STB FD 32760 (Sub 25) 12-24-97 B 185022

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December 23, 1997

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DELIVERY BY HAND

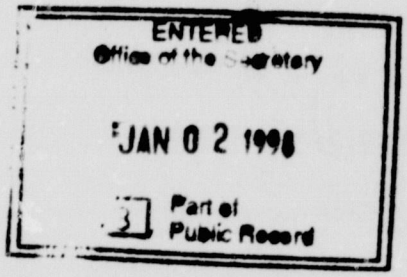
Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, D.C. 20036

Re: Finance Docket No. 32760 (Sub-No. 25), *Union Pacific Corp., et al. -- Control & Merger -- Southern Pacific Transp. Co., et al. -- Arbitration Review*

Dear Mr. Williams:

Enclosed for filing in the referenced matter are the original plus ten (10) copies of the Opposition to Petition for Stay of Arbitral Award, the Verified Statement of Wayne E. Noar, and the Certificate of Service for the foregoing.

Thank you for your assistance with this matter.



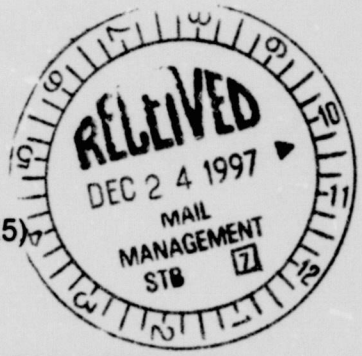
Very truly yours,

Eugenia Langan

Eugenia Langan
Attorney for Union Pacific
Railroad Company

Encl.
cc: Donald F. Griffin, Esq.

185022



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 25)

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 & RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

OPPOSITION TO PETITION FOR STAY OF ARBITRAL AWARD

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December 23, 1997

OPPOSITION TO PETITION FOR STAY OF ARBITRAL AWARD

The New York Dock arbitration award that is the subject of the BMWE's Petition for Review was issued on October 15, 1997, and established January 1, 1998 as the date on which Union Pacific ("UP") may begin to implement the consolidation of system track maintenance and repair operations in the Western Territory of the merged UP/SP railroads. The BMWE filed its Petition for Review on November 12, 1997, but waited until three months after the Award came down to seek a stay, on the very eve of the scheduled implementation and the year-end holidays.

There are compelling reasons not to grant the stay, and there is no reason to grant it. Apart from the unlikelihood that the BMWE will prevail on the merits, a stay at this time would preclude completion of track repair and rehabilitation work programmed for the 1998 season, which is an essential part of a complete cure for some of the track congestion experienced following the merger. There is no justification for this delay. The so-called "harms" to employees that the union claims will result from implementation are most unlikely to occur, and they certainly will not occur while the Board is considering the union's Petition for Review. UP will not revoke the seniority of any employee who declines a system gang position he would not have had to accept prior to the merger, pending a decision by the Board on the Petition for Review. In addition, UP has given all affected BMWE General Chairmen the opportunity to review the consolidated rosters for system gang positions in the Western Territory before the rosters go into effect. Thus, the BMWE's stay request does not meet any of the prerequisites for a stay, much less all of them.

ARGUMENT

As the BMWE concedes, a stay should not be granted unless the union has shown:

> "(1) that there is a strong likelihood that [the union] will prevail on the merits; (2) that [it] will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of a stay."[1/]

Failure to adhere to these standards would conflict with the directives of Congress and the requirements of New York Dock. The merger of UP and SP was approved by this Board as being in the public interest, after considering, among other things, the portions of UP's Operating Plan demonstrating the necessity of consolidating UP and SP system gang operations in the Western Territory. Implementation of this consolidation on schedule is essential to complete work programmed for the 1998 season as part of a permanent solution for existing track congestion in areas of the merged UP/SP system, as shown below. In virtually every Transportation Act and modern rail revitalization act, Congress has repeatedly expressed its intent that mergers that serve the public interest be accomplished without undue delays. See, e.g., 49 U.S.C. § 10101(15).

The New York Dock conditions reflect this legislative intent, and accommodate the potentially countervailing interest of rail labor as to timing in Article I § 4. Article I § 4 requires that an implementing agreement or award be in place before a carrier

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1/ BMWE Petition for Stay at 2, quoting Burlington Northern S.F. Ry. v. American Train Dispatchers Dep't, STB Finance Docket No. 33429, slip op. at 2 (served Jul. 18, 1997).

proceeds with a merger-related "transaction," but also provides that the agreement or award should be final within 90 days after the carrier gives initial notice to the union. If stays of implementing arbitration awards are to be granted routinely (as unions have sought recently), without regard to the equitable standards that the BMWE admits should govern, the 90-day timetable in Article I § 4 will become a dead letter; the Board will be besieged by union stay requests at virtually every step of the implementation of virtually every merger; and Congress's concern for expeditious completion of mergers will be set aside and ignored.

In this case, the union's stay request fails to meet any of the established standards for a stay, as we show below.

I. THE UNION IS UNLIKELY TO PREVAIL ON THE MERITS

It is most unlikely that the BMWE will prevail on the merits. The BMWE's contention that collective bargaining agreements that have been "bargained to conclusion" (whatever the union may mean by that) cannot be modified even where necessary to achieve public benefits of a merger flouts the statute and governing precedents of this Board, the ICC, the Supreme Court, and the courts of appeals. UP's arguments on the merits are thus straightforward, and are set forth fully in the Opposition to the Petition for Review. We shall not repeat those arguments here; we turn instead to showing that the union meets none of the other prerequisites for a stay, either.

II. IMPLEMENTATION OF THE AWARD WILL NOT HARM EMPLOYEES

The BMWE's allegations of irreparable harm are baseless, and could not in any event support the broad stay the union seeks.

No harm of any kind will result to employees if the Award is implemented on schedule. No employees will be dismissed. See Opposition to Petition for Review at 6. No employees will have to relocate their homes or families. Verified Statement of Wayne E. Naro ¶ 12. The union has not claimed otherwise. All that will happen is that system-gang employees -- traveling employees who usually work away from their home areas during the work-week -- may at times work somewhat farther from their homes than usual during the work-week, in many cases for higher pay than they usually receive.[2/]

The BMWE nonetheless claims that employees may be harmed in two ways while the Board considers this case unless a stay is granted. The union's main concern is that under the UP system gang agreement junior employees may be "forced" on pain of forfeiting their seniority to take system gang jobs if not enough employees volunteer for those jobs. Petition for Stay at 3-5. The union also claims that "administrative problems" may occur if UP's Gang Management System (GMS) does not consult with the union on the preparation of consolidated system gang seniority rosters for the Western Territory, which is the ministerial process of matching SP job classifications with UP classifications. Id. at 6-7. Neither of these two discrete claims provides any basis for staying all aspects of the consolidation of system gang operations in the Western Territory, as the union requests. Indeed, no stay of any kind is justified.

2/ System gang employees are and will remain free to return to their homes during their rest days. In addition, these employees will receive a per diem allowance for away-from-home meal and lodging expenses as well as travel allowances when they work more than 100 miles from their homes. Naro Statement ¶ 12.

In the first place, no employee will forfeit his seniority because of the Award while the Board is considering the Petition for Review. A surplus of available employees makes it unlikely that UP would have any need to force any employees onto system gangs during the first few months of 1998. More than 150 new jobs will be created on the system gangs scheduled to start work during that period. The work will begin in Arizona and New Mexico, where more than 900 employees reside who have the ability to work on system gangs. The 1997 system gang work season ended this month, so many of these employees will be furloughed if the system gangs for the 1998 season are not permitted to start work in January as scheduled. Naro Statement ¶ 7. It is overwhelmingly likely, therefore, that UP will be able to fill the new gangs with employees who volunteer for the jobs. UP is so confident of its ability to fill the new gangs with volunteers that it makes the following commitment: The carrier will not revoke the seniority of any employee who refuses to accept a system gang position he would have been free to refuse prior to the merger while the BMWE's Petition for Review is pending before the Board.[3/]

There is no need for a stay to prevent employees from forfeiting seniority because of the Award, therefore. On the contrary, as more than 150 new system gang jobs will be created in January if implementation proceeds as scheduled, a stay would actually deprive many BMWE-represented employees who are currently furloughed or

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3/ That is, an employee who worked on UP before the merger will be able to refuse system gang work on a former SP rail property without losing seniority, but not system gang work that he would have been required to take on property operated by UP before the merger. Naro Statement ¶ __.

due to be furloughed of opportunities to return to active paid service. Naro Statement ¶ 7.

As for the BMWE's complaint that it should be consulted during the preparation of consolidated seniority rosters, there are two basic answers. First, the union has no right to such consultation under either the UP or SP collective bargaining agreements; the practice is to allow unions to raise objections to new rosters only after they are posted. In some recent consolidations, UP has permitted the union to participate in the preparation of seniority rosters, but as a matter of courtesy, not of contractual right. Naro Statement ¶ 9.[4/]

Second, whatever the agreements may provide or the constituency of GMS's staff may be, GMS did consult extensively with the BMWE's SP General Chairman in advance of the consolidation of the rosters, and sought input from other affected BMWE General Chairmen as well. Naro Statement ¶ 10. GMS has completed the rosters and has invited all affected General Chairmen to review them before they are posted. Id. Thus, there is no basis for the BMWE's claims regarding consultation, either in the agreements or in fact.

In sum, the employees represented by the BMWE will not suffer any harm, irreparable or otherwise, if a stay is not granted. If anything, a stay would reduce the work opportunities available to employees represented by the union and cause more of them to be furloughed.

4/ The union say its input is necessary before the mergers in this case are posted, because it does not believe that anyone at GMS is familiar with SP job classifications and rosters. In fact, however, the GMS staff includes four former SP employees who are fully knowledgeable about these matters. Naro Statement ¶ 9.

III. A STAY WOULD IRREPARABLY HARM UP AND THE PUBLIC

While there is nothing to weigh on the union's side of the equitable scale, there is a great deal on the other side: a stay would seriously disrupt UP's system maintenance and repair program for 1998, irreparably harming the carrier and the public. Track conditions and insufficient track capacity have led to well-publicized traffic congestion in the western parts of the merged UP/SP system in recent months. UP has budgeted well over $500 million for major track repair, rehabilitation, and expansion projects in the Western Territory that will relieve capacity problems and bottlenecks that have contributed to existing congestion in the west. That is more than the total amount spent for such projects by all the merged railroads in any recent year. If work on the projects is delayed, relief for this congestion will also be delayed. Indeed, any delay will put off a full solution for existing western track congestion for another year. Naro Statement ¶¶ 2-6.

The 1998 program for the Western Territory covers two key corridors of the merged system. The first is the Los Angeles Corridor between Los Angeles, California and Tucumcari, New Mexico, where major repair and rehabilitation of the former SP line in that corridor is programmed for 1998. The second is the Central Corridor between Chicago, Illinois and Ogden, Utah, where some 700 miles of new rail is programmed for 1998. These projects will help to alleviate existing traffic congestion in major hubs such as Los Angeles and Houston, Texas by eliminating substandard track conditions which currently reduce trains speeds. Naro Statement ¶ 3.

Work on the Los Angeles corridor is scheduled to begin on January 5, 1998. The process of advertising and filling the jobs on the system gangs that will perform the

work, necessary annual training of employees, and moving equipment for the work has already begun. Work on the Central Corridor is scheduled to begin in March, 1998. Naro Statement ¶ 4. Setting back the start dates for these projects would serve only to delay relief for existing congestion along these corridors and related hubs.

Even a short delay in starting the projects could delay much of that urgently needed relief for a year, due to an essential fact of life of railroading: major track repair and rehabilitation can be done only when the weather is temperate. Steel rail contracts in very cold weather and expands in very hot weather. As a result, rail laid or repaired in very cold weather may become misaligned when hot weather arrives, and rail laid or repaired in very hot weather may pull apart when cold weather arrives -- conditions which can cause trains to derail. In short, major repair and rehabilitation work of the kind performed by system gangs cannot be done safely during the late fall and winter months in the northern parts of the country, or during the hottest parts of the day during the warmest months in the southern parts of the country. Naro Statement ¶¶ 5-6.

Thus, UP must be able to take advantage of the winter months on the Los Angeles Corridor to get the work there done efficiently and safely; and UP must be able to take advantage of the spring and summer months in the Central Corridor to get the work there done at all this year, as it cannot be done in cold weather. Unless the work in the Los Angeles Corridor starts on schedule and is substantially completed by March, UP will not have sufficient trained manpower or equipment available to start work on the Central Corridor that month as scheduled. Further, unless that work starts in March, there will not be enough time to complete it in 1998 before the cold weather sets in. Naro Statement ¶ 6.

This means that if UP cannot start its much-needed track repair and rehabilitation program for the Western Territory on time, the work cannot be completed this year. Existing traffic congestion problems will not be completely remedied in some areas until 1999 at the earliest, and congestion at some points may well be exacerbated. If the lines in question are not rehabilitated, more emergency "spot repairs" may have to be performed on those lines until they can be rehabilitated. Tying up the track for emergency repairs when trains need access to it will certainly increase congestion.

In sum, the harms to UP and the public from a stay would be incalculable and irreparable.[5/]

5/ The BMWE says that a stay would inflict no harm upon UP because the union will consider agreeing to "reasonable" requests to operate system gangs across former railroad boundaries for "limited" times, pointing out that it has agreed to such arrangements from time to time in the past. Stay Petition at 8. Recently, however, the union's agreement has come only after protracted negotiations, and only after the union extracted punitive concessions from the carrier. Naro Statement ¶ 11. In this case that would simply empower the union to delay or veto public transportation benefits of a merger approved by this Board and demand windfall benefits that far exceed the requirements of New York Dock.

CONCLUSION

A stay would irreparably harm UP and the public without serving any useful purpose, as employees do not stand to be harmed in any way. The Union's Petition for A Stay should be denied.

Respectfully submitted,

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Attorneys for Union Pacific Railroad Company

December 23, 1997

185022

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 25)

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 & RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

VERIFIED STATEMENT OF WAYNE E. NARO

1. I, Wayne E. Naro, am Director of Labor Relation - Maintenance of Way and Signal for the Union Pacific Railroad, and have held that position for four years. As such, I am the principal carrier official responsible for negotiating and administering agreements, as well as for handling labor arbitrations, with the Brotherhood of Maintenance of Way Employes (BMWE) under both the Railway Labor Act and New York Dock and other labor protective conditions. I represented UP in the negotiations and arbitration under Article I § 4 of New York Dock over the terms for implementation of the consolidation of UP and Southern Pacific system track maintenance and repair operations in the Western Territory of the merged UP/SP system, which led to the Award by Arbitrator Peter Meyers that is the subject of the BMWE's Petition for Review. I am thus familiar with UP's program for system maintenance and repair work for the 1998 season in the Western Territory and with the nature of system gang work generally.

2. Track conditions and insufficient track capacity have led to well-publicized traffic congestion in the western parts of the merged UP/SP system in recent months. To help alleviate this congestion, UP has budgeted well over $500 million for system track repair, rehabilitation, and expansion in the Western Territory during the 1998 season, more than the combined total of the amounts spent by all the merged railroads in that territory in any recent year.

3. The track repair and rehabilitation programmed for the Western Territory during the 1998 season will cover two key corridors. The first is the Los Angeles corridor between Lost Angeles, California and Tucumcari, New Mexico, where major repairs and rehabilitation will be done on the former SP line. The second is the Central Corridor between Chicago, Illinois and Ogden, Utah, where UP plans to replace some 700 miles of old rail with new rail in 1988. These projects will alleviate some of the existing congestion in and major western hubs such as Los Angeles and Houston, Texas by eliminating substandard track conditions that currently reduce train speeds on the lines involved.

4. The work in the Los Angeles corridor is scheduled to begin on January 5, 1998. The process of advertising the positions on the new system gangs that will perform the work, filling those positions, necessary training of the employees, and moving equipment for this project has already begun. The work in the Central Corridor is scheduled to begin in March, 1998. Some of the employees and equipment used for the Los Angeles Corridor project will be needed for the Central Corridor project, so unless the first project starts on schedule, the second cannot.

5. If these projects do not start on schedule, completion of UP's 1998 program of system track repair and rehabilitation in the Western Territory will be delayed for another year, and so will a complete solution for the traffic congestion the program is designed to help alleviate. This is so because of a simple and incontrovertible fact of life of railroading: major track repair and rehabilitation is seasonal work. The continuous welded steel rail used for railroad tracks is very sensitive to ambient temperatures. When the weather is very cold, the rail contracts; when the weather is extremely hot the rail expands. As a result, track laid or repaired in very cold weather

may become misaligned when the weather gets warm, and track laid and repaired when the weather is extremely hot may pull apart when the weather gets cold.

6. In short, to ensure that rail has safe tolerance to changes in the weather, major track repair and rehabilitation work must be done in relatively temperate weather. What this means in this case is that unless the work on the Los Angeles Corridor begins and is completed on schedule, freeing up system gangs and equipment for the work in the Central Corridor so that it can begin on schedule in March, there will not be enough warm weather months left in 1998 to complete that project next year, and completion of the work will be delayed until after the winter of 1999. So too, a full solution for traffic congestion along that corridor will be delayed for a year.

7. If implementation proceeds as scheduled, more than 150 new system gang jobs will be created in January to work in the Los Angeles Corridor. If not enough employees volunteer for those jobs, UP's agreement with the BMWE gives us the right to force junior employees to take the jobs by revoking the seniority of any employee who refuses to take one. UP does not expect to have to force anyone to take the jobs, however, because there is a large surplus of employees who will furloughed if they work on one of the new gangs does not become available. Work in the Los Angeles Corridor will start in New Mexico and Arizona. Over 900 employees who have the ability to work on system gangs reside in those states. There are not enough jobs in those states for all of these employees and the employees who usually work on non-system jobs, so many of these employees will be furloughed if the new jobs are not created in January as scheduled. Thus, UP expects to have more than enough volunteers to fill the new system gang jobs, and no need to force any employees to those jobs. Obviously, if implementation of the Meyers Award is stayed, the new system gang jobs will not be created in January and more employees will be furloughed than would be if implementation proceeds as scheduled.

8. UP is so confident that it will be able to fill all the new jobs with volunteers that it makes the following commitment: While BMWE's Petition for Review of the Meyers Award is pending before the Surface Transportation Board the carrier will not revoke the seniority of anyone who refuses to take a system gang job he could have refused without losing seniority before the merger. For example, an employee who worked for UP before the merger will be able to refuse system gang work on a former SP rail property without forfeiting seniority while the Board considers the Petition for Review. Of course, an employee who refuses a system gang job he would have had to accept on pain of losing seniority before the merger will forfeit seniority, as that will leave him in precisely the same position he would have been in before the Meyers Award came down.

9. UP's Gang Management System (GMS) has prepared seniority rosters for system gangs in the Western Territory by consolidating UP and SP rosters. This was largely a ministerial task, consisting of translating SP job classifications, which had a separate classification for each type of track equipment operated by system gang employees, into UP classifications, which combine operation of several types of similar equipment in single classifications. The GMS staff, which includes four former SP employees who are knowledgeable about SP equipment, job classifications, and rosters, was fully competent to perform this task.

10. UP and SP collective bargaining agreements do not require management to consult with the BMWE during the preparation of new seniority rosters. Instead, by practice, the carrier entertains comments and suggestions from the union on new rosters after they are posted. In recent consolidations, UP has solicited the union's input during preparation of the rosters -- but as a matter of courtesy only, not as a matter of contractual right. UP extended the same courtesy to

the union in this case. GMS consulted extensively with the BMWE's SP General Chairman D.E. McMahon before preparing the rosters. Other affected BMWE General Chairmen were invited to consult with GMS. Now that GMS has completed the rosters, UP has again invited all of the General Chairmen to consult about the rosters before they are posted on January 1.

11. The BMWE says in its stay petition that if implementation is stayed, the union will consider "reasonable" UP requests to conduct system gang operations for "limited times" across the former boundaries between UP and SP properties. In my view, that is a hollow offer. To be sure, the BMWE has agreed a few times to allow UP gangs to work on former SP properties -- but recently the union's agreement came only after protracted negotiations, and only when the union could extract punitive concessions for UP. For example, in 1997 UP needed to install concrete ties on a former SP line. The equipment used to install concrete ties is very sophisticated and no SP employees in the area were qualified to operate it. The BMWE agreed to allow qualified UP employees to perform the work but the price for that agreement was exorbitant. The BMWE insisted that UP provide three square meals a day (not money for the meals, but the food) to SP employees who would have done the work if traditional wooden ties had been installed, in addition to the per diem allowances these employees would have received for meal and lodging expenses while working away from home. As a result, UP had to provide meals and per diems to many former SP employees who never worked away from their home areas in 1997. The cost to UP was more than $125,000.

12. Finally, it is important to note that no employees will be dismissed and no employees will have to relocate their homes because of the Award. System gang jobs are traveling jobs, and the employees on these gangs usually work at considerable distances from their home during the

work-week, although they are free to go home on their rest days. System gang jobs pay more than most other maintenance-of-way jobs, and gang employees receive a per diem for their away-from home meal and lodging requests, as well as additional travel allowances if they have to travel more than 100 miles from their homes. The Award will not change these existing arrangements. It may simply require some employees who usually travel away from their homes to work to travel somewhat farther than usual at times. At the same time, many of these employees will receive a pay raise, because the Award requires UP to pay system gang employees the highest applicable rate under the UP and former SP system gang agreements.

I declare under penalty of perjury that the foregoing facts are true and correct. I further certify that I am qualified and authorized to make this statement.

Executed on December 23, 1997.

Wayne E. Naro

Wayne E. Naro

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 25)

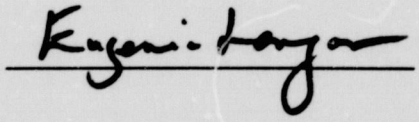
UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY -- CONTROL AND MERGER -- SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of December, 1997, served Union Pacific's Opposition to Petition for Stay of Arbitral Award and the accompanying Verified Statement of Wayne E. Naro by causing copies thereof to be delivered by hand to counsel for the petitioner as follows:

Donald F. Griffin, Esq.
Assistant General Counsel
Brotherhood of Maintenance of Way Employes
10 G Street, N.E., Suite 460
Washington, D.C. 20002



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*NOT ADMITTED IN D.C.

December 5, 1997

DELIVERY BY HAND

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Secretary
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Washington, D.C. 20036

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Dear Mr. Williams:

Enclosed for filing in the referenced matter are the original plus ten (10) copies of the Opposition to BMWE's Petition for Review of Arbitral Award and a separately bound volume of Exhibits (1-5).

Thank you for your assistance with this matter.

Very truly yours,

Eugenia Langan

Eugenia Langan
Attorney for Union Pacific
Railroad Company

Encl.
cc: Donald F. Griffin, Esq.

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December 5, 1997

OPPOSITION TO BMWE'S PETITION FOR REVIEW OF ARBITRAL AWARD

The Brotherhood of Maintenance of Way Employes ("BMWE") has petitioned under 49 C.F.R. § 1115.8 for review of the October 15, 1997 Award by Arbitrator Peter R. Meyers under the New York Dock conditions imposed in this docket upon the merger of the Union Pacific ("UP") railroads and the Southern Pacific ("SP") railroads, including the Denver & Rio Grand Western Railroad ("DRGW"). The Award provides for the selection and assignment of forces to implement the consolidation of certain maintenance-of-way functions in the Western Territory of the merged UP/SP system. To do so, Arbitrator Meyers found it necessary to place former SP Western Line and DRGW maintenance-of-way employees under a single local system-gang agreement, and that the appropriate agreement for this purpose was the existing agreement on UP-proper, with two modifications requested by the union to confer additional benefits upon employees. Operation under a single agreement will permit system gangs to work throughout the consolidated territory, while continuing under separate agreements would limit each gang to work within a single merged railroad as if no merger had occurred.[1/]

The BMWE's challenge to that commonplace implementing award does not merit review. Review of arbitration awards under 49 C.F.R. § 1115.8 is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [the] labor protective conditions." Chicago & N.W. Tptn. Co. -- Abandonment ("Lace Curtain"), 3 I.C.C.2d 729, 736 (1987)(emphasis added), aff'd sub nom. IBEW v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Review is not available on "factual questions," save in

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1/ "System gangs" on UP are large, mechanized gangs that work on maintenance-of-way projects over more than a single seniority district.

exceptional cases involving "egregious error." Id. at 735-36. The Meyers Award is not reviewable under either standard.

In an effort to raise a significant issue warranting review, the BMWE claims that Arbitrator Meyers applied the wrong standard under 49 U.S.C. § 11341(a) for determining whether it is necessary to place Western Territory maintenance-of-way employees under a single system-gang agreement.[2/] As we show below, however, Arbitrator Meyers applied precisely the same "necessity" standard approved time and again by the District of Columbia Circuit, the Interstate Commerce Commission, and by this Board: whether changes in collective bargaining agreements are necessary to achieve "public transportation benefits" of an approved merger, such as the "economies and efficiencies" expected to flow from a merger. Award at 20-21. Further, Arbitrator Meyers did not err, much less err egregiously, in applying that standard or in declining to cherry-pick from the BMWE national agreement provisions that have never applied to any of the merged carriers in the UP Western Territory.

