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Vernon A. Williams
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Union Pacific Corp. -- Control and Merger -- Southern Pacific Transportation Co., Finance Docket No. 32760 (Sub. No. 7) (Arbitration Review)

Dear Mr. Williams:

Please find enclosed for filing along with the $150.00 filing fee 11 copies of United Transportation Union's Petition for Review of Arbitration Award and Request for Stay in subject matter. A diskette is enclosed for the Board's use.

Sincerely,

Clinton J. Miller, III
General Counsel

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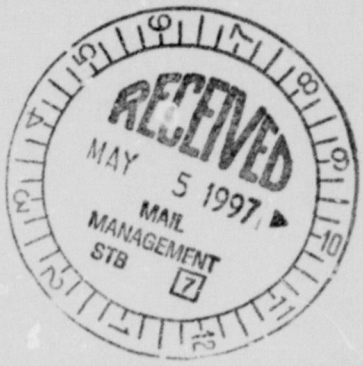
May 2, 1997



Vernon A. Williams
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Union Pacific Corp. -- Control and Merger -- Southern Pacific Transportation Co., Finance Docket No. 32760 (Sub. No. 1) (Arbitration Review)

Dear Mr. Williams:

Please find enclosed for filing along with the $150.00 filing fee 11 copies of United Transportation Union's Petition for Review of Arbitration Award and Request for Stay in subject matter. A diskette is enclosed for the Board's use.

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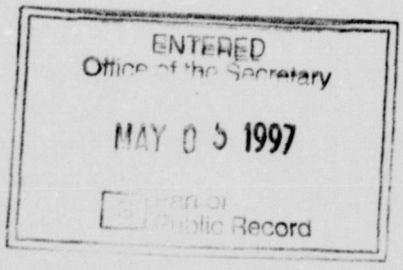

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 1)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
–CONTROL AND MERGER–
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION OF UNITED TRANSPORTATION UNION FOR REVIEW OF ARBITRATION AWARD AND REQUEST FOR STAY OF ITS IMPLEMENTATION

I.

INTRODUCTION

Pursuant to 49 C.F.R. § 1115.8, the United Transportation Union ("UTU"), the duly designated and authorized collective bargaining representative for the crafts and classes of firemen, conductors, brakemen, yard foremen and switchmen on the properties of the Union Pacific Railroad Company ("UP"), and the Southern Pacific Transportation Company ("SP"), St. Louis-Southwestern Railway Company ("SSW"), SPCSL Corporation ("SPCSL") and Denver and Rio Grande Western Railroad Company ("DRGW") (hereinafter collectively referred to as "UP" or "Carrier"), hereby petitions for review of an Arbitration Award, dated April 14, 1997

("Award"), regarding application of the *New York Dock* conditions[1] imposed by the Surface Transportation Board ("STB" or "Board") in the main docket herein on August 12, 1996 (Service Date) (Decision No. 44). The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (December 29, 1995 - effective January 1, 1996) abolished the ICC and transferred certain functions and proceedings to the STB. This matter relates to functions subject to Board jurisdiction under former 49 U.S.C. § 11347, current 49 U.S.C. § 11326.

A copy of the Award (with its Appendices, consisting of the Carrier Proposals for Merger Implementing Agreements for the Salt Lake City Hub and Denver Hub operations, which it adopted with some modification) is attached hereto as Appendix A. Accompanying this Petition is the Second Declaration of Paul C. Thompson, one of UTU's assigned Vice Presidents, which is attached as Appendix B hereto. The exhibits to the Second Thompson Declaration are separately bound as Attachments A (UTU Submission(s) and portion of its Appendix of Exhibits) and B (Carrier Submission(s) and a portion of its Exhibits), although Attachment C showing "fringe benefits" is attached to the Second Thompson Declaration. Also accompanying this petition is the Declaration of John P. Kurtz, which is attached as Appendix C hereto.

The issues raised by this Petition are recurring and significant issues of general importance regarding interpretation and application of the *New York Dock* conditions that meet the standard in *Chicago and North Western Transp. Co. --Abandonment-- Near Dubuque and Oelwein, Iowa* ("*Lace Curtain*"), 3 ICC 2d 729, 736 (1987), *aff'd sub nom. Int'l Brotherhood of*

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[1] *New York Dock Railway --Control-- Brooklyn Eastern District Terminal*, 360 ICC 60, 84 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979).

Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).[2] These issues are: (1) whether the Award impermissibly deals with a representation issue clearly outside the Board's and Arbitrator's jurisdiction; (2) whether a change in health and welfare arrangements, clearly a "fringe benefit," and in other "fringe benefits" is permissible under Article I, Section 2 of the *New York Dock* conditions without negotiation with and agreement by UTU; (3) whether Article I, Section 4 of the *New York Dock* conditions permits the Carrier to choose, without any standards, what existing collective bargaining agreements will be applicable in hub operations to apply throughout the hub; and, (4) whether various seniority modifications permitted by the Award are "necessary" to produce a public transportation benefit as required by 49 U.S.C. §§ 11321, 11326. UTU requests that if the Board accepts this petition, it should resolve those issues in the interest of correcting clear error in the Award; and, because UTU can establish the traditional alternative equitable standards, that a stay of the implementation of the Award be issued. *See, Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Union Pacific Corp. -- Control -- Chicago and North Western Transp. Co.*, STB Fin. Dkt. No. 32133 (Sub-No. 4), *et al.*, Arbitration Review, May 6, 1996 (Service Date).[3]

Under the *Lace Curtain* standard, the Board may also 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." *Delaware and*

---

[2] Pursuant to Sec. 204(b)(d) of the ICC Termination Act of 1995, Pub. Law 104-88, 109 Stat. 803, proceedings pending before the ICC on the effective date of that legislation (the Railroad Merger Application here was filed on or about November 30, 1995) are to be decided under the law in effect prior to January 1, 1996.

[3] For convenience of the Board and the parties, the request for stay is being combined with the petition or review, as was permitted in the referenced case.

Hudson Railway Company -- Lease and Trackage Rights Exemption -- Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) (Service Date - October 4, 1990) at 16-17, *remanded on other grounds, Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C. Cir. 1993). The Award herein fails to meet this standard in several respects, and should, therefore, be reviewed.

II.

BACKGROUND OF DISPUTE

On November 30, 1995, UP (and the Missouri Pacific Railroad Company, which was still in existence at the time) and SP, SSW, SPCSL and DRGW filed a Railroad Merger Application seeking approval and authorization under former 49 U.S.C. §§ 11343-45.

Incident to the involved merger application at the STB, the Carrier parties submitted to the STB, *inter alia*, the Operating Plan ("OpPlan"). Labor Impact Study ("LIS"), and supporting statements. *Railroad Merger Application*, Vol. 3 (UP/SP 24) (excerpts included as Organization's Exhibit 2). The Verified Statement of M. A. Hartman supporting the LIS contained a material misstatement at page 255 thereof in its claim that UP currently operates as a "hub-and-spoke" system, necessitating a single CBA and seniority roster for each component of the hub-and-spoke system in the merger implementation with SP. It does not. (Declaration of UTU Vice President M. B. Futhey, Organization's Exhibit 3).

While UTU was concerned at the time the merger application was pending that SP would be incapable of operating successfully in the West competing with BNSF and UP-CNW, raising the specter of § 10901 line sales without labor protection, it had equal concern that UP not obtain *carte blanche* to wreck havoc with the CBA's held by the UTU General Committees of

Adjustment on UP and SP (and its corporate relatives) in any merger approved. These concerns of UTU are spelled out in the Declaration of UTU International President Charles L. Little (Organization's Exhibit 4).

UTU had disputes with the Carrier over the interpretation and application of provisions of the February 26, 1996 letter of UP Vice President-Labor Relations John J. Marchant to UTU International President Charles L. Little ("Marchant Commitment Letter") (Organization Exhibit 1), noted and addressed by the Board in its August 12, 1996 (Service Date) Decision (No. 44) in STB Finance Docket No. 32760 ("UP-SP Merger Decision") with respect to the Carrier's various demands for changes in UTU's collective bargaining agreements ("CBA's"). The specific provision of the Marchant Commitment Letter at issue was at page 2 thereof, to wit:

> [U]P also commits that, in any Merger Notice served after Board approval, it will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s).

The STB fully understood the totality of what UTU extracted from UP in the Marchant Commitment Letter, as evidenced by the following passages from its August 12, 1996 UP-SP Merger Decision (Organization's Exhibit 6):

> UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that is supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be

> adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBA's that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of *New York Dock* is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time of issuance of the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MPRR or UPRR, the *New York Dock* conditions will nevertheless be applicable.
>
> UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

STB August 12, 1996 *Merger Decision* at 171.

> I believe that the Labor Unions deserve a special commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here, Labor's participation in the debate resulted in a win-win situation for everybody.

STB August 12, 1996 *Merger Decision* at 246-47 n. 281 (Vice Chairman Simmons, commenting).

> With regard to labor relations, I note that this is the only railroad

> merge. in recent history to receive widespread labor-union support. Railroads operate the largest outdoor factory in America, often stretching tens of thousands of miles. The existence of a well-trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and including them in the planning process. All too often, in recent years, labor relations in the railroad industry have been unnecessarily acrimonious.
>
> The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions.
>
> Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer. 300
>
> The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act.
>
> 300 *See, e.g., Railway Labor Executives Association v. United States*, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction.

STB August 12, 1996 *Merger Decision* at 251 (Commissioner Owen, commenting).

UTU invoked arbitration under provisions of the Marchant Commitment Letter with respect to the Carrier's failure to adhere to the limitations in that letter as to what it could

demand in the way of collective bargaining agreement changes, and the Carrier invoked arbitration under Article I, Section 4 of the *New York Dock* conditions for implementing agreements for its proposed Salt Lake City and Denver "hub" operations contained in merger notices related thereto.

The various UP Merger Notices and Bargaining Proposals demonstrative of the Carrier's failure to comply with the terms of the *New York Dock* Conditions and the Marchant Commitment Letter are discussed in the First Declaration of Paul C. Thompson (Organization's Exhibit 7). Additionally, the Carrier never presented the proposals to UTU it presented to the Arbitrator, which he adopted, with some modification. *Compare* Organization's Exhibit 7, with Exhibits. This "hide the ball" method of obtaining an implementing agreement violates the spirit, if not in fact the letter, of the statutory provisions at issue, and in any event, complicates the discussion below.

II. LEGAL BACKGROUND AND LIMITATIONS ON PERMISSIBLE AGREEMENT CHANGES AND AWARD PROVISIONS

While the merger will result in operational efficiencies, the Carrier made numerous requests in bargaining which created additional efficiencies solely through the abrogation of the terms and conditions of collective bargaining agreements. As shown below, the Carrier in some instances use the Board's approval as a maneuver to avoid their collective bargaining and Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, obligations. The Carrier did not produce any substantial evidence that the avoidance of these contractual and RLA obligations are necessary to effect the "approved transaction," as required by the decision of the Supreme Court of the United States in *Norfolk & Western Ry. v. American Train Dispatchers Ass'n,* 499 U.S.

117, 113 L.Ed.2d 95 (1991).

As the Supreme Court recognized in *Dispatchers, supra*, an exemption from legal requirements, such as the RLA, under 49 U.S.C. § 11341(a) [now 49 U.S.C. § 11321(a)], by its own terms, applies only when "necessary to carry out a transaction approved by the Commission." 113 L.Ed.2d at 110. These criteria must be satisfied before the Board can move on to the next limitation: whether the decision to override the carriers' obligations is consistent with the labor protective requirements of Section 11347 [now Section 11326]. *Id.*

In *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), the Fifth Circuit rejected an effort by a merged carrier to apply the exemption in 49 U.S.C. § 5(11) [the predecessor of Section 11341(a), and now Section 11321(a)] to an agreement requiring one of its merging railroads to maintain employees and an office in Palestine, Texas. In rejecting the carrier's exercise of the exemption authority, the Court of Appeals held that the agreement in question "did not threaten the merger's success." *Id.* at 414. The Court went on to hold that "Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger." *Id.* "Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest-when the destruction is irrelevant to the success of the approved transactions." *Id.* at 415.

As the Fifth Circuit emphasized in *Palestine*, "necessary" does not signify merely convenient or even the most efficient. Instead, "necessary" requires something more, the absence of which would bar the consummation of the approved transaction. A finding of necessity must

be premised on the applicants' actual inability to carry out an approved transaction, not on an assessment of the relative costs or possible efficiencies of proceeding in the absence of the alleged obstacle. A comparative efficiency standard cannot be consistently applied either by the Commission or by arbitrators who are called upon to resolve disputes between carriers and the representatives of their employees. The determination of "necessity" is primarily a factual one.

Section 11326 was enacted for the benefit of the affected employees, not the carriers. *Southern -- Central of Georgia -- Control*, 331 I.C.C. 151, 169-70 (1967); *Chicago, St. Paul, M & O Ry. Lease*, 295 I.C.C. 696, 701 (1958); *Texas & New Orleans Ry. v. BRT*, 307 F.2d 151, 157, 160 (5th Cir. 1962). Its purpose is to regulate the exercise of the Section 11321(a) exemption authority when it is applied to labor obligations. In other words, Section 11321(a) gives the authority, but Section 11326 limits the exercise of that authority. See, American Train *Dispatchers Ass'n v. I.C.C.*, 26 F.3d 1157, 1165 (D.C. Cir. 1994).

Section 11326 stands as a separate, distinct, and formidable limitation on the exercise of Section 11321(a) exemption authority. *See, id.* The two sections can be properly understood only if they are read in conjunction with each other. *See, United States v. Morton*, 467 U.S. 822, 828 (1984) (statutory sections must be read and interpreted together). Certainly, Section 11321(a) cannot be isolated from Section 11326, for any order of the Board under Section 11321(a) which does not conform to Section 11326's requirements is rendered invalid. *Southern*, 331 I.C.C. at 163-64. Instead, if "the consistency of the overall statutory scheme for dealing with CBA modifications required to implement Commission-approved mergers and consolidations" is to be achieved, the authority of Section 11321(a) must be "circumscribed" by Section 11347. CSX *Corp. -- Control -- Chessie and Seaboard* ("*Carmen II*"), 6 I.C.C.2d 715, 722 (1990).

The statutory scheme contemplates that Section 11321(a) will provide the means for advancing the national policy of consolidations in the rail industry that is found in the Interstate Commerce Act ("ICA"), while Section 11326 will provide the means for advancing the national policy of collective bargaining in the rail industry that is found in the Railway Labor Act ("RLA"). It is evident that there is a certain tension between those two important federal statutes. Yet the Supreme Court noted as recently as 1989 that the two competing federal policies can and must be accommodated to each other. The Court viewed the ICA and RLA as "complementary regimes" that, whenever possible, should be harmonized rather than forced onto a collision course. *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490, 105 L.Ed.2d 415, 434 and n. 18 (1989).

The Court of Appeals for the District of Columbia Circuit added significantly to the authority on the subject in its decision in *RLEA v. United States* ("*Guilford*"), 987 F.2d 806 (D.C. Cir. 1993). In *Guilford*, the court emphasized that Section 11326 "clearly mandates that 'rights, privileges, and benefits' afforded employees under existing CBAs be preserved." *Id.* at 814. Although the contours of those "rights, privileges, and benefits" were left in the first instance to the Commission to delineate, the Court made clear that Section 11326 itself imposed an affirmative obligation on the Commission. Recently, the D.C. Circuit stated in *UTU v. STB*, D.C. Cir. No. 95-1621 (March 21, 1997):

> [T]he questions at issue here are (1) whether established seniority provisions are within the category of interests that are subject to abrogation, and, if so, (2) whether the changes proposed by CSXT are *necessary* to effectuate the consolidation of railway operations that had been approved by the ICC. The Commission answered affirmatively to each of these questions, and we can find no error in the agency's judgment.

Slip op. at 3. That case in the Court of Appeals only dealt with an expansion, not a contraction, of existing seniority provisions, quite unlike what is at issue here. Moreover, the Court of Appeals therein reaffirmed *Guilford* to the effect that rates of pay, rules, working conditions and other rights, privileges and benefits under CBAs or otherwise, must be preserved. The definition given in that case by the ICC/STB to the "other rights, privileges and benefits" which are to be preserved as being "ancillary emoluments and fringe benefits" includes many provisions of CBAs that are of any significance to employees. *See, e.g.*, Second Thompson Declaration, Appendix B, Attachment C (showing supplemental pensions, health plans, dental plans, vacations, holidays, and "other" fringe benefits, such as jury pay, bereavement leave, accident and liability insurance, and other items, such as, UTU would say here, disability insurance). Since the decision clearly did not address rates of pay, rules and working conditions, the Court of Appeals obviously does not limit Article I, Section 2 of *New York Dock* entirely to fringe benefits. The Court in *Guilford* recognized that "at a minimum" an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction. *Id.* at 814. "[I]t is clear," the Court emphasized, "that the Commission may not modify a CBA willy-nilly." Indeed, courts recognized before *Guilford* that it is possible for a collective bargaining obligation to burden a carrier without rendering it impossible for the carrier to carry out an approved transaction. *E.g.*, *City of Palenstine*, *supra*, 559 F.2d at 414; *New York Dock Ry. v. U.S.*, 609 F.2d 83, 101 (2d Cir. 1979).

The *Guilford* court was well aware that any time a carrier can reduce its collectively bargained obligations, it can achieve greater economy and financial strength. But the court rejected the notion that elimination of collective bargaining obligations is a valid purpose within

the meaning of Section 11341(a). The cognizable purpose of a transaction, according to the court, must not be "merely to transfer wealth from employees to their employer," but must be "to secure to the public some transportation benefit that would not be available if the CBA were left in place." 987 F.2d at 815. And the court expressly clarified that the benefit to the public must flow from the approved transaction, not from the modification of the CBA. *Id.*

Elimination of collective bargaining obligations to improve the financial condition of carriers and to rid themselves of what they view as burdensome and inconvenient provisions that are irrelevant to the merger is simply not within the objectives of Section 11321 or Section 11326. "The necessity limitation is explicit in § 11341(a), and we have no reason to believe that the Congress meant to give the Commission any wider latitude to modify the provisions of a CBA where § 11341(a) does not apply; § 11347 on its face provides more, not less, generous labor protection than does § 11341(a)." *Guilford*, *supra*, 987 F.2d at 814.

This rationale of the Court of Appeals is further supported by the mandatory labor protective conditions imposed in this transaction pursuant to 49 U.S.C. § 11326. To ensure that the protection required by Section 11347 is provided to affected employees, the Commission [now the Board] developed the labor protective conditions of *New York Dock* imposed here. The first principle of *New York Dock* is that of respect for existing collective bargaining obligations: Section 2 of Article I provides that "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements . . . shall be preserved when changed by future collective bargaining agreements or applicable statutes . . . ." *Compare*, *Guilford*, *supra*, 987 F.2d at 814.

Clearly, Article I, Section 2 cannot be read woodenly to "preserve" each and every

collective bargaining obligation in each and every transaction. Otherwise, there would be no need for Article I, Section 4, which contemplates that it will be necessary to modify those provisions of collective bargaining agreements that provide for the "selection of forces" and "assignment of employees." But neither can Article I, Section 2 be read out of the *New York Dock* conditions entirely.

Article I, Section 2 is simply a ". . . codification of prior rights, generally recognized since 1936," when the Washington Job Protection Agreement ("WJPA") protections were applied by the Commission or by the parties. *Carmen II, supra*, 6 I.C.C.2d 715. As the Commission pointed out in *Carmen II*, parties have routinely complied with existing collective bargaining agreements and permitted "limited modification" only where necessary to the completion of a transaction that was approved by the Commission. *Id.* And where parties were unsuccessful in reaching agreement on reasonable accommodations, arbitrators used their authority "to modify CBAs to the extent necessary to permit approved transactions to proceed." *Id.*

The key to the interplay between Article I, Sections 2 and 4 of the conditions, the Commission indicated, "lies in the history of negotiation and arbitration in the period between 1940-1980." *Carmen II*, 6 I.C.C.2d at 752. During that era, a principle of accommodation was derived from the express language of Sections 4 and 5 of WJPA (which now effectively appear in Article I, Section 4 of the *New York Dock* conditions). By their terms, those sections require that provisions must be made for "the selection of forces" and "assignment of employees made necessary by the transaction." Arbitrators therefore limited their subordination of collective bargaining provisions to those which affected the transfer of work, integration of seniority agreements, and reassignment of employees that were necessary to achieve a consolidation. *See,*

Carmen II, 6 I.C.C.2d at 742. As the Commission recognized in its *Southern* decision, Section 5(2)(f) (now Section 11326) required adherence to existing collective bargaining agreements, and second, appropriate compensation where provisions must be modified, to wit:

> [W]e impose formulae of protective conditions upon the carriers seeking specific permissive authority under Section 5(2) of the act, the purpose being to protect the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. . . . These protective conditions imposed upon carriers under Section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces in accordance with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect.

Southern, 331 I.C.C. at 169-70 (emphasis in original). The Commission noted that it had demonstrated its concern for "the fulfillment of existing contractual obligations on the part of the carrier" as early as the 1930's. *Id.* at 158 (citations omitted).

Arbitral incursions on collective bargaining agreements were limited by the notion that the implementing agreements forged under the WJPA were intended to provide primarily for the selection of forces and assignment of employees that was necessary to effectuate the consolidation. According to that principle of accommodation:

> [w]ork was transferred from one railroad to another despite contrary contractual provisions in CBAs. It was also obvious that contractual seniority rights were modified in order to consolidate rosters of the two separate, combining railroads. . . . We can assume that the reassignment of employees would have regularly taken place despite CBA prohibitions. These actions are the sort that would be necessary to permit almost any consolidation of the functions of two merging railroads.

Carmen II, 6 I.C.C.2d at 742, citing *Southern*.

When Article I, Section 2 was added to the conditions, it made explicit what had previously been implicit and generally accepted in the rail industry by carriers and unions alike since 1936. Consequently, the adoption of Article I, Section 2 did not provoke the hue and cry that would have accompanied any "radical change" in the balance that had prevailed for decades. *Carmen II*, 6 I.C.C.2d at 720. As the Commission repeated, "Article I, Section 2, appears acceptable to all parties." *Carmen II*, 6 I.C.C.2d at 797 n. 16. For that reason, "no one commented when this language became part of the Commission's merger conditions in 1979." *Id.* at 750. Neither Article I, Section 2, nor Article I, Section 4 "trumps" the other, and neither should be read out of the *New York Dock* conditions. Instead, they "exist *in pari materia* and accordingly must be read together in a way that gives effect to each." *Carmen II*, 6 I.C.C.2d at 798. Collective bargaining agreements should not be overridden under Section 11321(a) simply to facilitate a transaction, but will be required to yield only when and to the extent necessary, i.e., "required," to permit the approved transaction to proceed.

Article I, Sections 2 and 4 can be thus harmonized in an approach that worked successfully during the 40-year "era of accommodation." *Carmen II*, 6 I.C.C.2d at 721. As the Commission recognized, Article I, Section 2 "does have significance as a Congressional directive that, to the extent possible, the terms of CBAs are to be preserved." *Carmen II*, 6 I.C.C.2d at 720. Thus, under Article I, Section 2, the parties and arbitrators must abide by existing collective bargaining agreements unless changes are necessary to permit the approved transaction to proceed. *See, Carmen II*, 6 I.C.C.2d at 749 ("only those changes in CBAs necessary to permit an approved transaction will be appropriate").

Changes that are made under that standard "will not undermine labor's rights to rely

primarily on the RLA for those subjects traditionally covered by that statute." *Id.* at 752-53. By giving proper effect to Article I, Section 2, the Board does not deprive carriers of their ability to consummate an approved transaction. It merely deprives them of any claimed "hunting license" to seek out and eliminate or dilute any collective bargaining provision that stands in the way of cost savings, administrative efficiency or some other general economy. By the time carriers seek the approval of the Board for a proposed transaction, they have assessed both the benefits and the costs of the transaction they propose to the Board as part of their "due diligence." Accordingly, they have full knowledge of the obligations that accompany the transaction for which they seek approval and can reasonably be held applicable to them. Absent necessity, carriers "should not easily be relieved of obligations voluntarily undertaken." *Carmen II, supra*, 6 I.C.C.2d at 720-21.

In *Dispatchers, supra*, the Supreme Court clarified that obligations imposed by collective bargaining agreements could be exempted if all statutory prerequisites were met. The Court specifies that those statutory prerequisites include a determination that the carrier has satisfied the labor protective conditions established under Section 11326—within which Article I, Section 2 squarely and securely resides. Thus, nothing in the Supreme Court's decision suggests that the Commission's recognition, expressed in *Carmen II*, of the rightful place of Article I, Section 2 is misguided. Indeed, "the respect for labor contracts" that the Commission demonstrated in the era of accommodation, *id.* at 749, is necessary in any attempt to achieve the balance necessary in large mergers between the Interstate Commerce Act and the Railway Labor Act.

At times recently the Board has seemed intent on applying "necessity" under 49 U.S.C. § 11321(a) in the sense used by the Supreme Court in *McCullough v. Maryland*, 17 U.S. 316

(1819), which is not a good source to justify such an expansive use. What was before the Court in that case was the notion of expansive constitutional powers of the central government from the "necessary and proper" clause of Article I of the U.S. Constitution. As Chief Justice Marshall said early in the decision:

> In considering this question, then, we must never forget, that it is a constitution we are expounding. (emphasis in original)

Here, we are considering a statute to which we must more appropriately ascribe the common and everyday meaning of the words used according to the cardinal principle of statutory construction. This is made more clear later in the opinion, when Chief Justice Marshall expounds that a narrow view of the "necessary and proper" clause is improper because the intention of the Constitutional Convention is evident from the context of the clause, i.e., its placement among the powers of the Congress, not its limitations, and it purports to be an additional power, not a restriction. The immunity provision has no similar context. Moreover, statutory exceptions, such as the immunity provision, are generally held to a rule of narrow, not broad construction, in cases of ambiguity.

Most importantly, the above-quoted sections of the Board's August 12, 1996 Merger Decision, which tellingly note the requirements of the Marchant Commitment Letter UTU extracted from UP here, indicate the propriety of applying "necessary" in the sense of "required," as discussed hereinabove, in this particular docket as to CBA changes. In fact, the remarks of Commissioner Owen in the August 12, 1996 Merger Decision explicitly so state at page 251 thereof.

A. The Arbitration Award Impermissibly Deals With A Representation Issue Outside The Board's And Arbitrator's Jurisdiction.

After selecting application of the Eastern District Collective Bargaining Agreement, with

modifications, in both the Salt Lake City and Denver Hubs, as proposed by the Carrier, at page 4 of the Award, the arbitrator states:

> [I]f the Eastern District General Chairman and Carrier are not able to agree within 30 days of this Award who the specific employees [to be protected] are....

Again, at page 5 of the Award, the arbitrator states:

> This Award is final and effective immediately. Should the Organization and the Carrier desire to continue negotiations over other elements then they should so proceed. These negotiations should be between the Eastern District General Chairman and the Carrier. These would be voluntary and not subject to Section 4 New York Dock arbitration if they do not prove fruitful.

In *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 38 F.3d 1224 (D.C. Cir. 1994) (*en banc*), the Court of Appeals clearly held that the *Railroad Merger Procedures* promulgated by the NMB, which permitted invocation of the representation jurisdiction of the Board under Section 2 Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth) by a carrier or the Board itself, were judicially reviewable as a gross violation of the Act and were contrary to the plain meaning and legislative history of the Railway Labor Act. Thus, even the governmental body exclusively responsible for resolution of representation issues on this nation's railroads cannot itself or upon application of a carrier resolve a representation issue. Neither this Board, nor an arbitrator acting under its authority, have any jurisdiction to address any issue connected with representation. It is the office of UTU as the duly designated representative for the crafts or classes involved herein under the Railway Labor Act to direct the carrier to the person or persons it must "treat with" with respect to any particular issue. Those portions of the Award identified hereinabove should be reviewed, and upon such review should be modified by referring to the UTU, instead of the Eastern District General Chairman.

B. The Arbitration Award's Approval Of The Carrier's Requested Forced Transfer Of DRGW Employees From The DRGW Hospital Association To The UP Hospital Association And Other "Fringe Benefit" Should Be Reviewed And Set Aside As Violative Of Article I, Section 2 Of The *New York Dock* Conditions Since This Change In "Fringe Benefits" Is Subject To Negotiation With And Agreement By UTU.

The Yost arbitration decision dated April 24, 1997 permits implementation of that part of the carrier's submission and proposed agreement for the Denver and Salt Lake City Hubs regarding the issue of health and welfare which states:

> "Employees not previously covered by the UPED agreement shall have 60 days to join the Union Pacific Association in accordance with that agreement."

This provision was presented in the written carrier submission stating that the Eastern District agreement requires that employees coming under that agreement be covered under the UP Hospital Association. The UP relied on an arbitration (NRAB First Division Award 24158) in making this proposal. This First Division award was a grievance arbitration under the Railway Labor Act by a group of employees between the UP-MOP at one particular location. It was not an implementing agreement arbitration in that merger. *Kurtz Declaration*, Appendix C, ¶ 3.

The specific issue of health and welfare coverage was not in the initial proposed agreement offered by the UP, and was never raised, at any time, during negotiations. *Id.* at ¶ 4. No exchange ever took place among the DRGW General Chairmen involved and other UTU representatives, who were present at all merger meetings. *Id.*

It should be noted that only three copies of the carrier's submission were available at the time of the hearing for the UTU board members who participated. *Id.* at ¶ 5. The DRGW General Chairmen present were not able to review what was contained therein and it was only

briefly covered by the carrier at the hearing. *Id.* Copies of the carrier's submission were later mailed to the General Chairmen by UTU.

The General Chairmen agreed to submit a unified proposal of one collective bargaining agreement as to the Salt Lake City Hub, that being the Eastern District Agreement. *Id.* at ¶ 6. Generally, the issue of health and welfare has always been separate and apart from work rules and pay issues. *Id.* It is handled separately at the national level with a Committee having the authority to act for all rail labor. *Id.* The affected DRGW General Chairmen, who agreed to the approach of one collective bargaining agreement, believed that the employees would be protected by the provisions of *New York Dock* which requires negotiations on all such issues. *Id.* The element of surprise is not a tactic which should be upheld by the interest arbitration process.

Union representatives, employees and retirees do not wish to automatically go to the UP Hospital Association, and believe that a choice should have been discussed and offered the employees at the time of negotiations. *Id.* at ¶ 7. In fact, the matter of choice was first raised by UP with other employee groups. UP Labor Relations officer Geneva Dourisseau and Doug Smith called UTU General Chairperson John Kurtz, also Chairman of the DRGW Employees' Hospital Association since 1976, in December, 1996 and discussed the same issue regarding the carmen craft. *Id.* Some carmen were being transferred to other locations and coming under different collective bargaining agreements, but were offered a choice of health plans. *Id.* Clerical employees transferred to other locations under the same scenario were offered the same choice, and a UP-TCU Agreement dated December 18, 1996 so shows. *Id.* In addition, the carrier negotiated one agreement for the Denver Hub with the BLE in the same scenario as the UTU, that being the Eastern District Agreement. *Id.* The employees were offered a choice of

plans within that agreement. *Id.* Clearly, the UP was cognizant of the requirements of *New York Dock* in the other negotiations, and the same obligation should apply here.

The DRGW Hospital Association is financially stable, with assets at an all-time high. *Id.* at ¶ 8. It is well known in this industry that active employees support and subsidize retirees on hospital association carriers. *Id.* However, a withdrawal of complete groups jeopardizes this stability to the detriment of the other employees, and specifically the retirees. *Id.* Currently, the premiums on the DRGW are nearly $300 lower for a retired couple with no annual drug limitations than exist with UP. *Id.* The nearly 2,500 retirees in the DRGW will unnecessarily be faced with drastic plan changes for elderly people on fixed incomes, some of who have been retired for over twenty years, who are not drawing significant retirement incomes some of whom may not be able to pay the increased costs. *Id.*

The purpose of *New York Dock* and the protection provisions is clearly to allow a protective period of time to elapse before a person is placed in a worse position with regard to pay and other benefits, especially health and welfare "fringe benefits" as the law and precedent hereinabove indicates. The parties may agree to other terms by negotiations. The issue is negotiable, and at a minimum, the employees should be offered a choice of plans in which to belong for the period of *New York Dock*, just as other employees have been offered in other employee negotiations with UP, and the award should be reviewed, and upon such review, language to that effect should govern implementation in the Denver and Salt Lake City Hubs.

C. The Carrier May Not Select The Collective Bargaining Agreement That Applies As A Matter Of Its Own Discretion.

As to the issue of which collective bargaining agreement will apply in an Article I, Section 4 *New York Dock* arbitration, the Yost Award dated April 14, 1997 adopts the UP's

proposals permitting UP's selection of the UP Eastern District agreement without delineating any standards for the selection. To begin with, the Carrier made no demonstration of necessity for a single agreement as required by the law and precedent discussed hereinabove. Moreover, even if UP established the need for a single agreement, if standards are not set forth as to how to determine which collective bargaining agreement will be applicable in the absence of agreement, then a carrier will never have to bargain, because it will pick the most desirable agreement from its standpoint, and that cannot be permitted as "necessary" or under Section 11326. In all of the mergers involving the Union Pacific Railroad to date, there has always been one common denominator so far as which collective bargaining agreement will apply. That common denominator has been the predominate collective bargaining agreements in effect in the territory comprehended by the Carrier's Operating Plan. *Second Thompson Declaration*, Appendix B, ¶4. That standard was followed in the UP/MOP Merger (ICC Finance Docket No. 30,000), the UP/MKT Merger (ICC Finance Docket No. 30,800) and the UP/C&NW Merger (ICC Finance Docket No. 32,133).

In the Denver Hub, the UP Eastern District Agreement would be the predominate collective bargaining agreement. *Id.* at ¶ 5. In the Salt Lake City Hub, UTU, with the involved General Chairpersons, made a proposal (Organization's Exhibit 9) that offered the UP Eastern District Agreement in that area as a result of trying to address the Carrier's needs at that location. *Id.* While the UP Eastern District Agreement is not the predominate agreement in the Salt Lake City Hub, it was the Agreement agreed upon by all of the General Chairpersons. *Id.* Arbitrator Yost gave no consideration to the history of the negotiations leading up to this Arbitration, because he accepted the proposals offered by the Carrier that the Organization had never seen

prior to the Arbitration Hearing. The proposals were different from the Carrier's earlier proposals. None of them meet the "necessity" standard required under the law discussed hereinabove.

The portion of the Yost Award permitting the UP to select a single agreement in the Denver and Salt Lake City "hubs" should be reviewed, and upon such review it should be eliminated from the award, requiring UP to apply existing CBA's. In the alternative, it should be reviewed, and upon such review, language should be inserted requiring application of the predominate CBA without modification, in the absence of agreement.

D. Seniority Modifications Permitted By The Arbitrator Are Not Necessary To Implement The Merger In The Salt Lake And Denver "Hubs."

In Article VII, Section D of the Carrier Proposals adopted by the Yost Award, not only can the Carrier force employees outside of the Hub after taking away their current system seniority rights, they can also, within one (1) year, force the junior employees outside of the Hub, then take away their seniority inside the Hub, and then require these same employees to establish a new seniority date outside of the Hub. *Id.* at 10. This is nothing more than an unnecessary manipulation of employees seniority rights, as well as an infringement on Crew Consist provisions that allow employees to work blankable positions on their existing seniority districts providing that they cannot hold a must-fill position. *Id.* Also, in the Denver Hub proposal, in Article II E on page 3, the Carrier explains the advantage of having Zones, and they completely reverses itself from the purpose stated in Section E by the language contained in Article VIII, Section D on page 10 of the proposal. *Id.* at ¶ 11.

On page 12 of the Carrier's proposal on both the Denver Hub and the Salt Lake City Hub, the issue of firemen is addressed. It should be noted that in the Carrier's Article I, Section 4 Notice under *New York Dock*, there never was a mention of firemen issues, nor did the Carrier ever include such a provision in any of its proposals. *Id.* at ¶ 7. The Carrier in its BLE Implementing Agreement in this merger is attempting to change the following language contained in Article XIII, Section 1 (7) of the October 31, 1985 UTU National Agreement (*id.*).

> (7) Change Article III, Section 4 to read as follows:
> "Section 4(a) - All firemen (helpers) whose seniority as such was established prior to November 1, 1985 will be provided employment in accordance with the provisions of this Article until they retire, resign, are discharged for cause, or are otherwise severed by nature attrition; provided, however, that such firemen (helpers) may be furloughed if no assignment working without a fireman (helper) exists on their seniority district which would have been available to firemen (helpers) under the National Diesel Agreement of 1950 (as in effect on January 24, 1964), and if no position on an extra list as required in Section 3 above exists on their seniority district subject to Section 5 of this Article." (emphasis added)

By taking away the firemen's existing seniority rights both in the Hub and outside and then applying paragraph F, page 13 of the BLE Agreement, the Carrier has circumvented the provisions of the UTU National Agreement without having to show any "necessity." *Id.* at ¶ 8. The BLE provision reads as follows:

> "During the interim period, at locations outside the Hub where shortages exists and an insufficient number of applications are received for vacant positions, the junior engineer holding a surplus position in either Hub not having an application accepted to a shortage location shall be forced to the vacancy." (*Id.*).

These same junior engineers may very well be senior train service employees or pre-1985 firemen. *Id.* at ¶ 9. This has the effect of forcing UTU train and engine service members to

undesirable positions and/or locations and thereby restricting their currently earned seniority rights. *Id.* Their rights to be forced outside of areas where they hold firemen and/or train service seniority should be restricted until such time as all such positions are filled. *Id.*

The Carrier's attempt to limit seniority is also diametrically opposite to its position in the Operating Plan, Appendix A, at 256 (Organization's Exhibit 2):

> This type of consolidation is a win-win situation for employees, UP/SP and customers. It expands work opportunities for the affected employees and mitigates the adverse effects that historically have befallen employees on smaller, isolated seniority districts when business or operations shifted to a different route due to shipper routing changes, maintenance programs, disasters, etc.

See also, Organization's Exhibit 6 at 174; *Beardsly v. CNW*, in *UTU v. STB*, D.C. Cir. No. 95-1621 (March 21, 1997), *supra.*

The Yost Award's cavalier attitude toward seniority must be corrected. UP made no demonstration of "necessity" with respect to any of these seniority limitations, as required by the law discussed above. Indeed, the recent D.C. Circuit decision in *UTU v. STB*, *supra*, related to an expansion, not a contraction of seniority. The Award should be reviewed, and upon such review the limitations on seniority exercise discussed above should be stricken from the adopted Carrier proposals.

III. IF THE PETITION FOR REVIEW IS ACCEPTED, IMPLEMENTATION OF THE AWARD SHOULD BE STAYED PENDING DECISION BY THE BOARD.

Should the Board accept the petition to review, implementation of the Award should be stayed pending decision since the alternative standard for equitable relief in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) can be shown by UTU, particularly as to seniority issues. *Beardsly v. CNW*, 850 F.2d 1255 (8th Cir.

1988), *cert. denied*, 489 U.S. 1066 (1989) (voided award under the March 4, 1980 agreement (adopted by the ICC as the protection in Rock Island line sales) because of failure to consider "unified position" of UTU as to seniority).

The Carrier's pending implementation will for the most part implement its desired hub-spoke method of operation at Denver and Salt Lake City. The disruptions to family life and the scrambling of the proverbial seniority egg that will take place unless this matter is stayed cannot be addressed by a later decision of this Board. Courts have recognized in the exercise of their equity jurisdiction that in such instances appropriate temporary and preliminary relief is warranted to protect the jurisdiction of a court (or in this case the Board) to render an effective later decision. *See, Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.* 363 U.S. 528 (1960). Indeed, the Supreme Court of the United States has recognized that it is appropriate for this Board, as successor to the ICC, to consider the "interests of justice" such as those involved here in the background of labor protective conditions. *United States v. Lowden*, 308 U.S. 225 (1939), *see also, Union Pacific--Control--Chicago and North Western*, Finance Docket No. 31233 (Sub-No. 4) *et al.* (May 6, 1996-Service Date), *supra.*

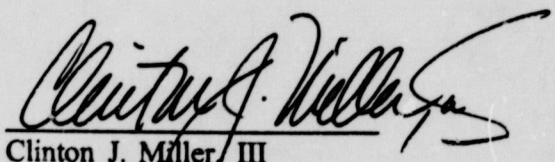
It is clear that the alternative equitable standard for preliminary relief in *WMATC V. Holiday Tours, supra,* has been met in light of the severe and irreparable harm that will befall the employees and their families as described above, such that an effective later determination cannot fix the harm. The balance of the hardships tips decidedly in favor of the employees, and the public interest factor as enunciated in *Lowden, supra,* and other cases cited hereinabove regarding protective conditions favors UTU. Therefore, UTU need not show that its ultimate success on the merits is a mathematical probability because it is obvious from what has been

stated herein that the issues UTU has raised that go to the merits are so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. *WMATC v. Holiday Tours, supra*, 559 F.2d at 844 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, (2d Cir. 1953) (footnote omitted).

CONCLUSION

The UTU requests the Board to accept this Petition and to decide the issues raised herein. The questions presented are new and not previously raised and answered. The answers thereto are critical to the employees represented by UTU. They are also critical to the Carrier and the public, because if left unanswered, or if resolved incompletely and/or unfairly, they could lead to much litigation involving all concerned and cause employee unrest and loss of morale. Additionally, if the Petition is accepted for review, implementation of the Award should be stayed pending Board decision.

Respectfully submitted,



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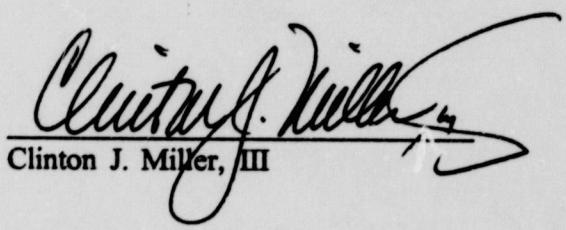
Attorney for United
Transportation Union

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing Petition to Review and accompanying appendices and attachments to be served by Federal Express, airbill prepaid, on this 2nd day of May, 1997, upon the following:

R. D. Meredith
General Director--
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-2111



Clinton J. Miller, III

ARBITRATION PROCEEDING

United Transportation Union
and
Union Pacific Railroad Company, et al.
Control and Merger - Southern Pacific
Transportation Company, et al.

STB Finance Docket
No. 32760

Findings and Award
Pursuant to Art. I,
Section 4, New York
Dock Conditions

Appearances:

For the Organization:

Byron A. Boyd, Jr., Assistant President
Clinton J. Miller III, General Counsel
J. Previsich, General Chairman

For the Carrier:

W. S. Hinckley, General Director Labor Relations
Dick Meredith, Asst. Vice President-Employee Relations, Planning
Catherine J. Andrews, Assistant Director Labor Relations
Mark E. Brennan, Operating Department

FINDINGS:

The parties to this dispute are the United Transportation Union and the Union Pacific System/Southern Pacific System. In Finance Docket No. 32760, the U.S. Department of Transportation, Surface Transportation Board (STB) approved the merger of the two systems which included various rail entities.

In accordance with New York Dock provisions the Carrier served notices on the Organization's General Chairmen covering two geographical areas referred to by the Carrier as the Salt Lake Hub and the Denver Hub. The parties in their submissions detailed the negotiating dates which covered approximately a 120 day period. The parties were unable to reach an agreement and a request was made for arbitration in accordance with New York Dock. The parties were unable to jointly select an arbitrator and through a joint letter to the National Mediation Board requested that one be appointed. By letter dated February 21, 1997 the undersigned was appointed by the National Mediation Board.

This arbitration is somewhat unique in that in addition to the normal terms and conditions of arbitration, under New York Dock, the Organization requested arbitration of what is known as the

"commitment letter". This letter was signed by the Carrier and addressed to the Organization's President and provided for certain commitments with regards to the entire merger process beginning with the Carrier's filing with the STB. It is the Organization's position that the Carrier did not live up to the commitments and as a result the issues raised therein should be arbitrated.

Two separate arbitration presentations were made beginning on March 25, 1997, one covering the commitment letter and the other the terms and conditions to govern the two Hubs. Since these two hearings are so intertwined, they shall be dealt with in this one award.

COMMITMENT LETTER

The purpose of the letter was to 1. Limit the Organization's exposure in the merger to items "necessary" to completing the merger, 2. Gain protection certification under New York Dock for a number of employees, and 3. Give affected General committees an opportunity to develop a seniority system for the merged areas.

In exchange, the Carrier wanted 1. the UTU's support for the merger and operating plans, 2. the Organization's recognition that some changes were "necessary" in the merger and, 3. a seniority system that was not illegal, administratively burdensome or costly.

It is apparent that the writer and the addressee of the commitment letter understood the benefits of a simpler merger process than the parties had previously undertaken: however, the negotiators on both sides failed to see the same benefits and in essence pushed the envelope too far. Both parties included items in their proposals that went beyond what was necessary. While the Organization was the moving party in requesting arbitration over the letter, their proposals included several unnecessary items such as changing work rules, cherry picking work rules, certification beyond the number in the commitment letter in lieu of relocation and a seniority system that was administratively burdensome and potentially more costly. However, when the Carrier's proposals, which included an unnecessary 25 mile zone and crew consist changes are brought before this arbitrator, it is not difficult to say that anything beyond what was contemplated in the commitment letter will not be used to escape any commitment to provide for automatic certification as provided later in this award, because the parties failed to make a voluntary agreement.

It is apparent to this arbitrator that not all the parties to the negotiations are aware or understand the value the Organization received by the letter. Some members of the Organization's

negotiating team apparently feel there is no need to reach a voluntary agreement in order to achieve automatic certification and have made demands that most certainly will not lead to such a voluntary agreement. On the other hand, as mentioned above the Carrier has reached beyond the limits that would be acceptable to creating a voluntary agreement.

Neither party should take comfort in future negotiations that this award provides for future automatic certification. The commitment letter is an example of responsible recognition of the needs of both parties and for the first round of merger negotiations/arbitration this arbitrator simply will not substitute his judgement for those behind the commitment letter.

