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Before the

SURFACE TRANSPORTATION BOARD

FEB 22 2005
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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 TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., and
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration review)

SUPPLEMENT TO PETITION FOR REVIEW

ENTERED
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Public Record

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Due Date: February 22, 2005

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(Arbitration review)

Preliminary statement

John E. Grother (petitioner, or Grother), submits this supplement to his petition, filed January 10, 2005, to review the Decision (by a divided 2-to-1 vote) of an arbitration panel, dated January 6, 2005.[1/] This petition also constitutes an appeal under the Board's rules. 49 CFR 1115.8. The panel's Decision (labeled opinion and award), denied Grother's claim for employee protective conditions.[2/] The Decision is set forth herein. (Appendix 1). The time for filing this supplement was extended by Board action dated January 12, 2005 (served January 13). This supplement restates the

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1/ There is some confusion concerning the date of arbitration decision, with January 6, 2005, considered the date. see: STB Decision, 1/13/05, n.1.

2/ The decision (Opinion and Award), on its cover, incorrectly lists the panel members. The panel members are John E. Grother (Grother member), William E. Loomis (carrier member), and Lynette A. Ross (neutral member), as shown on the signature page. (Appendix 1, 34). UP objected to terming Grother as "employee" although, of course, he is an employee.

initial January 10, 2005 petition, so that it is incorporated herein.

The Surface Transportation Board (STB) should review the panel's Decision, grant the appeal, and find the NYD employee protective conditions are applicable to petitioner Grother. Thereafter, the Board should assign for handling under modified procedure the calculation of compensation and/or benefits due Grother or, alternatively, remand to the panel the computation of benefits due Grother.

This petition for review contains a number of appendices, and embraces the entire record before the arbitration panel:

Appendix 1. Decision (Opinion and Award) of Arbitration Panel, Member Grother dissenting. (January 6, 2005).

Appendix 2. Decision of Union Pacific Railroad Company, by Marilyn J. Ahart, Director Protection Management, declining NYD conditions. (July 18, 2003).

Appendix 3. Employee's Submission-Part I. (September 14, 2004). (Corrected 9/17/04).

Appendix 4. Employee's Submission-Part II-Exhibit E-2. (September 14, 2004).

Appendix 5. Employee's Submission-Part II-Exhibits Excl. E-2. (September 14, 2004).

Appendix 6. Employee's Hearing Exhibits. GH25 thru GH29. (October 12, 2004).

Appendix 7. Employee's Post-Hearing Brief. (November 22, 2004). (Includes October 12, 2004 hearing transcript).

Appendix 8. Carrier's Submission-Volume One-Submission, Table of Contents, Exhibits 1-25. (September 14, 2004).

Appendix 9. Carrier's Submission-Volume Two-Exhibits 26-43 (September 14, 2004).

Appendix 10. Carrier's Hearing Exhibits. UH44 thru

UH50. (October 12, 2004).

Appendix 11. Carrier's Post-Hearing Brief. (Includes new exhibits No. 51 and No. 52). (November 22, 2004).

Background

The proceeding involves the so-called New York Dock employee protective conditions (NYD),[3/] imposed by the Surface Transportation Board (STB) in Finance Docket No. 32760, Union Pacific/ Southern Pacific Merger, 1 S.T.B. 233, 452-53, 521-22 (1996) (UP/SP).

Grother, presently a Union Pacific Railroad Company (UP) employee, had been employed by Southern Pacific Transportation Company (SP) for 27 years prior to the 1996 merger. At the time of the September 11, 1996 merger, Grother held the position of SP's Terminal Superintendent at Tucson, AZ. Throughout his railroad career, Grother had never worked under a collective bargaining agreement, or been a member of a labor organization.

Although the merger was consummated September 11, 1996, it did not go smoothly, or quickly, as the Board is well aware.[4/] The merger was implemented in various stages. The merger was implemented at Tucson beginning April 13, 1997, and Grother's

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3/ New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), aff'd New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

4/ The Board's UP/SP oversight proceedings did not terminate until late December 2001. Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company(served Dec. 21, 2001). 2001 WL 1635170 (Dec. 19, 2001).

title was changed, effective April 16, 1997, from Terminal Superintendent to the UP's designation of Senior Manager Terminal Operations (SRMTO), with Grother's compensation and benefits continued. However, only two months thereafter, Grother on June 26, 1997, was advised of displacement to Houston, effective July 1, 1997, to be Manager of Intermodal Operations (MIO), with a substantial reduction in compensation.

1. Union Pacific Claim Denial (Ahart Decision). Grother continually complained about his reduced compensation and displacement to various carrier officials, which resulted in job loss threats, and he frequently sought positions more remunerative than his MIO position at Houston, and also some lateral positions. (Appendix 4, Ex. E-2, pp. 103-8). As a non-agreement, at-will employee, and not represented by any union, Grother feared he stood to be immediately severed from his employment at Houston if he formally requested NYD displacement allowances in lieu of job promotion. Severance would have been catastrophic for himself and his family, particularly in light of family medical benefits. Nevertheless, on May 12, 2003, after many futile efforts, Grother submitted a formal request to UP for NYD conditions, to cover lost compensation and benefits associated with his displacement from SRMTO at Tucson, to MIO at Houston. (Appendix 4, Ex. E-2).

UP on July 18, 2003, acting through its Director of Protection Management, Marilyn J. Ahart, formally denied Grother's claim, citing lack of causal connection with the merger, Grother's job classification, and laches. (Ahart Decision) (Appendix 2). The Ahart Decision reasoned (1) Grother's demotion was based on performance standards, not as a result of the merger and, (2)

Grother's position at the time of merger implementation was "managerial in nature," with any individual assigned to such a position not meeting the definition of employee under the Railway Labor Act (RLA) and NYD cases.

Finally, Ms. Ahart stated that although NYD conditions do not have strict time limits, an unreasonable time has expired between merger implementation and first claim for NYD protection, with considerable arbitral authority holding that the doctrine of laches applies in cases such as this.

The Ahart Decision is quoted at length by the arbitration panel (with the exception of its laches explanation at the end); accordingly, petitioner sets forth below the complete text, including its two-pronged, alternative standard, stated in the 1987 Seidenberg award for "employee", and the afterthought of "laches." (Appendix 2):

> This is in reference to your May 12, 2003 letter to Mr. James v. Dolan in which you requested to be certified for New York Dock protective benefits as a result of the merger between the Union Pacific and Southern Pacific Railroads. As this is a protection issue, it has been referred to my office for handling. All future New York Dock related correspondence between you and Union Pacific Railroad should also be directed to me.
>
> I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger.

In addition, to be considered for coverage an individual must satisfy the term of "employee" as it is defined in the Railway Labor Act and by New York Dock cases. As arbitrator Seidenberg wrote (in relevant part) in his 1987 case of The Matter of Arbitration Between B.J. Messer et al. and Union Pacific RR Co. et al.:

> "A review of the history of labor protection conditions compels us to hold that the term 'employee' was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature.** (emphasis added).

Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

Finally, even though the New York Dock conditions do not have strict time limits for filing time claims, an unreasonable time has expired between the implementation of the merger and your first claim for protective coverage. Considerable arbitral authority has held that the doctrine of laches does apply in cases such as this.

Your claim for coverage as a displaced employee under the New York Dock labor protective conditions is respectfully declined.

2. Invocation of Arbitration. Issuance of the Ahart Decision precipitated the process of the National Mediation Board (NMB), whereby Lynette A. Ross was named the neutral member of the arbitration committee. (Appendix 5, Ex. E-4, 3; Appendix 8,

Ex. 6).[5/] (Grother was the employee member, and UP selected William E. Loomis, Director of Employee Planning, as the carrier member).[6/] The partisan parties thereafter entered into a two-phase agreement to govern the proceeding. The panel would first determine whether the NYD conditions are applicable to Grother, and that he may be entitled to some compensation or some benefits; if the panel determines that NYD is applicable to Grother, the partisan members of the committee would attempt to agree on the measure of such compensation or benefits but, failing agreement, would reconvene for a hearing to determine the measure of compensation or benefits. (Appendix 5, Ex. E-16; Appendix 8, Ex. 19).[7/]

The hearing procedures adopted by the arbitration committee for phase one, drew the strenuous objection of Grother. The

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5/ The instant case appears to be her first appointment as a NYD neutral. Ms. Ross characterizes her position as the "Neutral/ Referee" for the committee, but the referee role is incorrect. The NYD conditions provide for a single-member "Referee" to decide disputes concerning implementing agreements under NYD Article I, §1(4), and a three-member committee for arbitration under §1(11), with a "neutral member." All of the NYD arbitration awards issued by committee, reproduced by UP in its submission, use the term "Neutral." (Appendix 8, Ex. 24, 25, 27, 28, 30, 31, 32, 35, 36, 37, 38, 41).

6/ Grother's counsel, Gordon P. MacDougall, substituted for Grother as the committee member during the hearing, inasmuch as Grother was to be a witness at the hearing, having filed three verified statements as part of the pre-hearing submission (Appendix 3), and an additional rebuttal verified statement for the hearing (Appendix 6, GH28, G29). He was cross-examined on these statements. After the hearing, Grother resumed committee membership . (Appendix 7, 1).

7/ At the commencement of the hearing, the neutral sought confirmation that she had authority to hear the case but, of course, the "finality" and "binding" nature of any decision is qualified by agreement of the parties, STB review, and all under protest by Grother. (Appendix 1, 2; Appendix 3, 7; Appendix 7, Tr. 4-5).

procedures provided for a single simultaneous submission in advance of the hearing, by each party, without reply submissions. Grother considered this procedure unfair, particularly on the issue of causality.[8/] Grother sought to have the arbitration procedures reviewed by the STB, but was unsuccessful. (Appendix 3, 7-8; Appendix 5, Ex. E-7 thru E-14).[9/]

3. Pre-hearing Submissions. The UP's September 14, 2004 submission did not contain a single verified statement. The UP filing was entirely argument, with a number of exhibits and arbitration awards. Near the end of its "submission," UP stated it would present one witness, Mr. Ken Packard, who UP alleged was Grother's immediate supervisor and a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997. (Appendix 8, 41). UP considered it appropriate not to submit any advance verified statements, but to first introduce "live" testimony at the hearing. Grother's objection to UP's failure to comply with the advance submission requirements was overruled by the neutral, who said it would be appropriate for UP's proposed witness Packard to present statements on causality and job classification matters at the hearing. (Appendix 6, GH25, 1, 2, 3).

Grother's September 14, 2004[10/] submission contained his three verified statements dealing with each of the three issues, respectively, causality, job description, and laches. The Grother

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8/ NYD, Art. I, §11(c), states it shall be the railroad's burden to prove that factors other than a transaction affected the employee.

9/ The STB issued decisions in this proceeding, dated April 19, 2004 (served April 21), and June 10, 2004 (served June 10).

10/ Grother's submission was corrected September 17, 2004.

presentation also included the verified statements of Leland R. Holsinger (Conductor), and Ken Kroeger, Jr. (Engineer, and BLE Local Chairman in 1997). (Appendix 3, causality, Annex 1 & 2).[11/] An additional verified statement was received at the hearing from Tom Moore (Conductor, and UTU Local Chairman in 1997). (Appendix 6, GH27). Moreover, Grother in advance of his hearing appearance, distributed a written rebuttal verified statement directed to certain UP arguments which he testified were factually incorrect. (Appendix 6, GH28). Of course, apart from the sworn verified statements, the Grother submission also included argument and exhibits.

The Grother and UP submissions were in substantial agreement as to the issues. These were (1) Causality (whether Grother was adversely affected as a result of the UP/SP merger), (2) Job Classification (whether Grother is an "employee" within the meaning of 49 U.S.C. 11326 and NYD), and (3) Laches (whether Grother's NYD request was time-barred).[12/]

4. Hearing. The one-day hearing was held October 12, 2004.[13/] Witness Grother was examined on his three verified

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11/ Mr. Kroeger presently serves as Special Representative to the International BLE President, and Coordinator of Education and Training for the International BLE.

12/ UP's submission also sought an off-set for moving expenses paid for Grother's 1997 transfer from Tucson to Houston, in the event Grother is found entitled to NYD conditions. (Appendix 8, 42-44). The short Grother response was that any such offset is to be sought in phase two of the arbitration. (Appendix 6, GH28, 14-15).The UP's off-set claim thereafter was not advanced at the hearing or on brief.

13/ Although the Arbitration Decision (Appendix 1), states the hearing was held at the offices of the NMB, there was no NMB involvement with the hearing. The agency, as it does frequently if rooms are available, permitted the use of a conference room. The

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statements, and his additional written rebuttal verified statement, circulated prior to his appearance. Kenneth C. Packard introduced "live" direct testimony on causality and job description, and was cross-examined. Subsequently, he was recalled on the "laches" issue. (Appendix 7, 37; Tr. 192-94, 196-203, 210-12).

5. Post-Hearing Briefs. Grother and UP filed post-hearing briefs on November 22, 2004, Grother's brief appended the October 12, 2004 hearing transcript. UP's post-hearing brief was a mere 16 pages, the carrier arguing the committee look no further than the "employee" (Job Classification) issue, and that "there is no need to decide causality and laches issues." (Appendix 11, 15).[14/]

6. Panel Decision. The panel (member Grother dissenting) issued its 34-page "Opinion and Award" on January 6, 2005. (Appendix 1). The panel ruled in UP's favor, denying Grother all relief. The Decision is composed of 7 parts. After a brief Introduction, (Part I, pp. 1-2), Statement of Issues (Part II, pp. 2-3), Relevant Provisions of the New York Dock Conditions (Part III, pp. 3-4), and Factual Background (Part IV, pp. 4-9),[15/] the Decision next attempts (incorrectly in Grother's view) to paraphrase the Position of the Parties (Part V, pp. 9-23).

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court reporter was privately arranged by the partisan parties. (Appendix 6, GH25, 6).

14/ UP's Post-Hearing brief appended an arbitration award (Ex. 51), and some correspondence from Grother. (Ex. 52). While it is agreed there may be no objection to calling attention to arbitral and judicial decisions (Appendix 7, Tr. 128-29), the Grother material was neither mentioned nor relied upon by the panel in its decision.

15/ The Decision incorporates by reference considerable portions of the record without further discussion. (Appendix 1, 9 & 10 n.5).

The crux of the panel's statement and consideration of the three issues, begins in Part VI, "Discussion and Findings," (pp. 24-33), although the initial 2 pages of Part VI (pp. 24-25) really are a continuation of the prior "Position of the Parties" from Part V. The panel presents the three issues as laches, job classification, and causality. However, it is first necessary to clear up a threshold matter in the Discussion and Findings where, at the outset, the panel incorrectly sets forth the merger implementation date, and Grother's job position on the September 11, 1996 merger date. (Appendix 1, 23):[16/]

> It is essentially not disputed that, on the September 11. 1996 merger implementation date, the Claimant held a non-agreement position of Senior Manager Terminal Operations (SRMTO) at Tucson, AZ.

The actual fact is that the UP/SP merger was consummated on September 11, 1996, but the merger was implemented later, and much slower, in various stages at various locations, and at different times. For Grother at Tucson, the merger implementation date was not the September 11, 1996 merger consummation date, but was April 13, 1997. Moreover, Grother was not SRMTO on September 11, 1996; rather, Grother was Terminal Superintendent for SP at Tucson on September 11, 1996 when the merger was consummated. On April 16, 1997, UP named Grother Senior Manager Terminal Operations (SRMTO) at Tucson, with compensation unchanged; however, two months later, on June 26, 1997, he was transferred to Houston, TX, effective July 1, 1997, to the position of Manager of Interm-

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16/ The erroneous statement in the panel's discussion may stem from mistakes in the "position of the parties" portion of the decision; for example, "It is Claimant's position that, at the time of the merger, the characteristics of the SRMTO position he held at Tucson..." (Appendix 1, 11).

odal Operations (MIO), with a substantial reduction in compensation and benefits. (Appendix 3, Grother (Causality)).[17/]

Turning to the issues mentioned by the panel in its decision, it should be noted that the sentences in the "Discussion and Findings" (pp. 23-33) are sometimes stated to be those of the Neutral/Referee,[18/] and sometimes those of the Majority,[19/] and on occasion those of the Committee.[20/] The reader may be unable to appreciate the differing nuances. For the purposes of this petition for review and appeal, we sometimes lump together the Neutral/Referee with the UP member comprising the Majority, and speak of a "Decision," even though the sentences may have been crafted separately.

Although the decision mentions the three issues raised by the partisan parties, the decision places primary emphasis on one issue--whether Grother waited too long to file a formal NYD claim--the laches issue. The panel ruled the latches issue to be "dispositive of this case" (Appendix 1, 30), with Grother's claim "barred by laches" (Appendix 1, 25), and laches is a "bar to this claim" (Appendix 1, 31), and a "procedural bar of laches." (Appen

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17/ The panel's decision elsewhere confuses merger "implementation" with merger "consummation," merger "finalized," or "transaction implementation," with differing and often incorrect dates. For example, Decision (Appendix 1), at pp. 5, 6, 8, 10(twice), 13, 15, 18.

18/ The Neutral/Referee findings are set forth in 12 sentences, and appear at Appendix 1, 24, 25(3), 27, 28, 29, 30, 31 (2), 32, 33.

19/ The Majority findings are set forth in 23 sentences, and appear at Appendix 1, 25(2), 26(3), 27, 28(2), 29(4), 30(3), 31(4), 32(3), 33.

20/ The Committee findings are set forth in 3 sentences, and are set forth in Appendix 1, 26, 27, 32.

dix 1, 32).[21/]

The issue of Job Classification--whether Grother is an "employee" or "subordinate official," so as to be eligible for NYD protection, rather than an "official" and excluded from NYD--was determined by the panel only in the event the arbitration panel had reached an alternative finding on laches, i.e., if Grother's claim is not barred by laches. (Appendix 1, 30).

The third issue, Causality, involving whether Grother's adverse effect (displacement) was as a result of the UP/SP merger, was deemed "not relevant,"(Appendix 1, 26), "immaterial,"(Appendix 1, 32) or "moot." (Appendix 1, 25-26).

A. Dismissal for Laches. The Neutral/Referee found that UP had met its burden of proving Grother's NYD claim should be dismissed for laches. (Appendix 1, 23-24, 26-30).

> ...the Neutral/Referee Member finds that the Carrier has met its burden of proving that the instant claim should be dismissed under the equitable doctrine of laches. (Appendix 1, 24).
>
> Thus, for all of the reasons set forth above, the Neutral/Referee Member holds that the Carrier met its buren of proving, by substantial evidence, that the instant claim should be barred from consideration on the merits under the equitable doctrine of laches. (Appendix 1, 30).

The Decision said the nearly six-year delay by Grother in perfecting the claim under NYD Article IV, was grossly excessive; and the Neutral/Referee found that Grother's explanations to justify the delay were not supported by probative evidence.

21/ The ultimate finding is "Claimant's request is barred by the doctrine of laches as a result of his nearly six-year delay in filing." (Appendix 1, 33).

(Appendix 1, 25). The Decision added that Grother's May 12, 2003 letter was his NYD notification, that his July 15, 1997 letter to UP's President did not preserve his right to submit a NYD claim some 70 months later. (Appendix 1, 26). The Decision said that the absence of any time limit for filing a claim under NYD Article IV, especially since Grother was not represented by any labor organization, preserved Grother's right to file a claim at a later date, is not supported by credible proof. (Decision, 27). The Neutral/Referee interpreted the July 15, 1997 letter by Grother to U.P.'s President, as a request for a comparable management-type position, as opposed to seeking benefits as an employee or subordinate official under NYD. (Appendix 1, 27). In sum, the Decision found that Grother's excuses for delay in submitting his claim were not backed by credible proof. (Appendix 1, 29). In particular, the Decision said there is no real evidence to support Grother's contention that a timely filing of his claim would have subjected himself to "retaliatory discharge," loss of health benefits to himself or his wife, or other punitive actions. (Appendix 1, 29).

The Decision cited arbitral authority to support the view that laches can bar NYD claims, and should do so here. (Appendix 1, 28-29).

The Decision mentioned UP argument that loss or dissipation of records, fading memories, and personnel turnover during the six-year period had a chilling effect on UP's ability to defend itself against the "sizeable" Grother claim, and that if Grother had raised his claim earlier, it would have been settled at least

five years ago, when the players and papers involved were still available. (Appendix 1, 30).

The Decision did not mention the testimony of UP's only witness, Packard, on the laches issue.

B. Job Classification. The Neutral/Referee found, without retreating from the Decision's laches ruling, that Grother at the time of his transfer in 1997 was not an employee or subordinate official eligible for the NYD protective conditions. This determination was based upon and cited UP's discussion in its pre-hearing submission at pp. 8-20,[22/] as to the history of the term "employee" under NYD, railroad legislation, and arbitration awards. (Appendix 1, 25). The Neutral/Referee also stated she relied particularly upon Grother's description of the characteristics and responsibilities of the SRMTO position he held at the time of transfer, and the job description of Grother's duties as set forth in UP's pre-hearing submission at p. 21,[23/] and by UP's witness Packard at the hearing. (Appendix 1, 31).

The panel majority acknowledged Grother's May 12, 2003 letter, and considered that Grother regarded himself as a manager, and member of SP's management team when serving as SP's Terminal Superintendent at Tucson. (Appendix 1, 31). The Neutral/Referee stated that when Grother began to seek protective benefits under NYD, after UP acquired control of SP, he portrayed himself as being downgraded. (Appendix 1, 31). The majority stated this assessment is less than credible and hardly constitutes persuasive

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22/ Appendix 8, 8-20.

23/ Appendix 8, 21.

evidence he was an employee or subordinate official at the time of his July 1, 1997 transfer. (Appendix 1, 31).

The majority concluded the evidentiary record lacks any evidence to support Grother's contention that the SRMTO position he occupied was that of a subordinate official subject to unionization under the Railway Labor Act. The majority relied upon UP's pre-hearing submission, at p. 21, concerning the year 1999 responsibilities of the SRMTO position, and that witness Packard's recitation of the duties were not inconsistent with UP's submission. The majority found these duties and responsibilities are consonant with those of a management-level employee above the rank of what the Railway Labor Act (RLA) intended to be a "subordinate official." As authority for its RLA view, the majority cited the job status of a carrier's Manager of Labor Relations, found in a 1988 arbitral award not to be an "employee." (Appendix 1, 32).

3. Causality. The Decision in its Discussion and Findings did not reach the question whether Grother's adverse affect was a result of the merger transaction. This issue was deemed moot as a result of the laches ruling, as well as the alternate determination Grother was not an "employee, or a "displaced employee." (Appendix 1, 25-26, 32) Causality is "not relevant," so that UP is not required to prove that factors other than a transaction affected Grother. (Appendix 1 26). The question of whether Grother's transfer stemmed purely from the merger transaction itself, or was attributed to other reasons, is "immaterial." (Appendix 1, 32):

> Therefore, in light of the facts of record, the claimant was not entitled to protection under Article IV, above, and the question of whether his transfer stemmed purely from the merger transaction itself, or was attributed to other reasons, is immaterial, and the Committee need not determine whether the parties met their respective burdens of proof as regards the causality issue.

Despite its determination not to make a finding on Causality, the Decision in its Award, at Part VII, denies Grother's claim in its entirety, with ultimate findings that he was not adversely affected by the merger and not "displaced." Appendix 1, 34.

D. On-Property Conference. Finally, the Neutral/Referee mentioned the matter of the failure by the partisan parties to confer prior to arbitration, and ruled prior conferencing unnecessary. (Appendix 1, 32-33). The Neutral/Referee is correct, but has confused the issue, since conferencing per se is not required by NYD. Grother still claims unfairness. The Grother challenge to the Neutral/Referee is with respect to the procedures for the instant arbitration, patterned on the National Railroad Adjustment Board (NRAB) rules, but without either the conference safeguard mandated for NRAB by the Railway Labor Act (RLA), or the evidentiary procedures required by the STB's under its rules.[24/]

24/ See: Employee's Post-Hearing Brief. (Appendix 7, 9-11, and citation therein).

ARGUMENT

Introduction and Summary

Review of an arbitration decision[25/] involving employee protective conditions[26/] imposed by the Board under 49 U.S.C. 11326 is limited to recurring or otherwise significant issues of general importance regarding the interpretation of the conditions. The Board will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Chicago & 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).

This case involves significant issues of general importance regarding the interpretation of the NYD conditions. Of course, even in the absence of general importance issues, the STB does not owe deference to the decision with respect to matters such as laches or jurisdiction.

1. Laches. The Decision (Appendix 1) dismisses Grother's request for NYD protection on the asserted ground of unreasonable delay in requesting relief from UP. Yet there is no time limit or statute of limitations for seeking NYD protection, apart from the maximum 6-year period of protection following first adverse

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25/ We use the term "decision" rather than "award" inasmuch as the Board's rules for review (or appeal) use the term decision. 49 CFR 1115.8.

26/ We use the term "employee" protective conditions, rather than "labor" protective conditions, inasmuch as the statute reads "employee". 49 U.S.C. 11326. The term "labor" is pejorative, and is also used as an argument that the protective conditions apply only to "labor" as opposed to "management," rather than "employee/subordinate official" as opposed to "official."

effect; and Grother's request for NYD protection was made within that 6-year statutory protective period of 49 U.S.C. 11326.

Laches was advanced as an afterthought argument by UP, with UP having the burden of proof. Grother would have specifically mentioned NYD in numerous communications with UP following his displacement, except that he feared retaliation as a non-agreement employee. An example is his unchallenged statement:27/

> "During the exit interview with my Service Unit Superintendent, Ken Packard, held June 26, 1997, I was advised that I could still be demoted to a lesser position, so I should just accept the demotion happily, 'You know, they can further demote you. You are not getting any younger. You better take the demotion and be happy.'"
> .....
> "Shortly after my arrival at Houston, I was on August 2, 1997, advised by my new supervisor, Don F. Fryar concerning lawsuits, and he advised, 'You cannot work around here during any type of lawsuit, as they would make life unbearable for you.'"

The issue on laches is harm to UP--and UP provided no evidence in support of its "argument" that its case was hindered by delay. We know of no STB decision dismissing an employee NYD claim on timeliness, in the absence of injury to the rail carrier, and there is precedent to the contrary.

Dismissal of a claim as untimely would be a drastic action where there is no statutory or agency limitation. Clear harm to UP must first be demonstrated, which UP never really attempted. Indeed, UP in the conclusion of its brief argued that the arbitration committee needs to look no further than to find Grother to be

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27/ Appendix 3, V.S. Grother (Laches), 1-2.

an "official;" and that there is no need to decide the "causality" and "laches" issues. (Appendix 11, 15).

2. Definition of Employee. The second issue in this case is the definition of "employee" under NYD and the relevant statutes. Who is an "employee" or "subordinate official" that may qualify as an "employee" under 49 U.S.C. 11326, 45 U.S.C. 151, and NYD? The Board's predecessor, the Interstate Commence Commission (ICC), conducted a number of hearings over the years, primarily for the railroad operating crafts, and determined that, generally speaking, operating positions below the level of Division Superintendent are to be classified "employee" or "subordinate official" for purposes of Section 1, Fifth, of the Railway Labor Act, 45 U.S.C. 151, Fifth. The railroad industry, until recently, appears to have generally accepted the parallel classification for employee protection purposes of 49 U.S.C. 11326, and 45 U.S.C. 151, as recognized even by UP in its Ahart Decision finding Grother ineligible for NYD conditions. However, UP in the Ahart Decision, and the arbitration decision find, a person will not be classified "employee" or "subordinate official" if the individual's work is "managerial" or "management," but the person instead will be deemed an "official" and denied NYD employee protection. Ahart Decision (Appendix 2):

> In addition, to be considered for coverage an individual must satisfy the term of "employee" as it is defined in the Railway Labor Act and by New York Dock cases.
> .....
> Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

The Ahart Decision (Appendix 2), and the Decision (Appendix 1) are incorrect. The management/employee test comes under the eligibility requirements of the National Labor Relations Act (NLRA); the official/employee-subordinate official test is for railroad personnel under the RLA and ICC Act. The NLRA definition of employee is simply not applicable here.[28/]

The issue of "employee" definition is especially important in light of the trend in the railroad industry for a greater percentage of the total work force to be employed by small carriers, without collective bargaining agreements and/or union representation. Like petitioner Grother, these people need the statutory protection provided by Congress through 49 U.S.C. 11326, and administered by the Board through NYD and other conditions.

3. Arbitration Process. The third issue is whether Grother's claim should have been relegated to arbitration, rather than decided directly by the STB, with traditional review under usual administrative law standards. Features of this issue recently arose, but were left undecided, in a case involving non-agreement, non-union, persons employed by UP in its Management and Information Services (MIS) Division. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 35-36 (D.C. Cir. 2004). Grother, as a non-agreement at-will employee, not represented by a labor organization, challenges the compulsory arbitration of his NYD claim under the narrow Lace Curtain review standard. The arbitration process followed here, particularly in adopting evidentiary

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28/ One of the many misstatements by the panel concerning Grother's position in the case is the assertion he claims his SRMTO duties would qualify as "employee" under NLRA standards. (Appendix 1, 11).

standards inconsistent with fair hearing and/or Administrative Procedure Act standards were prejudicial to Grother.

4. Several Non-Issues. The Lace Curtain standard of review states the Board will not review issues of causality or calculation of benefits, absent egregious error. The issue of causality expressly was not decided by the arbitration panel, and thus the matter of causality would not be before this Board, except for the fact that the ultimate conclusion of the panel found that Grother was not adversely affected by the merger. (Appendix 1, 34). A conclusion inconsistent with the underlying finding is egregious error.

The question of any calculation of benefits due Grother was not decided by the panel, and thus is not before the Board. (Appendix 1, 2-3 n.2).

I. THE DECISION ERRS IN DENYING ALL NYD CLAIMS ON THE ALLEGED GROUND OF LACHES.

A. The Decision Errs in Finding Injury to UP. The Decision does not set forth a rational or factual dissertation of the facts underlying UP's affirmative defense of laches, the timing of Grother's grievances, or the complete lack of evidence submitted by UP in support of its claim for injury by delay. Indeed, the Decision (Discussion and Findings) reads as if Grother is bent upon a vicious and unprovoked attack against UP. (Appendix 1, 25, 26-30). The majority's discussion is egregiously wrong, and unsupported by the record.

The Ahart Decision in declining NYD coverage for Grother, gave no reasons in support for the defense of laches other than

undisclosed "arbitral authority." (Appendix 2, 2).

UP's submission presented a list of arbitration awards dealing with laches (Appendix 8, 33-36),[29/] and summarized Grother's reasons for not immediately filing a NYD claim, UP concluding that Grother was fearful of retaliation from UP. (Appendix 8). But UP in its submission presented no evidence that Grother's May 12, 2003 formal NYD claim, asserting reduction in compensation commencing July 1, 1997, in anyway harmed UP's defense against the NYD claim.

UP in its submission contended that some of those mentioned by Grother had since left UP, and that many documents and records relating to 1997 are no longer available, citing in particular Form 15121, which allegedly lists the reason for Grother's demotion as "disciplinary." However, UP said Ken Packard, Grother's asserted immediate supervisor, would be present to testify at the hearing. (Appendix 8, 41-42).

Grother's verified statement in his pre-hearing submission set forth the basis for his fears as a non-agreement employee, in filing a formal NYD claim, and cited various communications with the carrier concerning his status. Appendix 3, V.S. Grother (Laches). Grother responded that UP is quite able to defend itself. Grother's two immediate supervisors, Messrs. McDowell and Packard, remain with the company. (Appendix 6, GH28, 13; Appendix 7, Tr. 51). In addition, Thomas F. Murphy, closely involved with Grother's displacement (Appendix 3, V.S. Grother (Causality), 2-3;

29/ The Neutral/Referee twice mentions the TCI-UP (Rehmus, 12/30/92) award, but it is not found in the record or elsewhere, although it was a UP arbitration. (Appendix 1, 28, 29).

Appendix 7, Tr. 72-73, 101, 212-13), remains in an important role within UP. (Appendix 5, Ex. E-5, p. C-76). Moreover, at the hearing Grother presented a written reply verified statement refuting the laches arguments made by UP in its submission, and Grother was cross-examined on his reply statement. (Appendix 6, GH28, 12-14).

UP's Ken Packard was permitted to testify at the hearing on causality and job classification issues. (Appendix 6, GH25, 3, p. 2). However, Packard later was recalled for the laches issue--the missing Form 15121, purportedly indicating Grother was demoted from SRMTO at Tucson to a much lesser grade at Houston "for disciplinary action." (Appendix 8, 41-42; Ex. 40, 2).

The issue of the missing Form 15121 was resolved. When recalled, UP's Ken Packard said the Form 15121 disciplinary notation was "not correct--it was not disciplinary." (Appendix 7, Tr. 192-94, 196-203).[30/]

Accordingly, the findings of the Decision concerning laches are not only egregious error, they are perverse. UP's case for harm is "speculative perjudice" at best. There is no evidence to show any harm or damage to UP from any Grother delay. UP's post-hearing brief and argument, the sole cited "evidence" in the Decision, is not correct and the brief is an improper document upon which to base a laches finding. (Appendix 1, 30).

UP's argument on brief, copied into the Decision, that had Grother identified his dispute in 1997 as a NYD matter, it would

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30/ There never was a real issue of missing papers concerning the operations at Tucson. Grother stood ready to furnish them in 20 boxes. (Appendix 3, V.S. Grother (Causality), 3 & Atta. 2; Appendix 6, GH28, p. 6).

have been settled, is a completely wrong, as anyone familiar with the railroad industry would recognize. (Appendix 1, 30; Appendix 11, 10). Grother made numerous attempts at UP in 1997, and over the ensuing period, without success, for job redress and advancement. (Appendix 6, GH28, 6-7; Appendix 8, Ex. 2, 103-8),

The Neutral/Referee gave particular and repeated emphasis to the so-called TCI-UP (Rehmus, 12/30/92) award, mentioning it twice (Appendix 1, 28, 29). But the Rehmus award was not advanced by UP or made of record by any party, including the Neutral/Referee.[31/]

Finally, it must be mentioned that UP's claim of asserted inability to defend itself due to Grother delay, was predicated upon the causality issue (Appendix 8, 44)--now a moot issue, and one for which the Decision did not render subsidiary findings, supra 17-18.

B. Grother Had Valid Reasons for Delay. Grother presented valid reasons for delay on his part in filing a formal NYD claim. These were established in his pre-hearing submission (Appendix 3, 27; V.S. Grother (Laches)), and in his reply verified statement (Appendix 6, GH28, 12-14). Primarily, the delay was occasioned by fear of retaliation and/or dismissal, as indicated by the Grother testimony. UP does not really disagree. UP presented no evidence on laches in its submission or at the hearing. UP's

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31/ The award is inapposite. The NYD claim, made well over 6 years after displacement, was unexplained but, more importantly, involved overtime records which were no longer available to the carrier so as to mitigate its liability. Here, of course, Grother and UP have stipulated to determine the extent of compensation and other benefits (phase 2), after liability is established. (Appendix 1, 2-3 n.2).

Ken Packard at the hearing blew up any remaining UP notion that the carrier may have been harmed by any Grother delay in filing.

UP's argument on brief, that had Grother identified his dispute in 1997 as a NYD matter, it would have been settled, is nonsense. (Appendix 1, 30; Appendix 11, 10). The likely result at the time would have been UP's termination of Grother. Indeed, Grother was advised at the time of him displacement that "UP wanted its own managers on the 'Sunset Route,' and its "own people" at Tucson. (Appendix 3, V.S. Grother (Causality), 3). These words were unchallenged. For other specific quotations, see: supra at 20.

C. There is No Time Limit for New York Dock Claims. The provisions of 49 U.S.C. 11326 provide a period for 6 years of protective benefits. There is no time limitation for filing a claim for benefits. Grother's formal NYD claim was filed May 12, 2003, within six years of his first adverse effect on July 1, 1997. After the court in Lace Curtain confirmed Board review of arbitration decisions, the Board fashioned a 20-day rule for seeking review of NYD arbitration decisions.[32/]

However, the Board has not established any time limit for invoking arbitration under NYD Article I, §1(11), or Article IV, and we are unaware of any request for rulemaking in this regard.

D. The Limited Role of "Laches" in Board Cases.

The Decision refers to a short list of arbitration awards where laches were recognized. (Appendix 1, 28). For the most part,

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32/Norfolk & W. Ry. Co. and New York, C. & St. L.R. Co. Merger, 5 I.C.C.2d 234 (1989); Deadline for Req. Commission Rev. of Arbitration Decisions, 5 I.C.C.2d 520 (1989).

these were situations involving represented employees who may have redress against their union for any prejudice to them for the union's unnecessary delay. More important, there is no indication these decisions were reviewed by the Board.

Today, the NYD arbitration process is an integral part of the Board's adjudication procedure, such that laches are to be guided by the administrative process, rather than by arbitration from court referral, or otherwise.

The Board takes a dim view of the laches defense, particularly in employee protection matters, which may extend over decades. Where, as here, employees seek other forms of interim relief, the individual will not be faulted. Pennsylvania RR Co.-Merger-New York Central RR Co., 3 S.T.B. 834, 939-40). The Board has found "speculative prejudice" to a carrier an insufficient ground to invoke the bar of laches. F.D. No. 32549 (Sub-No. 24), The Burlington Northern and Santa Fe Railway Company-Petition for Review of Arbitration Award, served Sept. 25, 2002 (Suchy Award).

The narrow view of laches was expressed in Oklahoma Intrastate Freight Rates and Charges, 321 I.C.C. 186, 207 (1963):

> The defense of laches can only be interposed where the delay in enforcing a claim works a disadvantage to the other party. It is an equitable doctrine and cannot be upheld in an administrative proceeding. see: 30 C.J.S., section 112.

See also: Seaboard Air Line R. Co. Control, 330 I.C.C. 103 (1967), rev. den. Seaboard Coast Line Railroad Company v. United States, 283 F.Supp. 866, 869 (E.D. Va. 1968)(three-judge); Erie Lackawanna Ry. Co. v. Penn Central Co., 338 I.C.C. 513, 544 (1969). The test is not one of Grother's unexplained delay (here delay was explained), but any proven prejudice to the carrier.

The Board has recognized the role of laches where a transaction cannot be undone, or where there has been proven detrimental reliance, neither of which are present here. F.D. No. 31974, Mountain Laurel Railroad Company-Acquisition and Operation Exemption-Consolidated Rail Corporation, 8 (not printed)(served May 15, 1998). Likewise, the Board has sustained the laches defense where appropriate offsets cannot be calculated for the delay, a situation not present here. (Appendix 1, 2-3 n.2; Appendix 8, 42-44). Cf. F.D. No. 28676 (Sub-No. 2), Grand Trunk Western Railroad Company-Merger--Detroit and Toledo Shore Line Railroad Company--Arbitration Review, 4 (served Feb. 26, 1996).

Of course, the Board is well aware of the lengthy and prolix problems in connection with the UP/SP merger, which extended well beyond any normal period.

II. THE DECISION ERRS IN FINDING GROTHER NOT AN "EMPLOYEE" WITHIN THE MEANING OF 49 U.S.C. §11326 AND THE NYD CONDITIONS.

The Decision (Appendix 1) found Grother not an "employee" within the meaning of 49 U.S.C. 11326 and the NYD conditions, and not a "displaced employee" subject to the NYD conditions. (Appendix 1, 33). The "employee" issue is termed "jurisdictional" for the arbitration committee, e.g., Appendix 1, at 9, 16, 24. The decision should have found Grother to be a Subordinate official or employee, rather than an official, and the arbitration committee committed egregious error on this score.

A. A Terminal Superintendent Is Generally Classified as Employee or Subordinate Official.

Grother served as a Terminal Superintendent for SP at the time of the September 11, 1966 merger, and remained in that

capacity until named SRMTO by UP on April 16, 1997, and until transferred to Houston effective July 1, 1997. Terminal Superintendent was two levels below the SP Division Superintendent.33/ The UP's SRMTO label for Grother on April 16, 1997 was stated by UP to have been the same position held by Grother by SP, although under a different title. (Appendix 8, 2, 30).

The ICC held dozens of proceedings involving the classification of employees under the RLA. The general rule is that railroad employees below the rank of Division Superintendent are classified as "employees" or "subordinate officials" under the RLA. Regulations Concerning Employees Under Ry. Labor Act, 266 I.C.C. 87, 93 (1946):

> Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of division superintendent, are looked upon as officials. (emphasis supp.).

This finding by the ICC was repeated, verbatim, upon reargument. Regulations Concerning Employees Under Ry. Labor Act, 268 I.C.C. 55, 57 (1947).

B. Grother Comes Within the General Rule for Terminal Superintendent Status as "Employee" or "Subordinate Official".

UP recognizes the importance of Grother's job classification under RLA, to his eligibility for protection under NYD, although UP's analysis is flawed, for UP failed to appreciate the reported ICC decisions, among other failures. (Appendix 8, 8-20; Appendix 11, 4-8). UP seizes upon the qualifying language to the employ-

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33/ For the SP's El Paso Division organization chart, see: Appendix 3 (V.S. Grother (Job Classification), Atta. 1).

ee/subordinate official status for persons below the rank of Division Superintendent, cited above, 266 I.C.C. at 93, for train master:

> However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials. (emphasis supp.).

UP contends that Grother supervised three MYOs (a UP title change from SP train master),34/ and that the ICC "has consistently held" that a trainmaster is an "official," citing the above excerpt from 266 I.C.C. at 93. (Appendix 1, 19-20; Appendix 11, 4-7). According to UP's reasoning, if train masters are "officials," and Grother allegedly supervised trainmasters as Terminal Superintendent of SRMTO, then Grother is an "official."

1. Trainmasters. UP has misread the qualifying language of 266 I.C.C. at 93. The ICC did not find that a "trainmaster" is an official. The ICC meant that those trainmasters who at times, and under certain circumstances, exercised the authority of a division superintendent would be considered officials. (emphasis supp.). The I.C.C. did not rule that trainmasters were officials, or that trainmasters generally perform the duties of a division superintendent. To the direct contrary, the ICC ruled train masters are "employees." Regulations Concerning Employees Under Ry. Labor Act, 232 I.C.C. 44 (1939). Indeed, the job classifica-

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34/ For the title change from SP trainmaster to UP MYO, see: Appendix 3, V.S. Grother (Job Classification), 2.

tion "trainmaster" is a specie of "yardmaster." 232 I.C.C. at 48.35/

Any confusion in the meaning of the cited phrase from 266 I.C.C. 87 at 93, was clarified later by the ICC in a subsequent decision, where the exception phrase was deleted. Regulations Concerning Employees Under Ry. Labor Act, 289 I.C.C. 19, 24 (1953):

> Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be.

This amended rule was cited with approval in Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 65 n.2 (1981).

The predicate for UP's "trainmaster" analysis is false. Moreover, it is illogical, to assume that an "employee" may not supervise an "official," in this day of computers, safety specialization, and other occupations, although this might have limited application to traditional operating crafts.

2. Role of Unionization. The existence or non-existence of union representation for a job classification is irrelevant to whether a person is "employee/subordinate official" or "official" under RLA's command to the STB. 45 U.S.C. 151, Fifth (Appendix 3, Ex. E-23, 1):

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same

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35/ Yardmasters are, of course, "employees" or "subordinate officials" and were represented by a union on the SP, but not on the UP. Presently, Yardmasters on the combined company are unionized.

> may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders; Provided, however, That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.
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> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

The majority found the record lacked any evidence that Grother's SRMTO position is that of a subordinate official subject to unionization under RLA. (Appendix 1, 31). Of course, the arbitration panel is without authority to bind the Board under 45 U.S.C. 151, Fifth., and the Board cannot require unionization. Subordinate officials and employees, so found by the Board, are merely eligible for unionization. They are not required to be union members, or their positions made subject to collective bargaining, absent other procedures. The majority's alarm about potential unionization of additional positions on UP is misplaced. The ICC ruled that railroad personnel below the rank of division superintendent (for UP, this is Service Unit Superintendent)36/ generally are employees or subordinate officials. This is sufficient to find Grother eligible for unionization and, ordinarily, eligible for NYD conditions.

36/ Appendix 3, V.S. Grother (Job Classification), 2-3, 6). The Decision at 11, line 16, has the typographical error of "Union" in lieu of "Unit." (Appendix 1, 11, line 16).

The fact that Terminal Superintendents on SP, and SRMTO on UP, have never been organized by labor unions, does not render the positions to be classified as "official." Yardmasters are organized on UP, but not on some other rail carriers; train dispatchers are non-agreement on UP, but are agreement positions on other carriers, such as BNSF. Supervisors are agreement positions on a number of carriers, such as UP, but not on others. For some examples, see: Appendix 3, V.S. Grother (Job Classification), 6-7.

The majority's finding that Grother did not provide any evidence of his status as a subordinate official or employee is egregious error on its face. (Appendix 3, V.S. Grother (Job Classification)).37/ A good, and perhaps determinative best evidence of job classification is the ICC's rulings in its job classification cases.

C. Link Between Job Classification and NYD Eligibility. Considerable weight should be given to the connection between job classification under 45 U.S.C. 151, Fifth, and eligibility under NYD and 49 U.S.C. 11326.38/ This is UP's desire, as well as Grother's. (Appendix 3, 15-27; Appendix 6, 27-34; Appendix 8, 8-20; Appendix 11, 4-10). The instant arbitration Decision makes a number of references to the interplay between NYD eligibility and the railroad legislation, including RLA. (Appendix 1, 25, 30-32).

Although the former ICC gave considerable weight to the classification of subordinate official or employee under 45 U.S.C.

37/ Grother presented a time analysis, showing the percentage of his time spent at various tasks.

38/ It is logical that the same definition of "employee" for rail carriers should apply for 49 U.S.C. 11326, as for NYD conditions..

151, Fifth, in determining eligibility for "employee" protection under 49 U.S.C. 11326, there never was a "positive" determination between RLA classification and employee protection. Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 66 (1981).

At the time of Bell, supra, the ICC questioned its power to review the issue of "employee" in protection matters once arbitration had been invoked, and said it might not even have jurisdiction. However, Bell was prior to arbitration review for the ICC on this score, announced in International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Cf. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31 (D.C. Cir. 2004).

Now that the Board has review jurisdiction over NYD arbitration decisions, the agency can maintain a fairly consistent pattern among its determinations under RLA and NYD.

D. "Mangerial" Duties Not the Test to Deny NYD Coverage.

UP in the Ahart Decision (Appendix 2), and the majority in the arbitration Decision, conclude that Grother's duties and responsibilities were managerial in nature, or management-level, and that he considered himself a manager, member of the "management team," and "senior officer" at Tucson. (Appendix 1, 31-32).

UP and the majority are wrong in posing "managerial" or "management" as the test for disqualifying an employee for NYD coverage. Managerial is not the test under the RLA, 45 U.S.C. 151, Fifth, to exclude one from the status of "employee."

Of course, many employees are in a sense "managerial," such as the conductor for a freight train on a branch line, or yardmasters in a yard. The question becomes the level at which the employee's duties, responsibilities, supervision, and policy-

making, among other factors, rise to the extent of becoming a company "official."

The "managerial employee" concept came from the National Labor Relations Act (NLRA), which governs most management-employee relations outside the railroad and airline industries. The exclusion of "managerial employees" came through judicial construction, inasmuch as NLRA only excepts "supervisor." 29 U.S.C. 152(3). A supervisor is defined as a person having the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action. 29 U.S.C. 152(11).

In establishing the "managerial employee" exception under NLRA, the U.S. Supreme Court did so because the NLRA did not bring management employees under its definition of employee, unlike the RLA, with the Supreme Court specifically referencing 45 U.S.C. §151, which in contrast defined a subordinate official as an employee. NLRB v. Bell Aerospace Co., 416 U.S. 267, 279 (1974):

> Furthermore, other legislation indicated that where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly. See, e.g., Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. §151; .....

See also: NLRB v. Yeshiva University, 444 U.S. 674, 682-85 (1980).

The "managerial" findings of the Ahart Decision and the arbitration Decision, are not merely egregious error, but are wrong as a matter of law. The "management" or "managerial" employee is not a term of art for the railroad industry. The term

relates to the job classification taken from NLRA as interpreted by the U.S. Supreme Court, and the Court knew it was distinguishing the situation from that in the RLA.

We appreciate there are a number of NYD or other employee condition arbitrations, or other decisions, where the management/labor determination was made in granting or denying employee status for NYD coverage.

The former ICC and the current STB, over intermittent employee organization objection, continue to term NYD conditions as "labor protective conditions," even though statute, 49 U.S.C. 11326(a), and its predecessor extending back to 1940, use the term "employee protective conditions."

The former ICC appears to have first used the management/labor distinction in dismissing a Review Board decision that an individual was not "management-level," but did so only as a matter of dicta at the end of its report finding it had no jurisdiction to make a management/labor determination. Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 66 (1981).

Subsequently, the ICC used the term "management employee" as meaning one not entitled to protective conditions, but said the question of application to a given situation was "complicated, mixed questions of fact and law that are difficult to resolve."39/

The "managerial" or "management/labor" test does not apply, according to a leading arbitration award, to persons who are

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39/ Finance Docket No. 32549 (Sub-No. 19), Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, 3 (served Dec. 20, 1995). 1995 WL 753986 (Dec. 20, 1995).

subject to unionization, i.e., those whose status has been determined under 45 U.S.C. 151, Fifth, to be "subordinate official" or "employee." The Seidenberg award, cited in Ahart Decision (Appendix 2, 1), and extolled by UP at the hearing as issued by "the dean of railroad arbitrators" (Appendix 9, Ex. 26; Appendix 7, Tr. 146), points out that a terminal superintendent (having been determined subject to unionization), would not be subject to the alternative ("or") inquiry concerning "managerial" duties.40/

E. Grother Duties and Responsibilities. The Decision asserts that UP witness Packard said Grother as SRMTO was responsible for various functions at Tucson, giving certain transcript references. The six enumerated duties and responsibilities are not factually correct. The statement constitutes egregious error. (Appendix 1, 32). Grother in his verified statement set forth his duties and responsibilities as SRMTO. (Appendix 3, V.S. Grother (Job Classification)). UP did not present evidence in opposition; instead, UP presented "argument" concerning Grother's duties. UP claimed the SRMTO duties were the same as performed by Grother as Terminal Superintendent prior to April 16, 1997. (Appendix 8, 2, 30). UP listed the duties for SRMTO, and said the position had the authority to hire and fire employees. (Appendix 8, 21-22).

Grother replied by verified statement to UP's argument, showing the listed SRMTO duties were established in 1999, after he had departed Tucson in mid-1997, and that he had not been given a job description. He denied having the power to hire or to fire, or to conduct discipline. (Appendix 6, GH28, 2-5). UP at the hearing

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40/ The critical Seidenberg language is reproduced in paragraph 4 of the Ahart Decision, supra at 6. (Appendix 2, 1).

introduced the "live" testimony of Ken Packard who gave the present job description for SRMTO, but was unclear as to what was in effect in 1997, and could only speak "to the best of my knowledge. (Appendix 7, Tr. 88-89).41/ In any event, the so-called duties and responsibilities of Grother, listed by the majority, did not include the critical ability to hire, fire, or discipline employees, items deemed essential to an operating "official" classification.

Grother presented numerous citations concerning subordinate official/employee-official duties, including the Milwaukee/Rock Island definition, Rate Bureau definition, arbitration awards, and Congressional hearings. (Appendix 3, 20-23; Appendix 7, 32-35). The trend is to repudiate the management/labor test, and to limit the "official" exception for NYD protection.

III. CAUSALITY IS NO LONGER IN DISPUTE; GROTHER WAS ADVERSELY AFFECTED AND/OR DISPLACED BY THE MERGER OR TRANSACTION.

The arbitration Decision did not reach the question whether Grother's adverse affect was a result of a transaction stemming from the UP/SPmerger. This was the causality issue, which the panel said is "not relevant," "immaterial," and "moot." (Appendix 1, 25-26, 32). Accordingly, UP was not required to prove that factors other than a transaction affected Grother, as otherwise specified in NYD §11(c). UP's Member signed the Opinion & Award

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41/ UP resisted preparation of advance written verified statement, which often are very helpful in technical situations, and where court reporters may not be familiar with railroad terminology. UP said verified statement "stands centuries of Anglo-American jurisprudence on its head. Live testimony...is always preferable." (Appendix 6, GH25, 4).

without reservation on this score. (Appendix 1, 34). In its post-hearing brief, UP sought a ruling on the job classification issue, and said there is no need to decide "causality." The STB should hold UP (and the Neutral/Referee) to its word, and find there is no reason to contest Grother claim that he was adversely affected by the UP/SP merger or a transaction thereof, and was displaced as a result thereof.42/

There remains the matter of the Decision's ultimate finding that "Claimant was not adversely affected by the merger," and that Grother was not a "displaced employee." These findings are egregious error, arbitrary and capricious, and irrational in view of the subsidiary findings.43/

Finally, brief mention should be made of "calculation of benefits" another feature of Lace Curtain review where the STB ordinarily gives broad deference to the arbitrators. Although an ultimate issue here, it has been deferred, and is not part of the instant proceeding. (Appendix 1, 2-3 n.2).

IV. THE ARBITRATION PROCESS UNDER NYD IS PREJUDICIAL TO NON-AGREEMENT EMPLOYEES.

Grother considers the entire arbitration process, with its purported limited STB review, and judicial review thereof, to be prejudicial to his interest as a non-agreement, at-will, employee. This matter has come to the fore recently, ironically pressed by

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42/ Although UP in its brief adopted the same position on "laches," the Neutral/Referee was not in accord.

43/ UP's requested "displaced employee" finding placed two issues in a single question. The STB need not sort out the "displace" from the "employee," in the event the Board finds Grother to be a qualifying employee under NYD.

UP in the so-called MIS litigation.44/Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31 (D.C. Cir. 2004). Grother challenged the process at the outset (Appendix 3, 7-8), at the hearing, and in post-hearing brief. (Appendix 7, 9-12).

Grother's right to protection stems from the Congress. 49 U.S.C. 11326. He should not be relegated to a process without Administrative Procedure Act protection, and due process.

A. The NRAB Process. The Neutral/Referee, over Grother objection, adopted hearing procedures similar to those for the resolution of minor disputes by the National Railroad Adjustment Board (NRAB) under the Railway Labor Act (RLA). (Appendix 5, Ex. E-7, 4-8 & App. 2; Ex. E-11, E-12, E-15). The NRAB procedures require conferencing before invoking its procedures. 45 U.S.C. 152, Second, Sixth. Then the partes proceed to simultaneous submissions at the NRAB, based on the record and evidence already developed in the conferences. 29 CFR 301. (Appendix 3, Ex. 7, App. 2). The NRAB decision is not rendered by an Administrative Law Judge, or by anyone appointed by the President and confirmed by the U.S. Senate.

B. The STB Process. The usual STB process in arbitration is to have a three-step process, with opening written statement, opposition statement, and reply statement. 49 CFR 1108.8. In the usual complaint, petition to revoke, or other adversary proceeding, a petition and subsequent reply is the procedural framework. 49 CFR 1111, 1112, 1115. The STB's decision is subject to the Administrative Procedure Act, evidentiary requirements, and the

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44/ MIS stands for UP's "Management and Information Service" employees.

agency is headed by persons appointed by the President and confirmed by the U.S. Senate.

C. Prejudicial Error. There was no conferencing at the UP concerning Grother's NYD claim. The facts were not developed and/or agreed upon by any conferencing process. Instead, the Neutral/Referee utilized the NRAB hearing process for simultaneous submissions, and presumed the factual correctness of the UP's submission, without any verification by anyone familiar with the facts.45/In short, the UP's second "witness" and counselor was the individual in charge of its submission, UP's Director of Employee Planning. Unlike dealings with employees subject to collective bargaining agreements, UP's representative in this case does not administer the arrangements between Grother and UP, and does not have any first-hand experience with the facts. On the other hand, Grother, and three other employees, submitted their evidence in the form of verified statements, and present at Tucson and were familiar with the facts in 1997.

Grother has been denied due process by the arrangement, and the instant procedures should also sound an alarm for the STB--which only since 1988 has resumed oversight over NYD arbitration awards dealing with Lace Curtain matters.

45/ This was particularly egregious, since Grother does not deal with UP's Labor Relation Department concerning his rates of pay, rules, or working conditions, unlike UP's employees working under collective bargaining agreements. Grother's employment concerns are addressed to UP's Human Resources Dept. (Appendix 7, Tr. 184-85; Appendix 5, Ex. E-5, C-72).

V. CONCLUSION. The STB should review the January 6, 2005 arbitration decision, and grant the appeal from the arbitration decision. The STB should issue a decision in petitioner's favor, finding the NYD conditions applicable to him, and take such other or further action as may be required, inluding modified procedure or remand.

Oral argument is requested, due to the importance of the proceeding from the standpoint of non-agreement railroad personnel, and to advance the proper administration of the Board's NYD process.

Respectfully submitted,

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

Attorney for John E. Grother

February 22, 2005

Certificate of service

I hereby certify I have served a copy of the foregoing, with appendices, upon the designated representative for Union Pacific Railroad Company, by first class mail, as follows:

William E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas Street-Stop 0710
Omaha NE 68179

Gordon P. MacDougall

February 22, 2005 GORDON P. MacDOUGALL

APPENDIX 1

IN THE MATTER OF THE ARBITRATION

BETWEEN

JOHN E. GROTHER
("Grother" or "Claimant")

AND

UNION PACIFIC RAILROAD COMPANY
("Union Pacific," "UP," or "Carrier")

Pursuant to Article IV of the New York Dock Conditions Imposed by the Surface Transportation Board in Finance Docket No. 32760.

CLAIM OF
John E. Grother
(Whether Claimant is a displaced employee under the New York Dock conditions; whether Claimant was adversely affected by the merger; whether claim should be barred by the doctrine of laches).

OPINION AND AWARD

Before: Arbitration Committee

Members:

William E. Loomis General Director, Employee Relations Planning	Carrier Member
Gordon P. MacDougall, Esq.	Grother Member
Lynette A. Ross	Neutral/Referee Member
Appointment of Neutral Member	January 21, 2004

I. INTRODUCTION

The hearing before this Arbitration Committee was held on October 12, 2004 at the offices of the National Mediation Board, 1301 K Street, N.W., Suite 250-E, Washington, DC, commencing at 10:00 a.m. before the undersigned Arbitrator who was designated as the Neutral/Referee Member of the Arbitration Committee by the National Mediation Board, pursuant to the above-captioned New York Dock Protective Conditions, 360 ICC 60, 84-90 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

Pursuant to the Memorandum of Agreement Between John E. Grother and Union Pacific Railroad, signed on June 18, 2004 by Gordon P. MacDougall, for John E. Grother, and William E. Loomis, on behalf of the Union Pacific Railroad Company, on September 14, 2004, the partisan members served written submissions, one upon the other, simultaneously, with copies to the Neutral/Referee Member. During the hearing before the Arbitration Committee, the parties were afforded full opportunity to "present witnesses, statements of fact, supporting evidence, data and argument"[1] in support of their respective positions. A 222-page stenographic transcript of this hearing was made. The partisan members of the Committee each filed post-hearing briefs on November 22, 2004, whereupon the record was declared closed. The partisan members stipulated at the hearing as to the Neutral/Referee Member's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

II. STATEMENT OF THE ISSUES

The issues as framed by the Grother Member of the Arbitration Committee are:

"A. Applicability of New York Dock Employee conditions.

1. Whether employee was adversely affected as a result of the STB-approved merger, and has the burden to prove the causal connection between the merger and the adverse affect (sic).

2. Whether the involved employee was an 'employee' within the meaning of 49 U.S.C. 11326 and NYD at the time of first adverse affect (sic).

3. Whether employee's request for compensation/benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches.

B. Measure of Compensation/Benefits (Deferred Issue)."[2]

[1] See paragraph D, page 2, of the above-referenced Memorandum of Agreement ("MOA," or "MA-5D") signed on June 18, 2004 by the partisan members. (Grother Ex. E-16, Union Pacific Ex. 19).

[2] Pursuant to paragraph E, page 2 of the MOA, the Committee's jurisdiction was limited to "questions concerning the interpretation, application, or enforcement of New York Dock conditions to Grother and Union Pacific." According to paragraph E, "The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation and some benefits." Thus, under the MOA, the Committee will

The issues as framed by the Carrier Member of the Arbitration Committee are:

"(1) Was John E. Grother, at the time of his reduction in salary, a 'displaced employee' subject to the protection of the New York Dock conditions?

(2) Is John E. Grother's claim for a displacement allowance pursuant to New York Dock barred under the doctrine of Laches?"

III. RELEVANT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

NEW YORK DOCK CONDITIONS
Finance Docket No. 28250
APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly Sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions. – (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

* * *

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of Section 7(b) of the Washington Job Protection Agreement of May 1936.

* * *

first consider the question of whether the Claimant was covered and, if so, entitled to any benefits pursuant to the New York Dock conditions. If the Committee should deem the Claimant eligible for benefits under the New York Dock conditions, the partisan members thereafter shall confer in an attempt to reach agreement on the measure of compensation or benefits due the Claimant.

11. (e) 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.

* * *

ARTICLE IV

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.

IV. FACTUAL BACKGROUND

According to the Verified Statement-Causality submitted by Claimant John E. Grother with the Grother Member's September 17, 2004 pre-hearing submission, on May 12, 2003, while holding the position of Manager of Intermodal Operations at Houston, TX, the Claimant sent a letter to James V. Dolan, Union Pacific's Vice President of Law, seeking compensation of $107,370.00 in New York Dock benefits as a "displaced employee." In the Claimant's view, his "displacement" to Houston was a direct result of the September 11, 1996 merger between the Union Pacific and Southern Pacific railroads. In that Verified Statement-Causality, the Claimant asserted, "I have held this position since July 1, 1997, when I was displaced as Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. I suffered a reduction in pay and benefits by my displacement and transfer from Tucson to Houston."

The Carrier has consistently maintained, and as will be further discussed below, that the Claimant's transfer should not be viewed as a "displacement" for purpose of entitlement under

the New York Dock conditions. Rather, it has been the Carrier's position that at the time of the merger, the Claimant held an "official" position, and thus was not eligible for any benefits or displacement allowance under the New York Dock conditions. In any event, the demotion was for performance reasons, and was not a direct result of the merger. However, from the record before this Arbitration Committee, the Carrier does not appear to disagree that a result of the transfer from Tucson to Houston was a reduction in Claimant's salary, from approximately $6,200.00 to $4,928.00 per month.

Claimant's Verified Statement-Causality states that the Claimant began his railroad career on June 1, 1969 as a non-agreement employee on the former Southern Pacific Rail Corporation (SP) and, since that date, and for nearly 35 years now, has continued to work in a non-agreement capacity. On or about September 16, 1995, approximately one year before the merger of the SP and UP railroads, the Claimant was transferred from the non-agreement position he held at the SP's headquarters in San Francisco, CA, to a position of Terminal Superintendent at the SP's offices at Tucson, AZ. According to the record, at the time of the merger implementation, the Claimant held the above position at Tucson.

As the facts of record in this case further indicate, on August 6, 1996, the Surface Transportation Board (STB), in Finance Docket No. 32760, approved the common control and merger of the rail carriers controlled by both the Union Pacific and the Southern Pacific railroads, and the merger was finalized on September 11, 1996. In its Decision setting forth its approval of the merger, the STB ruled that the New York Dock conditions would apply to the rail employees of the merger applicants.

According to the record, approximately seven months after the effective date of the merger, on April 16, 1997, the Claimant's job title at Tucson, AZ was changed from the SP title of Terminal Superintendent to the UP title of Senior Manager Terminal Operations (SRMTO).

As stated above, at the time of the Claimant's subsequent transfer to Houston, TX, his salary at Tucson was approximately $6,200.00 per month. It is essentially undisputed in the record that, about two months after his title had been changed to SRMTO, the Claimant was informed that the Carrier had decided to relocate him to a position of Manager of Intermodal Operations at Houston, at a salary of approximately $4,928.00 per month. That "demotion," as the Carrier so states, or "displacement," as the Claimant would have it, to Houston, at a lower salary than that which he had been earning at Tucson, is the basis for the instant dispute before this Arbitration Committee.

According to the Claimant, as explained in his Verified Statement-Causality, there is an undeniable nexus between the UP/SP merger implementation and his "displacement" from his SRMTO position at Tucson, to the lower paying position of Manager of Intermodal Operations at Houston. A significant portion of this record is comprised of the Claimant's accounts of the Carrier's post-merger switching operations at Tucson, following a decision by the UP to discontinue its terminal switching operations at Phoenix, AZ.

Throughout his correspondence in this matter, the Claimant has emphasized that the Carrier's yard consolidation "experiment" at Tucson was a failure well known throughout the industry, and was neither his fault nor the fault of any other employee working at Tucson at that time. In his correspondence following his filing for the instant New York Dock arbitration, the Claimant has stressed that he was not involved in formulating the new terminal switching plans at Tucson, but that other "non-agreement" employees made those strategic-type decisions, and that notwithstanding his title of SRMTO, he merely carried out, in a subordinate fashion, the high-level decisions of his superiors.

Thus, asserted the Claimant in his Verified Statement-Job Classification, the non-agreement position he held on the effective date of merger was not "managerial in nature," as stated below:

> "This verified statement is to present facts in support of my contention that at all times since September 11, 1996 (consummation of the UP/SP merger), and between April 16, 1997 and my displacement on July 1, 1997, I have been an employee, within the meaning of the Railway Labor Act (RLA), which I understand defines a subordinate official as an employee, and I am an employee under appropriate New York Dock conditions. I do not consider myself to have been an 'official.'" [3]

It is not disputed in the record that, as stated above, on May 12, 2003 the Claimant wrote a 46-page letter, including 100 pages of attachments, to the Carrier's Vice President of Law, James Dolan, notifying Dolan that he was in the process of obtaining legal counsel to represent him in an arbitration pursuant to the New York Dock conditions, with specific regard to, in Claimant's words, "Grother's merger transaction related demotion effective July 1, 1997, which has classified Grother as a New York Dock 'displaced employee.'" (Union Pacific Ex. 2; Grother Ex. E-2).

According to the record, before receiving any response from the Carrier, on June 16, 2003, the Claimant sent a "30-day notice" to the National Mediation Board requesting arbitration of his demand for New York Dock benefits as a result of his "demotion and reduction in wages of $1,272 per month and other fringe benefits effective 7/1/97." According to that notice, the Claimant's request for arbitration resulted from what the Claimant regarded as "UPRR's failure to respond to the certified letter to Mr. Dolan." (Union Pacific Ex. 3; Grother Ex. E-3).

By letter dated July 7, 2003, Roland Watkins, the NMB's Director of Arbitration Services, responded to the Claimant's above letter and explained that he was sending a copy of

the Claimant's June 16, 2003 letter to the UP's Vice President of Law, Dolan, for review and comment, and requested a Carrier response by July 21, 2003. (Union Pacific Ex. 4). The record indicates that Dolan forwarded the Claimant's May 12, 2003 letter to Marilyn Ahart, the UP's Director of Protection Management. In her July 18, 2003 letter to the Claimant, with a copy to NMB Director Watkins (Union Pacific Ex. 5; Grother Ex. E-4), Ahart, in her second paragraph, stated:

> "I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect (sic) was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger."

Ahart further explained that "to be considered for coverage an individual must satisfy the term of 'employee' as it is defined in the Railway Labor Act and by New York Dock cases." Relying on the on-property arbitral precedent set by a 1987 award rendered by Referee Seidenberg on the issue of "employee,"[4] Ahart essentially emphasized that in light of the management position the Claimant held on the merger implementation date, the Claimant could not "meet the definition of employee under the Railway Labor Act and New York Dock cases." Ahart quoted the determinative language of the Seidenberg Award, as follows:

> "A review of the history of labor protection conditions compels us to hold that the term 'employee' was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature."** (emphasis supplied).

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[3] See page 1 of Verified Statement of John E. Grother (Job Classification), dated September 14, 2004.
[4] See Union Pacific Ex. 26, New York Dock Arbitration Award, B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v. Union Pacific Railroad Company, et al. (Seidenberg; 12/18/87)

Director Ahart's July 18, 2003 letter furthermore included a third reason for denying the Claimant's request for protective benefits under the New York Dock conditions, one involving procedure. Invoking the equitable doctrine of laches, Ahart stated that, although the New York Dock conditions do not prescribe specific time limits for the filing of employee claims, here the Claimant waited an unreasonable length of time before filing his claim giving rise to the instant arbitration. Applying the weight of "considerable arbitral authority" on the laches issue to the facts of this case, Ahart asserted that notwithstanding her two substantive reasons for denying the claim ("causality" and "jurisdiction"), from the procedural standpoint of filing untimeliness, the claim was fatally flawed.

The chronology of events, and correspondence relevant thereto, which then transpired between the July 18, 2003 date of Director Ahart's written claim declination to the June 18, 2004 date on which the partisan members of this Arbitration Committee formalized the procedures for the hearing of this matter in arbitration, as set forth in the Memorandum of Agreement (MOA), referred-to above, are referenced and discussed in the pre-hearing submissions prepared by the Carrier and the Grother Member, and are included herein by reference.[5] The Neutral/Referee Member has carefully reviewed the facts, relevant documentation and correspondence, as well as the legal and arbitral precedent, relied upon by the Claimant and the Carrier, comprising this extensive record, prior to preparing this Opinion and Award.

V. THE POSITION OF THE PARTIES

A. The Grother Member

As stated above, from the standpoint of procedure, the Claimant's arguments, and exhibits furnished in support thereof, are incorporated herein by reference. To summarize, the

Claimant contends that: (1) "the entire arbitration process, with its purported limited agency and judicia (sic) review [is] prejudicial, particularly where, as here a non-agreement railroad employee is involved," (2) the procedures set forth in the June 18, 2004 MOA governing the procedures for furnishing pre-hearing submissions did not allow Claimant to submit a pre-hearing reply on the issue of causality, and thereby respond to the Carrier's defense in that regard, and were in contrary to the "New York Dock scheme." In that regard, the Grother Member emphasized that, nevertheless, by identifying the UP/SP merger as the transaction that gave rise to his displacement to Houston, TX, and his uncontroverted loss of earnings, the Claimant fully satisfied his burden of proof, under Article I, Section 11(e), quoted above.

Concerning the substantive issues before this Committee, the Grother Member has presented many detailed arguments which, while carefully considered by the Committee, will be addressed in summary form. The Claimant strenuously argues that the Carrier's affirmative defense that the transfer was for reasons involving the Claimant's job performance as a non-agreement manager, as opposed to as an employee or subordinate official affected by the merger implementation, simply was not substantially proved in the record. Primarily relying on the argument, as set forth in his Verified Statement-Causality, that the "failed switching experiment at Tucson," an outgrowth of the merger implementation, in fact, triggered his "displacement," the Claimant strongly asserts that, with respect to the issue of causality, the Claimant entirely met his burden of proving the nexus between the merger implementation and his displacement to Houston.

With respect to the second issue of whether the Committee should find that the Claimant was an "employee" eligible for coverage under the New York Dock conditions at the time of the merger implementation, the Grother Member asserted that the Claimant credibly and

[5] See Union Pacific Exhibits 5 through 20; and Grother Exhibits E-4, and E-6 through E-17.

convincingly established throughout the record that notwithstanding his title of Senior Manager Terminal Operations (SRMTO), his actual duties and responsibilities were non-managerial in nature, and were much more consistent with the duties typically performed by an "employee" or "subordinate official," as those terms are comprehended by the Railway Labor Act and arbitration cases arising under New York Dock, as well as under the National Labor Relations Act.

According to the Claimant, the Carrier's sole reliance on its cited awards of arbitration panels in support of its position that the Claimant held an "official" position at the time of the merger, as opposed to looking toward broader authority, is incorrect, and that while such awards may be "helpful," they should not be regarded "governing" because they stemmed from disputes involving railroad employees who had been represented by labor organizations. Given the Claimant's status as a non-agreement employee not represented by any organization, the arbitral precedent should not weigh heavily on this Committee, the Grother Member asserts.

The Claimant thus strongly contends, therefore, as extensively set forth in his pre-hearing submission and relevant exhibits, that the SRMTO position he held at the time of the merger implementation and his subsequent transfer, "was below the level of the Service Union Superintendent (Division Superintendent); indeed he was two levels below the Division Superintendent." According to the Claimant, this is significant because, based on his interpretation of various rulings of the Interstate Commerce Commission (ICC), cited on pages 16 and 17 of the Grother Member's pre-hearing submission, in the Claimant's view the ICC has "generally" held that "persons below the level of Division Superintendent are subordinate officials or employees." Employing that logic, Grother should be deemed as similarly covered.

It is the Claimant's expressed opinion that, at the time of the merger, the characteristics of the SRMTO position he held at Tucson were, in fact, consistent with that of an "employee"

or "subordinate official," as opposed to an "official" of the Carrier and, more importantly, coincided with the "job evaluation factors used by the National Mediation Board," as set forth in its Representation Manual, or what the Claimant referred to as a "9-point test to determine 'subordinate employee.'" [6] Based on the Claimant's analysis of his job, as set forth in his Verified Statement-Job Classification, the Grother Member forcefully argued on page 19 of the submission that:

> "The V.S.[7] Grother (Job Classification) shows that Employee did not have authority to hire, discharge, or discipline anyone, or to recommend the same. V. S. Grother, 4-3 (Job Classification). He had no effective supervisory authority, but was an 'order taker.' (ibid. 4). He had no authority to authorize or grant overtime. (ibid. 4). He was without power to transfer or establish assignments. (ibid. 4). He did not create policy; rather he followed policy. (ibid. 4). Employee lacked authority to commit funds, and had a de minimus expense account which was seldom used. (ibid. 5); his authority was circumscribed by many written policies and directives. (ibid. 3-4). Employee was at the 8th level in the UP organizational hierarchy. (ibid. 6). Most of Employee's time was not actually spent on SRMTO duties, but was spent doing work one level below, at the MYO position. (ibid. 6 & Atta. 2). Finally, Employee based upon the work performed, was on the same 'band' level with other subordinate officials who were subject to unionization. (ibid. 7)."

Therefore, based on the above summary of the Claimant's duties and responsibilities, the Grother Member strongly argued that the Claimant obviously cannot have been regarded as having worked as an "official" under "NMB rules." Moreover, the Claimant asserted in his Verified Statement-Job Classification that he had "considered himself subject to unionization," the Grother Member pointed out. According to the submission prepared on the Claimant's behalf, having analyzed various court rulings addressing eligibility issues under 49 U.S.C. §11326, in light of the job attributes of the Claimant's SRMTO position held at the time of the

[6] According to Claimant's reference to §9.211 of the Representation Manual, an "official" is defined as follows: (1) the authority to dismiss and/or discipline employees or to effectively recommend the same; (2) the authority to supervise; (3) the ability to authorize and grant overtime; (4) the authority to transfer and/or establish assignments; (5) the authority to create carrier policy; (6) the authority to commit carrier funds; (7) whether the authority exercised is circumscribed by operating and policy manuals; (8) the placement of the individual in the

merger implementation, there simply is no doubt that the Claimant was not a managerial employee ineligible for protection, i.e., displacement allowance, contained in the New York Dock conditions. Thus, the decisions rendered by the ICC and various circuit courts, as well as two arbitration awards[8] cited by the Grother Member on pages 19 through 23 of the Grother pre-hearing submission lend strong support to a finding by this Committee that, at the time of the merger implementation, the Claimant was, in fact, an employee within the meaning of 49 U.S.C. 11326 and thus eligible for the New York Dock benefits requested herein.

In response to the third issue raised by the Carrier, that the instant claim should be barred from consideration by this Committee as a result of laches, the Claimant contends that because there are no stated time limits for instituting claims under the New York Dock conditions, this Committee must not dismiss the claim as untimely, and that the Carrier's position that the claim is barred under the doctrine of laches "border(s) on the frivolous." The Claimant further submits that on July 15, 1997, just two weeks after the Claimant had been downgraded from SRMTO at Tucson to the position of Manager of Intermodal Operations at Houston, he, in fact, furnished the Carrier a "written notice concerning his displacement, which was acknowledged September 4, 1997."

Concerning such "notice," the record establishes that on July 15, 1997, again, just two weeks after the effective date of Claimant's transfer to Houston, the Claimant sent a letter to the Union Pacific's President and C.E.O., J. E. Davis, requesting "some type of MTO position (if not the senior MTO) in the Arizona area and without the 21% wage reduction."[9] Thus, given

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organizational hierarchy of the carrier; and (9) any other relevant factors regarding the individual's duties and responsibilities.

[7] V.S.=Verified Statement.

[8] See Thomas M. Curley, et al. v. Missouri Pacific Railroad Company (Brown; 1987); and Southern Pacific Empowered Employees v. Southern Pacific Transp. Co. (Fredenberger; 2000).

[9] Based on the record, the Committee reasons that MTO would stand for "Manager Terminal Operations," given the SRMTO position repeatedly referred-to above. The Claimant's letter to C.E.O. Davis is found at Union Pacific

the letter he had sent to Davis, just two weeks after the effective date of his transfer, in defense of the Carrier's procedural charge as to laches, the Claimant has consistently maintained that, "UP was well aware of Employee's claim, even though the dispute was not labeled NYD." The Claimant further asserted that, "...other claims arose out of Employee's displacement, under other federal provisions, and UP conceded it was aware of these related claims." (See p. 36, Claimant's post-hearing brief; and Exh. GH-28 [Reply Verified Statement of John E. Grother], p. 13).

Moreover, the Claimant has emphasized throughout this proceeding that the Carrier's ability to defend itself has at no time been compromised by the Claimant's delayed filing of a claim requesting benefits under the New York Dock conditions. For example, the Carrier official to whom the Claimant reported at Tucson, Service Unit Superintendent, Ken Packard, was still employed by the Carrier when the Claimant sent his May 12, 2003 letter to the UP's Vice President of Law, James V. Dolan. Thus, at that time, Packard arguably still possessed detailed knowledge of the factors leading to the Claimant's "displacement," the Claimant stressed. Indeed, relying on certain testimony provided by Packard, who appeared at the hearing as a Carrier Witness, the Claimant's displacement was not motivated by disciplinary concerns. Therefore, argues the Claimant, if his transfer to Houston was not for disciplinary reasons (as a "lost" personnel form, identified as "UP 15121" supposedly at one time had indicated), the only reason for the transfer was merger-related, again, as a result of the "failed switching experiment at Tucson." Indeed, relying on the Verified Statement of Conductor Tom Moore (Ex. GH-27, p. 3), the Claimant submits that, as Moore so stated under oath:

> "...The failure of this merger yard consolidation program was not the fault of Grother or for that manner any of the non-agreement employees in Tucson as they gave it their all. The people in Omaha who orchestrated this plan without major

Ex. 2, pp. 64-66; or Grother Ex. E-2, Exh. 10). Davis's one-page response, dated September 14, 1997, is found at Union Pacific Ex. 2, p. 68; or Grother Ex. E-2, Exh. 11).

repairs to trackage or increased staffing of personal (sic) in Tucson yard are the ones who caused this plan to fail!"

Finally, notwithstanding the reasons set forth above in defense of the Carrier's challenge regarding the timeliness of his claim, the Claimant gave as an additional reason, a fear "retaliatory discharge," that would purportedly have caused him to suffer a loss of health benefits for him and his wife, given the fact that in July 1997 he had not attained a "medical benefit eligibility age of 55." As justification for his "fear," the Claimant cited a situation involving a non-agreement employee named Fransconi (See Grother Ex. E-2, Exh. 35). The Claimant further charged that at time of his transfer to Houston, both Packard and his new "supervisor," Don Fryar, "cautioned" him to take the demotion, and not pursue any "lawsuits," because the Carrier would otherwise make it "unbearable" for him (See pp. 1-2 of Grother's Verified Statement-Laches).

Accordingly, in view of the above, and based on the comprehensive arguments and evidence as set forth in detail in the entire record before this Arbitration Committee, the Claimant urges that the Committee find: (1) Claimant was adversely affected as a result of the Carrier's implementation of the STB-approved merger with the Southern Pacific Rail Corporation; (2) Claimant was an employee within the meaning of 49 U.S.C. 11326 and New York Dock at the time of adverse effect; and (3) the instant claim should not be barred by laches given the Carrier's knowledge of a claim dating back to July 15, 1997 and in view of the fact that the Claimant's "delay" in perfecting a specific claim under the New York Dock conditions was not prejudicial to the Carrier.

B. The Carrier Member

It its post-hearing brief, the Carrier addressed the three issues for resolution by this Committee, in the order in which they were discussed at the arbitration hearing. As the hearing

record so indicates, the questions involving (1) causality (merger); (2) jurisdiction (employee status); and (3) procedure (laches), were confronted in that order.

In its post-hearing brief, the Carrier initially commented that the Claimant's submission of his New York Dock claim to the UP's Law Department instead of to the Labor Relations Department was procedurally wrong. However, the Neutral/Referee Member notes that such error was deemed by the Carrier to be more of a procedural "misstep" than fatal error.

Specifically, the Carrier emphasized that with respect to its procedures for handling claims arising under protective conditions such as New York Dock, the Carrier's Labor Relations Department, and not its Law Department has customarily handled all claims, disputes and issues related to employee protection. Thus, states the Carrier, the Claimant's apparent view that the Law Department was the proper forum for adjudicating his May 12, 2003 claim under New York Dock was incorrect from the standpoint of procedure. However, from the record before us it is clear that the Carrier's key procedural argument rests on the laches doctrine, given the Claimant's 70-month delay in submitting his claim for relief under the New York Dock conditions.

Furthermore, in response to an additional procedural matter raised by the Grother Member, with regard to the Carrier Member's standing on this Arbitration Committee, the Carrier sharply contends that, as the Carrier's General Director of Labor Relations, the Carrier Member's assignment to this Committee was consistent with his customary responsibilities in Labor Relations which, as developed in the record, includes participating as a Carrier advocate in labor claim matters progressed to arbitration. In a related vein, on page 13 of its post-hearing brief, the Carrier stressed that "this arbitration case has been handled in the usual and customary manner." Specifically, the Carrier Member asserted that the parties' simultaneous exchange of *ex parte* submissions, followed by hearing and rebuttal briefs limited to reinforcement of prior

argument, but no new evidence or new argument, was consistent with the railroad arbitration procedures set forth in the Railway Labor Act as opposed to a "three-step" process of exchanging submissions advocated by the Claimant purportedly under STB procedural guidelines.

Returning to the three issues precisely before this Board, the Chair notes that like the Claimant, the Carrier, in its pre-hearing submission, testimony at the arbitration hearing, and post-hearing brief, has presented to this Committee detailed arguments and evidence in what it argues is overwhelming support for its position that the Committee should deny the instant claim for reasons of both procedure (laches) and substance (jurisdiction and causality).

The Carrier submits that the Claimant's assertions that his demotion from the position of Senior Manager Terminal Operations (SRMTO) to Manager Intermodal Operations at Houston, TX was solely merger related was not proved by him, irrespective of whether the Claimant was, in fact, an "employee" or "subordinate official" at the time, which the Carrier has consistently denied. Relying on the testimony at arbitration of the Claimant's then supervisor, Service Unit Superintendent Ken Packard, on page 2 of its post-hearing brief, the Carrier emphasized:

> "...Mr. Grother had not been demoted because of the issue with Phoenix. He stated 'the service issues and everything, they were insurmountable no matter who was in charge.' He testified the real reason for the demotion was Mr. Grother's lack of performance on the job. In his words, 'John wasn't up to the charge...' During cross examination by Mr. MacDougall, Mr. Packard reiterated that Mr. Grother's demotion did not occur as a result of the movement of Phoenix switching into Tucson."

Furthermore, the Carrier asserted that inasmuch as the switching experiment took place on the former territory of the Southern Pacific Rail Corporation, the Carrier's decision to move the switching from Phoenix to Tucson could have been made by the SP prior to the merger, and thus, was not a "merger dependent" operational change, as the Claimant has essentially contended. Moreover, for reasons stated in detail in its pre-hearing and post-hearing

submissions, the Carrier asserted that certain information contained in the Labor Impact Exhibit filed by the merger applicants did not support the Claimant's opinion that that his demotion was a direct result of the merger in light of the situations at both Phoenix and Tucson. In sum, the Carrier stressed that a comprehensive review of the entire record of this case by the Committee should support a determination that the Claimant, even if he were an employee or subordinate official, did not sustain his burden of proof as regards the causality issue.

Regarding the second issue of whether the Claimant's status at the time of the September 11, 1996 merger implementation was that of an "employee" for purpose of eligibility for a displacement allowance under the New York Dock conditions, given the clear facts in this case, the Claimant did not hold a position of employee or "subordinate official." The Carrier emphasizes that the historical meaning of the terms employee and subordinate official have been derived from federal legislation applicable to the railroad industry involving labor protection coverage issues such as this, and as further clarified by numerous awards rendered by arbitration committees convened on this Carrier's property as well as on other railroads. The "the real test for coverage under the New York Dock conditions is whether a person is considered to be an official," the Carrier states. (See Carrier's post-hearing brief, p. 4). According to the Carrier:

> "Only those persons who are covered by a collective bargaining agreement, or those non-agreement persons determined to be subordinate officials, are employees under the RLA. In each of the NYD awards cited by UP, the arbitration committee's decision hinged on whether a non-agreement person was an official."

The Carrier has argued throughout this matter that, based on the duties and responsibilities traditionally associated with the SRMTO position held by the Claimant at the time of the transaction implementation, it would be highly erroneous for this Committee to ultimately find in favor of the Claimant with respect to its determination on the "employee"

(jurisdictional) issue. Indeed, the Carrier reminds the Committee that "use of the term 'employee' in New York Dock is tied to the use of the term 'employee' in the RLA." Indeed, in Carrier Exhibit 51, a 25-page recent award rendered by Referee Suntrup, the Carrier emphasizes that an employee holding the non-agreement title of "project manager," was found to not have met the definition of a "displaced employee" under Article IV of New York Dock.[10] Thus, the Carrier reasons that the position of Senior Manager Terminal Operations (SRMTO), held by the Claimant the time of his demotion, should be regarded as an official position because it never has been covered by a collective bargaining agreement on either the Southern Pacific or Union Pacific railroads, and furthermore is a position that has never been deemed eligible for unionization on either railroad.

The Carrier furthermore urges the Committee to consider the Claimant's request for coverage under the New York Dock conditions in light of whether the Claimant meets the test of coverage with respect to whether the position he had occupied at the time of the merger transaction was that of an "official," as opposed to an "employee," or "subordinate official." According to the Carrier, specific language contained in the Railway Labor Act excludes officials from the definition of employees covered by the Act. The Carrier additionally argues that this Committee should be cognizant of the holdings made by the ICC in its Ex Parte No. 72 decisions. Therein, according to the Carrier, the ICC has consistently held that employees occupying the position of "trainmaster" have been viewed as holding "official" positions. Here, the Claimant held a higher level position of SRMTO, whose key function was to supervise trainmasters, or their equivalent the UP's MYO's, as will be further discussed below.

The Carrier points out that on page 2 of the Claimant's Verified Statement-Job Classification, the Claimant substantiated his place in the Carrier's managerial hierarchy at

[10] See Trans. Comm. International Union vs. Burlington Northern Santa Fe Railway Company (Suntrup; 7/14/04).

Tucson by admitting that beginning on September 16, 1995 (one year prior to the merger), his title at Tucson was that of Terminal Superintendent and, in that capacity, three trainmasters had reported to him. Moreover, according to the testimony of Carrier Witness Packard, when the title of Trainmaster at Tucson (former SP territory) was subsequently changed to the UP's title of Manager Yard Operations (MYO), the MYOs, in turn, still reported to the Claimant, whose title had also been similarly changed from the SP title of Terminal Superintendent to the UP title of Senior Manager Terminal Operations (SRMTO). Thus, given the facts of record, as admitted to by the Claimant, and as corroborated by the credible testimony of Carrier Witness Packard, the Claimant's position was unquestionably managerial, or official, given his supervisory responsibilities over the MYOs, formerly "trainmasters." Thus, the Carrier stresses that the Claimant's position that he was merely a "titular head of the terminal" who provided "trainmaster relief" is inconsistent with the actual record in this case, and should be rejected by the Committee.

The Carrier additionally maintains that the record clearly establishes that prior to his demotion to Houston, as the SRMTO at Tucson, the Claimant "was neither being paid, nor expected to perform the duties of the lower rated MYO position." Even if he voluntarily performed such duties, such as "trainmaster relief," such duties would still be consistent with those of a class of employee (used in the general sense) excluded from the category of "subordinate official" pursuant to the Railway Labor Act, and as determined by the ICC Ex Parte No. 72 decisions, which again, set the bar below the level of trainmaster. In sum, therefore, consistent with the relevant arbitral precedent established through the numerous awards of previous New York Dock arbitration committees that have considered this very

issue[11] this Committee should so similarly find that the Claimant in this case was neither an employee nor subordinate official for purpose of New York Dock coverage or eligibility given the SRMTO managerial position he held at Tucson.

Turning to the third issue involving the Carrier's contention that this claim is procedurally barred from this Arbitration Committee's consideration under the equitable doctrine of laches, the Carrier member emphasized at arbitration that the Claimant's argument that his July 15, 1997 letter to President and C.E.O. Davis somehow preserved his procedural right to advance a specific claim under the New York Dock conditions some 70 months later, on May 12, 2003, should be rejected in its entirety. Indeed, the Carrier points to the Claimant's own Reply Verified Statement-Laches, Exhibit GH-28, p. 13, in which the Claimant "admitted" he did not "label" his original letter (to C.E.O. Davis) as a dispute arising under New York Dock.

The Carrier argues that the Claimant's apparent belief that time limits do not apply to the initial submission of claims under the New York Dock conditions is completely without foundation, and it emphasizes that the lack of a specified time limit does not militate against his extraordinary delay in the filing of his claim. Citing numerous awards of prior arbitration committees that have indeed dismissed similar claims because the employees involved in those disputes were found to have waited an unreasonable length of time before initiating their New

[11] See B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v.. Union Pacific Railroad Company, et al. (Seidenberg; 12/18/87); John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Company (O'Brien; 10/22/87); Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (Stallworth; 4/5/88); James V. Nekich v. Burlington Northern Santa Fe Railroad (VerPloeg; 12/6/96); Ross F. Povirk and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth; 7/16/98); G. L. Dixon and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company; (Stallworth; 7/16/98); and B. W. Isabell and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company; (Stallworth; 7/16/98).

York Dock claims, and such delays were to prejudiced the Carrier,[12] the Carrier urges that this Committee make a similar determination here, given the nearly six year delay that preceded the Claimant's filing of his specific claim under New York Dock.

In response to the Claimant's argument that his delay in filing was justified by a legitimate fear of "some sort of" retaliation by the Carrier, the Carrier states that (1) the Claimant's "belief" that the Carrier would have discharged him for filing such a claim, before attaining the age of 55, resulting in his loss of certain medical benefits, was completely speculative and totally unfounded; (2) certain executives, whom the Claimant had identified in his Carrier correspondence as having knowledge of his dispute, had, in fact, left the company between 1997 and 2003; and (3) many of the documents and records relating to 1997, for example personnel form 15121, referred-to above, were no longer available, again, given the substantial passage of time from the date of the demotion to the date of his claim filing.

Last, the Carrier opines that the Claimant's "long delay" in submitting a claim under the New York Dock conditions furthermore worked to his advantage by virtue of the non-agreement compensation and relocation benefits paid to him for his relocation from Tucson to Houston. Thus, the Carrier asserts that in the event this Committee should find that the Claimant was covered by New York Dock, the Carrier should, in turn, be permitted to recover the salary and moving expenses paid to the Claimant as part of his non-agreement benefit package[13] that would have exceeded the moving expense benefits normally paid to employees covered under the New York Dock conditions.

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[12] United Transportation Union v. Union Pacific Railroad Company (LaRocco; 8/27/93); Southern Railway Company v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Muessig; 2/13/90); and Transportation-Communications International Union v. Union Pacific Railroad Company (LaRocco; 6/26/90).

[13] According to the Carrier, in addition to moving expenses received, the Claimant received $10,857.50 in salary and expenses related to the relocation to which he would not have been entitled had he been similarly compensated under New York Dock (Union Pacific Exhibit 43).

Therefore, based on the above and for all the reasons set forth by the Carrier, both orally an in writing, prior to and during the arbitration hearing, and thereafter in its post-hearing brief, the Carrier requests that the Committee find that: (1) the Claimant's claim was time barred under the equitable doctrine of laches; and (2) at the time of his demotion, the Claimant was not a "displaced employee" subject to the jurisdiction of New York Dock, and hence, his demotion was not "merger-related."

VI. DISCUSSION AND FINDINGS

As set forth in detail above, the instant case before this Arbitration Committee involves a claim by non-agreement Claimant, John E. Grother, for a displacement allowance under the New York Dock conditions, imposed by the STB on August 6, 1996, in Finance Docket No. 32760, the merger application filed by petitioner railroads, Union Pacific Railroad Company and Southern Pacific Rail Corporation. It is essentially not disputed that, on the September 11, 1996 merger implementation date, the Claimant held a non-agreement position of Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. Subsequent to the date of merger, on July 1, 1997, the Claimant was transferred to a lower paying position of Manager of Intermodal Operations at Houston, TX. Despite the fact that the Carrier viewed that transfer as a demotion, the Claimant received relocation benefits and other compensation as a result of the move.

The Claimant strongly contends that, at the time of his relocation to Houston, which he subsequently regarded as a "displacement," as opposed to a "demotion," the Claimant did not hold an "official" position, as the Carrier has argued. Furthermore, the Claimant asserts that he consequently was entitled to a displacement allowance under the New York Dock conditions given the fact that his transfer was involuntary and he was placed in a worse position with respect to his earnings. In the Claimant's view, he has amply carried his burden of proving that

the Carrier's action as regards his transfer to Houston was solely attributed to the Carrier's implementation of the UP/SP merger on the former SP territory.

With respect to the issue of the nearly six year delay in filing the instant claim asserting an entitlement to benefits under the New York Dock conditions, the Claimant has consistently argued that, for the reasons discussed above, this Committee should not regard the delay as fatally detrimental to his claim from the standpoint of procedure. Therefore, the Arbitration Committee should adjudicate this claim solely on its merits, the Claimant emphasized.

Conversely, the Carrier contends that procedurally, the Claimant's six-year delay is excessive, and citing the prior awards on that point, urges the Committee to dismiss the claim outright under the laches doctrine. According to the Carrier, the Claimant simply waited too long, and such delay was prejudicial to its ability to defend itself against the significant liability claimed.

With respect to the substantive issues of jurisdiction and causality, the Carrier asserts that the claim should be denied, and as noted above, has supplied numerous awards of previous arbitration committees in support of its contention that the Claimant's position of SRMTO met the test of an official position as opposed to that of an employee or subordinate official. Thus, because the New York Dock conditions do not apply to the Claimant, the reason for his transfer technically is irrelevant to the dispute.

The Committee has undertaken a painstaking review of the evidence, documentation and arguments extensively set forth by the partisan members with respect to the issues of procedure, jurisdiction and causality. As a result of that review, the Neutral/Referee Member finds that the Carrier has met its burden of proving that the instant claim should be dismissed under the equitable doctrine of laches.

The Claimant's nearly six-year delay in perfecting a claim for benefits under Article IV of the New York Dock conditions was grossly excessive, given the facts of record before this Committee. Furthermore, upon due study of the record, the Neutral/Referee Member finds that the explanations proffered by the Claimant in his attempt at justifying the substantial delay were not supported by probative evidence and simply do not mitigate the 70-month delay. Moreover, because of the extent of the liability which the Claimant calculated as having accrued beginning on July 1, 1997, and continuing for the six years thereafter, as previous awards have held, by the time the Carrier had received such claim its ability to defend it or somehow stem the accruing liability was seriously diminished.

The Neutral/Referee Member notes that given the existence of substantial relevant arbitral precedent on both the procedural and substantive issues before this Committee, with particular emphasis on the laches issue before us at this point in the discussion, the majority's determination as to the laches question must reflect its review of that precedent, with the resulting finding not inconsistent therewith.

Second, as regards the jurisdictional issue of whether the Claimant was an "employee" or "subordinate official" at the time of his transfer, without retreating from the threshold procedural determination as to laches, the Neutral/Referee Member finds that, based on the evidence of record and the relevant precedent identified by the Carrier, the Claimant, at the time of his transfer, was not an employee or subordinate official under the New York Dock conditions. See the Carrier's extensive discussion of the history of the term "employee" under New York Dock, railroad labor legislation, and the awards of numerous New York Dock arbitration committees on pages 8-20 of its pre-hearing submission.

Third, with respect to the issue of causality, given the majority's finding that the claim is barred by laches and its merits determination as to coverage, the issue of causality or nexus is

essentially moot. This is so because of the majority's findings that the Claimant had no standing under Sections 1.(b) and (c) of New York Dock given the SRMTO position he held at the time of the transfer. Hence, the Committee need not evaluate whether the Claimant met the burden of proof specified in Section 11. (e), that is, "to identify the transaction and specify the pertinent facts of that transaction relied upon." Indeed, any question as to what prompted the transfer, or demotion, in light of the Claimant's non-coverage under New York Dock is simply not relevant to the outcome of this dispute, and consequently, the Carrier would not be required "to prove that factors other than a transaction affected the employee."

Now giving more detail to the threshold procedural issue of laches, it is clear from a careful review of the record that the Claimant did not perfect any claim under Article IV of New York Dock until his May 12, 2003 (46-page) letter to James V. Dolan, the Union Pacific's Vice President of Law. In that letter, as opposed to the one he had sent 70 months earlier, on July 15, 1997, to President and C.E.O. Davis, the Claimant clearly asserted, both in a bold-type heading and in the opening paragraph of the letter, that the intent of his letter was to notify the Carrier of a "New York Dock Arbitration Dispute." Furthermore, the Claimant stated and that he was seeking benefits as a "displaced employee" under New York Dock as a result of a merger-related transaction. (Union Pacific Ex. 2; Grother Ex. E-2).

In light of the above, the majority cannot agree that, under the facts present in this dispute, the Claimant's submission of the 1997 letter in any manner whatsoever constituted his timely notification of a New York Dock dispute with the Carrier. Furthermore, following the Committee's careful review of the specific statements made in that July 15, 1997 letter, the majority holds there is nothing contained therein that would in some way preserve the Claimant's right to submit a New York Dock claim some 70 months later.

In a similar vein, the Claimant's argument that the absence of any time limit for filing a claim under Article IV of the New York Dock conditions, especially given the fact that he was not represented in this proceeding by any labor organization, presumably preserved his right to file a claim at a much later date, is not supported by any credible proof. Again, and from a slightly different angle, the majority notes that the Claimant's 1997 letter to C.E.O. Davis essentially is an expression of his concern about his "downgrade" from his management position of SRMTO at Tucson, to the lower level position of Manager of Intermodal Operations at Houston. Furthermore, in that same letter, the Claimant implied he was treated in a discriminatory manner, and asserted that he was not aware of any personal performance issues that would have justified such a transfer. Davis' response was essentially that there were many factors contributing to the problems at Tucson and that one of the strategies toward correcting those problems was a change in management staffing, which Davis acknowledged is sometimes difficult to comprehend. The Committee further notes that its jurisdiction is confined to the issues set forth in Section II, Statement of the Issues, above.

Moreover, the Neutral/Referee Member notes that in the Claimant's July 15, 1997 letter, the Claimant furthermore wrote to President Davis about his dissatisfaction with his demotion and essentially attempted to enlist his help in obtaining a comparable management position in Arizona, as opposed to Houston. Therein the Claimant expressed "the hope that I could possibly retain some type of MTO position (if not the senior MTO) in the Arizona area and without the 21% wage reduction..." Clearly, based on the specificity of that request for a comparable management-type position, and preferably at a senior level, the focus of that letter was to enlist Davis's aid in securing a management position to which he was accustomed to working as opposed to any obtaining benefits as an employee or subordinate official under the New York Dock conditions.

Thus, the majority concludes that until its receipt of the May 12, 2003 claim specifying a request for accrued benefits under New York Dock, the Carrier had no knowledge of any pending claim from the Claimant seeking some measure of compensation under the New York Dock conditions. The Neutral/Referee Member accordingly finds merit to the Carrier's argument that when it received the Claimant's request for over $107,300.00 in New York Dock benefits over the course of the previous 70 months, it essentially was "hit from behind," and thus unfairly placed in a position in which it could neither mitigate nor stem the liability.

Indeed, in an on-property case involving a similar delay in filing a claim under the New York Dock conditions, Referee Rehmus found that "a nearly six-year unexplained delay in filing this claim...creat(ed) possible increased financial liability to the Carrier that cannot now be avoided or offset, (and) fatally prejudices it." See Transportation-Communications International Union v. Union Pacific Railroad Company (Rehmus; 12/30/92). That award is particularly applicable here, where the record is devoid of any probative evidence justifying the Claimant's nearly six-year delay in filing a claim under New York Dock.

Moreover, further arbitral support for the majority's determination that the Claimant's extraordinary delay permanently bars this claim, under the equitable doctrine of laches, is found in the following awards cited by the Carrier: United Transportation Union v. Union Pacific Railroad (LaRocco; 8/27/93); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Southern Railway Company (Muessig; 2/23/90); Transportation-Communications International Union v. Union Pacific Railroad Company (LaRocco; 6/26/90); and Certain Designated Claimants v. Union Pacific Railroad Company (Seidenberg; 5/18/87). Referee Muessig stated in his February 13, 1990 award that a nearly three year delay in filing for New York Dock protective benefits was unreasonable, as follows:

> "Certainly the doctrine of Laches has been recognized in this industry as well as by other arbitral precedent to bar claims filed beyond a reasonable time period. The theory underlying the Laches doctrine is that the failure to litigate a claim presently by deferring action until some unspecific but distant time in the future result in bias or prejudice the party against whom the claim is ultimately filed. The purpose of Laches is to bar the submission of stale claims. Clearly, in employee protective matters, it is critical that claims be filed without delay. In the cases at hand, and while we have fully considered the General Chairman's aggressive and skilled comments before us, the Claimants' failure to act in a timely manner precludes consideration of the issue at hand."

Here, the majority finds that, upon its careful review of the record, the Claimant's excuses for his delay in submitting his claim in a timely manner were not backed by any credible proof. From the majority's review of the record, there simply is no real evidence to support the Claimant's contentions that a timely filing of his claim would have subjected himself to "retaliatory discharge," loss of health benefits to him or his wife, or other punitive actions. Such serious allegations must be backed by credible proof, the Neutral/Referee Member emphasizes, especially in a situation such as this, where the delay was far in excess of the delays involved in the on-property arbitration cases cited above, with the exception of the 1992 Rehmus award, which, again, dismissed an on-property claim for protective benefits under New York Dock when that claim was submitted nearly six years after the date of the merger involved in that case.

The Claimant's six-year delay in filing his claim parenthetically coincided with the maximum period of benefit entitlement under New York Dock, the majority of this Committee notes. Thus, the Carrier's position that it was essentially blindsided by the Claimant's six-year cumulative request for $107,370.00 in New York Dock benefits is well founded, and such tactic runs contrary to a management goal of achieving "stable and predictable railroad labor-management relations," as Referee LaRocco pointed out in his June 26, 1990 award, cited above. In sum, the majority finds that the Claimant's delay was not satisfactorily justified by

the evidence of record, and such delay did prevent the Carrier from taking any measures toward resolving the matter outright, reducing the liability, or alternatively, constructing a vigorous defense with still-available documentation and personnel. The Carrier's position as to the manner in which it was prejudiced by the Claimant's protracted claim filing is succinctly set forth on page 10 of its post-hearing brief:

> "...Had Mr. Grother identified his 'dispute' as one involving New York Dock, the parties could have scheduled a conference and discussed the facts. Either party could have referred this dispute to arbitration if it had not been settled within 20 days after the dispute arose. Has (sic) that happened, this matter would have been settled at least five years ago, when the players and the papers involved were still available. By not labeling his dispute as one involving New York Dock until nearly six year after his demotion, Mr. Grother seriously disadvantaged UP's ability to defend itself."

Last, even if this Committee were to regard the Carrier's "laying behind the log" metaphor to be a bit hyperbolic, the majority nonetheless is convinced of the correctness of the Carrier's argument that the loss or dissipation of records, fading memories, and personnel turnover over the period of time covering the nearly six-year delay were inevitable workplace realities that had a chilling effect on the Carrier's ability to appropriately defend itself against the sizeable claim submitted by this Claimant. Thus, for all of the reasons set forth above, the Neutral/Referee Member holds that the Carrier met its burden of proving, by substantial evidence, that the instant claim should be barred from consideration on the merits under the equitable doctrine of laches.

The majority's determination as regards the procedural threshold issue of laches is dispositive of this case, as stated earlier. However, without retreat from the foregoing, and in the event the majority had reached an alternative finding, we nonetheless conclude that the record before us is replete with evidence that, with respect to the question of coverage, at the time of the Claimant's transfer from Tucson, AZ, to Houston, TX, the Claimant was neither an employee

nor subordinate official for the purpose of entitlement to a displacement allowance under Article IV of New York Dock. In that regard, the Neutral/Referee Member relies particularly upon the Claimant's own description of the characteristics and responsibilities of the SRMTO position he held at the time of his transfer, and the description of the Claimant's duties as SRMTO as set forth by the Carrier on page 21 of it pre-hearing submission, and as emphasized by Carrier Witness Packard during the arbitration hearing.

In the second sentence of the first paragraph of his May 12, 2003 claim for benefits under New York Dock, the Claimant clearly considered himself as a manager, and moreover, as someone who had been selected for many promotions. Indeed, based on that document, it is clear to the majority of this Committee that the Claimant regarded himself as a member of SP's management team, stressing that, when selected for the position of Terminal Superintendent (later, SRMTO), he had essentially been given the responsibilities of "senior officer" at Tucson. The Neutral/Referee Member further finds that, as the facts of record indeed have made plain, at the time he actively began to pursue his claim for protective benefits under New York Dock, his portrayal of himself was "downgraded" to that of a mere "order taker" at Tucson, whose primary function was to provide "vacation relief." Such a belated assessment of his responsibilities at Tucson at the time of the transfer is less than credible and hardly constitutes persuasive evidence that the Claimant was an employee or subordinate official at the time of his July 1, 1997 transfer to Houston, the majority stresses.

Thus, notwithstanding the laches bar to this claim, the majority concludes that the evidentiary record is completely lacking in any evidence to support the Claimant's contention that the SRMTO position he occupied was that of a subordinate official subject to unionization under the Railway Labor Act. Indeed, as stated above, on page 21 of its pre-hearing submission, the Carrier set forth the primary responsibilities of the SRMTO position, and Packard's own

recitation of the relevant duties of the SRMTO were not inconsistent with the Carrier's list. Indeed, according to Carrier Witness Packard, the Claimant was responsible for (1) terminal operations; (2) safety; (3) budgeting; (4) the "transportation product" at Tucson; (5) hiring recommendations; and (6) conducting disciplinary hearings and making disciplinary recommendations. (See transcript pp. 69-70; 84-86). The above duties and responsibilities are consonant with those of a management-level employee above the rank of what the Railway Labor Act intended to be a "subordinate official," the majority holds. As arbitral support for our findings here, see, in particular, Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (Stallworth; 4/5/88), which answered, in the negative, the question of whether a Manager of Labor Relations on this Carrier was an employee subject to the protection under New York Dock and thus entitled to protective benefits.

Based on the foregoing, even fewer comments are necessary with respect to the question of causality, given the majority's first finding as to the procedural bar of laches, and its second finding as regards "employee." Given the majority's ruling that, notwithstanding the procedural bar, the Claimant was not an employee, it is emphasized here that he moreover does not meet the definition of a "displaced employee," as defined in Section 1. (b), despite the Claimant's valiant efforts to convince a majority of this Committee that the duties he performed in actuality, fell within a class of employees deemed by the Railway Labor Act as eligible for unionization.

Therefore, in light of the facts of record, the Claimant was not entitled to protection under Article IV, above, and the question of whether his transfer stemmed purely from the merger transaction itself, or was attributed to other reasons, is immaterial, and the Committee need not determine whether the parties met their respective burdens of proof as regards the causality issue.

Last, the Neutral/Referee Member is aware that, both during the arbitration hearing and in the post-hearing briefs, the parties made reference to the issue of whether there was a

statutory duty, under the Railway Labor Act, to conference this matter before the Claimant's decision to invoke arbitration and, if so, whether that duty was appropriately fulfilled. Given the majority's findings, as set forth in detail above, it clearly is unnecessary for that issue to be addressed by this Committee, for the predominant reasons that: (1) such issue was not formally raised by the Carrier as a statutory bar to arbitration; and (2) such argument was not fully developed by either of the partisan members of this Committee either prior to or during the arbitration hearing.

Furthermore, the Neutral/Referee Member holds that upon careful review of the record and all of the correspondence which ultimately led to the holding of the instant arbitration hearing (and the procedures for conducting same), both parties were afforded their respective due process rights. In sum, neither party was placed at any advantage or disadvantage with respect to the procedures governing this arbitration.

Therefore, in response to the questions put before this Arbitration Committee by the Claimant, the majority answers as follows:

1. Whether employee was adversely affected as a result of the STB-approved merger. **Claimant was not adversely affected by the merger.**

2. Whether the involved employee was an "employee" within the meaning of 49 U.S.C. 11326 and NYD at the time of first adverse effect. **Claimant was not an employee within the meaning of 49 U.S.C. 11326 and the New York Dock conditions.**

3. Whether employee's request for compensation/benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches. **Claimant's request is barred by the doctrine of laches as a result of his nearly six-year delay in filing.**

In response to the questions placed before this Arbitration Committee by the Carrier, the majority responds as follows:

1. Was John E. Grother, at the time of his reduction in salary, a "displaced employee" subject to the protection of the New York Dock conditions? **No.**

2. Is John E. Grother's claim for a displacement allowance pursuant to New York Dock barred under the doctrine of Laches? **Yes.**

VII. AWARD

For the reasons set forth above and incorporated herein as if fully rewritten, the subject claim is hereby denied in its entirety.

Lynette A Ross
Lynette A. Ross
Neutral Member

I DISSENT- John E. Grother
John E. Grother
Grother Member 1/6/2005

William E. Loomis 1/4/2005
Carrier Member

Dated: December 21, 2004

APPENDIX 2

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. J. E. Grother
1718 Rustic Park Dr.
Kingwood TX 77339

Dear Mr. Grother:

This is in reference to your May 12, 2003 letter to Mr. James V. Dolan in which you requested to be certified for New York Dock protective benefits as a result of the merger between the Union Pacific and Southern Pacific Railroads. As this is a protection issue, it has been referred to my office for handling. All future New York Dock related correspondence between you and Union Pacific Railroad should also be directed to me.

