ARBITRATION PROCEEDING
UNDER NEW YORK DOCK IMPLEMENTING AGREEMENT
ARTICLE I, SECTION 4

In the Matter of the Arbitration between:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

OPINION AND AWARD
Issue: Assignment of Forces

Date of Hearing: September 16, 1997
Place of Hearing: Chicago, Illinois
Date of Award: October 15, 1997

PETER R. MEYERS, Arbitrator
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APPEARANCES

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Introduction

This is a proceeding under Article I, Section 4, of the *New York Dock Conditions*. Upon application by the Union Pacific Corporation, the Surface Transportation Board (hereinafter "STB"), successor to the Interstate Commerce Commission, approved a merger between rail carriers controlled by the Union Pacific Corporation with rail carriers controlled by Southern Pacific Corporation. In approving this merger, the STB imposed the employee protective conditions known as the *New York Dock Conditions*. By letter dated February 4, 1997, the Union Pacific Railroad Company (hereinafter "the Carrier") notified the Brotherhood of Maintenance of Way Employees (hereinafter "the Organization") of its intent to establish system operations affecting maintenance of way employees working primarily in the western territory of the merged system. The Organization acknowledged receipt of the notice and agreed to meet with the Carrier, although it expressly reserved the right to challenge the legitimacy of the notice. The parties accordingly met and attempted to reach an implementing agreement, but ultimately were unsuccessful.

The arbitration provisions of *New York Dock* subsequently were invoked. Pursuant to Article I, Section 4, of the *New York Dock Conditions*, this matter then came to be heard before Neutral Arbitrator Peter R. Meyers on September 16, 1997, at Chicago, Illinois. The parties additionally filed written submissions in support of their respective positions.

Question at Issue Posed by the Carrier

Does the Carrier's Proposed Arbitration Award constitute a fair and equitable basis for the selection and assignment of forces under a *New York Dock* proceeding so that the economies and efficiencies - the public transportation benefit - which the STB envisioned when it approved the underlying rail consolidation of the SP into the Union Pacific will be achieved?

Questions at Issue Posed by the Organization

Does the UP's notice of February 4, 1997 concern a "transaction" under Section 1(a) of *New York Dock*?

If the UP's notice does concern a transaction, is it necessary to abrogate Article XVI of the September 26, 1996 BMWE-NCCC agreement that applies to UP, SP and DRGW; abrogate the relevant SP and DRGW system production gang agreements; and modify the UP system production gang agreements in order to carry out the transaction?

If it is necessary to abrogate all of the above agreements, which arrangement is more fair and equitable to the interests of the affected employees: BMWE's or UP's?

Relevant Contract Provisions

NEW YORK DOCK CONDITIONS

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 of agreement of 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 the 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.

Factual Background

This matter originates with the Union Pacific Corporation's ("UPC") filing, on November 30, 1995, of an application with the Interstate Commerce Commission ("ICC") seeking to obtain approval of a proposed merger of the rail carriers controlled by UPC with the rail carriers controlled by Southern Pacific Rail Corporation. The Surface Transportation Board ("STB"), the ICC's successor agency, subsequently approved the proposed merger, and it imposed the employee protective conditions found in the *New York Dock Conditions* upon the Carrier in implementing the approved merger.

As required by *New York Dock*, the Carrier issued a notice, on February 4, 1997, of its intention to establish system operations under the provisions of the collective bargaining agreement between Union Pacific Railroad and the Brotherhood of Maintenance of Way Employees. The proposed system operations, if implemented, will affect maintenance of way employees working in the Carrier's western territory, which includes Union Pacific

("UP"), Southern Pacific Western Lines ("SPWL"), UP(WP), and Denver & Rio Grande Western Railroad ("DRGW") territories.

The Organization reserved its right to challenge the legitimacy of the Carrier's February 4, 1997, notice, but it acknowledged receipt of the notice and agreed to meet with the Carrier to discuss the proposed system operations. The parties met and engaged in negotiations, but they were unable to reach an agreement as to the proposed system operations or how it would be implemented. The parties did, however, reach tentative agreements as to certain issues; most of these appear to be included in the proposed implementing agreements that the parties submitted in the course of these proceedings.