TERMS AND CONDITIONS

One of the key areas of dispute deals with what is "necessary" to accomplish the merger. In reviewing previous mergers and the need to coordinate employees and operations at common points and over parallel operations, it is proper to unify the employees and operations under a single collective bargaining agreement and single seniority system in each of the two Hubs. This does not mean the Carrier has authority to write a new agreement, but the Carrier's selection of one of the existing collective bargaining agreements to apply to all those involved in a Hub as proposed in this case is appropriate.

While selecting one existing collective bargaining agreement puts many issues to rest, both parties recognized in the letter that other changes may be necessary for a merger to accomplish a smooth flow of operations. These changes, however, were not to be monetary but operational. Such operational changes would include the combining of yards into single terminals, consolidating pool freight, local and road switcher operations and combining extra boards into fewer extra boards that would cover the more expansive operations of the two Hubs.

Seniority is always the most difficult part of a merger. There are several different methods of putting seniority together but each one is a double-edged sword. In a merger such as this one that also involves line abandonments and alternate routing possibilities on a regular basis, the tendency is to present a more complicated seniority structure as the Organization did. What is called for is not a complicated structure but a more simplified one that relies on New York Dock protection for those adversely affected and not perpetuating seniority disputes long into the future. The Carrier's proposals fairly address the issue in both Hubs.

There are two issues that must be addressed with regards to crew consist. The first is the special allowance/productivity fund issue and the second is the Carrier's request for the least restrictive yard/local provisions to overlay the Eastern District agreement. The second is easier to deal with. If the Carrier believed that another agreement would better fit this area, it had the opportunity to select that agreement for this area in total. Since it did not, this arbitrator will not give a separate crew consist provision to them. The Eastern District agreement covers this area with respect to crew size and work in both yard and road service.

The special allowance/productivity funds must be coordinated. This arbitrator does not see any undue advantage to the Carrier in its proposal to pay out the existing funds and create a new one. Those who would have been eligible for a productivity fund and special allowance had they worked under the Eastern District agreement since their entry into train service shall be entitled to them under the new plan. Those who sold their special allowances/productivity funds previously are not entitled to a windfall now and would not be eligible for those payments regardless of their seniority date.

Without the commitment letter, the Carrier is not required to certify any employees as protected. The letter identified a number of employees to be protected and the Carrier's notices, as amended, identified a larger number. Since the Carrier's proposal exceeded the commitment letter, it should protect the larger number referenced in its notices. If the Eastern District General Chairman and Carrier are not able to agree within 30 days of this Award who the specific employees are, then it shall be the employees whose assignments are involuntarily changed until the number in the notices is reached. If both proposals were proper and were not over reaching, as they were here, then this arbitrator would not have imposed this provision.

I have identified the major issues in more detail above and now turn to the proposals. In reviewing the proposals, this Board finds that the Carrier's proposals, including questions and answers, for each Hub, submitted to this panel are appropriate for inclusion as part of this Award except for the following:

Salt Lake City proposal:

1. Article III A (2) and (3) concerning the metro complex.
2. Article IV B (1) concerning the 25 mile zone.
3. Article VI protection is amended per above.
4. Article VIII E. Concerning the least restrictive crew consist.

5. All questions and answers referring to these eliminated sections.

Denver Hub proposal:

1. Article IV B (1) concerning the 25 mile zone.
2. Article VI protection is amended per above.
3. Article IX E concerning the least restrictive crew consist.
4. All questions and answers referring to these eliminated sections.

Copy of Carrier's proposed implementing agreement for the Salt Lake Hub and the Denver Hub are attached hereto and made a part of this Award.

This arbitrator is convinced from the facts of record that the changes contained in the Carrier's proposals as modified by the exceptions noted herein are necessary to effectuate the STB's approved consolidation and yield enhanced efficiency in operations benefiting the general public and the employees of the merged operations.

This Award is final and effective immediately. Should the Organization and the Carrier desire to continue negotiations over other elements then they should so proceed. These negotiations should be between the Eastern District General Chairman and the Carrier. These would be voluntary and not subject to Section 4 New York Dock arbitration if they do not prove fruitful.

Signed this 14th day of April 1997.

James E. Yost, Arbitrator

MERGER IMPLEMENTING AGREEMENT
(Salt Lake Hub)

between the

UNION PACIFIC RAILROAD COMPANY
SOUTHERN PACIFIC RAILROAD COMPANY

and the

UNITED TRANSPORTATION UNION

In Finance Docket No. 32760, the Surface Transportation Board approved the merger of Union Pacific Railroad Company/Missouri Pacific Railroad Company (Union Pacific or UP) with the Southern Pacific Transportation Company, the SPCSL Corp., the SSW Railway and the Denver and Rio Grande Western Railroad Company (SP). In approving this transaction, the STB imposed New York Dock labor protective conditions.

In order to achieve the benefits of operational changes made possible by the transaction, to consolidate the seniority of all employees working in the territory covered by this Agreement into one common seniority district covered under a single, common collective bargaining agreement,

IT IS AGREED:

I. SALT LAKE HUB.

A new seniority district shall be created that is within the following area: DRGW mile post 446.5 at Grand Junction, UP mile post 161.02 at Yermo, UP mile post 665.0 and SP mile post 553.0 at Elko, UP mile post 110.0 at McCammon and UP mile post 847 at Granger and all stations, branch lines, industrial leads and main line between the points identified.

II. SENIORITY AND WORK CONSOLIDATION.

The following seniority consolidation will be made:

A. A new senicrity district will be formed and master Seniority Rosters--(UP/UTU) Salt Lake Hub--will be created for the employees working as Conductors, Brakemen, Yardmen (the term yardman shall, in this agreement, refer to all yard positions

including foreman, helper, utility man, herder, switchtender and post October 31, 1985 hostlers) and Firemen in the Salt Lake Hub on November 1, 1996. (The term "trainmen" is used hereafter as a generic term to include all UTU-C,T&Y represented employees and where applicable all UTU-E represented employees) The four new rosters will be created as follows:

1. Switchmen/brakemen placed on these rosters will be dovetailed based upon the employee's current seniority date. If this process results in employees having identical seniority dates, seniority will be determined by the employee's current hire date with the Carrier.

2. Conductors placed on these rosters will be dovetailed based upon the employee's actual promotion date into the craft. If this process results in employees having identical seniority dates, seniority will be determined by the employee's current hire date with the Carrier.

3. All employees placed on a roster may work all assignments protected by a roster in accordance with their seniority and the provisions set forth in this agreement.

4. New employees hired and placed on the rosters subsequent to the adoption of this agreement will have no prior rights.

B. Employees assigned to the merged rosters with a seniority date prior to November 1, 1996, will be accorded primary prior rights reflecting their previous seniority areas that remain in the Hub and secondary prior rights with dovetail rights being the final determination for selection purposes to pool operations as follows:

POOL	PRIMARY	SECONDARY	DOVETAIL
SLC-MILFORD	S. CENTRAL	NONE	YES
SLC-POCATELLO	IDAHO	NONE	YES
SLC-Green River	UPED/IDAHO-ratio	NONE	YES
OG-Green River	UPED	DRGW	YES
OG-ELKO	SP	WP	YES
SLC-ELKO	WP	SP	YES
SLC-Provo/Helper/Grand Jct.	DRGW	NONE	YES
SLC-PROVO	DRGW	NONE	YES
Milford-Provo/Helper	SO. CENTRAL	DRGW	YES

Milford-Las Vegas	So. Central/Las Vegas	NONE	YES
Las Vegas-Yermo	LAS VEGAS	NONE	YES

Note 1: The Carrier does not plan Salt Lake City - Ogden pool operations and this service will be handled by an extra board or road switcher service. If sufficient extra work develops to sustain 4 or more pool turns, then a pool shall be established and pro rated on a 50/50 basis with Idaho prior right employees taking the odd numbered turns and DRGW prior right employees taking the even numbered turns.

Note 2: Salt Lake City - Helper may be combined with either the Salt Lake City - Grand Junction or the Salt Lake City - Provo pool.

Note 3: This Section does not limit the Carrier to these pool operations. New pools operated on prior rights areas will have the same primary prior rights and those that operate over two prior right areas will be manned from the dovetail roster.

Note 4: The Salt Lake City-Elko pool and the Salt Lake City-Grand Junction pool shall be single-headed operations with Salt Lake City as the home terminal. The Carrier shall give ten days written notice of the change to single headed pools if not given in the original 30 day implementation notice.

C. Yard crews will not be restricted in a terminal where they can operate but the following will govern which employees will have preference for assignments that go on duty in the following areas:

LOCATION	PRIMARY	SECONDARY	DOVETAIL
ROPER	DRGW	IDAHO	YES
SLC-NorthYard/intermodal	IDAHO	DRGW	YES
OGDEN	OURD/DAHO	SP	YES
ELKO	WP	SP	YES
CARLIN	SP	WP	YES
PROVO	DRGW	South Central	YES
Transfer Jobs	On Duty Point	NONE	YES
LAS VEGAS	LAS VEGAS	NONE	YES

D. Road Switchers will work in a given area and may cross prior right boundaries. Employees shall have prior rights to road switchers based on the on duty points:

1. Salt Lake City - North: Idaho.

2. Salt Lake City - Provo: DRGW

3. Provo - Milford: South Central

4. Salt Lake City - Milford via Tintic: South Central

5. In other areas the prior rights of the on duty points will govern.

E. Locals that continue current operations shall be prior righted. Locals that operate over more than one prior rights area shall be prior righted based on the on duty point.

F. It is understood that certain runs home terminaled in the Salt Lake Hub will have away from home terminals outside the Salt Lake Hub and that certain runs home terminaled outside the Salt Lake Hub will have away from home terminals inside the Salt Lake Hub. Examples are: Salt Lake City/Ogden runs to Green River and Pocatello, and Portola/Sparks to Elko. It is not the intent of this agreement to create seniority rights that interfere with these operations or to create double headed pools. For example, Sparks will continue to be the home terminal for Sparks/Elko runs and a double headed pool will not be established.

G. All trainman vacancies within the Salt Lake Hub must be filled prior to any trainman being reduced from the working list or prior to trainman being permitted to exercise to any reserve boards.

H. With the creation of the new seniority district all previous seniority outside the Salt Lake Hub held by trainmen on the new rosters shall be eliminated and all seniority inside the Hub held by trainmen outside the Hub shall be eliminated.

I. Trainmen will be treated for vacation and payment of arbitraries as though all their service on their original railroad had been performed on the merged railroad.

J. Trainmen who have been promoted to Engine service and hold engine service seniority inside the Salt Lake Hub and working therein on November 1, 1996 shall be placed on the appropriate roster(s) using their various trainmen seniority dates. Those Engine service employees, if any, who do not have a train service date in the Salt Lake Hub shall be given one in accordance with the October 31, 1985 National Agreement. Those engine service employees who previously came from an area that was not covered by an UTU-E contract shall be placed on the dovetail UTU-E roster with their current "reserve engineer" (fireman) seniority date.

III. TERMINAL CONSOLIDATIONS.

The terminal consolidations will be implemented in accordance with the following provisions:

A. Salt Lake City/Ogden Metro Complex. A new consolidated Salt Lake City/Ogden Metro Complex will be created to include the entire area within and including the following trackage:

Ogden mile posts 989.0 UP east, 3.25 UP north and 780.21 SP west and to Salt Lake City mile posts 739.0 DRGW south and 781.17 UP west.

1. All UP and SP pool, local, work train and road switcher operations within the SLC/Ogden Metro Complex shall be operated as a single carrier operation.

2. All road crews may receive/leave their trains at any location within the boundaries of the new complex and may perform any work within those boundaries pursuant to the controlling collective bargaining agreements. The Carrier will designate the on/off duty points for road crews within the new complex with the on/off duty points having appropriate facilities for inclement weather and other facilities as currently required in the collective bargaining agreement. The on-duty points shall be the same as the off-duty points.

3. All rail lines, yards and/or sidings within the new complex will be considered as common to all crews working in, into and out of the complex. All crews will be permitted to perform all permissible road/yard moves . Interchange rules are not applicable for intra-carrier moves within the complex.

4. In addition to the consolidated complex, all UP and SP operations within the greater Salt Lake City area and all UP and SP operations (including the OUR&D) within the greater Ogden area shall be consolidated into two, separate terminal operations. The existing switching limits at Ogden will now include the former SP rail line to SP Milepost 780.21. The existing UP switching limits at Salt Lake City will now include the Roper Yard switching limits (former DRGW) to DRGW Milepost 739.0.

B. Provo. All UP and SP operations within the greater Provo area shall be consolidated into a unified terminal operation.

C. Elko/Carlin. All UP and SP operations within the greater Elko and Carlin area shall be consolidated into a unified terminal operation at Elko. Carlin will become a station enroute.

D. General Conditions for Terminal Operations.

1. Initial delay and final delay will be governed by the controlling collective bargaining agreement, including the Duplicate Pay and Final Terminal Delay provisions of the 1985 and 1991 National Awards and implementing agreements.

2. Employees will be transported to/from their trains to/from their designated on/off duty point in accordance with Article VIII, Section 1 of the October 31, 1985 National Agreement.

3. The current application of National Agreement provisions regarding road work and Hours of Service relief under the combined road/yard service zone, shall continue to apply. Yard crews at any location within the Hub may perform such service in all directions out of their terminal.

Note: Items 1 through 3 are not intended to expand or restrict existing rules.

IV. POOL OPERATIONS.

A. The following pool consolidations may be implemented to achieve efficient operations in the Salt Lake City Hub:

1. **Salt Lake City - Elko and Ogden - Elko.** These operations may be run as either two separate pools or as a combined pool with the home terminal within the Salt Lake City/Ogden metro complex. This pool service shall be subject to the following:

(a) If the pools are combined, then the former SP and WP trainmen shall have prior rights on a 40/60 basis.

(b) If separate pools, the Carrier may operate the crews at the far terminal of Elko as one pool back to the metro complex with the crew being transported by the Carrier back to its original on duty point at the end of their service trip.

(c) The Carrier must give ten days written notice of its intent to change the number of pools or to combine the pools at Elko for a single pool returning to Salt Lake City/Ogden.

(d) Since Elko will no longer be a home terminal for pool freight operations east to the metro complex a sufficient number of pool and extra board employees will be relocated to the metro complex.

2. **Salt Lake City - Green River/Pocatello and Ogden - Green River.** These operations may be run as either one, two, or three separate pools. The Carrier shall determine whether to combine any or all of the pools and shall give ten days notice of its combining of pools.

3. **Salt Lake City - Grand Junction/Helper/ Provo.** These operations may be run as either one, two, or three separate pools with the home terminal within the metro complex. The carrier must give ten days written notice of its intent to change the number of pools. If run as a combined pool(s) then prior rights to the pool(s) shall be based on the percentages that existed on the day the ten day notice is given.

4. **Helper-Grand Junction/Provo and Milford-Provo/Helper.** Each of these operations will be run as a single pool.

5. **Other Service.** Any pool freight, local, work train or road switcher service may be established to operate from any point to any other point within the new Seniority District with the on duty point within the new seniority district.

Note: All service, with on duty points at Elko, operating to Winnemucca, but not including Winnemucca, shall be operated as part of the Salt Lake City Hub.

6. The operations listed in A 1-4 above, may be implemented separately, in groups or collectively, upon ten (10) days written notice by the Carrier to the General Chairman. Implementation notices governing item (5) above, shall be governed by applicable collective bargaining agreements.

Note 1: While the Sparks-Carlin and Wendel-Carlin pools are not covered in this notice it is understood that they will operate Sparks-Elko and Wendel-Elko and will be paid actual miles when operating trains between these two points pursuant to the current collective bargaining agreements and will be further handled when merger coordinations are handled for that area.

Note 2: The Portola-Elko and Winnemucca-Elko pools shall continue to operate pursuant to the current collective bargaining agreements and will be further handled when merger coordinations are handled for that area.

B. The terms and conditions of the pool operations set forth in Section A shall be the same for all pool freight runs whether run as combined pools or separate pools. The terms and conditions are those of the designated collective bargaining agreement as modified by subsequent national agreements, awards and implementing documents and those set forth below. The basic Interdivisional Service conditions shall apply to all pool freight service. Each pool shall be paid the actual miles run for service and combination service/deadhead with a minimum of a basic day.

1. **Twenty-Five Mile Zone** - At Salt Lake City, Ogden, Elko, Milford, Grand Junction, Helper, Provo, Green River, Las Vegas, Yermo and Pocatello pool crews may receive their train up to twenty-five miles on the far side of the terminal and run on through to the scheduled terminal. Crews shall be paid an additional one-half (½) basic day for this service in addition to the miles run between the two terminals. If the time spent in this zone is greater than four (4) hours, then they shall be paid on a minute basis.

Example: A Salt Lake City-Milford crew receives their north bound train ten miles south of Milford but within the 25 mile zone limits and runs to Salt Lake. They shall be paid the actual miles established for the Salt Lake-Milford run and an additional one-half basic day for handling the train from the point ten (10) miles south of Milford back through Milford.

Note: Crews receiving their trains on the far side of their terminal but within the Salt Lake-Ogden complex shall be paid under this provision.

2. **Turnaround Service/Hours of Service Relief.** Except as provided in (1) above, turnaround service/hours of service relief at both home and away from home terminals shall be handled by extra boards, if available, prior to setting up other employees. Trainmen used for this service may be used for multiple trips in one tour of duty in accordance with the designated collective bargaining agreement rules. Extra boards may handle this service in all directions out of a terminal that is within the Hub.

3. Nothing in this Section B (1) and (2) prevents the use of other employees to perform work currently permitted by prevailing agreements.

C. **Agreement coverage.** Employees working in the Salt Lake Hub shall be governed, in addition to the provisions of this Agreement by the UP Agreement covering the Eastern District for both road and yard, including all addenda and side letter agreements pertaining to that agreement, the 1996 National Agreement applicable to Union Pacific and previous National Agreement provisions still applicable. Except as specifically provided herein, the system and national collective bargaining agreements, awards and interpretations shall prevail. None

of the provisions of these agreements are retroactive. Since the employees have not worked under a daily preference system in the yard the employees shall be governed by the regular application system for yard assignments and the daily preference system shall not apply in the Salt Lake Hub.

D. After implementation, the application process will be used to fill all vacancies in the Hub as follows:

1. Prior right vacancies must first be filled by an employee with prior rights to the vacancy who is on a reserve board prior to considering applications from employees who do not have prior rights to the assignment .

2. If no prior right applications are received, then the junior dovetailed employee on a reserve board at the location who holds prior rights to the assignment will be forced to the assignment or permitted to exercise seniority to a position held by another employee.

3. If there are no prior right employees on one of the reserve boards covering the vacant prior right assignment, then the senior non prior right applicant will be assigned. If no applications are received then the most junior employee on any of the reserve boards will be recalled and will take the assignment or displace a junior employee. If there are no trainmen on any reserve boards, then the senior furloughed trainman in the Salt Lake Hub shall be recalled to the vacancy. When forcing or recalling, prior rights trainmen shall be forced or recalled to prior right assignments prior to trainmen who do not have prior rights.

4. Non prior right vacancies will be filled by the senior applicant from the dovetail roster. If no applicant then the junior employee on any reserve board in the Hub shall be recalled to the vacancy in accordance with the provisions of the UPED reserve board agreement.

V. EXTRA BOARDS.

A. The following extra boards may be established to protect vacancies and other extra board work in or out of the Salt Lake City/Ogden metro complex or in the vicinity thereof:

1. **Ogden :** One conductor and one brakeman/switchmen(total of two) extra boards to protect the Ogden-Green River Pool, and the Ogden-Elko Pool (if pools are operated separately), the Ogden yard assignments and all road switchers, locals and work trains between Ogden-Green River, Clearfield-McCammon and Ogden-Elko.

2. **Salt Lake North:** One conductor and one brakeman/switchmen (total of two) extra boards to protect the Salt Lake- Pocatello/Green River Pool, the Salt Lake-Elko pool, all Salt Lake Yard assignments and all road switchers, locals and work trains between Salt Lake to Wendover and Salt Lake to Clearfield except work trains may work all the way to Ogden

Note: If the Carrier operates Metro Complex pools to Pocatello/ Green River and Elko then the above extra boards will convert to two sets of extra boards with one set covering east pool freight and one covering west pool freight. The east extra boards will also cover all road switcher, locals, yard assignments and work trains at or between Salt Lake and Pocatello/Green River/Ogden with the west extra board covering these assignments between Ogden/Salt Lake and Elko.

3. **Salt Lake South:** One conductor/brakeman extra board to protect Salt Lake -Milford/Helper/Grand Junction/Provo pool(s) and all road switcher local and work train assignments in this area.

Note: The Carrier may operate more than these extra boards in the Salt Lake Metro complex. When more than these extra boards are operated the Carrier shall notify the General Chairman what area each extra board shall cover. When combining extra boards the Carrier shall give ten (10) days written notice.

B. The Carrier may establish or keep extra boards at points such as Milford, Provo, Helper, Elko, Las Vegas etc to meet the needs of service pursuant to the designated collective bargaining agreement provisions. If there are less than three yard assignments at any of these locations then the extra boards shall be conductor/brakemen/switchmen boards. If at least three yard assignments then the extra boards shall be separated into a conductor board and a brakemen/switchmen board.

C. At any location where both UP and SP/DRGW extra boards exist the Carrier may combine these boards into one board.

D. The Ogden and Salt Lake extra boards shall be filled off the dovetail roster. Extra Boards in prior right areas such as Milford, Las Vegas and Helper shall be filled using prior rights. Extra boards at the dual locations of Provo and Elko shall be filled on a 50/50 basis. At Grand Junction the extra board will be a combination east-west board.

VI. PROTECTION.

The Surface Transportation Board has stated that adversely affected employees shall be covered by New York Dock protection.

VII. IMPLEMENTATION.

A. This implements the merger of the Union Pacific and Southern Pacific railroad operations in the area covered by Notice 19W and any amended notices thereto.

In addition, the parties understand that the overall implementation is being phased in to accommodate the cut over of computer operations, dispatching, track improvements and clerical support.

B. The Carrier shall give 30 days written notice for implementation of this agreement and the number of initial positions that will be changed in the Hub. Employees whose assignments are changed shall be permitted to exercise their new seniority. After the initial implementation the 10 day provisions of the various Articles shall govern.

C. Prior to the movement to reserve boards or transfers outside the Salt Lake Hub, it will be necessary to fill all positions in the Salt Lake Hub.

D. In an effort to provide for employees to follow their work to areas outside the Salt Lake Hub, the Carrier shall advertise vacancies at locations outside the Hub for a period of one year from the implementation date, as long as a surplus of trainmen exist in the Hub, for employees to make application. The dovetail roster shall be used for determining the senior applicant. Should an insufficient number of applications be received then the junior surplus employee shall be forced to the vacancy. Employees who move by application or force shall establish new seniority and relinquish seniority in the Hub.

VIII. CREW CONSIST.

A. Upon implementation of this agreement (award) all crew consist productivity funds that cover employees in the Hub shall be frozen pending payment of the shares to the employees both inside the Hub and outside the Hub. A new productivity fund shall be created on implementatiion day that will cover those employees in the Salt Lake Hub and the funds that cover employees outside the Hub shall continue for the employees who remain outside the Hub. The Salt Lake Hub employees shall have no interest or share in payments made to those funds after implementation date.

B. Payments into the new productivity fund shall be made in compliance with the UPED crew consist agreement. Those employees who would have participated in the shares of the productivity funds had they originally been hired on the UPED shall be eligible to participate in the distribution of the new fund except as stated in (D) below.

C. Employees who would have been covered under the UPED special allowance provisions had they been hired originally on the UP Eastern District shall be entitled to a special allowance under those provisions except as stated in (D) below.

D. Those employees who sold their special allowances/productivity funds previously are not entitled to those payments under this agreement (award).

E. While the UPED crew consist agreement will govern this Hub the Carrier is not required to place yardmen/brakemen on any local, road switcher, yard or other assignment anywhere in the Hub that is was not required to use under the least restrictive crew consist agreement that previously existed.

IX. FAMILIARIZATION.

A. Employees will not be required to lose time or "ride the road" on their own time in order to qualify for the new operations. Employees will be provided with a sufficient number of familiarization trips in order to become familiar with the new territory. Issues concerning individual qualifications shall be handled with local operating officers. The parties recognize that different terrain and train tonnage impact the number of trips necessary and the operating officer assigned to the merger will work with the local Managers of Operating Practices and local chairmen in implementing this section.

X. FIREMEN

A. This agreement also covers firemen. Pre-October 31, 1985 firemen will only have seniority in the Salt Lake Hub and if unable to work an engineer's assignment or a mandatory firemen's/hostler psotion they shall be permitted to hold a fireman's postion first in their prior rights area and second, using their dovetail seniority.

B. Post October 31, 1985 firemen shall continue to be restricted to mandatory assignments and if unable to hold an engine service postion will be required to exercise their train service seniority in the Hub.

XI. HEALTH AND WELFARE

Employees not previously covered by the UPED agreement shall have 60 days to join the Union Pacific Hospital Association in accordance with that agreement.

QUESTIONS AND ANSWERS -UTU SALT LAKE HUB

Article I - SALT LAKE HUB

Q1. Does the new seniority district change switching limits at the mile posts indicated?

A1. No. It is the intent of this agreement to identify the new seniority territory and not to change the existing switching limits except as specifically provided elsewhere in this agreement.

Q2. Which Hub is Grand Junction in?

A2. For seniority purposes trainmen are in the Denver Hub, however due to the unique nature of Grand Junction being a home terminal for one Hub and away from home for another Hub, the extra board may perform service on both sides of Grand Junction.

Q3. What Hub are the Valmy coal assignments in?

A3. Because they are on duty at Elko and work to or short of Winnemucca, but not including Winnemucca, they are part of the Salt Lake Hub. This is also true of assignments that work out of Carlin but short of Winnemucca.

Article II - SENIORITY AND WORK CONSOLIDATION

Q4. How long will prior rights rosters be in effect?

A4. They will lose effect through attrition.

Q5. Do the OUR&D rosters and agreements survive this merger?

A.5. No.

Q.6 It is the intent of Article II B note 4 to operate SLC-Elko and SLC-Grand Junction as one pool?

A.6 No, each of these pool are now double headed and it is the intent of that note to run each pool as a single headed pool and not combine them with each other.

Q7. In Article II(G), what does it mean when it refers to protecting all trainmen vacancies within the Hub?

A7. If a vacancy exists in the Salt Lake Hub, it must be filled by a prior rights employee prior to placing employees on reserve boards. If a non prior rights employee is working in the Salt Lake Hub then a prior rights employee must displace that person prior to prior right trainmen going to a reserve board. If a vacancy exists in a pool and a trainman is on a reserve board that

person will be recalled prior to the carrier using trainmen who do not hold reserve board rights or hiring new trainmen..

Q8. Will existing pool freight terms and conditions apply on all pool freight runs?
A8. No. The terms and conditions set forth in the controlling collective bargaining agreements and this document will govern.

Q9. What is the status of an employee who placed in the Hub after November 1, 1996 but prior to the implementation of this Award?
Q9. They shall be placed on the roster using their dovetail date but they shall not have any prior rights.

Q10. Will an employee gain or lose vacation benefits as a result of the merger?
A10. No.

Q11. When the agreement is implemented, which vacation agreement will apply?
A11. The vacation agreements used to schedule vacations for 1997 will be used for the remainder of 1997. Thereafter the Eastern District Agreement will govern.

Q12. If a local operated by a UP Idaho trainman previously went on duty at the UP North Yard now goes on duty at the Roper Yard, does it now operate over more than one seniority district or is it continuing current operations?
A12. Changes in on duty points within a terminal or the travel over other trackage in a terminal does not alone alter the "continue current operations" intent of the Agreement.

Q13. What is the status of firemen's seniority?
A13. Firemen seniority will be dovetailed in a similar manner as trainmen.

ARTICLE III - TERMINAL CONSOLIDATIONS

Q14. Are the national road/yard zones covering yard crews measured by the metro complex limits or from the switching limits where the yard assignment goes on duty?
A14. The switching limits where the yard crew goes on duty.

Q15. If crews go on duty in the Complex short of Ogden, is Ogden part of the initial terminal?
A15. No, it is an intermediate point.

ARTICLE IV - POOL OPERATIONS

Q16. If the on duty point for the Salt Lake - Green River pool is moved from North Yard to Roper Yard, will the mileage paid be increased?

A16. Yes. The mileage will be from the center of Roper Yard to Green River.

Q17. Can you give some examples of work currently permitted by prevailing agreements as referenced in Article IV B 3?

A17. Yes, yard crews are currently permitted to perform hours of service relief in the road/yard zone established in the National Agreement, ID crews may perform combination deadhead service and road switchers may handle trains that are laid down in their zone.

Q18. Because of the elimination of Elko as a home terminal for pool service what type of job assignment will the trainmen who remain at Elko protect?

A18. The Carrier anticipates that for those trainmen who remain in this area, that based on manpower needs, the guaranteed extra board will protect extra locals, branch line work (Valmy coal), yard vacancies, short turnaround service, HOSA relief work and so forth.

Q19. Will the Carrier change the Las Vegas-Milford pool to a single-headed pool?

A19. No, not as a result of this merger notice. Article IX of the 1986 National Award would govern any future action.

Q20. If a crew in the 25 mile zone is delayed in bringing the train into the original terminal so that it does not have time to go on to the far terminal, what will happen to the crew?

A20. Except in cases of emergency, the crew will be deadheaded on to the far terminal.

Q21. Is it the intent of this agreement to use crews beyond the 25 mile zone?

A21. No.

Q22. In Article IV(B), is the ½ basic day for operating in the 25 mile zone frozen and/or is it a duplicate payment/ special allowance?

A22. No, it is subject to future wage adjustments and it is not duplicate pay/special allowance.

Q23. How is a crew paid if they operate in the 25 mile zone?

A23. If a pre-October 31, 1985 trainmen is transported to its train 10 miles south of Milford and he takes the train to Salt Lake and the time spent is one hour south of Milford and 9 hours 17 minutes between Milford and Salt Lake with no initial or final delay earned, the employee shall be paid as follows:

A. One-half basic day for the service South of Milford because it is less than four hours spent in that service.

B. The road miles between Salt Lake and Milford (207).

C. One hour overtime because the agreement provides for overtime after 8 hours 17 minutes on the road trip between Salt Lake and Milford. (207 miles divided by 25 = 8'17")

Q24. Would a post October 31, 1985 trainman be paid the same?

A24. No. The National Disputes Committee has determined that post October 31, 1985 trainmen come under the overtime rules established under the National Agreements/Awards/Implementing Agreements that were effective after that date for both pre-existing runs and subsequently established runs. As such, the post October 31, 1985 trainman would not receive the one hour overtime in C above but receive the payments in A & B.

Q25. How will initial terminal delay be determined when performing service as outlined above?

A25. Initial terminal delay for crews entitled to such payments will be governed by the applicable collective bargaining agreement and will not commence when the crew operates back through the on duty point. Operation back through the on duty point shall be considered as operating through an intermediate point.

Q26. What does "at the location" mean in Article IV D 2?

A26. This is a gegraphical term that forces junior employees in the general location to a vacancy rather than someone much farther away.

Q27. Is the identification of the UP Eastern District collective bargaining agreement in Article IV(C) a result of collective bargaining or selection by the Carrier?

A27. Since UP purchased the SP system the Carrier selected the collective bargaining agreement to cover this Hub.

Q28. When the UP Eastern District agreement becomes effective what happens to existing claims filed under the other collective bargaining agreements that formerly existed in the Salt Lake Hub?

A28. The existing claims shall continue to be handled in accordance with those agreements and the Railway Labor Act. No new claims shall be filed under those agreements once the time limit for filing claims has expired for events that took place prior to the implementation date.

Q29. In Article IV(D), if no applications are received for a vacancy on a prior rights assignment, does the prior right trainman called to fill the vacancy have the right to displace a junior prior right trainman from another assignment?

A29. Yes. That trainman has the option of exercising his/her seniority to another position held by a junior prior right employee, within the time frame specified in the controlling collective bargaining agreement, or accepting the force to the vacancy.

ARTICLE V - EXTRA BOARDS

Q30. How many extra boards will be combined at implementation?
A30. It is unknown at this time. The Carrier will give written notice of any consolidations whether at implementation or thereafter.

Q31. Are these guaranteed extra boards?
A31. Yes. The pay provisions and guarantee offsets and reductions will be in accordance with the existing UPED guaranteed extra board agreement.

ARTICLE VI - PROTECTION

Q32. What is loss on sale of home for less than fair value?
A32. This refers to the loss on the value of the home that results from the Carrier implementing this merger transaction. In many locations the impact of the merger may not affect the value of a home and in some locations the merger may affect the value of a home.

Q33. If the parties cannot agree on the loss of fair value what happens?
A33. New York Dock Article I, Section 12(d) provides for a panel of real estate appraisers to determine the value before the merger announcement and the value after the merger transaction.

Q34. What happens if an employee sells a $50,000 home for $20,000 to a family member?
A34. That is not a bona fide sale and the employee would not be entitled to a New York Dock payment for the difference below the fair value.

Q35. What is the most difficult part of New York Dock in the sale transaction?
A35. Determine the value of the home before the merger transaction. While this can be done through the use of professional appraisers, many people think their home is valued at a different amount.

Q36. Who is required to relocate and thus eligible for the allowance?
A36. An employee who can no longer hold a position at his/her location and must relocate to hold a position as a result of the merger. This excludes employees who are borrow outs or forced to a location and released.

Q37. Are there mileage components that govern the eligibility for an allowance?
A37. Yes, the employee must have a reporting point farther than his/her old reporting point and at least 30 miles between the current home and the new reporting point and at least 30 miles between reporting points

Q38. Can you give some examples?

A38. The following examples would be applicable.

Example 1: Employee A lives 80 miles north of Salt Lake and works a yard assignment at Salt Lake. As a result of the merger he/she is assigned to a road switcher with an on duty point 20 miles north of Salt Lake. Because his new reporting point is closer to his place of residence no relocation benefits are allowable.

Example 2: Employee B lives 35 miles north of Salt Lake and goes on duty at the UP yard office in Salt Lake. As a result of the merger he/she goes on duty at the SP yard office which is six miles away. No relocation benefits are allowable.

Example 3: Employee C lives in Elko and is unable to hold an assignment at that location and places on an assignment at Salt Lake. The employee meets the requirement for relocation benefits.

Example 4: Employee D lives in Salt Lake and can hold an assignment in Salt Lake but elects to place on a Road Switcher 45 miles north of Salt Lake. Because the employee can hold in Salt Lake no relocation benefits are allowable.

Q39. Are there any restrictions on routing of traffic or combining assignments after implementation?

A39. There are no restrictions on the routing of traffic in the Salt Lake Hub once the 30 day notice of implementation has lapsed. There will be a single collective bargaining agreement and limitations that currently exist in that agreement will govern (e.g. radius provisions for road switchers, road/yard moves etc.).However, none of these restrictions cover through freight routing. The combining of assignments are covered in this agreement.

Article VIII - IMPLEMENTATION

Q40. On implementation will all trainmen be contacted concerning job placement?

A40. No, the implementation process will be phased in and employees will remain on their assignments unless abolished or combined and then they may place on another assignment or on a reserve board depending on their seniority rights. The new seniority rosters will be available for use by employees who have a displacement.

Q41. How will the new extra boards be created?

A41. When the Carrier gives notice that the current extra boards are being abolished and new ones created in accordance with the merger agreement, the Carrier will advise the number of assignments for each extra board and the effective date for the new extra board. The trainmen will have at least ten days to make application to the new extra board and the dovetail roster

will be used for assignment to the Board. It is anticipated that the extra boards will have additional trainmen added at first to help with the familiarization process.

Q42. Will the Carrier transfer all surplus employees out of the Hub?
A42. No. The Carrier will retain some surplus to meet anticipated attrition and growth, however, the number will be determined by the Carrier.

Q43. When will reserve boards be established and under what conditions will they be governed?
A43. When reserve boards are established they will be governed by the current reserve board agreement covering the UP Eastern District.

GENERAL

Q44. Do the listing of mileposts in Article I mean that those are the limits that employees may work?
A44. No, the mile posts reflect a seniority district and in some cases assignments that go on duty in the new seniority district will have away from home terminals outside the seniority district which is common in many interdivisional runs.

Q45. If the milepost is on the east end of Yermo can the crew perform any work in the station of Yermo west of the mile post?
A45. Yes, Yermo is the away from home terminal and the crew may perform any work that is permissible under the Eastern District collective bargaining agreement as the crew does now under its current agreement. If a yard assignment is established it will not be filled by employees from the Salt Lake Hub

Q46. Will all pool freight be governed by the same rules?
A46. Yes, all pool freight will be governed by the UPED interdivisional rules, such as but not limited to, initial terminal delay, overtime, $1.50 in lieu of eating en route.

Q47. Will all employees be paid the same?
A47. No, the current rules differ between pre and post October 31, 1985 employees with regards to such items as entry rates, duplicate payments and overtime. Since those are part of the National Agreements that supersede local rules they will continue to apply as they have applied on the UPED prior to the merger.

Q48. What will the miles paid be for the runs?
A48. Actual miles between terminals with a minimum of a basic day as determined by the National Agreement.

MERGER IMPLEMENTING AGREEMENT
(Denver Hub)

between the

UNION PACIFIC/MISSOURI PACIFIC RAILROAD COMPANY
SOUTHERN PACIFIC TRANSPORTATION COMPANY

and the

UNITED TRANSPORTATION UNION

In Finance Docket No. 32760, the U.S. Department of Transportation, Surface Transportation Board ("STB") approved the merger of the Union Pacific Corporation ("UPC"), Union Pacific Railroad Company/Missouri Pacific Railroad Company (collectively referred to as "UP") and Southern Pacific Rail Corporation, Southern Pacific Transportation Company ("SP"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp., and The Denver & Rio Grande Western Railroad Company ("DRGW") (collectively referred to as "SP"). In approving this transaction, the STB imposed New York Dock labor protective conditions.

In order to achieve the benefits of operational changes made possible by the transaction, to consolidate the seniority of all employees working in the territory covered by this Agreement into one common seniority district covered under a single, common collective bargaining agreement,

IT IS AGREED:

I. Denver Hub

A new seniority district shall be created that encompasses the following area: UP milepost 429.7 at Sharon Springs, Kansas; UP milepost 511.0 at Cheyenne, Wyoming ; DRGW milepost 451.7 at Grand Junction, Colorado and milepost 251.7 at Alamosa, Colorado; SSW milepost 545.4 at Dalhart, Texas and UP milepost 732.1 at Horace, Kansas and all stations, branch lines, industrial leads and main line between the points identified.

II. Seniority and Work Consolidation.

The following seniority consolidations will be made:

A. A new seniority district will be formed and master Seniority Rosters, UP/UTU Denver Hub, will be created for the employees working as Conductors, Brakemen, yardmen (the term yardman shall, in this agreement, refer to all yard positions including foreman, helper, utility man, herder and switch tender) and Firemen in the Denver Hub on November

1, 1996. (The term "trainmen" is used hereafter as a generic term to include all UTU-C,T&Y represented employees and where applicable all UTU-E represented employees). The four new rosters will be created as follows:

1. Switchmen/brakemen placed on these rosters will be dovetailed based upon the employee's current seniority date. If this process results in employees having identical seniority dates, seniority will be determined by the employee's current hire date with the Carrier.

2. Conductors placed on these rosters will be dovetailed based upon the employee's actual promotion date into the craft. If this process results in employees having identical seniority dates, seniority will be determined by the employee's current hire date with the Carrier.

Prior Rights to Zones, Example (assumes only has 5 people on roster):

Name	**Roster Ranking**	**Zone 1** (Denver Terminal, Denver-Axial/Bond/ to Sharon Springs/Cheyenne *excluding Sharon Springs & Cheyenne yard/local/road switchers*, Pueblo-Horace) [UPED,MPUL Pueblo roster,DRGW]	**Zone 2** (GrandJunction/Denver/Bond /Montrose/Oliver/Minturn) [DRGW]	**Zone 3** (Pueblo-Denver S.Fork/Minturn/ to Dalhart, *excluding Dalhart*) [DRGW]
JONES, A.	#1	X		
SMITH, B.	#2	X		
ADAMS, C.	#3			X
BAILEY, D.	#4		X	
GREEN, E.	#5			X

3. All employees placed on the roster may work all assignments protected by the roster in accordance with their seniority and the provisions set forth in this Agreement.

4. New employees hired and placed on the new rosters on or after November 1, 1996, will have no prior rights but will have roster seniority rights in accordance with the zone and extra board provisions set forth in this Agreement.

B. The new UP/UTU seniority districts will be divided into the following three (3) Zones:

1. **Zone 1** will include Denver east to but not including Sharon Springs and the Oakley extra board, Denver north to but not including Cheyenne, Denver west to and including Bond and Axial, Pueblo east to Horace, and all road and yard

operations within the Denver Terminal including any road switchers at Colorado Springs.

Note: The Oakley extra board is part of the Denver Hub and assignments at Oakley will be filled by the Denver Hub. The reference to Sharon Springs is for pool freight service and the work normally protected by the oakley extra board shall continue as part of the Denver Hub.

2. **Zone 2** will include Grand Junction to Denver (long pool only), Grand Junction to Montrose, Oliver, Minturn (not including Minturn helper service) and Bond and yard assignments.

3. **Zone 3** will include Pueblo to Denver, South Fork, Minturn and to Dalhart not including Dalhart, but including Minturn helper service and yard assignments.

4. Road, road/yard or yard extra boards will not be part of any zone if they cover assignments in more than one zone. Extra boards that cover assignments in only one zone will be governed by zone rules and the current rules of the collective bargaining agreement for this Hub.

C. Trainmen initially assigned to the new rosters will be accorded prior rights to one of the three zones based on the following:

1. **Zone 1** -Trainmen assigned to rosters on the former Union Pacific Eastern District 12th District, MPUL Pueblo trainmen and DRGW employees working positions within the points specified for this Zone on November 1, 1996.

2. **Zone 2** -Trainmen assigned to rosters on the former DRGW, working positions within the points specified for this Zone on November 1, 1996.

3. **Zone 3** -Trainmen assigned to rosters on the former DRGW, working positions within the points specified for this Zone on November 1, 1996.

D. Trainmen hired and assigned to the merged roster after implementation shall be assigned to a zone, but without prior rights, based on the Carrier's determination of the demands of service at that time in the Denver Hub.

E. The purpose of creating zones is twofold: First it is to provide seniority in an area that an employee had some seniority prior to the merger, or contributed some work after the merger, unless that trackage is abandoned, and thus preference to some of their prior work over employees in other zones; Second to provide a defined area *of* trackage and train operations that an employee can become familiar so as not to be daily covering a multitude of different sections of track. As such the following will govern:

1. Trainmen will be allowed to make application for an assignment in a different zone as vacancies arise. If reduced from the working list in their zone, trainmen may exercise their common seniority in the remaining two zones.

2. Trainmen may not hold a reserve board outside their zone. The current collective bargaining agreement is amended to provide for a reserve board for each zone.

3. Trainmen with a seniority date prior to February 1, 1992 shall be permitted to hold a reserve board in their zone. Trainmen holding a seniority date subsequent to February 1, 1992 must be displaced prior to employees being permitted to hold a reserve board position.

F. It is understood that certain runs home terminaled in the Denver Hub will have away from home terminals outside the Hub and that certain runs home terminaled outside the Hub will have away from home terminals inside the Hub. Examples are Denver to Cheyenne and Pueblo to Dalhart. It is not the intent of this agreement to create seniority rights that interfere with these operations or to create double headed pools. For example, Denver will continue to be the home terminal for Denver-Cheyenne runs and Cheyenne will not have equity in these runs. The Denver-Rawlins run currently has no employees assigned to it. If this operation is reestablished at a later date the current Denver-Rawlins pool agreement will continue to apply with Denver as the home terminal.

G. All vacancies within the zones must be filled prior to any trainmen being reduced from the working list or prior to trainmen being permitted to exercise to any reserve board.

H. With the creation of the new seniority district all previous seniority outside the Denver Hub held by trainmen on the new rosters shall be eliminated and all seniority inside the Hub held by trainmen outside the Hub shall be eliminated.

I. Trainmen will be treated for vacation and payment of arbitraries as though all their service on their original railroad had been performed on the merged railroad.

J. Trainmen who have been promoted to Engine service and hold engine service seniority inside the Denver Hub and working therein on November 1, 1996, shall be placed on the appropriate roster(s) using their various trainmen seniority dates. Those Engine service employees, if any, who do not have a train service date in the Denver Hub shall be given one in accordance with the October 31, 1985 UTU National Agreement.

III. Terminal Consolidations

The following terminal consolidations will be implemented in accordance with the following provisions:

A. Denver Terminal

1. The existing switching limits at Denver will now include Denver Union Terminal north to and including M.P. 3.24 and M.P. 6.43 on the Dent Branch, south to and including M.P. 5.5, east to and including M.P. 635.10, and west to and including M.P. 7.5. Yard crews currently perform service on the Boulder Branch and they may continue to do so after implementation of this agreement in accordance with existing agreements.

Note: The intent of this section is to combine the two Carrier's facilities into a common terminal and not to extend the switching limits beyond the current established points.

2. All UP and SP operations within the greater Denver area shall be consolidated into a unified terminal operation.

3. All road crews may receive/leave their trains at any location within the boundaries of the new Denver terminal and may perform work anywhere within those boundaries pursuant to the applicable collective bargaining agreements . The Carrier will designate the on/off duty points for road crews with the on/off duty points having appropriate facilities for inclement weather and other facilities as currently required in the collective bargaining agreement.

4. All rail lines, yards, and/or sidings within the new Denver terminal will be considered as common to all crews working in, into and out of Denver. All crews will be permitted to perform all permissible road/yard moves pursuant to the applicable collective bargaining agreements. Interchange rules are not applicable for intra-carrier moves.