I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger.

In addition, to be considered for coverage an individual must satisfy the term of "employee" as it is defined in the Railway Labor Act and by New York Dock cases. As Arbitrator Seidenberg wrote (in relevant part) in his 1987 case of The Matter of Arbitration Between B. J. Maeser et.al and Union Pacific RR Co. et al.:

> "A review of the history of labor protection conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature."** (emphasis added).

Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

Finally, even though the New York Dock conditions do not have strict time limits for filing time claims, an unreasonable time has expired between the implementation of the merger and your first claim for protective coverage. Considerable arbitral authority has held that the doctrine of laches does apply in cases such as this.

Your claim for coverage as a displaced employee under the New York Dock labor protective conditions is respectfully declined.

Sincerely,

Marilyn J. Ahart

cc: Mr. Roland Watkins
Mr. J. V. Dolan

APPENDIX 3

BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO
ARTICLE IV OF THE NEW YORK DOCK EMPLOYEE CONDITIONS

JOHN E. GROTHER :
:
vs. :
:
UNION PACIFIC RAILROAD COMPANY :



EMPLOYEE'S SUBMISSION

(Corrected Copy--9/17/04)

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

Attorney for John E. Grother

September 14, 2004

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BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO
ARTICLE IV OF THE NEW YORK DOCK EMPLOYEE CONDITIONS

JOHN E. GROTHER :
:
vs. :
:
UNION PACIFIC RAILROAD COMPANY :

EMPLOYEE'S SUBMISSION

ISSUES IN DISPUTE:

A. Applicability of New York Dock Employee conditions.

1. Whether employee was adversely affected as a result of the STB-approved merger, and has the burden to prove the causal connection between the merger and the adverse affect.

2. Whether the involved employee was an "employee" within the meaning of 49 U.S.C. 11326 and NYD at time of first adverse affect.

3. Whether employee's request for compensation/ benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches.

B. Measure of Compensation/Benefits (Deferred Issue).

Organization of this Submission

This submission is presented in two parts. The first is the textual material presenting the case for Employee, John E. Grother, followed by three separate verified statements of John E. Grother. These verified statements address, and each is headed separately, to the three issues of causality, job classification, and laches. The Grother verified statement on causality includes

two annexed verified statements from Union Pacific Railroad Company (UP) employees, Leland R. Holsinger (Annex 1), and Ken Kroeger, Jr. (Annex 2), persons familiar with the events of 1996-98 in the Tucson, AZ area.

The second part of this submission, labeled exhibits, consists of various exhibits, numbered E-1 thru E-24.[1/]

I. PROCEDURAL STATEMENT

The Employee, John E. Grother, continuously since June 1, 1969, has been employed by Southern Pacific Transportation Company (SP), and thereafter by Union Pacific Railroad Company (UP). He is a non-agreement employee, never a member of an employee union. UP acquired SP by control and merger in September 1996, subsequent to approval by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1966)(UP/SP Merger). The STB's approval was conditioned by protection for employees as imposed in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979)(NYD).[2/] (Ex. E-1). UP/SP Merger, supra, 1 S.T.B. 233 at 452-53, 521-22. The merger was consummated September 11, 1996, at the time Employee was based at Tucson, AZ.

1/ A word about Exhibit E-2, which is the May 12, 2003 request by Employee to UP for application of the NYD conditions, and itself includes exhibits in {brackets}. Inasmuch as there were no following conferences on the property, Ex. E-2 is the May 12 transmission in its entirety, although some of the contents are not relevant to the issues at the present stage of arbitration. The exhibits do not include decisions published in the bound volumes of ICC, STB, or federal reports (such as F.Supp., F.2d, or U.S.), which are available in many public libraries. However, slip opinions will be furnished to committee members upon request.

2/ Aff'd, New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979)

However, the merger did not go smoothly, and was carried out in stages. Numerous problems arose in implementing the merger, requiring further STB orders, and modification and interpretation of conditions. The STB's oversight proceedings did not terminate until late December, 2001. Finance Docket No. 32760 (Sub-No. 21). Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company(served Dec. 21, 2001)(UP/SP Merger-Oversight). 2001 WL 1635170 (Dec. 19, 2001). As a result of the merger, and its directly associated service failure at Tucson, AZ (among other UP/SP locations), Employee on July 1, 1997 was displaced, suffering a reduction in compensation by several grades, and offered a position at Houston, TX. Employee objected to this UP action, with pay and benefit reductions, on numerous occasions, ever since.

1. Employee on May 12, 2003, by letter to UP's Vice-President Law, requested that he be certified for NYD protective benefits as a result of the merger. Employee sought payment of $107,340, plus fringe benefits. (Ex. E-2).[3/] In the absence of a timely reply, Employee on June 23, 2003, requested that the National Mediation Board (NMB) that it institute the arbitration process. (Ex. E-3).

3/ Ex. E-2 consists of 46 pages, one attachment (rather than the two listed), and 55 numbered exhibits (without an exhibit 28). Ex. E-2 was compiled prior to Employee's retention of counsel, and contains some materials not relevant to the first phase of this arbitration, such as measure of compensation or benefits.

2. The NMB on July 7, 2003, directed an inquiry to UP. On July 18, 2003, UP responded to the NMB, and requested assignment of a neutral to the case; also on July 18, 2003, UP denied Employee's request for NYD protection (copy to NMB), giving three reasons: (1) employee did not suffer adverse effect as a direct result of the merger transaction; instead, his demotion was based on performance standards, not as a result of the merger; (2) the position held at the time of the merger implementation was managerial in nature, which did not meet the definition of employee under the Railway Labor Act (RLA) and NYD cases; (3) An unreasonable time has expired between implementation of the merger and employee's first claim for protective coverage, such that the doctrine of laches applies to this case. (Ex. E-4).

3. Sometime in late August or September, 2003, UP's representative in the dispute was transferred from the Protective section of the Law Department, to the Planning section of the Labor Relations Department, and assigned to William E. Loomis, an individual with a background on the former SP, and who was familiar with Employee when both were SP employees. The "Planning Section" of the UP's Labor Relations department is something other than having direct responsibility for specific operating department employment disputes, as indicated by the UP's announcement in The Pocket List of Railroad Officials. (Ex. E-5).

4. The NMB on January 21, 2004, selected Lynette A. Ross, as the Neutral/Referee member of the arbitration committee. (Ex. E-6).

5. Thereafter, when the partisan parties were unable to agree upon the procedures to govern the arbitration, Employee on Febru-

ary 20, 2004, petitioned the STB to establish such procedures. Employee requested that the order of written arbitration submissions be first employee, then carrier, followed by an employee reply, with hearing then to be held in Washington, DC. (Ex. E-7). Employee on March 5, 2004, supplemented his petition, with the response of the Neutral. (Ex. E-8). Carrier on March 5, 2004, replied to Employee's February 28 petition to the STB, urging the procedures should be left to the Neutral. (Ex. E-9).

Employee on March 12, 2004, advised the STB that UP had incorrectly characterized Employee as "management employee." (Ex. E-10).

6. The STB on April 21, 2004, ruled that the arbitration procedures should be determined by the arbitrator; and because the arbitrator controls the arbitration, she should be the person who determines where and how the proceedings should be conducted. The STB stated that absent agreement between Employee and UP, resolution should be sought by the neutral arbitrator. 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 Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review). (Ex. E-11).

7. Employee on April 26, 2004, requested the STB to correct its ruling in certain respects. (Ex. E-12). UP did not oppose Employee's request. Nevertheless, the STB on June 10, 2004, stated the requested modifications are not material to the STB's decision and need not be made. (Ex. E-13).

8. UP on May 3, 2004, advised the Neutral that the parties were unable to agree on certain of the arbitration procedures, and suggested a telephone conference. (Ex. E-14). Employee responded on May 28, 2004, with a review of the points in agreement and disagreement between the parties. (Ex. E-15).

9. The arbitration committee held a telephone conference on June 7, with a Memorandum of Agreement (MOA) signed by the partisan parties on June 18, 2004, memorializing the views of the Neutral, and without prejudice to the differing positions of the parties to the MOA (Ex. E-16), with transmitted on June 23, 2004. (Ex. E-17). Simultaneous written submissions are to be served September 14, with hearing to be held October 12, 2004, in Washington DC. (Ex. E-16).

10. Under the MOA (Ex. E-16), the partisan parties will first consider the matter of the applicability of NYD to Employee, with a written decision. If the Committee finds NYD applicable, the partisan parties thereafter will attempt to agree upon the measure of compensation or benefits. (Ex. E-16, para. E & F).

II. EMPLOYEE'S POSITION ON PROCEDURES.

1. Arbitration Prejudicial to Employee. Employee considers the entire arbitration process, with its purported limited agency and judicia review, to be prejudicial, particularly where, as here, a non-agreement railroad employee is involved. The arbitration process is mandated by the STB, in lieu of the direct application of employee protection through 49 U.S.C. §11326 by the STB itself, or by the courts. Employee does not consider that his

right to the protection mandated by 49 U.S.C. §11326 should be circumscribed by the arbitration process and limited judicial review. Cf. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 35-36 (D.C. Cir. 2004), (Ex. E-18).

2. Failure to Permit Written Reply. The Memorandum of Agreement (Ex. 16), does not permit Employee to submit a pre-hearing reply on the issue of causality. However, NYD, Art. I, §11(e), provides the employee need only identify the transaction with the pertinent facts, whereupon it is the railroad's burden to prove that factors other than a transaction affected the employee. NYD, 360 I.C.C. at 88. (Ex. E-1, 5). Employee requested the right to reply to UP's defense on this score. (Ex. E-7; Ex. E-15, 2-3). The failure to provide an opportunity for a written reply on the causality issue, particularly in the absence of any prior conference on the property, is prejudicial to Employee, and inconsistent with the scheme of the NYD process.

III. EMPLOYEE HAS BEEN ADVERSELY AFFECTED BY THE UP/SP MERGER TRANSACTION.

Employee was adversely affected as a result[4/] of the merger transaction, and his displacement was not based upon performance standards, as claimed by UP. (Ex. E-4).

1. UP/SP Application. The UP/SP merger application, filed in 1995, projected a great increase in UP/SP traffic between Yuma and Tucson, AZ, as well as east of Tucson. One SP line between Yuma and Tucson ran via Phoenix (out of service between Wellton and

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4/ UP asserts "direct result," rather than the mere "result" set forth in the NYD conditions. See: Ex. E-1, 1; Art. I, §1(b), 360 I.C.C. at 84.

Litchfield, just west of Phoenix), and the other Yuma-Tucson line ran via Gila, Maricopa, and Picacho, to Tucson. The SP line via Picacho-Phoenix would have an increase in intermodal business, estimated at an additional 50 trucks per day. SP also connects with BNSF at Phoenix. SP has a line from Tucson to Nogales for connection the Mexican rail system. The Yuma-Maricopa-Tucson trackage is part of the Colton, CA-El Paso, TX so-called "Sunset Route." For a railroad map, with stations, see: V.S. Grother (causality), atta. 1.

Trains on the line between Tucson and the East (Cochise, AZ) were projected to rise from 30 trains/day in 1994, to 45 trains/day after the merger; trains between Tucson and the West (Picacho, AZ) would rise from 26 trains to a greater 41 daily trains. The tonnage would increase 27% East of Tucson, and 39% west of Tucson. The employee reduction would be modest at Phoenix. However, 71 engineman jobs would be created at Tucson, and 4 transferred the following year from Yuma to Tucson. Some 79 trainmen would be added at Tucson, and 48 more transferred to Tucson the next year from Yuma. Some 4 non-agreement jobs would be abolished at Tucson, and 3 transferred elsewhere (Omaha, El Paso, Ft. Worth), during the first 2 years; but 3 non-agreement employees would be transferred to Tucson during the same period (Pocatello, Roseville, San Francisco). All of this was set forth in the UP/SP merger application. F.D. No. 32760, Railroad Merger Application, Vol. 3. (Ex. E-19). The STB's Section on Environmental Analysis presented similar data for the increased traffic volume projected for the Tucson and Phoenix areas. F.D. No. 32760,

Environmental Assessment. Rail Line Segments, Rail Yards and Intermodal Facilities. (Vol. 2 of 5, pp. 2-1 thru 2-20)(Ex. E-20).

The Employee's verified statement (causality) further describes the merger's effect upon railroad operations in the Tucson area. (V.S. Grother (causality)). See also: Ex. E-21).

2. Employee Displaced. It is clear that UP/SP contemplated a major increase in operations at Tucson, with the displacement and transfer of non-agreement employees contemplated in the merger application.

Employee had been at Tucson beginning September 16, 1995, and was given a UP terminology title change by UP effective April 16, 1997. However, the process of implementing the merger at Tucson did not begin until 1997. The merger had been consummated September 11, 1996, but was implemented April 13, 1997 insofar as Employee was concerned. Employee was displaced effective July 1, 1997.

The verified statement of John E. Grother (causality) describes the events and the adverse effect of the merger implementation on him. The John E. Grother verified statement (causality) also includes verified statements from employees familiar with the situation at Tuscon during 1997, which corroborate Mr. Grother. These verified statements, annexed to V.S. Grother (causality), are from Leland R. Holsinger, and Ken Kroeger, Jr.

Unfortunately, the merger of two competing railroads creates a clash of a two-company "culture" between employees, particularly where each company has existed for many years, and where each was fiercely competitive with the other. There is a "SP Team" and a "UP Team" despite the merger. Ex. E-2{E12, E13, E15, E16, 47}).

This is illustrated in Employee's verified statement (causality), where he was advised UP desired its own people on the Sunset Route and at Tucson. The harmful effect of culture conflict in railroad mergers has been documented by two Philadelphia journalists to have been a major cause for the failure of the Pennsylvania Railroad-New York Central Railroad merger in 1970. See: Daughen, Joseph P. and Binzen, Peter: The Wreck of the Penn Central, Ch. 5, "The Red and the Green," pp. 90-128 (Little Brown, 1971).

3. UP/SP Merger-Emergency Crisis. The UP/SP merger, and its disruption to the commerce of the United States, became of national concern. The aftermath of merger consummation on September 11, 1996, and extending through the period of Employee's displacement in July, 1997, has been recited by the media, and in the reports of the STB issued during 1997 and 1998.

Mr. Jerry Davis, UP's President and CEO in 1997, wrote Employee he was advised there were many factors contributing to problems at Tucson; in June, the service levels to customers, both external and internal, deteriorated to the point where immediate action had to be taken. (Ex. E-2{E11}).

The flow of commerce over the so-called "Sunset Route" greatly exceeded the capacity of the merged carrier, with a virtual cessation of UP traffic in many areas, including Arizona. Exhibit E-2 illustrates some of the media attention. (Ex. E-2{E16 thru E22; E45, E50}),

The STB in May, 1997, instituted a formal oversight proceeding, placing emphasis on an in-depth UP analysis due July 1, 1997. UP/SP Merger-Oversight, 2 S.T.B. 251 (5/1/97).

In its July 1, 1997 report to the STB on Merger and Condition

Implementation (UP/SP-303), UP/SP advised that all non-agreement employees would be offered a "good job or a good severance;" and UP/SP reported that the UP/SP planners have entirely redesigned SP's intermodal service on the Sunset Route at Phoenix and Tucson, by means of a "replan" which went into effect on May 13, 1997. (Ex. E-21).

The STB expressed concern that UP's safety and service performance during the period following consummation of the merger. The STB took the unusual step, on October 2, 1997, of convening a special hearing, which was held October 27, 1997, the agency finding serious deficiencies. UP/SP Merger-Oversight, 2 S.T.B. 703, 705 (Oct. 24, 1997):

> These service and safety deficiencies are quite serious and disturbing, and in response, we are taking the unusual step; of convening a special hearing so that parties may address these problems and discuss proposals to resolve them.

Commenters noted "problems in all segments of UP's system, in terms of poor transit times and inadequate car supply and delivery performance," with UP acknowledging that "operating problems have proven to be more severe than originally anticipated," and "are creating significant difficulties for its customers." 2 S.T.B. 703 at 717.

The STB's October 27, 1997 hearing in Rail Service in the Western United States (Ex Parte No. 573), took the testimony of 60 witnesses concerning disruption of rail service in the western United States. The STB thereupon issued an emergency service order, finding a "transportation emergency in the West." The STB's service order was issued pursuant to 49 U.S.C. §11123. Joint Petition for Service Order, 2 S.T.B. 725 (10/31/97)(S.O. 1518).

The STB on December 3, 1997, held a further hearing, after which it extended its service order, finding the emergency continued to exist, with specific mention of blocked sidings between Tucson and Los Angeles. S.O. 1518, 2 S.T.B. 744, 747 (12/4/97). Chairman Morgan commented that the service problems in the west are "unprecedented." 2 S.T.B. 744 at 752. The agency on December 12, 1997, denied a request to rescind the service order. S.O. 1518, 2 S.T.B. 764 (12/12/97).

In early 1998, the STB denied drastic relief sought by the Railroad Commission of Texas. S.O. 1518, 3 S.T.B. 28 (2/17/98), but extended the service order to August 2, 1998. S.O. 1518, 3 S.T.B. 44 (2/25/98).[5/] On July 30, 1998, the STB found that the emergency was over, although service in the West was not at uniformly improved levels; monitoring conditions were imposed, and certain traffic conditions extended to September 17, 1998. Joint Petition for a Further Service Order, 3 S.T.B. 612 (7/30/98).

The STB on August 3, 1998, instituted a proceeding to consider requests for additional conditions to the UP/SP merger for the Houston, Texas/Gulf Coast area. Finance Docket No. 32760 (Sub-No. 26), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Houston/Gulf

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5/ The STB adopted protocol for resolving the status of particular shipper facilities, and access by another carrier. UP/SP Merger-Oversight, 3 S.T.B. 7 (1/21/98).

Coast Oversight), 3 S.T.B. 622 (8/3/98)(UP/SP Merger-Houston/Gulf Coast Oversight).

Finally, on December 18, 1998, the STB issued three decisions. In UP/SP Merger-Oversight, 3 S.T.B. 987 (12/18/98), the agency discussed problems of the UP/SP service disruptions, and continued the oversight proceeding;[6/] in UP/SP Merger-Houston/Gulf Coast Oversight, 3 S.T.B. 1030 (12/18/03), the agency adopted a "clear route" condition for Houston, and other conditions; and in Rail Service in the Western United States, 3 S.T.B. 1068 (12/18/98), the STB terminated the special data reporting requirements.

4. Burden of Proof. UP in denying Employee's request for NYD protection, stated that Employee "must prove that any adverse effect was a direct result of the merger transaction." (Ex. E-4, p.1). This is incorrect as a matter of law. First, the NYD conditions speak of "result," rather than UP's claimed "direct result" NYD, Art. I, §1(b). (Ex. E-1, 1). Second, and perhaps more important, NYD, Art. I, §11(e), places the burden of proof squarely upon the carrier, not upon the employee. 360 I.C.C. at 88. (Ex. E-1, 5):

> 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. (emphasis supp.).

Clearly, Employee has gone far beyond demonstrating a prima

6/ For a further oversight report, see: UP/SP Merger-Oversight, 4 S.T.B. 438 (11/29/99).

facie case for the causal connection between the merger and the adverse effect upon him.

The first issue presented should be answered that Employee was adversely affected as a result of the merger, and that the carrier, having the burden of proof, has not convincingly demonstrated to the contrary.

IV. EMPLOYEE IS AN "EMPLOYEE" WITHIN THE MEANING OF NYD PROTECTIVE CONDITIONS.

Employee, John E. Grother, at the time of his displacement on July 1, 1997, was an "employee" within the meaning of the NYD employee protective conditions. UP wrongly contends that the Employee's position was "managerial in nature," and any individual assigned to such a "managerial" position does not meet the definition of "employee" under the RLA and NYD cases. (Ex. E-4). UP cites a 1987 arbitration award to the effect that "employee" means subject to unionization or duties other than administrative, managerial, professional, or supervisory in nature:[7/]

> ...only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other than **administrative, managerial, professional, or supervisory in nature.** (emphasis added).

Employee places primary reliance upon statutory interpretations made by the courts, and interpretations by federal agencies, particularly the former ICC, in dealing with the definition under 45 U.S.C. 151, Fifth. It was not until 1987 that the ICC commenced

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7/ The Matter of Arbitration Between B.J. Maeser et al. and Union Pacific RR Co., et al. (Seidenberg, 1987).

to review arbitration awards.8/ Although arbitration panel decisions may be helpful, such panels and their neutrals frequently are oriented in the context of carrier vs. organized employee interests, i.e., unions; here, the Employee is not and never has been represented by an railroad employee bargaining unit, although he was eligible to do so.

1. Employee was a Subordinate Official or Employee--not an Official--Under the Railway Labor Act.

UP recognizes a key issue resolves around whether Employee's job was that of an "employee" under RLA. (Ex. E-4). The RLA definition of "employee" is a person who performs any work defined as that of an employee or subordinate official.

45 U.S.C. 151, Fifth (Ex. E-23, 1):

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by order hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders.....

The ICC held dozens of proceedings involving the classification of employees under the RLA. Excluded from "employee" are "officials," but "subordinate officials" are included under employee. The general rule is that railroad employees below the grade of Division Superintendent (in UP parlance, Service Unit

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8/ For history on this score, see: Employees of the Butte, Anaconda & Pacific v. U.S., 938 F.2d 1009, 1013-14 (9th Cir. 1991); Mahoney, William G., Labor-Union View, 64 J. Transp. L. Logist. & Pol'y 540 & n.2 (1997).

Superintendent) are classified as "employees" under the RLA. The ICC stated this general rule in specifically dealing with UP. Regulations Concerning Employees Under Ry. Labor Act, 266 I.C.C. 87, 93 (1946):

> Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise exercise the authority of a division superintendent, are looked upon as officials.

The ICC reiterated the above general ruling that persons below the level of Division Superintendent are subordinate officials or employees, upon reargument in Regulations Concerning Employees Under Ry. Labor Act, 268 I.C.C. 55, 57 (1947).

The ICC followed this rule, but without mention of the caveat for assistant superintendents, etc., in Regulations Concerning Employees Under Ry. Labor Act, 289 I.C.C. 19, 24 (1953):

> Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the the case may be.

Cited with approval in Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 65n.2 (1981).

Here, Employee was not a Division Superintendent while with SP before the UP/SP merger. See: V.S. Grother (Job Classification) & Atta. 1. Under UP control, his SRMTO position certainly was below the level of the Service Unit Superintendent (Division Superintendent); indeed, he was two levels below the Division Superintendent.

Airline Industry. The RLA, with its dividing line between "Official" and "Subordinate Official/Employee," also applies to

the airline industry. 45 U.S.C. 181. (Ex. E-23, 2). The factors used by the National Mediation Board (NMB) are similar to those applied by the ICC in its job evaluation. These are set forth in the Representation Manual, which defines an official. §9.211:

> (1) the authority to dismiss and/or discipline employees or to effectively recommend the same;
>
> (2) the authority to supervise;
>
> (3) the ability to authorize and grant overtime;
>
> (4) the authority to transfer and/or establish assignments;
>
> (5) the authority to create carrier policy;
>
> (6) the authority to commit carrier funds;
>
> (7) whether the authority exercised is circumscribed by operating and policy manuals;
>
> (8) the placement of the individual in the organizational hierarchy of the carrier; and
>
> (9) any other relevant factors regarding the individual's duties and responsibilities.

This 9-point test to determine "subordinate employee" or "employee" vis-a-vis "Official" has been accorded judicial approval. Dorsey v. United Parcel Service, 195 F.3d 814, 816-18 (6th Cir. 1999).[9/] Cf. Podlesnick v. Airborne Express, Inc., 550 F.Supp. 906 (S.D. Ohio 1982); Lum v. China Airlines Co., Ltd., 413 F.Supp. 613, 616 (D. HI 1976).

As to the involved Employee here, it is clear that consideration of the 9 factors points decisively to Employee being a "subordinate official" or "employee," rather than an "Official."

9/ The text of the NMB representation manual, since Oct. 15, 2003, was altered only slightly from that in effect in 1999, and without substantive change. The above is taken from the present NMB manual.

The V.S. Grother (Job Classification) shows that Employee did not have authority to hire, discharge, or discipline anyone, or to recommend the same. V.S. Grother, 4-3 (Job Classification). He had no effective supervisory authority, but was an "order taker." (ibid. 4). He had no authority to authorize or grant overtime. (ibid. 4). He was without power to transfer or establish assignments. (ibid. 4). He did not create policy; rather he followed policy. (ibid. 4). Employee lacked authority to commit funds, and had a de minimis expense account which was seldom used. (ibid. 5); his authority was circumscribed by many written policies and directives. (ibid. 3-4). Employee was at the 8th level in the UP organizational hierarchy. (ibid. 6). Most of Employee's time was not actually spent on SRMTO duties, but was spent doing work one level below, at the MYO position. (ibid. 6 & Atta. 2). Finally, Employee based upon the work performed, was on the same "band" level with other subordinate officials who were subject to unionization. (ibid. 7).

It is clear that Employee would not qualify as a management official under NMB rules.

Finally, in comparing the ICC job classifications for the railroad industry, with those by the NMB for the airline industry, both under RLA, 45 U.S.C. 152, fifth, it is obvious that Employee is a subordinate official or employee under RLA.

2. Employee was an "employee" under 49 U.S.C. §11326.

Although the former ICC gave considerable weight to the agency's classification of "subordinate official" or "employee" under 45 U.S.C. 151, Fifth, in determining eligibility for "em-

ployee" protection under 49 U.S.C. 11326, there was never a "positive" determination between RLA classification and employee protection. Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 66 (1981).[10/]

Of course, all of the factors indicating that Employee qualifies as an employee or subordinate official under the RLA test, serves to assist the same "employee" label under 49 U.S.C. §11326. As recognized in the arbitration award cited by UP in Ex. E-4 (Seidenberg, 1987), the fact that an employee is a subordinate official or employee under RLA and thus subject to unionization, is a strong point for eligibility as an employee under §11326. Here, Employee considered himself subject to unionization. (V.S. Grother (Job Classification), 6-7).

A court in dealing directly with §11326, or its predecessor, has denied employee status where the individual was (1) a supervisor of 5 employees, (2) salary of $43,200/yr. in 1980, (3) would be ineligible to be part of a railroad bargaining unit representing employees, (4) had transferable skills, (5) after displacement acquired a new job at a higher salary, (6) was one of 17 executives with a salary continuation plan, and (7) received salary continuation for 6 months after dismissal. Newbourne v. Grand Trunk Western R. Co., 758 F.2d 193 (6th Cir. 1985)(Newbourne).

10/ At the time of Bell, the ICC questioned its power to review the issue of "employee" in protection matters once arbitration had been invoked, and said it might not even have jurisdiction. 366 I.C.C. at 67. However, the ruling was prior to International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Cf. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31 (D.C. Cir. 2004)(Ex. E-18).

Here, Employee clearly would not be an official under the Newbourne test. Employee did not supervise anyone; had a salary less than $43,200 based upon 1980 level; would be eligible to join a union; in the view of UP does not have transferable skills; suffered a substantial reduction in salary on his new job; and received no salary continuation after displacement. V.S. Grother (causality); V.S. Grother (Job Classification).

Some courts denied employee status where the involved claimants were principal managers of the railroad from a single family, Edwards v. Southern Railway Company, 376 F.2d 665 (4th Cir. 1967); where the individual served as Vice-President and General Manager, McDow v. Louisiana Southern Ry., 219 F.2d 650 (5th Cir. 1955); where supervisory, professional, and executive personnel were involved, or other employees not subject to agreements with unions. Zinger v. Blaidyll, 549 F.2d 901, 904 (3rd Cir. 1977); and where persons were "wholly supervisory" they became officers, rather than employees. Beeler v. Chicago, R.I. & P.Ry. Co., 169 F.2d 557, 561 (10th Cir. 1948).

Milwaukee/Rock Island Definition. Employee is far below the level for consideration as an "official" or otherwise outside an "employee" entitled to protection pursuant to 49 U.S.C. 11326, under the Milwaukee/Rock Island test. When the U.S. Congress enacted legislation to assist the former Milwaukee Road and Rock Island carriers, it chose to define "employee" for protective purposes as any employee of the Milwaukee or Rock Island, other than a railroad president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions.

The Milwaukee/Rock Island definition for "employee" has been carried forward to the present at 45 U.S.C. 902(4); 45 U.S.C. 1002(4).

Rate Bureau Definition. The U.S. Congress in the Staggers Act placed rate bureau employees under the protection of 49 U.S.C. §11347, predecessor of the present §11326, and only excluded high-level executives of the same rank as in the Milwaukee and Rock Island legislation. Section 219(g) of Staggers Rail Act, 94 Stat. 1895, 1928 (1980), reads:

> The Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendments made by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to section 11437 of title 49, United States Code. For purposes of this subsection, the term "employees" does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions.

Cf. Brotherhood of Ry., A&SC Et Al. v. Southern Frt. T. Bur., 366 I.C.C. 390 (1982).

There are arbitration awards which recognize that only high-level railroad executives are outside the "employee" level for §11326, and thus NYD protection. One such award, 11 pages of which are reproduced in Ex. E-24, is Thomas M. Curley, Et Al. v. Missouri Pacific Railroad Company (David H. Brown, 1987), which extended "employee" up to the level of Vice-President. Another award would cover Management Information Service (MIS) employees. Southern Pacific Empowered Employees/Southern Pacific Transp. Co. (Fredenberger, 2000).

On the other hand, some arbitration decisions, and miscellaneous pronouncements by the former ICC and STB, would deny "employee" protection on various theories, such as an employee not being a member of a union, "managerial employee," "supervisor" and the like. These decisions are incorrect as a matter of law. Moreover, the entitlement of an "employee" to protection is statutory, and Employee does not consider the ICC or STB can finesse an employee from his statutory right by means of arbitration and agency review. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 35 (D.C. Cir. 2004)(Ex. E-18).

Employee does not accord much weight to arbitration decisions denying "employee" status. The arbitration machinery under NYD does not ordinarily render decisions which are published in various libraries or made generally available to the public. The arbitration is administered as part of a railroad/labor organization arrangement, which serves to prejudice the non-union employee. Indeed, one seeking information concerning arbitral decisions, as a practical matter, must secure the favorable attention of a labor organization.

3. Various Interpretations by ICC and Arbitrators Have Incorrectly Defined Employee Coverage.

Several arbitration awards under ICC or STB protective conditions, which have come to the attention of Employee, clearly have failed to correctly interpret the criteria for determining "subordinate official" or "employee" under §11326. Moreover, we are unaware of any arbitral decision dealing directly with the position and duties of this Employee herein.

A. "Managerial" is Not the Test. The question whether an individual's job is "managerial" is not the test for determining whether an employee is excluded from being an "employee" under the governing statutes, 45 U.S.C. §151, and 49 U.S.C. 11326,[11/] and the NYD employee conditions imposed thereunder by the STB.[12/]

Of course, many employees are in a sense "managerial," such as the conductor for a freight train on a branch line. The question becomes the level at which the employee's duties, responsibility, supervision, and policy-making, among other factors, rise to the extent of becoming a company official.

The "managerial employee" concept came about under the National Labor Relations Act (NLRA), which governs most management-employee relations outside the railroad and airline industries. The exclusion of "managerial employees" came through judicial construction, inasmuch as the statute only excepts "supervisor." 29 U.S.C. 152(3). A supervisor is defined as a person having the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. 29 U.S.C. 152(11). The text

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11/ UP's July 18, 2003 letter mentions only RLA as an involved statute. (Ex. E-4). We believe this an oversight, as the critical statutory provision authorizing employee protection, is mandated by 49 U.S.C. §11326. Similarly, agency imposition of "employee" conditions in carrier unification predates NYD, and goes back to United States v. Lowden, 308 U.S. 225 (1939), and the former 49 U.S.C. 5(2)(f), in Transportation Act of 1940. The provisions of RLA primarily involved herein, 49 U.S.C. 151, and Part IV of Transportation Act, 49 U.S.C. 11326(a), are set forth in Ex. E-23.

12/ The NYD conditions are set forth in Ex. E-1.

of 29 U.S.C. §152, is set forth in Ex. E-22.13/

In establishing the "managerial employee" exception under NLRA, the Supreme Court did so because NLRA did not bring managerial employees under its definition of employee, unlike the RLA, with the Supreme Court specifically referencing 45 U.S.C. §151, defining a subordinate official as an employee. NLRB v. Bell Aerospace Co., 416 U.S. 267, 279 (1974):

> Furthermore, other legislation indicated that where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly. See, e.g., Railway Labor Act of 1926, 44 Stat. 577, 45 U.S.C. §151;.....

See also: NLRB v. Yeshiva University, 444 U.S. 674, 682-85 (1980).

Clearly, UP's "managerial employee" claim for negating the "subordinate official" classification in RLA, 45 U.S.C. §151, is without basis in the RLA, and defies logic. Moreover, arguendo, the fact that one might be a "managerial employee," does not preclude the employee from being a subordinate official or other classification within the definition of employee under RLA. Moreover, 29 U.S.C. 152 specifically excludes railroad employees subject to 45 U.S.C. 151. Accordingly, "managerial employee" is not a term of art for the railroad industry. UP errs in applying the "managerial employee" label to the Employee herein or, indeed, to any railroad employee. Similarly, STB decisions asserting that Article IV the NYD conditions apply to "non-managerial employees"

13/ Other provisions permit supervisors to be union members, 29 U.S.C. §164(a), but do not require collective bargaining agreements with supervisors. 29 U.S.C. 157. (Ex. E-22, 2).

should not be read to exclude managerial employees. F.D. No. 32760 (Sub-No. 35), UP/SP Merger(Arbitration Review), at p.1 (served February 5, 2002). 2002 WL 173262 (Jan. 28, 2002).

The so-called "managerial employee" bar to inclusion as "employee," confuses the NLRA with the RLA.

B. "Management/Labor" is Not the Test. Some of the decisional materials infer the test is whether the employee's duties are "management" on the one hand, or "labor" on the other hand, in determining the applicability of NYD conditions for a given individual. The former ICC and the current STB, over intermittent employee organization objections, continue to term NYD conditions as "labor protective conditions," even though the carrier unification statute, 49 U.S.C. 11326(a), and its predecessor extending back to 1940, use the term "employee protective conditions." (Ex. E-23, p.2).[14/]

The former ICC appears to have first used the management/labor distinction in dismissing a Review Board decision that an individual was not "management-level," but only did so as a matter of dicta at the end of its report finding it had no jurisdiction to make an management/labor determination. Bell v. Western Railway Company, 366 I.C.C. 64, 68 (1981). Subsequently, the ICC used the term "management employee" as one not entitled to protective conditions, but said the question of application to a given situation was "complicated, mixed questions of fact and law that are difficult to resolve." F.D. No. 32549 (Sub-No. 19), Burlington

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14/ The former ICC, and now STB, staff use of the pejorative "labor," is a mystery, but may be explained by perceived social standing of agency staff vis-a-vis carrier attorneys and employees appearing before the agency.

Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, 3 (served Dec. 20, 1995). 1995 WL 753986 (Dec. 20, 1995).

Where the courts have used the term "management" as a term to bar protective conditions, it has done so with the view of management as opposed to employee; that is, the inquiry has been management/employee, rather than management/labor. Moreover, the inquiry has involved whether the individual was a supervisor, amount of salary, eligibility to be part of a railroad bargaining unit, transferability of skills, type of job acquired after displacement, type of salary continuation plan, and extent of severance compensation. Newborne v. Grand Trunk Western R. Co., 758 F.2d 193 (1985). For a recent management/employee mention, but without analysis, see: Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31 (D.C. Cir. 2004).

The second issue should be answered that Employee is an employee within the meaning of 49 U.S.C. 11326 and NYD at the time of first adverse affect.

V. EMPLOYEE IS NOT GUILTY OF LACHES.

UP acknowledges there is no time limit for progressing NYD claims, but asserts an unreasonable time has expired between implementation and Employee's first claim for protective coverage. (Ex. E-4, 2).

Laches is a defense, with the burden upon UP to prove its case on this score. Employee has made numerous claims for cover-

age, even having an exchange of correspondence with UP's President.

We await UP's development of this issue. See: V.S. Grother (Laches). Cf. F.D. No. 32760 (Sub-No. 35), UP/SP Merger (Arbitration Review), 2002 WL 173262 (Jan. 28, 2002). Similar to the issue of causality, the failure to permit rely submissions prior to hearing, has served to restrict evidence.

The record does not support UP's defense of laches.

VI. CONCLUSION

The committee should find in favor of Employee on all issues, and that NYD is applicable to Employee, such that he may be entitled to some compensation and some benefits.

Respectfully submitted,

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

Attorney for John E. Grother

September 14, 2004

VERIFIED STATEMENT
OF JOHN E. GROTHER

(Causality)

My name is John E. Grother. I am employed by Union Pacific Railroad Company (UP) as a Manager of Intermodal Operations at Houston, TX. I have held this position since July 1, 1997, when I was displaced as Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. I suffered a reduction in pay and benefits by my displacement and transfer from Tucson to Houston.

My railroad experience began June 1, 1969, with the former Southern Pacific Transportation Company (SP) as a non-agreement employee. I have remained non-agreement during the course of my career, which has been continuous since 1969. Most of my job experience has been operations. I transferred from SP in San Francisco to become a SP Terminal Superintendent at Tucson, AZ, effective September 16, 1995.

This verified statement is to explain the nexus between the UP/SP merger, and my displacement from SRMTO at Tucson. The displacement was the result of the implementation of the merger transaction; my displacement, contrary to UP, was not due to "performance standards" (Ex. E-4), although in my view merger causality and performance standards are not necessarily inconsistent concepts. A map of the area between El Paso and Yuma, listing the intermediate stations, is set forth as Atta. 1.

The UP/SP merger was consummated September 11, 1996. After the merger, UP established new territories and commenced to implement the merger in stages. The result was a merger transaction yard consolidation directive, to carry out the operating plan set forth in the merger application. As shown in Ex. E-19, at p.

416, taken from the merger application, two non-agreement employees were to have their jobs abolished at Phoenix (which were stated to me as Phoenix SRMTO position and vacant Manager Yard Operations (MYO) position), with the consolidation of the Phoenix terminal switching into Tucson. Three non-agreement jobs would be transferred from Tucson and two would be abolished, all in year one. (Ex. E-19, p. 417). Thus, the UP merger plan stood to adversely affect non-agreement employees, and that is what occurred in 1997, and I was one of those so affected.

In accordance with the "Re-Plan" at Phoenix, all terminal switching at Phoenix was to be transferred to Tucson. The term "Re-Plan," as it affected intermodal business, is also identified in the UP progress report to the STB, dated July 1, 1997. (Ex. E-21, p. 30).

The UP plan would require 71 additional Enginemen, and 79 more Trainmen, all at Tucson. In operating parlance, the term Trainmen includes Locals, Road Switchers, over-the-road Trainmen and Yard Switchmen, for planned yard consolidation at Tucson. (Ex. E-19, pp. 412, 421). The UP plan, as found by the STB's Section of Environmental Analysis, projected a 61% increase in Trains/Day between Picacho and Tucson, and a 51% increase in Trains/Day between Tucson and Cochise, AZ. (Ex. E-20, pp.2-5, 2-11).

Several former SP employees, both agreement and non-agreement, warned UP that the failure of the proposed yard consolidation merger transaction experiment was imminent, because Tucson could not absorb a more than tripling of flat switching in a yard with a 1% grade, and where most cars had to be shoved to a joint during switching to insure "no run-away cars over the West end derail,"

at 45 MPH. I made a study of cars in the Tucson yard to be switched, both before and after the "experiment," which indicated cars available for switching increased more than three-fold. This is depicted in Atta. 2. My study shows there were an average of 188 cars to be switched in the mornings leading up to the "Re-plan," and 612 cars on a typical day thereafter. My working papers are available for examination.

I was not involved in formulating the "Re-Plan." It came from the "planners" or others. I and others gave our negative views, but they were not considered. It is likely the operating decision was made in Omaha, or elsewhere.

I was not interviewed for my UP title conversion, as other non-agreement personnel in operations at Tucson or elsewhere. It was given to me on April 16, 1997. (Ex. E-2, p. 27; Ex. E-2{7}).

The consolidation or "Re-Plan" experiment began April 13, 1997, and ended June 26, 1997, when I was advised to either quit or take a severe $1,272 per month cut, with transfer to Houston.

This advice came to me on June 26, 1997, first from Thomas F. Murphy, who was UP Asst. Regional VP at Roseville, while he was visiting Tucson. He said the "Re-Plan" experiment had failed, and that it was over that day. I was told I no longer would be at Tucson, effective July 1, 1997. He added that UP wanted its own managers on the "Sunset Route," and directed me to see Service Unit Superintendent Ken Packard, who was based at Tucson. Packard confirmed that the "experiment" had ended, and that I would no longer be a SRMTO at Tucson. He told me about my new assignment, two grades lower, at Houston, or quit. He said UP wanted its own people at Tucson.

The Tucson yard consolidation experiment became another of the 1997 UP service failures, exemplified by a system-wide series of STB proceedings, customer law suits, and settlements.

In addition to the more than tripling of cars to be switched at Tucson, the terminal was surrounded by two 12-hour MofW curfews (one in each direction) which meant trains could not operate in or out of Tucson for 12 hours. After the MofW curfews cleared, the westbound and eastbound fleets of trains were trying to get through Tucson, followed by trains already held at Tucson. It was an impossible task to place multiple tracks of Phoenix switching into the Tucson yard trackage which was already almost at capacity.

1. As a direct result of the Merger Phoenix Re-Plan, and subsequent failure, UP in 1997 activated a "But For Corporate Culture" of the gunslinger, who shot a person first and asked questions later. This is illustrated in articles by Daniel Machalaba for the Wall Street Journal, with the "dysfunctional culture." (Ex. E-2{13}). Accordingly, "But For" the merger yard consolidation experiment, which UP highlighted as a positive step to the STB on July 1, 1997, I would not have become a displaced employee on July 1, 1997, and required to transfer to Houston to maintain my employment relationship.

2. The causal connection between the merger and my displacement is further illustrated by the UP's Ombudsman & Director of Ethics. (Atta. 3):

> The choices and decisions made during that merger period were difficult for many people.

3. UP's President & CEO, Jerry Davis, made it clear that the problems at Tucson in June 1997 required a management change. These problems, of course, were the result of the merger, and the its implementation Re-Plan. (Atta. 4).

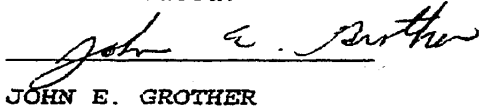
4. I have been advised by UP that I was displaced at Tucson based upon "performance standards." (Ex. E-4). However, no oral counseling or coaching was received before I was advised on June 26, 1997 to quit or accept a wage reduction and transfer to Houston. I did not receive a written interim Performance Development Review for 1997 at any time indicating poor personal performance. I did not receive a written final Performance Development Review for 1997 indicating at any time poor personal performance.

In my opinion, the alleged "performance standard" basis for my displacement is an after-the-fact rationalization. I appreciate that the operational changes contemplated and brought about by UP/UP merger may have caused changes in the requirements and abilities for an employee to hold a given position, due to operational changes in the requirements and abilities required for that position. (Ex. E-2{14}). I do know that my replacement at Tucson (coming from the UP side of the merger) received a higher initial salary than I had been receiving at Tucson, after I was displaced to Houston. However, even in a situation where there may be change in job requirements, forcing displacement to a different position, the announced UP policy in most cases was to maintain the salary level at the new position, apart from any New York Dock requirement to do so. (Ex. E-2, p. 18).

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

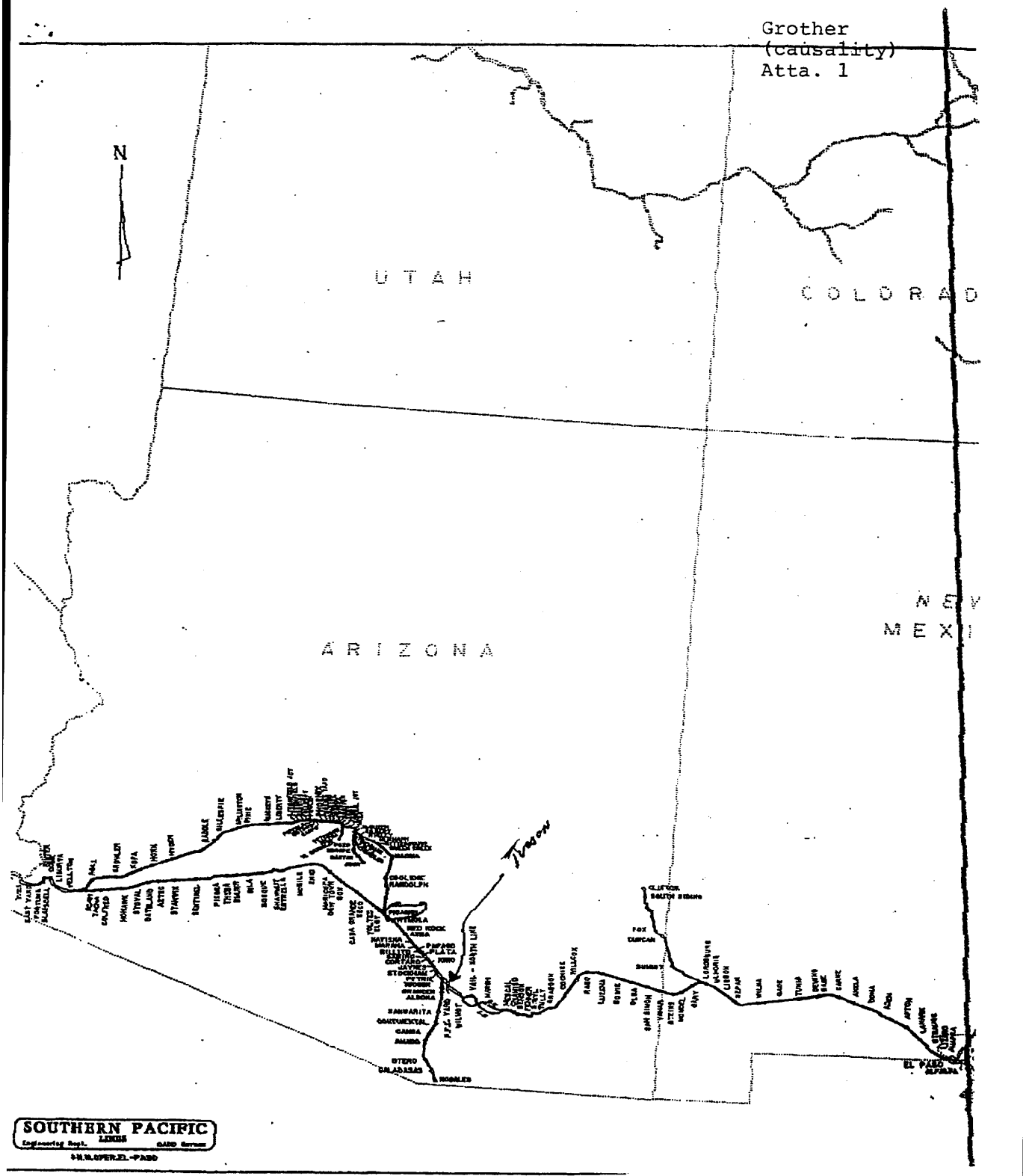
Under the penalties of perjury, I hereby affirm the foregoing verified statement is true and correct as stated.



JOHN E. GROTHER

Dated at
Houston, TX
September 14, 2004

Grother
(causality)
Atta. 1



Grother
(causality)
Atta. 2

EXHIBIT

CARS IN THE TUCSON YARD AVAILABLE TO BE SWITCHED AT 0600 DAILY BASED ON "MORNING REPORTS PROVIDED TO OMAHA AND DENVER HEADQUARTERS:

A. DATES OCCURRING ***BEFORE*** THE MERGER YARD CONSOLIDATION EXPERIMENT.

DATE	CARS TO SWITCH ON MORNING REPORT BEFORE EXPERIMENT BEGAN
1. 10-21-96	200
2. 10-22-96	177
3. 10-30-96	250
4. 11-02-96	160
5. 11-03-96	219
6. 11-05-96	110
7. 11-09-96	264
8. 11-11-96	110
9. 11-12-96	125
10. 11-14-96	219
11. 11-15-96	146
12. 04-10-97	202
13. 04-11-97	138
14. 04-13-97	307

14 DAYS = 2627 OR 188 AVERAGE CARS AVAILABLE TO SWITCH ON A.M. REPORT

B. DATES OCCURRING ***AFTER*** THE MERGER YARD CONSOLIDATION EXPERIMENT.

DATE	CARS TO SWITCH ON MORNING REPORT AFTER EXPERIMENT BEGAN
1. 04-20-97	393
2. 04-30-97	382
3. 05-01-97	678
4. 05-03-97	860
5. 05-31-97	385
6. 06-04-97	500
7. 06-06-97	474
8. 06-08-97	744
9. 06-09-97	689
10. 06-10-97	585
11. 06-12-97	837
12. 06-13-97	674
13. 06-14-97	813
14. 06-15-97	552

14 DAYS = 8566 or 612 AVERAGE CARS AVAILABLE TO SWITCH ON A.M. REPORT

C. CONCLUSION:

THE AMOUNT OF CARS AVAILABLE TO BE SWITCHED IS 3.25 TIMES GREATER ON THE MORNING REPORT AFTER THE MERGER YARD CONSOLIDATION EXPERIMENT BEGAN THAN BEFORE! AN IMPOSSIBLE TASK FOR A 1% GRADE WHERE MANY MOVES ARE "SHOVE ONLY" AND WITH TWO MAINTENANCE OF WAY CURFEWS ON EITHER SIDE.

Grother
(causality)
Atta. 3

C. E. ETHINGTON

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

November 10, 2003

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

Dear Mr. Grother:

I received your letter via regular mail dated November 2, 2003 regarding your accepting a lesser salary and position in 1997. You were given a choice at that time according to Mr. Ken Packard, Superintendent. There was no unethical practice. The choices and decisions made during that merger period were difficult for many people. The fact that you were one of the managers who were given difficult choices is unfortunate, but not unethical.

I will not rehash the personnel evaluations and decisions made by management and you so long ago. Mr. Jerry Davis responded to your petition in September of 1997.

Sincerely,

Butch Ethington

Butch Ethington
Ombudsman and Director of Ethics

UNION PACIFIC RAILROAD COMPANY

JERRY DAVIS
PRESIDENT AND
CHIEF OPERATING OFFICER

1416 DODGE STREET
ROOM 1230
OMAHA, NEBRASKA 68179-1230

Grother
(causality)
Atta. 4

September 4, 1997

Mr. John Grother
Manager-Intermodal Operations
Union Pacific Railroad Company
6800 Kirkpatrick Boulevard
Houston, TX 77026-3995

Dear John:

Thank you for your letter of July 15 concerning your transfer from Tucson to Houston. I appreciate your feedback and understand the difficulties you may be experiencing as a result of your reassignment.

Brad King, Vice President-Transportation, tells me that there were many factors contributing to the problems at Tucson. In June, the service levels to our customers, both external and internal, deteriorated to the point where immediate action had to be taken. We believe that a change in management was necessary for improvement to occur.

While it is not always easy, changes in staffing are sometimes necessary as we look at our work force and strive to handle all the business that comes our way. I'm sure you can understand that Union Pacific must continually fine tune our operations so that we can be more efficient and responsive to customer needs.

Again, thank you for your letter and your continued commitment to our company.

Sincerely,

Jerry Davis

Grother
(causality)
Annex 1

VERIFIED STATEMENT
OF LELAND R. HOLSINGER

My name is Leland R. Holsinger. I am employed by Union Pacific Railroad company (UP) as a Conductor at Tucson, Arizona. I have held this position since March 1966. My railroad experience began with the former Southern Pacific Transportation Company (SP) as a trainman or agreement employee. I worked in the Tucson area as a trainman (Brakeman and Conductor) for six years while attending the University of Arizona. Upon my graduation, I was promoted to Assistant Trainmaster in the operating department (a non agreement entry level management position) at Los Angeles in 1972. I was promoted and transferred several times over the following ten years; working on the Los Angeles Division, the Oregon Division, and the Western Division with several years working in the General Office San Francisco as a mid level manager in the Mechanical Department. In 1981, I decided to return to my agreement (seniority) position at Tucson. I am currently working between Tucson and El Paso as a Conductor on pool freight. Therefore, I have been personally involved in Tucson operations for 30 years, which is ten times more than any UP non-agreement person presently in Tucson. This verified statement is to present facts in support of John E.

Grother. Mr. Grother being a subordinate official at Tucson ending on July 1, 1997 when Mr. Grother was advised he could either quit or take a huge cut in wages and be relocated to another area, after the UP's incredulous Merger related yard consolidation attempt to move all lead switching from Phoenix to Tucson was declared a failure.

Mr. Grother was the nominal manager at Tucson Terminal, which included three other non-agreement employees (MYO's), whom Mr. Grother had to provide vacation and other relief for, as UP had not authorized a fourth MYO for relief. It was not uncommon to see Mr. Grother at the Terminal, working by himself as the duty person because one of the MYO's was on vacation, providing vacation relief for other locations, special assignment, efficiency testing teams or so forth. If the MYO's including Mr. Grother were to get any reasonable time off from twelve hour days, with time required at either end for turnovers of actions underway and needed, it was necessary that Mr. Grother perform the regular duties of the MYO duty person, in addition to his own, when there was an absence. As I would come in from my over the Road trips, at various times of the day and night, there would be Mr. Grother, by himself, trying to handle the multitude of daily conference calls with both Denver and Omaha, along with the chaotic conditions created, by the merger, to the Service

Unit. From both sides of Tucson, trains were constantly arriving out of block, wrong way traffic to switch out, perishable cars requiring fueling because other terminals had refused to fuel them, and so forth. In addition to observing Mr. Grother working through these lengthy conference calls, there were many occasions were I personally observed both Ken Packard and Hugh MacDowell (Mr. Grother's superiors) issue orders affecting operations to the duty person MYO directly, without Grother being present, consulted or contacted at that time.

After the merger experiment started in April 1997, and until it ended at the end of June 1997, it appeared that the Headquarter meetings and daily conferences escalated during my random appearances at the Tucson Office.

As a prior non-agreement employee, I had the skills, in combination with my intimate knowledge of Tucson, which lead me to the quick conclusion that there was absolutely no way that UP's yard consolidation could be successful. Despite more than doubling the volume of cars to be switched, and Maintenance of Way windows on both sides of Tucson, UP was not the least bit interested in what any of the Tucson long term employees had to say. UP appeared to have pre-conceived and false ideas on how much switching could be done on the +/- 1% grade Tucson Yard was built on. Such experiments had never been tried in the past or

since that chaotic 1997 period. The crammed yard at Tucson became yet another consolidation experiment failure by UP management. The failure and ensuing chaus created by "Omaha's" decision to consolidate Tucson and Phoenix yard switching was not for lack of hard work by Mr. Grother and the MYO's to make it work. It appeared to me that they tried every conceivable solution that was approved by UP. When Tucson first became crammed, I asked Grother why he could not hire more Trainmen or get borrow-outs from other system locations. Mr. Grother stated more than once, that any new hires or augmenters would take the authority of Omaha and they had already said "No". I overheard Grother ask Superintendent Packard for authority to obtain overtime. Mr. Grother and the MYO's were given orders from both Headquarters, Staff Departments and the Superintendent's Office in Tucson. They had very limited actual authority, as UP believes in very tight Centralized Control. Their actions were basically limited to following orders from others. When Grother was not immersed in performing as the relief for the MYO' s, Mr. Grother conducted safety discussions, liaison with the agreement employees implementing various UP Policies, and efficiency testing of the TE&Y crews. Mr. Grother did not determine the discipline to be assessed for operating rule violations or make

recommendations, as UP had their own unique system to perform this function.

I could not believe it, when I first heard that Mr. Grother had been severely demoted and sent to Houston Texas in 1997 because someone else's merger experiment had failed. As a long time Tucson employee, I was not aware of any poor personal performance from Mr. Grother that would justify the rationale for such a demotion.

VERIFICATION

STATE OF ARIZONA)
COUNTY OF PIMA)

Under the penalties of perjury, I hereby affirm the foregoing Verified statement is true and correct as stated.

Leland R. Holsinger

Dated at
Tucson, AZ
September 8, 2004

Grother
(causality)
Amnex 2

VERIFIED STATEMENT
OF KEN KROEGER, JR.

My name is Ken Kroeger, Jr.. I hired on with the Southern Pacific Railroad (SP) in 1973 in Engine Service and I was promoted to Engineer in 1974. I worked in Tucson as an Engineer until 1999, at which time I took a leave of absence from the railroad to work full-time for the International Brotherhood of Locomotive Engineers (BLE). I am currently working as a Special Representative to the International BLE President, and as Coordinator of Education and Training for the International BLE.

This verified statement is to present facts in support of John E. Grother (Grother) being a subordinate official at Tucson until July 1, 1997, when Grother was advised to accept a substantial pay reduction and transfer to Houston or quit, as a direct result of a failed Merger Yard Consolidation plan moving Phoenix traffic to Tucson.

In 1997, I was working as an Engineer in the Tucson terminal, in addition to serving as Local Chairman of BLE Division 28. My recollection of exactly what took place during this time has faded considerably; however, I have recently taken the time to look over some items of record in my files from that period.

As I recall, Union Pacific (UP) was making numerous changes with regard to the "SP system" and we all felt we were in a meltdown mode. It appeared to me that the managers in Tucson terminal were making every effort to keep things operating in a smooth manner in spite of the changes being ordered by UP managers. I believe that the managers of the Tucson Yard during this time period were Paul Lobello, John Grother, Dan Payawal, David Hampton, Ray Szarek, and Bob Strefelder.

Although I do not remember exact incidents during this time period, I am attaching two documents that show the problems that we were experiencing in 1997 with the UP cutover. The first attachment is an E-Mail to UP President Jerry Davis on September 29, 1997, concerning the TCS/CMS cut-over in Tucson that was to happen October 1, 1997. The second attachment is a copy of the Oct-Dec 1997 issue of "Update 28", a newsletter that I published and distributed to BLE Division 28 members during my tenure as Local Chairman, as well as posting it on the Internet. As you can see, the lead story of this issue related to the UP cutover and the problems we were encountering as a result of it. Basically, I remember the period between January and July 1997 as being a very chaotic time for all of us. I am

hopeful that the two attachments will provide corroboration details from said time period.

Attachments 1-2

VERIFICATION

STATE OF ARIZONA)
COUNTY OF PIMA)

Under the penalties of perjury, I hereby affirm the foregoing Verified statement is true and correct as stated.

Ken Kroeger, Jr.

09-09-04

Dated at
Tucson, AZ
September 12, 2004

Subj: **TCS/CMS CUTOVER**
Date: 09/29/97
To: jrdavis@notes.up.com
CC: pruitt@lightspeed.net, blediv56, ble28pres, jolene.molitoris@fra.dot.gov

Mr. Davis:

I am impressed by the recently installed safety hotline and with the fact that you are initiating phone calls to respond to those who have sent you E-mail messages.

On a little less positive note; however, I am totally appalled by some of the recent decisions being made by the management of Union Pacific. This railroad is in a tailspin and is heading for a **BIG** crash if some major changes are not implemented. The facts speak for themselves: numerous major rail accidents have occurred in the current year, many involving fatalities; the FRA is scrutinizing the operation of the company; the company is continually losing customers due to poor service; huge amounts of money are being wasted in "overtime" pay due to poor management decisions; and frequent gridlock is occurring on the rails.

At this point, I feel that I have no choice but to contact you via this E-mail message. Those of us who are operating employees in Tucson are in this profession for the long haul. We have chosen to live and work in Tucson and have chosen railroading as our lifelong careers. Employees who have been here as long as I have (24+ years) have seen a lot of managers come and go over the years. Much to our chagrin, we have watched them make the same mistakes over and over. Each new regime comes in and begins to implement changes that have proven time and again will not work. Each time, the attitude of the newcomers is the same: "We can make them work." What I don't understand is why these new managers don't take the time to consult with those who have lived and worked in Tucson for years, for this is where you will find the knowledge and experience needed to make the Tucson terminal function in an efficient manner.

In my capacity as Local Chairman for the BLE Division 28, I hear over and over again from numerous UP managers that the whole system is near meltdown. Someone has to be accountable and it is my opinion that someone is the top management of Union Pacific. Mr. Davidson talks about Union Pacific making one billion dollars this year. What I find really sad is that if this company was managed properly, Mr. Davidson could be talking about making two billion dollars this year. Those in the top management positions, such as you and Mr. Davidson, are the ones who are ultimately responsible for the way this company operates. The time has come to stop the "passing of the buck" and blaming lower management for this meltdown situation. It is time now for you and Mr. Davidson to take a long look at your own day-to-day operating methods and to realize and admit that it is the decisions that **YOU** are making that are the real cause of problems with this company.

On Saturday, September 20, I left a message on your safety hotline referencing the TCS/CMS cut-over for the Tucson Division, scheduled for October 1, 1997. I feel that this issue is going to seriously accelerate the tailspin that the Union Pacific is already experiencing. We are **NOT** ready for this system to be put into place. As with almost every other change that Union Pacific

has implemented since the merger, the proper steps in preparation for the cut-over have not been accomplished. The people in the field have not been properly trained in this new format. If this cut-over is implemented as planned on October 1, I foresee major chaos in the areas of crew dispatching, train dispatching, timekeeping, etc., which will result in huge frustration and disaster for all involved.

In a previous E-mail that you received from me, another Local Chairman was quoted as saying: "Now, we are given a handbook for the TCS/CMS cut-over and are being told that, because of manpower shortages, we will not be given any formal instruction on what appears a very user unfriendly process." Well, I have run out of patience with this alleged "manpower shortage"

LE 28 Newsletter

UPDATE 28

The Newsletter of
B L E Division 28

Oct.-Dec. 1997

TCS/CMS Cutover Creates Chaos in Tucson

By Ken Kroeger

begged them to wait, telling them we're not ready for this cutover, but no one would listen to me!' declared Local Chairman Ken Kroeger, with gard to the recent TCS/CMS cutover implemented on October 1. And the cutover has proven to be just as stressful and chaotic as was predicted. My engineers don't know if they are going to work in 12 minutes or 12 hours,"Ken told UP's Chief Operating Officer Jerry Davis at a dinner eeting on October 15 at the Westward Look. In a letter e-mailed from Kroeger to Mr. Davis on September 29, Kroeger stated that he was"appalled y some of the recent decisions being made by the management of Union Pacific and then went on to say *"the facts speak for themselves,"* citing: the umerous rail accidents occurring in the current year, many involving fatalities; the FRA scrutinizing of the company's operations; the continual loss f customers due to poor service; the huge amounts of money being wasted in 'overtime" pay; and frequent gridlock occurring on the rails. Using ords like "tailspin" and "meltdown," Kroeger went on to communicate his frustration to Davis regarding the lack of response *to his pleas for help*, id the frequently stated excuse that the shortage of manpower in UP Management is the reason for many of the problems, which were stated in *etail in* the September 29 communication. In the final paragraph of the letter, Kroeger begged Mr. Davis to postpone the cutover until some of these roblems were corrected and everything could be put in place for a smooth transition.

arly on September 30, Kroeger received a phone call from an angry and defeasive Davis, telling him he had no right to tell him who or what is *rong with the Company.* A week later, however, after receiving a similar letter from frustrated UTU Legislative Representative Jim Critchley in ucson, Mr. Davis invited Ken Kroeger, Jim Critchley, and BLE Division 28 Legislative Representative Rob Svob, to a dinner meeting on October 15. ecause Critchley was unable to get back in time from a run to El Paso, UTU Local Chairman Tom Moore attended the meeting on his behalf.

he *cutover was implemented as planned* on October 1, and Local Chairman Kroeger's phone began ringing constantly with questions and mplaints from frustrated engineers who could not figure out when they were going to work, could not figure out how to perform various functions n the new program, and were unable to talk to a dispatcher.

uring the week of *October 5*, UTU Local Chairman Moore and Kroeger were on hand at the yard office to learn the new system from the trainers P had sent to train operating employees and to help their members with the numerous problems being experienced.

roeger encouraged BLE Members to call the UP Safety Hotline to report these problems as a safety hazard, based on the fact that train crews were nable to go to work rested *due to the lack of information as to when they would* be called to duty. In the dinner meeting on October 15, Kroeger esented Mr. Davis with an extensive report, including examples, documenting the problems and comparing the nonuser-friendly UP computer ogram with the previously-used SP computer program. The report also included copies of articles from the Yuma newspapers covering the recent azmat incident, which *UP Management in Yuma refused to acknowledge as a hazardous situation* for the train crews involved.

r. Davis stated that he could see the difference in the two computer programs and agreed that a menudriven program is easier to use. He said he uld look into the possibilities of changing the UP program to a menudriven program. He was aware of the incident in Yuma and would investigate is further and get back to me on it.

AGREEMENT VOTE RESULTS

e agreement passed, 65% (589 votes) for and 35% (302 votes) against, on the whole system. *Div. 28 voted to pass the agreement 89% for (121* votes) and % against (14 votes), and 1% abstained (1 vote). To see the complete breakdown, go to internet web site http://www.c-zone.net/rogers/vote.html.

President's Corner

Taking Advantage

ion Pacific's lack of respect for our agreement and working conditions is causing a great deal of tension and stress amongst our fellow engineers. *Our union* icers are having to restructure the boards daily to conform with our agreement. Fifteen-hour trips, poor reliefs, and no line-ups are distressing enough, but *en we don't even* get paid correctly, that's the ultimate slap in the face! The frustration level is at an all time high!

s imperative at this time that we get the cooperation of every BLE Div. 28 member. Despite what anyone may tell you, our agreement has not changed (yet) ing up for rest, deadhead placement, and marking up to the bottom of the board are all within the scope of our current working agreement. You know where *u go and when you are* available for service. Please resist the temptation to take advantage of the confusion.

: must demand that the crew dispatchers follow our agreement. This means that we must also strictly adhere to the conditions of the agreement. Our union icers are continually "putting out fires" every day, all day long. Let's make sure that we are not the ones starting any fires.

VERIFIED STATEMENT
OF JOHN E. GROTHER

(Job Classification)

My name is John E. Grother. I am employed by Union Pacific Railroad company (UP) as a Manager of Intermodal Operations at Houston, TX. I have held this position since July 1, 1997, when I was displaced as Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. I suffered a reduction in pay and benefits by my displacement and transfer from Tucson to Houston.

My railroad experience began June 1, 1969, with the former Southern Pacific Transportation Company (SP) as a non-agreement employee. I have remained non-agreement during the course of my career, which has been continuous since 1969. Most of my job experience has been in operations. I transferred from SP in San Francisco to become a SP Terminal Superintendent at Tucson, AZ, effective September 16, 1995. My Job Work History is set forth in Ex. E-2{7}.

This verified statement is to present facts in support of my contention that at all times since September 11, 1996 (consummation of the UP/SP merger), and between April 16, 1997 and my displacement on July 1, 1997, I have been an employee, within the meaning of the Railway Labor Act (RLA), which I understand defines a subordinate official as an employee, and I am an employee under appropriate New York Dock conditions. I do not consider myself to have been an "official."

UP asserts my position at Tucson at the time of merger implementation was "managerial in nature," and that such a position does not meet the definition of employee under the RLA and NYD cases. (Ex. E-4).

My SP title at Tucson when I arrived September 16, 1995 was "Terminal Superintendent." At that time, SP had three trainmasters (terminal trainmasters) assigned to the Tucson terminal, who reported to me. The Tucson terminal was part of SP's El Paso Division, The SP organizational chart for the El Paso Division, immediately prior to the UP merger, is set forth hereto as Atta. 1. I would amplify Atta. 1 to note that although W.J. Slinkard and H.L. McDowell were assigned to El Paso, Slinkard maintained a residence in Tucson so that, for practical purposes, he was based at Tucson.

Duties as SRMTO. When UP arrived on the property after Septe mber 11, 1996, I was assigned as the non-agreement employee titular head of the terminal; but this was in title only. The three trainmasters and myself (Terminal Superintendent), reported directly to the UP senior managers. My function after merger consummation, but prior to implementation of the merger at Tucson, by the so-called "Re-Plan," on April 13, 1997, was primarily to provide vacation and other relief for the trainmasters; or, to perform the exact duties of the three trainmasters. On April 16, 1997, I was selected by the Service Unit Superintendent, Ken C. Packard (Packard), to be Senior Manager Terminal Operations (SRMTO). The titles of the three former SP trainmasters were changed to Manager Yard Operations (MYO). The change made by UP in my title was not associated with any difference in pay from what I had received from the former SP, and from UP beginning September, 1996 thru July 1, 1997.

Under UP control, I reported to Director Transportation Quality (DTQ, or generally recognized as the Asst. Service Unit

Superintendent) H. L. McDowell, and to Packard, his immediate superior. McDowell came from the SP side of the merger, and had been an Asst. Superintendent, based at El Paso; Packard came from the UP side of the merger, the former Rock Island lines absorbed earlier by UP. After merger, both McDowell and Packard were based at Tucson, as Tucson became headquarters for the Service Unit (UP terminology for Division); however, under the immediately prior SP operation, the Division headquarters officially was at El Paso, with the Superintendent William Slinkard based at El Paso, and McDowell based at ~~Tucson~~ El Paso. (Ft. 18-19)

Although the UP senior management officials, who arrived in Tucson in late December, 1996, or early January, 1997, were based at the Tucson yard, they appeared distracted by the multiple service failures surrounding Tucson; and the problems became immense after April 13, 1997, when UP put forth the Phoenix Re-Plan to implement the merger in the Phoenix/Tucson area.

The Re-Plan was an immediate failure and disaster, as I have described in my separate verified statement, submitted on the matter of causality. Tucson became another example of UP jamming too many cars into too few terminals during 1997-98.

There would be constant instructions from Packard and McDowell, both assigned at Tucson, and from other UP headquarters, and almost hourly calls to persons such as myself, or whichever SYO was the so-called "Terminal duty person" at the moment.

The train design, scheduling, and related matters, were spelled out for us by UP in the Transportation Plan, or "T-Plan." Therefore, all one supposedly needed to know about Tucson yard operations was contained in the compilation of written instruc-

tions, from which we were constantly reminded not to deviate, regardless of any common sense conflicts, for example, such as operating cars mill or mine run all together from Phoenix to Tucson, and then returning 60% of them back to Phoenix.

I was basically an "order taker" from the multiple operating headquarters at Denver (in the process of being closed) or Omaha, supplemented by Messrs. McDowell and Packard, to whom I reported at Tucson.

I did not have independent authority over the work of rank and file operating employees. I was constantly instructed and guided, circumscribed, or controlled, by the myriad of UP written policies, directives, and UP personnel. I did not have authority to transfer and/or establish assignments. Similarly, I had absolutely no authority to create carrier policy; at best, I was a mere transmission link between Messrs. McDowell and Packard, who were, respectively, Asst. Superintendent and Superintendent, in the UP organization, but with new UP titles, on the one hand, and with various yard personnel.

The use of overtime or establishment of engines was only with the approval of Packard or McDowell. The MYO personnel and myself were tightly controlled regarding any expenses, and had to first get daily authority for overtime, despite the fact the terminal was being overwhelmed by switching volume increases, which more than tripled, and was clearly in excess of Tucson's track capacity.

I, and the three MYOs, were not permitted to hire anyone, or to terminate anyone. We could not even acquire temporary "borrow outs" from the Kansas extra board, until after the "Re-Plan" was

terminated June 26, 1997, the day I was advised to quit, or transfer with a severe pay reduction to Houston, TX; ready for duty, four days later on July 1, 1997.

I was not allowed to commit any UP funds without the express approval of Packard or McDowell. My expense account was de minimis, and seldom used. My 14-hour day was normally too-filled for customer contacts.

All discipline was first discussed with Packard. I and the MYOs could not recommend, or even give out the equivalent of an "operating rule traffic ticket," without first discussing the operating rule failure with Packard. If a rule failure was recurring for a given employee, Packard would discuss the matter with senior management, and apply the UP standard discipline process, known as "Upgrade," or its predecessor automatic discipline system to determine the punishment. I and the MYOs served as traffic policemen to find offenders of operating rules, and then simply turn the matter over to Packard for possible prosecution. At no time did I recommend discipline or determine discipline.

I and the MYOs performed the "Border Trainmaster" duties, inasmuch as we were responsible for operations at Nogales, and the Mexico crossing, which we handled from Tucson and field visitations.

In summary, UP changed my job title on April 16, 1997, and continued my duties little differently from those of the MYO (formerly, Terminal Trainmaster or Border Trainmaster).

Transferability. My skills are not transferable, particularly in the view of UP, as I have attempted over the past several years since displacement in 1997 to obtain even lateral transfers within

the UP, but have been unsuccessful, even on jobs I performed or supervised.

Time Analysis of Duties. I calculate that some 72% of my time was utilized as a relief for the MYOs. This is illustrated in my attachment hereto. (Atta. 2). The balance of my time was spent in doing MYO work alongside another MYO, or implementing special directives received from McDowell or Packard.

Position in UP Organization. My position within the UP organization was seven levels below UP's President. These were:

President
VP Operations at Omaha
Asst. VP Operations at Omaha
Regional VP at Roseville
Asst. Regional VP at Roseville
Service Unit Superintendent at Tucson
DTQ (Director Transportation Quality) at Tucson

As indicated in this ranking, I was below the levels of Asst. Division Superintendent, and Division Superintendent, known in 1997 UP parlance as Director Transportation Quality, and Service Unit Superintendent, respectively. It is my understanding that the former ICC, as a general rule for classification of operating personnel, considered employees below the grade of Division Superintendent to be considered "subordinate officials" or "employees" under the RLA.

Relationship to Agreement Positions. There are non-agreement and agreement jobs, closely parallel to the work I was actually performing (MYO), which come under the RLA, and also were subject to collective bargaining agreements. The Yardmasters, clearly are classified as "employee" and are unionized agreement positions with UP. The collective bargaining agreement between UP and Union Pacific Union Yardmasters Council (UPUYC) indicates the Supervisor

Yard Operations (SYO) and Yardmaster in Charge (YIC) are convertible into agreement positions, and thus also come under the RLA as employees or subordinate officials. (Atta. 3).

There are a number of subordinate officials who are subject to becoming agreement employees. One example is train dispatchers, who are non-agreement on UP, but are agreement on other carriers, such as CSXT; the reverse is true for Yardmasters, who are agreement on UP, yet non-agreement on CSXT. Supervisors are agreement employees on a number of carriers, such as UP. The American Railway Supervisors Association (ARSA) is now a division of the Transportation Communications International Union. I believe I as a SRMTO would have been eligible to join a union, inasmuch as I was at a level below "official" under the RLA; however, I had no desire to do so.

Job Bands. UP has a program of "Job Banding." UP explains Job Banding as the grouping of jobs based on similarities, such as level of responsibility, types of skills required, knowledge and experience needed, and the development opportunities associated with other positions in the same band. (Atta. 4).

The MYO, SYO, and YIC are all within UP's Band B of UP job classification structure. Other jobs included in the Band B "family" are train dispatchers and border trainmasters. (Atta. 5).

Although my job classification (SRMTO) was nominally in Band C, my actual duties assigned by UP were comparable to, indeed identical with, those for MYO in Band B. It is clear to me that work in Band B is susceptible to agreement, and thus would be covered by RLA, and the positions are performed by an employee or subordinate official, as the case may be.

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

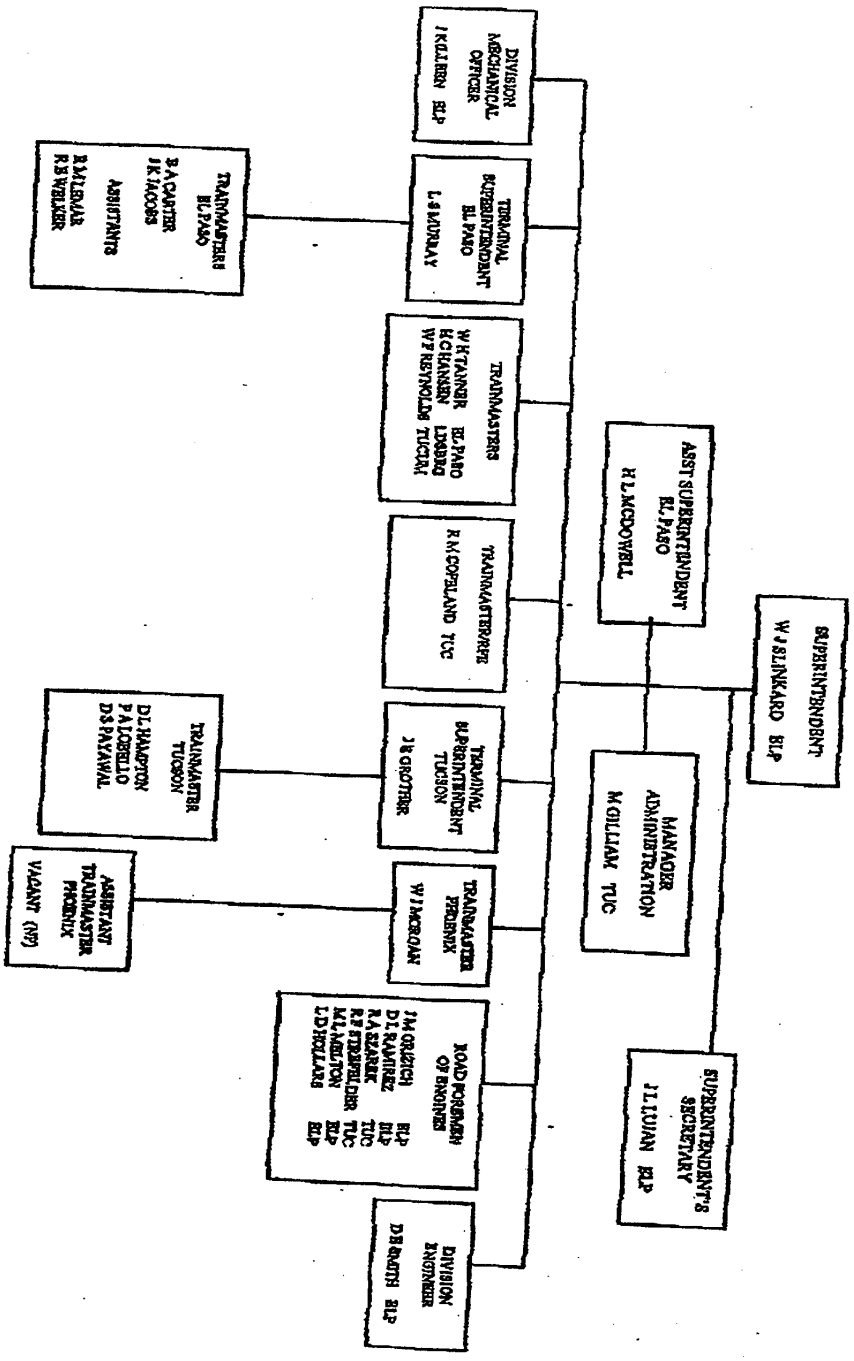
Under the penalties of perjury, I affirm the foregoing verified statement is true and correct as stated.

JOHN E. GROTHER

Dated at
Kingwood, TX
September 14, 2004

Grother
(Job classification)
Atta. 1

EL PASO DIVISION



Grother
(Job classification)
Atta. 2

HOW CLAIMANT SPENT PREPONDERANCE OF ACTUAL TIME PERFORMING THE DUTIES OF MYO/SYO ACCOUNT CARRIER ONLY HAD THREE MYO'S AND THEY NEEDED RELIEF FOR VACATIONS, SPECIAL TEAMS, ILLNESS AND DEATH FY 1997 *

1. YEARS OF SERVICE ENTITLED EACH MYO TO 5 WEEKS VACATION, WHICH REQUIRED CLAIMANT'S ACTUAL TIME:
   - A. DAN S. PAYAWAL 5 WEEKS MYO DUTY
   - B. PAUL A. LOBELLO 5
   - C. DAVID L. HAMPTON 5
2. MYO'S WERE USED AS VACATION RELIEF FOR OTHER LOCATIONS (I.E. PHOENIX, LORDSBURG, EL PASO):
   - A. VACATION RELIEF FOR PHOENIX 5
   - B. VACATION RELIEF, OTHER LOC. 5
3. MYO'S ASSIGNED TO SPECIAL STUDY OR TEAMS:
   - A. NOGALES YD ENG. STUDY 5/10/97 1
   - B. EFFICIENCY TEAM TESTING 2
   - C. SPORADIC ILLNESSES, MYO'S 2
4. MYO PAYAWALL'S TRAGIC STRESS RELATED DEATH:
   - A. ILLNESS BEFORE DEATH 2
   - B. TIME BETWEEN DEATH AND TIME GROTHER DISPLACED (6/17/97-7/1/97= 2 PLUS WEEKS) 2

SUBTOTAL OF WEEKS CLAIMANT HAD TO PERFORM ACTUAL DUTIES OF MYO'S AS ONLY RELIEF PERSON. = 34

TOTAL WEEKS AVAILABLE CLAIMANT * FY 97, BETWEEN 6/30/96-7/1/97 52
MINUS NUMBER WEEKS VACATION - 5

TOTAL NUMBER ACTUAL WORK WEEKS 47
RATIO OF ACTUAL WORK AS MYO TO ACTUAL CLAIMANT WORK WEEKS = (34 WEEKS AS MYO RELIEF/ 47 WORKING WEEKS), OR 72%

Grother
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AGREEMENT BETWEEN THE UNION PACIFIC RAILROAD COMPANY

And its Employees Represented By

UNION PACIFIC UNION YARDMASTERS COUNCIL

* * * * * * * *

THIS AGREEMENT, made this 1st day of October, 1999, by and between the Union Pacific Railroad Company (hereinafter referred to as UP or Carrier) and its employees represented by the Union Pacific Union Yardmasters Council (hereinafter referred to as UPUYC or the Organization), witnesseth:

IT IS HEREBY AGREED:

ARTICLE I - WAGES

Section 1 - First General Wage Increase

On January 1, 1998, all rates of pay in effect on the preceding day for employees covered by the Western Railway Supervisors Association (WRSA) Agreement shall be increased in the amount of three-and-one-half (3-1/2) percent applied so as to give effect to this increase in pay irrespective of the method of payment.

Rates of pay resulting from application of this general wage increase which end in fractions of a cent shall be rounded to the nearest whole cent, fractions less than one-half cent shall be dropped, and fractions of one-half cent or more shall be increased to the nearest full cent.

The increase in wages provided for in this Section I shall be applied in accordance with the wage or working conditions Agreements in effect between the Carrier and the Organization. Special allowances not included in fixed hourly, daily, weekly or monthly rates of pay for all services rendered, and arbitraries representing duplicate time payments, will not be increased. Overtime hours will be computed in accordance with individual schedules for all overtime hours paid for.

Section 2 - Second General Wage Increase

Effective July 1, 1998, all rates of pay in effect on the preceding day for employees covered by the WRSA Agreement shall be increased in the amount of one-and-three-fourths (1-3/4) percent applied so as to give effect to this increase in pay irrespective of the method of payment. The increase provided for in this Section 2 shall be applied in the same manner as provided for in Section 1 hereof, except that for the 12-month period beginning July 1, 1998, such rates shall be reduced by 7.19 cents per hour which is equivalent to the offset in the TCU 1996 National Agreement.

Section 3 - Third General Wage Increase

Effective July 1, 1999, all rates of pay in effect on the preceding day for employees

covered by the WRSA Agreement shall be increased in the amount of three-and-one-half (3-1/2) percent applied so as to give effect to this increase in pay irrespective of the method of payment. This increase is to be applied following termination of the twelve (12) month period of adjustments described in Section 2 of this Article. The increase provided for in this Section 3 shall be applied in the same manner as provided for in Section 1 hereof.

Following these adjustments, the rates for positions under the WRSA Agreement will be as follows:

Section 4 - Signing Bonus

(a) Subject to Paragraphs © and (d) of this Section 4, each employee covered by the WRSA Agreement with 2,000 or more straight time hours paid for as a Yardmaster (not including such hours reported to the ICC as constructive allowance except vacations, holidays, paid sick leave and guarantees in protective Agreements or arrangements) during the period January 1, 1998 through December 31, 1998 will be paid, upon ratification of this Agreement, a Signing Bonus of four hundred dollars ($400.00).

(b) The Signing Bonus provided for in this Article shall be paid to each employee covered by the WRSA Agreement and subject to this Agreement who has an employment relationship as of the date such payment is applicable, or has retired or died subsequent to the beginning of the applicable calendar year used to determine the amount of such payment. There shall be no duplication of the Signing Bonus by virtue of employment under another agreement nor will such payment be used to offset, construct or increase guarantees in protective agreements or arrangements.

(c) For employees covered by the WRSA Agreement who have fewer straight time hours (as defined) paid for in the period described in Section 4(a) than the minimum number set forth therein, the dollar amount of the Signing Bonus specified in Section 4(a) shall be adjusted by multiplying such amount by the number of straight time hours (including vacations, holidays, paid sick leave and guarantees in protective agreements or arrangements) for which the employee was paid during such period divided by the defined minimum hours.

(d) In the case of any employee covered by the WRSA Agreement subject to wage progression or entry rates, the dollar amount of the Signing Bonus specified in Section 4(a) shall be adjusted by multiplying such amount by the weighted average entry rate percentage applicable to wages earned during the specified determination period.

Section 5 - Adjustment of UTU(Y) Rates

Effective January 1, 2000, the $8.00 daily productive allowance applicable to Yardmasters covered by the United Transportation Union - Yardmaster Department [UTU(Y)] Agreements will be rolled into the basic daily rate for Yardmasters covered by the UTU(Y) Agreements. As a result of this change, the rates of pay for

employees covered under the UTU(Y) Agreements will be:

General Yardmaster	203.61
Assistant General Yardmaster	$202.04
Extra Board Yardmaster	$202.04

ARTICLE II - PRESERVED RATES

Effective January 1, 2000, all employees currently covered under the UTU(Y) Agreements with the Carrier, including those employees holding full time Union positions; employees not assigned to regular positions but awarded seniority dates pursuant to this Agreement; and, all non-agreement employees working as Yardmasters (including Supervisors of Yard Operations [SYO] and Yardmasters in Charge [YIC]) who elect to return to Agreement coverage when offered the one-time option pursuant to this Agreement) shall be paid the following rates:

General Yardmaster	$226.02
Assistant General Yardmaster	$221.17
Extra Board Yardmaster	$208.11

Overtime and other premiums earned by employees covered by this Article shall be based on the above-listed preserved rates. Employees hired or promoted to UTU(Y) Yardmaster positions after the date of this Agreement; SYOs and YICs returning to fully covered UTU(Y) positions after January 1, 2000; and, all promoted management employees holding Yardmaster seniority dates who return to positions covered by the UTU (Y) Agreement with the Carrier after January 1, 2000, will not be eligible for these preserved rates.

ARTICLE IV -COLLECTIVE BARGAINING AGREEMENT AND SENIORITY ZONES

Section 1 - WRSA Agreement

The existing WRSA Collective Bargaining Agreement will apply at all existing SP locations except for Kansas City. At locations covered by both the WRSA Collective Bargaining Agreement (SP) and the UTU(Y) Collective Bargaining Agreement (UP), the WRSA Collective Bargaining Agreement will apply except at Kansas City.

Section 2 - UTU(Y) Agreement

The UTU(Y)/Missouri Pacific Railroad Company Collective Bargaining Agreement will apply to all other locations on the Union Pacific including Kansas City.

Section 3 - Seniority Zones

The Yardmaster Seniority System will be comprised of the following four (4) seniority zones:

(a) The SP Seniority Zone comprised of four (4) seniority districts (SP West; SP East; SSW; and DRGW).

(b) The CNW Seniority Zone which will be comprised of ten (10) seniority districts (No. 2 - Central; No. 3 - Illinois; No. 3a - Madison; No. 4 - Iowa [which includes the UP Terminal at Council Bluffs]; No. 5 - Lakeshore; No. 6 - Western; No. 7 - Twin Cities; No. 8 - Wisconsin; and No. 9 - Chicago; and, No. 10 - Former C&EI).

(c) The MP Seniority Zone which includes all former MP locations including Kansas City but excluding Shreveport, Avondale and Dallas (Mesquite, Mockingbird and Miller Yards). Employees on the MP Zone have zone-wide seniority with prior rights in the terminal where employed.

(d) The UP Seniority Zone which comprises all other locations not covered by the above Seniority Zones. Employees will have zone-wide seniority with prior rights in the terminal where employed.

Section 4 - Seniority Dates

(a) The existing WRSA Seniority Rosters will remain in effect at all locations covered by the WRSA Collective Bargaining Agreement.

(b) The existing UTU(Y) Seniority Rosters will remain in effect at all locations covered by the UTU(Y) Collective Bargaining Agreement.

(c) On the effective date of this Agreement, all SYOs or YICs, and employees on the former MP/TP territories not assigned to regular positions but who have worked as "extra and unassigned" Yardmasters since June 1, 1999, will be awarded seniority dates at their respective terminals or on their respective zones as defined in Article IV, Section 3 of this Agreement as of the first day worked in the Yardmasters Craft.

(d) Yardmasters who accepted promotion to official positions under the former Union Pacific (UP), Western Pacific Railroad (WP), and Ogden Union Railway & Depot (OUR&D) Yardmasters Agreements prior to June 26, 1984 (UP), June 5, 1985 (WP), and March 1, 1985 (OUR&D) and were covered by the seniority retention provisions of their respective agreements, will retain their established Yardmaster seniority date subject to the Maintenance of Membership provisions provided in Section 5 of this Article.

Section 5 - Maintenance of Membership

Employees who elect not to convert on January 1, 2000, as well as all current employees in promoted status holding Yardmaster's seniority under any Agreement shall, as a condition of retaining and accruing seniority under this Agreement, be required to maintain membership in good standing in the Organization party hereto.

In the event such employee fails to maintain membership in good standing, the General Chairman shall notify the Director of Labor Relations or his or her designated representative. If, within thirty (30) calendar days after receipt of such notification the employee has not retained membership in good standing with the Organization, the employee will forfeit all seniority under this Agreement. Employees entitled to retain and accumulate seniority under this Article shall be privileged to bid on bulletined positions in accordance with the respective Collective Bargaining Agreement. Employees released from a non-agreement position shall exercise seniority in the terminal and zone where seniority is held. The exercise of seniority must be made within ten (10) calendar days from date released. This Section 5 supersedes any existing Maintenance of Membership agreement rules or provisions currently in effect between the parties.

ARTICLE V - REVERSE ATTRITION ARRANGEMENTS

Section 1 - Elimination of Attrition Agreements

On the effective date of this Agreement, the following Agreements will be annulled:

Description of Agreement	**Date of Agreement**
Agreement between the Missouri Pacific Railroad Company and the Railroad Yardmasters of America providing for the transfer of Yardmaster functions being performed at Kansas City under the provisions of the RYA Collective Bargaining Agreement and for the transfer of employees performing said work throughout the consolidated Kansas City Terminal.	06/05/85

Description of Agreement	Date of Agreement
Agreement between the Missouri Pacific Railroad Company and the Railroad Yardmasters of America providing for the protection of employees holding seniority as Yardmaster.	01/21/86

Description of Agreement	Date of Agreement
Agreement between the Missouri Pacific Railroad Company and the United Transportation Union providing for the protection of employees on the former IGN	02/13/86

and SAU&G.

Description of Agreement	Date of Agreement
Agreement between the Missouri Pacific Railroad Company and the American Railway and Airline Supervisors Association providing for the protection of Yardmaster employees on the former C&EI.	06/06/86

Description of Agreement	Date of Agreement
Agreement between the Union Pacific Railroad Company and the Yardmasters Steering Committee providing for the elimination all collective bargaining agreement provisions applicable to the various classifications of Yardmasters.	02/13/86

Description of Agreement	Date of Agreement
Agreement between the Union Pacific Railroad Company and the Western Pacific Yardmasters Association providing for the elimination of all collective bargaining agreement provisions applicable to the various classifications of Yardmasters.	06/05/85

Description of Agreement	Date of Agreement
Agreement between the Ogden Union Railway and Depot Company and the Odgen Yardmasters Steering Association providing for the elimination of all collective bargaining agreement provisions applicable to Yardmasters effective March 1, 1985.	02/11/85

Description of Agreement	Date of Agreement
Agreement between the Union Pacific Railroad Company and the United Transportation Union providing for the elimination of all collective bargaining agreement provisions applicable to the various classifications of Yardmasters at San Antonio, TX.	05/16/96

Description of Agreement	Date of Agreement
Agreement between the Chicago and North Western Railway Company/Union Pacific Railroad and the United Transportation Union Yardmasters Department providing for the protection of employees presently holding seniority as Yardmaster.	03/01/96

Yardmasters hired on or after the date of this Agreement shall be fully covered by the Agreement in effect at the terminal where employed.

Section 2 - Conversion Option

All SYOs and YICs will be given a one-time option on December 1, 1999, to relinquish their non-agreement status and convert to fully covered Yardmasters under the Collective Bargaining Agreement applicable to the terminal where employed effective January 1,2000. Employees electing not to convert to coverage under the Collective Bargaining Agreement will remain on their current positions as non-agreement employees. Non-agreement employees will be "grandfathered" in their current status and may be interchanged at their respective work locations without regard to any Collective Bargaining Agreement rules.

* Non-agreement occupied Yardmaster positions which are not filled by grandfathered non-agreement employees will be bulletined for seniority choice and filled with Agreement covered employees.

Grandfathered non-agreement employees may be displaced by senior fully covered employees who have a displacement right under the applicable Collective Bargaining Agreement. However, positions occupied by grandfathered non-agreement employees will not be subject to "Sadie Hawkins" (semi-annual or annual) bids or displacements. Non-agreement employees who are displaced may exercise a displacement on any junior Yardmaster at the location in accordance with the applicable seniority rules and remain in non-agreement status. Except as provided herein, positions occupied by grandfathered non-agreement employees will not be subject to the rules of the Collective Bargaining Agreement.

Section 3 - Temporary Vacancies

Temporary vacancies on Agreement-covered positions, if required to be filled, will be offered to Agreement employees only. Temporary vacancies on positions held by grandfathered non-agreement employees, if the Carrier elects to fill such positions, will be offered first to Agreement- covered employees in accordance with applicable

Agreement order of call, but only if such offer will not result in the Carrier being required to pay any Yardmaster at other than the straight time rate of pay. Moreover, it is agreed that no fully covered Yardmaster will be required to fill an assignment occupied by a non-agreement employee at the straight time rate. in the event the Carrier cannot fill the vacancy at the straight time rate of pay, the vacancy may be filled with a non-agreement employee.

ARTICLE VI - HEALTH AND WELFARE

On the effective date of this Agreement, or as soon thereafter as possible, all WRSA-covered employees covered by the Provident Policy identified as Group Policy No. R-415-B will be covered by the Supplemental Sickness Benefit Plan policy provided by TrustMark under Group Contract 9000. Effective on the date WRSA employees are covered under the TrustMark Group Contract 9000, Provident Policy identified as Group Policy No. R-415-B will be annulled.

ARTICLE VII - GENERAL PROVISIONS

Section 1 - Effect of this Agreement

(a) The purpose of this Agreement is to fix the general level of compensation during the period of the Agreement, except as noted in Section 2 below, is in settlement of the dispute growing out of the Notices served upon the Carrier dated October 7, 1997 and the Notice dated November 11, 1997 served by the Carrier upon the Organization.

(b) This Agreement shall remain in effect through December 31, 1999 and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

(c) The parties to this Agreement shall not serve nor progress prior to November 1, 1999 (not to become effective before January 1,2000) any Notice or proposal for the purpose of changing provisions of this Agreement, or which proposes matters covered by the Organization's proposals referred to in Paragraph (a) of this Section, and any proposals in pending Notices on such subject matters are hereby withdrawn.

(d) No party to this Agreement shall serve or progress, prior to November 1, 1999 (not to become effective before January 1,2000) any Notice or proposal which might properly have been served when the last Moratorium ended.

(e) This Article will not bar Management and the Organization from agreeing upon any subject of mutual interest.

Section 2 - Future Negotiations

The parties hereby agree to continue negotiations on the Consolidated Work Rules

Agreement and the "two-tier" wage system at the local level. Moreover, neither the Carrier nor the Organization will resort to relief provided under the Railway Labor Act as a result of failing to reach agreement on the above issues until December 31, 2002.

Signed at Chicago, Illinois, this 23rd day of September 1999.

FOR THE CARRIER:

/s/ Dean D. Matter
Gen. Director Labor Relations/Non-Ops

/s/ Deborah K. Peitzmeier
Director Labor Relations/Non-Ops

FOR THE UNION PACIFIC UNION YARDMASTERS COUNCIL:

/s/ A. C. Strain, Jr.
Chairman Union Pacific Union Yardmaster Council

/s/ Mike D. Thompson
General Chairman, UPUYC

/s/ David J. Just
General Chairman, UPUYC

APPROVED:

/s/ Joel M. Parker
International Vice President, TCU

/s/ Joseph P. Condo
International Vice President, TCU

/s/ Donald R. Carver
Assistant to the President - Yardmasters
UTU(Y)

/s/ Jerry Martin
Alternate Asst. to the President - Yardmasters
UTU(Y)

Part C - Cost-of-Living Allowance and Adjustments Thereto After January 1, 2000

Section 1 - Cost-of-Living Allowance and Effective Dates of Adjustments

(a) A cost-of-living allowance shall be payable in the manner set forth in and subject to the provisions of this Part, on the basis of the "Consumer Price Index for Urban Wage Earners and Clerical Workers (Revised Series) (CPI-

W)" (1967=100), U.S. Index, all items - unadjusted, as published by the Bureau of Labor Statistics, U.S. Department of Labor, and hereinafter referred to as the CPI. The first such cost-of-living allowance shall be payable effective July 1, 2000 based, subject to paragraph (d), on the CPI for March 2000 as compared with the CPI for September 1999. Such allowance, and further cost-of-living adjustments thereto which shall be come effective as described below, shall be based on the change in the CPI during the respective measurement periods shown in the following table, subject to the exception provided in paragraph (d) (iii), according to the formula set forth in paragraph (e).

Measurement Periods		Effective Date
Base Month	Measurement Month	of Adjustment
September 1999	March 2000	July 1,2000
March 2000	September 2000	January 1, 2001

Measurement Periods and Effective Dates conforming to the above schedule shall be applicable to periods subsequent to those specified above during which this Article is in effect.

(b) While a cost-of-living allowance is in effect, such cost-of-living allowance shall apply to straight time, overtime, vacations, holidays and to special allowances in the same manner as basic wage adjustments have been applied in the past, except that such allowance shall not apply to duplicate time payments, including arbitraries and special allowances that are expressed in time, miles or fixed amounts of money.

(c) The amount of the cost-of-living allowance, if any that shall be effective from one adjustment date to the next may be equal to, or greater or less than, the cost-of-living allowance in effect in the preceding adjustment period.

(d) (i) *Cap* - In calculations under paragraph (e), the maximum increase in the CPI that shall be taken into account shall be as follows:

Effective Date of Adjustment	Maximum CPI Increase That May Be Taken Into Account
July 1, 2000	3% of September 1999 CPI
January 1, 2001	6% of September 1999 CPI, Less the increase from September 1999 to March 2000

Effective Dates of Adjustment and maximum CPI Increases conforming to the above schedule shall be applicable to periods subsequent to those specified above during which this Article is in effect.

(ii) *Limitation* - In calculations under paragraph (e), only fifty percent (50%) of the increase in the CPI in any measurement period shall be considered.

(iii) If the increase in the CPI from the base month of September 1999 to the measurement month of March 2000 exceeds 3% of the September 1999 base index, the measurement period that shall be used for determining the cost-of-living adjustment to be effective the following January shall be the twelve (12) month period from such base month of September; the increase in the index that shall be taken into account shall be limited to that portion of the increase that is in excess of 3% of such September base index; and the maximum increase in that portion of the index that may be taken into account shall be 6% of such September base index less the 3% mentioned in the preceding clause, to which shall be added any residual tenths of points which had been dropped under paragraph (e) below in calculation of the cost-of-living adjustment which shall have become effective July 1, 2000 during such measurement period.

(iv) Any increase in the CPI from the base month of September 1999 to the measurement month of September 2000 in excess of 6% of the September 1999 base index shall not be taken into account in the determination of subsequent cost-of-living adjustments.

(v) The procedure specified in subparagraphs (iii) and (iv) shall be applicable to all subsequent periods during which this Article is in effect.

(e) *Formula* - The number of points change in the CPI during a measurement period, as limited by paragraph (d), shall be converted into cents on the basis of one cent equals 0.3 full points. (By "0.3 full points", it is intended that any remainder of 0.1 point or 0.2 point of change after the conversion shall not be counted.)

The cost-of-living allowance in effect on December 31, 2000 shall be adjusted (increased or decreased) effective January 1, 2001 by the whole number of cents produced by dividing by 0.3 the number of points (including tenths of points) change, as limited by paragraph (d), in the CPI during the applicable measurement period. Any residual tenths of a point resulting from such division shall be dropped. The result of such division shall be added to the amount of the cost-of-living allowance in effect on December 31, 2000 if the CPI shall have been higher at the end than at the beginning of the measurement period, and subtracted there from only if the index shall have been lower at the end than at the beginning of the measurement period and then only to the extent that the allowance remains at zero or above. The same procedure shall be followed in applying subsequent adjustments.

(f) Continuance of the cost-of-living allowance and the adjustments thereto provided herein is dependent upon the availability of the official monthly BLS Consumer Price Index (CPI-W) calculated on the same basis as such Index, except that, if the Bureau of Labor Statistics, U.S. Department of Labor should, during the effective period of this Article, revise or change the methods or basic data used in calculating such Index is such a way as to affect the direct comparability of such revised or changed index with the CPI-W during a measurement period, than that Bureau shall be requested to furnish a conversion factor designed to adjust the newly revised index to the basis of the CPI-W during such measurement period.

Section 2 - Payment of Cost-of-Living Allowances

(a) The cost-of-living allowances payable to each employee effective July 1, 2000 shall be equal to the difference between (i) the cost-of-living allowance effective on that date pursuant to Section 1 of this Part, and (i) the lesser of (x) the cents per hour produced by dividing one-quarter of the increase, if any, in the Carriers 1999 payment rate for foreign-to-occupation health benefits under the Plan over such payment rate for 1998, by the average composite straight-time equivalent hours that are subject to wage increases for the latest year for which statistics are available, and (y) one-half of the cost-of-living allowance effective July 1, 2000.

(b) The increase in the cost-of-living allowance effective January 1, 2001 pursuant to Section 1 of this Part shall be payable to each employee commencing on that date.

(c) The increase in the cost-of-living allowance effective July 1, 2001 pursuant to Section 1 of this Part shall be payable to each employee commencing on that date.

(d) The procedure specified in paragraphs (b) and (c) shall be followed with respect to computation of the cost-of-living allowances payable in subsequent years during which this Article is in effect.

(e) The definition of the Carriers payment rate for foreign-to-occupation health benefits under the Plan set forth in Section 10 of Article I shall apply with respect to any year covered by this Section.

(f) In making calculations under this Section, fractions of a cent shall be rounded to the nearest whole cent; fractions less than one-half cent shall be dropped and fractions of one-half cent or more shall be increased to the nearest full cent.

Section 3 - Application of Cost-of Living Allowances

The cost-of-living allowance provided for by Section 1 of this Part C will not become part of basic rates of pay. Such allowance will be applied as follows:

(a) For other than dining car stewards, each one cent per hour of cost-of-living allowance will be treated as an increase of 8 cents in the basic daily rates of pay produced by application of Article I of this Agreement. The cost-of-living allowance will otherwise be applied in keeping with the provisions of Section 8 of Article I.

(b) For dining car stewards, each one-cent per hour of cost-of-living allowance will be treated as an increase of $1.80 in the monthly rates of pay produced by application of Sections 8 and 9 of Article I.

Section 4 - Continuation of Part C

The arrangements set forth in Part C of this Article shall remain in effect according to the terms thereof until revised by the parties pursuant to the Railway Labor Act.

ARTICLE III - DENTAL BENEFITS

Section 1 - Continuation of Plan

The benefits now provided under the Railroad Employees National Dental Plan (Dental Plan), modified as provided in Section 2 below, will be continued subject to the provisions of the Railway Labor Act, as amended.

Q and A's

1. Q. How will the employees working Yardmasters positions be trained?

   A. Training will be a cooperative effort between the local union representative and the local manager.

2. Q. Can terminals call themselves (vs. CMS)?

   A. Yes, if an understanding to do so is reached between the local representative and local management at the terminal.

3. Q. Can a non-agreement SYO/YIC, that elects to convert to a union covered position, maintain a non-agreement benefit?

   A. No.

4. Q. Where SYO's and union Yardmasters are employed, how will vacations be assigned?

   A. In seniority order, consistent with the needs of the service.

5. Q. If an employee, who falls under the provisions of the UTU(Y) MP Agreement elects to return to a union covered position after January 1, 2000, what will be his rate of pay?

   A. If assigned to a GYM position: $203.61; if AGYM or Extra Board position: $202.04; subject to future wage and COLA increases.

6. Q. Do all SYO's/YIC's convert to the GYM rate?

   A. No (see Side Letter #4).

7. Q. Will MYO's have a right to a Yardmaster position?

   A. No. However, any non-agreement employee, regardless of title, whose primary duties consist of Yardmaster work on the effective date of this Agreement, will be covered by this Agreement.

Q and A's

8. Q. If a non-agreement employee chooses to remain non-agreement, will he retain seniority?

   A. Yes, if he maintains his membership by paying dues to retain his seniority.

9. Q. If a former YIC is presently performing service as an SYO, what service would be controlling in establishing seniority under this Agreement?

   A. The date SYO service commenced, provided there has been no break in service as an SYO.

10. Q. For employees not covered by Question #9 above, that do not presently have a Yardmaster seniority date established, what criteria will be used to determine their seniority date?

    A. The first day that the employee was compensated for service as a Yardmaster or SYO provided there has been no break in that service as a Yardmaster or SYO.

11. Q. In reference to the Question #9 and #10 above, where will this employee's seniority be established?

    A. In the terminal where that employee is employed on the effective date of this Agreement.

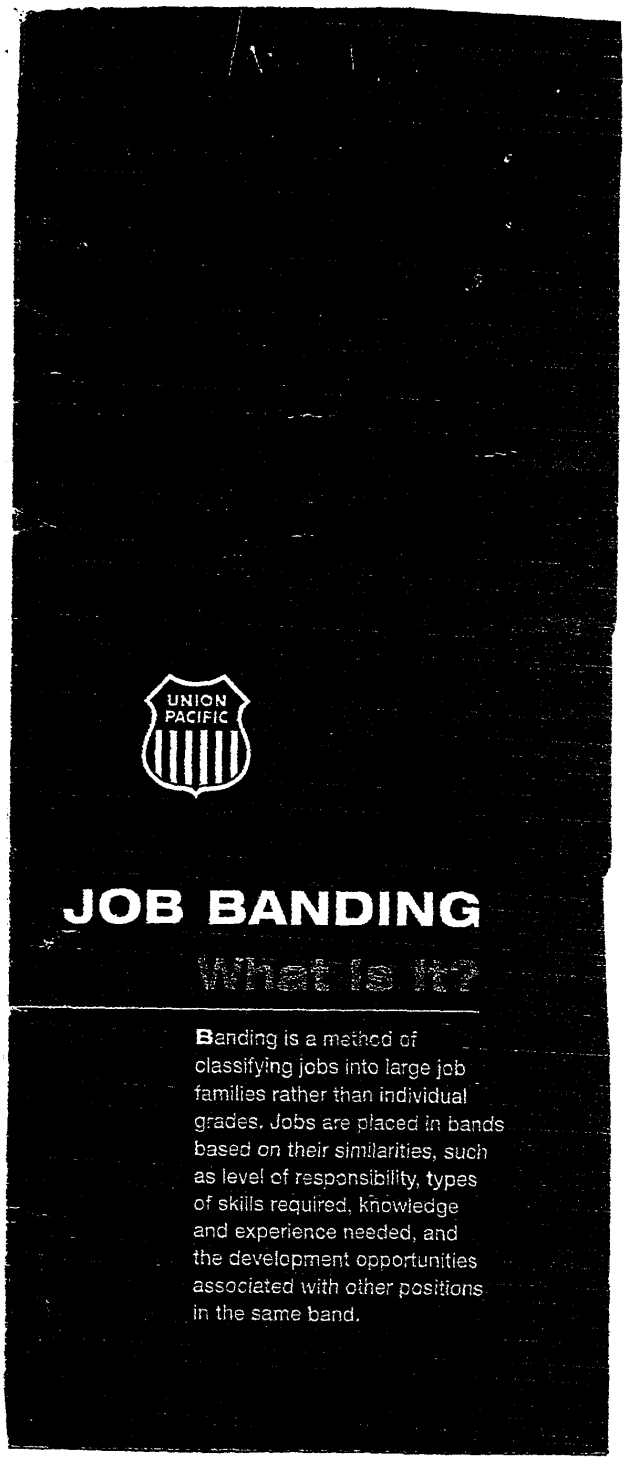
12. Q. If I don't send in my election form, what will my status be on January 1, 2000?

A. you will be a "grandfathered non-agreement employee".

13. Q. If I am an SYO that took promotion on January 1, 1990 and then was transferred to another location as an SYO, when does my seniority begin?

A. The first day that you performed compensated service as an SYO.

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JOB BANDING: What is it?

Overview/Strengths of Banding

- **Career Development:** Encourages the development of broader skills by providing more career options for employees, allowing employees to learn more about the business
- **Flexibility:** Provides management the opportunity to reward employees who are willing to broaden their skill sets and experience, which allows the Company to develop a greater "talent pool" for the future
- **Quality:** Supports the Quality initiative, as our focus on process improvement and customer service puts a premium on employees who are knowledgeable about a broad segment of our business
- **Decentralization:** Allows management to group jobs in a manner that supports an organization structure with fewer management layers and focuses on decision making at lower organizational levels

What Stays the Same?

- Your position title
- The primary components of your compensation plan: merit awards, bonus eligibility, stock options.
- The job agreement/PDR process
- Vacancies will still be posted in CNET

What's Different?

- Grades and SRGs have been eliminated. Your position now falls into one of four job bands with broad salary ranges that overlap.
- Focus is on skill development and experience-building opportunities rather than vertical (promotion only) growth.
- Opportunities to receive additional base salary adjustments for accepting assignments that broaden your experience and skill.
- No lump sum merit awards – any salary adjustments will be applied to your base salary.