Because the parties were unsuccessful in reaching an implementing agreement, the arbitration provisions contained in Article I, Section 4, of the *New York Dock Conditions* were invoked.

The Organization's Position

The Organization initially contends that the Carrier's notice of February 4, 1997, does not concern a "transaction" as that term is defined in Article 1, Section 1, of *New York Dock*. Because this issue is jurisdictional, if the Carrier's notice does not concern a transaction, then this Arbitrator is without authority to proceed any further. Contending that "transaction" is synonymous with the term "coordination" that is used under the Washington Job Protection Agreement ("WJPA"), the Union maintains that the seniority reorganization proposed in the Carrier's notice, which it previously characterized as a

change in the status of the former UP, SP, and DRGW employees, does not constitute a "coordination," so it cannot be a transaction under *New York Dock.* The reported WJPA decisions establish that coordinations involve the transfer of work from one carrier to another, or the closing of facilities and the corresponding consolidation of work from those facilities to a new central location. The Union maintains that there are no reported WJPA decisions concerning a "coordination" of maintenance of way forces similar to what the Carrier proposes in this proceeding.

The Union stresses that in its proposal, the Carrier is not seeking to join facilities or transfer work from one carrier to another; instead, the Carrier is seeking to expand the territory over which UP, SP, and DRGW employees must exercise their seniority in order to maintain their right to regional or system production gang work. The Organization asserts that the Carrier's proposal most closely resembles a proposed carrier action in a WJPA case that the arbitrator held was not a coordination. The Carrier's proposal amounts only to a change in crew assignments that simply would result in a larger seniority district for system operations. The Organization points out that under the Carrier's proposal, the SP would continue to operate separately, under different work rules from those used by the UP. The Organization contends that the Carrier's proposal is a legitimate one for collective bargaining under the Railway Labor Act, but it does not concern a transaction under *New York Dock.*

The Union also emphasizes that the parties' past dealings demonstrate that the

Carrier's proposal is appropriate for collective bargaining, but does not concern a *New York Dock* transaction. The Union points out that this Carrier, as well as others, sought to obtain through bargaining under the Railway Labor Act the same type of rules that the Carrier seeks here. The Carrier previously argued to PEB 229 that it needed Railway Labor Act bargaining relief to operate regional or system production gangs, and it did not then suggest that *New York Dock* might provide the same relief. The Organization points out that the parties have fully and fairly battled over regional and system production gangs for more than eleven years under the Railway Labor Act. The Organization suggests that the Carrier may be frustrated by its inability to get its way under the Railway Labor Act, so it now is advancing the novel theory that everything occurring under the Railway Labor Act has no effect because the operation of regional or system production gangs over carriers coming under common control actually is a transaction under *New York Dock*. The Organization contends that this is a frivolous and destabilizing theory, and it should be rejected.

Moreover, the history of the Carrier's dealings with the Organization, including three agreements in which the Carrier pledged to not try to operate system production gangs in the manner proposed in its notice, serves as an estoppel against the Carrier in this proceeding. The Organization asserts that the Carrier's bargaining with the Organization, pursuant to the Railway Labor Act, over the very rules it now seeks under *New York Dock* constitutes an admission that its notice is invalid. The Organization emphasizes that the

Carrier's existing voluntary agreements, made after the effective date of the UP-SP merger, that it would not seek PEB 219 regional or system gang rules bar the February 4th notice.

The Organization then contends that even if the Carrier's notice does concern a transaction under *New York Dock*, the Carrier cannot show that abrogating the SP and DRGW system production gang agreements, as well as Article XVI of the September 26, 1996, agreement between the Organization and the National Carriers' Conference Committee ("NCCC"), is necessary to carry out the UP-SP merger. The Organization acknowledges that the UP-SP merger allows the Carrier to utilize maintenance of way equipment throughout the merged system, to plan maintenance of way capital projects on a system-wide basis, and to create a system-wide maintenance of way budget. The Organization points out, however, that none of the collective bargaining agreements at issue prevent such actions, nor do they prevent the public from obtaining any reasonable transportation benefits from the merger.

