

210234

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760 (Sub-No. 42)

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

(Arbitration Review)

UNION PACIFIC RAILROAD COMPANY'S OPPOSITION TO THE
PETITION OF JOHN E. GROTHER SEEKING INTERLOCUTORY
APPEAL ON PRE-ARBITRATION PROCEDURAL MATTERS

William Loomis
Union Pacific Railroad Company
1416 Dodge Street, Rm. 332
Omaha, NE 68179
(402) 271-5446

Dated: March 4, 2004

Union Pacific Railroad Company ("Union Pacific") opposes John E. Grother's "PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS." In this remarkable Petition, Mr. Grother asks as an interlocutory appeal for the Surface Transportation Board (STB) to address procedural issues in an arbitration proceeding on labor protective conditions. At this point in the process, Mr. Grother has not even attempted to present the procedural issues to the neutral/referee member of the arbitration committee. In the Petition, Mr. Grother asks the STB to require the parties to abandon the customary process and utilize a procedure the STB has specifically determined does not apply to arbitration conducted pursuant to labor protective conditions. In addition, Mr. Grother asks the STB to require the arbitration hearing to be held in Washington, D.C. for the convenience of his attorney.¹ Union Pacific believes that these are both routine procedural issues that should be resolved by the arbitration committee. Mr. Grother's Petition is premature because at this time there is no arbitration decision for the STB to review. Union Pacific requests the STB to decline involvement in this interlocutory appeal and decline jurisdiction at least until these matters have been referred to the arbitration committee for resolution.

BACKGROUND INFORMATION

The Surface Transportation Board approved the merger of Union Pacific and Southern Pacific, Finance Docket 32760 in August, 1996, and imposed the

¹ See Union Pacific Appendix 1 - Grother's 2/20/2004 petition to the STB.

New York Dock labor protective conditions (NYD).² At the time of the merger, John E. Grother (Grother) was a management employee of Southern Pacific not represented by a labor organization, and remains in that capacity with Union Pacific (UP) today. Grother contends he is entitled to a displacement allowance under NYD as the result of an event which took place in May, 1997. Grother wrote to the National Mediation Board (NMB) in June, 2003, and requested the "assignment of an Arbitration Committee."³ Eventually, Lynette A. Ross was appointed as the "neutral/referee member" of the arbitration committee to resolve the dispute between Grother and Union Pacific.⁴

I. This Interlocutory Appeal of Procedural Disputes is Not Properly Before the STB

This dispute involving Grother and Union Pacific is simply not ripe for involvement by the STB. No decision, interlocutory or final, has been issued by the arbitration committee. In fact, as noted above, Mr. Grother has not even attempted to present his procedural issues to the arbitration committee. No hearing has been held. The Interstate Commerce Commission has previously recognized its involvement in a NYD arbitration process prior to a final arbitration decision would only serve to impede the process.

"This accords with our general practice not to entertain interlocutory appeals except in limited circumstances. [FN2] Moreover, the limited scope of review provided by the lace curtain criteria militates against Commission involvement prior to a final arbitration decision except in extraordinary circumstances. Our consideration of interlocutory appeals from intermediate decisions of arbitrators

² New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1970), aff'd sub nom. New York Dock Ry. v. United States, 609 F. 2d 83 (2nd Cir. 1979).

³ See Union Pacific Appendix 2 - Grother's June 16, 2003 letter to the NMB.

⁴ See Union Pacific Appendix 3 - NMB's January 22, 2004 letter appointing Lynette A. Ross.

would impede the process, and should not be undertaken unless clearly justified."

FN2 reads: "49 CFR 1113.15 provides for interlocutory appeals from an administrative Law Judge (ALJ) only if: (a) the ALJ's ruling denies or terminates any person's participation; (b) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (c) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (d) the ALJ finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party."⁵

This dispute involving Grother and Union Pacific does not fall within any of the limited exceptions above and presents no extraordinary circumstances. Procedural disputes such as the ones presented herein are routinely resolved by the neutral/referee member. These issues simply do not warrant the direct involvement of the STB.

II. Mr. Grother's Preferred Submission Process
Has No Application to Arbitration Conducted
Pursuant to Labor Protective Conditions

On pages 4 and 5 of his 2/20/2004 petition, Grother asks the STB to impose his preferred "three-step" process for filing written submissions.

"... Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFRR 1108.8."⁶

Grother prefers this three-step process over the customary simultaneous exchange of written submissions to the arbitration committee prior to the hearing. He argues the simultaneous exchange would somehow frustrate effective STB

⁵ See Union Pacific Appendix 4 - Interstate Commerce Commission Decision - Finance Docket No. 30800 (Sub-No. 28) - decided August 1, 1989.

⁶ Grother's 2/20/2004 petition - pp. 4-5.

review. Grother argues "The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled."⁷ He refers to the "considerable expense involved with a transcript" and argues that the three-step procedure for filing written submissions will produce a "reviewable record" while allowing the parties to avoid the cost of a transcript. Grother's argument reflects the mistaken view that arbitration under Article I, Section 11 of the New York Dock conditions is merely a perfunctory step on a path toward an ultimate review of the arbitration record by the STB. Given the STB's "Lace Curtain" standard for review of arbitration decisions, he is ill advised to so cavalierly look past the determinations of the arbitration committee.⁸ If Grother was really concerned over building a complete written record, he would consider the cost of a transcript.

Further, if Grother was really concerned about building a complete record in writing, he would ask for a four-step procedure for filing written submissions under which both he and UP would have the opportunity to file a pre-hearing written rebuttal. Of course that would deprive him of the last word prior to the hearing.