B. General Conditions for Terminal Operations

1. Initial delay and final delay will be governed by the controlling collective bargaining agreement, including the Duplicate Pay and Final Terminal Delay provisions of the 1985 and 1991 National Awards and implementing agreements.

2. Employees will be transported to/from their trains to/from their designated on/off duty point in accordance with Article VIII, Section 1 of the October 31, 1996 National Agreement.

3. The current application of National Agreement provisions regarding road work and Hours of Service relief under the combined road/yard service zone, shall continue to apply. Yard crews at Denver, Grand Junction and Pueblo may perform such service in all directions out of the terminal.

Note: Items 1 through 3 are not intended to expand or restrict existing rules

IV. Pool Operations.

A. The following pool consolidations may be implemented to achieve efficient operations in the Denver Hub:

1. All Grand Junction-Denver/Bond and Grand Junction-Minturn pool operations shall be combined into one pool with Grand Junction as the home terminal. Denver may have one, two or three pools, Denver-Phippsburg/Bond, Denver-Cheyenne, and Denver-Sharon Springs with the Carrier determining whether to combine the pools. Short pool operations when run shall be between Grand Junction-Bond and Denver-Bond.

2. All Pueblo-Denver and Pueblo-Dalhart pool operations shall be combined into one pool with Pueblo as the home terminal. The Pueblo-Alamosa local shall remain separate but Pueblo-Alamosa traffic may be combined with the Pueblo-Dalhart and Pueblo-Denver pool if future traffic increases result in pool operations. The Pueblo-Minturn pool shall remain separate until the number of pool turns drops below ten (10) due to the cessation of service on portions of that line, at that time, the Carrier may combine it with the remaining Pueblo pool. The Pueblo-Horace pool shall remain separate until terminated with the abandonment of portions of that line. The tri-weekly local provisions shall apply until abandonment of any portion of the line east of Pueblo where Pueblo crews now operate.

3. Pool, local, road switcher and yard operations not covered in the above originating at Grand Junction shall continue as traffic volumes warrant.

4. Helper service at Minturn shall remain separate until terminated with the cessation of service on portions of the line where the helpers operate.

5. Any pool freight, local, work train or road switcher service may be established to operate from any point to any other point within the new Seniority District with the on duty point within one of the zones.

6. The operations listed in A 1-4 above, may be implemented separately, in groups or collectively upon ten (10) days written notice from the Carrier to the General Chairman. Implementation notices covering item (5) above, shall be governed by applicable collective bargaining agreements.

7. Power plants between Denver and Pueblo may be serviced by either Pueblo-Denver pool or the Denver Extra board or a combination thereof. The Denver extra board shall be used first and if exhausted, the pool crew will be used and deadheaded home after completion of service.

B. The terms and conditions of the pool operations set forth in Section A shall be the same for all pool freight runs whether run as combined pools or separate pools. The terms and conditions are those of the designated collective bargaining agreement as modified by subsequent national agreements, awards and implementing documents and those set forth below. The basic Interdivisional Service conditions shall apply to all pool freight service. Each pool shall be paid the actual miles run for service and combination service/deadhead with a minimum of a basic day.

1. **Twenty-Five mile Zone** - At Grand Junction, Pueblo, Sharon Springs, Denver, Cheyenne and Dalhart, pool crews may receive their train up to twenty-five miles on the far side of the terminal and run on through to the scheduled terminal. Crews shall be paid an additional one-half (½) basic day for this service in addition to the miles run between the two terminals. If the time spent in this zone is greater than four (4) hours then they shall be paid on a minute basis.

Example: A Pueblo-Denver crew receives their north bound train ten miles south of the Pueblo terminal but within the 25 mile terminal zone limits and runs to Denver. They shall be paid the actual miles established for the Pueblo-Denver run and an additional one-half basic day for handling the train from the point ten (10) miles south of the Pueblo terminal.

2. **Turnaround Service/Hours of Service Relief** - Except as provided in (1) above, turnaround service and Hours of Service Relief at both home and away from home terminals shall be handled by extra boards, if available, prior to setting up other employees. Trainmen used for this service may be used for multiple trips in one tour of duty in accordance with the designated collective bargaining agreement rules. Extra boards may perform this service in all directions out of their home terminal within the Hub.

Note: Due to qualification issues at Minturn the pool crews will continue to perform Hours of Service relief at this location.

3. Nothing in this Section B (1) and (2) prevents the use of other trainmen to perform work currently permitted by prevailing agreements.,

C. **Agreement Coverage** - Employees working in the Denver Hub shall be governed, in addition to the provisions of this Agreement, by the Agreement between the Union Pacific Railroad Company and the UTU Union Pacific Eastern District, both road and yard, including all addenda and side letter agreements pertaining to that agreement, the 1996 National Agreement applicable to Union Pacific and previous National Agreement/Award/Implementing Document provisions still applicable. Except as specifically provided herein, the system and national collective bargaining agreements, awards and interpretations shall prevail. None of the provisions of these agreements are retroactive. Since most of the employees have not worked under a daily preference system in the yard the employees shall be governed by the regular application system for yard assignments and the daily preference system shall not apply in the Denver Hub.

D. After implementation, the application process will be used to fill all vacancies in the Hub as follows:

1. Prior right vacancies must first be filled by an employee with prior rights to the vacancy who is on a reserve board prior to considering applications from employees who do not have prior rights to the assignment including those in other zones within the Denver Hub. A reserve board employee will be recalled prior to considering applications from employees who do not have prior rights to the assignment.

2. If there are no prior right employees on the reserve board covering the vacant prior right assignment then the senior applicant without prior rights to the vacancy will be assigned. If no applications are received then the most junior employee on any of the other reserve boards will be recalled and will take the assignment or displace a junior employee. If there are no trainmen on any reserve board, then the senior furloughed trainman in the Denver Hub shall be recalled to the vacancy. When forcing or recalling, prior rights trainmen shall be forced or recalled to prior right assignments prior to trainmen who do not have prior rights.

3. Non prior right vacancies will be filled by the senior applicant from the dovetail roster. If no applicant then the junior employee on any reserve board in the Hub shall be recalled to the vacancy in accordance with the provisions of the UPED reserve board agreement.

V. EXTRA BOARDS

A. The following road/yard extra boards may be established to protect trainmen assignments as follows:

1. **Denver** - One conductor and one brakeman/switchman (total of 2) extra boards to protect the Denver-Cheyenne, Denver-Sharon Springs and Denver-Phippsburg and Denver-Bond pools, the Denver yard assignments and all road switchers, locals and work trains originating within these territories and extra service to any power plant and other extra board work.

2. **Pueblo** - One conductor and one brakeman/switchman (total of 2) extra boards to protect the Pueblo-Denver, Pueblo- Alamosa, Pueblo-Minturn and Pueblo-Dalhart pool operations, Pueblo Yard assignments and all road switchers, locals and work trains and other extra board work originating within the these territories. The MPUL extra board shall remain separate and shall be phased out with the Pueblo-Horace pool operations.

3. **Grand Junction** - One conductor and one brakeman/switchman (total of 2) extra boards to protect Grand Junction-Denver, Grand Junction-Bond and Grand Junction-Minturn pool(s), Grand Junction yard, road switcher, local and work train assignments and other extra board work originating within these territories. Since the extra board at Grand Junction is at a point joining two hubs, it may protect work up to but not including Helper, Utah.

Note: At each of the above locations the Carrier may operate more than these extra boards. When more than these extra board is operated the Carrier shall notify the General Chairman what area each extra board shall cover. When combining extra boards the Carrier shall give ten (10) days written notice.

B. The Carrier may establish extra boards at outside points to meet the needs of service pursuant to the designated collective bargaining agreement provisions. Extra boards at outside points such as Phippsburg may continue.

C. At any location where both UP and DRGW extra boards exist the Carrier may combine these boards into one board. If at any location there are less than three yard assignments then the extra boards referred to in A, B or C above shall be combined into a single Conductor/brakemen/switchmen extra board.

VI. PROTECTION

The Surface Transportation Board has stated that adversely affected employees shall be covered by New York Dock protection.

VII. HEALTH AND WELFARE

Employees not previously covered by the UPED agreement shall have 60 days to join the Union Pacific Hospital Association in accordance with that agreement.

VIII. IMPLEMENTATION

A. The Parties have entered into this agreement to implement the merger of the Union Pacific Railroad and Southern Pacific Railroad operations in the area covered by Notice 18W and any amended notices thereto.

In addition, the Parties understand that the overall operational implementation is being phased in to accommodate the cut over of computer operations, dispatching, track improvements and clerical support.

B. The Carrier shall give thirty (30) days written notice for implementation of this agreement and the number of initial positions that will be changed in the Hub. Employees whose assignments are changed shall be permitted to exercise their new seniority. After the initial implementation the 10 day provisions of Article IV(A)(6) and Article V(A) (note) shall govern.

C. Prior to movement to reserve boards or transfers outside the Hub, it will be necessary to fill all positions in the Denver Hub..

D. In an effort to provide for employees to follow their work to areas outside the Denver Hub, the Carrier shall advertise vacancies at locations outside the Hub for a period of one year from the implementation date, as long as a surplus of trainmen exist in the Hub, for employees to make application. The dovetail roster shall be used for determining the senior applicant. Should an insufficient number of applications be received then the junior surplus employee shall be forced to the vacancy. Employees who move by application or force shall establish new seniority and relinquish seniority in the Hub.

IX. CREW CONSIST.

A. Upon implementation of this agreement (award) all crew consist productivity funds that cover employees in the Hub shall be frozen pending payment of the shares to the employees both inside the Hub and outside the Hub. A new productivity fund shall be created on implementation day that will cover those employees in the Denver Hub and the funds that cover employees outside the Hub shall continue for the employees who remain outside the Hub. The Denver Hub employees shall have no interest or share in payments made to those funds after implementation date.

B. Payments into the new productivity fund shall be made in compliance with the UPED crew consist agreement. Those employees who would have participated in the shares of the productivity funds had they originally been hired on the UP Eastern District shall be eligible to participate in the distribution of the new fund except as stated in (D) below.

C. Employees who would have been covered under the UPED special allowance provisions had they been hired originally on the UP Eastern District shall be entitled to a special allowance under those provisions except as stated in (D) below.

D. Those employees who sold their special allowances/productivity funds previously are not entitled to those payments under this agreement (award).

E. While the UPED crew consist agreement will govern this Hub the Carrier is not required to place yardmen/brakemen on any local, road switcher, yard or other assignment anywhere in the Hub that is was not required to use under the least restrictive crew consist agreement that previously existed in either the Salt Lake or Denver Hub.

X. Familiarization

A. Employees will not be required to lose time or "ride the road" on their own time in order to qualify for the new operations. Employees will be provided with a sufficient number of familiarization trips in order to become familiar with the new territory. Issues concerning individual qualifications shall be handled with local operating officers. The parties recognize that different terrain and train tonnage impact the number of trips necessary and the operating officer assigned to the merger will work with the local Managers of operating practices and local chairmen in implementing this section.

XI. Firemen.

A. This agreement also covers firemen. Pre-October 31, 1985 firemen will only have seniority in the Denver Hub and if unable to work an engineer's assignment or a mandatory firemen's/hostler position they shall be permitted to hold a fireman's position first in their prior rights zone and second, using their dovetail seniority.

B. Post October 31, 1985 firemen shall continue to be restricted to mandatory assignments and if unable to hold an engine service position will be required to exercise their train service seniority in the Hub.

QUESTIONS & ANSWERS -UTU DENVER HUB

Article I - DENVER HUB

Q1. Does the new seniority district change terminal limits at the mile posts indicated?

A1. No. It is the intent of this agreement to identify the new seniority territory and not to change the existing terminal limits except as specifically provided elsewhere in this agreement.

Q2. Which Hub is Grand Junction in?

A2. For seniority purposes trainmen are in the Denver Hub, however due to the unique nature of Grand Junction being a home terminal for one Hub and away from home for another Hub, the extra board may perform service on both sides of Grand Junction.

Article II - SENIORITY AND WORK CONSOLIDATION

Q3. What is the status of an employee who placed in the Hub after November 1, 1996 but prior to the implementation of this Award?

A3. They shall be placed on the roster using their dovetail date but they shall not have any prior rights.

Q4. What happens if employees still have the same seniority date based on the current hire date?

A4. The UPED agreement has a provision for determining the seniority date under these conditions and that agreement will govern.

Q5. Why do the zones appear to overlap?

A5. Zones indicate a given area depending on the on duty point of an assignment. For example, for long pool service, Grand Junction is the proper zone for Grand Junction- Denver service. For short pool service Grand Junction is the zone for going to Bond and Denver is the proper zone for going Denver-Bond.

Q6. In Article II(G), what does it mean when it refers to protecting all vacancies within a zone?

A6. If a vacancy exists in a zone, it must be filled by a prior rights employee prior to placing employees on reserve boards. If a non prior rights employee is working in a zone then a prior rights employee must displace that person prior to going to a reserve board. If a vacancy exists in one zone and an employee in another zone is on a reserve board that person will be recalled prior to the Carrier hiring additional trainmen.

Q7. Will existing pool freight terms and conditions apply on all pool freight runs?
A7. No. The terms and conditions set forth in the controlling collective bargaining agreement and this document will govern.

Q8. Will an employee gain or lose vacation benefits as a result of the merger?
A8. No.

Q9. When the agreement is implemented, which vacation agreement will apply?
A9. The vacation agreements used to schedule vacations for 1997 will be used for the remainder of 1997. Thereafter the UPED agreement will govern.

Q10. What is the status of firemen's seniority?
A10. Firemen seniority will be dovetailed in a similar manner as trainmen.

Article III - TERMINAL CONSOLIDATIONS

Q11. If a yard job goes on duty in the previous UP yard what are the switching limits for performing work in the road/yard zone west of Denver?
A11. DRGW M.P. 7.5 will be used for all yard crews on duty in Denver.

Article IV - POOL OPERATIONS

Q12. If the on duty point for the Denver-Cheyenne pool is moved from Denver Union Terminal to the DRGW Yard, will the mileage paid be increased?
A12. Yes. The mileage will be from the center of DRGW Yard to Cheyenne.

Q13. In Article IV A 6 how would other operations be established?
A13. The controlling collective bargaining agreements would govern. For example ID service would be covered under Article IX of the 1985 National Agreement, road switchers can be established at any location under the local road switcher agreement.

Q14. In Article IV(B) Section 3 provides that the Carrier has the right to perform work currently permitted by other agreements, can you give some examples?
A14. Yes, yard crews are currently permitted to perform hours of service relief in the road/yard zone established in the National Agreement, ID crews may perform combination deadhead/service and road switchers may handle trains that are laid down in their zone.

Q15. If a crew in the 25 mile zone is delayed in bringing the train into the original terminal so that it does not have time to go on to the far terminal, what will happen to the crew?
A15. Except in cases of emergency, the crew will be deadheaded on to the far terminal.

Q16. Is it the intent of this agreement to use crews beyond the 25 mile zone?
A16. No.

Q17. In Article IV(B), is the ½ basic day for operating in the 25 mile zone frozen and/or is it a duplicate payment/special allowance?
A17. No, it is subject to future wage adjustments and it is not duplicate pay/special allowance.

Q18. How is a crew paid if they operate in the 25 mile zone?
A18. If a pre-October 31, 1985 trainman is transported to its train 10 miles east of Sharon Springs and he takes the train to Denver and the time spent is one hour east of Sharon Springs and 9 hours 24 minutes between Sharon Springs and Denver with no initial or final delay earned, the employee shall be paid as follows:

A. One-half basic day for the service east of Sharon Springs because it is less than four hours spent in that service.
B. The road miles between Sharon Springs and Denver.
C. One hour overtime because the agreement provides for overtime after 8 hours 24 minutes on the road trip between Sharon Springs and Denver. (210 miles divided by 25 = 8'24")

Q19. Would a post October 31, 1985 trainman be paid the same?
A19. No. The National Disputes Committee has determined that post October 31, 1985 trainmen come under the overtime rules established under the National Agreements/Awards/Implementing Agreements that were effective after that date for both pre-existing runs and subsequently established runs. As such, the post October 31, 1985 trainman would not receive the one hour overtime in C above but receive the payments in A & B.

Q20. How will initial terminal delay be determined when operating in the Zone?
A20. Initial terminal delay for crews entitled to such payments will be governed by the applicable collective bargaining agreement and will not commence when the crew operates back through the on duty point. Operation back through the on duty point shall be considered as operating through an intermediate point.

Q21. When the UPED agreement becomes effective what happens to existing DRGW/MPUL claims?
A21. The existing claims shall continue to be handled in accordance with the DRGW/MPUL Agreements and the Railway Labor Act. No new claims shall be filed under that agreement once the time limit for filing claims has expired.

Q22. Is the identification of the UPED collective bargaining agreement in Article IV© a result of collective bargaining or selection by the Carrier?
A22. Since UP purchased the SP system the Carrier selected the collective bargaining agreement to cover this Hub.

Q23. In Article IV (D), if no applications are received for a vacancy on a prior rights assignment, does the prior right trainman called to fill the vacancy have the right to displace a junior trainman from another assignment?

A23. Yes. That trainman has the option of exercising his/her seniority to another position held by a junior employee, within the time frame specified in the controlling collective bargaining agreement, or accepting the force to the vacancy.

Article V - EXTRA BOARDS

Q24. How many extra boards will be combined at implementation?

A24. It is unknown at this time. The Carrier will give written notice of any consolidations whether at implementation or thereafter.

Q25. Are these guaranteed extra boards?

A25. Yes. The pay provisions and guarantee offsets and reductions will be in accordance with the existing UPED guaranteed extra board agreement.

ARTICLE VI - PROTECTION

Q26. What is loss on sale of home for less than fair value?

A26. This refers to the loss on the value of the home that results from the carrier implementing this merger transaction. In many locations the impact of the merger may not affect the value of a home and in some locations the merger may affect the value of a home.

Q27. If the parties cannot agree on the loss of fair value what happens?

A27. New York Dock Article I Section 12 (d) provides for a panel of real estate appraisers to determine the value before the merger announcement and the value after the merger transaction.

Q28. What happens if an employee sells a $50,000 home for $20,000 to a family member?

A28. That is not a bona fide sale and the employee would not be entitled to a New York Dock payment for the difference below the fair value.

Q29. What is the most difficult part of New York Dock in the sale transaction?

A29. Determine the value of the home before the merger transaction. While this can be done through the use of professional appraisers, many people think their home is valued at a different amount.

Q30. Who is required to relocate and is thus eligible for the New York Dock benefit?

A30. An employee who can no longer hold a position at his/her location and must relocate to hold a position as a result of the merger. This excludes employees who are borrow outs or forced to a location and released.

Q31. Are there mileage components that govern the eligibility for an allowance?
A31. Yes, the employee must have a reporting point farther than his/her old reporting point and at least 30 miles between the current home and the new reporting point and at least 30 miles between reporting points.

Q32. Can you give some examples?
A32. The following examples would be applicable.

Example 1: Employee A lives 80 miles north of Denver and works a yard assignment at Denver. As a result of the merger he/she is assigned to a road switcher with an on duty point 20 miles north of Denver. Because his new reporting point is closer to his place of residence no relocation benefits are allowable.

Example 2: Employee B lives 35 miles north of Denver and goes on duty at the UP yard office in Denver. As a result of the merger he/she goes on duty at the DRGW yard office which is four miles away. No relocation benefits are allowable.

Example 3: Employee C lives in Pueblo and is unable to hold an assignment at that location and is placed in Zone 1, where a shortage exists, and places on an assignment at Denver. The employee meets the requirement for relocations benefits.

Example 4: Employee D lives in Denver and can hold an assignment in Denver but elects to place on a Road Switcher 45 miles north of Denver. Because the employee can hold in Denver, no relocation benefits are allowable.

Article VII-HEALTH AND WELFARE

Q33. Must employees not covered under the UP Hospital Association join after the merger?
A33. Yes because it is part of the UPED UTU collective bargaining agreement.

Article VIII - IMPLEMENTATION

Q34. Are there any restrictions on routing of traffic or combining assignments after implementation?
A34. There are no restrictions on the routing of traffic in the Denver Hub once the 30 day notice of implementation has lapsed. There will be a single collective bargaining agreement and limitations that currently exist in that agreement will govern, e.g., radius provisions for road switchers, road/yard moves etc. However, none of these restrictions cover through freight routing. The combining of assignments is covered in this agreement.

Q35. On implementation will all trainmen be contacted concerning job placement?
A35. No, the implementation process will be phased in and employees will remain on their assignments unless abolished or combined and then they may place on another assignment or on the protection board depending on surplus. see Article VIII(B). The new seniority rosters will be available for use by employees who have a displacement.

Q36. How will the new extra boards be created?
A36. When the Carrier gives notice that the current extra boards are being abolished and new ones created in accordance with the merger agreement, the Carrier will advise the number of assignments for each extra board and the effective date for the new extra board. The employees will have at least ten days to make application to the new extra board and the dovetail roster will be used for assignment to the Board. It is anticipated that the extra boards will have additional engineers added at first to help with the familiarization process.

Q37. Will the Carrier transfer all surplus employees out of the Hub?
A37. No. The Carrier will retain some surplus to meet anticipated attrition and growth, however, the number will be determined by the Carrier.

Q38. When will reserve boards be established and under what conditions will they be governed?
A38. They will be established in each zone at implementation. When reserve boards are established, they will be governed by the current agreement covering the UPED trainman at Denver.

Article IX- CREW CONSIST

Q39. When this award is implemented will the productivity funds be paid out at that time?
A39. No, the number of credits that each employee, who will be in the Hub, has earned will be determined and frozen for the pre-existing fund. They will then start earning credits in the new fund. Those employees not in the Hub will continue to earn credits in their old fund.

GENERAL

Q40. Do the listing of mileposts in Article I mean that those are the limits that employees may work?
A40. No, the mile posts reflect a seniority district and in some cases assignments that go on duty in the new seniority district will have away from home terminals outside the seniority district which is common in many interdivisional runs.

Q41. If the milepost is on the west end of Sharon Springs can the crew perform any work in the station of Sharon Springs east of the mile post?

A41. Yes, Sharon Springs is the away from home terminal and the crew may perform any work that is permissible under the Eastern District collective bargaining agreement. If a yard assignment is established it will not be filled by employees from the Denver Hub

Q42. Will all pool freight be governed by the same rules?

A42. Yes, all pool freight will be governed by the UPED interdivisional rules, such as but not limited to, initial terminal delay, overtime, $1.50 in lieu of eating en route.

Q43. Will all employees be paid the same?

A43. No, the current rules differ between pre and post October 31, 1985 employees with regards to such items as duplicate payments and overtime. Since those are part of the National Agreements that supersede local rules they will continue to apply as they have applied on the UPED prior to the merger.

Q44. What will the miles paid be for the runs?

A44. Actual miles between terminals with a minimum of a basic day as determined by the National Agreement.

SECOND DECLARATION OF PAUL C. THOMPSON

I, Paul C. Thompson, pursuant to 28 U.S.C. § 1746, declare that the following facts are true and correct.

1. I am a Vice President of the United Transportation Union ("UTU"), and in such capacity was one of the officers assigned to the Union Pacific ("UP")-Southern Pacific ("SP") merger approved by the Surface Transportation Board ("STB") in Finance Docket No. 32760 on August 12, 1996 (Service Date) in Decision No. 44, and particularly with respect to implementing agreement negotiations pursuant to Article I, Section 4 of the *New York Dock* conditions put on the merger by the STB in that docket.

2. Included as a separately bound Attachment A hereto are the UTU Submissions (one as to UP's non-compliance with the Marchant Commitment Letter and one as to the UP's Article I, Section 4 *New York Dock* notices covering the Denver and Salt Lake City "hubs"), the Organization's Appendix of Exhibits 1 through 9, and the Organization's Exhibits 10 through 16 submitted at the hearing before Arbitrator James Yost March 25, 1997 in Salt Lake City.

3. Included as a separately bound Attachment B hereto are the UP's Submissions regarding the same arbitration hearing and Carrier Exhibits 24 through 34 submitted therewith.

4. As to the issue of which collective bargaining agreement with UTU will apply in an Article I, Section 4 *New York Dock* arbitration, the Yost Award dated April 14, 1997 adopts the UP's proposals permitting UP's selection of the UP Eastern District agreement without delineating any standards for the selection. If standards are not set forth as to how to determine which collective bargaining agreement will be applicable in the absence of agreement, then a carrier will never have to bargain because it will pick the most desirable agreement from its standpoint, and that cannot be permitted as "necessary" or under Section 11326. In all of the

APPENDIX B

mergers involving the Union Pacific Railroad to date, there has always been one common denominator so far as which collective bargaining agreement will apply. That common denominator has been the predominate collective bargaining agreements in effect in the territory comprehended by the Carrier's Operating Plan. That standard was followed in the UP/MOP Merger (ICC Finance Docket No. 30,000), the UP/MKT Merger (ICC Finance Docket No. 30,800) and the UP/C&NW Merger (ICC Finance Docket No. 32,133).

5. In the Denver Hub, the UP Eastern District Agreement would be the predominate collective bargaining agreement. In the Salt Lake City Hub, UTU, with the involved General Chairpersons, made a proposal (Organization's Exhibit 9) that offered the UP Eastern District Agreement in that area as a result of trying to address the Carrier's needs at that location. While the UP Eastern District Agreement is not the predominate agreement in the Salt Lake City Hub, it was the Agreement agreed upon by all of the General Chairpersons. Arbitrator Yost gave no consideration to the history of the negotiations leading up to this Arbitration, because he accepted the proposals offered by the Carrier that the Organization had never seen prior to the Arbitration Hearing. The proposals were different from the Carrier's earlier proposals. But the important point is that the standard of applying the predominate agreement in the absence of agreement must be stated as an objective factor to meet the requirements of the law.

6. Concerning fringe benefits, the Award and the Carrier's proposals are silent concerning several fringe benefits currently enjoyed by the Southern Pacific employees, including disability insurance and an additional week of vacation. No doubt based upon the language of the Award, the Carrier will now take the position that these items no longer exist because the employees are working under the UP Eastern District Agreement. This flies directly in the face

of the language contained in Article I, Section 2 of the *New York Dock* conditions relating to fringe benefits at a minimum, as was stated in this Board's determination in the *UTU v. STB* case cited in the enclosed petition to review decided by the D.C. Circuit last March concerning the O'Brien Award on CSX, and what have always been considered "fringe benefits" in the industry, indicated by the annual fringe benefit sheet UTU has been providing since I've been a Vice President, the January, 1997 sheet being attached hereto as Attachment C.

7. On page 12 of the Carrier's proposal on both the Denver Hub and the Salt Lake City Hub, the issue of firemen is addressed. It should be noted that in UP's Article I, Section 4 Notice under *New York Dock* there never was a mention of firemen issues, nor did UP ever include such a provision in any of its proposals. The Carrier in its BLE Implementing Agreement in this merger is attempting to change the following language contained in Article XIII, Section 1 (7) of the October 31, 1985 UTU National Agreement:

> (7) Change Article III, Section 4 to read as follows:
> "Section 4(a) - All firemen (helpers) whose seniority as such was established prior to November 1, 1985 will be provided employment in accordance with the provisions of this Article until they retire, resign, are discharged for cause, or are otherwise severed by nature attrition; provided, however, that such firemen (helpers) may be furloughed if no assignment working without a fireman (helper) exists on <u>their seniority district which would have been available to firemen (helpers)</u> under the National Diesel Agreement of 1950 (as in effect on January 24, 1964), and if no position on an extra list as required in Section 3 above exists <u>on their seniority district</u> subject to Section 5 of this Article." (emphasis added)

8. By taking away the firemen's existing seniority rights both in the Hub and outside it, and then applying paragraph F, page 13 of the BLE Agreement, the Carrier has circumvented the provisions of the UTU National Agreement without having to show any "necessity." The

BLE provision reads as follows:

> "During the interim period, at locations outside the Hub where shortages exists and an insufficient number of applications are received for vacant positions, the junior engineer holding a surplus position in either Hub not having an application accepted to a shortage location shall be forced to the vacancy."

9. These same junior engineers may very well be senior train service employees or pre-1985 Firemen. This has the effect of forcing UTU train and engine service members to undesirable positions and/or locations, thereby restricting their currently earned seniority rights. Forcing them outside of areas where they hold firemen and/or train service seniority should be restricted until such time as all such positions are filled.

10. In Article VII, Section D of the UP Proposals adopted, not only can the Carrier force employees outside of the Hub after taking away their current system seniority rights, they can also, within one (1) year, force the junior employees outside of the Hub, then take away their seniority inside the Hub, and then require these same employees to establish a new seniority date outside of the Hub. This is nothing more than an unnecessary manipulation of employees seniority rights, as well as an infringement on Crew Consist agreement provisions that allow employees to work blankable positions on their existing seniority districts providing that they cannot hold a must-fill position.

11. In the Denver Hub proposal, in Article II E on page 3, the Carrier explains the advantage of having Zones, and then completely reverses itself from the purpose stated in Section E by the language contained in Article VIII, Section D on page 10 of the proposal.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed on May 2, 1997.

Paul C. Thompson

PAUL C. THOMPSON

47-7 Gen
33

CHARLES L. LITTLE
International President

BYRON A. BOYD, JR.
Assistant President

ROGER D. GRIFFETH
General Secretary and Treasurer

united transportation union

14600 DETROIT AVENUE
CLEVELAND, OHIO 44107-4250
PHONE: 216-228-9400
FAX: 216-228-5755

January 7, 1997

International Officers
United Transportation Union

Re: Letter No. 1-97

Dear Sirs and Brothers:

Attached is a copy of the 1997 Fringe Benefit sheet representing a breakdown of the estimated value of so-called fringe benefits accruing to operating employees during the year 1997.

With kind regards, I remain

Fraternally yours,

Charles L. Little

Charles L. Little
International President

Attachment

cc: Mr. B. A. Boyd, Jr., Ass't. Pres.
General Chairperson's - U.S. Rail
State Legislative Directors
Field Supervisors
Designated Legal Counsel

FRINGE BENEFITS

The following breakdown represents the estimated value of so-called fringe benefits accruing to operating employees with annual wages of $65,400/$48,600 * or more during the calendar year of 1997. The money values set forth are computed on costs actually known as of January 1997.

	PAID BY THE CARRIER	PER YEAR	# DURING MONTH
	Railroad Retirement Tier 1 (6.20%)	$4,054.80	$ 337.90
	Railroad Retirement Tier 2 (16.10%)	7,824.60	652.05
	Supplemental Pension	730.80	60.90
1/	Unemployment (RUIA)	592.80	49.40
4/	Health Plan (GA-23000)	5,879.76	489.98
	Health Plan - Retiree (GA-46000)	212.04	17.67
	Dental Plan	353.28	29.44
2/	Vacations	3,008.00	250.67
2/	Holidays	1,569.52	130.79
3/	Other	662.55	55.21
		$24,888.15	$2,074.01

RAILROAD RETIREMENT TAX	Tier 1 (6.2%)	$ 4,054.80	$ 337.90
PAID BY EMPLOYEE	Tier 2 (4.9%)	$ 2,381.40	$ 198.45
		$ 6,436.20	$ 536.35

* $65,400 represents the minimum annual wage subject to a maximum railroad retirement Tier 1 tax. $48,600 represents the minimum annual wage subject to the maximum railroad retirement Tier 2 tax. Medicare is taxed at a rate of 1.45% with no annual maximum applicable.

\# Per year total divided on a pro-rata basis per calendar month and rounded to the nearest 1 cent equivalent.

1/ This tax requirement will vary from year to year based upon the individual railroad's experience rating. The amount shown here is based on the Tax Rate of 5.55% and based on employee earnings of not more than $890.00 per month and $10,680.00 per year. The maximum rate is 12%.

2/ Taxable to employee as income.

3/ Includes jury duty pay, bereavement pay, $150,000 AD&D and liability insurance as part of the Off-Track Vehicle Accident provisions, along with other miscellaneous items attributable to fringe benefits.

4/ Employee contribution to Health Plan is $76.68 covering the period January, 1996 to July, 1998.

NOTE: Current information on Vacations, Holidays and Other no longer available. Information from 1987.

UTU/R&S Dept
JANUARY, 1997

DECLARATION OF JOHN P. KURTZ

John P. Kurtz, pursuant to 28 U.S.C. § 1746, declares the following facts are true.

1. I am General Chairman of a United Transportation Union ("UTU") General Committee of Adjustment with jurisdiction concerning some of its agreements with the Denver and Rio Grande Western ("DRGW") involved in the Union Pacific ("UP") merger with Southern Pacific ("SP") and related carriers, including the DRGW.

2. The recent UP/SP merger arbitration decision by James Yost dated April 14, 1997 permits implementation of that part of UP's submission and proposed agreement for the Denver and Salt Lake City Hubs regarding the issue of health and welfare which states:

> "Employees not previously covered by the UPED agreement shall have 60 days to join the Union Pacific [Hospital] Association in accordance with that agreement."

3. This provision was presented in the written UP submission in arbitration stating that the UTU-UP Eastern District collective bargaining agreement requires that employees coming under that agreement be covered under the UP Hospital Association. The UP relied on an arbitration award (NRAB First Division Award 24158) in making this proposal. This First Division award related to a grievance arbitration under the Railway Labor Act by a group of employees between the UP-MOP at one particular location. It was not an implementing agreement arbitration in that merger.

4. The specific issue of health and welfare coverage was not in the initial proposed agreement offered by the UP, and was <u>never</u> raised, at any time, during negotiations. No exchange ever took place among the DRGW General Chairmen involved and other UTU representatives, who were present at all merger meetings.

APPENDIX C

5. It should be noted that only three copies of the carrier's submission were available at the time of the arbitration hearing for the UTU counsel and officers who participated. The DRGW General Chairmen present were not able to review what was contained therein, and it was only briefly covered by the UP representative at the hearing. Copies of the UP submissions were later mailed to the UTU General Chairmen by UTU.

6. The UTU General Chairmen agreed to submit a unified proposal of one collective bargaining agreement as to the Salt Lake City Hub, that being the Eastern District Agreement. Generally, the issue of health and welfare has always been separate and apart from work rules and pay issues. It is handled separately at the national level with a Committee having the authority to act for all rail labor. The affected DRGW General Chairmen, who agreed to the approach of one collective bargaining agreement, believed that the employees would be protected by the provisions of *New York Dock* which requires negotiations on <u>all</u> such issues. The element of surprise used by UP here is not a tactic which should be upheld by the interest arbitration process.

7. Union representatives, employees and retirees have forwarded advice to me, as Chairman of the DRGW Employees' Hospital Association since 1976, stating that they did not wish to automatically go to the UP Hospital Association, and believe that a choice should have been discussed and offered the employees at the time of negotiations. In fact, the matter of choice was first raised by UP with other employee groups. UP Labor Relations officers Geneva Dourisseau and Doug Smith called me in December, 1996, and discussed the same issue regarding the carmen craft. Some carmen were being transferred to other locations and coming under different collective bargaining agreements, but were offered a choice of health plans.

Clerical employees transferred to other locations under the same scenario were offered the same choice, as the attached UP-TCU Agreement dated December 18, 1996 shows. In addition, the carrier negotiated one agreement for the Denver Hub with the BLE in the same scenario as the UTU, that being the Eastern District Agreement. The BLE-represented employees were offered a choice of plans within that agreement (UP draft letter to that effect attached). Clearly, the UP was cognizant of the requirements of Article I, Section 2 of *New York Dock* in negotiations with other unions, and the same obligation should apply here.

8. The DRGW Hospital Association is financially stable, with assets at an all-time high. It is well known in this industry that active employees support and subsidize retirees on hospital association carriers. However, a withdrawal of complete groups jeopardizes this stability to the detriment of the other employees, and specifically the retirees. Currently, the premiums on the DRGW are nearly $300 lower for a retired couple with no annual drug limitations than exist with UP. I have been personally lobbied by retired veteran employee groups representing the nearly 2,500 retirees in DRGW plan. At this time, they would be faced with drastic plan changes for elderly people on fixed incomes, some of who have been retired for over twenty years, who are not drawing significant retirement incomes. Some have stated that they do not know how they will be able to pay the increased costs. Based upon retirement age data, I believe that this is a true statement.

9. The purpose of Article I, Section 2 of *New York Dock* and the protection provisions is clearly to allow a protective period of time to elapse before a person is placed in a worse position with regard to pay and other benefits, especially health and welfare fringe benefits. The parties may agree to other terms by negotiations. The issue is negotiable, and at

a minimum, the employees should be offered a choice of plans in which to belong for the period of *New York Dock*, just as other employees have been offered in other employee negotiations with UP.

I declare under penalty of perjury that the foregoing facts are true and correct. Executed on May 2, 1997.

JOHN P. KURTZ

MEMORANDUM OF AGREEMENT
BY AND BETWEEN
SOUTHERN PACIFIC TRANSPORTATION COMPANY
UNION PACIFIC RAILROAD

AND THEIR EMPLOYEES REPRESENTED BY

ALLIED SERVICES DIVISION/ TCU
TRANSPORTATION COMMUNICATIONS UNION

WHEREAS, the Carriers have served various notices on the Organization in accordance with Finance Docket No. 32760; and

WHEREAS, the affected employees are entitled to all rights and benefits as contained in the New York Dock protective conditions; and

WHEREAS, the affected employees employed by the Southern Pacific Transportation Company who may be required to move to the geographic location of the Denver and Rio Grande Western Railroad or the Union Pacific Railroad are covered by Travelers GA-23000, while the employees on the Denver and Rio Grande Western Railroad and the Union Pacific Railroad belong to a hospital association;

It is therefore agreed that SPTCo employees who have transferred or are transferring to the D&RGW or the UPRR will be granted an option to (1) retain coverage under GA-23000, or (2) elect to become covered by the hospital association, it being understood, however, that once an employee elects coverage of the hospital association, he/ she may not elect at a later date to return to GA-23000.

It is further agreed that the employees will be provided an election form and must advise the designated Carrier Officer of their intent to retain GA-23000 or become members of the hospital association in writing within thirty (30) days. Failure to complete and submit the form to the designated Carrier Officer will be construed to be an election for coverage that the employee previously had at the location from which transferred.

This Agreement is signed this 18th day of December, 1996.

AGREED:

FOR THE ORGANIZATION:

R. F. Davis
President, ASD/ TCU

J. J. Quilty
General Chairman, TCU

M. L. Scroggins
General Chairman, SB #51

FOR THE COMPANY:

D. D. Mateer
Sr. Director Labor Relations/ Non-Ops

R. L. Cargo
Manager Labor Relations

Side Letter No. 1

Gentlemen:

This refers to the handling of health and welfare benefits for employees involved in the UP/SP merger.

In order to ensure appropriate health and welfare coverage for affected employees, it is agreed that employees transferring from one collective bargaining agreement to another (i.e., DRGW employees) may elect one of the following options which must be exercised within thirty (30) days from the notice of merger implementation:

(A) Elect to retain present coverage.

OR

(B) Elect to accept the health and welfare coverage applicable to the territory to which transferred.

An employee failing to make an election shall be considered as having retained option (A). A health and welfare benefits election form, attached as Exhibit "A", will be furnished to employees who transfer so they can make an election.

Yours truly,

W.S. Hinckley
General Director Labor Relations

AGREED:

_____
General Chairman UPED

_____
General Chairman MPUL

_____
General Chairman DRGW

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 1)

179587

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
–CONTROL AND MERGER–
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

ATTACHMENT A TO SECOND DECLARATION OF PAUL C. THOMPSON (UTU'S ARBITRATION SUBMISSIONS AND ORGANIZATION'S EXHIBITS 1-16)

Clinton J. Miller, III
General Counsel
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107-4250
(216) 228-9400

Date: May 2, 1997

BEFORE AN ARBITRATION BOARD TO DETERMINE CONSISTENCY OF CARRIER COMMITMENT IN APPLYING NEW YORK DOCK CONDITIONS

United Transportation Union	)
	) **STB Finance Docket No. 32760**
and	) **J. E. Yost, Chairman**
	) **and Arbitrator**
Union Pacific Railroad Company, et al., ("UP")– Control and Merger–Southern Pacific Transportation Company, et al., ("SP")	) **B. A. Boyd, Jr., Organization Member**
	) **W. S. Hinckley, Carrier Member**

United Transportation Union ("UTU") has disputes with the Carrier parties over the interpretation and application of provisions of the February 26, 1996 letter of Union Pacific Railroad Company ("UP") Vice President-Labor Relations John J. Marchant to UTU International President Charles L. Little ("Marchant Commitment Letter") (Organization's Exhibit 1), cited and addressed by the Surface Transportation Board ("STB") in its August 12, 1996 (Service Date) Decision (No. 44) in STB Finance Docket No. 32760 ("UP-SP Merger Decision") with respect to the Carrier parties' various demands for changes in UTU's collective bargaining agreements ("CBA's"). The specific provision of the Marchant Commitment Letter at issue herein is at page 2 thereof, to wit:

> [U]P also commits that, in any Merger Notice served after Board approval, it will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s).

QUESTIONS IN DISPUTE

In resolution of these disputes, the following questions relative thereto must be answered:

1. Are the CBA changes sought from UTU by the UP in the New York Dock Article I, Section 4 merger notices served upon UTU and the bargaining proposals associated therewith necessary to implement the transaction(s) approved by the STB, i.e., are they required for merger implementation?

2. If the answer to Question 1 is in the affirmative, do the changes to UTU CBA's sought by the UP in the New York Dock Article I, Section 4 merger notices served upon UTU and the bargaining proposals associated therewith produce public transportation benefits based solely on agreement change(s)?

3. If the answer to Question 1 is in the negative, or if the answer to both Questions 1 and 2 is in the affirmative, because of UP's failure to meet the condition precedent of the Marchant Commitment Letter that public transportation benefits produced by required CBA changes demanded would not be derived solely from such changes, should the implementing agreement(s) reached by arbitration immediately and mediately hereafter be deemed to be voluntary for purposes of application of the balance of the Marchant Commitment Letter, for example, automatic certification of identified employees as adversely affected and the like?

STATEMENT OF FACTS

On or about November 30, 1995, incident to the involved merger application at the STB, the Carrier parties submitted to the STB, *inter alia*, the Operating Plan ("OpPlan"), Labor Impact Study ("LIS"), and supporting statements. Railroad Merger Application, Vol. 3 (UP/SP 24) (excerpts from which are enclosed as Organization's Exhibit 2). The Verified Statement of M. A. Hartman supporting the LIS contains a material misstatement at page 255 thereof in its claim

that UP currently operates as a "hub-and-spoke" system, necessitating a single CBA and seniority roster for each component of the hub-and-spoke system in the merger implementation with SP. It does not. (Declaration of UTU Vice President M. B. Futhey, enclosed as Organization's Exhibit 3).

Shortly thereafter, the UP became greatly concerned that criticism from all quarters jeopardized the approval of the merger. UP began to seek out parties who would support the merger, including UTU. While UTU was concerned that SP would be incapable of operating successfully in the West competing with BNSF and UP-CNW, raising the specter of § 10901 line sales without labor protection, it had equal concern that UP not obtain *carte blanche* to wreck havoc with the CBA's held by the UTU General Committees of Adjustment on UP and SP in any merger approved. These concerns of UTU are spelled out in the Declaration of UTU International President Charles L. Little enclosed as Organization's Exhibit 4. These concerns remained paramount in the bargaining over the terms of the Marchant Commitment Letter, particularly those relating to CBA changes, since UTU was then fighting the results of the Interstate Commerce Commission's ("ICC") affirmance of the "O'Brien Award" on CSX issued by the ICC December 7, 1995 (which it is anticipated the Carrier will have as an exhibit), permitting wholesale CBA changes in agreements and seniority with no showing of "necessity" in its common and everyday meaning required. (Organization's Exhibit 4).

Although the automatic certification of employees represented by UTU as adversely effected was also an important component of any deal with UP to support the merger (*id.*), UTU would not commit to voluntarily reach implementing agreements without qualification, because

it would expose the membership and organization to the same harm evidenced in the O'Brien Award (*id.*). Agreement to support the merger was not reached until the above-quoted language from the Marchant Commitment Letter was inserted (*id.*).

At the July 1, 1996 hearing on the UP-SP Merger these purposes were made explicit by undersigned counsel (7/1/96 hearing remarks of UTU General Counsel C. J. Miller, III enclosed as Organization Exhibit 5). These remarks cannot be divorced from the context in which they arose, as UP has done during its phony negotiations with UTU. Again, while the impulse for UTU to support an obviously anti-competitive merger (the Justice Department vehemently opposed it) was to ensure survival of SP in the mega-carrier world West of the Mississippi River (BNSF and UP-CNW), it was not willing to support it at the price of wholesale changes in existing CBA's. Hence, the explicit limitation on CBA changes in the Marchant Commitment Letter.

The STB fully understood the totality of what UTU extracted from UP in the Marchant Commitment Letter, as evidenced by the following passages from its August 12, 1996 UP-SP Merger Decision (excerpts) (Organization's Exhibit 6).

> UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that is supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board

> approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBA's that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of New York Dock is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time of issuance of the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MPRR or UPRR, the New York Dock conditions will nevertheless be applicable.
>
> UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

STB August 12, 1996 Merger Decision at 171.

> I believe that the Labor Unions deserve a special commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here, Labor's participation in the debate resulted in a win-win situation for everybody.

STB August 12, 1996 Merger Decision at 246-47 n. 281 (Vice Chairman Simmons, commenting).

> With regard to labor relations, I note that this is the only railroad merger in recent history to receive widespread labor-union support. Railroads operate the largest outdoor factory in America, often stretching tens of thousands of miles. The existence of a well-

> trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and including them in the planning process. All too often, in recent years, labor relations in the railroad industry have been unnecessarily acrimonious.
>
> The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions.
>
> Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer. 300
>
> The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act.
>
> 300 *See, e.g., Railway Labor Executives Association v. United States*, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction.

STB August 12, 1996 Merger Decision at 251 (Commissioner Owen, commenting).