The Organization asserts that the collective bargaining agreements do limit the distance from home that maintenance of way employees may be required to work; the contracts set territorial limits on the scope of the system production gang operations. To the extent that any collective bargaining agreement puts such a territorial limit in place, it limits any carrier's flexibility in the assignment of employees. The Organization contends that the existence of a contractual term that limits a carrier's operational flexibility cannot be considered a term that must be overridden *per se*. The Organization points out that the

Carrier itself has proposed, for example, to maintain three separate system maintenance of way operations, and it has kept the UP and SP maintenance of way operations separate, except for system gang operations, through *New York Dock* implementing agreements. The Organization therefore asserts that the narrow question presented is whether the creation of a UP-SP-DRGW system production gang territory, and the corresponding abrogation of the SP and DRGW agreements and Article XVI of the September 26, 1996, agreement, is necessary to carry out the UP-SP merger. The Organization contends this is not necessary.

The Organization goes on to point out that the Carrier chose, on three separate occasions since 1991, to end its efforts under the Railway Labor Act to seek the same system gang rules that it seeks here. The most recent such occasion was in July 1997, after it served the *New York Dock* notice at issue here, when the Carrier agreed to perpetuate its earlier election not to operate regional or system production gangs over the SP and DRGW. The Organization contends that if the Carrier truly believed that system production operations over all carriers coming under its common control were "necessary" to carry out this and earlier mergers, then it would have elected, in 1991, to take the rights granted to it by PEB 219. The Carrier's actions demonstrate that these rules are not necessary to the operation of a merged carrier. The Organization additionally points to a determination by PEB 229, which both the Carrier and the Organization extensively briefed regarding system production gang rules, that such rules are not necessary; PEB 229 recommended

that the 1991 elections by carriers, either to accept or reject the PEB 219 regional and system gang production rules, should be frozen. The Organization contends that PEB 229's findings should be given great weight here. The Organization maintains that the Carrier now is trying to use *New York Dock* as an end run around decisions that it made during Railway Labor Act proceedings, decisions that carried long-term consequences. The Carrier's position here has nothing to do with the Railway Labor Act barring merger efficiencies; instead this matter has to do with the Carrier previously making what it now believes were incorrect choices.

The Organization then emphasizes that the Carrier's last proposed implementing agreement permitted the UP, SP, and DRGW employees to refuse to work on the territories of the other railroads. Such an arrangement would preserve the pre-merger system gang operations for current employees, and it would extend new seniority rules only to yet-to-be-hired employees. The Organization asserts that the acquisition of such prospective contractual rights is a matter for bargaining under the Railway Labor Act.

The Organization further contends that if this Arbitrator does fashion an implementing agreement, then the Organization's proposed arrangement should be selected. The Organization argues that its proposed implementing agreement is fair and equitable to the employees' interests. The Organization's proposal essentially provides that if the Carrier is to obtain PEB work rules under *New York Dock*, then it must be required to assume all of those rules; the Carrier cannot be allowed to pick and choose only those

portions that it wants. The Organization argues that a full imposition of PEB 219 rules, as amended by the September 26, 1996, agreement, would be fair to employees, and it would not give the Carrier an advantage over its competitors, such as BNSF, which operate under the full PEB 219 production gang rules.

The Organization points out that of the fifteen sections and one appendix contained in its proposal, the parties agreed in principal as to ten sections and the appendix. The Organization asserts that the remainder of its proposed sections merit inclusion in any implementing agreement that is put in place between the parties. The Organization then focused on each of these five sections.

The Organization asserts that its proposed Section 6 applies a tentatively agreed-upon rule, placing a limit of 1000 miles that an employee would be required to travel to work from his home territory, to all employees in system operations. The Organization also maintains that its proposed Section 9, mandating that positions in system operations will be paid at the highest rate extant for that positions on SP, DRGW, or UP, is legitimate under PEB 219. The Organization contends that if the Carrier considers these system operations to be essential, then it should pay for them at the highest rates prevailing in the merged system. The Organization's proposed Section 10 is designed to ameliorate the economic hardship to employees returning to service after furlough. This section would use unused vacation as collateral for a cash advance from the Carrier to cover the initial costs to a furloughed employee of returning to work, including travel, meal, and lodging

expenses; under this section, the Carrier, and not the employee, would subsidize the Carrier's start-up costs for system gangs. The Organization then argues that its proposed Section 11 incorporates a rule that applies to PEB 219 production gangs under Article XVI of the September 26, 1996, agreement. The Organization points out that because the Carrier is seeking to obtain PEB-219-style system gang rules, it is fair that the Carrier also accept PEB 219 system gang financial obligations, as its competitor has. The Organization further asserts that its proposed Section 12 adopts the DRGW election of allowances, which is a right, privilege, or benefit that cannot be taken from DRGW employees. The Organization maintains that these allowances are not part of an employee's rate of pay, but instead are a negotiated benefit that partially reimburses the employee for the cost of living away from home. For ease of administration, the Organization proposes that the election of allowances be available to all employees in the system operations.

