ARBITRATION PROCEEDINGS

In the Matter of the Arbitration Between UNION PACIFIC RAILROAD COMPANY - and - BROTHERHOOD OF RAILWAY SIGNALMEN	Subject: New York Dock Conditions Stage I: Procedure and Jurisdiction

Dana Edward Eischen, Arbitrator

Appearances

For the Carrier: Wayne C. Naro, Director Labor Relations Maintenance of Way & Signal

For the Organization: C. A. McGraw, Int'l Vice President

PROCEEDINGS

The Parties selected me to serve as sole arbitrator in this procedural arbitration concerning whether matters raised by a Carrier notice in May 1993 came within the ambit of the interest arbitration mechanisms of the New York Dock Conditions (NYDC). A hearing was held at Missoula, Montana on August 19, 1994, at which both Parties were represented and afforded full opportunity to present oral and documentary evidence in support of their positions.

ISSUE

The Parties jointly stipulated that the following question is presented for determination in this procedural stage of the arbitration proceeding:

1) Is the matter covered by Carrier's notice dated May 13, 1993, to consolidate two seniority districts, an appropriate subject for consideration under Article 1(4) of the New York Dock Conditions as imposed in Finance Docket 30,000.

PERTINENT CONTRACT PROVISIONS

New York Dock Railway-Control-Brooklyn Eastern District Terminal,

360 I.C.C. 60 (1979)

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. *Definitions.*--(a) 'Transaction' means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

* * *

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

* * *

4. *Notice and agreement or decision.*--(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. 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. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

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

* * *

UP/BRS Agreement
October 1, 1986

RULE 20 - SENIORITY DISTRICTS

Seniority districts shall be as follows:

1 - Nebraska Division.
2 - Wyoming Division.
3 - Old Kansas Division.
5 - Signal Engineer's forces (Territory covered by seniority rosters 1, 2 and 3).
6 - Western Region (Salt Lake City and North).
7 - Oregon Division (Huntington West).
8 - Western Region (Salt Lake City and South).
9 - Western Region (West of Salt Lake City - former WP).

The territorial limits of seniority districts as above Defined shall remain in effect until changed by agreement between the parties hereto."

* * *

Memorandum of Agreement
July 25, 1988
Consolidating Former MP Seniority Rosters

This Agreement made this 25th day of July, 1988, by and between the Union Pacific Railroad Company, hereinafter referred to as the Carrier, and the Brotherhood of Railroad Signalmen, hereinafter referred to as the Organization, establishes and defines the rights and privileges flowing to those individuals holding seniority on one of five (5) seniority rosters commonly referred to as the former MoPac proper, the former Texas and Pacific, the former C&EI, the former MKT and the former OKT territories as a result of the Carrier's and the Organization's intent to consolidate the five (5) existing seniority rosters into one System Seniority Roster.

IT IS AGREED:

2. Employes dovetailed into the System Seniority Roster will maintain a designation on the consolidated roster (see Attachment #1) which identifies their 'prior rights' territory as being one of the following:

C&EI

MKT

MP

OKT

TP

BACKGROUND

In September of 1980, Union Pacific Corporation, Pacific Rail System, Inc. and Union Pacific Railroad Company (collectively UP), and Missouri Pacific Corporation and Missouri Pacific Railroad Company (collectively MP) jointly filed an application with the Interstate Commerce Commission (ICC) seeking authority for UP to control MP. At the same time, UP and the Western Pacific Railroad (WP) jointly filed an application with the ICC seeking authority for UP to control WP.

On September 24, 1982, the ICC approved the applications in **Union Pacific-Control - Missouri Pacific: Western Pacific**, 366 I.C.C. 462 (1982), subject to the conditions set forth in **New York Dock Railway - Control - Brooklyn Eastern District Terminal**, 360 I.C.C. 60 (1979) for the protection of employees, generally referred to as *"New York Dock"* conditions (NYDC).

The UP territory involved in this matter extends from Menoken Junction, Kansas, to Denver, Colorado. Commonly known as the KP line, it closely parallels the former MP line that extends from Council Grove, Kansas to Pueblo, Colorado. In many instances these lines are less than 20 miles apart. The UP territory is covered by the collective bargaining agreement between the UP and the BRS while the former MP territory is covered by an extant collective bargaining agreement between the MP and the BRS. By a Memorandum of Agreement dated June 25, 1988, the Parties amended MP/BRS Agreement by merging five (5) seniority districts of former MP properties into a single consolidated MP/BRS seniority district.

In 1983 these Parties negotiated an Implementing Agreement to govern consolidation of UP and MP signal maintenance and construction work at terminal facilities in Kansas City, Kansas. It is noted that the seniority district consolidation bargaining in 1988 apparently proceeded in the normal fashion under Section 6 of the Railway Labor Act; whereas the terminal consolidation negotiation in 1983 went forth under New York Dock procedures. Other than those changes, so far as the present record shows, Carrier has operated each of the respective lines covered under separate collective bargaining agreements with BRS, with separate seniority districts, for more than eleven (11) years since the merger. The immediate impetus to change that arrangement was a management reorganization in 1993 whereby Carrier established the Midwest Service Unit covering both territories.

