

In the Matter of the
Arbitration Between:

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES,

Organization,

and

UNION PACIFIC RAILROAD COMPANY,

Company.

**Rule 16 Arbitration Pursuant to
Article XVI of the July 29, 1991
Imposed National Agreement**

OPINION AND AWARD

Hearing Date: April 15, 2005
Hearing Location: Sacramento, California
Date of Award: June 3, 2005

JOHN B. LaROCCO
ARBITRATOR
2001 H Street
Sacramento, CA 95814-3109

DESCRIPTION OF THE DISPUTE

Arbitration Concerning the Carrier's Proposal to Combine and Realign Certain Seniority Districts in and Surrounding the Kansas City Terminal.

OPINION

I. INTRODUCTION

The Union Pacific Railroad Company (Carrier) invoked the arbitration provisions of Article XVI of the July 29, 1991 Imposed National Agreement after the Carrier and the Brotherhood of Maintenance of Way Employees (Organization) reached impasse over the Carrier's intent to combine and realign certain seniority districts. Thereafter, the Carrier and the Organization properly progressed their dispute to the undersigned neutral (Referee) for a decision on its merits.

At the April 15, 2005 arbitration hearing, the Carrier submitted the following two issues:

- (1) Has the Carrier established an operational need to consolidate certain seniority districts as proposed in its notice of August 4, 2004?
- (2) If the answer to question No. 1 is yes, what are the appropriate conditions necessary to implement such consolidations?

With regard to the second issue, the Carrier urges the Referee to adopt its proposed implementing agreement.

The Organization asserts that the Carrier failed to demonstrate any operational necessity for combining and realigning seniority districts. Alternatively, the Organization submits that its proposed implementing agreement is appropriate.

Both parties filed pre-hearing submissions. They implicitly waived all the time limitations set forth in Article XVI of the 1991 Imposed National Agreement.

II. BACKGROUND AND SUMMARY OF THE FACTS

Rules 16(a) and 16(b) of the July 1, 2000 Union Pacific (former Missouri Pacific) Agreement entitled, *Combining and Realigning Seniority Districts*, provides:

(a) The Carrier will give at least thirty (30) days written notice to the affected employees and the General Chairman of its desire to combine or realign seniority districts, including all Carriers under the control of Union Pacific, specifying the nature of the intended changes. The protection of the Surface Transportation Board will continue to apply to all such combinations or realignments.

(b) If the parties are unable to reach agreement within ninety (90) calendar days from the serving of the original notice, either party may submit the matter to final and binding arbitration pursuant to the provisions of Article XVI of the imposed Agreement of July 29, 1991.

Rule 16 substantively mirrors Article XII of the 1991 Imposed National Agreement which reads:

Section 1 - Notice

A carrier shall give at least thirty (30) days written notice to the affected employees and their bargaining representative of its desire to combine or realign seniority districts, including all carriers under common control, specifying the nature of the intended changes. The protection of the Interstate Commerce Act will continue to apply to all such combinations or real realignments.

Section 2 - Arbitration

If the parties are unable to reach agreement within ninety (90) calendar days from the serving of the original notice, either party may submit the matter to final and binding arbitration in accordance with the terms of Article XVI.

Nothing in this Article is intended to restrict any of the existing rights of a carrier.

This Article shall become effective ten (10) days after the date of this Agreement except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative on or before such effective date.

Rule 12 of the July 1, 2000 Agreement defines seniority divisions across the property. The seniority divisions pertinent to this dispute are described in Rules 12(a)(2), 12(a)(9), 12(a)(12) and 12(a)(16) as follows:

(2) Central Seniority Division: Leeds Junction (MP B284.7) to Coffeyville (MP 467.8) on the Coffeyville Subdivision. Coffeyville (MP 467.8) to Van Buren (MP 497.2) on the Wagoner Subdivision. Van Buren (MP 497.2) to N. Little Rock (MP 346.14) on the Van Buren Subdivision. South Hillsdale (MP 41.8) to Parsons (MP 136.2) on the Parsons Subdivision. Parsons (MP 386.0) to McAlester (MP 564.8) on the Cherokee Subdivision. McAlester (MP 564.8) to Whitesboro (MP 683.2) on the Choctaw Subdivision. Chico (MP 562.0) to Chickasha (MP 436.3) on the Duncan Subdivision. Chickasha (MP 436.3) to Wichita (MP 241.8) on the Enid Subdivision. Chickasha (MP 0.0) to End of Track (MP 56.2) on the Lawton Subdivision. El Reno (MP 512.3) to end of track (MP 446.5) on the Oklahoma City Subdivision. Wichita (MP 241.8) to Herington (MP 172.0) on the Lost Springs Subdivision. Wichita Yard (MP 482.6) to end of track (MP 453.0) on the Wichita Subdivision. Herington Junction (MP 474.7) to end of track (MP 518.0) on the McPherson Subdivision. Chase (MP 324.8) to end of track (MP 278.3) on the Tulsa Subdivision. Former KO&G/Midland Valley trackage, Trigo Industrial Lead.

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(9) Kansas City Terminal Seniority Division: Congo (MP 444.2) to Southwest Junction (MP A278.2), Rock Creek Junction (MP 276.8) to Gillis Street (MP 282.1), Lydia Avenue (MP A281.7) to Troost Avenue (MP A282.0), AS8 Junction (MP 282.4) to West Yard (MP 6.51), Edgewater (MP 287.5) to Broadway (MP 283.0), Manchester (MP 8278.8) and Leeds Junction (MP 8284.7). Also included are Armourdale Yard and all former SSW trackage within the Kansas City Terminal.

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(12) Omaha Seniority Division: Edgewater (MP 287.5) to Gilmore Industrial Lead (MP 473.3) on the Falls City Subdivision.

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(16) St. Joseph Terminal: All former Missouri Pacific terminal operations in St. Joseph Terminal.

Pursuant to Rule 16(a) of the July 1, 2000 Agreement and Article XII(a)(1) of the 1991 Imposed National Agreement, the Carrier notified the Organization, on August 4, 2004, of its intent to combine and realign portions of certain seniority territories into the Kansas City Terminal seniority division. More specifically, the Carrier sought to consolidate the following three subdivisions and one terminal into the Kansas City Terminal division:

1. Falls City Subdivision - Edgewater (MP 287.5) to Mile Post 472.1
2. Coffeyville Subdivision - Leeds Jct. (MP 8284.7) to Mile Post 326.9
3. Parsons Subdivision - Mile Post 41.8 to Mile Post 43.3
4. St. Joseph Terminal Seniority Division

On September 8, 2004, the Organization asked the Carrier for additional information as well as an explanation of the operational needs that justified combining the seniority districts. The Organization also informed the Carrier that combining the districts will adversely affect maintenance of way employees in terms of compensation; increased travel time (and more time away from home); seniority; and, job security (including income protection).

In its September 21, 2004 reply, the Carrier explained that combining and realigning seniority districts was necessary for efficient operations because the Carrier was having difficulty filling

vacant positions; lacked available forces to respond to exigencies, such as derailments; and, needed more efficient utilization of maintenance of way equipment, such as tampers and ballast regulators. Disagreeing with the Organization, the Carrier declared that combining the seniority territories would not result in any adverse impact or, at most, have merely a negligible adverse affect on the employees.

The Carrier and the Organization successfully reached a tentative agreement but the tentative agreement was not ratified leading to this impasse.

III. THE POSITIONS OF THE PARTIES

A. The Carrier's Position

The Carrier's proposed implementing agreement is reasonable because the Carrier will reap operational efficiencies from the proposed seniority territory combination and realignment which far outweigh any adverse impact on maintenance of way employees.

There are strong reasons for consolidating the territories.

First, the Carrier experiences difficulty filling vacant positions due to the geographic limits of the current seniority divisions. The Carrier's Director of Track Maintenance explained to the Organization's representatives that the Carrier frequently abolishes positions and then re-establishes nearby positions due to the small seniority divisions. The problem is aggravated by employees who are unable to work year round. The Carrier forecasts that, after combining seniority divisions, the workforce will stabilize providing employees with greater work opportunities.