III. Mr. Grother Misrepresents His Preferred Briefing Process As Having Application to Arbitration Under Labor Protective Conditions

On page 6 of his 2/20/2004 petition, Grother attempts to justify the use of a three-step process because that is the process used in STB arbitration.

⁷ Grother's 2/20/2004 petition - p. 5.

⁸ How the submission process that has been effectively utilized in hundreds of New York Dock arbitrations somehow "would deprive the STB of effective review" is unclear to Union Pacific. Grother's 2/20/2004 petition - p.6.

"2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8."⁹

The problem with that argument is the arbitration committee to which Ms. Ross was appointed as neutral/referee member is arbitration pursuant to Article I, Section 11 of the New York Dock conditions, not STB arbitration. The STB arbitration procedures set forth in 49 CFR 1108 are "intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation or service subject to the statutory jurisdiction of the STB."¹⁰ In footnote 6 on page 6 of his 2/20/2004, Grother concedes the "STB's arbitration rules do not specifically apply to arbitration involving NYD conditions." That is quite an understatement, because 49 CFR § 1108.2(b) precludes the use of the STB arbitration procedures for arbitration pursuant to the New York Dock labor protective conditions:

"Nor are they available for arbitration that is conducted pursuant to labor protective conditions."¹¹

For the reason set forth above, Union Pacific believes the procedure for filing written submissions urged by Grother is not appropriate in a matter involving NYD arbitration. If the partisan members of the arbitration committee are unable to agree on this procedural matter, the proper forum for its resolution is through the assistance of the neutral/referee member of the committee, not the STB.

⁹ Grother's 2/20/2004 petition - p. 6.

¹⁰ 49 CFR § 1108.2(b)

¹¹ 49 CFR § 1108.2(b)

IV. Location of the Hearing

There is also the matter of the location of the hearing. Grother lives and works in the vicinity of Houston, TX. Ms Ross lives in Lawrenceburg, KY and Union Pacific's headquarters is in Omaha, NE. The only connection between this dispute and Washington, D.C. is that is where Grother's attorney has his office.¹² Union Pacific favors a location which is neutral ground for the partisan members, and a location, like Chicago, which can be reached by a single direct airline flight from an airport near each of the arbitration committee member's base. Union Pacific's position is that the neutral member of the arbitration committee should determine the location of the hearing if the partisan members cannot agree. Surely, the STB does not want to get involved in routine procedural matters arising under arbitration pursuant to the NYD protective conditions, such as the location of the hearing.

V. There is no requirement in New York Dock for a pre-hearing agreement on procedural matters between the partisan members.

There is no requirement in the New York Dock protective conditions for the partisan members of an arbitration committee to reach agreement on the procedural details prior to the hearing. A careful reading of Article I, Section 11 of the NYD conditions (Arbitration of disputes) reveals no obligation for the partisan members to reach agreement on anything. Nevertheless, in this specific case, and based on the desire for a smooth flowing and efficient process, UP's

¹² The location of NMB and STB offices is, of course, irrelevant to this matter. Properly prepared parties will have no need for "unpublished material" in Washington, D.C. Grother's 2/20/2004 petition - p.8.

member of the arbitration committee, William Loomis, has discussed several aspects of the upcoming arbitration with Grother's attorney, Gordon P. MacDougall. These discussions have been in the form of telephone conversations and facsimile transmissions. Through this process, the partisan members have reached an understanding on several issues leaving only two issues outstanding. The neutral/referee member, Ms. Ross, has been contacted by the partisan members only twice, jointly via telephone, regarding the dates she proposed for the hearing and to advise that the partisan members were attempting to settle a couple of procedural issues. Instead of the seeming confusion which a reader of Grother's 2/20/2004 petition might infer, the discussions between MacDougall and Loomis thus far have been orderly and productive. The next step should be a discussion between the three members of the arbitration committee, and if the outstanding items cannot be settled by agreement, that task should fall to Ms. Ross as the neutral member, i.e. tie-breaking member, of the committee.

VI. The New York Dock arbitration process does not distinguish between employees represented by a labor organization and those who are not.

Grother obviously places some significance on the fact he is not represented by a labor organization and attempts to argue the arbitration process under New York Dock is different depending on whether an employee is, or is not, covered by a collective bargaining agreement. Union Pacific is unable to discern a distinction in the procedures for arbitration under New York Dock on this basis because there is none. As referenced on page 3 of Grother's

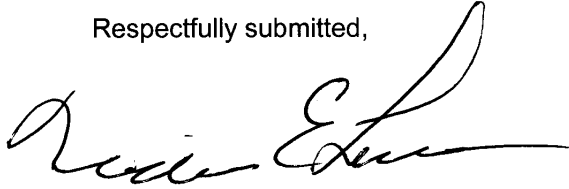
2/20/2004 petition, Article IV of the NYD protective conditions provides the remedy of arbitration to employees not represented by a labor organization just as it does to employees who are represented by a labor organization. This attempt on the part of Grother to distinguish this case from the usual and customary procedures used in other NYD arbitration has already caused considerable delay to the resolution of this dispute. Grother's letter to the NMB requesting arbitration was sent more than six years after the date of the event which he claims entitles him to a displacement allowance.¹³ More than five months elapsed between NMB's August 11, 2003 letter, which furnished a panel of seven neutrals, and NMB's letter of January 21, 2004 appointing Ms. Ross as the neutral/referee member. See Union Pacific Appendix 5 for the part Grother's contention of different handling for employees not represented by a labor agreement played in that delay. Now, we have Grother's 2/20/2004 petition, which appears to be yet another action to delay the commencement of arbitration.