Our showing in that regard should foreclose Lace Curtain review in this case. The BMWE, however, seeks to establish an entirely new standard of necessity -- one that would bar merged carriers from obtaining necessary changes under § 11341(a) or § 11321(a). That result would allow collective bargaining agreements to block public transportation benefits of mergers; it would nullify the plain language of §§ 11341(a)/ 11321(a) as well as the Supreme Court's 1991 ruling that § 11341(a) preempts

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2/ Because the application for the UP/SP merger was filed with the ICC prior to the ICC Termination Act, this proceeding is governed by former 49 U.S.C. §§ 11341(a) and 11347 rather than current §§ 11321(a) and 11326(a).

collective bargaining agreements as necessary to carry out mergers. Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991). A contention so squarely contrary to the statute and precedent does not merit review.

STATEMENT OF FACTS

The application for approval of the UP/SP merger was filed with the Interstate Commerce Commission on November 30, 1995. Among the anticipated public transportation benefits of the merger enumerated in the application were those resulting from territorial consolidations of track maintenance and repair functions, including economies and efficiencies that would result from establishing "system gangs or project teams, which [will] work throughout the [territorial] system as needed." Application at 93.

Appendix A of the Operating Plan submitted with the application explained further that a "balkanized and inefficient pattern of maintenance responsibilities" would be perpetuated if the UP and SP railroads continued to have separate maintenance systems, and that "a rational and logically unified" maintenance system must be created "to maintain rail lines in an efficient manner." Appendix A at 259 (Exhibit 1 hereto, and Carrier Arbitration Exhibit 1). Having thus established the need for changes, Appendix A went on to identify specific changes that would be made, including the following:

> "System Track Gangs. UP uses large, efficient mechanized track gangs that work over the entire UP system. UP/SP will create two large territories, one of which will comprise roughly the eastern half of the combined system and the other the western half. Each of these territories will include track in southern parts of the country where work can continue during winter months, which helps avoid furloughing employees part of the year.

". . . The western territory will consist of UP, SP Western Lines (SPWL), UP(WP) and DRGW territories, operating under the UP BMWE collective bargaining agreement." Appendix A at 261-62.

On August 6, 1996, this Board, as successor to the ICC, approved the UP/SP merger subject to the New York Dock conditions. The Board imposed conditions and restrictions on certain aspects of UP's proposed post-merger operations, but the Board imposed no restrictions upon UP's plan to operate system gangs as proposed in the application. Decision No. 44 (served Aug. 12, 1996).

Accordingly, on February 4, 1997, UP sent notice to the BMWE under Article I § 4 of New York Dock that the carrier proposed to do precisely what it had told the ICC and Board it would do in the Western Territory: ". . . establish system operations operating under the collective bargaining agreement between UPRR and BMWE." (Exhibit 2). As the parties were unable to reach an implementing agreement, the matter was referred to arbitration on July 7, 1997. The parties agreed to appointment of Arbitrator Meyers to hear and resolve the dispute.

Mindful that § 11341(a) allows only those modifications of collective bargaining agreements that are necessary to implement the public transportation benefits of mergers, UP limited the scope of the implementing agreement it presented to Arbitrator Meyers. (Exhibit 3.) Specifically, UP did not propose that all maintenance-of-way employees in the Western Territory be brought under a single agreement for all purposes, although that would have been the simplest approach from the carrier's point of view. Instead, UP proposed only to conduct consolidated system gang operations under a single system-gang agreement -- the existing UP-proper agreement.

As UP explained, each of the railroads merged into the Western Territory for maintenance purposes currently has its own pre-existing system-gang agreement with the BMWE. Carriers' Arbitration Submission at 75-77 (Exhibit 4). The merger is not a simple end-to-end merger, however; there is substantial geographical overlap between the merged carriers. See Operating Plan, Appendix A at 259. Further, there are inconsistencies among the merged carriers' system-gang agreements as to the type and number of gangs that may be established. Worse, the gangs under each merged carrier's agreement can work only on the former railroad property covered by that agreement or a subdivision of that property. Id. Thus, instead of consolidated operations, the pre-existing arrangements require that the system gangs be dismantled at the boundaries of the merged railroads or smaller subdivisions and the gang positions rebid on the next road or subdivision, and so on. Loss of time, loss of employee experience and gang cohesiveness, and added expense result each time a gang is dismantled and replaced.

To ensure effective and efficient maintenance functions in a large merged territory, the carrier must have the ability to deploy manpower in a consolidated fashion, where and when it is needed, unhampered by the now-imaginary boundaries of the formerly independent carriers. Carrier's Arbitration Submission at 58-60. The Western Territory, therefore, requires a single system-gang agreement, as UP argued. UP further argued that the UP system-gang agreement should be selected because it was the most flexible and thus best suited to efficient maintenance and repair functions over a large territory. Id. at 77.

UP presented Arbitrator Meyers with an extensive showing as to the substantial merger-derived public transportation benefits that would be achieved from operation of system gangs in the Western Territory under the UP system-gang agreement. These include savings from a modest reduction in force in the number of system gangs, but no furloughs as all affected employees will be able to hold jobs nearer to their homes. Also, UP would gain the ability to plan maintenance and repair projects on a territory-wide basis and deploy manpower in accordance with those projects without regard to the now-artificial boundaries in pre-merger system-gang agreements. This translates directly into public transportation benefits, because planning and carrying out maintenance and repair projects on an efficient, territory-wide basis will reduce incidents of traffic congestion that occur when such projects tie up track during peak traffic periods -- a critical imperative on a massive merged rail system. There would also be savings from elimination of duplicative equipment currently required for redundant gangs. Carrier Arbitration Submission at 58-72.[3/]

The BMWE did not contradict UP's evidence directly. Instead, the BMWE claimed that Article XVI § 6 of the union's 1996 national agreement with the National Carriers' Conference Committee (BMWE Exhibit 4 at 24) bars UP from consolidating system gang operations to implement the UP/SP merger. Article XVI of the 1996 agreement provides for a negotiation/arbitration procedure under the RLA through

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3/ Further, because the Western Territory encompasses several climate zones, territory-wide system gangs will provide employees with opportunities to work more of the year, rather than being furloughed seasonally when inclement weather in their districts prevents track work, as is frequently the case now. See Carrier's Arbitration Submission at 55-58.

which eligible carriers can seek to establish regional and system gangs. Section 6 of that Article simply limits the procedure to only three railroads, or parts of railroads -- the Burlington Northern side BN-SF, CSXT, and the Norfolk & Western side of NS -- and thus excludes UP, SP, and most other railroads from coverage. Section 6 provides that Article XVI is intended only "to continue the use of regional and system gangs after the implementation of the recommendations of PEB 219," not to provide the mechanism for other carriers to create these gangs. "PEB 219" is Presidential Emergency Board No. 219, which originally recommended the negotiation/arbitration procedure in 1991. The procedure was thus included in the 1991 national agreement. At the BMWE's insistence, however, carriers that wished to seek regional or system gangs under the national agreement had to forfeit any existing rights they had under their pre-existing local agreements to operate such gangs, before knowing the outcome of the prescribed arbitration. See NRLC-BMWE Contract Interpretation Committee, Answer to Issue No. 4 (Dec. 4, 1991) (BMWE Exhibit 6). Faced with that choice between the certainty of their local agreements and a "pig in a poke," most carriers, including UP and ultimately SP and DRGW, elected to retain their local system-gang agreements. See Testimony of Gary Lilly before Presidential Emergency Board 229 at 1151 (BMWE Exhibit 12)

In negotiations for the 1996 national agreement, the participating carriers (which included UP but not the SP roads) proposed that they all be permitted to invoke the national negotiation/arbitration procedure to seek new system gangs as well as retain the right to establish such gangs under local agreements. The BMWE vigorously opposed the carriers' proposal to extend the national regional/system gang procedure

to carriers that had opted out of it in 1991. Presidential Emergency Board 229 ultimately recommended, as the union had urged, that carriers such as UP and SP continue to be governed by "local provisions" for establishing regional or system gangs, rather than the national rule. PEB 229 Report at 37 (BMWE Exhibit 11). Article XVI, § 6 of the 1996 agreement simply recapitulates that recommendation. The recommendation was issued on June 23, 1996, over a month before this Board approved the UP/SP merger. UP settled outstanding local wage and rules disputes on SP and DRGW in that round of bargaining on the same basis. (BMWE Exhibit 14).

Thus, the national agreement made clear that the PEB 219 system gang procedures applicable on BN, CSXT and N&W do not apply to other railroads (including the UP and SP railroads). The BMWE contended before Arbitrator Meyers, however, that Article XVI represents an "agreement" of some kind not to exercise any other rights these other railroads may have or acquire to establish system gangs, and requires merged carriers to operate under multiple pre-existing local agreements (a matter not even mentioned before PEB 229 or in its report or in Article XVI). Arbitrator Meyers did not agree with the union that any arguably applicable collective bargaining provision could be enforced to block the merger of maintenance-of-way functions in the Western Territory, however. He recognized that § 11341(a) overrides collective bargaining agreements as necessary "to achieve the economies and efficiencies that are the purpose of the underlying rail consolidation." Award at 20. He further found, unremarkably, that such efficiencies and economies constitute a public transportation benefit under governing ICC and STB decisions. Id. at 22.

Arbitrator Meyers found that UP's evidence demonstrated that "these very efficiencies and economies can be realized in connection with the merger at issue if it is allowed to implement system operations," including the ability to "schedule its maintenance of way employees in a more efficient and productive manner" than was possible before the merger. Award at 21. Based on this evidence, Arbitrator Meyers found:

> "It is not possible to properly implement a system operation, and achieve the economies and efficiencies associated with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements [governing system gangs]. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into, and perhaps completely destroy, any possibility of achieving the efficient. coordinated, economical operation promised by a consolidation. If the Carrier's maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single [system-gang] agreement" in the Western Territory. Award at 22-23 (emphasis added).

In short, operation under a single system-gang agreement is necessary to achieve public benefits of consolidated operation.

UP, as noted, had proposed the UP-proper agreement with the BMWE as the single system-gang agreement that should be applied throughout the Western Territory. The BMWE did not argue for a different choice. Award at 23. Instead the BMWE argued that if the arbitrator approved system gang operations in the Western Territory under a single agreement, the agreement should be modified to include various provisions the union had "cherry-picked" from agreements that do not apply to any of the merged carriers -- including Article XVI of the national agreement, notwithstanding

the union's vigorous and successful effort to exclude UP from coverage under that Article.

Arbitrator Meyers thus upheld UP's basic proposal to use the UP-proper agreement as the single governing system-gang agreement for the Western Territory, necessarily overriding the SP and DRGW system-gang agreements in that territory, and also Article XVI of the national agreement to the extent that it might be interpreted to bar system gangs on the merged UP/SP system under a single agreement. Award at 24.[4/]

Arbitrator Meyers further determined, however, that two of the proposed modifications sought by the union should be adopted: (1) a proposal that UP pay employees working on the system gangs the highest rate for their positions under any of the system-gang agreements on UP, SP, or DRGW; and (2) a proposal that UP pay an annual bonus of up to $1,000 to employees who remain on system gang positions for at least six months a year. Id. He declined, however, to impose further operational restrictions found in no agreement anywhere or to cherry-pick restrictions applicable under Article XVI on certain other railroads. Id.

Dissatisfied, the BMWE filed its Petition for Review.

4/ Arbitrator Meyers also rejected claims by the BMWE that UP's New York Dock notice did not present a "transaction" and that an expense-reimbursement provision in the DRGW agreement is a fringe benefit immune from changes under § 11341(a). The union has not appealed those determinations.

ARGUMENT

I. ARBITRATOR MEYERS APPLIED THE CORRECT NECESSITY STANDARD

Former § 11341(a) and current § 11321(a) expressly provide that the approval of a merger by the ICC or this Board "exempt[s] participating carriers "from all other law," as "necessary to . . . carry out the transaction." The Supreme Court has held that this provision "supersedes" the Railway Labor Act ("RLA") and "bargaining agreements enforceable under" that Act "as necessary to allow achievement of the efficiencies of consolidation." Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 132-33 (1991).

Ensuing decisions by the District of Columbia Circuit, the ICC, and this Board are in accord as to the standard for necessity under § 11341(a)/11321(a) and the Train Dispatchers decision. The Board recently summarized those decisions as follows in affirming, in pertinent part, an implementing award by Arbitrator James Yost governing another union in this merger:

> "It is now firmly established that the Board, or arbitrators acting pursuant to authority delegated to them under New York Dock, may override provisions of collective bargaining agreements when an override is necessary for realization of the public benefits of approved transactions."

STB Finance Docket No. 32760 (Sub-No. 22), slip op. at 4 (served June 26, 1997) ("Yost Review") (emphasis added), citing Train Dispatchers, supra; RLEA v. United States, 987 F.2d 806 (D.C. Cir. 1993); ATDA v. ICC, 26 F.3d 1157 (D.C. Cir. 1994); and UTU v. STB, 108 F.3d 1425 (D.C. Cir. 1997).

The Board noted the court's admonition in the RLEA case that agreements cannot be modified "willy-nilly" or "merely to transfer wealth from employees to their

employer," but only "to secure some public transportation benefit that would not be available if the CBA were left in place." 987 F.2d at 814-15. "In other words," the Board concluded, "the court's standard is whether the change is necessary to effect a public benefit of the transaction." Slip op. at 4.

That is precisely the standard Arbitrator Meyers applied in this case. He determined that the agreement changes sought by UP are "necessary to achieve the economies and efficiencies that are the purpose of the underlying rail consolidation" and "generate a public transportation benefit." Award at 20-21. This is also the same necessity standard articulated by Commissioner Owen in the decision approving this merger, contrary to the BMWE's suggestions.[5/] In short, there is no tenable basis for any claim that Arbitrator Meyers strayed from the necessity standard expressed in existing well-established law.

The BMWE claims, however, that the Arbitrator should have "balanced" labor's "right to rely upon the collectively bargained deals it struck with [the] carrier" against the need for changes in agreements to secure merger-related transportation benefits, or independently "accommodated" the policies of the RLA and § 11341(a). BMWE Petition at 18, 27-28. According to the BMWE, the outcome of this new "balance" and "accommodation" approach should be to foreclose changes under § 11341(a) or § 11321(a) in agreements on subjects that a carrier and union have "bargained to

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5/ Commissioner Owen tracked the necessity holding of RLEA, stating that "necessary" means "required . . . to implement the transaction and not merely as a convenient means of achieving cost savings or, as a federal court noted, 'merely to transfer wealth from employees to their employer.'" Decision No. 44, slip op. at 251.

conclusion under the RLA," regardless of how necessary the changes might be to realize public benefits of merged operations. Id. at 18.

The BMWE made exactly the same argument to this Board during the approval proceedings for this merger. See Transcript of Oral Argument in Finance Docket N. 32760 (Jul. 1, 1996) at 495-496 (Exhibit 5). The Board did not accept the argument then, and it should fare no better now. All collective bargaining agreements deal with subjects that the parties have "bargained to conclusion" under the RLA, at least until a subject is reopened. "Bargaining to conclusion" is the essence of any collective bargaining agreement. Thus, the "accommodation proposed by the BMWE is not an accommodation at all. It would deprive this Board and its delegated arbitrators of their authority under § 11341(a) and § 11321(a) to override any collective bargaining agreement, contrary to the Supreme Court's ruling in Train Dispatchers.

In addition, § 11341(a) does not allow for arbitrators or anyone else to engage in free-wheeling accommodation of the policies of the RLA and the Interstate Commerce Act. The accommodation is embodied in the statutory "necessity" standard prescribed by Congress and applied by Arbitrator Meyers. When a carrier's agreements under the RLA would interfere with implementation of an approved merger, the carrier is "exempt" from the agreements. § 11341(a); § 11321(a). Thus, where collective bargaining agreements would prevent realization of "the efficiencies of consolidation," § 11341(a) requires that the agreements yield to the efficiencies, not the other way around. Train Dispatchers, 499 U.S. at 132-33. In short, in § 11341(a), Congress itself struck the

balance between RLA agreements and changes that are necessary in mergers -- in favor of the mergers.[6/]

Moreover, the BMWE's proposed new standard flies in the face of decisions of the ICC, this Board, and the District of Columbia Circuit resolving the question of how rail labor's interest in preserving collective bargaining agreements should be accounted for in mergers. CSXT Corp. -- Control -- Chessie System, et al., Finance Docket No. 28905 (Sub-No. 27) (served Dec. 7, 1995), aff'd UTU v. STB, supra; Yost Review, supra. Under these decisions, provisions in labor agreements that establish ancillary "rights, privileges and benefits" -- which are not likely to impede a merger -- must be preserved intact. CSXT, slip op. at 15; Yost Review, slip op. at 7; New York Dock, Article I § 2. But "the more central aspects of the work itself -- pay, rules and working conditions" -- which may impede a merger, can be modified or overridden as necessary to achieve the transportation benefits of a merger." CSXT, slip op. at 14-15; Yost Review, slip op. at 7.

As the court held in UTU v. STB, under this approach,

6/ The BMWE claims to find support for its "balancing" approach in the ICC's so-called Carmen Remand decision, 6 I.C.C.2d 715 (1990). That decision, however, was decided on remand from an erroneous court decision holding that § 11341(a) could not be applied to modify or override collective bargaining agreements, before the Supreme Court reversed that decision in Train Dispatchers. In short, the governing ground rules were changed when the Train Dispatchers decision came down. In any event, Carmen Remand cannot possibly be read to hold that private collective bargaining agreements should ever be allowed to frustrate the public interest in efficient implementation of mergers.

So too, neither § 11341(a) nor any other express preemption provision -- nor, for that matter, the RLA -- was applicable in the motor and water carrier cases the BMWE cites at page 27 of its Petition.

> "the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by the Congress." 108 F.2d at 1430 (emphasis added).

The BMWE does not contend here that any of the agreement terms overridden by the Meyers Award establish "rights, privileges [or] benefits," and none of them do. Thus, the result it seeks would negate "what was intended by Congress" as to the proper interplay between § 11341(a) and the interests of rail labor.

All subjects in a collective bargaining agreement have been bargained to conclusion for purposes of that agreement -- but usually only until the next round of negotiations or an intervening change. Adopting the BMWE's contentions would put arbitrators and this Board in the business of striking ad hoc balances between the Interstate Commerce Act and the RLA and deciding which agreements have been "bargained to conclusion" without any standard for decision -- resulting in "willy-nilly" changes of the precise sort that the Court of Appeals condemned in RLEA. 987 F.2d at 814-15.

In any event, Arbitrator Meyers simply applied the § 11341(a) necessity standard repeatedly endorsed by the Court, this Board, and the ICC. Accordingly, review of this issue is unwarranted under Lace Curtain. The Board can and should deal summarily with the BMWE's request for a new balancing standard that would allow collective bargaining agreements to thwart the public benefits of approved mergers, contrary to the statute and all relevant rulings of the Supreme Court, the Court of Appeals, and this Board itself.

II. ARBITRATOR MEYERS DID NOT ERR, EGREGIOUSLY OR OTHERWISE, IN FINDING THAT A SINGLE SYSTEM-GANG AGREEMENT IS NECESSARY

An arbitrator's finding as to the necessity of particular changes under § 11341(a) "is a factual finding" that can be reviewed "only if the arbitrator committed egregious error." Yost Review, slip op. at 4. The finding of necessity in this case was not only not egregious error: it was not error at all.

In this case, Arbitrator Meyers found that if "the Carrier's maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single [system-gang] agreement" in the Western Territory. Award at 22-23. To achieve this result, the Arbitrator further found it necessary to override the SP and DRGW system-gang agreements, which would have blocked operation under a single system-gang agreement, as well as Article XVI of the national agreement to the extent it might be interpreted to block this consolidation. Id. These findings were based on substantial evidence submitted by UP as to the public transportation benefits that will result from consolidated system gang operations in the Western Territory -- not the least of which is avoidance of unnecessary traffic congestion resulting from track work. Id. at 21-22. These findings simply implement the changes for the Western Territory that UP proposed in its Operating Plan. In short, the Arbitrator's necessity findings are not erroneous, certainly not egregiously erroneous.

The BMWE contends, however, that UP has "admitted" in collective bargaining in 1991 and 1996 that it is not necessary to operate under a single system-gang

agreement in the Western Territory, and that Arbitrator Meyers erred egregiously in declining to estop UP from seeking a single agreement on the basis of these so-called admissions. See BMWE Petition at 26-20. This contention has no basis in fact.

First, the BMWE says that the arbitration procedure under the 1991 national agreement for establishing regional and system gangs gave UP "the right to operate regional or system production gangs over UP, MP, and WP" and that UP admitted that such operations are not necessary on carriers under common control when it elected to retain its existing system-agreement rules. As noted, however, the choice presented to UP was between gambling that it might obtain extensive system gang operations through arbitration, or keeping its established system gang rights; it certainly never stated or agreed that system gangs are unnecessary. See Lilly Testimony, supra (BMWE Exhibit 12 at 1151). Moreover, the choice that UP made in 1991, when its system was comprised of only a few, mostly end-to-end, former railroads, has no bearing on what is necessary in a merger six years later that created the largest railroad in the United States with substantial overlap of trackage and existing maintenance-of-way functions. A merger of UP and SP was not even contemplated in 1991.

Second, the BMWE claims that UP admitted that a single system-gang agreement is not necessary by agreeing under Article XVI of the 1996 national agreement to "perpetuate" its 1991 election not to come under the 1991 arbitration procedure, and again by settling outstanding disputes on the SP and DRGW on the same basis. BMWE Petition at 21. The BMWE stresses that these agreements were signed after this merger was approved. They were based, however, on the recommendations of Presidential Emergency Board 229 issued on June 23, 1996, over

a month before this merger was approved. UP and the other carriers resisted those recommendations. With the prospect of a national strike looming, however, the recommendations were ultimately incorporated verbatim into the 1996 agreement, as the parties were unable to agree on contract language. At all relevant times, UP's Operating Plan was before the Board, making clear that UP reserved the right under § 11341(a) to seek to operate the entire consolidated Western Territory under the UP system-gang agreement. Operating Plan, Appendix A at 259-60. Article XVI of the 1996 national agreement and the SP settlements do not purport to waive UP's statutory right in that regard or estop UP from pursuing that right.

No such waiver or estoppel can be implied, moreover. The carriers' testimony on regional and system gangs to Presidential Emergency Board 229 -- which the BMWE has included as Appendices 12 and 13 -- did not ask the Board to decide whether system gangs are necessary under § 11341(a) to achieve public transportation benefits from a merger approved by this Board. Neither did the BMWE's. Emergency Boards sit to recommend collectively bargained resolutions of disputes under the RLA, a very different exercise from determining under § 11341(a) whether it is necessary in the context of a merger to override the RLA and collectively bargained resolutions. For that reason, PEB 229 did not "reject the argument that operation of system gangs is necessary to the carrying out of railroad mergers" either explicitly or "implicitly," contrary to the BMWE's assertion (at 21). Indeed, PEB 229 provided no explanation whatever of its reasoning.

In any event, UP's 1991 election of its own local system-gang agreement rather than the risky national rule and the subsequent perpetuation of that election by

PEB 229 are in no way inconsistent with UP's current effort under § 11341(a) to establish that local agreement as the single agreement for the consolidated Western Territory. What the BMWE wanted, and won in 1991 and 1996 -- and all that UP agreed to -- was that UP would not come under the national rule for system gangs.

But if, as the BMWE contends, the choices that UP made in collective bargaining memorialized in Article XVI of the 1996 national agreement (and counterpart local settlements) stand in the way of the public transportation benefits of the UP/SP merger, § 11341(a) exempts UP from that Article. Train Dispatchers, supra. Arbitrator Meyers recognized this and thus found that it is necessary to override Article XVI of the 1996 agreement insofar as it might prevent operation of system gangs under a single agreement in the Western Territory. Award at 23. This finding was not erroneous, egregiously or otherwise, and -- contrary to the BMWE's assertions -- required no further explanation.[7/]

In sum, the BMWE has shown no basis for the Board to review the Arbitrator's factual necessity findings.

7/ The BMWE also asserts that UP has "admitted" that a single system-gang agreement in the Western Territory is unnecessary by refraining from proposing a single agreement for the entire merged UP/SP system. BMWE Petition at 20. That assertion is a non sequitur. From the moment its merger application was filed, UP has proposed subdividing maintenance-of-way functions on the merged railroad into two territories, one in the west and one in the east. The two territories will be roughly balanced geographically so that the benefits of consolidated operations can be realigned with each territory, without creating a system so big as to be unwieldy. Nothing in § 11341(a) or the decisions thereunder require a carrier to make greater changes than are necessary to ensure that the intended efficiencies of a merger are implemented.

III. ARBITRATOR MEYERS DID NOT ERR IN DECLINING TO CHERRY-PICK OPERATIONAL RESTRICTIONS FROM THE NATIONAL AGREEMENT

Finally, the BMWE claims that Arbitrator Meyers erred egregiously by declining to borrow operational restrictions on system gangs under Article XVI of the national agreement -- which do not apply on the UP or SP railroads -- and impose those restrictions on UP. Specifically, the BMWE claims that the Arbitrator should have cherry-picked national rules "limiting the operation of system gangs to certain types, requiring a minimum complement in any system gang and requiring the carrier to 'program' its system work in advance." BMWE Petition at 28. This claim clearly does not merit review.