Second, the combined seniority districts will establish adequate forces to respond to emergencies, like derailments. The Carrier points out that it recently paid a time claim arising when

it sent a St. Joseph Terminal Trackman just 15 miles outside his territory to help repair a track defect on the Omaha division.

Third, the Carrier will gain greater efficiencies in utilizing equipment. The Carrier points out that the low staffing on some of the seniority districts means that employees cannot perform projects which require more manpower than two trackmen but are not of the magnitude to warrant calling a production gang manned by 10 plus employees.

Contrary to the Organization's representations, combining seniority territories will have little adverse impact on employees. The employees will continue to receive the same compensation and their aggregate earnings may actually increase due to position stabilization. The combined territories will not add significant travel time to employees. Indeed, the Carrier's proposed implementing agreement consolidates the four territories into two seniority divisions with the proviso that the Carrier can temporarily utilize gangs between the divisions when the Carrier is unable to fill needed positions by bulletin. Moreover, the two new divisions cover a smaller geographic area than many existing seniority divisions.

Next, the Carrier's proposed implementing agreement provides for not only significant prior rights but also New York Dock style protection for any employee who could be adversely affected by the seniority territory combination and realignment. The Carrier stresses that these protective benefits go well beyond any requirement in any collective bargaining agreement.

In sum, any negative impact on the employees will be quite minimal. On the other hand, combining and realigning the seniority territories is necessary for efficient railroad operations.

B. The Organization's Position

The Carrier failed to show any justifiable operational necessity for combining and realigning seniority territories.

The Carrier created its own predicament. The Carrier's manpower shortage does not stem from the current boundaries of seniority territories but rather, was caused by the Carrier's deliberate decision to staff its railroad with fewer employees than available positions. The Carrier is unable to fill all vacant positions because it is engaging in a reverse game of musical chairs. Instead of having more employees than chairs, the Carrier is maintaining more chairs than employees. More importantly, even if the Carrier were successful in filling all vacancies, it would not have enough employees to backfill those positions vacated by employees who bid for and are awarded the bulletined positions.

Assuming *arguendo*, that the Carrier came forward with justifiable operational needs for combining and realigning seniority districts, the Carrier's proposed implementing agreement is totally inadequate to protect affected employees from adverse impacts. In its September 8, 2004 correspondence, the Organization described the tremendous adverse effect on employees that will ensue after the proposed consolidation. The employees will incur reduced compensation, increased travel time, more time away from home and less job security.

In conclusion, the Carrier must maintain the current boundaries of the seniority territories.

IV. DISCUSSION

The Referee recognizes that seniority is a valuable employment right to employees. Thus, these types of controversies are best resolved via good faith bargaining. Arbitration is likely to yield

an outcome that is detrimental to one party or the other party or even to both parties. Only through negotiations can the parties mold an arrangement that can satisfy the interests of both the Carrier and the Organization. Therefore, the Referee encourages the parties to resolve future disputes of this type through good faith bargaining.

A Contract Interpretation Committee (CIC) was established to construe provisions of the 1991 Imposed National Agreement. CIC Issue No. 14 and the Answer to Issue No. 14 read:

Issue No. 14

In order to give substantive effect to all provisions of the parties' Imposed Agreement, should Section 11(b)(5) of PEB No. 219's Report be applied to limit the jurisdiction of the arbitrator in disputes arising under Section 9 thereof to a determination of how the seniority rights of affected employees will be established on the combined or realigned seniority roster?

Answer to Issue No. 14

It is the opinion of the Neutral Member of the Committee that it would be inconsistent with the general intent of Sections 9 and 11 to limit a Section 9 arbitrator's jurisdiction in the manner suggested by the Carriers. Combining or realigning seniority districts may have a significant impact upon the day-to-day lives of those employees who will be subject to the new geographic territory contemplated by a combined or realigned seniority district. Accordingly, it is the opinion of the Neutral Member of the Committee that Section 11(b)(5) should not be placed in Section 9 and be applied in accordance with its limited terms. Rather, it is the opinion of the Neutral Member of the Committee that a Section 9 arbitrator, in addition to determining how the seniority rights of affected employees will be established, should also have the additional authority to determine whether the proposed seniority district represents a justifiable operational need in context of the alleged impact that change would have upon employees affected by such change.