Question & Answer Section

1. What is the objective of Job Banding?
Job Banding is the process of grouping similar jobs together, placing them in job families, and providing broad salary ranges for each band, thereby replacing the current SRG and grade structure. It is designed to provide flexibility and support employee skill development.

2. Why are we making the change to Job Banding?
Banding establishes an HR process that supports our

(2)

Comparative Analysis

CURRENT GRADES	PILOT BANDING PROJECT
Structured	Flexible
Hierarchical	Flatter Structure
Limited Participation	Greater Involvement
Promotion Focus	Development Focus

Program Basics

Salary Bands and Ranges

Salary Structure (four bands):

	Lower Limit		Upper Limit
1. STAFF	$33,500	to	$52,000
2. MANAGER	$40,600	to	$67,300
3. SR. MANAGER	$55,900	to	$96,900
4. DIRECTOR	$79,600	to	$140,700

Each band includes a broad grouping of jobs

Promotional Move

Employees move from one band to a higher band

Developmental Transfer

Employees move to a different position in the same band

Employees will be eligible for salary increase consideration for both promotions and developmental transfers

Transformation and Quality initiatives and provides an incentive to employees to broaden their skills and experiences. The return on investment here is a broader and better qualified pool of candidates for our key leadership positions and a more highly skilled and satisfied workforce.

3. How will banding affect career development?
Banding will remove some of the barriers to career development that were present in the grading system and will provide encouragement for employees to seek out opportunities that will broaden their skill sets.

4. What is the difference between a promotion and a developmental transfer?
A promotion is defined as a job change involving a move from one band to a higher band. A developmental transfer is defined as a job change within the same band. Both personnel actions are eligible for salary adjustments.

5. How will banding affect my current salary?
Banding will not have an immediate impact on your salary. Broader salary ranges and the opportunities for

Question & Answer Section (continued)

compensation adjustments associated with developmental transfers should provide a greater opportunity for salary increases in the future.

6. Will salary increases be given for both promotions and developmental moves?
Employees who accept assignments which qualify as either promotions or developmental transfers will be eligible for a salary adjustment at management discretion. Factors such as budget, performance, the individual's pay level within the salary range, relationship of the individual's pay level to peers, etc., are all factors to be considered before salary adjustments are awarded.

7. How will I be affected if I do not move to a job in a different area?
You will still have the opportunity to be rewarded for accepting new assignments in your current functional groups. In addition, the removal of SRG limitations and broader salary ranges should be positive contributors toward potential salary growth.

8. Who decides the amount of a salary increase in this program?
The respective Regional Vice President or Vice President-HDC, based on the recommendation of your immediate Manager/Director, will be responsible for the distribution of salary increases in conjunction with this program.

9. What happens if I am demoted for performance reasons, or if I self nominate to a position in a lower job band?

This type of move may result in a salary reduction as deemed appropriate by management. In addition, the salary range from the previous position (in the higher job band) will not be carried forward.

10. Who determined the placement of jobs in each band?

The Operating Department leadership team reviewed the positions in the organization and approved the placement of each position in its respective band.

11. What other companies are using Job Banding?

Many successful companies have implemented banding programs over the last several years. Companies such as General Electric, Allied Signal, and CSX have implemented banding programs in all or part of their organizations.

12. What changes will banding itself initiate?

Banding does not create change on its own; it is a tool used by organizations who wish to promote career development, decentralized decision making, quality and flexibility.

A B C D

SERVICE UNIT STRUCTURE

Staff Band	Manager Band	Sr Manager Band	Director Band
Admin Aide	Border Trainmaster	Dir Budgets, Admin & Quality-Commuter Ops	Dir Commuter Ops Mech
Admin Asst	Field Engr-Commuter Ops	Dir Commuter Ops Car	Dir Quality Trans-Commuter Ops
	Material Supv	Dir Commuter Ops Loco	Dir Road Operations
	Mgr Admin	Dir Mechanical Maintenance	Dir Terminal Operations
	Mgr Admin & Purch-Commuter Ops	Dir Regional Operations	Dir Track Maintenance
	Mgr Crew Utilization	Locomotive Manager	Dir Transportation Services
	Mgr Facility Maintenance-Special Projects-Commuter Oprns	Mgr Bridge Const Commuter Ops	Supt Coal Oprns
	Mgr Intermodal Oprns (M 10)	Mgr Bridge Maintenance Commuter Ops	Supt Intermodal (Basin) Oprns
	Mgr Loco Maintenance	Mgr Commuter Ops Car	
	Mgr Loco Maintenance I	Mgr Commuter Ops Loco	
	Mgr Loco Maintenance II	Mgr Commuter Ops Mech	
	Mgr Yard Operations (M40)	Mgr Field Engr Commuter Ops	
	Service Unit Track Supv	Mgr Intermodal Terminal Oprns	
	Supv Ramp Operations	Mgr Locomotive Facility	
	Supv Term Operations	Mgr Maintenance	
	Supv Train Operations (S40)	Mgr Mech Maintenance	
	Supv Yard Operations (S40)	Mgr Mech Maintenance I	
	Sr. Project Engr Commuter Ops	Mgr Mech Maintenance II	
	Term Train Dispatcher	Mgr Operating Practices	
	Track Inspector	Mgr Safety Services Commuter Ops	
	Train Dispatcher	Mgr Signal Const Commuter Ops	
	Transportation Supv	Mgr Signal Maintenance Commuter Ops	
	Yardmaster in Charge	Mgr Signal Projects Commuter Ops	
		Mgr Spec Projects Field Const Commuter Ops	
		Mgr Spec Projects Planning Commuter Ops	
		Mgr Struct Projects Commuter Ops	
		Mgr Terminal Oprns.	
		Mgr Track Maintenance	
		Mgr Track Projects	
		Mgr Train Oprns (M40)	
		Sr Mgr Intermodal Terminal Opr	
		Sr Mgr Operating Practice	
		Sr Mgr Terminal Oprns	

Note: If you are in the Job Banding pilot program and do not see your job title; or if you have any questions about job banding, please call one of the following:

Linda Buttrill, Southern Region - 350-7527
Ralph Freeman, Western Region - 789-6175
Renee Lillard, Northern Region - 661-6808
Bob Kraft, Harriman Disp Cntr - 636-7035
Don Murray, West & HDC - 271-4921
Mary Stolinski, North & South - 661-6838

Grother
(Job Classification)
Atta. 5

VERIFIED STATEMENT
OF JOHN E. GROTHER

(Laches)

My name is John E. Grother. I am employed by Union Pacific Railroad Company (UP) as a manager of Intermodal Operations at Houston, TX. I have held this position since July 1, 1997, when I was displaced as Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. I suffered a reduction in pay and benefits by my displacement and transfer from Tucson to Houston.

My railroad experience began June 1, 1969, with the former Southern Pacific Transportation Company (SP) as a non-agreement employee. I have remained non-agreement during the course of my career, which has been continuous since 1969. Most of my job experience has been operations. I transferred from SP in San Francisco to become a SP Terminal Superintendent at Tucson effective September 16, 1995, and subsequently became a UP SRMTO.

This verified statement is to answer one of UP's contentions, expressed in its July 18, 2003 letter, that my request for NYD conditions should be barred as untimely (laches), (Ex. E-4, 2).

I did not file a written claim for NYD conditions immediately after my July 1, 1997 displacement for a number of good reasons.

1. Fear of Retaliation and/or Dismissal. As a non-agreement, and unrepresented employee, I was subject to discipline and possible discharge, without the usual protection afforded agreement employees. During the exit interview with my Service Unit Superintendent, Ken Packard, held June 26, 1997, I was advised that I could still be demoted to a lesser position, so I should just accept the demotion happily, "You know, they can further demote

you. You are not getting any younger. You better take the demotion and be happy."

Shortly after my arrival at Houston, I was on August 2, 1997, advised by my new supervisor, Don F. Fryar concerning lawsuits, and he advised, "You cannot work around here during any type of lawsuit, as they would make life unbearable for you."

I was particularly concerned at the time (July 1997) as I was age 50.5, and with a wife suffering from Lupus. I was not at the time eligible for the UP defined "subsidized medical insurance for retirees," which currently activates only after reaching age 55. For an illustration of the problem, see: E-2{E36A-E}. Accordingly, I could not consider the risk of being severed prior to age 55, which might occur with a formal written notice of arbitration at that time. An example of asserted medical retaliation by UP was the situation of non-agreement employee Fransconi in 1996. (Ex. E-2 {E35}).

In December 2001, upon reaching age 55, I requested a hard copy of my personal records. Immediately after seeking my personal record, UP requested that I submit to two alleged random drug and alcohol tests within three months on February 2 and May 2, 2002, for the first time in 33 years. (Ex. E-2 {E27A-27B}).

2. <u>UP Aware of My Claim</u>. UP was well aware, over the 6-year period between 1997-2003, of my claim for continuation of my salary level prior to displacement. On July 15, 1997, I wrote to UP's President (Ex. E-2{E10}), which was answered September 4, 1997. (Ex. E-2{E11}).

Over the years, I continually made written and oral objections to my July 1, 1997 displacement. Some of these are set forth

in Ex. E-2. (Ex. E-2{E23, E24, E26, E29, E46, E48, E49, E53, E55}).

3. No Prejudice to UP. There has been no prejudice to UP by my waiting until May 12, 2003 to file a formal request for NYD conditions. I am advised there is no time limit for filing a written request for NYD conditions. Moreover, all of my Tucson supervisors are currently in the employ of UP.

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

Under the penalties of perjury, I hereby affirm the foregoing verified statement is true and correct as stated.

JOHN E. GROTHER

Dated at
Kingwood, TX
September 14, 2004

APPENDIX 4

BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO
ARTICLE IV OF THE NEW YORK DOCK EMPLOYEE CONDITIONS

JOHN E. GROTHER :
:
vs. :
:
UNION PACIFIC RAILROAD COMPANY :

EMPLOYEE'S SUBMISSION

PART II- EXHIBITS

Exhibit 2 Only

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

Attorney for John E. Grother

September 14, 2004

AGAINST UPRR, CUSTOMER SETTLEMENTS OCCURRED ACROSS THE UPRR SYSTEM IN 1997 FOR ALLEGED PERFORMANCE ISSUES RELATED TO THE MERGER; THOSE MANAGERS DID NOT HAVE THEIR WAGES REDUCED, INCLUDING THOSE TRANSFERRED.

2. **"TRY NEW IDEAS...ENCOURAGE CHANGE"**
(GROTHER WAS RUINED AFTER VPO SHOENER HAD AN IDEA, WITHOUT PROCESS SIMULATION, TO CONSOLIDATE YARDS!)

3. **"TRUST IS ESSENTIAL"**
(THE ABOVE VALUES WERE NOT HONORED IN 1997. WILL THE BUSINESS ETHICS AND FAIRNESS ISSUES BE HONORED IN 2003?)

IN ADDITION, THE PURSUIT OF THE MALCOLM BALDRIDGE NATIONAL QUALITY AWARD (WHICH IS BASED IN PART, ON A HUMAN RESOURCE FOCUS AND PROCESS MANAGEMENT), SHOULD ALLOW GROTHER'S WORLD CLASS COMPANY TO QUICKLY REACH THE DECISION THAT GROTHER SHOULD BE PROVIDED THE LOSS IN COMPENSATION AND BENEFITS WHICH STARTED JULY 1, 1997. PROCESS MANAGEMENT WAS NOT USED TO DEMOTE GROTHER IN 1997, DETERMINE THE ROOT CAUSE OF THE TUCSON SERVICE PROBLEM AFTER THE MERGER EXPERIMENT'S FAILURE. NOR, WAS THERE A REASONABLE CONCERN FOR THE HUMAN RESOURCE FOCUS IN 1997'S UPRR CORPORATE CULTURE, OR A PROPER SIMULATION OF RESOURCES BEFORE THIS MAY 1997 MERGER EXPERIMENT.

GROTHER'S EXCELLENT PERFORMANCE BACKGROUND :

GROTHER HAD BEEN A PRIOR-TO-MERGER SOUTHERN PACIFIC TRANSPORTATION COMPANY ("SPTCO") MANAGER WITH 28 YEARS OF DEDICATED AND LOYAL SERVICE WHEN HIS DEMOTION BECAME EFFECTIVE JULY 1, 1997 (EXHIBIT 7). GROTHER WAS 50.5 YEARS OF AGE AND WAS REPLACED BY A 41.5 YEAR OLD "MENTORED STUDENT" OF MR. THOMAS F. MURPHY. GROTHER'S REPLACEMENT, MR. TOM S. PARR, WAS THEN GIVEN A PAY INCREASE TO $6,328, JUST "TO ACCEPT THE

JOB" WHICH WAS BEYOND THE SALARY OF $6,200 GROTHER HAD BEEN MAKING SINCE SEPTEMBER 1995.

GROTHER'S STANDARD OF PERFORMANCE HAD NEVER BEEN BELOW "OUTSTANDING" AT ANY TIME AND GROTHER WAS NOT FORCIBLY TRANSFERRED IN 1997 TO A JOB MORE SUITABLE WITH HIS ABILITY, AS HE KNEW LITTLE ABOUT THE INTERMODAL DEPARTMENT. THE MANAGER'S AND EMPLOYEES WHO WERE AT TUCSON IN MAY-JUNE 1997 ARE WILLING TO PROVIDE CORROBORATION THAT GROTHER DID EVERYTHING WITHIN HIS AUTHORITY TO MAKE SHOENER'S YARD CONSOLIDATION MERGER EXPERIMENT WORK; BUT, YOU CAN NOT SWITCH UP TO ALMOST DOUBLE THE VOLUME OF CARS IN A YARD WITH A RESTRICTED FLAT SWITCHING CAPACITY.

THEREFORE; BUT FOR SHOENER'S INITIAL ROLLOUT MERGER YARD CONSOLIDATION EXPERIMENT, GROTHER WOULD NOT HAVE BEEN DEMOTED 7/1/97.

UPRR TOOK OVER THE SPTCO IN A ROLLOUT MANNER AND TUCSON WAS PART OF THE LAST PORTION TO CUTOVER, AS FURTHER CORROBORATED BY BLE'S EXHIBIT 8.

PRIOR TO HIS SUDDEN DEMOTION BY UPRR, GROTHER HAD BEEN SELECTED FOR MANY PROMOTIONS, HAD ELEVEN (11) "GROOMING MOVES" AT THE REQUEST OF THE SPTCO, RECEIVED SPECIAL AWARDS, SPECIAL ASSIGNMENTS, SPECIAL PROJECTS BY SPTCO MANAGEMENT FOR MANY YEARS, INCLUDING AN ASSIGNMENT BY SPTCO PRESIDENT MIKE MOHAN TO REPRESENT SPTCO AS LEAD NEGOTIATOR FOR THE PROPOSED SALE OF THE PENINSULA COMMUTE SERVICE TO THE PUBLIC ENTITIES NEAR SAN FRANCISCO (EXH. 3), WHICH WAS A $450 MILLION TRANSACTION. (EX'S. 4-6 INDICATE PARTIAL RECOGNITION, INCLUDING FACT THAT GROTHER WAS ON THE UP/SP COMMON POINT MERGER TEAM (GROTHER WAS ONE OF THE 38 PERSONS WHO WERE SELECTED).

IS IT LOGICAL THAT A MANAGER OF SUCH DEPTH AND LONGEVITY WOULD DESERVE A 21% DEMOTION, AFTER A 1.5

MONTH MERGER RELATED YARD EXPERIMENT FAILED, WHICH WAS ORDERED IN MAY 1997 BY UPRR VP SHOENER?

GROTHER WAS HIGHLY REGARDED AS A PERSON WHO COULD GET THE JOB DONE THROUGH THE CREATION OF PROCESS MANAGEMENT BASED ON HIS AIR FORCE FAIL-SAFE TRAINING, FORMAL EDUCATION (INCLUDING AN MBA,) AND IN-DEPTH PROCESS TRAINING AT SPTCO. IN FACT, GROTHER WAS SELECTED BY SPTCO VPO BILL LACY TO BE THEIR SOLE "COORDINATOR, PRODUCTIVITY IMPROVEMENT PROGRAM", INCLUDING MULTIPLE TERMINAL AND BLOCKING STRATEGY STUDIES, WITH IMPLEMENTATION TIMELINES AND DETAILED PROCESSES, WHICH WERE FOLLOWED BY THE SERVICE UNITS.

REGARDING TUCSON, GROTHER WAS SELECTED TO BE SPTCO TERMINAL SUPERINTENDENT (SENIOR MANAGER TERMINAL OPERATIONS OR SRMTO IN UPRR TERMINOLOGY) OF THE TUCSON DISTRICT FROM NOGALES-THRU TUCSON TO PIACACHO – INCLUDING ALL YARDS EFFECTIVE SEPTEMBER 16, 1995 AT A MONTHLY SALARY OF $6,200. BASED ON GROTHER'S STRONG PERSONAL RECORD AND EXCELLENT PERFORMANCE, GROTHER WAS SELECTED AS UPRR'S CHOICE TO BE SRMTO APRIL 16, 1997. GROTHER'S SELECTION WAS SO STRONG THAT UPRR DID NOT REQUIRE THE PERSONNEL REVIEW SELECTION PROCESS CONDUCTED BY UPRR TO DETERMINE WHO WOULD KEEP THEIR EX-SPTCO POSITIONS WHICH WERE CONDUCTED IN JANUARY 1997 (EXH. 9). THEREFORE, ONLY TWO MONTHS BEFORE GROTHER'S SEVERE DEMOTION, GROTHER WAS SELECTED BY UPRR TO BE ITS SENIOR OFFICER FOR THE TUCSON DISTRICT, INCLUDING TUCSON AND NOGALES YARDS.

CORROBORATION OF NEXUS BETWEEN VPO SHOENER'S DECISION TO CONSOLIDATE SWITCHING AND DEMOTION :

NOTWITHSTANDING THAT THE UP-SPTCO MERGER WAS EFFECTIVE SEPTEMBER 11, 1996, THE IMPLEMENTATION WAS ROLLED OUT IN TERMINAL CONTROL SYSTEM (TCS) REGIONS. TUCSON WAS IN THE LAST REGION TO BE CUTOVER TO TCS

(EXH. 8). THE FIRST TCS CUTOVER WAS NOT COMPLETED UNTIL MAY 2, 1997 (1.5 MONTHS BEFORE DECISION MADE TO DEMOTE GROTHER) REGARDING THE FORMER D&RGW PORTION OF THE SPTCO. CLEARLY, THE MERGER IMPLEMENTATION WAS SLOW AND PAINFUL! AS PART OF THE INITIAL MERGER IMPLEMENTATION ROLL-OUT, UPRR VPO ARTHUR SHOENER PERFORMED HIS AN INITIAL IN-DEPTH REVIEW OF UPRR *ARIZONA OPERATIONS IN EARLY 1997 TO DETERMINE WHAT* WAS "DESIRABLE TO REALIZE MERGER BENEFITS". VPO *SHOENER REACHED THE MERGER TRANSACTION RELATED* DECISION TO CLOSE THE PHOENIX FLAT SWITCHING OPERATION AND MOVE "ALL FLAT SWITCHING" TO TUCSON, DESPITE THE 1% GRADE AND LACK OF OTHER RESOURCES, INCLUDING TRACK CAPACITY FOR THAT VOLUME AND TWO ON-GOING MAINTENANCE OF WAY (M OF W) CURFEW'S STOPPING TUCSON OPERATIONS, IN EACH DIRECTION FROM *0700-1900 MONDAY THOROUGH FRIDAY. GROTHER'S ATTORNEY* CONFIDENTIAL JOURNAL INDICATES THAT BOTH M OF W CURFEWS STARTED TUESDAY, MAY 6, 1997, AFTER GETTING THE M OF W EQUIPMENT ORGANIZED ON MONDAY, MAY 5, 1997.

ONE **CORROBORATION OF THE NEXUS TO THE UP-SP MERGER TRANSACTION** IS SHOENER'S DIRECT ORDER (BASED ON HIS MERGER TRANSACTION TRIP TO REVIEW EX-SPTCO *TERRITORY) TO SEVERAL UPRR MANAGERS; INCLUDING, BUT* NOT LIMITED TO DTO H. LAWSON MCDOWELL AND SERVICE *UNIT SUPERINTENDENT KEN C. PACKARD) THAT ALL PHOENIX* FLAT SWITCHING WOULD BE CONSOLIDATED AT TUCSON.

THE OMAHA WORLD-HERALD STATED AUGUST 19, 2000 THAT:

"U.P. CORPORATION WILL ELIMINATE ANOTHER 1,600 JOBS IN THE NEXT 16 MONTHS AS IT **MOPS UP THE LAST DETAILS OF *ITS 1996 MERGER WITH THE S.P.*" "DURING THE FIVE YEAR MERGER TRANSITION PERIOD, WHICH CONTINUES FOR ANOTHER YEAR, U.P. HAS *CONSOLIDATED OR DISPERSED OF REDUNDANT TRAIN FACILITIES AND ABANDONED RAILINES*".**

THE ABOVE ARTICLE WAS WRITTEN IN AUGUST 2000 OVER THREE (3) YEARS SINCE THE MERGER TRANSACTION YARD ***CONSOLIDATION EXPERIMENT WAS ORDERED BY UPRR VP SHOENER DISPERSING ALL PHOENIX FLAT SWITCHING TO TUCSON FROM PHOENIX.*** SINCE UPRR WAS STILL MOPPING UP THE DETAILS OF THE MERGER EXPERIMENTS IN 2000, THE **NEXUS IS CLEAR,** THAT A MAY 1997 YARD CONSOLIDATION SWITCHING EXPERIMENT THAT WAS ORDERED AS PART OF THE MERGER IMPLEMENTATION "SAVINGS PROCESS", ACROSS THE NEWLY MERGED UPRR SYSTEM, COULD NOT BE DEFINED AS ANYTHING OTHER THAN A MERGER TRANSACTION NEXUS.

PROGRESSIVE RAILROADING ARTICLE JANUARY 2003 UNDERSCORES THE CORROBORATION OR **NEXUS** AS IT PORTRAYS THE LENGTH OF DELAY RELATED TO THE UPRR ROLL-OUT STRATEGY:

"ALTHOUGH IT TOOK UNION PACIFIC **SEVERAL YEARS** TO GET ITS POST-MERGER ACT TOGETHER-BY IMPROVING SERVICE,... CUTTING COSTS-MANAGEMENT IS COUNTING ON THE REVAMPED FRANCHISE **(THE DIRECT RESULT OF MERGER TRANSACTION EXPERIMENTS INCLUDING YARD CONSOLIDATION EXPERIMENTS)**...TO ACT AS TOP-LINE SPRINGBOARDS" (PARENTHESIS INSERT ADDED) (SEE EXH. 50).

AS IN MOST MERGERS, UPRR MANAGERS WERE NOT INTERESTED IN THE OPINIONS OF EX-SPTCO MANAGERS. GROTHER DID PROVIDE A DOCUMENTED LIST OF THE RESOURCES AND BLOCKING THAT WOULD BE REQUIRED **BEFORE ATTEMPTING TO CONSOLIDATE.** THAT LIST WAS IGNORED BY THE 1997 UPRR CORPORATE CULTURE, WHICH REQUIRED THE MERGER TRANSACTION EXPERIMENT TAKE PLACE PROMPTLY AS ORDERED BY THE HASTY VPO DECISION.

ACCORDING TO WITNESSES AND DOCUMENTATION, GROTHER EXPRESSED CONCERN REGARDING THE FACT TUCSON WAS SURROUNDED ON BOTH SIDES BY MAINTENANCE-OF-WAY (M OF W) CURFEWS WHICH PROHIBITED THE OPERATION OF

TRAINS, IN ANY DIRECTION, BETWEEN THE HOURS OF 0700-1900 M-F. IN FOOTBALL PARLANCE, THE TRAMPLED PLAYING FIELD WAS CUT IN HALF (BY THE LACK OF OPERATIONAL TIME ACCOUNT CURFEW AND THE OTHER TEAMS SIZE WAS DOUBLED (BY CONSOLIDATING PHOENIX FLAT CAR SWITCHING INTO TUCSON), WHICH WAS A SURE RECIPE FOR DISASTER, WHICH WAS NOT GROTHER'S DECISION OR CONTROL!

UNDER PRESENT UPRR OPERATIONS, UPRR TAKES GREAT CARE WITH M OF W CURFEWS AND EVEN DETOURS TRAINS AND OTHER ACTIVITIES TO ENSURE THAT THE TERMINAL WILL SURVIVE. GROTHER OVERHEARD MANY CONFERENCE CALL STATEMENTS BY REGIONAL VP STEVE BARKLEY REGARDING THE CURFEWS ON EITHER SIDE OF SAN ANTONIO TO DENNIS THOLEN AND OTHERS CONCLUDING JULY 21, 2000 THAT "WE CAN NOT LET HIM (GARY DAVIDSON) FAIL FROM THESE CURFEWS". TRAINS WERE DETOURED AND OTHER SEVERE MEASURES WERE TAKEN TO SAVE GARY DAVIDSON (A PRIOR TO THE UP-SPTCO MERGER MANAGER OF UPRR). ANYONE WHO WAS IN ATTENDANCE ON BARKLEY'S JULY 2000 CONFERENCES COULD CORROBORATE THE FACT THAT M OF W CURFEW'S WILL ADVERSELY AFFECT A TERMINAL'S PERFORMANCE AND THAT IS NOT THE TIME FOR MERGER RELATED YARD CONSOLIDATION EXPERIMENTATION. UNFORTUNATELY, THAT WAS JUST THE CASE IN 1997, AS ALL WERE "PILING ON THE BELEAGUERED EX-SPTCO MANAGEMENT AT TUCSON", TO EXTEND THE METAPHOR OF THE "TRAMPLED PLAYING FIELD".

THE MERGER TRANSACTION EXPERIMENT WAS STARTED EFFECTIVE MAY 14, 1997 WHICH WAS ABOUT TWENTY (20) MONTHS AFTER GROTHER HAD PERFORMED EXCELLENTLY AS THE INCUMBENT ON GROTHER'S TUCSON TERRITORY ASSIGNMENT. SENIOR UPRR MANAGEMENT QUICKLY REALIZED THAT THE TWO (2) M OF W CURFEWS, LACK OF CAPACITY, LACK OF PERSONNEL, 1% GRADE ISSUE, TRACK CONDITIONS, AND OTHER TUCSON RESOURCE DEFICIENCIES HAD CREATED A FAILURE, JUST AS GROTHER PREDICTED. IN DESPERATION, CAPACITY STUDY, PROCESS AND "BULLYING SWITCHING

EXPERTS" WERE FLOWN IN TO SHOW THE EX-SPTCO MANAGERS "HOW TO RAILROAD". THEY WERE QUICKLY BROUGHT TO REALITY AND HAD TO PUBLICLY ADMIT THAT IT COULD NOT BE DONE. DURING THE WEEK OF JUNE 16, 1997, CONFIDENTIAL MEETINGS WERE HELD TO DETERMINE WHO WOULD BE THE SCAPEGOAT AND A LITTLE OVER ONE-MONTH INTO THE MERGER TRANSACTION EXPERIMENT, THE GROTHER DEMOTION AND 21% PAY CUT DECISION WAS MADE BEHIND DOORS, IN TUCSON, BY SENIOR UPRR MANAGEMENT.

THE DECISION TO DEMOTE GROTHER WAS MADE WITH COMPLETE DISREGARD FOR THE FACTS. SHOENER WAS THE GENESIS OF THIS MERGER TRANSACTION DECISION, AS TESTIFIED TO BY MANY WITNESSES. THEREFORE, WHY PUNISH THE LOCAL MANAGER, WHO JUST HAPPENED TO BE THERE?

AS INDICATED BY THE WEB SITE OF THE BLE UNION, EXH. 8, THE CONTINUING UPRR ROLLOUT PROBLEMS AT TUCSON CONTINUED FOR SEVERAL MONTHS AFTER THE DEMOTION OF GROTHER, WHICH DOES NOT MATCH STATEMENTS MADE IN PRESIDENT JERRY DAVIS'S RESPONSE TO GROTHER'S APPEAL (EXH. 10), CONCERNING GROTHER'S SEVERE DEMOTION.

PRESIDENT DAVIS STATED ON SEPTEMBER 4, 1997 IN PART:

"IN **JUNE** THE SERVICE LEVELS TO OUR CUSTOMERS, BOTH EXTERNAL AND INTERNAL, DETERIORATED TO THE POINT IMMEDIATE ACTION HAD TO BE TAKEN. WE BELIEVE THAT A CHANGE IN MANAGEMENT WAS NECESSARY FOR IMPROVEMENT TO OCCUR." (EXH.11).

IN FACT, THE DIFFICULTIES AT TUCSON WERE STILL OCCURRING IN SEPTEMBER, 1997, WHEN UPRR PRESIDENT DAVIS FINALLY RESPONDED TO GROTHER (EXH. 8). THE ONLY THINGS, WHICH KEPT, TUCSON TERMINAL BARELY FLUID IN SEPTEMBER 1997 WERE THAT:

1) THE M OF W CURFEWS ON BOTH SIDES HAD ENDED, AND

2) THE "JUNE SERVICE LEVEL PROBLEM" AT TUCSON WAS THE MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT HAD BEEN SUDDENLY ENDED JUNE 26, 1997, JUST AFTER GROTHER WAS ORDERED TO TAKE A 21% PAY CUT TO HOUSTON INTERMODAL, OR HIT THE STREET!

UPRR PRESIDENT DAVIS DID NOT STATE THAT MY DEMOTION WAS FOR "PERSONAL PERFORMANCE ISSUES OR ANY TYPE OF DISCIPLINARY REASON". DAVIS STATED IT WAS SIMPLY RELATED TO THE "JUNE SERVICE FAILURE", WHICH WAS THE DIRECT RESULT OF NEARLY DOUBLING THE VOLUME, WITH NO INCREASE IN RESOURCES AND A 12 HOUR PER DAY M OF W CURFEW ON BOTH SIDES OF TUCSON. (DOCUMENTATION OF ABOVE AVAILABLE TO PRESENT)

PRESIDENT DAVIS HAD SO LITTLE REGARD FOR THE DISPLACED DEMOTION OF GROTHER THAT DAVIS:

- TOOK ALMOST TWO MONTHS TO RESPOND,

- DID NOT USE THE QUALITY PROCESS TO DETERMINE THE ROOT CAUSE OF THE JUNE 1997 SERVICE FAILURE,

- DID NOT EVEN BOTHER TO ADDRESS GROTHER'S SPECIFIC INQUIRY ABOUT GROTHER'S FINANCIAL REQUEST TO AVOID FINANCIAL AND EMOTIONAL DENIGRATION FOR LIFE, AND

- DID NOT HAVE ANYONE INVESTIGATE GROTHER'S STATEMENT REGARDING "HOW...**THE ISSUES OF DISCRIMINATION RELATE TO MY SUDDEN DOWNGRADE"**

PRESIDENT DAVIS'S LETTER IS STRONG ***CORROBORATION*** THAT THE **NEXUS** OF GROTHER'S DEMOTION WAS THE JUNE SERVICE FAILURE, WHICH HAS A DIRECT NEXUS TO THE LATE MAY MERGER RELATED DECISION BY VPO SHOENER TO CONSOLIDATE TERMINALS WITHOUT DOING A CAPACITY

STUDY IN ADVANCE OR GOING THROUGH A PROPER SIMULATION STUDY OF ISSUES PRIOR TO THE ATTEMPTED YARD CONSOLIDATION IMPLEMENTATION, INCLUDING THE POSTPONEMENT OF THE TWO (2) STRANGLING M OF W CURFEWS.

FURTHERMORE, THE RECORDS DO NOT INDICATE THAT THERE HAD EVER BEEN AN ATTEMPT TO CONSOLIDATE **ALL** FLAT SWITCHING FROM PHOENIX TO TUCSON BEFORE THE 1997 UP-SP MERGER TRANSACTION NEXUS; NOR, HAS THERE BEEN ONE SINCE OF ANYTHING NEAR THE SAME VOLUME MAGNITUDE. THE LATE MAY, 1997 SWITCHING CONSOLIDATION EXPERIMENT HAD A DIRECT NEXUS OR TIMING WITH THE MERGER ROLLOUT RELATED TO THE UPRR SYSTEM IMPLEMENTATION, WHEN MANAGERS INEXPERIENCED WITH THE TERRITORY SOUGHT A QUICK "MERGER RETURN", AND WOULD NOT LISTEN.

GROTHER HAD ACCESS TO THE 1997 UPRR CAPACITY STUDY WHICH DOCUMENTED, THAT CONSOLIDATION OF THAT VOLUME COULD NOT BE DONE; ESPECIALLY, WITH PHOENIX ALSO SENDING ALL MILL-RUN WESTBOUND TRAFFIC TO TUCSON AND WEST COLTON WAS ALSO BLOCKING THE LAPXM'S SO POORLY THAT THEY HAD TO BE OPERATED INTO TUCSON BECAUSE THEY HAD TO BE PROPERLY RE-BLOCKED (EXH. 12 IS CORROBORATION).

THIS MERGER RELATED YARD CONSOLIDATION EXPERIMENT WAS AN IMPOSSIBLE TASK. MANY PRIOR-TO-MERGER UPRR MANAGERS WERE ALSO IN AGREEMENT, BEFORE THE MERGER CONSOLIDATION EXPERIMENT, THAT FAILURE WAS THE ONLY POSSIBLE OUTCOME, AS SWITCHING CAPACITY WAS LACKING.

CONDITIONS IN 1997 WHICH CORROBORATE THE MERGER TRANSACTION NEXUS FOR GROTHER DEMOTION :

AS ***CORROBORATION*** OF THE 1997 UPRR CORPORATE CULTURE, WHICH SEVERELY DEMOTED GROTHER, THE WALL STREET JOURNAL ON AUGUST 25, 1999 INDICATED, IN PART (EXH 13):

1. "WHEN SOMETHING HAPPENED, " **YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY**" (ABOVE PROVES NEXUS TO GROTHER'S DEMOTION. AFTER THE UPRR MERGER WAS APPROVED, ROLLOUT FIELD VISITS WERE TAKEN AND THE MERGER TRANSACTION EXPERIMENT OF CONSOLIDATING THE PHOENIX AND TUCSON FLAT SWITCHING TERMINALS WAS ORDERED THEREAFTER BY VPO SHOENER).

2. "THEIR CULTURE WAS DYSFUNCTIONAL AND CHARACTERIZED BY NONCOMMUNICATION"

3. "TROUBLED ... 1997-98 ..." "FREIGHT SERVICE HAD COLLAPSED, STRANDING MIDWESTERN CROPS, SNARLING WEST COAST PORTS AND DELAYING SHIPMENTS OF GOODS FROM CHEMICALS TO PAPER"
(THE WHOLE UPRR SYSTEM WAS FOULED).

4. "BUT MANY PEOPLE BLAME UNION PACIFIC MANAGEMENT. THEY SAY UNION PACIFIC **TRIED TO CUT COSTS DURING THE INTEGRATION, NOT HIRING PEOPLE AND CRAMMING CARS INTO FEWER YARDS"**
(ABOVE IS EXACTLY WHAT HAPPENED AT TUCSON DURING THE MERGER TRANSACTION YARD ***CONSOLIDATION EXPERIMENT OF MOVING PHOENIX SWITCHING INTO TUCSON, WITHOUT BENEFIT OF CAPACITY, PROCESS, PROPER RESOURCE STUDY!***

5. "MEANWHILE, MR. DAVIDSON REINFORCES HIS PUSH FOR GREATER FLEXIBILITY BY SHOWING **HE IS WILLING TO TRY ANYTHING".**
(ABOVE IS GREAT; BUT, WHY RUIN THE GROTHER'S LIVES?)

WHEN A MERGER RELATED TRANSACTION SWITCHING EXPERIMENT WAS ATTEMPTED WITHOUT BENEFIT OF: AN ADVANCE CAPACITY STUDY, INSUFFICIENT SIMULATION OF VOLUME IMPACT, NO PROPER IN-DEPTH DISCUSSIONS WITH LOCAL MANAGEMENT, NO POSTPONEMENT OF M OF W CURFEWS ON BOTH SIDES OF TUCSON YARD, LACK OF RESPECT

FOR THE DIFFICULTIES OF FLAT SWITCHING ON TUCSON'S ONE PERCENT (1%) GRADE AND NO ATTEMPT TO PROVIDE THE RESOURCES REQUESTED TO MAKE THE GOAL WORK; ANY YARD CONSOLIDATION EXPERIMENT WOULD FAIL.

IN MUCH THE SAME WAY AS ENRON'S VICE PRESIDENT OF CORPORATE DEVELOPMENT, MS. SHERRON WATKINS, BELIEVED SHE HAD A DUTY TO ADVISE SENIOR MANAGEMENT OF AN IMPENDING FAILURE, GROTHER ADVISED THAT THIS MERGER TRANSACTION EXPERIMENT WAS DOOMED. NOT ONLY WERE HIS WARNINGS IGNORED; BUT, WHEN THE EXPERIMENT FAILED, GROTHER WAS VICARIOUSLY DISPLACED AND ADVISED TO ACCEPT A 21% IN SALARY AT HOUSTON TEXAS, IN A DIFFERENT DEPARTMENT, OR "HIT THE STREET"!

AFTER 28 YEARS OF DEDICATED SERVICE, MAINLY AS AN OPERATING DEPARTMENT MANAGER WORKING 12+ HOUR DAYS/NIGHTS/WEEKENDS/HOLIDAYS/DERAILMENTS/INJURIES/ HAZARDOUS MATERIAL RELEASES/INCIDENTS AND SO FORTH, GROTHER FEELS 'THE 33,000 MILES OF BUILDING AMERICA"tm.

NONETHELESS, GROTHER AS AN EX-SPTCO MANAGER, WAS "OUTSIDE THE UPRR OLD BOY NETWORK" OF LONG-TERM ALLEGIANCES. IN ADDITION, BASED ON THE 1997 UPPR CORPORATE CULTURE AND THE MERGER TRANSACTION SWITCHING CONSOLIDATION FAILURE, SENIOR UPRR MANAGERS UNDERTOOK AN AGGRESSIVE PROGRAM OF REMOVING, DEMOTING, DENIGRATING (UNTIL RESIGNED) EX-SPTCO MANAGERS UNTIL ***ALL SPTCO MANAGERS WHO WERE AT TUCSON WHEN THE MERGER WAS ANNOUNCED ARE GONE!***

MSSERS. JOHN E. GROTHER, DAVID L. HAMPTON, PAUL A. LOBELLO, RAY SZAREK AND ROBERT STREFELDER WERE EITHER "ASKED TO" OR DID RESIGN AS MANAGERS AND EX-ROCK ISLAND SERVICE UNIT MGR. KEN C. PACKARD WAS LATER DEMOTED; BUT, ***WITH NO REDUCTION IN WAGES!*** EX-SPTCO MANAGER DAN S. PAYAWALL TRAGICALLY DIED DURING THE STRESS-FILLED TWELVE (12) HOUR PLUS DAYS OF

THE CONSOLIDATION TRANSACTION EXPERIMENT, WHEN HIS PANCREATIC CANCER CAME OUT OF REMISSION, "AFTER DAILY STRESSFUL CONFRONTATIONS WITH THE UPRR SWITCHING EXPERTS", AND DIED DURING SAID YARD EXPERIMENT.

GROTHER KNOWS WHAT HE WAS TOLD BY MASSEURS. KEN C. PACKARD AND THOMAS F. MURPHY ON JUNE 26, 1997 AS THE REASON FOR GROTHER BEING DEMOTED, WAGES CUT, ETC:

"**WE WANT OUR OWN PEOPLE IN TUCSON",** (PACKARD)

"**UNION PACIFIC WANTS ITS OWN MANAGERS ON THE SUNSET ROUTE"** (MURPHY)

THE ABOVE UPRR MANAGERS DID NOT SAY ONE WORD ABOUT POOR PERSONAL PERFORMANCE IN 1997; NOR, IS THERE ANY DOCUMENTATION KNOWN TO GROTHER, THAT INDICATES A "POOR PERSONAL PERFORMANCE ISSUE". GROTHER WAS NEVER PROVIDED AN ORAL OR WRITTEN WARNING OF PERSONAL PERFORMANCE ISSUES OR PLACED ON A PERSONAL DEVELOPMENT PROGRAM. GROTHER WAS NEVER ASKED TO SIGN ANY DOCUMENT, WHICH STATED THAT GROTHER'S PERFORMANCE WAS THE REASON FOR THE 1997 DEMOTION.

THE POOR PERFORMANCE STATEMENTS HEREIN; REGARDING GROTHER ARE "DEFAMATION", WHICH CAN BE PROVEN TO BE 100% FALSE. IT IS A PRETEXT (A COVER UP), IN PART, FOR PREJUDICE AGAINST FORMER MANAGERS OF SPTCO.

PARTIAL LIST OF REASONS FOR THE DELAY IN THE PRESENTATION OF THIS DISPUTE (INCLUDES THREATS OF RETALIATION, ACTIONS BY UPRR WHICH CREATED A PATTERN OF MISTRUST AND FEAR OF UPRR PUBLIC STATEMENTS, WHICH ALLEGE ONE TYPE OF CORPORATE BEHAVIOR AND ANOTHER TYPE OF BEHAVIOR OCCURS, WHICH WOULD FURTHER INTIMIDATE ANY EMPLOYEE INTO A FEAR TO TAKE ARBITRATION ACTION :

1. THE UPRR CORPORATE CULTURE IN 1997 WAS DYSFUNCTIONAL, ABUSIVE AND "GUNSLINGER" PER MR. R.F. DAVIDSON" ACCORDING TO EXHIBIT 13 FROM THE WALL STREET JOURNAL (WSJ) ARTICLE REFERRING TO 1997-98. THEREFORE, GROTHER SURELY WOULD HAVE BEEN IMMEDIATELY DISMISSED HAD GROTHER DARED TO TRANSMIT ANOTHER, STRONGER APPEAL THAN GROTHER'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS (EXH. 10), OR ATTEMPT ANY TYPE LEGAL ACTION. AS ANYONE EVEN "NEAR WHERE SOMETHING HAPPENED", WAS ELIMINATED.

   MR. R.F. DAVIDSON IS QUOTED IN EXHIBIT 13:

   "SOMETIMES YOU MAKE THE DECISION AND THEN ANALYZE THE PROBLEM"

   (ABOVE AND BELOW ARE HOW GROTHER WAS DEMOTED & FINANCIALLY/EMOTIONALLY DENIGRATED FOR LIFE!)

   UPRR VP JOHN REBENSDORF IS QUOTED (EXH. 13) BY WSJ DESCRIBING 1997-98 AS THE DAYS OF LEADING BY FEAR:

   " WHEN SOMETHING HAPPENED, YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY"

   BUT FOR UPRR'S ABOVE 1997 CORPORATE CULTURE BEING THE CREDO USED TO JUDGE THE FAILED MERGER YARD CONSOLIDATION EXPERIMENT OF PLACING ALL PHOENIX SWITCHING INTO TUCSON, GROTHER WOULD NOT HAVE BECOME A DISPLACED EMPLOYEE.

   WHEN VPO SHOENER'S MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT FAILED BETWEEN LATE MAY AND JUNE 1997, GROTHER WAS TRANSFERRED AND DEMOTED (DISPLACED) JULY 1, 1997 AND FINANCIALLY DENIGRATED FOR LIFE.

2. IN THE SEPTEMBER 1997 RESPONSE TO GROTHER'S APPEAL,

PRESIDENT DAVIS DISPLAYED SUCH A TOTAL LACK OF REGARD FOR THE ISSUES OF FAIRNESS, DISCRIMINATION, PROCESS MANAGEMENT TO DETERMINE THE ROOT CAUSE OF THE TUCSON 1997 JUNE SERVICE FAILURE AND THE FINANCIAL DENIGRATION OF GROTHER, THAT ANY FURTHER APPEAL TO FAIRNESS IN 1997 WAS TOO HIGH OF AN "INDIVIDUAL RISK".

3. IN 1997, THE UPRR VISION AND VALUES DESKTOP PLACARD WAS DISPLAYED PROMINENTLY ON GROTHER'S DESK STATING ALLEGED PROPER BEHAVIOR FOR UPRR (EXH. 2): (BELOW ARE FEW 1997 UPRR PUBLICLY PUBLISHED VALUES)

   " TREAT OTHERS LIKE YOU WANT TO BE TREATED",

   " TRY NEW IDEAS...ENCOURAGE CHANGE"

   " TRUST IS ESSENTIAL"

   IN THE MEANTIME, GROTHER WAS BEING DEMOTED 21%, OR $1,272 / MONTH AND BEING TRANSFERRED & DENIGRATED. SHOENER HAD THE ABOVE "NEW IDEA" AND GROTHER WAS FINANCIALLY AND EMOTIONALLY DENIGRATED FOR LIFE

THE DIFFERENCE BETWEEN UPRR REALITY AND WHAT UPRR PUBLICLY STATED AS ITS 1997 VISIONS AND VALUES IS A STARK AND DEVASTATING CONTRAST; ESPECIALLY, FOR EX-SPTCO MANAGERS! TO ILLUSTRATE FURTHER THE UNDERLYING "TRUST DISCONNECTS IN 1997 AND THEREAFTER", SEE MOST OF THE PARAGRAPHS BELOW.

4. IN APRIL-MAY 1997 WHEN GROTHER, IN WRITING, ADVISED SENIOR MANAGEMENT THAT THE MERGER CONSOLIDATION EXPERIMENT FAILURE WAS CERTAIN, BASED ON THE LACK OF RESOURCES AT TUCSON, GROTHER WAS IGNORED AND THEN PUNISHED WITH A TWO SALARY RATE GRADE DEMOTION IN 2 MONTHS, FOR JUST BEING THERE. GOES TO PATTERN OF MISTRUST AND FEAR OF UPRR RETALIATION.

5. GROTHER HAS ORALLY AND IN WRITING REQUESTED PERFORMANCE DEVELOPMENT REVIEWS (PDR'S) FROM SUPERVISORS DATING BACK TO 1997. AT THIS WRITING, ONLY YEAR 2000 HAS BEEN RECEIVED (SEE EX'S 13A-C). GROTHER ADVISED IN APRIL 2003 THAT 2001 PDR HAS BEEN "LOST".

MORE IMPORTANTLY, GROTHER NEVER RECEIVED ANY ORAL OR WRITTEN WARNING (PROGRESSIVE OR OTHERWISE) OF PERSONAL POOR PERFORMANCE AT TUCSON IN 1997. THERE WAS NO UPRR DEVELOPMENT ACTION PLAN. NO DISCUSSIONS OF POOR PERFORMANCE. GROTHER WAS NEVER ASKED TO SIGN ANY DOCUMENT, WHICH STATED THAT GROTHER HAD BEEN A POOR PERFORMER. NO PROGRESSIVE DISCIPLINE.

THERE WAS ONLY A FOUR (4) WORKDAY NOTICE TO TAKE THE $1,272 CUT IN WAGES IN HOUSTON OR "HIT THE STREET" ON JUNE 26, 1997.

6. UPRR DEMOTION POLICY IN 1997 STATED THAT:

"IN *MOST CASES*, THE EMPLOYEE'S PRESENT SALARY LEVEL IS RETAINED" (SEE EXH. 14).

IN CONTRAST TO THE ABOVE PUBLISHED POLICY, GROTHER'S SALARY WAS DRASTICALLY REDUCED; WHICH CORROBORATES THAT HE EXPERIENCED PREJUDICE AS AN EX-SPTCO MANAGER, FOR A MERGER EXPERIMENT FAILURE.

7. NEW HOUSTON SUPERVISOR, MR. DON F. FRYAR, STATED ON SATURDAY, AUGUST 2, 1997; IN PART:

" YOU CAN NOT WORK AROUND HERE DURING ANY TYPE OF LAWSUIT, AS THEY (UPRR) WOULD MAKE LIFE UNBEARABLE FOR YOU" (NO WITNESSES OF COURSE; BUT, INTIMIDATING, HARASSING AND A THREAT OF SEVERE RETALIATION.)

FRYAR RETIRED FEBRUARY 1, 2003; THEREFORE FRYAR'S ORDERS TO NOT PUSH BACK AGAINST UNFAIR TREATMENT, HOPEFULLY; NO LONGER HAVE ANY STANDING.

THIS WAS GROTHER'S SECOND WARNING OF IMMEDIATE RETALIATION, SHOULD GROTHER COMPLAIN OR SEEK ARBITRATION. MR. KEN C. PACKARD (PRIOR BOSS), HAD ADVISED GROTHER ON JUNE 26, 1997 (DAY OF DEMOTION NOTIFICATION) THAT:

"YOU KNOW, THEY CAN FURTHER DEMOTE YOU. YOU ARE NOT GETTING ANY YOUNGER". "YOU BETTER TAKE DEMOTION AND BE HAPPY"

8. GROTHER FOUND OUT ONLY AFTER THEY TOOK BUYOUTS OR RETIRED, THAT THE FOLLOWING TWO EX-SPTCO MANAGERS HAD BEEN DEMOTED FROM THE OPERATING DEPARTMENT (WHERE THEY MANAGED TRAIN OPERATIONS LIKE GROTHER), WERE TRANSFERRED TO INTERMODAL ON THE SAME JOB AND IN THE SAME PLACE AS GROTHER JUST BEFORE GROTHER AND YET THEIR WAGES WERE NOT REDUCED, OR THEIR SUBSEQUENT PENSIONS AFFECTED:

   MASSEURS HARRY L. STARK AND JOE D. CROW

GROTHER HAD BEEN TREATED DIFFERENTLY AS THE ABOVE SIMILARLY SITUATED PERSONS AT UPRR IN 1997. ONE REASON FOR BEING TREATED DIFFERENTLY WAS THAT THOSE UPRR MANAGERS IN DIRECT CHARGE OF THE 1997 TUCSON DEMOTION DECISION OF GROTHER, MASSEURS KEN C. PACKARD AND THOMAS F. MURPHY MADE IT CLEAR (SEE MIDDLE OF PAGE 15 ABOVE), THAT EX-SPTCO MANAGERS WERE NOT WELCOME IN THE MERGED UP-SPTCO COMPANY.

IN ADDITION, PRIOR TO THE MERGER MANAGERS OF UPRR WERE ALSO TREATED CONSIDERABLY DIFFERENT REGARDING THE EXTREMELY ADVERSE SERVICE FAILURES IN 1997. SHOWN

ON EXHIBIT 15 ARE THOSE PRIOR-TO-THE- MERGER UPRR MANAGERS WHO MADE THE LOCAL HOUSTON NEWSPAPER BECAUSE OF SPECTACULAR SERVICE FAILURES (I.E. MASSEURS CHARLES MALONE, AND GREG "BUBBA" GARRISON).

THESE TWO SAMPLES OF PRIOR TO THE MERGER MANAGERS OF UPRR SUFFERED NO PERSONAL REDUCTION IN PAY DESPITE THOUSANDS OF DELAYED CARS, HUGE LAWSUITS AND LARGE CUSTOMER SETTLEMENTS AGAINST UPRR ACCORDING TO THE HOUSTON NEWSPAPERS (EXH. 16). SURELY, THEY WERE ALSO PERCEIVED TO HAVE "PERFORMANCE PROBLEMS" OR PERFORMANCE WHICH WAS THAT WHICH WAS NOT WANTED; YET, THEIR WAGES AND PENSION WERE NOT DENIGRATED FOR LIFE-**WHY NOT? IN COMPARISON, GROTHER'S 1997 PERFORMANCE RESULTED IN NO LAWSUITS, CUSTOMER SETTLEMENTS OR STB THREATS TO TAKE TRACKAGE!**

THE SYSTEM-WIDE UP-SP MERGER CUSTOMER DELAY AND SERVICE FAILURE ISSUES ARE WELL DOCUMENTED (EX'S 17-22).

9. TO FURTHER ILLUSTRATE PACKARD AND MURPHY'S POSSIBLE PREJUDICE AGAINST EX-SPTCO MANAGERS, GROTHER JUST FOUND OUT **JULY 31, 2002,** FOR THE FIRST TIME AFTER CONSIDERABLE INQUIRIES AND EFFORT, THAT "SOMEONE" HAD PLACED ON THE SECRET-TO-GROTHER ONLINE PERSONAL RECORD SYSTEM THAT GROTHER HAD BEEN DEMOTED ON JULY 1, 1997 FOR "DISCIPLINARY REASONS" (SEE EXHIBIT 23).

   EXHIBITS 23, 24 AND 26 PROVIDE PART OF THE CORROBORATE FOR DELAY THAT GROTHER INCURRED OR THE NEED TO KEEP REQUESTING INFORMATION OVER SEVERAL MONTHS AND FROM SEVERAL PEOPLE, JUST TO OBTAIN THE NEW, "BACK-STABBED INSIGHT" INTO THE SECRET UPRR ONLINE SYSTEM, WHICH ALSO FURTHER CORROBORATES WHY GROTHER HAS DEVELOPED A REALISTIC FEAR OF TRUSTING SOME IN UPRR MANAGEMENT.

AT FIRST, GROTHER ATTEMPTED WORKING WITH THE LOCAL HR PERSON, LINDA BUTTRILL TO OBTAIN INFORMATION ON THE 1997 DEMOTION POLICY OF UPRR AND WHY GROTHER WAS NON-PROMOTABLE, INCLUDING OBTAINING GROTHER'S PERSONAL RECORD. ALL THESE REQUESTS ENDED IN DEADENDS, UNLESS OTHERS WERE INVOLVED AT A LATER DATE TO PROVIDE THE "REAL INFORMATION AND ANSWERS"

10. TO FURTHER CORROBORATE GROTHER'S CONCERN ABOUT THE "DISINGENUOUS ISSUE OR FEAR OF SOME IN THE UPRR SYSTEM". THE CONSTANT DEADENDS AND PATTERNS OF MISINFORMATION ARE WHY NO ONE IN THEIR RIGHT MIND WOULD REQUEST AN ARBITRATION CASE EARLIER THAN 55:

A. ON JANUARY 3, 2003 THE UPRR OMBUDSMEN, MR. BUTCH ETHINGTON ORALLY ADVISED GROTHER THAT:

"I CAN NOT GET ANYONE TO COME FORWARD AND ADMIT THAT THEY PLACED THE STATEMENT THAT YOU WERE DEMOTED FOR DISCIPLINARY REASONS ON YOUR ONLINE RECORD. IT IS A MYSTERY".

THE ABOVE UPRR DEAD-END, THAT NO ONE CAN FIND THE PERPETRATOR WHO RUINED ONE'S CAREER, IS THE RESPONSE GIVEN TO GROTHER WHEN GROTHER WROTE TO THE UPRR OMBUDSMEN SEEKING **FAIR TREATMENT,** WHICH IS PUBLICLY STATED ON THE UPRR WEBSITE TO BE:

" **A FUNDAMENTAL RIGHT OF ALL UPRR EMPLOYEES**".

THE ABOVE UPRR FEEDBACK CONTINUES THE PATTERN OF STONE-WALLING AND FEAR INSTILLATION BECAUSE:

- IN ALL UPRR DATA SYSTEM KNOWN TO GROTHER, THE UPRR COMPUTER EXPERTS HAVE DEVELOPED A MEANS TO BACK TRACK ELECTRONICALLY AND DETERMINE WHO MADE THE COMPUTER ENTRY; YET, UPRR NOW STATES

THEY CAN NOT DETERMINE THE PERSON WHO ENTERED THAT CAREER KILLING ENTRY ON THE ONLINE PR SYSTEM

- THE OMBUDSMEN ALSO STATED THAT PAGE 2 OF THE FORM 15121 USED TO DEMOTE GROTHER IN 1997 **HAS BEEN SHREDDED** AND CAN NOT BE RETRIEVED IN ANY WAY AS ONLY PAGE 1 HAS BEEN INPUT INTO THE SUCCEEDING SYSTEM. PAGE 2 OF THE FORM 15121, PER EXHIBIT 14, MAY HAVE ALLEGEDLY CONTAINED THE MANDATORY JUSTIFICATION, WHICH IS REQUIRED TO WARRANT SUCH A HUGE DOWNWARD SALARY ADJUSTMENT. FOR ALL GROTHER CAN FIND OUT, PAGE 2 MAY HAVE BEEN BLANK AND NO WAGE REDUCTION JUSTIFICATION WAS STATED! EVERYONE WAS JUST SIMPLY "IN A HURRY IN 1997" AND GROTHER'S DEMOTION WAS RUBBER-STAMPED THRU!

- THE POSITION OF OMBUDSMEN HAS THE SELF-STATED PURPOSE OF "... MAKING SURE THE COMPANY'S CULTURE AND ORGANIZATION ARE DOING THE RIGHT THING FOR THE EMPLOYEES" (EXH. 25). GROTHER IS OF THE OPINE THAT, TO DATE, ALTHOUGH THE OMBUDSMEN HAS APPARENTLY MADE A DECISION, THE FACTS OF FAIR TREATMENT ABOUT SHOENER'S DECISION HEREIN HAVE BEEN IGNORED, AS THEY SPEAK FOR THEMSELVES.

  OF COURSE, UPRR MAY BE IN A SHORT TERM DOWNWARD FINANCIAL CYCLE BECAUSE OF THE WAR AND BUSINESS CYCLE; BUT THAT IS NO REASON TO THROW THE "FUNDAMENTAL RIGHT TO FAIR TREATMENT FOR ***ALL EMPLOYEES"***, OUT THE WINDOW.

B. IN 2001, GROTHER REQUESTED A COPY OF HIS PERSONAL RECORD (PR). AFTER EXPERIENCING SOME POSSIBLE MISINFORMATION FROM HR REPRESENTATIVE LINDA BUTTRILL THAT THE ONLY WAY TO LOOK AT YOUR PR WAS IN THE OFFICE, IN FRONT OF A SUPERVISOR (EXH. 26A), GROTHER FINALLY RECEIVED COPIES OF TWO SETS, WHICH

HAD ALL THE INFORMATION, INCLUDING RECORDS OF PROCESS TRAINING WHILE WITH SPTCO (EX'S 26B &26C).

IN WHAT APPEARS TO BE RETALIATION FOR JUST REQUESTING GROTHER'S PERSONAL RECORDS IN DECEMBER 2001 (OR AN INCREDULOUS COINCIDENCE), GROTHER WAS ORDERED TO SUBMIT TO TWO ALLEGED FRA RANDOM DRUG AND ALCOHOL TESTS ALMOST BACK-TO-BACK! AFTER 33 YEARS WITHOUT A FRA RANDOM TEST, GROTHER WAS ORDERED TO SUBMIT ON SATURDAY A.M. FEBRUARY 2, 2002. THEN, BECAUSE HE HAD A SCHEDULED VACATION IN APRIL, THE NEXT "RANDOM FRA TEST" GOT DELAYED UNTIL MAY 2, 2002 (EX'S 27A-27B). BOTH TESTS WERE NEGATIVE; BUT, THE STATISTICAL RARENESS OF TWO FRA RANDOM TESTS, NEARLY BACK-TO-BACK APPEARS DESIGNED TO INSTILL FEAR AND "MORE APPRECIATION FOR RETALIATION".

C. IN 2002, GROTHER FINALLY IS ABLE TO OBTAIN A COPY OF THE 1997 DEMOTION POLICY (EXH. 14) FROM THE COMPENSATION DEPARTMENT, AFTER BEING ADVISED BY THE HR REPRESENTATIVE (LINDA BUTTRILL-EXH. 24), THAT SHE BASICALLY COULD NOT ASSIST GROTHER WITH THIS.

GROTHER WAS ALSO ORALLY ADVISED BY LOCAL HR REPRESENTATIVE, LINDA BUTTRILL, "WHY DO YOU WANT TO KNOW WHAT UPRR'S 1997 DEMOTION POLICY WAS, **YOU CAN NOT DO A DARN THING ABOUT WHAT HAPPENED TO YOU!" ALSO, AND IN WRITING "...I DOUBT THAT A REBUTTAL WOULD BE OF MUCH USE AT THIS TIME" (EXH. 26A).**

AS GROTHER BEGAN TO ASK MORE QUESTIONS OF MS. LISA BREWSTER (THE COMPENSATION DEPARTMENT) REGARDING WHO HAD THE ABILITY TO ENTER AND OBTAIN DATA REGARDING THE SECRET-TO-GROTHER ONLINE SYSTEM, BREWSTER'S FINAL E-MAIL (UPRR LOTUS NOTE) USED THE "UPRR SECRECY ICON". THE SENDER MUST SPECIFICALLY SELECT THIS SECRECY ICON FOR USE. IT ALLOWS THE SENDER TO TRANSMIT AN E-MAIL ***WHICH CAN NOT BE***

COPIED OR FORWARDED TO ANOTHER PARTY.

EX'S 29A-29C INDICATE GROTHER'S EFFORTS TO PRESENT BREWSTER'S RESPONSE "IN RED" SO ALL CAN SEE THE VAGUE AND VEILED RESPONSE, FOR A REVIEW.

WHAT WAS BREWSTER TRYING TO HIDE?

IT IS GROTHER'S OPINE THAT BREWSTER DID NOT WANT IT KNOWN TO "OTHERS" WHO HAD E-MAIL, THAT A SECRET-TO-UPRR- EMPLOYEE SYSTEM EXISTED, WHICH CAN BE USED TO DESTROY ONE'S CAREER (GROTHER) WITH FALSE DATA ENTERED (DEMOTED FOR DISCIPLINARY REASONS), THAT WAS AVAILABLE TO DECISION MAKERS, WHO CAN MAKE PROMOTION DECISIONS FROM ONLINE SYSTEM.

IN A COMPANY THAT PUBLICLY STATES THAT FAIR TREATMENT IS A "FUNDAMENTAL RIGHT", THE ABOVE EGREGIOUS LACK OF BUSINESS ETHICS CONCERNING THE ENTRY OF FALSE DATA AND APPEARING TO HIDE THE FACTS, UNDERSCORES ANOTHER REASON **INDIVIDUALS FEAR TO FILE A NEW YORK DOCK ARBITRATION DISPUTE.**

D. BREWSTER ALSO INDICATED THAT I SHOULD SEEK A DETAILED EXPLANATION FROM MR. KEN C. PACKARD, THE TUCSON SUPERVISOR OF GROTHER, REGARDING WHY THE SALARY DECREASE TOOK PLACE. BREWSTER'S EXH. 48 STATED HER INABILITY TO GO ANY FURTHER. BREWSTER'S ADVICE WAS A TYPICAL CATCH-22 RESPONSE, GIVEN THE FACT THAT GROTHER HAD ATTEMPTED TO GET A RESPONSE FROM PACKARD SIX TIMES, INCLUDING THREE UPRR COMPANY E-MAILS, TWO AOL E-MAILS AND EXH. 49 CERTIFIED LETTER TO PACKARD'S BUSINESS ADDRESS. PACKARD DID NOT HAVE THE "RESPECT FOR EMPLOYEES" TO ANSWER ANY OF THE ABOVE INQUIRIES.

WHAT IS PACKARD HIDING, THAT HE WILL NOT RESPOND, TO THE PERSON PACKARD FINANCIALLY DESTROYED?

E. GROTHER AND ALL OTHER SERVICE UNIT PHONES (TO OTHER WITNESSES) RECEIVED AN ALL POINTS VOICE MAIL MESSAGE MONDAY, JUNE 16, 1997 FROM PACKARD WHICH GROTHER TAPED AND FORWARDED IN GROTHER'S JULY 15, 1997 APPEAL LETTER TO PRESIDENT DAVIS WHICH STATED:

" ... THAT CONSIDERING THE RESOURCES THAT WE HAD AVAILABLE, THE ENTIRE SERVICE UNIT WAS DOING AN OUTSTANDING JOB..."

GROTHER WAS DEMOTED LESS THAN TWO WEEKS AFTER THE ABOVE SUPPORTING REMARKS – WHAT TYPE OF DISINGENUOUS BEHAVIOR DOES THIS REFLECT?

F. CONCERNING THE ALLEGED SHREDDING OF THE JUSTIFICATION USED TO DEMOTE GROTHER 2 SRG'S, AND THE UNKNOWN DATA ENTRY PERSON, WHO PLACED "DEMOTED FOR DISCIPLINARY REASONS" ON THE SECRET-TO-GROTHER ONLINE SYSTEM USED TO SELECT PERSONS FOR PROMOTION, BOTH ARE EXAMPLES OF A "CALLOUS DISREGARD" FOR THE PERSONAL RECORDS OF EMPLOYEES WHICH CREATES MISTRUST AND FEAR OF RETALIATION. EXH. 52 INDICATES A LETTER FROM BLE REPRESENTATIVE SVOB TO SUPERINTENDENT ROYCE HARDIN AT TUCSON WHICH COMPLAINS OF UPRR DISCARDING SENSITIVE PR DATA IN THE TRASH DUMPSTER, WHERE UNAUTHORIZED PERSONS COULD OBTAIN DISCIPLINE AND INTIMATE DETAILS OF INVESTIGATIONS (INCLUDING DRUG AND ALCOHOL VIOLATION). SVOB STATES "...THEY WERE DISPOSED OF IN A MANNER WHICH MADE THEM ACCESSIBLE TO **OTHER EMPLOYEES**, TRESPASSERS, OR THIEVES FOR WHATEVER ILLICIT OR **NEFARIOUS** PURPOSE MIGHT BE DEVISED (E.G. EXTORTION, BLACKMAIL, IDENTITY THEFT).

GROTHER'S CRITICAL DATA WAS ALSO "GARBAGE DUMPED" (SHREDDED) AND "**OTHER EMPLOYEES**" ACTUALLY DID PERFORM A **NEFARIOUS** PURPOSE (SECRET ENTRY ON THE

SECRET ONLINE SYSTEM), WHICH ENDED GROTHER'S ABILITY TO BE PROMOTED. UPRR'S LACK OF FAIRNESS IN THE CONTROL OF CRITICAL RECORDS AND THE ABILITY OF **OTHERS** TO USE THE SECRET-TO-GROTHER ONLINE SYSTEM FOR RETALIATION CORROBORATES ANOTHER REASON TO NOT CONSIDER ARBITRATION, AN EARLIER AGE THAN 55.

11. INITIALLY, ON DECEMBER 28, 2002 THE OMBUDSMEN STATED THAT PACKARD HAD STATED 1997 WAS A "VERY CONFUSING TIME" AND PACKARD "COULD NOT REMEMBER WHAT HAPPENED". THEN AFTER A LITTLE "SPINNING TIME BY PACKARD", ON JANUARY 14, 2003, THE OMBUDSMEN ORALLY ADVISED THAT HE WOULD NOT BE ABLE TO FURTHER PROCESS GROTHER'S REQUEST FOR COMPENSATION FAIRNESS; IN PART, BECAUSE HE HAD RECEIVED FEEDBACK FROM PACKARD AND MURPHY, THE PERSON'S WHO SEVERELY DISPLACED GROTHER THAT GROTHER'S 1997 DEMOTION WAS RELATED TO "POOR PERFORMANCE" AS:

"WE LOOKED AT A LOT OF PEOPLE AND GROTHER DID NOT PERFORM AS WELL AS THEM".

FINALLY, ON 3/10/03 OMBUDSMAN ETHINGTON ADVISED IN WRITING THAT GROTHER'S 7/1/97 DEMOTION REASON WAS:

"THE EXPLANATION WAS GIVEN THAT YOUR PERFORMANCE WAS NOT WHAT WAS NEEDED". (EXHIBIT 55)

(SOUNDS LIKE A MERGER RELATED DECISION TO ME AS WITNESSES AND DOCUMENTATION ARE AVAILABLE TO TESTIFY THAT THE YARD CONSOLIDATION EXPERIMENT CAUSED TUCSON TO HAVE A JUNE 1997 SERVICE FAILURE)

HOW IS THE ABOVE UPRR EXPLANATION APPROPRIATE JUSTIFICATION TO TAKE AWAY TWO SRG'S OR $1,272/MO., WHICH GROTHER HAD WORKED 28 YEARS TO OBTAIN?

THE ABOVE IS NOT LOGICAL FOR SEVERAL REASONS; INCLUDING, BUT NOT LIMITED TO:

A. PACKARD HAD SELECTED GROTHER AS THE SENIOR MTO (SRMTO) AT TUCSON EFFECTIVE APRIL 16, 1997 AFTER HAVING THE OPPORTUNITY TO OBSERVE GROTHER'S PERSONAL PERFORMANCE FOR 3.5 MONTHS AND REVIEW GROTHER'S OUTSTANDING RECORD.

   HOW COULD GROTHER'S PERSONAL PERFORMANCE DETERIORATE SO MUCH IN TWO (2) MONTHS; ESPECIALLY, WITH GROTHER'S BACKGROUND AS A SOLID, OUTSTANDING PERFORMER FOR 28 YEARS?

   THE ONLY LOGICAL REASON FOR THE "JUNE SERVICE FAILURE" IS THE SHOENER MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT STARTING MAY 16, 1997 AND PEAKING MID-JUNE (SLIGHTLY OVER ONE MONTH), IN A MERGER EXPERIMENT FAILURE, WHICH WAS NOTHING GROTHER HAD DECIDED.

B. IN GROTHER'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS, GROTHER STATED:
" I HAD NO INDICATION OF PERSONAL UNSATISFACTORY PERFORMANCE BEFOREHAND..."
ABOVE STATEMENT WAS NOT DISPUTED BY PRESIDENT DAVIS, AS DAVIS REFERS TO A **JUNE** SERVICE FAILURE. THE STATEMENT BY PACKARD TO THE OMBUDSMEN THAT SAID FAILURE WAS THE RESULT OF POOR PERSONAL PERFORMANCE OF GROTHER IS **DEFAMATION OF CHARACTER, AS IT WAS SIMPLY A MERGER YARD CONSOLIDATION EXPERIMENT THAT FAILED DUE TO LACK OF CAPACITY/CURFEWS AND NOT DUE TO ANY DECISION OR FAULT OF GROTHER.**

C. UPRR HAS BEEN REQUESTED, AS PART OF GROTHER'S FAIRNESS LETTER REQUEST FOLLOW-ON, TO VERIFY THE FOLLOWING ISSUES, WHICH WILL CONCLUSIVELY

CORROBORATE THAT, THE "PERSONAL PERFORMANCE" OF GROTHER WAS NOT THE ACTUAL REASON FOR GROTHER'S 1997 DEMOTION. UPRR CAN AND SHOULD PROVIDE THIS **FAIRNESS** DATA. AS OF THIS WRITING, UPRR HAS NOT PRODUCED THE FOLLOWING EXH. 53 VERIFICATIONS REQUESTED BY GROTHER, WHICH WOULD CLEARLY DEMONSTRATE THAT TUCSON TERMINAL WAS ORDERED IN 1997 TO PERFORM AN IMPOSSIBLE MERGER RELATED TASK AND FAILED:

- PRODUCE OR REPRODUCE THE 1997 TUCSON YARD CAPACITY MODEL WHICH CONCLUSIVELY STATED THAT ALL EAST AND WEST TRAFFIC TO & FROM PHOENIX AND PICACHO SETOUT TRAFFIC COULD NOT BE SWITCHED AT TUCSON BECAUSE OF EXCESSIVE VOLUME FOR 1997 YARD CONDITIONS (I.E. NO E/E SWITCHING LEAD, BAD TRACKS). (IF UNAVAILABLE, USE 2002 DATA WHICH MUST INCLUDE **ALL THE E/W TRAFFIC, INB/OUTBOUND FOR PHOENIX.**

  SHOULD THE LATEST UPRR CAPACITY STUDY INDICATE THAT IT IS SUDDENLY POSSIBLE TO CONSOLIDATE **THE ENTIRE EAST AND WEST TRAFFIC DESTINED TO & FROM PHOENIX AT TUCSON, WHY NOT DOING IT?**

  THERE ARE GOOD REASONS THAT THIS MERGER RELATED YARD CONSOLIDATION EXPERIMENT WAS NOT DONE BEFORE MID-MAY 1997; NOR, HAS **ALL EAST AND WEST TRAFFIC TO AND FROM PHOENIX BEEN ATTEMPTED AGAIN, WITH SWITCHING CONSOLIDATED AT TUCSON.** THE FACTS AND NEXUS SPEAK FOR THEMSELVES!

- THE ENGINEERING DEPARTMENT SHOULD BE ASKED TO CONFIRM THAT TUCSON HAD M OF W CURFEWS ON BOTH SIDES OF TUCSON DURING THE PERIOD MAY 16 – JUNE 26, 1997, WHICH WOULD NOT ALLOW TRAINS TO ARRIVE OR DEPART TUCSON BETWEEN THE HOURS OF 0700-1900 M-F.

- **ALL THE MANAGERS AND UNION OFFICIALS WHO**

WERE AT TUCSON DURING SHOENER'S EXPERIMENT SHOULD BE INTERVIEWED TO DETERMINE IF IT WAS GROTHER'S "POOR PERSONAL PERFORMANCE" OR THE EFFECT OF THE PHOENIX MERGER EXPERIMENT. THESE PERSONS WOULD INCLUDE MASSEURS BOB STREFELDER, RAY SZAREK, DAVID HAMPTON, TOM F. MOORE (UTU), KEN KROEGER (BLE), H. L. MCDOWELL, AND ANY MEMBER OF THE 1997 SAFETY COMMITTEE.

- THE UPRR MANAGERS WHO DEMOTED GROTHER, MASSEURS KEN C. PACKARD AND THOMAS F. MURPHY ARE STILL EMPLOYED BY UPRR. IT WOULD APPEAR HIGHLY APPROPRIATE THAT THESE TWO MANAGERS SHOULD BE ASKED TO "RECREATE THE DETAILED PERSONAL PERFORMANCE FAILURE ISSUES OF GROTHER".

WHAT DID GROTHER DO THAT WAS SO HEINOUS TO DESERVE SUCH A WHOOPING $1,272/MO WAGE CUT?

- WHAT WERE GROTHER'S HEINOUS POOR PERSONAL PERFORMANCE FAILURES THAT RESULTED IN GROTHER BEING CUT TWO SALARY RATE GRADES OR ONE BAND IN CURRENT UPRR SALARY PARLANCE? SURELY, ANY PERSONAL PERFORMANCE THAT WAS SO HEINOUS, SHOULD BE EASY TO RECALL IN DETAIL? WHAT IS THE "EVIDENCE", WHICH WAS AND HAS NEVER BEEN SHOWN OR DISCUSSED WITH GROTHER ABOUT HIS "PERSONAL PERFORMANCE"? SUCH A HEINOUS ACT, RESULTING IN A $1,272 MONTH PAY CUT, MUST BE MEMORABLE, AS OTHER "SERVICE FAILURE MANAGERS" WERE NOT CUT IN PAY!

  IN DIRECT CONTRAST, IT APPEARS CRYSTAL CLEAR THAT OTHER UPRR MANAGERS IN THE INFAMOUS 1997 SYSTEM-WIDE SERVICE FAILURES HAD MERGER RELATED SERVICE PROBLEMS; YET, NONE OF THE PRIOR TO THE MERGER UPRR MANAGERS WERE REDUCED IN PAY OR PENSION! UPRR COMPENSATION RECORDS MAINTAINED TO SATISFY THE IRS SHOULD READILY CORROBORATE NO OTHER SERVICE FAILURE WAGE REDUCTIONS.

THEREFORE, THERE HAS BEEN NO DISSIPATION OF EVIDENCE AS ON-THE-GROUND WITNESSES OF GROTHER'S MAY-JUNE 1997 "PERSONAL PERFORMANCE" ARE THERE AND THE WAGE CUT COMPARISONS ARE READILY AVAILABLE. IN ADDITION, STABLE AND PREDICTABLE LABOR MANAGEMENT RELATIONS HAVE NOT BEEN AFFECTED BY DISPLACING AN EX-SPTCO MANAGER.

- CORROBORATION THAT WEST COLTON WAS ALSO CREATING RE-SWITCHING FOR TUCSON DURING MAY-JUNE, 1997 SHOULD ALSO BE CONFIRMED. BASED ON ONE SAMPLE DOCUMENT DATED JUNE 10, 1997 (EXH. 12), THE LAPXM PER THE SERVICE PLAN WAS TO OPERATE DIRECTLY TO PHOENIX. HOWEVER, INVARIABLY TUCSON WOULD RECEIVE A MESSAGE ON NEARLY A DAILY BASIS STATING THAT THE ENTIRE TRAIN HAD TO YARDED AT TUCSON AND RESWITCHED STEM TO STERN AS WEST COLTON HAD MILL OR MINE-RUN THE TRAIN WITH PHOENIX AND TUCSON TRAFFIC MIXED. THIS PROBLEM WAS KNOWABLE ONLY AFTER GOING BY THE SCANNER. **WEST COLTON WAS ALSO DUMPING ON TUCSON!**

  MOREOVER, THE REVERSE WAS ALSO TRUE, AS PHOENIX WAS SENDING ALL WEST TRAFFIC TO TUCSON ALSO INSTEAD OF OPERATING A PXLAM AS AGREED.

- ASK REGIONAL VP STEVE BARKLEY TO CORROBORATE THE SERVICE EFFECTS OF PLACING AN M OF W TWELVE (12') HOUR DAYLIGHT CURFEW ON BOTH SIDES OF A TERMINAL LIKE SAN ANTONIO OR TUCSON. WHAT IS DONE NOW TO PROTECT SUCH TERMINALS?

  ASK BARKLEY IF SUCH A DOUBLE CURFEW WOULD BE A GOOD TIME TO ATTEMPT DOUBLING THE VOLUME OF TRAFFIC COMING INTO SAID TERMINAL.

- ASK THE QUALITY DEPARTMENT IF THEY CAN DETERMINE WHO WAS FLOWN TO TUCSON AROUND THE

- FIRST WEEK OF JUNE 1997 AND LEFT IN DISMAY STATING SOMETHING LIKE - IT IS IMPOSSIBLE TO DO WHAT UPRR HAS ASKED TUCSON TO DO. HOW CAN YOU PLAN WITH 12' CURFEWS ON BOTH SIDES, NEARLY DOUBLE THE VOLUME AND NO INCREASE IN PERSONNEL OR TRACKAGE? HE THOUGHT IT BEST TO LEAVE ASAP BEFORE "SOMEONE" DECIDED TO HOLD HIM ACCOUNTABLE FOR A TRAIN DISPATCHING SCENARIO WHICH CAUSED RANDOM AND BUNCHED ARRIVALS OF BOTH THE EASTBOUND AND WESTBOUND TRAIN FLEETS DURING DARKNESS AS MAIN TRACK OPERATIONS WERE CLOSED BY M OF W CURFEWS ON BOTH SIDES OF TUCSON STARTING MAY 1997.
  (I THINK HIS FIRST NAME WAS DAVE-I THINK. SOME HAVE SUGGESTED IT MAY HAVE BEEN DAVID WHALEN OR DAN WHITE; BUT UPRR EXPENSE ACCOUNTS SHOULD SELECT.

10. BASED ON HUNDREDS OF DISCUSSIONS BY GROTHER, THE CONCEPT OF A MANAGER BEING REDUCED IN COMPENSATION AS A RESULT OF DEMOTION WAS UNHEARD OF AT UPRR IN 1997. THAT BELIEF WAS SO STRONG; THAT, HR PERSONNEL ISSUED EXH. 30, "SUMMARY OF PLAN CHANGES: EFFECTIVE JANUARY 1, 1998 CONCERNING EX-SPTCO PENSION PLAN RIGHTS WHICH STATED:

"***IN NO CASE*** WILL YOUR BENEFIT UNDER THE **AMENDED** PLAN BE LESS THAN THE PLAN BENEFIT YOU EARNED THROUGH DECEMBER 31, 1998"

THE ABOVE DOES NOT APPEAR TO BE TRUE IN GROTHER'S CASE, AS GROTHER'S HIGHER PAY BETWEEN 1995-1997 WILL NOT BE ALLOWED IN THE CALCULATION OF HIS UPRR PENSION. THE GROTHER'S WILL BE FINANCIALLY HARMED FOREVER! GROTHER WAS MAKING $6,200 MONTH IN SEPTEMBER 1995 AND HIS WAGES **MAY** NOT RETURN TO THAT LEVEL UNTIL 2005, OR LATER. THAT IS AN ESTIMATED **EIGHT YEAR PUNISHMENT** JUST TO EARN THE SAME AMOUNT AND A LIFETIME OF PENSION / RAILROAD RETIREMENT LOSSES, "FOR JUST BEING IN TUCSON", WHEN SOMEONE ELSE MADE AN INITIAL MERGER

RELATED DECISION WITHOUT USING THE "QUALITY PROCESS" AND GROTHER WAS SEVERELY SCAPEGOATED?

12. PARAGRAPH 9 ABOVE CONCERNS AN ENTRY THAT WAS MADE ON THE ONLINE PERSONNEL SYSTEM WHICH WAS SECRET-TO-GROTHER; YET, KNOWN AND USED BY MANAGERS OF UPRR WHO MADE DECISIONS ON GROTHER'S ABILITY TO BE CONSIDERED FOR PROMOTION 1997-2003

THIS ONLINE ENTRY WAS PARTIALLY ACCOUNTABLE FOR GROTHER NOT BEING PROMOTED OR EVEN SELECTED FOR A LATERAL TRANSFER FOR THE LAST 5.5 YEARS AS THOSE WHO PROMOTE HAD EITHER ACCESS TO THIS SECRET ONLINE SYSTEM FROM THEIR OWN AUTHORITY OR THROUGH HR AND OTHER UPRR REPRESENTATIVES. THIS ONLINE SYSTEM HAS BEEN USED BEHIND GROTHER'S BACK TO DESTROY GROTHER'S CAREER AND NOW THE OMBUDSMEN SIMPLY STATES "NO ONE WANTS TO COME FORWARD FOR ENTERING THIS DEMOTED FOR DISCIPLINARY REASONS ON YOUR ONLINE PERSONAL RECORD".

AS CORROBORATION, EXHIBIT 31 INDICATES A PARTIAL LIST OF UPRR POSITIONS APPLIED FOR AND THE UPRR LACK OF RESPONSE OR RETALIATION REGARDING MY RESUME. IN SUMMARY, GROTHER APPLIED FOR SIX POSITIONS BACK TO ARIZONA IN 1999-2000 AND GROTHER ONLY RECEIVED ONE RESPONSE WHICH BASICALLY STATED TO GROTHER THAT BASED ON ALL APPLICANTS, YOUR EXPERIENCE, EDUCATION, TRAINING, ARE NOT ACCEPTABLE. THIS COMPUTER GENERATED RESPONSE WAS RECEIVED **REGARDLESS OF THE FACT THAT GROTHER HAD PERFORMED 22 MONTHS AT THE SAME LOCATION (TUCSON) IN THE # 1 POSITION AT TUCSON ITSELF OR TWO SALARY RATE GRADES ABOVE THE POSITION WHICH HAD GROTHER APPLIED FOR (EX'S. 32A-32B). EXHIBITS 33A – 33B IS ANOTHER POSITION THAT GROTHER WAS NOT EVEN SELECTED TO BE INTERVIEWED; DESPITE, GROTHER'S 22 MONTHS, ON THAT EXACT JOB AS INCUMBENT.**

WHY DID UPRR'S ROYCE HARDIN'S COMPUTER GENERATED, "TRY AGAIN LATER RESPONSE" IMPLY THAT GROTHER WAS NOT QUALIFIED FOR A POSITION THAT HE HAD BEEN THE SUPERVISOR OF FOR 22 MONTHS? (GOES TO PATTERNS OF MISTRUST AND RETALIATION).

13. IN 1997, THE UPRR MANAGERS WHO ARBITRARILY DEMOTED GROTHER KNEW THAT GROTHER HAD A VERY SICK WIFE WITH SYSTEMIC LUPUS AND **GROTHER COULD NOT RISK THE LOSS OF MEDICAL INSURANCE FOR HIS WIFE, AS THAT WOULD CERTAINLY RESULT IN HER DEATH!**

A. THERE WAS A CRITICAL QUESTION IF INSURANCE WOULD BE MADE AVAILABLE UNDER COBRA IN 1997. TO ILLUSTRATE ANOTHER CORROBORATION OF "CREATING FEAR OF RETALIATION". IN FRANCISCONI V. UNION PACIFIC RAILROAD, CASE NO. 20000 408-CA, VPO SHOENER APPARENTLY DENIED FRANCISCONI'S SICK WIFE COBRA COVERAGE IN 1997 (EXH. 35). SUCH A **DENIAL OF COBRA** WOULD HAVE BEEN VERY DESTRUCTIVE TO GROTHER'S WIFE, IF NOT LIFE THREATENING. THEREFORE, THE RISKS WERE TOO HIGH WITH THAT TYPE OF 1997 CORPORATE CULTURE RETALIATION "ALLOWED" AND "ACCEPTED".

IF AN INDIVIDUAL HAD TO MAKE MEDICAL INSURANCE PAYMENTS, EVEN IN 1997, THE COST WOULD HAVE BEEN STAGGERING. AARP SOURCES INDICATE THE "FAMILY MONTHLY PREMIUM" MAY HAVE BEEN OVER $600 A MONTH AND POSSIBLY MORE FOR A SEVERE PRE-EXISTING CONDITION, ASSUMING IT WOULD BE POSSIBLE TO EVEN OBTAIN INSURANCE FOR ONE'S PRE-EXISTING CONDITIONS. EXHIBITS 36B-36E ARE A FEW EXAMPLES OF HOW HARD IT IS FOR MRS. GROTHER TO OBTAIN ANY TYPE OF INSURANCE, INCLUDING THE NEW LONG TERM CARE UPRR HAS RECENTLY OFFERED THOROUGH ANOTHER COMPANY (CMA).

B. IT IS NOTEWORTHY THAT COBRA APPEARS TO ONLY PROVIDE COVERAGE FOR EIGHTEEN (18) MONTHS. IF

DISMISSED IN 1997 FOR FILING AN ARBITRATION, LAWSUIT OR SIMPLY REQUESTING ANOTHER APPEAL, THAT WOULD MEAN THAT WHEN THE COBRA COVERAGE RAN OUT, GROTHER WOULD HAVE BEEN 52 YEARS OLD AT THAT TIME AND **WITHOUT** MEDICAL INSURANCE FOR HIS WIFE - AN ILL LUPUS PATIENT, UNLESS FOUND EMPLOYMENT ELSEWHERE.

ALL READERS - CONSIDER THIS PLEASE:
ALL OF US ARE ONLY ONE JOB AWAY FROM A HEALTH INSURANCE DISASTER.

AN ESTIMATED INSURANCE BILL OF $600 PLUS PER MONTH WOULD BE A HEFTY BILL FOR GROTHER; ESPECIALLY, IF TERMINATED IN 1997 FOR ANY NUMBER OF POSSIBLE "SPIN DOCTOR ACCUSATIONS". IMAGINE LIVING ON GROTHER'S UPRR PENSION, ESTIMATED AT LESS THAN $400 PER MONTH IN 1997, AS GROTHER WAS, AND IS "TOO YOUNG" FOR RAILROAD RETIREMENT BENEFITS. THAT WOULD HAVE BEEN GROTHER'S "FAIRNESS REWARD" FOR 28 YEARS OF DEDICATED AND LOYAL RAILROAD SERVICE TO SPTCO AND TEN MONTHS WITH UPRR.

WOULD ANYONE IN THEIR RIGHT MIND DARE TO FILE FOR AN UNCERTAIN ARBITRATION PROCESS, UNDER THE ABOVE FINANCIAL CONDITIONS?

IT IS GROTHER'S UNDERSTANDING THAT NOW THAT GROTHER HAS REACHED FIFTY-FIVE (55) THAT GROTHER IS CATEGORIZED AS AN OFFICIAL "RETIREE" BY THE UPRR PENSION PROGRAM (I.E. ELIGIBLE; BUT NOT REQUIRED, TO FILE FOR GROTHER'S UPRR PENSION). AS A "RETIREE", GROTHER IS NOW ALLEGEDLY ELIGIBLE TO OBTAIN MEDICAL INSURANCE FROM THE UPRR, ASSUMING THAT GROTHER FILED FOR HIS SEVERELY AGE AND DEMOTION REDUCED UPRR PENSION AND PAID THE COST OF SUCH MEDICAL INSURANCE COVERAGE. WITHOUT SAID MED. INSURANCE, GROTHER HAS BEEN PARALYZED WITH NO FUNDS.

IN SUMMARY, BEFORE REACHING AGE 55, GROTHER WAS NOT ELIGIBLE FOR THIS SUBSIDIZED UPRR MEDICAL

INSURANCE COVERAGE AND COULD NOT RISK SEEKING RECOVERY OF GROTHER'S COMPENSATION AND FRINGE BENEFITS TAKEN AWAY AS A DISPLACED EMPLOYEE. EVEN AT AGE 55, ONE GIVES UP A WHOOPING 50% OF ONE'S UPRR RETIREMENT, IF THEY START RETIREMENT AT AGE 55!

MOREOVER, IT TOOK GROTHER SEVERAL YEARS TO OBTAIN EVIDENCE OF WRONGFUL UPRR BUSINESS ETHICS, UNFAIRNESS, INTIMIDATION AND RETALIATION BY CERTAIN UPRR MANAGERS, INCLUDING AN APPEAL "TO FAIR TREATMENT", WHICH IS ALLEGED AS THE FUNDAMENTAL RIGHT OF *ALL UPRR* EMPLOYEES. ALL THE ABOVE EFFORTS HAVE LED TO NO APPROPRIATE RESPONSE FROM UPRR, CONCERNING COMPENSATION FOR BEING A DISPLACED EMPLOYEE. LAST UPRR ANSWER WAS 3/10/03 ON FAIRNESS!

MUCH OF THE DELAY PRESENTING THIS DISPUTE COULD HAVE BEEN REDUCED. IF SELECT UPRR REPRESENTATIVES HAD BEEN FORTHCOMING AND LESS RETALIATORY IN THEIR ACTIONS AND RESPONSES AS REQUIRED BY UPRR BUSINESS ETHICS.

14. IN 2001, UPRR OFFERED A VOLUNTARY EARLY RETIREMENT PROGRAM TO UPRR NON-AGREEMENT (MANAGER) PERSONNEL, AT WHICH TIME GROTHER WAS 54 YEARS OLD. ONE OF THE WARNINGS IN THE UPRR'S VERP VHS TAPE WAS THAT IF YOU ARE NOT 55 YEARS OLD, DO NOT ACCEPT THIS OFFER, UNLESS INDEPENDENTLY WEALTHY, OR COULD ACCEPT A SUBSTANTIAL DROP IN YOUR PENSION. THIS IS CORROBORATION THAT AGE 55 IS THE POINT WHERE UPRR PENSION BENEFITS PROVIDE "BARE BONES BENEFITS".

    SAID 2001 VERP ALSO CLEARLY DISPLAYED JUST HOW BADLY GROTHER'S UPRR PENSION HAD BEEN DAMAGED BY THE 1997 DEMOTION. WHEN COMPARED TO ANOTHER MANAGER WITH COMPARABLE AGE AND USING GROTHER'S OLD 1997 EARNING LEVEL (ESCALATED BY AVERAGE OF .035% PER ANNUM FOR INCREASES), GROTHER'S DISMAL

VERP PACKAGE WAS GREATLY REDUCED IN COMPARISON. THE OMBUDSMEN (271-2113) ADVISED FEBRUARY 2, 2001 THAT THE VERP HAD SUCH A "RETIREMENT REDUCTION", IN GROTHER'S CASE, BECAUSE IT WAS ONLY BASED ON ONE'S LAST THREE YEARS OF PAY (1998-2000) IF YOU WERE A EX-SPTCO OFFICER WHICH ELIMINATED GROTHER'S HIGHER EARNINGS IN 1996-1997. THE VERP ALSO RESULTED IN QUESTIONS WHICH EXPOSED THE FACT THAT THE "PENSION PLAN OF UPRR FOR EX-SPTCO PERSONNEL" DOES NOT ALLOW WAGES BEFORE JANUARY 1, 1998 TO BE INCLUDED IN THE "FAE" PENSION CALCULATIONS OF UPRR, CREATING GROTHER A SUBSTANTIAL PENSION REDUCTION.

GROTHER IS STILL AWAITING A RESPONSE FROM THE PENSION DEPARTMENT TO COMPUTE RETIREMENT DAMAGE. EXHIBIT 46 INDICATES AN AUGUST 25, 2002 REQUEST.

15. TO THE LAYMAN, BINDING ARBITRATION BY THE NATIONAL MEDIATION BOARD APPEARS TO BE EXTREMELY DIFFICULT FOR AN INDIVIDUAL, WHO IS NOT REPRESENTED BY A UNION. IN ADDITION, ARTICLES HAVE BEEN WRITTEN WHICH INDICATE THAT SOME ARBITORS MAY FEEL PRESSURED TO RENDER DECISIONS THAT WILL NOT ALIENATE COMPANIES WHO MAY HIRE THEM AGAIN, AS OPPOSED TO THE SOLE EMPLOYEE WHO HAS NO FUTURE BUSINESS TO OFFER. BELOW ARE SPECIFIC EXAMPLES OF HOW AN INDIVIDUAL WOULD BECOME CONCERNED ABOUT THE POSSIBILITY OF RECOVERY FROM ARBITRATION WITH THE RISKS STATED IN PUBLICLY PUBLISHED DOCUMENTATION. GIVEN ONE'S CAREER HAS ALREADY BEEN ENDED AND CRITICAL MEDICAL INSURANCE FURTHER AT RISK, HOW COULD ONE REASONABLY FILE FOR ARBITRATION BEFORE ALL KNOWN FACTS (AVAILABLE, AS MANY ARE NOT MADE READILY AVAILABLE) FACTS WERE OBTAINED FROM SOME RECALCITRANT PERSONS AND THE INSURANCE ISSUE IS PROTECTED AT AGE 55 ("RETIREE"). BELOW ARE A FEW SAMPLES OF ARTICLES WHICH CREATE EXTREME FEAR IN REQUESTING ARBITRATION AS AN INDIVIDUAL.

A. RAILWAY AGE ARTICLE DATED JULY 18, 1999 ON NEW YORK DOCK/STB AGREEMENT WHICH DISCUSSES "CRAM-DOWN" REGARDING AN ALLEGED BIAS BY "RAIL REGULATORS" (I.E. SURFACE TRANSPORTATION BOARD), WHICH AFFECTED ARBITOR DECISIONS (EXH. 37):

"MYRON (BROTHERHOOD OF M OF W) INSISTS RAIL REGULATORS SO OFTEN OVERTURNED ARBITRATED DECISIONS FAVORABLE TO EMPLOYEES DURING THE 1980'S THAT **ARBITORS BECAME CONDITIONED TO GRANTING RAILROADS UNDUE PREFERENCE."**

B. EXH. 38 INDICATES AN ARTICLE FROM AARP WHICH QUOTES PAUL PALEFSKY, A LAWYER IN SAN FRANCISCO FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION STATING:
" ...ARBITORS MAY FEEL PRESSURED TO RENDER DECISIONS THAT WILL PLEASE (OR AT LEAST WON'T ALIENATE) COMPANIES THAT MAY HIRE THEM AGAIN."

C. SEVERAL ATTORNEYS HAVE STATED THAT AN INDIVIDUAL FILING ARBITRATION IS AT A DISADVANTAGE, AS YOU HAVE "NO REPEAT BUSINESS TO OFFER AN ARBITOR" AND ARBITORS NEED TO MAKE A LIVING TOO. SUCH STATEMENTS DO NOT INSPIRE AN INDIVIDUAL CLAIMANT TO COME FORWARD.

16. GROTHER WAS PERPLEXED BY HIS SEVERE 1997 PAY REDUCTION THAT WAS RELATED TO GROTHER'S SEVERE DEMOTION BECAUSE A PRIOR TO MERGER MGR. WITH UPRR WAS "DEMOTED AND TRANSFERRED FROM OMAHA SAFETY DEPARTMENT" TO TUCSON ON/ABOUT FEBRUARY 15, 1997 (FOUR MONTHS BEFORE GROTHER'S DEMOTION DECISION). HE BRAGGED THAT HE HAD CONNECTIONS AT UPRR HQ. AND HIS HIGHER PAY FROM HIS OMAHA SAFETY JOB WOULD NOT BE REDUCED; DESPITE HIS DEMOTION. HIS NAME WAS THEODORE F. INGRAM AND GROTHER IS SURE THAT HIS PRESENT WAGE HAS CONTINUED TO ESCALATE MUCH HIGHER THAN GROTHER'S, AS GROTHER IS STILL TRYING TO GET BACK TO GROTHER'S 1995 LEVEL OF PAY! WHY WAS

GROTHER TREATED DIFFERENTLY THAN INGRAM, WHO HAD BEEN DEMOTED AND TRANSFERRED? ALL THE ABOVE INCONSISTENT WAGE REDUCTION TREATMENTS CREATE FEAR OF RETALIATION AND MORE DISCRIMINATION.

17. UPRR PROVIDED AN INSERT WITH GROTHER'S DIMINISHED CHECK WHICH WAS RECEIVED MARCH 1, 2001 WHICH ADVISED GROTHER "IF YOU RETIRE AND TAKE A CASH DISTRIBUTION FROM YOUR 401(K) PLAN, YOU'LL PAY INCOME TAX ON THE TAXABLE PORTION OF THE DISTRIBUTION - PLUS A 10% FEDERAL TAX PENALTY, **IF YOU ARE UNDER AGE 55 WHEN YOU SEPARATE FROM THE COMPANY".**

THIS AGAIN GOES TO THE ISSUE OF BEING UNABLE TO TAKE ANY REALISTIC ARBITRATION ACTION BECAUSE ONE WOULD BE WIPED OUT FINANCIALLY, AS A MANAGEMENT INDIVIDUAL, UNTIL AGE 55 IS REACHED.

THIS APPEARS TO ALSO MEAN THAT SHOULD ONE HAVE BEEN TERMINATED (BEFORE AGE 55), AS RETALIATION FOR FILING ARBITRATION OR EVEN A FURTHER APPEAL TO SENIOR MANAGEMENT AND TAKE A CASH DISTRIBUTION FROM ONE'S 401(K) TO PAY FOR MEDICAL INSURANCE AS YOUR "EARLY UPRR PENSION" IS ESTIMATED AT LESS THAN $400 PER MONTH IN 1997, THE RESULT WOULD BE FURTHER FINANCIAL PUNISHMENT IN PERPETUITY. MEDICAL INSURANCE AND LIVING EXPENSE WITHDRAWALS WOULD ELIMINATE ONE'S DEMINIMUS LIFETIME SAVINGS. GROTHER COULD NOT AFFORD TO LOSE A SUBSTANTIAL PORTION OF GROTHER'S SAVINGS PLAN ON "UNNECESSARY TAXATION".

OF COURSE, ONE WOULD TRY TO OBTAIN REPLACEMENT EMPLOYMENT. HOWEVER, THE SPECIALIZED SKILLS OF RAILROADING (ESPECIALLY AS AN OPERATING OFFICER) ARE NOT HIGHLY MARKETABLE. AGE IS ALSO A FACTOR. AGE FIFTY-ONE AND UP IS A "HARD SELL" WITH ONLY MARKET SPECIFIC RAILROAD MANAGEMENT SKILLS.

18. IT IS WELL ESTABLISHED THAT PSYCHOLOGICAL AND PHILOSOPHICAL CLASHES OCCUR AS AN AFTERMATH OF MERGERS. PER MITCHELL LEE MARKS, PHD, "...WORKERS THAT REMAIN WILL BECOME ... SCARED..." (EXH. 47) THUS BEING "SCARED"; ESPECIALLY GIVEN BEING DEMOTED TWO SALARY RATE GRADES WITHIN THREE MONTHS OF THE MERGER TRANSACTION VP'S ARRIVAL (FOR NO FAULT OR DECISION OF YOUR OWN), DOES CREATE FEAR TO FURTHER APPEAL, ARBITRATE OR SEEK OTHER LITIGATION.

19. GIVEN THAT GROTHER IS HARASSED AND THREATENED ALMOST WEEKLY WITH LOSING HIS JOB OF 34 YEARS FOR ANYTHING FROM "FAILURES OF THE UPRR REPORTING SYSTEMS (I.E. SOMEONE ENTERED THE WRONG DEPARTURE DELAY CODE") TO OTHER ISSUES TOTALLY OUT OF GROTHER'S CONTROL, HOW COULD GROTHER DARE TO FILE ARBITRATION BEFORE AT LEAST AGE 55?

20. THE INVOLUNTARY SEVERANCE PROGRAMS AT UPRR FOR NON-AGREEMENT (MANAGERS) HAVE CONTINUED A PATTERN OF BEING CONTINUOUSLY REDUCED SINCE THE MERGER. INITIALLY, THOSE WITH OVER TWENTY YEARS OF SERVICE (LIKE GROTHER) HAD BEEN OFFERED EIGHTEEN (18) MONTHS OF SEVERANCE PAY PER MY RECORDS. ON DECEMBER 28, 2000, GROTHER HAD JUST TURNED 53 YEARS OF AGE AND UPRR ANNOUNCED THAT SEVERANCE PAY WAS REDUCED TO TWELVE (12) MONTHS FOR THOSE OVER TWENTY YEARS OF SERVICE. THEREFORE, SHOULD ONE APPEAL, FILE ARBITRATION OR TAKE ANY OTHER ACTION, ONE COULD READILY BE IDENTIFIED FOR "INVOLUNTARY SEVERANCE", DEPENDING ON "CONTROLLED CONDITIONS". UPRR HAS THE ABILITY TO INITIATE ANOTHER ROUND OF INVOLUNTARY BUYOUTS AT ANY TIME AND THOSE THAT FIGHT BACK WILL GO TO TOP OF "ELIMINATION LIST". WITHOUT AGE 55 MEDICAL INSURANCE, THERE IS NO FINANCIALLY REASONABLE WAY TO ARBITRATE.

TO ILLUSTRATE UPRR'S APPROPRIATE RIGHT AND CONTINUING EFFORTS TO REDUCE MANAGEMENT PERSONNEL, EXH. 51 IS A RECENT OMAHA WORLD-HERALD ARTICLE DATED JANUARY 14, 2003 INDICATING, IN PART:

"...THERE MAY BE MANY INSTANCES WHERE AFFECTED PEOPLE WON'T BE OF RETIREMENT AGE"

"...EMPLOYEES ARE NOT BEING OFFERED EARLY RETIREMENT" "

"...SEVERANCE PACKAGES WERE BASED ON YEARS OF SERVICE BUT DECLINED TO GIVE DETAILS"

"WHEN UPRR CUT JOBS IN 2001, EMPLOYEES WERE OFFERED A SEVERANCE PACKAGE AND A BUYOUT PROGRAM"

GROTHER HAD TO WAIT UNTIL HIS 55TH BIRTHDAY TO EVEN START ASKING FOR HIS PERSONAL RECORD, IN FEAR THAT THIS WOULD RESULT IN RETALIATION, WHICH IT APPARENTLY DID, IN THE FORM OF TWO URINALYSIS TESTS, NEARLY BACK TO BACK. ALSO, AS FURTHER RETALIATION, GROTHER'S SUPERVISOR FRYAR WOULD NOT TRAIN GROTHER ON THE BUDGET DUTIES NEEDED TO BECOME FRYAR'S REPLACEMENT, WHEN FRYAR RETIRED FEBRUARY 2003. THE SEARCH FOR RECORDS, 1997 DEMOTION POLICY, INTERVIEWS OF DEMOTION PAY CUTS, ETC., HAS BEEN VERY FRUSTRATING WITH NUMEROUS DEADENDS AND MISDIRECTION.

21. GROTHER HAD BEEN ADVISED THAT THE NATIONAL RAILROAD ADJUSTMENT BOARD WAS THE VENUE FOR **INDIVIDUAL ARBITRATION**; BUT, THAT WAS INCORRECT FOR EMPLOYEES NOT PROTECTED BY AN AGREEMENT (EXH. 54) RESEARCH CREATED ADDITIONAL DELAY IN THIS SUBMISSION. ALSO, FINDING LEGAL COUNSEL, TAKES TIME.

IN SUMMARY, THE UPRR HAS NOT BEEN ADVERSELY AFFECTED BECAUSE OF ANY DELAY IN SUBMITTING THIS DISPUTE. THE DELAY IN SUBMITTING THIS DISPUTE WAS CAUSED BY

DOCUMENTED FEAR OF RETALIATION, ACTIONS OF PREJUDICE AND DISCRIMINATION ACTUALLY PERPETRATED BY UPRR AGAINST GROTHER AND OTHERS WHO DARED TO LITIGATE (I.E. 1996 FRANSCONI CASE WHERE UPRR DELAYED COBRA HEALTH INSURANCE FOR LITIGANTS WIFE), DELAYS IN GATHERING EVIDENCE DUE TO UPRR REPRESENTATIVES EFFORTS TO CREATE DEAD-ENDS, MISDIRECTION, SHREDDING KEY DOCUMENTS, ALLEGED DISINGENUOUS BEHAVIOR. MOREOVER, THE PERSONS WHO DEMOTED GROTHER ARE STILL EMPLOYED BY UPRR AND SHOULD BE READILY ABLE TO DOCUMENT THE DETAILED "JUSTIFICATION" WHY GROTHER'S "PERSONAL PERFORMANCE" SUDDENLY BECAME "NOT WHAT WAS NEEDED" AFTER:

A) PERSONAL PERFORMANCE BEING OUTSTANDING FOR 28 YRS.
B) TWENTY (20) MONTHS AS THE INCUMBENT ON THE JOB,
C) JUST (2) MONTHS AFTER BEING SELECTED AS UPRR'S SENIOR MANAGER TERMINAL OPERATIONS (SRMTO) AT TUCSON AS THE RESULT OF REVIEWING GROTHER'S RECORD OVER SIX MONTHS AND GROTHER'S PERSONAL PERFORMANCE FROM JAN. THROUGH APRIL 1997 (3.5 MONTHS OF DAILY REVIEWS OR POSSIBLY MORE, DEPENDING ON PACKARD'S ARRIVAL).

WHY WAS GROTHER DEMOTED TWO SALARY RATE GRADES ($1,272 PER MONTH); WHEN, NO OTHER UPRR MANAGER IN 1997 WAS REDUCED IN PAY DURING THE SYSTEM WIDE SERVICE FAILURES?

IN COMPARISON, DESPITE GROTHER'S BELOW FINANCIAL DENIGRATION FOR LIFE AS A DISPLACED EMPLOYEE, GROTHER HAS PERFORMED IN A STABLE AND PREDICTABLE PATTERN SINCE JULY 1, 1997:

- FINANCIALLY (DEMOTED GRADE 19 TO 17, OR BAND C TO B) AND ADVERSELY AFFECTED AS A "DISPLACED EMPLOYEE". GROTHER HAS BEEN DEPRIVED OF OVER $107,000 THOROUGH 6/1/03.

- UPRR AND RAILROAD RETIREMENT HAVE BEEN REDUCED FOR A LIFETIME FOR BOTH GROTHER AND HIS WIFE.

- CONSISTENTLY BEEN REJECTED IN HIS EFFORTS TO SEEK PROMOTION, OR EVEN, A LATERAL TRANSFER! GROTHER HAS DOCUMENTED A FEW OF HIS NUMEROUS APPLICATIONS (EXH. 31) ON CNET AND THE RECENTLY "IMPROVED INTERNAL UPRR CNET SYSTEM", WHICH ALL RESULTED IN ONLY ONE PHONE INTERVIEW.

GROTHER'S TREATMENT BY UPRR COMPARED TO OTHERS WHO WERE IN COMMAND ROLES -"COMPARATIVE JUSTICE":

COMPARING THE "DEMOTION DISCIPLINE" EXECUTED ON GROTHER BY UPRR, FOR JUST BEING IN THE WRONG PLACE WHEN SHOENER MADE A MERGER CONSOLIDATION EXPERIMENT, WITH "DISCIPLINE" ISSUED TO OTHERS IN "COMMAND ROLES". EVEN RECENT MILITARY COMMANDERS WHO WERE "IN COMMAND" WHEN ***LOSS OF LIVES OCCURRED BY ACCIDENTS, HAVE NOT BEEN FINANCIALLY AFFECTED LIKE GROTHER'S PENSIONS. GROTHER WAS NOT INVOLVED IN ANY LOSS LIFE ISSUES, CUSTOMER SETTLEMENTS, LAWSUITS.***

1. EXH. 39 INDICATE THE RESULT OF THE HIGH PROFILE NEWS CASE OF USS GREENEVILLE CMDR. SCOTT WADDLE WHO WAS "IN COMMAND" WHEN HIS SUBMARINE SURFACED AND ***KILLED NINE (9) JAPANESE SAILORS. THE NAVY SAID WADDLE WILL RECEIVE HIS PENSION AND FULL RETIREMENT PAY!***

2. EXH. 40 CONCERNS THE FATE OF COLONEL LARRY D. NEW'S, WHO WAS COMMANDER AT NELLIS AFB 57TH OPERATIONS GROUP WHEN TWELVE (12) ***AIRMEN WERE KILLED.*** HE WAS TEMPORARILY SIDELINED IN A STAFF JOB ACCOUNT MEDIA

SCRUTINY; BUT HE RECEIVED ***NO LOSS OF PAY OR RETIREMENT BENEFITS.*** IN FACT, "GENERAL (SELECT) NEWS" WAS APPROVED AUGUST, 2001 TO BECOME A GENERAL AND HE ASSUMED COMMAND OF THE 325TH FIGHTER WING AT TYNDALL AFB, FL ON JULY 12, 2002, TRAINING ACTIVE DUTY JET PILOTS.