By letter of April 6, 1993, Carrier's Director Labor Relations - Maintenance of Way & Signal made the following proposal to the respective BRS General Chairmen who represent employees under the UP/BRS Agreement and the MP/BRS Agreement, respectively:

> Gentlemen:
>
> The Midwest Service Unit includes territory covered by the Union Pacific BRS Contract, and also includes territory covered by the MP BRS Contract. At the present time there are five Signal Maintainer territories on the Midwest Service Unit which are covered by the Union Pacific Contract and seven covered by the Missouri Pacific Contract.
>
> On the Union Pacific side of the territory, there are Maintainers headquartered at Salina, Ellsworth, Oakley, Limon and St. Marys. On the Missouri Pacific side, there are Maintainers at Council Grove, Hoisington, Utica, Scott City, Eads, Ordway and Wichita.
>
> This split in the territory has caused problems in filling vacancies and also in providing vacation relief. Specifically, there have been vacancies at Scott City and Hoisington which nobody on the MP wants to bid on. At the same time, there has

been an employe on the Union Pacific side of the territory that would like to bid on one of those jobs but is not willing to sacrifice his UP seniority in order to do so. Similarly, there is not enough vacation relief work on either side of the territory to create a full-time vacation relief job. However, if the territories were combined, there would be sufficient work to justify a full-time vacation relief position.

The best solution to the problems outline above would be to consolidate the Midwest Service Unit Signal operations and place them under either the MP or the UP Contract.

I would like to discuss this subject with you further when we meet in Golden in May.

The Parties discussed Carrier's proposal on or about May 3, 1993, but apparently the Union was not agreeable. Ten days later, under date of May 13, 1993, the Director Labor Relations served the following Notice which is the subject of the present proceedings:

Gentlemen:

This has further reference to my letter to you dated April 5, 1993, file 220-NYD-0084-Sig., and our discussions during the week of May 3, 1993 concerning consolidation of Signal Maintainer territories on the Midwest Service Unit.

As discussed, the structure of the territory in question has resulted in difficulties both in filling vacancies and in providing vacation relief. The solution to this problem is to eliminate the currently existing division of the territory. At the present time, part of the territory is covered by the UP Signalmen's Contract and part of it covered by the MP Signalmen's Contract. It is our intent to consolidate the two parts of the territory into one, operating under a single contract. A copy of our notice pursuant to Section 4(a) of the New York Dock Conditions is attached.

I propose that we commence meeting on this notice in my office at 10:00 am on Tuesday, June 1, 1993. If that time and date are not convenient, please suggest an alternative.

* * *

May 13, 1993
File: 220-NYD-0084-Sig.

NOTICE TO SIGNAL MAINTAINERS HEADQUARTERED AT SALINA, ELLSWORTH, OAKLEY, LYMAN AND ST. MARYS REPRESENTED BY THE BROTHERHOOD OF RAILROAD SIGNALMEN

The Interstate Commerce Commission (ICC) in Finance Docket No. 30,000, approved the Union Pacific's (UP's) merger with the Missouri Pacific (MP). The ICC imposed New York Dock Labor Protective conditions as a condition of the merger.

Pursuant to the New York Dock conditions, this to serve as ninety (90) days' notice that on or after August 16, 1993, Midwest Service Union Signal Maintainers will be integrated as follows:

(1) The Signal Maintainers headquartered at Salina, Ellsworth, Oakley, Limon and St. Marys will be incorporated into the MP and will be covered by the Labor Contract between the MP and the BRS.

(2) The employes affected will be placed at the bottom of the applicable MP seniority roster but will be guaranteed prior rights to the positions currently occupied.

No job abolishments are expected as a result of this transaction, and no adverse employe impacts are expected.

While maintaining throughout that the subject matter of the May 13, 1993, Notice was not covered by Article I(4) of the NYDC, the Organization met and discussed Carrier's proposal on several occasions through October 1993. In late August 1993, Carrier presented the Organization with a draft Implementing Agreement, as follows:

The parties hereby agree to the following terms and conditions for purposes of implementation of the Company's May 13, 1993 notice of intent to consolidate Signal operations on the Midwest Service Union and place the entire Service Unit under the BRS/MP Labor Contract.

(1) The incumbent UP Signal Maintainers at Salina, Ellsworth, Oakley, Limon and St. Marys will be given new seniority dates on the MP Seniority Roster 5100 and the territory covered by these positions will be placed under the MP/BRS Labor Contract.

(2) The incumbent UP Signal Maintainers on the positions identified above on the effective date of this Agreement will retain all seniority rights held by them on Union Pacific and in addition will:

(a) Have preserved prior rights to the positions covered by this Agreement. That is, no MP employe will ever be able to outbid the employes

covered by this Agreement for vacancies ta Salina, Ellsworth, Oakely, Limon, or St. Marys;

(b) Be given the option of converting to MP monthly rates for Signal Maintainers or remaining on UP hourly rates;

(c) Be certified as New York Dock Labor Protective Conditions protected employes (wages only) and will be entitled to a differential of six (6) years from the date of this Agreement.

(3) A new MP zone gang will be created under the terms and conditions outlined in (1) and (2) of this Agreement to cover the territory encompassed in this transaction.

(4) Future vacancies on the positions covered by this Agreement will be bulletined as MP vacancies but that will not limit the prior rights identified herein accruing to the former UP employes involved in this transaction.

This Agreement is effective January 1, 1994.

Discussions broke off on November 17, 1993, when BRS advised Carrier that "the proposal should proceed, if at all, under Section 6 of the Railway Labor Act and not pursuant to the merger authority granted in 1982, i.e., New York Dock conditions." Carrier's Director Labor Relations responded by letter of January 7, 1994, reading in pertinent part as follows:

> The Carrier clearly has a right to file notices pursuant to the ICC;s order whenever labor productivity can be enhanced.
>
> The Carrier's proposal seeks to consolidate certain Union Pacific signal work under the Missouri Pacific collective bargaining agreement. Such consolidation will allow the Carrier to improve the productivity of its employees by better utilizing them on this territory. Such consolidations are exactly what was contemplated by the ICC in its order. I therefore believe that my notice is appropriate.

Subsequently, the Parties entered into an agreement on March 25, 1994, to establish an arbitration board pursuant to Article

I(4) of the NYDC, to determine the following issues:

1. Is the matter covered by Carrier's notice dated May 13, 1993, to consolidate two seniority districts, an appropriate subject for consideration under Article 1(4) of the New York Dock Conditions as imposed in Finance Docket 30,000?