VII. Summary

Union Pacific requests STB to declare lack of jurisdiction in this matter at this time, and remand the procedural issues involving the filing of written submissions and the location of the hearing to the already established arbitration committee for prompt resolution.

¹³ See Union Pacific Appendix 2. This is not to imply there was no on-property handling prior to Grother's letter of June 16, 2003 requesting assignment of an arbitration committee. There was communication between Grother and various employees of Union Pacific in the period between May, 1997 and May, 2003. However, the first statement of claim contending he is a displaced employee as a result of the Union Pacific/Southern Pacific merger transaction is Grother's letter dated May 12, 2003 to James V. Dolan.

Respectfully submitted,



Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

Omaha, NE
March 4, 2004


WILLIAM E. LOOMIS

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND
MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTA-
TION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSC
CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES
FOR ARBITRATION UNDER NEW YORK DOCK
EMPLOYEE PROTECTIVE CONDITIONS

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Dated: February 20, 2004

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND
MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTA-
TION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL
CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES
FOR ARBITRATION UNDER NEW YORK
DOCK EMPLOYEE PROTECTIVE CONDITIONS

Preliminary Statement

John E. Grother (Grother, or employee), ancillary to review of a forthcoming arbitration award, and in aid of the arbitration prescribed by the Surface Transportation Board (STB), petitions the STB to establish certain procedures for implementing the non-agreement employee arbitration provisions of the New York Dock employee protective conditions, with respect to the current dispute between Grother and his employer (carrier), Union Pacific Railroad Company (UP). Specifically, employee desires (1) that the order of written arbitration submissions be first employee, then carrier, followed by an employee reply, and (2)

Washington DC be designated the site for hearing by the arbitration committee.

Background

Grother was employed by Southern Pacific Transportation Company (SPTC) as part of its yard force at Tucson, AZ, at the time of the STB's August 1996 approval of Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (Aug. 6, 1996) (UP/SP), wherein the STB imposed the so-called New York Dock (NYD)^{1/} employee protective conditions for the benefit of affected SPTC employees. UP/SP, 1 S.T.B. at 452-53. He claims to have been first adversely affected in 1997, as a result of problems with the attempted consolidation of switching between the Phoenix Yard and the Tucson Yard.

Grother was not (and is not) represented by a labor organization. He invokes Article IV of the NYD conditions, as a non-agreement employee, 360 I.C.C. 60, 90:

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

^{1/} New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979).

At Grother's initiative, the National Mediation Board (NMB), on January 21, 2004, designated Lynette A. Ross, as the "neutral/referee member" for arbitration of the Grother/UP dispute under NYD. (Appendix 1).^{2/} The NMB states its designation is "ministerial," and the NMB's action only provides a qualified arbitrator...in extending comity to the ICC's dispute resolution process. (Appendix 1, p. 2). The neutral/referee member has not been involved in discussions among the partisan members of the arbitration committee concerning any terms to govern the arbitration.

The partisan parties, while in agreement in principle for most of the terms to govern the proposed arbitration,^{3/} have come to an impasse with respect the extent and presentation of a written record, and the place for hearing. UP suggests the record be developed by a single, but simultaneous, written submission by carrier and by employee, which would be similar to the ex parte rules in place at the National Railroad Adjustment Board, conducted at NRAB offices in Chicago, IL. 29 CFR 301. (Appendix 2). UP urges that the arbitration hearing be conducted in Chicago, IL. To the contrary, Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its

^{2/} The other two members of the committee are William E. Loomis (UP) for the carrier, and Grother for the employee.

^{3/} UP does not believe a written arbitration agreement is necessary prior to an arbitration committee hearing. UP apparently is of the view the parties can participate simply by appearing at a designated time and place. Nevertheless, the partisan parties have exchanged views as to the appropriate process.

written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFR 1108.8. Grother urges that the arbitration hearing be held in Washington, DC, where the NMB and STB are both located.

The issues involve the interpretation, applicability, and enforcement of the NYD employee protective conditions for the involved Grother and UP, and will likely center upon eligibility of Grother for employee protection, causality, asserted laches, and the measure of any compensation or other benefits.

ARGUMENT

I. THE ARBITRATION SHOULD BE DESIGNED TO
TO DEVELOP A FULL WRITTEN RECORD FOR
STB REVIEW AT MINIMUM EXPENSE TO EMPLOYEE.

A. UP Would Frustrate Effective STB Review. The general practice in NYD arbitration, particularly where an individual or small number of employees are involved, is not to have a transcript of the oral hearing. There is considerable expense involved with a transcript, particularly when expedition is required.^{4/} The no transcript procedure is projected to be followed here. The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled.

^{4/} An arbitration decision ordinarily is to be issued within 45 days after the hearing is concluded and the record closed. NYD, Art. I, § 11(c).

The UP proposal for the simultaneous exchange of written submissions, to be followed by the oral hearing, would serve to transfer the usual written reply submission and argument, into "live" oral submissions, without a record of the evidence and argument for the STB to review. This would deprive the STB of effective review for the resultant arbitration award, and perhaps necessitate the conduct of additional submissions to the STB to supplement the record at the time of agency review.

The NYD arbitration process is part the STB's decisional mechanism, with an award being an "order" of the STB, which is carried out in lieu of direct STB action. American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 845-46 (D.C. Cir. 1995); International Broth. of Elec. Workers v. ICC, 862 F.2d 330, 335-39 (D.C. Cir. 1988); United Transp. Union v. Norfolk and Western R. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987).^{5/}

2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8.^{6/}

A. STB Consideration. The STB rejected simultaneous filings in establishing its three-step procedure. Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564, 576 (1997).