3. EXH. 41, MR. STEVE CLARK, PRIOR ATTORNEY GENERAL OF ARKANSAS AND CANDIDATE FOR GOVERNOR OF ARKANSAS IN 1990 WAS FOUND GUILTY OF USING THE STATE'S CREDIT CARD, A FELONY CONVICTION. IN JUNE 2000, HE WAS GIVEN ***A SECOND CHANCE*** BY THE TEXAS BOARD OF LAW EXAMINERS, WHO ALLOWED HIM TO TAKE THE TEXAS BAR EXAM BECAUSE "***WE BELIEVE IN REHABILITATION IN TEXAS AND YOU LOOK LIKE YOU'VE HAD ENOUGH"***

PARTIAL LIST OF MORE UPRR POLICIES WHICH SUPPORT COMPENSATING GROTHER AS A DISPLACED EMPLOYEE:

1. THE BUSINESS CONDUCT POLICY OF UPRR, AS NOTED ON UP ONLINE JUNE 28, 2002 (AGAIN EXH. 42) STATES, IN PART, "IN THE CONDUCT OF BUSINESS, EACH EMPLOYEE MUST ADHERE TO HIGH ETHICAL STANDARDS. THESE INCLUDE HONESTY (I.E. ***TRUTHFUL DEALING WITH EVERYONE, INCLUDING...FELLOW EMPLOYEES) AND FAIRNESS (I.E. TREATING ANOTHER IN THE SAME MANNER AS YOU WOULD EXPECT TO BE TREATED.)"***

2. GROTHER IS HOPEFUL THAT THE BELOW COMPANY WIDE PUBLISHED STATEMENT BY PRESIDENT AND COO IKE J. EVANS IN THE LOTUS NOTE TO ALL EMPLOYEES DATED FEBRUARY 4, 2002, WILL ALLOW A FAIR AND IMPARTIAL REVIEW OF THIS DISPUTE ISSUE:

" INTERNALLY, ALL OF US MUST HEIGHTEN OUR EFFORTS TO 'WALK THE TALK'. TO ME, ***THIS MEANS MATCHING THE EVERYDAY BEHAVIOR WITH THE VISION AND VALUES OF THE COMPANY. THIS IS A PREREQUISITE TO US ADVANCING INTO THE HIGHEST RANKS OF U.S. BUSINESS."***

FURTHERMORE, PRESIDENT IKE EVAN'S LOTUS NOTE JUNE 3, 2002 CONCERNING UPRR'S REPUTATION STATUS: "WE WANT TO ENHANCE THE REPUTATION OF THE UNION PACIFIC AND THE MEN AND WOMEN, LIKE YOU, WHO WORK HARD EVERY DAY TO MAKE US ONE OF THE BEST COMPANIES IN THE WORLD." GROTHER HAS WORKED HARD FOR 34 YEARS, (ESPECIALLY AS A 12 HOUR PLUS DAY OPERATING OFFICER) "BUILDING AMERICA" tm; BUT, HIS REPUTATION HAS BEEN RUINED BY THE TUCSON DEMOTION DISPLACEMENT. CAN THE REVIEWERS OF THIS DISPUTE AT LEAST RESTORE GROTHER'S COMPENSATION, AS GROTHER'S REPUTATION IS TARNISHED FOREVER?

3. EVEN IN TODAY'S 2003 UPRR CORPORATE CULTURE, IT IS STILL VERY DIFFICULT TO OBTAIN INFORMATION REGARDING WHY ONE HAS BEEN DISPLACED AND PIGEONHOLED. IT IS HOPED THAT THE "2002 UNION PACIFIC VALUES AND LEADERSHIP BEHAVIORS" (EXH 1), THE UPRR BALDRIDGE AWARD COMMITMENT, AND UPRR'S DESIRE TO ENHANCE ITS REPUTATION; ALL REVIEWED IN THEIR TOTALITY, WILL ALLOW UPRR TO FAIRLY ASSESS GROTHER'S LOSS AND PROVIDE REIMBURSEMENT TO "WALK-THE-TALK", AS DESCRIBED IN UPRR'S BUSINESS CONDUCT POLICY OR ETHICS AS SHOWN ON EXH. 42.

4. AS PART OF THE 2002 UPRR "BUILDING AMERICA" tm AD CAMPAIGN, THE GROTHERS RECEIVED A "IBM SIZED CARD" (EXH. 43) WITH GROTHER'S SEVERELY REDUCED PAYCHECK AT THEIR HOME STATING ON ONE SIDE

   "ITS TIME AMERICA HEARD YOUR STORY"

GROTHER WOULD PREFER TO SETTLE THIS MERGER RELATED TRANSACTION EXPERIMENT DEMOTION ISSUE WITHOUT BEING REQUIRED TO DETAIL THE GROTHER'S FINANCIAL AND EMOTIONAL DENIGRATION STORY TO THE NATIONAL MEDIATION BOARD NEUTRAL, AND SHOULD AN APPEAL BE NEEDED, TO THE SURFACE TRANSPORTATION BOARD.

WHOMEVER THE UPRR DECISION MAKERS ARE CONCERNING GROTHER'S ATTACHMENT 2 COMPENSATION DISPUTE CLAIM, PLEASE CONSIDER GROTHER'S FAIRNESS MANTRA:

HOW WOULD YOU WANT TO BE TREATED AS THE RESULT OF JUST BEING IN THE WRONG PLACE, AT THE WRONG TIME, WHEN A 1.5 MONTH MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT WAS ORDERED WITHOUT CAPACITY-RESOURCE PROCESS STUDIES AND M OF W CURFEWS ON EACH SIDE?

"WOULD YOU WANT A 21% OR $1,272 CUT IN WAGES, RETIREMENT AND A RUINED CAREER, FOR SOMEONE ELSE'S VICARIOUS MERGER EXPERIMENT DECISION?"(EXH. 42)?"

GROTHER HAS NOT LET THE ABOVE UNFAIRNESS AND TREATMENT AS A DISPLACED EMPLOYEE DESTROY HIS WILLINGNESS TO BE A "TEAM PLAYER". EXHIBIT 44 INDICATES GROTHER'S CONTINUING ABILITY AND WILLINGNESS TO ASSIST THE UPRR TO OBTAIN CRITICAL LEGISLATION.

MR. R.F. DAVIDSON IS QUOTED IN AN JULY 2, 2002 HOUSTON CHRONICLE ARTICLE DESCRIBING UPRR EXPENDITURES OF UNDER HALF A BILLION TO SETTLE THE 1997-8 MERGER RELATED SYSTEM-WIDE SERVICE FAILURE DEBACLES; INCLUDING CUSTOMER SETTLEMENTS AND LAWSUITS. IT WAS **DESCRIBED AS UPRR'S WORST PUBLIC DRUBBING, AND:**

"...THE PAIN FROM THE MERGER LASTED LONGER THAN ANYONE ANTICIPATED" (EXH. 45)

GROTHER'S FINANCIAL AND EMOTIONAL PAIN AS A DIRECT NEXUS TO A FAILED MERGER EXPERIMENT IS NOT OVER; AND, GROTHER'S PUBLIC AND PRIVATE DRUBBING CONTINUES!

IN SUMMARY, PURSUANT TO THE NEW YORK DOCK PROTECTIVE CONDITIONS, FINANCE DOCKET NO. 28250, APPENDIX III, ARTICLE IV, THIS IS OFFICIAL NOTICE THAT SHOULD THE PARTIES BE UNABLE TO SETTLE THIS DISPUTE

REGARDING GROTHER'S DISPLACED COMPENSATION AND FRINGE BENEFITS WITHIN THIRTY (30) DAYS, OR JUNE 16, 2003, SAID AVERAGE MONTHLY COMPENSATION AND FRINGE BENEFITS DISPUTE WILL BE REFERRED TO ARBITRATION.

ANY QUESTIONS, PLEASE CALL GROTHER AT 281-359-5667, AFTER 1500 CT, AS GROTHER IS STILL WORKING THE NIGHT SHIFT AFTER 34 YEARS OF LOYAL AND DEDICATED SERVICE.

SINCERELY,

JEG

ENCLOSURES:
ATTACHMENT TWO (pgs 1-4)
AND EXHIBITS 1-54

JOHN GROTHER

ATTACHMENT TWO – FINANCIAL LOSSES CREATED AS DIRECT RESULT OF GROTHER DEMOTION JULY 1, 1997 BECAUSE OF MERGER EXPERIMENT TO CONSOLIDATE

AVERAGE MONTHLY COMPENSATION LOSS:

MO. AVERAGE PAY FOR 12 MONTH PERIOD PRIOR 7/1/97 = $6,200

LESS: MO. PAY@ "TAKE IT OR LEAVE IT" HOUSTON JOB = $4,928

MONTHLY GROTHER LOSS IN COMPENSATION = $1,272

PERIOD OF TIME	PER MONTH	TIMES # OF MONTHS	HISTORICAL LOSS
7/1/97 – 6/30/98	$1, 272	12	$ 15, 264
7/1/98 – 6/30/99	1, 272	12	15,264
7/1/99 – 6/30/00	1,272	12	15,264
7/1/99 – 6/30/01	1,272	12	15,264
7/1/00 – 6/30/02	1,272	12	15,264
7/1/02 – 6/30/03	1,272	12	15,264

TOTAL DISPLACED EMPLOYEE BASE WAGE COMPENSATION LOSS THRU 6/30/03 $ 91,584.00

- THE ABOVE DATA ASSUMES NO SALARY INCREARES
- THEREFORE, IF ASSUME A 3.0% ANNUAL SALARY INCREASE
- APPLY SAID SALARY INCREASE TO THE ANNUAL/MONTHLY LOSS TIMES .030.
- (.030 x $15,264) = $458 X 6 YEARS = $ 2,748.00

BASE WAGE LOSS, PLUS EFFECT OF ASSUMED 3.0% ANNUAL SALARY INCREASES $ 94,332.00

(ABOVE SUB-TOTAL REPRESENTS SIX YEARS AS DISPLACED EMPLOYEE AND DOES NOT INCLUDE THE FRINGE BENEFITS NEXT UNDER).

THE ABOVE DOES ATTEMPT TO RECOGNIZE SOME NORMATIVE AMOUNT WHICH REPRESENTS THE GENERAL TYPE OF 3.0% SALARY INCREASES OVER THIS TIME FRAME. HAD I BEEN IN THE TUCSON OR OTHER "OPERATING DEPARTMENT JOB" (OPRNS), IT IS NOT UNCOMMON TO RECEIVE AN ANNUAL SALARY INCREASE OF 5-7% EACH YEAR AND GET A BONUS ON TOP OF THAT, WHICH THEN BECOMES A PART OF ONE'S FINAL RETIREMENT AND PENSION COMPENSATION CALCULATIONS.

I WAS ALSO DENIED THE ABILITY TO INCREASE MY SALARY SUBSTANTIALLY BECAUSE I REACHED THE SALARY CAP FOR MY DEMOTED SRG @ $61,140 WITHIN SIX MONTHS OF BEING ASSIGNED TO INTERMODAL. IN CONTRAST, MY PRIOR POSITION , THEN OCCUPIED BY **TOM S. PARR, WAS GIVEN AN IMMEDIATE INCREASE TO $6,338/MO.** EFFECTIVE 7/1/97. MOREOVER, PARR'S GRADE 19 SRG HAD A CAP OF $78,264; WHICH MEANS, MR. PARR WAS ABLE TO GET MORE INCREASES ON THE NEXT REVIEW; WHEREAS, MY SRG WAS CAPPED OUT, OR "AT THE TOP OF MY SALARY RANGE". IT WOULD BE VERY INTERESTING TO COMPARE THE PAY RAISES, BONUS'S, EXPENSE ACCOUNTS AND OTHER FRINGE BENEFITS (I.E PROMOTION OF PARR TO DTO @ WEST COLTON, RETIREMENT, ETC.) BETWEEN MIO GROTHER AND DTO PARR SINCE 7/1/97.

The requested amount of $107, 370 is greatly understated because:

- Wages/bonuses/expense accounts and other fringe benefits (starting 7/1/97) provided to my Tucson replacement, Mr. Thomas Parr, have and will greatly outpace my TO DATE AND pension earnings (See Parr's vs. Grother total compensation in the UPRR data bases)

- Includes no recognition of the emotional denigration and stress that both my wife and I have endured for almost six years. Includes assistance toward the restoration of my tarnished reputation, which is irreparable.

- Fact we will now need to move from Houston upon retirement.

- No compound interest or loss of use of money for 6 years is recognized.

NOTWITHSTANDING THE ABOVE, I AM WILLING TO ACCEPT THE $107, 370 (REDUCED BY APPROPRIATE TAXES) , TO RESOLVE UNFAIR TREATMENT FROM A MERGER YARD CONSOLIDATION EXPERIMENT ORDERED BY UPRR VPO.

ATTCH 2: PAGE 3 OF 4

LOSS OF FRINGE BENEFITS

DEPRIVED OF BENEFITS ATTACHED TO HIS PREVIOUS EMPLOMENT BY THE DEMOTION & TRANSFER TO HOUSTON

1. LOSS OF FREE TRANSPORTAION (I.E. COMPANY PROVIDED VEHICLE). AS A SPTCO. TERMINAL SUPERINTENDENT, ON DUTY AND ON CALL 24 HOURS PER DAY, THE SPTCO. APPROPRIATELY PROVIDED FREE TRANSPORTATION TO / FROM WORK AND TO ACCIDENTS, INCIDENTS, PERSONAL INJURIES ON A 24 / 7 / 365 DAYS PER YEAR BASIS. AFTER THE UP-SP MERGER, UPRR CONTINUED TO PROVIDE FREE TRANSPORTATION FOR "FIRST RESPONDERS" UNTIL 6/30/2000, WHEN MOST CARS WERE RECALLED (SOME STILL RECEIVE SOME TYPE OF VEHICLE REIMBURSEMENT; BUT, I HAVE NO ACCESS TO THAT INFORMATION TO DETERMINE ANY CONTINUING CLAIM:

(IF INFORMATION WERE MADE AVAILABLE ABOUT ANY CURRENT RE-IMBURSEMENT FOR THE BAND C, THEN THE BELOW LOSS SHOULD BE AMENDED ACCORDINGLY).

IN BOTH TUCSON AND HOUSTON, MY ONE WAY COMMUTE TO WORK WAS AND IS APPROXIMATELY 25 MILES ONE WAY. THEREFORE, TO COMPENSATE FOR MY PAST LOSS OF FREE TRANSPORTATION, I AM WILLING TO STIPULATE THAT THE "IRS RATE PER MILE" WILL BE PROVIDED AS "BACK COMPENSATION" BASED ON THE MINIMUM OF 50 MILES ROUNDTRIP PER DAY x 260 WORKING DAYS PER YEAR (I HAVE WORKED EVERY SATURDAY), LESS 25 VACATION DAYS OR 235 DAYS PER YEAR OF CAR USE:

PERIOD OF TIME	# OF DAYS	MILES PER DAY	IRS RATE	LOSS
7/1/97 – 6/30/98	235	50	$ .315	$ 3,701.25
7/1/98 - 6/30/99	235	50	$.325	$ 3,818.75
7/1//99 – 6/30/00	235	50	$.325	$ 3,818.75
LOSS OF FREE TRANSPORTATION COMPENSATION				$ 11,338.75

2. **LOSS OF MEDICAL FLEX CREDITS AS A FRINGE BENEFIT:**

FLEX CREDITS WERE BASED ON TOTAL COMPENSATION TO CALCULATE THE REDUCTION OF ONE'S MEDICAL COST. THEREFORE, AS YOUR COMPENSATION WENT DOWN, ONE WOULD HAVE FEWER FLEX CREDITS. BASED ON 1999 DATA, EACH FLEX CREDIT WAS ESTIMATED AT WORTH $26.61; THERFEFORE, A LOSS OF $573 IN FLEX CREDITS FOR A $ 15,264 REDUCTION IN ANNUAL WAGES:

YEAR	ANNUAL SALARY	FLEX CREDIT		EST CREDIT LOSS
1998	TO BE DETERMINED	TBD	*	550.00
1999	$ 62, 976	2, 367	**	573.62
2000	$ 62,184	TBD	*	575.00

ESTIMATED LOSS OF FLEX CREDIT USE TO OFSET MEDICAL COSTS , DENTAL & FLEXIBLE SPENDING = $ 1,698.62

- TO BE DETERMINED MEANS THAT ACTUAL VALUES NEED CORROBORATION FROM UPRR RECORDS, AS I HAVE MISPLACED THESE RECORDS; THEREFORE, AN ESTIMATED VALUE WAS UTILIZED FOR THIS INITIAL CALCULATION.
- FLEX CREDITS WERE DISCONTINUED IN 2001 AS "UNFAIR".

(** $62,976/2,367 CREDITS = $26.61 PER CREDIT OF VALUE. IF WAGES CUT $15,264/$26.61= 573.62 LOST FLEX CREDITS/YEAR.

EXCLUDING EXTREMELY ADVERSE AFFECT ON RETIREMENT BENEFIT CALCULATIONS, THE MINIMUM GRAND TOTAL WAGE AND FRINGE BENEFIT LOSS, WITHOUT INTEREST, FOR N.Y. DOCK DISPUTE THRU JUNE 30, 2003 IS = $ 107, 370

AMOUNT OF COMPENSATION REQUESTED = $ 107, 370

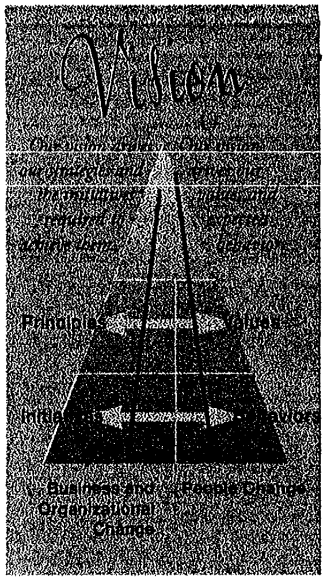
PLUS, MINIMUM PENSION LOSSES ARE ESTIMATED EXCEEDING TWO HUNDRED THOUSAND DOLLARS, SHOULD GROTHER'S LIVE TO BE 80 YEARS OLD! $ 200,000

MIN. EST. GRAND TOTAL OF ESTIMATED LOSS $ 310,000 (EXCLUDING TUCSON REAL ESTATE LOSSES)

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, and shareholder value is created.

UP VALUES AND LEADERSHIP BEHAVIORS

- **Safety:** *Safety comes first. We are each personally responsible for working safely and choosing the safest approach.*
  - We daily remind ourselves and other employees that safety is the company's first and overriding priority.
  - The safe way is the efficient way.
  - We report honestly but we find no accident acceptable and insist that all of us work on prevention of accidents.
- **Quality Principles:** *Customer Focus, Continuous Improvement, Teamwork, and Managing with Data are the way we run the business.*
  - We expect continuous improvement in all areas of our business by focusing on root causes of problems and creating action plans, time lines, and milestones to solve them.
  - Every action we take and every decision we make considers the customers' needs.
  - We will train our people to use and be skilled in Quality Principles and require them to demonstrate these skills as a daily habit.
- **Respect for Employees:** *We recognize all UP employees are critical to our success, and that ideas and aspirations exist at all levels in the organization. We value diversity in our workforce and the experiences, capabilities, and different viewpoints that each individual contributes.*
  - We act with respect for all employees.
  - We address our employees' developmental needs and build on their strengths by coaching and training.
  - We promote and reward managers for their leadership skills as well as their technical knowledge and abilities.
- **Commitment:** *We make realistic commitments to customers, employees and shareholders, and keep them.*
  - We set challenging, but achievable objectives.
  - We assure that we have the capability to meet our commitments.
  - We support each other in keeping commitments made to ourselves and others.
- **Accountability:** *The success of our company depends on our individual efforts. Each of us is responsible for the outcome of our efforts.*
  - We must make every employee aware that meeting our business objectives is critical to the success of the Company.
  - We accept personal responsibility for achieving the commitments we make.
  - We make no excuses, take responsibility for failures, but learn from our mistakes.



- **Simplicity:** *We keep things simple and focus on what is really important.*
  - We require that decisions be made at the lowest appropriate level.
  - We analyze and stay focused on the "critical few" items, which directly cause the results we want, while constantly removing low- or no-value steps from our business processes.
  - We define each individual's "critical few" in job agreements and make PDRs the performance drivers.
- **Communication:** *We will ensure an environment of open communications, where ideas are freely exchanged and listening is valued.*
  - We encourage 360-degree feedback, and we listen with respect.
  - We encourage novel thinking, evaluate ideas based on their merit regardless of source, and do not kill the messenger bearing bad news.
  - We put all issues on the table and attempt to resolve them through constructive debate and challenge.

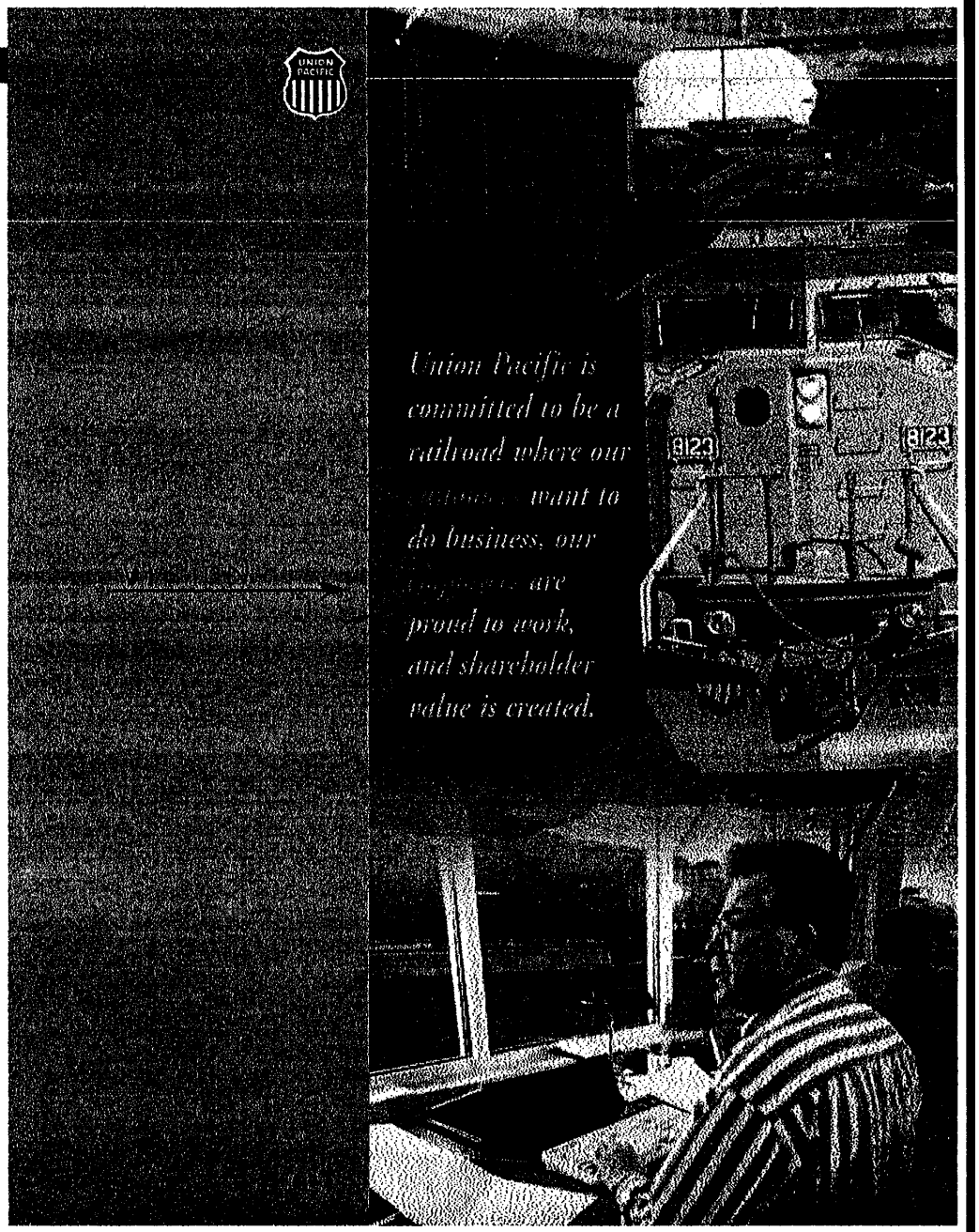
Union Pacific TRANSFORMATION

EXH. 4

BUSINESS PRINCIPLES

- **Recognize employees as critical to success.**
  Our employees are a critical asset; without them, we would not be able to serve our customers.
- **Recognize customers as critical to success.**
  Our customers depend on us for consistent and reliable service; we depend on them for their continued business.
- **Sell what we can deliver.**
  Our ability to match our customer commitments with network capacity is a key to our future success as a Company.
- **Deliver what we sell.**
  Our decentralized operating structure and network design capability will allow us to better meet our delivery commitments.
- **Maximize return on each dollar invested.**
  We will consider our shareholders' perspective with every investment decision we make.
- **Performance excellence.**
  We will use our focus on quality as the foundation for improved responsiveness to our customers and employees.
- **Lead effectively at all levels and strive for excellence.**
  We will use communication, training and performance feedback to develop leadership at all levels of our organization.

TRANSFORMATION



VALUES AND VISIONS 1997

EXH. 2.

UNION PACIFIC VALUES

We are dedicated to creating and maintaining a customer-focused environment...

...where people can be the best they can be."

– LEADERSHIP TEAM

IT DEPENDS ON ME

- *My team's success depends on me*
- *My contribution counts*
- *We all lead by the example we set*
- *Treat others like you want to be treated*
- *Enjoy your work; it's OK to have fun*

KEEPING OUR COMMITMENTS

- *Make commitments that are clear and realistic*
- *Do what we say we're going to do*
- *Create a sense of urgency*

BETTER, SIMPLER, SAFER

- *Safety is my responsibility*
- *Try new ideas... encourage change*
- *Focus on process improvement and timely results*
- *Keep it simple*
- *Emphasize the critical few*

OPEN COMMUNICATIONS

- *Tell it like it is*
- *Be here now... listen and respond with respect*
- *Share ideas and encourage different points of view*
- *Understand the requirement... when in doubt ask*

WE ARE ALL PART OF THE UNION PACIFIC TEAM

- *Trust is essential*
- *Respect differences*
- *Recognize and reward the contributions of individuals and teams*
- *My success depends on my team's success*

We will deliver... *it depends on me.*™

10" long

STOP 1 of 2

FOR YOUR DESK

AS A REMINDER

OF WHAT IS IMPORTANT

POLICY IN FEB, 1997

EXH 2

VALUES AND VISION 1997

EXH. 2

UNION PACIFIC VALUES

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10" long

STAFF Exh 2

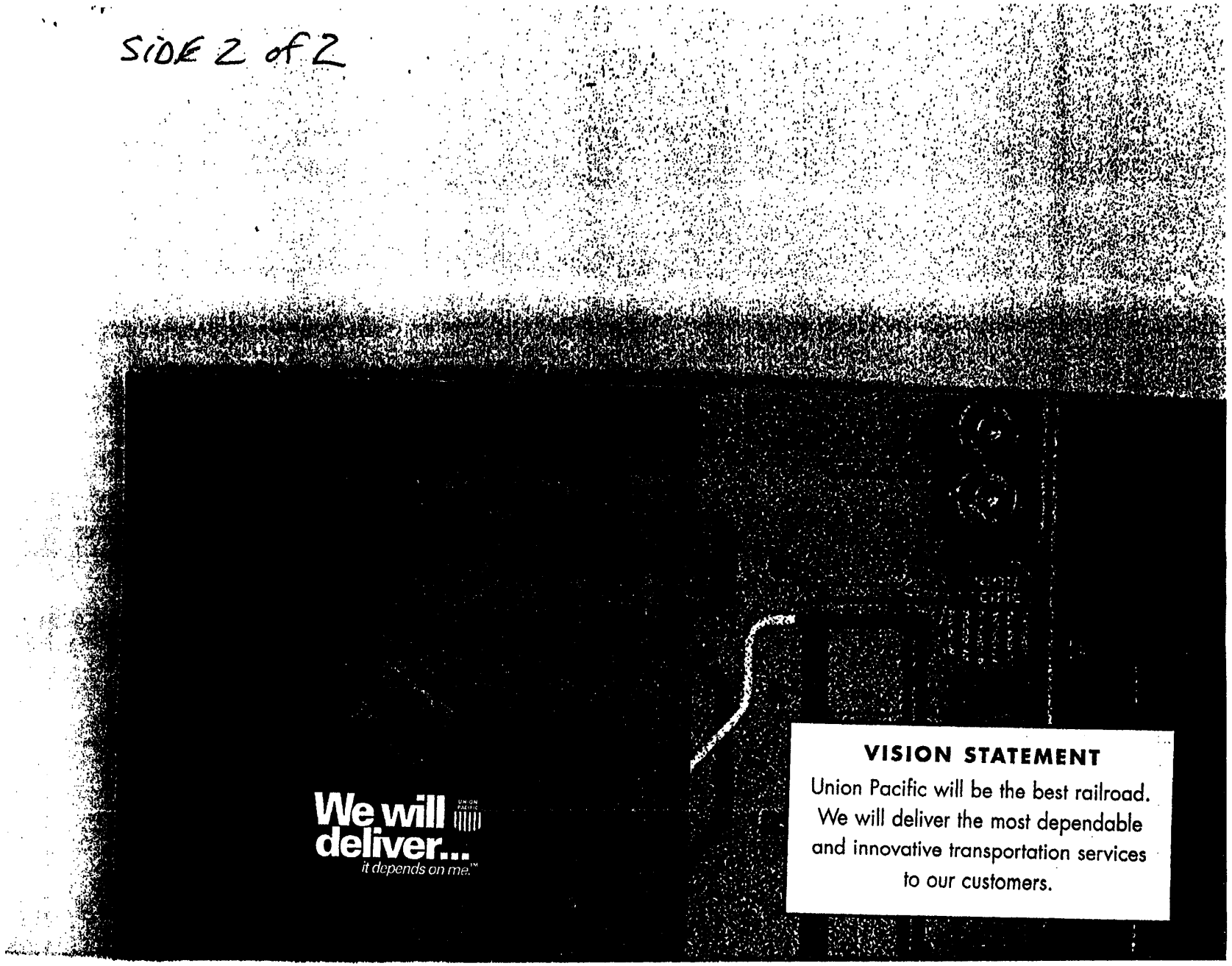
FOR YOUR DESK

AS A REMINDER

– AS WHAT IS IMPORTANT

POLICY IN FEB, 1997

SIDE 2 of 2


We will deliver...
it depends on me.™
VISION STATEMENT
Union Pacific will be the best railroad. We will deliver the most dependable and innovative transportation services to our customers.



EMM 5

521-34/925

cc: mkm

WPX

June 3, 1988

W.J.L.
JUN 03 1988

JUN 7 1988

Mr. W. J. Lacy:

Caltrans and the Joint Powers Board have requested that we open negotiations for a contract extension effective in June of 1990 on the current peninsula commute contract. We have countered that our interest is in selling the peninsula. We are in agreement with Caltrans that we will start a negotiating process to harmonize these two goals to the extent that that is possible.

We think it appropriate that John Grother be the lead negotiator and draw on others in the company as the need arises. I would suggest that John MacDonald Smith and Ray Mesick will be invaluable resources to him.

Burch Bachtold and myself will review the status of negotiations every quarter.

The Caltrans negotiating team will consist of Joe Browne, George Gray and O. J. Solander. If you or Mr. Grother are contacted by anyone from Caltrans, it is appropriate to schedule an initial meeting with them at our convenience, but not before you and our negotiating team meet with Mr. McNear and myself. Please advise if you are contacted by Caltrans.

D. M. MOHAN

cc: Mr. D. K. McNear
Mr. J. E. Grother
Mr. J. M. Smith
Mr. R. E. Mesick

R. W. McC.
JUN 3 1988
JUN 3 1988

EXH. 7A

2116
WLB
WRS

110-1
December 23, 1986

Mr. J. E. Grother:

Please refer to your letter of December 4, file 1000-40-A, requesting authority to execute agreements involving passenger trains/transit matters.

You are hereby authorized to execute agreements which pertain to passenger trains/transit operation matters. This authority applies with the respect to the following companies only:

Southern Pacific Transportation Company
St. Louis Southwestern Railway Company
Dallas Terminal Railway and Union Depot Company
Northwestern Pacific Railroad Company
Visalia Electric Railroad Company

You may, when the proposal has been approved, execute agreements except bonds and deeds. As an exception to this authority, you may execute agreements covering grants of easements or licenses to public bodies for passenger trains/transit operation purposes, which have been properly approved, if terminable upon abandonment by the user of the easement or license granted.

W. J. Lacy

cc: Mr. E. L. Johnson

Exh 4.B.

218-64
March 8, 1988

PERSONAL

Messrs. H. D. Fisher
R. D. Bredenberg
L. G. Simpson
L. F. Furlow
M. D. Ongerth
G. L. Pollitt
L. L. Phipps
K. L. Miller
E. L. Hord
G. D. Barnett
J. E. Grother
G. L. Murdock
P. D. Lively
J. D. Daniels
D. K. Medley
J. W. Lynch
G. A. Greblo
G. R. Fetty
M. L. Wells
A. M. Henson
L. L. Jenkins
R. R. McClanahan
J. W. Clark

Referring to my letter June 22, 1987, establishing a Special Awards Program for non-agreement employees whose efforts have significantly improved operating performance, productivity, or profitability and who have directed their attention to areas of greatest importance to the organization:

It is my pleasure to announce the top five candidates chosen to receive the Special Awards of $2,500:

Mr. J. E. Grother, General Manager-AMTRAK, Amtrak Department
Mr. D. J. Maxey, Geotechnical Engineer, Engineering Department
Mr. J. D. Puffer, Manager Divisions Clerical Operations, Operating Department
Mr. K. R. Regalia, Special Project Manager, Operating Department
Mr. M. D. Wasina, General Foreman, Mechanical Department

W. J. Lacy

EXH. 5

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179-0323

March 11, 1996

To: UP / SP Common Point Team Members / JOHN GROTHER

On November 30, 1995, Union Pacific and Southern Pacific filed the application for merger. This filing was the culmination of an enormous collective effort that began in August. Each of you contributed to this effort through your work with the Common Point team (made up of 38 individuals from both the Union Pacific and Southern Pacific).

During the two primary crunch months in particular, from our team's kickoff meeting on August 17 through the information transfer meetings on October 18, the travel and hours put in by each sub-team and team member were extraordinary (and somewhat unprecedented). The boxes of files in the Washington depository and quality of the operating plan are clear testimony to the Common Point team's contribution. These efforts will also help springboard the follow-up planning efforts for actual merger implementation, placing the railroad way ahead of where we have been in prior merger situations at a comparable time.

Please accept our sincere appreciation and thanks for your work on this project. As a further token and remembrance of this effort, we present you with the UP-SP Common Point Team watch (and regret that the process of obtaining and distributing it has taken as long as this).

Sincerely,

Richard Gray

Buck Hord

Brad King

CN. NO.		NEW OFFICER'S EA NO.
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	B T Wilson From PRA 207 11/16/79 to 5/15/80 #9497
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J C Wirich From PRA 457 11/16/79 to 5/15/80 #9537
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	P G Negrete From PRA 207 11/16/79 to 5/15/80 #6440
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79 to 5/15/80	U C Barton From PRA 207 11/16/79 to 5/15/80 #0494
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J W Wilshire From PRA 207 11/16/79 to 5/15/80 #9499
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	L G Powell From PRA 207 11/16/79 to 5/15/80 #7162
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	M R Stearman From PRA 607 11/16/79 to 5/15/80 #8426
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J C Malone From PRA 607 11/16/79 to 5/15/80 #5436
0	Coordinator-Performance Improvement Program-San F New posn. 11/16/79	J E Grother 11/16/79 THRU → 8/16/81
5		L F Epperson To PRA 11/19/79
5	Actg Asst Rd Foreman of Engs-Houston Formerly held by L F Epperson	Temp. vacant 11/20/79

OPERATING

EXH. 7

PeopleSoft

Report ID: upc41000

Page No. 1
Run Date 12/04/2001
Run Time 07:12:04

EMPLOYEE JOB WORK HISTORY

Empl ID: 0050020
SSAN: 526663917
NAME: Grother,John E

Exp Rtn Dt:
Serv Unit:

START/DT	TYPE CHG	STAT	TITLE	LOCATION	UNION	DEPT.	CO	JOBCD
08/16/01	NA Lat Lev	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
07/31/01	NABaseBen	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
04/01/01	NA Ttl Chg	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
03/01/01	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/00	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/99	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/98	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
07/01/97	NA Demote	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
04/16/97	NA SP-UP	Act	Sr Mgr Ter	Tucson, Az	N/A	Trns Ws Rg	01	N72007
09/16/95	NA Pro Exc	Act	Terminal S	Tucson, Az	N/A	Sp History	70	N88884
09/01/95	NA-Promo	Act	Sr Mgr Bud	San Franci, Ca	N/A	Sp History	70	N88884
05/01/94	NA Ttl Chg	Act	Sr Mgr Bud	San Franci, Ca	N/A	Sp History	70	N88884
09/01/92	NA Ttl Chg	Act	Mgr Joint	San Franci, Ca	N/A	Sp History	70	N88884
11/01/89	NA-Merit	Act	Gen Mgr Am	San Franci, Ca	N/A	Sp History	70	N88884
01/01/88	NA Ttl Chg	Act	Gen Mgr Am	San Franci, Ca	N/A	Sp History	70	N88884
01/01/87	N/A Salary	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
12/01/86	N/A Salary	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/85	NA Ttl Chg	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
05/01/85	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
12/01/84	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
12/01/83	NA Ttl Chg	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
06/01/82	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
05/01/81	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
07/01/80	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
06/01/80	NA Ttl Chg	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
11/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
09/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
03/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
06/01/78	NA Ttl Chg	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
03/01/78	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
12/01/77	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
05/01/77	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
11/01/76	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
06/01/76	NA Ttl Chg	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
12/01/75	N/A Salary	Act	Planner	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/75	NA Ttl Chg	Act	Planner	Los Angele, Ca	N/A	Sp History	70	N88884
12/01/74	N/A Salary	Act	Asst Term	West Coltn, Ca	N/A	Sp History	70	N88884
07/01/74	N/A Salary	Act	Asst Term	West Coltn, Ca	N/A	Sp History	70	N88884
06/01/74	NA Ttl Chg	Act	Asst Term	West Coltn, Ca	N/A	Sp History	70	N88884
08/01/73	N/A Salary	Act	Trainmaste	Long Beach, Ca	N/A	Sp History	70	N96008
03/01/73	NA Ttl Chg	Act	Trainmaste	Long Beach, Ca	N/A	Sp History	70	N96008
06/01/72	NA Ttl Chg	Act	Asst Train	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/71	NA Ttl Chg	Act	Asst Train	West Coltn, Ca	N/A	Sp History	70	N88884
06/01/69	NA Nw Hire	Act	Management	San Franci, Ca	N/A	Sp History	70	N88884

End of Report

"CUTOVER" IS "TCS COMPUTER SYSTEM OF UPRR WHICH DID NOT ROLLOUT UNTIL OCTOBER 1, 1997.

EXH. 8

This is G o o g l e's cache of http://members.aol.com/blewestern/4-97.htm.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
To link to or bookmark this page, use the following url: http://www.google.com/search?q=cache:JGkTRZ2Dgi8C:members.aol.com/blewestern/4-97.htm+tcs/cms+cutover+creates+chaos+in+tucson&hl=en

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These search terms have been highlighted: **tcs cms cutover creates chaos tucson**

UPDATE 28

The Newsletter of

B L E Division 28

Oct.-Dec. 1997

TCS/CMS Cutover Creates Chaos in Tucson

By Ken Kroeger

"I begged them to wait, telling them we're not ready for this cutover, but no one would listen to me!" declared Local Chairman Ken Kroeger, with regard to the recent TCS/CMS cutover implemented on October 1. And the cutover has proven to be just as stressful and chaotic as was predicted. "My engineers don't know if they are going to work in 12 minutes or 12 hours," Ken told UP's Chief Operating Officer Jerry Davis at a dinner meeting on October 15 at the Westward Look. In a letter e-mailed from Kroeger to Mr. Davis on September 29, Kroeger stated that he was "appalled by some of the recent decisions being made by the management of Union Pacific" and then went on to say "the facts speak for themselves," citing: the numerous rail accidents occurring in the current year, many involving fatalities; the FRA scrutinizing of the company's operations; the continual loss of customers due to poor service; the huge amounts of money being wasted in "overtime" pay; and frequent gridlock occurring on the rails. Using words like "tailspin" and "meltdown," Kroeger went on to communicate his frustration to Davis regarding the lack of response to his pleas for help, and the frequently stated excuse that the shortage of manpower in UP Management is the reason for many of the problems, which were stated in detail in the September 29 communication. In the final paragraph of the letter, Kroeger begged Mr. Davis to postpone the cutover until some of these problems were corrected and everything could be put in place for a smooth transition.
Early on September 30, Kroeger received a phone call from an angry and defensive Davis,

telling him he had no right to tell him who or what is wrong with the Company. A week later, however, after receiving a similar letter from frustrated UTU Legislative Representative Jim Critchley in Tucson, Mr. Davis invited Ken Kroeger, Jim Critchley, and BLE Division 28 Legislative Representative Rob Svob, to a dinner meeting on October 15. Because Critchley was unable to get back in time from a run to El Paso, UTU Local Chairman Tom Moore attended the meeting on his behalf.

The cutover was implemented as planned on October 1, and Local Chairman Kroeger's phone began ringing constantly with questions and complaints from frustrated engineers who could not figure out when they were going to work, could not figure out how to perform various functions on the new program, and were unable to talk to a dispatcher.

During the week of October 5, UTU Local Chairman Moore and Kroeger were on hand at the yard office to learn the new system from the trainers UP had sent to train operating employees and to help their members with the numerous problems being experienced.

Kroeger encouraged BLE Members to call the UP Safety Hotline to report these problems as a safety hazard, based on the fact that train crews were unable to go to work rested due to the lack of information as to when they would be called to duty. In the dinner meeting on October 15, Kroeger presented Mr. Davis with an extensive report, including examples, documenting the problems and comparing the non-user-friendly UP computer program with the previously-used SP computer program. The report also included copies of articles from the Yuma newspapers covering the recent hazmat incident, which UP Management in Yuma refused to acknowledge as a hazardous situation for the train crews involved.

Mr. Davis stated that he could see the difference in the two computer programs and agreed that a menu-driven program is easier to use. He said he would look into the possibilities of changing the UP program to a menu-driven program. He was aware of the incident in Yuma and would investigate this further and get back to me on it.

AGREEMENT VOTE RESULTS

The agreement passed, 65% (589 votes) for and 35% (302 votes) against, on the whole system. Div. 28 voted to pass the agreement 89% for (121 votes) and 10% against (14 votes), and 1% abstained (1 vote). To see the complete breakdown, go to internet web site http://www.c-zone.net/rogers/vote.html.

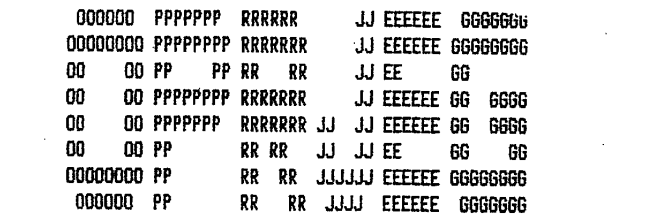
President's Corner

Taking Advantage:

Union Pacific's lack of respect for our agreement and working conditions is causing a great deal of tension and stress amongst our fellow engineers.Our union officers are having to restructure the boards daily to conform with our agreement. Fifteen-hour trips, poor reliefs, and no line-ups are distressing enough, but when we don't even get paid correctly, that's the ultimate slap in the face! The frustration level is at an all time high!

It is imperative at this time that we get the cooperation of every BLE Div. 28 member. Despite what anyone may tell you, our agreement has not changed (yet). Tying up for rest, deadhead placement, and marking up to the bottom of the board are all within the scope of our current working agreement. You

Exh. 9



FROM: OPRMXG --SPTSVM02 DATE AND TIME 01/28/97 12:48:01
TO: OPRPAL --SPTSVM02 LOBELLO, PAUL OPRDSP --SPTSVM02 PAYAWAL, DAN
OPRDLH --SPTSVM02 HAMPTON, D.
CC: OPRHLM --SPTSVM02 MCDOWELL, LAWSON OPRJEG --SPTSVM02 GROTHER, JOHN

FROM: MAI
SUBJECT: INTERVIEW SCHEDULE WITH SUPT WED 1-29-97 AT TUCSON
PLEASE ARRANGE TO MEET WITH THE SUPERINTENDENT ON WEDNESDAY 1-29-97 TO BE INTERVIEWED AT THE TIME INDICATED BELOW:

PAUL LOBELLO	-	7:30 AM
DAVE HAMPTON	-	8:30 AM
DAN PAYAWAL	-	3:30 PM

YOU DON'T NEED TO BRING ANYTHING TO THE INTERVIEW. THE INTERVIEW WILL LAST ABOUT 45 MINS.

THANKS!
END

JRG DETERMINED A KEEPER EARLIER AND NOT INTERVIEWED!

EXH. 10

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 000000  PPPPPPP  RRRRRR      JJ EEEEEE  GGGGGGG
00000000 PPPPPPPP RRRRRRR     JJ EEEEEE GGGGGGGG
00    00 PP    PP RR    RR     JJ EE      GG
00    00 PPPPPPPP RRRRRRR     JJ EEEEEE GG  GGGG
00    00 PPPPPPP  RRRRRRR JJ  JJ EEEEEE GG  GGGG
00    00 PP       RR RR   JJ  JJ EE      GG    GG
00000000 PP       RR  RR  JJJJJJ EEEEEE GGGGGGGG
 000000  PP       RR   RR  JJJJ  EEEEEE  GGGGGGG
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FROM: OPRJEG --SPTSVM02 DATE AND TIME 07/15/97 23:37:01
TO: OPRJEG --SPTSVM02 GROTHER, JOHN

FROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120
SUBJECT: LETTER TO DAVIS

MR. J. E. DAVIS
PRESIDENT AND CEO

JULY 15, 1997

DEAR MR. DAVIS,

THIS LETTER CONCERNS MY JULY 1, 1997 DOWNGRADE (ON FOUR DAYS NOTICE) FROM SENIOR MANAGER TRAIN OPERATIONS AT TUCSON, AZ ($6,200/MO) TO MANAGER INTERMODAL OPERATIONS AT HOUSTON, TX ($4,928/MO), A 21% WAGE REDUCTION AFTER 28 YEARS OF LOYAL AND DEDICATED SERVICE (SINCE 1989, I RECEIVED ONE $60/MO RAISE IN SEP 1995 WHEN TRANSFERRED TO TUCSON).

IT IS WITH HEAVY HEART THAT I AM WRITING YOU IN AN ATTEMPT TO RECONCILE HOW THE "UP VALUES SYSTEM" AND THE ISSUES OF DESCRIMINATION RELATE TO MY SUDDEN DOWNGRADE. I HAD NO INDICATION OF PERSONAL UNSATISFACTORY PERFORMANCE BEFOREHAND, ALTHOUGH THERE WAS TALK THAT THE PHOENIX REPLAN WAS NOT WORKING AS OTHERS HAD DESIGNED. IN FACT, ON JUNE 16, 1997, I RECEIVED A RECORDED VOICE MAIL FROM SUPERINTENDENT K.C. PACKARD "... THAT CONSIDERING THE RESOURCES THAT WE HAD AVAILABLE, THE ENTIRE SERVICE UNIT WAS DOING AN OUTSTANDING JOB ...". A FEW MONTHS BEFORE THAT, WE HAD ALL BEEN ELATED WHEN IT WAS FORMALLY ANNOUNCED THAT WE HAD ALL BEEN SELECTED AFTER A MERGER SELECTION PROCESS TO BE PART OF THE "UP TEAM".

OF COURSE I UNDERSTOOD THAT TUCSON WAS UNDER EXTREME PRESSURE DUE TO THE PARTIAL CLOSURE OF PHOENIX YARD; BUT, THE RESOURCES I REQUESTED TO KEEP TUCSON CURRENT WERE NOT PROVIDED. TO ILLUSTRATE, TUCSON WAS IN THE POSITION OF NOT BEING ABLE TO ADD MORE SWITCH ENGINES OR CALL EXTRAS AS NEEDED UNTIL JUNE 26, 1997, THE DAY THAT SIX AUGMENTORS WERE FINALLY ALLOWED ON THE TUCSON BOARD AND THE DAY I WAS INFORMED OF MY DOWNGRADE (I HAD REQUESTED MORE SWITCHMEN IN WRITING FOR OVER A YEAR BEFORE THESE AUGMENTORS WERE ALLOWED). IN ADDITION, ON THIS SAME DAY, I WAS REQUESTED TO SIGN A NOTICE THAT ALLOWED TUCSON TO MILL RUN TOGETHER CERTAIN TRAFFIC WHICH ELIMINATED SOME OF THE MULTIPLE HANDLING ON OUR 1% GRADE WITH A FOREMAN AND ONE SWITCHMAN. SEVERAL OTHER CHANGES HAVE BEEN ALLOWED SINCE MY DOWNGRADE WHICH HAD BEEN PREVIOUSLY REQUESTED INCLUDING BUT NOT LIMITED TO OPERATING THE LAPXM DIRECTLY TO PHX IN LIEU OF SWITCHING AT TUCSON, ADDITIONAL PERSONNEL AT PHOENIX, PICACHO AND TUCSON, BLOCKING CONSOLIDATIONS/CHANGES, IMPROVED COMMUNICATIONS IN THE 22ND STREET TOWER, ADDITIONAL LOCOMOTIVES IN SHUTTLE SERVICE BETWEEN TUCSON AND PHOENIX, ADDITIONAL TRACKAGE TO MAKE BLOCKS/HOLD INTERMODAL EQUIPMENT AND SO FORTH.

CONCERNING THE SPECIFIC CRITICISM THAT ONE YARDMASTER DID NOT START HIS JOBS IN A PROMPT FASHION ON TWO DIFFERENT OCCASIONS, THAT ACT IS DIRECTLY RELATED TO YARDMASTER DISSIBIO'S EFFORTS TO PERSUADE HIS SENIOR MANAGER AUDIENCE TO RESTORE AN ADDITIONAL YDM POSITION IN THE TOWER, WHILE KEEPING THE 36TH ST YARDMASTER POSITION. IN LIEU OF CONSIDERING DISSIBIO'S ACTIONS AS REPRESENTATIVE OF THE TERMINAL, DISSIBIO SHOULD HAVE BEEN HELD ACCOUNTABLE BY THOSE WHO DIRECTLY OBSERVED HIS ACTIONS BASED ON PROGRESSIVE DISCIPLINE.

I HAVE CONTINUED TO RECEIVE SOME PROFS INFORMATION ON CONTINUING CHANGES TO THE PHOENIX REPLAN, SOME OF WHICH IS NOTED AS AN URGENT CHANGE ON THE SUBJECT LINE AND THEN SHOWN AS "DELIVERY PRIOITY: NORMAL AND DELIVERY REPORT

AS BASIC" CONCERNING A MULTITUDE OF PHX REPLAN CHANGES (ATTCH WAS NOT URGENT). THERE IS NOTHING "NORMAL OR BASIC" ABOUT THE IMPACT OF THE PHOENIX REPLAN ON MYSELF AND MY FAMILY; ESPECIALLY CONSIDERING THE PLAN WAS NOT MINE AND THE ESSENTIAL RESOURCES WERE NOT PROVIDED AS REQUESTED UNTIL MY DOWNGRADE.

AFTER MUCH REFLECTION, I WRITE THIS LETTER IN THE HOPE THAT I COULD POSSIBLY RETAIN SOME TYPE OF MTO POSITION (IF NOT THE SENIOR MTO) IN THE ARIZONA AREA AND WITHOUT THE 21% WAGE REDUCTION. IF ALLOWED, THIS PROPOSAL WOULD ALLOW THE UP TO UTILIZE MY EXPERIENCE IN ARIZONA, WITHOUT THE COST OF MANY RELOCATIONS. OR, IF NOT IN AZ, IN SOME SOUTHWESTERN LOCATION (MY WIFE HAS LUPUS AND AVASCULAR NECROSIS), IN OPERATIONS WHERE A REDUCTION IN WAGES WOULD NOT BE A PART OF THE ASSIGNMENT.

OF COURSE, I WILL CONTINUE TO PERFORM AS DIRECTED; BUT, I FELT THIS LETTER WAS NEEDED TO ADDRESS THE ISSUES PROPERLY; ESPECIALLY SINCE YOU HAVE BEEN ASSOCIATED WITH BOTH RAILROADS INVOLVED IN THIS MERGER.

SINCERELY,

JOHN E GROTHER
MIO - HOUSTON

HOME 520-575-5511

"CUSTOMERS SIGN OUR PAYCHECKS"
ND

```
          OOOOOO    PPPPPP   RRRRRR       JJ EE    EE   GGGGGGG
         OOOOOOOO PPPPPPPP RRRRRRR      JJ EEEEEEE GGGGGGGG
         OO     OO PP     PP RR    RR      JJ EE       GG
         OO     OO PPPPPPPP RRRRRRR      JJ EEEEEE GG   GGGG
         OO     OO PPPPPPP  RRRRRRR JJ   JJ EEEEEE GG   GGGG
         OO     OO PP       RR RR   JJ   JJ EE       GG    GG
         OOOOOOOO PP       RR  RR  JJJJJJ EEEEEEE GGGGGGGG
          OOOOOO  PP       RR   RR  JJJJ  EEEEEEE  GGGGGGG
```

FROM: OPRJEG --SPTSVM02 DATE AND TIME 04/22/97 11:52:21
TO: OPRDSP --SPTSVM02 PAYAWAL, DAN OPRDLH --SPTSVM02 HAMPTON, D.
OPRPAL --SPTSVM02 LOBELLO, PAUL

FROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120
*** RESENDING NOTE OF 04/22/97 12:04
FROM: DAVE J. BLAKE@UP (DJBLAKE @ NOTES)

TO: MIKE J. GALLAGHER @ UP (MJGALLAG @ NOTES)
CC: LAWSON MCDOWELL @ UP (LMCDOWEL @ NOTES),
JOHN E. GROTHER (OPRJEG @ SPTSVM02)
DATE: 04-22-97 12:07:26 PM
SUBJECT: TUCSON BEER BLOCK - LATC - LATUM

MIKE, PLEASE UPDATE TAG TABLE AT LA TO PROVIDE A 281 (TUCSON) TAG FOR BEER
DESTINED TO TEMPE (27050)
THIS WILL SUPPORT A PURE PHOENIX HEAD END BLOCK FOR TUCSON TO SETOVER TO TUPXF
WHEN CLOSE CONNECTION
REQUIRES. THE TEMPE TRAFFIC MOVES ON A LATER CONNECTION AND CAN BE SWITCHED
OUT OF THE TUCSON SWITCH
BLOCK TO MAKE THAT CONNECTION CONSISTENTLY.

DELIVERY PRIORITY: NORMAL
DELIVERY REPORT: BASIC

D

99608 0 6 2223 07/15/97 U610 XB N078 VB99801

1. THIS HAS BEEN CHANGED SINCE TO DIRECT LAPXM TO PWX.

2. ILLUSTRATES "PRIORITY AND URGENCY" FOR WHICH I WAS DOWNGRADED OTHERS PLANNED, I WAS SCAPEGOAT.

EXH. 11

UNION PACIFIC RAILROAD COMPANY

JERRY DAVIS
PRESIDENT AND
CHIEF OPERATING OFFICER

1416 DODGE STREET
ROOM 1230
OMAHA, NEBRASKA 68179-1230

September 4, 1997

Mr. John Grother
Manager-Intermodal Operations
Union Pacific Railroad Company
6800 Kirkpatrick Boulevard
Houston, TX 77026-3995

Dear John:

Thank you for your letter of July 15 concerning your transfer from Tucson to Houston. I appreciate your feedback and understand the difficulties you may be experiencing as a result of your reassignment.

Brad King, Vice President-Transportation, tells me that there were many factors contributing to the problems at Tucson. In June, the service levels to our customers, both external and internal, deteriorated to the point where immediate action had to be taken. We believe that a change in management was necessary for improvement to occur.

While it is not always easy, changes in staffing are sometimes necessary as we look at our work force and strive to handle all the business that comes our way. I'm sure you can understand that Union Pacific must continually fine tune our operations so that we can be more efficient and responsive to customer needs.

Again, thank you for your letter and your continued commitment to our company.

Sincerely,

Jerry Davis

EXHIBIT 12

FOR TUCSON MAY-JUNE 97 DURING PEAK OF YARD CONSOLIDATION PHX. INTO TUCSON (MERGER EXPERIMENT)

1) EVEN WEST COLTON WAS MILL RUNNING TRAINS INTO TUCSON (OUT OF CONTROL AT WEST COLTON)

2) TO LEFT ARE SOME WHO CAN CORROBORATE HOW TUCSON WAS INUNDATED FROM BOTH PHOENIX AND WEST COLTON.

3) MORE SAMPLES ARE AVAILABLE, CAPACITY STUDIES, AND STATEMENTS FROM THOSE WHO WERE THERE CAN SPEAK TO "PERSONAL (GROTHER, PERFORMANCE!

ADDITIONAL WORK; NOT LOCAL CAUSED; BUT, FROM WEST COLTON!!

000000 PP RR RR JJJJ EEEEEE GGGGGG

FROM: DJBLAKE --NOTES DATE AND TIME 06/10/97 10:48:34
FROM: DAVE J. BLAKESUP (DJBLAKE § NOTES)

TO: ROGER J. MOWREY § UP (RJMOWREY § NOTES), Gene
OPRWZF § SPTSVM02 (OPRWZF § SPTSVM02),
JOHN E. READY § UP (JEREADY § NOTES),
ROBERT G. JONES (OPRRXJ § SPTSVM02),
HUGH J. ROGER § UP (HJROGER § NOTES), Gene Bryant
BILL R. WILKIE (OPUBRW § SPTSVM02) Tom W. COLTON
CC: JIM P. KOSCIELNIAK (OPRJPK § SPTSVM02),
JOHN E. GROTHER (OPRJEG § SPTSVM02),
LAWSON MCDOWELL § UP (LMCDOWEL § NOTES), St Louis
KEN L. CARGILE § UP (KLCARGIL § NOTES),
GARY R. DAVIDSON § UP (GRDAVIDS § NOTES), - San Antonio
MICHAEL J. GORMAN § UP (MJGORMAN § NOTES),
KEN C. PACKARD § UP (KCPACKAR § NOTES); Omaha
PAUL R. FLOWERS § UP (PRFLOWER § NOTES)
DATE: 06-10-97 10:53:22 AM
SUBJECT: 1MLATU 09 BLOCKING

I REVIEWED CONSIST ON 1MLATU 09 OUT OF GLAMIS (AEI CORRECTED)

THE BLOCKING ON THIS SCHEDULE OUT OF WEST CLTN (CORRECTED) IS AS FOLLOWS:

5 - 280 TUCSON (FROM LA)
2 - 270 PHOENIX(FROM LA) FOR SETOUT PICACHO FOR ATUPX
3 - 280 TUCSON (FROM WCLTN)
3 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
2 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
16 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
3 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
2 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
1 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
1 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
17 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
2 - 280 TUCSON (FROM WCLTN)
5 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN

62 MORE CARS TO SWITCH - UP TO 100 PER DAY

EXCEPTIONS:

1. CONSIST OUT OF WEST COLTON INDICATED 95% CORRECT BLOCKING, REVISED AEI CONSIST INDICATES MILLRUN 272/270
AS WELL AS 280 TRAFFIC .

2. TRAIN WILL HAVE TO BE TAKEN INTO TUCSON AND RESWITCHED AS QUANTITY OF RESWITCHING PRECLUDES HANDLING AT PICACHO

PLEASE HANDLE FOR CORRECTION

DELIVERY PRIORITY: NORMAL

DELIVERY REPORT: BASIC

ND

EXH. 13

ugust 25, 1999

After Some Crippling Chaos,
Union Pacific Can See the Light
By DANIEL MACHALABA
Staff Reporter of THE WALL STREET JOURNAL

HOUSTON -- Some of the signs that Union Pacific Corp. is slowly making progress have to do with speed, like the long plume of grayish smoke trailing almost horizontally from a locomotive as it barrels along here at 50 miles per hour.

That would have been an uncommon sight around this hub in the troubled period of 1997-98, when hardly anything moved fast enough to generate more than fitful puffs. Union Pacific's merger with Southern Pacific Rail Corp. -- melding two cultures, 53,000 employees, 7,000 locomotives, 155,000 freight cars and 36,000 miles of railroad routes covering the western two-thirds of the U.S. -- had turned into a nightmare. Freight service had collapsed, stranding Midwestern crops, snarling West Coast ports and delaying shipments of goods from chemicals to paper. A string of fatal accidents had the Federal Railroad Administration blaming a "fundamental breakdown" in safety.

The job of addressing the mess fell to Richard Davidson, Union Pacific's chairman and chief executive, who also was in charge during the railroad's breakdown. For more than a year he has been working to deliver on a promise that he would remake the nation's largest railroad, with new equipment, revamped management and a more open, flexible style. In the process, he has been addressing the martinet within. For Mr. Davidson is a diehard railroad man who can still thrill to the throb of a powerful locomotive at the age of 57, but who must shed an antiquated style of management that has roots in the days when hard-bitten ex-Civil War officers filled the executive ranks of railroad companies.

"You're sort of a gunslinger," Mr. Davidson says. "Sometimes you make the decision and then analyze the problem." His managers use similar language to describe the old days of leading by fear. "When something happened, you pulled out your gun and shot the guy in charge of the territory," says John Rebensdorf, a vice president of the company's railroad subsidiary, Union Pacific Railroad Co. "Now, you find out why it happened and make sure it doesn't happen again."

GROTHER WAS "SHOT" FOR MERGER EXPERIMENT=YARD CONSOLIDATION

'Dysfunctional' Culture

When inspectors from the Federal Railroad Administration descended on Union Pacific's headquarters in Omaha, Neb., in 1997 following a series of fatal accidents on the railroad, they were surprised by the company's top-down, military culture, which seemed to discourage teamwork and communication. "Their culture was dysfunctional and characterized by noncommunication," says Jolene Molitoris, head of the FRA in Washington. "They were separated from each other in a way that almost guaranteed problems."

f his 53,000 employees. He is setting up a unit to coordinate planning etween the company's sales force and its operating managers, and boosting apital spending to make up for years of cutbacks.

ast September, Mr. Davidson met with 100 Union Pacific field officers in Kansas City, Mo., and urged them to undergo a personal transformation. Then e shared the results of a review by his senior managers that depicted him s cold, aloof, too demanding, resistant to innovation and reluctant to raise. "It's like an alcoholic," he says. "To get better, you have to admit our weakness."

Mr. Davidson is shifting authority from the Omaha headquarters to managers n the field. Central management was making many of the daily decisions such as when and how to run trains. "We're a detail business, but it was too much detail at the wrong level," says Brad King, a Union Pacific Railroad executive vice president. Some executives are now urging Mr. Davidson to vacate the railroad's command center in Omaha. Already, some dispatchers have been moved to Houston, Fort Worth, Texas, and Southern California to be closer to their territories.

Strike Teams and Loops

The devolution began to make itself felt after the railroad's breakup into three regions last summer. Jeff Verhaal, who heads the company's western region, sent out roving "strike teams" of repairmen to the California desert to handle emergencies faster. "We couldn't wait for Omaha to do it," he says.

Steve Barkley, head of the southern region, says he reorganized the operating plan in the Houston area to move trains more efficiently. Shifting cars had entailed moving trains back and forth, yo-yo fashion, on a single track and often blocking traffic. Mr. Barkley devised a way to move cars through a loop that kept those single tracks open on a regular basis. The new setup cuts 24 hours from many shipments and keeps more than 400 freight cars a day out of busy yards.

To counter fatigue, the railroad is phasing in new work arrangements with assigned days off. It is also arranging for hotels to be built for its crews (and other guests) that will feature noise-abating walls and windows, heavy curtains to seal out light and 24-hour diners. And it is letting crews nap aboard trains as long as 45 minutes under certain conditions.

All this is a departure for Mr. Davidson, who remembers when railroads didn't pay to lodge train crews away from home. When he was a brakeman in Kansas, a conductor let the future CEO sleep on his couch. As a manager, Mr. Davidson says he fired at least a dozen people for sleeping on the job. But with recent evidence that napping can lead to safer operations, Mr. Davidson says, "you really have to put old habits behind you."

Applying the Blowtorch

Maybe not all of them. Mr. Davidson's personal style still draws criticism. Union Pacific managers say he remains brusque and impatient. "Put a blowtorch to his a," he told his chief engineer when informed during a track inspection that a crew boss was running behind schedule.

Many problems remain. Changing the culture won't happen overnight. "What we are trying to do will probably take five years," says Robert Bauman, a Union Pacific director. But riding with Mr. Davidson on inspection trains through 10 states, it's possible to find a number of places where the company appears to be back on track.

Union Pacific Announces Plans to Repurchase Track, Save Lines (Aug. 25, 1998)

Union Pacific Is to Restructure Centralization of Management (Aug. 20, 1998)

The last car on the inspection train is called the theater car. Its seats face backward, toward a large rear window through which Mr. Davidson and his executives watch the track stretching out behind them. The boss discusses plans to expand mainline tracks in Kansas and Nebraska to handle more trains. He chides his chief engineer for a rough ride the night before. "I had a nightmare that I was on a bucking bronco and was about to fall off the horse," Mr. Davidson says.

At one point in Nebraska, he can hardly contain his glee when his train races between two speeding freight trains on recently upgraded triple track. "This is how it's supposed to work," he says. "Man, man. It's phenomenal."

Another time, though, Mr. Davidson appears glum when he sees that rainy weather has idled work gangs and equipment laying sections of second track. "We're a month behind," he says. "It's a shame."

A Backlash Spurred

Mr. Davidson's efforts come at a crucial juncture. Union Pacific is emerging from its worst crisis and one that has spurred a backlash against railroads. Customers angry about lost shipments and delayed freight have been heaping blame on big rail mergers and clamoring for stiffer federal regulation. Although railroads still haul about 40% of the nation's freight traffic, reflecting their lock on bulk shipments of coal and grain, their spotty delivery record has sent many of the more lucrative consumer-goods shipments to trucks. Trucks have boosted their share of the nation's freight bill to 80% from 77% in 1990.

Overhauling Union Pacific is a critical test for Mr. Davidson, the only pure railroader heading one of the major U.S. railroads. He started as a brakeman in Kansas and rose through the operations side. David Goode, head of Norfolk Southern Corp., is a Harvard-educated tax attorney. John Snow at CSX Corp. is a Ph.D. economist and former official with the Department of Transportation. Robert Krebs at Burlington Northern Santa Fe Corp. is a Harvard M.B.A. who worked in railroad operations.

Critics wonder how Mr. Davidson kept his job, and they doubt he can make the needed changes. Tall and brawny with a booming voice, Mr. Davidson is aware of the skeptics. But he says the railroad has learned from its "painful experience."

With the learning has come revamping in all directions. To send a message that every worker counts, Mr. Davidson has granted 200 stock options to each

But progress has been made elsewhere, with the man and the railroad. Union Pacific executives say Mr. Davidson is more relaxed now that the trauma of the service crisis is behind him and the company has sold off businesses he didn't care about. (The latest slated for disposal is trucking firm Overnite Transportation.) His personal life, too, has settled down. Twice divorced, Mr. Davidson last year married a woman who worked for Union Pacific in community affairs for nearly 20 years.

He keeps his old workaholic ways, arriving at the office by 6 a.m., and says he doesn't have time for hobbies except raising cattle in his hometown of Allen, Kan., and working out. A former baggage car on his inspection train has been converted into an exercise room.

On the business side, freight-car inventory, a measure of congestion, is 15% better than at the worst of the crisis. Average train speeds -- a key measure for timely delivery -- are up, which means that trains are less frequently having their top speed of 70 mph dragged down by being stalled or forced to roll at a snail's pace through congested yards. The number of sidings blocked by stalled trains is down, which is essential in the many places where sidings provide two-way traffic for single tracks. Even in Houston, the center of the service meltdown, the tracks are clear. A year ago a long row of parked freight trains there was "like a big billboard saying, 'We're screwed up,' " Mr. Davidson says.

Financial results are improving. Analysts expect Union Pacific to earn between $2.90 and $3 a diluted share this year. That is still less than the $3.38 a share the company earned from continuing operations in 1996, when it bought Southern Pacific, but better than last year, when the company posted a net loss of $633 million, or $2.57 a share.

Pointing the Finger

To this day, Mr. Davidson's view of the service debacle differs from that of most people. He blames Southern Pacific's equipment problems, train accidents, weather and track repairs. But many people also blame Union Pacific management. They say Union Pacific tried to cut costs during the integration, not hiring enough people and cramming freight cars into fewer yards.

= YARD CONSOLIDATIONS !

"They did almost everything wrong you can do," says Phillip Yeager, chairman of Hub Group Inc., a Lombard, Ill., freight-marketing company. "Union Pacific was trying to maintain their stock performance and failed miserably." Union Pacific shares, which got as high as $72.4375 in New York Stock Exchange trading in July 1997, before the merger problems surfaced, closed yesterday at $54.50, up 68.75 cents.

Union Pacific directors say they are happy they stuck with Mr. Davidson. "If we were to look around the country for a guy to deal with the crisis, Dick was the guy. There wasn't anyone with his credentials and knowledge," says Richard Cheney, the former secretary of defense who is chief executive officer of oil-services giant Halliburton Co. and a Union Pacific director.

Customers still complain about service. "It's too much of a crapshoot," says

Dennis Williams, manager of transportation services at Roseburg Forest Products Co. in Roseburg, Ore. "You just can't count on them to deliver on time." The American Trucking Association in Alexandria, Va., recently suggested that truckers could do a better job running railroads.

'A Long Way to Go'

Mr. Davidson acknowledges that Union Pacific "still has a long way to go" to satisfy customers. But he dismisses the trucking group's offer: "I wouldn't be so bold to offer to run their trucks for them, and I really don't think they want to run the railroad industry."

Meanwhile, Mr. Davidson reinforces his push for greater flexibility by showing he is willing to try anything. He recently reinstated quality programs that had lapsed during the company's merger problems. He bought back a rail line in Kansas that had been sold in a cost-cutting move. Even the old way of slamming freight cars into one another in giant "hump yards" is giving way to a gentler approach; Union Pacific recently opened a spiffy new yard in California with such gradual slopes that cars glide to a stop.

He wants to use the Internet and make it easier to do business with railroads. When Union Pacific sent salespeople to the Los Angeles area, some potential customers didn't know anything about the company. "They think Union Pacific was a movie made in 1939," he says.

There's a lot at stake, says Dennis Duffy, executive vice president of operations of Union Pacific Railroad, and some say a potential Davidson successor. "If we don't change, we'll be a dinosaur and lucky to be alive," Mr. Duffy says.

Back in Kansas City, Mr. Davidson is showing off a Union Pacific freight yard when he sees a coal train so long that it requires locomotives at both the front and back. "I'm still old-fashioned," Mr. Davidson says. "I always expect to see a caboose on the end."

--part1_dec44353.24f82f9e_boundary--

---------- Headers ----------
Return-Path: <dennishoes@earthlink.net>
Received: from rly-za01.mx.aol.com (rly-za01.mail.aol.com [172.31.36.97]) by air-za03.mail.aol.com (v60.28) with ESMTP; Fri, 27 Aug 1999 15:27:30 -0400
Received: from snipe.prod.itd.earthlink.net (snipe.prod.itd.earthlink.net [207.217.120.62]) by rly-za01.mx.aol.com (v60.28) with ESMTP; Fri, 27 Aug 1999 15:27:02 -0400
Received: from earthlink.net (pool0362.cvx10-bradley.dialup.earthlink.net [209.178.183.107])
by snipe.prod.itd.earthlink.net (8.9.3/8.9.3) with ESMTP id MAA18955;
Fri, 27 Aug 1999 12:26:48 -0700 (PDT)
Message-ID: <37C6E638.D9004A71@earthlink.net>
Date: Fri, 27 Aug 1999 12:25:45 -0700

* QUALITY PROCESS NOT USED IN GROTHER'S DEMOTION !!

EXH. 13 A

Linda D. Buttrill
12/23/2002 11:53 AM = ONE MONTH FOR 1/6th OF DATA REQUESTED

To: John E. Grother MORE "DEAD-ENDS" - See 8C REQUEST
cc:

Subject: Re: PDR'S

John, this has really been a difficult time of the year - a mountain of reports due. But I have checked the data base and there is only one (1) PDR in the Southern Region system for you, that is January 2000 thru December 2000. I am sending it, via U.S.Mail, today. When the Intermodal group left the region, I no longer had access to their files. You might want to check with Fryar.

John E. Grother

John E. Grother
11/26/2002 01:19 AM

To: Linda D. Buttrill@UP
cc:

Subject: PDR'S

WOULD APPRECIATE COPIES OF MY PDR'S FOR THE LAST 5½ FIVE (6) YEARS BEING MAILED TO MY HOME ADRRESS BELOW:

1718 RUSTIC PARK DRIVE
KINGWOOD, TX 77339

EXH. 13B

NO RESPONSE

USUAL DEADEND

John E. Grother
11/26/2002 01:14 AM

To: Don F. Fryar (DIRECT SUPERVISOR)
cc:

Subject: PDR'S

WOULD APPRECIATE COPIES OF MY PDR'S FOR PAST 5 YEARS BEING MAILED TO MY RESIDENCE WHILE I AM RECOVERING SUCH THAT I MAY REVIEW MY POSITIVES AND NEGATIVES.

Exh. 13C

Union Pacific Railroad
Attn: Ms. Linda Buttrill
24125 Aldine-Westfield Road
Spring, TX. 77373

December 30, 2002

NO RESPONSE TO DATE

MORE DEADEND

Dear Ms. Buttrill,

This refers to attached copy of request for six (6) years of PDR reports.

I appreciate the Performance Development Report (PDR) which you sent for the year 2000 and your advice to contact Mr. Fryar. I did contact Mr. Fryar with a written lotus request dated 11/26/02; however, he choose not to respond thus far and Mr. Fryar appears to be on 2002 vacation until the date of his retirement (Feb 1, 2003). Therefore, that suggestion is another dead-end.

Do you have anyway to obtain the missing PDR REPORTS from Premium Services for 2001 and 2002?

Moreover, do you have anyway to obtain the Service Unit PDR's for 1996 through 1999? I am especially interested in 1996-1997.

I have requested copies of these for each of the foregoing years; yet, Mr. Fryar choose not to provide them, just as Mr. Fryar has done this time.

Thanking you in advance for your cooperation. Please send the requested data to my home address.

John Grother JL

Attach: Grother lotus note 11/26/02
Buttrill lotus note 12/23/02

Exh. 14

DEMOTION POLICY 1997 Rev. 3/1/96

Demotion justification	If an employee is transferred to a lower job grade due to his/her inability to perform the duties of the prior position, the SRG and job grade of the new (lower) position will apply on the effective date of the transfer.
What about salary changes?	In most cases, the employee's present salary level is retained. However, if you believe a salary adjustment is warranted, provide Operating HR with your justification and we will try to obtain Railroad HR sign-off on the 15121.
What if it isn't a demotion?	If an employee is transferred to a lower grade for reasons other than performance, use "other" on the 15121 with reasons noted in the "comments" section of the form.

EXHIBIT 15

PARTIAL LIST OF PRIOR TO THE MERGER UNION PACIFIC MANAGERS WHOSE TITLES AND RESPONSIBILITIES WERE REDUCED IN 1996-1997; BUT , WITHOUT ANY KNOWN REDUCTION IN THEIR MONTHLY COMPENSATION

NAME	FROM JOB TO JOB
$ CHARLES O. MALONE	HOUSTON HUB GENERAL MANAGER TO OMAHA DISPATCH CENTER
$ GREGORY "BUBBA" GARRISON	HOUSTON SR DTO TO OMAHA STAFF
THEODORE F. INGRAM	HIGH LEVEL SAFETY STAFF POSITION - FIELD MTO AT TUCSON. (DEMOTED TWO + SALARY RATE GRADES; BUT, NO PAY CUT.
# RAY J. PERRY	HOUSTON SR DTO TO OMAHA STAFF

$ SEE EXHIBIT 16 FOR DESCRIPTION OF SEVERE SERVICE ISSUES IN HOUSTON & GULF COAST WHICH RESULTED IN NUMEROUS SETTLEMENTS WITH CUSTOMERS, LAWSUITS, AND SO FORTH; BUT, NO REDUCTION IN THE PAY FOR THE ABOVE MANAGERS.

(IN COMPARISON, GROTHER'S TERRITORY HAD NO SUCH LAWSUITS AND HUGE SETTLEMENTS WHEN GROTHER WAS REMOVED ACCOUNT "WE WANT UNION PACIFIC PEOPLE IN TUCSON")

"RE-ASSIGNED" IN 2001 FROM HOUSTON WITH NO CUT IN PAY.

EXH. 16

Union Pacific workers shun OT

Railroad making management changes to deal with backlogs

12/24/97

By CHARLES BOISSEAU
Houston Chronicle

Union Pacific Railroad reported Tuesday its freight delays worsened in the past week because it is shorthanded as more train crews are taking time off, presumably for the Christmas holidays.

Also, the Omaha, Neb.-based railroad said it reassigned its two top supervisors in the Houston area and will bring in a new manager with more authority to oversee its troubled Gulf Coast operations.

In its weekly filing to the U.S. Surface Transportation Board, the nation's largest railroad said that "over the last two weeks, UP ... experienced a deterioration in service in the Gulf Coast area."

As a result, the railroad's average train speed slipped last week to an average of 14.1 mph from 14.2 mph.

The slowdown forced the number of freight cars on the railroad's 36,000-mile system to swell by 3,616 cars to 336,863. That's 27,000 cars above the desired maximum and the highest since the week before Thanksgiving.

Since summer, Union Pacific has been struggling with an unprecedented traffic jam that began in the Houston area and has spread throughout much of its 36,000-mile system. To try to resolve the congestion, the STB imposed an emergency order until March 15 to allow competitors to operate more freely over Union Pacific's lines in the Houston area.

Union Pacific spokesman John Bromley said the deterioration is "almost entirely due to a shortage of train crews. This is concentrated in the Houston area and the Houston to New Orleans line."

"It's worse this time than it traditionally is," Bromley said.

He speculated that workers are "laying off" and not reporting for work because they've already put in such long hours and may feel they've made enough money.

"A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year," Bromley said.

Asked if the company still hopes to get operations running normally by Jan. 1 as it has promised federal regulators, Bromley said: "It's going to be pretty hard to do, with this crew shortage."

Union Pacific also mentioned in its filing with the Surface Transportation Board that service suffered as "personnel and shippers have been learning to operate new routes and use new tools" since the carrier switched over former Southern Pacific lines in the Houston area to Union Pacific's computer system.

> 'A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year.'
>
> John Bromley, Union Pacific spokesman

To help catch up in the Gulf Coast region, Union Pacific said it will continue to operate through Christmas, while most of the rest of its mainline operations will shut down late Christmas Eve through Christmas Day.

Texas Railroad Commission Chairman Charles Matthews said the worsening service "points out that until the STB ... revisits the UP-SP merger and begins to make some meaningful changes, in particular in the Houston and Gulf Coast area, this rail crisis is going to drag on longer than anybody expected."

He reiterated his support for a commission plan that would force Union Pacific to divest a substantial amount of track in the Houston area to increase competition.

Union Pacific also confirmed a number of personnel changes at its local offices, located in Spring.

Effective Jan. 1, Houston hub General Manager Charles Malone — the railroad's top local manager here as the traffic jam began and worsened this summer and fall — was reassigned to the carrier's Omaha, Neb., dispatch center.

Malone is being replaced by Ed Handley, an ex-safety project coordinator for the Federal Railroad Administration whom Union Pacific hired in October as an assistant general manager.

Union Pacific also said it will beef up local management here by creating a new job with more authority.

Steve Barkley — who manages Union Pacific's massive central dispatching center in a football-field-size bunker beneath Omaha — was given a new position in charge of the railroad's Southern and Central Region. His official title will be announced after approval by the railroad's board of directors, Bromley said. Barkley will relocate here after Jan. 1. Handley will report to Barkley.

Moreover, the carrier said it reassigned Greg Garrison, who had served as Union Pacific's No. 2 local manager as superintendent, transportation services. Replacing Garrison will be Ray Perry, who currently is in charge of the carrier's massive North Platte, Neb., terminal. Garrison was relocated to Omaha with an unknown title, Bromley said. Also, an existing superintendent here, Jeff Crandall, was promoted to general superintendent, transportation.

Union Pacific, by far the largest railroad in the Houston area, employs slightly more than 2,000 workers in Harris County.

Asked if the carrier was displeased with the jobs done by the displaced managers, Bromley said: "We're trying to strengthen the management down there and put the best people in the best slots."

EX 14-19

Union Pacific reports progress on slowdown

Train speeds improve slightly, filing states

DATED 1/14/98

By CHARLES BOISSEAU
Houston Chronicle

Union Pacific Railroad reported Tuesday it is making progress in recovering from a traffic slowdown during the holidays.

In a weekly filing with federal regulators, the carrier said average train speeds hit 14.6 mph in the week ended Jan. 9, up from 12.3 mph the previous week. The average was the fastest since Union Pacific began providing the data in mid-September, but still below the 17.9 mph average a year ago.

Because of the faster traffic, the Omaha, Neb.-based railroad was able to move about 7,000 cars from its system, leaving it with 333,193. Officials said 310,000 is the maximum cars Union Pacific's 36,000-mile system can support without delays like those that have plagued the railroad for months and provoked the ire of shippers and regulators.

"The numbers show we are making some improvements," Union Pacific spokesman John Bromley said. "Basically we're seeing a pretty fluid (railroad) with the exception of that one area where all this started."

Bromley referred to the Houston terminal — where the railroad's congestion problems began last summer — and the Houston-to-New Orleans corridor. In these areas, traffic "still is pretty congested," he said.

The railroad hopes for improvements here in early February when it starts operating trains in two directions over tracks running from Houston to Memphis, Tenn., and southern Missouri. One track will be used exclusively for northbound freight, another for southbound traffic.

The railroad's recovery efforts had faltered the last two weeks, as it reported many train workers chose to stay home for the holidays. But in its latest report to the Surface Transportation Board, the railroad said fewer trains are now delayed because of a lack of manpower.

Also on Tuesday, a Union Pacific freight train derailed at 3:25 a.m. igniting a fire on a busy corridor in east Fort Worth, damaging a trestle spanning the Trinity River. No injuries were reported in the derailment, which involved eight cars, with one carrying a load of salt and the others empty, Bromley said.

Union Pacific has been under fire since last summer because of traffic congestion and safety problems that have plagued its operations. The widespread delays have caused additional costs estimated in the hundreds of millions of dollars for scores of shippers.

Many customers and state regulators have blamed the problems on the merger with Southern Pacific Rail Corp., which made Union Pacific once again the nation's largest railroad and gave it a commanding share of the Houston and Gulf Coast market — Texas' busiest rail corridor.

Because of the service problems, the federal Surface Transportation Board has issued an emergency order until March 15 that, among other things, requires Union Pacific to report on its progress each week.

For its part, Burlington Northern Santa Fe Railway Co. — the nation's second-largest carrier — said in its own quarterly progress report to the STB that Union Pacific's congestion has hampered its ability to serve the area.

Burlington Northern said because of the congestion it "has serious reservations about its ability long-term to fulfill the competitive role" the railroad and the agency had anticipated.

"BNSF's operational experiences to date, in light of the cost and unreliability of service over the trackage rights lines, raise serious questions as to whether BNSF will be able to provide rail customers viable long-term competitive service, particularly in South Texas and along the Gulf Coast," the carrier said.

The Fort Worth-based railroad was granted the right to operate over Union Pacific tracks as a condition of the UP-Southern Pacific merger.

Burlington Northern spokesman Jim Sabourin said Tuesday, "At this point we're not asking for anything specific (from the board). We are continuing to bring this to the board's attention.

"We are unable to take advantage or capitalize on the trackage rights because of the congestion," he said.

EXH. 18
Page 1 of 2

THE ORANGE COUNTY REGISTER, FRIDAY, OCT. 3, 1997

Railroad merger rides off the tracks to chaos

TRANSPORTATION: Union Pacific has lost millions and slipped in safety since its ballyhooed buyout of Southern Pacific Rail Corp.

By DANIEL MACHALABA
The Wall Street Journal

Its railroad safety record, marred by three fatal crashes in three months, is being characterized as a "fundamental breakdown" by federal regulators. Its route system west of the Mississippi River has slipped into near gridlock in many places, with thousands of freight cars backed up in the Houston area alone. Its chairman was forced to publicly apologize in August to its big customers.

So bad has service become that customers say Union Pacific Corp., the nation's largest railroad, can't account for millions of dollars of shipments for weeks at a time. Riviana Foods Corp., a Texas rice producer, tried to ship a freight car full of rice from Missouri to Tennessee in early August. A month later, the car was spotted on a track in Devil's Slide, Utah. The latest word is that it was somewhere in Texas. "I still don't know where it's at," says Terry Nickens, Riviana's distribution manager.

Is this any way to run a railroad?

Union Pacific's attempts to put together the biggest railroad merger in history is fast becoming one of the industry's biggest debacles. With high hopes last year, the company bought Southern Pacific Rail Corp. for $3.9 billion and promised to begin merging the systems this summer into a seamless link between the West Coast and the Midwest.

Instead, with amazing speed, the merger has unraveled in recent weeks into a series of service and safety quagmires. Analysts estimate the carrier has already lost about $125 million in revenue as customers diverted shipments. Hundreds of customers have threatened to take away business, and the Federal Railroad Administration could well impose stiff fines on the company for safety violations. The company concedes that its ser-

Please see RAIL Page 4

EXH 18 (CONT.)

Page 2 of 2

RAIL: Company hurt by self-professed arrogance

FROM 1

vice problems will reduce its third-quarter earnings by 10 percent to 15 percent. And the stock price has fallen 13 percent in the past month.

Wednesday, things got worse. The Dallas-based company said it would abandon an embarrassing plan to move goods by ship through the Panama Canal — a plan that was rejected this week by its customers. Instead, in an even more remarkable step, it agreed to hand over some of its business to competing railroads and to "borrow" the services of dozens of former managers from Eastern railroads to help untangle the mess.

The setbacks have startled industry observers, who only a few months ago expected the merger to go smoothly, especially because Union Pacific had had a sterling reputation in railroading.

"They thought they could conquer the world," says William Withuhn, transportation curator at the Smithsonian Institution in Washington, D.C., and a widely recognized expert on railroads. "They were counting on having a great success. But they just didn't plan it right. It fell apart."

Union Pacific acknowledges that it has been caught by surprise — and humbled by the experience. Richard Davidson, its chief executive, said in an interview after a recent meeting with more than 200 angry chemical-company officials and other shippers in Houston: "I never imagined in my wildest dreams that I'd be down here apologizing for our service." Wednesday, a Union Pacific spokesman said, "There's no denying we have severe service problems, but we are making headway."

The carrier's executives concede that they overestimated their ability to combine giant rail systems operating hundreds of thousands of freight cars. Its own long record of success, unmatched through much of the late 1980s and early 1990s, might have bred overconfidence. "We are arrogant," Greg Garrison, Union Pacific's Houston superintendent, said last month. "We consider ourselves the best."

Union Pacific's woes raise troubling questions about how well railroads can transport goods in the nation's ever-growing economy. For more than a decade, the industry has been on an unprecedented merger binge that was supposed to give the remaining five powerful railroads a better chance at competing against trucks, which now earn nearly 80 percent of the nation's freight revenues. That improvement, in turn, was supposed to help reduce everything from highway congestion to air pollution to fuel consumption. Consumers would gain, too, because railroads can haul goods about 20 percent more cheaply than trucks can, with much of the saving to be passed on to the public.

But Union Pacific's problems suggest that the railroads are a long way from fulfilling this promise and that shippers might be discouraged from using them. Chemical companies on the Gulf Coast have been switching to trucks whenever possible because Union Pacific's delays have cost them an estimated $100 million in plant closings, lost revenues and extra expenses.

In Waverly, Ohio, Mill's Pride Inc., a maker of prefabricated kitchens that had turned to railroads to save money, says it has dropped Union Pacific and the railroad industry entirely.

"They give us excuses. They have derailments, floods, breakdowns, snow, just stuff you wouldn't think would happen," says Armando Sanchez, the distribution manager.

A Union Pacific spokesman says floods in Texas as well as hurricane-related damage in the Gulf Coast region compounded the problems. The company tried to persuade its labor unions to agree to new flexible work rules, but the unions didn't go along until last month. By then, the snarl had spread to Union Pacific's facilities in the Los Angeles/Long Beach harbor complex, where as many as 3,000 containerized shipments have been piling up for lack of freight cars. "I've never seen it this bad," says David McLean, director of global marketing for Circle International Inc. of San Francisco, which arranges freight transportation for major firms.

Through its buyouts, Union Pacific also encouraged an exodus of many Southern Pacific executives and managers, whom industry officials said were skilled at keeping the weaker line going.

→ (OR DEMOTION?)

EXH. 19

NESS

Dow Jones	NYSE	Amex	NASDAQ	Gold
+101.87	+6.64	+5.00	+25.34	+1.10
Close 7,826.61	Close 500.54	Close 672.65	Close 1,626.56	Close 303.50

Railroad vows to bring trees

hristmas: Union Pacific says it won't be a rinch, despite transportation gridlock.

Art Wong Nov 8 '97
ff writer Sunday

ONG BEACH – Not wanting be a Grinch, Union Pacific lroad officials promised that pite a "massive mess" snarling ffic on its tracks, deliveries of ristmas trees to Southern Calinia would not be delayed.

We won't let that happen," said ion Pacific Vice President Rob- Starzel, speaking at a special ring held by the California blic Utility Commission.

n apologetic Starzel testified t the railroad had implemented unprecedented plan that is inning to ease a two-month dlock, but he said a complete urn to normalcy isn't expected il early next year.

'ort and steamship officials eed, saying they are beginning see improvements. They asked ulators not to intervene, which ld worsen the situation. But aller shippers complained that y are continuing to see lengthy ays.

We see it getting worse," said rin Lindsay of Lindsay Lumber Paramount, speaking on behalf he local lumber industry. "The blem is cars are taking six to t weeks to get from Oregon to Angeles that used to take a week."

The delays have resulted in a shortage of lumber, which has driven up its cost by about 15 percent, he said.

Starzel said the congestion stems from serious mistakes made by Union Pacific this summer as it tried to merge with Southern Pacific railroad. It closed some Southern Pacific yards in Houston, not realizing how vital they were.

That began to back up trains in the Southwest and then throughout its system, which extends to Southern California. The problems grew because the two railroads don't have common computer systems. A greater-than-expected surge in holiday shipments overwhelmed Union Pacific, which has yet to negotiate new labor agreements that would allow it to use Union Pacific workers to help on its newly acquired Southern Pacific routes, such as those in Southern California.

The gridlock has left cargo piled up on the docks. About 16 ships have been diverted.

United Parcel Service diverted about $50 million worth of cargo. Union Pacific paid 7,000 truckers to haul stalled cargo from Southern California to Chicago.



Robert Starzel, Union Pacific vice president, addresses m bers of the Public Utilities Commission at a hearing on the road tieup Wednesday in Long Beach. John Hayes / Associated

Starzel said new labor agreements should be completed by the beginning of the year, and a merging of the computer systems finished by spring.

Meanwhile, Union Pacific has taken the "revolutionary" step of asking other railroads to take its coal and grain shipments. Bu said other railroads are als their capacity. The company is acquiring another 300 loc tives. It already has 8,200. An hiring and training more wor

"The recovery plan is g working, but it takes time to g back," Starzel said.

tockholders sue Union Pacific over stock flop

Katie Fairbank
ociated Press

DALLAS – Shareholders are ag Union Pacific over its stock's ent slide, claiming the nation's rest railroad knew long ago that merger with Southern Pacific s off track.

A class-action lawsuit represent- Union Pacific shareholders o bought stock between March 4 Oct. 1 accuses the Omaha, Neb.-based railroad of misrepresenting its safety record and failing to disclose problems involving last year's merger.

The lawsuit, filed here Tuesday, contends that even as the railroad touted the benefits of the $5.4 billion merger, top railroad officials knew that combining the two lines would be costly. It also claims that the optimistic announcements inflated stock prices.

"It's a fair statement to say there is no doubt that the directors and officers knew very well that those statements about the merger were false," Steven Schulman, a lawyer for the stockholders, said. Union Pacific spokesman John Bromley on Thursday would not comment.

Railroad executives said last month that fourth-quarter profits would range from $74 to $149 million. On Monday, they said the quarter results could range break even to substantial lo

Schulman said the typ "stock-drop" case he has fil hard to win.

"It's not because it's not a g case, but because the compa fight hard," he said.

Although Union Pacific s rose above $72 in mid-July starting the year at $62, it since dropped to $58.50.

Exh 2

Dow sues railroad over delays

UP denies union's claim that it's violating safety regulations

By JENALIA MORENO
Houston Chronicle

3/18/98

Union Pacific Railroad was sued Tuesday by one of its biggest customers and accused of violating safety regulations by a union leader – the same day it announced signs of congestion relief in the Gulf Coast and Laredo areas.

Dow Chemical Co., in a suit filed in state district court in Angleton, claims rail service delays have cost the company more than $25 million in the past nine months and that the railroad breached its contract by failing to provide reasonable service.

The chemical company said it has been forced to use trucks to move its products and raw materials.

The company's Freeport and Plaquemine, La., manufacturing facilities depend on Union Pacific for service because no other railroad provides service to those plants, Dow said.

Some of the company's 115 manufacturing plants worldwide have been forced to close down for days at a time because of service delays, said Anne Ainsworth, spokeswoman for the Midland, Mich.-based company.

"The service disruptions have affected numerous of our product lines with our key industry segments," Ainsworth said. "Our losses are continuing to mount."

Attorneys for the nation's largest railroad had not yet received the suit and a spokesman declined to comment. This is the second suit filed against Union Pacific over service delays. Entergy Corp. filed a similar suit several months ago.

Shippers from around the nation met in Houston last month to discuss rail service delays and attorneys instructed them on how they could recoup their transportation losses, estimated to be $2 billion nationally.

At that meeting, Dow's transportation manager, Harry Ignatowski, said he was

See UNION on Page 8C.

Tax hotline

Filing a tax return this year will be no easy matter for many people, especially when you consider the number of new laws on the books.

Question: Taxpayers will be inundated with information about changes in the tax code. How do you decide what's worth paying attention to?

■ How do you decide what's worth paying attention to?

■ Should you withdraw money from your individual retirement account to pay for higher education expenses?

■ How do the new rules affect your estate planning?

■ What's the best way to save for your retirement?

Taxpayers can get answers to these questions and other tax-related questions from Houston CPAs from 7 a.m. to 7 p.m. Thursday by calling 713-260-9810. The service will be open Saturday and Sunday from 10 a.m. to 4:30 p.m.

Union 3/18/98

Continued from Page 1C.

frustrated "because this thing has gone on six or seven months and there's not an end in sight. All I want is my service back."

The filing proves how badly local shippers have been affected by the rail crisis, said Paul Broussard, a transportation consultant in Houston.

"You know if companies like Dow Chemical are hurting, you can just imagine what smaller shippers are experiencing," he said.

> 'You know if companies like Dow Chemical are hurting, you can just imagine what smaller shippers are experiencing.'
>
> **Paul Broussard, consultant**

The shippers he represents are still totaling how much they have been damaged by the crisis that began last summer, Broussard said.

Also on Tuesday, Dennis Penning, the general chairman of the Brotherhood of Locomotive Engineers, accused the railroad of unsafe practices and threatened to call a strike.

Although his division of the union group unanimously has agreed to strike, international leaders last week voted against calling such an action.

Penning, who represents 1,100 Union Pacific engineers, accused the railroad of rushing its implementation of directional running – running trains in only one direction on specific tracks – last month by forcing engineers to operate over unfamiliar tracks.

"We're an accident looking for a place to happen. They're violating our safety rights out in the field like you wouldn't believe to relieve their congestion," Penning said from his St. Louis office. "I'm going to do whatever it takes to stop this."

The accusations came the day before the National Transportation Safety Board begins a three-day meeting to discuss Union Pacific's safety record.

David Bolger, Federal Railroad Administration spokesman, said he has heard of only one engineer who said he was unfamiliar with the tracks he was assigned to operate over after the directional running program was implemented on Feb. 1. The agency is investigating that complaint and has overseen the switch to directional running in the past month.

"They seem to be investing a great deal in the Houston area," Bolger said. "They're trying to get as m qualified people as possible."

Union Pacific [illegible] Broussard said he considers it to be meeting its projections of [illegible] running and is operating in a s manner. He said engineers m complete a program to familia themselves with the tracks be they are allowed to operate the t alone.

Directional running has sho signs of relieving congestion in Houston area, cording to Tu day's report to U.S. Surfa Transportat Board.

That rep stated that Ho ton's rail ya were becom more fluid. Th were 282 fe cars in Englew Yard last we and 401 fewer c in the Setteg Yard.

The company is now planning construct a rail line less than a m long along Liberty Road to conn those two yards. Union Pacific quired the Englewood Yard in in its merger with Southern Pac The company now must circumna gate the city to move cars from yard to the other.

"Connecting those two trac would not only save hours, but prove productivity between the yards," said Union Pacific spok man Mark Davis.

In its weekly report, Union Pac also announced it had reached agreement with the Mexican railr Transportación Ferroviaria Me cana and Texas Mexican Railway alleviate the rail traffic backlog Laredo.

TFM and Texas Mexican, wh are jointly owned by Kansas S Southern Railway Co. and the Me can transportation company Te portación Marítima Mexicana agreed to accept an additional cars daily from Union Pacific. Th typically accepts 500 Union Pac cars en route to Mexico daily.

TFM also agreed to urge Mexic agricultural officials to inspect c in rail yards instead of on the La International Bridge when the c are crossing into Mexico.

Union Pacific agreed to run ad tional locomotives through Laredo Monterrey.

Both railroads agreed to send empty northbound trains through less congested Brownsville crossi

20 B

LAW

DuPont Sues Norfolk Over Rail Delays

By DANIEL MACHALABA
Staff Reporter of THE WALL STREET JOURNAL

DuPont Co. sued Norfolk Southern Corp., seeking damages for rail-service breakdowns following Norfolk's operation of parts of the former Conrail.

The suit, filed Friday in U.S. District Court in Alexandria, Va., accuses Norfolk Southern of breaching its contract with DuPont to provide timely, uninterrupted and reliable service. The Wilmington, Del., chemicals manufacturer said the rail-service snafus caused DuPont to slow production lines, use more-expensive substitute transportation and acquire substitute materials at higher costs.

DuPont spokesman Clif Webb said the disruptions affected almost a dozen plants in the company's nylon, fluoroproducts and chemicals-solutions businesses, among others, and occurred from June 1, 1999, through the present. He said DuPont "incurred expenses and suffered losses amounting to millions of dollars."

The lawsuit comes after several years of increasing customer frustration with rail service following big railroad mergers and customers' inability to get Congress or federal regulators to promote more competition in the rail industry.

In 1997 and 1998, massive service failures followed Union Pacific Corp.'s takeover of Southern Pacific Rail Corp. Then, soon after they began operating their respective portions of Conrail on June 1, 1999, Norfolk Southern and CSX Corp. became mired in freight congestion, delivery delays and communication snafus. CSX isn't involved in the lawsuit filed by DuPont.

"Too frequently, rail customers have had to live with whatever service their railroad gives them," said Edward Emmett, president of the National Industrial Transportation League, which represents rail, truck and ocean freight customers. "If there's no relief to be found in the marketplace, I expect more shippers will turn to the courts."

Some analysts, however, don't expect a wave of similar lawsuits, because Norfolk Southern has sought to resolve such customer issues expeditiously. In addition, the magnitude of its service problems never approached the full gridlock experienced by Union Pacific customers.

The DuPont suit "likely represents more the exception than the rule," said Scott Flower, an analyst at Salomon Smith Barney Inc.

Norfolk Southern, based in Norfolk, Va., declined to comment on specifics of the DuPont suit. But Norfolk Southern spokesman Robert Fort said the company has "been working with all customers who have had service-related claims from last year, and we have made a good-faith effort to work with DuPont, but we have been unable to resolve these issues."

In its suit, DuPont said Norfolk Southern had represented that transit times along the former Conrail routes would be as good as or better than transit times before the Conrail acquisition. But DuPont said that Norfolk Southern's performance deteriorated immediately after June 1, 1999, with transit times for loaded and empty railcars as well as cycle times for DuPont's rail fleet increasing dramatically.

Among the Norfolk Southern service breakdowns it experienced, DuPont said in its suit, were "'lost cars,' blocked rail sidings, discontinued or slowed intermodal service, reduced average train speeds and increased dwell times in yards."

DuPont said timely rail service is critical because the company's facilities are not designed to stockpile outgoing or incoming materials.

Railroad emergency is 'not yet over'

11/5/97

Board extends order on Union Pacific

By DAVID IVANOVICH
Houston Chronicle Washington Bureau

WASHINGTON – Federal regulators late Thursday extended an emergency order imposed on Union Pacific Railroad's operations, unpersuaded that the nation's largest railroad has overcome the operational woes that caused massive backups in Houston and much of the West.

But the federal Surface Transportation Board's order fell far short of the more radical steps proposed by the Texas Railroad Commission, which wanted Union Pacific to turn over control of some of its track in Houston.

The Surface Transportation Board announced Thursday night it would keep Union Pacific under emergency status until March 15, and give competitors Burlington Northern-Santa Fe and Texas Mexican Railway Co. the right to use Union Pacific's Houston lines in the area.

Previous emergency orders issued Oct. 31 had given only Texas Mexican the right to serve some of Union Pacific's customers along its Houston lines.

"While service is showing signs of improvement, the service recovery to date is not broad enough in scope. Given the improvement that is still needed, we have concluded that the emergency is not yet over," the board said.

The board also will require even more extensive reporting requirements on Union Pacific than it had in the past.

Union Pacific Chief Executive Dick Davidson, in a written statement, said the board had given all parties in the issue a fair hearing.

"We look forward to completing our service recovery as rapidly as possible in order to regain the confidence of our customers," Davidson said.

Some Union Pacific customers were surprised by the board's order, which went further than they had expected.

"I think this is probably as good as it's going to get from the board," said Maureen Healey, director of transportation services for the Washington-based Society of the Plastics Industry, a trade group which has been one of Union Pacific's biggest critics. "It's still going to take a lot of cooperating among the railroads, trying to get them to talk to one another and get the business taken care of."

Texas Railroad Commission Chairman Charles Matthews, who had asked the board to force Union Pacific to divest a portion of its rail lines in Houston as a way to promote rail competition in the area, blasted the decision.

"It appears to be very, very minor relief for the Houston area, which is disappointing," Matthews said. "It's Houston and the Gulf

See UNION on Page 4C.

Union

Continued from Page 1C.

Coast that are hurt the worst."

Matthews has pointed to a study conducted by Bernard Weinstein at the Center for Economic Development and Research at the University of North Texas, which estimated that the service problems have cost Texas businesses $762 million.

"They just still don't seem to get it," Matthews said. "It's amazing. No matter how many Texans go up there to testify, they just don't seem to pay any attention to us."

The board declared the initial rail emergency in response to massive rail congestion problems that began in Union Pacific's Houston operation and quickly spread throughout the West.

Union Pacific's Englewood Yard in northeast Houston was ground zero for the railroad's troubles. Company officials have said one of their biggest mistakes was to stop making up trains at the company's busy Strang Yard in La Porte and try to consolidate all shipments out of the massive Englewood operation.

Davidson had assured the board back in October that his railroad could resolve the traffic problems by shortly after Thanksgiving.

And on Wednesday, Davidson claimed victory over the traffic woes and told reporters his railroad would be running smoothly again by the end of the year.

Union Pacific's customers, many of whom have been forced to curtail production, lay off employees, even shut down plants because of an inability to obtain raw materials or ship out products, had asked the board to continue the order.

Robert Evans of the National Industrial Transportation League predicted Union Pacific would need at other three months to resolve its traffic problems.

Many critics blame Union Pacific woes on the company's merger wit Southern Pacific Rail Corp. last year a move that made Union Pacific th biggest rail carrier in the nation, em ploying 53,000 workers and control ling 36,000 miles of track. Union Pa cific also is the nation's larges hauler of chemical products, much o which is produced along the Gul Coast.

Davidson said company officials have thrown their budget for the year out the window, sparing no cost to fix the operational troubles.

Industry analysts earlier this summer were expecting Union Pacific Railroad's parent company, Union Pacific Corp., to post a profit of about $1.20 a share for the fourth quarter. Wall Street railroad analysts Doug Cummins and Tony Hatch now are looking for a 40-cent-per-share loss.

Union Pacific's stock, which was selling around 72 in early August, fell 1¾ Thursday to close at 62⅞ Thursday on the New York Stock Exchange.

Texas Mexican, which is 49 percent owned by Kansas City Southern Railroad Co., is currently moving about half a dozen cars in the Houston area each day. The company will be able to serve customers along Union Pacific's line only until the emergency order is lifted.

Chronicle staffer Charles Boisseau contributed to this report.

2

Union Pacific spending big to unclog rail lines

RAILROADS: The company is upgrading key segments on the Nebraska plains to ease its costly, merger-related congestion.

By JOE RUFF
The Associated Press

NORTH PLATTE, Neb. — Welding machines the size of semitrailer trucks straddle new Union Pacific rail lines in this vast expanse of Nebraska's western plains that is home to the busiest segment of the nation's largest railroad.

Nearly 800 workers in the summer heat grind ends of the rails smooth, cut new rail bed and lay concrete ties in a $366 million track expansion and maintenance project just east of North Platte.

About 40 percent of Union Pacific's trains hit this 108-mile stretch, carrying cargo as diverse as airplane wings, automobiles, frozen vegetables and coal, traveling from Los Angeles to Chicago, Wyoming to Texas.

The track work here and around Union Pacific's 36,000-mile network already is making progress at easing congestion that made the railroad an object of ridicule and the target of customer lawsuits last year. But much remains to be done to smooth out the stormy 1996 merger of Union Pacific and Southern Pacific.

The price tag for upgrading track and trains is running at least $200 million above the $1.4 billion Union Pacific had projected. The work now is expected to take two more years than the five years originally planned.

Still, things are going well enough that the railroad showed off some of its expansion on a recent media tour of its routes to Wyoming coal fields.

Like the rest of Union Pacific's 23-state system, travel slowed through this stretch last year because of congestion that cost the U.S. economy an estimated $4 billion in stalled production and more-expensive transportation.

Only now is traffic picking up, and railroad executives hope putting a third track down will speed service still more.

If all goes as planned, trains will go 70 mph instead of 60. Instead of 125 trains each day, more than 200 could roar through daily by year's end. When one track undergoes maintenance, the other two will run full speed.

But Union Pacific has a long way to go to please its customers, said Ed Rastatter, director of policy for the National Industrial Transportation League, which represents about 1,000 rail and truck users.

Most agree the crisis is over, but they're still not getting the service they expect, Rastatter said. Merger benefits were supposed to include faster transportation times, but unforeseen delays in service continue and train times are too slow, he said.

"Almost everybody thinks they have a long way to go to normal, let alone where they want to be with the benefits of the merger," he said.

The merger that created the biggest U.S. railroad quickly challenged the notion that bigger is better.

A surge in business surprised Union Pacific in 1997, even as it suffered from a rash of wrecks and difficulties merging with Southern Pacific's aging equipment.

Average train speeds systemwide now are at about 14 mph, slower than the precrisis 18 mph. Union Pacific lost $633 million over the past three quarters, including settlements with customers angry over money lost to delivery delays.

While the worst may be over, the railroad still faces a difficult fall.

Union Pacific and Burlington Northern are warning farmers that they do not have enough rail cars to handle what is expected to be an unusually difficult harvest season.

Low grain prices and reduced exports in the aftermath of Asia's economic crisis have led farmers and grain elevators to store much of last year's harvest in hopes of improving markets.

Page 1 of 1

EXHIBIT A

EXH 228

Page 2 of 2

The Orange County Register **NATION/WORLD** Saturday, Sept. 19, 1998

Union Pacific might be ordered to divest

The federal government Friday raised the possibility of forcing **Union Pacific** to divest some of its rail lines if service did not improve by the end of the year.

In a submission to the Surface Transportation Board, the Department of Transportation said it did not support allowing the railroad an indefinite amount of time to restore service to the levels seen before its 1996 merger with **Southern Pacific**.

The Department of Transportation noted some improvement in service, but expressed concern that Union Pacific's performance would deteriorate in the coming months as grain and other shipments increased.

A Transportation Board emergency order last year against Union Pacific that allowed other railroads to compete for customers on UP tracks expired Thursday.

EXH. 23A

John E. Grother
07/31/02 02:39 AM

To: Lisa Brewster@UP
cc:
Subject: Re: Letter dated July 25, 2002

MY DIRECT SUPERVISOR WAS MR. KEN C. PACKARD, WHO STILL APPEARS TO BE AN ACTIVE EMPLOYEE AS NOTED ON COED. DO YOU THINK HE KNOWS WHERE THE 15121 IS FILED?

WOULD MR. PACKARD HAVE BEEN THE PERSON ACCOUNTABLE FOR FILLING OUT THE 15121?

WHY WOULD MR. PACKARD STILL HAVE THE 15121? WOULD IT NOT BE ON MICROFICHE OR HARD COPY?

HE HAS NOT RESPONDED TO MY TWO LOTUS NOTES ABOUT THIS ISSUE; BUT, HE MAY RESPOND TO YOURS.

NOTWITHSTANDING THE PROBLEM THAT THE CONTACTS YOU ARE TRYING TO REACH ARE ON VACATION, WHICH IS EXASPERATING AT BEST, PERHAPS WE CAN FOCUS ON FOUR SIMPLE QUESTIONS:

1. IS THERE A 15121 ON SOME HR HARD COPY FILE OR MICROFICHE? THERE MUST BE A PROCESS? I don't know. Our systems have changed at least twofold.

I HAVE REQUESTED & RECIEVED MY PERSONAL RECORD TWICE & THERE IS NOT ONE IOTA OF INFORMATION THEREIN ABOUT THE 1997 DEMOTION, OR ANY "DISCIPLINE" OR RATIONAL RELATED THERETO.

2. WAS JUSTIFICATION FOR A WAGE REDUCTION REQUESTED AND APPROVED? Yes, in the online system it indicates an electronic approval from Brad King and Art Schoener.

WHAT WAS THE BASIS FOR SUCH A HORRIFIC WAGE REDUCTION ($ 1,272/MO) ; WHEN ALL AROUND THE COUNTRY IN 1997, UPRR WAS BEING SUED BY SHIPPERS FOR SERVICE FAILURES; BUT, NO LAW SUITS IN MY TERRITORY? The online record indicates disciplinary action.

3. MAY I OBTAIN A COPY OF THE 15121? If the old system and the archive is brought up, yes. I don't have any idea of what it looked like in 1997.

4. WAS PERFORMANCE STATED AS THE REASON FOR MY DEMOTION OR "OTHER"? As I indicated above, the only note I can see in the online system was the demotion was for disciplinary reasons.

IF "OTHER", WHAT REASONS ARE NOTED IN THE "COMMENTS" SECTION OF THE 15121? Since we don't have a copy of the actual 15121, I don't know.

FORGIVE ME FOR ROLLING ON; BUT, PART OF MY TRANSITION IS TO WORK 1730-0530; 5-6 DAYS A WEEK AND SOMETIMES I GET A LIL' CONCERNED WHEN I RE-VISIT THE "FAIRNESS" OF THIS 1997 EVENT.