2. If the answer to issue 1 is yes, what are the appropriate conditions for an Implementing Agreement?

It is noted that the BRS made a "special appearance" in Stage I of these proceedings to present its position regarding Issue No. 1, without prejudice to its argument that the Board lacks subject matter jurisdiction.

POSITIONS OF THE PARTIES

The following positions have been extrapolated and edited from the Parties' respective post hearing briefs.

Carrier

It is the Carrier's position that the ICC has made clear that merger related transactions may occur at any time. The very definition - "any action ...on which these provisions have been imposed"--should establish beyond any doubt that there is not time limit on a merger related transaction. The Carrier's May 13, 1993, notice is timely.

There can be no doubt that a New York Dock arbitrator has the authority to modify existing collective bargaining agreements to the extent necessary to carry out the operational changes proposed by the Carrier in its May 13, 1993, notice. The fact that the implementation of the transection will modify existing agreements does not require the Carrier to follow the procedures of the Railway Labor Act.

The Carrier is seeking to coordinate and better utilize its employees. None of which can happen until the territories are consolidated under one collective bargaining agreement. No objection was raised by the BRS when the notice to consolidate the terminals was served. The Parties entered into good faith bargaining, and an agreement was reached that transferred UP covered work and employees to the Missouri Pacific. The same should occur here as well.

It also should be noted that the ICC did not set a threshold by which to measure the efficiencies that must be met before a proposed transaction would be proper. It simply defined a transaction as "any action taken pursuant to authorization of this commission on which these conditions have been imposed." The ICC imposed the New York Dock conditions in the control of the Missouri Pacific by the Union Pacific. This proposed transaction is being taken pursuant to that order and the

concomitant protective conditions will also apply.

Finally, it must be understood that the ability of a Carrier to implement changes of this nature is the *quid pro quo* the carriers received in exchange for the expanded protection the employees received. The BRS should not be allowed, by use of procedural arguments, to deny the Carrier its part of the bargain.

Organization

It is the position of the Brotherhood that the matter covered by Carrier's notice, dated April 6, 1993, to consolidate two seniority districts, is not an appropriate subject for consideration under Article I(4) of the New York Dock Conditions. The Brotherhood contends that this matter does not involve a "transaction," as that term is defined under the New York Dock Conditions. The absence of a transaction precludes Carrier from invoking the arbitration provisions of Article I(4) and this Board from asserting jurisdiction in this matter. The Brotherhood contends further that Carrier has failed to establish that this matter has any connection whatsoever with the 1982 merger of the Union Pacific and Missouri Pacific Railroads, establishing beyond question that this matter is not an appropriate subject for consideration under the New York Dock Conditions.

It is clear that Carrier's proposed action was triggered, not by a transaction under New York Dock, but by a unilateral management decision which resulted in assignment of a supervisor to a territory which includes parts of the two seniority districts. It is this action, rather than any coordination of facilities, operations or services, which Carrier is seeking to address as a "*transaction*" under New York Dock.

It is clear, in the absence of a transaction, that this Board lacks jurisdiction to impose an implementing agreement to address this matter. It is also clear that this matter is not an appropriate subject for consideration under Article I(4) of the New York Dock Conditions. The collective bargaining process under the Railway Labor Act provides the appropriate forum for addressing the question of changes in seniority districts and, therefore, the question at issue must be answered in the negative.

OPINION OF THE ARBITRATOR

This dispute concerns Carrier's attempts to incorporate an existing Union Pacific seniority district into an existing Missouri Pacific seniority district. The Carrier contends that the UP-MP merger authority granted by the I.C.C. in 1982 allows Management to take such action unilaterally, subject to New York Dock protective conditions. The Organization contends that the proposed rearrangement of forces does not involve any unification,

consolidation, merging or pooling of railroad facilities, operations or services and. therefore, cannot proceed without RLA collective bargaining.

The principles which govern proper disposition of the threshold arbitrability issue have already been developed fully in prior decisions which this Board considers authoritative precedent. In that connection, the general definition of a New York Dock transaction is set forth succinctly in Matter of the Arbitration between Transportation Communication Workers and Missouri Pacific Railroad Company, Award No. 1, Case No. 6 (Arbitrator LaRocco, December 18, 1987):

> In summary, a New York Dock transaction is any activity which is a coordination under the WJPA or any other action taken pursuant to the ICC's authorization.
>
> * * *
>
> Before the New York Dock Conditions are applied to a particular work transfer or consolidation, the [Moving Party] must demonstrate a causal nexus between the merger and the alleged transaction. **(Emphasis added)**

By now, it is firmly established that the moving Party in a New York matter has the burden of demonstrating a causal nexus between the proposed action and the ICC's merger authorization. Typically, railroads have relied upon that principle in avoiding New York Dock arbitration but the present case presents a mirror image of the typical situation. In this case, the Carrier faces the Organization contention that no causal nexus exists between the proposed merger of the seniority districts in May 1993, and the 1982 merger in which the New York Dock conditions were imposed.

The general guiding principles in such matters were

persuasively and authoritatively set forth in Matter of the Arbitration between Missouri Pacific Railroad Company and American Train Dispatchers Association (Arbitrator Zumas, July 31, 1981):

> ... [T]he Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue. **Every action initiated subsequent to a merger cannot be considered, *ipso facto*, to be 'pursuant to' the merger. There must be a causal connection.** As it relates to the applicability of New York Dock II to a merger, such nexus is implicit in the term 'pursuant to.' Otherwise, terms such as 'in accordance with', 'subsequent to', 'following' and 'changes consequent upon' have no meaning; they become empty words rattling in a semantic vacuum. For example, in the Southern Ry. - Control - Central of Georgia Ry. case, the Commission stated: (Emphasis added).
>
> > The 'effect' of subsequent internal technological improvements by either of the (two consolidating) carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions.' Southern Ry. - Control - Central of Georgia Ry., 317 I.C.C. 729, 732 (1963), aff'd sub nom. Railway Labor Executives Assn. v. United States, 226 F. Supp. 521, (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).
>
> It is the absence of any such causal nexus in this case that defeats the application of the term transaction...