In approving this merger, the Board disapproved a request from rail labor that "any CBA 'rationalization' be accomplished by allowing UP/SP's unions to 'cherry-pick' from existing UP or SP agreements." Decision No. 44, slip op. at 174. The BMWE's demand for imposition of the Article XVI restrictions goes even farther than that: the BMWE wants to cherry-pick rules that do not apply under any existing UP or SP agreement. As the BMWE admits, the Article XVI restrictions it seeks do not apply to UP at present, because the BMWE was successful in its efforts in 1991 and 1996 to keep UP and similarly situated carriers under local rather than national rules. BMWE Petition at 28. Because SP and DRGW also opted to retain their local agreements, Article XVI restrictions do not apply on those railroads either.

The BMWE's effort to cherry-pick rules that do not apply on any of the merged railroads goes well beyond the New York Dock protective conditions, which preserve only certain terms in existing agreements on the participating carriers. See Article I § 2.

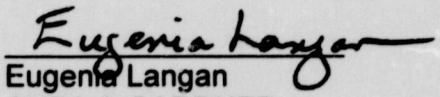
In approving this merger, the Board concluded that no protection beyond New York Dock should be imposed because no "unusual circumstances have been shown in this case to justify additional protection." Decision No. 44, slip op. at 172. In light of that determination, Arbitrator Meyers did not err in refusing to cherry-pick the Article XVI restrictions. UP's effort to implement the changes it had proposed to the Board in the Operating Plan certainly does not present an "unusual circumstance."

The BMWE nevertheless claims that Arbitrator Meyers should have cherry-picked those restrictions to ensure that UP does not obtain a competitive disadvantage over the three carriers that operate system gangs under Article XVI of the national agreements. BMWE Petition at 29. A New York Dock arbitrator has no charter, however, to consider the putative competitive interests of carriers that are not parties to the merger at bar. Moreover, this Board -- after considering the record, including provisions of the Operating Plan outlining UP's plan to operate system gangs in the Western Territory under the UP agreement -- has concluded that this merger will not have anticompetitive effects. Decision No. 44, supra. The BMWE has no credible basis for second-guessing that conclusion.

CONCLUSION

None of the BMWE's contentions merit review by this Board. The BMWE's Petition for Review of Arbitral Award should therefore be denied.

Respectfully submitted,



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Attorneys for Union Pacific Railroad Company

December 5, 1997

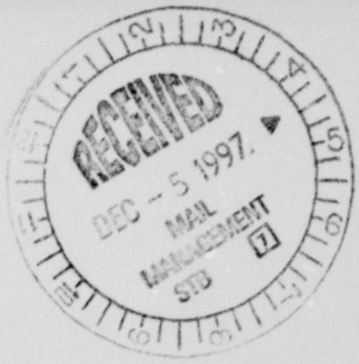
CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of December, 1997 served the foregoing Opposition to BMWE's Petition for Review of Arbitral Award and Exhibits thereto by causing a copy thereof to be delivered by hand to counsel of record for the Brotherhood of Maintenance of Way Employes, as follows:

Donald F. Griffin, Esq.
Assistant General Counsel
Brotherhood of Maintenance of Way Employes
10 G Street, N.E., Suite 460
Washington, D.C. 20002

Eugenia Langan
Eugenia Langan

184620

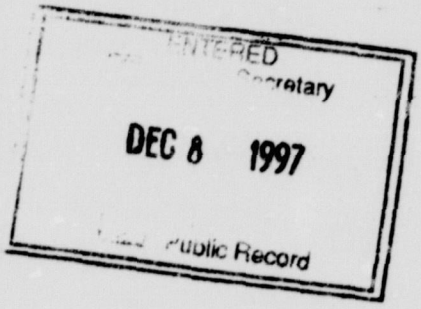


BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (SUB-NO. 25)

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 & RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)



EXHIBITS TO

OPPOSITION TO BMWE'S PETITION FOR REVIEW OF ARBITRAL AWARD

Brenda J. Council
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December 5, 1997

TABLE OF CONTENTS

(Selected Portions of Arbitration Record and/or
Record of Merger Approval Proceedings)

Excerpt from Operating Plan, Appendix A

CORRIDOR	TERMINAL	TERMINAL
Southern California	Los Angeles Area[1]	Bakersfield
	Los Angeles Area[1]	San Luis Obispo
	Los Angeles Area[1]	Yermo
	Los Angeles Area[1]	West Colton
	Los Angeles Area[1]	Los Angeles Area[1]
	Las Vegas	West Colton
	Tucson	Glamis/Clyde
	Glamis/Clyde	Los Angeles Area[1]

Maintenance of Way Organization

As a glance at a rail map confirms, UP and SP rail lines serve many of the same geographical areas in parallel, crossing or complementary configurations. As separate railroads, UP and SP maintain these tracks with entirely separate maintenance, track and bridge forces, even where this is obviously inefficient. For example, in Northern Nevada, UP and SP main lines are paired for more than 150 miles, sometimes on the same roadbed, but collective bargaining restrictions require the two tracks to be maintained by separate forces. In order to maintain rail lines in an efficient manner, UP/SP must transform this balkanized and inefficient pattern of maintenance responsibilities into a rational and logically unified maintenance capability.

---

[1] The "Los Angeles Area" includes:
Los Angeles and Long Beach Harbors
East Los Angeles, Mira Loma and Montclair Yards
Taylor and West Colton Yards
City of Industry
ICTF/Dolores
LAXT Coal Terminal
Alameda Corridor

1. Maintenance of Way Districts. To operate as planned, UP/SP must reorganize track maintenance seniority districts so that employees can work on all UP/SP tracks in a common geographical area. The following modifications are required:

a. The SP Western Lines seniority divisions and collective bargaining agreement will encompass all UP operations west of Daggett, California; the UP(WP) territory; and UP operations in El Paso.

b. DRGW employees will be placed under the UP collective bargaining agreement, with the territory from Grand Junction to Ogden merged into the Utah Seniority Division, the territory from Grand Junction to Denver merged into the Wyoming Seniority Division, and employees on the Hoisington Subdivision merged into the UP Kansas Seniority Division.

c. The following operations will be placed under the UP(MP) collective bargaining agreement:

- SPCSL, merged into the Illinois Seniority Division.

- SSW from St. Louis to Owensville, Missouri merged into the Old Eastern Seniority Division.

- SSW operations in the St. Louis terminal, merged into Consolidated Seniority District No. 1.

- SP operations in the Kansas City terminal, merged into the Kansas City Terminal Seniority Division.

- SSW Seniority District #1, merged into the Arkansas Seniority Division along with the UP Louisiana Seniority Division from Paragould to Helena Jct.

- SSW territories from Texarkana to Ft. Worth, Mt. Pleasant to Big Sandy, and Ft. Worth and Denison to Ennis, merged into the Red River B Seniority Division, along with the UP(MKT) territory from the Red River to Alvarado and Dallas.

- SSW territories from Big Sandy to Corsicana, Ennis to Hockley and Flatonia, and Glidden to and including San Antonio, merged into the Palestine Seniority Division. along with UP(MKT) territory south of Alvarado.

- SP's Corpus Christi and Brownsville Branches and the SP lines from Flatonia to Victoria, Coleto Creek to Victoria, Victoria to Port Lavada, Victoria to West Junction (including the New Gulf Branch), West Junction to Glidden and Bellaire Junction to Eagle Lake (including the Arenal Lead), merged into the Kingsville Seniority Division.

- All operations in Houston will be consolidated into a new separate seniority division.

2. System Track Gangs. UP uses large, efficient mechanized track gangs that work over the entire UP system. UP/SP will create two large territories, one of which will comprise roughly the eastern half of the combined system and the other the western half. Each of these territories will include tracks in southern parts of the country where work can continue during winter months, which helps avoid furloughing employees part of the year.

The eastern territory, which will operate under the MPRR Brotherhood of Maintenance of Way Employees ("BMWE") collective bargaining agreement, will consist of SP Eastern Lines, UP(MP), UP(MKT), UP(OKT), UP(CNW) and SSW territories. The

western territory will consist of UP, SP Western Lines (SPWL), UP(WP) and DRGW territories, operating under the UP BMWE collective bargaining agreement.

3. Work Equipment Mechanics. UP and SP have nine different collective bargaining agreements covering the job classification of Work Equipment Mechanic. This work must be realigned in a merged system. All work on UP(MP, MKT, OKT, CNW), SSW and SP Eastern Lines will be consolidated under the UP(MP) collective bargaining agreement with BMWE. All work on UP, UP(WP), SPWL and DRGW will be consolidated and assigned to mechanics represented by the International Association of Machinists.

4. Bridge and Building. Bridge & Building ("B&B") forces construct and maintain bridges, culverts, tunnels and other facilities over large geographical areas. As a merged system, UP/SP must consolidate B&B operations to reduce travel time and increase efficiency. The following changes are needed:

- SSW Seniority Districts 1, 3 and 4, as well as the SPCSL, will be merged into UP(MP) System Gangs North and placed under the UP(MP) collective bargaining agreement.

- SP Eastern Lines and SSW Seniority District 2 will be merged into UP(MP) System Gangs South and placed under the UP(MP) collective bargaining agreement.

- UP(WP) employees will be consolidated into SPWL seniority districts and become subject to the SPWL BMWE agreement.

- DRGW territory from Grand Junction to Ogden will be placed under the UP BMWE agreement and merged into the Utah Seniority Division and South Central Seniority Division.

- DRGW territory from Grand Junction to Denver will be placed under the UP BMWE agreement and merged into the Wyoming Seniority Division and Eastern District Seniority Division.

- UP territory west of Daggett, California, will be consolidated into appropriate SPWL seniority districts and become subject to the SPWL BMWE agreement.

- DRGW employees from Pueblo to Herington will be placed under the UP BMWE agreement and merged into the Kansas Seniority Division.

- SSW operations at Kansas City will be placed under the UP(MP) BMWE agreement and merged into the Kansas City Terminal Seniority Division.

- SSW operations in the St. Louis terminal and between St. Louis and Owensville, Missouri, will be placed under the UP(MP) BMWE agreement and merged into consolidated Seniority Division #1.

- SSW territory from Illmo, Missouri, to Texarkana and Shreveport and the UP(MP) Arkansas Seniority Division will be consolidated under the UP(MP) BMWE agreement and merged into the Louisiana Seniority Division.

- SPCSL territory will be placed under the UP(MP) BMWE agreement and merged into the Illinois Seniority Division.

- The SP Houston terminal and lines from Houston to Shreveport, Houston to Galveston, and New Orleans to a point east of Greens Bayou, Louisiana, will be placed under the UP(MP) agreement and merged into the DeQuincy Seniority Division, along with the UP(MKT) territory from Sealy, Texas, to Galveston. All other portions of the SP Houston Seniority Division will be merged into the Kingsville Seniority Division.

- SSW territory south of Texarkana, including the territory from Corsicana to Denison and Ft. Worth, will be placed under the UP(MP) BMWE agreement and merged into the UP (Old TP) Seniority Division.

- The remaining portions of the SP Houston Seniority Division not consolidated into the UP(MP) DeQuincy Seniority Division will be placed under the UP(MP) BMWE agreement and merged into the Kingsville Seniority Division.

- The SP Dallas Austin Seniority territory from Corsicana, TX, to Denison, TX, and to Ft. Worth will be placed under the UP(MP) BMWE agreement and merged into the old UP (Old TP) Seniority District. The remaining portions of the SP Dallas Austin Seniority Division will be placed under the UP(MP) BMWE agreement and merged into the UP(MP) Palestine Division Seniority District.

5. Signal. The signal operation is similarly divided among multiple labor contracts that would restrict the merged company from realizing the benefits of the merger. Signal operations will be consolidated as follows:

- The Roseville, California and Houston, Texas signal shops will be closed and the work transferred to the signal shop in Sedalia, Missouri.

- The territories comprising the SP Eastern Lines and the Cotton Belt would be consolidated with the UP(MP) and placed under the UP(MP) collective bargaining agreement. This is dictated by the number of parallel lines in these three territories, and the opportunity to consolidate operations and coverage. This will result in better response time for crossing failures, which will reduce train delays and provide greater safety for the public.

- The territories in the Los Angeles Basin area would be placed under the SP collective bargaining agreement.

- The territory of the former WP would be placed under the SP collective bargaining agreement.

- In order to maximize the efficiency of our construction gang, it is contemplated that the territory of the combined system be divided along the same lines as the system maintenance operations. The territory of the SP Western Lines, DRGW, and UP would comprise one construction

territory. The second territory would encompass the SP Eastern Lines, the UP(MP), Cotton Belt and CNW territory. These gangs are primarily involved in crossing installation, new line construction, and signal upgrade programs. They necessarily must cover large territories to be cost effective and to provide constant work opportunity for the employees.

Conclusion

These are among the presently foreseeable changes for train crews, maintenance and signal employees resulting from the Operating Plan. Additional changes in labor assignments for mechanical, clerical and other crafts are also described in the Operating Plan and the Labor Impact Exhibit. These kinds of changes will enhance the combined UP/SP system's competitive posture and will permit it to provide unprecedented service benefits to its customers. If the merger is approved, UP/SP is likely to identify additional or modified opportunities to improve service, resulting in additional changes of these types.

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

RECEIVED
FEB - 6 1997
BMWE

February 4, 1997

L/R File: NYD-235

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. W. F. Gulliford
General Chairman, BMWE
1010 S. Joliet St. Suite 100
Aurora, Colorado, 80012-3150

Mr. D. E. McMahon
General Chairman, BMWE
930 Alhambra Blvd. Ste. 260
Sacramento, Ca. 95816

Mr. R. B. Wehrli
General Chairman, BMWE
1010 S. Joliet St. Ste. 102
Aurora, Colorado, 80012-3150

Gentlemen:

The U.S. Department of Transportation, Surface Transportation Board (STB), approved in Finance Docket 32760 the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad and Missouri Pacific Railroad), collectively referred to as "UPRR" and the rail carriers controlled by Southern Pacific Rail Corporation(Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation, and Denver and Rio Grande Western Railroad Company), collectively referred to as "SP". As part of the approval, the STB authorized the establishment of system gangs to work over territories covered by your respective collective bargaining agreements. In so doing the STB imposed the New York Dock employee protective conditions.

Therefore, pursuant to Section 4 of the New York Dock conditions, notice is hereby given of UP's intent establish such system operations operating under the collective bargaining agreement between UPRR and BMWE. Copies of this notice will be posted at locations accessible to interested employees as information and in compliance with the notice provisions of New York Dock.

g:\labor\naro\nyd-235 nyd-235

It is not anticipated that any employees will be affected (displaced or dismissed) as a result of this transaction.

It is suggested that we meet in the offices of the Carrier at 1416 Dodge St. Room 332 B, Omaha, Nebraska, 68179, beginning at 1:00 p.m. on February 18, 1997, and continuing through February 19, 1997. Please advise if the date and time are acceptable.

Yours truly,

W.E. Naro

W.E. Naro
Director Labor Relations
Maintenance of Way & Signal

MERGER IMPLEMENTING AGREEMENT

between

UNION PACIFIC RAILROAD COMPANY

and the

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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 ("SPT"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp., and the Denver & Rio Grande Western Railroad Company ("DRGW") (collectively referred to as "SP") in Finance Docket 32760. 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 territory covered under a single, common collective bargaining agreement,

IT IS AGREED:

Section 1.

All system gang operations will be combined on UPRR, WPRR, SPRR and D&RGW territories and will be subject to the collective bargaining agreement between the Union Pacific Railroad (UPRR) and the Brotherhood of Maintenance of Way Employees (BMWE) effective January 1, 1973 (including revisions to April 1, 1992, as amended).

Section 2.

(A) UPRR, WPRR, SPRR and D&RGW employees who, prior to the effective date of the agreement, had a right based on their seniority to work on system type operations within their respective territories, will have their name and seniority dates dovetailed onto the UPRR System Gang seniority rosters for the following ten (10) classifications, as applicable:

GROUP 20: ROADWAY EQUIPMENT SUBDEPARTMENT

(A) Roadway Equipment Operator
(B) Roadway Equipment Helper

GROUP 26: TRACK SUBDEPARTMENT

(A) System Extra Gang Foreman
(B) System Assistant Extra Gang Foreman
(C). System Gang Track Machine Operator
(D) System Gang Truck Operator/Bus
(E) System Extra Gang Laborer
Special Power Tool Machine Operator (SPTMO)
Roadway Power Tool Machine Operator (RPTMO)
Roadway Power Tool Operator (PTO)
Track Laborer

GROUP 27: TRACK SUBDEPARTMENT

(A) Track Welding Foreman
(B) Track Welder - Machine
(C). Track Welder Helper

Section 3

(A) UPRR division/district personnel who do not have seniority in Group 20, 26, or 27 prior to the effective date of this agreement will be added to the rosters identified in Section 2 (A), as applicable. These employes will be given seniority dates as of the effective date of the implementing agreement, on the applicable roster, and the ranking order will be determined by ranking the employees with the oldest division/district seniority dates first.

(B) All new employees hired to fill positions as identified under Section 2 (A) will establish seniority on the applicable system seniority roster pursuant to Rule 15(a) of the Collective Bargaining Agreement betwenn UPRR and BMWE.

Section 4

(A) All employees listed on the combined rosters established under Section 2(A) will have their hire date in the maintenance of way department listed next to their seniority date and the following designations listed next to their name.

Employee	Designation
UPRR	U
SPRR	S
WPRR	W
DRGW	D

Example

Designation	Name	SS#	Seniority Date	Hire Date
S	Brown JC	520-48-0901	7-16-73	2-8-71

(B) When employees with designations apply for bulletined Group 20, 26, or 27 positions, assignments will be handled as follows:

(1) When bids are received from only S,W, and D designated employees, the employees listed on the applicable seniority roster with the superior seniority date/ranking will be assigned.

(2) When bids are received from only U designated employees, the employee listed on the applicable seniority roster with the superior date/ranking will be assigned.

(3) When bids are received from U, and S, W, or D employees, the senior U designated employee and senior S,W, and D designated employee will be identified and the employee with the senior hire date will be assigned.

(C) The exercise of seniority displacement rights by U, S, W, and D deisgnated employees will be controlled by the same principles set forth in Section 4(B) above.

Section 5

(A) Except as provided above, all new positions or vacancies that are to be filled for system type operations identified in Article 1, Section 2 (A) of this Agreement will be bulletined and assigned in accordance with Rule 20 of the Collective Bargaining Agreement between the UPRR and BMWE.

(B) Except as provided above, employees assigned to system type operations identified in Section 2 (A) whose position is abolished or who are displaced will be governed by Rule 21 of the Collective Bargaining Agreement between the UPRR and BMWE.

(C). Employes assigned to system type operations identified in Section 2 (A) will be governed by Rule 22 of the Collective Bargaining Agreement for the purpose of seniority retention on system seniority rosters.

(D) Employees who have seniority on the system combined roster and who are regularly assigned in a lower class or who are furloughed from the service of the carrier will be governed by Rule 23 of the Collective Bargaining Agreement between the UPRR and BMWE.

(4) Any "displaced" employes will file an initial claim with the Supervisor Protection Administration at the address set forth in Section 2 above. If an employe is determined to be eligible for displacement allowances, the employe will be paid a differential allowance for each month in which he/she is entitled. Such employe need not file any additional forms unless he/she becomes furloughed. In such an event, the employe will be subject to the requirements of a dismissed employe as set forth above.

Section 8

This agreement will constitute the required agreement as provide in Article 1 Section 4 of the New York Dock employee protective conditions. Any claims for disputes arising from the application of this Agreement or the protective conditions referred to in Section 6 will be handled directly between the General Chairman and Director of Labor Relations.

This agreement will become effective on the _____ day of _____ 199__.

In the matter of arbitration between }
Brotherhood of Maintenance of Way Employes }
}
- and - }
}
Union Pacific Railroad Company }

CARRIER'S SUBMISSION

CARRIER'S STATEMENT OF ISSUE:

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

CARRIER'S STATEMENT OF FACTS:

On November 30, 1995, application was filed with the Interstate Commerce Commission by Unior Pacific Corporation (UPC) seeking to obtain common control and to merge the rail carriers controlled by UPC (Union Pacific Railroad Company and Missouri Pacific Railroad Company) with the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company-Eastern and Western Lines, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver & Rio Grande Western Railroad Company). In this application, the Carriers sought to establish that significant economies and efficiencies could be achieved by the merger of these

railroads and thereby provide a transportation benefit to the public.

As part of these economies and efficiencies, the Carriers defined at page 93 of Volume 3 "Railroad Merger Application" four (4) main areas where Engineering activities would contribute to these economies and efficiencies. One of these four main areas was "(2) system gangs or project teams, which work throughout the system as needed;". Following on page 94, the Carriers summarized the functions of a system gang and mentioned some of the benefits to be achieved with system gangs performing maintenance of way work on the infrastructure and on the facilities. In discussing system gang operations and its impact upon its employees the Carriers, on page 95 of the application, referred the Commission to Appendix A of the Operating plan.

Appendix A of the Carrier's Operating Plan (pages 259 to 265) discussed the proposed changes to its system engineering operations and the need for those changes as follows[1]:

> "In order to maintain rail lines in an efficient manner, UP/SP must transform this balkanized and inefficient pattern of maintenance responsibilities into a rational and logically unified maintenance capability." (page 259)

To achieve this the Carriers submitted the following:

> "2. System Track Gangs. UP uses large, efficient mechanized track gangs that work over the entire UP system. UP/SP will create two large territories, one of which will comprise roughly the Eastern half of the combined system and the other the western half. Each of these territories will include track in southern parts of the country where work can continue

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[1] Excerpts from Appendix A of Carrier's Operating Plan is attached as Carrier Exhibit "1."

during winter months, which helps avoid furloughing employees part of the year.

> The eastern territory, which will operate under the MPRR Brotherhood of Maintenance of Way Employes ("BMWE") collective bargaining agreement, will consist of SP Eastern Lines, UP(MP), UP(MKT), UP(OKT), UP(CNW), and SSW territories. **The western territory will consist of UP, SP Western Lines (SPWL), UP(WP), and DRGW territories, operating under the UP BMWE collective bargaining agreement."** (Emphasis added).

Following extensive hearings and testimony, the Surface Transportation Board (STB), which is the successor to the Interstate Commerce Commission, approved this application. While imposing certain qualifications upon its approval, the above portions of the operating plan were approved without qualification. A copy of Finance Docket 32760 is attached as Carrier Exhibit "2." In approving this merger, the STB imposed the New York Dock employee protective conditions (NYD), which are attached as Carrier Exhibit "3."

Pursuant to the requirements of NYD the Carrier served notice by letter dated February 4, 1997, of its intent to establish the following:

> "....establish system operations operating under the collective bargaining agreement between UPRR and BMWE. Copies of this notice will be posted at locations accessible to interested employees as information and in compliance with the notice provisions of New York Dock."[2]

The Brotherhood of Maintenance of Way Employes (BMWE) acknowledged receipt of the above notice and agreed to meet with the express understanding that they were doing so while reserving their "right to challenge the legitimacy of UP's notice in the proper forum if necessary."[3]

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[2] This notice is included as Carrier Exhibit "4."

[3] These letters are attached as Carrier Exhibit "5."

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Notwithstanding BMWE's reservations, the parties met over several months in an attempt to reach an implementing agreement with respect to the above notice. The parties, however, were unable to reach agreement , and the arbitration provisions of NYD were invoked. The issue now comes before this arbitration panel. The parties also were unable to reach agreement with respect to specific questions to be posed to this panel. The Carrier has therefore framed the issue as set forth above in its statement of the issue.

INTRODUCTION

This arbitration is an arbitration proceeding governed by the New York Dock labor protective conditions, which were imposed by the Surface Transportation Board (STB) in Finance Docket No. 32760.

The Interstate Commerce Commission (ICC), the predecessor agency of the STB, in Finance Docket No. 32133, (a copy of which is attached as Carrier Exhibit "6") and the specific language of the New York Dock conditions make clear what is to be accomplished in this proceeding in order for the transactions necessary to achieve the underlying rail consolidation to take place. The Commission said:

> "The basic framework for mitigating the labor impacts of rail consolidations was created in the Washington Job Protection Agreement of 1936, was enacted into law (what is now 49 U. S. C. 11347) by the Transportation Act of 1940, and was carried into its present form in 1979 when we issued the New York Dock decision which embraces the employee protective conditions commonly imposed in common control and merger cases. That frame work provides both substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) and a procedural

> mechanism (negotiation, if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular transactions made possible by the underlying rail consolidation." (page 95 of Carrier Exhibit "6".

This charge is spelled out much more simply in the Conditions -

> "Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4." (Carrier Exhibit "3")

Quite simply, this is what the Carrier is asking for in this arbitration proceeding - that the decision of this Arbitration Panel will provide for an appropriate rearrangement of forces so that the economies and efficiencies of the underlying rail consolidation of the Southern Pacific Rail Corporation (SP) into the Union Pacific Railroad Company (UP) may be accomplished. There can be no doubt that this is a proper and worthwhile goal. The STB, on pages 225-226 of Carrier Exhibit "2", said:

> "In Finance Docket No. 32760, we find: (a) that the acquisition by UPC, UPRR, and MPRR of control of SPR, SPT, SSW, SPCSL, and DRGW through the proposed transaction, as conditioned herein, is within the scope of 49 U.S.C. 11343 and is consistent with the public interest...."