^{5/} The arbitration process is a delegation by the STB to the arbitrator of the STB's authority to implement employee conditions. Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 5 I.C.C.2d 234, 236 1989). Arbitration is essentially an extension of the STB's action. Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

^{6/} The STB's arbitration rules do not specifically apply to arbitration involving NYD conditions. In the same vein, NRAB arbitration does not extend to NYD conditions.

B. NYD Causality Procedure. The simultaneous submissions urged by UP would be particularly unfair here, where UP challenges Grother's claim to have been affected by the transaction--the matter of causality. The NYD conditions specify that the employee should first identify the transaction and specify the facts, followed by the carrier's evidence. NYD, Art. I, § 11(e), 360 I.C.C. at 88:

In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Thus, UP's simultaneous submission could not fully cover the matter of causality, but would allow UP to first present its case not in written form in advance of the oral hearing, but at the hearing itself, with Grother to respond extemporaneously at the hearing. Such tactics should be discouraged in the interest of a fair hearing, and in developing a complete and reviewable record. The STB's NYD conditions contemplate answering statements, not simultaneous statements.

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NRAB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C. 153. Here, Grother, as an unrepresented employee, does not

possess the full range of representation. The single submission procedure of the NRAB would be inappropriate here.

D. Cost of Proceedings. Arbitration is not inexpensive. For a single individual, the sum may be significant. The three-stage written submissions will minimize the ultimate cost for resolving the issues. The UP proposal for one set of simultaneous submissions likely will result in prolix proceedings, and result in additional costs. Moreover, because of the novelty of some of the anticipated issues, and the impact of any award upon future proceedings, it is likely that one or more of the parties will seek review of the award by the STB. Here, the compensation claim is for approximately \$108,000.

Although the cost of arbitration and resultant final agency action may not be avoided, American Train Dispatchers Ass'n v. ICC, 949 F.2d 413, 414 (D.C. Cir. 1991), the STB should aim to minimize the expense in this situation.

II. THE HEARING SHOULD BE HELD IN
WASHINGTON DC, NOT CHICAGO IL.

The hearing location should be Washington, DC, where the facilities of the NMB and STB are situated, rather than Chicago, IL, where the NRAB has its headquarters. The expenses for Grother would be minimized by a Washington location. Moreover, access by the parties, and the arbitrator, to unpublished material at the NMB and STB would be readily available in Washington, DC.

Hearing at Chicago IL would be inappropriate. While UP may have access to facilities at Chicago, Grother and his counsel do

not. Moreover, the arbitration involved in this NYD case involves a comity arrangement between NMB and STB.

III. REFERRAL OF THE WRITTEN SUBMISSION
PROCESS AND HEARING LOCATION TO THE
ARBITRATOR WOULD BE INAPPROPRIATE.

The STB should not refer the matter of simultaneous or three-part written submissions, or the hearing location, to the arbitrator, as such would not be appropriate.^{7/}

The matter of the written submissions, as indicated above, goes to the record available to the STB on review, particularly in the absence of a hearing transcript; and a multi-staged submission process is actually required by STB for NYD Art. I, §11(e). Thus, it is for the STB to determine the procedures for the submissions.

The hearing location likewise is for the STB. The arbitration committee is subject to the protective conditions mandated by the STB, such that the facilities maintained by in Washington DC should be available to the parties in an inexpensive manner.

CONCLUSION

The STB should determine that, in the absence of agreement, the involved NYD arbitration should be conducted by the three-stage written submission process, with hearing at Washington DC.

Respectfully submitted,

^{7/} The arbitrator should, of course, schedule the hearing date, and presumably will do so after consultation with the partisan parties of the arbitration committee.


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon
parties by first class mail postage-prepaid, as follows:

William E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street-Rm. 332
OMAHA NE 68179

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Washington DC
February 20, 2004


GORDON P. MacDOUGALL



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

January 21, 2004

**Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342**

**RE: New York Dock Arbitration: John Grother and
the Union Pacific Railroad Company**

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

**This Board has no authority to look
behind the procedural soundness of any
such requests. Rather, the Board acts in
a ministerial capacity on the basis of**

- 2 -

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

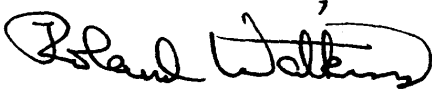
The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" *Id.* The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

- 3 -

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.



**Roland Watkins
Director, Arbitration Services**

Copies to:

**Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339**

**Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036**

**Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179**

PART 301—RULES OF PROCEDURE

- Sec.
301.1 General duties.
301.2 Classes of disputes.
301.3 Organization.
301.4 Jurisdiction.
301.5 Form of submission.
301.6 General.
301.7 Hearings.
301.8 Appearances.
301.9 Awards.

AUTHORITY: Sec. 3, 44 Stat. 578, as amended;
45 U.S.C. 153.

SOURCE: Circular 1, Oct. 10, 1934, unless
otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151-162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the

facts and all supporting data bearing upon the disputes.

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) *First Division.* The First Division will have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) *Second Division.* The Second Division will have jurisdiction over disputes involving machinists, boiler-makers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) *Third Division.* The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) *Fourth Division.* The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

§ 301.5

29 CFR Ch. III (7-1-03 Edition)

§ 301.5 Form of submission.

(a) *Parties.* All parties to the dispute must be stated in each submission.