In *Brotherhood of Maintenance of Way Employees and the Chicago and Northwestern Transportation Company*, (Fletcher, 1991), Arbitrator Fletcher held that the CIC's answer to Issue No. 14 created a balancing test. Arbitrator Fletcher wrote, "The balance, therefore, is between the degree of the benefit to the carrier and the impact upon the employees."

The first side of the balancing test is whether the Carrier herein has demonstrated a justifiable operational need to combine and realign the seniority districts as delineated in its proposed implementing agreement.

In *Brotherhood of Maintenance of Way Employees and the Chicago and Northwestern Transportation Company*, Arbitrator Fletcher specified that the availability of personnel and equipment are relevant factors which can constitute a justifiable operational need for combining and realigning seniority districts. In this case, the inherent nature of the current seniority territories causes the Carrier to engage in multiple position abolishments and multiple position establishments because of the impractical limits on where certain employees can perform necessary service. The Carrier will also be able to make more efficient use of available track machinery because it will accomplish projects that are too large for one or two trackmen but not large enough to warrant the assignment of a 10-man (plus) production gang.

In addition, the Carrier showed an inability to promptly and effectively respond to emergency situations due to the way seniority is disbursed among the various subdivisions in question. It is vital for the Carrier to have a sufficient supply of available labor to address exigencies to avoid both disruptions to train operations and a myriad of work assignment claims.

For its part, the Organization did not substantively rebut the reasons that the Carrier proffered for the seniority realignment and consolidation, except for its bare assertion that the Carrier has not met its burden of showing justifiable operational needs because the Carrier ostensibly manufactured a shortage of employees. However, as the Carrier explained, the problem is employee utilization due to restrictions on work locations that causes positions to remain unfilled as opposed to a short labor supply.

The Organization vigorously argues that affected employees will suffer great harm in terms of a less desirable lifestyle as well as reduced compensation as a result of the seniority consolidation.

While these dire consequences are unlikely to occur, the Carrier's proposed implementing agreement contains cushions which will soften, if not obviate, any adverse impact on employees. The implementing agreement contains particular prior rights provisions and ample New York Dock type protections.¹ Once the new seniority territories are established, the Carrier should not have to bulletin and abolish positions as frequently as it does under the current seniority alignment. The reduction in position fluctuations should provide employees with greater stability and perhaps, greater work opportunities which would translate into an increase in compensation. The employees may suffer a minor adverse impact due to the construction of larger territories which might require, in some circumstances, additional travel time. However, under the balancing test, this minor adversity is outweighed by the substantial economic efficiencies that the Carrier will attain through the seniority consolidation and realignment.

¹ The Referee concurs with the Carrier that New York Dock protection is not an essential component of each and every implementing agreement concerning seniority realignment and consolidation.

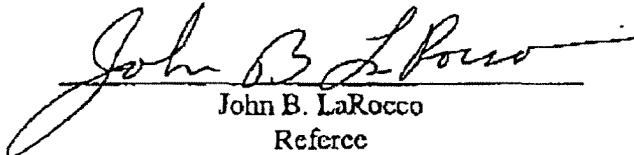
Therefore, the Referee holds that the parties shall adopt the Carrier's proposed implementing agreement.

AWARD AND ORDER

The Referee renders the following Award and Order:

1. The Answer to the Carrier's first question at issue is "Yes."
2. The Answer to the Carrier's second question at issue is that the conditions set forth in the Carrier's proposed implementing agreement are appropriate to implement the consolidation.
3. The Carrier and the Organization shall adopt the Carrier's proposed implementing agreement within 14 days of the date stated below.

Dated: June 3, 2005


John B. LaRocco
Referee