In the Matter of Arbitration between	OPINION AND AWARD
United Transportation Union (Western Pacific)	New York Dock Labor Protective Conditions Article I, Section 11 Four Claims
-and-	and
Union Pacific Railroad Company	Two UTU/WP Questions

The undersigned, Charles M. Rehmus, was selected by the parties to serve as neutral referee to resolve four New York Dock claims and provide answers to two questions raised by the Union Organization, the first of which relates to 24 claims identified as WY-51. The parties waived their right to appoint members to the Section 11 arbitration committee.

The parties' pre-hearing briefs were received by July 11, 1987. Hearing was held in San Francisco, CA on July 16, 1987.

Appearing for the Union:

Harley A. Siler, General Chairman, UTU/WP
J. L. Thornton, Vice President, UTU

Appearing for the Carrier:

John E. Cook, Director, Labor Relations
J. R. Gum, Assistant Director, Labor Relations
Dennis J. Gonzales, Senior Manager, Labor Relations

Because the interests of the UTU/SN were involved in the two questions raised by the UTU/WP, the General Chairman of the UTU/SN was allowed to make written comment on them after the hearing following notice of the Carrier's position on the questions. His letter supporting the UTU/WP position was received on August 6, 1987. Thereafter the record was closed.

Four Displacement Allowance Claims

These claims by four Western Pacific yardmen--T. Kangas, A. Robinson, J. Darlington and D. Fox--are for New York Dock Section 5 displacement allowances following the abolishment on November 11, 1985 of the last yard assignment and associated extra board at Oroville, CA. Each asserts that his yard assignment, 3402, was abolished and he was displaced because his work was thereafter performed by the comingled road switcher LW-67.

As background on these claims, in ICC Finance Docket 30,000 the Western Pacific was merged with the Union Pacific and New York Dock Conditions were imposed to protect adversely affected employees. On March 1, 1985, Referee Walter Phipps issued a Coordination Award and Implementing Agreement for the integration of the work forces of the Western Pacific and its former subsidiary, the Sacramento Northern, as those two carriers were being consolidated with each other and into the Union Pacific. Referee Phipps held that New York Dock Conditions were incorporated into and were "applicable to this [the SN-WP consolidation] transaction." Hence the claimants are entitled to the protection they seek if they show that their displacement was caused by one of the transactions associated with the consolidation.

In this referee's award of February 14, 1986, under Section 11 of New York Dock, I found that the consolidation of the SN Yuba City-Oroville road switching assignment with WP assignments was a transaction under New York Dock. This is the comingled road switcher, LW-67, that worked out of the Oroville terminal

and to which the claimants refer. The immediate effect of this transaction creating LW-67 was that prior rights WP trainmen gained one full assignment. The reason why the claimants assert they subsequently were adversely affected by this transaction is considerably more complex.

Their assignment, 3402, was to the last remaining yard engine in the WP yard at Oroville, which had regularly started at 4 p.m. When LW-67 began to operate out of Oroville six days a week, and also beginning at 4 p.m., the Carrier then re-bulletined 3402 to begin its work at 8 p.m., and the second 12-hour period began then. Hence under the June 25, 1964 National Agreement LW-67 could and did switch in the Oroville yard between 4 p.m. and 8 p.m. In fact, records show that LW-67 performed 87.45 hours of switching in the Oroville yard during 18 days in December of 1985, or nearly five hours of switching each day it worked in that yard (Un.Ex.G, 1-17).

In the meantime, after 3402 started the yard job at 8 p.m., and after the new road switcher began doing yard switching between 4 and 8 p.m., the Carrier served notice to time study 3402 pursuant to Article V of the 1964 National Agreement. That last yard assignment could no longer meet the four hours' work in 10 over 10 days specified in that Agreement, and as a result the 3402 switch engine was discontinued on November 11, 1985. The four claimants here were therefore displaced and had to exercise their seniority to the road service extra board at either Stockton or Portola, both more than 30 miles from Oroville.

Their claim for displacement allowances is therefore based on the assertion that the comingled road switcher LW-67 only became practical for the Carrier when it could work both WP and SN trackage and customers. This comingled assignment was possible only because of an ICC-approved transaction. Hence the whole combination of events by which they were ultimately displaced resulted from a transaction, which they claim gives rise to their entitlement to New York Dock protection.

The Carrier asks that their claim be denied on a number of grounds. Essentially, it argues there is no causal nexus between the Phipps Award and the abolishment of the Oroville yard job. First, the Carrier notes that in April of 1985 it had signed an agreement with the Union entitling it to establish a road switcher operating from the Oroville terminal. Further, the 1964 National Agreement entitled it to require the road switcher to perform yard work during a second 12-hour period during which no yard assignment started or ended. Hence the Phipps Award neither empowered it to establish LW-67 nor specified the yard switching it could be assigned. Second, the Carrier maintains the last yard assignment in Oroville would have ended because of business declines and other operating changes in any event and roughly within the same time frame. For these reasons the Carrier asserts the claimants cannot be construed as having been displaced by a transaction as required for New York Dock protection.