The Carrier's Position

The Carrier initially contends that this Arbitrator has both the jurisdictional authority and the obligation to adopt the Carrier's proposed implementing agreement. The Carrier points out that neutrals in Article I, Section 4, proceedings act as agents of the STB; they are therefore bound by ICC/STB precedent. Both the STB and the federal courts have definitively established that *New York Dock* arbitrators have authority, under Sections 11341(a) and 11347 of the Interstate Commerce Act, to override Railway Labor Act procedures and collective bargaining agreements as necessary to carry out an ICC/STB

approved transaction, such as the merger at issue. The Carrier emphasizes that it also well established that the Section 11341(a) exemption for approved transactions extends to subsidiary transactions that fulfill the purposes of the main control transaction. As applied to the instant matter, the proposed establishment of system operations is a subsidiary transaction that fulfills the purposes of the approved merger, the main control transaction, by achieving the economies and efficiencies, for the public benefit, that lie at the heart of the merger. The Carrier maintains that there is a direct causal relation between the UP/SP merger coordination approved by the STB and the operational changes that it seeks in this proceeding to implement that coordination. This Arbitrator therefore has the jurisdictional authority to modify the collective bargaining agreements, as proposed by the Carrier, because these modifications are necessary to effectuate the efficiencies and economies of the merger underlying this proceeding.

Moreover, the Carrier asserts that the definition of "transaction" contained in Article I, Section 1, of *New York Dock* includes the transfer of work and employees in order to effectuate an approved merger and achieve the economies and efficiencies that were the motives for seeking the merger. The Carrier asserts that it is well established that the ICC/STB and, by extension, *New York Dock* arbitrators have the jurisdictional authority to transfer work and employees from one collective bargaining agreement to another, notwithstanding contrary requirements of the Railway Labor Act or the collective bargaining agreements themselves. It similarly is well established that *New York Dock*

arbitrators have authority to modify or set aside collective bargaining agreements as necessary to realize the merger efficiencies identified by the carrier.

The Carrier goes on to argue that both STB and judicial precedent establish that the promotion of more economical and efficient transportation constitutes a public transportation benefit. The Carrier therefore asserts that because the transportation benefit flowing to the public from the underlying transaction in this matter will be effectuated by the operational efficiency associated with system operations, its proposed implementing agreement should be imposed here.

The Carrier then points out that as a result of the UP/SP merger, it currently has ten system tie gangs and twelve system rail gangs working across its Western Territory. Some of the gangs are on UP lines, others on DRGW lines, and the rest on SP lines. Moreover, these various gangs are separated by different seniority districts that are split between these lines, and the seniority districts even split the lines internally. The Carrier contends that under the current system and collective bargaining agreements, the movement and efficiency of all the rail and tie gangs are hindered by climate changes, manpower shortages, and equipment allocation problems.

As an example of these various hindrances, the Carrier points out that due to work-schedule limitations caused by conflicting seniority rosters, the 1997 schedule was not able to account for climate concerns. One tie gang worked from June through October in southern Arizona and New Mexico, while another tie gang is scheduled to work in northern

Oregon in November through mid-December. With the current collective bargaining agreements in place, the Carrier cannot make changes that would eliminate or alleviate problems caused by scheduling in such different climates without incurring delay, additional manpower needs, and greater costs. The Carrier asserts that if all of these systems are put under the Union Pacific collective bargaining agreement, then it could schedule crews to work in the southern and western areas from late fall through early spring, then move the crews to the northern regions from late spring through early fall.