Because this Panel sits as an extension of the STB and is bound to follow STB and ICC precedent and policy, the Carrier believes it is appropriate to review (1) the history of labor protective conditions in the railroad industry, (2) the history of the Section 11341 (a) immunity provision of the Interstate Commerce Act (ICA) and (3) a review/synopsis of the results of other New York Dock proceedings in the industry generally and between this

Carrier and other labor organizations as part of the UP/SP consolidation specifically. These reviews will provide this Arbitration Panel with the background information needed to recognize that the Carrier's Proposed Arbitration Award fully satisfies the requirements of New York Dock - it provides for the efficient and economic rearrangement of forces to achieve the public transportation benefits that are the basis for the underlying rail consolidation.

However, before beginning these reviews, there is one item that must be addressed first. That item is the jurisdiction and authority of this Panel.

1. Jurisdiction and Authority of this Panel

It is the Carrier's position there can be no question UP's Proposed Arbitration Award is a "transaction" within the meaning of the New York Dock conditions. Article I, Section 1(a) of New York Dock defines a "transaction" as "any action taken pursuant to authorizations of this Commission upon which these provisions have been imposed." The ICC explained the relevant inquiry as follows:

> "In our view, 'approved' transactions include those specifically authorized by the Commission, such as the various proposals we have approved which led to the formation of CSXT . . . and those that are directly related to and grow out of, or flow from, such a specifically authorized transaction. The instant transaction, the transfer of the dispatching functions, falls into the latter category. The existence of this second category of transactions is implicit in the definition of the term 'transaction' in the standard labor protective provisions: '....any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.' New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84 (1979) . . . ."

This quote is from a case involving CSX Corporation and the Dispatchers Union

which the ICC reviewed in 8 I.C.C.2d 715. The case had its beginning in an arbitration case decided by Referee Robert J. Ables. These cases are discussed at length later in this submission and may be found at Carrier Exhibit "7", (the ICC decision), and at Carrier Exhibit "8", (Referee Ables' decision).

UP's proposed combinations of operations, facilities and work forces of the SP into UP to form a single carrier operation clearly are "directly related to and grow out of, or flow from" the STB's decision in Finance Docket No. 32760 authorizing UP to control SP. Indeed, the STB order expressly contemplated UP would take such actions to realize merger efficiencies.

Since this is clearly a New York Dock transaction, this Referee has jurisdiction under Article I, Section 4 to impose the implementing agreement proposed by UP. As will be explained more fully later in this Submission, the STB has recognized both the Board and New York Dock arbitrators have authority under Sections 11341(a) and 11347 of the Interstate Commerce Act to override RLA procedures and collective bargaining agreements as necessary to allow a carrier to combine work forces and achieve the efficiencies which flow from a merger. Thus, as the ICC said in the CSX/Dispatchers case:

> "In light of the Supreme Court's decision in Train Dispatchers, there is no longer any dispute that under section 11341(a) the Commission may exempt approved transactions from certain laws, such as the RLA and collective bargaining agreements subject to the RLA, that would prevent the transactions from being carried out. This authority extends to arbitrators as well, when they are working under the delegated authority of the Commission."

Because the Organization's probable objections to the Carrier's Proposed Arbitration

Award will be contrary to well-established ICC and STB precedents, it is important to note that neutrals in Article I, Section 4 proceedings are acting as an agent of the STB and are bound by controlling authorizations and decisions. In Indiana R.R. – Lease and Operation Exemption –Norfolk & W. Ry., Finance Docket 31464 (July 13, 1990), the ICC reiterated that an arbitrator is bound to follow the ICC's determinations concerning those issues on which it has ruled: " (I)n initially permitting arbitrators to decide, we assume that they will act within the limits of their jurisdiction and consistent with applicable precedent."

Neutrals in New York Dock proceedings have consistently and correctly recognized they must follow ICC/STB precedent when considering issues raised in an Article I, Section 4 proceeding. The following are examples of this principle:

> Consolidated Rail Corp. and Monongahela Ry. Co. and UTU(E), Referee LaRocco - "(s)ince the Arbitrator derives his authority from the ICC, the Arbitrator must strictly follow the ICC's pronouncements."
>
> United Transp. Union v. Illinois Cent. R.R., Referee Fredenberger - "In determining this threshold question as well as any other rising under Article I, Section 4 of the Conditions a Neutral Referee is bound and must be guided by the relevant pronouncements of the ICC as to the meaning and scope of the Conditions...."
>
> Norfolk & W. Ry. and Brotherhood of R.R. Signalmen, Referee LaRocco - "This Committee is a quasi-judicial extension of the ICC and thus we are bound to apply the ICC's interpretation of the Interstate Commerce Act and the New York Dock Conditions."
>
> Union Pacific R.R. and American Train Dispatchers' Ass'n., Referee Fredenberger "As the author of the ...Conditions, the Commission's interpretations of those conditions, if directly on point, are binding upon a Referee in an Article I, Section 4 proceeding."

Based on the foregoing, this Panel has both the authority and the duty, delegated from the STB pursuant to Article I, Section 4 of the New York Dock conditions and sections 11341(a) and 11347 of the Interstate Commerce Act, to adopt the Carrier's Implementing Agreement. That proposal is authorized by and is fully consistent with the STB's decision authorizing the merger of SP into UP, the New York Dock labor protective conditions imposed by the STB in that approval decision and the ICC/STB decisions applying those conditions.

2. History of Labor Protective Conditions in the Railroad Industry

The concept of labor protection for railroad employees began during the Great Depression and, as might be expected , had its genesis as part of a consolidation effort. The Emergency Railroad Transportation Act of 1933 was designed to encourage consolidations of facilities between carriers. However, the Act also provided that there would be a "job freeze" so that any consolidation would not result in more unemployment. The Act was unsuccessful because carriers were unwilling to achieve consolidations at the risk of a job freeze. In addition, the Act was temporary and scheduled to expire in June of 1936.

The June 1936 expiration date is significant. Rail labor was concerned that with the expiration of the Emergency Railroad Transportation Act carriers would actively pursue consolidations without job freeze protection. During 1935 and 1936, labor worked for legislation which would provide even greater protection than the Emergency Railroad Transportation Act had provided. The most pro-labor of the many legislative solutions was

the Wheeler-Crosser bill, which provided for lifetime protection for employees who were deprived of employment as a result of a consolidation. The realities of the Wheeler-Crosser bill (management was afraid of the lifetime protection feature and labor feared for the constitutionality of the bill) led the parties to negotiate a labor protection agreement. That agreement is the Washington Job Protection Agreement of May 1936.

While the Washington Job Agreement constitutes the genesis of labor protection in the railroad industry, it is important to note that it is an "agreement." In subsequent years, management and labor entered into numerous agreements where management achieved flexibility, economy and efficiency in exchange for labor protection. However, over the years another form of protection evolved - protective conditions which were mandated (imposed) by the ICC as a condition of its approval of carrier-requested transactions. That is the form of protection involved in this dispute.

The ICC got into the protection business in a case involving the trustees of the Chicago, Rock Island & Gulf Company and the Chicago, Rock Island & Pacific Railway Company. In that case, the ICC ruled that in order for the Commission to approve the Companies' request for the lease arrangement they desired, it would impose the following "just and reasonable" employee protective conditions: "that for a period not exceeding five years each retained employee should be compensated for any reduction in salary so long as he is unable, in the exercise of his seniority rights under existing rules and practices to obtain a position with compensation equal to his compensation at the date of the lease ....."

The ICC's decision was upheld in United States v. Lowden (308 US 225). In that

decision, the Court said:

> "Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the privilege."

Congress followed the ICC's lead and, in the Transportation Act of 1940, mandated employee protection. Specifically, the Act covered mergers and consolidations subject to Commission approval and granted employees who were adversely affected by such a transaction four years of protection.

Over the last fifty-five years, Congress, the ICC and now the STB have addressed the terms and conditions of employee protection and the New York Dock labor protective conditions are the result of that evolutionary process. However, there is an even older evolutionary process involving the ICC's and STB's role in mergers and consolidations; one that is equally as important as the evolutionary process involving labor protective conditions. That process involves the Board's immunity power.

3. The History of the Section 11341(a) Immunity Provision

There can be no doubt as to the importance of the Board's immunity power. This power gives the STB and New York Dock arbitrators acting for the STB the authority to modify collective bargaining agreements as necessary to carry out an STB-approved transaction. Without this authority, one of the key public transportation benefits of this or any merger - the creation of a single, coordinated work force - would be rendered

impossible. Given this undeniable importance of the immunity power, this history is likewise of considerable importance.

A good discussion of the role of the immunity clause is found in the ICC's report (Finance Docket No. 30,000) concerning the Union Pacific/Missouri Pacific/Western Pacific merger. The Commission's comments are both informative and instructional and are worth repeating. The relevant comments are as follows:

> "The Transportation Act of 1920 first established our jurisdiction over railroad consolidations now found in 49 U.S.C. 11341-11350. The effect of the 1920 Act was to give the Commission exclusive jurisdiction over all phases of consolidations by regulated carriers . .
>
> *"The Commission's Immunity Power.* The plenary and exclusive nature of Commission jurisdiction over consolidations is confirmed by the immunity provisions which were added by the Transportation Act of 1920. These provisions are now contained in 49 U.S.C. 11341(a) which provides:
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> > 'A carrier, corporation, or person participating in (the approved transaction) is exempt from the antitrust laws and from all other law, including State and Municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control of franchises acquired through the transaction.' (emphasis added by the Commission).
>
> "The immunity clause is unambiguous on its face: it applies to *all laws*, both State and Federal, as necessary to allow implementation of an approved consolidation. We are bound to give effect to its terms, and it is unnecessary to engage in the methods of statutory construction advanced by the SP.
>
> "The express immunity provisions of the statute are a necessary complement to the Commission's authority to approve or disapprove consolidations, mergers, or acquisitions of control. Without the immunity provisions of section 11341(a), approved transactions would be subject to attack under various Federal and State laws,

undercutting our authority to supervise the national transportation network.

"The courts have recognized the broad reach of our immunity power. Suits based on statutes other than the Interstate Commerce Act, challenging Commission-approved transactions, have been regularly dismissed on the basis of the immunity provisions of section 11341(a) . . . ." (366 I.C.C. 462, at 556-557)

It is important to note that one of the cases cited by the Commission where challenges based on other statutes were dismissed involved a challenge based on the Railway Labor Act. In that case, *Brotherhood of Locomotive Engineers v. Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir. 1963), the Court described its charge as follows:

"We thus direct our attention now to the basic issue of whether the statutory authority conferred upon the ICC by the Interstate Commerce Act to approve and facilitate mergers of carriers includes the power to authorize changes in working conditions necessary to effectuate such mergers."

The Court had to deal with the basic issue of what happens when two Federal statutes are in conflict. In that case, the two statutes were the Interstate Commerce Act and the Railway Labor Act. The Court found that the Interstate Commerce Act took precedence. Specifically, the Court said:

"While the three Supreme Court cases just discussed do not deal directly with the specific problem now confronting us (namely, whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act) in the situation here presented we believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of section 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." (p. 431-432)

A copy of *Brotherhood of Locomotive Engineers v. Chicago & N. W. Ry.* is attached as Carrier Exhibit "9".

The ICC continued to hold to its position that it had exclusive jurisdiction over mergers and was authorized by Congress to set the terms and conditions for the transactions involved in mergers. In Sub-No. 25 to Finance Docket No. 30,000 (the UP/MP/WP merger docket), the ICC's jurisdiction to exempt a transaction from the requirements of the Railway Labor Act was challenged by the UTU. The Commission rejected the challenge, saying:

> "The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA."

A copy of Sub-No. 25 is attached as Carrier Exhibit "10."

The ICC continued to address the section 11341(a) immunity question. In a decision involving the Norfolk & Western and Southern Railway Companies and the Dispatchers Organization, the ICC made the following comments:

> "However, Article Section 4 of New York Dock provides for compulsory, binding arbitration of disputes. It has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission. Absent such a resolution, the intent of Congress that Commission-authorized transactions be consummated and fully implemented might never be realized. Moreover, 49 U.S.C. 11341(a) exempts from other law a carrier participating in a section 11343 transaction as necessary to carry out the transaction."

A copy of ICC decision 4 I.C.C.2d 1080 is attached as Carrier Exhibit "11."

The Commission continued to develop is position regarding its immunity power. In a CSX Corporation control case involving the Chessie System and the Seaboard Coast Line, the Commission reviewed its own history regarding section 11341(a):

> "As noted earlier in this decision, the court of appeals remanded to the Commission the question of whether section 11341(a) may operate to override the provisions of the RLA. In our decision . . . we said that we would address and explain our views on this issue. We do so here.
>
> "Despite some labor suggestions to the contrary, we do not believe the Commission is prevented by the *Carmen* decision from finding that section 11341(a) may displace Railway Labor Act procedures (that decision found no exemption for 'contracts' because that term, unlike 'law' does not appear in section 11341(a) to exempt mergers and consolidations from the RLA at least to the extent of our authority under section 11347. Thus we consider our section 11341(a) authority in the context of mergers and consolidations a 'mirror image' of our 11347 power. To the limited extent (as described in this decision or established by arbitrators) that we are able to act under section 11347, we are also able to foreclose resort to RLA procedures.
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> "We base our assertion of this authority principally on several grounds: (1) the language of the statute, which exempts transactions approved by us under Subchapter III of Chapter 113 of the Interstate Commerce Act 'from the antitrust laws and from all other law;' (2) the legislative history of the 1978 codification of the Interstate Commerce Act which shows that the exemption found in section 11341(a) 'from the antitrust laws and from all other law, including State and municipal law' clearly embraces exemption from *all other Federal law* as the new language was substituted for former section 5(12)'s 'of all of the restraint, limitations, and prohibitions of law, Federal, State, or municipal' to *eliminate redundancy* . . . ; and (3) several Court of Appeals decisions, including a concurring Supreme Court opinion...indicating that the Commission had the power to displace the RLA in the circumstances present in

those cases."

A copy of 6 I.C.C.2d 715 is attached as Carrier Exhibit "12."

The Supreme Court of the United States finally directly dealt with the immunity issue in two cases that were decided by the Court in 1991 - *Norfolk and Western Railway Company v. American Train Dispatchers Association* and *CSX Transportation , Inc v. Brotherhood of Railway Carmen (Train Dispatchers).* The Court, in agreeing with the ICC's long-standing view regarding the section 11341(a) immunity issue, ruled:

> "Our determination that section 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC-approved transaction makes sense of the consolidation provisions of the Act, which were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure . . . . The Act requires the Commission to approve consolidations in the public interest . . . . Recognizing that consolidations in the public interest will 'result in wholesale dismissals and extensive transfers, involving expense to transferred employees' as well as 'the loss of seniority rights', the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible . . . . Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If section 11341(a) did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated . . . (resolution procedures for major disputes 'virtually endless') . . . (dispute resolution under RLA involves 'an almost interminable process') . . . (RLA procedures are 'purposely long and drawn out'). The immunity provision of section 11341(a) is designed to avoid this result." (499 US 117, at p. 133)

A copy of *Train Dispatchers* is attached as Carrier Exhibit "13."

There can be no doubt as to how the ICC/STB and the Supreme Court believe the section 11341(a) immunity provision is to be applied. Its application by the ICC/STB has resulted in the fundamental structure of the New York Dock labor protective conditions. That fundamental structure is the trade-off between employee protection and a dispute resolution process outside of and quicker than the Railway Labor Act. Without this fundamental structure of the New York Dock conditions, the public good would be in the same shape it was in with the Emergency Railroad Transportation Act of 1933 - even though consolidations are in the public good, no railroad would pursue them because of the fear of excessive employee protection without some guarantee that the "virtually endless" resolution procedures under the Railway Labor Act would be set aside. The ICC again reiterated the importance of this trade-off in its decision in Finance Docket 32133 when it said (and the Carrier quotes again):

> "That framework provides *both* substantive benefits for affected employees . . . and a procedural mechanism . . . for resolving disputes regarding implementation of particular transactions made possible by the underlying rail consolidation." (Carrier Exhibit "6" at p. 95)

Additional guidance that the STB has given regarding the application of the Section 11341(a) immunity provision is found in the very transaction at issue here - (Carrier Exhibit "2").

The STB specifically addressed several aspects of the immunity provision with the following comments:

"The Immunity Provision. An Arbitrator acting under Article I, Section

> 4 of the New York Dock conditions imposed in the lead docket...will have the authority to override CBAs and RLA rights, as necessary to effect...the merger in the lead docket....This authority derives ultimately from 49 U.S.C. 11341 (a), the 'immunity' provision."
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> ***
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> "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 49 U.S.C. 11341(a) immunity provision by declaring that it is available only in circumstances identified prior to approval." (Carrier Exhibit "2" at page 173)

There can be no doubt, based on the above cited decisions, that the section 11341(a) immunity provision gives the STB (and arbitrators acting for the STB in Section 4 New York Dock arbitrations), the authority "to override the RLA or CBAs negotiated thereunder" in order to carry out an approved STB transaction. The following section is a review of how arbitrators, the ICC and the STB, courts and implementing agreement negotiators have responded to this challenge.

4. The History of the Results of Other New York Dock Proceedings

Since the October 19, 1983 decision in the UP/MP/WP merger (Carrier Exhibit

"10"), the ICC/STB has consistently ruled it has, and by extension New York Dock arbitrators have, the jurisdictional authority to transfer work and employees from one collective bargaining agreement to another, notwithstanding contrary requirements of the Railway Labor Act or collective bargaining agreements.

The October 19, 1983, decision gave Union Pacific the legal foundation needed for its strategy in the implementing agreement negotiations concerning the merger of the MP and WP into UP. That strategy was, and is, one based on the carrier's right to select the surviving collective bargaining agreement - employees of the involved railroads at each common location would be placed on a single seniority roster and would then work under a single collective bargaining agreement selected by the carrier. In addition, this negotiating strategy was based on the position that the New York Dock conditions allowed for an override of the RLA and CBAs. This strategy also applied to all resulting arbitration for the UP/MP/WP merger.

As required by controlling ICC decisions regarding its authority in merger transactions, the referees involved in those arbitrations accepted Union Pacific's position regarding the section 11341(a) immunity provision and the controlling carrier concept. Decisions by William E. Fredenberger, Jr., Dr. Jacob Seidenberg and Judge David H. Brown, correctly applying ICC rulings, all commented favorably on Union Pacific's approach. Referee Fredenberger ruled on a case involving the UP and WP merger and the Dispatchers Organization; Referee Seidenberg dealt with two cases - one involving the UP/MP merger and the BLE and the other involving the UP/MP merger and the Yardmasters Organization; and, Referee Brown dealt with a case involving the UP/MP

merger and the UTU.

In his case, Referee Fredenberger made the following comments concerning the transfer of work from the Western Pacific Dispatchers Agreement to Union Pacific dispatchers:

> "In another proceeding involving Finance Docket 30,000 decided October 19, 1983, the ICC also determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated. Given the Commission's ruling noted above with respect to the specific transfer of work in this case this referee concludes that neither the Railway Labor Act or existing protective and schedule agreements, even when considered in the context of Sections 2 and 3 of the New York Dock conditions, impair the Referee's jurisdiction under Article I, Section 4 of the New York Dock conditions to resolve the impasse concerning transfer of the work in this case."

A copy of Referee Fredenberger's decision is attached as Carrier Exhibit "14".

Referee Seidenberg, in a case involving the transfer of work from the former Missouri Pacific BLE agreement to coverage by the Union Pacific BLE agreement, made the following comments concerning the importance of the ICC's October 19, 1983 decision:

> "We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4 of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions."

In addition, Referee Seidenberg had this to say about the specific transfer of work

involved in that case:

> "In summary we are aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected Organization and employees. However, the Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement. We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiencies and benefits which were the prime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation."

A copy of Referee Seidenberg's BLE decision is attached as Carrier Exhibit "15."

Referee Seidenberg also discussed these issues in a separate case involving the Yardmasters' Organization. Specifically, he said:

> "We find that the ICC has declared in Finance Docket 30,000 that the controlling carrier concept shall be applicable, when it held that Omaha/Council Bluffs yards were to be operated by Union Pacific as a Union Pacific single controlled terminal, as a consolidated common point. This concept is not now open to question or contest by the Organization. We find further that, consonant with this concept, is this single terminal can be operated under Union Pacific wage rates and schedule rules. Also consonant with this concept is that Missouri Pacific Yardmasters may be transferred to the Union Pacific RR and function under the Union Pacific Schedule Agreement and wage rates."

A copy of Referee Seidenberg's Yardmaster decision is attached as Carrier Exhibit "16."

Referee Brown went into great detail in discussing the jurisdictional issue since the UTU was challenging the referee's authority to move employees from coverage under the MP collective bargaining agreement to coverage under the UP agreement. Even though Referee Brown declined to issue a ruling in this case (he did so for reasons unrelated to

the jurisdictional issue), his comments on the jurisdictional issue are worth reciting here:

> "The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.
>
> "The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in such cases as that before us is plenary and exclusive . . . .
>
> "And indeed, without such authority vested in some board or agency it is not reasonable to expect that matters such as those before us could ever be resolved, since it is clearly in the interest of one or more partisans to maintain the status quo in one or more details . . . ."
>
> "We therefore conclude and find that this committee has jurisdiction to transfer work from the MP to the UP as such is deemed appropriate in giving effect to the ICC decisions in the several dockets herein involved. We further find that should circumstances reflect that placing the transferred work under the UP collective bargaining agreements would be the most appropriate means for giving effect to such decisions, this committee has jurisdiction to do so."

A copy of Referee Brown's decision is attached as Carrier Exhibit "17."

Even though these decisions were rendered several years before *Train Dispatchers*, and even though there were many twists and turns in the road as the ICC, the courts, arbitrators railroads and unions dealt with the section 11341(a) immunity provision issue, what Referees Fredenberger, Seidenberg and Brown said in these four decisions accurately reflects the current state of the law.

Prior to *Train Dispatchers*, other referees struggled in other cases involving ICC-approved transactions with the issue of overriding the RLA and CBAs, and they did so without the guidance provided by the Supreme Court. Yet, those referees were able to make correct decisions even in cases where both work and employees were transferred from one agreement to another or even when one agreement was eliminated.

On September 25, 1985, Referee Robert Ables, in an arbitration involving the Norfolk and Western Railway Company, Interstate Railroad Company, Southern Railway Company and the United Transportation Union, confronted the following issue: "Does this arbitration panel have jurisdiction to consider the content of an implementing agreement where an existing contract would be changed and, if so, what shall be the contents of that implementing agreement?" Actually, the issue was even more dramatic than a "change" in an existing contract; the implementation of the carriers' proposal would lead to the elimination of the Interstate collective bargaining agreement. Referee Ables placed the Interstate trainmen under the N&W agreement with the following comments:

> "No responsible court would ultimately refuse to order an implementing agreement under the disputes settling of Section 4. Only the 27 trainmen off the Interstate Railroad who did not ratify the tentative agreement of April 27, 1985, are holding out on working under the N&W contract. All other unions in this case have accepted the same or similar agreement, including organizations representing firemen, engineers, clerks and maintenance of way employees.
>
> "Labor protective conditions are in place.
>
> "There is no legal, public policy, or common sense reason not to decide at this level of proceedings what will eventually be decided, i.e., an implementing agreement to accomplish the purposes of an authorized consolidation."

A copy of Referee Able's Interstate decision is attached as Carrier Exhibit "18."

On May 19, 1987, Referee Robert O. Harris dealt with a case involving the transfer of union- represented dispatchers to a location where the work in question was performed by non-represented employees. Challenges to the arbitration panel's jurisdiction by the Dispatchers' Union, as well as challenges as to whether such a transfer constituted an appropriate rearrangement of forces, were the questions before Referee Harris. He dealt with the jurisdictional issue first:

> "The panel hearing the instant dispute has exactly the same authority as that noted by Arbitrator Brown, quoted above. Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supersedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view."

Next, Referee Harris dealt with the rearrangement of forces issue:

> "It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along; however this does not change the rights of individual employees . . . . What is lost by the transfer is the incumbency status of the ATDA . . . The protections afforded by New York Dock are to individual employees, not to their collective bargaining representatives."

A copy of Referee Harris' decision is attached as Carrier Exhibit "19."