HOWEVER, SINCE I WILL BE FINANCIALLY PENALIZED FOR THE REST OF MY ENTIRE LIFE, I FEEL I AM ENTITLED TO SOME REASONABLE EXPLANATION AS TO WHY I HAVE BEEN SINGLED OUT AS SCAPEGOAT OF THE DECADE.

THANKING YOU IN ADVANCE FOR YOUR UNDERSTANDING OF THIS PAINFUL DEMOTION ISSUE.

I

E&H. 23B

To: John E. Grother@UP
cc:

Subject: Re: Letter dated July 25, 2002

Mr. Grother, I have not been able to find anyone who knows if the old system (15121) is archived anywhere. Therefore, I will not be able to do anything more on that front. I will forward you a copy of the form that is included in one of our more recent systems. That is all the luck I have had. The reference to disciplinary/performance is due to the policy statement in effect at that time, which I forwarded to you already.

Take care,
Lisa Brewster
John E. Grother

John E. Grother
08/01/02 09:19 PM

To: Lisa Brewster@UP
cc:
Subject: Re: Letter dated July 25, 2002

THANK YOU FOR THE TIME YOU HAVE DEDICATED TO THE FAIR REVIEW OF THIS ISSUE.

HOWEVER, I STILL WOULD APPRECIATE IT IF YOU WOULD REVIEW YOUR ANSWER IN RED TO #3 BELOW
WHERE YOU ANSWERED "YES" ; TO PROVIDING A COPY OF THE 15121 ("IF THE OLD SYSTEM AND ARCHIVE IS BROUGHT UP, YES") ; AND , PROVIDE ME WITH A COPY OF THAT 15121 DOCUMENT.

UPRR POLICY STATES EMPLOYEES SHALL BE TREATED WITH RESPECT AND FAIRNESS, "JUST LIKE YOU WOULD LIKE TO BE TREATED".

IF YOU CAN NOT ACTIVATE THE EQUIPMENT NECESSARY TO OBTAIN MY 15121, WHO, IS IN POSITION TO ACTIVATE SAID EQUIPMENT OR SYSTEM?

IN THE MEANTIME, IS IT POSSIBLE TO OBTAIN A COPY FROM THE "ON LINE RECORD" WHICH INDICATES DISCIPLINARY ACTION AND THE NAMES OF THE PARTIES WHO APPROVED THIS DEMOTION IN HARD COPY FORMAT TO MY HOME ADDRESS?

IN CONCLUSION, THEREFORE, I ONCE AGAIN AM REQUESTING THAT THE TRUTH FINALLY BE MADE AVAILABLE TO THE EMPLOYEE WOULD HAS BEEN SO ADVERSELY AFFECTED FOR THE REST OF THEIR LIFE.
Lisa Brewster

Lisa Brewster [redacted]

To: John E. Grother@UP
cc: Ken C. Packard@UP, Linda D. Buttrill@UP

~~Subject: Re: Letter dated July 25, 2002~~

Please see my comments in red.
John E. Grother

Prior Page

EXH. 24

Linda D. Buttrill
07/09/2002 03:34 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

ANOTHER SLOW RESPONSE WITH DEAD END

John, As I have indicated on several occasions to you, I do not have a copy of this policy you are requesting. If you want to continue to pursue the 'demotion' and 'reduction in pay' from your 1997 assignment; maybe you should speak with someone in the EEO group. You can reach them at 402-271-4435, or 1-866-877-3362.
John E. Grother

WHY? EEO ISSUE?

John E. Grother
07/02/2002 03:55 AM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

IT HAS BEEN OVER 100 DAYS SINCE I INITIALLY REQUESTED A COPY OF THE UNION PACIFIC 1997 DEMOTION POLICY AND THE IMPLEMENTING GUIDELINES, IF ANY.

ARE YOU NOW IN A POSITION TO PROVIDE SAID DOCUMENTS OR ADVISE ME TO WHOM I SHOULD BE ADDRESSING THIS REQUEST PLEASE?

---------- Forwarded by John E. Grother on 07/02/2002 03:52 AM ----------

John E. Grother
05/09/2002 04:51 AM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

AS REQUESTED BELOW ON 3/27/02:

ARE YOU NOW ABLE TO PROVIDE THE "OFF-THE-SHELF FILED 1997 DEMOTION POLICY" OF THE UNION PACIFIC RAILROAD?

ALSO, ARE THERE ANY IMPLEMENTING GUIDELINES OR PROCEDURES THAT WENT WITH THE POLICY, THAT ARE ALSO AVAILABLE?

---------- Forwarded by John E. Grother on 05/09/2002 04:47 AM ----------

John E. Grother
03/27/2002 10:28 PM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

UPOnline

Updated: Wed, Aug 09, 2000 02:28 PM CST

August 9, 2000

Ombudsmen Helps Make System Work for Employees

UP Online Main Page
SECTIONS:
Stock Report
Omaha News
St. Louis News
Want Ads
Employee Discounts
EMPLOYMENT INFO:
Open Mkwt Opptys
CNET
UP Career Link
UP ONLINE FEEDBACK:
Send Ideas/Comments

Do you have a work-related problem that you haven't been able to solve at a local level by talking to your supervisor? Maybe it's time to call Union Pacific's Ombudsman, Butch Ethington.

The ombudsman's office, created almost a decade ago, is designed to assist employees with issues they feel need executive office involvement. Employees are encouraged to talk with their supervisors first about any issues or concerns they may have.

Ethington took over the ombudsman chores when Mike Phillips moved to a new position in Labor Relations in March. Ethington had been tapped to provide a list of potential candidates for the position before President Ike Evans eventually asked him if he'd take the job.

"I said I'd be willing to do anything to help this company," Ethington said. His background as the former director of internal auditing and as head of the company's business conduct committee made him a perfect choice, not to mention his background working on a B&B gang during the summers when he was in college. His last position as director of environmental and ethics compliance took him to the field for audits to ensure the company is complying with environmental regulations.

"Sometimes in large organizations, people can fall through the cracks because they can't get connected to the right channels. I'm interested in making sure the company's culture and organization are doing the right thing for the employees."

Ethington sees the ombudsman's office as a place for employees to turn when they can't find the answers. "I try to make the system work like it's suppose to," he said. "Sometimes in large organizations, people can fall through the cracks because they can't get connected to the right channels. I'm interested in making sure the company's culture and organization are doing the right thing for the employees."

On the other hand, Ethington said the ombudsman's office was never designed to over-ride authority.

EXH. 26A

DEADEND

"DO NOT WASTE MY TIME TYPE OF RESPONSES"

Linda D. Buttrill

Linda D. Buttrill
03/10/2002 05:46 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hello John . Yest you can make notes of what is in your personal record. Since the files are maintained in Omaha, far removed from the managers/supervisors that actually made 1997 decisions, I doubt that a rebuttal would be of much use at this time. However, if you are able to discuss with your supevisor at that time, they may be able to shed some light on the decision.

Linda D. Buttrill
03/07/2002 08:05 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hi John. My suggestion was to review your Personal Record. A hard copy 'generally' has more information than is documented in the computer. The procedure for doing that is to have your present manager request the record and sit with you during the review. Records cannot be copied or taken out of the presence of your supervisor. Secondly, whoever you worked for in Tucson at the time of the change should have knowledge of why that decision was made. If neither of these suggestions produce the information you're looking for, I don't know where you would find it.

NOT TRUE (See 26B 26C)

Linda D. Buttrill
03/06/2002 09:28 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

I would be happy to meet with you; however, I have no information that details your move from Sr. MTO to MIO. The only thing I have access to is the database information which associates this title change with the move from Tucson to Houston.

I suggest that your time would be better spent by either reviewing your Personal Record (with your supervisor) or talking to the manager/supervisor who recommended this change.

Exh 28B

Wayne E. Huddleston
02/04/2002 03:13 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

John, we have sent you a copy of everything that is in your personal record file.

Is there something specific that you were looking for that wasn't in the file?

I have the file in my office and would be happy to review it with you if you want to. Please call me in Omaha at 271-3312.

TURNED OUT THERE IS ANOTHER SECRET RECORD ONLINE

---------- Forwarded by Wayne E. Huddleston on 02/04/2002 03:07 PM ----------

Linda S. Jensen 02/04/2002 03:06 PM

To: Wayne E. Huddleston@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

---------- Forwarded by Linda S. Jensen on 02/04/2002 03:05 PM ----------

John E. Grother
02/04/2002 12:51 PM

To: Linda S. Jensen@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

HOW CAN I OBTAIN A COPY OF EVERTHING , INCLUDING WITHOUT LIMITATION BOTH POSTIVE AND NEGATIVE ISSUES, IN MY PERSONAL RECORD?

Linda S. Jensen

Linda S. Jensen 02/04/2002 09:13 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

The copy that was forwarded to you is the entire hard copy personal record that we have in Records

EXH. 26
C

Management.
I am forwarding a copy of your training history and exam history that is in Peoplesoft... There are no entries of discipline on your record in Peoplesoft...
John E. Grother

John E. Grother
02/03/2002 11:55 AM

To: Linda S. Jensen@UP
cc:

Subject: REQUEST FOR COPY OF PERSONAL RECORD

I APPRECIATE THE TWO DIFFERENT WAYS YOU USED TO PRINT THE WORK HISTORY. THAT WAS VERY CONSIDERATE OF YOU.

HOWEVER, I AM NOT CERTAIN THAT I HAVE MY ENTIRE PERSONAL RECORD.

SPECIFICALLY, I WOULD APPRECIATE A COPY OF ANY AND ALL POSITIVE (AWARDS, ACCOLADES,POSITIVE STATEMENTS, ETC.) AND NEGATIVE (DEMOTIONS, DISCIPLINE, LETTERS OF REPRIMAND, LETTERS OF UNSATISFACTORY PERFORMANCE, ETC) THAT ARE PRESENT IN MY PERSONAL RECORD.

I CAN BE REACHED AT 8-678-5303 SHOULD YOU HAVE ANY QUESTIONS.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

---------- Forwarded by John E. Grother on 02/03/2002 11:50 AM ----------

Wayne E. Huddleston
12/03/2001 03:37 PM

To: Linda S. Jensen@UP
cc: John E. Grother@UP

Subject: REQUEST FOR COPY OF PERSONAL RECORD

Linda, would you please send John a copy of his personal record.

---------- Forwarded by Wayne E. Huddleston on 12/03/2001 03:35 PM ----------

Mitzy A. Graybeal 12/03/2001 09:49 AM

To: Wayne E. Huddleston@UP
cc:

Subject: REQUEST FOR COPY OF PERSONAL RECORD

For your handling. Thanks.

---------- Forwarded by Mitzy A. Graybeal on 12/03/2001 09:48 AM ----------

William J. Behrendt
12/03/2001 09:33 AM

EXHIBIT A

FORM 20834
REV. 5/01

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Affix Or Print Screening Results Here

RBT IV# 011407
DATE 02-02-02
TEST NO. 0339
ID#
526-66-3917
AS IV# 026865
SCREENING
G/210L TIME
0000 AUTO 12:37

TAPE

EVIDENCE

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last) John E. Grother

B: SSN or Employee ID No. 526-66-3917

C: Employer Name UNION PACIFIC RAILROAD
Street 5500 Gullisville Rd.
City, ST ZIP Houston TX. 77020

DER Name and Telephone No. ~~CHARLIE SHOGREN~~ John Lichton 402-271-4800 ~~1800) 840-3784~~
DER Name DER Phone Number

D: Reason for Test: ☑ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 02/02/02

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☑ BAT ☐ STT DEVICE: ☐ SALIVA ☑ BREATH* 15-Minute Wait: ☐ Yes ☑ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Additional Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

Eagle Ind. Examiners — Alcohol Technician's Company
4784 Hwy 346 South — Company Street Address
Michael A Van Alsdale — (PRINT) Alcohol Technician's Name (First, M.I., Last)
Ft. Worth TX. 76116 817) 560-8114 — Company City, State, Zip / Phone Number
Michael Van A — Signature of Alcohol Technician
2/2/02 — Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year: / /

COPY 1 – ORIGINAL – FORWARD TO:
(YELLOW) University Services
Arsenal Business Center, Bldg. 4
5301 Tacony Street
Philadelphia, PA 19137

COPY 2 – EMPLOYEE RETAINS
(GREEN)

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-877-0565 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-271-5796

Exh 27B

FORM 20834
REV. 5/01

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

#26

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last) John Grother

B: SSN or Employee ID No. 526-66-3917

C: Employer Name / Street / City, ST ZIP: UNION PACIFIC RAILROAD Engineering, 5500 Wallisville Rd., Houston TX 77020

DER Name and Telephone No.: ~~CHARLIE SHOGREN~~ John Lietzau ~~402-326-46~~ ~~(800) 840-3784~~
DER Name / DER Phone Number

D: Reason for Test: ☑ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Affix Or Print Screening Results Here

RBT IU# 014407
DATE 05-02-02
TEST NO. 0565
ID#
~~526-66-3917~~
AS IU# 026055
SCREENING
C/210L TIME
.000 AUTO 17:42

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 5 12 02

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☑ BAT ☐ STT DEVICE: ☐ SALIVA ☑ BREATH* 15-Minute Wait: ☐ Yes ☑ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Additional Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

Alcohol Technician's Company: Eagle Ind. Examiners
Company Street Address: 4711 Hwy 377 S.
(PRINT) Alcohol Technician's Name (First, M.I., Last): Michael Van Arsdale
Company City, State, Zip / Phone Number: Ft. Worth TX 76116 (817) 560-5414
Signature of Alcohol Technician: Michael Van Arsdale
Date Month Day Year: 5 12 02

STEP 4: TO BE COMPLETED BY EMPLOYER IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year: / /

COPY 1 – ORIGINAL – FORWARD TO:
(YELLOW) University Services
Arsenal Business Center, Bldg. 4
5301 Tacony Street
Philadelphia, PA 19137

COPY 2 – EMPLOYEE RETAINS
(GREEN)

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-877-0565 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-271-5796

29A

John E. Grother
08/27/2002 04:23 PM

INITIAL REQUEST

To: Lisa Brewster@UP
cc: (bcc: John E. Grother)

Subject: ON-LINE SYSTEM ACCESS

STILL TRYING TO GET A REPLY FROM MR. PACKARD; BUT, IN THE MEANTIME, MAY I PLEASE UNDERSTAND A LITTLE MORE ABOUT THE ON-LINE SYSTEM:

WHAT IS THE PURPOSE OF THIS ON-LINE SYSTEM?

WHO HAS ACCESS?

IS ACCESS RESTRICTED TO CERTAIN BAND LEVELS?

DOES MY CURRENT SUPERVISOR HAVE ACCESS? HOW?

DO I HAVE ACCESS? HOW?

DO BAND C OR D MANAGERS HAVE DIRECT ACCESS?

COULD ANY MANAGER LEVEL, OR JUST BAND LEVELS C & D REQUEST VERBALLY OR IN WRITING THAT SOMEONE IN HR PROVIDE THEM WITH A PRINT-OUT OF SAID ON-LINE DATA FOR A SELECTED PERSON ,OR IS THIS INFORMATION RESTRICTED IN ANY WAY BY BAND LEVEL OR OTHERWISE?

IF RESTRICTED INFORMATION, HOW IS ACCESS CONTROLLED?

PLEASE ADVISE.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

John E. Grother
08/28/2002 01:31 PM

To: Lisa Brewster
cc:

Subject: Re: ON-LINE SYSTEM ACCESS

ANSWER MADE UNPRINTABLE BY "ICON OF SECRECY." COULD NOT BE FORWARDED OR COPIED.

WHY RESPOND IN MANNER THAT COULD NOT BE PRINTED?

Dated AT [8/28/2002 07:56 AM]

(See Attached)

Message stated:

"MR. GROTHER - I AM LEAVING ON MATERNITY LEAVE IN FIVE DAYS. SO I APOLOGIZE FOR BEING SHORT WITH THIS E-MAIL. I HAVE INDICATED RESPONSES IN RED BELOW.

LISA BREWSTER"

ANSWER BLOCKED { } OR WRITTEN IN RED ON THE NEXT PAGE..

GRH. 29E

John E. Grother
08/27/2002 04:23 PM

To: Lisa Brewster@UP
cc: (bcc: John E. Grother)

Subject: ON-LINE SYSTEM ACCESS

STILL TRYING TO GET A REPLY FROM MR. PACKARD; BUT, IN THE MEANTIME, MAY I PLEASE UNDERSTAND A LITTLE MORE ABOUT THE ON-LINE SYSTEM: IT WAS USED BY PERSONNEL TO RECORD CHANGES TO PERSONNEL WITHIN THE RR.
WHAT IS THE PURPOSE OF THIS ON-LINE SYSTEM? ✓
HR PERSONNEL DID, AS WELL AS PAYROLL
WHO HAS ACCESS? ✓

IS ACCESS RESTRICTED TO CERTAIN BAND LEVELS? SEE ABOVE

DOES MY CURRENT SUPERVISOR HAVE ACCESS? HOW?
THE CURRENT RECORD KEEPING SYSTEM USED IS PEOPLESOFT AND I DO NOT KNOW)
DO I HAVE ACCESS? HOW? WITHIN THE FIELD HAS ACCESS.
& I WOULDN'T THINK SO.
DO BAND C OR D MANAGERS HAVE DIRECT ACCESS? IT WOULD PROBABLY DEPEND ON NEEDS ACCESS - A REQUEST WOULD HAVE TO BE MADE TO THE SECURITY TEAM TO BE GRANTED ACCESS.
COULD ANY MANAGER LEVEL, OR JUST BAND LEVELS C & D REQUEST VERBALLY OR IN WRITING THAT SOMEONE IN HR PROVIDE THEM WITH A PRINT-OUT OF SAID ON-LINE DATA FOR A SELECTED PERSON ,OR IS THIS INFORMATION RESTRICTED IN ANY WAY BY BAND LEVEL OR OTHERWISE? I WOULD NOT BE COMFORTABLE RELEASING INFORMATION TO JUST ANYONE. IN YOUR CASE, I GAVE YOU YOUR INFORMATION.
IF RESTRICTED INFORMATION, HOW IS ACCESS CONTROLLED?
SYSTEMATICALLY - BUT, I COULDN'T BEGIN TO EXPLAIN IT.
PLEASE ADVISE.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

EXH.
30

Pension Plan for Salaried Employees of
Union Pacific Corporation and Affiliates

Summary of Plan Changes
Effective January 1, 1999

The plan was amended to include several changes effective January 1, 1999. These changes may have little or no effect on your plan benefit. Alternatively, your benefit may grow at a slower rate in the future or not grow at all for a period of time. In some cases, your benefit may increase as a result of these changes. In no case will your benefit under the amended plan be less than the plan benefit you earned through December 31, 1998. The following summarizes the changes made to the plan.

Compensation

- The plan uses actual monthly base pay, plus overtime and certain paid incentives, to determine compensation. Beginning January 1, 1999, the plan will determine compensation using the base rate of pay in effect on the first day of each month, plus overtime and certain paid incentives.

- Pay from certain acquired companies (such as Chicago and North Western, Missouri Pacific, and Western Pacific) is currently included as plan compensation. Beginning January 1, 1999, the plan generally will not include any pay earned from an acquired company.

- Pay while in agreement service with a participating company is included as plan compensation if the agreement service is directly followed by five years of non-agreement employment. Beginning January 1, 1999, the plan will not include any pay for a period of agreement service (that is not covered by the plan).

- Compensation for part-time employees is adjusted by multiplying monthly pay by the following ratio: 190 divided by the hours worked during the month. Beginning January 1, 1999, the plan will determine compensation for part-time employees using actual monthly base pay, plus overtime and certain paid incentives, with no adjustment.

- For part-time employees, compensation during an unpaid absence is determined using the base pay rate in effect at the start of the absence if the employee returns to work after the absence, or if the absence is for a family or medical leave. Beginning January 1, 1999, no compensation will be credited during an unpaid absence for part-time employees.

EXHIBIT 31

C-NET JOBS APPLIED FOR AND UPRR RESPONSE (IF ANY)

JOB APPLIED FOR – DATE	CONFIRMATION REQUEST NUMBER	RESULTS/ REMARKS
1. Mgr. Terml Oprns (MTO)-Tucson (SRG 18) (Royce Hardin decision maker) Position was one SRG below what I had worked for 22 months	2879526663917 Applied 3/17/99	Resume was Recvd. C-Net said position filled 3/23/99
2. Mgr. Yard Oprns. (MYO)-Tucson (SRG 17) Position was two SRG's below what I had worked for 22 months.	2914526663917 Applied 4/6/99 (Royce Hardin decision maker)	Resume was Recvd. No other response
3. Sr. Mgr. Terml. Oprns. (SMTO)-Tucson (SRG 19) (Exh's 30A & 30B) (Royce Hardin) Position Exact SAME as I had performed for 22 mo. @ Tucson.	3047526663917 Applied 8/9/99	Resume was Recvd. No interview as "NOT Qualified"
4. Mgr. Intmdl Terml. Oprns (MITO)-Long Beach (Band C) (Gary Davidson decision maker) Position was Band C, at which level I had already performed. Position given to Marie Bedwell–est. age 38 & I was 53	3301526663917 Applied 12/23/99	Resume was Recvd. No interview as "NOT Qualified"
5. Sr. Mgr. Terml. Oprns (SMTO)-Phoenix (Band C) (Royce Hardin decision maker) Position same as I worked in Tucson for 22 mo., except Phoenix.	3293526663917 Applied 12/23/99	Resume was Recvd. No other response
6. Supt. Intmdl Oprns. (SIO)- Los Angeles (Band D) Position was a promotion of two Bands from Demoted Status.	3372526663917 Applied 1/28/00 (Greg Workman decision maker)	Resume was Recvd. No other response

7. Mgr. Terml. Oprns. Not Received No system response
(MTO)- Freeport, Tx Applied 6/6/00 (Dennis Tholen decision maker)
(Band C) (Charlie A. Bishop "personally lobbied my application", with no results, except "They don't want you. You are not young enough to handle an outside operating district"

8. Mgr. Terml. Oprns. 3648526663917 Resume was Recvd.
(MTO)-Tucson Applied 6/21/00 No other response
(Band C) (Royce Hardin decision maker)
(Position was one SRG below where I had performed for 22 months)
Position would have been a Promotion from my Demoted Status.

9. Mgr. Yard Oprns. 3725526663917 Resume was Recvd.
(MYO)-Tucson Applied 7/24/00 No other response
(Band B) (Royce Hardin decision maker)
(Position was one Band below that which I performed at Tucson for 22 months or two Salary Rate Grades). (Exh's 31A & 31B)
My selection would have been a lateral from my Demoted Status.

10. Mgr. Yard Oprns. Not received Received call from
(MYO)-Bloomington Applied 10/31/00 David Bader indicating
(Band B) Position was lateral transfer "unacceptability".
back to Train Operations.
(Unsure; but ,Dennis Tholen may have been actual decision maker)

11. Various Operating No calls – No feedback for about 2 years,
Positions on new C-NET (Since new system started)
System which is allegedly continuously
Searching for Operating Department Matches.

EXH. 32A

Page: 1 Document Name: untitled

Rs004R10

Thank You For Using the Union Pacific Job Posting System

JOHN, your resume has been received and is being considered along with other candidates who have applied for the OPER MGR YARD OPRNS (TUCSON) position in the ~~OPER~~ Department.

Your Confirmation Number is:
3725526663917

Number of lines in your Resume 199

>>> ENTER to Continue >>>

PF Keys

PF1-Help PF4-Close CNet

This Position is two SALARY RATE GRADES (SRG 17 vs. 19) below the SR. MTO POSITION WHICH I PERFORMED AT TUCSON FOR 22 MONTHS. (NOW BAND B vs. BAND C UNDER PRESENT SYSTEM)

I DID NOT RECEIVE A RESPONSE TO MY APPLICATION, FOR THIS "BELOW- LATERAL TRANSFER."

Date: 7/24/00 Time: 06:05:03 PM

EXH. 32B
SUBMITTED 7/24/99

Applications accepted from: 07/19/00 through 07/25/00

Profile ID Title

72017 MGR YARD OPERATIONS

Grade Band B

LATERAL TRANSFER FROM CURRENT DEMOTED POSITION.

Department: TRANS - FIELD OPERATIONS JVN 3725
Location: TUCSON, AZ. Start Date: ASAP
Job Status: Full Time Vacancies: 1
Contact: ROYCE HARDIN Phone: 8-629-2120
Company: UPRR
Bus Group: OPER

Job Profile # 72017 - MGR YARD OPERATIONS

Basic Purpose of Position:

Execution of the daily transportation plan to achieve business objectives and customer satisfaction within the terminal confines.

Primary Accountabilities of the Position:

- Manage the safety process for terminal TE&Y employees
- Manage the terminal transportation plan to ensure that all quality of service business objectives are met or exceeded. Manage TE&Y expenses within assigned budgetary limits commensurate with volume of business
- Lead and manage Supervisor Yard Operations and agreement employees in execution of transportation plan
- Execute action plans to achieve cost of quality business objectives
- Coordinate and plan daily activities with centralized functional areas
- Monitor work force levels to ensure all jobs are covered and execute corrective action plans
- Execute locomotive shut down policy
- Communicate (close the loop) company policies and directives to terminal employees

Desired Experience:

- Yard, Road Train Service (3-4 yrs.) Proficient
- Management Trainee (1-2 yrs.) Proficient
- Yardmaster/SYD (1-2 yrs.) Proficient
- NCSC (1 yr.) Working knowledge

Special Training, Skills, or Education:

- Undergraduate Degree
- Written/Oral communication skills
- TQMS
- ATCS
- Computer skills (HOST/PC)
- Drug awareness

Desired Education Level: Bachelor Degree or equivalent

Travel Requirements: 0-25% travel may be required

RS007R03 - JVN 3725 07/18/00

EXH. 33A

Page: 1 Document Name: untitled

Page 1 of 2 CNet Notice Rst4F1

09/22/99

Dear John:

Thank you for your application for the position of MGR TERMINAL OPERATIONS (TUCSON AZ).

I have reviewed all of the resumes for consideration and have assigned interviews to those individuals who possess a combination of experience, education, and skills which appropriately meet the requirements of this position. While I cannot extend an interview opportunity to you, your time and interest in applying for the position are appreciated. I encourage you to continue to seek developmental opportunities for which you are qualified within Union Pacific.

Sincerely,

Delete Notice ( ) (Y/N)

PF Keys

PF3-Exit PF4-Close CNet PF8-Next Page

ABOVE SHOULD HAVE BEEN THE FORM LETTER FOR "UNQUALIFIED" REGARDING ATTACHED POSITION WHICH MEANS THIS DOCUMENT SHOULD HAVE BEEN POSITION TITLED "SENIOR MGR. TERMINAL OPERATIONS; NOT MGR. TERMINAL OPERATIONS - TUCSON. THE POSITION OF SENIOR CLOSED 8/10/99 AND THIS WAS THE CLOSEOUT ONE MONTH LATER INDICATING POSITION WAS FILLED BY SOMEONE "MORE QUALIFIED" THAN MYSELF WHO HAD WORKED THE POSITION ITSELF FOR 22 MONTHS!!

Date: 1/28/00 Time: 03:41:33 PM

confirmation #

Exh. 33B

3047/52663917

SR MGR TERM OPRNS (TUCSON AZ)
Applications accepted from: 08/04/99 through 08/10/99

rofile ID Title
--------- -------
)007 SR MGR TERM OPRNS Grade Level 19

Department: TRANS - FIELD OPERATIONS JUN 3047
.ocation: TUCSON AZ Start Date: ASAP
Job Status: Full Time Vacancies: 1
Contact: ROYCE HARDIN Phone: 8-629-2120
Company: UPRR
Bus Group: OPER

Profile # 72007 - SR MGR TERM OPRNS

ic Purpose of Position:

ure the quality of the transportation product of the terminal meets exceeds the standards set by the business objectives and customer ectations.

mary Accountabilities of the Position:

sure safe performance of all terminal TE&Y employees through veloping, implementing and executing the safety process
rect the execution of the transportation plan for the terminals ensure that all quality of service objectives are met or exceeded
erate the terminal at or below annual transportation budget
sure terminal failure prevention activities are executed to
hieve cost of quality business objectives
ordinate terminal activities with HOC, NCSC, adjoining Service
it to meet business objectives
nage terminal work force level to ensure transportation needs are
t and within budget
nage the efficient use of locomotives and fuel to ensure that
eight car cycles are effectively managed while in the terminals
ad and develop both managers and agreement employees to the
tent that their individual performance and employee involvement
tivities determine successful accomplishment of company business
jectives
spond to emergency situations or service interruptions

ired Experience:

Q/HYQ (2 yrs.) Working
N (2 yrs.) Working
O (2 yrs.) Working
P (1 yr.) Working
ntralized function (1 yr.) Working

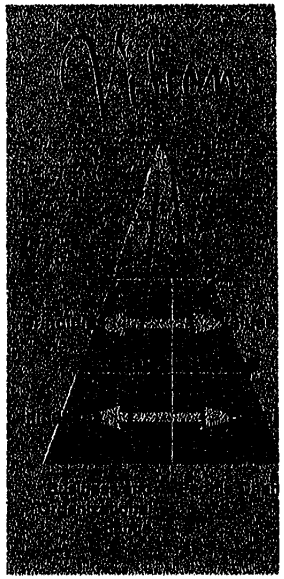
cial Training, Skills, or Education:

nagement training program
adership seminars
dergraduate Degree

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, and shareholder value is created.

UP VALUES AND LEADERSHIP BEHAVIORS

- **Safety:** *Safety comes first. We are each personally responsible for working safely and choosing the safest approach.*
  - We daily remind ourselves and other employees that safety is the company's first and overriding priority.
  - The safe way is the efficient way.
  - We report honestly but we find no accident acceptable and insist that all of us work on prevention of accidents.
- **Quality Principles:** *Customer Focus, Continuous Improvement, Teamwork, and Managing with Data are the way we run the business.*
  - We expect continuous improvement in all areas of our business by focusing on root causes of problems and creating action plans, time lines, and milestones to solve them.
  - Every action we take and every decision we make considers the customers' needs.
  - We will train our people to use and be skilled in Quality Principles and require them to demonstrate these skills as a daily habit.
- **Respect for Employees:** *We recognize all UP employees are critical to our success, and that ideas and aspirations exist at all levels in the organization. We value diversity in our workforce and the experiences, capabilities, and different viewpoints that each individual contributes.*
  - We act with respect for all employees.
  - We address our employees' developmental needs and build on their strengths by coaching and training.
  - We promote and reward managers for their leadership skills as well as their technical knowledge and abilities.
- **Commitment:** *We make realistic commitments to customers, employees and shareholders, and keep them.*
  - We set challenging, but achievable objectives.
  - We assure that we have the capability to meet our commitments.
  - We support each other in keeping commitments made to ourselves and others.



- **Accountability:** *The success of our company depends on our individual efforts. Each of us is responsible for the outcome of our efforts.*
  - We must make every employee aware that meeting our business objectives is critical to the success of the Company.
  - We accept personal responsibility for achieving the commitments we make.
  - We make no excuses, take responsibility for failures, but learn from our mistakes.
- **Simplicity:** *We keep things simple and focus on what is really importa*
  - We require that decisions be made at the lowest appropriate level.
  - We analyze and stay focused on the "critical few" items, which directly cause the results we want, while constantly removing low- or no-value steps from our business processes.
  - We define each individual's "critical few" in job agreements and make PDRs the performance drivers.
- **Communication:** *We will ensure an environment of open communicati where ideas are freely exchanged and listening is valued.*
  - We encourage 360-degree feedback, and we listen with respect.
  - We encourage novel thinking, evaluate ideas based on their merit regardless of source, and do not kill the messenger bearing bad news.
  - We put all issues on the table and attempt to resolve them through constructive debate and challenge.

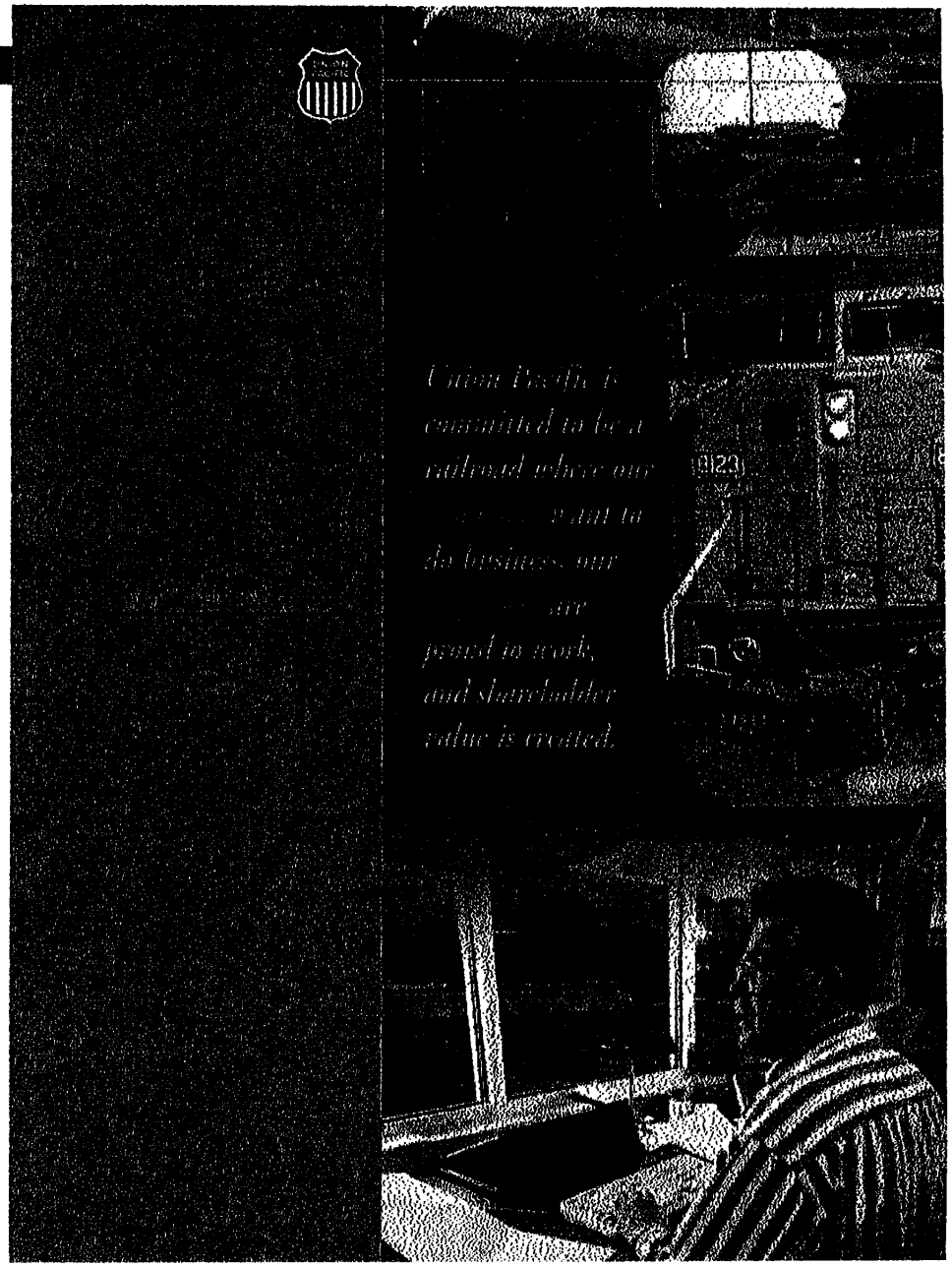
TRANSFORMATION

E.H. 3749

BUSINESS PRINCIPLES

- **Recognize employees as critical to success.**
  Our employees are a critical asset; without them, we would not be able to serve our customers.
- **Recognize customers as critical to success.**
  Our customers depend on us for consistent and reliable service; we depend on them for their continued business.
- **Sell what we can deliver.**
  Our ability to match our customer commitments with network capacity is a key to our future success as a Company.
- **Deliver what we sell.**
  Our decentralized operating structure and network design capability will allow us to better meet our delivery commitments.
- **Maximize return on each dollar invested.**
  We will consider our shareholders' perspective with every investment decision we make.
- **Performance excellence.**
  We will use our focus on quality as the foundation for improved responsiveness to our customers and employees.
- **Lead effectively at all levels and strive for excellence.**
  We will use communication, training and performance feedback to develop leadership at all levels of our organization.

TRANSFORMATION



Exh. 348
pg 1 of 2

award. Jenkins also is a safety captain and member of a QIT team.

As timekeeper, Jenkins also offers timekeeping training for both new and experienced timekeepers. "Steve is willing to share information he has learned with anyone who will benefit from it in order to do his or her job better," said Bell.

In his spare time, Jenkins also organizes the Tie-North newsletter, keeping his gang informed of local work group and companywide happenings.

The World Class Employee Award recognizes Track Programs employees for their hard work and exceptional contributions to quality and safety improvements. UP Online will feature individual profiles of other award winners in future issues.

▲ top

A Lifelong Balancing Act
Decide to Keep Your Life in Balance



Balancing the disappointments of life can sometimes be overwhelming – but there are behaviors and actions that can help.

U.P. SUGGESTION

Act on adverse situations as much as you can. Take decisive action, rather than detaching completely from problems and wishing they would just go away.

Watch for additional tips in upcoming issues of UP Online. All are designed to help you maintain a balance when life takes a difficult turn.

Employees interested in a group presentation on resilience -- a process of adapting in the face of trauma and stress, or "bouncing back" from difficult experiences -- should contact Denny Holland at dwhollan@up.com or 271-4155.

▲ top

Railroads Urge More Public/Private Partnerships



The nation's railroads last week urged Congress to support "public-private financing partnerships for railroad infrastructure improvement projects" in order to realize the public benefits that would come if more freight is moved by rail, reports *AAR.org.*

In testimony before the House Transportation and Infrastructure Committee's Railroad Subcommittee, Edward R. Hamberger, president of the Association of American Railroads (AAR), said that greater use of rail can yield significant "public benefits, such as reduced congestion, cleaner air, improved safety and enhanced mobility."

UP Online

Need to catch up?
View the past 5 issues.
You will be given the option to view additional issues.

For a specific article – Search:

UP Online **editions appear Mondays, Wednesdays and Fridays.**

June 30, 2003

In This Issue:

- New Market for Feed Supplements
- UP Sells Colorado Branch to RA
- Foreman Is World Class Nominee
- Lifelong Balancing Act
- Public/Private Partnerships Urged
- Rail Freight Traffic Declines
- Service Delivery Index
- UPLINC Schedule
- 'Most Wanted' Cars
- Stock Report

Mexico Is New Rail Market For Animal Feed Supplement



Meat and bone meal from Nebraska is moving to Mexico by rail through a new arrangement with Union Pacific, Nebraska Byproducts and ConAgra Trade Group.

Nebraska Byproducts produces the meat and bone meal, and ConAgra Trade Group markets the product and transloads it from truck to rail at Darr, Neb.

"It's a win-win-win situation," said Greg Brown, product manager. Previously, the packinghouse sold the meat and bone meal, which is used primarily for animal feed and pet food, locally and moved it by truck as the plant is not serviced by rail. Mexico is a more lucrative market for the product, and ConAgra Trade Group approached UP about moving it through UP's Mexican gateways, Brown said.

"ConAgra Trade Group was looking for new opportunities," he said. "In this particular market, there are not a lot of new opportunities, as it's pretty mature. This is an opportunity we are excited about."

SECTIONS:
Stock Report
Omaha News
St. Louis News
Want Ads
Employee Discounts
EMPLOYMENT INFO:
Open Mgmt Opptys
CNET
UP Career Link
UP ONLINE FEEDBACK:
Send Ideas/Comments

Alert Status

UP is currently at **Alert Level 2: "Heightened Security Awareness."** This applies when there is a general non-specific threat of possible terrorist activity involving railroad personnel and facilities.

REMEMBER: Report all suspicious activity to RMCC at **1-888-877-7267** (1-888-UPRRCOP).

Ethics

This policy allows an employee to give cash or gifts to a host or hostess who provides a gratuitous product or service, such as a meal or lodging, in lieu of a reasonable "expense . . . which the employee normally would have incurred." The In Lieu Policy explains: "The purchase of a gift for the hostess in appreciation of a gratuitous meal served to an employee while traveling on company business, at the home of a fellow employee or business associate, would represent an example of an appropriate 'in lieu of' expense." Each of Francisconi's expense claims, some of which involved stays with his father in Pocatello, Idaho, was approved by his supervisor.

¶3 In 1987, Francisconi was temporarily transferred to Omaha, Nebraska, to work as a safety representative for Arthur Shoener, a Union Pacific executive. During this time, Francisconi became intimate with another employee whom, he later learned, also had an intimate relationship with Mr. Shoener. Francisconi alleges that Mr. Shoener incurred some malevolence against him as a result of his relationship with the employee. In 1994, after this assignment, Union Pacific published a policy entitled "Union Pacific General Rules for Administering Discipline Effectively" (the UPGRADE Policy), and delivered a copy to Francisconi. Union Pacific then implemented the UPGRADE Policy. The UPGRADE Policy provides for a formal disciplinary process, including a formal hearing regarding an employee's conduct prior to termination.

¶4 On April 26, 1996, Francisconi was directed to attend a meeting in Omaha, Nebraska (the Omaha Meeting), without being told the purpose of the meeting. At the meeting, six Union Pacific officers and agents, including auditors, supervisors, and a railroad policeman, confronted Francisconi for four hours. Union Pacific accused Francisconi of abusing the In Lieu Policy, and presented some grounds and documents capable of being construed as evidence of abuse, such as altered receipts he had submitted. He was also accused of lying, theft, fraud, and abuse of his position. Further, Francisconi was told that Union Pacific was considering having him criminally prosecuted, which would lead to a search of his relatives' homes.

¶5 Although Francisconi did not believe he was at fault, he asked what he could do to keep his job. He was told, "Well, the first thing you can do to save your job is to fill out a statement." Francisconi wrote and signed, at Union Pacific's direction, a statement which included the following:

> I . . . freely and voluntarily admit to making in lieu of expense purchases not in accordance to the intent of the policy. I didn't include the itemized receipts for these purchases and I altered receipts to remove the itemized items listed on the receipts. I was aware that the items purchased were being given to my wife, my sister and my son and other people that my Dad chose to give them to. I also admit to including personal time with company time while I was in Pocatello on weekends and being reimbursed by the company for the time spent there for expenses. I was wrong in what I have done and am extremely sorry for misusing the expense account system.

Also during the meeting, the highest level of the UPGRADE Policy was mentioned as a possible way to resolve the matter.

¶6 After the meeting, Francisconi experienced extreme anxiety, lack of sleep, and an outbreak of hives. The assistant vice-president of Union Pacific, Mr. Campbell, telephoned Francisconi several times demanding his resignation and that he release Union Pacific from liability. Mr. Campbell, knowing that Francisconi's wife was experiencing health problems, threatened that Francisconi would not be insured from April 30, 1996, would not receive COBRA medical coverage, would not be paid for the month of May, and would be criminally prosecuted. Mr. Campbell did not retract these threats even after Francisconi explained that his wife was scheduled for surgery. Further, "[t]he health care benefits department of [Union Pacific] was directed by . . . the human resources director of the railroad operations department, which was headed by Mr. Shoener, not to offer COBRA coverage to" Francisconi's wife. These directions were initially followed, causing the surgery to be rescheduled until Francisconi's wife finally obtained COBRA coverage.

¶7 Union Pacific then terminated Francisconi for alleged willful disregard of the In Lieu Policy and for intent to deceive Union Pacific in his use thereof. He now appeals the district court's summary dismissal of his claims.

STANDARD OF REVIEW

EXH. 30A



INSURANCE IN TOUCH WITH BUSINESS (UPRR CONNECTED PROGRAM)

PO Box 946760
Maitland, FL 32794-6760

July 18, 2002

DOROTHY D GROTHER
1718 RUSTIC PARK DR
KINGWOOD TX 77339

Underwriting Co.: Continental Casualty Company
Application Number: 10170-1010
Account Name: CNA Group Benefits Long-Term Care Program

Dear DOROTHY GROTHER:

Thank you for your recent application for Long-Term Care Insurance.

We are sorry that we are unable to issue the insurance for which you have applied. Our decision is based on your history of response to questions 2.a., 2.e., 2.i., 3 and question 5 listed on your application. While we realize you may be disappointed, we want to assure you we made this decision only after careful consideration of your health history.

Occasionally, as in your case, a particular condition or combination of conditions will prevent us from issuing coverage. We hope that you understand that without such an underwriting review we would need to raise our premiums substantially, greatly limiting the availability of this product.

You may request reconsideration of this decision. All requests for reconsideration should be submitted in writing within 60 days of receipt of this letter by sending the reasons for your request and any documentation you may have to support your request. Please send this information to the Group Long Term Care Underwriting Department at the address listed above. Ordinarily, you will receive notification of the final determination within 60 days following receipt of your request. If special circumstances require an extension of time, you will be notified of such extension within 60 days.

Again, thank you for choosing CNA; we appreciate your interest in this plan. If you have any further questions, please let us know.

Sincerely,

Jody Ross

Administrator
Group Long-Term Care Plan from CNA

Enclosure(s)

EXH. 36B

AARP Life Insurance Program from NEW YORK LIFE

New York Life Insurance Company
AARP Operations
Customer Service
P.O. Box 30712
Tampa, FL 33630-3712

October 26, 2001

Mrs. Dorothy D Grother
1718 Rustic Park Dr
Humble, TX 77339

Dear Mrs. Dorothy D Grother:

Thank you for your request for insurance under the AARP Life Insurance Program from New York Life Insurance Company.

We regret to inform you that based on the health information you provided, we must decline your request for insurance.

We appreciate your interest in the AARP Life Insurance Program from New York Life. If you believe the information we have received from you is inaccurate, please write me and we will be happy to review this matter with you.

Sincerely,

Maria Echazabal

Maria Echazabal
Underwriting Associate
Customer Service

EXH. 30 E

North American Company
for Life and Health Insurance
Office: 20700 Ventura Boulevard, Suite 220 / Woodland Hills, CA 91364
Mailing Address: P.O. Box 4193 / Woodland Hills, CA 91365-4193
Telephone: (818) 716-0004 Fax: (818) 716-0006

DOROTHY D GROTHER
1718 RUSTIC PARK DRIVE
KINGWOOD TX 77339

OCTOBER 29, 2001

RE: LW00184094
DOROTHY D GROTHER

Thank you for applying to North American for your life insurance needs. We are not able to approve your application due to the reason stated below:

medical history and current medical findings

If you submitted money with your application in exchange for a Conditional Receipt, it will be promptly refunded. This notice and the refund void the Conditional Receipt and no coverage is provided under its terms.

If your policy was assigned to North American, we have returned the original paperwork to your agent. A letter of release has been sent to your existing Insurer.

We regret that we are not able to be of service to you at this time. If you have any questions, please contact your agent.

Underwriting Department
87 /3XH

Exh 36D

John Hancock Financial Services, Inc.

333 West Everett
Post Office Box 2986
Milwaukee, WI 53201-2986

John Hancock
FINANCIAL SERVICES

Susan Stinard
Senior Underwriter

February 8, 2002

Dorothy Grother
1718 Rustie Park Drive
Kingwood, TX 77339

Dear Ms. Grother:

Thank you for your application for Long Term Care insurance with this company. I am sorry to inform you that after careful consideration and a review of your medical history we cannot provide coverage for you.

Our decision was based on your medical history of an abnormal MRI of the brain. Additionally our decision was affected by your history of rheumatoid arthritis and systemic lupus erythematosus under treatment with multiple prescription medications as documented in your medical records provided by Dr.. Cavanar-Johnson.

If you have any questions regarding the medical history contained in this letter, please feel free to forward a copy of this letter to your primary care physician. If your physician feels this information is incorrect or inaccurately stated, we would be happy to re-evaluate your medical history based on a corrected statement from your physician.

Any conditional receipt coverage that you may have requested when you applied is no longer in effect. Any initial premium made in connection with this application will be refunded.

Thank you for considering John Hancock for your insurance needs and we appreciate the opportunity to review your application.

Sincerely,

Susan J. Stinard

Susan Stinard
Senior Underwriter

Reference#: 5037729

EXH 30E

GE Capital Assurance

Long Term Care Division
1650 Los Gamos Drive
San Rafael, Ca. 94903-1899
(415) 492-7000

November 1, 2001

Mr. Dorothy D. Grother
1718 Rustic Park Dr
Kingwood, TX 77335

RE: UDG4239360

Dear Mr. Dorothy D. Grother:

Per your request, we corresponded with Dr. Mary Cavnar Johnson on this date regarding the reasons for our decision on your long term care application.

We suggest that you contact your physician to discuss the information provided in our letter.

Sincerely,

Jennifer Rogers /B

Jennifer Rogers
Senior Underwriting Specialist
LTC Underwriting Department

LTC4BAW #430

cc: Ms Diane L Dussault

EXHIBIT 39

UTU Message Board

[Contents | Search | Post | Reply | Next | Previous | Up]

Railway Age article on New York Dock/STB agreement revisions

From:
Date: 18 Jul 1999
Time: 20:26:28
Remote Name: 205.188.197.58

Comments

"Cram-down" casts a menacing cloud over upcoming negotiations RAILWAY AGE July 19, 1999 COMMENTARY By Frank N. Wilner

Just a few months ago, Union Pacific Chairman Dick Davidson was optimistic that railroads and their unions could negotiate an end to a bitter controversy known as "cram-down." Dream on. Last month Davidson's chief labor negotiator, John Marchant, told the Industrial Relations Research Association how essential cram-down is to carrier efficiency. Fellow panelist Linda Morgan, chairman of the Surface Transportation Board-the agency that gives a final thumbs up or down to cram-down proposals even decades after mergers are consummated-appeared to agree by distancing herself from a Clinton administration proposal to banish cram-down legislatively. Offering a blistering rebuke of the process, and of STB as its facilitator, was Brotherhood of Maintenance of Way official Joel Myron.

Cram-down is a shorthand term for the ability of merged railroads to override the Railway Labor Act and collective bargaining agreements to the extent-and this is a legal term-"necessary" to enable the unifying carriers to achieve intended efficiencies of the unification. There is no time limit on "necessary" transactions and it is not uncommon for contract overrides to be sought decades following a merger. Fourteen years after Missouri Pacific was merged into UP, UP successfully moved to override a local collective bargaining agreement to facilitate consolidation of work assignments and seniority rosters.

In exchange for overriding collective bargaining agreements, merged railroads pay damages to adversely affected workers-payments Morgan termed "substantial." When the two sides can't agree on the trade-off, arbitrators decide. Hence, the term cram-down.

Railroads are the only industry where Congress permits an override of private-sector contracts for the benefit of merging companies, their customers, and investors. But railroads also are the only industry where adversely affected employees' pre-transaction incomes and benefits are protected for up to six years. The process flows from the voluntarily negotiated Washington Job Protection Agreement of 1936 as embodied in a 1979 regulatory decision-blessed by the courts-called New York Dock, which relates to a merger involving New York Dock Railway.

Although New York Dock's Article I, Section 4 sets out procedures and a timetable by which separate collective bargaining agreements of unifying railroads are harmonized-selection and assignment of employees, transfer of work, and merging of seniority-Myron says it conflicts with Section 2 that mandates rules and working conditions may be changed only through Railway Labor Act bargaining procedures. The courts disagree, but Myron and the AFL-CIO Executive Council won't retreat. The matter has become so disruptive that the bi-partisan leadership of the House Transportation and Infrastructure Committee encouraged the sides to negotiate a settlement. Talks broke down.

Marchant takes issue with the term cram-down. "Employers can't just go out and change operations following a merger," he said. Railroads must give 90 days notice, make an attempt voluntarily to negotiate an implementing agreement under New York Dock guidelines, and submit to binding arbitration if an agreement cannot be reached. Myron insists rail regulators so often overturned arbitrated decisions favorable to employees during the 1980s that arbitrators became conditioned to granting railroads undue preference. Morgan says she's trying to "level the playing field" and "eliminate" expectation by either side of a "favorable" STB arbitration review.

If railroads and their unions had to bargain under the sometimes interminable procedures of the Railway Labor Act, said UP's Marchant, railroads would become further hobbled in competing with trucks.

When UP and the MP merged, he said, efficiency dictated that a 100-year-old locomotive repair facility at Omaha be closed and the work shifted to a five-year-old facility at Little Rock. New York Dock procedures provided the key to unlocking what Marchant called a rapid and equitable solution for selecting the new work force, determining seniority, and protecting the earnings of those adversely affected. Similarly, following the UP-Southern Pacific merger, six separate collective bargaining agreements threatened efficient operations at Salt Lake City. UP again turned to New York Dock procedures to choose a single surviving agreement. Short of arbitration, a peaceful resolution would have been impossible, said Marchant, because each vested interest wanted to "cherry-pick" terms most favorable.

"Carriers have huge investments in mergers and were we to resort to the Railway Labor Act for implementing agreements we'd have strikes that would devalue mergers and give unions an unconscionable amount of leverage," said Marchant. "We'd have to take out our checkbooks," he said, displaying his for effect.

The enemy, of course, is non-unionized truckers, but Serbs and ethnic Albanians may live together peacefully before rail management and labor settle contract-override differences. Under this menacing cloud, the two sides will begin in November industry-wide bargaining for a new wage-benefits-rules agreement. God save the railroad industry. xxxxx

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Last changed: July 18, 1999

EXHIBIT 38

her way for employees to win

es workers rights

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workplace disputes to arbitration. The EEOC is not bound by such contracts, the high court ruled.

"The Supreme Court recognized what Congress intended when it established the EEOC: that it must have the power to enforce civil rights laws," says AARP lawyer Tom Osborne. "Had the decision gone the other way, the agency would have been stripped of its clout."

AARP filed a friend-of-the-court brief in support of the EEOC.

The case involved Eric Scott Baker, who in 1994 was a short-order cook at a Waffle House restaurant in West Columbia, S.C. After two weeks on the job, he had a seizure at work and shortly thereafter was fired.

Like other employees of Waffle House, Inc., Baker had agreed that any grievance he had against the company would be resolved through arbitration, a dispute resolution system that bypasses the judicial system.

Buoyed by recent court decisions, some employers have begun requiring workers to waive their right to jury trials—including potential class action suits—and submit job-related disputes to arbitration instead. Some companies insert such agreements into job application forms, and, workers' advocates say, job seekers have little choice but to sign on the dotted line.

Your Money

About 6 percent of all American workers are covered by workplace arbitration agreements, notes Robert Meade, senior vice president of the American Arbitration Association (AAA). Proponents of arbitration say it offers a quick, cost-effective alternative to litigation.

Keeping results fair

But when employers impose mandatory arbitration on workers as a condition of employment, the results can be "brutally unfair," claims Cliff Palefsky, a lawyer in San Francisco and co-founder of the National Employment Lawyers Association.

Compared to a lawsuit, Palefsky contends, arbitration gives plaintiffs less access to evidence in the employer's control, less chance of being awarded punitive damages and no opportunity to have the case heard in an open courtroom. Moreover, he charges, arbitrators may feel pressured to render decisions that will please (or at least won't alienate) companies that may hire them again.

AAA's Meade counters that reputable arbitrators operate by a code of ethics that requires them to disclose any conflicts of interest.

Besides, arbitration provides a venue for workers whose complaints those that could win big awards.

Baker, the former Waffle Hou cook, never tried to arbitrate his gri ance with his employer. Instead, I filed a claim with the EEOC, allegi that in firing him, the company ha violated the Americans with Disab ities Act.

Of about 80,000 claims filed with th EEOC every year, only about 400 en up in court. Baker's case was amon the half of 1 percent that do.

The EEOC enters the case

As with other claims it pursues, th EEOC first tried to settle with Wa fle House out of court. When tho attempts failed, the EEOC sue the company, seeking not only court order requiring Waffle Hou to stop discriminating, but an awa on Baker's behalf, including ba pay and compensatory and puniti damages.

An appeals court ruled the EEC had no right to seek damages fo victim who had agreed not to take l claim to court. But in a 6-3 decisi the Supreme Court overturned t lower court's ruling, saying t EEOC was not bound by a contr to which it was not a party.

Writing for the majority, Just John Paul Stevens said the EEOC "the master of its own case."

Justice Clarence Thomas, who or headed the EEOC, wrote the c senting opinion. He claimed t EEOC should not be allowed to ' on behalf of an employee that wh an employee has agreed not to do himself."

Know what you're signing

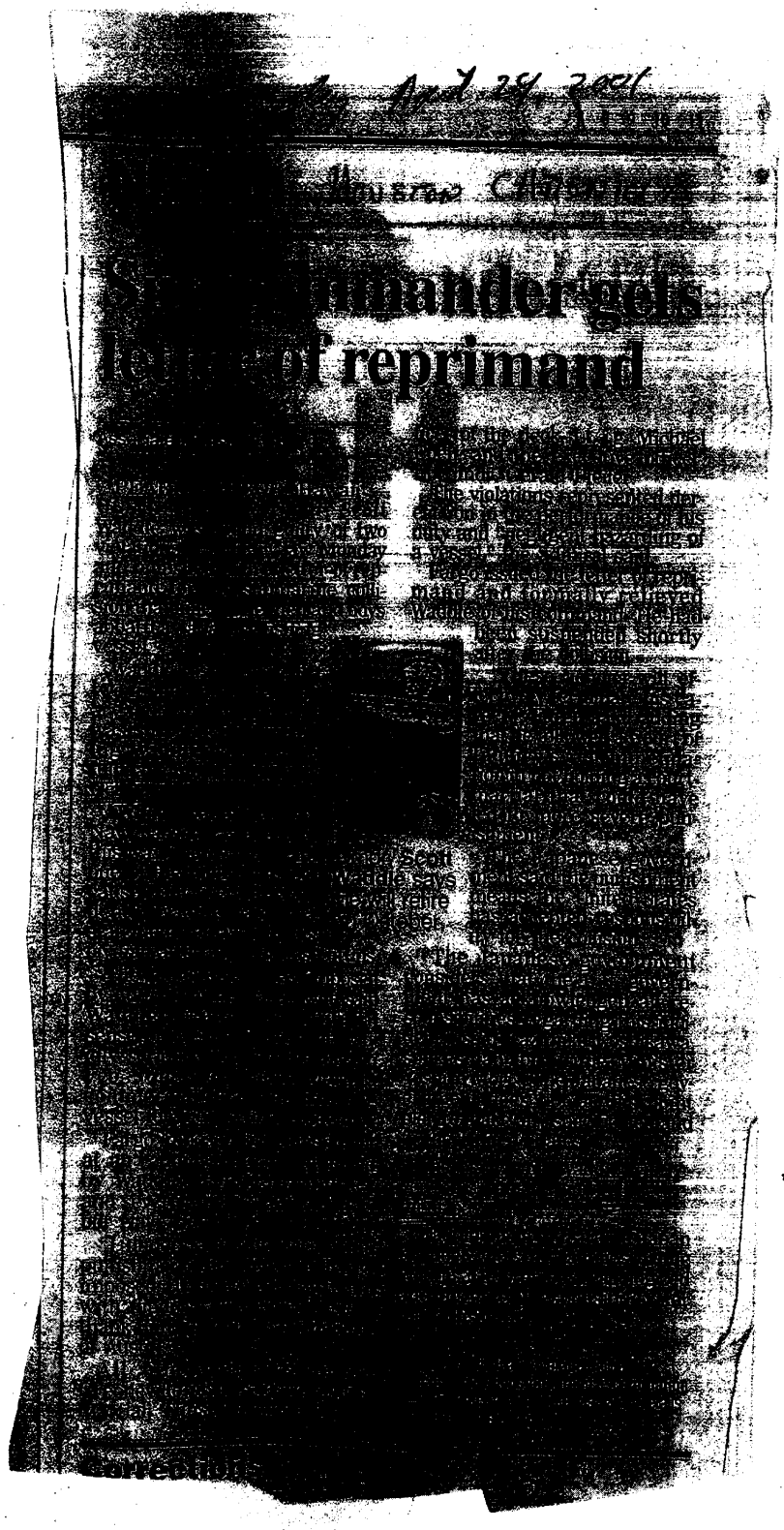
RECENT COURT decisions have given companies the green light to require workers to submit disputes to arbitration instead of litigation.

Be on the lookout for arbitration clauses in any documents you're asked to sign, and be sure you understand the consequences, advises Robert Meade of the American Arbitration Association.

"Weigh the pros and cons," he says. Weigh how much you want that particular job against how im-

Article from AARP MAGAZINE

EXH 39



April 28, 2004

[illegible] commander gets letter of reprimand

EXH. 4/0
- Page 1 of 2

a brand NEW day

A.F. Times 8/5/02

Commander is back with a wing — and soon a star

By Bruce Rolfsen
TIMES STAFF WRITER

Two years after he was denied command of a fighter wing, Col. Larry D. New's career appears to be back on track.

New was handed the flag of command for the 325th Fighter Wing at Tyndall Air Force Base, Fla., on July 12. The wing trains the service's active-duty F-15C Eagle pilots and is taking on the same job for the F-22 Raptor.

New also is in line to pin on his brigadier general star this year.

His career hit difficulties after a 1998 helicopter accident at Nellis Air Force Base, Nev., that killed 12 airmen. New then was commander of Nellis' 57th Operations Group.

An Air Force accident-investigation board faulted New for not taking stronger actions to improve the safety of operations in the helicopter squadron. Also, family members of some of the lost airmen sought support from U.S. lawmakers to stop New's promotion.

The head of Air Combat Command in 2000 put a hold on New's wing-command posting. The air combat commander then was Gen. John Jumper, the man who now is the Air Force chief



ROBERT COOPER

Col. Larry New speaks at the July 12 change-of-command ceremony for the 325th Fighter Wing at Tyndall Air Force Base, Fla.

New told Air Force Times in a written statement, "My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence."

New's command represents the turnaround of a career that was in trouble since the deaths of the airmen in the crash.

Fatal accident

On Sept. 3, 1998, two HH-60G Pave Hawk helicopters assigned to the 66th Rescue Squadron collided during a night-training mission.

An accident-investigation board concluded that aircrew error was the immediate cause of the accident. But the board also found the rescue squadron suffered a wide range of woes, from a grueling overseas-deployment schedule to poor morale to an inexperienced cadre of pilots.

Investigators said New believed he had solved the 66th Rescue Squadron's problems when he relieved from their jobs a weak squadron commander and a first sergeant. But actually, the report concluded, New had treated just the symptoms.

'My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence.'
COL. LARRY D. NEW

New also didn't provide the new squadron commander and base safety officer a safety evaluation of the rescue squadron, called the Operational Health Readiness Assess-

Force Base, Fla.

Gen. Mike Ryan, who then was chief of staff, had approved the wing posting, and the routine wheels of changing command were turning for an April 2001 ceremony.

Then the outgoing Air Combat Command head Gen. Richard Eberhart started a review of New's proposed assignment. Jumper succeeded Eberhart at Air Combat Command and in July 2000 denied New command of the 33rd Fighter Wing.

Jumper wrote that while New is a "highly capable officer with a career-long record of exceptional performance, the continuing media scrutiny surrounding (him) would impair his ability to effectively command the 33rd FW."

Brighter fortunes

Instead of getting his wing command, New stayed in a desk job at the Pentagon with the Joint Chiefs of Staff office. But his fortunes got brighter in 2001 when he was among the more than three dozen Air Force colonels nominated for brigadier general.

Family members of the crash victims challenged New's promotion. But then-Air Force Secretary Whit Peters and Defense Secretary William Cohen defended his performance.

In August 2001, the Senate approved New's promotion and in the same month he became Air Combat Command's director of requirements.

When New was asked what lessons from his experience he

EXH. 40 —
page 2 of 2

of staff and who has approved New's latest assignment as commander of the 325th Fighter Wing.

"The previous decision to delay General (select) New's command opportunity was based on my judgment that his effectiveness in command would be impaired by an ongoing investigation," Jumper said in a statement to Air Force Times.

"This would not have been fair to General New or the airmen in his wing. With the investigation completed, the Air Force is right to take full advantage of General New's leadership and qualifications to command," he said.

ment, written by the Air Force Safety Center at New's request.

The new squadron commander had been in his job three weeks when the crash occurred.

Board president Col. Denver L. Pletcher concluded about New's performance, "... I believe the 57th OG commander failed to mitigate known safety hazards within the squadron that directly contributed to this accident."

After the accident and a staff assignment at the Pentagon, New in 2000 had been on track to become commander of an F-15 unit, the 33rd Fighter Wing at Eglin Air

would share with student fliers, he said, "What I try to impart on all airmen is that we are part of a cause that is much bigger than ourselves. Our calling in the military is most certainly challenging and has an inherent level of risk.

"... They are part of a force that takes great measures to provide our young men and women with the best equipment, training and support to ensure we accomplish the mission with the greatest emphasis on safety." □

Bruce Rolfsen can be reached at (703) 750-8647 or brolfse@atpco.com.

EXH. 41 →

HOUSTON CHRONICLE MARCH 12, 2001

SECOND CHANCE

Former Arkansas attorney general who lost his law license gains redemption in Texas

Associated Press

AUSTIN — Eleven years ago, at age 43, Steve Clark was attorney general of Arkansas and thinking about challenging the incumbent governor, Bill Clinton.

Ten years later, he was working at a Half Price Books in Austin, making $6.50 an hour while flunking the Texas bar exam. Even if he had passed, he might not have gotten a law license because of a felony conviction in Arkansas, according to Saturday's editions of the Austin American-Statesman.



Associated Press

Steve Clark, former Arkansas attorney general, is reflected in the glass frame of his recently acquired Texas law license.

Today, Clark is on the rebound. He passed the bar exam on the third try, got his Texas law license in June and started a general civil and mediation practice as a solo Austin practitioner.

"It's very wonderful to say to somebody, 'I'm a lawyer and mediator,'" Clark said. "It is redemption."

Under Arkansas rules, Clark can never get his law license back in that state because of his felony conviction.

Clark is the most prominent of a handful of former felons practicing law in Texas, where lawyers who lose a license because of a felony conviction can get it back. A 1997 survey by the American Bar Association indicated that few states permanently disbar lawyers.

Over the past five years, records show, four petitions for reinstatement involving felony convictions were approved. Texas has more than 66,000 lawyers.

Clark, then 31, in 1978 ran for attorney general, a position Clinton gave up to run for governor. Both men, who are

See CLARK on Page 17A.

Clark

Continued from Page 13A.

Democrats, won. By the end of the 1980s, Clinton was looking to run for president. Clark dreamed of becoming governor.

But in January 1990, just after Clark announced that he was running for governor, the Arkansas Gazette reported that Clark's office had spent $115,729 on travel and meal expenses in 1988.

That article triggered an official investigation, and Clark dropped his race for governor. He was found guilty of using his state credit card to pay for meals and travel for family and political contributors. He was fined $10,000 and ordered to pay restitution.

The Internal Revenue Service also said he owed $465,000 in back taxes, penalty and interest. He negotiated and paid $75,500.

Determined to get a law license, Clark met with the Texas Board of Law Examiners. They decided he was morally fit to be a lawyer.

He remembers what a board official told him: "We believe in rehabilitation in Texas, and you look like you've had enough."

hronicle

and

as a manifest block in Seadrift, Texas, for movement to Freeport, where the cars are built into a 45- to 70-car unit train that moves north. Some of the cars go to Chicago for delivery to the Belt Railway Company of Chicago (BRC), where they continue in manifest service on other railroads. The rest go to Dow's Midland, Mich., facility.

"We are seeing dramatic improvements in the overall movement of Dow's shipments across all roads," said Carver. "The project will generate substantial savings for both Dow and the railroad, a real win-win solution."

One of the biggest benefits is having cars arrive on time. Previously, Dow cars took an average of six days to travel from Freeport to Chicago, and under the worst-case scenario, the time was 21 days. "Now, our average is four days, and we never take more than six days," Carver said, adding that Dow's expectation is that cars be delivered on the date committed 90 percent of the time.

With the pilot now in actual use, team members are looking forward to building on its success and expanding the service concept to other locations, such as Dow cars moving from Freeport to Plaquemine, La., Plaquemine to Chicago, and Freeport to sites in the west, northeast and southeast, Carver said. The team also is challenging Dow to convert barge and truck business between the impacted points to the new rail service, while working with Network Planning and Service Design to keep a tight control on costs.

This project was a team effort of the entire Chemical Marketing and Sales Team, led by Ed Sims and Doug Glass.



shareholders and community partners: **Employees are expected to apply the following principles of behavior in carrying out their business duties.**

1. Loyalty. No employee should be, or appear to be, subject to influences, interests or relationships that conflict with the best interests of the Corporation.
2. Compliance with Applicable Laws. The Corporation and its employees are expected to comply with law and regulations applicable to the Corporation's activities.
3. Observance of Ethical Standards. In the conduct of business, each employee must adhere to high ethical standards. These include honesty (i.e., truthful dealing with everyone, including customers, suppliers, shareholders and fellow employees) and fairness (i.e., treating another in the same manner as one would expect to be treated.) – *Business Conduct Policy*

CAR LOADINGS for:

7-day totals
182,463
June 22
19,945
June 23
17,277
June 24
26,876
June 25
29,034
June 26
28,171



Chronic stress that lasts more than a month may increase your risk

EXH. 43

WAS GROTHER "TREATED FAIRLY AND WITH RESPECT" WHEN DEMOTED IN 1997?



EXH. 43

RECEIVED WITH PAY CHECK APRIL 26, 2002



Union Pacific's new television campaign will reach across America, telling an important story. Yours. The story of the men and women of Union Pacific and the truly indispensable role you play in our nation's growth. To learn more about the campaign, visit www.uprr.com.

BUILDING AMERICA℠

UNION PACIFIC

EXH. 44

UNION PACIFIC CORPORATION

DICK DAVIDSON
CHAIRMAN

February 16, 2000

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339-2963

Dear Mr. Grother:

Last year I asked for your help in communicating to Congress the immense achievements of the railroad industry—and Union Pacific—in cutting rates, improving safety and increasing investment since being deregulated by the Staggers Rail Act in 1980.

The response was terrific. Over 2,800 letters, e-mails, faxes and phone calls were logged from Union Pacific employees and retirees to representatives in Washington, urging them to oppose any measure—such as H.R. 2784, S. 621 and S. 747—that would re-regulate the industry and send it back to the 1970's when government interference left railroads poorly managed and often bankrupt. Joining forces with other advocates, we were able to slow the momentum of some opportunistic shipper groups who wanted to see our industry stifled by government control.

However, we cannot afford to relax our efforts despite these successes. It will take continued vigilance to ensure that Congress stays on the right track and passes a reauthorization bill that is good for railroads and good for the country that depends on them.

Let me say in closing that I am proud to be a part of a company whose employees and retirees care so much about keeping it as strong and vital in this new century as it was in the last. Again, thank you for your hard work for Union Pacific and for your extra effort with this legislative challenge. As a team, we can ensure that railroaders—not government—continue to run railroads.

Sincerely,

Dick

Dick Davidson

1416 DODGE STREET, OMAHA, NE 68179

Page 1 of 2

Tuesday, July 2, 2002

EXH. 45



Photos by Melissa Phillip / Chronicle

At the height of Union Pacific's post-merger problems, rail cars averaged as much as 50-hour waits at the company's Englewood Yard on Liberty Road. Five years later, massive efforts have returned the freight carrier to normal service to avert future crises.

Better rail service doesn't end gripes

Union Pacific back to normal; shippers crave competition

By BILL HENSEL JR.
Houston Chronicle

FIVE years ago, the troubled merger of Southern Pacific and Union Pacific nearly paralyzed rail traffic in Houston and points north.

Despite the near-meltdown in service in 1997 and into 1998, massive efforts by Union Pacific to improve service have brought the carrier back to normal.

Customer service is also better and the company is reporting record profits, spokesman John Bromley said. The company hauled in record net income of $222 million in the first quarter of 2002.

While shippers agree that customer service is considerably better than it was five years ago, that doesn't mean they all are happy.

The source of their ire is the lack of rail competition in the Houston area. It is an ever-present annoyance for shippers like Sam Slovack of Basell USA.

"We are not in a meltdown condition. Traffic is moving," Slovack said. "Is it moving at what we believe to be competitive rates? No. Do we see room for improvements in service levels? Absolutely. But if you have no competition, there is no drive nor desire to improve the product offering."

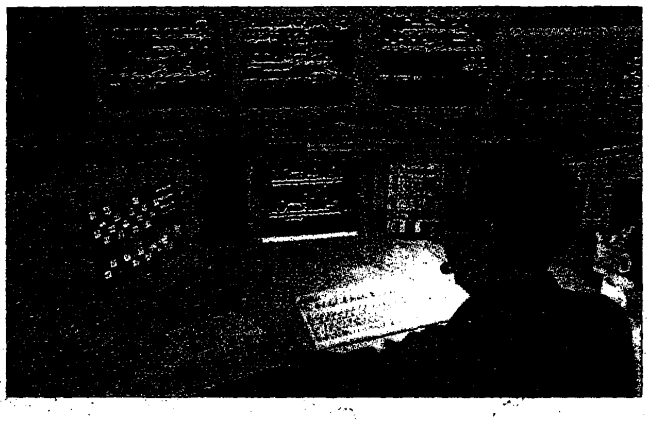
Shippers generally agree they would like to see more competition, said Diane Duff, head of the Alliance for Rail Competition, which represents a group of freight rail customers and industry trade associations in the ongoing debate over rail competition.

"I can generally state that my members are far happier with their rail service today than they were five years ago," Duff said. "But that wouldn't take too much. My experience has been that rail customers on the whole are thrilled when their stuff arrives with any regularity at all."

It's not a problem isolated to Houston. The number of mergers since 1980 has whittled the number of major railways in the nation to only a handful.

In the midst of the crisis, there

See UP on Page 12B.



Terminal train dispatcher Billy Duke keeps trains moving at the new dispatching office in Spring.

COMPANY AT A GLANCE

- Nation's largest rail network with service in 23 states and Mexico.
- $10.83 billion in revenues in 2001.
- Employs 2,250 in the Houston area with an annual payroll of $132 million.
- Operates 165 trains a day in the Houston area.
- Major commodities hauled in Texas: chemicals, export grain, gravel and automobiles.

UP Page 2 of 2

Continued from Page 1B.

were widespread calls to make changes to ensure more competitive rail service.

While the rail merger was only approved with terms requiring Union Pacific to open up a few of its lines to competing carriers, here was a strong push to open the system far more during the crisis. There's still plenty of talk of the need for more opening, but the chance of it happening has faded as service has improved.

Union Pacific dominates the local rail shipping business because it owns the great majority of the lines, said Ed Emmett, president of the National Industrial Transportation League. The group represents big shippers before government regulatory agencies.

That's a major concern for the chemical plants along the Ship Channel that depend on trains to move their huge output overland.

"All modes of transportation supposedly have been deregulated, but the very nature of railroad is if you have a chemical plant, you are served by a railroad — and if you don't like that railroad, you can't call another one," said Emmett, a former member of the Interstate Commerce Commission.

Most shippers just want the ability to have another railroad physically serve their plants or at least have the ability to get around "bottleneck rates," he said.

That urge sparked the formation of a venture combining a group of large chemical makers with the Burlington Northern and Santa Fe Railway Co. to build their own 13-mile spur line.

The $80 million project, called San Jacinto Rail Ltd., would cut the cost of shipping in and out of the four plants in the Bayport area: Atofina Petrochemicals, Basell, Equistar Chemicals and Lyondell Chemical Co.

Since the petition asking to build the line was filed by San Jacinto and Burlington Northern last August, the Surface Transportation Board originally was to have completed its investigation and review by August. But it will take more time because the agency is doing an environmental analysis, said Joe Dettmar, deputy director of the board's office of proceedings.

"We can't put out a final decision until the environmental process is complete, and it is pretty clear that it is not going to be completed" on time, Dettmar said.

While the huge traffic tie-up in 1997 at Union Pacific's Englewood yard in Houston could happen again, Emmett doesn't believe it will.

The 1997 breakdown wound up costing the railroad hundreds of millions of dollars. Enraged customers, whose shipments were delayed, demanded reimbursement because the shipments hurt their businesses.

The rail slowdown triggered lawsuits filed by the likes of Phillips Petroleum and Air Liquide America Corp. The lawsuits contended Union Pacific refused to acknowledge the extent of its service problems and "set out on a campaign to deceive Air Liquide and other shippers," the company's lawsuit charged.

Union Pacific denied those allegations. It has since settled that lawsuit and most of the others. Only one suit is still pending against the carrier from that period.

At the height of the problems, the average time a car spent at the Englewood Yard in Houston was as long as 50 hours, Union Pacific Chairman and Chief Executive Officer Dick Davidson said. Now it is a bit more than half that.

Union Pacific has taken advantage of its recent turnaround by launching a marketing campaign aimed at shoring up its image. The "branding" campaign marks the first such move in years for Union Pacific, which suffered one of its worst public drubbings as a result of the problems emanating from Houston after the merger.

Steve Barkley, a regional vice president with Union Pacific, was dispatched to Houston in 1998 to attack the problems the Southern Pacific merger caused.

One solution was simple — trains in Houston were being moved by dispatchers in Omaha and Fort Worth, Barkley said. The company dealt with that by creating a local dispatching office that was also designed to maximize cooperation with its biggest competitor, Burlington Northern.

The idea for the shared office to coordinate train movements was hatched during a Sunday afternoon meeting in 1998 involving top executives from both companies.

"This was groundbreaking," said Rod Richardson, superintendent of the coordinating center, which is in Spring and focuses on dispatching trains in the area from Brownsville to New Orleans. "It has worked a lot better than anyone could have imagined."

One advantage of the setup is that what they call "colorblind" dispatching. The system reduces conflict between the competing interests of the railways by setting priorities based on the kind of cargo rather than the train line.

Intermodal traffic, products carried on stack cars or trailer cars, have the highest priority, followed by chemicals, said Stan Bubela, joint director of the Spring dispatching center.

For example, say a Burlington Northern chemical train is about to leave the South Yard, headed west to Rosenberg. If a Union Pacific intermodal train is heading east into Houston on the same tracks, dispatchers would normally decide to keep the intermodal train coming and hold the chemical train back until the intermodal train is past.

If the trains are carrying similar cargo, the priority goes to the crew that worked the longest.

The staff of the center is also a mix, with 95 Union Pacific employees, 24 Burlington Northern employees and 31 who work on behalf of both companies. An employee of the TexMex Railway, a joint operation of Kansas City Southern and TMM, also is at the center.

Union Pacific also made use of the added track from the merger by creating lines where all the trains run in the same direction. The advantage of this is easy enough to see — it reduced the number of times a train had to pull off the track to let another pass by 41,000 times a year. But initially it slowed operations instead.

"We knew it was going to be a wonderful thing, but the changeover itself was very painful," Davidson said. "It took about two months to make the changes work effectively."

Average train speed had slowed to about 7 mph during the height of the slowdown, Davidson said. It is back up to about 15 or 16 mph or even higher today, he said.

"It never will be as fast along the Gulf Coast because you have so much business originating and terminating there," he said.

Union Pacific also has since integrated its operations with the old Southern Pacific system by installing a new computer system.

Davidson noted that Union Pacific has spent $150 million in the Houston area alone to implement changes and make good on promises of improved service. Much of the improvements were needed because Southern Pacific had not kept up with maintenance improvements, he said.

"Southern Pacific had been neglected because they really had been cash-strapped," he said.

Union Pacific also had to spend several hundred million dollars to settle lawsuits the slowdown triggered. Davidson did not reveal the settlement figure, only acknowledging it was under half a billion dollars.

In the case of Air Liquide, the company has relied on Union Pacific for years to ship products from its manufacturing plants to national distribution points. The company ships products such as liquid argon and carbon dioxide, supercooled gases that are subject to rapid evaporation, meaning reliable delivery and transit times are paramount.

Phillips Petroleum leveled similar allegations in its lawsuit — that slowdowns and delays cost the company millions because it could not serve its customers properly.

Attorney Ronald Krist, who represented Phillips in its suit against Union Pacific, said the company did a good job of promptly settling the case, but he declined to discuss the terms.

"Railroad law is heavily laden with rules and regulations that limit damages, but in this case it was resolved very reasonably for both sides," Krist said.

Union Pacific paid out another $34 million in 2000 when it agreed to settle a shareholder lawsuit. That suit, like the others, claimed the company made false and misleading statements about service and congestion following the merger.

Davidson said he never questioned that the problems would eventually be straightened out. But he acknowledged that the "pain" from the merger lasted longer than anyone anticipated.

"It has all paid off," Davidson said. "Our service is better than it was prior to the merger, operations are clearly more safe and customer satisfaction levels are at an all-time high."

Exh. 46

Union Pacific Railroad
Ms. Janice Arthur (Via Certified Mail)
Director-Pensions
1700 Farnam Street
10th Floor North
Omaha, Ne 68102

August 25, 2002

Dear Ms. Arthur,

Thank you for your attachment 1 response of 8/14/02: however, I am still concerned about a logical "WHAT IF ISSUE", as I am trying to mathematically determine how badly my retirement was affected by my July 1, 1997 demotion.

Referring to attachment 2, STRICTLY ASSUMING that my higher compensation for 36 consecutive months before 1998 (namely, July 1994-June 1997) were used to calculate my Base Company Annuity (like prior to the merger "UP Employees"), in lieu of spreading the SPRC earnings over 5 years. Based on attachment 3 rough calculations, it appears that my Base Company Annuity would be approximately $ 1,959. That estimated number is about $ 230 per month greater than UP 2002 Benefit Statement of $ 1, 729 * or $ 55,292, assuming a 20 year life span after retirement at age 65. Correct? Am I also correct that my July 1, 1997 demotion has forever removed my higher earnings (July 1994-June 1997) from FAE consideration and my wife and I will be penalized for the remainder of our lives? By how much money?

Finally, is it correct that had I only maintained my $6,200 per month wage level that I initially started back on August 1, 1995 between January 1, 1999 until December 31, 2001, my estimated UP 2002 Benefit Statement would have been about $ 1,955 per month at age 65 (attachment 4)? *
(A $226 /MONTH SHORTFALL FROM ESTIMATED 1729 AT 65, *
I believe it would be relatively easy to enter the compensation figures I have estimated on attachs 3 and 4, or verifiable data (with bonus), from the Union Pacific compensation system into the standard pension computation model.

Please advise the results of these "WHAT IF" scenarios, as I am concerned about "FAIRNESS". Thanking you in advance for your cooperation.

Attachments @ 4
1718 Rustic Park Drive, Kingwood Tx 77339

Sincerely,

Exh. 47

This is G o o g l e's cache of http://www.apa.org/monitor/jul98/merger.html.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
To link to or bookmark this page, use the following url: http://www.google.com/search?q=cache:_DMCjB3avPgC:www.apa.org/monitor/jul98/merger.html+%22How+groups+merge:++the+effects+of+merger+integration+patterns%22&hl=en&ie=UTF-8

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from the *APA Monitor*

VOLUME 29 , NUMBER 7 -July 1998

Some corporate mergers, like marriages, end up on the rocks

Psychologists' corporate counseling eases the way for mergers and acquisitions.

By Scott Sleek
Monitor staff

Two giant automakers have barely walked down the corporate aisle together, and already organizational psychologists are predicting a divorce.

Like newlyweds who discover they can't agree on anything, Daimler-Benz and Chrysler Corp. appear destined for trouble in the merger they announced in April, says psychologist Mitchell Lee Marks, PhD, a San Francisco–based management consultant.

'Daimler-Benz has a strong sense of cultural superiority; it regards itself as the pre-eminent automobile manufacturer in the world,' Marks says. 'Chrysler, by contrast, is 'just' the number-three automaker in the United States. You can almost hear the folks in Stuttgart saying, 'We'll show them how to run a car company!"

And that superior air will probably irk Chrysler's top managers, he predicts.

Marks speaks from observational experience. He's been involved in more than 50 mergers during the past 15 years. And he's seen far too many newly allied companies discover their corporate cultures fit together poorly.

In fact, up to 80 percent of corporate mergers and acquisitions fail to garner the expected financial gains, mainly because the deal-makers fail to anticipate the psychological and philosophical clashes that can undermine the alliance, industrial/organizational (I/O) psychologists say.

Yet new mergers are being announced almost daily. And the trend is becoming a big line of business for I/O psychologists who specialize in helping two or more companies join forces effectively. Some psychologists are using tenets of marital therapy to help companies maintain a workable union.

'It's not inevitable that [merged companies] will fail, if they pay attention to the right things—like immediately resolving their different ways of doing business,' says organizational psychologist Addie Perkins Williamson, PhD, of Stamford, Conn., who works with companies that enter mergers and acquisitions.

What goes wrong?

While top executives of two companies may decide that merging operations makes sense competitively, the human antipathy toward change often infects the work force and erodes the alliances, psychologists say. At the top level, executives may find they're unwilling to adopt their partners' way of doing business, as Northwest Airlines and KLM Royal Dutch Airlines found when they joined forces in 1993.

The two companies began deriding each other's cultures in the business press, took their differences to court and, earlier this year, disbanded the alliance, notes Marks. Such cultural clashes can occur even between merging companies from the same country, says Rich Michaels of Michaels McVinney, Inc., a Boston-based corporate education and development firm. (Michaels' firm uses many techniques grounded in psychological research and theory.)

A prime example, says Michaels, is GTE's 1997 purchase of BBN Corp., a technology firm that was in the forefront of developing the Internet. BBN is a research-oriented company made up of scientists and technology 'wizards,' he says. Many of those valuable employees resigned because they thought GTE would impose a new, much more businesslike atmosphere on their workplace, he notes.

'They weren't in fear of losing their jobs,' Michaels says. 'They were just worried about what this new culture was going to be like.'

Employee morale can plummet as soon as a merger or acquisition is announced, psychologists say. Workers almost immediately fear that they'll lose seniority or expected promotions. They lament the loss of control of their jobs. And at worst, they worry about losing their jobs as the new partners combine operations and shed redundancies.

Top talent may leave the company altogether, and workers that remain will become angry or scared, and thus unproductive, says Marks.

Morale appears to be most at risk among employees in the company being acquired, says Gary Mottola, PhD, senior market analyst with Peco Energy Co. in Philadelphia. Mottola was involved in a recent study on the effects of mergers and acquisitions on employees. He and his colleagues recruited 263 college students to participate in a role-playing experiment. Some participants role-played middle-level managers in two fictitious companies—'Acme Corp.,' a large manufacturing firm that was

acquiring 'Bolt Corp.'

The researchers found that employees of both the Bolt and Acme corporations felt more threatened and less committed to their 'jobs' the more they had to adapt to new policies, pay scales and technology systems.

Previous studies have shown a similar resistance or decline in morale among employees who fear their organizational culture will disappear in an acquisition, Mottola adds.

Making the alliance work

Psychologists use a variety of techniques to help newly aligned companies keep their best workers and maintain healthy morale. Williamson and her colleagues, Erika Hayes, PhD, of Tulane University and Cheryl Henderson, PhD, of Stamford, Conn., try to help companies develop realistic expectations about a merger, just as they would help romantic partners anticipate some of the struggles they'll encounter after they marry. They encourage companies, in the premerger (premarital) stage, to really learn about and understand each other and to make sure they each have the same expectations about the merger.

For example, they worked with a large American corporation that bought a foreign travel agency. At first, the corporation was only interested in enhancing its economies of scale and had no desire to learn about the travel agency's business strategy, Williamson says. But in merger talks, officials at the agency convinced the acquiring corporation to absorb the agency's successful business practices, and not just its personnel and equipment.

Unfortunately, few executives take this step before entering a merger agreement, Henderson notes. After the merger is under way, Williamson, Hayes and Henderson encourage companies to address and resolve problems before they escalate out of control. For example, executives should immediately tell key employees that they're needed, lest those workers resign for fear of being laid off, Hayes says.

Both Mottola and the co-author of the merger study, Samuel L. Gaertner, PhD, professor of psychology at the University of Delaware, suggest a common group identity model, which guides two parties from a 'them and us' to a 'we' mind set. Even simple steps, like forming a whole new company name instead of hanging on to the name of one of the partners, can create a stronger sense of unity.

Marks uses a variety of approaches to help companies make a smooth merger, particularly in the area of employee relations. For example, he's helped companies develop programs to minimize the stress that employees may feel in the midst of a merger. The programs are designed to help workers:

• Understand and manage the stress they're feeling over the merger.

• Consider new ways of thinking, rather than embracing the old way of doing business.

• Stay informed about the merger progress and the implications it has for their jobs.

• Find ways to get involved in building the newly formed entity so they have a stronger sense of control and investment in their jobs.

Marks says that more companies are recognizing the need to address work force issues immediately

after embarking on a merger, he adds.

'I'm getting called in not just frequently, but earlier in the process,' he says. 'It used to be executives waited until all hell broke loose, until they lost their top talent. Now I'm getting called in before the government even approves the deal.'

Further reading

'Joining Forces: Making One Plus One Equal Three in Mergers, Acquisitions and Alliances,' by Mitchell Lee Marks and Philip H. Mirvis (Jossey-Bass, 1998).

'How Groups Merge: The Effects of Merger Integration Patterns on Anticipated Commitment to the Merged Organization,' by Gary Mottola, PhD, Samuel Gaertner, PhD, Betty Bachman, PhD, and John Dovidio, PhD, *Journal of Applied Social Psychology* (August 1997, Vol. 27, No. 15, p. 1335–1358).

Cover Page for This Issue

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Exh. 48

UNION PACIFIC RAILROAD COMPANY

HUMAN RESOURCES
DEPARTMENT

1416 DODGE STREET
OMAHA, NEBRASKA 68179

August 16, 2002

John Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Dear Mr. Grother:

I am in receipt of your certified letter dated August 5, 2002. I can completely understand your frustration with the lack of detail that I have been able to find for you. Unfortunately, I do not have the knowledge of how things were handled systematically from a Human Resources standpoint in 1997. The systems that were used then have since merged with others which makes backtracking difficult.

Regarding the reasons behind your 'demotion', I would suggest that you speak directly with Mr. Ken Packard who you indicated was your supervisor at the time. If anyone can shed any detail on your situation, I would hope he could. I do know that Mr. Packard is still working with Union Pacific here in Omaha. As far as how the systems have recorded or detailed the situation, I don't believe more researching will necessarily give you what you are looking for, which is a detailed explanation as to why the demotion/salary decrease was given to you.

Again, I apologize for my lack of help in this matter. I hope that Mr. Packard will be able to give you what you are looking for.

Sincerely,

Lisa Brewster

Lisa Brewster

Exh. 49

VIA CERTIFIED MAIL

October 28, 2002

To: Mr. K.C. Packard
Director Transportation Services
1416 Dodge Street, CBSU #1
Omaha, Ne. 68179-0004

From: Mr. J.E. Grother

Subject: Discipline reason for 1997 Demotion of Grother

This is my sixth (6) attempt to contact you by E-mail or otherwise.

Sorry to bother you after over five (5) years; but I had a near death experience in February 2002 and I need the below questions answered before I can go to my grave.

You will recall that during late June 1997, I was advised by Mr. Tom F. Murphy and you, that I was reassigned to Houston Intermodal with a whooping 21% reduction in wages or $1,272 per month. When you and Mr. Murphy debriefed me separately in June 1997, no one stated why I was being demoted, except that Union Pacific Railroad (UPRR) wanted its own people in Tucson and UPRR wants Prior-UPRR persons running the Sunset Route.

I realize that the Service Unit was unable to shift all the flat switching from Phoenix to Tucson, as that was a near doubling of volume, without any more trackage made available in May-June 1997. Moreover, even the UPRR capacity model personnel said, "this merger experiment will not work".

Also, you will painfully remember that we had Maintenance of Way (MofW) curfews on both sides of Tucson during that yard consolidation merger experiment. Tucson could only operate trains between 1900 and 0700, which is also the general time span when both the Eastbound and Westbound fleets of trains were converging on an overwhelmed Tucson.

We were not allowed any new hiring, augmenting or train blocking relief until one day after I was advised of my 1997 Demotion!

While all the above was going on, on my desk was sitting the Union Pacific Vision and Values "1997 Desktop Stand" which stated, in part, "our values" include: "***TREAT OTHERS AS YOU WOULD LIKE TO BE TREATED".***

Was anyone else reduced 21% or $1,271 per month, as a result of someone else's merger yard consolidation experiment?

What about all the thousands of cars delayed elsewhere (i.e. Houston, Gulf Coast, etc.). Was anyone at these locations and others cut two SRG's for those spectacular service failures, which lasted beyond 6-9 months?

Surely, you would agree, that no one in their right mind, would think losing 21% of their wages was "Fair Treatment"; especially when other, Prior-UPRR managers were not reduced in pay for long periods of horrendous service failures and lawsuits against UPRR?

I have a few basic questions, which I desperately need answered please:

Are you now able to advise me specifically, at this time, what I did at Tucson that was so HEINOUS, other than being an Ex-Southern Pacific manager, that I deserved being demoted two SRG's, which will require at least seven years from 1997 to just restore my September 1995 salary level?

Who made the decision to demote me and on what specific basis, evidence or charges?

Why was I not allowed to defend myself?

Why was I not allowed a "developmental action plan"?

Logic Tests:

If I had known in June-July 1997, that I was being demoted for alleged "disciplinary reasons", why would I have had the GALL to write then UPRR President Jerry Davis on July 15, 1997, asking for an appeal to save my wages, career and retirement?

More importantly, when President Davis responded after almost two months, why did his ghostwriter say nothing about me being demoted for alleged "disciplinary reasons"?

Finally, why was I never advised that "discipline reasons" had been placed on my record until July 31, 2002?

The reasons these questions are directed to you include; but, are not limited to:

1. I was advised by Linda Buttrill, of Houston HR, that these questions should be sent to my 1997 Tucson supervisor.

2. I was advised on July 31, 2002, that an on-line record exist with information in place regarding my 1997 demotion which states that it was a "disciplinary action" and I want to know NOW - "for what please".

It appears that over these last 5.5 years, every attempt I made to get promoted has been rejected, as I had this unknown-to-me "disciplinary action" entry in the on-line system which is a very quick way for hiring managers to reject someone for promotion consideration!

Please advise, such that I may clear my secret on-line record.

I can be reached at 678-5303 should you wish to discuss the above.

Thanking you in advance for your cooperation.

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
UNION PACIFIC RAILROAD
MR Ken C. PACKARD
416 Dodge Street
CBSU #1
OMAHA, NE
68179-0004

2. Article Number

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X NOV 4 2002 ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

JG

John Grother

EXH. 50

Attitude ADJUSTMENT

UP focuses on the future by promulgating a can-do spirit, pushing productivity and promoting process change



January 14, 2003

EXH. 51

UP job cuts become reality

OMAHA, Neb. -- The president of Union Pacific Railroad (UP) warned employees in a recent e-mail that aggressive cost-cutting and job cuts were coming in the first quarter of 2003. One round of those cuts came Monday (January 13), when 53 employees in the information technology department lost jobs, according to a report by Grace Shim that appeared in the Omaha World-Herald.

President Ike Evans warned in a Thursday e-mail sent to employees that each department would have to cut costs.

"While the scope of these plans will vary by department, these cost reductions will be felt across all areas of the company, primarily in administrative functions," he said in the e-mail.

Union Pacific spokeswoman Kathryn Blackwell would not say how many employees lost jobs Monday but did say it was likely some of those affected were managers. Blackwell said the job cuts were immediate.

An Omaha employee of Union Pacific, who spoke on the condition of anonymity, said 53 workers in the information technology department in Omaha lost jobs Monday. The employee also said at least 26 workers in the crew management department in Omaha lost jobs last week.

Two crew management employees in Omaha, who also spoke on the condition that they not be named, said more job cuts are anticipated in the department.

Union Pacific Corp., the Omaha-based company whose largest unit is its railroad, had announced in December that it was drafting a plan to cut costs by as much as 20 percent.

Evans said in a recent e-mail to employees that 2002 was "a very good year," but cited these factors as the reason for cuts in 2003: higher employee wages, double-digit increases in health care benefits, higher fuel prices resulting from the threat of war in the Middle East and political strife in Venezuela, and soaring insurance costs since the Sept. 11 terrorist attacks.

"A continuing soft economy is a backdrop to all of these challenges," Evans said in the e-mail.

In the past, Evans said, the company met similar challenges through productivity improvements, price increases and careful budgeting, but the company is not earning its cost of capital, which is the basic return that investors and lenders expect from their investment in the company.

"We need to take a bolder step," he said of 2003.

UP's cuts come at a time of improved earnings for the company, which reported record revenues of $3.2 billion for the third quarter.

For the first nine months of 2002, the company reported net income of $963 million. During the first nine months of 2001, the company posted $691 million in net income.

UP will report its fourth-quarter 2002 results Jan. 22.

"Some have asked why we need to take these tough actions at a time when we are setting financial and operating records. The answer is simple: It is better to act from a position of strength while you have choices, rather than to wait until financial weakness forces even more severe actions," Evans wrote in the e-mail.

Union Pacific spokeswoman Blackwell said employees are not being offered early retirement. She said that severance packages were based on years of service but declined to give details.

One of the Union Pacific employees said managers who lose their jobs would get a maximum of one year's pay if they have 20 or more years' tenure. If a manager chose to revert to union membership, then the union member with the least seniority would lose his job, the employee said.

The employee said no department is being asked to cut more than 20 percent of its staff.

When Union Pacific cut jobs in 2001, employees were offered a severance package and a buyout program.

In this round of cuts, Blackwell said there may be many instances where affected people won't be of retirement age.

Blackwell said the company is targeting aspects of the business that don't add value. The company can do more things efficiently because of technology and does not need as many people, she said.

(The preceding report by Grace Shim appeared in the Omaha World-Herald Tuesday, Jan. 14, 2003.)

EXH. 52A

14. The 3rd and the 5th principles of the Code were violated in the Spring of 1998 at the UP Tucson Yard Office, in the course of some "spring cleaning." Information regarding discipline proceedings gathered by the Southern **Pacific** Transportation Company was discarded by **Union Pacific** carrier officials in a seemingly negligent manner--exposing that information to public display. The **Union Pacific Railroad**, by its careless disposal of discipline **records**, failed to take appropriate precautions to prevent the possible misuse of that data. (see photos enclosed)

15. Contrary to **Union Pacific's** unstated premise regarding the sanctity of **personal records** and data, this incident of improper disposal of **records** shows--not careful stewardship--but rather callous disregard for the **personal records** of employees and disregard for the privacy rights of those employees. The old discipline **records** which we found next to the dumpster near the Tucson Yard Office contained names, social security numbers, the intimate details of investigations (including drug and/or alcohol violations--old "Rule G" offenses), and carrier comments about the final disposition of those cases. These were **records** of current employees. The unsealed boxes of files were stacked next to the dumpster in plain sight for several days until the trash removal service hauled them away. It would seem that **records** of this nature should have been shredded or incinerated to prevent their accidental dissemination; yet they were disposed of in a manner which made them accessible to other employees, trespassers, or thieves for whatever illicit or nefarious purpose might be devised (e.g., extortion, blackmail, identity theft).

16. Engineer Howard has expressed concern that, given the UP's new policy on graffit of a sexual or racial nature found on company property (effective 05 Dec 01)--and the reporting requirements imposed by that policy--he may be unjustly categorized as a less than upstanding employee by the existence of the prank time claim.

17. We believe that the removal of this offensive record from Engineer

EXH. 52B

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These search terms have been highlighted: **personal records union pacific railroad**

HOME

BLE DIVISION 28

TUCSON, AZ.

E-MAIL ME

11/27/2001 LAST UPDATED

LOCAL CHAIRMAN

LEGISLATIVE PAGE

DIVISION OFFICERS

PHOTO

From:

R.S. Svob, Jr., Chairman
Arizona State Legislative Board
Brotherhood of Locomotive Engineers
1534 E. Water St.
Tucson, AZ 85719-3344
520-327-5864 ph. / 520-320-9697 fax
520-557-6795 pg. / 520-247-4961 cell

EXH. 53

Via CERTIFIED MAIL
Union Pacific Railroad
Human Relations Department
Attn: Ms. M. Uwakwe
1416 Dodge Street
Omaha, Ne 68179

January 28, 2003

Ms. M. Uwakwe,

Further the issues of **"FAIRNESS TO ALL EMPLOYEES" AND THE ACCOUNTABILITY OF MANAGERS FOR NOT FOLLOWING UNION PACIFIC RAILROAD'S (UPRR) PUBLICLY PUBLISHED "BUSINESS ETHICS", WHO DEMOTED ME 2 SRG'S DESPITE A 1997 DEMOTION POLICY THAT STATED "IN *MOST CASES, THE EMPLOYEE'S PRESENT SALARY LEVEL IS RETAINED" (EXH.1).***

Recommend that corroboration of total compensation fairness be obtained simply by requesting a few comparisons from the Compensation Dept.:

1. Compare what has been paid to Thomas Parr, my 1997 **mentor-assisted,** youthful replacement from 1997 to present in terms of monthly salary, bonus, expense accounts, annual increases, fringe benefits and retirement benefits to my pigeon-holed position.

   The difference is incredible, as I have been unfairly pigeon-holed in a dead-end job and probably will not even get back to my 1995 wage level of $6,200/month until 2005 of later (ten year penalty). If I had been allowed to keep my 1997 wage level, like others who were similarly situated, this huge differential in pay and retirement would not exist.

2. Compare what has been paid to Masseurs Charles O. Malone and Gregory "Bubba" Garrison since they were demoted and transferred in 1997 as a result of the "Railroad making changes to deal with backlogs" per Exhibit 2. THEIR DEMOTIONS WERE DUE TO **EXTREME SERVICE FAILURES, WHICH OCCURRED IRONICALLY IN THE SAME HOUSTON AREA THAT I WAS TRANSFERRED TO IN 1997, AS THE RESULT OF ALLEGED TUCSON SERVICE FAILURE; BUT, NO CUT IN WAGES FOR THOSE MANAGERS WHO WERE PRIOR TO THE MERGER UPRR MANAGERS!**

THEIR SERVICE FAILURE WAS AT LEAST FIFTY (50) TIMES GREATER THAN ANY "JUNE SERVICE FAILURE" WHICH OCCURRED AT TUCSON IN THE SUMMER OF 1997. THEIR "SERVICE FAILURE" RESULTED IN THE RAILROAD MAKING PERSONNEL CHANGES, JUST LIKE MY ALLEGED SERVICE FAILURE; YET NO ONE WAS CUT IN THEIR PAY! THE NEWSPAPER ARTICLE'S SUBTITLE REGARDING "RAILROAD MAKING MANAGEMENT CHANGES ..."; (EXH. 3) IS ALMOST EXACTLY WHAT PRESIDENT DAVIS SAID IN HIS SEPTEMBER 4, 1997 LETTER; BUT, THEY HAD NO PAY CUTS. THEIR SERVICE FAILURE HAD HUGE CUSTOMER SETTLEMENTS, EXTREME LAWSUITS AND ALMOST THE LOSS OF SOME MERGER TERRITORY TO OTHERS (STB ACTION) IN COMPARISON, I HAD NONE OF THE ABOVE!

You can see on Exhibit 2 that "Since summer (1997) UPRR has been struggling with an unprecedented traffic jam... has spread throughout much of its 36,000 mile system". Why was I the only one reduced in wages? The above system-wide service failures had demotions and transfers; but I was unfairly singled out to lose the wage level I had worked 28 plus years of loyal and dedicated service to obtain!

The last comparison, per my attorney-only 1997 Journal entry, Theodore (Ted) F. Ingram was demoted from a very high level in the UPRR Safety Department in Omaha to Tucson as an MTO on or about February 1997. This was approximately four (4) months before my demotion, after a failed merger yard consolidation experiment. Upon Ingram's arrival, Ingram stated that he had "**CONNECTIONS IN OMAHA**" and his very high Omaha monthly salary would be retained "as is", despite his lowered salary rate grades in Tucson. Why disparate treatment for similarly situated persons?

In comparison, I had "**no connections in Omaha**" as an Ex-SPTCO manager and I was financially denigrated for life!

DO ALL THE ABOVE APPEAR AS "FAIRNESS TO ALL EMPLOYEES" AND PROPER BUSINESS ETHICS TO HR?

Attaches: Exhibits 1-3

John Grother

Exh. 54

Arbitration
Frequently Asked Questions

1. **Q: What is the current daily pay rate for arbitrators working in the railroad industry?**
   A: $300.00 per day

2. **Q: Is there a separate roster for airline arbitrators?**
   A: The NMB has a single Roster of Arbitrators from which arbitrators can be selected for airline and railroad cases.

3. **Q: Can an individual railroad employee process a claim?**
   A: Yes, via the National Railroad Adjustment Board (NRAB) in Chicago.

4. **Q: Can an award under the RLA be appealed?**
   A: Yes...to the U.S. District Court within 2 years from the date of the award.

Arbitration Menu

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ARBITRATION | DOCUMENTS & FORMS | FOIA | COMMENTS & SUGGESTIONS
RELATED WEB SITES

EXH. 55

Butch Ethington
03/10/03 12:32 PM

To: John E. Grother@UP
cc: Mariette C. Uwakwe@UP
Subject: Re: REQUEST FOR 1997 POOR PERFORMANCE DETAILS

I spoke with Ken Packard, Dennis Tholen, and Tom Murphy about your demotion in 1997. The explanation was given that your performance was not what was needed. They made clear to me that the action was explained to you and you were given options. You chose to move and take a lower paying job. I am satisfied that the action was appropriate to the needs and practices at that time. The fact that others got treated differently is because they were in different jobs with different responsibilities and performance. You appealed to President Jerry Davis. Rene Orosco, the Ombudsman at that time, looked into your situation and responded appropriately at that time. He was closer to the situation, in time and information, than I am now. I believe that matter was settled, obviously not to your liking.

As for the reason for your lack of promotion in the interim, I believe the comment on the Form 15121 data base has nothing to do with that. Only by digging into the forms did that comment surface. I believe it has no bearing on your lack of interview success. I believe you should talk to the hiring managers about why you were not selected for various positions and get direct feedback.

You allege age and Viet Nam veteran status as a basis for discrimination in your treatment. That puts you case squarely in the hands of the EEO group.

Sincerely,
Butch Ethington
Ombudsman

John E. Grother

John E. Grother
03/09/03 11:33 AM

To: Butch Ethington@UP
cc: Jill E. Augustyne@UP, Mariette C. Uwakwe@UP, Jill E. Thomsen@UP
Subject: Re: REQUEST FOR 1997 POOR PERFORMANCE DETAILS

See Next Two Pages for Questions Creating Above Response.

3/9/03

Mr. Ethington,

I need a clarification please, as I am sensing a Catch-22 situation.

As you know, there were several issues in my 12/15/02 letter concerning the reasons why I was demoted. To illustrate:

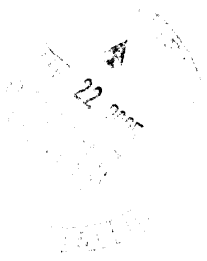
1) I was orally advised June 26, 1997 (given days notice to transfer or resign after 28 years of dedicated and loyal service) by Messeurs Packard and Murphy that my demotion was basically because I was a former manager of Southern Pacific Manager and U.P. wanted its own people in Tucson and on the former Sunset Route of the SPTCo.

2) Next, I discovered on 7/31/02, after years of effort regarding why I could not get promoted, that "someone had secretly placed on my Online Personal Record the statement that I was demoted 7/1/97 for "DISCIPLINARY REASONS".

APPENDIX 5

BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO
ARTICLE IV OF THE NEW YORK DOCK EMPLOYEE CONDITIONS

JOHN E. GROTHER :
:
vs. :
:
UNION PACIFIC RAILROAD COMPANY :



EMPLOYEE'S SUBMISSION

PART II-EXHIBITS

(Does Not Include Exhibit E-2)

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

Attorney for John E. Grother

September 14, 2004

CONTENTS

Ex. E-1. New York Dock protective conditions (7pp).

Ex. E-2. Grother letter and attachments, dated May 12, 2003 (Exhibit contains its separate table of contents)

Ex. E-3. Grother Letter to NMB, dated June 16, 2003 (1p).

Ex. E-4. UP Letter to Grother, dated July 18, 2003)(2pp).

Ex. E-5. Pocket List of Railroad Officials, Summer 2004 (7pp).

Ex. E-6. NMB designation of Lynette A. Ross, dated January 21, 2004 (3pp).

Ex. E-7. STB F.D. No. 32760 (Sub-No. 42), Grother pet. to Est. Procedures, filed February 20, 2004 (15pp).

Ex. E-8. Grother Supplement to E-7, filed March 5, 2004 (2pp).

Ex. E-9. STB FD 32760 (Sub-No. 42). UP Opposition to Ex. E-7 pet., filled March 5, 2004 (42pp).

Ex. E-10. STB FD 32760 (Sub-No. 42). Grother letter re Ex. E-9, filed March 12, 2004 (1p).

Ex. E-11. STB FD 32760 (Sub-No. 42). STB Decision dated Arpil 19, 2004 (served Apr. 21, 2004) (3pp).

Ex. E-12. STB FD 32760 (Sub-No. 42). Letter from Grother re Ex. E-11, filed April 26, 2004 (2pp).

Ex. E-13. STB FD 32760 (Sub-No. 42). STB Notice dated and served June 10, 2004 (1p).

Ex. E-14. UP Letter to Lynette A. Ross, dated May 3, 2004 (4pp).

Ex. E-15. Grother letter to Lynette A. Ross, dated May 28, 2004 (8pp).

Ex. E-16. Memorandum of Agreement-UP/Grother, dated June 18, 2004 (4pp).

Ex. E-17. Letter from UP to Grother, dated June 23, 2004 (1p)

Ex. E-18. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 131 (D.C. Cir. 2004) (9pp).

Ex. E-19. ICC FD 32760, Railroad Merger Application, Vol. 3, Operating Plan, dated November 30, 1995 (15pp).

Ex. E-20. ICC FD 32760, Environmental Assessment, No. 2, dated April 12, 1996 (22pp).

Contents (Cont.)

Ex. E-21. STB FD 32760 (Sub-No. 21), UP/SP Merger--Oversight, Applicants' Report on Merger and Condition Implementation, dated July 1, 1997 (6pp).

Ex. E-22. 29 U.S.C. §§152, 157, 164(a) (2pp).

Ex. E-23. 45 U.S.C. §151, 181; 49 U.S.C. 11326 (2pp).

Ex. E-24. Arbitrator's Decision and Award, Thomas M. Curley, et al. v. Missouri Pacific Railroad Company (David H. Brown, 1987) (11pp).