The various UP Merger Notices and Bargaining Proposals demonstrative of the Carrier's failure to comply with the terms of the Marchant Commitment Letter are fully discussed in the Declaration of UTU Vice President P. C. Thompson (Organization's Exhibit 7), and are commented upon categorically below with respect to how they run afoul of the Marchant

Commitment Letter.

POSITION OF ORGANIZATION

UTU's position in this matter is simple. UP knew it needed UTU's support for a proposed merger that was in great danger of disapproval by the STB because of its anti-competitive duopolistic characteristics, evidenced by the Justice Department's vehement opposition. The price for UTU's support was the Marchant Commitment Letter. At the time, UP was only too happy to pay it because UTU became one of its very few friends in Hearing Room A at the STB on July 1, 1996. The STB knows what the Marchant Commitment Letter means, and so does UP. UP's actions do not measure up to its promises. UP has simply welshed on the deal.

1. The Carrier does not have the unilateral right to designate a single collective bargaining agreement for a proposed Hub and Spoke area irrespective of conditions, such as commonality of territory, without negotiating the terms and conditions of such arrangement with the Organization.

As explained in UTU Vice President Futhey's Declaration (Organization's Exhibit 3), contrary to the Carrier's statement in their Operating Plan, the Union Pacific does not currently operate a "Hub and Spoke" system. In neither the Operating Plan, nor the Verified Statement of M. A. Hartman, did the Carrier take the position that it should be able to unilaterally select the Collective Bargaining agreement desired for each Hub and Spoke location. This is reflected in the following statement from pages 255 and 256 of Appendix A of the Operating Plan (Organization's Exhibit 2):

> "It is essential that all operating employees within the hub, as well as all road operations into and out of the hub, be subject to one common collective bargaining agreement with common seniority."

> "This type of consolidation is a win-win situation for employees, UP/SP and customers." (emphasis added).

This was further clarified by M. A. Hartman in his Verified Statement, at pages 402 and 403 of the Operating Plan (*id.*), to wit:

> "As explained in Appendix A to the Operating Plan, these changes cannot be implemented under existing labor agreements. For example, in many corridors, UP and SP train crews will be required to operate interchangeably or directionally over both UP and SP lines, which is impossible under existing labor agreements." (emphasis added).
>
> "The arrangements described in Appendix A represents our best projections, based on the information available to us today, but experience teaches that different arrangements and modifications of existing labor agreements may be necessary as circumstances change and shipping patterns evolve."
>
> "The job changes summarized in the Labor Impact Exhibit reflect the details of the Operating Plan as we now project them, including the necessary changes in seniority districts, crew change points, labor agreement consolidations, etc. set forth in the Operating Plan and Appendix A.

In studying M. A. Hartman's Verified statement regarding CBA changes, it is obvious that if a collective bargaining agreement needs to be modified in order to implement the transaction, then such changes or modifications would meet the "necessity" requirement. This would be a situation, as explained by Mr. Hartman, such as allowing UP and SP train crews to operate interchangeably or directionally over both UP and SP lines. The Organization takes no exception to those types of operational changes which are obviously necessary and required to physically implement the merger. However, UTU does take exception to the Carrier's attempt to eliminate entire collective bargaining agreements and pick the one it most desires. In the presentation of its Operating Plan, the Carrier also recognized there was no need for the

elimination of complete CBA's. If such had not been the case, M. A. Hartman would have so stated, instead of using phrases as quoted above, i.e., **"different arrangements and modifications of existing labor agreements"** and **"labor agreement consolidations."** The words "modifications" and "consolidations" indicate the "blending together" of existing agreements, so that they are sufficiently uniform to address the necessity issues, i.e., the agreements would not stand in the way of physical implementation of the merger. This does not encompass the elimination of existing CBA's, nor does it grant the Carrier the unilateral right to pick or select whatever CBA it desires in the territory involved.

It is ironic that in every past merger involving this Carrier, the Organization has been confronted with the same issue involving CBA's. This very issue was presented before two of the industry's most recognized and distinguished Neutrals during arbitration in the UP/MKT merger enclosed as Organization's Legal Appendix, Exhibit 21. Robert E. Peterson and Richard R. Kasher issued the following findings regarding the elimination of CBA's:

> "This Arbitration Committee does not question the Carrier's contention that there is a need for current agreements to be modified, which would facilitate implementation of the operating aspects of the transaction. However, the record is devoid of any evidence supporting the precise nature of such need, let alone the complete elimination of the collective bargaining agreements of the MKT, OKT and GH&H. In the opinion of this Arbitration Committee, while the Carrier's proposal might eliminate some administrative problems associated with the continued application of the referenced agreements, there is no evidence in the record to establish that these cost savings were factored into the Operating Plan or presented for the ICC's consideration. (Page 13 of the Award) (emphasis added).

> If the Carrier firmly believes that collective bargaining agreements, which it seeks to eliminate, are millstones which prevent it from achieving its goal of becoming what it says would be "the most competitive and efficient transportation mode in the territory

affected by the merger," or, "the most competitive transportation force in the involved corridor," it has the right to seek change through negotiation and the orderly procedures of the Railway Labor Act. We do not see that it has the right to have all such agreements declared null and void by simple reason of the fact that the ICC authorized a transaction." (Page 13 of the Award) (emphasis added).

"Accordingly, the Arbitration Committee concludes that the Carrier's proposal to completely eliminate existing collective bargaining agreements is not a mandatory subject of bargaining in the context of these New York Dock negotiations." (Page 14 of the Award) (emphasis added).

2. In a consolidated area, or "Hub and Spoke," where the Carrier demonstrates the necessity of a single collective bargaining agreement, the predominant collective bargaining agreement should apply, as even the Carrier has acknowledged in the past.

In all of the other mergers involving this Carrier, it has been its position that in consolidated areas where it requires one collective bargaining agreement, the predominate collective bargaining agreement over the territory involved would be applied. This was acknowledged in the Kasher - Peterson Arbitration Award in the UP/MKT Merger as follows:

"The Carrier submits that the three agreements which it proposes be the sole controlling agreements are the predominate collective bargaining agreements currently in effect on the overall territory comprehended by the Carrier's Operating Plan. (Page 13 of the Award)

In this merger, the Carrier has taken a different approach. By following its past positions on predominate collective bargaining agreements at some locations, the Carrier would be required to accept an agreement more favorable to the employees than other agreements. For this sole reason the Carrier now wants to change what it has insisted upon in the past. This has nothing to do with the Operating Plan and the implementation of the merger. It merely transfers wealth from the employees to the employer, contrary to the decision of the D.C. Circuit in *RLEA v.*

United States ("*Guilford*"), 987 F.2d 806 (D.C. Cir. 1993) (enclosed as Organization's Legal Apppendix Exhibit 8). That is exactly what UP committed it would not do in this merger, in exchange for support of the merger by UTU.

> 3. Where train and engine service (firemen) employees now hold "system seniority" under existing agreements, the Carrier's Operating Plan as contemplated in the Marchant Commitment Letter does not require these same employees to relinquish their "System Seniority" rights under existing Agreements.

Currently many employees now have system seniority rights that allow them to bid in and work assignments over portions of the entire railroad. It is the Carrier's desire to create new seniority districts in their so-called "Hub and Spoke" areas. Once the new seniority district is created under the Carrier's plan, employees outside of the "hub" would be required to relinquish their seniority rights within the "hub," and those with seniority rights in the "hub" would be required to relinquish all seniority rights outside of the "hub." This has no effect or bearing on implementing the merger. Again, this Carrier has attempted this in past mergers, and this issue also was addressed by Neutrals Robert E. Peterson and Richard R. Kasher in the UP/MKT Merger (Organization's Legal Appendix, Exhibit 21) as follows:

> "The Carrier has proposed that concurrent with implementation of its proposed elimination of MKT, OKT and GH&H labor agreements that the seniority standing of employees covered under those agreements be integrated into eleven (11) proposed seniority rosters."
> (Page 14 of the Award) (emphasis added).

> "Since this Arbitration Committee finds the Carrier proposal for the rearrangement of forces to be overly broad, beyond the obligations and protections provided in the New York Dock conditions, the Carrier proposal should be withdrawn from the New York Dock negotiations. (Page 14 of the Award)

> Therefore, this Arbitration Committee concludes that the wholesale rearrangement of seniority for employees represented by the Union is not justified in the context of the limited scope of this transaction. Nevertheless we would recommend to the parties that they work cooperatively in developing the necessary rearrangement of seniority rights where certain changes are implemented, such as the consolidation of terminals. (Page 14 of the Award (emphasis added).

The Organization recognizes the obligation to the rearrangement of seniority rights in a consolidated terminal, but UTU does not agree to the "wholesale rearrangement of seniority," nor the elimination of such seniority rights that employees now hold. UTU is obligated to preserve existing seniority rights to the greatest extent possible, and an arbitration award that disregards that obligation is voidable. *See Beardsly v. CNW*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (enclosed in Organization's Legal Appendix as Exhibit 22).

4. The Carrier does not have the right to unilaterally force relocations outside the defined territory of the Notice to areas not commensurate with transfer of work.

Despite the fact the Carrier insists that employees be required to relinquish seniority outside of the hub, the Carrier nonetheless wants the right to force excess employees inside the hub to any location on the new system (Union Pacific - Southern Pacific). The Carrier wants to determine the number of employees needed in each hub, and if the number of employees are in excess of that number, then those employees can be forced to any location where a shortage of employees exist on the new merged railroad. This would include areas where the employees would hold no seniority rights. As an example, a surplus of employees on the Union Pacific in Chicago could result in employees being forced from that location to Los Angles, California on the Southern Pacific. Further, there are currently locations where under Crew Consist Agreements, Reserve Boards were established. Under existing agreements, employees on the

Reserve Board cannot be forced to another location. The Carrier's desire in insisting upon this phony "forced transfer" right has nothing to do with the merger, but rather with the right to distribute employees at the whim of the Carrier to any location it desires that will permit it to line its pockets with money belonging to the employees.

5. The Carrier's Operating Plan as contemplated in the Commitment Letter does not allow the Carrier the right to make changes and/or eliminate existing Crew Consist Agreements and the protections contained therein for the sole purpose of granting the Carrier savings and/or relief from restrictions contained in a Crew Consist Agreement.

The Organization recognizes that in consolidated areas the work restrictions under crew consist agreements must be compatible. The Carrier, on the other hand, is attempting to use this merger as means to reduce payments under one crew consist agreement by forcing coverage by another crew consist agreement. The Carrier wants to disturb current Reserve Boards and rearrange them to cover much broader areas than currently exists. It is the Organization's position that each Crew Consist Agreement must stand on its own merits. If a conflict other than with regard to monetary issues exists that demonstrates a requirement for changes in an existing crew consist agreement, that could be accomplished through negotiations. However, to change an existing crew consist agreement, the Carrier must first meet the burden of "necessity." The Carrier does not have the unilateral right to make the determination of what changes are necessary in each crew consist agreement, nor does it have the right to eliminate any crew consist agreement by transferring employees to a location covered by one with lesser benefits for the employees involved.

6. The Carrier's Operating Plan as contemplated in the Commitment Letter does not allow the Carrier the right to change and/or eliminate Extra Board Guarantees and Pool Freight monthly

Guarantees because that only results in monetary savings to the Carrier.

The various General Committees involved in this transaction have through the years negotiated guarantees for extra boards, and in some instances Pool Freight assignments. These guarantees vary from one General Committee to another. There are agreements that provide for higher guarantees than others, and the Carrier wants to eliminate those agreements in exchange for an agreement that pays a lesser guarantee. Guarantees have nothing to do with affecting the Carrier's right to implement this transaction. This should be an item that should be decided through negotiations in making **"different arrangements and modifications of existing labor agreements"** or **"labor agreement consolidations"** as referred to in M. A. Hartman's Verified Statement, which is enclosed as part of Organization's Exhibit 2. The changes that the Carrier desires, are all at the expense of the employees, and are financially favorable to the Carrier. These changes have no effect or bearing on putting together an Implementing Agreement under Article I, Section 4 of New York Dock.

7. Southern Pacific employees are entitled to the Lump Sum Payments contained in PL 102-29 and the 1996 UTU Award of Arbitration No. 559, if they agree to Union Pacific's request to bring their Agreement up to national contract standards.

The Southern Pacific employees were carved out of the 1991 National Agreement as to wage increases, and were not involved with the 1996 UTU Award of Arbitration No. 559 because of the financial condition of the Southern Pacific. This resulted in "on-property" negotiations. The Southern Pacific employees received three (3) items in return for by-passing the Lump Sum payments contained in the 1991 and 1996 settlements. Those three (3) items were: (1) the maintaining of the basic day at 108 miles; (2) no rule changes such as were contained in the

1991 Agreement; and, (3) the employees would not be required to pay a contribution to their Health and Welfare benefits since those payments were deducted from the Lump Sum Payments.

The Organization has no problem with bringing the Southern Pacific Agreements up to the national standard; however, in doing so it is only right that the employees involved be paid the same Lump Sums as employees in the rest of the industry. By bringing the Southern Pacific employees up to national standards, their basic day will increase from 108 miles to 130 miles. They would be subject to all the rule changes contained in the last two (2) national agreements that were favorable to the Carrier, and they would have to start contributing to their Health and Welfare benefits. This is everything they received from the Southern Pacific in exchange for the Lump Sum payments. Again, Union Pacific benefits from acceptance of the national standards. In refusing to grant the Southern Pacific employees the Lump Sums, this is again an attempt by the Carrier is again attempting to transfer the wealth from the employees to the employer. This is not a case of requesting lump sums discussed by the STB in its Decision at page 174 (Organization's Exhibit 6) because there is a quid pro quo involved, i.e., UP wants the benefits of productivity gains on the national agreement(s), and the price for that is the lump sum(s).

8. The Operating Plan as contemplated by the Marchant Commitment Letter does not allow the Carrier the right to eliminate a $12.50 allowance to Southern Pacific crews for not stopping to eat enroute.

This is another example where the Carrier is attempting through the guise of a merger to transfer wealth from the employees to the employer. The Southern Pacific General Committees in past years have negotiated an agreement that pays them $12.50 for giving up the right to eat in road service. Other General Committees on various railroads have negotiated similar agreements that pay various amounts to crews for not stopping to eat. Under the 1972 National

Agreement, crews in Interdivisional service receive $1.50 for not stopping to eat. This has nothing to do with the merger, but rather is purely a monetary issue that the Carrier is attempting to eliminate through this transaction.

9. The Carrier's Operating Plan and the Commitment Letter do not allow the Carrier to eliminate existing agreements that provide for additional earnings for work off of assignments in both road and yard.

Various General Committees involved in this transaction have negotiated agreements that pay additional earnings when an employee is used off of their regular road or yard assignment. These agreements came about because of shortages resulting from the Carriers hiring insufficient manpower. The Carrier has complete control of these provisions by seeing to it that each location has sufficient manpower to man all of the assignments. If this occurs, then there is no cost to the Carrier. However, if the Carrier fails to hire sufficient manpower for all locations and employees are used off of their regular assignments, those employees should be covered under the existing agreements currently in effect. Again, this is not merger related. It is just another attempt by the Union Pacific to transfer wealth from the employees to the employer.

10. The Carrier's Operating Plan and the Commitment Letter do not allow the Carrier to eliminate the Short Line Sale Protection (no sale without an agreement with UTU) in effect on the former Southern Pacific.

The Southern Pacific General Committees negotiated an Agreement that requires the Carrier to negotiate an Agreement with the UTU before a portion of that railroad can be sold off to a short line railroad. Again, this Agreement is not merger-related, and all the Organization requests is that the Union Pacific honor collective bargaining agreements with the Organization, or to seek change through negotiations and the orderly procedures of the Railway Labor Act.

11. The Carrier does not have the unilateral right to establish interdivisional service at its discretion, as it pertains to operations and the date(s) implemented, without negotiations as required in current collective bargaining agreements.

Both the Southern Pacific and Union Pacific are parties to the UTU National Agreements that provide for a means to address and establish interdivisional service. Article XIII of the January 27, 1972 UTU National Agreement, as well as Article IX of the October 31, 1985 UTU National Agreement provide for greater employee protection than is provided for under New York Dock conditions. That is the sole reason that the Carrier desires to establish interdivisional service in this transaction-- to eliminate and/or circumvent employee protection that is greater than that contained in New York Dock.

This is not the first time that this Carrier has attempted to establish interdivisional service under a New York Dock transaction. Neutrals Robert E. Peterson and Richard R. Kasher addressed this very issue in their Arbitration Award in the UP-MKT Merger (Organization's Legal Appendix Exhibit 21) stating, in pertinent part:

> **"This Arbitration Committee has no reason to conclude** that the ICC had intended that the Carrier would have a unilateral right to establish interdivisional service and circumvent agreed-upon or recognized procedures for attainment of such service. Here, it is noted that creation of interdivisional service is not something which the collective bargaining agreements prohibit Rather, current agreements provide an orderly manner and reasonably expeditious means by which such service may be implemented and myriad problems resolved; such agreements include final and binding arbitration provisions should such action be necessary. (Page 15 of the Award) (emphasis added).

12. The Carrier does not have the unilateral right to require dual destination terminals, which in effect establish two (2) away-from-home terminals in a single pool operation.

Existing freight pool operations have always been established through negotiations. Part

of all pool negotiations is the location of both the home terminals and the away-from-home terminals. Because of convenience, as well as the need for transportation at the away from home terminals, many employees have automobiles at these locations. They also have lockers with clothing, shaving equipment, etc. at the away-from-home terminal. The Carrier wants to take these existing negotiated away-from-home terminals away from the employees, and add additional away-from-home terminals in the same pool. The hardship this would work on the employees would be considerable. The existing pools can continue to function with the same away from home terminals without affecting the Carrier's Operating Plan. Here again, the Carrier is attempting to gain something in an Article I, Section 4 New York Dock transaction that properly should be negotiated under the provisions of the Railway Labor Act. Moreover, such a result may violate an FRA requirement for single home terminal (Organization's Exhibit 8).

14. The Carrier does not have the right to unilaterally change yard assignments to road assignments when the jobs in question remains under the same collective bargaining agreement, if such agreement does not allow same.

The proposal by the Carrier to change current yard operations by establishing road assignments in their stead is clearly a transfer of wealth from the employees to the Carrier. The assignments in question currently are yard assignments under a simple agreement that is proposed by the Carrier as the surviving agreement. There is no intermingling of any of the other merging Carrier's yard or road operations. The only change is the designation of the type of assignment.

15. The Carrier does not have the right to consider multiple locations a "single outlying point," were only one (1) extra board protects vacancies that are currently protected by multiple extra boards on both properties.

The Carrier is attempting to consolidate "outside points" (outside of Houston) which are

miles apart (greater than 30) into a single location for extra board protection purposes. Currently both UP and SP each have multiple extra boards protecting the so called "outside points" that are involved herein. The Carrier further wants to require the employees to provide their own transportation at no cost to the Carrier. This proposed requirement by the Carrier is not consistent with any current agreement, and merely represents the Carrier exercising an opportunity to require the employees to assume expense which is properly borne by the Carrier.

The Carrier is required to have a single reporting point for an extra board in accordance with the FRA. In correspondence addressed to a BLE General Chairman, the same condition as proposed by the Carrier is addressed by FRA Director, Office of Safety Enforcement, Edward R. English (Organization's Exhibit 8):

> In addition, extra board employees may have only one regular reporting point. The regular reporting point for these employees may be the specific or fixed location of the extra board. In the previous example, the location may be either Proviso or Global I, but not both for the same extra board. If Proviso is designated as the extra board location, all travel time for extra board employees reporting to Proviso is considered as commuting. Conversely, travel time from the employee's residence or from Proviso to Global I is considered as on-duty time consistent with FRA's application of deadheading. (*See* Title 49 Code of Federal Regulations, Part 228, Appendix A)

Clearly, the Carrier is beyond its bounds contractually and under FRA requirements.

16. SP employees who are entitled to group life insurance, hospitalization and medical care, and disability insurance retain those benefits after implementation of the merger.

Clearly the ICC decision reviewing the O'Brien Award on CSX (at 14-15) recognizes the right to retain these rights and privileges.

In addition, the Urban Mass Transit Act of 1964 ("UMTA") now, the Federal Transit Act

("FTA") Section 13(c) [49 U.S.C. § 1609(c)] requirements are instructive. Since no UMTA ("FTA") financing can be completed without the Secretary of Labor's Section 13(c) certification, a model protective agreement was developed to permit rapid and dependable processing of applications. The current regulations of the Department of Labor provide that the Secretary will certify pursuant to Section 13(c) if the parties adopt the Model Agreement. 29 CFR 215.6. Paragraph 10 of the Model Agreement sets forth the type of rights, privileges, and benefits that are "preserved" (emphasis added):

> (10) No employee receiving a dismissal or displacement allowance shall be deprived during his protection period, of any rights, privileges, or benefits attaching to his employment, including without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workman's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions so long as such benefits continue to be accorded to other employees of the bargaining unit, inactive service or furloughed as the case may be. (emphasis added).

17. The Carrier does not have the right to prevent furloughed employees on an involved territory from being placed on integrated seniority rosters or to dictate how seniority will be combined in an affected territory.

This scenario represents the Carrier's desire to dictate who will have rights to merge resultant territories. The Organization contends the Carrier does not have the right to "shrink" seniority where rights currently exist. The Carrier has no managerial prerogative here. The Organization, as employee representative, has equal standing in determining the method of potential integration of seniority. (Elkouri & Elkouri, How Arbitration Works, at 586):

> One of the most severe limitations upon the exercise of managerial

> discretion is the requirement of seniority recognition. Indeed, the effect of seniority recognition is dramatic from the standpoint of employer, union, and employee alike since "every seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interest of each worker against those of all the others."
>
> In the absence of a definition of the term in the collective agreement, seniority "is commonly understood to mean the length of service with the employer or in some division of the enterprise." Seniority "means that men retain their jobs according to their length of service with their employer and that men are promoted to better jobs on the same basis." It is generally recognized that the chief purpose of a seniority plan is to provide maximum security to workers with the longest continuous service."

The Carrier's attempt to limit seniority is diametrically opposite to its position in the Operating Plan, Appendix A, at 256 (Organization's Exhibit 2):

> This type of consolidation is a win-win situation for employees, UP/SP and customers. It expands work opportunities for the affected employees and mitigates the adverse effects that historically have befallen employees on smaller, isolated seniority districts when business or operations shifted to a different route due to shipper routing changes, maintenance programs, disasters, etc.

See also, Organization's Exhibit 6 at 174; *Beardsly v. CNW, supra*; ICC Decision Affirming O'Briend Award on "rights and privileges."

CONCLUSION

For the foregoing reasons, it should be found that the Carrier has failed to satisfy the condition precedent to UTU negotiating voluntary implementing agreements, and that any implementing agreements reached by arbitration or otherwise immediately and mediately hereafter shall be deemed to be voluntary in application of the balance of the Carrier promises in the Marchant Commitment Letter.

Respectfully submitted,

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ORGANIZATION'S SUBMISSION

In the Matter of Arbitration

between

United Transportation Union

and

Union Pacific Railroad Company, et al. ("UP") – Control and Merger – Southern Pacific Transportation Company, et al. ("SP")

Pursuant to Article I, Section 4 of the New York Dock conditions imposed by the Surface Transportation Board in Finance Docket No. 32760

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TABLE OF CONTENTS

OVERVIEW

This arbitration principally concerns the efforts of the carriers in ICC Finance Docket No. 32760 to use Article I, Section 4 of Appendix III of the New York Dock II labor protective conditions placed on the transaction by the STB in Decision No. 44 therein (Service Date-August 12, 1996), which authorized the acquisition of control of the SP holding company and carriers by the holding company that controls Union Pacific Railroad Company and other carriers to obtain changes in existing collective bargaining agreements held by UTU that are not necessary for implementation of the approved transaction, and run afoul of the Marchant Commitment Letter as discussed in the STB Decision. The carriers are apparently of the erroneous opinion that they can make merely inconvenient collective bargaining agreement provisions of UTU vanish as well by means of the Article I, Section 4 process, rather than by negotiating changes under the Railway Labor Act ("RLA").

UP was involved in the same sort of conduct in its merger with the Missouri-Kansas-Texas Railroad ("MKT") several years ago. It was thwarted in its effort by Arbitrators Richard Kasher and Robert Peterson in an Article I, Section 4 award in that Finance Docket (30800), which will be referred to and discussed at several points below. UP should suffer the same fate by means of award in this transaction, for the facts here are not materially different than those involved in the UP-MKT merger, and if anything more strongly favor the Organization here.

I. FACTUAL BACKGROUND OF DISPUTE AND MARCHANT COMMITMENT LETTER

United Transportation Union ("UTU") has disputes with the Carrier parties over the interpretation and application of provisions of the February 26, 1996 letter of Union Pacific Railroad Company ("UP") Vice President-Labor Relations John J. Marchant to UTU International

President Charles L. Little ("Marchant Commitment Letter") (Organization Exhibit 1), cited and addressed by the Surface Transportation Board ("STB") in its August 12, 1996 (Service Date) Decision (No. 44) in STB Finance Docket No. 32760 ("UP-SP Merger Decision") with respect to the Carrier parties' various demands for changes in UTU's collective bargaining agreements ("CBA's"). The specific provision of the Marchant Commitment Letter at issue herein is at page 2 thereof, to wit:

> [U]P also commits that, in any Merger Notice served after Board approval, it will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s).

On or about November 30, 1995, incident to the involved merger application at the STB, the Carrier parties submitted to the STB, *inter alia*, the Operating Plan ("OpPlan"), Labor Impact Study ("LIS"), and supporting statements. Railroad Merger Application, Vol. 3 (UP/SP 24) (excerpts from which are enclosed as Organization's Exhibit 2). The Verified Statement of M. A. Hartman supporting the LIS contains a material misstatement at page 255 thereof in its claim that UP currently operates as a "hub-and-spoke" system, necessitating a single CBA and seniority roster for each component of the hub-and-spoke system in the merger implementation with SP. It does not. (Declaration of UTU Vice President M. B. Futhey, enclosed as Organization's Exhibit 3).

Shortly thereafter, the UP became greatly concerned that criticism from all quarters jeopardized the approval of the merger. UP began to seek out parties who would support the merger, including UTU. While UTU was concerned that SP would be incapable of operating

successfully in the West competing with BNSF and UP-CNW, raising the specter of § 10901 line sales without labor protection, it had equal concern that UP not obtain *carte blanche* to wreck havoc with the CBA's held by the UTU General Committees of Adjustment on UP and SP in any merger approved. These concerns of UTU are spelled out in the Declaration of UTU International President Charles L. Little enclosed as Organization's Exhibit 4. These concerns remained paramount in the bargaining over the terms of the Marchant Commitment Letter, particularly those relating to CBA changes, since UTU was then fighting the results of the Interstate Commerce Commission's ("ICC") affirmance of the "O'Brien Award" on CSX issued by the ICC December 7, 1995, permitting wholesale CBA changes in agreements and seniority with no showing of "necessity" in its common and everyday meaning required. (Organization's Exhibit 4).

Although the automatic certification of employees represented by UTU as adversely effected was also an important component of any deal with UP to support the merger (id.), UTU would not commit to voluntarily reach implementing agreements without qualification, because it would expose the membership and organization to the same harm evidenced in the O'Brien Award (id.). Agreement to support the merger was not reached until the above-quoted language from the Marchant Commitment Letter was inserted (id.).

At the July 1, 1996 hearing on the UP-SP Merger these purposes were made explicit by undersigned counsel (Organization Exhibit 5). These remarks cannot be divorced from the context in which they arose, as UP has done during its phony negotiations with UTU. Again, while the impulse for UTU to support an obviously anti-competitive merger (the Justice Department vehemently opposed it) was to ensure survival of SP in the mega-carrier world West

of the Mississippi River (BNSF and UP-CNW), it was not willing to support it at the price of wholesale changes in existing CBA's. Hence, the explicit limitation on CBA changes in the Marchant Commitment Letter.

The STB fully understood the totality of what UTU extracted from UP in the Marchant Commitment Letter, as evidenced by the following passages from its August 12, 1996 UP-SP Merger Decision (Organization's Exhibit 6).

> UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that is supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBA's that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of New York Dock is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time of issuance of the award(s); and (4) that, in the event UP uses a lease

> arrangement to complete the merger of the various SP properties into MPRR or UPRR, the New York Dock conditions will nevertheless be applicable.
>
> UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

STB August 12, 1996 Merger Decision at 171.

> I believe that the Labor Unions deserve a special commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here, Labor's participation in the debate resulted in a win-win situation for everybody.

STB August 12, 1996 Merger Decision at 246-47 n. 281 (Vice Chairman Simmons, commenting).

> With regard to labor relations, I note that this is the only railroad merger in recent history to receive widespread labor-union support. Railroads operate the largest outdoor factory in America, often stretching tens of thousands of miles. The existence of a well-trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and including them in the planning process. All too often, in recent years, labor relations in the railroad industry have been unnecessarily acrimonious.
>
> The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions.
>
> Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a

> convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer. 300
>
> The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act.
>
> 300 *See, e.g., Railway Labor Executives Association v. United States*, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction.

STB August 12, 1996 Merger Decision at 251 (Commissioner Owen, commenting).

The various UP Merger Notices and Bargaining Proposals demonstrative of the Carrier's failure to comply with the terms of the New York Dock II Conditions and the Marchant Commitment Letter are discussed in the Declaration of Paul C. Thompson (Organization's Exhibit 7).

II. LEGAL BACKGROUND AND LIMITATIONS ON APPLICANTS' DESIRE FOR AGREEMENT CHANGES

While the merger will result in operational efficiencies, the Carriers have made numerous requests which seek to create additional efficiencies solely through the abrogation of the terms and conditions of collective bargaining agreements. As shown below, the Carriers in numerous instances attempt to use the Board's approval as a maneuver to avoid their collective bargaining and Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, et seq., obligations. A principal purpose of this transaction is apparently to avoid the applicants' legal obligations to the Organization, but the STB was not commissioned as a labor regulator or labor relations agency. The applicants

have not produced any substantial evidence that the avoidance of these contractual and RLA obligations are necessary to effect the "approved transaction," as required by the decision of the Supreme Court of the United States in Norfolk & Western Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117, 113 L.Ed.2d 95 (1991) (copy included in Organization's Legal Appendix as Exhibit 1).

As the Supreme Court recognized in Dispatchers, supra, an exemption from legal requirements, such as the RLA, under 49 U.S.C. § 11341(a), by its own terms, applies only when "necessary to carry out a transaction approved by the Commission." 113 L.Ed.2d at 110. These criteria must be satisfied before the Commission can move on to the next limitation: whether the decision to override the carriers' obligations is consistent with the labor protective requirements of Section 11347. Id.

Thus, if the subordination of the statutory and contractual rights of the UP and CNW employees is not "necessary" to carry out the merger, this arbitration need go no further on this point. Only if the "necessity" requirement of Section 11321(a) [former Section 11341(a)] is satisfied must the impact of the labor protective requirements of 49 U.S.C. § 11326 [former Section 11347] and the New York Dock conditions be considered.

A. Exemption Of The Collective Bargaining Agreement Obligations Is Not Necessary To Carry Out The Transaction.

On the facts of this case, it is clear that it is not "necessary" to subordinate the statutory and collective bargaining rights of the Carriers' employees in order to implement the merger.

In its decision in Dispatchers, the Supreme Court stated that the standard of "necessity" was not before it. 113 L.Ed.2d at 110. While the Supreme Court has not previously considered the "standard of necessity" under 49 U.S.C. § 11341(a) [now Section 11321(a)] or its

predecessors, other courts have. In City of Palestine v. United States, 559 F.2d 408 (5th Cir. 1977), cert. denied, 435 U.S. 950 (1978) (included in Organization's Legal Appendix as Exhibit 2), the Fifth Circuit rejected an effort by a merged carrier to apply the exemption in 49 U.S.C. § 5(11) [the predecessor of Section 11341(a), and now Section 11321(a)] to an agreement requiring one of its merging railroads to maintain employees and an office in Palestine. Texas. In rejecting the carrier's exercise of the exemption authority, the Court of Appeals held that the agreement in question "did not threaten the merger's success." Id. at 414. The Court went on to hold that "Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger." Id. "Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest-when the destruction is irrelevant to the success of the approved transactions." Id. at 415.

As the Fifth Circuit emphasized in Palestine, "necessary" does not signify merely convenient or even the most efficient. Instead, "necessary" requires something more, the absence of which would bar the consummation of the approved transaction. A finding of necessity must be premised on the applicants' actual inability to carry out an approved transaction, not on an assessment of the relative costs or possible efficiencies of proceeding in the absence of the alleged obstacle. A comparative efficiency standard cannot be consistently applied either by the Commission or by arbitrators who are called upon to resolve disputes between carriers and the representatives of their employees. The determination of "necessity" is primarily a factual one. See, discussion of RLEA v. United States ("Guilford"), and CSX Corp. -- Control -- Chessie and

Seaboard ("Carmen II"), infra.

B. Section 11326 Applies In The Context Of Labor Agreements To Limit The Exercise Of Authority That Section 11321(a) Provides.

As argued above, there is no need to continue on to the 49 U.S.C. § 11326 prong of this analysis because the requirements under Section 11321(a) have not been met. However, assuming arguendo that the changes proposed by the Carriers in this case, subordinating the collective bargaining agreement and statutory rights of the employees, were approved by the Board under Section 11321(a), and assuming arguendo that it was determined under Section 11321(a) that it was necessary to modify collective bargaining agreement and statutory rights to avoid thwarting the transaction, the transaction must be considered authorized under Section 11321(a). That analysis would apply to the exemption of any law or legal obligation—such as a federal antitrust statute or a state regulatory law. However, when the Section 11321(a) exemption power is applied to obligations arising in the context of labor relations—to labor laws like the RLA or obligations imposed by a collective bargaining agreement--there is an additional restriction on the exercise of that authority, i.e., Section 11326 requires the carrier to provide appropriate labor protective conditions for the employees affected by the transaction.

Section 11326 was enacted for the benefit of the affected employees, not the carriers. Southern -- Central of Georgia -- Control, 331 I.C.C. 151, 169-70 (1967) (See, Organization's Legal Appendix, Exhibit 10 at p. 36); Chicago, St. Paul, M & O Ry. Lease, 295 I.C.C. 696, 701 (1958); Texas & New Orleans Ry. v. BRT, 307 F.2d 151, 157, 160 (5th Cir. 1962) (included in the Organization's Legal Appendix as Exhibit 3). Its purpose is to regulate the exercise of the Section 11321(a) exemption authority when it is applied to labor obligations. In other words, Section 11321(a) gives the authority, but Section 11326 limits the exercise of that authority. See,

American Train Dispatchers Ass'n v. I.C.C., 26 F.3d 1157, 1165 (D.C. Cir. 1994) (included in Organization's Legal Appendix as Exhibit 4).

Section 11326 stands as a separate, distinct, and formidable limitation on the exercise of Section 11321(a) exemption authority. See, id. The two sections can be properly understood only if they are read in conjunction with each other. See, United States v. Morton, 467 U.S. 822, 828 (1984) (statutory sections must be read and interpreted together) (included in Organization's Legal Appendix as Exhibit 5). Certainly, Section 11321(a) cannot be isolated from Section 11326, for any order of the Commission under Section 11321(a) which does not conform to Section 11326's requirements is rendered invalid. Southern, 331 I.C.C. at 163-64. Instead, if "the consistency of the overall statutory scheme for dealing with CBA modifications required to implement Commission-approved mergers and consolidations" is to be achieved, the authority of Section 11321(a) must be "circumscribed" by Section 11347. CSX Corp. -- Control -- Chessie and Seaboard ("Carmen II"), 6 I.C.C.2d 715, 722 (1990) (included in Organization's Legal Appendix as Exhibit 6).

The statutory scheme contemplates that Section 11321(a) will provide the means for advancing the national policy of consolidations in the rail industry that is found in the Interstate Commerce Act ("ICA"), while Section 11326 will provide the means for advancing the national policy of collective bargaining in the rail industry that is found in the Railway Labor Act ("RLA"). It is evident that there is a certain tension between those two important federal statutes. Yet the Supreme Court noted as recently as 1989 that the two competing federal policies can and must be accommodated to each other. The Court viewed the ICA and RLA as "complementary regimes" that, whenever possible, should be harmonized rather than forced onto a collision

course. Pittsburgh & Lake Erie R.R. v. RLEA, 491 U.S. 490, 105 L.Ed.2d 415, 434 and n. 18 (1989) (included in Organization's Legal Appendix as Exhibit 7).

The Court of Appeals for the District of Columbia Circuit added significantly to the authority on the subject in its decision in RLEA v. United States ("Guilford"), 987 F.2d 806 (D.C. Cir. 1993) (included in Organization's Legal Appendix as Exhibit 8). In Guilford, the court emphasized that Section 11326 "clearly mandates that 'rights, privileges, and benefits' afforded employees under existing CBAs be preserved." Id. at 814. Although the contours of those "rights, privileges, and benefits" were left in the first instance to the Commission to delineate, the court made clear that Section 11326 itself imposed an affirmative obligation on the Commission.

Guilford arose from a series of decisions by the Commission concerning the efforts of Guilford Transportation Industries to have four of its subsidiaries lease their rail lines and trackage rights to a fifth subsidiary, the Springfield Terminal Railway Company ("ST"). The purpose of the lease transaction was purely and simply to reduce Guilford's collective bargaining obligations by applying the least onerous collective bargaining agreement to all five subsidiaries. Pursuant to Section 11326 and the imposed labor protective provisions, the parties submitted the dispute arising from the proposed lease to arbitration.

The resulting arbitration award required the ST to apply the rates of pay, rules and working conditions of the four lessor carriers' contracts in operating the leased lines. On review by the Commission, the award was partially overturned on the basis that imposition of the lessors' agreements on the ST would frustrate the purpose of the transactions—to apply the more economical ST contracts to the entire Guilford system. The Commission returned the remaining

issues to the parties for negotiation and, if necessary, further arbitration.

When a second arbitration proved necessary, the ensuing award acknowledged that the second arbitrator would have imposed the lessor carriers' collective bargaining agreements on the ST's operation of the lines, exactly as the first arbitrator had. Id. at 809. However, the arbitrator was constrained by the Commission's determination to allow modification of the work rules of the agreements instead. The Commission affirmed the second award.

On appeal to the Court of Appeals for the District of Columbia, the court declined to affirm the Commission's decision to override the collective bargaining agreements. According to the court, Section 11326 "clearly mandates that 'rights, privileges, and benefits' afforded employees under existing CBAs be preserved." 987 F.2d at 814. And because the Commission had not addressed the meaning and scope of those rights, privileges and benefits, the court remanded that issue to the Commission.

In doing so, however, the court placed a significant limitation on the Commission's determination. The Commission, according to the court, is obliged by Section 11326 to provide a "fair arrangement" for the employees affected by any transaction that it sees fit to approve. The court recognized that "at a minimum" an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction. Id. at 814. "[I]t is clear," the court emphasized, "that the Commission may not modify a CBA willy-nilly." Id.[1]

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[1]Indeed, courts recognized before Guilford that it is possible for a collective bargaining obligation to burden a carrier without rendering it impossible for the carrier to carry out an approved transaction. E.g., City of Palestine, supra, 559 F.2d at 414 ; New York Dock Ry. v. U.S., 609 F.2d 83, 101 (2d Cir. 1979) (included in Organization's Legal Appendix as Exhibit 9).

The court was well aware that any time a carrier can reduce its collectively bargained obligations, it can achieve greater economy and financial strength. But the court rejected the notion that elimination of collective bargaining obligations is a valid purpose within the meaning of Section 11341(a). The cognizable purpose of a transaction, according to the court, must not be "merely to transfer wealth from employees to their employer," but must be "to secure to the public some transportation benefit that would not be available if the CBA were left in place." Id. at 815. And the court expressly clarified that the benefit to the public must flow from the approved transaction, not from the modification of the CBA. Id.

Elimination of collective bargaining obligations to improve the financial condition of carriers and to rid themselves of what they view as burdensome and inconvenient provisions that are irrelevant to the merger is simply not within the objectives of Section 11321 or Section 11326. "The necessity limitation is explicit in § 11341(a), and we have no reason to believe that the Congress meant to give the Commission any wider latitude to modify the provisions of a CBA where § 11341(a) does not apply; § 11347 on its face provides more, not less, generous labor protection than does § 11341(a)." Guilford at 814.

C. Section 2 and Section 4 of Article I of the New York Dock II conditions Support The Rationale In the Guilford Decision.

This rationale of the Court of Appeals is further supported by the mandatory labor protective conditions imposed in this transaction pursuant to 49 U.S.C. § 11326. To ensure that the protection required by Section 11347 is provided to affected employees, the Commission [now the Board] developed the labor protective conditions of New York Dock imposed here. The first principle of New York Dock is that of respect for existing collective bargaining obligations: Section 2 of Article I provides that "rates of pay, rules, working conditions and all

collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements . . . shall be preserved when changed by future collective bargaining agreements or applicable statutes . . . ." Compare, Guilford at 814.

Clearly, Article I, Section 2 cannot be read woodenly to "preserve" each and every collective bargaining obligation in each and every transaction. Otherwise, there would be no need for Article I, Section 4, which contemplates that it will be necessary to modify those provisions of collective bargaining agreements that provide for the "selection of forces" and "assignment of employees." But neither can Article I, Section 2 be read out of the New York Dock conditions entirely.

Instead, Article I, Section 2 must be given the effect that Congress intended. Properly interpreted, Article I, Section 2 is simply a ". . . codification of prior rights, generally recognized since 1936," when the Washington Job Protection Agreement ("WJPA") (included with other protective conditions from the Commission in Organization's Legal Appendix as Exhibit 10) protections were applied by the Commission or by the parties. Carmen II, supra, 6 I.C.C.2d 715. As the Commission pointed out in Carmen II, parties have routinely complied with existing collective bargaining agreements and permitted "limited modification" only where necessary to the completion of a transaction that was approved by the Commission. Id. And where parties were unsuccessful in reaching agreement on reasonable accommodations, arbitrators used their authority "to modify CBAs to the extent necessary to permit approved transactions to proceed." Id.

Under the WJPA, negotiators and arbitrators regularly came to an accommodation of the collective bargaining processes of the RLA and the promotion of consolidations. Carmen II, 6

I.C.C.2d at 742, 749. Yet the WJPA lacked an Article I, Section 2 that explicitly enjoined arbitrators to preserve collective bargaining agreements unless necessary to carry out a consolidation. The key to the interplay between Article I, Sections 2 and 4 of the conditions, the Commission indicated, "lies in the history of negotiation and arbitration in the period between 1940-1980." Carmen II, 6 I.C.C.2d at 752. During that era, a principle of accommodation was derived from the express language of Sections 4 and 5 of WJPA (which now effectively appear in Article I, Section 4 of the New York Dock conditions). By their terms, those sections require that provisions must be made for "the selection of forces" and "assignment of employees made necessary by the transaction." Arbitrators therefore limited their subordination of collective bargaining provisions to those which affected the transfer of work, integration of seniority agreements, and reassignment of employees that were necessary to achieve a consolidation. See, Carmen II, 6 I.C.C.2d at 742. As the Commission recognized in its Southern decision, Section 11326 itself—pursuant to which labor provisions were imposed— required first, adherence to existing collective bargaining agreements, and second, appropriate compensation where provisions must be modified:

> [W]e impose formulae of protective conditions upon the carriers seeking specific permissive authority under Section 5(2) of the act, the purpose being to protect the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. . . . These protective conditions imposed upon carriers under Section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces in accordance with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect.

Southern, 331 I.C.C. at 169-70 (emphasis in original) (Organization's Legal Appendix, Exhibit

10 at p. 36). The Commission noted that it had demonstrated its concern for "the fulfillment of existing contractual obligations on the part of the carrier" as early as the 1930's. Id. at 158 (citations omitted).

Arbitral incursions on collective bargaining agreements were limited by the notion that the implementing agreements forged under the WJPA were intended to provide primarily for the selection of forces and assignment of employees that was necessary to effectuate the consolidation. According to that principle of accommodation:

> [w]ork was transferred from one railroad to another despite contrary contractual provisions in CBAs. It was also obvious that contractual seniority rights were modified in order to consolidate rosters of the two separate, combining railroads. . . . We can assume that the reassignment of employees would have regularly taken place despite CBA prohibitions. These actions are the sort that would be necessary to permit almost any consolidation of the functions of two merging railroads.

Carmen II, 6 I.C.C.2d at 742, citing Southern.

When Article I, Section 2 was added to the conditions, it made explicit what had previously been implicit and generally accepted in the rail industry by carriers and unions alike since 1936. Consequently, the adoption of Article I, Section 2 did not provoke the hue and cry that would have accompanied any "radical change" in the balance that had prevailed for decades. Carmen II, 6 I.C.C.2d at 720. As the Commission reported, "Article I, Section 2, appears acceptable to all parties." Carmen II, 6 I.C.C.2d at 797 n. 16. For that reason, "no one commented when this language became part of the Commission's merger conditions in 1979." Id. at 750.

Moreover, "there is no suggestion that Congress intended the 4R Act to make sweeping changes in labor protective conditions." Id. at 797. Instead, it adopted a provision that already

existed in other statutes: Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), and Section 405 of the Rail Passenger Act, former 45 U.S.C. § 565, now 49 U.S.C. § 24706.

In sum, the Commission overreacted in DRGW[2] to an unfounded fear that Article I, Section 2 would be read to establish an "immutable" obstacle to any changes required by consolidations. Yet arbitrators appear generally to have recognized that neither Article I, Section 2, nor Article I, Section 4 "trumps" the other, and neither should be read out of the New York Dock conditions. Instead, they "exist in pari materia and accordingly must be read together in a way that gives effect to each." Carmen II, 6 I.C.C.2d at 798. Collective bargaining agreements will not be overridden under Section 11321(a) simply to facilitate a transaction, but will be required to yield only when and to the extent necessary, i.e., "required," to permit the approved transaction to proceed.