Referees Fredenberger, Seidenberg, Brown, Ables and Harris correctly interpreted and applied the ICC's view of the 11341(a) immunity provision and clearly understood that the purpose of an ICC-approved merger was to achieve economies and efficiencies in the

operations of the merged carriers that would be in the public interest; and they were able to reach these conclusions without the guidance provided by *Train Dispatchers*. With that guidance, arbitrators in post-*Train Dispatchers* cases have, without hesitation, acknowledged the carrier may select the applicable collective bargaining agreement. One such example of a post-*Train Dispatchers* arbitration award is Referee John LaRocco's decision in a case involving the United Transportation Union, Conrail and the Monongahela Railroad. In that decision, which contains a brief history of the 11341(a) issue, Referee LaRocco dealt with the issue of whether a New York Dock referee had the authority to determine which of two collective bargaining agreements (Conrail's or Monongahela's) would apply to the new consolidated operation. Referee LaRocco said:

> "Conrail is the controlling Carrier in the merger and thus, it is most appropriate to place MGA Engineers under the Agreement applicable to Locomotive Engineers on Conrail . . . . Complete integration of train operations makes it unwieldy for MGA Engineers to carry any portion of the MGA agreement with them to Conrail. Imposing multiple agreements on the former MGA territory would render the coordination not just awkward but would thwart the transaction."
>
> "To reiterate, this Arbitrator has the authority, under Section 4 of the New York Dock Conditions, to determine which schedule agreement will apply to MGA Engineers following the coordination and, the Arbitrator rules that, the MGA Engineers must be placed under the collective bargaining agreements applicable to Locomotive Engineers and Reserve Engine Service Employees on Conrail."

A copy of Referee LaRocco's decision is attached as "Carrier Exhibit "20."

The ICC also took guidance from the Supreme Court's decision in *Train Dispatchers*. In Finance Docket No. 28905 (Sub-No. 23), a case involving CSX and the

ATDA, the Commission said:

> "We see nothing in the Supreme Court's decision in *Train Dispatchers* that would alter our earlier findings on this point. In fact, if anything, the Court's decision, which upheld this Commission's views regarding the immunity provisions of section 11341(a), strengthens this reasoning. The Court discussed the ICA's goal of promoting economy and efficiency in interstate transportation. It is also noted Congress's recognition that consolidations in the public interest will result in 'extensive transfers, involving expense to transferred employees."
>
> "In view of this language, we believe that our approval of future transactions that may logically arise out of a consolidation transaction, even though they are not mentioned at the time of the original transaction's approval, is consistent with the ICA's goals, as expressed by the Court . . . . Obviously, then, as far back as 1980, we contemplated that the applicants could undertake operational changes to improve efficiency which we had not considered in the decision and that specific approval of these coordinations was not necessary. To the extent these changes adversely affect employees, they are entitled to the full panoply of protective benefits available to rail employees adversely affected by a transaction approved by us."

This is the case mentioned earlier and it is attached as Carrier Exhibit "7".

Federal courts also took guidance from *Train Dispatchers*. The Railway Labor Executives Association (RLEA), in 987 F.2d 806, and the ATDA, in 26 F.3d 1157, both went to court to challenge ICC decisions involving ICC review of arbitration awards. In the RLEA case, the United States Court of Appeals for the District of Columbia Circuit, addressed the issue of what it takes to override CBAs to effectuate an ICC-approved consolidation:

> "What, then, does it mean to say that it is necessary to modify a CBA in order to effectuate a proposed transaction? In this case the Commission reasonably interpreted this standard to mean 'necessary to effectuate the purpose of the transaction.' If the purpose of the lease transaction were merely to abrogate the terms of a CBA, however, then 'necessity' would be no limitation at all upon the

> Commission's authority to set a CBA aside. We look therefore to the purpose for which the ICC has been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the 'necessity' for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease).
>
> "Transportation benefits include the promotion of 'safe, adequate, economical, and efficient transportation,' and the encouragement of 'sound economic conditions . . . among carriers.'" (p.815)

A copy of this decision (known as *Executives*) is attached as Carrier Exhibit "21."

The case involving the ICC and the ATDA also was heard by the Court of Appeals for the District of Columbia. In that case, the Court made a variety of comments concerning the proper application of the New York Dock conditions:

> "Section 4 does not provide a formula for apportioning the 'selection of forces.' Instead, it frees the hand of the arbitrator to fashion a solution that is 'appropriate for application in the particular case.'" (p. 1163)
>
> "The Union next attacks the ICC's finding on the merits, arguing that the four Corbin employees were capable of performing the work in Jacksonville and that there was thus no need to give it to non-union employees. The argument misapprehends the standard of necessity. In *Executives*, we held that to satisfy the 'necessity' predicate for overriding a CBA, the ICC must find that the underlying transaction yields a transportation benefit to the public; 'not merely (a) transfer (of) wealth from employees to their employer.' In other words, the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain."
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> "We find reasonable the ICC's view that the section 11341(a) exemption for 'approved...transaction(s)' extends to subsidiary transactions that fulfill the purposes of the main control

> transaction....The New York Dock conditions define 'transactions' as 'any action taken pursuant to authorizations of this Commission on which these provisions have been imposed'...The ICC adopted this definition at the urging of labor unions, who insisted that labor protections must extend not only to workers displaced by the main control transaction but also to those displaced by later, related restructurings . . . . The ICC's elastic construction of 'approved transaction' in this case mirrors this settled understanding.

A copy of the ATDA case is attached as Carrier Exhibit "22."

The ICC had the opportunity to apply the Court of Appeals decisions when it reviewed several arbitration awards that had been appealed to the Commission. All of the cases involved the acquisition by Fox Valley and Western Railroad Company of the Fox River Valley Railroad Corporation and the Green Bay and Western Railroad Company. A common issue in some of these cases involved the issue of the ICC's authority to override collective bargaining agreements. The following are the ICC's comments on this issue:

> "It is now well established that these CBA terms (rates of pay, rules, and working conditions) can be modified by us or by an arbitrator as necessary to carry out an approved transaction." (Finance Docket No. 32035 (Sub-No. 2))
>
> "We uphold the arbitrator's rejection of UTU's request for preservation of pre-transaction rates of pay, rules, and working conditions. On pages 7-8 of his decision, the arbitrator determined that this would undermine efficient operation of the merged entity." (Finance Docket No.32035 (Sub-No. 3))
>
> "The Sub-No. 4 appeal concerns the FRVR signalmen represented by UTU. The parties failed to reach an implementing agreement, and the issues were submitted to arbitration. On August 13, 1993, arbitrator Herbert L. Marx, Jr., rendered a decision establishing an implementing agreement. He rejected UTU's request for preservation of rates of pay, rules and working conditions, and determined that preservation would thwart the transaction by blocking the creation of a 'single, coordinated work force.'

> "We will uphold Marx's award in Sub-No. 4 in its entirety. Marx's determinations as to preservation of rates of pay, rules, and working conditions in Sub-No. 4 were appropriate under our Lace Curtain standard of review. Marx found (arbitration decision, p. 8) that FVW "convincingly argues that FV&W will have a single integrated work force covering the entire system and determination of which assignments are GBW or FRVR positions would not be feasible or efficient." Finance Docket 32035 (Sub-No. 4))

A copy of the ICC's decision in the Fox Valley and Western case is attached as Carrier Exhibit "23."

All of these decisions have combined to establish that the STB and STB Article I, Section 4 arbitrators have the authority to modify collective bargaining agreements as necessary to realize merger efficiencies identified by the carrier. One of the ICC's last labor protection decisions reviewed a New York Dock arbitration decision which had approved changes of the same kind as those proposed by UP in this case. That award is a decision by Referee Robert M. O'Brien in a case involving the United Transportation Union and the Brotherhood of Locomotive Engineers and CSX Transportation, Inc. Because of the thoroughness of the award, the Carrier will discuss Referee O'Brien's decision at considerable length. A copy of Referee O'Brien's CSXT and UTU/BLE decision is attached as Carrier Exhibit "24".

The case was the result of the following notice which CSXT served on both the UTU and the BLE:

> "The January 10, 1994, notice advised the affected UTU and BLE General Committees of Adjustment that CSXT intended to fully transfer, consolidate and merge the train operations and associated work on the former WM, RF&P and a portion of the former C&O in the area between Philadelphia, PA., Richmond, VA., Charlottesville, VA., Lurgan, PA., Connellsville, PA., Huntington, W. VA. and Bergoo, W.

VA. This proposed consolidation would include all terminals, mainlines, intersecting branches and subdivisions located in this territory between southern Pennsylvania and southern Virginia. This territory would be known as the Eastern B&O Consolidated District. It would encompass seven (7) existing seniority districts for train service employees and five (5) existing seniority districts for engine service employees."

"The January 10, 1994, notice also advised the UTU and BLE General Committees of Adjustment that the aforementioned operations on the C&O, WM and RF&P would be merged into operations on the former Baltimore and Ohio Railroad and the affected train and engine service employees would be governed by the existing collective bargaining agreements on the former B&O applicable to train and engine service employees. Additionally, CSXT proposed that the working lists of the separate districts protecting service in this territory would be merged, including establishment of common extra boards to protect service out of the respective supply points that would be maintained."

As this Panel will discover when it reviews the Carrier's Proposed Arbitration Award, the approach of the CSXT and the Carrier in this case are highly similar, if not identical. As expected, both the UTU and the BLE challenged the CSXT's approach. It is anticipated the BMWE will mount a similar challenge to Union Pacific's approach in this case. Referee O'Brien's responses to the Organizations' challenges are most instructive and provide this Panel with guidance.

Initially, Referee O'Brien made the following comments concerning his authority and obligation:

"It is a universally accepted principle that Arbitrators appointed pursuant to Article I, Section 4, of the New York Dock Conditions serve as an extension of the ICC. Since these Arbitrators derive their authority from the ICC, they are duty bound to follow decisions and rulings promulgated by the ICC. The ICC has suggested that New York Dock Arbitrators should initially decide all issues submitted to them, including issues that might not otherwise be arbitrable, subject,

of course, to ICC review. Consistent with that mission, the undersigned Arbitrator hereinafter addresses the issues advanced by the UTU and BLE."

The first challenge by the Organizations and Referee O'Brien's answer are as follows:

"Has CSXT presented a 'transaction' as defined in Article I, Section 1(a) of the New York Dock Conditions?"

"In this Arbitrator's opinion, the operational changes proposed by the Carrier in its January 10, 1994 notice directly related to and flowed from the aforementioned transactions that were authorized by the ICC. Were it not for the ICC permission in those Finance Dockets, CSXT would have no authority to merge the B&O, C&O, WM and RF&P territories into a single, discrete rail freight operation. To this Arbitrator, there is a direct causal relation between the mergers and coordinations sanctioned by the ICC in the Finance Dockets cited in the Carrier's January 10, 1994, notice and the operational changes it sought to implement on the former B&O, C&O, WM and RF&P properties. Accordingly, that proposal constituted a 'transaction' as defined in Article I, Section 1(a), of the New York Dock Conditions."

It is the Carrier's position that a review of its Proposed Arbitration Award will establish there is a direct causal relation between the UP/SP coordination approved by the STB in Finance Docket No. 32760 and the operational changes the Carrier seeks in order to implement that coordination.

The Organizations continued their challenge to the correct interpretation of Section 11341(a) and Referee O'Brien correctly applied the law in the next challenge and answer:

"Does Section 11341(a) of the Interstate Commerce Act apply to proceedings exempted from prior review and approval by the ICC?"

"As noted at the outset of this proceeding, Arbitrators acting under the authority of the ICC must adhere to ICC rulings and decisions. In the aforementioned Carmen II decision, the ICC expressly stated that Arbitrators appointed under the New York Dock conditions have the

> authority to modify collective bargaining agreements when necessary to permit mergers. Thus, this Arbitrator has the authority under both Section 11341(a) and 11347 to modify collective bargaining agreements if this is necessary to carry out the coordination proposed by CSXT in its January 10, 1994, notice."

It is the Carrier's position the Neutral Member of this Panel has the authority to make the modifications to collective bargaining agreements proposed by the Carrier in its Proposed Arbitration Award because those modifications are necessary to effectuate the efficiencies and economies of the UP/SP consolidation.

In the CSXT case, the carrier referenced seven (7) Finance Dockets. The Organizations also challenged this approach. The specific challenge and Referee O'Brien's answer are as follows:

> "Are the provisions of Section 11341(a) inapplicable to combinations of multiple approved or exempted transactions?"
>
> "For all the foregoing reasons, this Arbitrator finds that it was not improper for CSXT to reference a combination of seven (7) Finance Dockets in its January 10, 1994, notices to the UTU and BLE."

In the UP/SP case, the Carrier is referencing only one (1) Finance Docket.

The Organizations' next challenge went directly to the heart of an Article I, Section 4 arbitration:

> "Is the Section 11341(a) exemption necessary to carry out the Carrier's proposed transaction?"

Obviously, this is the critical question. It is Carrier's belief this Panel will find that the modifications inherent in the Carrier's Proposed Arbitration Award, which are made possible by the Section 11341(a) exemption, are necessary. Later in this Submission, the Carrier will clearly demonstrate exactly why its Proposed Arbitration Award best achieves

the efficiencies and economies which the STB had in mind when it approved the UP/SP consolidation.

The next challenge by the Organizations dealt with the fact that on some of the properties involved in the CSXT's proposal the Organizations and CSXT had previously entered into implementing agreements which were "to remain in full force and effect until revised or modified in accordance with the Railway Labor Act." The Organizations contended such implementing agreements could now only be changed in accordance with the Railway Labor Act and not in accordance with Article I, Section 4 arbitration. Referee O'Brien dismissed this challenge saying:

> "For all the foregoing reasons, this Arbitrator finds that it was permissible for CSXT to propose a subsequent coordination of property that had been coordinated previously which was subject to an implementing agreement which could only be modified or revised pursuant to the Railway Labor Act."

Should the Organization in this case make a similar contention to this Panel, the contention should be rejected because the Court of Appeals for the District of Columbia, in another case involving CSXT and this same issue, recently upheld the STB's decision that the coordination was to be carried out under New York Dock rather than under the Railway Labor Act. Specifically, the Court said:

> "...While it remains unresolved whether the 1993 Proposed Coordination complies with the labor protective conditions of the ICA - at least until the parties sit down to negotiate pursuant to New York Dock - nevertheless, given the emphasis the *Dispatchers* decision places on expeditious consolidation, we think that the STB acted within its discretion in concluding that contracting parties wanting to replace New York Dock procedures with the more complex RLA procedures must make their intent plain."

A copy of *United Transportation Union v. Surface Transportation Board* (decided June 13, 1997) is attached as Carrier Exhibit "25."

The Organizations' last challenge was another "go to the heart of the issue" challenge:

> "Is there a public transportation benefit flowing from the Carrier's proposal?"

Referee O'Brien simply and correctly found that the promotion of more economical and efficient transportation constituted a public transportation benefit. Specifically, he said:

> "The Carrier anticipates that its proposed changes will promote more economical and efficient transportation in the territory now served by the B&O, C&O, WM and RF&P which it wished to coordinate. According to the D.C. Court of Appeals, there would thus be some transportation benefit flowing to the public from the underlying transaction proposed by CSXT in its January 10, 1994, notices to the UTU and BLE."

It is the Carrier's firm belief this Panel -upon review of this submission, review of the Carrier's presentation at the arbitration hearing and review of the Carrier's Proposed Arbitration Award - will find there is a transportation benefit flowing to the public from the underlying transaction proposed by the Carrier in its Proposed Arbitration Award.

In each of the challenges which were raised by the UTU and BLE in the CSXT case and which were discussed above, Referee O'Brien correctly applied the rulings and decisions of the ICC and found for the CSXT. There was an additional challenge raised by the Organizations in that case and it will be discussed later in this submission as a procedural question in Carrier's Position Regarding Potential Procedural Issues Involving an Interpretation of the New York Dock Labor Protective Conditions. In any event, the

Organizations appealed Referee O'Brien's decisions regarding the challenges discussed above to the ICC. The ICC affirmed each of Referee O'Brien's decisions which were challenged by the Organizations.

Specifically, the ICC said:

> "This agency (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefit of a transaction."
>
> ***
>
> "In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely a transfer of wealth from employees to their employer.
>
> "This standard has been met here. The Arbitrator did not commit error (much less egregious error) in finding that the changes sought by CSXT would improve efficiency, a factual finding entitled to deference under our Lace Curtain standard. CSXT has supported its claims that merging the separate seniority rosters into one will produce real efficiency benefits.... Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that cost decreases are reflected in rate decreases. Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.
>
> "The changes sought by CSXT do not appear to be a device merely to transfer wealth from employees to the railroad. Indeed, there does not appear to be a significant diminution of the wealth of the employees. The extent of unionization will not change. The reduction in labor costs will occur through more efficient use of employees and equipment, not by any reduction in current hourly wages and benefits. In order to use

employees more efficiently, CSXT will require some employees to work different territories and report to different staging areas. Some employees may have to move. Moving expenses are a benefit under our New York Dock compensation formula.

"Certain WM employees may experience minor changes in compensation due to minor differences between the B&O and WM collective bargaining agreements. But the differences apply only to small numbers of employees in atypical situations. Any changes in compensation would be compensable under New York Dock.

"The one adverse effect on employees from the proposed consolidation of seniority districts apparent from the record is that some employees may have to travel to protect their seniority rights. A specific instance cited was that terminal reporting points for engineers working out of Cumberland, MD. would be 100 miles away. No reduction in wages or change in working conditions would exist, except the minor changes noted. Employees subject to these changes would be compensated under New York Dock. For that reason, the criteria of RLEA have been met.

"In considering whether the actions taken by CSXT comport with RLEA, we need to consider the court's decision in ATDA, which adopted the RLEA standard, adding (26 F.3d at 1164, emphasis supplied):

'In other words, the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain.'

"The Arbitrator found that the consolidation of the seniority districts would lead to lower costs, hence resulting in transportation benefits."

A copy of the ICC's decision is attached as Carrier Exhibit "26."

The UTU and BLE appealed the ICC's decision to the Court of Appeals for the District of Columbia. The Organizations again challenged the plan allowing for abrogation

of parts of collective bargaining agreements as necessary to effectuate the merger and again the Organizations lost. Specifically, the Court made the following comments concerning the issue of necessity:

> "We next turn to the question whether CSXT's proposed changes to the seniority rosters were *necessary* to effectuate an ICC-approved transaction. The unions contend that the Commission erred in finding a nexus. We disagree. (Emphasis by the Court)
>
> 1. **Nexus Between Changes Sought and ICC-Approved Transaction**
>
> ***
>
> "The record clearly supports the Commission's affirmance of the arbitrator's factual finding that the proposed changes are linked to an approved transaction."
>
> ***
>
> 2. **Transportation Benefit**
>
> ***
>
> "CSXT argued, and the ICC accepted, that a consolidation of seniority rosters was necessary to effectuate the merger of the rail lines. This is both obvious on its face and was demonstrated by CSXT. First, there is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation. Second, CSXT demonstrated that changing crews at previous territorial boundaries of the former railroads, as would be required with separate seniority rosters, would increase costs and slow down transit times. Improvements in efficiency generated by a consolidated seniority roster will reduce CSXT's cost of service, resulting in reduced rates to shippers and ultimately to consumers...."

A copy of *UTU and BLE v. Surface Transportation Board* is attached as Carrier Exhibit

"27". It is the Carrier's position that Referee O'Brien's decision and the ICC's review of that decision and the Court of Appeals' review of both those decisions constitute definitive statements regarding Article I, Section 4 arbitration. It is also the Carrier's position that when this Panel applies the principles of that decision and those reviews it can reach no other conclusion than that the Carrier's Proposed Arbitration Award is appropriate, provides a public transportation benefit and should be imposed as the Arbitrated Implementing Agreement for this dispute.

5. UP/SP Arbitration Results Involving the Carrier and Other Labor Organizations

Finally, there is one more area of New York Dock activity that must be reviewed in light of this precedent. All these ICC/STB rulings, court decisions and arbitration results eventually have to be applied to the UP/SP merger. There have been two important arbitration cases - one involving the UTU and one involving the Brotherhood of Railroad Signalmen (BRS) - that have resulted from the UP/SP merger.

In the UTU case, Referee James E. Yost dealt with the consolidation of UP and SP operations in Salt Lake City and Denver. Specifically, he had comments concerning necessity and seniority. Those comments are as follows:

> "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 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."

***

"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 benefitting the general public and the employees of the merged operations."

***

"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 abandon ments 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...."

A copy of Referee Yost's decision is attached as Carrier Exhibit "28".

The Carrier believes Referee Yost has correctly addressed the issue of seniority. It should be combined in a manner that is simplified rather than in some unworkable, administratively burdensome arrangement. There will be more on the ability of New York Dock arbitrators to change seniority in order to achieve the economies and efficiencies of the merger later in this submission. (See the discussion concerning the one unanswered issue from the O'Brien arbitration award, Carrier Exhibit "24".)

In addition, the Carrier believes Referee Yost was correct on the issue of the selection of the collective bargaining agreement for the consolidated operation. There is no doubt "it is proper to unify the employees and operations under a single collective

bargaining agreement." However, the courts and the vast majority of arbitration decisions have held that collective bargaining agreements may be set aside - in whole or in part - if the agreement or agreement provision stands in the way of successful implementation of the approved transaction. Referee Yost's comments that a carrier does not have the authority to write a new agreement must be viewed in the context of the current state of the law of New York Dock. A carrier may write a new agreement if a new agreement is necessary to achieve the economies and efficiencies of the merger.

The UTU did not accept Referee Yost's decision and appealed the award to the STB. The Board specifically responded to the UTU's challenges regarding Referee Yost's decisions concerning seniority and uniform collective bargaining agreement. The Board's comments regarding seniority are as follows:

> "UTU objects to the general provisions of the implementing arrangements approved by the arbitrator that allow the carrier to alter seniority districts and to force employees within the new hubs to move to different seniority districts...."
>
> "As noted, the arbitrator found that the consolidation was 'necessary to effect the STB's approved consolidation and yield enhanced efficiency in operations benefitting the general public and the employees of the merged operations.'
>
> This was a factual finding to which we must accord deference to the arbitrator under our *Lace Curtain* standards of review....

On the issue of uniform collective bargaining agreement, the STB had the following significant comments:

> "...As noted in our discussion of the changes in seniority districts, it is now firmly established that the Board (or arbitrators acting under *New York Dock*) may override provisions of collective bargaining agreements when an

override is necessary for realization of the public benefits of approved transactions.

Here, the arbitrator found that application of a uniform collective bargaining agreement was also among the changes that were necessary to effect the STB's approved consolidation and yield enhanced efficiency in operations benefitting the general public and the employees of the merged operations."

"...Here, the necessity for the merger of bargaining agreements is supported by the number of collective bargaining agreements alone that were in effect before the merger - before the merger the Salt Lake Hub consisted of six collective bargaining agreements, and the Denver Hub consisted of three collective bargaining agreements The arbitrator could easily find that UP cannot effectively manage employees in a merged and consolidated operation if the operation must be burdened with six collective bargaining agreements, each with its own set of work rules. Our predecessor agency has previously upheld the consolidation of collective bargaining agreements. Under these circumstances, UTU bears a heavy burden in attempting to show that the consolidation of collective bargaining agreements in the Hubs was egregious error...." (See the following discussion of Referee Bend's award in the BRS case for the burden the carrier bears.)

"UTU also seems to argue that the arbitrator erred by failing to apply the predominant collective bargaining agreement in the respective Hubs. We disagree. UTU has submitted no authority from the Board, the ICC, or a court that establishes a duty to adopt the predominant collective bargaining agreement that has in effect in an area where operations are being coordinated when consolidation of collective bargaining agreements is necessary in such an area to effect the benefits of a merger...."

A copy of *STB Finance Docket No. 32760 (Sub-No. 22)* is attached as Carrier Exhibit No. "29".

It is the Carrier's position the STB has made clear once again that collective

bargaining agreements may be set aside if necessary to achieve the economies and efficiencies of an approved transaction In addition, it is the Carrier's position that the STB has made clear that changes in seniority districts are appropriate when necessary to achieve the economies and efficiencies of the merger.

As mentioned, Referee Edwin Benn, in a case involving the UP and BRS, addressed the issue of the burden borne by the carrier to prove the changes requested are "necessary" to effectuate the merger. His comments are well worth noting and are as follows:

> "In this case, the Carrier therefore must show that its actions will result in a transportation benefit in furtherance of the STB's order. As just discussed, that benefit to the public could be efficiency of operations.
>
> "The Carrier's burden is not a heavy one. This Board's role and the Carrier's burden in these cases were discussed in Finance Docket No. 32035 (1995) at 3:
>
> '...Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) to justify operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identified with reasonable particularity...'"
>
> ***
>
> "In sum then, the Carrier has shown that by combining the forces as planned, the result will be the ability to use these individuals on a system wide basis without having the boundary restrictions that might exist by keeping the former SP

> and UP employees in these categories separate. **The bottom line is therefore more efficient operations. The Carrier has sufficiently shown a transportation benefit. The treatment of these employees as contemplated by the Carrier will thus be in furtherance of the STB's order concerning this merger."** (emphasis added)

A copy of Referee Benn's award is attached as "Carrier Exhibit "30".

This is as clear a statement of the carrier's burden as could be found - the burden is not a heavy one and simply establishing that the implementing agreement proposal will result in more efficient operations will satisfy the burden. More efficient operations equal a transportation benefit.

Based on all the foregoing, it is abundantly clear the ICC, the STB and the Federal courts have established "the law" or "the rules" for any New York Dock arbitration. The law/ rules may be summarized as follows:

> (1) The section 11341(a) immunity provision and the section 11347 labor protection conditioning authority allows for the override of the RLA and CBAs so long as the STB provides for the interests of affected employees.