(b) *Statement of claim.* Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) *Statement of facts.* In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts," then each party shall show separately the facts as they respectively believe them to be.

(d) *Position of employees.* Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(f) *Signatures.* All submissions must be signed by the parties submitting the same.

(g) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon ad-

vised the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD.

By Order of _____ Division

Attest: _____
(Secretary)

VIA CERTIFIED MAIL

National Mediation Board (NMB)
Attn: Mr. Roland Watkins
Washington, D.C. 20572

June 16, 2003

LAW DEPT.

JUN 20 2003

REC'D UPRR

Dear Mr. Roland Watkins,

I have been advised that your Office is the contact point for individuals applying for NMB Arbitration. Pursuant to the attached excerpt from the New York Dock (NYD) Article IV, and oral information from your Office, this letter is to request the assignment of an Arbitration Committee.

In accordance with Article IV, I have provided Union Pacific Railroad ("UPRR") a thirty (30) day notice (attached in part) to resolve this dispute ("Dispute"), concerning myself being defined as a Displaced Employee (Non-Agreement person). The issue involves UPRR's failed Merger Transaction related yard consolidation experiment to operate ALL the switching for Phoenix from Tucson, Arizona in late May 1997, which resulted in my demotion and reduction in wages of \$1,272 per month and other fringe benefits effective 7/1/97. UPRR has not responded to my certified letter dated 5/12/03, attached in part, requesting Dispute resolution.

I am hereby requesting Neutral selection data, including biographies, for referees, who would be available for the states of Arizona, Texas, California and Washington D.C. please. I am uncertain if witnesses are able to testify; but, Tucson Arizona would be an appropriate site for an Arbitration, if ALL those employees present in 1997 are allowed to testify in person.

NMB-2 appears to apply to Mediation; so, not prepared. Please advise immediately what may additionally be required to activate the entire NMB Arbitration process, including any deposits or pre-payments required. I would appreciate a return call to discuss the entire NMB Arbitration Process to 281-359-5667 between 1300-1800 CT please (night worker).

By copy to UPRR, this is Official Notice to UPRR of my intent to refer said Dispute to an Arbitration Committee, as no UPRR response to attached certified letter.

Attachments:
NYD Conditions
Certified ltr. to UPRR

Sincerely,

JEG
John Grother

cc: UPRR OBS-RM 830



(202) 692-5000

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

UNION PACIFIC APPENDIX 3
SHEET 1 OF 1

WEL
JAN 26 2004
REC'D
JAN 26 2004
Labor Relations

January 21, 2004

**Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342**

**RE: New York Dock Arbitration: John Grother and
the Union Pacific Railroad Company**

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of

- 2 -

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

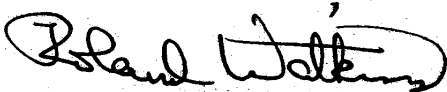
The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

- 3 -

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.



**Roland Watkins
Director, Arbitration Services**

Copies to:

**Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339**

**Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036**

**Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179**

Surface Transportation Board (S.T.B.)

***1 UNION PACIFIC/MKT MERGER--UTU IMPLEMENTING AGREEMENT ARBITRATION REVIEW**

Decided: August 1, 1989

INTERSTATE COMMERCE COMMISSION DECISION
Finance Docket No. 30800 (Sub-No. 28)

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

On April 18, 1989, Union Pacific [FN1] filed a motion requesting the Commission to: (1) stay its "notice of appeal," filed March 2, 1989; and (2) direct the Arbitration Committee, notwithstanding the pendency of the appeal, to resume the arbitration process immediately and to move forward promptly to arrive at an implementing agreement. The United Transportation Union (UTU) replied. For the reasons discussed below, we will dismiss the appeal and deny the motion.

BACKGROUND

In *Union Pacific Corp. et al.--Cont.--MO-KS-TX Co. et al.*, 4 I.C.C.2d 409 (1988), we approved the acquisition of control, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), and Missouri Pacific Railroad Company (MPRR), of the Missouri-Kansas-Texas Railroad Company (MKT), the Oklahoma, Kansas and Texas Railroad Company (OKT), and the Galveston, Houston & Henderson Railroad Company (GHH). In doing so, we imposed the labor protective conditions set forth in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). The decision is currently on review in *RLEA v. ICC*, No. 88-1391 (D.C. Cir., argued Apr. 28, 1989).

On June 1, 1988, Union Pacific served notice upon representatives of the UTU that it intended fully to integrate the personnel, facilities, and operations of MKT, the OKT, and the GHH into their MPRR counterparts. Negotiations failed to yield an agreement. On November 21, 1988, UTU formally requested arbitration to prescribe the terms of an implementing agreement. Proceedings before Arbitrators Richard Kasher and Robert Peterson were held in December 1988 and January 1989.

On February 14, 1989, the Arbitration Committee entered its Findings and Award (the arbitration decision). The arbitrators did not believe that the parties had availed themselves of a fair opportunity to negotiate a standard New York Dock implementing agreement. The arbitrators found that the reason an implementing agreement was not reached on a voluntary, collectively bargained basis was that both Union Pacific and the UTU were polarized on a number of issues the arbitrators believed were not proper subjects for a New York Dock implementing agreement. The arbitrators' intent in issuing the Findings and Award was to identify those issues that they believed should be removed from the bargaining table because they fell outside the scope of their understanding of an ordinary New York Dock implementing agreement. Arbitration decision, at 17. The arbitrators thus directed the parties to negotiate an implementing agreement addressing the remaining issues within 30 days from the date of the findings (id., at 18) and authorized the parties, in the event negotiations failed, to petition the arbitrators to impose an implementing agreement.