The Carrier additionally argues that the current system also results in manpower shortages within a seniority district when road work is done within that district. Positions are left temporarily vacant due to a maintenance of way project because employees are taken from their regular maintenance positions to work on the road crew. Moreover, when a project crosses seniority district lines, the positions are all abolished and then re-bid for the new seniority district, which affects the continuity of the crew and the work. The Carrier maintains that in a system without seniority districts, as it proposes, the mobility of the work force would not face such limits and employees could be kept working in suitable climates throughout the year. In addition, gangs would benefit from continuity through the elimination of the need to re-bid; the Carrier asserts that a crew that has worked together for some time will be more productive than a new group of employees. Moreover, with separate collective bargaining agreements applying to the different east-west corridors, work currently is scheduled in such a way that none of the corridors is left open for

unobstructed business.

The Carrier maintains that the different collective bargaining agreements and the various seniority districts exacerbate all of these problems. The Carrier asserts that extending the present UP system operations to encompass the SP/WL, DRGW, and WP makes sense for both business and the employees. The Carrier emphasizes that system operations would allow the employees an opportunity to move to seasonal work, rather than be furloughed. In addition, the Carrier would have greater flexibility to work around climatic changes and corridor traffic needs. The Carrier further stresses that under the proposed system operations, it can accomplish more with less, thus realizing the economies and efficiencies of the merger.

The Carrier emphasizes that its proposed changes are necessary to achieve the public transportation benefits of the merger. As the ICC previously has found, consolidating carriers achieve cost reductions, and these cost reductions are a public benefit. The Carrier asserts that its proposed implementing agreement is designed to promote more economical and efficient transportation; and it places the burden of *New York Dock* protections on the Carrier when it implements these economies and efficiencies. The Carrier maintains that its proposed implementing agreement complies with the goals of the STB's decision approving the merger. The Carrier ultimately argues that its proposed implementing agreement should be adopted.

Decision

This Arbitrator has carefully reviewed all of the evidence and testimony in the record, as well as the written briefs submitted by the parties. In this proceeding, each side has posed certain Questions at Issue, each of which must be answered. These Questions at Issue highlight various aspects of the fundamental dispute between the Carrier and the Organization here: whether and how a system operation for the Carrier's maintenance of way work in its western territory should be implemented?

The first question that must be addressed is one posed by the Organization: Does the UP's notice of February 4, 1997, concern a "transaction" under Section 1(a) of *New York Dock*? This question raises what is, essentially, a jurisdictional issue. If the February 4, 1997, notice does not concern a *New York Dock* transaction, then this Board cannot proceed to any of the substantive issues presented here. There is extensive decisional precedent available on this point from the ICC/STB, and it must be emphasized that because this Arbitrator's authority flows directly from the STB, this Arbitrator is bound to follow decisions and rulings issued by the STB and its predecessor, the ICC. After a thorough review of the numerous documents, court decisions, arbitration awards, and law review articles submitted by the parties, this Arbitrator must find that that precedent overwhelmingly establishes that the Carrier's February 4, 1997, notice does concern a "transaction," as that term is defined in Article I, Section 1(a), of the *New York Dock Conditions*.

In approving the UP/SP merger, the STB imposed the *New York Dock* protections on the rail consolidation. Article I, Section 1(a) of the *New York Dock Conditions* defines "transaction" as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." There can be no question that in approving the merger, and imposing the *New York Dock* provisions, the STB authorized the Carrier to act so as to achieve the economies and efficiencies of the merger. In compliance with the procedures mandated in the *New York Dock Conditions*, the Carrier issued its February 4, 1997, notice, which contains the required specifics associated with its proposal to establish system operations affecting maintenance of way employees working in its western territory. The operational changes that the Carrier has proposed are directly related to the STB-approved merger that is the foundation of this proceeding. Because the Carrier's February 4, 1997, notice proposes a course of action to effectuate the STB-approved merger, a course of action whereby the Carrier seeks to consolidate and unify its maintenance of way forces and operations, the notice does, in fact, concern a *New York Dock* transaction. After reviewing the extensive materials submitted by the parties, this Arbitrator must find that the first Question at Issue posed by the Organization must be answered in the affirmative. Accordingly, this Arbitrator has the authority to consider the merits of the matter presented here.