NYD, Art. IV
UP/SP-Grother
Exhibit E-1

required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss during the time necessary for such move, and for a reasonable time thereafter not to exceed 5 working days. The extent of the responsibility of the railroad under this provision and the ways and means of transportation shall be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however*, that changes in place of residence which are not a result of a transaction, which are made subsequent to the initial change and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent as provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. *Definitions.*—(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further,* that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall ceaee while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

serve as chairman. If any party fails to selects its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) 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.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not repesented 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 interpreation, 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.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits establisted under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

Ex. E-3

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

June 16, 2003

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

Sincerely, JEG

Ex. E-4

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. J. E. Grother
1718 Rustic Park Dr.
Kingwood TX 77339

Dear Mr. Grother:

This is in reference to your May 12, 2003 letter to Mr. James V. Dolan in which you requested to be certified for New York Dock protective benefits as a result of the merger between the Union Pacific and Southern Pacific Railroads. As this is a protection issue, it has been referred to my office for handling. All future New York Dock related correspondence between you and Union Pacific Railroad should also be directed to me.

I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger.

In addition, to be considered for coverage an individual must satisfy the term of "employee" as it is defined in the Railway Labor Act and by New York Dock cases. As Arbitrator Seidenberg wrote (in relevant part) in his 1987 case of The Matter of Arbitration Between B. J. Maeser et.al and Union Pacific RR Co. et al.:

> "A review of the history of labor protection conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature."** (emphasis added).

Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

Finally, even though the New York Dock conditions do not have strict time limits for filing time claims, an unreasonable time has expired between the implementation of the merger and your first claim for protective coverage. Considerable arbitral authority has held that the doctrine of laches does apply in cases such as this.

Your claim for coverage as a displaced employee under the New York Dock labor protective conditions is respectfully declined.

Sincerely,

Marilyn J. Ahart

cc: Mr. Roland Watkins
Mr. J. V. Dolan

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. Roland Watkins
National Mediation Board
Washington DC 20572

Dear Mr. Watkins:

This is in reference to your July 7, 2003 letter to Mr. James V. Dolan regarding Mr. John Grother's request to have the National Mediation Board assign arbitration pursuant to Article IV, of the New York Dock labor protective conditions.

Attached is a copy of my response to Mr. Grother. As indicated in my letter, Union Pacific is confident his claim for New York Dock protective benefits has absolutely no merit. However, in accordance with Article IV of the New York Dock labor protective conditions, please assign a neutral member to this case.

Since my office handles New York Dock protective issues at Union Pacific Railroad, please address future correspondence related to this case to me at 1416 Dodge St., PNG06; Omaha, NE 68179.

Your assistance in this matter is greatly appreciated.

Sincerely,

Marilyn J. Ahart

cc: Mr. John Grother
Mr. J. V. Dolan

3rd Quarter 2004
Summer 2004
Vol. 110, No. 3
Serial No. 439

The Pocket List of Railroad Officials

Linking Buyers and Suppliers Since 1895

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Commonwealth
BUSINESS•MEDIA

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ABBREVIATIONS OF RAILROAD OFFICIALS' TITLES

Acct. ..... Accountant
Act. ..... Acting
Agr. Agt. ..... Agricultural Agent
Arch. ..... Architect
Asst. ..... Assistant
Atty. ..... Attorney
Aud. ..... Auditor
Aud. Disb. ..... Auditor Disbursements
Aud. Frt. Accts. ..... Auditor Freight Accounts
Aud. Rev. ..... Auditor of Revenue

B. & B. Mast. ..... Bridge and Building Master
Brdg. Eng. ..... Bridge Engineer

Car Acct. ..... Car Accountant
Car For. ..... Car Foreman
Chman. ..... Chairman
Ch. of Board ..... Chairman of the Board
Chman. Exec. Comm. ..... Chairman Executive Committee
Chem. ..... Chemist
Ch. Acct. Off. ..... Chief Accounting Officer
Ch. Carp. ..... Chief Carpenter
Ch. Clm. Agt. ..... Chief Claim Agent
Ch. Drafts ..... Chief Draftsman
Ch. Elect. ..... Chief Electrician
Ch. Eng. ..... Chief Engineer
Ch. Mech. Off. ..... Chief Mechanical Officer
Ch. Oper. Off. ..... Chief Operating Officer
Ch. Person. ..... Chief of Personnel
Ch. Police ..... Chief of Police
Ch. Surg. ..... Chief Surgeon
Clm. Agt. ..... Claim Agent
Clm. Atty. ..... Claims Attorney
Coal Frt. Agt. ..... Coal Freight Agent
Coal Traf. Mgr. ..... Coal Traffic Manager
Commerce Atty. ..... Commerce Attorney
Comr. ..... Commissioner
Compt. ..... Comptroller
Conslt. Eng. ..... Consulting Engineer
Cont. ..... Controller
Coun. ..... Counsel

Diesel Supvr. ..... Diesel Supervisor
Dist. Eng. ..... District Engineer
Dist. Str. Kpr. ..... District Store Keeper
Dist. Supt. ..... District Superintendent
Div. Car For. ..... Division Car Foreman
Div. Eng. ..... Division Engineer
Div. For. ..... Division Foreman
Div. M.M. ..... Division Master Mechanic
Div. Rd. Mast. ..... Division Road Master
Div. Str. Kpr. ..... Division Store Keeper
Div. Supt. ..... Division Superintendent

Elec. Eng. ..... Electrical Engineer
Elec. Supvr. ..... Electrical Supervisor
Eng. ..... Engineer
Eng. Brdgs. ..... Engineer Bridges
Eng. B. & B. ..... Engineer Bridges & Buildings
Eng. Bldgs. ..... Engineer Buildings
Eng. Constr. ..... Engineer Construction
Eng. M.W. ..... Engineer Maintenance of Way
Eng. Struct. ..... Engineer Structures
Eng. Tests ..... Engineer Tests
Eng. Trk. ..... Engineer Track
Exec. Asst. ..... Executive Assistant
Exec. V.P. ..... Executive Vice President

1 V.P. ..... First Vice President
For. ..... Foreman
For. Car. Dept. ..... Foreman Car Department
For. Car Repairs ..... Foreman Car Repairs
For. Car Shops ..... Foreman Car Shops
For. Paint. ..... Foreman Painters
For. Rnd. Hse. ..... Foreman Round House
For. Sig. Maint. ..... Foreman Signal Maintenance
4 V.P. ..... Fourth Vice President
Frt. Clm. Agt. ..... Freight Claim Agent
Frt. Traf. Mgr. ..... Freight Traffic Manager
Fuel Agt. ..... Fuel Agent
Fuel Supvr. ..... Fuel Supervisor

Gen. Acct. ..... General Accountant
Gen. Air Brk. Insp. ..... General Air Brake Inspector
Gen. Atty. ..... General Attorney
Gen. Aud. ..... General Auditor
Gen. Car For. ..... General Car Foreman
Gen. Car Insp. ..... General Car Inspector
Gen. Coal Frt. Agt. ..... General Coal Freight Agent
Gen. Coun. ..... General Counsel
Gen. For. ..... General Foreman
Gen. For. B. & B. ..... General Foreman Buildings & Bridges
Gen. For. Car Dept. ..... General Foreman Car Department
Gen. For. Car Rep. ..... General Foreman Car Repairs
Gen. For. Eng. Hse. .... General Foreman Engine House
Gen. For. Loco. Dept. ..... General Foreman Locomotive Department
G.F.A. ..... General Freight Agent
G.F. & P.A. ..... General Freight & Passenger Agent
Gen. Frt. Traf. Mgr. ... General Freight Traffic Manager
Gen. Loco. For. ..... General Locomotive Foreman
Gen. Mgr. ..... General Manager
Gen. Mech. Insp. ..... General Mechanical Inspector
G.P.A. ..... General Passenger Agent
Gen. Rd. Mast. ..... General Road Master
Gen. Sig. Insp. ..... General Signal Inspector
Gen. Solr. ..... General Solicitor
Gen. Str. Kpr. ..... General Store Keeper
Gen. Supt. ..... General Superintendent
Gen. Supt. Trans. ..... General Superintendent Transportation
Gen. Traf. Agt. ..... General Traffic Agent
Gen. Traf. Mgr. ..... General Traffic Manager

Ind. Agt. ..... Industrial Agent
Ind. Dev. ..... Industrial Development
Ind. Eng. ..... Industrial Engineer
Ind. Mktg. Mgr. ..... Industrial Marketing Manager

Joint Mgr. ..... Joint Manager
Jr. Exec. ..... Junior Executive

Light Rail Sys. Eng. ..... Light Rail System Engineer
Loco. & Car For. ..... Locomotive & Car Foreman
Loco. For. ..... Locomotive Foreman

Mgr. ..... Manager
Mast. B. & B. ..... Master Bridges & Buildings
Mast. Carp. ..... Master Carpenter
M.M. ..... Master Mechanic
Mech. Eng. ..... Mechanical Engineer
Mech. Insp. ..... Mechanical Inspector
Mech. Supt. ..... Mechanical Superintendent

Off. Eng. ..... Office Engineer
Off. Mgr. ..... Office Manager
Oper. Mgr. ..... Operation Manager

Pass. Trf. Mgr. ..... Passenger Traffic Manager
Pension Off. ..... Pension Officer
Pres. ..... President
Prin. Asst. Eng. ..... Principal Assistant Engineer
Pur. Agt. ..... Purchasing Agent

R.E. Agt. ..... Real Estate Agent
R.E. & Tax Agt. ..... Real Estate & Tax Agent
Res. Eng. ..... Resident Engineer
R. of W. Agt. ..... Right of Way Agent
Rd. For. Eng. ..... Road Foreman of Engines
Rd. For. Loco. ..... Road Foreman of Locomotives
Rd. Mast. ..... Road Master
Rnd. Hse. For. ..... Round House Foreman

2 V.P. ..... Second Vice President
Sec. ..... Secretary
Sig. Eng. ..... Signal Engineer
Sig. Insp. ..... Signal Inspector
Sig. Supvr. ..... Signal Supervisor
Sls. Mgr. ..... Sales Manager
Spec. Eng. ..... Special Engineer
Sta. ..... Stationer
Stat. ..... Statistician
Str. Kpr. ..... Store Keeper
Supt. ..... Superintendent
Supt. B. & B. ..... Superintendent Bridges & Buildings
Supt. Car Dept. ..... Superintendent Car Department
Supt. Car Serv. ..... Superintendent Car Service
Supt. Car Shops ..... Superintendent Car Shops
Supt. Commun. ..... Superintendent Communication
Supt. Din. Cars ..... Superintendent Dining Cars
Supt. Equip. ..... Superintendent Equipment
Supt. Mchy. ..... Superintendent Machinery
Supt. M.P. ..... Superintendent Motive Power
Supt. M.P. & E. ..... Superintendent Motive Power & Equipment
Supt. Police ..... Superintendent of Police
Supt. Safety ..... Superintendent Safety
Supt. Shops ..... Superintendent Shops
Supt. Sig. ..... Superintendent Signals
Supt. Strs. ..... Superintendent Stores
Supt. Tele. ..... Superintendent Telegraph
Supt. Telo. ..... Superintendent Telephone
Supt. Term. ..... Superintendent Terminals
Supt. Trans. ..... Superintendent Transportation
Supvr. ..... Supervisor
Supvr. B. & B. ..... Supervisor Bridges & Buildings
Supvr. Commun. ..... Supervisor Communication
Supvr. Tele. & Sig. ..... Supervisor Telegraph & Signals
Supvr. Trk. ..... Supervisor of Track
Supvr. Wk. Equip. ..... Supervisor Work Equipment

Tax Agt. ..... Tax Agent
Tax Commr. ..... Tax Commissioner
3 V.P. ..... Third Vice President
Trk. Supvr. ..... Track Supervisor
Traf. Mgr. ..... Traffic Manager
Tr. Mast. ..... Train Master
Trans. Asst. ..... Transportation Assistant
Trav. Eng. ..... Traveling Engineer
Treas. ..... Treasurer

Valua. Eng. ..... Valuation Engineer
V.P. ..... Vice President

Weld. Supvr. ..... Welding Supervisor
Wks. Mgr. ..... Works Manager

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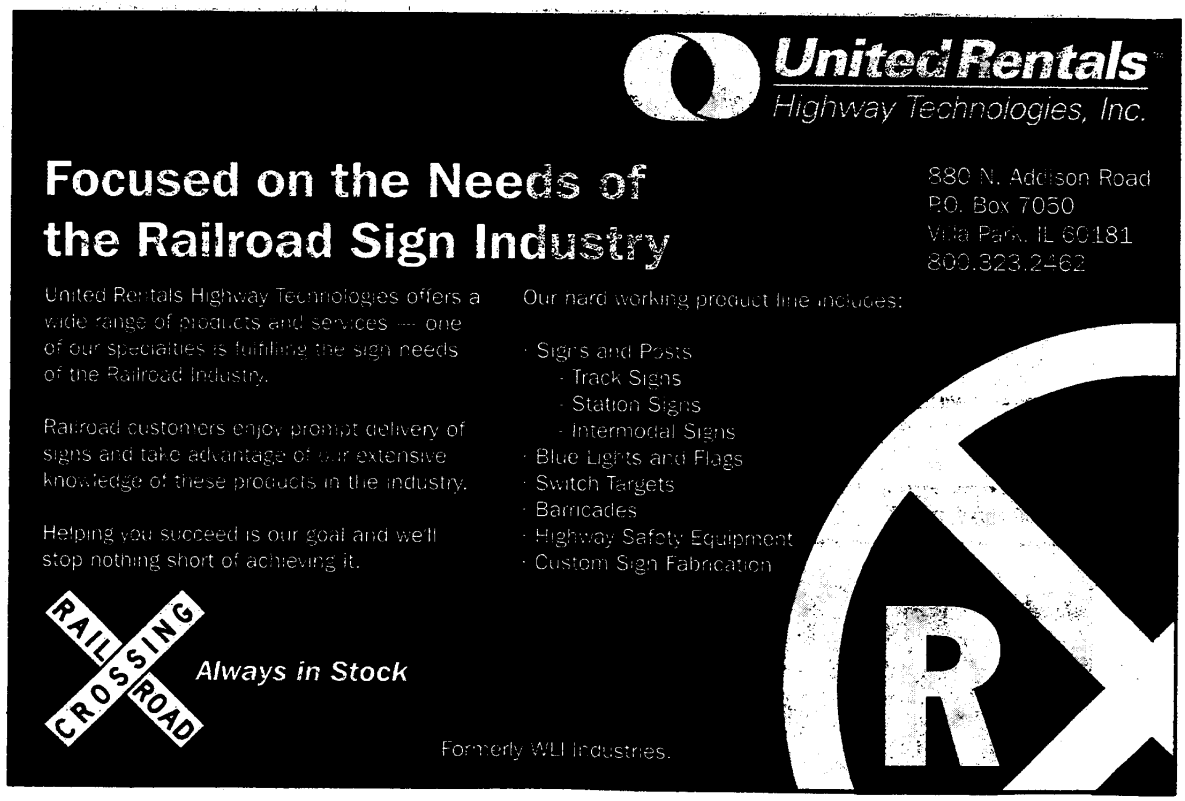
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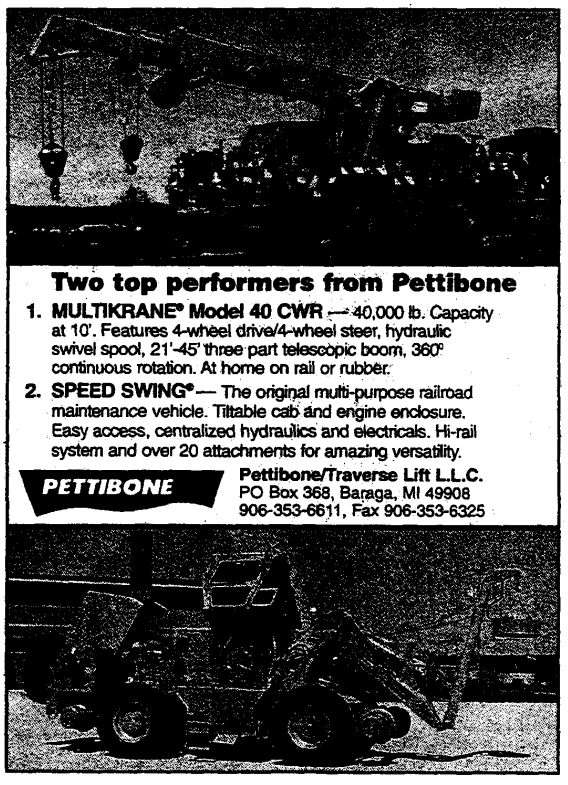
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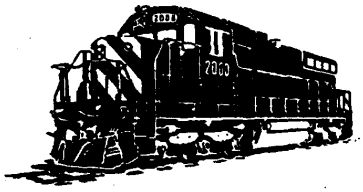
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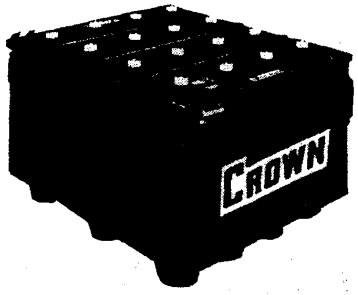
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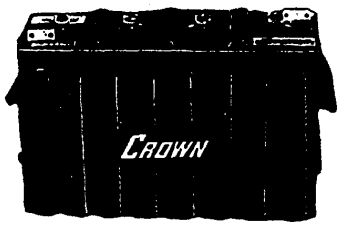
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NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(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**

> 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.

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

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Gordon P. MacDougall
Representative for John E. Grother
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Mr. W. E. Loomis
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Employee Relations Planning
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Omaha, NE 68179

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SURFACE TRANSPORTATION BOARD

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SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, 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

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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 TRANSPORTATION 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 NARB 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

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By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins
Director, Arbitration Services

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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, boilermakers, 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 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 advise 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:_____

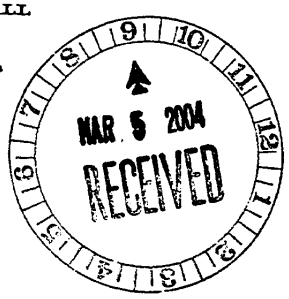
[Secretary]

210236

Ex. E-8

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

TELEPHONE
AREA CODE 202
223-9738



March 5, 2004

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20036

Re: 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 Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

This is to supplement the petition, filed February 20, 2004, in the captioned proceeding, with the one-page letter from the Arbitrator, dated March 1, 2004.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

ENTERED
Office of Proceedings
MAR 5 2004
Part of
Public Record

MAR - 4 2004

Lynette A. Ross
Arbitrator

1220 Fairway Drive
Lawrenceburg, KY 40342-9706

(502) 859-9003
(502) 859-9004 (fax)
E-mail: lynetteross@hotmail.com

March 1, 2004

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
Union Pacific Railroad Company
1416 Dodge Street
Room 332
Omaha, NE 68179

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

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm my receipt of a copy of Mr. MacDougall's petition, dated February 20, 2004, before the Surface Transportation Board (STB), to establish arbitration procedures regarding the above-captioned case. I appreciate your efforts to keep me informed of the status of this case.

As we discussed during a recent telephone conference, once the procedural issues set forth in the petition are resolved, we will resume contact in order to schedule a mutually acceptable hearing date.

Very truly yours,

Lynette A Ross

Lynette A. Ross

21023 Ex. E-9



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

ENTERED
Office of Proceedings
MAR 5 2004
Part of
Public Record

(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

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[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.

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[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.

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[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 employees 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

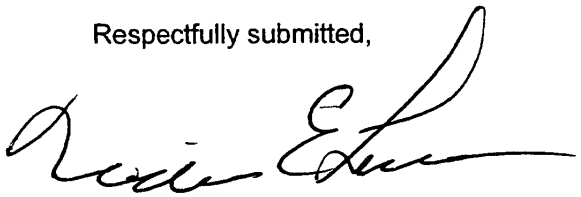
2/20/2004 petition, Article IV of the NYD protective conditions provides the remedy of arbitration to employees not represented by a labor organization just as it does to employees who are represented by a labor organization. This attempt on the part of Grother to distinguish this case from the usual 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,



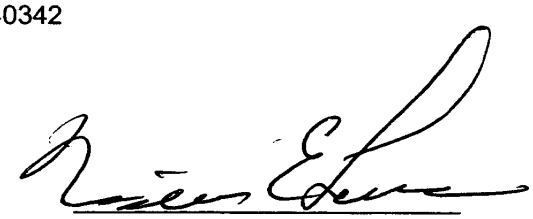
Certificate of Service

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

UNION PACIFIC APPENDIX 1
SHEET 1 OF 15

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 TRANSPORTATION 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

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 TRANSPORTATION 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

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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 NARB 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**

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.

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, boilermakers, 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 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 advise 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)

UNION PACIFIC APPENDIX 2
SHEET 1 OF 1

VIA CERTIFIED MAIL

June 16, 2003

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

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 085-Rm 830

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

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**

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.

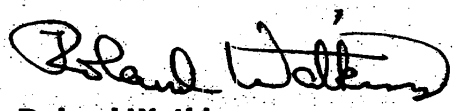
A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary 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.

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,

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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 mooting 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

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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

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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

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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.

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

UNION PACIFIC RAILROAD COMPANY

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,

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

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

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,

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
223-9736

October 6, 2003

REC'D
OCT - 7 2003
Labor Relations

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

BY HAND

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

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572
(202) 692-5000

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: 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, pleased 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.

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-6446
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,

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
223-9736

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,

Gordon P. MacDougall

cc: John E. Grother
William E. Loomis

UNION PACIFIC RAILROAD COMPANY

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,

W. E. Loomis

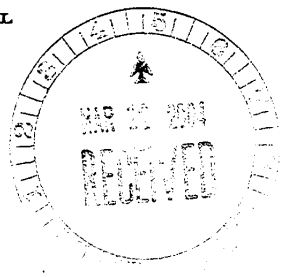
CC: John E, Grother
1718 Rustic Park Drive
Kingwood, TX 77339

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

Ex. E-10

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

TELEPHONE
AREA CODE 202
223-9738



March 12, 2004

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: 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 Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

Petitioner is in receipt of the opposition by Union Pacific Railroad Company (UP), filed March 5, 2004. The Board's rules do not permit a reply absent unusual circumstances, and petitioner will not answer the facts and arguments which it deems erroneous, at this time.

However, UP has characterized the identity of the petitioner, John E. Grother, as a "management employee" (UP Opp. 3), analogous to the term of art ("managerial employee") under the NLRA, in lieu of the RLA definitions for railroad and airline personnel (subordinate official/employee). Cf. 29 U.S.C. 152(f); 45 U.S.C. 151, fifth, 182. For a recent decision and summary of cases, see: LeMoyne Owen College v. NLRB (No. 03-1031, USCA-DC Cir., Feb. 10, 2004), 72 U.S. Law Week 1497-98 (2/24/04).

We wish the record to show that petitioner disagrees with UP's characterization of his identity; and that he is not a "management employee," now or previously.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

34500
EB

SERVICE DATE - APRIL 21, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB 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 TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: April 19, 2004

John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP) who is not represented by a labor organization, has filed a petition asking the Board to establish the procedures to be used in an arbitration proceeding to consider claims against UP for benefits under the New York Dock conditions.[1] The petition will be denied.

BACKGROUND

In approving the acquisition and control of the Southern Pacific Rail Corporation (SP) and its rail carrier subsidiaries by the Union Pacific Corporation and its rail carrier subsidiaries, the Board imposed the New York Dock conditions for the protection of affected employees.[2] Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner filed his claim with UP under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization the same level of protection as accorded to represented employees. In a letter dated June 16, 2003, petitioner asked the National Mediation Board (NMB) to select a neutral for an arbitration committee to consider his claim. In a letter dated January 21, 2004, the NMB designated Ms.

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

[2] Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 452-53, 553 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

Lynette A. Ross as the neutral arbitrator to handle the dispute.[3] NMB's letter indicated that the arbitrator "is responsible for scheduling and other appropriate procedural determination concerning the arbitration process."[4]

The petition indicates that the parties, while agreeing to most of the terms for the proposed arbitration, have been unable to agree on the extent and presentation of a written record and the place for an oral hearing. Petitioner proposes that the record be developed in a three-step process similar to the Board's arbitration procedures in 49 CFR 1108.8, whereby the complaining party proceeds first with a written statement, the defendant proceeds next, and the complainant has an opportunity to reply. Petitioner also asks that the hearing be held in Washington, DC. UP proposes that the parties submit single and simultaneous written submissions, followed by an oral hearing in Chicago, IL.

In his petition, Mr. Grother asserts that the procedures proposed by UP would not produce an adequate record for the Board to review. He argues that simultaneous submissions, with no opportunity for written responses, would not enable the parties to address fully the issue of causality, if UP were to contend that petitioner was not adversely affected by the transaction. Petitioner states further that the hearing should be held in Washington, DC, where the parties and the arbitrator would have access to unpublished material of the NMB and the Board.

In its response in opposition to the petition, UP asserts that the petition is premature because it raises routine procedural issues that, if they cannot be agreed upon by the parties, should be resolved by the neutral member of the arbitration committee. Citing 49 CFR 1108.2(b), UP states further that the Board's three-step arbitration procedures referred to by petitioner are designed for disputes involving the payment of money or involving rates and practices related to rail transportation or service subject to Board jurisdiction, and not for a New York Dock arbitration proceeding. UP requests that the Board dismiss the petition for lack of jurisdiction at this time, and remand the procedural issues to the arbitration committee for resolution.

DISCUSSION AND CONCLUSIONS

---

[3] The other members of the panel are Mr. Grother and Mr. W. E. Loomis, representing UP.

[4] Petitioner supplemented the record on March 5, 2004, forwarding a letter from Ms. Ross. Petitioner also submitted a comment/letter on March 12, 2004, expressing disagreement with UP's characterization of Mr. Grother as a management employee.

Under the deferential Lace Curtain standards of review,[5] the Board may review final decisions issued by arbitrators under the New York Dock labor protection conditions. The Board may also consider interlocutory appeals from an arbitrator's decision prior to a final arbitration decision in extraordinary circumstances. Union Pacific/MKT Merger–UTU Implementing Agreement, Finance Docket No. 30800 (Sub-No. 28) (ICC served Aug. 8, 1989).

Here, however, the Board has not been asked to review an arbitrator's decision. Rather, the petition seeks to have the Board become involved in a preliminary phase of this arbitration proceeding customarily handled by the arbitrator, i.e., scheduling and making procedural determinations concerning the arbitration process. These functions are properly encompassed within the arbitrator's authority to resolve disputes under the New York Dock labor protection conditions. Because the arbitrator controls the arbitration, she should be the person who determines where and how those proceedings should be conducted. Petitioner should attempt to reach an agreement with UP on the matters it has raised, and, if no agreement can be reached, seek resolution by the neutral arbitrator. Accordingly, the petition will be denied.

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

It is ordered:

1. The petition is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

---

[5] Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Broth. Of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standards, the Board does not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error.

Ex. E-12

210675

ENTERED
Office of Proceedings
APR 26 2004
Part of
Public Record

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

TELEPHONE
AREA CODE 202
223-9738

APR 26 2004
RECEIVED

April 23, 2004

Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: 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, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

This is to request that the decision in the entitled proceeding, served April 21, 2004, be corrected in the following respects, at page 1, final paragraph, 2nd sentence, and 3rd sentence, with text to be stricken indicated by dash, and to be added by underline, as follows:

> Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance, among other benefits, under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner ~~filed his claim with UP~~ invoked arbitration under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization substantially the same level of protection as accorded to represented employees.

Although the decision correctly states petitioner seeks a displacement allowance, such is not the entire basis for his benefits. Moreover, petitioner did not file a "claim" with UP under New York Dock's Article IV, but invoked arbitration under that provision. Perhaps the use of "claim" as both a noun and verb may have caused the misleading sentences. The NYD conditions embrace more than displacement allowances, and also include matters such as fringe benefits, moving expenses, etc. 360 I.C.C. at 87-90. Finally, the word substantially should be added to the second sentence, so as to track the exact wording of Article IV, 360 I.C.C. at 90.

The paragraph as it presently stands does not correctly reflect the record filed with the Board, and does not correctly reflect the language of the NYD conditions.

Very truly yours,

Gordon MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

Ex. E-13

34764
SEC

SERVICE DATE - LATE RELEASE JUNE 10, 2004

SURFACE TRANSPORTATION BOARD

STB 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 TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

June 10, 2004

NOTICE TO THE PARTIES:

On April 26, 2004, John E. Grother, the petitioner in this arbitration proceeding, submitted a letter requesting minor modifications to the background section of the Board's decision that was served on April 21, 2004. Petitioner notes that he initiated this proceeding by invoking arbitration under Article IV of the New York Dock conditions, rather than filing a claim with his employer under Article IV. He also seeks two other modifications in the decision. The requested modifications are not material to the Board's decision and need not be made.

Vernon A. Williams
Secretary

Ex. E-14

UNION PACIFIC RAILROAD COMPANY

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

MAY - 7 2004

May 3, 2004

Lynette A. Ross, Arbitrator
1220 Fairway Drive
Lawrenceburg, KY 40342-9706

Dear Ms. Ross:

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

This refers to your March 1, 2004 letter confirming receipt of Mr. McDougall's February 20, 2004, petition to the Surface Transportation Board. In that letter you said "we will resume contact in order to schedule a mutually acceptable hearing date" once the procedural issues set forth in the petition are resolved.

A copy of the STB's April 21, 2004 decision is attached, in which the Board characterized the outstanding procedural issues raised by Petitioner as extent and presentation of the written record and place for an oral hearing. The Board's decision directed the Petitioner to "attempt to reach agreement with UP on the matters it has raised, and if no agreement can be reached, seek resolution by the neutral arbitrator."

Subsequent to the STB's decision, Mr. McDougall and I have spoken and it appears we are unable to agree on these two matters without your assistance. Accordingly, this letter is to advise UP is ready to discuss these matters, in person or by telephone, at the earliest mutually convenient date you recommend.

Sincerely,

W. E. Loomis

Attachment

cc: Gordon P. McDougall
Suite 410
1025 Connecticut Ave., NW
Washington, DC 20036

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

34500
EB

SERVICE DATE - APRIL 21, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB 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 TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: April 19, 2004

John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP) who is not represented by a labor organization, has filed a petition asking the Board to establish the procedures to be used in an arbitration proceeding to consider claims against UP for benefits under the New York Dock conditions.[1] The petition will be denied.

BACKGROUND

In approving the acquisition and control of the Southern Pacific Rail Corporation (SP) and its rail carrier subsidiaries by the Union Pacific Corporation and its rail carrier subsidiaries, the Board imposed the New York Dock conditions for the protection of affected employees.[2] Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner filed his claim with UP under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization the same level of protection as accorded to represented employees. In a letter dated June 16, 2003, petitioner asked the National Mediation Board (NMB) to select a neutral for an arbitration committee to consider his claim. In a letter dated January 21, 2004, the NMB designated Ms.

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

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Lynette A. Ross as the neutral arbitrator to handle the dispute.[3] NMB's letter indicated that the arbitrator "is responsible for scheduling and other appropriate procedural determination concerning the arbitration process."[4]

The petition indicates that the parties, while agreeing to most of the terms for the proposed arbitration, have been unable to agree on the extent and presentation of a written record and the place for an oral hearing. Petitioner proposes that the record be developed in a three-step process similar to the Board's arbitration procedures in 49 CFR 1108.8, whereby the complaining party proceeds first with a written statement, the defendant proceeds next, and the complainant has an opportunity to reply. Petitioner also asks that the hearing be held in Washington, DC. UP proposes that the parties submit single and simultaneous written submissions, followed by an oral hearing in Chicago, IL.

In his petition, Mr. Grother asserts that the procedures proposed by UP would not produce an adequate record for the Board to review. He argues that simultaneous submissions, with no opportunity for written responses, would not enable the parties to address fully the issue of causality, if UP were to contend that petitioner was not adversely affected by the transaction. Petitioner states further that the hearing should be held in Washington, DC, where the parties and the arbitrator would have access to unpublished material of the NMB and the Board.

In its response in opposition to the petition, UP asserts that the petition is premature because it raises routine procedural issues that, if they cannot be agreed upon by the parties, should be resolved by the neutral member of the arbitration committee. Citing 49 CFR 1108.2(b), UP states further that the Board's three-step arbitration procedures referred to by petitioner are designed for disputes involving the payment of money or involving rates and practices related to rail transportation or service subject to Board jurisdiction, and not for a New York Dock arbitration proceeding. UP requests that the Board dismiss the petition for lack of jurisdiction at this time, and remand the procedural issues to the arbitration committee for resolution.

DISCUSSION AND CONCLUSIONS

---

[3] The other members of the panel are Mr. Grother and Mr. W. E. Loomis, representing UP.

[4] Petitioner supplemented the record on March 5, 2004, forwarding a letter from Ms. Ross. Petitioner also submitted a comment/letter on March 12, 2004, expressing disagreement with UP's characterization of Mr. Grother as a management employee.

Under the deferential Lace Curtain standards of review,[5] the Board may review final decisions issued by arbitrators under the New York Dock labor protection conditions. The Board may also consider interlocutory appeals from an arbitrator's decision prior to a final arbitration decision in extraordinary circumstances. Union Pacific/MKT Merger–UTU Implementing Agreement, Finance Docket No. 30800 (Sub-No. 28) (ICC served Aug. 8, 1989).

Here, however, the Board has not been asked to review an arbitrator's decision. Rather, the petition seeks to have the Board become involved in a preliminary phase of this arbitration proceeding customarily handled by the arbitrator, i.e., scheduling and making procedural determinations concerning the arbitration process. These functions are properly encompassed within the arbitrator's authority to resolve disputes under the New York Dock labor protection conditions. Because the arbitrator controls the arbitration, she should be the person who determines where and how those proceedings should be conducted. Petitioner should attempt to reach an agreement with UP on the matters it has raised, and, if no agreement can be reached, seek resolution by the neutral arbitrator. Accordingly, the petition will be denied.

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

It is ordered:

1. The petition is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

---

[5] Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Broth. Of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standards, the Board does not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error.

Ex. E-15

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

TELEPHONE
AREA CODE 202
223-9738

May 28, 2004

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

Re: Grother/Union Pacific-NYD

Dear Ms. Ross:

This is in response to the letter, dated May 3, 2004, from William E. Loomis, regarding the procedural posture of this proceeding. The STB on April 21 issued its decision (subject to request for ministerial corrections, filed April 26). I agree it is time to move forward, but suggest discussion likely will prove more meaningful if written positions are first exchanged prior to a conference call among all members or representatives of the Committee.

By way of background, this arbitration involves a non-agreement employee not represented by an employee organization, with displaced employee wage losses estimated at $108,000, exclusive of other benefits. The events giving rise to the proceeding commenced in 1997, some 7 years ago. There have not been any conferences on the property concerning this dispute. There has been no indication of pressing time constraints for the arbitration process. The employee desires a written record, insofar as practicable, due to the unusual nature of this case, and also in recognition by the partisan parties that there is a substantial likelihood the cause will be reviewed by another agency and/or court, irrespective of the arbitration outcome. Indeed, even with regard to causality, there is recent judicial authority challenging the notion of limited review for a New York Dock arbitration ruling on causality. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 35-36 (D.C. Cir. 2004).

In the absence of prior conferences, the issues cannot be determined in advance with certainty, although it appears eligibility, causality, asserted laches, and measure of compensation or other benefits. The limited sum directly sought, $108,000, renders the expenses of arbitration, including counsel fees, an important consideration to the employee, and perhaps also suggests additional carrier motivations or considerations in connection with the 1997-98 operational meltdown of the two merging carriers.

The carrier's May 3 letter might suggest only two outstanding procedural issues. Attached is a fourth draft (MA-4D), leaving open the hearing location, item C; and Appendix 1 being Grother's suggested schedule for pre-hearing submissions. These embrace the two matters brought to the attention of the STB. Unfortunately, there are matters in addition to the two referenced issues.

1. Additional Objections. UP objects to MA-4D,item E(1), first sentence, "or by other representatives as they may elect;" and to E(2), second sentence, relating to additional evidence, as well as to E(3), third sentence, relating to post-hearing briefs. The employee member is unable to appreciate UP's objection to E(1), but understand's UP's objections to E(2) and E(3) are based upon UP's view that these matters should be determined by the neutral member, rather than by the Committee. However, UP can best explain its position. UP also notes objection to item E, first sentence, where reference is made to Appendix 1, and to item F, in line 13, with reference to Appendix 1. Again, UP can best explain its position, as it appears the objection is not to the content of the items, but to Appendix 1 in its entirety.

Employee strongly believes that any additional evidence should be a Committee decision; likewise, post-hearing briefs should be permitted by Committee action as part of the adopted procedures. Arbitration under NYD Art, I, §11 is by Committee, whereas arbitration under Art. I, §4 is by referee.

2. Pre-Hearing Submissions. Where, as here, causality is anticipated to be a major, if not the most important, issue to be resolved, it is essential that the claimant have an effective opportunity to rebut the carrier's case for denial. The NYD procedures provide, NYD, Art. I, §11(e):

> 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 then shall be the railroad's burden to prove that factors other than a transaction affected the employee.

It is the employee's position that he should have an opportunity for a written response to the carrier's submission on causality, and that the matter not be left to oral "Perry Mason" or "Law & Order" live presentations, absent special circumstances. We are dealing with events dating back to 1997 (and perhaps earlier) such that written submissions are to be preferred. Further, the procedure suggested in Appendix 1 should be followed for all issues, not just causality, for causality would appear interrelated to other anticipated issues, and two or more separate procedures, dependant upon multiple issues, would be unwieldy. However, the partisan parties appear in agreement to bifurcate the arbitration, such that the measure of compensation and/or benefits be deferred. MA-4D, item D.

3. Hearing Location. Employee in his letter to the NMB, dated June 16, 2003 (received June 23), suggested selection of a neutral who would be available for Arizona, Texas, California and Washington, DC, with Tucson, AZ an appropriate site if all employees present in 1997 are allowed to testify. Subsequently, employee through counsel, has expressed a preference for Washington, DC,

with an understanding "live" testimony may not be necessary in this proceeding. Upon that assumption, Washington, DC is the preferred location, not only for travel expenses, but importantly as the location of the STB and NMB, where much written material is available, and where personnel at STB or NMB, or other federal agencies, may be contacted for information.

Of course, if the arbitration process is to be open-ended, with substantial "live" testimony, employee in that event would prefer Tucson, AZ.

Accordingly, upon reflection, it may prove preferable to defer naming the hearing location until after completion of the pre-hearing written submissions, under the suggested procedure of Appendix 1, when the issues may have become better known or clarified, along with the nature and extent of the proffered material.

Very truly yours,

Attorney for John E. Grother

cc: L.A. Ross
W.E. Loomis

J.E. Grother

MA-4D

(fourth draft)

MEMORANDUM OF AGREEMENT

BETWEEN

JOHN E. GROTHER

AND

UNION PACIFIC RAILROAD COMPANY

****

WHEREAS, John E. Grother (Grother) and Union Pacific Railroad Company (Union Pacific) are in dispute as to the interpretation, application, or enforcement of the so-called New York Dock protective conditions prescribed by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (August 6, 1996); a neutral/referee having been designated January 21, 2004 by the National Mediation Board; and a decision having been issued April 21, 2004 by the STB in its 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 Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review),

IT IS AGREED:

A. There shall be established an arbitration committee (committee), which shall consist of three members. The member representing Grother shall be John E. Grother. The member representing Union Pacific shall be William E. Loomis. The neutral member and chairperson shall be Lynette A. Ross. Either Grother or Union

Pacific may change its member of the committee by advance written notice to the other members of the committee.

B. The compensation and expenses of the Grother member shall be borne by John E. Grother. The compensation and expenses of the Union Pacific member shall be borne by Union Pacific Railroad Company. The compensation and expenses of the neutral member shall be borne equally by Grother and Union Pacific.

C. The committee shall hold its initial hearing at _____, on a date to be determined by the committee. The time and place for subsequent hearings, if any, shall be determined by the committee.

D. The committee shall have jurisdiction only to decide questions concerning the interpretation, application, or enforcement of New York Dock conditions to Grother and Union Pacific. The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation or some benefits.

E. At the hearing, the parties may be heard in person, by counsel, or by other representatives as they may elect, and they may present statements of fact, supporting evidence, data and argument, in accordance with the procedural arrangement attached hereto as Appendix 1. The committee shall have the authority to require the production of such additional evidence, either oral or written, as it may desire from either party. The parties, at their discretion, may present post-hearing briefs within 20 days following the close of the hearing.

F. Within 45 days after the conclusion of the initial hearing and close of that record, which determines the applicability of New York Dock to Grother, the committee shall render a written decision, which shall become effective when signed by two members. If the decision finds that New York Dock is applicable to Grother, and that he may be due some compensation or some benefits, the partisan members will then attempt to agree on the measure of such compensation or benefits. If the partisan members are unable to agree on such compensation or benefits, the committee will, upon a request submitted by Grother or Union Pacific within 60 days from the effect date of the first decision, hold a subsequent hearing to determine the measure of compensation or benefits due. See Appendix 1. Within 45 days after the subsequent hearing is concluded and the record is closed, the committee shall render a decision, setting forth the measure of compensation or benefits due Grother, which shall become effective when signed by two members.

G. Each member of the committee shall have one vote, and two members of the committee shall be competent to adopt a decision or make such other rulings and decisions as may be necessary to carry out the functions of the committee. If an initial decision is in favor of Grother, it shall declare the applicability of New York Dock to him for the STB authorization(s) and, if a further decision is issued, it shall specify a remedy and direct the carrier to comply therewith on or before the date named in the decision.

H. The committee shall continue in existence until its decision(s) have become effective, after which it shall cease to exist, except for interpretation of its decision(s).

I. The time limits provided herein may be extended, or shortened, by mutual agreement of the parties.

Signed this _____day of May, 2004.

FOR: JOHN E. GROTHER

FOR: UNION PACIFIC RAILROAD COMPANY

APPENDIX 1

The following procedures shall govern the service of submissions by the partisan parties in advance of the hearings:

Initial Hearing. Grother shall serve his initial written submission (applicability phase) upon Union Pacific by an overnight express delivery service, with copy to the neutral member, on or before 90 days from the date the Memorandum of Agreement is signed or becomes effective. Union Pacific shall serve its initial written opposition submission (applicability phase), upon Grother by an overnight express delivery service, with copy to the neutral member, on or before 60 days from receipt of Grother's initial submission; Grother, at his option, may serve a reply written submission upon Union Pacific by an overnight express delivery service, with copy to the neutral member, on or before 20 days following receipt of Union Pacific's written opposition submission.

Subsequent Hearing. The schedule and procedures for advance submissions for any subsequent hearing(s)s shall be by agreement of the partisan parties or, failing agreement, by the committee.

MA-5D

MEMORANDUM OF AGREEMENT

BETWEEN

JOHN E. GROTHER

AND

UNION PACIFIC RAILROAD COMPANY

****

WHEREAS, John E. Grother (Grother) and Union Pacific Railroad Company (Union Pacific) are in dispute as to the interpretation, application, or enforcement of the so-called New York Dock protective conditions prescribed by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (August 6, 1996); a neutral/referee having been designated January 21, 2004 by the National Mediation Board; and a decision having been issued April 21, as clarified June 10, 2004, by the STB in its 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 Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review), and a telephone conference held June 7, 2004, among the parties and the neutral/referee, and without prejudice to the differing positions of the parties, but for the purpose of establishing procedures to permit the arbitration to proceed in light of the views of the neutral/referee,

IT IS AGREED:

A. There shall be established an arbitration committee (committee), which shall consist of three members. The member representing Grother shall be John E. Grother. The member representing Union Pacific shall be William E. Loomis. The neutral member and chairperson shall be Lynette A. Ross. Either Grother or Union Pacific may change its member of the committee by advance written notice to the other members of the committee.

B. The compensation and expenses of the Grother member shall be borne by John E. Grother. The compensation and expenses of the Union Pacific member shall be borne by Union Pacific Railroad Company. The compensation and expenses of the neutral member shall be borne equally by Grother and Union Pacific.

C. The committee shall hold its initial hearing at Washington, D.C. on October 12, 2004. The time and place for subsequent hearings, if any, shall be determined by the committee.

D. The partisan members of the committee shall serve written submissions, one upon the other, simultaneously, with copy to the neutral/chairperson, by sending via a second day delivery service on September 14, 2004. At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statements of fact, supporting evidence, data and argument. The committee shall have the authority to require the production of such additional evidence, either oral or written, as it may desire from either party. The parties, at their discretion, may present post-hearing briefs within 20 days following the close of the hearing.

E. The committee shall have jurisdiction only to decide questions concerning the interpretation, application, or enforce-

ment of New York Dock conditions to Grother and Union Pacific. The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation and some benefits.

F. Within 45 days after the conclusion of the initial hearing and close of that record, which determines the applicability of New York Dock to Grother, the committee shall render a written decision, which shall become effective when signed by two members. If the decision finds that New York Dock is applicable to Grother, and that he may be due some compensation or some benefits, the partisan members will then attempt to agree on the measure of such compensation or benefits. If the partisan members are unable to agree on such compensation or benefits, the committee will, upon a request submitted by Grother or Union Pacific within 60 days from the effective date of the first decision, hold a subsequent hearing to determine the measure of compensation or benefits due. The schedule and procedures for advance submissions for any subsequent hearing(s) shall be by agreement of the partisan parties or, failing agreement, by the committee. Within 45 days after the subsequent hearing is concluded and the record is closed, the committee shall render a decision, setting forth the measure of compensation or benefits due Grother, which shall become effective when signed by two members.

G. Each member of the committee shall have one vote, and two members of the committee shall be competent to adopt a decision or make such other rulings and decisions as may be necessary to carry

out the functions of the committee. If an initial decision is in favor of Grother, it shall declare the applicability of New York Dock to him for the STB authorization(s) and, if a further decision is issued, it shall specify a remedy and direct the carrier to comply therewith on or before the date named in the decision.

H. The committee shall continue in existence until its decision(s) have become effective, after which it shall cease to exist, except for interpretation of its decision(s).

I. The time limits provided herein may be extended, or shortened, by mutual agreement of the parties.

Signed this 18TH day of June, 2004.

FOR: JOHN E. GROTHER

FOR: UNION PACIFIC RAILROAD COMPANY

Ex. E-17

June 23, 2004

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

Dear Mr. MacDougall:

I have signed and enclosed the original copy of the memorandum of agreement concerning the New York Dock arbitration between John E. Grother and Union Pacific Railroad. As discussed during our telephone conversation on June 18, 2004, a copy is enclosed for Ms. Ross and Mr. Grother. If any party has a question relating to this memorandum of agreement, please let me know and I will schedule a conference call.

Sincerely,

William E. Loomis

Enclosure:

cc:

Lynette A. Ross w/encl
1220 Fairway Drive
Lawrenceburg, KY 40342

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

William E. Loomis
General Director

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710
ph. (402) 544-5446 fx. (402) 233-2499
beloomis@up.com

UNION PACIFIC RAILROAD COMPANY *f/k/a* Southern Pacific Transportation Company, Petitioner,

v.

SURFACE TRANSPORTATION BOARD and United States of America, Respondents.

Southern Pacific Empowered Employees Committee, Intervenor.

No. 02-1340.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 12, 2003.

Decided Feb. 3, 2004.

Background: Carrier petitioned for review of order of Surface Transportation Board declining to set aside arbitrators' finding that outsourcing was causally related to merger in manner bringing it within reach of *New York Dock*'s provisions, and that named complainants represented "employees" for purposes of *New York Dock* eligibility.

Holdings: The Court of Appeals, Stephen F. Williams, Senior Circuit Judge, held that:

(1) order was "final order" reviewable by Court of Appeals;

(2) Board acted arbitrarily and capriciously in declining to set aside finding that outsourcing was causally related to merger; and

(3) Board acted arbitrarily and capriciously in allowing organization to refuse to identify which nonunion employees it purported to represent.

Reversed.

Henderson, Circuit Judge, filed opinion concurring in judgment.

1. Arbitration ⇐73.2

Order of Surface Transportation Board, declining to set aside arbitrators' finding that outsourcing was causally related to merger in manner bringing it within reach of *New York Dock*'s provisions, and that named complainants represented "employees" for purposes of *New York Dock* eligibility, was "final order" over which Court of Appeals had jurisdiction, where order completed liability phase of proceeding that parties agreed to bifurcate, and all that remained to be decided was amount of benefits for each employee. 28 U.S.C.A. § 2342(5); 49 U.S.C.A. § 11326(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Carriers ⇐34

For an order of the Surface Transportation Board to be final, as required for the Court of Appeals to have jurisdiction, two conditions must be satisfied: the order must not be tentative or interlocutory in nature, and it must be an action in which rights or obligations have been determined or from which legal consequences will flow. 28 U.S.C.A. § 2342(5).

3. Carriers ⇐34

The factors for determining whether an order of the Surface Transportation Board is final, as required for the Court of Appeals to have jurisdiction, are interpreted pragmatically to assure that courts neither improperly intrude into the agency's decisionmaking process nor squander judicial resources through piecemeal review. 28 U.S.C.A. § 2342(5).

4. Arbitration ⇐77(6)

Surface Transportation Board acted arbitrarily and capriciously in declining to set aside arbitrators' finding that outsourcing by carrier was causally related to merger in manner bringing it within reach

granting its 1988 approval for the merger of the Denver & Rio Grande and the Southern Pacific, the Board imposed its standard requirements, known as the *New York Dock* conditions. See 49 U.S.C. § 11326(a); *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, aff'd sub nom. *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir.1979).

In 1989 the merged carrier consolidated various activities. Among these were the prior railroads' Denver and San Francisco computer systems, which the carrier joined in a "Management and Information Services" ("MIS") division at Southern Pacific's computer headquarters in San Francisco. And in 1992 the carrier gave notice of further consolidations between operations of Southern Pacific and the former Denver & Rio Grande; as a result, it and the Transportation Communications Union entered into a 1992 Implementing Agreement governing protection for certain groups of potentially affected employees.

In 1993 a task force headed by Thomas Matthews, the carrier's Senior Vice President and Chief Administrative Officer, recommended that the carrier outsource the functions of its merged MIS department. It proceeded to do so, engaging a completely separate firm, Integrated Systems Solutions Corporation ("ISSC"), to perform the department's functions. Many of the MIS employees moved to ISSC. A dispute arose between the carrier and some noncontract, nonunion MIS employees over whether this outsourcing was subject to the *New York Dock* conditions imposed in 1988. In December 1993 four such employees, together with the Southern Pacific Empowered Employees Committee ("SPEEC," pronounced "speak"), a self-described "voluntary organization" purporting to represent such employees, invoked arbitration under Article IV of the *New York Dock* conditions.

The parties agreed to bifurcate the arbitration, initially addressing only those issues applicable to all claimants. After a lengthy and unexplained delay, the panel issued a decision on March 20, 2000 (the "2000 Award"), finding that the MIS outsourcing was causally related to the 1988 merger in a manner bringing it within the reach of *New York Dock*'s provisions, and that the named complainants and SPEEC-represented individuals were "employees" rather than management for purposes of *New York Dock* eligibility. See generally *Newbourne v. Grand Trunk W. R.R. Co.*, 758 F.2d 193, 195 (6th Cir.1985). The carrier appealed to the Board; while that appeal was pending, the panel issued a second decision on February 10, 2001, rejecting the carrier's claim that a key witness's recantation required it to vacate its 2000 Award.

On September 17, 2002 the Board issued the decision now at issue ("Board Decision"). It applied its highly deferential "*Lace Curtain* standard"—established in review of an arbitration over a "lace curtain allowance," which is awarded for expenses incurred "preparing a newly-purchased home for occupancy." *Chicago & N. W. Transp. Co.—Abandonment* ("*Lace Curtain*"), 3 I.C.C.2d 729, 730 n. 2 (1987), aff'd sub nom. *International Bhd. of Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C.Cir. 1988). As the Board said:

> Under the *Lace Curtain* standard, we limit our review of arbitrators' decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." ... We do not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error.

employee. See *Hart Surgical*, 244 F.3d at 234–35 (holding that court has jurisdiction under the Federal Arbitration Act to review arbitration awards that determined only liability and not damages). While those damages might amount to nothing for any given individual, the chance that the remaining proceedings will moot the case by giving victory to Union Pacific as to all claimants seems remote. See *Public Utilities Comm.*, 894 F.2d at 1377. Nor does it appear that the issues likely to arise in such proceedings would much overlap with the claims that are central here, so that serious duplication of appellate effort seems unlikely. We find the Board's decision "final" for purposes of our jurisdiction.

Standard of review

The carrier argues that we should review the arbitration panel's decision directly, rather than limiting our inquiry to whether the Board acted arbitrarily and capriciously in the application of its *Lace Curtain* standard. Compare *Association of American Railroads v. Surface Transp. Bd.*, 162 F.3d 101, 112 (D.C.Cir.1998) (Sentelle, J. concurring in part and dissenting in part) (stating that the court may be required to directly review the arbitrator's decisions when the Board has applied *Lace Curtain* review), with *Swonger v. Surface Transp. Bd.*, 265 F.3d 1135, 1139–40 (10th Cir.2001) (stating without explicitly deciding that judicial review is limited in this situation to whether the Board properly declined to review the arbitration panel's decision). In *Association of American Railroads* the Board had issued an order, under a cognate labor protection provision, 49 U.S.C. § 10902(d), requiring arbitration for disputes arising under that order, and we upheld the Board. Judge Sentelle noted in his concurrence that the court's decision did *not* address the scope of our review if an arbitration decision emerging from such a scheme should reach us after the Board denied review under its *Lace Curtain* standard. 162 F.3d at 111–12. He contrasted that scenario with ordinary arbitration arising out of a party's "voluntary act, either at the time of the dispute or at an earlier time in a contract providing for such arbitration," *id.* at 111, and reasoned that the Board could not, by combining its arbitration mandate with *Lace Curtain* review, "finesse a litigant" out of its statutory right to judicial review under the standard principles of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). *Association of American Railroads*, 162 F.3d at 112. Accordingly, he said, we would have to either "directly review" the arbitrator's decision as a final agency decision, or find some other remedy. *Id.* Union Pacific argues for precisely such direct review.

Whether the Board can finesse a litigant out of its statutory right to judicial review under standard APA principles presents a serious question. Compare *International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 336 (D.C.Cir.1988) (noting that, had the ICC not elected to mandate arbitration, "all disputes over employee protective conditions would have remained solely within the primary jurisdiction of the agency"). And we note that although this court has repeatedly rejected claims that the Board's *Lace Curtain* standard of review is too *broad* in scope, see, e.g., *United Transp. Union v. ICC*, 43 F.3d 697 (D.C.Cir.1995); *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 811–12 (D.C.Cir.1993) (per curiam); *International Bhd. of Elec. Workers*, 862 F.2d at 332, we have never before addressed the argument that the standard is too *narrow*, or that the resulting layers of deference unlawfully place the arbitration result beyond judicial review. See 5 U.S.C. § 706; *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282, 107 S.Ct. 2360, 96

tion approval to consolidate our clerical positions, thereby establishing the Carrier's unfettered regulatory authority and discretion to implement any subsequent consolidations or personnel actions impacting on our clerical personnel, including the MIS employees, arising from the D&RGW–SP transaction," *id.* at 2–3. Rather than showing that the 1993 outsourcing was causally related to the 1988 merger, this opaque statement says only that the carrier wrote its 1992 *New York Dock* notice as broadly as possible so that it could implement "any subsequent consolidations or personnel actions . . . arising from the D&RGW–SP transaction." *Id.* at 2. It thus begs the question the arbitration panel was to answer: whether the 1993 outsourcing in fact was a consolidation or personnel action directly "arising from" the Denver & Rio Grande/Southern Pacific merger. Compare *Brotherhood of Locomotive Eng'rs v. ICC*, 885 F.2d 446, 451 (8th Cir.1989) (approving arbitrator's finding of a "reasonably direct causal connection"—more than "a mere but for standard"—between the merger and the adverse action).

Not only did the Lamb Declaration not adduce a single fact tending to establish a causal relation between the 1988 merger and 1993 outsourcing, but the timing and character of the transactions undermine any such idea. Thomas Matthews—who was primarily responsible for the outsourcing and who did not join the carrier until 1991, three years after the merger—explained that the outsourcing was done for financial reasons entirely unrelated to the merger. See Matthews Declaration at 1–2. No evidence was offered contradicting those reasons. Given that an outsourcing is on its face utterly different from a consolidation, and that the merged carriers had *already* consolidated their computer systems, it would take some specific evidence to establish causality, rather than the vague, question-begging conclusions offered by Lamb.

In *American Train Dispatchers Ass'n v. CSX Transportation, Inc.*, the Board explained that under its *Lace Curtain* standard it would vacate arbitration awards "when there is egregious error," meaning that the award is "irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." 9 I.C.C.2d 1127, 1130–31 (1993) (internal quotations and citation omitted). But here the arbitration panel found the Lamb Declaration to be "pivotal" even though it provided no support whatever for a finding of causation, and all other evidence pointed away from such a finding. We conclude therefore that the arbitration panel's finding that the 1993 outsourcing was causally related to the 1988 merger was "actually and indisputably without foundation in reason and fact," and that the Board acted in an arbitrary and capricious manner in not "reviewing" the 2000 Award, even under the Board's generous *Lace Curtain* standard of review.

[5] Although this error is reason enough to vacate the Board's order, the Board and arbitrators committed a second plainly egregious error in upholding SPEEC's persistent refusal to identify the MIS employees that it purported to represent. See *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587 (D.C.Cir.2001) ("If a plaintiff presents two or more alternative grounds as routes to its hoped-for ultimate victory, a court does not lose jurisdiction over the second claim once it has ruled in the plaintiff's favor on the first claim; victory on the first claim doesn't moot the second." (citation omitted)). The Board first argues that the carrier is precluded from making this argument because it did not do so below. The record shows other-

tive a declaration by a founding member of SPEEC to the effect that 287 MIS employees attended an initial SPEEC meeting, that a majority at that meeting "designated SPEEC to represent them," and that "such majority made a financial contribution" to fund the arbitration proceeding. 2000 Award at 25; see also Markovich Declaration at 4–5. SPEEC submissions evidently allude to "sign-up sheets" distributed at several meetings and to lists of persons who "signed up," see 1997 letter, but SPEEC never disclosed any such lists or sign-up sheets.

* * *

The Board's decision is accordingly reversed.

So ordered.

KAREN LeCRAFT HENDERSON, Circuit Judge, concurring in the judgment:

I concur in the majority's holding that the arbitration panel committed egregious error in finding the 1993 MIS outsourcing causally related to the 1988 merger and that the Surface Transportation Board therefore acted arbitrarily and capriciously in denying review of the erroneous arbitration award. I do not join the majority's discussion of what it terms the "second plainly egregious error" of the arbitration panel, upheld by the board—namely, failing to require SPEEC to identify the employees it represented. Maj. op. at 37–38.* Whether or not the majority is correct that this failure was "procedural error," there is, as the majority apparently recognizes, no need to address the issue in light of our having found egregious error in the panel's substantive decision. *See* maj. op. at 38 ("As the award and the order are also subject to vacation on substantive grounds, this procedural error can entail no immediate additional remedy."). In the unlikely event that an employee makes a future *New York Dock* claim related to the 1993 outsourcing (notwithstanding our substantive holding in favor of Union Pacific), at that time, as the majority indicates, the Board might have occasion to decide whether the claim is barred by collateral estoppel because the claimant was a party to this arbitration with a full and fair opportunity to litigate the causality issue. *See* maj. op. at 38 ("In the event of further *New York Dock* claims by MIS employees, it will remain for the Board in the first instance to determine the preclusive effects of the judgment."); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–481, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (collateral estoppel applies only when party against which earlier decision is asserted had " 'full and fair opportunity' to litigate that issue in the earlier case") (quoting *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 328–29, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971)) (footnote omitted); *see e.g., Bhd. of Locomotive Eng'rs v. CSX Transp. Inc.*, 9 I.C.C.2d 713, 723 (1993) (finding no collateral estoppel because employees were not parties to earlier proceedings); *id.* at 727–28 (two commission members dissenting because it appeared employees seeking labor protection were represented by union in prior proceeding). Until such time, discussion of the procedural issue is hypothetical. Accordingly, I see no reason to address it in our review of the STB decision now before the court.



* I also do not join in the majority's speculation on whether the court should—in another case—conduct direct review of an arbitrator's decision. *See* maj. op. at 34–36.

Before the

INTERSTATE COMMERCE COMMISSION

Ex. E-19

Finance Docket No. 32760

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

RAILROAD MERGER APPLICATION

VOLUME 3

OPERATING PLAN (EXHIBIT 13), LABOR IMPACT EXHIBIT,
DENSITY CHARTS (EXHIBIT 14), AND SUPPORTING STATEMENTS

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NEW MANIFEST BLOCKS AT MAJOR TERMINALS

Terminal	Yard	Block Name
ODEM TX	UP	N LIT ROCK AR
OKLA CITY OK	UP	HERINGTON KS
OKLA CITY OK	UP	KAN CITY MO
OKLA CITY OK	UP	WICHITA KS
ORANGE TX	SP	ENGLEWOOD
ORANGE TX	SP	LIVONIA LA
ORANGE TX	SP	N LIT ROCK AR
ORANGE TX	SP	SETTEGAST TX
OROVILLE CA	UP	ROSEVILLE CA
PARSONS KS	UP	PINEBLUFF AR
PHOENIX AZ	SP	HERINGTON KS
PHOENIX AZ	SP	N LIT ROCK AR
PINE BLUFF AR	SP	ANGLETON TX
PINE BLUFF AR	SP	ARLINGTON TX
PINE BLUFF AR	SP	CITY INDUSTRY CA
PINE BLUFF AR	SP	FT WORTH TX
PINE BLUFF AR	SP	LAKE CHARLES LA
PINE BLUFF AR	SP	LIVONIA LA
PINE BLUFF AR	SP	LONGVIEW TX
PINE BLUFF AR	SP	MONROE LA
PINE BLUFF AR	SP	ORANGE TX
PINE BLUFF AR	SP	REISOR LA
PINE BLUFF AR	SP	SETTEGAST TX
PINE BLUFF AR	SP	SO SAN ANTONIO TX
PINE BLUFF AR	SP	SPRING TX
POCATELLO ID	UP	FTWORTH TX
POCATELLO ID	UP	GREEN RIVER WY
POCATELLO ID	UP	PROVO UT
POCATELLO ID	UP	SLCITY ROPER UT
POCATELLO ID	UP	WEST COLTON CA
PROVISO IL	UP	C BLUFFS IA
PROVISO IL	UP	EIGHTENST KS
PROVISO IL	UP	HERINGTON KS
PROVISO IL	UP	MARTINEZ
PROVISO IL	UP	MIRA LOMA CA
PROVISO IL	UP	PHOENIX AZ
PROVISO IL	UP	SLCITY ROPER UT
PROVO UT	SP	DENVER CO
PROVO UT	SP	WEST COLTON CA
RENO/SPARKS NV	SP	ELKO NV
RENO/SPARKS NV	SP	NPLATTE NE
ROSEVILLE CA	SP	ALBINA OR
ROSEVILLE CA	SP	ANAHEIM CA
ROSEVILLE CA	SP	CITY INDUSTRY CA
ROSEVILLE CA	SP	ELKO NV
ROSEVILLE CA	SP	ENGLEWOOD
ROSEVILLE CA	SP	GEMCO CA

NEW MANIFEST BLOCKS AT MAJOR TERMINALS

Terminal	Yard	Block Name
SETTEGAST TX	UP	DALLAS TX
SETTEGAST TX	UP	ENGLEWOOD
SETTEGAST TX	UP	HEARNE TX
SETTEGAST TX	UP	NPLATTE NE
SETTEGAST TX	UP	SALEM-CR-AVON
SETTEGAST TX	UP	SALEM-CR-CONWAY
SETTEGAST TX	UP	STRANG TX
SHREVEPORT LA	UP	N LIT ROCK AR
SHREVEPORT LA	UP	RODEMACHER LA
SHREVEPORT LA	UP	SETTEGAST TX
SO SAN ANTONIO TX	UP	SAN ANTONIO TX
SPRING TX	UP	CHICAGO-BRC
SPRINGFLD IL	SP	CHICAGO-BRC
STOCKTON CA	UP	BAKERSFIELD CA
STOCKTON CA	UP	FRESNO CA
STOCKTON CA	UP	ROSEVILLE CA
STOCKTON CA	UP	WEST COLTON CA
STPAUL MN	UP	BUTLER WI
STRANG TX	SP	LIVONIA LA
STRANG TX	SP	N LIT ROCK AR
STRANG TX	SP	SALEM-CR-AVON
STRANG TX	SP	SALEM-CR-CONWAY
STRANG TX	SP	SETTEGAST TX
TAYLOR TX	UP	EIGHTENST KS
TEXARKANA AR	UP	HOPE AR
TEXARKANA AR	UP	MT PLEASANT TX
TEXARKANA AR	UP	SALEM-CR-COLUMBUS
TEXARKANA AR	UP	SALEM-CR-SELKIRK
TUCSON AZ	SP	CITY INDUSTRY CA
TUCSON AZ	SP	HERINGTON KS
TUCSON AZ	SP	MIRA LOMA CA
TUCSON AZ	SP	N LIT ROCK AR
TUCSON AZ	SP	SPRING TX
TUCSON AZ	SP	YUMA AZ
VILLA GROVE IL	UP	PINEBLUFF AR
W CHICAGO IL	UP	CHICAGO-BRC
WARM SPRINGS CA	SP	ALBINA OR
WEST COLTON CA	SP	ARDEN NV
WEST COLTON CA	SP	ARLINGTON CA
WEST COLTON CA	SP	DENVER CO
WEST COLTON CA	SP	FTWORTH TX
WEST COLTON CA	SP	HERINGTON KS
WEST COLTON CA	SP	LIVONIA LA
WEST COLTON CA	SP	MILPITAS CA
WEST COLTON CA	SP	MIRA LOMA CA
WEST COLTON CA	SP	MONTCLAIR CA
WEST COLTON CA	SP	N LIT ROCK AR

SP Train Densities

Segment				Adj. 1994 Base Trns/Day			Post-Merger Trns/Day			Change in # of
From Station	To Station	Road	Miles	Psgr.	Frgt.	Total	Psgr.	Frgt.	Total	of Trains/Day
Sparks NV	Roseville CA	SP	139	1	13	14	1	20	21	7
Roseville CA	Sacramento CA	SP	18	9	20	29	9	23	32	3
El Paso TX	Lordsburg NM	SP	148	1	28	29	1	44	45	15
Lordsburg NM	Cochise AZ	SP	85	1	29	30	1	44	45	15
Cochise AZ	Tucson AZ	SP	78	1	29	30	1	44	45	15
Tucson AZ	Nogales AZ	SP	63	0	1	1	0	1	1	0
Tucson AZ	Picacho AZ	SP	50	1	25	26	1	40	41	16
Picacho AZ	Phoenix AZ	SP	71	0	3	3	0	2	2	-1
Picacho AZ	Yuma AZ	SP	203	1	25	26	1	38	39	13
Yuma AZ	West Colton CA	SP	195	1	27	28	1	38	39	11
West Colton CA	City of Industry CA	SP	34	1	38	39	1	41	42	3
City of Industry CA	Bartolo CA (via UP)	SP	8	0	7	7	9	29	38	2
		UP		9	21	29				
Bartolo CA	Los Nietos CA	SP	4	0	7	7	0	2	2	-5
Los Nietos CA	Slauson Jct. CA	SP	9	0	7	7	0	2	2	-5
City of Industry CA	Los Angeles CA (via SP)	SP	19	1	32	33	1	34	35	3
Los Angeles CA	Slauson Jct. CA	SP	6	0	19	19	0	26	26	6
Slauson Jct. CA	Long Beach CA	SP	14	0	22	22	0	26	26	4
Los Angeles CA	Burbank Jct. CA	SP	8	35	6	41	35	3	38	-3
Burbank Jct. CA	Palmdale CA	SP	57	13	4	17	13	2	15	-2
Burbank Jct. CA	Oxnard CA	SP	55	19	6	25	19	5	24	-2
Oxnard CA	Santa Barbara CA	SP	37	10	6	16	10	5	15	-2
Santa Barbara CA	San Luis Obispo CA	SP	119	4	6	10	4	5	9	-2
San Luis Obispo CA	San Jose CA	SP	203	2	5	7	2	5	7	0
San Jose CA	Niles Jct. CA	SP	18	8	5	13	8	3	11	-2
Niles Jct. CA	Oakland CA (parallel routes)	SP	25	8	5	13	8	20	28	3
		UP		0	12	12				
West Colton CA	Palmdale CA (via Hiland)	SP	80	0	9	9	0	13	13	4
Palmdale CA	Mojave CA	SP	34	0	13	13	0	15	15	2
Mojave CA	Bakersfield CA	SP	67	0	14	14	0	15	15	2
Bakersfield CA	Fresno CA	SP	108	0	13	13	0	14	14	2
Fresno CA	Stockton/Lathrop CA	SP	106	0	13	13	0	15	15	2
Stockton/Lathrop CA	Martinez CA (via Mococo)	SP	48	0	0	0	0	4	4	4
Stockton/Lathrop CA	Sacramento CA	SP	46	0	13	13	0	15	15	2
Sacramento CA	Martinez CA	SP	57	9	8	17	9	7	16	-1
Martinez CA	Oakland CA	SP	32	17	8	25	17	11	28	3
Roseville CA	Marysville CA	SP	34	2	15	17	2	18	20	4
Marysville CA	Dunsmuir CA	SP	174	2	15	17	2	20	22	5
Dunsmuir CA	Klamath Falls OR	SP	106	2	15	17	2	20	22	5
Klamath Falls OR	Chemult OR	SP	74	2	15	17	2	22	24	6

Estimated Changes in Millions of Gross Tons

Segment				Adj. 1994 Base	Post Merger	% Change
From Station	To Station	Road	Miles	Tons	Tons	in Tons/Yr.
Provo UT	Salt Lake City UT (via SP)	SP	44	40	29	-42%
		UP		10		
Salt Lake City UT	Ogden UT (via UP)	SP	36	30	54	-48%
		UP		74		
Ogden UT	Alazon NV	SP	178	24	38	63%
Alazon NV	Winnemucca NV (UP-SP joint)	SP	182	23	59	9%
		UP		31		
Winnemucca NV	Flanigan NV (via UP)	SP	152	0	10	-62%
		UP		25		
Flanigan NV	Klamath Falls OR	SP	219	0	0	No Change
Winnemucca NV	Sparks NV	SP	175	22	35	58%
Sparks NV	Roseville CA	SP	139	20	33	63%
Roseville CA	Sacramento CA	SP	18	41	58	41%
El Paso TX	Lordsburg NM	SP	148	65	84	29%
Lordsburg NM	Cochise AZ	SP	85	60	74	24%
Cochise AZ	Tucson AZ	SP	78	60	76	27%
Tucson AZ	Nogales AZ	SP	63	3	4	25%
Tucson AZ	Picacho AZ	SP	50	59	82	39%
Picacho AZ	Phoenix AZ	SP	71	5	7	31%
Picacho AZ	Yuma AZ	SP	203	60	73	23%
Yuma AZ	West Colton CA	SP	195	59	73	24%
West Colton CA	City of Industry CA	SP	34	68	47	-32%
City of Industry CA	Bartolo CA (via UP)	SP	8	11	33	-7%
		UP		25		
Bartolo CA	Los Nietos CA	SP	4	11	4	-62%
Los Nietos CA	Slauson Jct. CA	SP	9	9	3	-63%
City of Industry CA	Los Angeles CA (via SP)	SP	19	49	47	-4%
Los Angeles CA	Slauson Jct. CA	SP	6	29	28	-5%
Slauson Jct. CA	Long Beach CA	SP	14	34	28	-19%
Los Angeles CA	Burbank Jct. CA	SP	8	15	11	-27%
Burbank Jct. CA	Palmdale CA	SP	57	9	8	-15%
Burbank Jct. CA	Oxnard CA	SP	55	9	8	-13%
Oxnard CA	Santa Barbara CA	SP	37	9	8	-13%
Santa Barbara CA	San Luis Obi CA	SP	119	8	7	-15%
San Luis Obi CA	San Jose CA	SP	203	8	7	-19%
San Jose CA	Niles Jct. CA	SP	18	9	7	-19%

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Enginemen (Cont.)	Marysville, KS	Year 2	3	0	0	
	Memphis, TN	Year 2	9	0	0	
	Mineola, TX	Year 2	1	0	5	To Be Negotiated
	Monroe, LA	Year 2	0	1	0	
	N Little Rock, AR	Year 2	34	0	0	
	Nampa, ID	Year 2	1	0	0	
	North Platte, NE	Year 2	0	4	0	
	Oakland, CA	Year 2	1	3	0	
	Oakley, KS	Year 2	0	16	0	
	Ogden, UT	Year 2	0	14	0	
		Year 3	12	0	0	
	Oroville, CA	Year 2	1	0	0	
	Palestine, TX	Year 2	12	0	59	To Be Negotiated
	Pekin, IL	Year 2	0	6	0	
	Phoenix, AZ	Year 2	1	0	0	
	Pine Bluff, AR	Year 2	1	15	0	
	Pocatello, ID	Year 2	5	0	0	
	Poplar Bluff, MO	Year 2	0	0	25	To Be Negotiated
	Portland, OR	Year 1	1	0	0	
		Year 2	0	47	0	
	Portola, CA	Year 2	26	0	0	
	Pratt, KS	Year 2	0	34	0	
	Proviso, IL	Year 2	2	0	0	
	Provo, UT	Year 2	1	0	0	
	Pueblo, CO	Year 2	39	0	0	
		Year 3	8	0	0	
	Quincy, IL	Year 2	17	0	0	
	Reno, NV	Year 1	3	0	0	
	Roseville, CA	Year 2	0	36	0	
		Year 3	0	2	0	
	S. Morrill, NE	Year 2	1	0	0	
	Sacramento, CA	Year 2	3	0	0	
	Salem, IL	Year 2	0	24	0	
	Salina, KS	Year 2	0	5	0	
	Salt Lake City, UT	Year 2	62	5	5	To Be Negotiated
	San Antonio, TX	Year 2	21	0	0	
	Seattle, WA	Year 2	0	3	0	
	Shreveport, LA	Year 2	3	10	0	
	Smithville, TX	Year 2	0	0	29	To Be Negotiated
	Sparks, NV	Year 2	0	10	0	
	St. Louis, MO	Year 2	14	0	0	
	St. Paul, MN	Year 2	5	0	0	
	Stockton, CA	Year 2	26	0	20	To Be Negotiated
		Year 3	8	0	0	
	Sweetwater/Toyah, TX	Year 2	0	30	0	
	Taylor, TX	Year 2	0	0	5	To Be Negotiated
	Texarkana, TX	Year 2	2	0	0	
	Topeka, KS	Year 2	1	0	0	
	Troup, TX	Year 2	1	0	0	
	Tucson, AZ	Year 2	0	71	0	
	Tucumcari, NM	Year 2	0	0	26	To Be Negotiated
	Tyler, TX	Year 2	7	0	0	
	Van Buren, AR	Year 2	6	0	0	
	Victoria, TX	Year 2	9	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
ıginemen (Cont.)	Waco, TX	Year 2	1	0	0	
	Warm Springs, CA	Year 1	2	0	0	
	Winfield, KS	Year 2	2	0	0	
	Yermo, CA	Year 2	10	0	0	
	Yuma, AZ	Year 3	0	0	4	Tucson, AZ
	Total Enginemen		**772**	**663**	**251**	
iborers	Denver, CO	Year 1	3	0	3	Pocatello, ID
		Year 2	0	0	10	N Little Rock, AR
	Eugene, OR	Year 1	7	0	0	
		Year 3	4	0	2	Albina, OR
	Houston, TX	Year 3	5	0	0	
	Kansas City, MO	Year 1	1	0	7	El Paso, TX
	Los Angeles, CA	Year 2	4	0	0	
	Oakland, CA	Year 1	1	0	0	
	Pueblo, CO	Year 2	3	0	0	
	Sacramento, CA	Year 3	0	0	3	Denver, CO
	San Antonio, TX	Year 1	4	0	0	
	Stockton, CA	Year 1	0	0	5	Roseville, CA
		Year 3	0	0	8	Roseville, CA
	Total Laborers		**32**	**0**	**38**	
achinists	Colton, CA	Year 1	1	0	0	
	Denver, CO	Year 1	5	0	10	Pocatello, ID
		Year 2	0	0	39	N Little Rock, AR
	Eugene, OR	Year 3	0	0	3	Albina, OR
	Ft. Worth, TX	Year 2	15	0	0	
	Grand Jct., CO	Year 2	0	0	6	Denver, CO
	Houston, TX	Year 3	0	0	18	El Paso, TX
	Kansas City, MO	Year 1	0	0	15	El Paso, TX
	Los Angeles, CA	Year 2	0	0	22	Denver, CO
	Oakland, CA	Year 1	2	0	0	
	Pine Bluff, AR	Year 1	1	0	1	Desoto, MO
	Pocatello, ID	Year 2	2	0	21	Denver, CO
	Pueblo, CO	Year 2	0	0	4	Denver, CO
	Sacramento, CA	Year 3	0	0	22	Denver, CO
	San Antonio, TX	Year 1	1	0	0	
	Stockton, CA	Year 3	0	0	21	Roseville, CA
	Total Machinists		**27**	**0**	**182**	
aintenance of Way	Beaumont, TX	Year 1	2	0	0	
	Colton, CA	Year 1	2	0	0	
	Denison, TX	Year 1	0	2	0	
	Denver, CO	Year 1	4	0	0	
	El Paso, TX	Year 1	0	2	0	
	Ft. Worth, TX	Year 1	0	1	0	
	Grand Jct., CO	Year 1	0	1	0	
	Gypsum, KS	Year 3	0	0	5	Mobile Gang
	Haswell, KS	Year 3	4	0	0	
	Hoisington, KS	Year 1	0	0	6	Salina, KS
		Year 3	3	0	0	
	Horace , KS	Year 3	0	0	5	Mobile Gang
	Houston, TX	Year 1	14	0	0	
	Kansas City, KS	Year 1	7	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Maintenance of Way (Cont.)	Klamath Falls, OR	Year 1	0	1	0	
	Laramie, WY	Year 1	0	17	0	
	Las Vegas, NV	Year 1	0	1	0	
	Lindsborg, KS	Year 3	3	0	3	Mobile Gang
	Los Angeles, CA	Year 1	0	1	0	
	McCracken, KS	Year 3	4	0	0	
	Mobile Gang	Year 1	244	45	0	
		Year 2	62	0	0	
	N Little Rock, AR	Year 1	0	10	0	
	Ogden, UT	Year 1	2	0	0	
	Paragould, AR	Year 1	2	0	0	
	Phoenix, AZ	Year 1	0	1	0	
	Pine Bluff, AR	Year 1	10	0	0	
	Pittsburg, CA	Year 1	0	5	0	
	Pocatello, ID	Year 2	0	0	2	Denver, CO
	Pueblo, CO	Year 1	0	1	0	
	Roseville, CA	Year 1	0	2	0	
	Salt Lake City, UT	Year 1	2	0	0	
	Scott City, KS	Year 3	5	0	0	
	St. Louis, MO	Year 1	9	0	0	
	Texarkana, TX	Year 1	4	0	0	
	Wells, NV	Year 1	6	0	0	
	Whitelaw, KS	Year 3	0	0	3	Mobile Gang
	Wichita, KS	Year 1	0	1	0	
	Total Maintenance of Way		**389**	**91**	**24**	
Non Agreement	Addis, LA	Year 1	0	0	1	Colfax, CA
	Amarillo, TX	Year 1	1	0	0	
	Anaheim, CA	Year 1	1	0	0	
	Atlanta, GA	Year 1	7	0	0	
	Avondale, LA	Year 1	0	0	1	Kansas City, MO
		Year 2	1	0	0	
	Bakersfield, CA	Year 1	0	0	1	Omaha, NE
	Beaumont, TX	Year 2	1	0	0	
	Benecia, CA	Year 1	0	0	1	Houston, TX
	Cheyenne, WY	Year 1	0	0	1	Denver, CO
		Year 2	0	0	3	Denver, CO
	Chicago, IL	Year 1	5	0	1	Decatur, IL
		Year 1	0	0	1	Jacksonville, FL
		Year 1	6	0	1	Toledo, IL
		Year 2	6	0	0	
	Cincinnati, OH	Year 1	4	0	0	
	Colfax, CA	Year 1	1	0	1	San Antonio, TX
	Colorado Springs, CO	Year 1	1	0	0	
	Colton, CA	Year 1	5	0	2	Omaha, NE
		Year 2	1	0	3	Oakland, CA
		Year 2	0	0	1	Omaha, NE
	Dallas, TX	Year 1	7	0	1	Austin, TX
		Year 1	0	0	10	Omaha, NE
		Year 2	3	0	0	
	Denver, CO	See Appendix				
	Detroit, MI	Year 1	6	0	0	
	Dolores, CA	Year 2	1	0	0	
	Dunsmuir, CA	Year 1	3	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Non Agreement (Cont.)	Eads, CO	Year 1	1	0	0	
	East St. Louis, IL	Year 1	1	0	0	
		Year 2	1	0	0	
	El Paso, TX	Year 1	2	0	1	Houston, TX
		Year 2	3	0	0	
	Elko, NV	Year 2	1	0	0	
	Eugene, OR	Year 1	2	0	0	
		Year 2	1	0	0	
	Fresno, CA	Year 1	2	0	0	
	Ft. Worth, TX	Year 2	1	0	1	Colorado Springs, CO
	Grand Jct., CO	Year 1	1	0	0	
		Year 2	1	0	2	Salt Lake City, UT
	Grand Prairie, TX	Year 1	1	0	0	
	Guadalajara, MX	Year 1	1	0	1	Mexico City, MX
	Gurdon, AR	Year 2	1	0	0	
	Helper, UT	Year 1	0	0	1	Salt Lake City, UT
	Herington, KS	Year 1	1	0	0	
		Year 2	1	0	0	
	Hinkle, OR	Year 1	0	0	1	Spokane, WA
	Houston, TX	Year 1	33	0	1	Denver, CO
		Year 1	0	0	1	El Paso, TX
		Year 1	0	0	1	Herington, KS
		Year 1	0	0	1	Kansas City, MO
		Year 1	3	0	1	Laredo, TX
		Year 1	0	0	4	Omaha, NE
		Year 1	3	0	4	San Antonio, TX
		Year 2	7	0	3	Longview, TX
		Year 2	0	0	6	Omaha, NE
		Year 2	3	0	1	St. Louis, MO
		Year 3	0	0	2	El Paso, TX
	Kansas City, KS	Year 1	5	0	1	Omaha, NE
		Year 1	0	0	1	Palestine, TX
		Year 1	0	0	1	Shreveport, LA
		Year 1	0	0	3	West Colton, CA
		Year 2	5	0	0	
	Kansas City, MO	Year 1	2	0	1	Council Bluffs, IA
	Klamath Falls, OR	Year 1	1	0	0	
	Lafayette, LA	Year 1	0	0	1	Livonia, LA
		Year 2	1	0	0	
	Lake Charles, LA	Year 1	1	0	0	
		Year 2	1	0	0	
	Laredo, TX	Year 1	2	0	0	
	Lenexa, KS	Year 2	0	0	6	Salt Lake City, UT
		Year 3	0	0	3	Salt Lake City, UT
	Long Beach, CA	Year 1	1	0	1	Chicago, IL
		Year 1	0	0	3	Lathrop, CA
		Year 1	0	0	1	Los Angeles, CA
		Year 1	0	0	1	N Little Rock, AR
		Year 1	0	0	1	Oakland, CA
		Year 1	0	0	1	Texarkana, TX
	Los Angeles, CA	Year 1	21	0	5	Montery Park, CA
		Year 1	0	0	16	Omaha, NE
		Year 2	4	0	0	
	Lufkin, TX	Year 2	1	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Non Agreement (Cont.)	Marysville, KS	Year 1	0	0	1	El Paso, TX
	Memphis, TN	Year 1	0	0	1	Brownsville, TX
		Year 1	0	0	1	Tucson, AZ
	Memphis, TN (Cont.)	Year 2	2	0	0	
	Mesquite, TX	Year 1	0	0	1	Houston, TX
	Mexico City, MX	Year 1	6	0	0	
	Minturn, CO	Year 1	1	0	0	
	Montclair, CA	Year 2	1	0	0	
	Monterey Park, CA	Year 1	2	0	7	Omaha, NE
		Year 2	3	0	1	St. Louis, MO
	Monterey, CA	Year 1	0	0	1	Los Angeles, CA
		Year 1	0	0	1	Omaha, NE
	Monterrey, MX	Year 1	3	0	0	
	N Little Rock, AR	Year 1	1	0	0	
	New Orleans, LA	Year 1	0	0	1	Laramie, WY
	New York, NY	Year 1	2	0	0	
	Oakland, CA	Year 1	5	0	1	Houston, TX
		Year 1	0	0	2	Omaha, NE
		Year 1	0	0	1	Roseville, CA
	Omaha, NE	See Appendix				
	Philadelphia, PA	Year 1	10	0	0	
	Phoenix, AZ	Year 1	2	0	0	
		Year 2	1	0	0	
	Pine Bluff, AR	Year 1	6	0	1	Desoto, MO
		Year 1	0	0	1	El Paso, TX
		Year 1	0	0	1	Laramie, WY
		Year 1	0	0	1	Livonia, LA
		Year 1	0	0	3	N Little Rock, AR
		Year 1	0	0	1	Omaha, NE
		Year 2	5	0	0	
	Pittsburgh, PA	Year 1	2	0	0	
	Pocatello, ID	Year 1	2	0	1	Roseville, CA
		Year 2	0	0	1	Omaha, NE
		Year 3	0	0	1	Tucson, AZ
	Portland, OR	Year 1	29	0	2	Calgary, AL
		Year 1	0	0	1	Nampa, ID
		Year 1	0	0	1	Omaha, NE
		Year 1	0	0	1	Seattle, WA
		Year 1	0	0	1	Spokane, WA
		Year 1	0	0	1	Texarkana, TX
		Year 2	2	0	0	
	Pueblo, CO	Year 1	2	0	1	Cheyenne, WY
		Year 1	0	0	1	Omaha, NE
		Year 2	3	0	0	
	Reno, NV	Year 1	0	0	1	Sacramento, CA
	Roseville, CA	Year 1	8	0	5	Omaha, NE
		Year 1	0	0	1	Pocatello, ID
		Year 1	0	0	1	Sacramento, CA
		Year 1	0	0	1	Salt Lake City, UT
		Year 1	0	0	1	Tucson, AZ
		Year 2	1	0	1	Omaha, NE
	Sacramento, CA	Year 1	8	0	1	Denver, CO
		Year 1	0	0	1	Sedalia, MO
		Year 2	1	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Non Agreement (Cont.)	Salida, CO	Year 1	1	0	0	
	Salt Lake City, UT	Year 1	3	0	1	Laramie, WY
		Year 1	0	0	1	Omaha, NE
	Salt Lake City, UT (Cont.)	Year 2	1	0	0	
	San Antonio, TX	Year 1	9	0	1	Ft. Worth, TX
		Year 1	0	0	1	Omaha, NE
		Year 2	5	0	1	Omaha, NE
	San Francisco, CA	Year 1	108	0	3	Chicago, IL
		Year 1	0	0	1	Denver, CO
		Year 1	0	0	1	Ft. Worth, TX
		Year 1	0	0	1	Houston, TX
		Year 1	0	0	1	Laredo, TX
		Year 1	0	0	1	Los Angeles, CA
		Year 1	0	0	79	Omaha, NE
		Year 1	0	0	1	Roseville, CA
		Year 1	0	0	12	Sacramento, CA
		Year 1	0	0	1	San Antonio, TX
		Year 1	0	0	2	San Francisco, CA
		Year 1	0	0	23	St. Louis, MO
		Year 1	0	0	1	Tucson, AZ
		Year 2	65	0	133	Omaha, NE
		Year 2	0	0	42	St. Louis, MO
		Year 3	2	0	15	Omaha, NE
	Schriever, LA	Year 1	1	0	0	
	Scott City, KS	Year 1	2	0	0	
		Year 2	1	0	0	
	Spring, TX	Year 1	4	0	0	
		Year 2	0	0	3	Livonia, LA
	St. Louis, MO	See Appendix				
	Stockton, CA	Year 1	2	0	3	Roseville, CA
		Year 2	1	0	0	
	Strang, TX	Year 2	2	0	0	
	Texarkana, TX	Year 1	1	0	0	
	Tokyo, JP	Year 1	1	0	0	
	Toronto, CN	Year 1	0	0	2	Vancouver, BC
	Tracy, CA	Year 1	0	0	1	Denison, TX
	Tucson, AZ	Year 1	2	0	1	El Paso, TX
		Year 1	0	0	1	Ft. Worth, TX
		Year 1	0	0	1	Omaha, NE
		Year 2	2	0	0	
	Victoria, TX	Year 2	1	0	0	
	Walnut Creek, CA	Year 1	19	0	0	
	Washington, DC	Year 1	0	0	1	Omaha, NE
	Winnemucca, NV	Year 1	1	0	0	
	Yermo, CA	Year 2	3	0	0	
	Yuma, AZ	Year 2	2	0	0	
	Total Non Agreement (See Appendix)		523	0	494	
Railway Supervisors	Avondale, LA	Year 1	1	0	0	
	Denver, CO	Year 1	3	0	2	Pocatello, ID
		Year 2	0	0	5	N Little Rock, AR
	El Paso, TX	Year 1	0	1	0	
	Eugene, OR	Year 1	2	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Signalmen (Cont.)	San Francisco, CA (Cont.)	Year 1	0	0	21	Omaha, NE
	Scott City, KS	Year 3	1	0	0	
	Tucson, AZ	Year 1	1	0	0	
	Utica, KS	Year 3	1	0	0	
	Total Signalmen		47	0	43	
Trainmen	Alpine, TX	Year 2	5	0	0	
	Amelia, TX	Year 2	12	0	0	
	Avondale, LA	Year 2	29	0	0	
	Bakersfield, CA	Year 2	0	9	0	
	Big Spring, TX	Year 2	0	0	29	To Be Negotiated
	Bloomington, IL	Year 2	1	0	0	
	Boone, IA	Year 2	0	22	0	
	Brownsville, TX	Year 2	2	0	0	
	Cheyenne, WY	Year 2	0	28	0	
	Chicago, IL	Year 2	0	21	0	
	Chickasha, OK	Year 2	0	0	12	To Be Negotiated
	Clinton, IA	Year 2	0	3	0	
	Coffeyville, KS	Year 2	9	0	0	
	Corpus Christi, TX	Year 2	4	0	0	
	Council Bluffs, IA	Year 2	0	5	0	
	Council Grove, KS	Year 2	21	0	0	
	Dalhart, TX	Year 2	0	18	0	
	Dallas, TX	Year 2	7	14	0	
	Del Rio, TX	Year 2	0	16	0	
	Denver, CO	Year 2	17	16	0	
	Des Moines, IA	Year 2	1	0	0	
	Duncan/Enid, OK	Year 2	0	17	0	
	Dunsmuir, CA	Year 2	17	14	0	
	E. St. Louis, IL	Year 2	1	0	0	
	Eagle Grove, IA	Year 2	1	0	0	
	El Paso, TX	Year 2	11	42	0	
	Elko, NV	Year 1	5	0	0	
		Year 2	12	0	0	
	Eugene, OR	Year 1	12	0	0	
		Year 3	17	0	0	
	Fremont, NE	Year 2	0	4	0	
	Ft. Madison, IA	Year 2	0	40	0	
	Ft. Worth, TX	Year 2	15	19	0	
	Galesburg, IL	Year 2	0	1	0	
	Galveston, TX	Year 2	8	0	0	
	Grand Jct., CO	Year 2	26	0	5	To Be Negotiated
		Year 3	17	0	0	
	Harlingen, TX	Year 2	5	0	0	
	Hearne, TX	Year 3	4	0	0	
	Herington, KS	Year 2	18	0	0	
	Hinkle, OR	Year 2	0	4	0	
	Hoisington, KS	Year 2	32	0	0	
	Houston, TX	Year 2	74	8	0	
	Illmo, IL	Year 2	20	0	0	
		Year 2	0	0	15	To Be Negotiated
	Janesville, WI	Year 2	1	0	0	
	Jefferson City, MO	Year 2	4	0	0	
	Kansas City, KS	Year 3	32	0	3	Herington, KS

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Trainmen (Cont.)	Kansas City, MO	Year 2	13	0	0	
	Kingsville, TX	Year 2	0	1	0	
	Klamath Falls, OR	Year 2	0	0	20	To Be Negotiated
	La Grande, OR	Year 2	1	0	0	
	Lafayette, LA	Year 2	3	2	0	
	Lake Charles, LA	Year 2	8	0	0	
	Las Vegas, NV	Year 2	11	0	0	
	Livonia, LA	Year 2	0	6	0	
	Los Angeles, CA	Year 2	0	13	0	
		Year 3	108	0	0	
	Marshalltown, IA	Year 2	1	0	0	
	Marysville, KS	Year 2	3	0	0	
	Memphis, TN	Year 2	15	0	0	
	Mineola, TX	Year 2	1	0	5	To Be Negotiated
	Monroe, LA	Year 2	0	1	0	
	N Little Rock, AR	Year 2	37	0	0	
	Nampa, ID	Year 2	1	0	0	
	North Platte, NE	Year 2	0	4	0	
	Oakland, CA	Year 2	1	4	0	
	Oakley, KS	Year 2	0	18	0	
	Ogden, UT	Year 2	0	15	0	
		Year 3	23	0	0	
	Oroville, CA	Year 2	2	0	0	
	Palestine, TX	Year 2	13	0	63	To Be Negotiated
	Pekin, IL	Year 2	0	7	0	
	Phoenix, AZ	Year 2	1	0	0	
	Pine Bluff, AR	Year 2	3	17	0	
	Pocatello, ID	Year 2	5	0	0	
	Poplar Bluff, MO	Year 2	0	0	33	To Be Negotiated
	Portland, OR	Year 1	3	0	0	
		Year 2	0	52	0	
	Portola, CA	Year 2	28	0	0	
	Pratt, KS	Year 2	0	38	0	
	Proviso, IL	Year 2	6	0	0	
	Provo, UT	Year 2	2	0	0	
	Pueblo, CO	Year 2	43	0	0	
		Year 3	16	0	0	
	Quincy, IL	Year 2	19	0	0	
	Reno, NV	Year 1	5	0	0	
	Roseville, CA	Year 2	0	20	0	
		Year 3	12	4	0	
	S. Morrill, NE	Year 2	1	0	0	
	Sacramento, CA	Year 2	9	0	0	
	Salem, IL	Year 2	0	26	0	
	Salina, KS	Year 2	0	6	0	
	Salt Lake City, UT	Year 2	80	10	5	To Be Negotiated
	San Antonio, TX	Year 2	25	0	0	
	Seattle, WA	Year 2	0	3	0	
	Shreveport, LA	Year 2	5	11	0	
	Smithville, TX	Year 2	0	0	31	To Be Negotiated
	Sparks, NV	Year 2	0	11	0	
	St. Louis, MO	Year 2	27	0	0	
	St. Paul, MN	Year 2	5	0	0	
	Stockton, CA	Year 2	31	0	39	To Be Negotiated

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Trainmen (Cont.)	Stockton, CA (Cont.)	Year 3	10	0	0	
	Sweetwater/Toyah, TX	Year 2	0	33	0	
	Taylor, TX	Year 2	0	0	4	To Be Negotiated
	Texarkana, TX	Year 2	6	0	0	
	Topeka, KS	Year 2	2	0	0	
	Troup, TX	Year 2	2	0	0	
	Tucson, AZ	Year 2	0	79	0	
	Tucumcari, NM	Year 2	0	0	16	To Be Negotiated
	Tyler, TX	Year 2	8	1	0	
	Van Buren, AR	Year 2	7	0	0	
	Victoria, TX	Year 2	12	0	0	
	Waco, TX	Year 2	2	0	0	
	Warm Springs, CA	Year 1	2	0	0	
	Winfield, KS	Year 2	3	0	0	
	Yermo, CA	Year 2	20	0	0	
	Yuma, AZ	Year 3	0	0	48	Tucson, AZ
	Total Trainmen		1,081	683	328	
Yardmasters	Avondale, LA	Year 2	8	0	0	
	Beaumont, TX	Year 2	3	0	0	
	Eugene, OR	Year 1	6	0	0	
		Year 3	5	0	0	
	Grand Jct., CO	Year 3	6	0	0	
	Houston, TX	Year 2	13	0	0	
	Kansas City, KS	Year 3	5	0	0	
	Lafayette, LA	Year 2	2	0	0	
	Los Angeles, CA	Year 1	2	0	0	
	Oakland, CA	Year 1	3	0	0	
		Year 2	2	0	0	
	Portland, OR	Year 2	6	0	0	
	Proviso, IL	Year 2	3	0	0	
	Sacramento, CA	Year 2	1	0	0	
	San Antonio, TX	Year 2	5	0	0	
	Shreveport, LA	Year 2	5	0	0	
	St. Louis, MO	Year 2	5	0	0	
	Stockton, CA	Year 3	5	0	0	
	Total Yardmasters		85	0	0	

Service Date: April 12, 1996
Comment Due Date: May 3, 1996

ENVIRONMENTAL ASSESSMENT

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY

-CONTROL AND MERGER-

SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
SPCSL CORPORATION, AND
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

VOLUME 2 OF 5
RAIL LINE SEGMENTS, RAIL YARDS AND INTERMODAL FACILITIES



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CHAPTER 2.0
RAIL LINE SEGMENT, RAIL YARD, AND INTERMODAL FACILITY IMPACTS ARIZONA

This chapter provides an analysis of the potential environmental impacts resulting from increased traffic on rail segments and increased activity at rail yards and intermodal facilities in Arizona as part of the proposed merger. In analyzing these impacts, the Surface Transportation Board's (Board) Section of Environmental Analysis (SEA), consistent with its environmental rules at 49 CFR Part 1105.7(e), specifically considered: (1) impacts to air quality, (2) impacts to noise, (3) impacts to local, regional and national transportation systems, and (4) impacts to safety.

The following rail line segments, rail yards, and intermodal facilities would meet or exceed the Board's environmental analysis thresholds:

- Yuma to Picacho (SP).
- Picacho to Tucson (SP).
- Tucson to Cochise (SP).
- Cochise to Lordsburg, New Mexico (SP).
- Yuma rail yard (SP).
- Phoenix rail yard (SP).
- Nogales rail yard (SP).
- Phoenix intermodal facility (SP).

Each rail line segment, rail yard, or intermodal facility is discussed in this chapter by impact category, as follows:

- Air quality (Section 2.1).
- Air quality at grade crossings (Section 2.2).
- Noise (Section 2.3).
- Transportation systems (Section 2.4).
- Safety (Section 2.5).

If a rail line segment, rail yard, or intermodal facility would not experience impacts in any one of these categories as a result of proposed merger, no analysis was necessary. Accordingly, no discussion is provided.

Chapter 1 of this volume describes the thresholds established for analysis of potential air quality and noise impacts and the methods used to evaluate these and other potential impacts.

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Tucson AZ	Cochise AZ	78	15.1	51%	27%
Cochise AZ	Lordsburg NM	85	14.6	48%	24%
Tucson AZ	Nogales AZ	63	0.3	25%	25%

Two of the three rail segments listed above (Tucson to Cochise and Cochise to Lordsburg, New Mexico) were assessed for air quality impacts because they would exceed the Board's analysis thresholds. The estimated increased emissions from these two segments are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Tucson - Cochise	501	11.2	34.9	261.2	18.9	5.7
Cochise - Lordsburg NM	501	5.4	16.7	125.3	9.1	2.7
Total		**16.6**	**51.6**	**386.5**	**28.0**	**8.4**

Key:

HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Emissions from Increased Rail Yard Activity

The proposed merger would lead to an increase in rail yard activity of 22.6 percent in the Nogales Yard. This activity includes fueling, switching, and assembling of trains. The estimated increased emissions from this rail yard are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Yard	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Nogales	501	0.0	0.1	1.0	0.1	0.0

Key:

HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen oxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

The Pima AQCR (502) includes Pima County, portions of which are designated as nonattainment for sulfur dioxide (SO_2), total suspended particulates (TSP), particulate matter (PM-10), and carbon monoxide (CO). In considering potential environmental impacts, SEA assessed the potential air quality impacts of increased activity along the two rail segments. SEA concludes that increased rail operations would contribute to increased levels of ozone as well as other pollutants in the Pima nonattainment area.

Emissions from Increased Rail Segment Activity

The proposed merger would lead to changed activity on three rail segments that pass through or are connected to the Pima AQCR (502). The total length (in miles), the change in the number of trains per day on the segment, and the percent change in annual gross ton miles for each of these segments would be as follows:

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Tucson AZ	Cochise AZ	78	15.1	51%	27%
Picacho AZ	Tucson AZ	50	15.7	61%	39%
Tucson AZ	Nogales AZ	63	0.3	25%	25%

Two of the three rail segments listed above (Picacho to Tucson and Tucson to Cochise) were assessed for air quality impacts because they would exceed the Board's analysis thresholds. The estimated increased emissions from these two segments are shown below. The impacts of these emissions are discussed below in the section on Analysis of Activity.

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Tucson - Cochise	502	11.2	34.9	261.2	18.9	5.7
Picacho - Tucson	502	11.3	35.0	262.2	19.0	5.7
Total		**22.5**	**69.9**	**523.4**	**37.9**	**11.4**

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Analysis of Activity

The increased rail segment activity in this AQCR would result in increased levels of all

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Yuma - Picacho	503	20.5	63.8	477.2	34.6	10.3
W. Colton CA - Yuma	503	0.1	0.5	3.4	0.2	0.1
Total		**20.6**	**64.3**	**480.6**	**34.8**	**10.4**

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Emissions from Increased Rail Yard Activity

The proposed merger would lead to an increase in rail yard activity of 58.6 percent in the Yuma Yard. This activity would include fueling, switching, and assembling of trains. The estimated increased emissions from this rail yard are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Yard	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Yuma	503	0.0	0.1	0.7	0.0	0.0

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Analysis of Combined Activity

This section discusses the impact to the Mohave-Yuma AQCR based on the combined estimated emissions from the rail segments and the rail yard related to the proposed merger. The total estimated increases in pollutant emissions are listed below:

Emissions from Increased Rail Segment Activity

The proposed merger would lead to changed activity on two rail segments that pass through or are connected to the Maricopa AQCR (504). The total length (in miles), the change in the number of trains per day on the segment, and the percent change in annual gross ton miles for each of these segments would be as follows:

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Yuma AZ	Picacho AZ	203	13.4	52%	23%
Picacho AZ	Phoenix AZ	71	-0.9	-31%	-31%

One of the two rail segments listed above (Yuma to Picacho) was assessed for air quality impacts because it would exceed the Board's analysis thresholds. The estimated increased emissions from this segment are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Yuma - Picacho	504	17.1	53.1	397.7	28.8	8.6

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Emissions from Increased Rail Yard Activity

The proposed merger would lead to an increase in rail yard activity of 25.3 percent in the Phoenix rail yard. This activity would include fueling, switching, and assembling of trains. The estimated increased emissions from this rail yard are shown below. The impacts from these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Yard	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Phoenix	504	0.2	0.5	3.5	0.3	0.1

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

definition of significance (as defined in Prevention of Significant Deterioration at 40 CFR 51.166) for all pollutants. The increased rail segment activity in this AQCR would result in increased levels of all pollutants, with the greatest increase in NO_2. These estimates of increased emissions are conservative, however, because they do not account for offsetting decreases that could result from truck-to-rail diversions. Overall, SEA concludes that while the proposed action is not subject to National Ambient Air Quality Standards General Conformity regulations, the proposed merger would result in increased levels of all pollutants in the Maricopa AQCR, primarily from mobile rail segment emissions.

2.1.5 Central Arizona (AQCR 505)

Rail operations in the Central Arizona AQCR associated with the proposed merger that require analysis, as specified by the Board's environmental rules at 49 CFR 1105.7(e)(5), consist of portions of two rail segments (Yuma to Picacho and Picacho to Tucson). There are no intermodal facilities or rail yards in this AQCR that exceed the Board's analysis thresholds. Based on increased activity levels as a result of the proposed merger, SEA examined the Central Arizona AQCR for potential air quality impacts. SEA concludes that adverse impacts to air quality could result from increased rail segment activity in this AQCR.

The Central Arizona AQCR (505) includes the counties of Gila and Pinal, portions of which are designated as nonattainment for total suspended particulates (TSP) and particulate matter (PM-10). In considering potential environmental impacts, SEA assessed the potential air quality impacts of increased activity along two rail segment and the rail yard. SEA concludes that increased rail operations would contribute to increased levels of ozone in the Central Arizona nonattainment area.

Emissions from Increased Rail Segment Activity

The proposed merger would lead to changed activity on three rail segments that pass through or are connected to Central Arizona AQCR (505). The total length (in miles), the change in the number of trains per day on the segment, and the percent change in annual gross ton miles for each of these segments would be as follows:

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Picacho AZ	Phoenix AZ	71	-0.9	-31%	31%
Yuma AZ	Picacho AZ	203	13.4	52%	23%
Picacho AZ	Tucson AZ	50	15.7	61%	39%

Two of the three rail segments above (Yuma to Picacho and Picacho to Tucson) were

2.3 Noise Analysis

SEA performed noise analyses to identify noise-sensitive land uses where the proposed changes in operations could result in increases in noise exposure that meet or exceed the Board's environmental analysis thresholds at 49 CFR 1105.7(e)(6). The following discussion provides an estimate of the number of noise-sensitive receptors (e.g., residences, schools, churches) where the Board's thresholds would be exceeded, potentially causing an adverse increase in noise exposure. The noise level impact assessment was based on the baseline and projected activity level data provided by UP/SP.

2.3.1 Increased Rail Segment Activity

West Colton, California to Yuma

This rail segment, which currently has 27.7 trains/day, would experience an increase of 11.1 trains/day (a 24.1 percent change in gross ton-miles per year) as a result of the proposed merger. The projected increase in train volume and gross ton-miles on this segment would cause less than a 2 dBA increase in the L_{dn}. No adverse noise impacts are expected.

Yuma to Picacho

This rail segment, which currently has 25.8 trains/day, would experience an increase of 13.4 trains/day (a 23 percent change in gross ton-miles per year) as a result of the proposed merger. The projected increase in train volume and gross ton-miles on this segment would cause less than a 2 dBA increase in the L_{dn}. No adverse noise impacts are expected.

Picacho to Tucson

This rail segment currently has 25.7 trains/day and would experience an increase of 15.7 trains/day (a change of 38.6 percent in gross ton-miles per year) as a result of the proposed merger. This change in through train activity would result in an increase in the L_{dn} of 2.1 dBA. Most of these noise impacts would occur at or near grade crossings where train horns are sounded as a warning. Currently, the noise impact zone at grade crossings extends approximately 750 feet perpendicular to the tracks, whereas after the proposed merger the noise impact zone would increase to 1,000 feet. The only large population center that could be affected by noise from this line segment is the City of Tucson.

The line segment cuts through the northwestern portion of Tucson, commencing at the yard along Aviation Parkway between 22nd and 36th Streets. Although much of the alignment is bordered by industrial and commercial land uses, there are some dense residential areas with

there would be no noise impacts within the 65 dBA L_{dn} contour.

2.4 Transportation Systems

The Board's environmental rules at 49 CFR 1105.7(e)(2) require a description of the effects of the proposed merger on local and regional transportation systems. The primary transportation impacts of the proposed merger are related to: (1) additional truck traffic generated at those intermodal facilities where intermodal activity is projected to increase, and (2) increases in roadway delays at grade crossings as a result of increased train traffic on rail segments.

The impacts near intermodal facilities would result from increased truck traffic using local roadways to enter and exit the intermodal facility. For those facilities with an expected increase of 50 trucks or more per day, SEA analyzed the impacts of this increased traffic on the local roadway system in terms of increases in daily and peak hour traffic. SEA collected traffic count data from local and state transportation officials for this analysis. While the offsetting benefits of the proposed merger were not quantified at the local level, the traffic impacts from added truck traffic at intermodal facilities would be partially offset in many localities by truck-to-rail diversions and consolidation of operations. SEA concludes that the impacts from the single intermodal facility in Arizona would not cause adverse impacts on the local transportation system.

SEA addressed the concerns of local communities about increased traffic delays at grade crossings through an evaluation of vehicle delay and wait times at grade crossing locations. It is important to note that the acceptability of delays at grade crossings varies substantially based on local conditions such as the location of land uses by type, availability of alternative travel routes, the degree of use by emergency vehicles, and other local variables. While the time of delay at grade crossings would increase proportionately with the increase in train traffic, most of the grade crossings in Arizona carry fewer than 5,000 vehicles per day. SEA concludes that increases in vehicle delay and/or wait time due to merger-related operational changes would not be excessive.

2.4.1 Intermodal Facilities

Phoenix

The SP Phoenix facility is located on West Harrison Street. Truck transportation to the facility is via U.S. Route 60, Interstate 17 and 7th Avenue or 15th Avenue. This intermodal facility currently serves approximately 68 trucks per day. After the proposed merger, this facility would experience an average increase of 50 trucks per day based on UP/SP projections. SEA obtained Average Daily Traffic (ADT) counts for the vicinity of the intermodal facility from the City of Phoenix. A count performed in 1994 showed an ADT of 25,396 along 7th Avenue, north of Lincoln Avenue. The projected increase of 50 trucks per day at this facility represents a 0.4 percent increase in ADT on

Tucson to Cochise

On the Tucson to Cochise line, average rail traffic is proposed to increase from 29.6 to 44.7 trains per day, a train volume increase of about 51 percent. There are 14 grade crossings on this segment, 2 of which have ADT counts greater than 5,000 vehicles per day. At typical speed grade crossings along the route (e.g., train speed of 55 mph), delay to vehicle traffic would increase from 50 minutes (pre-merger) to 76 minutes (post-merger) over a 24-hour period. At the highest speed grade crossings (e.g., train speed of 70 mph), delay to vehicle traffic would increase from 44 minutes (pre-merger) to 66 minutes (post-merger) over a 24-hour period. At the lowest speed grade crossings (e.g., train speed of 40 mph), delay to vehicle traffic would increase from 62 minutes (pre-merger) to 93 minutes (post-merger) over a 24-hour period. The maximum queue length per train due to peak hour vehicle traffic would range from one to nine vehicles, and the corresponding delay per vehicle would vary from 1.04 to 1.35 minutes.