Article I, Sections 2 and 4 can be thus harmonized in an approach that worked successfully during the 40-year "era of accommodation." Carmen II, 6 I.C.C.2d at 721. As the Commission has recognized, Article I, Section 2 "does have significance as a Congressional directive that, to the extent possible, the terms of CBAs are to be preserved." Carmen II, 6 I.C.C.2d at 720. Thus, under Article I, Section 2, the parties—and the arbitrators to whom they may resort—must abide by existing collective bargaining agreements unless changes are necessary to permit the approved transaction to proceed. See, Carmen II, 6 I.C.C.2d at 749 ("only those

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[2]Denver and Rio Grande Western Railroad Company -- Tracking Rights Over Missouri Railroad Company Between Pueblo, Colorado and Kansas City, Missouri ("DRGW"), Finance Docket No. 3000 (Sub. No. 18) (1983), rev'd sub nom. BLE v. ICC, 761 F.2d 4 (D.C. Cir. 1985) (included in Organization's Legal Appendix as Exhibit 11), vacated sub nom. ICC v. BLE, 482 U.S. 220 (1987) (included in Organization's Legal Appendix as Exhibit 12).

changes in CBAs necessary to permit an approved transaction will be appropriate").

Changes that are made under that standard "will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute." Id. at 752-53. By giving proper effect to Article I, Section 2, the Board does not deprive carriers of their ability to consummate an approved transaction. It merely deprives them of any claimed "hunting license" to seek out and eliminate or dilute any collective bargaining provision that stands in the way of cost savings, administrative efficiency or some other general economy. By the time carriers seek the approval of the Board for a proposed transaction, they have assessed both the benefits and the costs of the transaction they propose to the Board as part of their "due diligence." Accordingly, they have full knowledge of the obligations that accompany the transaction for which they seek approval and can reasonably be held applicable to them. Absent necessity, carriers "should not easily be relieved of obligations voluntarily undertaken." Carmen II, supra, 6 I.C.C.2d at 720-21.

In Dispatchers, supra, the Supreme Court clarified that obligations imposed by collective bargaining agreements could be exempted if all statutory prerequisites were met. The Court specifies that those statutory prerequisites include a determination that the carrier has satisfied the labor protective conditions established under Section 11326--within which Article I, Section 2 squarely and securely resides. Thus, nothing in the Supreme Court's decision suggests that the Commission's recognition, expressed in Carmen II, of the rightful place of Article I, Section 2 is misguided. Indeed, "the respect for labor contracts" that the Commission demonstrated in the era of accommodation, id. at 749, is necessary in any attempt to achieve the balance necessary in large mergers between the Interstate Commerce Act and the Railway Labor Act.

This language is in addition to the Article I, Section 2 "preservation of rights, privileges or benefits" language and deals with the specific issue of what happens to an employee's rights under preexisting protective arrangements when the employee is affected by a transaction for which the labor protective conditions of New York Dock have been imposed.

The Commission first addressed whether the employees' rights under the Washington Job Protection Agreement were superseded by Commission-imposed protective conditions in Finance Docket No. 21400, Southern Railway Company--Control--Central of Georgia Railway Company, supra,[3]

> Indeed, in adopting the terms of that [Washington] agreement for our purposes, sometimes with modifications, this Commission has not here nor in any other proceedings, purported to abrogate or supersede the Washington Agreement as a private contract.

331 I.C.C. at 162.

Therefore, employees had the option of protection under the WJPA or under the ICC-imposed conditions, but were not entitled to duplicate benefits.

With respect to an employee's collective bargaining agreements, the I.C.C. held therein:

> The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under Section 5(2)(f) [the predecessor to 49 U.S.C. § 11347] are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts: those under the latter stem from our statutory duty to

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[3]The ICC actually issued three decisions in Southern Ry. -- Control -- Central of Georgia Ry.: November 7, 1962 (317 I.C.C. 557), June 10, 1963 (317 I.C.C. 729) and November 15, 1967 (331 I.C.C. 151) (see, Organization's Legal Appendix, Exhibit 10 at pp. 31-36).

> protect employees. The existence of multiple sources of employee protection does not imply, however, that any employee necessarily has a right to duplicate benefits from all sources.

331 I.C.C. at 169.

Article I, Section 3 of the conditions embodies the concept that ICC-imposed protective arrangements do not supersede pre-existing protective agreements, and further provides that employees may make an election between the provisions of New York Dock and any other protective agreement. In other words, as long as employees do not seek to duplicate, combine or "pyramid" the benefits available to them under New York Dock and another protective arrangement, they may choose the protective package they believe best protects them. Consequently, Article I, Section 3 buttresses the "rights, privileges and benefits" provisions of Article I, Section 2 when it comes to preexisting protective arrangements.

D. Agreement Changes Requested Are Outside The Bounds Of The Marchant Commitment Letter As Recognized By The STB Decision.

In this matter, the Carrier committed to a particular manner of application of the New York Dock II conditions, recognized by the STB in its decision. Part of that commitment was the Carrier would not demand agreement changes that produced public transportation benefits solely on account of agreement changes. The STB said in its Decision it expects UP to live up to this commitment, and it has not done so here, as discussed more fully in Organization's Exhibit 8 and Commitment Letter arbitration submission.

III. THE WEIGHT OF ARBITRAL AUTHORITY AND COMMISSION DECISIONS INDICATE THE CARRIER CANNOT USE ARBITRATION TO ACCOMPLISH CHANGES LEFT TO THE RLA NEGOTIATION PROCESS, PARTICULARLY IN LIGHT OF THE MARCHANT COMMITMENT LETTER.

In 1981-82, in a trilogy of New York Dock implementing agreement arbitrations ("St.

Louis trilogy") arising from the acquisition of the Illinois Terminal Railroad ("IT") by the Norfolk and Western Railway ("N & W"), all three arbitrators preserved existing collective bargaining agreements, without adversely affecting the coordination of rail lines that the Commission had approved.

In the first such arbitration (included in Organization's Legal Appendix as Exhibit 13), Arbitrator Leverett Edwards was presented with the carriers' proposal to place all employees under the Norfolk & Western schedule agreement. The arbitrator did not accept the carriers' proposal to impose the N & W collective bargaining agreement on the IT employees once the transaction was consummated. As to that proposal, the Arbitrator noted that there was authority "to revise or rearrange some provisions of a working agreement in some cases if clearly specified and required" by the Commission's approval order. Id. at 6. However, it was not sufficient for the carriers to show that application of two agreements "would be extremely burdensome and wasteful to administer." Id. at 5. A showing of necessity was required in order to impose the agreement on the IT employees, and that showing was lacking. Id. at 6. The Arbitrator concluded:

> There is no doubt that product of [the Carriers' proposal] . . . might initially result in a better working or more convenient agreement for the Carriers, and might even have benefits for the employee group involved, but there is very substantial doubt of the Arbitrator's jurisdiction to deliver such a package.

Id. As the Arbitrator properly recognized, the "answer here is further negotiations." Id.

Arbitrator Joseph A. Sickles, in the second award from the trilogy (included in Organization's Legal Appendix as Exhibit 14), was confronted with the same issues concerning yardmaster positions after the N & W acquisition of the IT resulted in the closing of two yards

formerly operated by the IT. Again the parties failed to reach agreement on the issue of the schedule agreement that would cover the former IT yardmasters who remained employed after the IT yards were closed.

The unions invoked Article I, Section 2 of the conditions as a bar to any changes in their collective bargaining agreements. The Arbitrator's determinations turned as much on his assessment of Article I, Section 4, as on Article I, Section 2. The Arbitrator also found that Section 4 is limited by the scope of the transaction and can extend only "to those actions proposed by a carrier to make the changes in operations authorized by the ICC." Id. at 11. Yet the carriers acknowledged that an award imposing a foreign working agreement on the IT employees "would alter all other aspects of the employment relationship, including such things as the holiday pay they receive and the disciplinary procedures applied to them." Id. There the Arbitrator drew the line:

> The arbitration clause in Section 4 must necessarily be limited to labor disputes connected with the implementation of that specific transaction. There is no language in Section 4, or anywhere else, that suggests that the scope of arbitration should extend beyond the transaction contemplated. Certainly, nothing suggests that the scope of the Award may go so far beyond the particular transaction involved to determine, as the carriers now ask, such things as the rates of holiday pay to be provided to all employees, or the particular disciplinary procedures which should be followed.

Id. at 12. In analyzing the particular transaction involved, the Arbitrator noted that while the Commission had approved the acquisition of IT by N&W "with all the attendant changes in operations, including the closing of the [two yards]," the Commission did not approve "changes in working agreements." Id. at 11. According to the Arbitrator, "it cannot be said that the Commission authorized the carriers to take steps to alter working conditions in the abstract." Id.

Under the facts of the case, the Arbitrator declined to find that a failure to impose the N&W agreement would obstruct the transaction. Recognizing that a single agreement might be "logical" or might "result in a smoother operation," the Arbitrator nevertheless declined to modify the IT agreement, except to the extent necessary for the selection of forces. Id. at 12-13. Accord, N&W, Illinois Term. and BLE and UTU, Article I, Section 4 New York Dock, ICC Fin. Dk. 29455, February 1, 1982 (Nicholas H. Zumas) (included in Organization's Legal Appendix as Exhibit 15) (arbitrator had authority under Article I, Section 4 to provide for the selection of work forces and employee protections, but not to alter collectively bargained benefits that are preserved under Article I, Section 2).

Additionally, the award rendered by Arbitrator Jacob Seidenberg in Baltimore & Ohio R.R. and Brotherhood of Maintenance of Way Employees (August 31, 1983), Finance Docket No. 30095, (included in Organization's Legal Appendix as Exhibit 16) is instructive. In that award, the Arbitrator endorsed the view of the St. Louis trilogy arbitrators that Article I, Section 4 did not confer on arbitrators "the authority to be a compulsory interest arbitrator and to change or abolish existing collective bargaining agreements in contravention of the procedures" of the RLA. Seidenberg Award at 28. A contrary award, he accurately predicted, "would create uncertainty and lead the parties to relitigate the issue endlessly." Id. at 29.

Arbitrator Seidenberg also recognized explicitly that Article I, Section 4 implementing agreements, designed to make it possible the carriers to get their approved transactions underway, are by their nature temporary. They are not designed to establish the working conditions that will govern the employees of the consolidated entity prospectively. Accordingly, the implementing agreement forged by an Article I, Section 4 arbitrator "does not have to be frozen for all time."

Id. at 32. To the contrary, "[a]fter the acquisition becomes operative, there is no reason why the parties cannot negotiate an agreement that will be congruent with their respective needs." Id. That scenario illustrates precisely how Article I, Section 4 can be accommodated to Article I, Section 2, and, on another level, how the ICA can be accommodated to the RLA. Arbitrators generally recognize that Article I, Section 2, and Article I, Section 4 do not trump one another. Neither can be read out of the New York Dock conditions. Instead, they "exist *in pari materia* and accordingly must be read together in a way that gives effect to each." Carmen II, supra, 6 I.C.C.2d at 798.

In Finance Docket No. 28905, Arbitrator William E. Fredenberger, Jr., in an arbitration decision (included in Organization's Legal Appendix as Exhibit 18) involving the IAMAW and B&O Rv., L&N Ry., dated January 19, 1993, held:

> "...such neutral has no authority to modify a collective bargaining agreement where the parties have not agreed to confer that authority upon him." Id. at 11.

In Finance Docket Nos. 29916, 29985 and 30053, Arbitrator Zumas, in an arbitration Opinion and Award (included in Organization's Legal Appendix as Exhibit 19) involving the Seaboard System and BMWE dated August 20, 1993, stated, in pertinent part:

> "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.
>
> AWARD
>
> 1. The Answer to Issue No. One is in the negative.

> The Arbitrator has no jurisdiction under Article I, Section 4 of New York Dock II conditions to consider the items contained in Carrier's Notices dated February 2 and 4, 1983, and this proceeding is dismissed for lack of jurisdiction.... (Id. at 23-24).

The Commission in Finance Docket No. 32035 (Sub-Nos. 2-6), Fox Valley & Western Ltd. -- Exemption Acquisition and Operation Certain Lines of GBW, Etc. (Arbitration Review) (Service Date - August 10, 1995) (included in Organization's Legal Appendix as Exhibit 20), noted (at pp. 1-2, n.4) its earlier December 19, 1994 Decision upholding the Award of Arbitrator Preston J. Moore in Sub-No. 1, which kept the existing BMWE collective bargaining agreements in place in the face of a carrier's demand for change.

Article I, Section 2 and Article I, Section 4 can be thus harmonized in an approach that worked successfully during the 40-year "era of accommodation." Carmen II, supra, 6 I.C.C.2d at 721. As the Commission recognizes, Article I, Section 2 "does have significance as a Congressional directive that, to the extent possible, the terms of CBAs are to be preserved." Carmen II, supra, 6 I.C.C.2d at 720. Thus, under Article I, Section 2, Article I, Section 4 arbitrators must abide by existing collective bargaining agreements unless "necessary to permit the approved transaction to proceed." See, Carmen II, supra, 6 I.C.C.2d at 749 ("only those changes in CBAs necessary to permit an approved transaction will be appropriate.")

The Carrier will likely raise certain arbitral precedent and ICC decisions reviewing said arbitration awards in opposition to the above-discussed awards and decisions. This precedent has afforded certain changes to some collective bargaining agreements. However, these decisions are clearly distinguishable, and some apply an incorrect version of the standard of necessity. Moreover, nothing approaching the Marchant Commitment Letter was involved therein, and none

involved anything like the language in the STB Decision applicable here (Organization's Exhibit 6).

The Carriers may rely on the ICC's decision in Finance Docket 30582 (Sub-No. 2), Norfolk and Western Railway Company, Southern Railway Company and Interstate Railroad Company - Exemption - Contract to Operate and Trackage Rights, (Service Date - May 14, 1992). In this decision, the Commission affirmed its prior decision upholding the arbitrator's findings that the exemption authority enunciated in Section 11341(a), as applied to the RLA and collective bargaining agreements, allowed the abrogation of the Interstate/UTU agreement. However, as directly noted by the District of Columbia Circuit Court of Appeals very recently, "the ICC's assertion in its 1992 decision that 'the necessity predicate is satisfied' whenever a CBA is 'an impediment' to a transaction clearly misstates the necessity standard." American Train Dispatchers Ass'n v. I.C.C., supra, 26 F.3d at 1165 (D.C. Cir. 1994). As a result, any attempt by the Carrier to rely on the underlying award and Commission decision is misplaced.

In Finance Docket 32035 (Sub-Nos. 2-6), Fox Valley & Western Ltd. - Exemption Acquisition and Operation - Etc., (Service Date - August 10, 1995), supra, the Commission upheld various arbitration awards, some of which abrogated certain terms and conditions of UTU collective bargaining agreements. In this decision, which did not alter the December 19, 1994 Moore arbitration award in the same docket discussed above, already upheld by the I.C.C., and which required preservation of pre-transaction rates of pay, rules, and working conditions, the Commission reviewed various other Section 4 arbitration awards in the proceeding. The Commission, with respect to the awards covered by Sub-Nos. 5 and 6, ordered the parties to attempt to resolve the disputes through further negotiations. In Sub-Nos. 2-4, in applying the

Dispatchers and Guilford "necessity" standard, the Commission permitted changes of various terms and conditions in the collective bargaining agreements. In doing so, the Commission stated that it has generally delegated the task of determining the changes that are and are not necessary to carry out the purposes of the transactions to the arbitrators. This determination is obviously factual in nature, thereby requiring an arbitrator to carefully review the proposed changes to the collective bargaining agreements in relation to the transaction. In Fox Valley, unlike this transaction, the acquisition involved smaller entities with less than 100 employees. Accordingly, the use of one agreement would not result in the resounding affect, causing significant changes and losses to the employees, which would occur herein.

The other factual differences between the Fox Valley transactions and the merger here, particularly the Marchant Commitment Letter, will be discussed in the oral presentation. Argument that is responsive to arbitration awards and Board decisions relied upon by the Carrier will also be made at that time. What is clear from the Commission's decisions in Fox Valley is that the case law regarding the standards of "necessity," "approved transaction," and "rights, privileges and benefits" must be applied.

IV. THE CHANGES SOUGHT BY THE CARRIER MUST BE BARGAINED FOR, NOT GIVEN TO IT BY ARBITRAL FIAT.

In a typical transaction approved by the STB or subject to the STB exemption authority under the provisions of the Interstate Commerce Act, it is normal for the collective bargaining agreements, if any, that are applicable to the crafts or classes of employees to remain as the collective bargaining agreements unless the carrier can produce "tangible" and "compelling" "necessity" that the transaction cannot be completed without such change, as argued above.

The Organization clearly pointed out to the Carrier at the conferences held herein the fact

that the transactions did not require proposed changes in the collective bargaining agreements, and that the Carrier's actions contemplated unilateral changes of the collective bargaining agreements of the employees that could be changed only by following the procedures prescribed within the Railway Labor Act.

The Carrier argued at the conferences that if the Organization refused to agree to their emasculation of the collective bargaining agreements and working conditions, an arbitrator has the jurisdiction under Article I, Section 4 of the New York Dock conditions to order such changes. The Organization disagrees. The employee protective conditions imposed by the STB in this case are not swords which can be used to modify existing schedule rules and agreements "willy-nilly." Rather, those conditions are a shield for the employees to protect them and existing agreements from changes that are unnecessary to permit implementation of an approved transaction. As stated previously in this submission, the avenue for the Carrier to follow in those kinds of situations is direct negotiations under schedule rules and agreements.

A. Changes To The Collective Bargaining Agreements Sought In The Carrier Notices That Are Not "Necessary" For Implementation And/Or Are Outside The Bounds Of The Marchant Commitment Letter.

The Carrier contends in its original notice that they want one (1) collective bargaining agreement for the so called Salt Lake and Denver "Hub and Spoke" operations. In reality, the Carrier is attempting to manufacture a collective bargaining agreement which is not in conformity with any of the collective bargaining agreements currently in effect in the proposed new operations in Salt Lake City and Denver. In fact, the requirements set forth by the Carrier run contrary to each collective bargaining agreement involved and none of the proposed changes are necessary to implement the agreement. Indeed, the Organization will reveal that the changes

proposed by the Carrier are not operationally necessary, rather another attempt to raid the collective bargaining agreement of conditions are beneficial for employees and transfer the wealth to the Carrier.

There is not a single agreement that interacts with all the territories contemplated in the Salt Lake "Hub and Spoke" operation, nor the Denver "Hub and Spoke."

A review of the operation at Salt Lake City reveals current operations on both Union Pacific ("UP") and Southern Pacific ("SP") are governed by multiple collective bargaining agreements For the SP main lines entering Salt Lake City from the west, SP Western Lines Agreement controls. Going each out of Salt Lake City, the DRGW Agreement controls. Likewise, UP operates under the same conditions as those for SP. Arriving from the west are employees controlled by the Western Pacific ("WP") collective bargaining agreement. North and south traffic is controlled by the UP Central South Central collective bargaining agreement. Eastbound from Salt Lake City are employees controlled by the UP Eastern District collective bargaining agreement. In fact, the operation from Salt Lake City, via Ogden east, is operated with a compilation of UP South Central and Eastern District collective bargaining agreement employees, each working under their own agreement.

The Organization has continually recognized where there is a coordination, a fusion of collective bargaining agreements is necessary. For instance, were directional traffic flows westward from Salt Lake City on both WP and SP Western lines. But the Carrier is clearly without support when they attempt to place a group of employees under a new agreement that is not even a factor in the current or proposed operation. That is what UP is attempting. There is not a single agreement that has a common thread through current nor proposed operations.

Accordingly, the parties should be remanded with instructions to negotiate conditions subject to causal nexus. The same conditions apply in Denver and the results should be identical to that in Salt Lake City.

Any collective bargaining agreement applied to the newly integrated property should be applied in total and the Carrier should not change said agreements where it is not necessary for implementation.

The Carrier's attempt to apply one (1) collective bargaining agreement was full of changes that are not in conformity with any collective bargaining agreement in place currently.

First, the Carrier demanded that seniority outside the "Hub and Spoke" must be relinquished and those working outside the "Hub and Spoke" would not have seniority in the expanded territories and would lose that currently enjoyed. How does this proposition conform to the presentation to the Surface Transportation Board ("STB"):

> IV. Seniority Consolidation
>
> A. The seniority of all employees working in the territory described above shall be consolidated into one common new seniority district. All current seniority in all crafts shall be relinquished when new seniority is established. The seniority district shall be divided into three zones with seniority movement between the zones limited. The three zones shall be as follows:
>
> Zone 1: Salt Lake City and Ogden West to and including Winnemucca not including the terminals of Salt Lake City and Ogden.
>
> Zone 2: Salt Lake City North to McCammon and Ogden East to Green River not including Green River or the road switchers, locals and yard assignments that operate in the vicinity thereof but including all operations in the Ogden and Salt Lake City Terminals.

Zone 3: Salt Lake City East, not including the Salt Lake Terminal, to but not including Grand Junction and South to Callente via either route including the Provo Terminal.

B. Seniority movement between the Zones shall be limited to once per year unless employees are reduced from their working lists and cannot hold an assignment in their current Zone. (Carrier Salt Lake City Notice at 3 and 4).

V. Collective Bargaining Agreements

All of the employees subject to this notice shall be covered under a single, common collective bargaining agreement including all National Agreement rules. The agreement shall be compatible with the economics and efficiencies that will benefit the public as outlined in the carrier's operating plan. (Carrier Denver Notice at 3).

This type of consolidation is a win-win situation for employees, UP/SP and customers. It expands work opportunities for the affected employees and mitigates the adverse effects that historically have befallen employees on smaller, isolated seniority districts when business or operations shifted to a different route due to shipper routing changes, maintenance programs, disasters, etc. (emphasis added). (Appendix A at 256) (Organization's Exhibit 2).

In reality, for the preponderance of the employees, their seniority is shrunk into one (1) geographic area, rather than across multiple focal points and seniority districts. Additionally, the system seniority for employees outside the "Hub and Spoke" is reduced considerably. This is not a win-win situation as suggested by the Carrier. This merger is not justification for taking seniority away from an employee.

The Carrier simply does not have the unilateral right to dictate how seniority is applied. Elkouri and Elkouri, in How Arbitration Works, sends a clear message about how the limitations of exercise of managerial discretion applies:

One of the most severe limitations upon the exercise of managerial discretion is the requirement of seniority recognition. Indeed, the

affect of seniority recognition is dramatic from the standpoint of employer, union, and employee alike since "every seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interest of each worker against those of all the others." (How Arbitration Works, Fourth Edition, at 586).

The added restriction of movement from zone to zone after one (1) year is certainly contrary to every agreement involved and would create an unnecessary hardship on the employee which is not applied today. An employee could enter a zone for the benefit of a longer run and more pay, but under the Carrier's proposal those hopes of higher pay could result in lower pay and relocation by virtue of one seniority move. This is certainly not palatable for the Organization.

The Carrier is attempting to establish dual point pool consolidations of either the home terminal or away-from-home terminal.

II. Dual Point Pool Consolidations

A. Salt Lake City-Elko and Ogden-Carline - This may operate as either two pools with Salt Lake City and Ogden as the home terminals and Elko as a single away-from-home terminal or one pool with the home terminal in the Salt Lake City-Ogden metro complex. At Elko all crews may operate as a single far terminal pool for the return trip to the Salt Lake City-Ogden metro complex via either route with necessary transportation back to their tie-up point.

B. Salt Lake City-Green River/Pocatello - These two pools shall be combined into one pool with Salt Lake as the home terminal and dual destination far terminals.

Ogden-Green River - May operate as a separate pool or be combined with the Salt Lake City-Green River pool with crews being operated back to the Salt Lake City-Ogden metro complex with necessary transportation back to their tie-up point.

C. Salt Lake City-Grand Junction/Helper/Milford/Provo - These four pools shall be combined into one pool with Salt Lake City as the home terminal and multiple far terminals.

D. Helper-Provo/Grand Junction - One pool shall be created with the home terminal at Helper with dual far terminal destinations of Provo and Grand Junction.

E. Milford-Provo/Helper - One pool shall be created with the home terminal at Milford with dual far terminals of Provo and Helper.

F. Salt Lake City-Ogden Metro Complex - Any pool crew with a home terminal in the Salt Lake City-Ogden metro complex may receive or leave their train anywhere within the limits of the Metro Complex which shall extend from the new terminal limits of Ogden through the new Terminal limits of Salt Lake. (Carrier Salt Lake City Notice at 2 and 3).

The Carrier's attempt to establish dual point pool consolidations are outside the agreement provisions of each respective collective bargaining agreement. Pools are established with a point for going on-duty and a point for going off-duty. Any instance where dual destinations are involved, the same has been negotiated as a special condition, without prejudice to future operations. In any case, the establishment of dual home terminals is without precedent. In fact, the FRA takes exception with that concept. In a letter issued by Edward R. English, Director, Office of Safety Enforcement, he states in pertinent part:

> FRA has consistently maintained that a train or engine employee can have no more than one regular reporting point. The document you cited in your letter remains a statement of FRA's position concerning reporting points. Further, FRA maintains the Act does not permit multiple regular reporting points for any one individual despite any agreement purporting to establish them. (Organization's Exhibit 9).

Additionally, a FRA issued handbook, March 10, 1995, contains the following in the Train and Engine Glossary, at V-4:

> FRA maintains that a train and engine employees may have only one regular reporting point. A regular reporting point is determined by the employees regular assignment. The regular reporting point for an extra board employee is the carrier defined location of the extra board. (id.)

Clearly the Carrier's attempt to maintain multiple home terminals is an attempt to transfer wealth from the employees to the Carrier. Example: If one reporting point, the Carrier must pay deadhead under all the applicable agreements if employees are transported to a new point. The Carrier is attempting to have the employee bear the cost of reporting to multiple points. Incidentally, the points are of significant distance to warrant a relocation payment if an employee is required to move from Salt Lake City to Ogden as contemplated in the operation outlined in Operating Notice II, A. The Carrier wants the employee to bear the burden of this transportation cost on a daily basis. This is truly a blatant attempt to transfer wealth from the employee to the Carrier.

If the Carrier wants these operations, it should bargain for them. This is how win-win situations evolve.

The Carrier, in its proposal submitted December 3, 1996, attempts to place employees in furloughed status and vulnerable to forced relocation at the whim of the Carrier.

A. It is the intent during the interim period to minimize the relocation of employees who wish to delay relocating, if their services are not needed immediately at another location and to determine the number of surplus/shortage of trainmen in the Hub. If a surplus exists then opportunities for transfers will exist to other locations on the system that will need trainmen...

D. The Carrier will identify other locations that either have a current shortage of trainmen or will have a shortage due to projected traffic increases. If there is a surplus, trainmen in the Salt Lake and Denver Hub's shall, in seniority order, be given the opportunity to make application for a permanent transfer to one of these locations. If there are borrow out trainmen at the location the employee may transfer immediately and displace the borrow out. If no borrow outs are at the location or the shortage does not yet exist the transfer will be delayed until the employee is notified of the need.

E. At locations outside the Hub were shortages exist and an insufficient number of applications are received, the junior trainman holding a surplus position in either Hub not having an application accepted shall be forced to the vacancy. If they are senior to other trainmen working in the Hub, they may displace the junior working trainman at the location where they are surplus or the junior trainman working in the Hub, with the junior trainman being forced to the location. (Carrier proposal December 3, 1996 at 10 and 11).

The origin for this proposal is contained in the Carrier's original notice for implementation:

IV. Allocation of Forces

An adequate supply of forces shall be relocated from locations where assignments are abolished to locations where new assignments are established. (Carrier Notice at 4).

Obviously, the Carrier expanded the basis for transferring employees from transfer of work to where current shortage exists (*See* Section D, of Carrier proposal, at 11). The Organization rightfully contends that the Carrier does not have the right to require force relocations when the relocation of work from the employee's current operations is not commensurate. In the Carrier's Operating Plan submitted to the STB: "Effects on Applicant Carrier's Employees," it is clear that the Carrier can not support mass relocation of employees out of the Salt Lake City or Denver areas:

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Trainmen	Denver, CO	Year 2	17	16	0	
	Elko, NV	Year 1	5	0	0	
	Grand Jct., CO	Year 2	26	0	5	To Be Negotiated
	Ogden, UT	Year 2	0	15	0	
	Provo, UT	Year 2	2	0	0	
	Pueblo, CO	Year 2	43	0	0	
	Salt Lake City, UT	Year 2	80	10	5	To Be Negotiated

(Application at 419 and 420) (Organization's Exhibit 2).

What the Carrier is attempting to accomplish with this mass relocation process is to circumvent protective conditions that evolved from crew consist agreements on the various properties. For example: SP Western Lines has a no furlough agreement which the Carrier finds offensive. The UP Eastern District, South Central and WP Agreements on crew consist require reserve board positions, rather than furlough for certain employees. In fact, all of these agreements are in active force and effect currently. The Carrier is merely using this merger as an opportunity to remove protected employees from protective boards, such as reserve boards, and place them where there are current shortages. This is not a problem due to a merger, but

everyday manpower needs that the Carrier is trying to use to circumvent protective conditions given in consideration of work rule changes.

One of the most obvious attempts by the Carrier to alter an agreement purely for financial gain can be found in the Carrier's original notice, at page 3:

> E. Any pool freight, local, work train or road switcher service may be established to operate from any point to any other point within the new Seniority District.

The Carrier already has the right to establish runs or service between terminals, but to operate through a terminal, the Carrier must serve notice as required in the 1985 UTU National Agreement. The Carrier once again is attempting to usurp protective conditions in order to line their own pockets. This merger in no way changes the way interdivisional service is implemented. Under said conditions, relocation benefits are available when employees are required to move. Protection for wages is included. These are not local arrangements; they are national in scope and the Carrier should not be able to remove these conditions gained through negotiations just because there is a merger. It just isn't necessary.

The Carrier's December 3, 1996 proposal has the following provisions, at 7:

> B. Terms and conditions of the operations set forth in A above, are as follows:
>
> 1. *Miles paid.* Each pool shall be paid the actual miles between the points of the run for all service and combination deadhead/service. If a crew receives/leaves their train beyond the points of the run then they shall be paid the additional miles they operate the train.
>
> Example: A Salt Lake-Milford crew receives their south bound train ten miles north of the Salt Lake terminal but within the Metro Complex and run to

Milford. They shall be paid the actual miles established for the Salt Lake-Milford run and an additional ten miles for their handling the train from point ten miles north of the Salt Lake Terminal.

7. *Twenty-Five mile Zone* - At Elko, Milford, Grand Junction, Helper, Provo, Green River and Pocatello pool crews may receive their train up to twenty-five miles on the far side of the terminal and run on through to the scheduled terminal.

These propositions violate every collective bargaining agreement involved in this proposed operation. There are no provisions anywhere that provide the Carrier the right to operate through a seniority district without an implementing agreement as outlined above. The Carrier is just attempting to gain an unfair advantage. Public Law Boards, The First Division and other tribunals readily recognize seniority rights. The proposition by the Carrier clearly alters agreement provisions between the parties for Carrier profit. If allowed to stand, crews could operate through terminals and into other hubs without recourse by the Organization to required recognition of seniority. The ability to operate off seniority districts was handled in the last round of national negotiations and the 1996 Agreement set standards for serving customers and the negotiation process necessary to achieve same. This Carrier shouldn't receive favorable consideration not afforded other carriers. If they want this type of operation, then negotiate same. This is not the proper forum.

On the same page of the Carrier's December 3, 1996 proposal, the Carrier attempts to change the way crews are called for service:

6. *Blue Print Boards* - All through freight service shall be rotary pool service with blue print provisions for placing employees in the proper order at the home terminal and at the far terminal. Under a blue print board operation, employees are not runaround if

used on the train for which called.

This provision, at first glance, may seem innocuous. However, it can be very costly to the employee. Here again, the Carrier is attempting to change the basic process of calling crews and it has nothing to do with merging UP and SP. The Carrier doesn't like the premise of first-in, first-out contained in the prevailing agreements. The Carrier has fought this issue and lost at Public Law Boards. They come here for relief. None should be forthcoming.

Section IV, B, 9, is a catch-all by UP to gain all the operational rules that they have attempted to improperly place in effect during the recent past:

> 9. Nothing in this Section B (7) and (8) prevents the use of other employees to perform work currently permitted by other agreements, including, but not limited to yard crews performing hours of service relief within the road\yard zone, ID crews performing service and deadheads between terminals, road switchers handling trains within their zones and using an employee from a following train to work a preceding train.

The way the wording is arranged, one would consider these as usual and customary operations. That is not the case. The aforementioned are part of a wish list that the Carrier has attempted to gain in Railway Labor Act, Section 6 Notices, but were not willing to give value for value received. They come here now attempting to back-door the Railway Labor Act and receive these considerations under the guise of a merger. Current rules require that you be notified when called, what the service is, i.e., work or deadhead. The Carrier is attempting to usurp that requirement by simply removing the obstacle. They've run UP and SP separately all these years with the requirement in place Why do they <u>need</u> it changed for this merger? They don't, pure and simple.

The Carrier is even trying to abrogate the seniority differences between brakemen and conductors, as well as expunge the demarcation between road and yard.

> D. Extra Boards - At locations where there are more than one extra board, extra boards may be combined into one or more extra boards.

There are three (3) main divisions of trainmen's seniority: conductor, brakeman and yardman. Historically, there have been separate extra boards to protect each crafts' vacancies. Those boards still exist today. The Organization has agreed to combine boards where the work has dwindled to a point where both parties benefitted from the consolidation. Some of the boards were established through crew consist negotiations where moratorium prohibit change without negotiation. The Organization proposed to the Carrier to eliminate nine (9) extra boards in the Salt Lake City area. We recognize some change has to occur. But, to allow the Carrier the unilateral right, even after implementation, to change any board they want is unconscionable. They don't have the right now and nothing has occurred to give them that right.

For years the Carrier has attempted to erase the demarcation between road and yard, all the way back to the "White House" agreement of the early 60's. In every Railway Labor Act Section 6 Notice since the Carrier has tried to erase the demarcation between road and yard. In the proposal submitted December 3, 1996, it went for all the relief in one short, but significant sentence:

> 2. All road crews may receive/leave their trains at any location within the boundaries of the new complex and may perform any work within those boundaries. The Carrier will designate the on/off duty points for road crews within the new complex. (emphasis added). (Carrier proposal, at 5).

This extra bite of the apple by the Carrier should shed new light on the rest of its

"necessities." There is absolutely no way the Carrier can support the necessity standard with evidence needed to support this proposition. The Marchant Commitment Letter raised the bar. The Carrier acts as if none exists.

The Carrier made a commitment in the Marchant Commitment Letter that it is now attempting to completely disavow in order to expand the Carrier's bottom line. It should be held responsible for its actions, and these unnecessary changes should be rejected in their entirety.

B. Since The Facts Involved In This Arbitration Most Nearly Resemble Those Involved In The UP-MKT Merger, Finance Docket No. 30800, An Award Similar To That Rendered By Arbitrators Kasher And Peterson Therein Should Be Rendered Here.

After carefully studying the Carriers' original Operating Plan, Labor Impact Statement, and Marchant Commitment Letter, it becomes very obvious that the issues they are attempting to convince this Board now stand in the way of the merger are not in fact any impediment to merger implementation.

As noted above, this is not the first time that the UP has attempted to gain bargaining concessions from the Organization through the guise of a merger. In the UP/MKT merger, ICC Finance Docket No. 30800, it also attempted to consolidate seniority districts, establish interdivisional service and eliminate collective bargaining agreement provisions. That dispute, as noted above, was also submitted to arbitration before two (2) distinguished neutrals in this industry, Robert E. Peterson and Richard R. Kasher. The question arbitrated in that transaction was as follows:

> "What provisions shall be contained in an implementing agreement pursuant to Article I, Section 4, of the New York Dock conditions in order to consummate the merger transaction authorized by the Interstate Commerce Commission in Finance Docket No. 30800?"

(A copy of the Findings and Award in Union Pacific and UTU, Article I, Section 4 New York Dock, ICC Fin. Dkt. No. 30800, February 14, 1989 (Richard R. Kasher and Robert E. Peterson) is included in the Organization's Legal Appendix as Exhibit No. 21.)

Arbitrators Kasher and Peterson considered a similar situation in the UP-MKT merger as exists here, and in their award they stated, in pertinent part:

> "E. Changes in Seniority Rights or Rosters
>
> The Carrier has proposed that concurrent with implementation of its proposed elimination of MKT, OKT and GH&H labor agreements that the seniority standing of employees covered under those agreements be integrated into eleven (11) proposed seniority rosters. It says, except for very minor changes, that this action would permit existing UP seniority territories to remain virtually unaffected as to geographical definition and would allow for implementation of its Operating Plan.
>
> There is no question that this change in seniority could represent a major reallocation of forces. It would require an unspecified number of employees to be force transferred from their present or prior rights seniority districts to Positions on new seniority districts.
>
> In the context of the Carrier's Operating Plan, which contemplates the abandonment of approximately 325 miles of track, over an operating system that exceeds 3,100 miles of track, and the potential adverse affect upon 426 train service employees out of a compiement of approximately 3,000 train service employees, the Carrier's proposal to rearrange seniority would appear to unnecessarily force the transfer and relocation of employees remotely concerned or completely removed from the involved transaction.
>
> Since this Arbitration Committee finds the Carrier proposal for the rearrangement of forces to be overly broad, beyond the obligations and protections provided in the New York Dock conditions, the Carrier proposal should be withdrawn from the New York Dock negotiations.
>
> Therefore, this Arbitration Committee concludes that the wholesale rearrangement of seniority for employees represented by the Union is not justified in the context of the limited scope of this transaction. Nevertheless we would recommend to the parties that

they work cooperatively in developing the necessary rearrangement of seniority rights where certain changes are implemented, such as the consolidation of terminals.

(Award, page 14)

The Organization also relies on the following additional statements and findings contained in that Arbitration Award:

"The Carrier notice described the manner in which consolidations would occur on or after September 1, 1988. This notice stated that in order to effect the transaction, all MKT, OKT and GH&H agreements would be eliminated and that both the employees and the work covered by these agreements would thereafter be covered by the MP-Upper Lines Agreement."

* * *

"The notice also outlined the manner in which through freight service in the affected areas would be changed, and designated those home terminals which were to be either eliminated or relocated."

(Award, page 2)

"At the hearing the Carrier was requested to provide additional information pertaining to the projected impact on labor arising from implementation of its Operating Plan in the manner such information had been originally presented and amended in its submission to the ICC."

(Award, page 4)

"The Union takes exception to the Carrier proposals which related to the following issues:

1. The creation of new seniority districts throughout the former MP and MKT properties by combining numerous existing seniority districts and dovetailing all the employees onto a new roster.

* * *

3. The elimination of all the various Agreements now in effect and placement of all employees under the MP-Upper Lines Agreement.

4. The granting of relief from crew consist agreements as under the MP-Upper Lines Agreement in place of the elimination of individual schedule agreements.

5. The establishment of Interdivisional service, special train operations and the changing of present home terminals under the guise of an implementing agreement.

6. The proposed forced transfer of employees off their present prior rights seniority districts."

(Award, page 5)

"2. The failure of the Carrier to have bargained in good faith, and the Carrier's seeking relief from labor contracts which have no impact on implementation of the transaction."

* * *

"Based upon the foregoing contentions the Union submits that the Arbitration Committee should conclude that the Carrier's notice, as amended, is procedurally defective and that the Arbitration Committee should further conclude that the Carrier has bargained in bad faith by its insistence upon including non-merger related subject matters in a New York Dock implementing agreement.

(Award, page 6)

"Contrary to the position of the Union, the Carrier contends that the right to provide for implementation of the above mentioned matters flow from the Operating Plan that was submitted to and approved by the ICC during the merger proceedings. The Carrier argues of the two railroads' operations and organizes the operation of the UP and MKT into a single railroad system with unified operations, with the integration of MKT and UP functions, personnel and facilities to the maximum feasible extent, in order to provide the best possible service to the shipping public at the lowest possible cost."

(Award, page 7)

"The Carrier submits that: "Inasmuch as the ICC has approved this Operating Plan, it has mandated its implementation." (Emphasis by the Carrier).

(Award, page 7)

"The Carrier also submitted that the inclusion in its notice of such items as the relocation of home terminals, establishment of special train operations and realignment of seniority districts are matters appropriate and necessary for what it says is "the complete implementation of the ICC – approved Operating Plan."

(Award, page 8)

Findings and Opinion of the Arbitration Committee

"The unyielding and uncompromising positions of the parties is evidenced on the one hand by the Carrier's unrelenting demand for extensive relief from varied work rules and in its insistence that such changes had been mandated by the ICC by its approval of the Carrier's Operating Plan. On the other side, the Union's resistance is revealed by the sharp focus of attention that the Union gave to procedural issues and its insistence on benefits that far exceed the standard levels, and durations of protection typically afforded to employees under New York Dock.

In order that the parties may properly and promptly return to the "New York Dock bargaining table," the Arbitration Committee will make findings as to which subject matters fall outside the scope of our perceived understanding of an ordinary New York Dock implementing agreement. We are, therefore, directing the parties back to the bargaining table because we recognize the parties broader desires would be better served by use of their considerable skills and expertise in collective bargaining to reach the terms of a voluntary implementing agreement. After all, the parties are sensitive to their own critical needs. They are uniquely equipped, by direct past association with merger – related matters, to understand how such concerns may best be resolved through the give and take of collective bargaining.

If either one or both parties insist on staying the past course of action, then each will have to contend with both the bitter and the better of an arbitrated disposition of the dispute. This Arbitration Committee expects that such ultimate action will not be found to be necessary. Surely it must be recognized that neither side can hope to obtain through arbitration non-merger related benefits

either in the form of relief from work rules not directly merger-related or in the form of additional protective conditions which go beyond the parameters of the New York Dock conditions." (Emphasis added).

(Award, pages 10 and 11)

The Carrier's Operating Plan

"The Arbitration Committee does not find that the ICC has mandated implementation of the Carrier's Operating Plan irrespective of appropriate consideration of other issues, such as labor negotiations. (Emphasis added).

* * *

"It is obvious, therefore, that the Carrier recognized that in order to implement its Operating Plan it was obliged to negotiate on matters that concerned appropriate or necessary changes in collective bargaining agreements, such as seniority integration, changes in home terminals, interdivisional service, and the operation of special trains, including the modification of crew consist rules." (Emphasis added).

(Award, page 12)

"This Arbitration Committee does not question the Carrier's contention that there is a need for current agreements to be modified, which would facilitate implementation of the operating aspects of the transaction. However, the record is devoid of any evidence supporting the precise nature of such need, left alone. The complete elimination of the collective bargaining agreements of the MKT, OKT and GH&H. In the opinion of this Arbitration Committee, while the Carrier's proposal might eliminate some administrative problems associated with the continued application of the referenced agreements, there is no evidence in the record to establish that these cost savings were factored into the Operating Plan or presented for the ICC's consideration.

If the Carrier firmly believes that current collective bargaining agreements, which it seeks to eliminate, are millstones which prevent it from achieving its goal of becoming what it says would be "the most competitive and efficient transportation mode in the territory affected by the merger," or, "the most competitive transportation force in the involved corridor," it has the right to seek changes through negotiation and the orderly procedures of the

Railway Labor Act. We do not see that it has the right to have all such agreements declared null and void by simple reason of the fact that the ICC authorized a transaction." (Emphasis added).

(Award, page 13)

"... The Arbitration Committee concludes that the carrier's proposal to completely eliminate existing collective bargaining agreements is not a mandatory subject of bargaining in the context of those New York Dock negotiations."

* * *

"There is no question that this change in seniority could represent a major reallocation of forces. It would require an unspecified number of employees to be force transferred from their present or prior rights seniority districts to positions on new seniority districts."

* * *

"... The Carrier's proposal to rearrange seniority would appear to unnecessarily force the transfer and relocation of employees remotely concerned or completely removed from the involved transaction."

* * *

"Since this Arbitration Committee finds the Carrier proposal for the rearrangement of forces to be overly broad, beyond the obligations and protections provided in the New York Dock conditions, the carrier proposal should be withdrawn from the New York Dock negotiations." (Emphasis added).

(Award, page 14)

"The Carrier desires to establish special train operations, which would essentially call for the creation of interdivisional service runs. The Carrier's intention in this regard is contained in its Operating Plan as presented to the ICC.

This Arbitration Committee has no reason to conclude that the ICC had intended that the Carrier would have a unilateral right to establish interdivisional service and circumvent agreed-upon or recognized procedures for attainment of such service. Here, it is to be noted that creation of interdivisional service is not something

which the collective bargaining agreements prohibit. Rather, current agreements provide an orderly manner and reasonable expeditious means by which such service may be implemented and myriad problems resolved; such agreements include final and binding arbitration provisions should such action be necessary.

Such issue will, therefore, be remanded for direct negotiation between the parties pursuant to the guidelines contained in existing agreements for the establishment of interdivisional service. (Emphasis added).

(Award, pages 14 and 15)

"The Committee is optimistic that with the removal of the above identified negotiating road blocks, the parties will bargain realistically and in good faith to voluntarily reach a valid implementing agreement consistent with the new York Dock conditions within thirty (30) days from the date of these findings."

(Award, page 18)

V. **IN THE ALTERNATIVE, THE ORGANIZATION'S PROPOSED IMPLEMENTING AGREEMENT (INCLUDING PROVISIONS FOR SELECTION, ASSIGNMENT AND REARRANGEMENT OF FORCES) COMPLIES WITH THE TERMS AND CONDITIONS OF NEW YORK DOCK AND SHOULD BE ADOPTED (ORGANIZATION'S EXHIBIT 9) FOR SALT LAKE CITY, AND THE DENVER AREA SHOULD BE GOVERNED BY ITS PRINCIPLES, AS OFFERED BY THE ORGANIZATION.**

CONCLUSION

For the foregoing reasons, the arbitrator should issue a decision or award similar to the Kasher-Peterson Award in Finance Docket No. 30800 (Organization's Legal Appendix, Exhibit 21) remanding the parties to further negotiations. In the alternative, the Organization's proposed Implementing Agreement should be adopted for Salt Lake City, and its principles should govern the Denver area.