> (2) The New York Dock conditions provide for the interests of affected employees and for a procedural mechanism for resolving disputes. This is the great genius of the New York Dock conditions - employees receive substantial labor protection outside of the RLA process and carriers receive a procedural mechanism to effectuate the economies and efficiencies of an STB-approved consolidation in a timely manner outside of the RLA and CBA processes.

> (3) Arbitrators and the courts have determined the following actions qualify as necessary to achieve the goals and purposes of an STB-approved consolidation:

> a. Work and employees may be transferred from coverage

under one collective bargaining agreement to coverage under another, or even transferred from union to non-union status.

b. This process may " result in wholesale dismissals and extensive transfers, involving expense to transferred employees" as well as "the loss of seniority rights."

c. Carrier selection is a satisfactory method to determine which rules and which agreement will prevail in any particular transaction within a consolidation.

d. Agreement provisions which would prevent the full, complete achievement of the economies and efficiencies available to both the public and the carrier may be set aside in whole or in part.

(4) Carriers are not required "to identify all anticipated changes" before the STB. Subsidiary transactions which support the effectuation of economies and efficiencies are also covered by the section 11341(a) immunity provision.

(5) The carrier has the burden of establishing that the proposed changes in a collective bargaining agreement are "necessary" to effectuate the economies and efficiencies of the merger.

(6) This burden is not a heavy one and may be met by establishing that the changes will result in more efficient operations. More efficient carrier operations constitute a transportation benefit.

(7) Arbitrators, deriving their jurisdiction from the STB and acting for the STB, are bound to strictly follow the rulings and findings of the STB.

Given all the foregoing, it is Carrier's position these seven "laws" or "rules" of New York Dock arbitration govern this proceeding. It is also the Carrier's position these seven "laws" or "rules", when applied to the facts of this case, support a finding that the Carrier's Proposed Arbitration Award is both appropriate and necessary if the STB-approved

consolidation of the SP into the UP is to achieve the economies and efficiencies envisioned by the STB when it found this consolidation to be in the public interest.

6. Carrier's Position Regarding Potential Procedural Issues Involving an Interpretation of the New York Dock Labor Protective Conditions

Historically, in cases of this type, there has been a procedural question raised by labor concerning the referee's jurisdiction. For example, Referee Seidenberg (Carrier Exhibit "15"), Referee Brown (Carrier Exhibit "17") and even Referee LaRocco (Carrier Exhibit "20") all found it necessary to address this procedural issue:

> "Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?" (Referee Seidenberg)

> "Does this committee, in applying the New York Dock Conditions to the UP/MP merger, have jurisdiction to transfer work from the MP to the UP and place the transferred work under the operating rules and collective bargaining agreements of the UP?" (Referee Brown)

> "Does the Referee have the authority under New York Dock to determine whether the Conrail or the MGA Schedule Agreement will apply on the consolidated operation?" (Referee LaRocco)

In each of these decisions, the Referee correctly found he had the necessary jurisdiction/authority. After *Train Dispatchers*, there can be no realistic nor responsible argument to the contrary. The Supreme Court and the ICC/STB have ruled New York

Dock arbitrators, as delegatees of the ICC, have the authority to modify or set aside the RLA and CBAs in order to effectuate the transactions identified by the Carrier that are needed to achieve the economies and efficiencies inherent in the underlying rail consolidation. Should the Organization take a position challenging this Panel's jurisdiction to implement the Carrier's Proposed Arbitration Award, such a challenge should and must be rejected.

In addition to this basic challenge to a New York Dock arbitrator's authority, labor has made another challenge to the arbitrator's authority - a challenge based on Article I, Section 2 of the New York Dock conditions, which in turn flows from the requirements of Section 11347 of the Interstate Commerce Act. This is the remaining challenge to CSXT's proposal that Referee O'Brien had to address.

The question which the UTU and BLE put before Referee O'Brien was as follows:

> "Does the Arbitrator lack authority to grant CSXT's request for modification or relief from existing collective bargaining agreements because Article I, Section 2, of the New York Dock conditions mandates the preservation of rates of pay, rules, working conditions and rights, privileges and benefits under existing agreements?"

The relationship between Section 2 and Section 4 has long been a procedural issue for New York Dock arbitrators. Referee Robert O. Harris, in Carrier Exhibit "19", gave the following review of that relationship:

> "The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix I to New York Dock. As noted earlier, Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates

the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of Section 4, and its authority derives from that section.

"Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules, or working conditions, or of representation under the Railway Labor Act occur through arbitration under Section 4 of the New York Dock conditions...." (Referee Harris then cited those five arbitration awards. Should the Organization cited any of those awards, they should be disregarded by this panel. For reasons set forth below, those awards must now be considered as invalid and an improper application of the rulings and decisions of the ICC/STB.)

"Prior to, at the time of, and subsequent to this ICC decision, various arbitrators ruled that Section 4 effectively superseded the Section 2 protection contained in New York Dock and that new conditions could be imposed pursuant to such a Section 4 arbitration award. It should be noted that in at least two cases arbitrators who had made earlier decisions regarding the interrelationship between sections 3 and 4 have changed their position . . . ."

". . . it is clear that the ICC believes that its order supersedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly evolved reconciliation of the conflict between the two sections."

The dispute concerning the relationship between Section 2 and Section 4 continued.

In *Executives* (Carrier Exhibit "21"), the Court of Appeals remanded a case to the ICC to

define "rights, privileges and benefits." While the remanded case was before the ICC, Referee O'Brien had to deal with the Organizations' Section 2/Section 11347 challenge. He made the following ruling:

> "Although the ICC has suggested that New York Dock arbitrators address all issues submitted to them, subject to its review, clearly it would be inappropriate for the Arbitrator to determine what was intended by the statutory language 'rights, privileges and benefits' in Section 405 of the Rail Passenger Service Act. In *Executives*, the Court of Appeals for the D. C. Circuit specifically remanded this determination to the ICC. Therefore, it would be totally inappropriate for this Arbitrator to offer an opinion on the scope of this statutory language and I expressly decline to do so."

CSXT appealed this one part of Referee O'Brien's decision to the ICC. In the same decision when it affirmed Referee O'Brien's decisions that were challenged by the Organizations, the ICC both ruled an arbitrator had jurisdiction to address the Section 2 (Section 11347) versus Section 4 issue and gave Section 4 arbitrators guidance concerning the proper outcome for that dispute. The ICC held Section 2 was limited to fringe benefits such as vacation benefits and did not protect collective bargaining rates of pay, rules and working conditions. Specifically, the Commission said the following about the "Section 2/rights, privileges, and benefits" issue:

> "The history of the phrase 'rights, privileges, and benefits' indicates that it has traditionally meant what it implies - the incidents of employment, ancillary emoluments or fringe benefits - as opposed to the more central aspects of the work itself - pay, rules and working conditions...."
>
> ***
>
> "We believe that this is compelling evidence that the term 'rights, privileges, and benefits' means the 'so-called incidents

> of employment, or fringe benefits,' Southern Ry. Co.–Control–Central of Georgia Ry. Co., 317 I.C.C. 557, 566 (1962), and does not include scope or seniority provisions.
>
> "In any event, the particular provisions at issue here do not come within 'rights, privileges, and benefits' because they have consistently been modified in the past in connection within consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions. The ATDA court looked to past conduct in consolidations when it ruled that scope rules were not among those provisions protected as 'rights, privileges, and benefits.'...."
>
> "Seniority provisions have also been historically modified with regularity by arbitrators in connection with consolidations. See Carmen II at 721,736-737, 742 and 746 n.22. (Carmen II is attached as Carrier Exhibit "12") Thus, both scope rules and seniority provisions have historically been changed without RLA bargaining and, accordingly, are not eligible for protection as 'rights, privileges, and benefits.'"

A copy of this ICC decision reviewing Referee O'Brien's award is attached as Carrier Exhibit "26".

As mentioned earlier, the UTU and BLE appealed the ICC decision to the Court of Appeals. The court's decision, which is attached as Carrier Exhibit "27", specifically addressed the "rights, privileges and benefits" issue with the following comments:

> "The unions argue that the Commission erred in finding that CSXT's proposed merger of the seniority rosters in the consolidated district would not undermine protected rights. We disagree."
>
> ***
>
> "In this case, the Commission offers a definition: 'rights, privileges, and benefits' refers to 'the incidents of employment,

> ancillary emoluments or fringe benefits - as opposed to the more central aspects of the work itself - pay, rules and working conditions.'...And 'the incidents of employment, ancillary emoluments or fringe benefits' refers to employees' vested and accrued benefits, such as life insurance, hospitalization and medical care, sick leave, and similar benefits...."
>
> "The Commission's interpretation is reasonable. *See American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 847-48 (D.C.Cir. 1995)* (holding that the ICC's interpretation of *New York Dock* rules is entitled to substantial deference by a reviewing court. Under the Commission's interpretation, 'rights, privileges, and benefits' are protected absolutely, while other employee interests that are not inviolate are protected by a test of "necessity," pursuant to which there must be a showing of a nexus between the changes sought and the effectuation of an ICC-approved transaction. Under this scheme, the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by Congress."

Thus, regardless of whether the Organization frames its opposition to the Carrier's Proposed Arbitration Award as a Railway Labor Act, collective bargaining agreement or Article I, Section 2 issue, such opposition is without merit. As the ICC said in Finance Docket 32035 (Sub-Nos. 2-6) (Carrier Exhibit "23"):

> "It is now well established that these CBA terms can be modified by us or by an arbitrator as necessary to carry out an approved transaction." (Sub-No. 2)

There are two more related procedural issues which may be raised by the Organization and both are totally without merit. The first issue would involve a contention the Carrier is restricted to including in its proposed arbitration award only to those items which were included in its application to the STB. The STB addressed this issue in its

decision in Finance Docket No. 32760 (Carrier Exhibit "2") when it said:

> "...Parties seeking approval of a transaction, whether by application or 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 in appropriate 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."

The second issue may involve a contention the arbitrator should consider and, in fact, be governed by the proposals presented by the parties during negotiations. Such a position is totally contrary to public policy. Were negotiators to be held accountable for their efforts to make agreements, such actions would have a chilling effect on the give and take which characterizes negotiations. The parties would resist offering serious proposals and they certainly wouldn't make those efforts in the future. Proposals where there is no final agreement between the parties are just that - proposals. Any contention by the Organization that the Referee should impose one of the Carrier's negotiating proposals as the Arbitration Award is totally without merit and must be rejected. As Referee Herbert Marx said in a case involving the Chesapeake and Ohio Railway, the Seaboard System and the Carmen:

> "A final note: Again during negotiations, certain additional side agreements were offered by the Carriers to cover, on a reassurance basis, certain specific issues. Since these did not

lead to a negotiated settlement, the Carriers are correct in stating they should not be held to such additional provisions..."

A copy of Referee Marx' decision in that case is attached as "Carrier Exhibit "31".

Now that these three traditional procedural arguments have been set aside, it is necessary to look at the one issue in this case. That issue may be stated as follows:

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

It is the Carrier's position there is only one possible answer to this question and that answer is "YES." The Carrier believes a review of its Proposed Arbitration Award will clearly demonstrate the Award best achieves the public transportation benefits the STB had in mind when it approved the UP/SP merger. However, before that review, there is one corollary issue which must be addressed. That issue has to do with the standard to be used to determine whether the Carrier's Proposed Implementing Agreement is appropriate.

There can be no doubt the standard for the appropriateness of the Carrier's proposed implementing agreement is whether the consolidations proposed by the Carrier will yield a public transportation benefit. It is the Carrier's position it will establish throughout the next section that the economies and efficiencies inherent in the Carrier's Proposal will provide a public transportation benefit. Moreover, the Carrier's presentation certainly meets and exceeds the standard of proof established by the STB and applied by

New York Dock arbitrators.

Referee Ables, in a case involving CSX and the ATDA, dealt with how far a carrier could go to achieve the approved economies and efficiencies. Specifically, he said:

> "The Commission could not reasonably anticipate all the changes - either in kind or degree - that would logically flow from its authorization to merge carriers. Absent the parties themselves agreeing how to accommodate the changes, neutrals are hard-put to consider substituting their judgment for that of carriers why the change either will not effect the economies and efficiencies projected or that some artificial bar, like the limits of New York Dock conditions or the public interest connection between authorized mergers and changes, prevent the proposed operational changes." (emphasis added)

A copy of Referee Ables' decision in this CSX/ATDA case is attached as Carrier Exhibit "8".

Likewise, Referee O'Brien (Carrier Exhibit "24") accepted the carrier's judgment as to what would meet the standard of proof:

> "The Carrier anticipates that its proposed changes will promote more economical and efficient transportation in the territory now served by the B&O, C&O, WM and RF&P which it wished to coordinate. According to the D.C. Court of Appeals, there would thus be some transportation benefit flowing to the public from the underlying transaction proposed by the CSXT in its January 10,1994, notices to the UTU and BLE."

Again, it is instructive to turn to the ICC's decision in Finance Docket No. 32035 (Sub-Nos. 2-6) (Carrier Exhibit "23"). In that decision , the Commission dealt directly with the standard required of carriers.

> "Arbitrators should also be aware that in Springfield Terminal the court admonished us to identify which changes in pre-transaction labor agreements are necessary to secure the public benefits of the transaction and which are not. We have generally delegated to arbitrators the task of determining the particular changes that are and are not necessary to carry out the purposes of the transaction, subject

only to review under our Lace Curtain standards. Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identifies with reasonably particularity. But arbitrators should not assume that all pre-transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purpose of the transaction."

This is the full text of the quote used by Referee Bend in Carrier Exhibit "30".

It is the Carrier's position its proposed implementing agreement is completely consistent with this ruling. The Carrier's proposal addresses only those operational and related work assignment changes which are "clearly necessary to make the merged entity operate efficiently as a unified system." The Carrier's proposal seeks to create a unified operation that will meet both the needs of our customers and the challenges raised by our rail, barge and truck competitors. In other words, the proposal seeks to provide the public transportation benefit envisioned by the ICC when it approved this merger.

A LOOK AT EXISTING OPERATIONS

Currently, with the merger of the Southern Pacific and Union Pacific Lines, the Carrier has ten system tie gangs and twelve system rail gangs working across the Western territory of its property. Three of the tie gangs are on Southern Pacific Western Lines (SPWL) and are separated by four different seniority regions. One of the tie gangs is on

the Denver & Rio Grande Western Lines (D&RGW). The remaining six tie gangs are on the Union Pacific System Lines (UP). The UP also has one concrete tie gang and two surfacing gangs.

Of the twelve rail gangs, five are SP gangs and two are D&RGW gangs. The remaining five are UP gangs, not including one additional in-track-welding gang. This section will explore the current operation given the numerous seniority districts that split between these lines and even split the lines internally. Under the current system and collective bargaining agreements, the movement and efficiency of all the rail and tie gangs are hindered by climate changes, manpower shortages and equipment allocation problems.

1. Climate Problems

The nature of work on a Maintenance of Way system gang is such that working outdoors is unavoidable. Furthermore, the outside work is not intermittent, but is constant throughout the work day. These employees have little opportunity for reprieve from icy winds and snow or from blistering heat and sun. With a system as wide-spread as the merged Union Pacific, a certain amount of project scheduling can be done so as to attain optimal weather and climate conditions for the crew and the project. For example, it makes far more sense to schedule work for the colder northern regions during the summer months. If work in North Platte, Nebraska or Cheyenne, Wyoming is scheduled for the months of October through April, not only will there be great discomfort on the part of the

gang members, the job will undoubtably be "frozen out,"[4] and the employees sent home without work. While even the hottest conditions do not preclude maintenance of way work from an engineering standpoint, it is obvious that employees who work in extreme heat are more prone to discomfort, or even illness and injury. Work in extreme temperature affects employee morale and can conceivably be linked to safety concerns. An employee eager to finish a job to get out of the extreme heat or cold is simply more likely to take risks or shortcuts to finish a task and get out of the elements. Extreme temperatures may also cause grogginess and abnormal fatigue.

Due to the limitations placed on work scheduling by conflicting seniority rosters across the merged UP (inclusive of SP, WP and D&RGW), the 1997 schedule was not optimum for climate concerns.[5] For example, Tie Gang 8563 (SP) worked the months of June through October in the Lordsburg Subdivision. This system stretches across southern Arizona and New Mexico. Needless to say, the heat is sweltering during those summer months. Meanwhile, another SP Tie Gang (8564) is scheduled to work the Cascade Subdivision in November through mid-December. The Cascade Subdivision is located in northern Oregon and this crew is likely to be working in cold conditions and may even be "frozen out" and sent home. Likewise, Tie Gang 8565 (D&RGW) is scheduled to work from late November through the first of 1998 on the Bond Subdivision, which is located in the heart of the Colorado Rocky Mountains. Again, weather conditions may

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[4] "Frozen out" refers to the occasion when the temperature stays below freezing and the ground is frozen. In such conditions, rail and tie work cannot be completed.

[5] All current scheduling examples refer to Carrier Exhibit "32."

make it impossible for them to even commence that work so late in the year. SP Tie Gang 8566 is scheduled from April until October in the East and Bakersfield Subdivisions, a climate that would be good to work in during the late fall, winter, and early spring months will be very hot during the prime summer months. The examples continue throughout the entire schedule. UP Tie Gangs 9061, 9062, 9064, 9066 and Concrete Tie Gang 9073 all end their 1997 schedule in a cold climate, where work will be at least uncomfortable and, at worst, cut off early due to frozen ground.[6] In examining the Rail Gang schedules, the same climatic difficulties are found. Gangs are expected to be able to work in cold regions during late winter and early spring while working in very hot climates during the brunt of summer. This scheduling makes no sense from any logistical standpoint. The weather can cause a halt in work and can cause discomfort, illness and safety concerns for employees.

No person can review this work schedule and not ask "why?" However, the answer is very simple. The current Collective Bargaining Agreements bind the hands of the Carrier. With these agreements in place, the Carrier can make no changes that would eliminate or alleviate the problems caused by scheduling in so many different climates without incurring delay, additional manpower needs and greater costs. To put this quite simply, by putting all of these systems under the Union Pacific Collective Bargaining Agreement, the Carrier could schedule crews to work in the south and western regions

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[6] The Current Operational Schedule is mapped out on Carrier Exhibits "33," "34," "35," and "36." These maps show the current and actual placement of gangs during the months of February, May, August and November.

during the late fall, winter and early spring. During the late spring, summer and early fall, the crews could then be moved to projects in the northern regions.

2. Manpower Issues

The seniority boundaries created by the Collective Bargaining Agreements hinder the efficient and effective completion of maintenance of way work in ways other than climatic scheduling problems. Manpower is a recurrent theme in maintenance of way work. When work is scheduled in a seniority district, the positions are posted for bidding by those district members. When the crew is filled, it leaves a hole in the staffing plans of that district. Conversely, if an insufficient number of employees bid on the road work, the gang does not have enough people to safely and effectively complete the work. The central point is that the seniority districts are stretched very thin on manpower when road work is done in their district.

This is currently handled in two ways. The positions left temporarily vacant due to a maintenance of way project in the district can be left empty, for other employees to cover until the project is complete; or the vacancies can be filled by hiring. However, once the project is complete, those new hires become excess and are furloughed. Additionally, both solutions lead to the problem of putting employees on tasks with which they are unfamiliar and inexperienced, whether the employee is from the shop or a new hire off the street. The learning curve for these employees hinders crew efficiency and brings with it safety concerns.

For example, when Tie Gang 9066 works on the Subdivision from Sacramento,

California to Ogden, Utah, the gang jobs are bulletined and employees are taken from their regular maintenance positions in the district to work on the road crew. When the 9066 works from Sacramento, California to Portland, Oregon, the former positions are all abolished and the jobs are rebid for the new seniority district. Those employees whose jobs are abolished then either go back to their vacant position, bump a less senior employee, or go home without work. This not only interferes with the employment of the crew members, it also affects the continuity of the crew make-up. With each abolishment and re-bid of positions, the composition of the crew is changed. Experienced employees are sent back to a vacant position, or back home with no work, while an inexperienced employee is put in their place, merely because of a change in location that can be less than 100 miles.

On D&RGW Tie Gang 8565, this relative small piece of track is made even smaller by the seniority districts. Two seniority districts are separated at Grand Junction, Colorado. Both districts contain trackage that demands maintenance of way work can only be performed in the milder months of the year, late April through early October. However, any gang that works on those small Subdivisions pulls manpower away from other important work. When a seniority district encompasses an area with only one type of climate, the potential to keep a crew working year-round decreases with the size of the district. In a system without seniority districts to limit the mobility of the workforce, the employees can be kept working in suitable climates all year long. Furthermore, the gang could have continuity because it would not need to be re-bid. This continuity means that the crew members are experienced in their jobs and they are accustomed to working with one

another. This prevents a learning curve situation and problems with communication between employees. A crew that has worked together for some time is naturally going to be more productive than a group of new employees who have yet to learn their jobs, much less learn how to communicate with each other. The crews could also be worked without causing manpower shortages in district locations. No jobs would be short-shifted and there would not be fluctuating short term, or almost part-time employment.

Another example of the difficulties in dealing with limited manpower due to seniority systems can be exemplified in the example of Elko, Nevada. In Elko, two separate seniority systems are present for two lines that intersect. One is a Southern Pacific seniority district and the other is Western Pacific seniority district. In Elko, one person working on the Western Pacific can be fully employed, while a Southern Pacific district employee is furloughed. These work locations are mere miles from each other, yet the imaginary lines drawn by the Collective Bargaining Agreement keep the Carrier from running an efficient operation with full employment.

3. Clogged Corridors

With the merger of Southern Pacific with the Union Pacific, the system now has several basic east-west corridors for use. However, because of the separate Collective Bargaining Agreements and the resulting seniority districts, work is currently scheduled in such a way that no corridor is left open for unobstructed business. Just this year, Tie Gang 9062 had to be moved in order to open the Wyoming corridor for business demands because maintenance of way gangs were also working on the other two corridors. Due to

the congestion caused by blocked corridors, the Wyoming project went gravely behind schedule.

From Salt Lake City, Utah to Sacramento, California the Western Pacific seniority district crosses with a Southern Pacific seniority district. If both crews are working on the line, the congestion on that corridor can make it almost impossible to pass. Even on double tracks that are on only one seniority district, the cross-overs (which allow the trains to switch tracks) usually only occur at a minimum distance of ten miles apart. This causes trains traveling in opposite directions to come to a complete halt and wait for a turn to pass along the clear track. This situation happening on single track is not so bad. However, due to the inability of the Carrier to schedule work on certain corridors in concert with all the seniority districts, this problem occurs on all of the corridors simultaneously. With the separate Collective Bargaining Agreements restraining the Carrier from scheduling maintenance of way work effectively and efficiently, the Carrier loses its competitive edge. The Collective Bargaining Agreements cause the Carrier to do business in a non-competitive manner and prevent any gains in efficiency or economies of scale that the Carrier should reap from the merger.

4. Summary of the Present

In reviewing the current work schedule and seniority district maps, it becomes apparent that the numerous Collective Bargaining Agreements and the resulting seniority districts exacerbate the problems with manpower, equipment, climate and rail congestion described above. The existing operation has ten tie gangs (totaling 912 men) and twelve

rail gangs (totaling 587 men). Even with 1,499 men working on the tie and rail gangs, six tie projects and nine rail projects will be left undone at the end of 1997. Of the six tie projects, four will go uncompleted due to time constraints and two will fail to be finished due to weather conditions. In total, this is 185 days of work left undone. The nine rail projects that fail completion total 86 days of work. A person reviewing these numbers could easily conclude that the Carrier needs to add more manpower and equipment to get these jobs done. However, the Carrier will demonstrate that this entire schedule could have been met in a manner that would have resulted in:

1. Full employment for crew employees on the SP, WP and D&RGW.

2. Consistent, reliable and productive crew staff, regardless of where they worked.

3. Crews working in synchronization on corridors to ensure that business was not hindered.

4. No manpower shortages in small seniority districts due to gang work being performed in the area.

5. No equipment shortages related to manpower issues.

6. No short-term employment cycles of hiring then furloughing in an attempt to manage manpower shortages.

7. Work assigned in locations appropriate to climate and season.

8. Employees being given a wider range of job opportunity with significantly less chance of furlough.

9. Realization of the benefits of merger and resulting gains for the Carrier, employees and the public.

A VISION OF THE FUTURE

As approved by the STB, we envision extending the present UP system operations to encompass the SPWL, D&RGW, and UP(WP). Such system operations are presently in effect on the UP and are quite efficient. Expanding this system makes sense, in business aspects as well as to the employees that work on the gangs. We want to give employees the opportunity to move to seasonal work, rather than be furloughed.

Without the constraints of several different Collective Bargaining Agreements and their subsequent seniority divisions, the ability of the Carrier to schedule productively and logically opens a whole new world of possibilities. For example, crews would not have to be rebid when seniority districts are crossed. This would help to keep the crews staffed with knowledgeable and experienced road workers who are comfortable working together as a team and understand their jobs and how to communicate with each other. On the SP currently, ties gangs are limited to regional districts. No sooner does a crew begin to "click" then the jobs are abolished and re-bulletined. One Collective Bargaining Agreement would eliminate all but the vacancies left by attrition and employee-initiated job transfers.