Cochise to Lordsburg, New Mexico

On the 85-mile Cochise to Lordsburg, New Mexico line, average rail traffic is proposed to increase from 30.3 to 44.9 trains per day, a train volume increase of about 48 percent. There are nine grade crossings in Arizona, none of which have ADT counts greater than 5,000 vehicles per day. At typical and high speed grade crossings along the route (e.g., train speed of 70 mph), delay to vehicle traffic would increase from 45 minutes (pre-merger) to 67 minutes (post-merger) over a 24-hour period. At the lowest speed grade crossings (e.g., train speed of 60 mph), delay to vehicle traffic would increase from 49 minutes (pre-merger) to 73 minutes (post-merger) over 24-hour period. The maximum queue length per train due to peak hour vehicle traffic would range from one to three vehicles, and the corresponding delay per vehicle would vary from 1.04 to 1.11 minutes.

2.5 Safety

SEA assessed a number of safety issues associated with the proposed merger, including the probability of increased accidents at grade crossings, and the risks associated with increased shipments of hazardous commodities.

2.5.1 Grade Crossing Safety

Accidents at grade crossings are a function of the number of trains, train speed, number of train tracks, grade crossing condition and warning facilities, roadway condition and number of lanes, and amount of roadway traffic. Since the proposed merger would not result in any new grade crossings and would affect only the number of trains passing through existing grade crossings, the probability of an increase in the number of accidents at grade crossings would

activities in Arizona are summarized below:

- Natural Resources Conservation Service does not have any comments on this proposal.

- Arizona Department of Environmental Quality does not have any comments on this proposal.

2.7 Suggested Mitigation

No specific mitigation measures were suggested for the proposed changes to rail line segment, rail yard, or intermodal facility operations in Arizona by the various parties consulted in the process of preparing the EA for the proposed merger. (See **Volume 5**, Appendices D and E, for agency consultation lists.)

2.8 SEA Recommended Mitigation

This section contains the mitigation measures that SEA recommends that the Board impose in any final decision approving the changes to rail line segment, rail yard, or intermodal facility operations in Arizona. SEA will consider all comments on the EA in making its final recommendation to the Board. The Board will consider SEA's recommendations and the environmental record in making its final decision. SEA's recommended mitigation is as follows.

Air Quality

1. UP/SP shall consult with appropriate Federal, state, and local agencies responsible for regulating air quality in AQCRs 501, 502, 503, 504, and 505 concerning any possible mitigation measures to reduce any potential adverse emissions from the rail segments, rail yards, and intermodal facilities in these regions. UP/SP shall advise SEA of the results of these consultations.

Noise

1. To reduce potential noise level impacts to sensitive receptors along the Yuma to Picacho, Picacho to Tucson, Tucson to Cochise, and Cochise to Lordsburg, New Mexico rail line segments, UP/SP shall consult with appropriate state and local agencies to develop noise abatement plans. The Applicant shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

Ex. E-21

UP/SP-303

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

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

APPLICANTS' REPORT ON MERGER AND CONDITION IMPLEMENTATION

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July 1, 1997

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of Way Employees and the Brotherhood of Railroad Signalmen, although a tentative agreement has been reached with BMWE to consolidate UP and SP work in California.

b. Non-Agreement Employees

Implementing agreements with unionized employees are not the only prerequisite for integrated operations. There also must be an orderly integration of the non-agreement employees who manage and administer the railroad.

As the merger date approached, human resources experts from the two railroads worked through such issues as employee selection, severance packages, adjustments to compensation, employee benefits, training for new positions and communications with employees. Under the resulting plans, all UP and SP non-agreement employees were assured that they would be offered a "good job or a good severance" -- and that is what happened.

Interested SP and UP applicants were considered and interviewed for non-agreement jobs with the new system, and the best employee was selected for each merged-company position. On a company-wide basis, over 580 non-agreement employees qualified for severance packages. A number of UP and SP departments, including Marketing, Finance, Labor Relations, Law, Risk Management and Contract Services, are fully integrated. Most of the remaining departments should be fully integrated by the end of July.

The non-agreement integration process is proceeding smoothly, and UP and SP managers are cooperating effectively. UP/SP's management capabilities will continue to improve as employees learn their new jobs and continue to work with each other. As employees relocate, primarily to Omaha and St. Louis, redundant facilities have been or are being closed, with SP's headquarters offices in Denver and San Francisco expected to be vacated by year-end.

3. Merger-Related Capital Investments

In their merger application, UP and SP proposed to invest over $1.3 billion in capital over four years, beyond the amounts the two railroads would have spent separately, to implement their merger and achieve its benefits. UP/SP is now on course to spend even more than that to combine the two railroads. Total merger-related capital investment is likely to exceed $1.5 billion over a five-year period. Such investments were entirely beyond SP's means.

This massive infusion of capital has begun in earnest. This year, UP/SP is spending over half a billion dollars on merger-related capital projects. UP/SP is coordinating its capital investments with the phased implementation of the merger by targeting spending on those projects that are necessary to build the foundation for future service improvements and efficiencies. For example, UP/SP is investing $108.8 million -- $57.8 million more than UP would

Portland. Volumes have already increased to the point that UP/SP is considering adding an additional train. Significant numbers of loads are being handled in international steamship containers that would have moved empty before the merger. Clearance work to be completed next year will allow the service to be expanded to include high-cube doublestacks.

d. Sunset Route Intermodal Service

An important merger objective was to deploy UP's service planning capability and operating systems to cure SP's chronic service problems. UP/SP planners have entirely redesigned SP's intermodal services on the Sunset Route connecting Memphis, New Orleans, Houston, and San Antonio with El Paso, Tucson, Phoenix, and Southern California. This "re-plan" went into effect on May 13. SP intermodal trains on this route were unreliable and inefficient because they did extensive switching and block exchanging en route, often stopping seven or eight times between origin and destination. As well as impairing service, this increased SP's costs and caused severe terminal congestion.

UP/SP simplified the operation of intermodal trains in this corridor by emphasizing ramp-to-ramp services and limiting the amount of work that trains perform en route.[6/]

[6/] Under normal conditions, no train adds or sets out cars more than three times between origin and destination, eliminating 118 weekly setouts and pickups. Terminal congestion is reduced, because the new service plan eliminates (continued...)

To improve service further, UP/SP and NS are shifting one set of trains from the New Orleans gateway to the Memphis gateway. The new Sunset Route schedules will reduce crew costs, while also improving reliability.

e. Midwest-California Intermodal Service

UP/SP will shortly institute a similar restructuring of SP intermodal services connecting Chicago, St. Louis and Kansas City with California in order to provide more reliable and customer-responsive service.[7] SP intermodal service in this corridor has been unreliable because SP operated separate westbound trains from each of three intermodal ramps in Chicago and from St. Louis, each with traffic to multiple destination ramps in California. Those trains swapped blocks or were switched at many locations en route.

The merged system will restructure SP's intermodal service so that trains from the three Chicago ramps (IMX,

---

[6] (...continued)
26 setouts and pickups at City of Industry, 36 at Tucson, 36 at Pine Bluff, 9 at El Paso, and 11 at San Antonio.

[7] UP/SP had intended to implement this restructuring, and to launch several of the other new services described in this report, during June, but was prevented from doing so by the interim stay granted to the UTU. In its decision vacating the UTU stay, the Board expressed doubt that the stay could have had the severe impacts described by UP/SP in a June 19 petition, which the Board correctly noted should have been filed earlier. Finance Docket No. 32760 (Sub-No. 22), Decision served June 26, 1997, p. 2 n.2. UP/SP assures the Board that it did experience the service delays and financial costs described in that filing, and apologizes for its delay in bringing those facts to the Board's attention. UP/SP appreciates the Board's prompt action on the UTU appeal.

§ 152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 164. Construction of provisions

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

§ 151. Definitions; short title

When used in this chapter and for the purposes of this chapter—

First. The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of title 49, as of December 31, 1995,[1] and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad; and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

[1] So in original.

45 UNITED STATES CODE

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

49 UNITED STATES CODE

49 § 11326

§ 11326. Employee protective arrangements in transactions involving rail carriers

(a) Except as otherwise provided in this section, when approval is sought for a transaction under sections 11324 and 11325 of this title, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) of this title. Notwithstanding this part, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Board (or if an employee was employed for a lesser period of time by the rail carrier before the action became effective, for that lesser period).

(b) When approval is sought under sections 11324 and 11325 for a transaction involving one Class II and one or more Class III rail carriers, there shall be an arrangement as required under subsection (a) of this section, except that such arrangement shall be limited to one year of severance pay, which shall not exceed the amount of earnings from the railroad employment of that employee during the 12-month period immediately preceding the date on which the application for approval of such transaction is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of that employee with the acquiring carrier during the 12-month period immediately following the effective date of the transaction. The parties may agree to terms other than as provided in this subsection.

(c) When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers, this section shall not apply.

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ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

THOMAS M. CURLEY, CHARLES O. ERNST, KENNETH GROH,
MARTIN MOLLAND, TERRY MARTIN, WARREN RICHTER,
ROBERT SANFORD, and BILL TRAUTMAN, Claimants

VS.

MISSOURI PACIFIC RAILROAD COMPANY, Carrier

Pursuant to Article IV of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000.

ARBITRATOR: DAVID H. BROWN, selected by the Parties

APPEARANCES: For the Carriers:

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For the Claimants oe

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THE ISSUES

ISSUE No. 1 Did Claimants have their right to arbitration?

ISSUE NO. 2 Are Claimants "employees" within the meaning of New

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Furthermore, relative to the use or abuse of judicial discovery procedures, we are of the opinion that an arbitrator under New York Dock has inherent power to authorize discovery in aid of arbitration. Certainly there is nothing in the record which would justify the denial of Claimants' right to arbitration under Section 11,

DECISION

We hold that the dispute before us is arbitrable.

ISSUE NO* 2 (Remstated)

ARE THE CLAIMANTS "EMPLOYEES" WITHIN THE MEANING OF NEW YORK DOCK CONDITIONS?

THE EVIDENCE

Martin Leonard Holland, at the time his employment with MoPac was terminated on June 17, 1983, held the position of Director of Marketing, Lumber, Forest Products and Paper, drawing a salary of

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$57,600.00 per year.

At the time of the severance of his employment relationship with the carrier, Mr. Holland was-five levels on the organizational chart below MoPac President R. G. Flannery, Mr. Holland reported to General Manager Marketing@4ommodities B. J. Maeser. who reported to Assistant Vice President Marketing J. R. Colvin, who reported to Vice Presidentm@Harketing J. M. Ostrow, who reported to Senior Vice President@@Marketinq G. A. Craig, who reported to President Flannery.

Mr. Holland had commenced his employment with MoPac in 1962, beginning as a mail clerk and working in a total of 27 different jobs during his railroad-career. In his position as a director of



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marketing, Mr. Holland had three people who reported to him directly and ten reporting to him indirectly, including a secretary who worked for the entire group. The principal function of the group was to Wake rate adjustments that hopefully would get us some business that

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Sep 13 04 02:00p John E. Grother 2813594702 p.4

produced a profit'.

Unlike some of his superiors, Mr. Holland received no special benefits such as bonuses, country club memberships, co4pany automobile or use of a company plane or business car. Nevertheless, Mr. Holland was said to be 'totally responsible for marketing and revenues associated with lumber, forest products, paper and consumer goods" amounting to over $184 million per annum. His written job description included the following: (1) directing the operation of the annual Lumber, Forest Products, Paper and Consumer Goods Commodity Module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on a course of action essential to the achievement of revenue and profitability of objectivities; and (3) establishing priorities and measuring the result of the productivity of subordinates,

Upon his leaving the carrier, Mr. Holland commenced working for an insurance agency owned by his family. Mr. Holland testified that in his hew oployment he received none of the fringe benefits which he received with -the railroad, and that he is making substantially less money,

However, before he left the carrier, Mr. Holland was offered a job in Omaha comparable with the one which he had in St. Louis. He refused

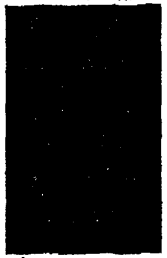


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such offer because of family considerations and was then offered a better job in Omaha, paying $80 thousand per year with the prospect of an annual bonus amounting to $20 thousand. Again he opted for personal considerations and refused the offer. Mr. Holland's expertise is, and his experience has been, in the establishment of freight rates. In his last position with the railroad he had no authority to hire or fire employees but could recommend disciplinary action.

Charles Ernst, at the time of his leaving the employment of Carrier, was Director of Marketing Coal, Ores, Aggregates and Metals, being paid a salary of $55,080 per year. Mr. Ernst began his employment with MoPac in 1958 as a messenger. Ten years later he was promoted to his first supervisory position. As of the date of the hearing herein Mr. Ernst was fiftywfive years of age.

In his position as a director of marketing with MoPac Mr. Ernst was at the same organizational level as Mr. Holland and in the same chain of command. And although his salary was slightly less than Mr. Holland's, he supervised eighteen people and was said to be responsible for nearly 600million in revenue per year.

Like Mr. Holland, his chief responsibility was working out-rates with retpect to the commodities under his jurisdiction.

Sep 13 04 02:00p John E. Grother 2813594702 P.5
09/13/04 15:49 TX/RX NO.5356 P.005

effects of numerous mergers, To contend that only subordinate officials and other employees eligible for unionization will suffer adverse effects from a merger is to ignore reality.

On three, and only three, occasions, the Congress of the United States has definitively addressed the question of what employees should be covered by protective conditions imposed for the purpose of minimizing the adverse effects resulting from reduction of jobs in the railroad industry. Actually, Congress has found it easier to simply exclude certain classes of employees while affording broad coverage for the remainder, Let us examine the legislation.

On November 4. 1979, Congress passed the Milwaukee Railroad Restructuring Act (now Title 45, Chapter 18, Sections 901 et seq). Section 908 made provision for negotiations between the Milwaukee Road and labor organizations representing the employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad (conditions quite similar to those resulting from mergers, control or consoildations). Section 907 made provision for preferential hiring for all employees separated or furloughed from the Milwaukee (other than for cause) prior to April 1. 1984, and Section 909 provided for suDolementary unemployment Insurance for all employees affected by reduction In service. (all underlining supplied) And Section 902 (4) states:

'..the term 'employee' -

09/13/04 15:49 TX/RX NO.5356 P.006

Sep 13 04 02:00p John E. Grother 2813594702 P.6



image:

'(A) includes any employee of the Milwaukee Railroad who worked on a line of such railroad the sale of which became effective on October 1. 1979; but
'(S) does not includt any individual serving as president, vice. president, secretary, treasurer, comptroller, counsel, member of the board of directorg, or any other person performing such functions;'

Pursuant to Section 908, negotiations between the Milwaukee and the labor representatives of its employees took place, The result was adoption of New York Dock Protective Conditions in an instrument identified as Appendix S. Most significantly, Milwaukee management then made the terms of Appendix B applicable to all nonmagreement employees except those excluded by Section 902 (4)(A)e

On May 309 1980, the Congress passed the Rock Island Railroad Transition and Employee Assistance Act (now Title 45, Chapter 19, Sections 1001 et seq).

Section 1001 cited a need for adequate protection provisions to insure uninterrupted continuation of services over Rock Island lines and avoid serious repercussions on the economies of the states served

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Sep 13 04 02:00p John E. Grother 2813594702 P.7

by the railroad, Section 1002 included the following among its

*Definitions":
'(,,4) 'employee' includes any employee of the Rock Island Railroad a,s of August 1. 1979, but does not Include any individual serving as president, vice@president,,secretary, treasurer, comptroller. counsel, member of the board of directors, or any other person performing such functions;Q
Section 1005 imposed on the Secretary of Transportation and *the

representatives of the various classess and crafts of employees' (not 'labor organizations as in the Milwaukee conditions) responsibility

for negotiating protective conditions, with proviso that if they were

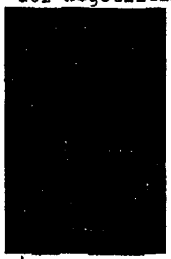


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un ab l e to re ach agreement . the S ecret ary wou l d un i l at er a l l y pr es c r i be

such conditions,

(2) On October 14, 1980, the Sta/gers Rail Act of 1980, Public Lae 96-448 was enacted. Section 219(g) states:

> Khe Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendmentsmade by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to Section 11347 of Title 49, United State Code. For purposes of this subsection the

Sep 13 04 02:01p John E. Grother 2813594702 P.8
09/13/04 15:49 TX/RX NO.5356 P.008

term 'employees' does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions."

From the foregoing it is evident that each time the Congress has made provision for protective conditions for employees adversely affected by circumstances or events other than mergers, Congress has extended eligibility to all employees below the rank of vice president. The drawing of this line of demarcation is consistent with the philosophy that the protection is due only to those employees who have had little if any control over developments which precipitated the need for protection, It will be remembered that this thinking was advanced by the U. S. Circuit Court of Appeals in Edwards ve Southern Railwayl supra.

This doctrine is also consistent-with the definition of gemployee" found in the unabridged Webster's Third New International Dictionary (G. & C. Merriam Co.), reading as follows: 'One employed b another, .y usually in a position below the executive level and usually for wagesO. (Emphasis supplied)

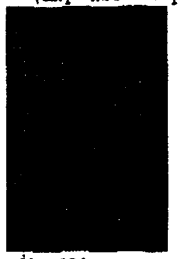


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SUYYA;Y OF RATIONALE

We summarize the reasons for our holding on this issue:

14 We believe that while all of the congressional legislation reflects an intent to cover a broad range of employees with protection against the adverse effect of mergers, none of such legislation indicates an intent to exclude from protection employees at the level of these claimants, None of the claimants had the power to affect the merger of MPwUP4P nor the influence to cushion its impact. Claimants were not really executives of MoPac, and in spite of the large sums of income for which they were nominally responsible, we would venture to say that none of their names was ever mentioned in the company's annual report to its stockholders.

2. The use of the definition Oemployee" found in the Railway Labor Act is insupportable. Such act has no relevancy insofar as the scope of employee protective conditions is concerned, The fact that the Interstate Commerce Commission Act authorizes the NMB to appoint arbitrators is likewise not relevant to the Issue before us.

3. The court cases and arbitral awards relied on by the carrier have been carefully considered. We are unable to recognize them as authoritative precedent.

4. We believe our decision is consistent with the authority delegated us ty the Interstate Commerce Commission and with the

09/13/04 15:49 TX/RX NO.5356 P.010

Commission's consistent adherence to what it perceives to be the intent of Congress.

[redacted]

image:

DECISION

We hold that each of the claimants was an employee of MoPac within themeaning of New York Dock conditions,

ISSUE NO, 3 (Remstated)

IF THE CLAIMANTS ARE EMPLOYEES WITHIN THE MEANING OF-NEW YORK DOCK ARE THEY "DISMISSED EMPLOYEES" UNOER THE TERMS OF NEW YORK DOW"

ANALYSIS AND OPINION

m"m

Since each of the claimants was offered a position in Omaha comparable to that which he occupied in St. Louis, none of the claimants is a dismissed employee under the definition set forth in New York Dock conditions,

DECISION

Sep 13 04 02:02p John E. Grother 2813594702 P.11

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APPENDIX 6

(1) GH25

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

TELEPHONE
AREA CODE 202
223-9738

September 21, 2004

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

Re: Grother/Union Pacific-NYD

Dear Ms. Ross:

This is in response to the carrier's submission, received September 14, 2004, with particular reference to the statement, at p. 41, that Mr. Ken Packard will be present as a witness at the hearing scheduled for October 12. Thus, the carrier's case--on the critical issue of causality--has not been presented by any advance written submission of facts or statements from knowledgeable personnel; rather, it has been deferred, and is now projected to be through "live" testimony from Mr. Packard, former Service Unit Superintendent (Division Superintendent). I deem it highly unfair, prejudicial, and serves to deny a fair hearing to the employee, for the carrier's case to be presented in this manner--the employee first learning of the only known opposition statement orally at the hearing, without advance opportunity to check facts or to gather further information, and in an environment (Washington DC) far removed from Tucson AZ. I expressed a premonition the carrier might advance what it has now seeks to achieve procedurally, per my letter of May 28, 2004. (Employee Ex. E-15).

I attempted to reach W.E. Loomis yesterday, having finished my initial review of the carrier's written submission over the weekend, to first raise my concerns with him. However, I am advised he is on vacation until September 28. In accordance with his wishes expressed on his answering tape, I am sending a copy of this letter to Mr. Richard D. Meredith, by overnight express.

I consider this tactic of deleting a critical element for a written submission, with substitution by a "live" hearing submission, to be contrary to the Memorandum of Agreement (MOA) governing procedures for this arbitration. (Employee Ex. E-16; UP Ex. 19). Paragraph D provides that the partisan parties shall serve written submissions. To be sure, there is a safety valve for witnesses should such become necessary, but the written submission and witness provisions must be read together and in harmony with each other; here, the "live" and unannounced testimony is to be from the employee's asserted immediate supervisor, and such oral submission on an important matter would be contrary to the agreement for written submissions in advance of the hearing.

It is my request that the committee direct the carrier member to serve the written statement of Mr. Ken C. Packard, in its entirety, to be verified under oath, on or before October 1, 2004, or else the individual be precluded from appearing at the October 12 hearing. This is not onerous--the employee has submitted five verified statements in his written submission.

Very truly yours,

Atty. for John E. Grother

cc: W.E. Loomis
R.D. Meredith

(2)

UNION PACIFIC RAILROAD

FAX TRANSMITTAL COVER SHEET

TO: Ms. Lynette Ross

CC: Mr. Gordon MacDougall

FROM: Marilyn Ahart

PHONE: (402) 544-2614

DATE: September 27, 2004

PAGES INCLUDING COVER: 3

Ms. Ross

This is the Carrier's response to Mr. MacDougall's letter of September 21, 2004.

A copy of this letter will also be mailed to all parties today.

Marilyn Ahart

September 24, 2004

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

Dear Ms. Ross:

This refers to Mr. Gordon P. MacDougall's letter of September 21, 2004. In that letter, Mr. MacDougall asks for the following:

> *"It is my request that the committee direct the carrier member to serve the written statement of Mr. Ken C. Packard, in its entirety, to be verified under oath, on or before October 1, 2004, or else the individual be precluded from appearing at the October 12 hearing."*

Union Pacific opposes Mr. MacDougall's request for the following reason:

The Memorandum of Agreement between John E. Grother and Union Pacific Railroad Company dated June 18, 2004, provides for the following in Paragraph D:

> *"At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statement of fact, supporting evidence, data and argument."* (emphasis added)

The Memorandum of Agreement has no requirement for a written statement. The Memorandum of Agreement does not link the requirement for a written submission with the opportunity to present witnesses - the requirement and the opportunity occur at different times (pre-hearing and at the hearing). The Memorandum of Agreement clearly provides "the parties ... may present witnesses" without restriction. On this basis alone, Mr. MacDougall's request must be denied.

In addition, Union Pacific opposes Mr. MacDougall's request for the following reasons:

(1) Mr. MacDougall's preference for "verified statements" over live testimony stands centuries of Anglo-American jurisprudence on its head. Live testimony, where the fact-finder may judge a witness's credibility, is always preferable to "verified statements." This is especially true in this case where the "verified statements" are clearly self-serving or Grother-serving. Mr. Packard, Mr. Grother's immediate supervisor on the Tucson Service Unit (not, as Mr. MacDougall wrongfully says, "asserted immediate supervisor") should be allowed to testify without the requirement of a written statement.

William E. Loomis
General Director

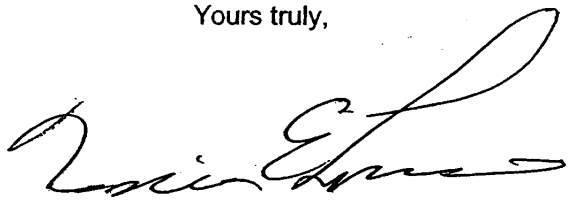
UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710

(2) Mr. MacDougall implies that witness testimony from Mr. Packard will somehow surprise Mr. Grother. Nothing could be farther from the truth. Union Pacific advised Mr. Grother in its submission that Mr. Packard would be a witness at the hearing. In fact, Union Pacific specifically advised Mr. Grother in its submission that Mr. Packard was "a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997." Mr. MacDougall cannot claim surprise.

(3) Finally, Mr. MacDougall furnishes no support for his request other than his opinion. In the first paragraph of his letter, he says, "I deem it highly unfair..." In the third paragraph, he says, "I consider this tactic..." "I deem" and I consider" cannot serve as justification for Mr. MacDougall's request.

Based on all the foregoing, there can be no doubt Mr. MacDougall's request is without merit and must be denied. The Surface Transportation Board saw no merit in his repeated protestations and neither should this Committee. Paragraph D clearly gives Union Pacific the right to present witnesses at the hearing without any preconditions such as written statements.

Yours truly,



W. E. Loomis
General Director
Labor Relations

CC: John E. Grother
Gordon P. MacDougall

(3)

Sent via fax to Messrs. MacDougall and Loomis
Sent via U. S. Priority Mail to Messrs. Grother, MacDougal and Loomis

Lynette A. Ross
Arbitrator

1220 Fairway Drive
Lawrenceburg, KY 40342-9706

(502) 859-9003
(502) 859-9004 (fax)
E-mail: lynetteross@hotmail.com

September 28, 2004

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

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

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St., Stop 0710
Room 332
Omaha, NE 68179-0710

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

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm the telephone conference conducted on this date, among the Committee members in this case, with Mr. MacDougall representing Member Grother. The purpose of the conference was to discuss Mr. Grother's procedural request of September 21, 2004, communicated to the Carrier and Neutral Members through his Representative.

Specifically, the Grother Member submits that Pargaraph D of the June 18, 2004 Memorandum of Agreement, governing the upcoming arbitration hearing, requires the Carrier Member to tender a "verified statement under oath" to the Grother Member prior to the hearing, and as a pre-condition of any live testimony by its witness, Mr. Ken Packard. The Grother member requests receipt of Mr. Packard's statement on or before October 1, 2004, and essentially asks the Neutral Member to direct the Carrier Member to furnish the statement or else Mr. Packard shall be precluded from appearing at the October 12, 2004 hearing. By letter dated September 24, 2004, the Carrier Member submitted his response, disagreeing with the September 21, 2004 request.

During our telephone conference, Mr. MacDougall, as Representative of Mr. Grother, and Carrier Member Loomis amplified the positions set forth in their above-referenced letters. Mr. Loomis related that, as an individual directly familiar with Mr.

Grother's circumstances at the time of the event which gave rise to his claim, Mr. Packard is expected to provide his views on the causality issue and convey his understanding of Mr. Grother's duties as SMTO in Tuscon. Mr. Grother will have an opportunity to respond to Mr. Packard's statements at the hearing.

After giving careful consideration to the parties' positions in light of Paragraph D, referenced above, the Neutral Member finds that Paragraph D allows the Carrier Member to present Mr. Packard as a Carrier witness without the pre-condition of submitting a "verified statement". Therefore, the Grother Member's procedural request is denied.

Mr. Grother is reminded that, as a Member of the Committee, notwithstanding the fact that to this point he has provided two witness "verified statements", under Paragraph D he retains an equal right to present witnesses without tendering any written statements, in advance, to the other Committee Members. Furthermore, as Paragraph D clearly sets forth, at the conclusion of the hearing, both parties may present post-hearing briefs within 20 days of the close of the hearing.

Very truly yours,

Lynette A Ross

Lynette A. Ross

(4)

September 28 2004

VIA FAX AND U.S. MAIL

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

Dear Mr. MacDougall:

RE: John E. Grother New York Dock arbitration

On page 3 of Mr. Grother's submission, dated September 14, 2004 (corrected copy 9/17/04), the last sentence in footnote 1 states:

> "However, slip opinions will be furnished to committee members upon request."

This letter is a request that such slip opinions be furnished to me in sufficient time for review prior to the hearing date.

Thank you.

Sincerely,

W. E. Loomis

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

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

William E. Loomis
General Director

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710
ph. (402) 544-5446 fx. (402) 233-2499
beloomis@up.com

(5)

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WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

September 29, 2004

W.E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St.-Stop 0710
Omaha NE 68179

VIA FAX/US MAIL

Re: Union Pacific/Grother

Dear Mr. Loomis:

Your facsimile of yesterday came to my attention today. You seek copies of published opinions, referring to Grother's submission, at p. 3, n.1, "However, slip opinions will be furnished to committee members upon request."

At this time, such would be quite an undertaking, coming some two weeks after the partisan parties exchanged their submissions, and less than two weeks before hearing. Grother's intent was to supply these published opinions, which are available on the bookshelves of many public libraries, in the event members of the committee so desire. Please note the use of the plural "members."

Grother's offer was premised upon the geographical location of the neutral member. Grother will undertake the task of providing two sets if one is requested by the neutral member. The other would be forwarded to yourself as desired.

However, the Union Pacific law department, at Omaha, is believed to have more than a complete set of the very opinions cited in the Employee's submission. I spoke today with one of the several attorneys I deal with in that department. I am advised their library resources are available to you; indeed, I rather suspect the law department would prefer you secure your legal materials from UP in Omaha, rather than from Grother's attorney. Accordingly, Grother is unwilling to go to the expense of reproducing these materials merely at the request of one (UP) committee member.

I am sorry, but I must decline your request at this time.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: L.A. Ross
J.E. Grother

(6)

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

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AREA CODE 202
223-9738

October 6, 2004

Lynette A. Ross (502) 859-9004
William E. Loomis (402) 501-0120

VIA FAX & US MAIL

Re: Union Pacific/Grother

I have arranged to have our Tuesday, October 12 hearing to be covered by a reporter.

This is at the expense of Employee, inasmuch as I am advised the carrier does not wish to participate in this expense.

The reporting service is: Beta at 910-17th Street, NW. Tel: (202) 638-2400.

I am advised the transcript is usually available within 10 days.

The reporter is authorized to administer oaths, should such be desired. My suggestion is that each of the partisan parties bring a set of their submissions for use of the reporter.

I am available for any of your thoughts concerning this matter by telephone anytime tomorrow.

Very truly yours,

Gordon P. MacDougall

GH-26

CROSS REFERENCE TO J. E. GROTHER AND U.P. SUBMISSION EXHIBITS

DATE	DESCRIPTION	JEG	UP
	New York Dock employee protective conditions	E-1	1
5-12-03	John E. Grother (separate binder Exhibit 2)	E-2	2
6-16-03	JEG to National Mediation Board	E-3	3
7- 7-03	NMB Roland Watkins' letter to JEG		4
7-18-03	UP Marilyn Ahart's letter to JEG	E-4	5
7-18-03	UP Marilyn Ahart's letter to Roland Watkins	E-4	6
7-21-03	NMB Roland Watkins letter to JEG		7
7-29-03	JEG letter to UP Marilyn Ahart		8
8-11-03	NMB Roland Watkins letter to JEG		9
8-11-03	JEG letter to NMB Roland Watkins		10
8-15-03	UP Marilyn Ahart's letter to JEG		11
Sept-Oct. 2003	Written correspondence between the parties and the NMB concerning the selection of a neutral member for this arbitration committee		12
	Pocket List of Railroad Officials, Summer 2004	E-5	
1-21-04	NMB Roland Watkins' designation of Lynette A Ross	E-6	13
2-20-04	JEG Petition to Establish Procedures STB FD No. 32760 (Sub-No. 42)	E-7	14
3- 5-04	JEG Supplement to E-7	E-8	
3- 4-04	UP Opposition to JEG Ex. E-7	E-9	15
3-12-04	GPM letter to STB re Ex. E-9	E-10	16
4-19-04	STD Decision re JEG Ex. E-7	E-11	17
4-23-04	GPM letter to STB re Ex. E-11	E-12	18
6-10-04	STD Notice re JEG Ex. E-7	E-13	
5- 3-04	UP to Lynette A. Ross	E-14	
5-28-04	JEG to Lynette A. Ross	E-15	

6-18-04	UP/JEG Memorandum of Agreement	E-16	19
	Section 300 of the Transportation Act of 1920		20
2- 5-24	ICC Regulations, Ex Parte No. 72		21
	Section 1 of the Railway Labor Act, 45 USC Ch. 8, §151	E-23	22
May, 1936	Washington Job Protection Agreement		23
1985	NYD Arb. Award Dana R. Bond and Michael J. Topolosky v. Union Pacific Railroad Co. (Stallworth)		24
1986	NYD Arb. Award James M. Benham v. Delaware & Hudson Railway Company (O'Brien)		25
1987	NYD Arb. Award B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v. Union Pacific Railroad Company (Seidenberg)		26
1987	NYD Arb. Award John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Co. (O'Brien)		27
1998	NYD Arb. Award Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Co. (Stallworth)		28
1996	NYD Arb. Award James V. Nekich v. Burlington Northern Santa Fe Railroad (Ver Ploeg)		29
1998	NYD Arb. Award Ross F. Povirk and the Transportation and Communication International Union v. Union Pacific Railroad Co. (Stallworth)		30
1998	NYD Arb. Award G. L. Dixon and the Transportation and Communication International Union v. Union Pacific Railroad Co. (Stallworth)		31
1998	NYD Arb. Award B. W. Isabell and the Transportation and Communication International Union v. Union Pacific Railroad Co. (Stallworth)		32
10-20-97	Agreement between UP and United Transportation Union "Modification" Agreement		33
6-23-99	Agreement between UP and UTU - Merger Implementing Agreement		34

1993	NYD Arb. Award UTU (S. G. Nelson) v. Union Pacific Railroad Co. (LaRocco)	35
1993	NYD Arb. Award R. L. Shankel, R. E. Porter and L. Chapman v. Union Pacific Railroad Co. (LaRocco)	36
1990	NYD Arb. Award International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (D. L. Haver, G. L. Galbreath) v. Southern Railway Co. (Muessig)	37
1990	NYD Arb. Award Transportation-Communications International Union (R. Tefft) v. Union Pacific Railroad Co. (LaRocco)	38
1987	NYD Arb. Award Ronald F. Sysak (Attorney representing 28 individual machinists) v. Union Pacific Railroad Co. (LaRocco)	39
6-27-97	UP payroll authority form relating to JEG demotion	40
1986	NYD Arb. Award Brotherhood of Maintenance of Way Employes (C. E. Hardesty) v. The Atchison, Topeka and Santa Fe Railway Co. (LaRocco) and NYD Arb. Award United Transportation Union (T. B. Barnes, et. al) v. Norfolk & Western Railway Co. (Peterson)	41
	"Correspondence written to Mr. Grother by Union Pacific Railroad Ombudsman Butch Ethington"	42
1997	"1997 payroll information for Mr. Grother"	43
6-23-04	UP Wm. E. Loomis' letter to Gordon P. MacDougall	E-17
	Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F3d 131 (D.C. Cir. 2004)	E-18
11-30-95	ICC FD 32760, Railroad Merger Application, Vol. 3, Operating Plan	E-19
4-12-96	ICC FC 32760 Environmental Assessment,No. 2	E-20
7- 1-97	STB FD 32760 (Sub-No. 21) UP/SP Merger--Oversight, Applicants' Report on Merger and Condition Implementation	E-21
	29 U.S.C. §§152, 157, 164(a)	E-22
	45 U.S.C. §151, 181; 49 U.S.C. 11326	E-23
1987	Arbitrator's Decision and Award, Thomas M. Curley, et al. v. Missouri Pacific Railroad Company (David H. Brown)	E-24

REFERENCES TO EXHIBITS IN UP'S SUBMISSION

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14	6 (mistakenly referred to as Exhibit 13)
15	6 (mistakenly referred to as Exhibit 14)
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E-23	16, 18, 24, 26
E-24	22

industrial switching, ie: industrial lead / spur switching, pulling and spotting, but everything else would be done in Tucson for Phoenix.

This verified statement is to present facts in support of John E. Grother being a subordinate official (non-agreement employee) at Tucson ending 7/1/97, with displacement to Houston with a wage cut and the causality of said displacement, being directly related to the UP-SP Merger in 1996.

As the union representative of the Trainmen and Conductors working into and out of Tucson, I participated in the Tucson Safety and Labor Management Steering Committee and later the Tucson SHEOP Committee under UP. Discussion at these meeting during the time period of January through June 1997, discussing all aspects of the Tucson, Yuma and Phoenix operation as well as all safety concerns. Yard speeds had been reduced from 10mph to 5mph in Tucson yard rather than going in and making the needed repairs. Union representatives from both yard and road indicated that this plan would fail without sufficient staffing in the ranks of the yard employees and road employees. We also indicated that Tucson yard was already working to capacity with its own work and couldn't

handle this 'new business'. While I believe that Grother was acutely aware of the obstacles facing the non-agreement employees in Tucson, they none the less gave it all they could and attempted to comply with the new orders from Omaha.

At no time prior to this period or after it failed miserably in June of 1997 has the railroad attempted to do all the Phoenix work in Tucson. Adding to the difficulties during this period the railroad had an ongoing Maintenance of Way curfew both east and west of Tucson, thus restricting all traffic into and out of Tucson yard from 0700 to 1900 daily creating more congestion and backup. The non-agreement employees in Tucson put their best foot forward and tried as they might but were unable to overcome the many obstacles and road blocks that were thrown against them. The failure of this merger yard consolidation program was not the fault of Grother or for that manner any of the non-agreement employees in Tucson as they gave it their all. The people in Omaha who orchestrated this plan without major repairs to trackage or increased staffing of personal in Tucson yard are the ones who caused this plan to fail!

Prior to the implementation of this plan, things were going very smoothly in Tucson except for the ongoing manpower problems and physical repairs that are always needed at the railroad and which are always affected by budgetary constraints. During Union discussions with Grother about adding more jobs or overtime, it was clear that he had to get permission before he could do anything that would affect the UP budget. During my observations of Grother during 1995-1997, he displayed no poor or inadequate personal performance concerning the operation of Tucson Terminal; especially given all the new people from Omaha and other UP personnel who were ordering what Tucson must do. Grother was a good, qualified non-agreement employee with many years of experience with the railroad and I was shocked when they laid the blame of the failed Phoenix to Tucson switching plan at his feet and gave him four days to quit or take a severe demotion to Houston, Texas, an undue burden on him and his family.

VERIFICATION

STATE OF ARIZONA)

COUNTY OF PIMA)

Under the penalties of perjury, I hereby affirm the foregoing *Verified Statement* is true and correct as stated.

Tom F Moore

TOM F. MOORE

Dated at

Tucson, AZ

September 14, 2004

AV-28

REPLY VERIFIED STATEMENT
OF JOHN E. GROTHER

My name is John E. Grother, I am the same person of the same name who has submitted three verified statements in this proceeding, dealing with causation, job classification, and laches.

I have read the submission presented by committee member William E. Loomis (Loomis), on behalf of Union Pacific Railroad Company (UP). This reply verified statement responds to asserted factual matters advanced by Loomis in his Submission.

Opening Statement

1. Page 1, final para., "Union Pacific is represented by its General Director of Labor Relations, W.E. Loomis."

Response: It is my understanding that the title of Mr. Loomis is "General Director-Employee Relations Planning." (Emp. Ex. E-5, p. 3),

Statement of Facts
(Causality & Job Classification; Displaced Employee)

2. Page 2, 2d para. "John E. Grother had been employed by Southern Pacific for 28 years prior to the merger, having served in a variety of management positions."

Response: I was a Southern Pacific (SP) employee for 27 years prior to the merger. The term management positions is incorrect; for example, I was a trainee at one point, among other positions. For my job history, see: Emp. Ex. E-3{7}; UP Ex. 2, p. 60.

3. Page 3, final para. "Mrs. Ahart found no evidence Mr. Grother's demotion was as a result of the merger transaction."

Response: Mrs. Ahart made no finding concerning "evidence." The Ahart correspondence speaks for itself. (Emp. Ex. E-4; UP Ex. 5, 6, 11).

4. Page 5, para. 3. "...Mr. Grother also engaged in an exchange of correspondence with Butch Ethington, the Union Pacific Ombudsman, during this same period of time.....in order to present a complete record that correspondence is attached as Union Pacific Exhibit 42."

Response: The UP Ex. 42 is not a "complete record" of correspondence with the Ombudsman, but is only a highly selective portion of the Ombudsman's letters to me. UP Ex. 42 consists of only three letters, all issued in late 2003, after this arbitration was invoked. None of my correspondence to the Ombudsman is included in UP Ex. 42.

5. Page 20, final para., last complete sentence, "At the time of Mr. Grother's self-described "demotion" on July 1, 1997 he was Senior Manager Terminal Operations (SMTO) at Tucson, Arizona."

Response: My actual self-described terminology is Merger Transaction Related Demotion, and is set forth at the outset of my May 12, 2003 letter to Mr. James V. Dolan, invoking arbitration or a settlement process. (Emp. Ex. E-2, 1, para. 1; UP Ex. 2, p. 1).

6. Pages 20-21. "A Senior Manager Terminal Operations is the top transportation (operating) position in the terminal. In other words, the SMTO is the boss of the terminal."

Response: Mr. Loomis has not correctly described the UP operating positions, whether "top" or "boss." The top position at UP terminals is regularly a Director Terminal Operations (DTO) or higher. At Tucson, El Paso, San Antonio and Settegast (Houston), the DTO is the top. At Avondale (New Orleans), the Director Transportation Services (DTS) is the top terminal position, based

on the UP COED data base. The SMTO works for the DTO, DTS or Superintendent Transportation Services (STS), dependent on how the Service Unit (Division) is organized. My duties as SMTO (SRMTO) are set forth in my V.S. (Job Classification, pp. 2-5). I was not the "top" man, or the "boss" of the Tucson terminal.

7. Page 21, 1st para. & 9 items. "The job description for that position lists the basic purpose of the position is to "ensure the quality of the transportation product of the terminal meets or exceeds the standards set by the business objectives and customer expectations." The primary responsibilities of the position are: (list 9 items),

Response: The above job description, except for the safety process sentence, is taken from the August 1999 job application description. (Emp. Ex. E-2 {33B}; UP Ex. 2, p. 108). This was not in effect in April 1997. I was not given a 1997 job description. Indeed, Mr. Loomis asserts that following the merger, my job did not change. (UP Sub., p. 2, final para.). In the hectic days of the breakdown in operations following the merger, many of the UP personnel processes were not in place, including a new job description for myself. For the "real world" on UP in early 1997, see my V.S. (Causality) and V.S. (Job Classification).

8. Page 21, final para. "In Mr. Grother's own words, he was "in command" of the terminal at Tucson."

Response: This is a misquote. (UP Ex. 2, p.42; Emp. Ex. E-2, p.42). The reference to "compared to others who were in command roles," does not imply that Grother was "in command" at Tucson. It is the "others" who were in command.

9. Page 21, final para. "He was the boss of a terminal where approximately 85 employees covered by collective bargaining agreements worked under his command. Mr. Grother was responsible for approximately 13 yard assignments and 4 road jobs (locals)."

Response: The DTO position was the "boss" of the terminal. In the absence of a DTO, which was the situation at Tucson in early 1997, Superintendent Packard (STS) and Assistant Superintendent McDowell (DTS) were in charge ("boss"). They performed the "boss" role over the 85 employees and yard assignments. See my V.S. (Job Classification).

10. Pages 21-22. "The terminal he commanded had an annual budget of approximately $2.5 million per year and processed approximately 700 cars per day."

Response: As for my "commanded," see my response to No. 8. I had no knowledge of any budget for Tucson, $2.5 million, or $10 million. The UP budget for Tucson was not made known to me or to the other 3 MYOs. We were told the budget was in the process of being finalized. Therefore, as an example, all overtime had to be authorized by either McDowell or Packard. Overtime was the province of McDowell or Packard, as was the use of additional switch engines.

11. Page 22. First para, last sentence. " Approximately four subordinate officers (MTOS) and MYOS) reported to Mr. Grother, and he reported directly to the service unit superintendent."

Response: The term "approximately" is incorrect. The three non-agreement operating personnel in 1997, all MYOs, are named. (Emp. Ex. E-2 {E9}; V.S. Grother (Job Classification), Atta. 1; UP Ex. 2, p. 63). My relationships with these MYOs are set forth in my V.S. (Job Classification), pp. 2-5), which was in a relief role. The three MYOs were not my "subordinate officers." They reported directly to Packard and McDowell. I reported

to both McDowell (preponderance) and to Packard, and to personnel at headquarters who issued instructions. At no time did Packard state or act as if Packard were my direct supervisor.

12. Page 22, first para., 1st and 3rd sentences. "As Senior Manager of Terminal Operations, either he, or one of his subordinate officers, would make hire decisions on candidates for employment who were being interviewed by the Human Resources Department....."In short, a Senior Manager of Terminal Operations has the authority to hire and fire."

Response: For my "subordinate officers," see response to No. 11. As for hiring and firing, at no time did I or any of the MYOs make hiring decisions between September 1996 and June 1997. Moreover, the merged companies were in a hiring freeze, as it was assumed the UP hub system would require fewer employees. I never had the authority to fire anyone. Packard had the authority to hire and to fire. See also my V.S. (Job Classification), at pp. 4-5.

13. Page 22. 2nd para., 2nd sentence. "In the event of a disciplinary investigation (hearing) involving an employee at the Tucson terminal, the Senior Manager of Terminal Operations would review the transcript and recommend the appropriate level of discipline, including dismissal where appropriate, to the service unit superintendent."

Response: As SRMTO, I never reviewed a transcript, or recommended discipline to Packard. Moreover, one of the UP processes, which was being introduced at Tucson in early 1997, was the UP UPGRADE discipline system, which was used by Superintendent Packard to determine the appropriate level of discipline based on repeat offenses and other standards. The UPGRADE system did not require any input from a low level non-agreement employee, as it provided a matrix to determine discipline.

14. Page 22, first line, and footnote 4. ".....approximately 700 cars per day. The term "approximately" is used repetitively in this section because the timing of Mr. Grother's claim places Union Pacific in a position of estimating what was in effect at Tucson more than six years ago."

Response: My sample indicates an average of 618 cars at the beginning of the day. See my V.S. (Causality), 2-3 & Atta. 2. I have repeatedly offered the data (consisting of 20 boxes) to UP, but without any request for examination, concerning my sample, which in any event approximates the UP's 700-car estimate.

15. Pages 23-24. "Terminal Superintendents (A Southern Pacific title) or Senior Managers of Terminal Operations (A Union Pacific title) have never been covered by collective bargaining agreement on either Southern Pacific or Union Pacific. Mr. Grother acknowledges this in his July 28, 2003 letter to Marilyn Ahart (Union Pacific Exhibit 8) when he says after retirement he plans to "Re-activate the Unionization of managers starting with UPRR."

Response: My letter did not acknowledge whether or not certain personnel had ever been covered by a CBA on either SP or UP, and I do not have complete information on this score. My use of the phrase "reactivate the unionization of managers" did not have specific reference to any particular craft or class of employees. My July 28, 2003 letter to Ms. Ahart was intended for settlement purposes, as suggested in the opening sentence. (UP Ex. 8, p.1).

16. Page 25, final 2 paragraphs. "This Board should evaluate Mr. Grother's skills to determine if they are transferable. The best source of that information is Mr. Grother's own assessment of his skills. In his May 12, 2003, letter to Mr. Dolan, Mr. Grother touts his own eduction, training and skills, as follows:(UP Ex. 2, p. 6)(citation omitted). Clearly, Mr. Grother's level of education, training and skills is readily transferable to industries other than the railroad. Union Pacific asserts this is another reason why Mr. Grother should be considered to be an official and, thus, not covered by New York Dock.))

Response: The referenced quotation from my May 12, 2003 letter to Mr. Dolan, did not address any skills I may have for employment outside the railroad industry. At my age in 1997 (then 51, now 58 years), I am not considered suitable for comparable employment in another industry. Moreover, UP has found my skills not transferable to other railroad work at UP, even on a lateral level. Despite numerous job applications, partially shown (UP Ex. 2, pp. 103-108; Emp. Ex. E-2{E31 thru E33B}), I have not progressed beyond one telephone interview. The best source of transferability is my actual experience in attempting job transfer. See also my V.S. (Job Classification), pp. 5-6. Finally, the statement "Union Pacific asserts this is another reason why Mr. Grother should be considered an official..." is without foundation, for whatever UP person considers me an "official," either at Tucson or Houston, is not identified. There is, of course, a distinction between "officer" and "official."

17. Pages 26-27. "A great deal of Mr. Grother's May 12, 2003 letter is devoted to his portrayal of himself as the victim not of the merger, but of what he considers to have been an ill-advised and not very well thought out plan implemented by his superiors."

Response: Contrary to the above statement, the UP/SP merger with the subsequent action taken in April, 1997, was the cause of my adverse effect on July 1, 1997. The reduction of work at Phoenix, and the dramatic increase in freight traffic for Tucson, were part of the merger plan, or "re-plan" experiment, as filed with the Surface Transportation Board. This plan was implemented by persons superior to me, but its basis is in the UP/SP merger. See my V.S. (Causality).

18. Page 27, 2nd para., 2nd sentence. "Note carefully, however, Mr. Grother never clearly explains the link between the "consolidation experiment" and his demotion."

Response: Contrary to the above statement, I demonstrated the causal nexus. See my V.S. (Causality), and Emp. Ex. E-2, p.3, para.3; p. 5, para.3; p. 6, para.4; p. 7, para.2; p. 10, para.2 & 4; p. 11, final para.; p. 12, para.2 & final para.; p. 14, para.2. The consolidation of Phoenix traffic into Tucson had never been tried prior to the UP/SP merger attempt. The June 1997 service failure described by UP President Davis would not have occurred, and his immediate action of displacing me and ending the merger experiment, would not have taken place, apart from the merger. (Emp. Ex. E-2{11}; UP Ex. 2, p. 68). Moreover, I am advised the burden is on UP to prove that factors other than the merger related transaction affected the employee.

19. Page 27, 3rd para., 1st sentence; page 31, 1st para. "Union Pacific asserts Mr. Grother was removed from his position in Tucson because of his job performance and not because of the merger..... Union Pacific states the reason Mr. Grother was transferred to a position of less responsibility, and his salary adjusted accordingly, was because of his superiors' assessment of his overall job performance. During the Spring and early summer of 1997, Mr. Grother was observed by managers who had not previously had the opportunity to observe his performance. The reason for Mr. Grother's demotion was that after a few months of such observation, his new bosses concluded he was not the person to be "in command" at Tucson.[i)]

Response: The terms "Union Pacific asserts," and "Union Pacific states," in the above first two sentences are anonymous, unless it is the opinion of the author, Mr. Loomis. My appeal to UP President Davis stated, "I had no indication of personal unsatisfactory performance beforehand, although there was talk that the Phoenix replan was not working as others had designed." (Emp. Ex. E-2{10}; UP Ex. E-2, pp. 64-67). President Davis did not deny my

statement concerning unsatisfactory performance. Instead, Davis corroborated the direct nexus of my displacement with the June service failure created by the Phoenix replan. (Emp. Ex. E-2{11}; UP Ex. 2, p. 68). On UP, it is the direct supervisor's accountability to document overall performance with an interim Performance Development Review and Developmental Action Plan, yet no one at UP did these documents in my situation.

The balance of the above statement (taken from p. 31, first para.) relate to my superiors at Tucson, managers visiting Tucson, and "new bosses." My superiors at Tucson were McDowell and Packard. Neither of these superiors orally or in writing advised me of 1997 unsatisfactory personal performance.

The purported observations by managers who had not previously observed my performance is another anonymous statement which comes to me first through Mr. Loomis in his submission. None of the managers who visited Tucson told me orally or in writing that I was an unsatisfactory performer. Indeed, I was selected as SRMTO on April 16, 1997 by Packard.

The term "new bosses" does not provide identification. Apparently the submission writer (Mr. Loomis) is referring to UP personnel, rather than SP personnel. The statement that these "new bosses" did not want me "in command," may be simply the submission writer's opinion. I was not in command at Tucson; rather, Messrs. McDowell and Packard were in command at Tucson.

20. Page 27, 3rd para., 2nd sentence. "Union Pacific does not believe the "consolidation experiment" is even merger related."

Response: The basis for "Union Pacific" is anonymous, but the statement that the merger had not been implemented for operations at Tucson in the Spring of 1997 (and description at pp. 27-29) appears based upon the writer's experience in negotiating merger implementing agreements with organized operating crafts. Contrary to the UP submission writer, UP managers were in charge at Tucson in early 1997, and merger-related plans were being carried out. See my V.S. (Causality), and Emp. Sub. pp. 8-14. To be sure organized operating employees may continue under their pre-merger agreements until implementing agreements are placed into effect, but this does not mean that non-agreement employee changes must await changes in agreement employee working conditions.

21. Page 29, 2nd para.; 3rd para. first 2 sentences. "In this instant case involving Mr. Grother, the transaction is the UP-SP merger. Events which could have taken place even if the merger had not occurred do not trigger protection, even if the result is an employee being placed in a worse position.....Separate and apart from the timing of the merger, the "experiment" to consolidate switching formerly done at Phoenix into Tucson could have been done by SP prior to the merger. It was not merger dependent."

Response; While the UP/SP merger is a transaction, so is the action taken pursuant to the merger resulting in Grother being placed in a worse position on July 1, 1997, also a "transaction." (Emp. Ex. E-2, p. 1; UP Sub. p. 26). At no time prior to the UP/SP merger would SP have attempted to consolidate all switching from Phoenix to Tucson's 1% grade yard. Of considerable importance is the fact that the UP/SP merger gave UP the right to make immediate operational decisions to benefit the UP system, but which would not have been made by SP, standing alone, as such decisions would have been economically adverse to a separate SP system. Moreover,

it was the UP traffic diverted to Tucson, along with other revisions in traffic, which permitted changes in the operation of SP facilities. These changes would not have been made without the merger.

22. Page 30, last para. "UP states that if Mr. Grother had been removed from his job as part of a merger related reduction or consolidation of officials, there would have been no need to appoint a replacement."

Response: The identity of "UP states" is unknown, but is presumed the writer of UP's submission. The fact is that UP advised in its merger application to the STB there would be many changes in non-agreement (not official) positions at Tucson, with jobs transferred from other locations to Tucson, and jobs transferred from Tucson to other locations. There are obviously many reasons for job transfers, which may embrace replacements of the very jobs being transferred. (Emp. Ex. E-19).

23. Page 31, 3rd para., 1st sentence. "A manager who suffers a decrease in salary because of reassignment based on job performance can not be considered as having been placed in a worse position because of the merger."

Response: The reasoning lacks logic. A merger, with shifts in traffic and in operations, can create different requirements for "job performance." In short, in a reorganization, stemming from a merger, the nature of the job might change, with a change in required "performance standards," and with different criteria for evaluation of "job performance." See my V.S. (Causality), pp. 1, 4-5. Thus, merger-related job performance can be a cause for displacement to a worse position. In any event, I was not charged with poor "job performance." Ms. Ahart's July 18, 2003 letter denying coverage of NYD conditions mentioned "perfor-

mance standards," not "job performance." (Emp. Ex. E-4; UP Ex. 5, p.1).

24. Pages 31-33. "Mr Grother will argue that "but for" the UP-SP merger, the situation which led to his demotion would never have occurred.....In summary, it really does not make a difference whether this arbitration committee determines the reason put forth by Mr. Grother (the consolidation "experiment") or the reason put for(th)(sic) by Union Pacific (poor job performance) was the cause of his demotion. Either event could have taken place prior to the merger. Therefore, Mr. Grother's reassignment and reduction of salary did not come as a result of the merger."

Response: See my responses to 19, 21, concerning merger-related operational changes. Of course, as a non-agreement person, I am always subject to reassignment or discharge, but such does not avoid the fact that the reassignment or discharge is merger related. Under the theory (apparently Loomis) advanced above, a non-agreement employee, always subject to reassignment or discharge, would never qualify for NYD, which would be absurd. Finally, I note this is the first occasion in this submission where "Union Pacific" (unidentified person) has claimed, in writing, that my July 1997 displacement was due to "poor job performance." There is no record support for such claim, apart from hearsay January 14, 2003 by the Ombudsman, which subsequently was modified on November 10, 2003. (Emp. Ex. E-2, p. 26; UP Ex. 2, p. 26; Emp. Sub. V.S. (Causality, Atta. 3)).

Statement of Facts
(Laches)

25. Page 33, 3rd para. "Mr. Grother's demotion was effective July 1, 1997. His first notified Union Pacific of his position that a dispute existed under New York Dock by letter dated May 12, 2003."

Response: My first written notification that a dispute exists was on July 15, 1997, not May 12, 2003. See my VS (Laches), at p. 2; Emp. Ex. E-2{E10}). This was acknowledged September 4, 1997. (Emp. Ex. E-2{E11}). To be sure, my dispute was not labeled NYD, but the label is unimportant. UP was well aware a dispute existed over my claim. Moreover, other claims arose out of my displacement, under other federal provisions, well before May 12, 2003.

26. Page 33, 3rd para., 4th sentence thru page 36, para. 2, 1st sentence. "Union Pacific's position is Mr. Grother slept on his rights, to the detriment of Union Pacific in being able to defend itself...because some of the alleged "villains" in his claim have left the Company. In addition, records pertaining to the switching "experiment" no longer exist and the personal recollection of people still with the railroad have grown dim....-His reasons are sprinkled throughout his May 12, 2003 letter to Mr. Dolan."

Response: Union Pacific is quite able to defend itself. Messrs. McDowell and Packard, the latter being Service Unit Superintendent, are still with the Company, and Packard is an announced witness. (UP Sub. p. 41). The records involving the switching experiment have been preserved and are available, per my response No. 14.

27. Pages 36-38. "The numbered paragraphs which follow list Mr. Grother's reasons for delay (as summarized by Union Pacific)."

Response: The UP submission grossly misstates my written statement, and much of UP's "summary" is also speculation. The reader is directed to my own written statement. (Emp. Ex. E-2; Emp. Sub. V.S. (Laches)).

28. Page 38, final para., thru page 41, first para. "One of the reasons Mr. Grother cites...is loss of his medical insurance.....Mr. Grother's fear that he might lose COBRA coverage could not have arisen..."

Response: UP does not dispute my fears concerning medical coverage, but merely asserts I would not be as adversely affected as I understand my coverage would have been. I stand by my reasoning. I did not say I would retire at age 55, but only that after that age I could "more safely file for arbitration inasmuch as I would be eligible to pay a reduced amount for medical insurance for my wife. Without such minimal assurance, not guaranteed by UP policy, one would pay astronomical COBRA insurance payments for 18 months, and then placed in a high -risk pool. These high risk insurance pools would cost up to ten times more than my severely reduced UP pension, if taken at age 55.

29. Page 41, 2d para. "However, a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997 is still employed with Union Pacific. That person is Ken Packard, who was the Tucson Service Uni(t)(sic) superintendent, and Mr. Grother's immediate supervisor."

Response: My immediate supervisor, to whom I reported, was H.L. McDowell. See my V.S. (Job Classification), pp. 2-3.

Statement of facts
(Relocation Expenses)

30. Pages 42-43, final para. "If this Board determines Mr. Grother was covered by New York Dock at the time of his salary reduction and relocation, then Union Pacific should be able to recover the excess compensation and reimbursement paid to Mr. Grother when it comes time to consider the "measure of compensation and/or benefits due Grother..." phase of this case."

Response: I disagree with the UP's statement of costs of relocation, claimed at pp. 42-43, or whether any off-set to my NYD benefits is proper. Moreover, this Committee should

not at this time make any findings as to whether UP's claim should be sustained, or whether any off-set should be allowed. Indeed, it is believed improper for any mention of the subject at this time in light of the procedural agreement covering this arbitration. (Emp. Ex. E-16, para. E&F.).

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

Under the penalties of perjury, I hereby affirm the foregoing reply verified statement is true and correct as stated.

JOHN E. GROTHER

Dated at
Houston, TX
October 9, 2004

GH-29

Washington DC
October 12, 2004

Ms. Lynette A. Ross
Mr. William E. Loomis

Re: Union Pacific/Grother-NYD Arbitration

To the Committee members:

In accordance with our Memorandum of Agreement, paragraph A, signed June 18, 2004, this is to change the member representing John E. Grother, from myself, to Gordon P. MacDougall.

JOHN E. GROTHER

cc: Gordon P. MacDougall

APPENDIX 10

0444

Sent via fax to Messrs. MacDougall and Loomis
Sent via U. S. Priority Mail to Messrs. Grother, MacDougal and Loomis

REC'D
SEP 30 2004
Labor Relations

Lynette A. Ross
Arbitrator

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September 28, 2004

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

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St., Stop 0710
Room 332
Omaha, NE 68179-0710

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

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm the telephone conference conducted on this date, among the Committee members in this case, with Mr. MacDougall representing Member Grother. The purpose of the conference was to discuss Mr. Grother's procedural request of September 21, 2004, communicated to the Carrier and Neutral Members through his Representative.

Specifically, the Grother Member submits that Pargaraph D of the June 18, 2004 Memorandum of Agreement, governing the upcoming arbitration hearing, requires the Carrier Member to tender a "verified statement under oath" to the Grother Member prior to the hearing, and as a pre-condition of any live testimony by its witness, Mr. Ken Packard. The Grother member requests receipt of Mr. Packard's statement on or before October 1, 2004, and essentially asks the Neutral Member to direct the Carrier Member to furnish the statement or else Mr. Packard shall be precluded from appearing at the October 12, 2004 hearing. By letter dated September 24, 2004, the Carrier Member submitted his response, disagreeing with the September 21, 2004 request.

During our telephone conference, Mr. MacDougall, as Representative of Mr. Grother, and Carrier Member Loomis amplified the positions set forth in their above-referenced letters. Mr. Loomis related that, as an individual directly familiar with Mr.

Grother's circumstances at the time of the event which gave rise to his claim, Mr. Packard is expected to provide his views on the causality issue and convey his understanding of Mr. Grother's duties as SMTO in Tuscon. Mr. Grother will have an opportunity to respond to Mr. Packard's statements at the hearing.

After giving careful consideration to the parties' positions in light of Paragraph D, referenced above, the Neutral Member finds that Paragraph D allows the Carrier Member to present Mr. Packard as a Carrier witness without the pre-condition of submitting a "verified statement". Therefore, the Grother Member's procedural request is denied.

Mr. Grother is reminded that, as a Member of the Committee, notwithstanding the fact that to this point he has provided two witness "verified statements", under Paragraph D he retains an equal right to present witnesses without tendering any written statements, in advance, to the other Committee Members. Furthermore, as Paragraph D clearly sets forth, at the conclusion of the hearing, both parties may present post-hearing briefs within 20 days of the close of the hearing.

Very truly yours,

Lynette A Ross

Lynette A. Ross

September 24, 2004

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

Dear Ms. Ross:

This refers to Mr. Gordon P. MacDougall's letter of September 21, 2004. In that letter, Mr. MacDougall asks for the following:

> *"It is my request that the committee direct the carrier member to serve the written statement of Mr. Ken C. Packard, in its entirety, to be verified under oath, on or before October 1, 2004, or else the individual be precluded from appearing at the October 12 hearing."*

Union Pacific opposes Mr. MacDougall's request for the following reason:

The Memorandum of Agreement between John E. Grother and Union Pacific Railroad Company dated June 18, 2004, provides for the following in Paragraph D:

> *"At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statement of fact, supporting evidence, data and argument."* (emphasis added)

The Memorandum of Agreement has no requirement for a written statement. The Memorandum of Agreement does not link the requirement for a written submission with the opportunity to present witnesses - the requirement and the opportunity occur at different times (pre-hearing and at the hearing). The Memorandum of Agreement clearly provides "the parties ... may present witnesses" without restriction. On this basis alone, Mr. MacDougall's request must be denied.

In addition, Union Pacific opposes Mr. MacDougall's request for the following reasons:

(1) Mr. MacDougall's preference for "verified statements" over live testimony stands centuries of Anglo-American jurisprudence on its head. Live testimony, where the fact-finder may judge a witness's credibility, is always preferable to "verified statements." This is especially true in this case where the "verified statements" are clearly self-serving or Grother-serving. Mr. Packard, Mr. Grother's immediate supervisor on the Tucson Service Unit (not, as Mr. MacDougall wrongfully says, "asserted immediate supervisor") should be allowed to testify without the requirement of a written statement.

UNION PACIFIC EXHIBIT __
PAGE 3OF 6

William E. Loomis
General Director

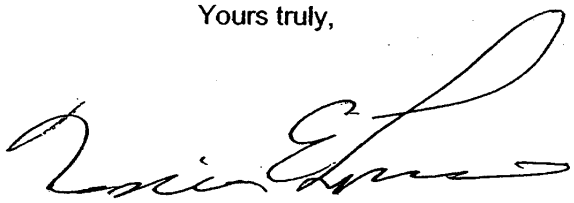
UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710

(2) Mr. MacDougall implies that witness testimony from Mr. Packard will somehow surprise Mr. Grother. Nothing could be farther from the truth. Union Pacific advised Mr. Grother in its submission that Mr. Packard would be a witness at the hearing. In fact, Union Pacific specifically advised Mr. Grother in its submission that Mr. Packard was "a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997." Mr. MacDougall cannot claim surprise.

(3) Finally, Mr. MacDougall furnishes no support for his request other than his opinion. In the first paragraph of his letter, he says, "I deem it highly unfair..." In the third paragraph, he says, "I consider this tactic..." "I deem" and I consider" cannot serve as justification for Mr. MacDougall's request.

Based on all the foregoing, there can be no doubt Mr. MacDougall's request is without merit and must be denied. The Surface Transportation Board saw no merit in his repeated protestations and neither should this Committee. Paragraph D clearly gives Union Pacific the right to present witnesses at the hearing without any preconditions such as written statements.

Yours truly,



W. E. Loomis
General Director
Labor Relations

CC: John E. Grother
Gordon P. MacDougall

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

TELEPHONE
AREA CODE 202
223-9738

September 21, 2004

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

Re: Grother/Union Pacific-NYD

Dear Ms. Ross:

This is in response to the carrier's submission, received September 14, 2004, with particular reference to the statement, at p. 41, that Mr. Ken Packard will be present as a witness at the hearing scheduled for October 12. Thus, the carrier's case--on the critical issue of causality--has not been presented by any advance written submission of facts or statements from knowledgeable personnel; rather, it has been deferred, and is now projected to be through "live" testimony from Mr. Packard, former Service Unit Superintendent (Division Superintendent). I deem it highly unfair, prejudicial, and serves to deny a fair hearing to the employee, for the carrier's case to be presented in this manner--the employee first learning of the only known opposition statement orally at the hearing, without advance opportunity to check facts or to gather further information, and in an environment (Washington DC) far removed from Tucson AZ. I expressed a premonition the carrier might advance what it has now seeks to achieve procedurally, per my letter of May 28, 2004. (Employee Ex. E-15).

I attempted to reach W.E. Loomis yesterday, having finished my initial review of the carrier's written submission over the weekend, to first raise my concerns with him. However, I am advised he is on vacation until September 28. In accordance with his wishes expressed on his answering tape, I am sending a copy of this letter to Mr. Richard D. Meredith, by overnight express.

I consider this tactic of deleting a critical element for a written submission, with substitution by a "live" hearing submission, to be contrary to the Memorandum of Agreement (MOA) governing procedures for this arbitration. (Employee Ex. E-16; UP Ex. 19). Paragraph D provides that the partisan parties shall serve written submissions. To be sure, there is a safety valve for witnesses should such become necessary, but the written submission and witness provisions must be read together and in harmony with each other; here, the "live" and unannounced testimony is to be from the employee's asserted immediate supervisor, and such oral submission on an important matter would be contrary to the agreement for written submissions in advance of the hearing.

UH-45

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

TELEPHONE
AREA CODE 202
223-9738

September 29, 2004

W.E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St.-Stop 0710
Omaha NE 68179

REC'D
OCT 05 2004
Labor Relations

VIA FAX/US MAIL

Re: Union Pacific/Grother

Dear Mr. Loomis:

Your facsimile of yesterday came to my attention today. You seek copies of published opinions, referring to Grother's submission, at p. 3, n.1, "However, slip opinions will be furnished to committee members upon request."

At this time, such would be quite an undertaking, coming some two weeks after the partisan parties exchanged their submissions, and less than two weeks before hearing. Grother's intent was to supply these published opinions, which are available on the bookshelves of many public libraries, in the event members of the committee so desire. Please note the use of the plural "members."

Grother's offer was premised upon the geographical location of the neutral member. Grother will undertake the task of providing two sets if one is requested by the neutral member. The other would be forwarded to yourself as desired.

However, the Union Pacific law department, at Omaha, is believed to have more than a complete set of the very opinions cited in the Employee's submission. I spoke today with one of the several attorneys I deal with in that department. I am advised their library resources are available to you; indeed, I rather suspect the law department would prefer you secure your legal materials from UP in Omaha, rather than from Grother's attorney. Accordingly, Grother is unwilling to go to the expense of reproducing these materials merely at the request of one (UP) committee member.

I am sorry, but I must decline your request at this time.

Very truly yours,

Gordon A. MacDougall

Attorney for John E. Grother

UNION PACIFIC EXHIBIT __
PAGE 1 OF 3

cc: L.A. Ross
J.E. Grother

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

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September 29, 2004

W.E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St.-Stop 0710
Omaha NE 68179

VIA FAX/US MAIL

Re: Union Pacific/Grother

Dear Mr. Loomis:

Your facsimile of yesterday came to my attention today. You seek copies of published opinions, referring to Grother's submission, at p. 3, n.1, "However, slip opinions will be furnished to committee members upon request."

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I am sorry, but I must decline your request at this time.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: L.A. Ross
J.E. Grother

UNION PACIFIC EXHIBIT __
PAGE 2 OF 3

September 28 2004

VIA FAX AND U.S. MAIL

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

Dear Mr. MacDougall:

RE: John E. Grother New York Dock arbitration

On page 3 of Mr. Grother's submission, dated September 14, 2004 (corrected copy 9/17/04), the last sentence in footnote 1 states:

> "However, slip opinions will be furnished to committee members upon request."

This letter is a request that such slip opinions be furnished to me in sufficient time for review prior to the hearing date.

Thank you.

Sincerely,

W. E. Loomis

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

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

UNION PACIFIC EXHIBIT __
PAGE 3 OF 3

William E. Loomis
General Director

UNION PACIFIC RAILROAD
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ph. (402) 544-5446 fx. (402) 233-2499
beloomis@up.com

04/46

LAW OFFICES
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AREA CODE 202
223-9736

October 6, 2004

Lynette A. Ross (502) 859-9004 VIA FAX & US MAIL
William E. Loomis (402) 501-0120

Re: Union Pacific/Grother

I have arranged to have our Tuesday, October 12 hearing to be covered by a reporter.

This is at the expense of Employee, inasmuch as I am advised the carrier does not wish to participate in this expense.

The reporting service is: Beta at 910-17th Street, NW. Tel: (202) 638-2400.

I am advised the transcript is usually available within 10 days.

The reporter is authorized to administer oaths, should such be desired. My suggestion is that each of the partisan parties bring a set of their submissions for use of the reporter.

I am available for any of your thoughts concerning this matter by telephone anytime tomorrow.

Very truly yours,

Gordon P. MacDougall

UNION PACIFIC EXHIBIT __
PAGE 1 OF 1

EX PARTE NO. 72 (SUB-NO. 1)[1]

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

ROADMASTERS (ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, FRANK A. THOMPSON, TRUSTEE)

Submitted June 18, 1946. Decided July 19, 1946

On oral argument, findings in prior reports, 263 I. C. C. 607 and 264 I. C. C. 239, that the orders of the Commission now in effect, defining the work of employees or subordinate officials of common carriers by railroads, include the work of roadmasters of respondent in the title proceeding and the work of roadmasters and supervisors, such as general roadmasters, roadmasters, assistant roadmasters, and general foremen; supervisors of bridges and buildings such as supervisors, assistant supervisors, and general foremen; supervisors of water supply; supervisors and inspectors of signals such as supervisors, assistant supervisors, and general foremen; and supervisors of telegraph lines of the respondent in the embraced proceeding, affirmed.

Additional appearances, *Martin F. O'Donoghue* for original petitioner in the title proceeding.

Willard H. McEwen for an association of railway labor executives, intervener.

J. Carter Fort, *Thomas L. Preston*, and *J. M. Souby* for an association of railroads, intervener.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

In the prior report in the title proceeding, 263 I. C. C. 607, division 3 found that the orders of the Commission now in effect, defining the work of employees or subordinate officials of common carriers by rail-

[1] This report also embraces Ex Parte No. 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials To Be Included Within the Term "Employee" Under the Railway Labor Act—Roadmasters and Supervisors such as General Roadmasters, Roadmasters, Assistant Roadmasters, and General Foremen, Supervisors of Bridges and Buildings such as Supervisors, Assistant Supervisors, and General Foremen, Supervisors of Water Supply, Supervisors and Inspectors of Signals such as Supervisors, Assistant Supervisors, and General Foremen, and Supervisors of Telegraph Lines of the Union Pacific Railroad Company.

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employees or subordinate officials to include the work of certain classes then being considered. For example, in *Regulations Concerning Employees Under Ry. Labor Act*, 218 I. C. C. 141, division 3 found that the work defined as that of an employee or subordinate official in the existing orders included the work of signal foremen of the Union Pacific Railroad Company, northwestern district. Prior to the present proceedings no such orders had been issued to include the work of supervisors of telegraph lines, general track foremen, general foremen of bridges and buildings, and general signal foremen, and accordingly, division 3 in the prior report in the embraced proceeding herein entered an order dated December 27, 1945, amending the existing orders to include the work performed by the supervisors of telegraph lines, general track foremen, general foremen of bridges and buildings, and general signal foremen of the Union Pacific system.

The respondent in the title proceeding employs about 37 roadmasters, each of whom supervises the maintenance of as much as 200 miles of track. This respondent has no roadmasters with the title of division roadmasters or with assigned duties which cover an operating division of railroad. Each roadmaster has office space and maintains office files and records. He has supervision of the foremen of regular track gangs, extra gangs, rail and welding gangs, fence gangs, and crossing watchmen, aggregating between 40 and 200 men, including foremen. Within limitations the roadmaster may hire or dismiss employees under his jurisdiction. Disciplinary letters, however, are signed by the division superintendent. The roadmaster is given a monthly allowance which is spent according to his judgment for labor and materials to maintain the track in his territory. Rails and crossties, however, are budgeted. He is subject to call at all hours, but ordinarily fixes his hours of work and vacation periods for himself and for those under his charge. He is paid a fixed monthly wage, and approves for pay-roll purposes the time records of those under him. He signs bulletins and advertisements for vacancies in his territory on maintenance work, and makes the assignments when the vacancies are filled. It is his duty to check the track gages, safety of tools, frogs, cross-overs, locks, and all working equipment. He is responsible for, and has charge of, any work train that is doing maintenance-of-way work on tracks assigned to him. When two or more jobs are to be done, the roadmaster decides which work is to be performed first. He negotiates contracts as to leasing of parts of the right-of-way, cutting of right-of-way fences for private crossing, drainage, and similar matters. So far as inspection and performance of work are concerned, the roadmaster for the most part relies upon his own judgment. He reports, however, to the division engineer. Before rail-

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road labor was given vacations with pay, roadmasters were granted a vacation yearly and were allowed sick leave with pay, a privilege usually granted only to officials. Since vacation with pay has been granted to railway employees generally, the schedules of vacations for foremen and trackmen are prepared by the roadmasters and approved by a representative of the maintenance-of-way union, and occasionally also by the division engineer. A copy of the schedule is then sent to the accounting department of the company for inclusion in the pay roll and audits.

In the embraced proceeding the respondent employs 9 general roadmasters located in various cities on its lines. The general roadmaster's jurisdiction extends, generally speaking, over an operating division, except for 2 of them located on the respondent's Idaho division. The duties of a general roadmaster and a division roadmaster on respondent's lines are the same. The general roadmaster has about 800 men under his supervision, and he covers an average territory of 1,139 miles of main track and sidings. His duties include supervision of track construction, drainage projects, bank restoration, and installation of ballast or new rails as well as supervision of repairs and maintenance, right-of-way fences, upkeep of the property, except buildings and major structures, and coordination of the work performed by roadmasters assigned to various districts. He is in charge of the particular section of railroad to which he is assigned and is responsible for track maintenance and largely for construction. He determines, among other things, whether new rails should be laid, drainage put in, or new ballast installed, and he performs routine work such as inspecting roadbed and crossings. The general roadmaster generally has a program of major items of construction or improvement which he considers necessary, resulting from his familiarity with the portion of track under his care. This program is submitted by him, however, to the division engineer, and in turn is submitted to the superintendent, the general manager, maintenance engineer, and finally to the executive officers, for ultimate decision as to whether or not sufficient funds are available to cover the projects. The general roadmaster does not have discretionary power to determine how much money shall be spent each month on his division. He can only recommend that certain expenditures be made. If his recommendation is approved he is so advised by the division engineer, to whom he reports, and he then proceeds to carry out the projects. At the time of the hearing in May 1945 he worked from 290 to 300 hours a month during the cold season and about 350 hours monthly during the warm season. When serious storms occur his hours of duty are increased. His salary is on a monthly basis.

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PAGE 4 OF 20

Under each general roadmaster there are, on an average, seven district roadmasters who are in charge of, and responsible for, particular districts. Each district roadmaster initiates the recommendations for such things as new rails and ballast, as he has the responsibility for a particular segment of track on a division. His jurisdiction extends over about 179 miles of track and 200 employees. These latter employees perform normal maintenance work, but there also may be as many as 200 to 300 other employees working in heavy construction, such as laying rails and ballast. The district roadmaster has the duty of seeing that material is supplied to various projects and that manpower is available. Other duties entail looking after the welfare of employees under him, such as housing and transportation; keeping informed as to the track structure, right-of-way fences, loading of livestock, and the cleaning of cars; seeing that weeds and brush around buildings or other structures are cut to prevent fires; and making certain that fire regulations are enforced, especially in timber territory where he has to employ fire patrols and see that they perform their assignments. The district roadmaster must also be efficient in spotting and repairing rough or weak track, and must know of conditions which may impair the speed of trains or restrict their capacity or motive power. Whatever recommendations the district roadmaster makes, however, are passed on to the general roadmaster who determines the advisability and importance of the project recommended. The district roadmaster's salary is on a monthly basis, and the number of hours which he works a month corresponds, on an average, with that of the general roadmaster.

There are employed by this respondent 13 general track foremen, who, until 1944, were called assistant roadmasters, and whose duties are the same as those formerly exercised by the assistant roadmasters. The general track foreman has from 100 to 300 men under his supervision, depending upon the extent of construction or maintenance work which he is directing. He is in charge of individual projects, such as relaying rails or ballast jobs, and extended yard improvements, and is subject to assignment to any place on respondent's lines. He is primarily a road man and spends most of his time on the outside as distinguished from office work. The general track foreman reports to the roadmaster in his own particular district. His salary is on a monthly basis, and the number of hours he works each month averages generally less than that of the general roadmaster or district roadmaster.

Fifteen supervisors are employed by this respondent in the bridge and building department, and are assigned to various divisions. Each supervisor has from 80 to 160 employees under his supervision,

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PAGE 5 OF 20

or the so-called "B-type" car (bus inspection car) usually furnished officials. Many of them in performing their duties labor manually, and much of the time they wear overalls when so engaged. They usually handle their own business correspondence and make their reports without secretarial or stenographic help. They do not as a rule have private offices as is customary with officials. Some of them have expense accounts for such items as lodging, meals, et cetera, but they are more restricted in their expenditures than are the officials, and account more strictly for those expenses than do the officials.

If the prior findings are affirmed the respondents in both proceedings fear that outside interests eventually will take over the management of the railroads and create a serious threat to the maintenance of discipline and efficiency of the employees under consideration, and that the latter's loyalty to the company will be impaired if they become unionized. Whether or not these employees join labor unions is not dependent upon our findings herein. In any event these are matters which are not cognizable by us in the determination of the issues presented. Our duties under the Railway Labor Act are clear, and questions of public policy have no place in our deliberations here. If the employees under consideration were full-fledged officials their advice would be sought by, and they would confer with, other officials in company matters such as policy management. According to the records the services and advice of these employees are subordinate to those individuals who have heretofore been regarded as officials. Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials.

The petitioners have brought nothing to our attention which would warrant a reversal of the prior findings. As a result of the oral argument and on reconsideration of the records, we affirm the prior findings.

ALLDREDGE, *Commissioner*, concurring in part:

I concur in the findings except that in my opinion the general roadmasters of the Union Pacific Railroad Company fall within the classification of officials.

MILLER, *Commissioner*, dissenting:

From my review of the prior decisions in these and other similar proceedings, I now feel that we have gone beyond the intent of the Railway Labor Act, in many instances, in holding that certain persons are subordinate officials rather than officials of particular railroads. I believe that this has resulted chiefly from our prior classification orders

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wherein we have attempted to state by the use of title of positions who are and who are not employees or subordinate officials. Because of this method of classification, it seems that in many of our decisions involving this question we have accorded too much weight to titles and given too little consideration to the work performed by, and the duties and responsibilities imposed upon, the persons holding the positions. Titles, of course, should be given consideration but they should not be accorded controlling weight. In the final analysis the status of a person should be determined from the evidence respecting the nature of his work, duties, and responsibilities.

Moreover, it is my view that the existing classification orders define as subordinate officials various persons holding high-grade positions, such as here involved, who should be excluded. In other words, these orders now reach up and embrace many persons who, in my opinion, are part of railroad management. They should be amended and the ceiling lowered.

I also believe that many of our decisions in these matters have unduly stressed certain facts which are of little or no importance. For example, we have accorded too much weight to the fact that the actions taken by the person, whose status was in question, with respect to the dismissal and disciplining of employees under his supervision were subject to the review or approval by someone in higher authority. In my opinion, such fact should have little or no weight in deciding the issue. We well know that many of the actions taken by officials of railroads are subject to the approval of their superiors in position.

From my further consideration of the records in the instant proceedings, I am of the opinion that the work, duties, and responsibilities of the various persons involved in these proceedings, and holding the several positions defined in the report, mark them as officials of these respondents and a part of their respective managements. I therefore dissent from the opposite conclusion reached by the majority.

I am authorized to state that COMMISSIONER PORTER joins in this dissent.

COMMISSIONER ROGERS dissents.

COMMISSIONERS AITCHISON and LEE did not participate in the disposition of these proceedings.

UNION PACIFIC EXHIBIT __
PAGE 10 OF 20

EX PARTE 72 (SUB-NO. 1)

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

ROADMASTERS AND SUPERVISORS, SUCH AS GENERAL ROADMASTERS, ROADMASTERS, ASSISTANT ROADMASTERS, AND GENERAL FOREMEN; SUPERVISORS OF BRIDGES AND BUILDINGS, SUCH AS SUPERVISORS, ASSISTANT SUPERVISORS, AND GENERAL FOREMEN; SUPERVISORS OF WATER SUPPLY; SUPERVISORS AND INSPECTORS OF SIGNALS, SUCH AS SUPERVISORS, ASSISTANT SUPERVISORS, AND GENERAL FOREMEN; AND SUPERVISORS OF TELEGRAPH LINES OF THE UNION PACIFIC RAILROAD COMPANY

Submitted January 8, 1947. Decided February 3, 1947

On reargument, findings in prior report, 266 I. C. C. 85, defining as subordinate officials, under the provisions of the Railway Labor Act, the work of certain classes of employees of respondent Union Pacific Railroad Company, affirmed.

Additional appearance, *Clarence M. Mulholland*, for Railway Labor Executives Association, intervener.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In our report of July 19, 1946, 266 I. C. C. 85, on oral argument, we affirmed the findings of division 3 in its report of December 27, 1945, 264 I. C. C. 239, that our orders now in effect, defining and classifying the work of subordinate officials, include the work of respondent's[1] roadmasters and supervisors, such as general roadmasters, roadmasters, assistant roadmasters, and general foremen; supervisors of bridges and buildings, such as supervisors, assistant supervisors, and general foremen; supervisors of water supply; supervisors and inspectors of signals, such as supervisors, assistant supervisors, and general foremen; and supervisors of telegraph lines.

Upon further consideration of the record and upon petition of the respondent for reargument and reconsideration and concurring petition of the Association of American Railroads, intervener, we reopened the proceeding for reargument, which we have heard. The petitioners give various reasons in support of their prayer for reopening. It is deemed necessary here to consider only the contentions

[1] Respondent is Union Pacific Railroad Company.

that (*a*) the issues are not controlled by our order of February 5, 1924, wherein we prescribed regulations designating the classes of employees to be included within the term "subordinate official"; (*b*) in determining who are subordinate officials or employees "for the purpose of collective bargaining," the purpose and intent of the Railway Labor Act require that public policy and public interest shall be considered; and (*c*) we have erred in laying disproportionate emphasis on trivial matters to the subordination of our findings as to matters of substance and importance.

In the two afore-mentioned prior reports, there are discussed in much detail the duties and responsibilities of the various groups of employees under consideration, and we will not repeat that discussion.

Dealing first with the contention that the issues in this proceeding are not controlled by our order of February 5, 1924, in our report of July 19, 1946, we stated that—

> By order dated February 5, 1924, we prescribed regulations designating the classes of employees to be included within the term "subordinate official." Among those so named were roadmasters, with rank and title not higher than division roadmasters, track supervisors, maintenance inspectors, supervisors of bridges and buildings with rank and title below that of superintendent of bridges and buildings, supervisors of water supply, and supervisors and inspectors of signals with rank and title below that of assistant signal engineer. It was further stated in the order that the definitions included therein embraced all of the classes of employees whose claims to recognition as subordinate officials were presented at the hearing, and that the list of subordinate officials might be enlarged or restricted after due notice and hearing if and when occasion demanded. In numerous proceedings thereafter we amended or interpreted our existing orders defining the work of certain classes then being considered.

We have no thought that this order of February 5, 1924, may not be changed as circumstances warrant. By the terms of the Railway Labor Act (fifth paragraph of section 1, as quoted in the prior reports), we have the authority to amend or interpret our orders entered under the provisions of that act. Thus, determination of the instant issues properly may be influenced by the order of February 5, 1924, because the record before us does not warrant any other conclusion than that these classes of employees under consideration are subordinate officials. Having found that roadmasters with rank and title not higher than that of division roadmaster, track supervisors, maintenance inspectors, supervisors of bridges and buildings with rank and title below that of superintendent of bridges and buildings, supervisors of water supply, and supervisors and inspectors of signals with rank and title below that of assistant signal engineer are subordinate officials, that classification, which has been in effect for many years, should remain undisturbed until we have a record which requires a change to be made. In our opinion the present record is not sufficient for that purpose.

UNION PACIFIC EXHIBIT __
PAGE 12 OF 20

As indicated, the petitioners contend that the purpose and intent of the Railway Labor Act require that public policy and the public interest should be considered when we define the work of subordinate officials or employees. The petitioners are fearful of their continued loyalty to the company, if these various groups of employees have their work defined as that of subordinate officials. As pointed out in our report of July 19, 1946, whether or not these employees join labor unions is not dependent upon our findings herein. Our duties under the Railway Labor Act are clear, and questions of public policy or the public interest have no place in our deliberations under the issues presented. In passing, it may be noted that there is nothing of record to warrant the petitioners' fears in this particular.

With respect to the contention that we have erred in laying disproportionate emphasis on trivial matters and have subordinated our findings as to matters of substance and importance, as we said in our report of July 19, 1946, the Railway Labor Act does not contain a definition of a subordinate official, and we have not attempted to set a rigid standard by which, in all instances, the duties and responsibilities of subordinate officials and officials may be distinguished at a glance. It is true that in our order of February 5, 1924, some limitation was placed on some of the classes therein embraced. In the final analysis, however, rank and title are not controlling any more than are wages and salaries, or hours of labor performed. However, rank and title tend to disclose the responsibilities of a position, and help in defining the work of subordinate officials or employees. In our prior report, we said that—

> Generally speaking railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials.

In our prior report we also said that—

> We do not believe that as a practical matter it is feasible to make a definite line of demarcation between the work of subordinate officials and that of officials. Frequently, it is comparatively simple to find that the work of certain employees is that of subordinate officials. There are other instances, however, the so-called border-line cases, the present proceedings being good illustration, where the determination of the question is more difficult. Each proceeding, therefore, of necessity must be decided upon the record before us, and all pertinent facts considered, even though of themselves some may be deemed trivial.

On reargument and reconsideration of the record, we affirm the prior findings.

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PAGE 13 OF 20

MILLER, *Commissioner*, dissenting:

My views respecting this proceeding are set forth in my dissenting expression in the prior report. The findings made in that report and here affirmed should be reversed and the original petition dismissed.

In addition, however, I am constrained to make the following remarks: It appears that the chief object of the respondent carrier in here seeking a finding that the persons involved and holding the positions defined in the report, are its officials, is to prevent them from joining labor unions. As pointed out in the report, whether or not these persons join such unions does not depend upon our findings. My views in this matter have been reached from considerations, independent of, and apart from, such matters as those noted above. However, assuming that respondent's real purpose, in seeking to have the persons involved classified as its officials, is to prevent them from joining labor unions, I venture to suggest that the one thing most likely to deter them from doing so is for respondent to make their compensation, rules, and working conditions so attractive that there would be no incentive for their joining unions.

COMMISSIONERS LEE and ROGERS dissent.

COMMISSIONER BARNARD, being necessarily absent, did not participate in the disposition of this proceeding.

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Ex Parte No. 72 (Sub-No. 1)

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

Railroad Maintenance of Way Supervisors Chicago, Rock Island & Pacific Railroad Company

Submitted December 17, 1952. Decided May 26, 1953

Orders of the Commission now in effect defining the work of employees or subordinate officials of common carriers by railroad, found to include the work of respondent's roadmasters, master carpenters, signal supervisors, and supervisor of lines and equipment.

Beecher Rintoul for petitioner.

Bruce Dwinell and *W. F. Peter* for respondent.

Richard R. Lyman, Clarence M. Mulholland, Edward J. Hickey, Jr., and *J. P. Tahney* for interveners.

Report of the Commission

By the Commission:

Exceptions to the report proposed by the examiner were filed by the respondent, and certain interveners replied. We have heard the parties in argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Upon petition of Beecher Rintoul, general chairman, Association of Railroad Maintenance of Way Supervisors, we entered upon a hearing to determine whether our orders now in effect defining and classifying employees and subordinate officials of common carriers by railroad should be amended or interpreted to include the work performed by persons employed as railroad maintenance of way supervisors by the Chicago, Rock Island and Pacific Railroad Company. The Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen of America, the Railway Employees' Department of the American Federation of Labor, and the American Railway Supervisors Association, Inc., intervened. At the hearing it developed that the only work for which determination was sought was that performed by respondent's roadmasters, master carpenters, signal supervisors, and supervisor of lines and equipment.

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Section 1 (fifth) of the Railway Labor Act, as amended, provides, in part, as follows:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders.

By an order of February 5, 1924, we prescribed regulations as to the classes of employees to be included within the term "subordinate officials." Among those so designated were:

> Foremen, supervisors, and roadmasters. This class shall include roadmasters with rank and title not higher than division roadmaster, track supervisors, maintenance inspectors, supervisors of bridges and buildings, with rank and title below that of superintendent of bridges and buildings, supervising carpenters with rank below that of superintendent, supervisors of water supply, supervisors and inspectors of signals with rank and title below that of assistant signal engineer, and foremen or supervisors of machinists, boilermakers, blacksmiths, sheet metal workers, electricians, car men, and their helpers and apprentices, with rank and title beneath that of general foreman.

On December 27, 1945, in *Regulations Concerning Employees Under Ry. Labor Act*, 264 I. C. C. 239, division 3 found that our orders defining work as that of employees or subordinate officials of common carriers by railroad, should be amended to include the work of supervisors of telegraph lines, and an appropriate order was entered.

As of May 1951, as well as in January 1952, when the hearing was held, the respondent had in its employ 51 roadmasters. There is but 1 roadmaster employed on the short Chicago, Ill., division, but from 4 to 7 are assigned to each of the other 9 of respondent's divisions. Each roadmaster is responsible for the proper maintenance of approximately 150 miles of track and roadway, and for the distribution of labor and material within his territory. The roadmasters report to the division superintendent, and none is designated "division roadmaster." Office space assigned to roadmasters is adequate for their needs. They keep their own records of rail that is laid and of ties and material used, and write out their own reports, as clerical assistance is not assigned to them. However at stations where there is stenographic help, it is available to the roadmaster.

Roadmasters have authority over section, maintenance, and extra gang foremen and men, with an average of 11 foremen and 51 men under the supervision of each. They have authority to hire men and take them out of service pending investigation, but only the division superintendent may discharge employees. Foremen generally hire the men subject to the immediate approval of the roadmaster and the

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ultimate approval of the division superintendent. When working within the territory of a particular roadmaster, roadway machine operators, helpers, and heavy-work equipment operators are under his jurisdiction. He has control also of all work trains while at work in his territory, including the train and maintenance crews. The duties of the roadmaster include making frequent inspection of all main-line track and switches under his supervision, and less frequently of other tracks, to determine whether they are being maintained properly and that surface, alinement, and gage of tracks are proper. These inspections are made from the rear end of a passenger train, by walking over the track, or by using a personally operated track motorcar.

It is the roadmaster's responsibility to decide what improvements are required to remedy any unsatisfactory conditions. While usually he does none of the actual work, he frequently demonstrates to section foremen and workers how properly to drive a spike or place a plate. From these inspections he makes an estimate of the money required for the labor and material necesary for the succeeding month's maintenance and submits his estimate to the division superintendent, who may modify it before passing it on to higher authority. A budget for the system as a whole is set up at Chicago, Ill., for the ensuing month, with allocations to each division superintendent, who in turn allocates funds to his respective roadmaster territories. Each roadmaster then has the responsibility of wisely expending such funds. During a normal month the roadmaster of the largest territory, on the Des Moines, Iowa, division, receives an allowance of $36,600 for labor and material. For the month of May 1951, the average labor allowance per roadmaster was $14,583, the largest allowance, $32,967.28, being for the Chicago division, and the smallest, $4,351, for the Cedar Rapids, Iowa, division.

Roadmasters deal directly with highway authorities, adjoining land owners, and municipal authorities in the first instance, and correct conditions of which complaint is made or report them to the division superintendent. They have no assigned hours of work, being subject to call at any time the work demands, whether it be nights, Sundays, or holidays, and generally work more hours a month than the employees under them. They are paid fixed monthly salaries, and along with master carpenters, signal supervisors, and the supervisor of lines and equipment, have the same vacation privileges as do the officers of the carrier. The roadmaster alone approves the payroll data sent to the accounting department by each foreman in a maintenance, section, or extra gang.

The respondent has 9 master carpenters, 1 for each operating division, except the Chicago division. These employees report to the division engineer, with whom they are jointly responsible on their

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respective divisions for the condition of all bridges, viaducts, trestles and culverts, signal bridges, retaining walls and tunnels, buildings, platforms, turntables, fuel stations, stockyards, cinder pits, mail cranes, scales in connection with the scale department, water and oil tanks, water and oil pumping plants, and fire protection. A master carpenter has jurisdiction over 2 to 4 bridge and building foremen and gangs varying in size from 13 to 29 men, 1 water-service foreman and gang of not more than 5 men, and 1 paint foreman and gang of 2 to 4 men. Master carpenters have the same authority as roadmasters respecting disciplinary matters. They operate under monthly allowances made in the same manner as those of the roadmasters, except that master carpenters submit their monthly estimates of material and labor needs to the division engineer, and these in turn are submitted to the division superintendent. All master carpenters are located at division headquarters, where adequate office space and stenographic help are available, but they prepare all their reports in longhand, and maintain certain records. Much of their time is spent on the roadway, and while they have no prescribed hours, they usually work more hours per month than the men under them. Master carpenters receive monthly compensation at a fixed rate.

There is 1 signal supervisor for each of the 10 divisions of the respondent's railroad. They report jointly to the division superintendent and the signal engineer with respect to matters of operation, and report solely to the signal engineer on engineering standards and the types of material to be used in constructing, maintaining, and repairing signal equipment. The territories of the signal supervisors range in size from the Chicago division with approximately 130 miles of track to 473 miles of territory on the Southern division. The amount of signaling involved varies, that of the Chicago division requiring the services of 31 signal maintainers and assistant signal maintainers, while only 9 maintainers and assistants are employed on the Southern division. Signal supervisors have authority to take employees out of service pending investigation, but they may be discharged only by higher authority.

With respect to office facilities and stenographic help, the situation as to the signal supervisors is the same as that of the master carpenters. They likewise keep their own files and prepare their reports in longhand. They operate under monthly allowances determined in the same way as those for roadmasters and master carpenters, except that signal supervisors submit their estimates jointly to the division superintendent and the signal engineer. They make frequent inspections of their territory, promptly investigate accidents attributed to defective signal equipment to determine what action is necessary to prevent recurrence, and make recommendations for changes in signal

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systems and locations. They instruct the men as to the proper performance of their duties and conduct such examinations as are required by the signal engineer. Signal supervisors are paid monthly salaries. They determine their own hours of labor per day, but normally work more hours in a month than the hourly paid employees under them, and much of their time is spent out of their offices. They are on call 24 hours a day throughout the year.

The respondent's 1 supervisor of lines and equipment has jurisdiction over the entire system of 8,000 miles, and reports directly to the superintendent of communications, a system officer. He has complete charge over pole and wire line construction, reconstruction, and maintenance, and has supervisory authority over gang foremen, linemen, groundmen, section linemen, and telephone and telegraph equipment installers. He may not commence new construction unless the project has been agreed upon by higher authority. He is responsible for the proper estimates for the general day-to-day maintenance, and for poles, wires, insulation, new construction, and reconstruction. He is required to see that the time rolls and reports of foremen and section linemen are correctly prepared and forwarded to the office of the superintendent of communications, and that all work equipment is properly used and maintained. He is authorized to hire or to remove from service pending investigation, but not to discharge employees. He shares office space with others, keeps records and files pertaining to his work, and prepares his own reports. Most of his labor is performed away from his office. He works no assigned hours and, except in emergencies, performs his duties during daylight hours. He is paid a monthly salary. The present supervisor of lines and equipment holds seniority rights with the respondent as a section lineman.

The respondent's position is that roadmasters, master carpenters, signal supervisors, and the supervisor of lines and equipment are not subordinate officials, but are responsible officers, and are treated as such rather than as employees. For example, the respondents had in effect for 35 years prior to enactment of the Railroad Retirement Act a pension system applicable to all officers and employees, which included the groups here considered. Following the enactment of that act, the respondent continued a supplemental pension plan and, in addition, instituted in May 1950 a health insurance plan, for officers only, including the same groups. While the limitations upon the authority of these groups are emphasized by the petitioner, the respondent calls attention to their broad powers and responsibilities, and to the fact that all officers are subject to certain restraints and limitations. The substantial sums of money which roadmasters are called upon to disburse are shown to illustrate the extent of their

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responsibility. The respondent refers also to certain of its rules defining the duties and responsibilities of these groups as published in booklet form, entitled Rock Island Rules and Regulations for Maintenance of Way and Structures, effective April 1, 1951, introduced in evidence. The first statement in the publication provides that: "The rules, regulations, and instructions contained herein govern Maintenance of Way and Structures Employees of the Chicago, Rock Island and Pacific Railroad Company." The second paragraph of this statement is as follows:

> Rules governing practice and work details of Maintenance will be issued in the form of Standard Practice Circulars, a complete set of which will be furnished to all officers and employees concerned therewith. Where Standard Practice Books, or circulars, differ from General Instructions as covered in these rules, the Standard Practice authority will govern.

Many of the rules are directed specifically to roadmasters, master carpenters, signal supervisors, and the supervisor of lines and equipment. Although, as argued, the rules do not disclose the recognition accorded the men in these groups as officers, they nevertheless constitute the respondent's determination of their status. It does not follow that an employee is an official of a carrier because he may have weighty responsibilities in connection with his work. Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. *Regulations Concerning Employees Under Ry. Labor Act*, 266 I. C. C. 85.

The roadmasters, master carpenters, signal supervisors, and the supervisor of lines and equipment are indisputably in the service of the respondent, subject to its continuing authority to supervise and direct the manner of rendition of their services, and each class is below the grade of division superintendent.

We find that the orders of the Commission now in effect defining and classifying the work of employees or subordinate officials of common carriers by railroad, include the work of the respondent's roadmasters and others herein considered. No order is necessary.

CHAIRMAN ALLDREDGE concurs in the conclusions of the report except as to roadmasters. He does not regard the latter group as coming within the classification of employees and subordinate officials.

COMMISSIONERS JOHNSON, MITCHELL, and KNUDSON dissent.

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UP-48

Surface Transportation Board (S.T.B.)

**1 HASKELL H. BELL
v.
WESTERN MARYLAND RAILWAY COMPANY

Decided December 30, 1981

The Commission has only limited jurisdiction to entertain complaints concerning violation of employee protective conditions when it has prescribed arbitration as a means of resolving disputes.

FINANCE DOCKET NO. 23178 (SUB-NO. 2)
*64 Charles A. Spitulnik for petitioner.
Joseph B. Geyer and Peter J. Shudtz for Western Maryland Railway Company, respondent.
DECISION

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

BY THE COMMISSION:

INTRODUCTION

On June 6, 1979, Haskell H. Bell, an employee of the Western Maryland Railway Company (WM), filed a complaint alleging that WM violated employee protection conditions imposed in Chesapeake & O. Ry. Co.--Control--Western Maryland Ry. Co., 328 I.C.C. 684 (1967) (WM Control). Mr. Bell contends that WM's actions caused him to lose his job and suffer a loss of compensation.

On August 18, 1980, the Commission, Review Board Number 5, dismissed Mr. Bell's complaint. The board found that because he was a management-level employee at the time the grounds for the complaint arose, he was apparently not subject to the Commission's protection. In addition, the board concluded that there was insufficient evidence to show that the alleged injury resulted directly from the control exercised by the Chesapeake & Ohio Railway Company (C&O) over the WM.

In a letter petition filed October 6, 1980, Mr. Bell appealed the board's decision. On November 18, 1980, WM filed a petition for an extension of time to file a reply to Bell's appeal and the reply. On March 5, 1981, and April 3, 1981, Mr. Bell filed a petition for leave to file a supplemental pleading along with the pleading. On April 24, 1981, WM filed a petition for an extension of time to file

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a reply to Mr. Bell's supplemental pleading and its reply.

*65 Since no objection was raised to any of the late-filed and supplemental pleadings they will be incorporated as part of the record.

POSITIONS OF THE PARTIES

Mr. Bell submits that the board erred in failing to find that he was an 'employee' within the meaning of 49 U.S.C. 11347, depriving him of the opportunity to present a claim of adverse affect and attendant damages to an arbitrator as permitted by the employee protective conditions. He contends that a Commission determination of his employee status is necessary before he can go to arbitration.

Mr. Bell argues that while the term 'employee' is not expressly defined in the Interstate Commerce Act, its definition in the Railway Labor Act, 45 U.S.C. 151 et seq., compels the conclusion that he is covered by the employee protective conditions. [FN1] Mr. Bell points to the series of Commission decisions in Ex Parte No. 72 (Sub-No. 1), Regulations Concerning Employees Under Ry. Labor Act. [FN2]

WM argues that proper interpretation of the Commission's decisions would not include petitioner within the group of protected employees. WM asserts that the statutory intent is to provide protection to union employees rather than management. It states that in WM Control, no party sought expansion of the labor protective conditions to any class of management personnel. WM believes that petitioner is attempting to expand the scope of the Commission's labor protection to a class of management personnel not previously covered.

**2 WM contends that any expansion of the established employee classifications may be accomplished only after notice and hearing in a rulemaking proceeding under Ex Parte No. 72 (Sub-No. 1). WM further argues that there is no basis for submitting petitioner's claim to arbitration since the protective conditions in WM Control only apply to union employees.

DISCUSSION AND CONCLUSIONS

The sole issue presented for our consideration in this proceeding is whether petitioner is an employee protected by the conditions imposed in WM Control. There are two ways to examine this issue. First, we can *66 examine our previous definitions of 'employee' and determine whether Mr. Bell fits into any of these existing classifications. Second, if petitioner does not fit into any of the existing definitions of 'employee,' we must decide whether it is appropriate to make ad hoc determination of his status.

Petitioner has pointed to a line of cases, noted above, in which we classified types of railroad employment as that of employees or of subordinate officials. These cases arose out of the obligation to classify employees imposed by the Railway Labor Act. This act governs the right of railroad employees to engage in

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collective bargaining and provides a mechanism for the prompt settlement of disputes. We are required to classify employees under this act for purposes related to employee representation, collective bargaining and jurisdiction of the National Mediation Board. Our power to classify employees under this act is limited, and does not extend to the classification of employees for the purpose of employee protection. See Hudson & M. R. Co. Employees--Railway Labor Act, 245 I.C.C. 415, 417 (1941); National Mediation Board, The Railway Labor Act at Fifty, (1976). Accordingly, none of the decisions in Ex Parte No. 72 (Sub-No. 1) relied upon by petitioner can be used to support a positive determination of his 'employee' status in this proceeding.

Similarly, our decisions under the Interstate Commerce Act do not resolve the question of petitioner's employee status. WM points to decisions where we have declined to order employee protection for supervisory, professional and executive personnel. E.g., Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 330 I.C.C. 780 (1967). In contrast with the issue before us here, these decisions represent our findings concerning the imposition of conditions in specific proceedings and provide guidelines for the carrier and its employees to use in negotiating implementing agreements.

The language in the decisions referred to does not provide a basis for classifying petitioner. There is no description of the criteria we should use to distinguish an executive or a professional from a laborer. Such distinctions are not always self-evident. The general terms that we find appropriate in imposing conditions are inadequate to use as a means of determining petitioner's employee status. Despite petitioner's allegations to the contrary, we have never specified the classes of employees covered by the protective conditions. We have consistently declined to precisely define 'employee' on the ground that once the protective conditions have been imposed, the matter is for interpretation by the courts. See New Orleans & Northeastern R. Co.--Control, 282 I.C.C. 819 (1953).

****3** Petitioner's argument that arbitration is unavailable unless we issue a decision on his employee status is novel and compels us to examine ***67** whether we can make such a determination. Once protective conditions have been imposed, our power of review is limited and possibly we may not retain jurisdiction to make the findings petitioner seeks.

In WM Control we imposed conditions protecting WM employees who might be adversely affected. Affected employees were afforded the benefit of the so-called New Orleans conditions as modified in the fringe benefit and arbitration provisions. [FN3] The conditions provided that all disputes requiring interpretation, application or enforcement of the provisions were to be resolved in accordance with the arbitration procedures set forth.

We recognize that Federal policy favors arbitration of labor disputes. Douglas Aircraft Co. v. N.L.R.B., 609 F. 2d 352 (9th Cir. 1979) and Lodges 700, 743, 1946, Intern. Ass'n. of Machinists and Aerospace Workers, AFL-CIO v. N.L.R.B., 525 F. 2d 237 (2d Cir. 1975). Arbitration is regarded as quasi-judicial, and by imposing arbitration we are establishing a procedure for settling differences in lieu of a Commission proceeding. Except where subsequent agreements between employees and a carrier may reduce the aggregate compensation guaranteed by the protective conditions, individuals having disputes regarding loss of compensation or

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employment are required to seek relief through arbitration. See Norfolk & Western R.R. v. Nemitz, 404 U.S. 37 (1971) and Leavens v. Burlington Northern, 348 I.C.C. 962 (1977).

We believe that this is an arbitrable dispute, and consequently we may not take any action in the matter. Mr. Bell's complaint against WM turns initially on the question of whether he was an employee. Since the conditions limit protection to employees of WM, the dispute requires interpretation of the term 'employee' and application of the term to the facts presented by Bell. This brings the dispute within the categories for which arbitration is the proper remedy.

Where we have specifically prescribed arbitration as the remedy for employee complaints, we no longer have authority to become involved in disputes between a railroad and individual parties arising out of the protective conditions. Pennsylvania R. Co.--Lease, 330 I.C.C. 503, 506-7 (1966). Recourse to the Commission is unnecessary, since any party in a dispute over protective conditions has an absolute right, binding on the other, to refer the dispute to arbitration. New Orleans & Northeastern R.R. v. Bozeman, 312 F. 2d 264, 266-8 (1963). Even the fact that Bell was not a union employee at the time the dispute arose does not affect this right to seek arbitration. Pennsylvania R. Co.--Merger--New York Central R. Co., 327 I.C.C. 475, 544 (1966) and Great Northern Pac.--Merger--Great Northern, 331 I.C.C. 228, 278 (1966).

****4 *68** Because the question of whether Mr. Bell's position was labor or management is a proper matter to be resolved at arbitration, and is therefore outside the scope of our jurisdiction, we will not consider the complaint.

Petitioner raises the contention that the board's findings on the issues of his employment status and the nexus between his complaint and the control transaction will prejudice his ability to seek relief under arbitration. The board's decision was based on a sparse factual background and was consequently not determinative on these issues. In light of our decision to uphold the board's decision to dismiss this complaint, a reversal of the board's findings is unwarranted.

It is ordered:

1. The complaint is dismissed.

2. This decision is effective on the date of service.

1 The Railway Labor Act defines the term 'employee' as follows: The term 'employee' as used herein includes every person in the service of a carrier subject to its continuing authority to supervise and direct the manners and rendition of his service, who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred on it to enter orders amending or interpreting such existing orders * * *

2 See unprinted decision of February 5, 1924, and decisions printed at 263 I.C.C. 607 (1945); 264 I.C.C. 239 (1945); 268 I.C.C. 55 (1947); 289 I.C.C. 19 (1955); and 328 I.C.C. 684 (1967).

3 Originally imposed in New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952).

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I.C.C.

366 I.C.C. 64, 1981 WL 22679 (I.C.C.)

END OF DOCUMENT

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NMD-14

ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

THOMAS M. CURLEY, CHARLES D. ERNST, KENNETH GROH,
MARTIN HOLLAND, TERRY MARTIN, WARREN RICHTER,
ROBERT SANFORD, and BILL TRAUTMAN, Claimants

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Carrier

Pursuant to Article IV of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000.

ARBITRATOR: DAVID H. BROWN, selected by the Parties

APPEARANCES: For the Carrier -

RICHARD E. JAUDES, ESQ.
Peper, Martin, Jensen, Maichel & Hetlage
720 Olive Street, 24th Floor
St. Louis, MO 63101

For the Claimants -

PAUL C. HETTERMAN, ESQ.
Gray & Ritter
1015 Locust Street, Suite 900
St. Louis, MO 63101

THE ISSUES

ISSUE NO. 1 Did Claimants waive their right to arbitration?

ISSUE NO. 2 Are Claimants "employees" within the meaning of New York Dock Conditions?

ISSUE NO. 3 If Claimants are employees within the meaning of New York Dock, are they "dismissed employees" under the terms of New York Dock?

ISSUE NO. 4 If Claimants are employees under New York Dock, although neither "dismissed employees" nor "displaced employees" as defined therein, are they nevertheless entitled to substantially the same levels of protection as were afforded to members of a labor organization through implementing agreements negotiated pursuant to the provisions of New York Dock such as Implementing Agreement No. 1 effective June 1, 1983?

ISSUE NO. 5 Are Claimants entitled to additional vacation benefits?