*2 On March 2, 1989, Union Pacific filed with this Commission a protective "notice of appeal" to the arbitration decision. Union Pacific argued that the arbitrators erred in removing certain issues from the bargaining table. These issues, in Union Pacific's view, were and are proper subjects for a New York Dock implementing agreement, and consequently may not be dismissed from the arbitration process. Union Pacific acknowledged, however, that we might wish to await the outcome of the further negotiations prescribed in the arbitration decision,

and any subsequent decision by the Arbitration Committee, before establishing procedures for hearing and addressing the merits of Union Pacific's appeal.

On March 18, 1989, the Arbitration Committee announced that in the light of Union Pacific's protective appeal, it would not proceed with an arbitration hearing scheduled for March 20, 1989. By letter dated April 13, 1989, it stated its willingness to continue if both parties withdrew the matter from the Commission, with prejudice, and agreed to the principles of the February 14th ruling.

On March 20, 1989, UTU filed a pleading styled an "answer" to Union Pacific's notice of appeal and a "counterclaim for enforcement of award." UTU argued that the arbitration decision was not ripe for review, since it does not constitute an arbitrated implementing agreement. UTU also argued, alternatively, that if the arbitration agreement is ripe for review then the Commission should affirm it.

By decision served April 17, 1989, the Director of the Commission's Office of Proceedings issued a decision holding in abeyance Union Pacific's notice of appeal. The Director noted that subsequent negotiations ordered by the arbitrators or any ensuing arbitration might yield results satisfactory to both parties, thus mooted the issues raised in Union Pacific's pleading. The decision required the parties to file quarterly reports with this Commission so that we may be informed of the status of their ongoing negotiations and any subsequent arbitration.

Following this decision, Union Pacific filed a motion to stay its notice of appeal. Union Pacific is unwilling to withdraw its appeal because it does not wish to be precluded from challenging pertinent aspects of the February 14th findings and award. Union Pacific is concerned that the arbitrators' refusal to proceed is not only delaying the completion of an implementing agreement, it is also delaying indefinitely the consolidation of the operations of UPRR/MPRR and MKT, and the realization of the public interest benefits associated with that consolidation. Therefore, Union Pacific urges us to stay its appeal pending the completion of arbitration, and to enter an order directing the Arbitration Committee, notwithstanding the pendency of the appeal, to resume the arbitration process immediately and to move forward promptly to arrive at an implementing agreement. UTU responded to the motion, saying that if the Commission orders arbitration to go forward, it should make it clear that arbitration must proceed on the basis of the February 14th Findings and Award.

DISCUSSION AND CONCLUSIONS

*3 Union Pacific filed its request for review of the arbitrators' Findings and Award under 49 C.F.R. 1117.1, invoking our jurisdiction under the standards announced in *Chicago and North Western Tptn. Co.--Abandonment*, 3 I.C.C.2d 729 (1987) (Lace Curtain), *aff'd sub nom. International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C.Cir.1988). There, we concluded that we would exercise jurisdiction to review decisions issued under the arbitration provisions of the labor protective conditions we have imposed under 49 U.S.C. 11347. We found that our jurisdiction resided in the statutory mandate to impose the conditions. *Id.* at 733.

Subsequent to *Lace Curtain*, we have defined our role in reviewing arbitration decisions on a case-by-case basis. See, e.g., *Norfolk & W. Ry. Co. and New York, C & St. L.R. Co. Merger*, 5 I.C.C.2d 234 (1989) (Norfolk). Cases to date have involved our review of a final award of an arbitrator. There is nothing in them to suggest that preliminary or interim findings by an arbitrator during the arbitration process will be reviewed before the arbitrator issues a final decision.

Following our decision in *Norfolk*, but subsequent to Union Pacific's filing of its petition on March 2, 1989, we adopted a rule codifying that an appeal of right is permitted to review arbitration decisions, and that the appeal must be filed within 20 days of a final arbitration decision. See *Ex Parte No. 55* (Sub-No. 75), *Deadline for Requesting Commission Review of Arbitration Decisions*, served May 8, 1989 (54 Fed.Reg. 1984), May 9, 1989), codified at 49 CFR 1115.8. This accords with our general practice not to entertain interlocutory appeals except in limited circumstances. [FN2] Moreover, the limited scope of review provided by the *Lace Curtain* criteria militates against Commission involvement prior to a final arbitration decision except in extraordinary circumstances. Our consideration of interlocutory appeals from intermediate decisions of arbitrators would impede the process, and should not be undertaken unless clearly justified. Union Pacific implicitly acknowledged this point in suggesting

we might hold its protective appeal in abeyance, pending the arbitrators' final decision.

The arbitrators' February 14th Findings and Award is not a final decision of the arbitration committee. The arbitrators deliberately did not address the specifics of the items which they believed should be included in an implementing agreement. Rather, they stated their hope that with the removal of negotiating roadblocks, the parties would bargain realistically and in good faith to reach a valid implementing agreement consistent with the New York Dock conditions. This action does not justify interlocutory review of the February 14th decision. Indeed, it reflected the arbitrators' mediation role.

We are not ignoring the adverse effect of delay on consummation of the UPRR/MPRR-MKT consolidation. But, on balance, this concern does not outweigh our interest in the arbitration process being free of our interference through interlocutory review.