Respectfully submitted,

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Daniel R. Elliott, III
Assistant General Counsel
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FAX (216) 228-0937

Counsel for
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United Transportation Union and Union Pacific Railroad Company, et al., ("UP")–Control and Merger–Southern Pacific Transportation Company, et al., ("SP")	)) STB Finance Docket No. 32760) J. E. Yost, Chairman) and Arbitrator) B. A. Boyd, Jr., Organization) Member) W. S. Hinckley, Carrier Member

ORGANIZATION'S APPENDIX

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Organization's Exhibits

J J MARCHANT
SR ASST VICE PRESIDENT
LABOR RELATIONS

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA NEBRASKA 68179

February 26, 1996

Mr. Charles Little
President UTU
14600 Detroit Ave
Cleveland OH 44107

Dear Sir:

This refers to our earlier conversation concerning the issues of New York Dock protection and the certification of adversely affected UTU employees.

As you know, Union Pacific, in its SP Merger Application, stipulated to the imposition of the New York Dock conditions. The Labor Impact Study which UP filed with the Merger Application reported that 328 trainmen would transfer, that 1081 trainmen jobs (net) would be abolished, that 85 UTU represented yardmaster jobs and 17 hostler positions would be affected because of the implementation of the Operating Plan. The Labor Impact Study also indicates that a number of engineer positions will be affected but does not indicate how many, if any, of those are working on properties where engineers are represented by the UTU.

Within the New York Dock conditions, Section 11 addresses disputes and controversies regarding the interpretation, application or enforcement of the New York Dock conditions (except for Sections 4 and 12). Under Section 11, perhaps the two most serious areas for potential disputes involve whether an employee was adversely affected by a transaction and what will be such employee's protected rate of pay.

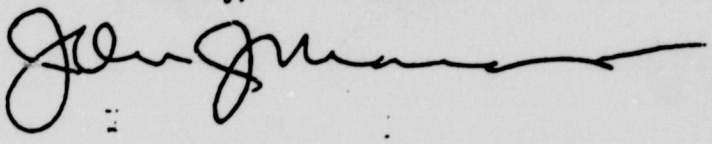
In an effort to eliminate as many of these disputes as possible, Union Pacific makes the following commitment regarding the issue of whether an employee was adversely affected by a transaction: UP will grant automatic certification as adversely affected by the merger to the 1409 train service employees, the 85 UTU represented yardmasters and the 17 UTU represented hostlers projected to be adversely affected in the Labor Impact Study and to all other train service employees and UTU represented yardmasters and hostlers identified in any Merger Notice served after Board approval. UP will also grant automatic certification to any engineers adversely affected by the merger who are working on properties where engineers are represented by the UTU. UP will supply UTU with the names and TPA's of such employees as soon as possible upon implementation of approved merger.

Union Pacific commits to the foregoing on the basis of UTU's agreement, after merger approval, to voluntarily reach agreement for implementation of the Operating Plan accompanying the Merger Application. UP also commits that, in any Merger Notice served after Board approval, it will only seek those changes in existing collective bargaining agreements that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s).

Even with these commitments, differences of opinion are bound to occur. In order to ensure that any such differences are dealt with promptly and fairly, Union Pacific makes this final commitment: If at any time the International President of the UTU (or his designated representative) believes Union Pacific's application of the New York Dock conditions is inconsistent with our commitments, UTU and UP personnel will meet within five (5) days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within ten (10) days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of Award(s).

In view of Union Pacific's position regarding the issues of New York Dock protection and the certification of employees, I understand that the UTU will now support the UP/SP merger.

Sincerely,



cc: B. A. Boyd, Jr.
Asst. President UTU

Before the

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

RAILROAD MERGER APPLICATION

VOLUME 3

OPERATING PLAN (EXHIBIT 13), LABOR IMPACT EXHIBIT,
DENSITY CHARTS (EXHIBIT 14), AND SUPPORTING STATEMENTS

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November 30, 1995

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EXHIBIT 13

UP/SP OPERATING PLAN

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APPENDIX A

Projected Seniority, Agreement and Territory Changes Required for the Operating Plan

The Operating Plan shows how a UP/SP system will take advantage of complementary UP and SP routes to provide new and improved rail services and to make more efficient use of rail capacity and investment. The Operating Plan requires not only repositioning and modification of clerical and mechanical positions, as indicated in the Operating Plan and the Labor Impact Exhibit, but also a significant reorganization of train crew districts and terminals, maintenance of way and signal districts, system track gangs, and other forces. These changes are needed so that the deployment of labor will correspond with new and more efficient operating patterns, rather than today's corporate alignments. This operating strategy will provide the employees with expanded work opportunities, while assuring UP/SP greater manpower availability and the flexibility to use employees efficiently to meet customer demands. Some examples of the types of changes necessitated by the Operating Plan are set forth below:

Train and Engine Crew Changes

A UP/SP system will place great emphasis on using and integrating complementary UP and SP routes and facilities, without regard to prior ownership, to achieve significant improvements in customer service. UP/SP will use rail capacity more efficiently by employing concepts such as directional routing of trains; segregating types of traffic on paralleled routes; creating large, consolidated terminal "hubs"; establishing

efficient and productive crew districts; and situating manpower to achieve maximum operational flexibility.

The new train services and operating efficiencies identified in the Operating Plan can be achieved only by reorganizing train crew operating districts and terminals to take advantage of new and alternative routings. For example, UP/SP will have several lines through the Los Angeles Basin which it must be able to use interchangeably in order to handle traffic more smoothly. In Northern California, UP/SP will have three lines between Sacramento and Oakland that must be used flexibly and in coordination with BN/Santa Fe operations. Further east, the directional operation planned for UP and SP routes from St. Louis and Memphis to and among Houston, San Antonio and Dallas/Ft. Worth, and the division of traffic by type on parallel routes between Houston and San Antonio and between Houston and New Orleans will require train crews to operate in one direction over tracks that now belong to UP and in the other direction over tracks that now belong to SP. Today's collective bargaining agreements would preclude all of these greatly improved operations.

In using train and engine employees, UP functions as a "hub and spoke" railroad. UP/SP must use that basic operating strategy to integrate UP and SP operations in order to achieve the efficiencies and service improvements envisioned in the Operating Plan. Operations into and out of central hubs provide the spokes for the long, through freight service operations identified in the Operating Plan. It is essential that all operating employees within the hub, as well as all road operations into and out of the hub, be subject to one common collective bargaining agreement with common seniority.

This type of consolidation is a win-win situation for employees, UP/SP and customers. It expands work opportunities for the affected employees and mitigates the adverse effects that historically have befallen employees on smaller, isolated seniority districts when business or operations shifted to a different route due to shipper routing changes, maintenance programs, disasters, etc. It also will allow UP/SP to provide enhanced service to its customers because of improved manpower availability and flexible utilization of its workforce.

This strategy for train and engine crew consolidations is predicated upon certain changes in crew districts. These efficient, productive crew districts and crew change points are essential elements of the UP/SP service improvement strategy as reflected in the Operating Plan. The new or modified crew districts assumed to exist for purposes of the Operating Plan are:

CORRIDOR	TERMINAL	TERMINAL
Chicago to Kansas City	Chicago	Belvidere/Rockford
	Chicago	Butler
	Chicago	Clinton
	Chicago	Ft. Madison
	Chicago	Janesville
	Chicago	Nelson
	Chicago	Quincy
	Chicago	South Pekin
	Ft. Madison	Kansas City
	Quincy	Kansas City

VERIFIED STATEMENT

OF

MICHAEL A. HARTMAN

My name is Michael A. Hartman. I am Director-Employee Relations and Planning at UP, a position I have held since December 1990. My rail experience commenced in January 1967, when I was hired in a clerical capacity by Santa Fe. I was promoted to a managerial position in Santa Fe's Labor Relations Department in July 1969, where I worked until 1973. During that time, I earned a B.A. Degree in Economics at Washburn University. I subsequently occupied director-level labor relations positions on the Illinois Terminal Railroad from 1973 to 1977, the Western Pacific Railroad from 1977 to 1983, and the Missouri Pacific Railroad from 1984 to 1987. The acquisition of WP and MPRR by UP resulted in my appointment as Director-Labor Relations of UP on January 1, 1988, a position I held until I was appointed to my present position. During my 26 years as a labor relations practitioner, I have been actively involved in numerous transactions in which labor protective conditions have been imposed by the Commission, including the UP/MP/WP merger in 1982 and UP's acquisitions of the MKT in 1988 and CNW in 1995.

I offer this statement to explain the Labor Impact Exhibit and discuss changes in labor agreements that are essential to achieve the benefits and efficiencies projected in the Operating Plan.

Labor Impact Analysis

The Labor Impact Exhibit compiles the results of numerous studies of staffing requirements for a merged UP/SP system in every aspect of its business. The Exhibit shows the effects of a UP/SP merger on all categories of employment, from clerical employees to track workers to senior executive officers. Except for special treatment of certain Denver, Omaha and St. Louis employees, which I discuss below, the Exhibit is organized by job classification, such as "Boilermakers" and "Trainmen." For each classification, the Exhibit reflects the location at which positions will be created, eliminated or transferred; when these changes will occur; the number of positions affected; and whether positions will be moved to another location, abolished or added. If a position is to be relocated, the Exhibit identifies its new location. A minor exception is certain locations where trainmen and enginemen are projected to be relocated to a different terminal but the location of that new terminal is undecided. In those instances, the Exhibit indicates that the new location is "to be negotiated."

The Summary of Benefits Exhibit and the pro forma financial statements incorporate the economic effects of the job changes shown in the Labor Impact Exhibit. We assumed that eligible employees affected by the merger will receive the employee protective conditions established in New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), or the standard labor protection applicable to related trackage rights and abandonment proposals. Our economic projections reflect protective payments in many cases, but also reflect realistic assumptions about other options for UP/SP and the potentially affected employees. In reality, many of the employees in adversely affected positions will retain their employment, because they will be needed at locations projected to have employment increases or

to replace employees who leave the company as a result of normal attrition. In addition, UP/SP may offer some affected employees a severance package; based on past experience, we expect many employees to accept this option and leave the company. Our economic projections also reflect the fact that some employees refuse relocation offers, voluntarily forfeiting their labor protection rights. Finally, our experience in prior consolidations shows that adverse labor impacts usually are more modest than predicted.

I also prepared an Appendix to the Labor Impact Exhibit to reflect the special situation with regard to clerical, non-agreement and dispatching positions now located at UP and SP administrative centers in Omaha, Denver and St. Louis. After merger, UP/SP headquarters will be in Omaha, at least initially, and SP's San Francisco headquarters will be closed. There is not enough room in UP's existing Omaha facilities, however, for all administrative personnel to work in one place. As a result, UP/SP may relocate a substantial number of Omaha, St. Louis or Denver positions to a new facility in one of those cities, or elsewhere. Because of uncertainty about this decision, the Applicants are unable to state how many of these Omaha, St. Louis and Denver positions will be relocated or where they might move. To estimate the economic effects of these potential relocations, we assumed that affected employees would be moved to Omaha or St. Louis, but that assumption does not reflect any management decision.

Revised Labor Arrangements

The Operating Plan describes the numerous changes in operations required to integrate the UP/SP route network, to provide improved services to shippers, and to achieve greater efficiency in rail operations. As explained in Appendix A to the Operating Plan, these changes in operations cannot be implemented under existing labor arrangements. For example, in

many corridors. UP and SP train crews will be required to operate interchangeably or directionally over both UP and SP lines, which is impossible under existing labor agreements. Similarly, the efficiency benefits of the merger cannot be achieved if UP/SP is required to maintain existing arrangements under which different maintenance crews must maintain parallel, or even adjacent, tracks in the same geographic area.

Appendix A to the Operating Plan describes new train crew districts, maintenance of way labor assignments, and signal personnel assignments that underlie the Operating Plan. The arrangements described in Appendix A represent our best projections, based on the information available to us today, but experience teaches that different arrangements and modifications of existing labor agreements may be necessary as circumstances change and shipping patterns evolve. Such revised assignments will provide greater long-term employment opportunities for our employees, while giving UP/SP the flexibility to meet its customers' needs and much more sensible and efficient ways to allocate its personnel.

Conclusion

The job changes summarized in the Labor Impact Exhibit reflect the details of the Operating Plan as we now project them, including the necessary changes in seniority districts, crew change points, labor agreement consolidations, etc. set forth in the Operating Plan and Appendix A. UP/SP may identify additional opportunities after the merger is approved. These changes are essential to achieving the efficiencies of the merger, as well as to allowing UP/SP to provide the service benefits described in the Operating Plan. They are also essential if UP/SP is to meet the needs of shippers for efficient transportation at attractive and competitive prices. In the

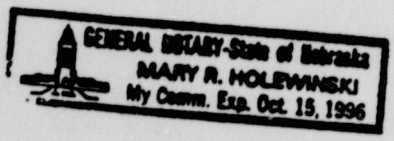
long run, these new arrangements will therefore lead toward expanded rail traffic, new job opportunities, and greater job security for our employees.

As of the date of the Application, no employee protection agreements have been reached with certified labor representatives.

VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

Michael A. Hartman, being duly sworn, deposes and says that he is Director--Employee Relations Planning for Union Pacific Railroad Company and Missouri Pacific Railroad Company, and has read the foregoing statement, knows the contents thereof, and that the same is true and correct.



Michael A. Hartman
Michael A. Hartman

Subscribed and sworn to before me by Michael A. Hartman this 16TH day of November, 1995.

Mary R. Holewinski
Notary Public

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Signalmen (Cont.)	San Francisco, CA (Cont.)	Year 1	0	0	21	Omaha, NE
	Scott City, KS	Year 3	1	0	0	
	Tucson, AZ	Year 1	1	0	0	
	Utica, KS	Year 3	1	0	0	
	Total Signalmen		47	0	43	
Trainmen	Alpine, TX	Year 2	5	0	0	
	Amelia, TX	Year 2	12	0	0	
	Avondale, LA	Year 2	29	0	0	
	Bakersfield, CA	Year 2	0	9	0	
	Big Spring, TX	Year 2	0	0	29	To Be Negotiated
	Bloomington, IL	Year 2	1	0	0	
	Boone, IA	Year 2	0	22	0	
	Brownsville, TX	Year 2	2	0	0	
	Cheyenne, WY	Year 2	0	28	0	
	Chicago, IL	Year 2	0	21	0	
	Chickasha, OK	Year 2	0	0	12	To Be Negotiated
	Clinton, IA	Year 2	0	3	0	
	Coffeyville, KS	Year 2	9	0	0	
	Corpus Christi, TX	Year 2	4	0	0	
	Council Bluffs, IA	Year 2	0	5	0	
	Council Grove, KS	Year 2	21	0	0	
	Dalhart, TX	Year 2	0	18	0	
	Dallas, TX	Year 2	7	14	0	
	Del Rio, TX	Year 2	0	16	0	
	Denver, CO	Year 2	17	16	0	
	Des Moines, IA	Year 2	1	0	0	
	Duncan/Enid, OK	Year 2	0	17	0	
	Dunsmuir, CA	Year 2	17	14	0	
	E. St. Louis, IL	Year 2	1	0	0	
	Eagle Grove, IA	Year 2	1	0	0	
	El Paso, TX	Year 2	11	42	0	
	Elko, NV	Year 1	5	0	0	
		Year 2	12	0	0	
	Eugene, OR	Year 1	12	0	0	
		Year 3	17	0	0	
	Fremont, NE	Year 2	0	4	0	
	Ft. Madison, IA	Year 2	0	40	0	
	Ft. Worth, TX	Year 2	15	19	0	
	Galesburg, IL	Year 2	0	1	0	
	Galveston, TX	Year 2	8	0	0	
	Grand Jct., CO	Year 2	26	0	5	To Be Negotiated
		Year 3	17	0	0	
	Harlingen, TX	Year 2	5	0	0	
	Hearne, TX	Year 3	4	0	0	
	Herington, KS	Year 2	18	0	0	
	Hinkle, OR	Year 2	0	4	0	
	Hoisington, KS	Year 2	32	0	0	
	Houston, TX	Year 2	74	8	0	
	Illmo, IL	Year 2	20	0	0	
		Year 2	0	0	15	To Be Negotiated
	Janesville, WI	Year 2	1	0	0	
	Jefferson City, MO	Year 2	4	0	0	
	Kansas City, KS	Year 3	32	0	3	Herington, KS

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Trainmen (Cont.)	Kansas City, MO	Year 2	13	0	0	
	Kingsville, TX	Year 2	0	1	0	
	Klamath Falls, OR	Year 2	0	0	20	To Be Negotiated
	La Grande, OR	Year 2	1	0	0	
	Lafayette, LA	Year 2	3	2	0	
	Lake Charles, LA	Year 2	8	0	0	
	Las Vegas, NV	Year 2	11	0	0	
	Livonia, LA	Year 2	0	6	0	
	Los Angeles, CA	Year 2	0	13	0	
		Year 3	108	0	0	
	Marshalltown, IA	Year 2	1	0	0	
	Marysville, KS	Year 2	3	0	0	
	Memphis, TN	Year 2	15	0	0	
	Mineola, TX	Year 2	1	0	5	To Be Negotiated
	Monroe, LA	Year 2	0	1	0	
	N Little Rock, AR	Year 2	37	0	0	
	Nampa, ID	Year 2	1	0	0	
	North Platte, NE	Year 2	0	4	0	
	Oakland, CA	Year 2	1	4	0	
	Oakley, KS	Year 2	0	18	0	
	Ogden, UT	Year 2	0	15	0	
		Year 3	23	0	0	
	Oroville, CA	Year 2	2	0	0	
	Palestine, TX	Year 2	13	0	83	To Be Negotiated
	Pekin, IL	Year 2	0	7	0	
	Phoenix, AZ	Year 2	1	0	0	
	Pine Bluff, AR	Year 2	3	17	0	
	Pocatello, ID	Year 2	5	0	0	
	Poplar Bluff, MO	Year 2	0	0	33	To Be Negotiated
	Portland, OR	Year 1	3	0	0	
		Year 2	0	52	0	
	Portola, CA	Year 2	28	0	0	
	Pratt, KS	Year 2	0	38	0	
	Proviso, IL	Year 2	6	0	0	
	Provo, UT	Year 2	2	0	0	
	Pueblo, CO	Year 2	43	0	0	
		Year 3	16	0	0	
	Quincy, IL	Year 2	19	0	0	
	Reno, NV	Year 1	5	0	0	
	Roseville, CA	Year 2	0	20	0	
		Year 3	12	4	0	
	S. Morrill, NE	Year 2	1	0	0	
	Sacramento, CA	Year 2	9	0	0	
	Salem, IL	Year 2	0	26	0	
	Salina, KS	Year 2	0	6	0	
	Salt Lake City, UT	Year 2	80	10	5	To Be Negotiated
	San Antonio, TX	Year 2	25	0	0	
	Seattle, WA	Year 2	0	3	0	
	Shreveport, LA	Year 2	5	11	0	
	Smithville, TX	Year 2	0	0	31	To Be Negotiated
	Sparks, NV	Year 2	0	11	0	
	St. Louis, MO	Year 2	27	0	0	
	St. Paul, MN	Year 2	5	0	0	
	Stockton, CA	Year 2	31	0	39	To Be Negotiated

DECLARATION OF MALCOLM B. FUTHEY, JR.

I, Malcolm B. Futhey, Jr., pursuant to 28 U.S.C. § 1746, declare that the following facts are true and correct.

1. I am an International Vice President of the United Transportation Union ("UTU"), which represents engine and train service employees on both Union Pacific ("UP") and Southern Pacific ("SP"). My rail experience commenced on the former Missouri Pacific Railroad ("MP") in June, 1971, as a trainman. I became General Chairman for the UTU General Committee of Adjustment in the Memphis Terminal in January, 1979. In July, 1988, I was elected General Chairman for the UTU General Committee of Adjustment with jurisdiction over UTU's Agreements on the Missouri Pacific Upper Lines, which operated in ten (10) states. MP became a part of the Union Pacific Corporation in 1982 as a result of the merger decision of the Interstate Commerce Commission in Finance Docket No. 30,000. I commenced my current job as UTU International Vice President on January 1, 1996.

2. I submit the following in rebuttal to statements in the Carrier's Operating Plan, Appendix A, at 255, where the UP contends:

> In using train and engine employees, UP functions as a "hub and spoke" railroad. UP/SP must use that basic operating strategy to integrate UP and SP operations in order to achieve the efficiencies and service improvements envisioned in the Operating Plan. Operations into and out of central hubs provide the spokes for the long, through freight service operations identified in the Operating Plan. It is essential that all operating employees within the hub, as well as all road operations into and out of the hub, be subject to one common collective bargaining agreement with common seniority. (Appendix A at 255).

UP does not in fact currently function as a "hub and spoke" operation. The following are just a few examples where UP has major operations that are not "hub and spoke," and are not operated under one collective bargaining agreement:

EXHIBIT 3

North Little Rock is a major yard terminal for UP, with a major hump yard and auxiliary support yards. The yard and road districts that enter North Little Rock are composed of multiple seniority districts which are not subject to one collective bargaining agreement. The south leg is a dual seniority operation under both the Missouri Pacific Upper Lines and the former Texas Pacific Lines. Operating west, north and east are separate seniority districts under the Missouri Pacific Upper Lines collective bargaining agreement.

St. Louis is another major terminal with multiple yards in the make up of the terminal. Three (3) mainline operations enter St. Louis under the MP collective bargaining agreement. Of the three, one is actually home terminaled at Poplar Bluff, with St. Louis as the away-from-home terminal. Another main line enters St. Louis from the east and is controlled by the C&EI agreement. The aforementioned operations are not intermingled at all as far as the seniority of the employees is concerned.

Kansas City is the location of one of UP's largest yard operations, and is composed of multiple yard and road districts. The road districts have three (3) under the collective bargaining agreement on the Missouri Pacific Upper Lines. One of those three, Jefferson City, uses Kansas City as the away-from-home terminal. The traffic flowing west out of Kansas City is under the jurisdiction of the Union Pacific-Eastern District collective bargaining agreement.

3. Additionally, operations in Ft. Worth, Houston, Salt Lake City and Omaha/Council Bluff are nearly identical to those in St. Louis and Kansas City.

4. Clearly UP misspoke when it indicated in the Operating Plan submitted to the Surface Transportation Board that it is a "hub and spoke" system necessitating one collective bargaining agreement. UP isn't a "hub and spoke" system, and it doesn't require one agreement as contended.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 20, 1997.

Malcolm B. Futhey, Jr.

MALCOLM B. FUTHEY, JR.

DECLARATION OF CHARLES L. LITTLE

I, Charles L. Little, pursuant to 28 U.S.C. § 1746, declare that the following facts are true and correct.

1. I am International President of the United Transportation Union ("UTU"), and have held such position since September 6, 1995, having previously served as International General Secretary and Treasurer from January 1, 1992 to September 6, 1995, International Vice President from 1984-92, and General Chairperson of the General Committee of Adjustment on the Houston Belt & Terminal Railway from 1979-84.

2. In the late Fall of 1995, I had occasion to meet in Cleveland with then Vice President-Labor Relations of Southern Pacific ("SP") Thomas Matthews about whether UTU's stated opposition to the UP-SP Merger then pending before the Surface Transportation Board ("STB") could be changed to support of that merger. Since concerns had been voiced by some of the UTU General Chairpersons on the SP about the survivability of that carrier without the merger, I told Mr. Matthews that we could consider support of the merger if some of our concerns about labor protection could be dealt with. At that time, we specifically discussed in general our desire for automatic certification of UTU-represented employees as adversely affected so that their claims for displacement or dismissal allowances could not be defeated by a Carrier claim of lack of causal connection of the adverse effect to the merger.

3. Shortly thereafter, UTU Assistant President B. A. Boyd, Jr. began telephone discussions about what UTU needed to support the merger with UP Vice President-Labor Relations John Marchant, and I received periodic reports from him as to the substance of those discussions.

4. Mr. Marchant furnished a draft to Assistant President Boyd, which I saw at the UTU Officers' Meeting the week of January 8, 1996. In reviewing Mr. Marchant's draft letter with Assistant President Boyd, and particularly the text relating to UTU reaching a voluntary implementing agreement, Assistant President Boyd and I discussed it further with UTU General Counsel C. J. Miller, III.

5. The reason for our concern was that we were and are, in fact, still litigating the results of what is known as the "O'Brien Award" on CSX, which permitted changes in collective bargaining agreements without negotiation under the Railway Labor Act or any demonstration of their necessity under the immunity provision of the Interstate Commerce Act. Additionally, General Counsel Miller and I had just been through the Mikrut arbitration hearing involving the UP-CNW merger where UP was heavily relying on the O'Brien Award for the agreement changes it was demanding there. Also, in the Mikrut arbitration hearing, there were many more employees adversely affected identified in the UP-CNW Merger Notices served than had been indicated in the Labor Impact Statement submitted by the Carriers in that merger.

6. As a consequence of all this, Assistant President Boyd, General Counsel Miller and I drafted language to be added to Mr. Marchant's existing draft that would cover both situations described above. On the first page of Organization's Exhibit 1 language appearing in the last six lines was intended to cover any UTU-represented employees identified in a Merger Notice with the benefits of automatic certification.

7. More importantly, we were not willing to commit UTU to make voluntary implementing agreements to obtain the benefits of automatic certification unless there was a condition on what UP could ask for in such implementing agreements. That condition appears

in the last four lines of the first paragraph of the second page of the Marchant Commitment Letter (Organization's Exhibit 1). It was intended to condition UTU's promise to negotiate voluntary implementing agreements on UP not seeking changes in existing collective bargaining agreements unless they are "necessary" to implement the merger, meaning those changes that produce public transportation benefits not based solely on savings from agreement changes.

8. That was the last provision negotiated, and it was discussed with Mr. Marchant several times. Without that condition, UTU would not have supported the merger, for while we were concerned about the survival of SP, we were not going to permit UP to demand agreement changes that merely enrich the Carrier at the employees' expense, as happened under the O'Brien Award.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 21, 1997.

Charles L. Little

UP-SP MERGER, ICC F.D. NO. 32760
ORAL ARGUMENT BY THE UTU BEFORE THE STB - 7/1/96

May it please the Board. I'm Clint Miller, General Counsel to the United Transportation Union. The United Transportation Union represents conductors, trainmen, yardmasters, hostlers and some engineers of the applicants. UTU is in support of the proposed merger. UTU's support of the merger is based upon its concerns as to the survivability of a stand-alone SP and the agreements of the Applicants to conditions that will help mitigate the impact of job loss on our members. UTU asks the Board to condition any approval of the Control and Merger Application upon those agreements that were part of our Verified Statement and Comments, and Brief, pursuant to its authority under Section 11324(c) as we requested in those documents. The agreements contain conditions in the form of commitments in applying the New York Dock protective conditions, which is the basis for UTU's conditional support of the proposed merger.

The chief condition the Applicants have agreed to with UTU is the automatic certification as adversely affected by the merger of the train service, yardmaster, and hostler employees projected to be adversely affected in the Labor Impact Study that was part of the Application, and of all other train service employees and UTU-represented yardmasters and hostlers identified in any Merger Notice served after Board approval, and automatic certification of any engineers adversely affected by the merger who are working on properties where engineers are represented by the UTU. Moreover, UP has agreed to supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the approved merger.

Further, and just as importantly, in any Merger Notice served after Board approval, the Applicants, in using the immunity provision, will only seek those changes in existing collective bargaining agreements that are actually "necessary" to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by labor agreement changes.

In the event any differences between UP and UTU arise with regard to UP's application of the New York Dock conditions being inconsistent with these conditions, UTU and UP personnel will meet within five (5) days of notice from the UTU International President and agree to expedited arbitration with a written agreement within ten (10) days.

Finally, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MP or UP, the New York Dock conditions would, nevertheless, be applicable. UP has also voluntarily agreed with UTU to this condition.

In view of UP's agreement to those conditions, UTU agreed to support this merger. They will eliminate a lot of the problems experienced in the UP-CNW Merger indicated by UTU's petition for review of the implementing agreement arbitration award therein, although that matter was resolved by agreement last Friday and UTU will shortly be filing a withdrawal of its petition.

The UTU has as members more than 79,000 transportation industry workers, and believes it is the largest labor organization in the rail industry, representing a very substantial portion of

the employees of the Applicants. Its chief responsibility is to protect the economic interests of UTU members, who make the national rail transportation system work. As the Board is aware, rail labor has been very concerned about, and very critical of, rail mergers in general because of the significant job loss and family dislocations that they entail, particularly where parallel lines are involved. UTU supports the proposed UP/SP merger not only because UP has agreed to conditions as to how the New York Dock conditions will be applied that will help mitigate the impact of job loss on its members, but also because of its concern about the continued viability of SP without the merger in a UP-CNW/BNSF environment in the West.

UTU is very familiar with the financial condition of SP. UTU retained financial experts to analyze the SP when it was sold to Rio Grande Industries, and again when SP sought concessionary labor agreements because of its cash losses in wage adaptation negotiations mandated by the Report of PEB 219 and Pub. L. 102-29 in 1991. The Congressional recognition of SP's cash losses provided SP with a way to pay our members less money than employees doing exactly the same work on other railroads. Our members now earn about 20-25% less at SP than at other Class I railroads. Congress did not want another Conrail, Milwaukee or Rock Island situation on its hands.

As UTU understands it, SP has lost about $1.3 billion in cash from rail operations since the SP/Santa Fe merger was rejected by the ICC. SP had been spun out of the SFSP holding company pending approval of carrier merger. As far as UTU is concerned, there just isn't enough real estate left from the spin-out and later Rio Grande acquisition to continue to offset SP's net operating losses much longer by selling it, which has been the *modus operandi* of SP for some time.

UTU believes the approval of the BN/Santa Fe merger makes things even worse for SP. SP couldn't efficiently compete before that merger to generate net income from rail operations. It probably could not survive competing against the UP-CNW and the BN/Santa Fe in the current environment. UTU believes that the financial condition of an applicant may be taken into consideration in a merger, as well as negative competitive consequences. There is a clear case of financial need that has been made by the SP in this application. UTU is not concerned with the niceties of the "failing carrier" doctrine. Its concerns are intensely more practical.

UTU represents operating employees. They know that single-line service is more efficient than interchange operations. They also know that trackage rights can provide a way to address problems related to competition. In fact, our SP members operate all of the new trains that SP now has as a result of trackage rights obtained in the BN/Santa Fe Merger. The SP operates over BN/Santa Fe tracks between Chicago and Kansas City, Kansas City and Ft. Worth, and Pueblo and Ft. Worth.

UTU also has concerns about the safety implications of a stand-alone SP. Financially troubled railroads don't invest as much in safety and, in general, are forced to cut corners. Deferring required maintenance is the first corner cut in UTU's experience, and that, in the long run, leads to more hazards to our members.

UTU does not want the SP to be forced to be sold in pieces. That is another unwelcome possibility if this application is not approved. What happens to the pieces nobody wants? More importantly, UTU members will lose more jobs in piecemeal line sales, at least some of which may be done by the exemption line sale method with no labor protection. The new owners likely will pay less and have worse working conditions, and UTU knows that from too much painful past experience.

Support of this merger application is, in sum, the best of a bad lot of choices for UTU. This support itself is conditioned on the applicants' agreements as to how the applicable protective conditions will be administered. On balance, because of the uncertainty of the long-run survival of a stand-alone SP intact in the current environment in the West, where two mega-carriers dominate rail service, UTU submits approval of the merger is the best of a bad lot of choices for the Board itself.

20247

This decision will be included in the bound volumes of the STB printed reports at a later date.

SERVICE DATE
AUG 12 1996

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Decision No. 44[1]

Decided: August 6, 1996

The Board approves, with certain conditions, the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company).[2]

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[1] This decision covers the Finance Docket No. 32760 lead proceeding and the embraced proceedings listed in Appendix A.

[2] The ICC Termination Act of 1995, Pub. L. No. 104-88 109 Stat. 803 (the Act), enacted December 29, 1995, and effective January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC at the time of its termination that involve functions transferred to the Board pursuant to the Act shall be decided (1) by the Board, and (2) under the law in effect prior to January 1, 1996. The Finance Docket No. 32760 lead proceeding, the Finance Docket No. 32760 (Sub-Nos. 1 to 9) embraced proceedings, and the 17 embraced abandonment and 4 embraced discontinuance proceedings were pending with the ICC at the time of its termination. The Finance Docket No. 32760 (Sub-Nos. 10, 11, 12, 13, 14, 16, and 17) embraced proceedings were not then pending but will be considered as if they had been because responsive applications that seek to invoke the conditioning power of old 49 U.S.C. 11344(c) have never been regarded as independent applications. See Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38 (ICC served Aug. 23, 1995) (BN/SF) (slip op. at 55 n.76). Except as noted in the next two paragraphs, all of the proceedings addressed in this decision involve functions that are subject to our jurisdiction pursuant to new 49 U.S.C. 11323-27 (control/merger transactions), new 49 U.S.C, 11102 (terminal facilities), and new 49 U.S.C. 10903-05 (abandonments), and we will therefore decide these proceedings under the law in effect prior to January 1, 1996.

The Finance Docket No. 32760 (Sub-No. 8) proceeding, wherein applicants seek an exemption from the trucking company acquisition requirements of old 49 U.S.C. 11343-44, involves a

(continued...)

EXHIBIT 6

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[2](...continued)
effect on and after January 1, 1996. We will nevertheless decide this proceeding, and decide it under the law in effect prior to January 1, 1996, in accordance with the special transition rule provided by section 204(b)(3)(C) of the Act (any proceeding involving the "merger" of a motor carrier of property, that was pending before the ICC at the time of its termination, shall be decided by the Board under the law in effect prior to January 1, 1996). The transactions at issue in Finance Docket No. 32760 (Sub-No. 8) are not, in the technical sense, mergers, but prior practice suggests that the word "merger," as used in section 204(b)(3)(C), should be read broadly. See, e.g., Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW) (slip op. at 56 n.52) (in the context of old 49 U.S.C. 11343-44, the words "merger" and "transaction" have been used almost interchangeably).

Section 204(b)(3)(A) of the Act provides, in general, that in the case of a proceeding under a provision of law repealed and not reenacted by the Act, such proceeding shall be terminated. The Finance Docket No. 32760 lead proceeding includes, among other things, a request that certain securities matters be approved under or exempted from the requirements of old 49 U.S.C. 11301. Because the referenced securities requirements were repealed and not reenacted, the described portion of the Finance Docket No. 32760 lead proceeding was terminated, by force of law, effective January 1, 1996.

As used in this decision, the term "new law" refers to the law in effect on and after January 1, 1996, and the term "old law" refers to the law in effect prior to January 1, 1996. All further references in this decision, except as otherwise specifically indicated, will be to the applicable provisions of the old law.

INTRODUCTION

Applicants. By application filed November 30, 1995, Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), Missouri Pacific Railroad Company (MPRR), Southern Pacific Rail Corporation (SPR), Southern Pacific Transportation Company (SPT), St. Louis Southwestern Railway Company (SSW), SPCSL Corp. (SPCSL), and The Denver and Rio Grande Western Railroad Company (DRGW)[3] seek approval under 49 U.S.C. 11343-45 for:[4] the

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[3] UPC, UPRR, MPRR, SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as applicants. UPC, UPRR, and MPRR are referred to collectively as Union Pacific. UPRR and MPRR are referred to collectively as UP. SPR, SPT, SSW, SPCSL, and DRGW are referred to collectively as Southern Pacific. SPT, SSW, SPCSL, and DRGW are referred to collectively as SP. These and other abbreviations frequently used in this decision are listed in Appendix B.

[4] The application filed November 30, 1995 (UP/SP-22, -23, -24, -25, -26, -27, and -28), as supplemented on December 21, 1995 (UP/SP-36), March 26, 1996 (UP/SP-188), and March 29, 1996 (UP/SP-194 and -195), consists of the primary application (which seeks approval for the common control and merger of UP and SP, and which was filed in Finance Docket No. 32760) and various

(continued...)

acquisition of control of SPR by a wholly owned UPC subsidiary; the resulting common control of UP and SP by UPC; and the consolidation of the rail operations of UP and SP.[5]

The UPC/SPR Merger Agreement, dated August 3, 1995, provides that, upon the satisfaction of certain conditions, including regulatory approval, a wholly owned UPC subsidiary will acquire all of SPR's common stock and SPR will be merged into UPRR. Applicants note, however, that UP/SP common control may be effected by other means, including, for example, the merger of SPR into MPRR or the lease of all SP properties to UPRR and/or MPRR. Applicants add that they intend to merge SPT, SSW, SPCSL, and DRGW into UPRR, although they also add that these SPR subsidiaries may retain their separate existence for some time and that other means may be used to consolidate these subsidiaries into the merged system. Applicants ask, citing Schwabacher v. United States, 334 U.S. 192 (1948), that we determine that the Merger Agreement's terms for the purchase of the SPR common stock are fair both to the stockholders of UPC and to the stockholders of SPR.[6]

Applicants also have filed related applications, petitions, and notices. These include a notice of exemption for settlement-

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[4](...continued)
ancillary applications, petitions, and notices (which seek approval for or exemption of various merger-related matters).

[5] UPRR and MPRR are wholly owned subsidiaries of UPC. SPT, SPCSL, and DRGW are wholly owned subsidiaries of SPR; SSW is a 99.9%-owned subsidiary of SPR.

[6] On August 9, 1995, UP Acquisition Corporation (Acquisition), a wholly owned UPC subsidiary that was later merged into UPRR, see UP/SP-269, tendered for up to 25% of SPR common stock at $25.00 per share in cash; on September 7, 1995, the tender offer was completed for 39,034,471 shares; and, on September 15, 1995, Acquisition purchased these shares for approximately $976 million (the shares are being held in a voting trust pending approval of the merger). Applicants indicate that, upon satisfaction of all conditions to the merger, each of SPR's stockholders will have the right to specify the number of shares that such stockholder wishes to have converted into (a) 0.4065 shares of UPC common stock per share, and (b) the right to receive $25.00 per share in cash, without interest. The aggregate number of shares to be converted into cash at the time of the merger, together with shares tendered in the tender offer, will be equal as nearly as practicable to 40% of all shares outstanding as of the date immediately prior to the date on which the merger becomes effective. To the extent that SPR stockholders elect in the aggregate to receive either cash consideration in excess of 40% or stock consideration in excess of 60%, the Merger Agreement requires the cash or stock component to be prorated in order to achieve the specified proportions.

Applicants note that SSW has a small number of minority equity holders, and that the Federal Railroad Administration also holds certain SSW redeemable preference shares. Applicants indicate that they are not now requesting a Schwabacher determination with respect to the compensation that might be paid to SSW security holders in connection with a merger of SSW into UPRR or MPRR. Applicants add that, should they determine to carry out such a merger, they will request either a Schwabacher determination respecting the terms or a declaratory order that no such determination is required.

the Roseport Terminal will be lifted; (4) that, to alleviate competitive problems in Minnesota, the Southwest, and the West, and on routes to Mexico, additional agreements, including agreements respecting joint track ownership with other carriers, will be negotiated; and (5) that UP will honor its commitments regarding line sales, abandonments, and employment in Minnesota.

Arkansas. *Attorney General Bryant* is concerned that Arkansas will experience competitive problems due to a 2-to-1 reduction in the number of Class I railroads serving the vast majority of the state, and also will lose jobs on account of the shutdown of redundant lines, reductions in service on other lines, and the closing of machine shops, yards, and car and locomotive facilities. The Attorney General, arguing that the BNSF agreement does not solve the competitive problems that the merger would create, contends that UP/SP should be required either to divest certain lines, particularly the line between Chicago and Texas, or to reach another arrangement whereby a competing Class I railroad will have access to those lines.

Washington. *The Washington Department of Transportation (Wa/DOT)* is skeptical that BNSF will be a viable competitor in the Central Corridor, and contends that acquisition of a Central Corridor line by a regional or a shortline may produce more effective competition, prevent abandonments, and offer Washington shippers an alternative route. Wa/DOT therefore suggests that we consider a conditional grant of the BNSF agreement's Central Corridor trackage rights, and that we retain jurisdiction to order divestiture, joint ownership, or third carrier trackage rights if BNSF fails to provide adequate competition.

Iowa. *The Iowa Department of Transportation (Ia/DOT)* fears that there will be a reduction in competition in the corridor connecting Iowa to Gulf Coast ports and Mexican gateways, and claims that, even with the BNSF and IC agreements, UP/SP will still dominate the corridor for many types of freight movements important to Iowa. Ia/DOT therefore supports the merger provided that conditions are imposed requiring the grant of further trackage rights or line sales to a third Class I carrier to reduce potential UP/SP market dominance in that corridor.

Utah. *Governor Leavitt* supports the merger but seeks certain conditions: (1) to create a competitive environment, a reduction in the BNSF trackage rights fee from 3.0 mills to 2.5 mills; (2) to emulate (or provide a surrogate for) a competitive environment, a requirement that there be an annual audit, paid for by UP/SP, of rail rates in similar rail markets that enjoy the benefits of intramodal competition (it being understood that, if the audit reveals that rates charged shippers in similar markets are higher than UP/SP rates charged Utah shippers, UP/SP would be required to provide refunds to affected Utah shippers); and (3) to preserve our jurisdiction in this matter, the establishment of oversight for at least 15 years.

LABOR PARTIES. Statements respecting the proposed merger have been filed by various labor parties.

Allied Rail Unions. The American Train Dispatchers Department (ATDD),[80] the Brotherhood of Maintenance of Way Employees (BMWE), and the Brotherhood of Railroad Signalmen (BRS), participating collectively as the Allied Rail Unions (ARU), contend that the merger should be rejected for a variety

[80] ATDD is a Department of the Brotherhood of Locomotive Engineers (BLE).

of reasons: because thousands of jobs will be lost; because applicants intend to abrogate or modify existing collective bargaining agreements (CBAs), and thereby to effect massive changes in the rules and working conditions of UP/SP employees, by bypassing the procedures required by the Railway Labor Act (RLA); because the merger will reduce competition, and allow UP/SP and BNSF to engage in collusive behavior, throughout the West; and because, given the impact on workers and on competition, SP's financial problems do not justify approval. ARU asks that we condition any approval of the merger by imposing both the conditions set forth in New York Dock, 360 I.C.C. at 84-90, and the additional conditions described below.

Conditions Requested: Scope of 49 U.S.C. 11341(a). ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions taken to actually consummate the financial aspects of the merger (the acquisition of control of SP, the common control of UP and SP, and the merger of UP and SP), and that Article I, Section 2 of the New York Dock conditions will prevent UP/SP from using 49 U.S.C. 11341(a) to abrogate, modify, or "rationalize" existing CBAs. Alternatively, ARU asks us to hold that the scope of the immunity applicable to the merger is limited to actions specifically set forth in the application and the proposed operating plan. In either instance, ARU also asks us to state specifically that approval of the merger does not amount to approval of applicants' plans to abrogate, modify, or "rationalize" existing CBAs.

Conditions Requested: Cherry-Picking. ARU suggests that, if we believe that "rationalization" of CBAs is inherently a part of our approval of the merger, we should order that any such "rationalization" should be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements (i.e., by allowing the unions to select from among the provisions in the CBAs now in effect on the railroads involved in the merger).

Conditions Requested: Reimbursements To SP Employees. ARU, noting that between 1991 and 1995 various SP unions made wage concessions in connection with SP's financial difficulties, and further noting that SP wages did not return to the national levels until after 1995, maintains that, if shareholders are to be rewarded for their investments in SP, it is only fair that union members should similarly benefit from the merger at least to the extent of repayment of their investments (their forgone lump sum payments and their deferred wage increases).

Conditions Requested: Pre-Implementation Agreement. ARU, viewing the BNSF agreement as a part of the merger, contends that we should require BNSF to be made a co-applicant in the Finance Docket No. 32760 lead proceeding, or, in the alternative, that we should impose the New York Dock conditions on the trackage rights provided for in the BNSF agreement. ARU insists that only imposition of the New York Dock conditions on the trackage rights provided for in the BNSF agreement will provide full protection for employees, by allowing for a comprehensive implementing arrangement prior to implementation of the trackage rights.[81]

Conditions Requested: Hiring Preference. ARU suggests that, if we do not impose the New York Dock conditions on the

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[81] In Decision No. 30 (served Apr. 18, 1996), we denied ARU's ARU-8 motion seeking the designation of BNSF as a co-applicant, but without prejudice to ARU's right to continue to argue that the New York Dock conditions should be imposed on the trackage rights provided for in the BNSF agreement.

trackage rights provided for in the BNSF agreement, we should at least modify the hiring preference provision in the BNSF agreement (which provides for a form of hiring preference for work on, or related to, the trackage rights lines and the acquired lines). The modifications ARU has in mind would be patterned upon the New York Dock conditions, and would make the preference mandatory and subject to negotiations with the unions.

Conditions Requested: Contracting Out. ARU also asks that we require UP/SP and BNSF to utilize bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work. This is work, ARU claims, that employees represented by BMWE and BRS historically have done and that they are fully capable of doing; but ARU fears that, although such work is required to be done by such employees under their scope rules and past practice, applicants may nevertheless attempt to contract out such work.

Conditions Requested: Annual Reports. ARU, noting that applicants claim that the merger will generate public benefits, asks that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings (including labor costs) are utilized, and how much is either (a) passed on to shippers through rate reductions or deferred rate increases, (b) reinvested, (c) distributed to shareholders, (d) paid in executive salaries and bonuses, or (e) shared with employees.

International Brotherhood of Teamsters. IBT requests that any approval of the merger be conditioned by requiring UP/SP to divest three subsidiaries, to grant New York Dock protection to the employees of a fourth subsidiary, and to file semi-annual reports regarding diversion of truck cargoes.