UP Management cannot be faulted for seeking to improve efficiency and effectuate economy by combining two seniority districts into one. But the terms and conditions of those separate seniority districts are established by solemnly negotiated collective bargaining agreements with the BRS. It is black letter law that Carrier is not free to abrogate collective bargaining agreement conditions once deemed acceptable simply because they have *now* become inconvenient or onerous. The ICC, courts and arbitrators have recognized that Carriers may, under carefully circumscribed conditions, obtain relief through NYDC compulsory interest arbitration from collectively negotiated terms and

conditions which would prevent effectuation of an ICC-approved transaction. **See** NYCD Arbitration between UP and ATDA (Arbitrator William E. Fredenberger, Jr., May 27, 1984); Norfolk and Western Railway Company v. American Train Dispatchers/CSX Transportation Inc. v. Brotherhood of Railway Carmen, 11 S.Ct. 1156 (1991); and ICC Finance Docket 28905 CSX Corporation-Control Chessie System Inc and Seaboard Coast Line Industries (August 13, 1992). This limited conditional right to disregard collective bargaining agreements is not a license to unilaterally implement change merely for convenience or to improve efficiency. To that extent, I find unpersuasive Carrier's argument that the notice meets ICC criteria because it arguably seeks to increase the efficiency of signal maintainers in the geographical area in question.

In a case which is virtually identical in all significant aspects, Arbitrator Zumas rejected Carrier's argument. In that connection, the following holdings from Matter of Arbitration between Seaboard System Railroad and BMWE, Finance Docket Numbers 29916, 299985 and 30853 (Arbitrator Nicholas H. Zumas, August 20, 1983) are persuasive and dispositive of the issue:

> The Carrier's reasoning commences by establishing the goal: improvement in efficiency through the consolidation of seniority districts -- and concludes by finding that I.C.C. permits the accomplishment of the goal through its imposition of the New York Dock conditions. The Arbitrator, however, cannot start with, or follow, the same analysis. Although the ultimate goal may have tremendous merit, an Arbitrator must begin by assessing his jurisdiction. This is particularly true where, as here, the jurisdiction has been challenged by one of the parties. Thus, this Arbitrator must first determine the extent of his authority and what he is and is not permitted to do. This *necessarily requires a careful reading of the basic grant of jurisdiction, i.e., Article I,* Section 4 of the New York Dock conditions.
>
> Section 4 permits an Arbitrator to decide certain disputes that the parties have been unable to resolve through negotiations. The negotiations, which may ultimately give rise to an arbitration, are invoked whenever a Carrier, on which the New York Dock

conditions have been imposed, contemplates a transaction that may cause the dismissal or displacement of any employees, or the rearrangement of forces.

The Carrier argues that since (1) New York Dock conditions have been imposed on it and (2) the Carrier contemplates a rearrangement of forces, then (3) the Arbitrator is authorized to impose an accord after unsuccessful negotiations. Section 4, however, clearly requires the presence of an additional element, viz., a transaction that triggers the rearrangement of forces. In the absence of that element, an Arbitrator has no authority to resolve any dispute under Section 4.

'Transaction' is defined as any action taken pursuant to authorization of the I.C.C., on which the New York Dock conditions were imposed. Thus, in order for either party to invoke Section 4, the Carrier must be authorized to take some action pursuant to an I.C.C. order, the result of which would be a rearrangement of forces. A rearrangement of forces itself cannot be a transaction; it is the necessary and inevitable consequence of the transaction.

* * *

In essence, what the Carrier seeks is sanction in making changes in working rules. The New York Dock provisions may be used to gain that sanction, either through negotiations or arbitration, but only when the changes are necessary to implement an I.C.C. approved action. As indicated above, the I.C.C. approved a purely corporate restructuring that did not mandate the rearrangement of forces as a necessary consequence.

* * *

In effecting seniority consolidation, Carrier has recourse to the provisions of the Railway Labor Act. Absent a 'transaction' that gives an Arbitrator jurisdiction, seniority consolidation cannot be accomplished under the arbitration provisions of New York Dock II. This Arbitrator agrees with the Organization that a contrary holding would embrace the premise that compulsory interest arbitration may be instituted in all cases in which the I.C.C. has imposed New York Dock II employee protective conditions.

Merger of the two seniority districts in question obviously is desirable to Carrier, and for sake of argument one may even assume that efficiency and economy would be byproducts of such seniority district consolidation. However, there is no showing on this record that the merger of these seniority districts is either pursuant to or a necessary consequence of the ICC authorization granted in 1982. In short, Carrier's notice of May 13, 1993, does not propose a "transaction" within the meaning of that quoted term under NYDC. Based upon all of the foregoing, therefore, the issue presented in Stage I must be answered in the negative.

AWARD OF THE ARBITRATOR

1) Issue No. One is answered in the negative. The Arbitrator has no jurisdiction under Article I Section 4 of NYD conditions to consider the items contained in Carrier's Notice dated May 13, 1993. Accordingly, this proceeding is dismissed for lack of jurisdiction.

2) In light of the above, no opinion is expressed or implied concerning Issue No. Two.

Dana Edward Eischen

Signed at Ithaca, New York on December 9, 1994

STATE OF NEW YORK }
COUNTY OF TOMPKINS } SS:

On this 9th day of December, 1994, before me personally came and appeared DANA E. EISCHEN, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged to me that he executed the same.