With one Collective Bargaining Agreement, the Carrier would have greater flexibility to work around climatic changes and corridor traffic needs. For example, the Union Pacific system was able to use a "swarming" technique in 1997 that produced great results in a short time by effectively using all of its available resources on one important corridor for fifteen days. The Carrier committed to shutting down the corridor during the time that the crews were there and, at the end of fifteen days, the corridor was finished and successfully

reopened to traffic. This swarming could be put to excellent use system-wide if there was only one Collective Bargaining Agreement. For example, during the coldest winter months, the crews could be concentrated in the south and southwestern regions, leaving the two northerly corridors open. As the seasons progressed, the crews could move from south to north. This envisions crews moving in more of a longitudinal direction north and south than across the system in east-to-west movements.[7]

While the Organization may oppose what the Carrier views as the completion of the merger, its reasons for doing so are weak and contradict the language of the STB merger decision. The Organization may argue against the consolidation of these lines under the Union Pacific Collective Bargaining Agreement by focusing on the possibility that employees may be moved from Junction City, Oregon to Grand Island, Nebraska to Three Rivers, New Mexico. This movement of forces, the Organization may contend, could put a strain on the personal lives of the employees. However, the Organization neglects to acknowledge three vital items.

First, employees are paid for visits home. System maintenance of way employees receive a travel allowance to accommodate their personal life. PEB 229 resulted in the September 26, 1996 National Agreement. In Article XIV of this Agreement, travel allowance benefits are addressed. Employees are given the choice of accepting a travel

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[7] The Proposed Operational Schedule is attached as Carrier Exhibit "37." A side-by-side comparison of the Existing Operational Schedule and the Proposed Operational Schedule can be found at Carrier Exhibit "38." Four maps, showing the geographic placement of gangs in the Proposed Schedule for the months of February, May, August and November are included as Carrier Exhibits "39," "40," "41," and "42."

allowance for miles actually traveled by the most direct highway route or allowing the Carrier to purchase a round-trip airline ticket for their use every third weekend while they are working at a location more than 400 miles from their residences.[8] Additionally, the placement of SP/WL, WP and the D&RGW under the UPRR Collective Bargaining Agreement actually gives employees more opportunity for work closer to their homes.

Second, employees are free to choose their work for themselves. Positions on the systems gangs are bulletined. Employees make their choices to work on system gangs knowing that travel is imminent. Employees also make their choices with the knowledge that they will receive per diem payments and travel allowances.

Third, such long-range movement of employees and gangs would simply not be cost effective nor efficient for railroad operations. With the removal of Collective Bargaining Agreement barriers to efficient operations, movement of employee gangs would be more in the way of longitudinal movement, north to south, rather than latitudinal movement from east to west. Long distance movement of employees increases the cost of the maintenance work done and also increases the Carrier's cost of travel allowances. Any argument made regarding this projected excessive movement is unfounded, unsupportable and irrelevant to the end goal of the merger.

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[8] Article XIV is included as Carrier Exhibit "43."

1. **Engineering Benefits**

The benefits of putting these lines under the Union Pacific Collective Bargaining Agreement can be summed up in one phrase: **We can do more with less**. As can be seen by the Proposed Operational Schedule, without the interference of four collective bargaining agreements, efficiencies of the merger can be realized.[9]

Under one Collective Bargaining Agreement, the existing tie gang numbers could be reduced from ten to eight. This is a reduction of 131 employees. The existing rail gang numbers would fall from twelve to ten – a savings of 107 employees. Amazingly enough, with these numbers reduced, **all of the scheduled projects are completed**. Furthermore, this reduction of manpower equates into front cost savings on manpower that recurs annually.

With every tie or rail gang that is eliminated, so are gangs that are created to support that gang (district or regional surfacing and/or unloading gangs). Costs are additionally decreased because the gangs have vehicle costs which would cease to exist once the gang is abolished. For example, Tie Gang 9061 incurred labor costs in July 1997 of $216,467.00.[10] Other costs incurred by the gang were material and general expenses totaling $10,242.00. Finally, the vehicle costs summed $15,587.00. Not including the labor costs of the additional surfacing and unloading gang, Tie Gang 9061 cost the Carrier $242,296.00 to run in the month of July for 44 employees. With the costs of the support

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[9] See the side-by-side comparison at Carrier Exhibit "38."

[10] A schedule of wages is included as Carrier Exhibit "44."

gangs (9081 and 9091), the cost totals $416,636.00.[11]

Similarly, Tie Gang 9064 had expenditures of $255,865.00 for 41 employees during the month of July 1997. Including the costs of the supporting gangs (9084 and 9094), the total rises to $412,051.00.[12] Curve Rail Gangs 9011 and 9013 showed labor and vehicle costs of $168,559.00 and $155,265.00 for 33 and 31 employees, respectively. With unloading gang support (9021 and 9023), the costs rose to $195,425.00 and $182,131.00.[13]

This information can be summed up as follows[14]:

Gang No.	9061	9064	9011	9013	TOTALS
# of Employees	44	41	31	33	149
Base cost	$242,296	$255,865	$168,559	$155,265	$821,985
Cost with support	$416,636	$412,051	$195,425	$182,131	$1,206,243

Above, it was discussed that the proposed schedule would allow system gang movement to be so efficient as to allow for the elimination of 238 positions, or two tie gangs and two rail gangs. The figures above represent the elimination of four gangs (two tie and

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[11] These calculations and supporting documentation are located at Carrier Exhibit "45."

[12] The spreadsheet showing these calculations, along with documentation, is attached as Carrier Exhibit "46."

[13] See Carrier Exhibits "47" and "48" for the spreadsheets and documentation regarding these Curve Rail Gangs.

[14] It should be noted by the Arbitrator that these figures for July 1997 are actual amounts.

two rail), yet only total 149 employees. The support staff for all four of these gangs totals approximately 63 employees, bringing the number of total employees to 212. With that number in mind, the elimination of these four gangs would have saved the Carrier $1,206,243 in the month of July. Because most gangs work an average of ten months during the year, **estimated savings can be calculated at $12,062,430 per year**. It should also be realized that this cost savings will repeat annually as it is an annually budgeted expense.

An analysis of the yearly wages and benefits paid to Gangs 9011 and 9061 during the twelve months period from August 1995 through July 1996 demonstrates greater wages and income than calculated above. For these two gangs, their annual income averaged $73,684, including fringe benefits.[15] If these past wage averages were used to calculate the savings of eliminating 212 jobs, the cost savings would be $15,621,008. In this case, the Carrier would rather err on the side of prudence and estimate the manpower savings to be **$12,062,430**.

The reduction of two rail gangs and two tie gangs also reduces the need for support mechanics. Each tie gang requires four mechanics, with each mechanic having a truck. The rail gangs have one mechanic and truck each. Each tie gang is budgeted for $20,000 worth of maintenance materials per month. Each rail gang is budgeted for $15,000 worth of maintenance materials per month. The salary and overhead for each mechanic is $71,854 per year and the cost for a mechanic truck is $25,774 per year. The reduction in

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[15] See Carrier Exhibit "49."

tie and rail gangs equates into an annual mechanic savings of **$1,814,280**, to-wit:

TIE GANGS	
4 mechanics @ $71,854 each =	$287,416
4 mechanic trucks @ $25,774 each =	103,096
Maintenance materials for 12 months @ $20,000 per month =	240,000
Sub-total	630,512
x 2 gangs	x2
Tie Gang Total Mechanic Savings	$1,261,024
RAIL GANGS	
1 mechanic @ $71,854 each =	$ 71,854
1 mechanic truck @ $25,774 each =	24,774
Maintenance materials for 12 months @ $15,000 per month =	180,000
Sub-total	$276,628
x 2 gangs	x2
Rail Gang Totals Mechanic Savings	$553,256
TOTAL MECHANIC SAVINGS	**$1,814,280**[16]

For the existing schedule to complete all of the scheduled projects, the crews would work a total of 2,120,256 hours. With the proposed operation, all of the projects are completed in 1,859,832 hours. This is a difference of 260,242 hours of payroll costs that the Carrier will save with the system under one Collective Bargaining Agreement. Using the July 1997 payroll of Gang 9061 to create an average hourly cost of work as $26.66, the cost of those 260,242 hours of work can be estimated at **$6,924,903.80.**[17]

With the present schedule, the Carrier projected that it would need to purchase

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[16] Supporting documentation is included as Carrier Exhibit "50."

[17] Gang 9061 Labor Costs were $216,467, divided by 41 employees, divided by 22 work days in July at nine hours a day equals $26.66.

equipment for one tie gang and for one rail gang to optimize manpower. The equipment costs for one tie gang is $4,569.781. The equipment costs for one rail gang is $2,381.237. By putting these regions under the Union Pacific Collective Bargaining Agreement, the Carrier will be able to avoid a one-time cost of **$6,951,018.**[18]

The above figures are only those benefits which the Carrier feels comfortable putting a price on. It should be recognized that there are greater benefits that can be attained from this merger that are more difficult to quantify. Given the above calculations, the Carrier asserts that the adoption of the attached Implementing Agreement, creating one western system under the Union Pacific Railroad Collective Bargaining Agreement, would equate in engineering savings estimated at **$27,770,631** for one year.

2. **Transportation Benefits**

The proposed operation makes sense of seasonal and climatic changes – scheduling work on the northern lines for the summer months and the southern lines for the winter months. This leaves corridors open for unobstructed travel and transportation, a benefit that will greatly enhance the Carrier's competitive edge and bottom line.

In 1996, the combined Union Pacific and Southern Pacific ran a total of 8,822,895 train hours. This total includes eastern lines that are not the subject of this arbitration. Of those train hours, an estimated 54.08% are on tracks that will be affected by the outcome

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[18] Supporting documentation is included as Carrier Exhibit "51."

of the merger. The year-to-date total of train hours for 1997 is 5,253,002.[19] The cash impact/Total Cost per hour according to Financial Planning and Analysis is $47.63.[20]

Given the projected crew movement changes and work load shifting, the Transportation Energy Operations General Manager, Woodruff Sutton, has given an estimated savings of 5% from the operational budget. With this 5% estimate, the Carrier's Train Delay cost savings would be $11,597,864 annually.[21]

The consolidation of the WP, SP/WL and D&RGW under the UPRR Collective Bargaining Agreement would also give transportation benefits regarding terminal performance. The changes in work scheduling would impact that number of hours that cars are held in terminals. During the first eight months of 1997, 4,626,214 cars were switched in the region subject to this arbitration. The system average of holding the cars in the terminal (terminal dwell) is 24.6 hours. Using Financial Planning and Analysis figures, the cash component of holding a 77.3 car train is $13.99 per hour, or $.1810 per hour per car. Using the 5% gains estimated above, the Carrier would expect to realize savings of $1,544,901 from terminal delays.[22]

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[19] These figures are from Network Planning and are included as Carrier Exhibit "52."

[20] The Total Cost per hour is the sum of 1) Cost of fuel, 2) Cost of foreign cars, 3) Cost of recrews, and 4) Cost of overtime. This is the cash impact that would be directly removed from the operational budget.

[21] The Train Delay cost savings is calculated by taking the YTD train hours (5,253,002) multiplied by 12/7 (to estimate the rest of the year) multiplied by the Total Cost per hour of $47.63 multiplied by 54.08% (the amount of train hours actually under review in this arbitration).

[22] This calculation was done by multiplying the 4,626,214 cars by 12/8 to estimate the total car switches for 1997, multiplied by 24.6 hours average terminal dwell multiplied by 5% improvement multiplied by cost per car of $.1810 per hour.

In examining the transportation benefits, the Carrier used figures based on the cash components accounted for in the annual budget. Contributing costs were not factored in, to keep the estimate conservative. Combined, the estimated savings for transportation would be **$13,142,765 annually**.

3. Summary of Benefits

As demonstrated above, the placement of the SP/WL, UP(WP) and D&RGW under the Union Pacific Collective Bargaining Agreement would serve the goal of the merger: a more efficient operation with public transportation benefits. The efficiencies of the proposed system would give the Carrier increased flexibility and mobility of its forces. The improvement in engineering and transportation is conservatively estimated at **$40,913,396**.

Before concluding, there is one more argument the Organization might raise which must be addressed. That argument is a contention by the Organization based on a following quotation from *Train Dispatchers v. ICC* (Carrier Exhibit "19"): ". . . the ICC must find that the underlying transaction yields a transportation benefit to the public, 'not merely [a] transfer [of] wealth from employees to their employer.'" The next section will address any such unwarranted contention.

4. Proven Public Transportation Benefits versus Organization Contentions

In all likelihood, the Organization will make a contention based on this quotation from *Train Dispatchers* v. ICC. It will probably be an attempt to raise the "bloody shirt" that the Carrier is attempting to make great financial gains solely from the changes in collective

bargaining agreements. As the Carrier has established throughout this Submission, there is no merit whatsoever to such a contention. The modifications proposed by the Carrier are those which are necessary to achieve the public transportation benefits of this merger. In addition, the ICC, in Finance Docket No. 32133 (Carrier Exhibit "6"), made the following comments concerning the public benefits:

> "Public benefits may be defined as efficiency gains which may or may not be shared with shippers and which include both cost reductions and service improvements. Cost reductions, regardless of whether they are passed on to shippers, are public benefits because they permit a railroad to provide the same level of rail services with fewer resources or a greater level of rail services with the same resources. An integrated railroad can realize additional benefits by capitalizing on the economies of scale, scope, and density which stem from larger operations. These benefits, which may initially be retained by the combining carriers, are eventually passed on to most shippers in the form of reduced rates and/or improved services." (page 5)

Thus, the ICC made it clear it expects the consolidating carriers to achieve cost reductions and that such cost reductions are a public benefit. The STB has not changed this standard.

The real issue is whether the Carrier's proposed changes - the Carrier's Proposed Arbitration Award - will promote more economical and efficient transportation, I. e., will the economies and efficiencies which the STB envisioned when it approved the UP/SP consolidation be achieved by the Carrier's proposal.

It is the Carrier's position that it has established throughout this submission that the Carrier's Proposed Arbitration Award is designed to "promote more economical and efficient transportation" and places the burden of New York Dock protection on the Carrier when it implements those economies and efficiencies.

THE IMPLEMENTING AGREEMENT

1. Introduction

It has been shown that the mandate of the STB is to merge the UP and SP in such a way as to provide for economies and efficiencies to the shipping public. In reviewing the Carrier's proposed implementing agreement, the Carrier believes this panel will find the proposal complies with the goals of the STB decision. If the Organization should submit a proposed implementing agreement, the Carrier also requests this Board to review that proposal closely to see the deviations from the STB decision.

2. Merger Application (Territory)

It is the system gang western territory consisting of the UP, SP Western Lines (SPWL), UP (WP) and DRGW territories, outlined in Carrier's Statement of Facts, which is now before this Board. To understand what is being proposed, it is necessary to review the seniority maps illustrating the western territories for system gangs before any consolidation proposed in accordance with the merger application.[23] Then, compare the current seniority maps with the map which illustrates the western territory after consolidation in accordance with the proposal in the merger application to achieve flexibility and operating efficiencies.[24] Consequently, in keeping with the Merger Application and the STB Decision the Carrier has fashioned an Implementing Agreement for system

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[23] These maps are included as Carrier Exhibit "54."

[24] This map is included as Carrier Exhibit "55."

gangs on the western territory, which is attached as Carrier Exhibit "56," for adoption by the Board. The Implementing Agreement discussion is as follows:

Collective Bargaining Agreement

Section 1.

> All system gang operations will be combined on UPRR, WPRR, SPRR and D&RGW territories and will be subject to the collective bargaining agreement between the Union Pacific Railroad (UPRR) and the Brotherhood of Maintenance of Way Employees (BMWE) effective January 1, 1973 (including revisions to April 1, 1992, as amended).

This language comports with the Merger Application and the Carrier's intent as expressed therein. If not adopted, the Carrier would be faced with attempting to perform system gang work on the western territory under the auspices and work rules of four (4) separate and diverse Collective Bargaining Agreements. Failure to implement the proposed system gang territory would bar the Carrier from realizing the operating efficiencies and service reliability and/or flexibility contemplated by the STB in approving the merger. If the Carrier has to attempt to operate its programmed maintenance functions under the four (4) separate Collective Bargaining Agreements then the labor productivity savings and equipment utilization savings will not be realized. When attempting to utilize its system gangs over the currently aligned territories, the Carrier is placed in a position of approaching the Organization, hat in hand, and attempting to negotiate an agreement, subject to the whim of the particular Organization officer. Demands by the Organization can quickly offset any of the proposed savings and productivity enhancements contemplated by the STB.

Currently, system gang operations on the Union Pacific territory includes the system gangs which may perform work associated with the replacement and renewal of rail (steel relay and curve relay/transposition); the replacement and renewal of ties (both concrete and wood); the replacement and renewal of switches (tie and rail); the out of face surfacing of the track structure; the welding of rail (in-track welding and thermite); the unloading and distribution of the materials for the programmed tie or rail work; the pickup of the released materials from the tie or rail programmed work; the construction of new track; and other support work associated with the operation of the system gang. There is no limitation in the agreement as to the number of gangs that may be established.

In comparing these same types of system gang operations on the UP with the present SPWL operations, the SPWL Collective Bargaining Agreement provides for the renewal and replacement of rail (steel relay) with one (1) system steel gang and, only provides for out of face surfacing work with the Continuous Action Tampers (the CAT gang) as a system gang. Under this Collective Bargaining Agreement there can be only two assigned system type gangs. The renewal and or replacement of ties, rail, surfacing, switches, and/or crossings may be delegated to "Regional Mechanized Production Gangs" which operate over and are confined to four (4) separate regional seniority territories. The new construction and the welding functions are confined to gangs established independently on the nine (9) separate division or district seniority territories and cannot cross the artificially set boundary lines of the seniority division.

Likewise, in a comparison of the Denver & Rio Grande Western system gang operations with the Union Pacific system gang operations, the Carrier may only establish

one (1) system steel gang and may only establish one (1) system tie gang on the D&RGW territory. The remainder of the tie, rail, surfacing, etc. gangs may only be established and staffed by the employees on the three (3) Division seniority rosters and these division gangs are confined to the artificially imposed seniority boundaries of those three (3) seniority divisions.

The fourth player in this equation, the former Western Pacific Railroad, has a territory, with few exceptions, which is manned by employees assigned on a system seniority basis. However, as the Western Pacific does not have the significance of one of the two larger roads (UP or SPWL) the adoption of its Collective Bargaining Agreement does not fit the overall operation and committal to this CBA would be burdensome to the Carrier.

Looking at the differences between the various Collective Bargaining Agreements, there is an obvious need for one set of rules governing system gang operations. With separate rules and functions addressing how seniority operates the efficiencies and savings contemplated in the decision of the STB would not be realized.

The adoption of the Union Pacific Collective Bargaining Agreement, with its apparent flexibility and efficiencies, as the prevailing Collective Bargaining Agreement, and its related rules, in governing the Carrier's system gang operations over these identified territories, is therefore in keeping with the intent of the STB decision and should be found to be appropriate in line with the decisions of O'Brien (Carrier's Exhibit 24) and Benn (Carrier's Exhibit 30), among others.

Seniority Classifications

Section 2.

(A) UPRR, WPRR, SPRR and D&RGW employees who, prior to the effective date of the agreement, had a right based on their seniority to work on system type operations within their respective territories, will have their name and seniority dates dovetailed onto the UPRR System Gang seniority rosters for the following ten (10) classifications, as applicable:

GROUP 20: ROADWAY EQUIPMENT SUBDEPARTMENT

(A) Roadway Equipment Operator
(B) Roadway Equipment Helper

GROUP 26: TRACK SUBDEPARTMENT

(A) System Extra Gang Foreman
(B) System Assistant Extra Gang Foreman
(C). System Gang Track Machine Operator
(D) System Gang Truck Operator/Bus
(E) System Extra Gang Laborer
Special Power Tool Machine Operator (SPTMO)
Roadway Power Tool Machine Operator (RPTMO)
Roadway Power Tool Operator (PTO)
Track Laborer

GROUP 27: TRACK SUBDEPARTMENT

(A) Track Welding Foreman
(B) Track Welder - Machine
(C). Track Welder Helper

Section 2 of the Carrier's proposed Implementing Agreement identifies the present classifications to which employees are assigned under the Union Pacific Collective Bargaining Agreement when assigned to system type operations. Each of the BMWE Collective Bargaining Agreements involved in this transaction also have similar type

position classifications and therefore this should not be considered as any kind of a stumbling block or issue of contention.

Establishment of Seniority Rights

Section 3

(A) UPRR division/district personnel who do not have seniority in Group 20, 26, or 27 prior to the effective date of this agreement will be added to the rosters identified in Section 2 (A), as applicable. These employes will be given seniority dates as of the effective date of the implementing agreement, on the applicable roster, and the ranking order will be determined by ranking the employees with the oldest division/district seniority dates first.

(B) All new employees hired to fill positions as identified under Section 2 (A) will establish seniority on the applicable system seniority roster pursuant to Rule 15(a) of the Collective Bargaining Agreement between UPRR and BMWE.

During the course of the negotiations attempting to reach an agreement the parties discussed this issue in detail. The above language comes from a proposal the Organization submitted to the Carrier and therefore should not be met with a lot of resistance. During those discussions, concern was expressed that division employees from the SP and D&RGW who had never worked on system type gangs would be obtaining seniority on these rosters. UP Division employees were not receiving the same opportunity. The above language corrects that problem and the Carrier has no objection to its inclusion. It is submitted here because it is a fair and equitable means of arranging for the consolidation of seniority on UP system rosters.

It is important for this Panel to keep in mind the mandate of the STB, which is to allow the merger of the UP and SP so as to bring about economies and efficiencies that would bring about public transportation benefits. The imposition of "prior rights" would

certainly be contrary to that mandate, and therefore should not be imposed.

Designations

Section 4

(A) All employees listed on the combined rosters established under Section 2 will have their hire date in the maintenance of way department listed next to their seniority date and the following designations listed next to their name:

Employee	Designation
UPRR	U
SPRR	S
WPRR	W
DRGW	D

Example

Designation	Name	SS#	Seniority Date	Hire Date
S	Brown JC	520-48-0901	7-16-73	2-8-71

(B) When employees with designations apply for bulletined Group 20, 26, or 27, positions, assignments will be handled as follows:

(1) When bids are received from only S,W, and D designated employees, the employees listed on the applicable seniority roster with the superior seniority date/ranking will be assigned.

(2) When bids are received from only U designated employees, the employee listed on the applicable seniority roster with the superior date/ranking will be assigned.

(3) When bids are received from U designated employees, as well as S,W, or D designated employees, the senior U designated applicant and senior S,W, and D designated applicant will be identified, and the employee with the senior hire date will be assigned.

(C) The exercise of seniority displacement rights by U,S,W, and D designated employees will be controlled by the same principles explained in Section 4(A).

Section 4 also is language that was discussed during our negotiations. It was developed to address the fact that UPRR employees did not have system dates prior to 1983. SP and DRGW employees were being placed on the rosters with their division dates and therefore would have placed UPRR employees at a disadvantage. The above language treats the employees equally when bidding for such positions by comparing UP employees to SP, DRGW, or WP employees based upon their hire dates. The Carrier believes it also is a fair and equitable way of addressing the employees seniority concerns.

General Application of Seniority

Section 5

(A) Except as provided above, all new positions or vacancies that are to be filled for system type operations identified in Article 1, Section 2 (A) of this Agreement will be bulletined and assigned in accordance with Rule 20 of the Collective Bargaining Agreement between UPRR and BMWE.

(B) Except as provided above, employees assigned to system type operations identified in Section 2 (A) whose position is abolished or who are displaced will be governed by Rule 21 of the Collective Bargaining Agreement between UPRR and BMWE.

(C). Employes assigned to system type operations identified in Section 2 (A) will be governed by Rule 22 of the Collective Bargaining Agreement between UPRR and BMWE for the purpose of seniority retention on system seniority rosters.

(D) Employees who have seniority on the system combined rosters and who are regularly assigned in a lower class or who are furloughed from the service of the carrier will be governed by Rule 23 of the Collective Bargaining Agreement between the UPRR and BMWE.

To reiterate, the Carrier is not attempting to cherry-pick or rewrite agreement language. In line with the previous discussion concerning one Collective Bargaining

Agreement being applicable to the Carrier's system gang operations in the defined territory, the above rules of the Union Pacific Collective Bargaining Agreement with the BMWE address how (1) an employee would be assigned to a vacancy or how new positions are to be filled; (2) how an employee exercises seniority rights; (3) what the employee is required to do to retain seniority rights on the new created system gang seniority rosters; and, (D) the protection of one's seniority date on the seniority roster. Also as previously stated, the Collective Bargaining Agreement rules between the BMWE and the UPRR would be applicable and the mention of only the seniority rules in Sections 3, 4, and 5 is not intended to restrict employees seniority but to clarify how employees seniority operates. Decisions concerning seniority and its application are difficult decisions and therefore simplicity should be the rule. As Arbitrator James E. Yost, in his decision of April 14, 1997, relative to an arbitration proceeding over the between the United Transportation Union (UTU) and this Carrier wrote in part:

> "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..."**[25] (Emphasis added)

Benefits

Section 6

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[25] This decision is included as Carrier Exhibit "28."