Overnite Transportation Company, Pacific Motor Transport Company, and Southern Pacific Motor Trucking Company. IBT notes that 49 U.S.C. 11344(c) provides, in part, that we can approve a 49 U.S.C. 11343 transaction in which a railroad or an affiliate is an applicant and in which a motor carrier is involved only if, among other things, the transaction will enable the rail carrier to use motor carrier transportation to public advantage in its operations. IBT therefore contends that we cannot approve common control of UP/SP and the three motor carrier subsidiaries because applicants, having indicated that they intend to keep Overnite and PMT independent and SPMT inactive, have made clear that they will not use these motor carriers in furtherance of UP/SP's rail operations. IBT adds that, because such common control cannot be approved under 49 U.S.C. 11344, it certainly cannot be exempted under 49 U.S.C. 10505; 49 U.S.C. 10505(g), IBT notes, provides that the 49 U.S.C. 10505 exemption authority cannot be used to authorize intermodal ownership that is otherwise prohibited. IBT therefore concludes that we must either disapprove the UP/SP merger or order the pre-merger divestiture of the three motor carriers (although IBT allows that, inasmuch as SPMT is currently inactive, we could condition UP/SPMT common control by requiring that any future SPMT operations be auxiliary to UP/SP rail operations).

Union Pacific Motor Freight Corporation. IBT, noting that applicants have not sought authorization for common control of SP and Union Pacific Motor Freight Corporation (UPMF, an MPRR subsidiary), concludes that applicants must believe that UPMF is a railroad company rather than a motor carrier company, which would mean (IBT indicates) that UPMF employees would be entitled to mandatory labor protection under 49 U.S.C. 11347. UPMF employees, IBT adds, should be entitled to mandatory labor protection because they are engaged almost exclusively in

supporting rail operations within rail yards, and they are therefore "rail employees" for the purposes of 49 U.S.C. 11347. The tasks performed by these employees, IBT maintains, fall into three basic categories: (1) ramp drivers ("hostlers") and groundmen who move trailers and containers within rail yards and assist with such movements; (2) crane operators who load and unload containers from trains; and (3) mechanics who repair trailers and other UP equipment. IBT insists that, because the jobs currently performed by UPMF employees are unique to the railroad industry, these employees (unlike over-the-road truck drivers) possess skills that are not generally marketable outside the railroad industry and would therefore have difficulty finding comparable employment elsewhere. Recognizing that we may determine that UPMF employees are not entitled to mandatory New York Dock labor protection under 49 U.S.C. 11347, IBT asks in the alternative that we impose New York Dock protection in favor of UPMF employees as an exercise of our discretionary power under 49 U.S.C. 11344(c).

Diversion Reports. Applicants, IBT notes, claim that UP/SP will divert significant volumes of cargo from over-the-road truck carriage to rail. These diversions, IBT insists, may harm the public interest because they may be obtained in part by non-compensatory pricing, and because, even if not so obtained, they will result in significant job losses in the motor carrier industry. To provide a mechanism for monitoring competitive impacts on the rail and motor carrier industries and on services to shippers, IBT requests that we condition any merger approval by requiring UP/SP to file semi-annual public reports indicating the volume of traffic diverted from truck carriage and the rate of return (ratio of revenue to fixed costs) for such cargo.

Transportation•Communications International Union. TCU fears that the merger will have broad anticompetitive effects; a merged UP/SP, TCU claims, will monopolize rail traffic in much of the West, will control virtually all traffic to and from Mexico, and will dominate the transportation of particular products including coal, plastics, and petrochemicals. The claim that SP will fail without the merger, TCU insists, is not valid; SP, in TCU's view, simply does not face the distinct likelihood of insolvency. With respect to labor impacts, TCU contends that the merger should be denied on account of the disproportionate impact it will have on employees who either work in certain crafts (especially the clerical craft) or reside in certain states (in particular, California). And experience teaches, TCU adds, that the actual number of jobs lost will far exceed the estimates provided by applicants. TCU insists that, if the merger is approved, it should be made subject to the standard New York Dock conditions.

Transportation Trades Department. The Transportation Trades Department (TTD) opposes the merger, which it asserts: threatens competition, represents an unnecessary consolidation of market power, and will result in significant job losses and dislocation within and outside the rail and motor carrier industries. The merger, TTD adds, will not only combine the rail components of UP and SP, it also will combine their motor subsidiaries, which will lead to the overall consolidation of the motor carrier industry in the West as well as possible collusive behavior by and between UP/SP rail and trucking interests. TTD, which supports the conditions requested by ARU, IBT, and TCU, insists that we should condition any approval of the merger with adequate labor protections. In many instances, TTD adds, New York Dock benefits are not sufficient (TTD mentions in particular the case where an employee chooses not to accept a transfer assignment), and TTD therefore contends that we should award UP/SP's rail and motor

employees protective conditions that go beyond New York Dock. And, TTD adds, we should not allow applicants to abrogate or modify CBAs through the misapplication of 49 U.S.C. 11341(a). That, TTD maintains, would amount to a seizure of private contract rights under the pretense that CBAs are an impediment to the successful consummation of an approved railroad transaction.

Union Locals. *John D. Fitzgerald*, a United Transportation Union (UTU) general chairman for certain BN lines, opposes the merger movement in the Western District (the consolidation of the four major carriers into two, BNSF and UP/SP), and urges us to consider the UP/SP merger on a consolidated basis with a reopened BN/SF merger proceeding. Mr. Fitzgerald also opposes the provision in the BNSF agreement in the present proceeding that involves the grant to UP/SP of trackage rights between Saunders, WI, and Superior, WI (overhead rights only, with access to MERC Dock in Superior), and over the Pokegama connection at Saunders. These rights, Mr. Fitzgerald fears, will enable UP/SP to divert traffic from BNSF, and will therefore adversely affect BN employees; and he therefore requests that BN employees adversely affected by the Sub-No. 1 trackage rights receive full New York Dock protection, including an implementing agreement with UP/SP and its employee organizations.

Charles W. Downey, a UTU general chairman for lines of SPCSL and GWWR,[82] fears that the agreement applicants entered into with GWWR, by altering radically the present work arrangements applicable to SPCSL and GWWR operations, will wreak havoc upon the rights of persons employed by SPCSL and GWWR in the Chicago-St. Louis territory of the former Chicago, Missouri & Western Railway Company (CMW).[83] Mr. Downey, fearing that certain work now performed by SPCSL employees will be transferred to GWWR, insists that fairness to employees of both carriers requires that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, and that the GWWR agreement be subject to the full reach of the New York Dock conditions.[84]

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[82] Mr. Downey's late-filed statement was accompanied by his CWD-1 petition for leave to intervene and to become a party of record. The petition will be granted.

[83] Mr. Downey contends, among other things, that the present work arrangements were "passed upon" by the ICC in its decision in Rio Grande Industries, Inc. et al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL, Finance Docket No. 31522 (ICC served Oct. 31, 1989) (slip op. at 2-3). "Passed upon" is not an accurate characterization; the ICC simply noted that certain arrangements were consistent with the conditions it had imposed in approving the acquisition, by SPCSL, of CMW's Chicago-St. Louis line.

[84] In their UP/SP-250 response to Mr. Downey's comments, applicants contend: that nothing in the GWWR agreement alters the allocation of switching responsibility between GWWR and SPCSL in the Granite City, IL, area; that the GWWR agreement does not transfer to GWWR responsibility for serving the Alton Branch, but merely commits the parties to evaluate such a transfer, and that SPCSL personnel affected by any such future transfer will receive labor protection; and that the GWWR agreement merely preserves the status quo by nullifying a provision of the 1989 GWWR/SPCSL arrangement under which operating responsibilities would change if GWWR were acquired by a Class I railroad. With respect to

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Clarence R. Ponsler, a UTU general chairman for the Alton & Southern, fearing that the operations envisioned by applicants would create havoc for personnel employed by the A&S, urges the denial of the merger and the Sub-No. 3 petition.

Joseph C. Szabo, UTU's Illinois legislative director, urges denial of the three proposed Illinois abandonments.

Dan Potoshnik, the secretary of BLE's Division 892 (UP lines in the Seattle area), fears that, in connection with the merger, work that could be done by Division 892's members will be diverted to BNSF.

FEDERAL PARTIES. DOJ, DOT, DOD, USDA, and DOL have submitted comments in this proceeding.

United States Department of Justice. DOJ contends that the merger would have 3-to-2 or 2-to-1 impacts in hundreds of traffic corridors throughout the West, involving such commodities as wood products, intermodal freight, agricultural products, iron and steel, and plastics. The BNSF agreement, DOJ notes, will not remedy the loss of competition in any 3-to-2 market, and, DOJ adds, for various reasons (including an excessive compensation rate, inadequate guarantees to ensure service quality, and other factors that reduce BNSF's incentive to compete using the trackage rights provided for in the BNSF agreement), BNSF is unlikely to be an effective competitor even in the 2-to-1 corridors. The BNSF agreement, DOJ insists, is simply an inadequate remedy, and its flaws cannot be corrected by imposing oversight conditions or monitoring. And the merger-related efficiencies claimed by applicants, DOJ adds, are vastly overstated, and, in any event, are not enough to outweigh the probable anticompetitive effects of the merger. The claims that an independent SP would not be a viable competitor, DOJ argues, are unfounded. SP, DOJ claims, is not a failing firm within the well-established antitrust definition; it has successfully raised capital in recent years; its operations have already shown some improvement; and, absent a merger, it is likely to have other sources of funding for capital expenditures, including improved cash flow from operations, potential additional borrowing and lease financing, and additional real estate sales proceeds. And, DOJ adds, there are alternatives to the proposed merger that SP has not even explored, including a sale of itself in whole or in pieces to a company other than UP. DOJ therefore concludes that the merger should be denied.

DOJ asserts that, if the merger is approved, the competitive problems that will result can be adequately remedied only with extensive divestitures that will allow a new competitor access to markets where shippers would otherwise face a monopoly or a duopoly. DOJ insists that the divestitures must include, at the very least: (1) one of the two parallel north/south routes from

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"(...continued)
Mr. Downey's request that we require that an implementing agreement be arrived at for the GWWR agreement prior to consummation of the UP/SP merger, applicants contend that no implementing agreement is needed at all because nothing in the GWWR agreement will change existing operations. And, with respect to Mr. Downey's request that New York Dock be applied to the GWWR agreement, applicants contend that, if any of the operating changes that concern Mr. Downey are ever implemented, adversely affected SPCSL employees will be fully covered pursuant to the standard labor protective conditions that applicants expect will be imposed in this proceeding.

of these unions, in writing, certain commitments that form the basis of a partnership within which the parties commit to cooperate in implementing the merger. UP, applicants indicate, has gone beyond New York Dock conditions by committing to processes, more advantageous to the employees, by which the New York Dock conditions will be administered; these processes, applicants claim, give assurances to unions and employees alike that application of the protective benefits will not be fraught with delays and adversarial proceedings, and that the protective benefits will be administered fairly and expeditiously. The unions, applicants add, have committed to reach, voluntarily, agreements implementing the operating plan accompanying the primary application.

UTU, the largest union in the rail industry, indicates, in its comments dated March 29, 1996, that it supports the merger for two reasons: first, because UP has agreed to a number of conditions that will help mitigate the impact of job loss on UTU's members; and second, because UTU believes that the merger, by allowing UP and SP to form a strong competitor to BNSF, is in the best interest of rail labor in the future. UTU adds that UP's commitments include the following: (1a) that automatic certification as adversely affected by the merger will be accorded (i) to the 1,409 train service employees, the 85 UTU-represented yardmasters, and the 17 UTU-represented hostlers projected to be adversely affected in applicants' Labor Impact Study, (ii) to all other train service employees and UTU-represented yardmasters and hostlers identified in any merger notice served after Board approval, and (iii) to any engineers adversely affected by the merger who are working on properties where engineers are represented by UTU; (1b) that UP will supply UTU with the names and test period averages of such employees as soon as possible upon implementation of the merger; (2) that, in any merger notice served after Board approval, applicants will seek only those changes in existing CBAs that are necessary to implement the approved transaction, meaning such changes that produce a public transportation benefit not based solely on savings achieved by agreement change(s); (3) that, in the event that UTU contends that UP's application of New York Dock is inconsistent with the above-mentioned conditions, UTU and UP personnel will meet within 5 days of notice from the UTU International President or his designated representative and agree to expedited arbitration with a written agreement within 10 days after the initial meeting if the matter is not resolved, which will contain, among other things, the full description for neutral selection, timing of hearing, and time for issuance of the award(s); and (4) that, in the event UP uses a lease arrangement to complete the merger of the various SP properties into MPRR or UPRR, the New York Dock conditions will nevertheless be applicable.[218]

Protective Conditions: New York Dock. Applicants, as previously noted, project that the total labor impact of the merger will be 4,909 jobs abolished, 2,132 jobs transferred, and 1,522 jobs created. ARU and TCU, which regard these projections as a minimum, estimate that the number of UP/SP employees furloughed or transferred will be far greater than applicants have projected; and TCU warns that these job impacts will fall most heavily on certain crafts and in certain geographic locations. We believe that applicants have submitted reasonable

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[218] UTU, in its comments dated March 29, 1996, asked that we approve the merger and note the commitments that UP had made. Furthermore, while we are not imposing these commitments as an actual condition, we expect UP to abide by its commitments here.

estimates of job dislocations from common control, although actual job dislocations could end up being greater than projected by applicants. Neither the dislocations themselves, however, nor their concentration by craft or location, pose a barrier to our approval of the UP/SP merger transaction. Mergers of necessity involve employee dislocations, and the labor protective conditions that we impose are to mitigate these dislocations.

The basic framework for mitigating the labor impacts of rail mergers is embodied in the New York Dock conditions, which have been held to satisfy the statutory requirements of 49 U.S.C. 11347, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). See New York Dock, 360 I.C.C. at 84-90. The New York Dock conditions provide both substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) and procedures (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions. We may tailor employee protective conditions to the special circumstances of a particular case; but we will adhere to the practice which the ICC adopted in Railroad Consolidation Procedures, 363 I.C.C. at 793, and to which it consistently adhered, see, e.g., BN/SF, slip op. at 79-81; UP/CNW, slip op. at 94-96, that employees are to be provided the protections mandated by 49 U.S.C. 11347 unless it can be shown that, because of unusual circumstances, more stringent protection is necessary.

We find that the statutory protections provided in New York Dock are appropriate to protect employees affected by the merger, the lines sales, and the terminal railroad control transactions, and we further find that, subject to such protections, approval of the merger (in the lead docket), the lines sales (in the Sub-No. 2 docket), and the terminal railroad control transactions (in the Sub-No. 3, 4, 5, 6, and 7 dockets) will be consistent with the public interest insofar as carrier employees are concerned. No unusual circumstances have been shown in this case to justify additional protection.[219]

Protective Conditions: Norfolk and Western. In accordance with the "usual practice" followed by the ICC, BN/SF, slip op. at 81, we will impose the Norfolk and Western conditions in the Sub-No. 1 docket with respect to the trackage rights provided for in the BNSF agreement.[220]

We will deny the requests made by ARU and Mr. Fitzgerald that we impose the New York Dock conditions, and not the Norfolk and Western conditions, on the trackage rights provided for in the BNSF agreement. The Norfolk and Western conditions, which have traditionally provided the basic framework for mitigating the labor impacts of trackage rights transactions, have been held to satisfy the statutory requirements of 49 U.S.C. 11347 in that context. RLEA v. ICC, 675 F.2d 1248 (D.C. Cir. 1982). The benefits provided by the Norfolk and Western conditions are identical to the benefits provided by the New York Dock conditions; the two sets of conditions differ only in matters of procedure. The Norfolk and Western conditions, on the one hand,

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[219] The New York Dock protections will be available to adversely affected employees whenever they are adversely affected, and whether or not it was anticipated that their positions would be affected.

[220] We will also impose the Norfolk and Western conditions in the Sub-No. 13 docket with respect to the Tex Mex trackage rights approved therein.

allow implementation immediately upon completion of a defined negotiation period, even if management and labor have not yet achieved an agreement or gone to arbitration; the New York Dock conditions, on the other hand, require agreement or arbitration prior to implementation; and, for this reason, application of the New York Dock conditions to the BNSF trackage rights would have a severe short-term impact on BNSF's ability to provide competitive service under the trackage rights provided for in the BNSF agreement.

Protective Conditions: Oregon Short Line. We will impose the Oregon Short Line conditions on each of the authorized abandonments and discontinuances. The Oregon Short Line conditions are similar to the New York Dock conditions, but are applied in the abandonment/discontinuance context. The imposition of the Oregon Short Line conditions here is a matter of consistency but has little practical significance, because all affected employees will also be covered by the New York Dock conditions imposed on the merger. See UP/MKT, 4 I.C.C.2d at 513.

The Immunity Provision. An arbitrator acting under Article I, Section 4 of the New York Dock conditions imposed in the lead docket, the Sub-No. 2 docket, and the Sub-No. 3, 4, 5, 6, and 7 dockets will have the authority to override CBAs and RLA rights, as necessary to effect, respectively, the merger in the lead docket, the line sales in the Sub-No. 2 docket, and the terminal railroad control transactions in the Sub-No. 3, 4, 5, 6, and 7 dockets. This authority derives ultimately from 49 U.S.C. 11341(a), the "immunity" provision.

An arbitrator acting under Article I, Section 4 of the Norfolk and Western conditions imposed in the Sub-No. 1 docket will likewise have the authority to override CBAs and RLA rights, as necessary to effect the Sub-No. 1 trackage rights. This authority, like its New York Dock counterpart, also derives ultimately from 49 U.S.C. 11341(a).

The immunizing power of section 11341(a) is not limited to the financial and corporate aspects of an approved transaction but reaches, in addition to the financial and corporate aspects, all changes that logically flow from the transaction. Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect CBAs or RLA rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is "self-executing," that is, its immunizing power is effective when necessary to permit the carrying out of a project. American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994); UP/CNW, slip op. at 101; BN/SF, slip op. at 82. Thus, it would be inappropriate and inconsistent with the statutory scheme to limit the use of the 49 U.S.C. 11341(a) immunity provision by declaring that it is available only in circumstances identified prior to approval.[22]

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[22] Although the literal terms of the 49 U.S.C. 11341(a) immunity provision indicate that it is applicable to any transaction approved or exempted "under this subchapter" (i.e., under Subchapter III of Chapter 113 of Subtitle IV of Title 49, United States Code), we believe that the immunity provision also applies in the 49 U.S.C. 10505 exemption context. See, e.g., UP/CNW, slip op. at 63-64, citing Delaware and Hudson Railway Co. -- Lease and Trackage Rights -- Springfield Terminal Ry. Company, (continued...)

Certain Requests Denied. We will not impose several additional labor-related conditions that have been requested by parties to this proceeding.

Cherry-Picking. We will deny ARU's request that we order that any CBA "rationalization" be accomplished by allowing UP/SP's unions to "cherry-pick" from existing UP or SP agreements. This is a matter committed to the implementing agreement procedures established by the New York Dock conditions. See New York Dock, 360 I.C.C. at 85 (Article I, Section 4).

Reimbursements. We will deny ARU's request that we require UP/SP to repay SP employees their forgone lump sum payments and their deferred wage increases. SP has already "paid" its employees for their wage concessions by giving up productivity concessions achieved by the nation's other railroads. UP/SP-230 at 316-17; UP/SP-232, Tab D at 8-9.

Hiring Preference. We will deny ARU's request that we modify the hiring preference provision in the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11).

Contracting Out. We will deny ARU's request that we require UP/SP and BNSF to use bargaining unit maintenance of way employees and signalmen for all merger-related track, right-of-way, and signal construction and rehabilitation work, including items mentioned in the application, the operating plan, and the BNSF agreement. This is a matter committed to the Article I, Section 4 implementing agreement procedures both with respect to UP/SP (see New York Dock, 360 I.C.C. at 85) and also with respect to BNSF (see Norfolk and Western, 354 I.C.C. at 610-11). We would also observe that "contracting out" is a matter that may be covered by provisions of existing CBAs. See UP/SP-230 at 315.

Annual Reports. We will deny ARU's request that we require UP/SP to submit annual reports demonstrating how the forecast benefits in the area of cost-savings have been used. Isolating merger benefits from other changes as they are experienced would be inordinately costly, and there is no reason to saddle UP/SP with reporting obligations that have been imposed on no prior merger.

Diversion Reports. We will deny IBT's request that we require UP/SP to file semi-annual reports indicating the volume of traffic diverted from truck carriage and the rate of return for such cargo. The merger-related diversion of traffic from motor to rail is properly regarded as a benefit that weighs in favor of approval of the merger, not a harm that must be mitigated or monitored. And IBT's suggestion that motor-to-rail diversions may reflect predatory rail pricing makes no sense at all. Indeed, as the recently enacted ICC Termination Act of 1995 (Pub. L. No. 104-88) demonstrates, Congress was obviously not persuaded by arguments of this type because it went so far as to eliminate regulatory jurisdiction over the issue of whether rail rates are too low.

Union Pacific Motor Freight Corporation. We will deny IBT's request that we impose New York Dock protection in favor of UPMF

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[221] (...continued)
Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served Apr. 21, 1993) (at 2 n.4).

competitive harm without the risk of potentially more intrusive governmental action. It recognizes and affirms the importance and the benefit of market-based proposals and private sector negotiations among the various sectors of the transportation community, including management and labor. On balance, this decision is a sound one; it represents good government; it is good for transportation; and it is good for the economy.

VICE CHAIRMAN SIMMONS, commenting:

I was a member of the Interstate Commerce Commission when, in 1986, that body denied the application of the Santa Fe Southern Corporation to acquire and merge with the Southern Pacific Railroad (SF/SP). Arguably, many of the competitive problems of the ill-fated SF/SP merger exist in this case, leading one to conclude that the two cases are similar. However, I believe that it was irresponsible for some parties to conclude, summarily, that the proposed merger here is anti-competitive and ill-advised merely because applicants' lines are parallel.

Such an inflexible view with respect to this industry is abhorrently narrow minded. More important, such an unyielding view ignores the economic realities of this present day industry and the economic realities that favor a merger in this instance, but that did not favor a merger in SF/SP.

There are striking material differences between the two cases that require additional examination or analysis. First, unlike the applicants in SF/SP, here, at the outset, UP and SP have identified areas that will face a reduction in competition and have voluntarily negotiated settlements that offer remedial solutions. Second, the applicants have factually demonstrated, persuasively, that the economic forces in play today demand such a merger. Now more than ever, shippers are requiring railroads to provide seamless, single-line service, free of costly interchanges and reciprocal switching.

Thus, no one should be misled by opposing shippers who refuse to see beyond their singular concerns, thereby pitting their parochial interests against a broader public interest that demands increased efficiencies throughout the surface transportation system.

Likewise, we should also not be misled by the self-serving and centralized views of opposing railroads, who, after all, are merely bartering for a greater slice of the economic pie.

Here, as in similar cases, the analysis must be -- what as a whole is in the public interest. It is this analysis and none other that controls the debate.

Railroads have made significant productivity gains as a result of the Staggers Act, ICC actions, and improved labor agreements. However, there is sufficient evidence to credit railroad consolidations with many of the efficiency gains. This merger will further the productivity gains already achieved in the rail industry.Mergers reduce interchanges and excess equipment. Mergers also, as preferred by shippers, traditionally result in single-line operations capable of providing uninterrupted, seamless service.

Today, the single fastest growth segment for railroads is intermodal and its transportation requires certain characteristics that UPSP can deliver. This will continue to be the growth segment for the industry. While carriers can limp

linger and hope for better times to appear, I believe, weakens the carrier further, and as traffic patterns adjust or alter as a consequence of BNSF and UP's relentless competitive activity at the expense of SP, the value of its assets would greatly diminish. DOJ claims that SP can continue to offer the same price-quality combinations it offers now, and that SP's position relative to the two other carriers would not change if we deny the merger. However, logic dictates that without substantial infusion of capital, SP will be unable to continue to provide those services in the few markets it has been able to do so. A rational SP would concentrate on those markets and routes where it has a competitive advantage and limit capital spending, while BNSF grows even more efficient.

Lastly, I believe that the transaction will strengthen the country's national defense. The Department of Defense supports the merger realizing that it will result in the creation of a strong rail network whose key routes will remain intact. Because of its weak financial condition over the last few years, SP has been an unreliable provider of rail service for DOD. A lack of capital investments have hampered SP's ability to provide efficient and timely service to the military. The merger will improve quality while also offering an alternative to the service of the BNSF.

In sum, I believe that this merger will result in tremendous benefits and enhancements to the Nation's economy. The founders of the Nation's railroads were individuals of vision. Because of their foresight, the country went on to create the world's most efficient transportation system, which in turn helped to create the world's most powerful industrial base and strong agricultural economy. This merger will continue to advance our strong manufacturing and agriculture sectors, and strengthen this nation's competitiveness in the global economy. The benefits enunciated are real and will produce shorter routes, new services, lower costs, better car supply, and more efficient operations. Farmers served by UP will find new markets for their wheat. Coal producers in Utah and Colorado will be able to market their coal to utilities because the SP has already invested heavily in expanding the market for western coal, and UP will not do anything to jeopardize that success, especially since a substantial amount of that coal goes to Asian markets. Chemical and plastic shippers faced with the loss of a competitive alternative, will have the services of BNSF through the settlement agreement. Although many of those manufacturers fear the consequences of the merger, BNSF will want to provide service just to increase its own market share and revenues. Besides, these captive shippers have the added protection of being able to file a rate complaint against the UPSP with the Board. Add that to the fact that the Board will monitor the transaction for the next five years to determine if BNSF is offering viable competition.

Finally, I want to personally commend the applicants here in an additional area. Specifically, I am confident that in the future we will look back at this entire episode -- at the continued advancement of the surface transportation industry -- as a sterling example of a moment in time where railroads, shippers, and labor[281] met at the conference table beforehand,

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[281] I believe that the Labor Unions deserve a special commendation here. Labor should take special pride in the level of commitment it exacted from UPSP in reconciling competing interests. The level of commitment made by the railroads to Labor is a credit to Labor's diligent efforts in striking a proper balance between its interests and the overall compelling public benefits of the merger. History will show that here,

(continued...)

and forged a marvelous market based private solution to further the industrial interests of this nation. That, coupled with the very special measured expertise of the dedicated staff of a beleaguered but valiant Federal agency, has produced an excellent result that will benefit the public for decades to come.

COMMISSIONER OWEN, commenting:

Since passage of the Transportation Act, 1920, it has been the public policy of the United States to encourage railroad mergers and consolidations that are in the public interest.[282] The 1920 congressional directive was restated by the Transportation Act of 1940, which provided that railroad mergers and consolidations be "consistent" with the public interest.[283] Again in 1976, Congress encouraged "efforts to restructure the [rail] system on a more economically justified basis, including . . . an expedited procedure" for mergers and consolidations.[284] And in 1980 and again in 1995, Congress voted to retain in the Interstate Commerce Act the provision that mergers and consolidations among two or more Class I railroads "shall" be approved if they are found by the Surface Transportation Board to be "consistent with the public interest."[285]

The recurring term "public interest" may be found in the National Transportation Policy, which instructs the Surface Transportation Board to promote safe and efficient rail transportation and to foster sound economic conditions.[286] The Supreme Court has held:[287]

> The term public interest . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service . . . [and to] best use of transportation facilities . . .

Congress provides us with additional direction -- specifically, that five factors be considered when reviewing railroad merger and consolidation applications:[288]

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[281](...continued)
Labor's participation in the debate resulted in a win-win situation for everybody.

[282] Transportation Act, 1920, 41 Stat. 456 (1920).

[283] Transportation Act of 1940, 54 Stat. 899, 905 (1940).

[284] Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, 90 Stat. 31 (1976) at Section 101(a)(2). See also Report of the Committee on Conference on S. 2718, S. Rep. No. 94-595, 94th Cong., 2d Sess., January 27, 1976, at 34.

[285] Staggers Rail Act, 94 Stat. 1895 (1980), and ICC Termination Act of 1995, 109 Stat. 803 (1995), now codified at 49 U.S.C. 11324(c).

[286] 49 U.S.C. 10101.

[287] New York Central Securities v. United States, 287 U.S. 12, 25 (1932).

[288] 49 U.S.C. 11324(b).

aware of every failure on the part of the applicants to translate those words into deeds.

With regard to labor relations, I note that this is the only railroad merger in recent history to receive widespread labor-union support. Railroads operate the largest outdoor factory in America, often stretching tens of thousands of miles. The existence of a well-trained, motivated and loyal workforce is essential to safe and efficient train operations. Employee support of this transaction will be a crucial factor in its economic success. The applicants are to be applauded for their sincere efforts at reaching out toward their employees and including them in the planning process. All too often, in recent years, labor relations in the railroad industry have been unnecessarily acrimonious.

The applicants entered into a number of good-faith agreements with their dedicated employees in which both sides vowed to cooperate in implementing this merger. Specific pledges were made in a series of letters exchanged between the applicants and their unions.

Among those pledges is that the applicants will use the immunity provision of 49 U.S.C. 11341(a), now 49 U.S.C. 11321(a), only to seek those changes in collective bargaining agreements that are actually "necessary" -- and I read the word "necessary" to mean "required" -- to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal appeals court noted, "merely to transfer wealth from employees to their employer."[300]

The very fact that the applicants addressed this matter positively in their agreement with the United Transportation Union is evidence that the issue has merit. The purpose of implementing agreements is to permit consummation of a merger or consolidation, not to achieve other objectives properly handled through collective bargaining under the Railway Labor Act.

Finally, there is an interest group that rarely is recognized but is essential to making our capitalist system function. They are the investors who make possible more efficient transportation, American competitiveness in world markets and more secure jobs.

It is the investors who spend less than they earn and lend the difference -- their savings -- to companies such as railroads so that they might build, renew and expand and become more efficient.

In recent months, Union Pacific stockholders repeatedly have been asked to give up portions of the projected merger savings -- to share them with shippers, unionized employees and communities.

Union Pacific has negotiated in good faith and entered into concessionary agreements. They have gone the extra mile with regard to environmental concerns.

The stockholders and management of Union Pacific -- the capitalists -- are to be congratulated. Capitalism is about building and creating. It always has been; it always will be.

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[300] See, e.g., Railway Labor Executives Association v. United States, 987 F.2d 806, 814, 815 (D.C. Cir. 1993). The D.C. Circuit held (at 814) that, "at a minimum," an arrangement cannot be considered fair if it modifies a collective bargaining agreement more than is necessary to effectuate the transaction.

DECLARATION OF PAUL C. THOMPSON

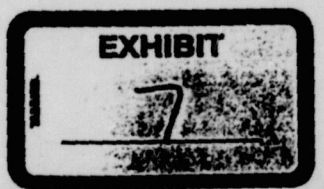
I, Paul C. Thompson, pursuant to 28 U.S.C. § 1746, declare that the following facts are true and correct.

I am an International Vice President of the United Transportation Union ("UTU") assigned to UTU's implementing agreement disputes with Union Pacific in the UP-SP Merger, STB Finance Docket No. 32760 and I previously served as General Chairperson of a UTU General Committee of Adjustment on the Atchison, Topeka & Santa Fe Railway Company.

HISTORY OF NEGOTIATIONS UNDER ARTICLE I, SECTION 4 OF NEW YORK DOCK

On August 5, 1996, Tom L. Watts, Union Pacific ("UP") Senior Vice President-Labor Relations wrote to United Transportation Union ("UTU") International President C. L. Little advising of an initial merger meeting in Kansas City on September 17 and 18, 1996. On September 17, 1996, Mr. Watts opened that meeting by saying: "It is not my intention to change any of the collective bargaining agreements. What you have today, you will still maintain. SP and DRG&W Labor Relations will be relocated to Omaha within 6 months to 1 year."

Richard Meredith, Union Pacific Labor Relations Officer then handed out the Marchant Commitment Letter of February 26, 1996, Appendix A (pages 254-59) of the Operating Plan submitted to the Surface Transportation Board ("STB"), and pages 41-43 of the Operating Plan, referred to as The Sunset Route and Mid-Continent Services. Mr. Meredith explained that there were four (4) major issues to be addressed in the merger: (1) "Hub and Spoke" concept; (2) directional running; (3) dual terminals and dual destination terminals; and, (4) changes in crew districts and crew change points. Mr. Meredith also advised that the Union Pacific had identified twenty-five (25) "Hub and Spokes" that would have to be established, requiring new districts, consolidation of seniority and single agreements.



Mr. Meredith then advised that for the Union Pacific to abide by their commitments in the Marchant Commitment Letter, it would be necessary for UTU to reach a voluntary agreement for implementation of the Operating Plan accompanying the Merger Application, and that failure to reach a voluntary agreement meant UP would not have to honor the automatic certification of employees as adversely affected by the merger provision of the Marchant Commitment Letter.

UTU Vice President A. M. Lankford then explained that UTU has always ended up in arbitration in merger negotiations with UP. The Merger Notice that was to be served on the UTU is worse than the one the Carrier served in the UP/C&NW Merger, he added he also noted that the UP's position on the Commitment Letter, now that the merger has been approved, was quite different and not in line with what was originally committed to the UTU. Mr. Lankford also advised the Carrier of problems with the Carrier establishing two (2) negotiating teams, pointing out that if the Carrier was wedded to the two (2) team concept, UTU would not be able to have concurrent meetings because all three (3) UTU Vice Presidents would have to attend all meetings.

On September 18, 1996, Union Pacific General Director-Labor Relations W. S. Hinckley explained the Denver and Salt Lake City "Hub and Spoke" concept, stating that the BNSF trackage rights granted in the UP-SP Merger was going to create serious problems for the Union Pacific. Mr. Hinckley advised that there were three (3) items that must be addressed: employees, shortage, and surplus. Mr. Hinckley then stated that the next question was how to commingle the employees' seniority. UP believed the answer was to build a common new seniority district with one common agreement. This new district would consist of employees from DRG&W, MOP Upper Lines and Union Pacific-Eastern Lines. Mr. Hinckley then advised that this was an

overview as to what he saw was the need the parties would have to address as quickly as possible, particularly in the areas where BNSF was going to be a major player competing with the UP as a result of the trackage rights granted to the BNSF in this merger.

UP Director-Labor Relations Mike Hartman then explained the Houston to New Orleans areas also ascribing the urgency to reach an implementing agreement in this area to the competitive threat by BNSF.

On September 18, 1996, at the Kansas City meeting, UP served UTU with a number of Merger Notices relating to the UP/SP Merger. Two (2) of these Notices were served pursuant to Section 4 of Article I of the New York Dock conditions covering the Salt Lake City area and the Denver area.

UP Senior Vice President-Labor Relations Tom L. Watts recognized UP's obligation under the Marchant Commitment Letter at the beginning of the meeting on September 17, 1996, when he stated that it was not UP's intention to change any of the collective bargaining agreements. However, his two (2) negotiating teams made it very clear that they intended not only to gut most of the collective bargaining agreements, but also intended to redraw and realign seniority districts so that none would resemble what they are today.

Their stated reason for doing this was because of the competitive threat by BNSF resulting from the trackage rights that the Union Pacific granted to the BNSF in order to obtain STB approval of the UP/SP merger. That is another way of saying the UP employees represented by UTU would pay the price to allow the Union Pacific to be more competitive with BNSF by transferring the wealth from the employees to the Carrier. That was not the intent of the Marchant Commitment Letter that was given to the UTU in return for its needed support of

the merger.

In the very early stages of the negotiations, the UP did as UTU had requested by scheduling separate meetings for each of the Carrier's teams. On October 7 and 8, 1996, the Carrier team led by Mike Hartman met with the UTU in Sprang, Texas. At this meeting, the parties discussed the Houston to Avondale Corridor. A second meeting with the Mike Hartman team was held on October 21 and 22, 1996 in Sprang, Texas, and a third meeting with Mike Hartman's team was held in Dallas, Texas on October 31 and November 1, 1996.

The first meeting to discuss the Salt Lake City area was held in Salt Lake City on November 14 and 15, 1996, with Scott Hinckley's team, and UTU was requested to keep the first three (3) weeks of December open for further meetings. At the first meeting concerning the Salt Lake City area, Mr. Hinckley explained how the parties would proceed in merger negotiations, emphasizing that the parties were operating under the New York Dock conditions, not the Railway Labor Act. Hinckley further stated that the STB could permit agreement changes that would not be permitted under the Railway Labor Act, passing out four (4) documents and advising, "My purpose for handing these documents out is for those that have never been involved in mergers before, this illustrates what the Carrier can do in mergers versus our rights under the Railway Labor Act."

Mr. Hinckley also advised that in the Salt Lake City area there currently are six (6) collective bargaining agreements and UP wanted only one (1) collective bargaining agreement. Mr. Hinckley then explained the manner in which traffic will be routed in the various areas around Salt Lake City, and again advised that the BNSF is now operating in this area under trackage rights granted to them under the UP/SP merger. UTU was advised that there would be

three (3) yards in this area that would be affected, the Ogden yards, and two (2) yards in Salt Lake City, the Union Pacific and the DRG&W Rover yard. Mr. Hinckley advised that all seniority in these areas would be consolidated. He purposed one (1) seniority district divided into the following three (3) zones:

Zone 1 would be WP-SP
Zone 2 would be Yards - SLC-Pocatello-Greenriver
Zone 3 would be SLD - Callente/Las Vegas and Grand Junction

Mr. Hinckley also advised that "We will accept the Organization's proposal on seniority consolidation so long as it is reasonable and meets our desire as previously explained." He also said, "We need a means to transfer employees from a location of surplus to an area where we have a shortage." Finally, Mr. Hinckley advised that the Carrier would have a proposal for the Organization at the next meeting scheduled for the week of December 2, 1996 in Salt Lake City.

With regard to Denver, Mr. Hinckley said, "For you from the Denver area, our proposal will be completely different from what we are purposing in the Salt Lake Hub." On November 15, 1996, at this session, Mr. Hinckley presented UTU with a copy of the Carrier's proposal with the BLE for the Salt Lake City and Denver Hub.

The remainder of the time was spent in discussing the proposed operations of the Denver Hub. Mr. Hinckley then brought up the issue of crew consist and the need to close out existing productivity funds, eliminate special allowances, reserve boards and the like. UTU Vice President A. M. Lankford inquired of Mr. Hinckley whether it was his opinion that the STB can open up crew consist agreements in an approved merger. Mr. Hinckley's reply was that he was not trying to renegotiate crew consist, only how the money would be divided. During these two days, UP advised that they wanted the right to force employees to give up seniority in exchange

for new seniority. UP also indicated that the carrier wanted the right to establish extra boards wherever it desired, in this new territory, regardless of where the extra boards have been maintained in the past under existing collective bargaining agreements.

Hinckley concluded the session by advising that we would know by January if we would be able to reach an agreement or have to arbitrate under Article I, Section 4 of the New York Dock conditions.

On December 2, 1996 the parties met in Salt Lake City. The meeting began at 1:00 p.m. and UP presented UTU with its only proposals for the Denver and Salt Lake City "Hubs." The meeting adjourned at 1:50 p.m.

On December 3, 1996, discussions commenced on the Denver Hub with Mr. Hinckley, who advised that UP had a handshake agreement on the Denver Hub with seniority dovetailed in the new Hub with BLE. Most of the morning session was spent listening to UP explain the BLE "handshake agreement."

UTU Vice President A. M. Lankford inquired of the Carrier as to what the Union Pacific's major concerns were in this merger. Mr. Hinckley stated four (4) concerns: (1) need to capture people and place them where needed; (2) need the right to move people with the traffic; (3) more productivity from the employees to allow UP to earn more money, and, (4) get the people where the work is located.

Mr. Hinckley then advised that New York Dock moving allowance would only be paid one (1) time.

UTU Vice President Lankford informed the Carrier that its proposal would be hard to sell for a number of reasons, one of which was UP was insisting on employees having to give up

seniority at other locations that they now hold. Mr. Hinckley advised that keeping old seniority means more employees moving and relocating outside of the "Hub," which UP did not want to allow.

UTU had requested from the very beginning data and various information such as engine starts, miles paid, etc. from the Carrier. This type of information is essential for UTU to properly address equity among the various groups affected by the merger. The Carrier passed out some information on starts and miles; however, it was later determined that this information was incomplete.

Mr. Hinckley advised that there would be no commingled jobs, as this would cause too many problems for the Crew Management System."

On December 4, 1997 UTU Vice President Lankford advised the Carrier that UTU took strong exception to the BLE "handshake proposal" that requires engineers to give up their UTU seniority, i.e., firemen, trainmen, since BLE does not have the authority under the Act to give away seniority in another craft.

Mr. Hinckley mentioned that the Carrier proposed the consolidation of terminals. Vice President Lankford inquired as to when the Carrier planned to consolidate the terminals, and Mr. Hinckley advised that the Carrier would serve the Organization with a thirty (30) day Notice when it was ready to consolidate.

Vice President Lankford advised the Carrier that UTU was opposed to dovetail seniority since equity is the only fair means in which to address seniority issues in a consolidated area.

Vice President Lankford also advised the Carrier that UTU was still waiting on the necessary information from the Carrier in order for the UTU to prepare a proposal for addressing

equity. UP contended that it could not get this data from SP. Vice President Lankford advised the Carrier of all the information that UTU needs, i.e., train starts, engine hours, miles paid for and the like.

UP advised that there was a problem in obtaining all this type of information for crews required to capture trains dead under the Hours of Service Law. According to the Carrier, the UP records would show two (2) crews on one (1) train.

Vice President Lankford also notified the Carrier that UTU needed the make-up of crew sizes from one (1) railroad to another. The Parties agreed to use August, 1995 to July 31, 1996 for determining Test Period Earnings.

UTU also informed the Carrier that in putting together a seniority roster, we would slot the roster based upon work equity and then ratchet the roster when employees left or returned to the service of the Carrier.

Currently there are three (3) rosters in the Denver area. UTU proposed that the three (3) rosters be maintained and then identify those employees who would be entitled to work in the consolidated area. Rosters or order of selection would be based upon the equity each group would bring into the new consolidated area.

Vice President Lankford suggested that the Carrier make the supply point as Denver with the other locations as outside locations. Move everyone to Denver in this area and then let them flow to the outside locations. UTU Vice President Futhey explained how this was handled by the Parties in the UP/MKT Merger involving Coffeeville. Extra Boards were maintained at outside locations. Mr. Hinckley stated that he didn't see how that would be applicable here. Vice President Futhey tried to explain.

In order to address the Carrier's concerns in moving people from surplus locations to shortage locations, Vice President Lankford suggested the use of System Boards currently in effect on the Southern Pacific-Western Lines.

Mr. Hinckley advised that he would like to review UTU's verbal proposals before giving a complete response. He inquired that we did not mention extra boards and the like.\, and then stated, "Your silence on these other issues, I recognize that does not mean you accept those issues."

Late in the afternoon, UP made its presentation on the Salt Lake City "Hub," and then the Parties adjourned for the day.

On December 5, 1996, Mr. Hinckley explained the status of obtaining the data needed by UTU to address equity. According to him SP was trying to provide UP with the necessary data that could be transferred to UP's system so all data would be the same. It appeared that SP only has current records back ninety (90) days. They believed they could retrieve the necessary information from tapes.

Vice President Lankford informed the Carrier that it would be impossible to obtain an agreement that required people to give up their seniority inside and outside of the "Hub." He inquired if the Union Pacific would provide these individuals with any benefits to encourage them to give up seniority like reserve boards, or some other benefits, so that the individuals could see some benefits in considering giving up some of their existing seniority. Without some benefit, employees would be hard pressed to give up their current seniority.

Mr. Hinckley responded that it appeared to him that UTU was asking him what he would pay UTU people to get them to accept the Carrier's proposal. Mr. Hinckley stated that what he

would pay is what is provided in New York Dock. Vice President Lankford responded that what the Carrier was requesting was completely outside of New York Dock, and if he wanted UTU to consider such a request, there had to be something additional in it for those employees. Otherwise, UTU would stay within the provisions of New York Dock, which would not require any employee to relinquishing any of their current seniority.

This resulted in the parties arguing over the Commitment Letter that the Carrier provided to UTU for its support of this merger. The Carrier's position was that there was no commitment unless the UTU reaches a voluntary implementing agreement based upon the Carrier's Operating Plan.

In the afternoon, UTU presented the Carrier with a general proposal for addressing seniority based upon equity and retaining prior rights as near as possible. The following is an example of UTU's proposal: Zone 1 would have a primary roster and a secondary roster. The primary roster will be placed together based upon equity in that zone. This would follow through with the three (3) other zones. If a group (property) had equity in more than one (1) zone, then it would be possible for an individual to have primary seniority in more than one zone. Once all of the primary seniority rosters are developed, this roster will be slotted based on equity. The rosters would be ratcheted (moved up on down) should an individual come back to work or leave the industry. Each primary roster will consist of a Conductor's Roster and a Brakeman's roster.

Once the primary rosters are developed, then each zone will have a secondary seniority roster based upon date of hire. The secondary roster for each zone would include all UTU represented employees that are not on the primary roster for that particular zone.

There would also be a primary and secondary roster for yard service. Vice President Lankford explained to the Carrier that we need to use equity and develop both a Conductor and Brakemen Rosters. He also explained that we would have four (4) Road primary and secondary rosters for Conductors and Brakemen. Zone 5 would be strictly Yard.

Vice President Lankford also explained the UTU's proposal on reserve boards. We would want five (5) reserve boards, one (1) for each zone. UP indicated that they wanted to be able to force someone from a reserve board in one zone to work in another zone. They currently do not have that right under existing agreements.

On December 6, 1996 Mr. Hinckley advised that he thought it would be best to talk about two (2) things. First, with any merger, we now have a new railroad. Everyone wants to keep that which they now have. That cannot happen. The second part is in trying to address the Carrier's problems and at the same time, provide the union with some long term benefits instead of looking at short term benefits.

Mr. Hinckley explained that there is approximately 1868 miles in the Salt Lake area. The approximate current seniority districts in this area is as follows:

WP - 930 miles
UP Zone 200 - 770 miles
DRG&W - (Utah) - 335 miles
(Colorado) - 1100? miles
SP - System Seniority
Idaho - 1170 miles
Utah - 783 miles

Mr. Hinckley then explained that UP is concerned with the movement of traffic and the ability to move people in order to protect the service. The Carrier did not want to hire new people when they can move existing people around to meet their needs.