The extensive relevant precedent submitted by the parties also leaves no doubt that this Arbitrator has authority, under Sections 11341(a) and 11347 of the Interstate

Commerce Act, to override the Railway Labor Act and the collective bargaining agreements as necessary to achieve the economies and efficiencies that are the purpose of the underlying rail consolidation. Again, a line of ICC/STB decisions, as well as federal court decisions, culminating in the United States Supreme Court's decision in *Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991), expressly hold that such authority is a fundamental part of the process through which a rail consolidation is effectuated.

The ICC/STB previously has considered and rejected the Organization's assertion that Section 4 proceedings, such as this one, essentially are limited to physical transfers of work and the coordination of operations in terminal areas following a merger or consolidation. There is no express support in either the statutory law or relevant decisional precedent for the Organization's contention that any other adjustments associated with the implementation of a rail consolidation must be made through collective bargaining under the Railway Labor Act. The overwhelming weight of relevant authority conclusively establishes that *New York Dock* arbitrators have the authority, in Section 4 proceedings, to override Railway Labor Act procedures and collective bargaining agreements as necessary to achieve the economies and efficiencies that flow from an approved merger. This Arbitrator accordingly has authority to modify, as necessary, to carry out the transaction, the September 26, 1996, BMWE-NCCC agreement, as well as the relevant UP, SP, and DRGW system production gang agreements.

The Organization's second Proposed Question at Issue, whether it is necessary to abrogate these various agreements in order to carry out the transaction, also must be answered in the affirmative. It generally has been recognized that rail consolidations, such as the one underlying this proceeding, generate a public transportation benefit to the extent that they lead to more efficient and economical operations. Rail consolidations, if properly effectuated, can mean more streamlined operations, with increased efficiency in the assignment of employees and the completion of work projects. In this proceeding, the Carrier has presented competent evidence that these very efficiencies and economies can be realized in connection with the merger at issue if it is allowed to implement system operations for its maintenance of way work. The other side of this contention is, of course, that without the implementation of such a system operation, it will not be possible to achieve all of the economies and efficiencies that a rail consolidation typically is designed to yield.

The Carrier convincingly has shown that if it implements a system operation, then it will be able to schedule its maintenance of way employees in a more efficient and productive manner. It will be possible for the Carrier to schedule work projects over its entire western territory, thereby making allowances for weather extremes and corridor traffic needs. The need to abolish and re-bid positions on various road work gangs as the work crosses over currently existing seniority district boundaries, and the delay and administrative costs associated with these steps, also would be eliminated; the entire

western territory effectively would become a single seniority district under the Carrier's proposals. On this record, it is evident that under the particular circumstances surrounding the approved merger underlying this proceeding, the implementation of system operations for the Carrier's maintenance of way work, as proposed in the Carrier's February 4, 1997, notice, will yield significant economies and efficiencies in its operations.

As the ICC/STB repeatedly has found, such efficiencies and economies constitute a public transportation benefit. Moreover, this is precisely the showing that the Carrier must make in this proceeding to support its proposal for the implementation of system operations. The purpose of the approved merger is to generate a transportation benefit for the public. As emphasized by the United States Court of Appeals for the District of Columbia Circuit, transportation benefits include the promotion of economical and efficient transportation. *Railway Labor Executives Association*, 987 F.2d 806, 815 (D.C. Cir. 1993).

It is not possible to properly implement a system operation, and achieve the economies and efficiencies associated with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into, and perhaps completely destroy, any possibility of achieving the efficient, coordinated, economical operation promised by a rail consolidation. If the Carrier's

maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single collective bargaining agreement.

As is its right, the Carrier has chosen to adopt the provisions of the collective bargaining agreement between UP and BMWE to govern its maintenance of way operations in the western portion of the combined system. The Organization has not argued that one of the other relevant contracts should be adopted instead of the one chosen by the Carrier. The Carrier's election means that the relevant SP and DRGW system production gang agreements are effectively abrogated. There is no legitimate basis for insisting that the parties attempt to operate under several collective bargaining agreements, when it is abundantly clear that the post-merger consolidated rail operation can exist and do business most efficiently if the maintenance of way employees in the expansive western territory of the consolidated system are working under a single set of contractual provisions, seniority protections, and work rules. One can understand the frustration felt by the Union after having negotiated collective bargaining agreements that are now abrogated by the current law in this area. However, in answer to the second Question at Issue Proposed by the Organization, this Arbitrator finds that it is necessary to abrogate the SP and DRGW system production gang agreements and Article XVI of the September 26, 1996, BMWE-NCCC agreement, as well as to modify the UP system production gang agreements, in order to most efficiently and economically carry out the transaction.