All service performed by employees on any of the system territories identified in this agreement which is part of their continuous employment relationship in the Maintenance of Way Department will be combined for vacation, personal leave, entry rates and other present or future benefits that are granted on the basis of qualifying time of service in the same manner as through all such time had been spent in the service subject to one collective bargaining agreement.

This "boilerplate" language just clarifies that if an employee normally working under of the other Collective Bargaining Agreements involved in this consolidation accepts an assignment to a system gang working under the Union Pacific BMWE Collective Bargaining Agreement as contemplated herein, the time spent on the gang(s) will be treated just as though the employee had continued working on a position bulletined under their respective Collective Bargaining Agreement.

Protection

Section 7

(A) The New York Dock employee protective conditions will be applicable to this transaction. There will be no duplication of benefits by an employe under this agreement and any other agreements or protective arrangements.

(B) If employes are entitled to protection as a result of this transaction, the following will apply:

(1) Not later than the twenty-fifth day of the month following the month for which benefits are claimed, each "dismissed" employe will provide the Carrier with the following information for the month in which he/she is entitled to benefits:

(a) the day(s) claimed by such employe under any unemployment act, and

(b) the day(s) each employe worked in other employment, the name(s) and addresses of the employer(s), and the gross earnings made by the employe in such other employment.

(2) If a dismissed employe has nothing to report under this Section account not being entitled to benefits under any unemployment insurance and having no earnings from other employment, such employe will submit, within the time period provided for in Section 4(B)(1), the appropriate form stating "Nothing to Report." This can be submitted by letter or on Form 32179 provided by the Carrier. The claim is to be submitted to:

Supervisor Protection Administration
1416 Dodge Street, MC PNG 06
Omaha, Nebraska 68179

(3) The failure of any dismissed (furloughed) employe to provide the information required in this Section will result in the withholding of all protective benefits for the month in question pending receipt of such information for the employe.

(4) Any "displaced" employes will file an initial claim with the Supervisor Protection Administration at the address set forth in Section 2 above. If an employe is determined to be eligible for displacement allowances, the employe will be paid a differential allowance for each month in which he/she is entitled. Such employe need not file any additional forms unless he/she becomes furloughed. In such an event, the employe will be subject to the requirements of a dismissed employe as set forth above.

While this arbitration is not protection arbitration under New York Dock, the language is included in the proposed Implementing Agreement of the Carrier for clarification. The STB in its decision stated that employees adversely affected would be afforded New York Dock protection. Only the STB can state the protective conditions and those can only be changed by voluntary negotiations between the parties. It is the Carrier's position that this Board has no authority to alter the terms of New York Dock protection. In addition, it is impossible before the merger is implemented to know who will be so affected so individual employees cannot claim protective benefits at this time. Protection is an individual item and each employee stands in a unique place with his/her seniority in determining adverse impact. New York Dock provides for separate arbitration

for each individual after they allege adverse impact.

In concert with the above language of Section 6 of the proposed Implementing Agreement, the following section just serves to clarify how claims for protective benefits under the New York Dock conditions are to be handled:

Satisfying Requirements of New York Dock

Section 8

> This agreement will constitute the required agreement as provide in Article 1 Section 4 of the New York Dock employee protective conditions. Any claims for disputes arising from the application of this Agreement or the protective conditions referred to in Section 6 will be handled directly between the General Chairman and Director of Labor Relations.

Such handling of claims conforms with existing agreements on the property with the various BMWE General Chairmen.

3. **Summary**

Quite simply, what Union Pacific is seeking from this Panel is nothing new, is nothing that hasn't already been approved by arbitrators, the ICC, the STB and the courts in other cases, and is nothing less than what is necessary to achieve the public transportation benefits which the STB envisioned when it approved the merger.

Specifically, it is the Carrier's position that the following points clearly support a determination by this Panel that the Carrier's Proposed Arbitration Award should and must be the New York Dock Implementing Agreement between the Union Pacific/Southern Pacific and the Brotherhood of Maintenance of Way Employees:

1. The Section 11341(a) immunity provision, as well as section 11347, gives arbitrators the authority to override the Railway Labor Act and Collective Bargaining Agreements as necessary to achieve the purpose of the underlying rail consolidation.

2. This is the clear position of the STB and arbitrators, deriving their authority from the STB, are obligated to follow the rulings and decisions of the STB.

3. Procedural objections of the Organization are totally without merit. The STB has empowered Article I, Section 4 arbitrators to address *all* issues submitted to them. Section 4 arbitration is to be decided on the merits, not procedure. This includes Section 2 versus Section 4 arguments which have now been decided in favor of Section 4.

4. The test is whether the proposed changes will achieve a public transportation benefit. A proposal which brings about more economical and efficient transportation satisfies this test.

5. The Carrier's Proposed Arbitration Award - supported by arbitration awards, court decisions, and, most importantly, by the decisions of the ICC and STB - clearly and without a doubt meets the test. The Carrier's Proposed Arbitration Award will bring about more economical and efficient transportation in the territory covered by the proposal.

The Carrier requests this Panel to impose the Carrier's Proposed Arbitration Award as the Implementing Agreement.

Respectfully submitted,

W. E. Naro
Director Labor Relations
Maintenance of Way and Signal
Union Pacific Railroad
September 10, 1997

UNITED STATES OF AMERICA

SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

IN THE MATTER OF:	:	
UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, and MISSOURI PACIFIC RAILROAD COMPANY	:	Finance Docket No. 32760
- 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.	:	

Monday, July 1, 1996

Surface Transportation Board
Hearing Room A
12th Street & Constitution Ave., N.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

LINDA J. MORGAN	Chairperson
J. J. SIMMONS, III	Vice Chairperson
GUS OWEN	Commissioner

are to be abandoned. However, negotiating a trail use rail banking agreement can be very complex, particularly since many of the railroad corridors involved are federally granted rights of way. Unless the merger agreement contains rail banking conditions, there's no guarantee at all that part or all of these valuable rights of way will be preserved for future reactivation.

In short, RTC would like this Board to adopt conditions on all merger-related abandonments essentially requiring rail banking where a qualified management entity is willing to assume all management and financial liabilities. RTC itself has submitted several statements of willingness in this matter.

That is all I have.

CHAIRPERSON MORGAN: Thank you very much.

MS. MIDDLETON: Thank you.

CHAIRPERSON MORGAN: Next, we will hear from Donald Griffin, representing the Allied Rail Union Transportation-Communications International Union.

MR. GRIFFIN: Good evening, Madam

Chairman, Vice Chairman Simmons and Commissioner Owen. I'd like to begin with just a brief correction. I'm not here representing the Transportation and Communications International Union. That union has graciously conceded their four minutes to the Allied Rail Union with a caveat that I place on the record that TCU remains adamantly opposed to this transaction for the reasons set forth in their brief.

The Allied Rail Union is also opposed to this merger. The Allied Rail Union, Vice Chairman Simmons, we're worried about membership here, consists of the Train Dispatchers Union, the Brotherhood of Maintenance of Railroad Employees and the Brotherhood of Railway Signalmen.

The ARU opposes this transaction and we're not going to go into the competitive effects here. Other parties have talked about that issue at great length today. I'd like to focus, if I may, on three issues that are important to the ARU.

The first issue here is one that seems to come up constantly before this Board and that's the question of 11341(A) immunity attaching to the

approved transaction and how it impacts on labor and specifically on labor's collective agreements.

Now the Board has taken the position recently in the C&O, B&O, Western Maryland, RF&P coordination that was effected under the O'Brien award that immunity granted under Section 11341 is prospectively self-executing. It's a position that the ICC previously took in the UP/C&W merger. The ARU disputes that. The O'Brien award case is on appeal at the present time.

Nevertheless, even if the Board's interpretation of 11341(A) is correct, what ARU asks you to do in this particular case is expressly limit the application of that immunity to only those changes at most that are identified in the operating plant. I'd like to give two real world examples why the Board should limit the immunity in the labor relations sphere.

The first one is on Friday, the Washington Post ran an article about hearings before the National Transportation Safety Board related to the MARC train accident in Silver Spring on February 16th. In that

accident, 11 people were killed. Now it was suggested in testimony before the NTSB that one possible contributing factor in that tragic accident was the implementation of the O'Brien award and how it had so turned seniority rights upside down on the B&O, C&O, Western Maryland and RF&P that the entire train crew and other crew members of those MARC train crews were so distressed over the fact that they were no longer going to be operating a passenger service, that their seniority had been completely changed, that it was weighing on their minds to the extent that the CSXT had held a meting in Brunswick, Maryland earlier, a few days earlier, to try to calm everything down. So the point is that when the Board sanctions an interference and collective relations between the railroads and the unions, that interference can have unforeseen and potentially tragic consequences.

Certainly, the Board didn't intend that something like what happened at Silver Spring happened, but the problem is when you go in and you begin to change seniority rights and expectations employees have had based on a transaction and use of

11341(A) immunity that was cobbled together out of transactions that were put together over the prior 32 years, you're treading in a very, very delicate area, almost 60 years ago. I guess almost 60 years ago.

The Supreme Court said in a Loudoun case that employee morale and safety suffers when employee interests aren't considered. The second point, the second real world point I'd like to talk about on the use of immunity is in this transaction the applicants have proposed, at least as it relates to maintenance of weigh employees that they want to be able to go in and change agreements under the auspices of Commission approval of this transaction, the New York dock conditions, change meal periods, change starting times, and create two huge system gangs seniority districts, one in the East and one in the West. Well, the problem for the applicants is they tried to negotiate something like that just recently. Presidential Emergency Board 229 investigated collective bargaining disputes between the BMWE and many of the nation's major rail carriers, the UP included. Presidential Emergency Board consisted of

three experts appointed by the President. That Board, after hearing eight days of testimony and after due deliberation refused to recommend anything the carriers had proposed regarding changes in meal periods, changes in starting times or an expansion in the use of these systems gangs.

What we, from ARU, want to bring to this Board's attention is the carriers tried to make change in their agreements through the front door of the Railway Labor Act. Those dispute resolution processes worked. The carriers were unsuccessful. They didn't obtain the recommendation from the PEB that they sought. We want to make sure that this Board if it approves this transaction does not permit the applicants to obtain through the back door, Commission approval here, or excuse me, Board approval here or the New York dock conditions what they could not obtain before a Presidential Emergency Board. That's why we ask you that when you discuss the question of the immunity as it relates to labor contracts that you expressly limit it, at most, to those changes that are proposed in the operating plan that are concretely

proposed in the operating plan. The meal periods and starting periods are just something they said they may want to do. They haven't said what they intend to do, how they intend to do it.

It's a very important real world issue. The McLean Trucking decision says that when this Board acts, it must act in approving a transaction keeping in mind the policies that underlie the Railway Labor Act. One of the important policies, two important policies in the Railway Labor Act, are promoting collective bargaining and the Railway Labor Act exhibits a profound hostility to compel changes in collective bargaining agreements.

My second point, and it's in the alternative, the Commission -- excuse me, I've said it again, the Board believes and wishes to affirmatively state that there is this immunity power and the Board has the ability to get in and micromanage federal railway relations and ARU requests that a condition be imposed on any approval of this transaction, that this $1.3 billion in rail construction work that's proposed by the applicants be done by the applicants'

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 25)

UNION PACIFIC R.R., ET AL. – MERGER –
SOUTHERN PACIFIC TRANSP. CO., ET AL.

OPPOSITION TO MOTION FOR VACATUR OF ARBITRAL AWARD

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September 3, 1998

OPPOSITION TO MOTION FOR VACATUR OF ARBITRAL AWARD

Union Pacific ("UP") does not oppose the motion by the Brotherhood of Maintenance of Way Employes ("BMWE") to dismiss as moot its Petition for Review of the October 15, 1997, *New York Dock* award by Arbitrator Peter Meyers ("the Award"). The carrier does, however, oppose the union's motion insofar as it seeks vacatur of the Award, for three reasons: (1) vacatur of the Award would be contrary to the parties' July 29, 1998 implementing agreement; (2) the cases under Article III of the U.S. Constitution upon which BMWE relies do not support its position, but rather support UP's; and (3) vacatur of the Award would be contrary to the public interest, all as set forth below.

ARGUMENT

VACATUR OF THE AWARD WOULD BE CONTRARY TO THE PARTIES' IMPLEMENTING AGREEMENT

The BMWE claims that the parties' implementing agreement dated July 29, 1998 requires this Board to vacate the Award. That claim is, in a word, ridiculous.

Nothing in the July 29th Agreement provided for vacatur of the Award. The preamble and Article 13 of the agreement states that its purposes include "resolution of all disputes associated" with the Award. This language -- the only language in the agreement referring to the Award -- was proposed by the BMWE. UP advised the union that the carrier would not accept this language unless it were understood not to affect the continued vitality of the Award. The BMWE's representative said that he understood this, and on that understanding, UP accepted the language. Supplemental Declaration of Wayne E. Naro ¶ 3, filed herewith. It was, in short, the understanding of

the negotiators on both sides that the July 29th Agreement would *not* provide for vacatur of the Award. Moreover, the language in question would have been unnecessary if the parties intended to wipe the Award out of existence, because then no disputes could "be associated" with it.

The provision the BMWE relies upon provides only that the July 29th Agreement cancels and replaces "*the Implementing Agreement of October 15, 1997.*" Preamble & Article 13 (emphasis added). That is why the BMWE places the word "Award" in brackets when quoting this provision. But for purposes of interpreting the July 29th Agreement, the terms "Implementing Agreement of October 15th, 1997" and "arbitral award of October 15, 1997" cannot properly be used interchangeably, as the BMWE uses them, because the agreement uses those terms separately and makes different provisions for the Award and the original implementing agreement.

Furthermore, the Award is in no way inconsistent with the July 29th Agreement. Indeed, that agreement preserves the fundamental aspects of the Award:

- The Award provides for consolidation of system maintenance-or-way functions in the Western Territory of the merged UP and SP railroads. So does the July 29th Agreement.

- The Award overrides the SP railroads' system gang agreements, and placed all maintenance-of-way employees under the UP-proper system gang agreement, thus allowing UP to establish system gangs that can work throughout the Western Territory. So does the July 29th Agreement.

- The Award dovetails seniority rosters for employees on the UP and SP railroads who have the right to work on system or system-type gangs. So does the July 29th Agreement.

- The Award provides certain benefits for affected employees, beyond the benefits required by *New York Dock*. So does the July 29th Agreement.

Supplemental Declaration of Wayne E. Naro ¶ 4.

There are only two material differences between the Award and the July 29th Agreement, and these differences are entirely consistent with the fundamental premises of the Award. First, while the Award applies only to the UP and SP railroads in the merged Western Territory, the July 29th Agreement also applies to the former Chicago & North Western Railway ("CNW") property. Second, as the quid pro quo for providing for consolidation of maintenance-of-way functions for the former CNW property along with such functions for the Western Territory properties and for dismissal of the BMWE's Petition for Review, the July 29th Agreement grants employees additional benefits beyond those provided in the Award.[1/]

[1/] Supplemental Declaration of Wayne E. Naro ¶ 5. The principal additional benefits are that employees with seniority dates on or before January 1 of this year cannot be forced to accept positions on system gangs with assembly points outside their home roads or regions, and any of these employees who accepts such a position may vacate it later if his gang travels more than 500 miles away from his home station. These benefits will result in some inconvenience for UP, but in the end they are unlikely to result in very different arrangements than the Award would have. As explained in our Opposition to the BMWE's motion for a stay of the Award and the accompanying Declaration of Wayne E. Naro, typically many more employees volunteer for positions on system gangs than there are such positions. In addition, most employees who bid for these positions are willing to assemble off their home roads/regions and stay with the gangs regardless of how far they travel, because the pay for system gang work is higher than for comparable work within single districts and regions, and employees who travel more than 400 miles from their home stations are entitled to generous travel benefits, including free airline trips for visits home. *Id.* ¶¶ 6-7.

In short, nothing in the July 29th Agreement supports the BMWE's motion for vacatur of the Award, and as the Agreement is entirely consistent with fundamental elements of the Award, there is no reason to vacate the Award.

THE ARTICLE III CASES UPON WHICH THE BMWE RELIES DO NOT SUPPORT VACATUR OF THE AWARD

The BMWE relies upon the rule that when a case is rendered moot while on appeal, the underlying lower court judgment ordinarily should be vacated. *United States v. Munsingwear*, 340 U.S. 36 (1950). The BMWE's reliance on this rule is entirely misplaced, however.

The sole purpose of the *Munsingwear* rule (which applies only in courts established under Article III of the Constitution, not this Board) is to deprive of preclusive effect a judgment that the losing party below cannot appeal because the case has become moot. 340 U.S. at 39-41. But the BMWE admits that the Award, like all arbitral awards under *New York Dock* and the other protective conditions, would not have preclusive effect in subsequent cases. BMWE Motion at 10. Thus, the *Munsingwear* rule has no application to this case.

The BMWE makes this admission because it hopes to avoid application of the corollary of the *Munsingwear* rule established in *U.S. Bancorp v. Bonner Mall Partnership*, 513 U.S. 18 (1995): when a voluntary settlement moots a case on appeal, the underlying lower tribunal judgment should *not* be vacated, because actions taken by the parties should not be allowed to invalidate a judgment of a tribunal that had

jurisdiction of the controversy when the judgment was entered, nor should the parties be free to escape the preclusive effect of the judgment in these circumstances.

As the Board is not an Article III court, this corollary rule may not be binding here, but it should be applied in this case as a matter of equity. It was the BMWE that proposed negotiating an implementing agreement that would moot its Petition for Review, not UP, which would have been entirely content to allow the Board to rule on the Petition. Supplemental Declaration of Wayne E. Naro ¶ 2. The BMWE, as the proponent of the settlement that deprived UP of any opportunity to have the Award – which was more favorable in some ways to the carrier than the July 29th Agreement is -- affirmed, should not be permitted to benefit from that strategy by having the Award vacated, *particularly not when the negotiators on both sides of the table understood that the July 29th Agreement would have not have any effect on the Award.* See Part I, *infra.*

VACATUR OF THE AWARD WOULD BE CONTRARY TO THE PUBLIC INTEREST

The BMWE acknowledges that under ICC and Board precedents, decisions in cases that later go moot need not be vacated, and generally are not vacated if they state interpretive rules or otherwise provide guidance to persons subject to the Board's jurisdiction. BMWE Motion at 6. According to the BMWE, however, the Award in this case cannot serve as such an interpretive rule, because it is not final action by the Board. *Id.* at 6-7. But arbitrators under the protective conditions are the Board's delegates, and exercise the authority of the Board pursuant to the Board's delegation. Where, as here, a union proposes negotiations that lead to settlement of an appeal of

an arbitral award before the Board decides the appeal, the award is the final exercise of the Board's jurisdiction.

Moreover, the Award in this case provides critical guidance to the unions subject to the Board's jurisdiction. The BMWE and other rail unions have petitioned the ICC and this Board for review of virtually every arbitral award under the protective conditions that has found it necessary under former 49 U.S.C. § 11341(a) or current §11321(a) to override or modify collective bargaining agreements. And at least since the Supreme Court's decision in *Norfolk & Western Ry.* v. *Dispatchers*, 499 U.S. 117 (1991), those petitions have been almost entirely frivolous and, with minor exceptions on subsidiary issues, have been affirmed not only by the Board and the ICC, but also by the courts when the unions have sought judicial review. So far, however, that has not stopped the unions from continuing to seek review of virtually every award under § 11341(a) or § 11321(a), resulting in wasteful dissipation of the resources of the Board, the public funds that support the Board's activities, and the resources of carriers. It is apparent that nothing is likely to stop the flow of petitions for review until a critical mass of arbitral and Board precedent is allowed to accumulate, so that eventually even the BMWE and other unions will recognize that further petitions attempting to relitigate repeatedly the issues decided by the Supreme Court in *Norfolk & Western* and the agency would be a waste of union resources as well, including the dues employees pay to support the unions.

Vacating the Award in this case would have precisely the opposite effect. It would give the unions a powerful incentive to follow the BMWE's strategy of filing a

petition for review of every arbitral under the protective conditions, using those petitions as leverage to wrest concessions from carriers that give employees more than the conditions require, and then using the agreements that result from those concessions to have the awards wiped off the books. The resulting influx of petitions would result in even more dissipation of the Board's resources and the public funds that support the Board.

In short, vacatur of the Award would be contrary to the public interest.

CONCLUSION

For the foregoing reasons, the BMWE's motion for vacatur of the Award should be denied.

Respectfully submitted,

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September 3, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of September, 1998, served the Opposition to Motion for Vacatur of Arbitral Award and the accompanying Supplemental Declaration of Wayne E. Naro by causing copies thereof to be delivered by hand to counsel for petitioner, as follows:

Donald F. Griffin
Assistant General Council
Brotherhood of Maintenance of Way Employes
10 G Street, N.W., Suite 460
Washington, D.C. 20002

Eugenia Langan
Eugenia Langan

STB FD 32760 (Sub 25) 9-3-98 B 190959

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 25)

**UNION PACIFIC R.R., ET AL. – MERGER –
SOUTHERN PACIFIC TRANSP. CO., ET AL.**

SUPPLEMENTAL DECLARATION OF WAYNE E. NARO

1. I, Wayne E. Naro, General Director of Labor Relations at the Union Pacific Railroad ("UP"), make this supplemental declaration in support of UP's opposition to the BMWE's motion to vacate the October 15, 1997, arbitral award by Arbitrator Peter Meyers. My qualifications to make this declaration are set forth in my prior declarations in this matter. This declaration is based on my personal knowledge and information received in the course of my duties as General Director of Labor Relations.

2. On February 11, 1998, this Board issued an order requiring the parties to submit supplemental statements addressing the fairness of the Award. Confident that the record would demonstrate that the Award is not only fair and equitable, but also that it gives employees benefits in excess of those required by the *New York Dock* conditions, UP began to prepare its supplemental statement. A few days later,

however, UP's counsel in this matter advised me that counsel for the BMWE had called her and proposed on behalf of the union that the parties meet to try to negotiate a voluntary implementing agreement in lieu of the one established by the Award, and that the parties seek an extension of time in which to file supplemental statements so that they would not waste the resources of this Board or themselves preparing and filing supplemental statements while there was a chance of settlement. UP agreed to negotiate with the union. We reached agreement; the agreement was duly ratified under the BMWE's procedures; and it was signed on July 29, 1998.

3. The preamble and Article 13 of the July 29th Agreement state that its purposes include "resolution of all disputes associated" with the Award, and that the agreement cancels and replaces the original "implementing agreement of October 15, 1997". This is the only language in the July 29th Agreement that refers to the Award. The BMWE proposed this language. On behalf of UP, I advised the union that the carrier would not accept any language that would affect the continued vitality of the Award. The BMWE's representative said that he understood this, and after consulting with counsel UP accepted the language. Moreover, the discussions over this language were the only ones during the negotiations that addressed the potential effect of the agreement on the Award. In my opinion, the negotiators on both sides of the table clearly understood that the July 29th agreement would *not* provide for vacatur of the Award.

4. The July 29th Agreement incorporates the fundamental elements of the Award: both provide for consolidation of system maintenance-of-way functions in UP's Western Territory; both place all BMWE-represented employees in that Territory under a single system gang agreement so that UP has the right to establish system gangs to work throughout the territory; both dovetail affected employees in the territory onto a single merged seniority roster; and both provide certain benefits for affected employees beyond those required by *New York Dock*.

5. There are two principal differences between the Award and the July 29th Agreement. First, while the Award applied only to the merged railroads in the Western Territory (UP lines and SP lines), the agreement applies to the former Chicago & North Western Railway ("CNW") property as well. Second, in exchange for inclusion of the former CNW property and dismissal of the BMWE's Petition for Review, the July 29th agreement provides additional beyond-*New York Dock* benefits for affected employees.

6. Chief among these benefits that go beyond *New York Dock* is that UP may not force active employees with seniority dates on or before January 1, 1998, to accept positions on system gangs with assembly points off their home roads or regions. In addition, ay such employee who accepts such a system gang position may vacate it later if the gang moves more than 500 miles from his home station.

7. These changes will result in some inconvenience to UP, but in the end they are not likely to result in materially different arrangements than would have resulted from the original implementing agreement. As I explained in my declaration in support of UP's opposition to the union's motion for a stay of the Award, there have typically been many more volunteers for system gang positions than there are positions to fill, so the carrier does not have to force anyone to the gangs, and most employees stay with the gangs no matter how far they travel. That was true during the last system maintenance season as it has been in all other past seasons in recent years. The higher pay for system gang work and the availability of travel benefits, including free airline trips home for visits when a system gang employee travels more than 400 miles from home, provide powerful incentives for employees to volunteer for the gangs and stay with them.

I declare under penalty of perjury that the foregoing facts are true and correct to the best of my knowledge, information, and belief.

Wayne E. Naro

Wayne E. Naro

Executed on: Sept. 2, 1998

GENERAL NOTARY-State of Nebraska
DORIS J. VAN BIBBER
My Comm. Exp. Nov. 30, 2000

Subscribed to and sworn before me
this 2nd day of Sept., 1998.

Doris J. Van Bibber

Notary Public

My commission expires: Nov. 30, 2000