Mr. Hinckley also advised that there was no need for five (5) reserve boards. He would only agree to one (1) reserve board for this entire area. This would result in the elimination of several current reserve boards.

Vice President Lankford responded, "We are puzzled. My experience in the past, is that you have no trouble telling us what you want. Either you don't want to tell us or you don't know the numbers. We have the ability to address your problems in this area, if you give us these numbers and the intent of your operations within this area. You are telling us you have areas where you currently have shortages. This is the result from the Carrier's past hiring practices. Possibly now is the time for the Organization to try and help you address this problem. This problem is not merger related; however, you want to correct a Carrier created problem at the expense of UTU represented employees.

We want to know where you think the shortages will be, where you want to relocate the excess, and a complete description of your plans.

Can I ask, why you have Las Vegas in this hub?"

Mr. Hinckley responded, "Rather than in any other hub?"

Lankford: "Why do you need it in any hub?"

Hinckley: "Our proposal clearly indicates how we plan on operating our railroad. We need a single agreement. Our proposal details what we want."

Lankford: "You told us that with the BLE, you have moved beyond this proposal."

Hinckley: "Not with our operation. Only with seniority." (During the discussions, Mr. Hinckley indicated that many of the current pools would continue to operate as they currently operate in this area).

Lankford: "We need the numbers and data."

Hinckley: "All I can give you in regards to the numbers of employees needed in the pools, that would be a projection and nothing else."

At the conclusion of this week of negotiations, it became very apparent to the Organization that the Carrier was attempting two (2) things. It was very obvious that the Carrier was of the opinion that they had an Agreement on the "Denver Hub" with the BLE, and they would accept nothing less from the UTU. The Carrier has played this same game in the last several mergers. In fact, the Carrier was adamant in the UP/MKT Merger that the UTU accept the same Agreement as the BLE. Neutrals Richard R. Kasher and Robert E. Peterson addressed this issue in their New York Dock Arbitration Award in that merger. They stated in part as follows:

> The Carrier proposition that the Implementing Agreement which it has entered into with its employees represented by the BLE be imposed upon the union does not represent a viable resolution to the dispute, in this Committee's opinion. That Agreement was achieved through voluntary collective bargaining. The Carrier and the BLE recognized in executing the Agreement that they had negotiated conditions which differed from those which might be properly implemented under New York Dock conditions.
>
> While the BLE Agreement may contain changes which the Carrier finds appropriate to conduct a more efficient operation merged services, such agreement must nevertheless be recognized as the product of voluntary collective bargaining that reached beyond the parameters of the New York Dock conditions.
>
> The Carrier can be justifiably proud of implementing agreements it has negotiated with other labor unions. However, the fact that the Carrier has an agreement with another organization, which it finds to be desirable, did not persuade the Union, and does not persuade this Arbitration Committee that the agreement must be applied in the instant case. While the Union could voluntarily accept any agreement similar to the BLE Agreement, it is not obligated to do so under New York Dock. (emphasis added).

The Organization does not doubt for one minute that the Carrier will be before this Board requesting that the BLE Agreement in this merger be imposed on the UTU. This Carrier has a history of trying to make a showing of good faith negotiations until such time as they reach an agreement with the BLE. Then their good faith ceases to exist, and they try and force the UTU into accepting what the BLE has negotiated.

The other obvious attempt by this Carrier is to gain an upper hand in competition by disturbing the delicate balance of competition west of the Mississippi River between the only two (2) mega-carriers. The STB was clear in developing an intricate of trackage rights and shipper service requirements to hopefully prevent the "captive shipper" argument from arising and leaving major shippers at the mercy of one carrier.

The Union Pacific granted BNSF numerous trackage rights in return for their support in this merger. Now as a result, the Union Pacific is attempting to reinvent the wheel insofar as their labor agreements are concerned. This would give the Union Pacific an unwarranted competitive advantage over the BNSF.

It should be pointed out that the UTU has successfully negotiated Implementing Agreements in very short time periods under Section 4 of New York Dock in the BN-Santa Fe Merger, the Kansas City Southern - MidSouth Merger, and the Soo Line - Milwaukee Railroad merger. It has been a different story with the Union Pacific. It has become standard for this Union to end up in arbitration in every merger involving the Union Pacific. This includes the UP/MOP merger, the UP/MKT merger, the UP/C&NW merger, and now this present merger. The records of the two (2) parties when it comes to mergers, should leave no doubt as to where the problem rests.

The Parties next met in negotiations involving the Houston Hub, in Kansas City on December 9-13, 1996. At the Carrier's request, the Organization set aside the dates of January 6-10, 1997, January 20-24, 1997, February 3-7, 1997 and February 17-21, 1997. These dates were to further negotiations on an Implementing Agreement.

On January 6, 1997, the parties met in Scottsdale, Arizona at which time the Carrier insisted on the Organization negotiating with both of the Carrier's negotiating teams in the future. This required the Organization separating into two (2) different groups including the three (3) assigned Vice Presidents. This created numerous problems, and a major problem involving the UTU General Committee on the former Missouri Pacific Lines. General Chairperson R. D. Hogan, Jr., had interest in both the "Houston Hub" and the "Denver Hub." When the Carrier insisted on negotiating both the "Houston Hub" and the "Denver - Salt Lake City Hub(s)" at the same time, it made it impossible for some of the involved General Chairpersons to participate in all of the negotiations in which they had an interest.

On January 6 and 7, 1997 the parties discussed the Houston Hub at Scottsdale, Arizona.

On January 8, 9 and 10, 1997 the parties met and Mr. Hinckley explained the rerouting of traffic due to weather conditions in the west. Hinckley also discussed the status of the BLE negotiations.

The UTU then met alone to try and find ways in which to address the Carrier's concerns. The next two and one-half days were spent by UTU working on a counter proposal for the Carrier on the Salt Lake City Hub.

Part of the UTU met with Mike Hartman's negotiating team on the Houston Hub. The UTU representatives involved in the Salt Lake City and Denver Hubs worked on a proposal to

present to the Carrier on the Salt Lake City Hub. The Organization presented their proposal to the Carrier late on the evening of January 22, 1997.

On January 23, 1997, Mr. Hinckley opened the meeting with a comment that the UTU proposal that was presented to him was much more costly than what UTU had negotiated with the BNSF. He then inquired about reserve boards and system boards. UTU Vice President Futhey explained that reserve boards were for protected employees under crew consist and system boards were for non-protected employees that could not hold a position in the new territory.

Mr. Hinckley responded as follows: "What I have here is a proposal that has been cherry picked from various agreements on the UP and SP. You want the Idaho yard agreement, but not the Idaho crew consist agreement."

Vice President Futhey said "General Chairman G. A. Eichmann does not have yard assignments in this area and it is his agreement that would be applicable in the road territory involved."

Hinckley: "Why would you want a different crew consist agreement?"

Futhey: "Because of the problems with two (2) crew consist agreements with employees continually going from yard to road service."

Hinckley: "You propose joint representation in this area and then you want to restrict any arbitration findings to the hub. That is in violation of the Railway Labor Act."

Vice President Futhey explained where this identical situation had already occurred on the Union Pacific in the past. This is not something new.

Hinckley: "This has gone way past the Commitment Letter that you would negotiate an agreement that is harder to handle. It is more costly. You cherry picked the agreements, which

is not what the UTU committed they would do." "Are you saying that people retain their outside seniority?"

Futhey: "Yes."

Hinckley: "That is a big issue to us."

Futhey: "It is to us also."

Hinckley: "We think there are too many extra boards. We are opposed to increase TPA's to employees not now under the 1991 and 1996 National Agreements. We would not be willing to certify anyone under a proposal such as this one. We would not be willing to do anything on relocation other than what New York Dock provides. We will not agree to include Productivity Funds in TPA's. The System Board is just an attempt to cherry pick the SP Western Lines Agreement."

Futhey: "System Boards address your concerns outside and inside the hub for filing vacancies where shortages exists. It has been very successful in meeting the Carrier's needs on the Southern Pacific."

The Organization responded on the issue of the extra boards by explaining that under the UTU's proposal, extra boards were reduced in each zone as follows:

Zone 1 reduced from the current 4 to 2 under the UTU proposal;
Zone 2 reduced from the current 3 to 2 under the UTU proposal;
Zone 3 reduced from the current 9 to 5 under the UTU proposal;
Zone 4 no reductions, maintain the current 2 under UTU proposal;
Zone 5 reduced from the current 4 to 2 under the UTU proposal.

Mr. Hinckley responded to the overall proposal presented by the UTU, "The Carrier believes it has the right to select whatever collective bargaining agreement the Carrier desires, to control in the new territory. We want the Eastern Lines CT&E Agreements. We will take

the Idaho yard agreement with the foreman only crew consist agreement. We are not willing to have several General Chairmen having jurisdiction in the hubs. I want to know who the highest representative for the UTU will be in these areas. We will not agree to system boards. We will take the 1996 TPA's without adjustments. We will not agree to a minimum of qualifying trips. We will only give Interdivisional Service protection to changed or combined pools. On implementing date, we will close out all existing Productivity Funds and then establish new funds.

On extra boards, Carrier will determine the number of boards. The Organization will give us the percentage of each groups' rights to extra board positions.

The carrier must have the 25 mile zone for road crews receiving trains over taken by the Hours of Service Law.

The Carrier must have the right to transfer surplus employees to outside the zone, at least for a period of one (1) year.

Those employees that in the past sold their up front money cannot draw up front money if they are placed under another crew consist agreement that provides for up front money."

On January 24, 1997, the Organization responded to the various issues raised by the Carrier. They are as follows:

Seniority integration - UTU's proposal must apply. UTU will not agree to a dovetail roster.

UTU will accept application of the Union Pacific Eastern Lines CT&E Agreement. Crew consist for yards would require amendments to other existing crew consist agreements in effect in this area. UTU cannot agree to change existing crew consist agreements as the Carrier insists.

UTU wants to maintain system boards, but will limit them to existing employees. In the future, if UP found they were successful and met the Carrier's needs, it could use new hires on these Boards, if desired.

1996 TPA's. UTU had a problem addressing the Carrier's position because the Carrier has not responded to the Lump Sums to SP employees. There is a broader picture here. At that time, UTU was not in a position to change our position.

On the number of qualifying trips, UTU was not backing off of this issue. UP has abused this situation in the past. They created the problem and now we must resolve it to UTU's satisfaction.

Multiple UTU Representatives in the hub and the limiting of findings in arbitration decisions to the hub. This is an important issue to UTU and we cannot back off of either of these two (2) issues.

Combining pools and applying Article XIII Protection under the January 27, 1972 National Agreement. This has nothing to do with the merger. UTU has a provision in existing agreements to establish such pools. Use the existing agreement.

Closing out the Productivity Funds. UTU could accept the Carrier's recommendation on this issue; however, we have some General Chairmen that believe on their territory, it will result in a nightmare.

Extra Boards: UTU's proposal reduced extra boards almost by half. UTU cannot agree to the Carrier having the right to create as many extra boards as desired. UTU would not have a problem discussing where UP has problems, but it cannot just give the Carrier the right to do whatever is desired with extra boards because it would violate Crew Consist Agreements.

UTU cannot agree to the (25) mile zone for road service since it has no business in these negotiations.

UTU cannot agree to the one (1) year on force assigning surplus employees. UP wants to take away the employees' existing seniority and then turn around and be able to force employees to anywhere on the new railroad, to locations where they hold no seniority. UTU can agree to voluntary transfers, but nothing more.

Vice President Futhey concluded by stating, "It is our feeling that we have given you one (1) Agreement that the Carrier requested. In trying to meet your requests, our proposal has gone beyond the requirements of the Organization under New York Dock."

Mr. Hinckley responded, "If we go to arbitration, the Carrier is going to obtain the right to pick the agreements."

Futhey: "We disagree. What we have presented to you today is a further effort on the part of the UTU to respond to all of your concerns you expressed yesterday."

Hinckley: "We talked about your proposal. We have a different concept of your proposal. You are trying to certify more people than should be certified. I will meet with Tom Watts and discuss your proposal."

The Organization requested additional dates including the two (2) weeks set aside in February. Mr. Hinckley advised that we would not need those dates, and if they decided we needed to get back together, the Carrier would get back to UTU.

UTU Vice President Lankford experienced identical responses from Mike Hartman on the "Houston Hub." In fact, Mr. Hartman advised Vice President Lankford that he would agree to meet with him (Lankford), but would not meet again with any of the General Chairpersons.

Based upon this history, the Organization made the determination to invoke arbitration on the Commitment Letter, after which the Carrier invoked implementing agreement arbitration as to the Salt Lake and Denver Hubs under Article I, Section 4 of New York Dock.

UTU strongly believes that the proposal presented to the Carrier on the evening of January 22, 1997, provided the Carrier with many benefits completely outside of the requirements under New York Dock. In fact, at the time this proposal was presented to the Carrier, the following letter was attached to the Organization's proposal:

> January 22, 1997
>
> Mr. W. S. Hinckley
> General Director, Labor Relations
> Union Pacific Railroad
> 1416 Dodge Street
> Omaha, Nebraska 68179
>
> Dear Sir,
>
> The Organization hereby submits the attached Merger Implementing Agreement proposal for consideration by the Carrier. The Organization submits that the referred-to proposal contains benefits for the Carrier not anticipated by Surface Transportation Board or New York Dock conditions. However, the Organization submits this proposal in an effort to each a satisfactory, voluntary conclusion to the implementing negotiations.
>
> It is not intended by the Organization that the contents be used as a basis for any consideration outside the forum intended.
>
> Yours truly,
> /s/ A. M. Lankford
> A. M. Lankford
> Vice President, UTU

The Organization clearly understands the need to have a uniform agreement in place in consolidated areas. We feel this can be accomplished through negotiations, not by the Carrier picking the agreement they most desire. It is for this reason that the Organization believes the

only solution to this current situation is found in the Kasher - Peterson Award in the UP/MKT Merger, i.e., for this Board to set the guidelines under New York Dock and the Marchant Commitment Letter, then send the parties back to the negotiating table based upon those guidelines. If the parties still cannot agree, then this Board should retain jurisdiction.

As far as the "Denver Hub" is concerned, UTU never was given an opportunity to present a written proposal for that area. The Organization did discuss and made numerous recommendations for the "Denver Hub;" however, the Carrier advised the Organization that they would take those suggestions under advisement and notify the Organization at a later date. This never happened, as the parties spent all of the rest of their time negotiating on the Salt Lake City Hub. For these reasons, the parties should also be sent back to the negotiating table with guide lines to follow in these negotiations. The Organization would also request that the negotiations on "Denver and Salt Lake City" be held separately from the same dates that negotiations take place involving the Houston area. This will allow **all** of the involved General Chairpersons to participate in **all** of the negotiations in which they have an interest.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 20, 1997.

Paul C. Thompson

PAUL C. THOMPSON

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Mr. B. D. MacArthur
Chairman, General Committee of Adjustment
Brotherhood of Locomotive Engineers
327 South LaSalle Street, Room 1107
Chicago, Illinois 60604

Dear Mr. MacArthur:

Please refer to your June 16 letter regarding a previous request for an interpretation of the Federal Railroad Administration's (FRA) application of the Hours of Service Act involving multiple reporting points.

FRA has consistently maintained that a train or engine employee can have no more than one regular reporting point. The document you cited in your letter remains a statement of FRA's position concerning reporting points. Further, FRA maintains the Act does not permit multiple regular reporting points for any one individual despite any agreement purporting to establish them.

However, this does not prohibit a railroad from having multiple on-duty sites within a defined crew base, such as, the Chicago terminal. When a railroad establishes multiple on-duty points, it may (1) designate one regular reporting point for each employee assignment or (2) make no designation at all. All travel time between the employee's residence and regular reporting point at his/her home terminal is commuting, i.e., considered as off-duty. Travel time to any other on-duty site is subject to the deadheading provisions of the Act and, therefore, considered as on-duty. When a railroad does not designate a regular reporting point, travel to all on-duty points is subject to the deadheading provisions.

An employee is considered to have a regular reporting point when he/she has a specific assignment with a fixed on-duty location. An assignment may be an individual run, job, or extraboard. Any employee with an assignment has the on-duty location of the train, job or extraboard as his/her regular reporting point.

As an example, a crew assignment may be established with Global I as the reporting point. All travel between the employee's residence and Global I for crewmembers with Chicago as the home terminal is treated as commuting. In the event that Chicago is the away-from-home terminal for crewmembers assigned to that run, travel attributed to commuting and/or deadhead would be determined by

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FRA's application of the Act when carrier provided away-from-home lodging is involved.

In addition, extraboard employees may have only one regular reporting point. The regular reporting point for these employees may be the specific or fixed location of the extraboard. In the previous example, the location may be either Proviso or Global I, but not both for the same extraboard. If Proviso is designated as the extraboard location, all travel time for extraboard employees reporting to Proviso is considered as commuting. Conversely, travel time from the employee's residence or from Proviso to Global I is considered as on-duty time consistent with FRA's application of deadheading. (See Title 49 Code of Federal Regulations, Part 228, Appendix A)

It is my understanding that the CNW utilizes "pool" crews in the Chicago terminal. If this is the case, the CNW may designate a specific location, such as, Proviso Yard or Global I, as the regular reporting point for the certain pool crews. In the event that a Proviso pool crew is used at Global I, their travel time is considered deadheading as previously explained. Of course, the reverse is true if a Global I pool crew is used at Proviso.

Thank you for your interest in railroad safety.

Sincerely,

ORIGINAL SIGNED BY

Edward R. English
Director, Office of Safety
Enforcement

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REPORTING POINT

A reporting point is a precise physical location where an employee reports for duty to begin or restart a duty tour.

Explanation:

First, a reporting point should not be confused with a designated terminal. A reporting point is employee related. It is the physical location designated by the railroad where an employee reports for duty. Reporting points are further defined as regular and other-than-regular.

FRA maintains that a train and engine employee may have only one regular reporting point. A regular reporting point is determined by the employees regular assignment. The regular reporting point for an extraboard employee is the carrier defined location of the extraboard.

For purposes of deadheading, FRA requires the carrier to establish a regular reporting point for each train and engine service employee. Travel between an employee's residence and his/her regular reporting point is considered as commuting and is treated as part of the off-duty period. Travel to any other reporting point will involve the accumulation of deadhead time. In the event a regular reporting point is not established, travel between the employee's residence and all reporting points will involve deadheading and must be governed by the deadheading provisions.

DESIGNATED TERMINAL

A designated terminal is a geographic location for a railroads operation. It must be identified in or under authority of a collective bargaining agreement as the "home," "away-from-home," or "additional" terminal for a specific run (train assignment). Also, it must have suitable food and lodging available for the crew of that run.

Explanation:

First, a designated terminal should not be confused with a reporting point. A designated terminal is run or train related. It may be a yard, terminal, city or defined geographic area. It may include one or more on-duty locations or reporting points.

Designated terminals determine final or interim release points for qualifying off-duty purposes. An employee may be relieved at a non-designated terminal, but not released. The employee may be transported to a designated terminal for release. In this case, deadheading provisions must be considered in the travel.

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UTU 01/24/97

Document "F"

MERGER IMPLEMENTING AGREEMENT
(Salt Lake Hub)

between the

UNION PACIFIC RAILROAD COMPANY
SOUTHERN PACIFIC RAILROAD COMPANY

and the

UNITED TRANSPORTATION UNION

In Finance Docket No. 32760, the Surface Transportation Board approved the merger of Union Pacific Railroad Company/Missouri Pacific Railroad Company (Union Pacific or UP) with the Southern Pacific Transportation Company, the SPCSL Corp., the SSW Railway and the Denver and Rio Grande Western Railroad Company (SP). In order to achieve the benefits of operational changes made possible by the transaction, to coordinate the seniority of all employees working in the territory covered by this Agreement into one common seniority district and to provide agreement modifications necessary to effect the benefits of the merger,

IT IS AGREED:

I. SALT LAKE HUB

A new seniority territory named Salt Lake Hub shall be created that is within the following area: DRGW mile post 450 at Grand Junction on the Southeast, UP mile post 164.4 at Yermo on the Southwest, UP mile post _____ and SP mile post _____ at Elko on the West, UP milepost 110 at McCammon on the North and UP mile post 847 at Granger on the East and all stations, branch lines, industrial leads and main line between the points identified.

In addition to the seniority rights of existing employees, the Salt Lake Hub shall have a common Seniority Roster for each craft (Brakemen, Conductors and Switchmen) created for all employees working in the Salt Lake Hub on _____, and a single common roster for all employees hired thereafter.

Employees working in the Salt Lake Hub shall remain under the jurisdiction of their prior General Committee, and will perform service in accordance with the agreement attached hereto as Attachment "B".

The parties recognize that the common agreement attached hereto incorporates for former Southern Pacific employees the work rule and basic day mileage modifications contained in the 1991 and 1996 National Agreements. Accordingly, such employees who were otherwise eligible

to receive the lump sum payments contained in the 1991 and/or 1996 National Agreements shall receive those payments not later than 30 days following implementation of the common agreement.

A. ZONES

The new UP/UTU Salt Lake Hub common seniority district will be divided into five (5) zones. Zones shall include extra board(s) as set forth in this agreement. If an extra board has no employees rested and available, employees on another extra board in the terminal may be called, however, an extra board employee is not required to accept a call off zone. Extra Boards will be guaranteed the following:

Road Extra Board - 1925 miles per semi-monthly period at Conductors local freight rate of pay.

Yard Extra Board - 11 days per semi monthly pay period at yard helper rate of pay.

Combination Road/Yard - 1925 miles per semi-monthly period at Conductors local freight rate of pay.

The purpose of creating zones is twofold: First, it is to allocate work in an area recognizing the entitlements of existing employees to that work; Second, to provide a defined area over which a trainman/switchman can become familiar with trackage and train operations so as not to be daily covering a multitude of different sections of track.

Employees will not be required to lose time or "ride the road" on their own time in order to qualify for the new operations. Employees will be provided with a sufficient number of familiarization trips, not less than 10 trips, unless mutually agreed to, in order to become familiar with the new territory. Employees on familiarization trips shall be compensated in accordance with the controlling agreement the same as if working the assignment on which becoming familiar. Issues concerning individual qualifications shall be handled with local operating officers.

Zones are defined as and will be governed by the following:

1. Zone 1 will include Salt Lake City and Ogden West to and including Elko via either route but will not include the terminals of Salt Lake City and Ogden. (current WP and SP pool and local operations)

Pool assignments and extra board positions in Zone 1 will be allocated 60%* to the former WP and 40%* to the former SP. Local Freight, Road Switcher, work trains, helper service and pilot conductor service will be allocated to the former seniority district over which it operates. Assignments which operate over both former Seniority Districts shall, at the direction of the Organization, be assigned to the appropriate prior rights district in order to equalize the mileage equities between the districts.

Assignments allocated to the former WP will be available for the exercise of prior rights seniority by former WP employees in accordance with their prior rights to the work in, or moved to, the Zone. Assignments allocated to the former SP will be available for the exercise of prior rights seniority by former SP employees in accordance with their prior rights to the work in, or moved to, the Zone.

Employees from the Salt Lake Hub common roster may exercise seniority to assignments in Zone 1 in accordance with their standing on the common roster and behind those who have prior rights to the assignment.

a. Pool operations

1. Salt Lake City - Elko and Ogden - Elko.

This operation shall be run as one interdivisional pool with a home terminal at Ogden. Crews brought on duty in Ogden may be transported to Salt Lake City for departure. The Carrier may operate the crews at the far terminal of Elko back to Salt Lake City or Ogden, with the crews operating to Salt Lake City being transported by the carrier back to Ogden at the end of their service trip. Employees transported between Salt Lake City and Ogden shall be compensated established highway mileage (39) between those two points at the rate of and in addition to the service trip.

b. Terminal consolidations

The operation of the Salt Lake City to Elko pool operation will be relocated to Ogden

Note 1: Elko - Carlin. All UP and SP operations within the greater Elko and Carlin area shall be further handled when merger coordinations are handled for the Elko West area.

Note 2: While the Sparks-Carlin and Wendel-Carlin pools and yard and local assignments are not covered in this notice it is understood that they will operate Sparks -Elko and Wendel-Elko and will be paid actual miles when operating trains between these two points and will be

further handled when merger coordinations are handled for the area west of Elko.

Note 3: The Portola-Elko pool shall continue to operate as it currently does and will be further handled when merger coordinations are handled for the Elko west area.

c. Extra Boards

The following extra board(s) will be established to protect all road assignments in Zone 1:

1. Road extra board at Ogden, which protects all Zone 1 road service assignments out of Ogden.

2. Combination extra board at Elko

* 60/40 allocation may be subject to change when additional data is examined. The present allocation is based on UP provided data which includes 36 crews in WP pool and 24 crews in SP pool

2. Zone 2 will include Salt Lake City North to McCammon and Ogden east to Granger and all road operations in the Ogden and Salt Lake City terminals. Green River locals or road switchers are not included in this zone.

Assignments in the Salt Lake City - Pocatello pool will be allocated _____% to the former _____and _____% to the former _____.

Assignments in the Salt Lake City - Green River pool will be allocated _____% to the former _____and _____% to the former _____.

Assignments in the Ogden - Green River pool will be allocated _____% to the former _____and _____% to the former _____.

Local Freight, Road Switcher, work trains, helper service and pilot conductor service will be allocated to the former seniority district over which it operates. Assignments which operate over more than one former Seniority District shall, at the direction of the Organization, be assigned to the appropriate prior rights district in order to equalize the equities between the districts.

Zone 2 Road Extra Board at Ogden will be allocated _____% to the former _____and _____% to the former _____.

Zone 2 Road Extra Board at Salt Lake City will be allocated _____% to the former _____and _____% to the former _____.

Assignments allocated to the former UP - Eastern District will be available for the exercise of prior rights seniority by former UP - Eastern District employees in accordance with their prior rights to the work in, or moved to, the Zone. Assignments allocated to the former UP - Idaho will be available for the exercise of prior rights seniority by former UP - Idaho employees in accordance with their prior rights to the work in, or moved to, the Zone. Assignments allocated to the former D&RGW will be available for the exercise of prior rights seniority by former DRGW employees in accordance with their prior rights to the work in, or moved to, the Zone.

Employees from the Salt Lake Hub common roster may exercise seniority to assignments in Zone 2 in accordance with their standing on the common roster and behind those who have prior rights to the assignment.

a. Pool operations:

Salt Lake City to Green River
Salt Lake City to Pocatello
Ogden to Green River

b. Extra Boards

The following extra boards will be established to protect assignments in Zone 2

1. Road extra board at Ogden, which protects Zone 2 road assignments out of Ogden and Local and Road Switcher assignments at _____

2. Road extra board at Salt Lake City, which protects Zone 2 road assignments out of Salt Lake City.

3. Zone 3 will include Salt Lake City East to and including Grand Junction Road assignments and South to Caliente via either route.

Assignments in the Salt Lake City - Milford pool will be allocated _____% to the former _____and _____% to the former _____.

Assignments in the Salt Lake City - Grand Junction pool will be allocated _____% to the former _____and _____% to the former _____.

Assignments in the Milford - Helper pool will be allocated _____% to the former _____and _____% to the former _____.

Local Freight, Road Switcher, work trains, helper service and pilot conductor service will be allocated to the former seniority district over which it operates. Assignments which operate over both former Seniority Districts shall, at the direction of the Organization, be assigned to the appropriate prior rights district in order to equalize the equities between the districts.

Zone 3 Road Extra Board at Salt Lake City will be allocated _____% to the former _____and _____% to the former _____.

Zone 3 Road Extra Board at Milford will be allocated _____% to the former _____and _____% to the former _____.

Zone 3 Combination Extra Board at Grand Junction will be allocated _____% to the former _____and _____% to the former _____.

Zone 3 Combination Extra Board at Provo will be allocated _____% to the former _____and _____% to the former _____.

Zone 3 Road Extra Board at Helper will be allocated _____% to the former _____and _____% to the former _____.

Assignments allocated to the former UP - South Central will be available for the exercise of prior rights seniority by former UP - South Central employees in accordance with their prior rights to the work in, or moved to, the Zone. Assignments allocated to the former DRGW will be available for the exercise of prior rights seniority by former DRGW employees in accordance with their prior rights to the work in, or moved to, the Zone.

Employees from the Salt Lake Hub common roster may exercise seniority to assignments in Zone 3 in accordance with their standing on the common roster and behind those who have prior rights to the assignment.

a. Pool operations:

Salt Lake City - Milford
Salt Lake City - Grand Junction
Milford - Helper
Milford - Las Vegas

b. Extra Boards

The following extra boards will be established to protect all road assignments in Zone 3

1. Road extra board at Salt Lake City, which protects Zone 3 road service out of Salt Lake City.

2. Road extra board at Milford, which protects Zone 3 road service out of Milford

3. Combination extra board at Grand Junction, which protects Zone 3 yard and road service out of Grand Junction

4.. Combination extra board at Provo, which protects Zone 3 yard and road service out of Provo.

5. A road extra board will be established at Helper which will protect Conductor's and Brakemen's extra work and vacancies at Helper.

4. Zone 4 will include Caliente to Yermo, California.

Assignments (including extra board positions) in Zone 4 will be allocated 100% to the former UP - South Central.

Local Freight, Road Switcher, work trains, helper service and pilot conductor service will be allocated to the former seniority district over which it operates. Assignments which operate over both former Seniority Districts shall, at the direction of the Organization, be assigned to the appropriate prior rights district in order to equalize the equities between the districts

Assignments allocated to the former UP - South Central will be available for the exercise of prior rights seniority by former UP - South Central employees in accordance with their prior rights to the work in, or moved to, the Zone.

Employees from the Salt Lake Hub common roster may exercise seniority to assignments in Zone 4 in accordance with their standing on the common roster and behind those who have prior rights to the assignment.

a. Pool operations

Las Vegas to Yermo
Las Vegas to Milford

b. Extra Boards

The following extra boards will be established to protect assignments in Zone 4

1. A road extra board will be established at Las Vegas which will protect all Conductor's vacancies other than road switchers.

2. A combination extra board will be established at Las Vegas which will protect all Conductor and Brakeman vacancies on the Las Vegas road switchers.

5. Zone 5 will include yard operations at Salt Lake City, Ogden, Roper, Grand Junction and Provo.

A Working Roster shall be established for Zone 5. Positions on the Working Roster will be allocated 62%** to the former UP - Idaho and 38%** to the former DRGW.

Positions on the Working Roster allocated to the former UP - Idaho will be available for the exercise of prior rights seniority by former UP - Idaho employees in accordance with their prior rights to the work in, or moved to, the Zone. Positions on the Working Roster allocated to the former DRGW will be available for the exercise of prior rights seniority by former DRGW employees in accordance with their prior rights to the work in, or moved to, the Zone. Employees shall rank in seniority order on the working roster in accordance with their relative standing on the Salt Lake Hub Common Roster.

Employees from the Salt Lake Hub common roster may exercise seniority to a position on the Working Roster in accordance with their standing on the common roster and behind those who have prior rights to that position.

Assignments in Zone 5 shall be available for the exercise of seniority by employees from the Zone 5 Working Roster.

a. Terminal consolidations

Separate yard operations shall include Ogden, Grand Junction and Provo. Salt Lake City Yard and Roper Yard shall be combined into a single terminal.

b. Extra Boards

The following extra boards will be established to protect assignments in Zone 5:

1. Yard extra board shall be established at Salt Lake City/Roper.

2. Yard extra board shall be established at Ogden.

3. Yard Vacancies and extra work in Grand Junction and Provo will be filled from the Zone 3 extra boards at those terminals.

** - Subject to change when additional data is examined.

II. SENIORITY

To achieve the work efficiencies and allocation of forces that are necessary to make the Salt Lake Hub operate efficiently as a unified system, the following will apply:

A. Existing rights of employees to exercise seniority in the Salt Lake Hub shall be preserved. Assignments in each Zone shall be allocated as set forth in the Zone provisions of Article I.A of this agreement. An allocated assignment shall be subject to seniority choice, as follows:

First: existing employees who have prior rights to the allocated work.

Second: employees from a Salt Lake Hub Common Roster.

Employees will be treated for vacation, entry rates and payment of arbitraries as though all their time in operating service on their original railroad had been performed on the merged railroad. A protected employee on any seniority roster will be considered a protected employee on all seniority rosters. Each zone shall assign vacations to employees by craft in seniority order of the craft.

B. In addition to the seniority rights of existing employees, the Salt Lake Hub shall have a Seniority Roster for each craft (Brakemen, Conductors and Switchmen) created for all employees working in the Salt Lake Hub on _____. The new Salt Lake Hub rosters will be created as follows:

1. Existing employees placed on the new craft common rosters will be dovetailed based upon the employee's earliest retained seniority date in the craft. If any employees have identical seniority dates in the craft, seniority will be determined by the earliest employee's retained seniority in a UTU represented craft. If the earliest retained seniority date is identical, seniority will be determined by birth date.

2. Employees hired subsequent to the effective date of this agreement shall be placed on a single common road/yard Salt Lake Hub roster which will rank below each of the craft rosters set forth above. Such employees shall, when qualified, rank as Conductor/Foreman in accordance with their relative standing on the common roster.

When a class of students completes their preparatory training and examinations, their order of standing for seniority will be determined as follows:

a. FIRST GROUP - Employees from the carrier's other crafts will be ranked highest in potential seniority in the class of trainees based on the employee's number of years of continuous service with the carrier. In the event that two employees have the same date of hire, they shall be ranked according to their date of birth with the senior employee ranking ahead of junior

employees.

b. SECOND GROUP - New employees will be ranked amongst themselves by their date of birth and placed behind Group 1 in seniority.

Thereafter, the first service performed by a member of said class as either a trainman or switchman will establish the common seniority date for all members of the class in the order determined by the above groups. If more than one class is prepared to mark up for service in the same Hub on the same date, all groups will be ranked in accordance with a and b above, as if they were all in the same class of students.

When a single new employee is marked up for initial service as either brakeman or switchman, he/she will establish a seniority date as of the date such initial service is performed.

NOTE: A seniority "picture" of all affected locations on the merged railroad(s) will be taken as of _____ so that all employees are identified with a Hub roster.

III. HUB/SYSTEM BOARD

The Salt Lake Hub will be divided into Demand Number Areas (DNA). A Hub/System Board will be established for the Hub. (see attachment)

For each DNA in a hub, a number of positions on the Hub/System Board equal to the number by which the supply of active employees exceeds the demand number shall be made available for seniority choice of Hub common roster employees at that DNA. If the Company's need for employees at a DNA exceeds the demand number, the Company may bulletin fewer Hub/System Board positions and allow employees in excess of the demand number to continue working at that DNA.

The Salt Lake Hub/System Board employees may be used anywhere on the Union Pacific Lines, including within the Salt Lake Hub.

IV. PROTECTION

A. The parties agree that all employees listed on the Salt Lake Hub common roster and all other employees working in the Salt Lake Hub and Elko at the time of implementation of this agreement will be automatically certified for wage protection which will be calculated pursuant to New York Dock provisions, with the exception that Test Period Averages shall be determined using the employee's W-2 compensation for calendar year 1996, including 401(k) contributions, not calculating months of extraordinary absence. Employees who earned their TPA while working under an agreement not subject to the percentage increases contained in the 1991 and/or 1996 National Agreements shall have their TPA's increased equivalent to the percentage increases and lump sum payments which would otherwise have been paid during the Test Period. (Q's and A's relating to New York Dock are attached hereto)

B. Employees who are automatically certified as a result of this implementing agreement and who are not listed on the Salt Lake Hub Common Roster shall commence a new Protective Period pursuant to the implementing agreement for the Hub with which they are identified.

C. Employees who become eligible to receive compensation for moving expenses pursuant to the relocation provisions of New York Dock as modified by Article XII and XIII of the 1972 UTU National Agreement shall have the option of accepting the allowances set forth in New York Dock or a lump sum payment of $30,000 for homeowners and $10,000 for renters in lieu thereof. The foregoing shall also apply to employees who are automatically certified as a result of this agreement and who voluntarily follow their work to a new location. Employees who voluntarily follow their work and receive a moving allowance must not exercise seniority from the location to which moved for a period of five years from the markup date at the new location unless that employee is unable to hold a regular or extra position at that location.

D. Employees shall receive a separate Test Period Average (TPA) for their respective participation in their prior productivity fund. For any year following implementation of this agreement, including the year in which implemented, in which the employee receives less productivity fund compensation than his/her pro-fund TPA, the employee shall be compensated the difference. This entitlement shall continue subject to the moratoriums contained in the employee's prior productivity fund and may thereafter only be modified by negotiation with the General Committee having jurisdiction over that prior productivity fund. Elected full or part time union officers shall receive a pro-fund TPA equal to the average pro-fund TPA for the craft in which they hold seniority and in which they worked (or represented) for the preponderance of the test period or such employee's own pro-fund TPA, whichever is greater.

V. IMPLEMENTATION

The Carrier shall give 30 days written notice for implementation of this agreement and the number of initial positions that will be changed in the Hub.

VI. SAVINGS CLAUSE

Health and Welfare
Disability insurance
Protective agreements
- Siskiyou
- Peninsula Commute
- Coast Line

ATTACHMENT "A"

HUB/SYSTEM BOARD

I. DEMAND NUMBER

The Hub will be divided into Demand Number Areas.

The demand number represents the minimum number of trainmen/switchmen permitted to work on other than the Hub/System Board from each Demand Number Area (DNA).

The demand number may be adjusted as a result of changes in operations, business conditions or other factors that would cause an increase or decrease in operations.

A downward adjustment in a demand number can only be made after 90 days from the date of the last downward adjustment.

The minimum demand number for each DNA will consist of the number of regular assignments within the DNA plus 30% the number of assignments. Sufficient workforce shall be maintained in each DNA to provide relief for vacations, layoffs, PL days, etc.

II. TRANSFERS - No shortage to surplus

On the effective date of this Agreement, the ability of a trainman/switchman to exercise seniority between DNA's shall be temporarily restricted as follows:

A. Prior rights employees do not count Non-prior rights employees as active

Employees at a DNA, where the supply of active employees is equal to or less than the demand number, shall not be allowed to transfer to a DNA where the supply of active employees, with seniority established prior to the effective date of this Agreement, is equal to or greater than the demand number for that DNA.

B. Non-prior rights employees count everyone as active

Employees who establish seniority subsequent to the effective date of this agreement and who are at a DNA where the supply of active employees is equal to or less than the demand number, shall not be allowed to transfer to a DNA where the supply of active employees is equal to or greater than the demand number for that DNA.

C. Definition of "Active Employee"

Active employees are those employees who hold a regular, extra, or Hub/System Board position at a DNA and who have earned compensation as a trainman/switchman under the schedule agreement during the last 30 days. Trainmen/switchmen who commence a leave of absence, are dismissed, or reach the 30th day of absence for reasons such as suspension, illness or injury, shall no longer be considered active until they return to service and earn compensation as a trainman/switchman under schedule agreements.

III. HUB/SYSTEM BOARD

A. Defines where a "Hub/System Board" employee can work

One Hub/System Board will be established in each of the seniority hubs. While on a Hub/System Board, an employee is subject to being used in the capacity of an extra trainman or extra switchman at any DNA on the Union Pacific RR.

Hub/System Board employees must first be used within the Hub if positions exist prior to being sent to another DNA outside the Hub.

B. Assignments - Needs of Service

Hub/System Board positions will be determined on a monthly basis as follows:

1. How to calculate the number of assignments

For each DNA in a hub, a number of positions on the Hub/System Board (including inactive positions) equal to the number by which the supply of active employees exceeds the demand number may be made available for seniority choice of Hub common roster employees at that DNA.

2. Allows carrier latitude in total number of assignments

If the Company's need for employees at a DNA exceeds the demand number, the Company may bulletin fewer Hub/System Board positions and allow employees in excess of the demand number to continue working at that DNA.

C. Voluntary

1. Bulletin period

The Company will bulletin voluntary Hub/System Board positions by Noon

Pacific Time on the first day of the month preceding the month of assignment. Bids will close at Noon Pacific Time the 7th day of the month preceding the month of assignment and posted by 3 PM that day. Hub common roster employees who select the Hub/System Board by seniority choice will be known as voluntary Hub/System Board employees.

2. Exercise of seniority to get off the Hub/System Board

During the period of time he/she is on the Hub/System Board, a voluntary Hub/System Board employee will not be entitled to exercise seniority. Such employee will be allowed full exercise of seniority upon completion of their Hub/System Board obligation, in accordance with applicable agreements.

D. Involuntary

The Company may elect to assign involuntary Hub/System Board positions to employees on the hub common roster, subject to the demand number for that DNA, or to the number of employees allowed to remain at that DNA. Involuntary Hub/System Board positions will be assigned on a monthly basis at Noon Pacific Time on the 10th day of the month preceding the effective month of the assignment, as follows:

1. Who to draft

At a DNA, if there are insufficient voluntary Hub/System Board employees to fill the number of Hub/System Board positions, the junior trainmen/switchmen on an extra board (including unassigned brakemen/switchmen) equal to the number of positions on the Hub/System Board not filled by voluntary employees shall be removed from the active list for that DNA. Employees reduced in this manner who hold common roster seniority will be allowed to mark to the Hub/System Board.

2. Released from Hub/System Board

These Hub/System Board employees will be known as involuntary Hub/System Board employees and, when released by the Company from their Hub/System Board obligation, will be allowed to mark to an extra board at the DNA from which assigned.

3. Exercising seniority from Hub/System Board

Involuntary Hub/System Board employees may exercise seniority from a

Hub/System Board to a DNA as follows:

a. May mark to an extra board if the number of non-Hub/System Board trainmen/switchmen at that DNA is less than the demand number for that DNA; or,

By bid or bump to a regular position, subject to applicable agreements.

b. When exercise of seniority must be made

Assigned involuntary Hub/System Board employees must make application to exercise seniority from the Hub/System Board by Noon Pacific Time the 8th day of the month preceding the month in which the exercise of seniority will become effective.

Involuntary Hub/System Board employees will not be released from the Hub/System Board until the end of a cycle (month) as set forth above.

NOTE: should the assignment of the Hub/System Board positions leave a surplus of employees in a Zone within the DNA, junior employees may be reduced from an extra board in that Zone within the Demand Number Area. Employees so reduced may exercise their right to displacement, or may mark to an extra board in a shortage location within the Demand Number Area.

E. Hub/System Board Work/Inactive assignments

The Company will make inactive and work assignments, referred to as cycles, available for seniority choice (date of hire as a trainman or switchman) to Hub/System Board employees on the first day of the month preceding the month of assignment. Bids will close at Noon Pacific Time the 15th day of the month preceding the month of assignment and posted by Noon the 16th day. Failure of a Hub/System Board employee to indicate a preference will be considered as no preference and such employee's cycle will be assigned by the Company.

A Hub/System Board employee not occupying an inactive position will be used on one of the following cycles:

31-day month:

Cycle - 20 consecutive 24-hour periods (work segment), with 11 consecutive 24-hour periods (rest segment); or,

Split Cycles - 10 consecutive-24 hour periods (work segment) with 5 consecutive 24-hour periods (rest segment) followed by 10 consecutive 24-hour periods (work segment) with 6 consecutive 24-hour periods (rest segment).

30-day month:

Cycle - 20 consecutive 24-hour periods (work segment), with 10 consecutive 24-hour periods (rest segment); or,
Split Cycles - 10 consecutive 24-hour periods (work segment) with 5 consecutive 24-hour periods (rest segment) followed by 10 consecutive 24-hour periods (work segment) with 5 consecutive 24-hour periods (rest segment).

29-day month:

Cycle - 20 consecutive 24-hour periods (work segment) with 9 consecutive 24-hour periods (rest segment); or,

Split Cycles - 10 consecutive 24-hour periods (work segment) with 5 consecutive 24-hour periods (rest segment) followed by 10 consecutive 24-hour periods (work segment) with 4 consecutive 24-hour periods (rest segment).

28-day month:

Cycle - 19 consecutive 24-hour periods (work segment) with 9 consecutive 24-hour periods (rest segment); or,

Split Cycles - 10 consecutive 24-hour periods (work segment) with 5 consecutive 24-hour periods (rest segment) followed by 9 consecutive 24-hour periods (work segment) with 4 consecutive 24-hour periods (rest segment).

F. Work Segments of cycle

Work segments for a Hub/System Board employee shall begin at the time the employee reports to the on-duty point of the source of supply from which the employee bid or was placed on the Hub/System Board, and shall end at the time the employee is released from the work segment at that same source of supply.

The scheduled end of a Hub/System Board employee's work segment will be based on the date and time the work segment began. For example, a 20-day work

segment which begins at 7:30 AM on July 11 will end at 7:30 AM on July 31 (480 hours later). In the event that a Hub/System Board employee is not returned to his/her home location at the scheduled end of his/her work segment, or the scheduled end of the voluntarily extended work segment, the employee will be compensated as follows:

1. Penalty for not being released at proper time

If arrival is less than four hours past scheduled end time: no extra compensation

If arrival is four hours or more, but less than eight hours past scheduled end time: $245.00 in addition to regular earnings/guarantee.

If arrival is eight hours or more, but less than 24 hours past scheduled end time: $245.00 in addition to regular earnings/guarantee plus succeeding work segment will be reduced by one day (24 hours).

If arrival is 24 hours or more, but less than 48 hours past scheduled end time: $490.00 in addition to regular earnings/guarantee plus the succeeding work segment will be reduced by two days (48 hours).

For each additional 24 hours past the scheduled end time, until the employee returns to his/her home location: An additional $245 plus the succeeding work segment will be reduced by one additional day (24 hours).

The Company will have the option of returning the Hub/System Board employee to his/her home source of supply prior to the scheduled expiration of his/her work segment in order to avoid delay in commencement of scheduled rest segment.

2. Marking up at work location

Hub/System Board employees will be marked to their work segment extra boards in accordance with their arrival time at the lodging facility. If two or more employees have the same arrival time, the employees will be marked to the board in reverse seniority order. Hub/System Board employees who have been given advance approval to drive their vehicle will be treated, for purposes of board markup and rest, the same as if they had utilized Company provided transportation.

3. Order of call

Hub/System Board employees will only be assigned to protect service from