NOTARY PUBLIC

KATHLEEN S. REIF, REG. #4993646
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN TOMPKINS COUNTY
MY COMMISSION EXPIRES 3/23/96

APPENDED TO AWARD NO. 264

SERVICE DATE

JUL 31 1996

19447
EB

SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 30000 (Sub-No. 48)

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY--CONTROL--MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY
(Arbitration Review)

Decided: July 17, 1996

This proceeding is an appeal of an arbitrator's decision holding that the Union Pacific Railroad Company (UP) may not invoke New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), to arbitrate the merger of two seniority districts applicable to signalmen represented by the Brotherhood of Railroad Signalmen (BRS). We will grant the appeal and remand the matter to the parties for further action consistent with this decision.

BACKGROUND

In Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982)(Union Pacific--Control), docketed as Finance Docket No. 30000, the ICC authorized the Union Pacific Corporation to control the Missouri Pacific Corporation, the Missouri Pacific Railroad Company (MP), and the Western Pacific Railroad Company (WP). The authority granted in Union Pacific--Control was subject to the employee protective conditions set forth in New York Dock, which implemented the ICC's mandate to provide such protection under former 49 U.S.C. 11347.

Under New York Dock, employment changes that are related to ICC-approved transactions are established by implementing agreements negotiated before the changes occur. If the parties cannot reach an implementing agreement, the issues are resolved by arbitration. Arbitration awards may be appealed to the Board under the Lace Curtain standard of review adopted by the ICC.[2]

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988), popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Board (1) does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error" and (2) limits its review to

(continued...)

The Board (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction. The changes for which an override is sought must be a necessary part of, or casually linked to, a New York Dock-conditioned transaction.[3] This qualification allows parties contesting requests that we exercise our authority to override collective bargaining agreements to argue that a particular change is not related to, or necessary for effectuating the purposes of, the New York Dock-conditioned transaction. Under New York Dock, employees adversely affected when a collective bargaining agreement is overridden must be compensated pursuant to the formula established therein, which provides comprehensive displacement and termination benefits for up to 6 years.

This proceeding has arisen because of UP's attempt to make an employment change that the railroad says is related to, and necessary to realize the operational benefits from, the 1982 acquisition by UP of MP in Union Pacific--Control. UP proposes to consolidate two signal maintainer seniority districts, one now covering UP's line from Menoken Junction, KS, to Denver, CO, and the other covering MP's line from Council Grove, KS, to Pueblo, CO. UP's line closely parallels the MP line, and, in some areas, the lines are only about 15 miles apart. The Menoken Junction line is covered by a collective bargaining agreement between UP and BRS. The Council Grove line is also covered by a collective bargaining agreement between MP and BRS.

In a letter dated April 6, 1993, UP formally proposed the seniority district consolidation to the respective BRS general chairman representing employees under the agreement between the UP and the BRS and the agreement between the MP and the BRS. The parties discussed UP's proposal. The union did not accept it. On May 13, 1993, UP served notice on BRS, pursuant to Article I, section 4(a) of New York Dock, that the signal maintainers headquartered at Salina, Ellsworth, and Oakley, KS, and Limon and St. Marys, CO, would be incorporated into the MP/BRS collective bargaining agreement. The affected employees would be placed at

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[2](...continued)
"recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Id. at 735-36. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), the ICC elaborated on the Lace Curtain standard as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

[3] Where modification is necessary, we may act under either section 11347 or section 11341(a). CSX Corp.--Control--Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988), modified 6 I.C.C.2d 715 (1990); Brandywine Valley R. Co.--Pur.--CSX Transp., Inc., 5 I.C.C.2d 764 (1989); Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993); Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991); and American Train Dispatchers Ass'n v. I.C.C., 26 F.3d 1157 (D.C. Cir. 1994).

the bottom of the applicable MP seniority roster but would be guaranteed prior rights to the positions they currently occupied.

While maintaining its position that the proposed consolidation could not be mandated under New York Dock, the BRS met with UP on several occasions to discuss UP's proposal. In August 1993, UP presented BRS with a draft implementing agreement, which the union did not sign. Discussions broke off in November 1993, when BRS notified UP that the proposed consolidation should proceed, if at all, by bargaining under section 6 of the Railway Labor Act, rather than by the procedure established under New York Dock. Subsequently, the parties agreed to seek arbitration pursuant to Article I, section 4 of New York Dock to determine two issues: (1) whether the matter covered by UP's May 13, 1993 notice to consolidate two seniority districts was an appropriate subject for consideration under Article I, section 4 of New York Dock; and (2) if so, what conditions would be appropriate for an implementing arrangement.

By decision entered December 9, 1994, the arbitrator, Dana Edward Eischen, held that he lacked jurisdiction to arbitrate UP's proposed consolidation under New York Dock. He dismissed the proceeding without establishing an implementing arrangement. The arbitrator held that a carrier has the burden of proving a causal connection between the proposed employment action and the Commission's authorization in Union Pacific--Control. Relying upon two prior arbitration decisions,[4] the arbitrator found that, while merger of the two seniority districts would arguably result in efficiencies and economies, the carrier had failed to show that the consolidation was either pursuant to, or a necessary consequence of, the ICC authorization granted in Union Pacific--Control. The arbitrator concluded that jurisdiction under New York Dock was lacking because "there is no showing on this record that the merger of these seniority districts is either pursuant to or a necessary consequence of the ICC authorization granted in 1982." (Decision at 15.)

By petition filed January 18, 1995,[5] UP sought review of the arbitrator's decision. On February 7, 1995, BRS filed its reply in opposition to the petition. On the same day, the Railway Labor Executives' Association (RLEA) filed a "Notice of Intervention" and a tendered statement opposing the relief sought by UP. On February 25, 1995, UP requested leave to file a tendered rebuttal to the arguments of BRS and RLEA (herein collectively, Rail Labor).