*4 Accordingly, we will deny Union Pacific's motion and dismiss its pending appeal of the February 14th decision without prejudice. This action should moot Union Pacific's request that we direct the arbitrators to proceed. It should also satisfy the arbitrators' legitimate concern about their role vis-a-vis this Commission. [FN3]

The decision of the Director of the Office of Proceedings, served April 17, 1989, is vacated. We expect that our dismissal of the appeal will remove any obstacle standing in the way of the Arbitration Committee in continuing with the negotiations, and that the arbitration process will resume promptly. Appeals to the arbitrators' final decision (as well as the February 14 decision as relevant) may be filed pursuant to 49 CFR 1115.8. [FN4]

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

It is ordered:

1. Union Pacific's "notice of appeal," filed March 2, 1989, is dismissed, and its motion, filed April 19, 1989, is denied.
2. This decision is effective on August 8, 1989.

Noreta R. McGee

Secretary

FN1 "Union Pacific" refers, collectively, to Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri-Kansas-Texas Railroad Company.

FN2 49 CFR 1113.15 provides for interlocutory appeals from an administrative Law Judge (ALJ) only if: (a) the ALJ's ruling denies or terminates any person's participation; (b) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (c) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (d) the ALJ finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

FNWhile we do not have specific rules regarding interlocutory appeals from arbitrators, if we were to apply the above criteria, the interlocutory appeal in this proceeding would not be justified.

FN3 We do not read the arbitrators April 13th letter as preventing any party from subsequently seeking review of

Slip Copy
(Cite as: 1989 WL 239106 (I.C.C.))

UNION PACIFIC APPENDIX 4
SHEET 4 OF 4

their final decision, as influenced by the February 14th decision. Instead, we read their request that the parties adopt the February 14th decision as one that simply allows the process to continue under the framework and limitations of that decision.

FN4 It would be inappropriate for us broadly to rule, as UTU requests, that Union Pacific is bound by the February 14th decision. We have made clear that, for the purpose of the arbitration process it is so bound.

1989 WL 239106 (I.C.C.)

END OF DOCUMENT



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

August 11, 2003

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Re: New York Dock: Union Pacific Railroad Company
And John Grother

Dear Mr. Grother:

Reference is made to the exchange of correspondence requesting arbitration pursuant to Article IV, of New York Dock labor protective conditions involving a dispute between you and the Union Pacific Railroad Company.

In accordance with the request, I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roland Watkins".

Roland Watkins
Director, Arbitration Services

Copy to:

Ms. Marilyn J. Ahart
Director Protection Management
Union Pacific Railroad Company
1416 Dodge Street
PNG06
Omaha, NE 68179

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499



September 30, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to John E. Grother's June 16, 2003 letter to you concerning neutral selection data in connection with his request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions, to resolve a dispute with Union Pacific Railroad. I have been assigned to handle this arbitration for Union Pacific. Mr. Grother's August 11, 2003 letter to you advised he has retained the services of Attorney Gordon P. MacDougall for the pending arbitration issue.

Your letter of August 11, 2003 to John E. Grother, with copy to Marilyn Ahart at Union Pacific, enclosed a panel of seven neutrals and requested the parties notify your office "...as soon as a selection has been made." This is to advise Ms. Ahart and I have had three telephone conversations with Mr. MacDougall for the purpose of selecting a neutral from your panel by means of alternate strikes. Mr. MacDougall is unwilling to use the alternate strike method to reduce the panel to a single neutral.

During our telephone conversation today, Mr. MacDougall said he has talked with you on this matter. He alleges you said the neutral selection process for New York Dock arbitration set forth in your April 28, 2000 memorandum is not applicable to cases stemming from Article IV of New York Dock, where the individual is not represented by a labor organization. Is that correct and, if so, what process is applicable?

Sincerely,

A handwritten signature in black ink, appearing to be "W. E. Loomis".

W. E. Loomis

cc: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036



(202) 692-5000

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

UNION PACIFIC APPENDIX 5
SHEET 3 OF 9

CORRECTED COPY

October 6, 2003

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street, Room 322
Omaha, NE 68179

Dear Mr. Loomis:

I received your letter concerning a recent conversation with Mr. Gordon MacDougall, counsel for John Gother. I did not offer any opinion as to the applicability of New York Dock. As you and Mr. MacDougall are aware, I merely furnished a list pursuant to a request initiated by Mr. Gother. With this letter, I am requesting of you and Mr. MacDougall that any further inquiry on this matter must be in writing. I will not respond to any further phone calls on this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roland Watkins", is written over a horizontal line.

Roland Watkins
Director, Arbitration Services

cc: Gordon MacDougall

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

October 6, 2003

REC'D

OCT - 7 2003

Mr. Roland Watkins
National Mediation Board
1301 K St., NW-#250E
Washington DC 20572

BY HAND

Labor Relations

Re: NYD Claimant-John E. Grother

Dear Mr. Watkins:

I am in receipt of a letter from Mr. W.E. Loomis (UP-Employee Relations Planning), dated September 30, regarding selection of a neutral in the entitled matter. I have a somewhat different version of the events to date.

1. We have conducted three telephone discussions, 9/24, 9/26, and 9/30, during which a number of matters were discussed, such as likely issues, procedures, location, and possible terms for an arbitration agreement. I believe these discussions, for the most part, have been helpful. However, during the 9/26 discussion, Mr. Loomis referred to your August 11, 2002 letter, addressed to Mr. Grother:

"I am enclosing a panel of seven (7) neutrals.
Please notify this office as soon as a selection has been made for our records."

Mr. Loomis maintained that the alternate striking process is mandatory in selecting a neutral, in accordance with your April 28, 2000 memorandum, attached, which he forwarded to me following our telephone conference. I agreed, at his suggestion, to inquire whether this is your understanding of the two sentences quoted above from your August 11 letter to Mr. Grother--that selection means alternate striking.