After consideration of these various contentions and the

many exhibits attached to each of the parties' briefs, I have concluded that there was in fact a causal nexus between an ICC-approved transaction and the claimants' displacement. It is true that the Carrier had the right to establish a road switcher at Oroville prior to the transaction, but it did not do so, instead maintaining a road switcher at Marysville and a yard engine assignment at Oroville. Only when the Phipps Award allowed it to serve customers on both WP and SN tracks was the Oroville road switcher established. Even then, the road switcher LW-67 could not immediately do substantial yard switching at Oroville. First, yard assignment 3402 had to be re-bulletined to begin the second 12-hour period at 8 p.m. Only when this was accomplished could a substantial amount of the Oroville yard switching be performed by the comingled road switcher. After this was accomplished then the last yard engine could be shown in a time study no longer to have enough work to prevent its abolishment. In short, while the Carrier accomplished the abolishment of 3402 by a series of legal actions, the triggering factor in the abolishment was the transaction which permitted the creation of a comingled road switcher to do both WP and SN road and yard work. Hence the causal nexus between the transaction and the displacement is clear, even though delayed.

Further, I am not persuaded by the Carrier's arguments that the Oroville yard job would have been ended, at the time that it was, based on economic and operating reasons. The only definite evidence on this point is that car counts for 1985 were

down for two major customers in the Oroville area, but it is conceded car counts were up for others. All other changes to which the Carrier points occurred months or even a year after 3402 was abolished in November, 1985. For example, intradivisional service between Stockton and Portola by-passing Oroville was not begun until May, 1986, and not fully implemented until September, 1986. The Oroville yard assignment might, for such reasons, have been ended sometime within the next year, but not in November, 1985. The road switcher was averaging three hours of yard switching every single day of December, 1985, the month after the yard job was abolished, so substantial yard switching remained.

Finally, the Carrier repeatedly asserted that the abolishment of 3402 was permitted by easing of road-yard restrictions permitted it in the October 31, 1985 National Agreement. But It offers no evidence or examples of what such flexibilities were or how they reduced the work of the last Oroville yard engine. As I have said before in New York Dock cases, contentions of this kind must be supported by specific facts if they are to be persuasive.

In short, since the causal nexus between the transaction and the displacement is clear, if delayed, and the economic and operating justifications that are asserted to have resulted in the displacement are unproven or took place considerably later, I have concluded these claims should be sustained.

It is possible, as the Carrier suggests, that the claimants

may be entitled to protective benefits under the intradivisional run implementation provisions of Article XIII of the 1985 National Agreement. If so, under Section 3 of New York Dock, the claimants are entitled to make an election between the two sets of protection conditions.

Two Organization Questions

> Did the Coordination Award and Implementing Agreement by Referee W.F.Phipps of March 1, 1985 permit the Carrier to unilaterally use WP Yard assignment on Sacramento Northern trackage during the course of their yard tour of duty?

Along with and directly related to this question the parties also jointly submitted a group of 24 claims identified as Carrier's File No. WY-51. Each of these claims, I am told, is a claim of a prior rights WP yardman for a penalty day's pay on account of being required to perform duty outside of WP yard switching limits on what was former SN trackage. The claims were amended also to assert a violation of Rule 4(f), a scheduled overtime rule in the UTU/WP "S" contract, but I have concluded that a New York Dock Section 11 arbitrator does not have jurisdiction over such a contractual claim, and have not considered it further.

Prior to the consolidation of the SN and the WP with the UP, both the SN and the WP had freight yards in Sacramento, the SN's known as the Westside Yard and the WP's as the South Sacramento Yard. For an engine to go from the South Sacramento yard to the Westside yard it must travel northeasterly on the WP

mainline to East Haggin Yard, then northwesterly across Southern Pacific tracks--which SN engines had the right to do--and then reach the Westside Yard and from it the former SN mainline. The WY-51 claims arise because WP yard engines and crews have repeatedly been assigned to make this trip and then to conduct industrial switching and bring in trains whose crews were over Hours of Service laws on former SN tracks westerly toward Woodland. Question No. 1 challenges the Carrier's right to use WP yard crews on SN trackage in this manner, contending it violates the Phipps Award.

The Carrier argues that it has the right to do so under Section 2 of Article VIII of the UTU National Agreement of October 31, 1985. Without quoting the whole of this rather lengthy article, it provides that yard crews may bring in tied-up trains from locations up to 25 miles outside of switching limits and provide industrial switching service to customers up to 20 miles outside switching limits. These distances increased those of 15 and 10 miles, respectively, that had been in the 1978 agreement. The Carrier notes that none of the WY-51 claims state that the 25 or 20 mile limits were exceeded and argues that these claims are thus without foundation. Further, it argues that interpretations of the 1978 Agreement in this subject area held that road-yeard service qones can be established in any direction, and that crews of one carrier can bring in tied-up trains of another carrier in consolidated yards or terminals. In effect, the Carrier contends it has simply treated all of what

are now the Union Pacific's Sacramento yards as a consolidated yard and has assigned WP yard crews to work "in any direction" on industrial switching and to bring in tied-up trains on any UP outlying tracks. It argues that these earlier interpretations apply with equal force to the greater mileage limits of the 1985 National Agreement. Finally, to the extent that it might be limited by Interpretation Question and Answer 8 to "...the provisions of the agreement covering the operations of the consolidated terminal.", the Carrier contends such provisions at most would require it to meet the comingled assignment requirements of the Phipps Award.

