These labor protective benefits, as careful reading of the New York Dock Conditions and various arbitral decisions reveal, do not, however, extend to employees for any reason other than as such employees have been directly affected by a transaction. In this respect, it is noted that various arbitral decisions have been to the effect that there must be a 'causal nexus' between the actual 'transaction' and the action at issue; every action initiated subsequent to a merger or consolidation cannot be considered, ipso facto, to be pursuant to the merger; it must be shown an employee

> displacement, or abolition of a position, arose directly from and was causally related to the transaction involved; the adverse effect must be a direct result of the transaction and not the result of other causes; the mere loss or reduction in earnings per se does not render or place an employee in the status of a 'displaced employee;' the protective benefits arrangements are not intended to afford absolute and complete financial protection to any railroad employee who might be in some way 'tangentially' adversely affected by a merger or coordination; the petitioner must show a causal relationship between his furlough or reduction in compensation and the transaction; and, a defined transaction must be the causative element which leads to the worse position."

Applying the above findings from a collection of past decisions to the Questions at Issue in the present dispute, it is apparent that the service requirements of the UP prior to the consolidation dictated a need for additional employees and that the Carrier took steps to contact a number of its furloughed employees. While the Carrier would attribute its operating needs and the recall of furloughed employees to a "sudden increase" in its business, the timing and manner in which the recall was handled tends to suggest that Carrier had been attempting to delay any work force adjustments until after the consolidation, but suddenly found that it could not continue to handle then current operating needs with its then existing active work force. In any event, the Carrier action reveals that at least 20 UP employees stood to be recalled for service in the normal course of business prior to the consolidation.

In the circumstances, and in response to Question at Issue No. 1, it may be properly concluded that the Carrier was obligated to provide protective status for not less than 20 senior employees who took recall under the workings of the rules agreement.

Since only 14 of 20 senior employees recalled for service were subsequently certified as entitled to protective benefits status, it will be held that the next six most senior employees who were recalled and did actually report for service shall be considered as entitled to protective benefits status. The fact that these six employees may be junior to six other more senior employees who failed to accept recall did not give the Carrier reason to hold that their junior standing on the roster precluded them from attaining status as a protected employee. In the absence of the more senior employees who had elected or forfeited a right to return to active service at that time, the junior employees became a part of the active work force and thereby became entitled to the same protective conditions as were extended to all other employees who were, or stood to properly be in active service on the date of consolidation.

For the foregoing reasons, Question at Issue No. 1 will be answered in the affirmative.

As concerns Question No. 2. It appears evident that the nature of circumstances at the time in question made it necessary the Carrier utilize the services of junior employees while awaiting the report for service of senior recalled employees. It is understood that the use of junior employees in this manner is not an unusual circumstance on this property, and that in the normal course of business the junior employee would be returned to a furloughed status once the senior employee reported for duty. Under the circumstances, the Board does not find that it may be held that the junior employees were placed in a worse position as a result of the consolidation. Consequently, the fact that certain of the junior employees happened to be in active service on the date of consolidation may not be said to have changed the fact that they were essentially working on only an interim basis pending the return of more senior employees who had accepted recall from furlough and were in the process of reporting for duty. Accordingly, Question at Issue No. 2 will be answered in the negative.

Turning now to Question at Issue No. 3. As indicated above, the New York Dock Conditions and various arbitral decisions regarding such Conditions hold that the adverse effect which an employee sustains must be a direct result of the transaction involved and not the result of other causes. The protective benefit arrangements are not intended to afford absolute and complete financial protection to any employee who might be in some way tangentially adversely affected by a consolidation. The fact that an employee has a place on a seniority roster per se does not establish that employee as a protected employee or a displaced employee as a result of a merger, coordination or a transaction as authorized by the ICC. In other words, the New York Dock Conditions do not provide for blanket certification of each and every employee in the employ of a carrier. Accordingly, Question at Issue No. 3 will be answered in the negative.

AWARD:

Question at Issue No. 1 is answered in the affirmative. Both Questions at Issue Nos. 2 and 3 are answered in the negative.

Robert E. Peterson, Arbitrator

Kansas City, MO
August 20, 1987