2. I advised Mr. Loomis during our brief 9/30 conversation that my understanding is the April 28, 2000 memorandum is mandatory only as to the persons addressed, i.e., railroad carriers and rail labor organizations and, as such, alternate striking is not mandatory here, where the controversy does not involve a rail labor organization party.

3. Mr. Loomis asserts I am unwilling to use the alternate strike method to reduce the panel to a single neutral, but he does not mention my other suggestions, apparently in the belief the alternate strike scheme is binding. However, it is possible the discussions may prove more fruitful if the April 28, 2000 memorandum was not intended, and does not apply, to non-labor situations.

Very truly yours,


Gordon P. MacDougall

Atty. for John E. Grother

cc: W.E. Loomis
Union Pacific RR Co.
1416 Dodge St.-Rm. 332
Omaha, NE 68179

(By overnight express)

John E. Grother
1718 Rustic Park Drive
Kingwood TX 77339



(202) 692-5000

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572**MEMORANDUM****REC'D**
MAY 05 2000
LABOR RELATIONS

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins *Roland Watkins*
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

A number of months ago, the National Mediation Board (Board) began experimenting with a new procedure for providing the parties with balanced panels in New York Dock cases. Since many of you may not have been involved with New York Dock cases recently, please be advised that the following procedures will apply governing the selection of a neutral to resolve disputes in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions:

- Upon receipt of a request from a party for a neutral, the Board will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals. Each party will be requested to provide a list of fifteen (15) preferred neutrals from that list. **This information is confidential and will be used only for the purpose of the selection of a neutral for that dispute.**
- The lists, along with other relevant information, will be considered by the Board in compiling a panel of seven (7) neutrals. The Board will then promptly provide the parties with such a panel. The parties will use the strike method to derive at a neutral and will immediately inform the Board of the selection.

These procedures will not prevent the parties from mutually deciding on a neutral, but will apply only when the parties are unable to agree on a neutral.



W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499

October 15, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to your letter of August 11, 2003 in connection with John E. Grother's request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions. Enclosed with your letter was a list of seven (7) qualified neutrals. During telephone discussions with Mr. Grother's attorney, Gordon P. MacDougall, Union Pacific has attempted to reduce that list to a single neutral by means of the alternate strike method. Unfortunately, our efforts in this regard have not been successful. For your records, and only for the purpose of this case, had the alternate strike method been utilized, Union Pacific's three strikes would have been Barbara C. Deinhardt, Ira F. Jaffe and Robert M. O'Brien.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. E. Loomis". The signature is fluid and cursive, with a large, sweeping loop at the end.

W. E. Loomis

CC: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

December 31, 2003

Mr. Roland Watkins
Director, Arbitration Services
National Mediation Board
Washington DC 20572

REC'D
JAN - 5 2004
Labor Relations

Re: New York Dock: Union Pacific Railroad Company
and John E. Grother

Dear Mr. Watkins:

This is in reference to the June 23, 2003 request by Mr. John E. Grother for arbitration pursuant to the New York Dock employee protective conditions, and the various exchange of correspondence subsequent thereto.

Mr. Grother, during all relevant periods, has been a non-agreement employee; and he was not associated with counsel until on or about August 11, 2003, when the undersigned was engaged. Previously, you had furnished Mr. Grother, and the carrier, with the names of individuals for consideration as the neutral member of an arbitration committee.

Unfortunately, the carrier has insisted upon a system of selecting a neutral by an alternate strike method, apparently recently prescribed or utilized in situations involving carriers and labor organizations. There have been no meaningful discussions since receipt of the carrier's October 15, 2003 letter to you.

The alternate strike method is deemed prejudicial to Mr. Grother, particularly in light of contemplated issues peculiar to this non-agreement employee, which appear to include matters of official vis-a-vis employee, in contrast with management vis-a-vis labor.

Accordingly, under the circumstances, this is to request that you select the neutral member of the arbitration committee. From Mr. Grother's standpoint, you may wish to consider a person heretofore either named or unnamed, or not on any previous list, and either with or without railroad industry experience, as may be appropriate.

Mr. Grother's preference for location of any hearing by the arbitration committee would be the Washington DC area.

Very truly yours,

cc: John E. Grother
William E. Loomis

Gordon P. MacDougall

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499



January 6, 2004

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to the December 31, 2003 letter from Gordon P. MacDougall, who is representing John E. Grother in his request for arbitration in accordance with Article IV of the New York Dock labor protective conditions.

Thus far, the Board's and Union Pacific's handling of this matter has been in strict compliance with your April 28, 2000 memorandum which sets forth the procedure to be followed when the Board is requested to furnish a neutral to resolve New York Dock disputes. The procedure broke down when Mr. MacDougall was unwilling to utilize the strike method to reduce the list of seven neutrals furnished with the Board's letter of August 11, 2003 to a single neutral. Without offering any explanation why, Mr. MacDougall now states, in his December 31, 2003 letter, that the alternate strike method is "... prejudicial to Mr. Grother...."

The Board will note Union Pacific's letter of October 15, 2003 contains its three strikes, thus reducing the list of neutrals to four. Union Pacific does not object to Mr. MacDougall's request for the Board to select the neutral member of the arbitration committee. In fact, this appears to be the only option left to move this matter forward. However, Union Pacific's position is the Board should comply with its own stated procedure by making that selection from among the four neutrals remaining on the list.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. E. Loomis". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

W. E. Loomis

CC: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036