Hence I turn again to consideration of the Phipps Award to answer Question No. 1 and the Carrier's contentions. Initially, it is very clear what the Phipps Coordination Award and the Implementing Agreement it ordered did. It merged SN and WP seniority rosters; it applied New York Dock Conditions to trainmen who were displaced by certain transactions it authorized, such as comingled assignments; and it gave prior rights to SN and WP trainmen to the work they had formerly performed on the tracks over which they performed it. The Phipps Award did not abolish all distinctions between former SN and WP tracks or yards and it did not consolidate all former Sacramento yards into one. In fact, according to uncontradicted testimony, at one time during negotiations prior to the coordination the Carrier made a proposal to the SN and WP UTU representatives that would have had this result, but the Carrier withdrew its proposal and the

parties then went to the New York Dock Section 4 Phipps Award.

In short, I can understand the Carrier's desire to treat all of what are now UP tracks and yards as a single entity and thus to take advantage of the greater road-yard switching limits of the 1985 Agreement. But when it assigns WP yard crews to cross trackage on which former SN employees have prior rights it violates the terms of the Phipps Award and Implementing Agreement. This Award requires that the Carrier establish a comingled assignment before such assignment is valid. Further, any such comingled assignment would, under Phipps, come under the terms of the WP "S" or "C&T" agreements, or the SN agreement, as appropriate. Here, however, the Carrier never established a comingled assignment but simply ordered WP yard crews to work across former SN trackage. It could not and did not establish such a road-yard zone or make such assignments after 1978. It still cannot except in conformity with the Phipps Award. I have been shown nothing in the 1985 National Agreement that abrogates the Phipps Coordination Award. Further, and contrary to Carrier's briefs, as will be discussed in more detail with respect to Question No. 2, it did not gain it by my answer to Question No. 12 in my award of Februry 14, 1986.

Answer to Question No. 1

Question No. 1 is answered in the negative. The Carrier did not obtain the right to use WP yard assignment crews on prior rights Sacramento Northern trackage during the course of their yard tour of duty from the Phipps Coordination Award and

Implementing Agreement of March 1, 1985.

Question No. 2

Would the Coordination Award and Implementing Agreement by Walter Phipps of March 1, 1985 permit the Carrier to unilaterally use extra assignments manned by exclusive SN employees to perform yard service in South Sacramento Yard?

The UTU/WP notes that prior to December of 1986 there were two yard assignments manned by prior rights WP trainmen in the South Sacramento Yard. On December 16, 1986 the Carrier served notice to time study yard assignment YW-04 which, because it could not meet the four-hour requirement per working day, was abolished after January 16, 1987. The Organization alleges but does not prove that the comingled road switcher LW-63 performed yard switching all during this period. The trainmen's extra board supporting the South Sacramento Yard was reduced from nine to six men after the abolishment.

Thereafter, as the Organization alleges and offers evidence to prove, the Carrier increasingly began to call extra engines to work in the South Sacramento Yard. These were manned by prior rights SN crews rather than prior rights WP crews. During the period of March through May of 1987, no WP extra engines were called for yard service. During this same three-month period 33 extra SN jobs were called to perform both SN branch line service and yard service in South Sacramento Yard. Unlike the UTU/WP which has a separate "S" contract for yard service and a "C&T" contract for road service, the UTU/SN does not have separate

contracts for road and yard service. All three contracts were maintained in the Phipps Award.

In summary, the Organization shows that beginning in about March of 1987 the Carrier called SN extra jobs only and had them perform a substantial portion of their assigned work in the South Sacramento Yard. It alleges that the Carrier's motive for doing so is obvious: Because most of the SN trainmen involved are New York Dock protected under my February 14, 1986 award, if SN crews receive extra work the Carrier's guarantee payments are minimized. Several WP yard trainmen who were later displaced or dismissed by these extra assignments have also filed for New York Dock protection but those Section 5 claims are not yet ripe. Instead, the Organization challenges in Question No. 2 the Carrier's right under the Phipps Award to assign prior rights SN trainmen to work regular extra jobs in the South Sacramento Yard.

The Carrier responds to these allegations by again noting that it believes the October 31, 1985, UTU National Agreement allows it to call prior rights SN employees to perform service on SN tracks outside of Sacramento switching limits and may then also assign them under its Agreement with the UTU/SN to perform yard service in the South Sacramento Yard. In effect, this appears to be the converse of the Carrier's argument in Question No. 1. Having called an SN crew to perform work in or outside of the Westside Yard, the Carrier argues it may then assign them to perform yard work in another Union Pacific yard in the