PRELIMINARY MATTERS

In addition to its petition for review, UP also filed, on February 1, 1995, a motion to exceed the 30-page limit governing the length of appeals (49 CFR 1115.2(d) and 1115.8), in order to include in the record some 90 pages of appendices, including the arbitration award. In its February 7, 1995 reply to UP's petition, BRS also sought leave to exceed the page limitation in

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[4] Matter of the Arbitration between Missouri Pacific Railroad Company and American Train Dispatchers Association (Arbitrator Zumas, July 31, 1981) (MOPAC/ATDA); and Matter of Arbitration between Seaboard System Railroad and BMWE (Arbitrator Zumas, August 20, 1983) (Seaboard/BMWE).

[5] By decision served January 4, 1995, UP was granted a 30-day extension of time (until January 18, 1995) in which to file its appeal.

order to submit 25 pages of appendices. In support of their requested waivers, both parties argue that to provide a more complete and balanced record, the documents contained in the appendices must be considered. We find that acceptance of the appendices and arbitral award is necessary for a full understanding of the issues involved in this proceeding. We grant the parties' requests.

Because RLEA's intervention will neither disrupt this proceeding nor unduly broaden the issues, we will permit RLEA to intervene. See 49 CFR 1112.4.

Attached to UP's petition as Appendix B is the Verified Statement of Wayne E. Naro. Both BRS and RLEA have moved to strike the statement, all supporting exhibits and all references to Mr. Naro's testimony in the appeal.[6] The unions contend that neither the statement nor the related exhibits were presented to the arbitrator and that UP is seeking a trial de novo.[7] This, the unions argue, contravenes Lace Curtain and other cited cases.[8] In its reply to BRS's and RLEA's motions to strike, UP argues that the testimony in Mr. Naro's verified statement was, in fact, made available to the arbitrator, both in evidence filed with him and during a hearing which took place on August 19, 1994, and that it is not new evidence.

We will grant the motions to strike. Naro's testimony relates chiefly to the issue of the efficiencies that UP and MP would assertedly realize from the merger of the seniority districts. Arbitrator Eischen's award did not turn on this issue. He held that, conceding that the merger would produce increased efficiencies, it nevertheless did not come within the scope of New York Dock because the merger was not a transaction within the meaning of that decision. UP will not be prejudiced by the exclusion of this testimony.

Consistent with ICC precedent, we will grant UP's request to file the tendered rebuttal. See CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905 (Sub-No. 25) (ICC served Jan. 11, 1994), at 1 n.3; The Baltimore and Ohio Railroad Company--Exemption--Abandonment in Harrison, Doddridge, Ritchie and Wood Counties, WV, Finance Docket No. 31566 (Sub-No. 1) (ICC served Jan. 13,

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[6] BRS' motion to strike appears in its Union's Reply to Carrier's Appeal, and RLEA's in its Opposition of Railway Labor Executives' Association to Appeal by Union Pacific Railroad Company of Arbitration Opinion and Award, both filed February 7, 1995.

[7] Naro's verified statement sets out the background of this arbitration appeal, and discusses UP's reasons for seeking to consolidate the subject seniority districts. Mr. Naro argues that (1) the consolidation is consistent with and pursuant to ICC authorization in Union Pacific--Control and (2) the proposed action is the kind of increased operating efficiency contemplated by the ICC's decision. The verified statement also contains legal argument in support of UP's position. The testimony and evidence contained in the verified statement appear, in different form, in the arbitration report attached to UP's petition as Appendix A.

[8] The unions cite: Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960); and Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960).

1995) (rebuttal filed by UTU accepted without supporting request for leave to file); and Burlington Northern, Inc.--Control and Merger--St. Louis - San Francisco Railway Company, Finance Docket No. 28583 (Sub-No. 24) (ICC served June 23, 1988).

By motion filed May 3, 1995, UP requests that we accept tendered supplemental legal argument supporting its position. RLEA opposes UP's motion to supplement, arguing that: (1) UP's request is improperly filed as a letter, rather than as a petition as required by 49 CFR 1117.1; (2) the request is, in effect, a reply to a reply and should be barred under 49 CFR 1104.13(c); (3) as a "supplemental argument" to UP's reply, the request is time-barred, because the authority cited is not a relevant decision issued by the Commission after the filing of UP's reply but is the New York Dock decision issued nearly 16 years ago; and (4) UP's reliance on the quoted New York Dock language is misplaced, because the arbitrator in this case did not hold that a consolidation of seniority districts could never result from an approved transaction. Rather, he held that no causal nexus existed between UP's control transaction and its proposed consolidation of rosters.

BRS also opposes UP's motion to supplement,[1] contending that there is no justification for supplementing the record with quotations from New York Dock which could have been included in UP's original petition or its rebuttal. According to BRS, the citation is nothing more than an afterthought, made irrelevant by the fact that the arbitrator found no causal nexus between UP's proposed consolidation and the 1982 Union Pacific--Control decision. Therefore, according to BRS, UP's supplemental argument should be excluded from the record.

We will grant UP's request to supplement. UP's motion simply enlarges upon arguments previously made in its earlier filings by citing language from New York Dock. BRS will not be prejudiced by our receipt of the minimal argument contained in the motion. See Wilmington Term. RR, Inc.--Pur. & Lease--CSX Transp., Inc., 7 I.C.C.2d 60, 61 at n.2 (1990).

POSITIONS OF THE PARTIES

The parties differ over (1) the standard of review under Lace Curtain and (2) the proper way to establish a link between a New York Dock-protected transaction and a related employment change.

UP contends that its appeal is reviewable under Lace Curtain because it concerns a recurring and significant issue of general importance regarding the interpretation and application of the New York Dock conditions.