The Organization's final Question at Issue and the single Question at Issue posed by the Carrier seek essentially the same answer: which of the parties' proposals constitutes the more fair and equitable basis for implementing the proposed system operations. Prior to invoking these Section 4 arbitration proceedings, the parties did meet and negotiate over the terms of an implementing agreement; as shown in their respective proposed implementing agreements, the parties were able to reach agreement on a substantial number of issues. These areas of agreement must form the basis of the implementing agreement developed through this proceeding. Accordingly, all of those provisions that the parties both have indicated were agreed upon form the basis of the implementing agreement developed here.

The Organization's proposal contains some measures in addition to those upon which the parties reached agreement. Focusing on those proposed additional terms that the Organization emphasized in its submission, Sections 9 and 11 of the Organization's proposal both merit inclusion in the implementing agreement. Section 9 refers to rates of pay for positions in the proposed system operations, and it mandates that highest rate provided among the SP, DRGW, and UP prevail as the rate of pay applicable to these positions. Such a proposal is appropriate, in that employees who fill these positions will be assuming certain additional burdens and hardships, particularly the burden of having to work in areas much farther from their home bases than they are now required to work. Fairness and equity require that the rates of pay applicable to the positions in the proposed

system operations be at the highest prevailing rates allowed maintenance of way employees filling similar positions on the UP, DRGW, and SP.

As for Section 11 of the Organization's proposal, it was apparent at the hearing that the parties reached an agreement as to the concept underlying this measure, although there were some differences between the parties as to language. Under these circumstances, it is appropriate to include this provision, as proposed by the Organization.

Sections 6, 10, and 12 of the Organization's proposal fare less well. Section 6 suggests the imposition of a cap of 1000 miles on the distance from home base that an employee would be required to travel to a work site. Given the geographic size of the Carrier's western territory, such a cap would completely undercut the implementation of the proposed system operation. Such a cap cannot be imposed as part of the implementing agreement if it is to have its intended effect. Section 10 proposes a system of issuing short-term loans, made against unused vacation time, to assist employees with expenses associated with returns to service. As the Organization itself indicates in its submission, however, the rules generally applicable to employees represented by the Organization, presumably including both those employed by this Carrier and those employed by other carriers, call for *per diem* meal and lodging allowances, as well as travel allowances, that are paid after the actual expenses are incurred. If this is the system that is in place and followed by carriers generally, it would be inappropriate to require this Carrier to adopt a less advantageous one. It also is difficult to comprehend how such a system could be

established so that the described loans could be processed and then reach an affected employee in a timely fashion, and how such a system could be protected from potential problems of abuse. Moreover, if such loans are to be made available only for employees who have at least five days of unused vacation time, it is possible that this would benefit a relatively small number of employees. There is no showing that such a provision would be workable or would contribute in any meaningful way to the fairness and equity of the proposed system operations.

As for Section 12, the Organization's assertion that the election of allowances contained in the DRGW contract must be preserved as a negotiated benefit ignores the fact that the implementation of the Carrier's proposed system operations means that the DRGW agreement, as well as the SP agreement, are being abrogated. Adopting such a system of election for employees throughout the Carrier's entire maintenance of way operation in its western territory would be a costly administrative burden that would do little or nothing to advance the fairness and equity of the situation. This provision shall not be included in the implementing agreement.

Award

The first Question at Issue posed by the Organization is answered in the affirmative.

The second Question at Issue posed by the Organization is answered in the affirmative.

The final Question at Issue posed by the Organization and the Question at issue

posed by the Carrier are answered in both the negative and the affirmative. Certain provisions from each party's proposed implementing agreement, including all of those provisions as to which the record reveals that the parties have agreed, are included in the Implementing Agreement submitted by this Arbitrator.

PETER R. MEYERS
Arbitrator

Dated this 15th day of October, 1997
in Chicago, Illinois.