BRS replies that the appeal should not be heard on its merits because it challenges the arbitrator's factual finding regarding causation. The union states that the crux of UP's appeal--its contention that the proposed consolidation of seniority districts flows directly from the Union Pacific--Control transaction--is a factual question which is not subject to [Board] review under Lace Curtain. The union argues that the arbitrator's finding that there is "no showing on this record that the merger of these seniority districts is either pursuant

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[1] See BRS' document styled, "Opposition of Brotherhood of Railroad Signalmen to Request to Supplement Appeal," filed May 15, 1995.

to or a necessary consequence of the ICC authorization granted in 1982" (Decision at 15) gives the Board no basis on which to review the arbitral decision.

In addition, according to BRS and RLEA, the arbitrator applied the appropriate standard of review, and UP made no attempt to show, or even to claim, that the arbitrator committed egregious error, issued an award that failed to draw its essence from the labor protective conditions, or exceeded the limits of his authority. Moreover, according to Rail Labor, the appeal does not involve a "recurring and significant issue of general importance", but, rather, the micromanagement of one craft's forces on a tiny fraction of the UP system. Therefore, BRS and RLEA argue, the arbitral award should not be reviewed.

In rebuttal, UP reiterates that its appeal goes beyond a mere question of causation, involving instead a significant issue regarding the interpretation of New York Dock conditions. Specifically, UP asserts, the issue is whether there must be an actual change in railroad operations, services or facilities as a prerequisite to the application of New York Dock protection, as contended by Rail Labor, or whether a change in the status of employees of two consolidated railroads--such as the proposed consolidation of seniority districts--which results in operating efficiencies is a "transaction" under New York Dock.

The arbitrator, according to UP, fundamentally misinterpreted the applicable New York Dock provisions. UP argues that a "transaction" under New York Dock includes any action taken pursuant to Commission authorization upon which labor protective provisions have been imposed, and is not limited to changes in operations, services or facilities. UP's rearrangement of its work forces, argues the railroad, must be treated as just the sort of transportation benefit contemplated by the ICC to flow from a railroad consolidation.

UP concludes that its proposed seniority district consolidation is a "transaction", as defined in New York Dock; that it is an action undertaken pursuant to ICC authorization in Union Pacific--Control; that the "efficiencies and economies" which will result from the consolidation clearly fall within the categories of benefits which could be reasonably expected to result from the ICC's approval in Union Pacific--Control; and that there is a causal nexus between the 1982 UP/MP consolidation and its proposed seniority district consolidation.

DISCUSSION AND CONCLUSIONS

Lace Curtain review. We will hear and grant the appeal under our Lace Curtain standard of review. BRS argues that the appeal is one of causation and therefore lies outside the scope of Lace Curtain review. The railroad claims that the question here is a mixed one of fact and law, and that the issue justifies review.

BRS (as opposed to RLEA) has characterized Arbitrator Eischen's decision as limited to an issue of causation, which, BRS asserts, lies outside the ambit of ICC (and now Board) review under Lace Curtain. RLEA does not advance this argument, but, in support of its motion for intervention, states that "any order of this Commission interpreting the New York Dock conditions and the jurisdiction of arbitrators will affect every railroad in the United States to which the New York Dock conditions apply." UP, in rebuttal at 4, argues that the Arbitrator's decision raises the broad issue, "whether there must be an actual change in operations, service or facilities as a prerequisite to New York

Dock protection (as contended by BRS and RLEA), or whether a change in the status of employees of two consolidated railroads--such as the consolidation of seniority districts--which results in operating efficiencies and economics is a 'transaction' under the New York Dock conditions."

The BRS characterization of the issue involved in this appeal as being one of causation is not supported by the arbitrator's decision. Causation presupposes a purely factual analysis. Eischen's decision embodies no discussion of the causal nexus, or lack thereof, between Union Pacific--Control and the merger of the two seniority districts. Rather, Eischen relies on the precedent of Arbitrator Zumas in another case with different facts. Thus, we can only conclude that Eischen viewed his findings as expressing a conclusion of law--or at least mixed findings of law and fact--that he found in the Zumas precedent and applied here.

Because the Eischen Award thus involves legal conclusions rather than merely factual findings, we will review the award.

The merits of the case. Eischen held that the merger of the two seniority districts is not a transaction within the meaning of New York Dock. He based this conclusion on his finding that "there is no showing on this record that the merger of those seniority districts is either pursuant to or a necessary consequence of the ICC authorization granted in 1982." Eischen rested this finding on an arbitral precedent by Arbitrator Nicholas H. Zumas in Seaboard/BMWE, which Eischen found to be "persuasive and dispositive of the issue".[10]

In Seaboard/BMWE, Zumas found that modification of a collective bargaining agreement (CBA) could only be undertaken pursuant to New York Dock when it is the necessary and inevitable consequence of a transaction. Zumas found that Seaboard/BMWE did not involve such a transaction because it was "a purely corporate restructuring that did not mandate the rearrangement of forces as a necessary consequence."

While it is clear that Eischen found Seaboard/BMWE to be "dispositive" of this case, it is not apparent why the arbitrator found it to be so. Eischen cannot have limited his holding to a comparison of the facts in Seaboard/BMWE with those in the instant case, because Union Pacific--Control is no mere corporate restructuring. Instead, it involved the acquisition of control of two large Class I railroads by a third.

Specifically, the record shows that UP acquired the MP in 1982. Since then, the two carriers have integrated their operations, including the operations of the parallel Menoken Junction and Council Grove lines. Formerly operated separately by the UP and MP, respectively, the lines are now run as part of a single system. The continuation of separate labor pools to maintain the signals on each line means that a signal on the Menoken Junction line may not be repaired by a signalman who

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[10] Eischen cites another decision (MOPAC/ATDA) by Arbitrator Zumas as "persuasively and authoritatively" setting forth "the general guiding principles" of whether a causal nexus exists between a proposed action and an ICC-approved transaction. In that decision, Zumas stated that "[T]he Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue . . . . There must be a causal connection."

belongs to the MP seniority district, notwithstanding that he may be located only 15 miles away. UP argues that the integration of operations on the two lines has obviated any reason for maintaining separate labor pools to maintain the signals on the two lines and prevents the realization of efficiencies that would be achieved if the signals on both lines were maintained by employees drawn from a single pool of employees.

The facts of Seaboard/BMWE differ so significantly from those here that the Zumas decision cannot be viewed as disposing of the merits of this case. In fact, Eischen makes no attempt to find that the facts in this case are similar to those in Seaboard/BMWE.

Rail Labor argues that this case involves no transaction under New York Dock because it involves no change in railroad operations, service or facilities. Rail Labor also argues that the merger of seniority districts will yield no efficiencies or economies. However, Arbitrator Eischen does not directly address these issues in his decision but rather merely cites the Seaboard/BMWE case as dispositive.

With regard to these arguments, the Board notes that the evidence on the record does indicate an integration of operations by UP and MP on the Menoken Junction and Council Grove lines. There is also evidence on the record that the merger will yield efficiencies: the merger of the two labor pools will allow the present signal maintenance functions on those lines to be undertaken with at least one fewer employee.

Also, the Board notes that in approving the UP/MP merger, the ICC discussed at length the transportation benefits of UP's acquisition of MP and the Western Pacific Railroad Company (WP) in its decision in Union Pacific--Control at 487-500. The ICC noted that "[t]he proposed consolidation provides single system service on complementary east-west and north-south routes . . . ." Id. at 493. The ICC noted that "[t]he consolidated system will be able to achieve significant cost reductions through more effective use of the applicant's mechanical and repair facilities and through coordination of maintenance-of-way activities (emphasis added), Id. at 498. The ICC concluded that "the proposed consolidation of UP-MP-WP will result in substantial public benefits. Shippers and the general public will benefit by the improved efficiency and reliability of single system service . . . ." Id. at 501.[11]

However, Eischen's decision did not address in any detail any of this evidence directly or in relation to his conclusion as to causation. Thus, we find that Eischen's conclusion that there is no transaction here is flawed because: (1) the basis for his finding, the Zumas award in Seaboard/BMWE, involves a different factual situation; (2) he has undertaken no analysis of the facts of this case to support his conclusion; and (3) available facts

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[11] The efficiencies resulting from UP's acquisition of MP, cited by the ICC in Union Pacific--Control, also make clear that Rail Labor's reliance on Railway Labor Executives Ass'n v. U.S., 987 F.2d 806 (D.C. Cir. 1993) (Springfield Terminal) is misplaced. These efficiencies represent the sort of "transportation benefits" that the court in Springfield Terminal cited as a predicate to overriding a collective bargaining agreement. The court of appeals cited those benefits in its decision upholding Union Pacific--Control. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708, 720 (D.C. Cir. 1984).

tend to show that the integration of operations by the UP and MP over the two lines constitutes the sort of efficiency improvement that caused the ICC to approve the underlying merger transaction and Arbitrator Eischen's decision does not address those facts. Given these flaws, we find that his decision fails to draw its essence from New York Dock, and we will vacate his decision. Furthermore, we are not persuaded by the arguments either offered by Rail Labor as independent grounds for affirming the result reached by Eischen or offered by UP as grounds for finding here that the proposed consolidation does constitute a transaction flowing from Union Pacific--Control and properly the subject of implementation under New York Dock.

We hope that the parties will be able to negotiate an agreement. If they cannot, they may submit the issue to an arbitrator. If they do submit the matter to an arbitrator, a couple of issues should be addressed. It is not clear as to why UP waited 11 years before merging the seniority districts and what implication that delay has for its argument that this merger of seniority districts is a "necessary consequence" of the consolidation in Union Pacific--Control. Rail Labor should support its argument that the merger of seniority districts is due to a supervening cause other than the original New York Dock-conditioned consolidation.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The decision of Arbitrator Dana Edward Eischen is vacated. The proceeding is remanded to the parties for further proceedings consistent with our findings.

2. This decision is effective on July 31, 1996.

3. A copy of this decision will be served on Arbitrator Eischen at the following address:

Mr. Dana Edward Eischen
20 Thornwood Drive
Suite 107
Ithaca, NY 14850

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Chairman Morgan commented with a separate expression.

CHAIRMAN MORGAN, commenting:

This case, and a related case,[12] involve appeals from arbitral awards arguably stemming from ICC-approved transactions subject to New York Dock implementing conditions. While I have respected and continue to respect the deference due such awards by voting not to overturn arbitral awards in most instances, I cannot vote to uphold either of these awards as they now stand.

First of all, the decision in Finance Docket No. 30000 (Sub-No. 48) is based on a case whose facts were very different from those in this proceeding. In addition, arguments concerning the type of transaction involved, the efficiencies and benefits

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[12] Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Missouri-Kansas-Texas Railroad Company, et al, Finance Docket No. 30800 (Sub-No. 30).

associated with the transaction, and the causal connection between the underlying UP/MP merger and the action at issue have not been addressed in the decision. In order to determine whether the instant transaction is subject to New York Dock and whether the arbitral award draws its essence from New York Dock, the decision should have more specifically addressed these issues. As the award in the accompanying case was based entirely on the decision in Finance Docket No. 30000 (Sub-No. 48), it likewise cannot withstand scrutiny.

The Board must take seriously its role in considering appeals from arbitral awards. To ensure that the Board can exercise its role responsibly, arbitrators and parties must make certain that arbitral decisions clearly present the factual and legal basis for particular awards. Neither of these decisions presents such a record, and thus neither can be upheld.

Vernon A. Williams
Secretary