ISSUE NO. 1 (Re-stated)

DID THE CLAIMANTS WAIVE THEIR RIGHT TO ARBITRATION?

THE EVIDENCE

Litigation of the instant dispute commenced on April 16, 1984, when Claimants filed suit against Carrier in the Missouri Circuit Court for the City of St. Louis. Carrier filed a timely motion for removal of the case to the United States District Court for the Eastern District of Missouri, requesting that such court assume jurisdiction of the matter because the claim was based on alleged violations of New York Dock Condiditons. Carrier also filed an answer in which it argued that the case should be barred because Claimants had failed to exhaust their administrative remedy of arbitration.

Claimants vigorously resisted Carrier's efforts to remove the case to the United States District Court, arguing that their claim was based upon "a simple action for breach of contract".

On November 1, 1984, United States District Judge Steven Limbaugh ruled that Carrier's removal of the lawsuit was proper, holding that the instant claims are based on protective conditions imposed by the Interstate Commerce Commission under Finance Docket 30,000.

In the course of time, fairly extensive discovery proceedings were had, and Carrier filed a Motion for Summary Judgment based upon its claim that the redress of the involved grievances can only be had through arbitration. On November 21, 1984, Judge Limbaugh stayed the lawsuit pending arbitration, and on January 29, 1985, the parties entered into an Arbitration Procedure Agreement. The parties thereafter selected the undersigned as sole arbitrator of the dispute. Oral hearings before the undersigned were held in St. Louis on May 14, 1986, and February 12, 1987, and final briefs were submitted by both parties on April 6, 1987.

Article I, Section 11. Arbitration of disputes.--(a) of New York Dock protective conditions provides in pertinent part as follows:

> "In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix . . . within 20 days after the dispute arises, it may be referred by either party to an arbitration committee..."

POSITION OF THE CARRIER

Carrier argues that the arbitration remedy as just set out is compulsory and exclusive, citing Walsh v. United States, 723 F.2d 570 (7th Cir. 1983) and Swartz v. Norfolk & Western Railway Co., 589 F.Supp 743 (E.D. Mo. 1984). Language is quoted from the latter decision which, after referring to Eighth Circuit decisions involving similar

arbitration clauses to the "may" clause found in New York Dock Conditions, states as follows: "The chosen construction has been that the purpose of the 'may' language is to give the aggrieved party a choice--arbitration or abandonment of the claim."

Carrier relies heavily on the case of Reid Burton Construction, Inc. v. Carpenter's District Council of Southern Colorado, 614 F.2d 698 (10th Cir. 1980). Special references are made to the fact that Claimants "engaged in extensive pre-trial discovery" and persisted in pursuing their litigation in federal court after notice that the correct remedy is in arbitration.

POSITION OF THE CLAIMANTS

Claimants maintain that the filing of a breach of contract suit in state court could not waive any federal right. Claimants point out that at the time their suit was filed "no law, either federal or state, prohibited such action." They point out that Judge Limbaugh held, on November 1, 1984, that the action arose out of a railroad consolidation pursuant to the Interstate Commerce Act and therefore the federal court had original jurisdiction, that on November 8 Carrier filed its Motion for Summary Judgment based on the mandatory arbitration proceedings required under New York Dock and that on November 21, 1984, the parties entered into a consent order by which the lawsuit was stayed pending arbitration.

Claimants stressed the point that at the time they filed their lawsuit in the state court there was no federal law in the Eight Circuit establishing the mandatory nature of arbitration in cases such

as theirs and that it was not until July 17, 1984, that Judge Limbaugh handed down his decision in the Swartz case cited above.

Finally, Claimants emphasize the fact that prior to the entering of the consent order Carrier had at no time sought arbitration on its own behalf.

ANALYSIS AND OPINION

We concur with Carrier's view that arbitration of this dispute is mandatory. However, we find no basis for holding that Claimants have waived their right to arbitrate the dispute.

The Reid Burton case cited above involved facts which are not remotely analogous to those before us. From the record before us there is no reason to question the good faith of Claimants in seeking to litigate the matter in state court at the time such action was taken. Indeed the law was not settled at the time. Contrary to the factual situation which obtained in Reid Burton, we see no evidence that Claimants, at any time, were less than forthright with Court and Carrier.

Counsel for Carrier complains that Claimants improperly took advantage of discovery procedures available in federal court but not available in arbitration, contending that such conduct should be held to constitute a waiver of the right to pursue arbitration. In connection with this argument counsel cites the Reid case. The court in Reid offers no rationale in support of its comment but does cite a case on the point which leads to two other cases. The case cited is Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2nd Cir. 1968). In such

case the appellant had sought a stay pending arbitration some two years after the suit was filed. The court held that mere delay in seeking a stay would not constitute waiver in the absence of a showing of prejudice to a party, citing Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2nd 978 (2nd Cir. 1942). Kulukundis involved arbitration under a contract to arbitrate pursuant to the United States Arbitration Act, Title 9, U.S.C., legislation which encouraged arbitration in the maritime and commercial field.

Under the Act the arbitrators were "commercial men" whom we doubt were capable of overseeing discovery procedures in aid of the arbitral process. The abuse of such procedures was not involved in Kulukundis. The court did state that it might consider it improper for a plaintiff "to avail himself of provisional (court) remedies not available in aid of the arbitration" and then, after a long delay, seek a stay of court proceedings in order to pursue arbitration of the dispute.

The other case cited in Carcich is Graig Shipping Co. v. Midland Overseas Shipping Corp., 259 F.Supp 929 (S.D.N.Y. 1966), in which the court denied a motion to stay the proceedings pending arbitration after the plaintiff had brought suit in two federal courts and conducted substantial discovery procedures.

Our examination of these and other cases reveals no case where a court has held that a plaintiff had waived arbitration at the expense of a trial on the merits in any forum.

We further find no case where a court has held that arbitration was waived under circumstances akin to those under review herein.

Furthermore, relative to the use or abuse of judicial discovery procedures, we are of the opinion that an arbitrator under New York Dock has inherent power to authorize discovery in aid of arbitration. Certainly there is nothing in the record which would justify the denial of Claimants' right to arbitration under Section 11.

DECISION

We hold that the dispute before us is arbitrable.

ISSUE NO. 2 (Re-stated)

ARE THE CLAIMANTS "EMPLOYEES" WITHIN THE MEANING OF NEW YORK DOCK CONDITIONS?

THE EVIDENCE

Martin Leonard Holland, at the time his employment with MoPac was terminated on June 17, 1983, held the position of Director of Marketing, Lumber, Forest Products and Paper, drawing a salary of $57,600.00 per year.

At the time of the severance of his employment relationship with the carrier, Mr. Holland was five levels on the organizational chart below MoPac President R. G. Flannery. Mr. Holland reported to General Manager Marketing--Commodities B. J. Maeser, who reported to Assistant Vice President Marketing J. R. Colvin, who reported to Vice President--Marketing J. M. Ostrow, who reported to Senior Vice President--Marketing G. A. Craig, who reported to President Flannery.

Mr. Holland had commenced his employment with MoPac in 1962, beginning as a mail clerk and working in a total of 27 different jobs during his railroad career. In his position as a director of

marketing, Mr. Holland had three people who reported to him directly and ten reporting to him indirectly, including a secretary who worked for the entire group. The principal function of the group was to "make rate adjustments that hopefully would get us some business that produced a profit".

Unlike some of his superiors, Mr. Holland received no special benefits such as bonuses, country club memberships, company automobile or use of a company plane or business car. Nevertheless, Mr. Holland was said to be "totally responsible for marketing and revenues associated with lumber, forest products, paper and consumer goods" amounting to over $184 million per annum. His written job description included the following: (1) directing the operation of the annual Lumber, Forest Products, Paper and Consumer Goods Commodity Module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on a course of action essential to the achievement of revenue and profitability of objectivities; and (3) establishing priorities and measuring the result of the productivity of subordinates.

Upon his leaving the carrier, Mr. Holland commenced working for an insurance agency owned by his family. Mr. Holland testified that in his new employment he received none of the fringe benefits which he received with the railroad, and that he is making substantially less money.

However, before he left the carrier, Mr. Holland was offered a job in Omaha comparable with the one which he had in St. Louis. He refused

such offer because of family considerations and was then offered a better job in Omaha, paying $80 thousand per year with the prospect of an annual bonus amounting to $20 thousand. Again he opted for personal considerations and refused the offer. Mr. Holland's expertise is, and his experience has been, in the establishment of freight rates. In his last position with the railroad he had no authority to hire or fire employees but could recommend disciplinary action.

Charles Ernst, at the time of his leaving the employment of Carrier, was Director of Marketing Coal, Ores, Aggregates and Metals, being paid a salary of $55,080 per year. Mr. Ernst began his employment with MoPac in 1955 as a messenger. Ten years later he was promoted to his first supervisory position. As of the date of the hearing herein Mr. Ernst was fifty-five years of age.

In his position as a director of marketing with MoPac Mr. Ernst was at the same organizational level as Mr. Holland and in the same chain of command. And although his salary was slightly less than Mr. Holland's, he supervised eighteen people and was said to be responsible for nearly 600 million in revenue per year.

Like Mr. Holland, his chief responsibility was working out rates with respect to the commodities under his jurisdiction. Responsibilities covered in his job description included the following: (1) directing the operation of the coal and coke, ores, aggregates, and metals commodities module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on courses of action essential to the achievement of revenues and profitability

objectivities; and (3) establishing priorities and measuring results of the productivity of subordinates.

Mr. Ernst's group of nineteen people shared one full-time secretary and another employee who worked as a secretary for the group part of her time. His fringe benefits and "perks" were identical with those of Mr. Holland. He had no authority to hire or fire employees.

Mr. Ernst was offered a position in Omaha as Market Manager, Energy, with salary and benefits commensurate with those received in St. Louis. He declined the employment and elected to take a job as director of maintenance with his church, with a pay cut in excess of 50% and benefits not comparable with those which he received while in the employment of MoPac.

Thomas Curley, at the time he left the service of Carrier, was serving as Director of Marketing Services at a salary of $61,000 per year. Mr. Curley was at the same organizational level as Messrs. Holland and Ernst; however, he was in a different chain of command. Mr. Curley commenced work for MoPac in 1949 as a messenger/mail clerk. In 1960, he became Chief Clerk, occupying his first supervisory position. He was assigned revenue accountability for approximately $199 million in revenue per annum. Among his responsibilities as detailed in his job description were the following: (1) supervising 84 employees, 10 reporting directly and 74 indirectly; (2) staying abreast of swiftly changing activities brought on by increased competition as a result of deregulation; (3) analyzing and making decisions concerning

competitive forces; and (4) analyzing and making decisions concerning the restrictions on anti-trust immunity.

Mr. Curley testified that his time "was taken up mostly by handling rate bureau mergers, rate bureau agreements, bureau allocations deregulations, and things of that sort." His office accommodations, secretarial help, benefit, perks and authority were comparable to those afforded Holland and Ernst.

Mr. Ernst was offered a position in Omaha comparable to that which he occupied in St. Louis. However, he had four children at home with two of them in school. Rather than dislocate his family under such circumstances he, being just fifty-five years of age, elected to take early retirement which he did, effective July 15, 1983. He swore that it was not his intention to take early retirement until he was faced with the sole option of moving his family to Omaha.

Kenneth Groh was Manager, Marketing Lumber and Forest Products at a salary of $50,760 per annum when he left the service of Carrier on June 13, 1983. Mr. Groh's direct supervisor was Martin Holland. He confirmed Mr. Holland's testimony as to responsibilities, office facilities and help, benefits etc.

Mr. Groh commenced work for the carrier on July 24, 1943, as a messenger. He advanced to a supervisory position in 1960. As Manager of Marketing, Lumber and Forest Products, he had five people under his supervision. He was assigned responsibility relative to $88 million in revenue. This was a part of the $184 million placed in Mr. Holland's area of responsibility.

Mr. Groh had no authority to hire or fire anyone. For some time prior to the announcement of merger plans he had expressed a tentative plan to retire at age 60. He declined transfer to a comparable job in Omaha. At the time he had a son in college who was living at home and there were other family considerations which made a move to Omaha undesirable. Mr. Groh did retire and remains in such status.

Terry Martin was Assistant Manager of Market Development for Chemicals and Petroleum Products at the time he left the employment of MoPac. Carrier offers no argument relative to the status of Messrs. Richter, Sanford and Trautman.

POSITION OF THE CARRIER

The position of the carrier may be summarized as follows:

Claimants Martin Holland, Charles Ernest, Thomas Curley, Kenneth Groh and Terry Martin are not employees within the meaning of New York Dock because they were MoPac officials as opposed to rank and file employees or subordinate officials. While the Interstate Commerce Commission (I.C.C.) has not undertaken a definition of the term "employee" as it is used in Dock, nevertheless an examination of relevant statues, railroad history, and case law establishes that such term includes rank and file employees and subordinate officials but excludes officials such as the five named claimants. It is the carrier's position that the Commission, when it used the phrase "employees of the railroad who are not represented by a labor organization", was only extending the protection of New York Dock to

those employees and subordinate officials who are entitled to union representation but who are not represented, the work of such employees and subordinate officials having been defined by the I.C.C. pursuant to Section 1, Fifth, of the Railway Labor Act. Previous to the enactment of such Act the Commission had also defined "subordinate official" under the mandate of Congress in its enactment of the Transportation Act of 1920.

The Commission, when it used the phrase "employees of the railroad who are not represented by a labor organization" in Article IV of New York Dock Conditions, was using the term "employee" in the accepted Railroad Industry manner--to include only those rank and file employees and subordinate officials who are subject to and entitled to unionization but were not unionized. Carrier's position is supported by the following court decisions:

McDow v. Louisiana Southern Ry. Co., 219 F.2d 650 (5th Cir. 1955)

Edwards v. Southern Ry. Co., 219 F.2d 650 (5th Cir. 1955)

Zinger v. Blanchett, 549 F.2d 901 (3rd Cir. 1977)

Carrier further relies on the following arbitration awards:

Brotherhood of Railway Trainman v. Southern Pacific Co., (David R. Douglas, Arbitrator) decided April 1, 1968.

In the Matter of Arbitration between Dana R. Bond and Michael J. Topolosky and Union Pacific Railroad Co. (Lamonte Stallworth, Arbitrator) decided September 25, 1985

In the Matter of Arbitration between Gerald J. Huggins, Lindell B. Rudloff, Ervin J. Kloess and Eugene F. Moore and Norfolk and Western Railway Co. (Robert O. Harris, Arbitrator) decided November 26, 1985.

POSITION OF THE UNION

Claimants argue that both the case law and prior administrative and arbitral decisions establish a fact-sensitive standard which demands a case-by-case analysis. When such standard is applied and a case-by-case analysis made herein, the facts will fully justify a finding that each of the claimants was an employee of Carrier within the meaning of the New York Dock Conditions imposed by the I.C.C.

ANALYSIS AND OPINION

In its ordinary sense, the word "employee" simply means a person who works for another person or entity for compensation in wages or salary. In its broadest sense, the term applies to the chief executive officer of the corporate entity. The resolution of the particular issue now under consideration turns on a determination of the sense in which the term was employed in the New York Dock Conditions imposed by the Commission pursuant to legislation now codified as 49 United States Code, Section 11347, which reads in pertinent part as follows:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

The referenced section 11344 is entitled "Consolidation, merger*, and acquisition of control: general procedure and conditions of approval", and Section 11345 is entitled "Consolidation, merger, and acquisition of control: rail carrier procedure". No definition of "employee(s)" is found in sections 11344, 11345, 11347 or elsewhere in Chapter 113, Title 49, United States Code.

Section 405 of the Rail Passenger Service Act (45 U.S.C. 565) (Amtrak Act) contains the following language which we deem relevant:

> § 565. Protective arrangements for employees
>
> (a) Duty of railroads; discontinuance of intercity rail passenger service. A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by discontinuances of intercity rail passenger service whether occurring before, on, or after January 1, 1975.
>
> * * * *
>
> (b) Substantive requirements for protection. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise;
>
> * * * *
>
> (3) the protection of such individual employees against a worsening of their positions with respect to their employment.
>
> * * * *
>
> (f) "railroad employee" defined.
>
> * * * *
>
> As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or

*For the sake of convenience we sometimes use this term in lieu of one or more of the three.

terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

We conclude that the definition of the term "railroad employee" pertains only to subsection (f) and therefore that it gives us no meaningful insight into the intent of Congress. No other definition of employee is set out in the Amtrak Act.

For those of us involved in railroad labor relations the homing beacon is generally the Railway Labor Act, 45 U.S.C. Chapter 8. Paragraph Fifth of Section 151 defines "employee" for the purposes of the Act, as follows:

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Our instinctive reliance on the Railway Labor Act is especially apparent in the arguments made herein on behalf of Carrier and in two of the three arbitral awards relied on by Carrier. We now consider all three of such awards.

Award No. 51 of Arbitration Committee, ICC F. D. NO. 23011, (David R. Douglass, Referee) predates New York Dock and contains insufficient explanation of its holding to provide meaningful precedent relative to the instant dispute.

Bond and Topolsky v. Union Pacific Railroad Company (hereinafter Bond) held that the U.P. Assistant Controller--Accounting Operations and its Manager.Personnel Accounting were not "employees" subject to New York Dock at the time of their termination from service. We examine langage from the award which justifies its holding.

> In the Committee's opinion Section 1, Fifth offers guidance as to the scope of the unionization and the term "employee" as including rank and file employees and subordinate officials. It is worth noting that the framers of Section 1, Fifth used the term "subordinate official" but excluded the term "official" of the carrier. On this point, the Carrier contends that when the ICC used the phrase "employees of the railroad who are not represented by a labor organization" it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term "employee" supports this contention. See, e. g. Harry Lustgarten Principles of Railroad and Airline Labor Law (Omaha: Rail Publications) pp. 29-32 and Ernest Dale and Robert L. Raimon: Management Unionism and Public Policy on the Railroads and Airlines" (Industrial and Labor Relations Review, Vol. II, No. 4, July, 1985).

It should be remembered that in the Railway Labor Act the Congress did not in any way or manner address the subject of what protective conditions for employees would be appropriate to redress the adversity which would be imposed on some employees through the merger or consolidation of the operations of two or more rail carriers. Dictionaries present words in their multiple meanings. And so it is that Congress in its legislation uses a single word in multiple senses,

usually defining, in each piece of legislation, the word as it is to be understood therein. When no definition is given, it is generally taken to mean that the word is to be interpreted in its general sense. We think it significant that in searching many dictionaries we have discovered only one which offers more than one simple definition of the word "employee".

Railroads have played a most vital role in the development of the resources of our nation. Because of their importances to our economic growth and national defense they were granted subsidies and made subject to regulation. The same two factors have motivated Congress over a period of many years to pass legislation designed to promote harmony between railroad management and labor, thus avoiding crippling work stoppages and industrial strife. The goal was substantially achieved in 1926 with the adoption of the Railway Labor Act. The two forces of industry, labor and management, were harnessed.

For the purpose of this discourse we need give attention to only two of the stated purposes of the Railway Labor Act as found in its Section 151a: "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter". Only these two subsections (and the definition quoted above) mention "employees".

It is apparent that the intent of the Railway Labor Act was to draw a line of demarcation between management and labor so as to give full recognition to the right of employees to bargain collectively with their employer, while recognizing the right of proprietorship of the employer carrier to the extent necessary to preserve its fundamental right to manage its workforce. Such latter right cannot be maintained unless the managerial cadre is big enough to insure that the paramount interest of the proprietor will not be entrusted to people with divided loyalties.

The considerations bearing on the drawing of this line of demarcation are quite different from those relevant to the issue of which employees of a carrier should be protected from adverse effects on their employment status brought about by consolidation, merger, and/or acquisition of control of rail interests. The Congress that wrote the Railway Labor Act was a different Congress addressing totally different concerns from those addressed by the Congress which passed that legislation codified as 49 United States Code, Section 11347; and it should be kept in mind that the essence of our charge is to give effect to the will and intent of Congress in Section 11347, particularly as relayed to us by the Interstate Commerce Commission. This conviction is re-enforced by a diligent study of all I.C.C. decisions having any relevancy to the issue. Such decisions span a long period of time and reflect a consistent policy, of a Commission of changing membership, to faithfully carry out the will of Congress without legislative mutation.

We strongly disagree with the conclusion of the arbitral committee in Bond quoted above. Such paragraph is the basis of the committee's decision. Let us examine the language:

> "In the Committee's opinion Section 1 Fifth offers guidance as to the scope of unionization and the term 'employee' as including rank and file employees and subordinate officials."

Section 1 Fifth (codified in U.S.C.A. as Section 151, Fifth) of the Railway Labor Act was not intended to provide a generic definition of an employee in the railroad business or otherwise. Its purpose was simply to limit the class of employees subject to unionization, including, however, specifically such subordinate officials as should be declared eligible by definition of the Interstate Commerce Commission. It simply cannot be said that in either 1926 or 1934 or at any time since, Congress, in framing the Railway Labor Act, has attempted to "offer guidance" on the issue as to who are "employees" under New York Dock.

> "It is worth noting that the framers of Section 1, Fifth used the term 'subordinate official' but excluded the term 'official' of the carrier."

We do not deem the stated fact to be noteworthy. Had the framers provided for the unionization of officials then the Railway Labor Act would have been stillborn.

From this foundation of speciousness the committee proceeds:

> "On this point, the Carrier contends that when the ICC used the phrase 'employees of the railroad who are not represented by a labor organization' it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term 'employee' supports this contention."

At this point the arbitral committee cites the writings of Harry Lustgarten and Dale and Raimon cited above. We have searched the cited works in vain for support of the stated thesis. Industry use of the term "employee" relates in the main to the administration and effect of the Railway Labor Act. However, it is significant that industry discussions of protective conditions for redress of adverse effects of merger frequently use specific language to embrace consideration of "all employees". (Emphasis ours)

The reference to Harry Lustgarten's Principles of Railroad and Airline Labor Law cites pages 29 through 32. On such pages a single topic is discussed: "Employees Subject to Union Organization and Representation." The syllabus reads as follows:

> "As a result of the definition of the word 'employee' in Section 1, Fifth, union organization and representation rights include not only ordinary employees but also extends to 'subordinate officials'. The Interstate Commerce Commission, which is authorized to make the determination of what employees are included in these classifications, has been rather indefinite but has tended to draw a line between 'subordinate officials' and officers rather high into the supervisory levels."

Nowhere on the referenced pages does Mr. Lustgarten address the subject of the definition of "employees" as the term relates to employee protection.

Management Unionization and Public Policy on the Railroads and the Airlines by Ernest Dale and Robert L. Raimon is not remotely concerned with the definition of "employees" under New York Dock or other provisions for employee protection. The principal theses of the article are the voracious appetite of the National Mediation Board for expansion of the definition of subordinate officials, the continuing

tendency of the Interstate Commerce Commission to satisfy the Board's hunger, and the plight of the carriers in dealing with the trend. The cited commentary provides no help in the resolution of the instant dispute.

We now turn to the court decisions cited in the Bond opinion. McDow v. Louisiana Southern Railway Co., 219 F2d 650 (1955), decided by the Fifth Circuit Court of Appeals, held that the question of whether a former vice-president of the Louisiana Southern Railway Company was an "employee" entitled to employment protections afforded by I.C.C.-imposed employee protective conditions, should not have been decided by the district court, which had concluded that "a study of the legislative history of (Section 5 (2) of the Interstate Commerce Act) leaves no doubt that the term 'employee' as used therein does not include the vice president and general manager of a railroad." No specific reference is made relative to the legislative hearings. A specific reference to such hearings is made in the Huggins opinion hereafter discussed.

Edwards v. Southern Railway Co., 376 F2nd 665 (1967) involved the Oklahoma conditions for employee protection. Edwards was a stockholder, and an employee (Chief Engineer), of a small family-owned railroad of which his father was the chairman and chief executive officer. The Fourth Circuit Court of Appeals held that he was not an employee covered by the Oklahoma conditions. The most significant language in the opinion, we think, is the following:

> "We believe, however, that 'employees' as used in the present context by Congress and the I.C.C. surely does not include the

principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidation." (emphasis supplied)

In this language, we believe, the court exposed what should be, at least, the justification for protective conditions: to protect railroad employees whose position with the company is such that it will not empower them to protect themselves. And we believe that such purpose should far transcend the issue of union membership. The Railway Labor Act is a stranger to this consideration.

This understanding of the purpose of employee protective conditions was endorsed to a degree in the case of Newbourne v. Grand Trunk Western Railroad Co., 758 F2nd 193 (1985) in which the Court of Appeals for the Sixth Circuit held that Newbourne, a former supervisor on the DT & I who reported directly to a vice-president, was not an employee under Section 11347. The court enumerated seven factors used by the district court in its arrival at the same conclusion. The judges were impressed by the fact that Newbourne possessed skills which were "transferable", citing the fact that during 21 of the 30 years of his career he had been employed outside of the railroad industry. Thus the court felt that Newbourne could "take care of himself". While we appreciate the court making a distinction between employees who can take care of themselves and those who cannot, we think that resort to "transferable skills" should not be required of a career railroad man, even one with only nine years of service. The elusive nature of such insurance is demonstrated by the fact that within two years after his

termination, Newbourne, who earned $43,220 with the railroad, was earning approximately $9,000 per year.

Zinger v. Blanchette, 549 F2nd 901 (1977) is not helpful because it provides no definitive ruling on the issue of whether or not Mr. Zinger was an employee eligible for protection, the case being decided on other grounds.

Strong reliance on federal court decisions in the Bond award is subject to serious question. Surely the Congress as well as the Supreme Court has made it plain that it is in the arbitral forum that these disputes should be resolved. It would therefore appear that knowledgeable railroad arbitrators should be able to adjudicate the disputes independent of putative precedential constraints of random fallout resulting from the straying by the disputants into the judicial arena. Yet, to be sure, some court decisions may be educational in providing us with ratiocination helpful in getting to the heart of the matter. The same applies to I.C.C. decisions.

Most instructive, we believe, is the following language of the Interstate Commerce Commission in its decision in Leavens v. Northern Burlington, 348 I.C.C. Reports 962, 975:

> "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized. However, there would have been no conditions had there been no merger. The conditions were adopted to protect affected employees from harm that would be caused by the merger. Our review should be limited to those matters that either result from the merger or which claim violation of a specific condition that was intended to protect against a specific merger-related harm. Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we required for adversely affected employees.

"However, in dealing with these protective conditions, the Commission is faced with a special problem--defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is provided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. (Emphasis ours) This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations. Burlington Truck Lines v. U.S. 371 U.S. 156 (1962); Overnite Transp. Co.--Pur.--Rutherford Freight Lines."

The significance of the quoted language is quite obvious. Of singular interest and instructional benefit is the Commission's declaration that matters such as those before us are deferred to the jurisdiction of arbitrators in order that those "most familiar with the complexities of labor law and the peculiar problems associated with the railroad employees (may) determine disputes arising out of (protective) conditions." Obviously, those not familiar with the complexities of labor law and the peculiar problems associated with railroad employees are without that expert competence which the Interstate Commerce Commission itself disclaims. In our extensive study of I.C.C. opinions we are greatly impressed with the Commission's profound understanding of its charter and the careful restraint it has exercised in its avoidance of infringement on the province of Congress, courts, and arbitral forums, which it has referred to as "quasi- judicial." Thus, in Leavens, the Commission affirms its resolve not to "contravene" the national policy as to labor relations: that is, not to make decisions on matters which are within the realm of arbitral jurisdiction.

It is for this reason that we should not expect I.C.C. decisions to provide precedent for the resolution of the issues before us. And indeed the search for authoritative precedent in I.C.C. decisions is no more proper than looking to the courts to decide the issue for us. It is ironic that the pivotal consideration in the decision of the arbitral board in Huggins, et al v. Norfolk and Western Railway Co. (1985) is the case of Haskell H. Bell v. Western Maryland Railway Co., 366 I.C.C. Reports 64..

Mr. Bell, an employee of Western Maryland Railway Company, lost his job after the Chessie swallowed the WM. He filed a complaint with the I.C.C. alleging that the C&O had violated provisions of the so-called New Orleans conditions imposed by the Commission in WM Control. The matter was routinely referred to the Commission's Review Board Number 5. After hearing, the review board found that "because he was a management-level employee at the time the grounds for the complaint arose, he was apparently not subject to the Commission's protection." The board's decision was appealed to the Commission, and the Commission's decision is illuminative of several of the issues directly involved herein. Basically, Mr. Bell presented two arguments in support of his complaint. We shall discuss such arguments in reverse order to that followed in the I.C.C. opinion. We describe the arguments in the language of the Commission:

> "Mr. Bell argues that while the term "employee" is not expressly defined in the Interstate Commerce Act, its definition in the Railway Labor Act, 45 U.S.C. 151 et seq., compels the conclusion that he is covered by the employee protective conditions. Mr. Bell points to the series of Commission decisions in Ex Parte No.

72 (Sub-No. 1), Regulations Concerning Employees Under Ry. Labor Act."

While in its opinion the Commission does not reveal Mr. Bell's title or describe his duties and responsibilities, it is quite obvious that Bell and his attorneys believed that his position would fit the job description of one of the classes of subordinate officials which the Commission had declared eligible for union representation in one of its Ex Parte 72 decisions. This is most interesting, since in recent cases the carriers have usually taken the position that eligibility for coverage under New York Dock should be limited to employees (including subordinate officials) as defined by the Commission (in Ex Parte 72 proceedings) pursuant to the mandate found in the Railway Labor Act. And in Bell, the Western Maryland based its defense upon argument that Mr. Bell was improperly seeking to expand the group of protected employees and that such expansion could be accomplished "only after notice and hearing in a rule-making proceeding under Ex Parte No. 72 (Sub-No. 1)".

The Commission addressed this issue in succinct language which should serve to dispel the notion that definition of the term "employee" for the purposes of the Railway Labor Act is either controlling or significantly meaningful as relates to the determination of the meaning of the term under Section 11347. The Bell opinion states, page 66,

> "Our power to classify employees under (Railway Labor Act) is limited, and does not extend to the classification of employees for the purpose of employee protection. See Hudson & M. R. Co. Employees--Railway Labor Act, 245 I.C.C. 415, 417 (1941); National Mediation Board, The Railway Labor Act at Fifty, (1976).

> Accordingly, none of the decisions in Ex Parte No. 72 (Sub-No. 1) relied upon by petitioner can be used to support a positive determination of his 'employee' status in this proceeding."

Again we advert to the Huggins--N&W arbitration award relied on by carrier, drawing attention to language found on page 17 of the opinion. It is stated: "The I.C.C. has never taken a broad view of the term 'employee'." The award goes on to state,: "But the I.C.C. clearly differentiated between 'labor' and 'management' in (Bell)." The decision refers to language from the review board's decision, using such language as authority in its determination of the issue of whether or not Bell was an employee covered by the New Orleans conditions. However, it is clear that the Commission in no way affirmed any language of the inferior board touching on the merits of the case. Having explained that its Ex Parte 72 decisions were strictly for purposes related to employee representation, collective bargaining and jurisdiction of the National Mediation Board and not intended for purposes of employee protection and having disavowed its intent, competence and jurisdiction to resolve issues such as that before us, the Commission made the following observations: "We believe that this is an arbitral decision, and consequently we may not take any action in the matter....Because the question of whether Mr. Bell's position was labor or management is a proper matter to be resolved at arbitration, and is therefore outside the scope of our jurisdiction, we will not consider the complaint."

The Interstate Commerce has clearly ruled, therefore, that it has no jurisdiction to decide whether or not the claimants in cases such as

that before us are employees covered by the protective conditions of New York Dock. It is patently not appropriate to determine their status on the basis of illusory definitions envisioned in I.C.C. decisions.

As aforenoted, the Interstate Commerce Commission has scrupulously observed the constraints of its organic legislation, recognizing that its duty is to enforce the will of the Congress. It behooves us to do exactly the same, for in spite of the fact that Section 11347 has its roots in the Washington Job Protection Agreement, the legislation must necessarily be viewed in light of the general welfare and not within the narrow interest of railroad owners and labor unions. We find no arcane language in Section 11347 or in New York Dock. Neither do we attach significance to legislative history exposing the presence of partisans at the creation. The following is abstracted from the opinion in Huggins et al v. Union Pacific:

> "(I)n 1936 the carriers and the representatives of the organized employees entered into an agreement which has become known as the Washington Job Protection Agreement. That agreement is the direct linear predecessor of the New York Dock II conditions under which Claimants seek protection. However, notwithstanding that Agreement, an attempt was made to get further legislation from Congress, which would allow greater flexibility on the part of the ICC in allowing consolidations and mergers. The hearings which formed the basis for the subsequent legislation included testimony by George M. Harrison, the President of the Clerks Union, recommending that there be 'fair and reasonable protection for the rights and interests of the workers that may be adversely affected' by any merger. In response to a question regarding the possibility of protection for management itself, since they might also be affected, Mr. Harrison noted:
>
> > Most of our supervisory and management staff members have been promoted from the ranks. They retain their rights to the classified service while they are so occupied, and, should they discontinue a position of one of those persons,

> they would then slide back or go back, I should say, to the classified service. (Report of the Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Congress, 1st Session, at page 245 (1939).
>
> In other words, union labor was suggesting to Congress that management at a level above subordinate officials was not in need of the type of job protection that was suggested by Section 5 (2) (f) of the Interstate Commerce Act, as amended (49 U.S.C. 11347).
>
> There was the additional implication that the Washington Job Protection Agreement was intended to cover management at a level above subordinate officials since such management officials would most probably have the ability to bump down to lower level jobs if need be."

We again stress that the federal legislation which brings us together in this case was by no means a mere ratification of the Washington Job Protection agreement. An old adage is as follows: "Whose bread I eat, his song I sing." To be sure, President Harrison was singing the song of the Clerks' union when he gave the quoted testimony. And indeed it would be in the interest of the Clerks' union if the protective conditions were restricted to union members. Mention is made of the fact that management officials could "bump down" in order to avail themselves of protection. But if someone is forced to bump down because of a merger, has he not thereby been adversely affected by such merger?

In the final analysis our lengthy research has not revealed, in either legislation affecting railroads and their employees, or in decisions of the Interstate Commerce Commission, any language which would indicate that it was the intent of Congress to deny to claimants the benefit of New York Dock protective conditions. In 21 years as a railroad arbitrator the undersigned has been privileged to observe the

effects of numerous mergers. To contend that only subordinate officials and other employees eligible for unionization will suffer adverse effects from a merger is to ignore reality.

On three, and only three, occasions, the Congress of the United States has definitively addressed the question of what employees should be covered by protective conditions imposed for the purpose of minimizing the adverse effects resulting from reduction of jobs in the railroad industry. Actually, Congress has found it easier to simply exclude certain classes of employees while affording broad coverage for the remainder. Let us examine the legislation.

On November 4, 1979, Congress passed the Milwaukee Railroad Restructuring Act (now Title 45, Chapter 18, Sections 901 et seq). Section 908 made provision for negotiations between the Milwaukee Road and labor organizations representing the employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad (conditions quite similar to those resulting from mergers, control or consoildations). Section 907 made provision for preferential hiring for <u>all</u> employees separated or furloughed from the Milwaukee (other than for cause) prior to April 1, 1984, and Section 909 provided for <u>supplementary</u> unemployment insurance for <u>all</u> employees affected by reduction in service. (all underlining supplied) And Section 902 (4) states:

"..the term 'employee' -

"(A) includes any employee of the Milwaukee Railroad who worked on a line of such railroad the sale of which became effective on October 1, 1979; but

"(B) does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions;"

Pursuant to Section 908, negotiations between the Milwaukee and the labor representatives of its employees took place. The result was adoption of New York Dock Protective Conditions in an instrument identified as Appendix B. Most significantly, Milwaukee management then made the terms of Appendix B applicable to all non-agreement employees except those excluded by Section 902 (4)(A).

On May 30, 1980, the Congress passed the Rock Island Railroad Transition and Employee Assistance Act (now Title 45, Chapter 19, Sections 1001 et seq).

Section 1001 cited a need for adequate protection provisions to insure uninterrupted continuation of services over Rock Island lines and avoid serious repercussions on the economies of the states served by the railroad. Section 1002 included the following among its "Definitions":

"(4) 'employee' includes any employee of the Rock Island Railroad as of August 1, 1979, but does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions;"

Section 1005 imposed on the Secretary of Transportation and "the representatives of the various classess and crafts of employees" (not "labor organizations" as in the Milwaukee conditions) responsibility for negotiating protective conditions, with proviso that if they were

unable to reach agreement, the Secretary would unilaterally prescribe such conditions.

On October 14, 1980, the Staggers Rail Act of 1980, Public Lae 96-448 was enacted. Section 219(g) states:

> "The Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendmentsmade by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to Section 11347 of Title 49, United State Code. For purposes of this subsection, the term 'employees' does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions."

From the foregoing it is evident that each time the Congress has made provision for protective conditions for employees adversely affected by circumstances or events other than mergers, Congress has extended eligibility to all employees below the rank of vice president. The drawing of this line of demarcation is consistent with the philosophy that the protection is due only to those employees who have had little if any control over developments which precipitated the need for protection. It will be remembered that this thinking was advanced by the U. S. Circuit Court of Appeals in Edwards v. Southern Railway, supra.

This doctrine is also consistent with the definition of "employee" found in the unabridged Webster's Third New International Dictionary (G. & C. Merriam Co.), reading as follows: "One employed by another, usually in a position below the executive level and usually for wages". (Emphasis supplied)

SUMMARY OF RATIONALE

We summarize the reasons for our holding on this issue:

1. We believe that while all of the congressional legislation reflects an intent to cover a broad range of employees with protection against the adverse effect of mergers, none of such legislation indicates an intent to exclude from protection employees at the level of these claimants. None of the claimants had the power to affect the merger of MP-UP-WP nor the influence to cushion its impact. Claimants were not really executives of MoPac, and in spite of the large sums of income for which they were nominally responsible, we would venture to say that none of their names was ever mentioned in the company's annual report to its stockholders.

2. The use of the definition "employee" found in the Railway Labor Act is insupportable. Such act has no relevancy insofar as the scope of employee protective conditions is concerned. The fact that the Interstate Commerce Commission Act authorizes the NMB to appoint arbitrators is likewise not relevant to the issue before us.

3. The court cases and arbitral awards relied on by the carrier have been carefully considered. We are unable to recognize them as authoritative precedent.

4. We believe our decision is consistent with the authority delegated us by the Interstate Commerce Commission and with the Commission's consistent adherence to what it perceives to be the intent of Congress.

DECISION

We hold that each of the claimants was an employee of MoPac within the meaning of New York Dock conditions.

ISSUE NO. 3 (Re-stated)

IF THE CLAIMANTS ARE EMPLOYEES WITHIN THE MEANING OF NEW YORK DOCK, ARE THEY "DISMISSED EMPLOYEES" UNDER THE TERMS OF NEW YORK DOCK?

ANALYSIS AND OPINION

Since each of the claimants was offered a position in Omaha comparable to that which he occupied in St. Louis, none of the claimants is a dismissed employee under the definition set forth in New York Dock conditions.

DECISION

The claimants are not "dismissed employees" under the terms of New York Dock.

ISSUE NO. 4 (Re-stated)

IF CLAIMANTS ARE EMPLOYEES UNDER NEW YORK DOCK, ALTHOUGH NEITHER "DISMISSED EMPLOYEES" NOR "DISPLACED EMPLOYEES" AS DEFINED THEREIN, ARE THEY NEVERTHELESS ENTITLED TO SUBSTANTIALLY THE SAME LEVELS OF PROTECTION AS WERE AFFORDED TO MEMBERS OF A LABOR ORGANIZATION THROUGH IMPLEMENTING AGREEMENTS NEGOTIATED PURSUANT TO THE PROVISIONS OF NEW YORK DOCK SUCH AS IMPLEMENTING AGREEMENT NO. 1 EFFECTIVE JUNE 1, 1983?

BACKGROUND

This issue involves the interpretation of Article IV of New York Dock conditions which reads in pertinent part as follows:

> "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."

This would not appear to be an ambiguous provision. The aura of ambiguity is generated by arguments encouraged by arbitral awards which have held that a considerable number of railroad employees are simply not employees.

We have already concluded that claimants were indeed employees of MoPac subject to the protective conditions of New York Dock.

Pursuant to the provisions of New York Dock, the BRAC and carrier entered into Implementing Agreement No. 1 effective June 1, 1983. Upon termination, each of the claimants sought to take advantage of one of the provisions of such agreement. The issue is whether or not such agreement inured to the benefit of the claimants.

POSITION OF THE CARRIER

In support of its argument that claimants are not eligible for any of the benefits accruing to employees under Implementing Agreement No. 1, counsel for Carrier cites a recent arbitration award authored by Neutral Robert M. O'Brien and being styled Benham & Delaware & Hudson Ry. Co. It is the further position of the carrier that the position of the claimants is contrary to public policy. The adoption of such position, it is urged, would pose a serious threat to industrial peace in the railroad industry and create an administrative nightmare.

Carrier argues that the claimants cannot receive the benefits contained in Implementing Agreement No. 1 because they are neither "dismissed employees" nor "displaced employees" under New York Dock. It is argued that New York Dock is designed to "guarantee only minimal protection" to eligible employees. The company further cites

Burlington Northern-St.L. & S.F. Ry. Co.-Control, 360 I.C.C. Reports 788, as authority that "there is no requirement that all employees be treated substantially the same in the event of a merger or control".

Finally, counsel argues that Option 3 in Implementing Agreement No. 1 is not derived from New York Dock but from the February 7, 1965, National Agreement, an agreement having no application to non-agreement employees.

POSITION OF THE UNION

Claimants contest each of the points made by Carrier, pointing out that New York Dock simply establishes minimum protective benefits, that employees are entitled to negotiate more favorable conditions than those in Dock, and that the language of Article IV plainly says that non-agreement employees are to be treated substantially the same as agreement employees.

ANALYSIS AND OPINION

The crux of the holding in Benham is an affirmance of the arbitral awards rejected by us in our discussion under Issue No. 2. For the reasons set forth in such discussion we likewise reject Benham as authentic precedent.

Carrier's position that relief under Dock is limited to employees who are dismissed or displaced as contemplated by Dock Article I, Sections 1.(b) and 1.(c) ignores Article IV. It ignores the fact that the skeletal provisions of Dock constitute simply the minimum protections for employees adversely affected by a merger. It also ignores the effect of Article 1, Section 4, of Dock providing for

negotiation or settlement by arbitration of matter relating to displacement or dismissal of any employees, or re-arrangement of forces.

Adverting to the BN-Frisco-Control decision, we consider Carrier's argument that such holding is authority that "there is no requirement that all employees be treated substantially the same in the event of a merger". As background to consideration of BN-Frisco we quote the following language from the Interstate Commerce Commission in a prior case cited in BN-Frisco. The case is Norfolk & W. Ry. Co. and New York, C. & St.L. R. Co. Merger, 324 I.C.C. Reports 1, 50, and the relevant language reads as follows:

> "Employee conditions.-As previously stated herein and in appendix A, various agreements have been reached between employee representatives and the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. For the benefit of employees not covered by such agreements, the hearing examiner recommended the imposition of protective conditions similar to those imposed in Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177. However, it has been our experience in proceedings of this nature that more adequate protection is afforded by the conditions prescribed in Southern Ry. Co.-Control-Central of Georgia Ry. Co., 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees not covered by the agreements and adversely affected by the transactions."

Appendix A referred to in the foregoing quotation recited that prior to the I.C.C.'s decision the N & W had entered into an agreement with 19 of the principal labor organizations.

The relevant language from BN-Frisco-Control is as follows:

> "Employee protection.-Since we have decided to approve the merger, we must consider the interest of, and provide protection

for, carrier employees. We must determine first, what level of protection should be provided, and second, which employees should be protected.

"This merger will provide a long-term benefit to employees of BN and Frisco by increasing the number of positions on the merged system. The applicants acknowledge that there will be short-term dislocations on their system. We must protect employees from these dislocations. Three alternative protective conditions which we might impose are: the standard protective conditions; these minimum standards, with the amendments requested by RLEA (set out in appendix K); or the protection which BN and Frisco have negotiated with three other labor unions.

"In the past we have imposed differing levels of employee protection for employees who reached an agreement for protection and those who did not. We believe that this proceeding is also an appropriate place to bifurcate the levels of employee protection. Those parties who have negotiated agreements will be provided with that level of protection. Those who have not will be accorded the statutory standard....

"In this case there is no basis for us to exercise our discretion and require a greater degree of employee protection than the statutory minimum....

"The New York Dock conditions are significantly more protective of railroad labor than any previously imposed single set of employee protective conditions. The New York Dock conditions satisfy the employee protection mandated by the statute. They will be imposed for the protection of employees who do not enter into a protective agreement with BN and Frisco prior to consummation of the merger.

"We next turn to the agreements which were negotiated with the Brotherhood of Railroad Signalmen (BRS), Sheet Metal Workers International Association (SMWIA), International Association of Machinists and Aerospace Workers (IAMAW), and Brotherhood of Locomotive Engineers (BLE). These agreements are more protective than the New York Dock conditions and protect not only employees of BN and Frisco but also their wholly owned subsidiaries. The protective period is the same as in New York Dock or in the alternative, the period equal to length of service at the date of merger, with the protective period starting on the date of merger but no benefits to accrue until the employee is affected due to the merger. The displacement allowance is subject to a 6-year minimum.

"For BLE the displacement allowance is a monthly allowance computed by dividing earnings from the last 12 months by the

number of calendar days in the 12 months and multiplying that daily rate by the number of calendar days in the current month. These rates are to be adjusted for general wage increases, and reduced by any changes in laws or agreements which limit availability for work. Dismissal allowances are to be computed in the same manner. However, they are reduced by outside earnings, unemployment compensation, opportunities for available comparable work, and any period the employee would have been furloughed due to emergency conditions.

"The BRS, SMWIA, and IAMAW agreements also compute wages on the basis of the prior 12 months, unless the employee has worked for less than 12 months.

"The employee has the option of electing separation pay 30 days after furlough instead of 7 days provided in New York Dock.

"There are other modifications to the New York Dock conditions which we have reviewed and found to be fair and equitable to the employees and at least as protective as arrangements required by 49 U.S.C. 11347.

"After analyzing these agreements, we are convinced that the interest of carrier employees covered thereby will be adequately and fairly protected by the terms of the agreements, and we find that the agreements do not render the proposed transaction inconsistent with the public interest. When we adopt a labor agreement, we impose it as a condition to our approval of the transaction. We emphasize that these protective agreements shall apply only to those organizations which enter into such agreements with BN and Frisco prior to consummation of the merger...."

Section 11347 makes specific provision for the negotiation by a carrier and its unions of contracts for employee protection independent of I.C.C. control, subject, however, to the legislative mandate that the negotiated protective conditions shall not be below the level of New York Dock. It is noteworthy that the contracts negotiated by the four unions prior to the BN-Frisco merger were "more protective than the New York Dock conditions." For such reason, the agreements were virtually certain to be approved by the Commission, as they were. While the Commission invited other unions to negotiate similar

agreements with the carrier, it made it clear that those not doing so prior to merger would be "accorded the statutory standard", ie. New York Dock.

This bifurcation of the levels of employee protection does not impair the claimants' rights under Article IV. What it does is provide the reason for the use of the language "under these terms and conditions" in Article IV. The addition of "under these terms and conditions" denies to non-agreement employees consideration for protective conditions substantially similar to those negotiated by the unions prior to merger, yet entitles such non-agreement employees to substantially the same level of protection as is negotiated or imposed by arbitration under New York Dock.

If the intent of Article IV was simply to qualify non-agreement personnel of whatever stripe for protection under the strict terms of New York Dock there is no logic supporting protection at substantially the same level of benefits. The language which was employed comes into focus only when we consider the variances in implementing agreements which may be negotiated or imposed for the governance of conditions affecting members of the various bargaining units. Because of the variables involved it makes perfect sense to provide employees outside the bargaining units only substantially (not exactly) the same benefits.

Carrier introduced expert testimony to the effect that affording non-agreement employees such as claimants substantially the same level of protection as that given union members through negotiated accords or

arbitral fiats would be impossible to administer and produce a chaotic situation. We see no such problem, for the word "substantially" imposes a standard of practicality sufficient to quell the chaos feared by management. Common sense dictates that New York Dock implementing agreements affecting union members will (or should) have an identifiable thread of commonality reflecting a consistent carrier policy of fairness to all. It was the intent of Congress, we believe, to make non-agreement employees beneficiaries of that same policy. As surely as the difference in union crafts poses no insurmountable barrier to negotiating fair agreements for all such crafts, so it should be with non-union people who share the adversity brought about by merger.

The law frequently is satisfied with simply substantial compliance with its requirements. Indeed, arbitral law recognizes such principle along with that of equal justice under law. There is no good reason for not providing all classes of railroad employees substantially the same level of job protection when mergers are sanctioned by the I.C.C. Such, we believe, is and has been the will and intent of Congress.

What is the meaning of the language "the same levels as are afforded...under these terms and conditions"?

Counsel for Carrier argues that the underlined words limit protections afforded non-agreement employees to the bare-bones benefits extended to "displaced" and "dismissed" employees, in New York Dock provided such non-agreement employees qualify as being "displaced" or "dismissed" as defined in Dock. Obviously, such construction would

deny to employees like claimants the higher level of protection that was provided to senior clerks in the BRAC Implementing Agreement No. 1. If claimants are entitled to the same benefits they are entitled to collect significantly higher severance pay while refusing an assignment in Omaha. Implementing Agreement No. 1 contains the following language:

> "Employees offered the positions at Omaha must exercise one of the following options within 10 days:
>
> * * * *
>
> (3) Resign from all service and accept a lump sum computed as follows:
>
> * * * *
>
> "b) MP protected employees with 15 or more years service -- computed in accordance with Section 9 of the Washington Job Protection Agreement of May 9, 1936."

Most significantly, substantially the same language is found in Mediation Agreement, Case No. A-7128, dated February 7, 1965, with BRAC, U.P., M.P. and W.P. signatories thereto. We quote:

> "In the case of any transfers or rearrangements of forces for which an implementing agreement has been made, any protected employee who has 15 or more years of employment relationship with the carrier and who is requested by the carrier pursuant to said implementing agreement to transfer to a new point of employment requiring him to move his residence shall be given an election, which must be exercised within seven calendar days from the date of request, to make such transfer or to resign and accept a lump sum separation allowance in accordance with the following provisions:
>
> * * * *
>
> "If the employee elects to resign in lieu of making the requested transfer as aforesaid he shall do so as of the date the transfer would have been made and shall be given (in lieu of all other benefits and protections to which he may have been entitled under the Protective Agreement and Washington Agreement) a lump

sum separation allowance which shall be computed in accordance with the schedule set forth in Section 9 of the Washington Agreement; provided, however, that force reductions permitted to be made under this Agreement shall be in addition to the number of employees who resign to accept the separation allowance herein provided."

We hold that protections "under these terms and conditions contemplates protections provided in implementing agreements negotiated or imposed pursuant to New York Dock Conditions.

Stated another way, implementing agreements negotiated under mandate of New York Dock become an integral part of Dock, that is, a part of its "terms and conditions" mentioned in Article IV.

However, we cannot justify extending such protections to non-agreement employees where, as is here the case, the carrier's obligation long pre-dated the consolidation which created the need for protection.

In essence the quoted language from Implementing Agreement No. 1 was not born of New York Dock.

We think it most unlikely that this language would have appeared in the BRAC Implementing Agreement absent the existence of the 1965 Agreement. The fact that it was recited in the implementing agreement does not bring it within the purview of Article IV.

DECISION

For the foregoing reasons we hold that Claimants are entitled to substantially the same level of protection as that provided clerks under Implementing Agreement No. 1, but cannot exercise Option No. 3 under such agreement because it is merely a recitation of a right

available to clerks under the February 7, 1965 Mediation Agreement and independent of New York Dock.

ISSUE NO. 5 (Re-stated)

ARE CLAIMANTS ENTITLED TO ADDITIONAL VACATION BENEFITS?

THE EVIDENCE

The facts are not in dispute. Upon termination of their service with MoPac in June and July of 1983, each of the claimants was paid accrued vacation benefits under the UP formula. The benefits were less than they would have been under the MoPac formula.

However, in January of 1983, two different high UP officials assured MoPac employees that their MoPac vacation benefits would be "grandfathered" and under no circumstances would their MoPac benefits be reduced. In addition, Carrier circulated a Question and Answer sheet to the same effect. Then, in February, 1983, UP published a booklet outlining employee benefits. Included was the UP method of computing vacation time accrual.

Counsel for each side cite the case of Hinkeldey v. Cities Service Oil Co., 470 S.W.2d 494 (Mo. 1971). Counsel for Carrier cites the case as authority that notice of contract modification constitutes an offer, acceptance of which is found in continued employment. Claimants' counsel cites Hinkeldey for its holding that where an employer makes two different representations to employees, ambiguity must be construed against the employer. We are not at all sure that under the facts of record Claimants were properly charged with notice that the employee handbook contained a repudiation of the three prior representations

made by management. At the least, there is ambiguity which should be resolved in Claimants' favor.

DECISION

We hold that Claimants are entitled to benefits as thrice promised by carrier officers about six months before the benefits were claimed; that is, to computation of vacation pay in conformity with the old MoPac method.

Rendered May 11, 1987.

David H. Brown

DAVID H. BROWN, Arbitrator

Section F. The provisions of Section E, paragraphs 1 through 3 of this article, also will apply to regular assigned conductors or conductors assigned to extra boards who are taken therefrom and used under the provisions of Section A of this Article.

ARTICLE 54

LEAVES OF ABSENCE

Section A. Committeemen will be granted leave of absence and transportation without unnecessary delay.

Section B. A trainman selected for training under the Southern Pacific Transportation Company's Training and Development Program, promoted to an official position in the Company's service, or exclusively employed by the United Transportation Union, will retain his seniority rights.

Section C. 1. In the discretion of the Superintendent other leaves of absence may be granted for not more than 30 days, with an extension of 30 days, except is cases of sickness or disability. A trainman who has been five years in the Company's service will be granted leave of absence for one (1) year and will retain his seniority rights if the requirements of the service will permit and if he does not accept position on another railroad. Request and approval for leave of absence under this section must be in writing.

2. Thirty day leave of absence, as referred to in paragraph 1, will extend from the effective date in one month to and including the corresponding date in the next subsequent month.

3. Trainmen who are absen because of sickness or injury will be on an automatic leave of absence until they are able to return to service.

4. A trainman who is elected or appointed an official of the Federal or State Government will be granted leave of absence for the duration of the term of office or appointment.

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other matters decided the provisions in Section 15(f) for protection of employes adversely affected as a result of the discontinuance of any existing runs or the establishment of new runs resulting from application of this rule.

(e) Interdivisional, interseniority district, intradivisional or intraseniority district service and/or agreements in effect on September 1, 1971, are not affected hereby.

(f) Every employe adversely affected either directly or indirectly as a result of the application of this rule shall receive the protection afforded by Sections 6, 7, 8, and 9 of the Washington Job Protection Agreement of May 1936, except that for the purposes of this Rule Section 7(a) of said agreement is amended to read 100% (less earnings in outside employment) instead of 60% and extended to provide period of payment equivalent to length of service not to exceed 5 years and to provide further that allowances in Sections 6 and 7 be increased by subsequent general wage increases.

Any employe required to change residence shall be subject to the benefits contained in Sections 10 and 11 of the Washington Job Protection Agreement and in addition to such benefits shall receive a transfer allowance of $400.00 and five working days instead of the "two working days" provided by Section 10(a) of Washington Job Protection Agreement. Under this Section, change of residence shall not be considered "required" if the reporting point to which the employe is changed is not more than 30 miles from his former reporting point.

If any protective benefits greater than those provided in this Article are available under existing agreements, such greater benefits shall apply subject to the terms and obligations of both the Company and employe under such agreements, in lieu of the benefits provided in this Rule.

Holding Official Positions

SECTION 16. An engineer with seniority rights on any district, accepting an official position in the service of the Company, or being exclusively employed by the Brotherhood of Locomotive Engineers, retains in either case his seniority rights; upon application, as provided for in Section 12, this Article, he will have the privilege to displace any engineer his junior.

Leave of Absence

SECTION 17. An engineer having been in the service of the Company as an engineer for five (5) years may be granted leave of absence for one (1) year and retain his seniority rights, provided he does not accept a position on any other railroad.

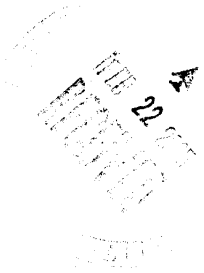
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APPENDIX 11

IN THE MATTER OF ARBITRATION BETWEEN)
)
)
JOHN E. GROTHER)
)
and)
)
)
UNION PACIFIC RAILROAD COMPANY)
)
Pursuant to Article IV of the New York Dock Conditions Imposed by the Surface Transportation Board in Finance Docket N0. 32760)

UNION PACIFIC'S POST-HEARING BRIEF



* * * * * * * * * * * * *

During the hearing, Neutral Member Ross summarized the three issues in this case as whether Mr. Grother's demotion was as a result of the merger (causality), whether Mr. Grother was an employee under New York Dock (employee), and whether Mr. Grother waited too long to pursue his case under New York Dock (Laches). She stated that post-hearing briefs should be limited to amplification or rebuttal of arguments already made, and could not contain new argument. The order in which Union Pacific presents amplification and rebuttal on each of the three issues in this document follows the order in which they were presented during the hearing, and does not indicate UP's order of importance.

Causality:

In Mr. Grother's May 12, 2003, letter he clearly and repetitively sets forth his belief that his demotion was merger related because it came as a result of the movement into Tucson of switching formerly performed at Phoenix.[1] Based on the testimony of Witness Packard, Mr. Grother's belief as to causality is not true. Mr. Packard testified Mr. Grother had not been demoted because of the issue with Phoenix. He stated "the service issues and everything, they were insurmountable no matter who was in charge." He testified the real reason for the demotion was Mr. Grother's lack of performance on the job:. In his words, "John wasn't up to the charge." (74:4-12) [2] During cross-examination by Mr. MacDougall, Mr. Packard reiterated that Mr. Grother's demotion did not occur as a result of the movement of Phoenix switching into Tucson (96:8-10).

Union Pacific's later decision to return the switching to Phoenix was made for the reason set forth by Mr. Packard (101: 8-16). Because that decision was made on the same day Mr. Grother was informed of his demotion (101:17-20), Mr. Grother wrongfully concluded his demotion was related to the Phoenix experiment. .

In its written submission and during the hearing, Union Pacific argued that the movement of switching from Phoenix to Tucson could have been made by Southern Pacific prior to the merger and thus was not dependent upon the merger. Grother apparently disagrees.[3] In his reply verified statement, item #21, Mr. Grother states:

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[1] Mr. Grother's May 12, 2003 letter is Exhibit 2 in both Grother's and Union Pacific' written submission.

[2] Citations in parentheses refer to the transcript of the hearing. (74: 4-12) refers to page 74, lines 4 through 12 in the transcript.

[3] "Grother", as used herein, refers collectively to the opposite party in this arbitration, while "Mr. Grother" refers specifically to John E. Grother

> "Of considerable importance is the fact that the UP/SP merger gave UP the right to make immediate operational decisions to benefit the UP system, but which would not have been made by SP, standing alone, as such decisions would have been economically adverse to a separate SP system."[4]

That statement is illogical. If there were an economic benefit to flow to UP as the result of moving Phoenix switching into Tucson, that same benefit would have flowed to SP prior to the merger. To the extent the move made economic sense, then it would make the same economic sense to either carrier. Notice also that Mr. Grother says "would not have been made," not "could not have been made" by SP standing alone.

In his verified statement relating to causality, Mr. Grother contends the movement of switching from Phoenix into Tucson was part of the merger implementing plan.[5] In Item #17 of his reply verified statement (Exhibit GH28), Mr. Grother states:

> "The reduction of work at Phoenix, and the dramatic increase in freight traffic for Tucson, were part of the merger plan, or "re-plan" experiment, as filed with the Surface Transportation Board."

The Labor Impact Exhibit filed by UP/SP prior to the merger does not support that contention.[6] During the hearing, Union Pacific pointed out that the Labor Impact Exhibit shows a reduction of one engineer and one trainman at Phoenix in year two following the merger.[7] When questioned about this during the hearing, Mr. Grother was unable to explain how moving most of

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[4] Grother Exhibit GH28 - page 10

[5] Grother Verified Statement (Causality) - bottom of page 1, top of page 2

[6] The Labor Impact Exhibit is Exhibit 20 in Grother's submission

[7] Page 6 (labeled "412" at the bottom) and Page 13 (labeled "420" at the bottom) of Grother Exhibit 20

the switching out of Phoenix could have been part of the first year merger implementing plan when the Labor Impact Exhibit filed by UP/SP shows a reduction of only one engineer and one trainman at Phoenix, and then not until the second year (118:13 - 122:5). The facts indicate the movement of switching from Phoenix to Tucson was not part of the merger plan.

An argument might possibly be made that Union Pacific could/should have done a better job in handling Mr. Grother's demotion. For example, Mr. Packard testified when he counseled Mr. Grother, he only gave him verbal, not written, advice of the elements of his performance which were inadequate and needed to be improved. However, to find fault with UP's handling of Mr. Grother's demotion does not transform the underlying reason for the demotion from job performance into being merger related.

Employee:

In its submission, Union Pacific detailed the history of the term "employee" in federal legislation governing railroad labor. UP also presented several previous arbitration awards which dealt with the issue of whether an individual not represented by a labor organization is an "employee" under New York Dock. A reading of those awards reveals the real test for coverage under the New York Dock conditions is whether a person is considered to be an official. Officials are not considered to be employees under the RLA, and thus are not considered to be employees under New York Dock. Only those persons who are covered by a collective bargaining agreement, or those non-agreement persons determined to be subordinate officials, are employees under the RLA. In each of the NYD awards cited by UP, the arbitration committee's decision hinged on whether a non-agreement person was an official. Subsequent to the October 12 hearing in this case,

UP has received a copy of a recent award dealing with the same issue, which is attached as Union Pacific Exhibit 51 .[8] That issue is a key point in this case. During the hearing, Union Pacific reviewed those prior arbitration awards (133:10 - 152:16). Those awards stand for the proposition that only individuals who are considered employees for purposes of the Railway Labor Act (RLA) are considered employees for purposes of the New York Dock conditions. That relationship did not develop as the result of an ICC/STB pronouncement (143: 5 - 13). Instead, it arose because many New York Dock arbitration committees have examined the history of the term "employee" under the labor protective conditions and concluded use of the term "employee" in New York Dock is tied to use of the term "employee" in the RLA.

Grother also appears to accept the premise that to be considered an "employee" under New York Dock conditions, a person must also be considered an employee for purposes of the Railway Labor Act. See Mr. Grother's verified statement (job classification):[9]

> "This verified statement is to present facts in support of my contention that at all times since September 11, 1996 (consummation of the UP/SP merger), and between April 16, 1997 and my displacement on July 1, 1997, I have been an employee, within the meaning of the Railway Labor Act (RLA), which I understand defines a subordinate official as an employee, and I am an employee under appropriate New York Dock conditions."

Grother, however, improperly does not place much weight on the precedential value of the previous arbitration awards. During the hearing, UP pointed out the locations in Grother's submission where he says just that. (129:22 - 131:21). Pages 16-27 of Grother's submission contain

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[8] New York Dock Arbitration Award - Transportation-Communications International Union (F. L. McAlexander) v. Burlington Northern Santa Fe Railway Company (2004, Suntrup)

[9] Page 1, third paragraph, first sentence

other sources upon which he would have this arbitration committee rely as precedent in determining whether Mr. Grother is an "official" or a "subordinate official:"

> "Employee places primary reliance upon statutory interpretations made by the courts, and interpretations by federal agencies, particularly the former ICC, in dealing with the definition under 45 U.S.C. 151, Fifth."[10]

Union Pacific commented in depth during the hearing on these other sources cited by Grother (153: 4 - 167: 4) The arguments presented by UP explain why Grother's sources do not constitute proper precedent this committee needs to follow.

If this committee chooses to follow the precedent established by the previous NYD arbitration awards, it must then determine whether the position held by Mr. Grother at the time of his demotion was subject to unionization under the RLA. The position held by Mr. Grother has never been unionized on either Southern Pacific or Union Pacific. (175: 4-12)

In the Ex Parte No. 72 decisions rendered by the ICC, there is recognition that trainmasters are "looked upon as officials."

> "However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials."[11]

Mr. Grother states that prior to the merger, as Terminal Superintendent at Tucson, he supervised trainmasters.

> "At that time, SP had three trainmasters (terminal trainmasters) assigned to the Tucson terminal, who reported to me."[12]

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[10] Grother submission, page 15

[11] Union Pacific Exhibit UH47 - page 9

[12] Grother's verified statement on job classification - page 2

Witness Packard testified those trainmasters became Managers of Yard Operations under the terminology of UP titles.(65: 19-21) Mr. Grother concurs with that, because he states ". . . the titles of the three former SP trainmasters were changed to Manager Yard Operations... "[13] Mr. Packard also testified that when he was pressed to select his management team for the Tucson Service Unit, he left the incumbents in their jobs.(65: 18 - 66: 6) After Mr. Packard selected his management team at Tucson, the former SP trainmasters, now known as MYOs, still reported to Mr. Grother. Thus. as senior manager of terminal operations, Mr. Grother was clearly above the level of a trainmaster, because MYOs reported to him. If the ICC recognizes a trainmaster as an official, then it stands to reason that the person to whom that trainmaster reports to is also an official.

During the hearing, UP pointed out the amazing change in Mr. Grother's view of his position within UP that took place in the sixteen months which elapsed between his May 12, 2003, letter and his September 14, 2004 verified statement (job classification). (168: 3 - 174: 3) In May of 2003, Mr. Grother wrote about his May-June 1997 position:

> "THEREFORE, ONLY TWO MONTHS BEFORE GROTHER'S SEVERE DEMOTION, GROTHER WAS SELECTED BY UPRR TO BE ITS SENIOR OFFICER FOR THE TUCSON DISTRICT, INCLUDING TUCSON AND NOGALES YARDS."[14]

In September, 2004, Mr. Grother wrote that during that May-June 1997 period he was not actually the senior officer in the Tucson District, but was doing the work of an MYO:

> "The MYO, SYO, and YIC are all within UP's Band B of UP job classification structure. Other jobs included in the Band B 'family' are train dispatchers and border trainmasters. (Atta. 5).

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[13] Grother's verified statement on job classification - page 2

[14] Union Pacific Exhibit 2 - page 6

> "Although my job classification (SRMTO) was nominally in Band C, my actual duties assigned by UP were comparable to, indeed identical with, those for MYO in Band B. It is clear to me that work in Band B is susceptible to agreement, and thus would be covered by RLA., and the positions are performed by an employee or subordinate official, as the case may be."[15]

UP disagrees vehemently with Mr. Grother's view of his position in the UP organization. The duties of a Senior Manager Terminal Operations were detailed in UP's submission as well as in Ex. 33-B of Exhibit E-2 of Grother's submission. Mr. Grother was neither being paid, nor expected, to perform the duties of the lower rated MYO position. If he were, in fact, doing that, perhaps it explains some of the reasons why his supervisor was not satisfied with his job performance. Further, even if he filled his tours of duty with MYO work, UP contends that still does not take him out of the category of official for purposes of the Railway Labor Act. Therefore, following the precedent established by the previous NYD arbitration awards cited earlier, since Mr. Grother was not in the category of employee under the RLA he was not an employee for purposes of New York Dock.

Laches:

During the hearing, Union Pacific explained how the long lapse of time between Mr. Grother's demotion and his allegation of being covered under New York Dock adversely affected UP's ability to defend itself. Little more needs to be said on that point, except for one aspect. That aspect is Mr. Grother's contention UP was aware New York Dock was involved well in advance of his May 12, 2003 letter.

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[15] Grother's verified statement on job classification - page 7

"Response: My first written notification that a dispute exists was on July 15, 1997, not May 12, 2003. See my VS (Laches), at p. 2; Emp. Ex. E-2{E10}). This was acknowledged September 4, 1997. (Emp. Ex. E-2{E11}). To be sure, my dispute was not labeled NYD, but the label is unimportant. UP was well aware a dispute existed over my claim. Moreover, other claims arose out of my displacement, under other federal provisions, well before May 12, 2003."[16]

Break that response down into its elements. First, Mr. Grother says UP was aware a dispute existed because of his July 15, 1997 letter to UP President Jerry Davis.[17] All that Mr. Davis would have been aware of was that he had an unhappy manager, who had been demoted and transferred. Davis might have suspected the letter involved an allegation of discrimination because of the wording "I am writing to you in an attempt to reconcile how the 'UP values system' and the issue of discrimination related to my sudden downgrade." But, there is nothing in the letter which would indicate Mr. Grother believed he was covered under the provisions of New York Dock! Mr. Grother recognizes this when he said "To be sure, my dispute was not labeled NYD..."

In his reply verified statement, Mr. Grother chastised Union Pacific because it had not included all of the correspondence between himself and UP's ombudsman, Butch Ethington.[18] Mr. Grother accused UP of including only a "highly selective portion" of the correspondence. Subsequent to the hearing in this case, Mr. Ethington was asked to furnish copies of any additional correspondence between himself and Mr. Grother he may have in his files. That correspondence is

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[16] Grother's reply verified statement (Exhibit GH28), page 13, item 25

[17] Union Pacific Exhibit 2 - pages 64-66

[18] Grother Exhibit GH47, page 2, Item 4 - referring to Union Pacific Exhibit 42

attached as Union Pacific Exhibit 52.[19] This committee should note there is no mention of New York Dock contained in any of Mr. Grother's letters in Exhibit 52, including one dated November 8, 2004, which is subsequent to the October 12 hearing.

Second, Mr. Grother says "the label is unimportant." The label is important. Had Mr. Grother identified his "dispute" as one involving New York Dock, the parties could have scheduled a conference and discussed the facts. Either party could have referred the dispute to arbitration if it had not been settled within 20 days after the dispute arose.[20] Has that happened,, this matter would have been settled at least five years ago, when the players and the papers involved were still available. By not labeling his dispute as one involving New York Dock until nearly six years after his demotion, Mr. Grother seriously disadvantaged UP's ability to defend itself.

Third, Mr. Grother says "other claims arose out of my displacement, under other federal provisions, well before May 12, 2003". But, those claims under other federal provisions did nothing to make UP aware of the alleged New York Dock link. UP submits it was only after those claims based on other federal provisions did not yield the result Mr. Grother expected, it was only then that he decided to pursue the New York Dock path.

General Comments:

One aspect of this case which requires comment is Grother's apparent view of the arbitration process itself. Grother challenged Union Pacific's presentation at several points during the handling of this case, not with respect to accuracy but with respect to qualification of the person to make the

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[19] Mr. Ethington advises some earlier correspondence he received from Mr. Grother is no longer in his office files and may be in storage at an off-site location.

[20] Union Pacific Exhibit 1, page 5 (Article I, Section 11 of New York Dock)

argument or the manner in which it was presented. For example, the following statement appears on page 5 of Grother's pre-hearing submission:

> "3. Sometime in late August or September, 2003, UP's representative in the dispute was transferred from the Protective section of the Law Department, to the Planning section of the Labor Relations Department, and assigned to William E. Loomis, an individual with a background on the former SP, and who was familiar with Employee when both were SP employees. The 'Planning Section' of the UP's Labor Relations department is something other than having direct responsibility for specific operating department employment disputes, as indicated by the UP's announcement in The Pocket List of Railroad Officials. (Ex. E-5)."

First of all, part of that statement is not correct. There is no section of the Law Department. which handles disputes arising under labor protective conditions. UP also contests the accuracy of Grother's statement that "UP's Labor Relations department is something other than having direct responsibility for specific operating department employment disputes. . ." With regard to employment issues such as hiring, that may be true, but all labor arbitration for both operating and non-operating personnel on UP, whether arising under the collective bargaining agreements, or under protective conditions such as New York Dock, is handled by the Labor Relations Department.

Other apparent attempts to challenge Mr. Loomis' ability, or perhaps credibility, to speak on matters relating to this case appear in Mr. Grother's reply verified statement. Examples include: Item 1:

> "1. Page 1, final para., 'Union Pacific is represented by its General Director of Labor Relations, W. E. Loomis.'
>
> Response: It is my understanding that the title of Mr. Loomis is 'General Director - Employee Relations Planning.' (Emp. Ex. E-5, p. 3),"[21]

[21] Grother's reply verified statement (Exhibit GH28), page one, item one

Item 19: (only a portion of the response is shown)

> "Response: The terms 'Union Pacific asserts,' and 'Union Pacific states,' in the above first two sentences are anonymous, unless it is the opinion of the author, Mr. Loomis. - - -"[22]

These challenges continued throughout the hearing. Mr. MacDougall made several comments about UP's member of the arbitration committee, Mr. Loomis, not being able to offer testimony on this or that point. Examples include (178: 18-21); (181: 11 - 182:13). At one point during the hearing, Mr. MacDougall, clearly indicated he does not challenge Mr. Loomis's ability to be Union Pacific's member of this arbitration committee (183: 9-18). Note, however, the conflict with Mr. MacDougall's earlier comment on this point when he refuses to respond, saying "We'll argue that on brief." (179: 16-19)

By specifying arbitration as the process for resolving disputes arising under the New York Dock conditions, the STB(ICC) indicated its belief that arbitration, rather than the courts, is better suited to resolve such matters. There are significant differences between the two processes. For example, the strict rules of evidence which apply in court are typically not applicable in railroad labor arbitration. In court, an attorney develops the record by means of witness and expert testimony. In railroad labor arbitration, the partisan members of the arbitration committee/board, in this case Mr. MacDougall and Mr. Loomis, present their side's position by a written submission, presentation of documents relevant to the case, verbal argument during the hearing and, in some cases, testimony from witnesses. The partisan members of the arbitration committee are free to challenge the accuracy or relevance of any statement, argument or document presented. When all of this has been

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[22] Grother's reply verified statement (Exhibit GH28), page 8, item 18

accomplished, the record is closed and the body of information which has been developed comprises the facts and the analysis of the protective conditions the neutral uses to reach a decision. The job of the neutral is to determine which of the facts, and which analysis, are most applicable to the specific circumstances of the case at hand.

Union Pacific submits this arbitration case has been handled in the usual and customary manner, and there is no validity in Mr. MacDougall's attempt to convince the neutral member otherwise. UP anticipates this committee will hear much more on this issue in Grother's post-hearing brief.

The other aspect of this case which requires comment is Grother's apparent desire, throughout the handling of this case, to gain a position of advantage by having the last word. The first manifestation of this was Grother's desire to have a three-step process for the filing of pre-hearing submissions. Under Grother's proposal, Grother would send a written submission to UP, following which UP would send its written submission to Grother. Finally, Grother, but not UP, would be entitled to submit a rebuttal submission prior to the hearing. When UP refused to agree to that process for the handling of submissions, Grother petitioned the Surface Transportation Board seeking a determination that the three-step process was appropriate for the handling of written submissions in this case. The reason stated for desiring this process was ". . .to develop a full written record for STB review at minimum expense to employee."[23] In its opposition to Grother's STB petition, UP pointed out that Grother's focus on a written record indicated "... 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

[23] Union Pacific Exhibit 15 - page 15 - center of page under "ARGUMENT"

Curtain' standard for review of arbitration decisions, he is ill advised to so cavalierly look past the determinations of the arbitration committee."[24] Grother's effort concerning the submissions failed when Ms. Ross, to whom STB had remanded the issue, determined the usual and customary practice of simultaneous exchange of submissions would be used.

At the hearing, Grother introduced a reply verified statement and was anxious for a response from Union Pacific. Since that was the first time UP had seen the reply verified statement, it did not have an opportunity to review the document during the hearing. When UP indicated it would not respond to Grother's reply verified statement during the hearing, Mr. MacDougall objected (22:11-20). UP presumes Grother sought to obtain UP's rebuttal to the reply verified statement during the hearing, so he could have the last word on that matter in his post-hearing brief.

This committee should note Grother did not make a comprehensive argument on causality during the hearing. Grother's argument on the issue of causality consisted of a verbatim reading of Grother's reply verified statement (Grother Exhibit GH28). Mr. MacDougall read the numbered points and Mr. Grother read the answers. That reply verified statement actually covers all three issues, causality, employee and Laches and "responds to asserted factual matters advanced by Loomis in his submission."[25]

This committee should also note that Grother did not make any argument at the hearing concerning the issue of employee. Mr. MacDougall's comments were:

> "But we have nothing to say to that. As you say, it's argument and we can answer the argument on brief." (178: 16-18)

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[24] See Union Pacific Exhibit 15 - page 5

[25] Grother Exhibit GH28 - page one - second paragraph

Why did Grother not offer any argument during the hearing? UP submits that decision was a conscious effort by Grother not to lay his argument on the table, because that would allow UP to make a rebuttal in its post-hearing brief. By holding back on its argument, Grother feels he has achieved what he sought throughout this case, i.e., the ability to speak the last word.

By opting to save his arguments for his post-hearing brief, Grother has held his cards close to his vest. However, Grother needs to be mindful of Neutral Member Ross' comment that post-hearing briefs be limited to amplification and rebuttal, and that she would not accept new arguments in such briefs. In her words, the parties will have to "trust her to tell the difference."

Summary:

This arbitration committee needs to look no further than UP's argument on "employee" to deny Mr. Grother's claim for benefits under the New York Dock conditions. The only reason for differentiating his claim from the series of previous NYD awards UP has presented would be a finding that Mr. Grother was not an "official." However, the arguments presented by UP clearly demonstrate Grother was an "official." This committee should determine Mr. Grother was an official, therefore he was not an employee under New York Dock and therefore is not entitled to any benefit under those conditions. Having made that determination, there is no need to decide the "causality" and "Laches" issues.

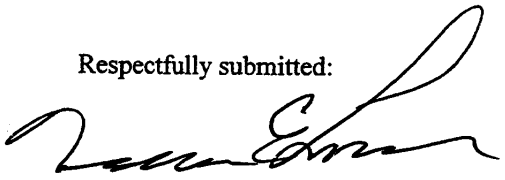
That is not to say UP lacks confidence in its arguments on causality and Laches. Grother's link between his demotion and the merger is merely speculation and suspicion on his part. The extreme lapse of time between Grother's demotion and his initial contention of New York Dock

coverage resulted in UP being forced to defend itself without documents and personnel necessary to fully develop the facts on the issue of causality.

Union Pacific's argument on all three issues in this case, causality, employee and Laches, taken together, constitute an overwhelming justification for this committee to deny Mr. Grother's claim in its entirety. UP respectfully requests this committee to answer the questions/issues presented by the parties as follows:

> Union Pacific's first question - "Was John E. Grother, at the time of his reduction in salary, a 'displaced employee' subject to the protection of the New York Dock conditions?' - **NO**
>
> Union Pacific's second question - "Is John E. Grother's claim for a displacement allowance pursuant to New York Dock barred under the doctrine of Laches?" - **YES**
>
> Grother's first issue - "Whether employee was adversely affected as a result of the STB-approved merger, and has the burden to prove the causal connection between the merger and the adverse affect." - **HE WAS NOT ADVERSELY AFFECTED AS THE RESULT OF THE MERGER**
>
> Grother's second issue - "Whether the involved employee was an 'employee' within the meaning of 49 U.S.C. 11326 and NYD at time of first adverse affect." **HE WAS NOT**
>
> Grother's third issue - "Whether employee's request for compensation/benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches." **HIS REQUEST IS BARRED BY THE DOCTRINE OF LACHES**

Respectfully submitted:



William E. Loomis
November 22, 2004
Omaha, Nebraska

In the Matter of Arbitration

Transportation Communications International Union	)	
	)	**Arbitration Proceedings**
vs	)	**New York Dock (I.)(11)**
	)	**ICC Finance Docket 32549**
Burlington Northern Santa Fe Railway Company	)	**Claimant: Fred L. McAlexander**

Introduction

In August of 1995 the former Interstate Commerce Commission (ICC)[1] approved the merger between the Burlington Northern Railroad Company (BN) and the Atchison, Topeka and Santa Fe Railway Company (SF) in ICC Finance Docket No. 32549. With that approval the ICC imposed New York Dock (NYD) conditions on the new merged Carrier.

The parties subsequently signed an implementing agreement under I. (4.) of NYD which is called on this property the Master Implementing Agreement (MIA). According to a claim for benefits filed by Fred L. McAlexander on November 30, 2001, he elected to receive NYD benefits as an employee covered under Article VII of the MIA. As of November 1, 2001 the Claimant had been an exempt employee who subsequently exercised his seniority as a former TCU covered clerk. Mr. McAlexander bumped to a covered position after his management job was abolished in Topeka, Kansas in October of 2001. Bumping to a covered position was one of the Claimant's options when his exempt position

[1]The former Interstate Commerce Commission (ICC) has since been replaced by the Surface Transportation Board (STB). This has no particular bearing on the outcome of the instant case but it should be mentioned for the record.

was abolished at Topeka. The Claimant was offered a severance package by the company after his position was abolished. He refused this offer and chose to bump back to the ranks of clerks. Upon doing so the Claimant then presumed that he was covered by NYD.

The Claimant's exempt position was eliminated by what the Carrier states was a business-driven reorganization of its auditing functions in 2001 wherein some of the auditing work done at the Carrier's Topeka, Kansas facility off the former SF was shifted to its Fort Forth, Texas facility off the former BN. Subsequently the Carrier moved all of the work of its revenue and financial audits' division from Topeka to Fort Worth.

Issue(s) Before the Arbitrator

The parties present the arbitrator with a number of issues to rule on in this case. First, the arbitrator must rule on whether the Claimant was covered by Article IV of NYD. If he is then the union asks for a ruling a fortiori on whether the Claimant fell under the definition of a "displaced employee", as defined by NYD I. (1.)(b.), and whether he suffered an adverse effect directly related to a transaction as defined by NYD I. (1.)(a.) & (11.)(e). The lynch-pin of this case, however, centers on an interpretation of Article IV of NYD.

NYD Provisions

The following provisions of NYD are referenced by the parties in arguing this case.

Article I

1. Definitions

(a) "Transaction" means any action taken pursuant to authorization of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee...who, as a result of a transaction has been placed in a worse position with respect to his compensation and rules governing his working conditions.

.....

(d) "Protective period" means the period of time during which a displaced...employee is to be provided protection hereunder and extends from the date on which an employee is displaced...to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced...than the period during which such employee in the employ of the railroad prior to the date of his displacement... For purposes of this appendix, an employee's length of service shall be determined in accordance with the provision of Section 7(b) of the Washington Job Protection Agreement of May 1936.

4. (a.) Each railroad contemplating a change or changes in its operations, services, facilities, or equipment as a result of a transaction which may cause the dismissal or displacement ot any employees, or rearrangement of forces, shall give at least ninety (90) days' notice of such intended change or changes by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes...

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

.....

5. (a.) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rule and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during this protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he is displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services

immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increase) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that eh is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b.) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c.) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11.

.....

(e) 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. The claiming employee shall prevail on this issue if it is established that the transaction had an effect upon the employee even if other factors also may have affected the employee.

Article IV

Employees of the railroad who are not represented by an 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 his claim dated November 30, 2001 the Claimant cites Article VII of the MIA. In addition to that, the arbitrator will also cite here Article I of the MIA, for the record.

Master Implementing Agreement (MIA) of December 19, 1995

Article I

When the Company contemplates a technological or operational change, including merger-related transactions, the Company will serve appropriate notices as may be required under the proper protective agreement (Blue Book or Gold Book). When a contemplated changes involves a inter-railroad related transaction, a notice will be served on the General Chairman on the railroad where the work is being transferred from with a copy to the General Chairman on the railroad to where the work is going. An implementing agreement covering the contemplated change will not be necessary prior to the Company effecting a change on which notice has been given.

Article VII

(a) Protected employees under the Orange Book, White Book, Blue Book or Gold Book will be considered as having elected to retain such protection unless they make written election to be covered by the New York Dock Conditions, which election must be made within thirty (30) days of being affected.

Background

Fred M. McAlexander is a long-term employee who has worked for the BNSF and for one of its predecessor railroads which is the SF. According to information of record he hired in as a Clerk in 1966 and worked until 1997 as a covered employee under the labor agreements negotiated between TCU and this employer as the latter underwent various

corporate changes, result of of its mergers with other railroads.[2] The Claimant worked in the revenue department for about a decade, and then bid on a rate clerk position and worked in the latter capacity for some 20 years. During this time the Claimant was subsequently promoted to the position of a rate supervisor which was still a covered position. In 1997 Mr. McAlexander then made a career move which became the sine qua non for the instant case. He took himself out from under the protection of his union contract and accepted a non-covered position as a auditor in the revenue and financial audits' division of the Carrier's corporate audit services' department. About a year after this, in 1998, he received, according to the union, a raise that he had been promised when he had accepted the exempt position. But arguably Mr. McAlexander received at that time more than a raise. He also received a promotion in accordance with what this Carrier calls its developmental progression scheme for management trainees and staff auditors which will be discussed later in this Award. After October of 1998 the Claimant's exempt title was now: "project manager". According to the union, which is a matter to be examined closely in this case, the October, 1998 changes in title and pay grade that the Claimant received were not accompanied by any change in duties nor any additional responsibilities. In other words, according to the union, the Claimant was given the title of manager, which has never been disputed, but he was never required to act like one when he was a "project manager". This is why he should fall under the umbrella of NYD coverage. A ruling in this case will center on whether the union is right, or not, in this

[2]Given the time frame the union also underwent a metamorphosis and the Claimant was undoubtedly first covered by BRAC's labor agreements which was TCU's predecessor.

contention.

To reiterate the facts, in further detail, behind this NYD arbitration: on November 30, 2001 Fred L. McAlexander turned in a request, in accordance with the 30 day time-limit outlined in Article VII of the MIA, to be covered by NYD conditions as a result of being allegedly "...affected..", as he put it, by a transaction under NYD. He had bumped into a clerical position on November 1, 2001 in Seniority District No. 101 on the Carrier's property.[3] In response to Mr. McAlexander's claim for NYD benefits supervision wrote to him as follows:

> "Our records do reflect that you were in a direct chain of displacements due to the abolishment of position 6155... Our records indicate that you were in exempt status until November 1, 2001. If there is a New York Dock transaction in which you were affected, please advise...".[4]

Along this same line of reasoning, and some two months later, Carrier's supervision again advised the Claimant that his request for NYD benefits was being denied because the company's records reflected that he had only been affected by "...the involuntary reductions made in the exempt ranks during October..." of 2001 and that this did not represent a transaction in accordance with New York Dock conditions. These responses for denying Mr. McAlexander's request for NYD benefits did not satisfy the Claimant. Subsequently, they did not satisfy the Claimant's union representative, and as such they would not have, in and of themselves, satisfied the instant arbitrator. The question is not whether the Claimant was

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[3]Employees' Exhibit A @ p. 2 of 106. This request for coverage was later amended in view of a technical error on the original request which was correcterd by the Claimant. See Employees' Exhibit A @ p. 22 of 106.

[4]Employees' Exhibit A @ p. 21 @ 106.

an exempt employee when his position was abolished, since exempt employees, depending on what they actually do while on the job, might be covered by NYD conditions if their positions are abolished, but the question is whether the Claimant was an exempt employee who was performing management duties when his position was abolished.

So it is not surprising that in August of 2002 the General Chairman of the Organization in Topeka appealed Mr. McAlexander's claim for NYD benefits with request that he be granted NYD coverage. The General Chairman's very detailed, closely reasoned and lengthy appeal of August of 2002 was rejected by the Carrier. Thereafter the parties continued to address their differences during 2003 on whether Mr. McAlexander was eligible for NYD benefits or not. Absent settlement of the matter the instant case was brought to arbitration under NYD I (11.).

Discussion

Argument by the union is that while the Claimant was not represented by a labor organization at the time of the abolishment of his position on October 31, 2001 he was, nevertheless, a displaced employee involved in a transaction in accordance with the provisions of NYD. He ought, therefore, according to the union, have been given "...substantially the same levels of protection as are afforded to members of labor organizations...", to paraphrase Article IV of NYD, in pertinent part.

The union argues that the abolishment of the Claimant's position, as well as the abolishment of other positions in the ranks of exempt employees in October of 2001 in the Carrier's Topeka revenue and financial audits' division, was not the result of economic or

other operational factors. According to the union these actions by the Carrier were merger related. The union argues that the Claimant's loss of his position in Topeka in October of 2001 was the result of a transaction . There was a nexus between the merger of the BNSF and the abolishment of the Claimant's job. The union argues that the instant case is comparable in principle to an earlier one in 1987 involving this union and the UP wherein the arbitrator concluded that a consolidation move by that railroad, which resulted in the abolishment of an employee's position and his demotion, were merger related. In that case a position was eliminated but the work was not. This leads the union representative to conclude that this is what happened at the Topeka accounting division in 2001 and 2002. According to the union, "...an examination of the (accounting) division prior to and after the abolishment of (the Claimant's) position will show that Claimant's position was not actually eliminated but, rather, assigned to employees on the other side of the merged railroad to whom relocation expenses need not be paid...".[5] The brunt of the union's transaction related argument is that after the consolidation of the corporate audits' department did take place, or was taking place, then the Claimant's position was abolished in Topeka and the work of his whole former division was moved from Topeka to Fort Worth. According to the union, there was no diminution of work of the type that the Claimant did. It was just all done now in Fort Worth by different exempt employees. Thus the Claimant was clearly put in a worse position as a result of this transfer of work from one location to another which required the Claimant to exercise seniority and return to the clerical ranks. According to the union: "the Claimant's

[5]Carrier's Exhibit B @ p. 6 of 52.

position as a "project manager" was not eliminated due to economic and operational factors as the Carrier alleges. In fact, it was not eliminated at all. Rather, it was abolished at Topeka, Kansas, transferred across former property lines, and reestablished at Fort Worth, Texas in a consolidation of the department. The Claimant was not given the opportunity to transfer with his work. The abolishment ot his position at Topeka was the result of a merger related transaction. The Claimant is clearly a 'displaced employee' as contemplated by NYD...", according to the union.[6]

Turning then to the status of the Claimant as an employee eligible to receive NYD benefits under Article IV of NYD the union cites arbitral precedent to the effect that other than unionized employees are eligible to receive these benefits in the event of a transaction, and if they are put in a worse position, so long as they perform duties "...that generally are described as being other than administrative, managerial, professional or supervisory, in nature...".[7]

After a review of arbitral case materials involving the interpretation of Article IV of NYD the union argues that this leads to the conclusion that a "framework" can be derived as a tool for analyzing specific cases. This "framework" includes the following factors which

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[6]Carrier's Exhibit B @ p. 8 of 52.

[7]There is considerable NYD I (11.) arbitral precedent dealing with the meaning of the phrase: "...employees of the railroad who are not represented by a labor organization..." and the union representative has cited some well reasoned Awards. The only issue here is whether the Claimant was performing managerial or supervisory duties when his exempt position was abolished. If he did the instant arbitrator is not persuaded that precedent that states that he ought not be covered is not correct. There is a certain analogy between the interpretation of Article IV if NYD and Section 2 (11) of the NLRA albeit the latter deals with unit determination matters. Both one and the other focus on the issue of eligibility.

are cited here in somewhat abbreviated form.

> Does the individual: (1) exercise managerial, administrative or supervisory duties at a certain level? (2) exercise policy making at a certain level? (3) work under supervision him/herself? (4) have skills indigenous to the rail industry; (5) receive benefits not granted to the rank and file after being affected by a transaction; and (6) have access to representation by a labor union without being actually represented by a union?[8]

Using this framework the union argues that the Claimant to this case did not pass muster as an "official" of the BNSF in October of 2001 when his position in the division of revenue and financial audits was abolished. The union states that it was not able to get a copy of a job description for the "project manager" position held by the Claimant when his job was abolished,[9] but it ventures that such description cannot be much different from that of an auditor. The union opines that auditors are just "...moved up for pay purposes..." and then called "project managers".

The union then addresses the formal credentials of the Claimant and states that he has no college degree, has never taken an accounting course in college, is not a CPA, and has no MBA. The Claimant is an "...old time rate clerk...". His skills are not transferrable to any other industry. Until he accepted the job in the revenue and financial audits' division the

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[8]Carrier's Exhibit B @ p. 15 of 52. Also Organization's Brief @ p. 18. In reviewing the arguments by the union the arbitrator has relied heavily on the very detailed original claim of August 9, 2002 which contained many of the arguments repeated in the Submission. This August 9, 2002 document is found in Employees' Exhibit A @ pp.1-19 of 106 & in Carrier's Exhibit B @ pp.1-19 of 52. When citing one Exhibit with respect to this letter the other is implied by reference for the sake of brevity.

[9]One reason for this is, according to the union representative, because "...it is possible that project manager positions are seldom if ever posted...". On this point it can be observed that posting of jobs is closely associated with seniority driven bidding rights common to union contracts. Jobs subject to bidding must be posted otherwise the system would not work. Nothing requires an employer to post certain kinds of job openings unless there is an issue related to external law that might be applicable (discrimination, etc.).

union states that the Claimant had never heard of generally accepted auditing standards and has no information on generally accepted accounting principles. Prior to working for the division the Claimant had no auditing experience at all. But he did bring something with him to the division: he brought a "...wealth of specialized knowledge about freight rates in the railroad industry...". The work the Claimant did was specialized: he did compliance audits aimed "...specifically at looking for missed freight rates...". His job as program manager was to meet with the department head for direction and then "...deal directly with the employees who performed the nuts and bolts work of the department. After his analysis was complete he would develop recommendations for improvements...". The Claimant had no authority to supervise, evaluate, hire or fire other employees...he worked under "...the daily direction of three high level managers...".[10] According to the union, the Claimant served as a "...liaison between the nuts and bolts employees in the departments he audited, their department heads, and his own supervisors. He had no authority to order changes in policy to implement the methods he identified for improving performance. If the department heads and his own supervisors did not both sign off on his recommendations they were not implemented...". According to the union, the Claimant did not choose the audits he performed. Once he was assigned an audit, he met briefly "...with the department head for direction and then deal(t) directly with the employees who performed the nuts and bolts work of the department...". His manager reviewed his work and made changes "...to documents that were going outside

[10]Carrier's Exhibit B @ p. 17 of 52.

of the department...". [11]

The union argues that the position held by the Claimant to this case in October of 2001 was remarkably similar to that of an exempt employee by the name of James V. Nekich who had filed a claim for NYD benefits on this property at another location when his whole department was eliminated after the BNSF merger. When Nekich's request for NYD benefits was denied, he then prevailed in a NYD I (11.) arbitration proceeding.[12]

Further, in times past the position that the Claimant held had been subject to labor representation. At one time the union had represented a "...whole roster of internal auditors...".[13]

Because the Claimant was put in a worse position when he had to exercise his seniority back to the ranks of the clerks the remedy requested by the union is the difference between the earnings that the Claimant received as a "project manager" prior to the abolishment of his position in October of 2001, and the earnings he started to receive when he bumped to a way billing position.

According to the Carrier the reduction in positions in the audit department in Topeka

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[11]Employees' Exhibit E @ p. 4 and Employees' Submission @ p. 21 seq.

[12]Nekich held the position of quality coordinator off the BN when his whole department was eliminated after the BNSF merger. Nekich was not represented by a labor organization in that case. He had originally hired in as a dispatcher represented by the ATTD/BLE and then took the exempt position of quality coordinator in 1994. In that case the arbitrator was not persuaded that Nekich had sufficient duties in his qualify coordinator position to qualify as a manager.

[13]This statement is premised on the assumption that an auditor is synonymous to that of a project manager which is an assumption used by the union representative arguing this case throughout the record. There is no evidence, nor even an assertion, in the record that project managers in the auditing department had ever been represented by a union at any point.

was "...simply a reduction in exempt headcount..." As a result the Claimant was given the option to take a severance package, or to exercise seniority as a covered employee. He chose to do the latter.

As a" project manager" at the Topeka revenue and financial audits' division the Claimant was, according to the Carrier, "...in wage band 29...", and exempts in this wage band are not covered by NYD. The Carrier admits that non-union employees could potentially be covered by NYD. But they are also non-managerial employees. On the other hand, the Claimant as a project manager "...was in charge of auditors while on assignment. It was his responsibility to plan the project to be audited. He would prepare and issue the engagement letter; prepare the planning memo defining the scope of the audit; develop and complete (the) audit program; and develop and issue a report of the audit." The scope of the Claimant's duties were considered to be "...administrative, managerial, professional or supervisory in nature...", according to the Carrier.[14]

The Carrier argues that the "development progression" for auditors working for the corporate audit services' department shows that a "project manager I", which is what the Claimant was when his job at Topeka was abolished, as having the following duties:

> "Responsible for all audit processes on individual audit projects, including planning, execution, supervision of staff, customer relations and reporting".[15]

The Carrier takes umbrage with the designation of the Claimant as simply an "old line rate

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[14]Carrier's Exhibit B @ p. 21 of 52.

[15]Carrier's Exhibit E, cited in Ibid. @ p. 22 of 52.

clerk". The Carrier states that this is an attempt to belittle the Claimant's knowledge and skills. The Claimant was able to do the work of a "project manager". He was promoted to that position after having served as an auditor for the division. And he fulfilled the duties of a "project manager" intelligently and competently. In defense of the Claimant the Carrier states that many managers at the Carrier started their careers as schedule employees and worked their way the corporate ladder.

The Carrier also argues that the Claimant does have auditing skills that are transferable to other industries and if he would have opted for severance pay, which he did not, he could have found a place for his skills at other employers.

Lastly, the Carrier admits that auditors in the past on the SF side had been unionized. But the internal audit department was abolished in 1982 in a reorganization along with all of the positions in that department. The latter was then transferred to the holding company of the former SF railroad. Thereafter the auditing functions on the SF were reorganized. But as a "project manager" the Claimant was not eligible for unionization at the new merged entity which is the BNSF because he was a manager.

Findings

Prior to proceeding with framing a ruling in this case, given the volume of materials presented to the arbitrator, and the diversity and minutiae of arguments found in the record, a number of points need to be sorted out.

First of all, the original claim that was filed on November 30, 2001 by the Claimant was filed under Article VII of the parties' MIA. The claim was filed properly in accordance

with the pertinent time-lines outlined in that Agreement. However, whether the Claimant is eligible for benefits outlined in the MIA is contingent on whether he is an employee covered by Article IV of NYD. The issue of eligibility cannot be resolved by resort to the MIA itself.

Secondly, whether a transaction took place under Article I of NYD is also contingent upon whether the Claimant is covered by Article IV of NYD. It is not possible to logically separate, in this type of case, the issue of whether this Claimant is a displaced employee, and whether a transaction took place, when Mr. McAlexander's position was abolished in October of 2001. All conclusions about the Claimant's alleged displaced status under Article I (b.) of NYD, and a transaction, is contingent on the evidence relating to the Claimant's status under Article IV of NYD. This observation is made because one of the parties to this case attempts to establish that a transaction took place, and then having done so, they argue that the Claimant was a covered employee subject to a nexus between the transaction and his covered status. The logic of such an approach amounts to putting the cart before the horse. As noted earlier, however, the lynch-pin of this case centers on the proper interpretation of Article IV of NYD as it applies to the record before the arbitrator.

This is not a case of first impression albeit the meaning of the language of Article IV of NYD has caused considerable consternation over the years because of its failure to make a clear demarcation between coverage of non-managerial and managerial personnel working for railroads. Clearly non-managerial personnel who are covered by a union contract are eligible for NYD benefits, given evidence of a nexus between their being put in a worse

position and a transaction. So are those employees, in accordance with precedent, at least, who are eligible to be unionized under the RLA but for some reason have not been organized and so on. This is one of the arguments used by the union in this case. The union believes the Claimant is eligible to be unionized, albeit the Carrier does not. The arbitrator will deal with that issue shortly. There is more than sufficient arbitral and legal precedent to warrant conclusion that what the literature of management theory would designate as "managers" would not be protected employees under NYD. But the language of Article IV of NYD poses a challenge, at least as it has been interpreted in some instances, because it supposedly also coopts under NYD coverage those employees who are less than full fledged managers, yet non-unionized. The courts have attempted to clarify what this means but without much success by referring to such individuals as "...subordinate officials..."[16] or by stating that "...rank and title are not controlling in defining the work of (such) subordinate officials..."[17]. The latter line of legal fuzzy thinking is particularly disconcerting since the title of "manager" in the real world of work is almost always associated with managerial duties such

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[16]We avoid the use of the term "official", subordinate or otherwise, in framing this Award for the simple reason that it is never used in the management literature to designate managers. An "official" is a term to describe someone who holds a position normally in a political arena, appointed or elected, who may or may not even have definable management responsibilities (i.e. legislators, etc.). It is unclear why the courts, at any level, would introduce this term into a discussion of managerial decision-making in the railroad industry, or in any other industry, for that matter. There have been instances where even the supreme court has been known to make important rulings on the locus and characteristics of managerial decision-making without one reference to the large literature of management science, with its empirical underpinnings, that has a direct bearing on the case in point.See "NLRB v Yeshiva University & Unionization in Higher Education" Industrial Relations Law Journal, Vol. 4:287-307 (1981)(Suntrup). Having said all that the arbitrator is aware that there is a convention in this industry of sometimes referring to managers as "officials" and there is no intention here of trying to will away that cultural trait of the industry. But the term, "manager" is also used. We use only this term here in framing the instant Award.

[17]See Edwards v Southern Railway Company (U.S. Court of Appeals, 4th Cir., 376 F. 2d. 665).

as overseeing the work of others, independent decision-making, and authority over subordinates. Such latter observation is supported by both common sense and a library full of literature on management science.

Given the language of Article IV it is clear that instances could arise whereby a non-unionized employee who is put in a worse position by the actions of a merged railroad could be covered by NYD. Management science would generally refer to these employees simply as support staff: some with more, and some with less, responsibilities. But support staff, nonetheless. The union here cites an Award involving an employee off the BN whose position was abolished. The title of the position was quality coordinator. This is the case involving employee Nekich. This is an important case for our purposes here because it took place on the BNSF, it took place rather recently, and it is a good example of how non-unionized, support staff personnel can fall under the protections of NYD. After Nekich's exempt position was abolished he did the same thing that McAlexander did, and exercised seniority and bumped back to his craft. That employee exercised seniority back to the ranks of covered dispatchers. After a review of the evidence the arbitrator concluded, in that case that Nekich was not a manager in view of the "...level of responsibility that is inherent in (the) position (of quality coordinator that he held)...", and that the "...level and amount of supervisory authority..." exercised by employee Nekich did not rise to the level of a manager. The arbitrator also found it pertinent that the position of quality coordinator implied that this employee served as a "...liaison between scheduled and management employees to identify and facilitate ways in which to improve the Carrier's overall levels of

performance...". Since Nekich had no supervisory authority over other employees the arbitrator concluded that his exempt position fell within the purview of an employee, and not a manager, under NYD.[18] The union comes back to this case often in its arguments here before the arbitrator because it finds strong parallels between what happened to that quality coordinator when his position was abolished in 1995 on the BNSF, and what happened to the Claimant to this case whose position as project manager was abolished in 2001. Whether there is a parallel is a matter of evidence since each case involving the application of Article IV of NYD must be taken, obviously, on its own merits.

Was the Claimant to this case a manager? Or did his position involve work which was insufficiently managerial in nature that it would not be improper to classify him as an exempt, non-managerial support staff employee which is what the arbitrator did in the case of Nekich?

First of all, the Claimant to this case consistently refers to his position in October of 2001 as that of a manager. He never says anything other in all available correspondence between he and the Carrier. Common sense; common usage in the work place; and the literature of management science, despite certain legal thinking to the contrary, all tell us that if someone says he/she is a manager then they probably are. But there may be rare cases when this might not be the case. Thus we will not accept here the conclusion that McAlexander is a manager because he says he is albeit such evidence certainly pushes the arbitrator in a certain

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[18]See James V. Nekich vs Burlington Northern Santa Fe Railroad, NYD I (11.) Arbitration Award (December 6, 1996)(Ver Ploeg, Arbitrator). Employees' Exhibit A @ pp. 56 seq.

direction as a starter.

Arbitral precedent dealing with Article VII shows that prior arbitrators have gone beyond the mere presence of a title in framing rulings about an exempt employee's eligibility for NYD benefits. So this arbitrator will do the same.[19]

Did the Claimant to this case perform managerial duties?

The union argues that he did not. According to the union the Claimant was just a "...liaison..." person between the employees in the departments he audited, their department heads and his own supervisors. The union says he had no authority to order changes in policy to implement methods used for improving performance. He needed his supervisors to sign off on recommendations in order to get them implemented. He did not evaluate, hire or fire other employees.

Whether this is an accurate appraisal of what the Claimant did can best be evaluated by looking at the job description of the duties of a "project manager"[20] or a reasonable facsimile thereof. Does this exist? Yes it does. Does it exist in the same form as a bulletined job normally associated with covered employees? It appears not. Is the Carrier required to post the position of "project manager"? There is nothing in the record to show that this is so. Why? Because the position of "project manager" is but one step in the developmental

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[19]Certainly the experts in figuring out who is and who is not a manager are hearing officers dealing with unit determination cases since the NLRA and most state labor laws exclude managers from coverage in the event of an organizing drive. So hearing officers have to figure out who is eligible to vote in a representation election, etc.

[20]Throughout this Award we refer to the Claimant's position as that of a "project manager". We will continue to do so albeit this is short-hand for "project manager I".

progression of employees chosen by the Carrier in its exempt, managerial track. In the auditing division the Carrier had an internal system of seven grades of auditors designated by what it calls salary bands; primary duties; education requirements; professional certification; experience requirements, and promotion criteria.[21] The seven grades (and salary bands) go from grade 26 through 32. The Claimant's position of "project manager" is in the middle of those seven grades. Under him are management trainees/staff auditors, auditors and auditors II. Above him are project manager IIs, program managers and audit managers. What are the primary responsibilities of a "project manager". The developmental progression document states the following:

> "Responsibility for all audit processes on individual audit projects, including planning, execution, supervision of staff, customer relations and reporting."

How does someone who holds the position of "project manager" get promoted? The developmental progression document explains that. It says that a "project manager" must:

> "lead at least 6-8 audits, along with other lesser projects simultaneously. 1-2 special projects. Lead development of plan and analysis of significant risks associated with 3-4 of the projects. Presented audit work and associated findings to customer up to AVP."

The developmental progression document is a de facto job description of the duties of a "project manager". It is just in a different form than a bulletin. Given the information on this document it is simply incorrect to conclude that the Claimant was no more than a liaison type support staff employee. A "project manager" has considerable responsibility and is responsible for "...all audit processes on individual projects...", "...including...supervision of

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[21]All of this information is found in Carrier's Exhibit E.

staff...", and he is in charge of presenting audit findings "...up to AVP...". Does the Claimant report to other managers? Yes, he does. Do other managers oversee his work? Yes, they do. Does this make him less a manager. No. The most rudimentary knowledge of managerial decision-making in a large scale organization such as the BNSF tells us that all managers report to someone until you get to the top and even then, in a publicly held corporation, which is what this Carrier is, there is the Board of Directors. And there are stockholders as legal, if not factual, overseers. Further, a review of the primary responsibilities of the three managers higher up on the chart than the Claimant shows that about the only thing they do that he does not do is participate in an annual audit plan. This apparently is what the union is referring to when it argues that the Claimant is not a manager since he does not participate in the making of policy. On this latter point it can simply be said that, proportionately, most managers in large scale organization probably do not participate in policy making. They implement policy. But this does not make them less a manager. They simply supervise others who assist them in implementing policy. This appears to describe what the Claimant to this case did, in accordance with his job description, as it exists.

The union argues that the Claimant did not get involved in the recruitment, hiring, evaluation and disciplining of employees. Albeit these are functions done by many managers, they are not sine qua non perquisites for managerial status for the simple reason that American industry has scores of managers who do not do these things. So does, it appears, this Carrier for it is far from clear on its face if audit project managers II, program managers, and audit managers in the Carrier's revenue and financial audits division do these things

either. Are we to conclude that they also are not managers?

The union states that the Claimant is an "...old time rate clerk..." and he had none of the formal credentials required of a "project manager". If one reviews the educational and professional certification requirements of the Carrier's developmental progression scheme it shows that the position the Claimant held will "...generally (have) a four year college degree in accounting...", or comparable degree and be willing to work toward professional certification such as a CPA and so on. Obviously the Claimant to this case was able to do the job of a "project manager" without these credentials and there is no information in the record, as noted earlier, that he did not excel in his job. About the only thing that can be said for this argument by the union is that if the Carrier can find an individual with sufficient experience and intelligence and ability to do a management job it has the right to waive formal educational requirements just as professorships in great universities in poetry, music and the fine arts are sometimes filled by individuals with minimal education but with creative genius.[22]

The union argues that the Claimant only had skills indigenous to this industry with implication that if he would have accepted a severance package he would not have been able to have found a job somewhere else because he did not have transferable skills. This does not seem to be any more correct that the proposition that he was simply an old line rate clerk.

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[22]The union provides information on a "auditor" bulletin from Fort Worth which also requires considerable formal education, etc. The Claimant to this case must simply have bypassed all of that while at Topeka when he was first hired as an exempt auditor in May of 1997. It is unclear from the record if he went through all three audit positions from May of 1997 until October of 1998 when he was promoted to project manager or if he hired in as auditor II.

Was the Claimant subject to potential covered status? At one time auditors had been represented by this Organization on this property. That is not disputed in the record. But the basis of the union's argument with respect to the Claimant is that he also was eligible for representation since his position as a "project manager" was synonymous with that of an "auditor". The foregoing discussion dealing with the responsibility of a "project manager" suggests that auditors are not synonymous with "project managers".

A final issue dealing with whether the Claimant received benefits not granted to the rank-and-file, after being affected by a transaction is, in view of the foregoing, moot. There was no transaction in the instant case because the Claimant was not an employee covered by NYD under Article IV.

In view of the full record before him the arbitrator rules that the Claimant to this case is not an employee under Article IV of NYD. Subsequently he was not a displaced employee when his position of "project manager" was abolished in October of 2001, and there was no transaction associated with the abolishment of that position. The Carrier was not in violation of Article VII of the parties' MIA when it denied the Claimant's claim for NYD benefits.

Award

The ruling is in accordance with the Findings.

Edward L. Suntrup, Arbitrator & Chair

Daniel J. Kozak, Carrier Member
Assistant Vice President
Labor Relations, BNSF

William Miller
Director of Industrial Relations
Transportation Communications Union

Dated: 7-14-04

November 12, 2004

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

Dear Mr. Grother:

I received your letter dated November 8, 2004 regarding your claims against Union Pacific.

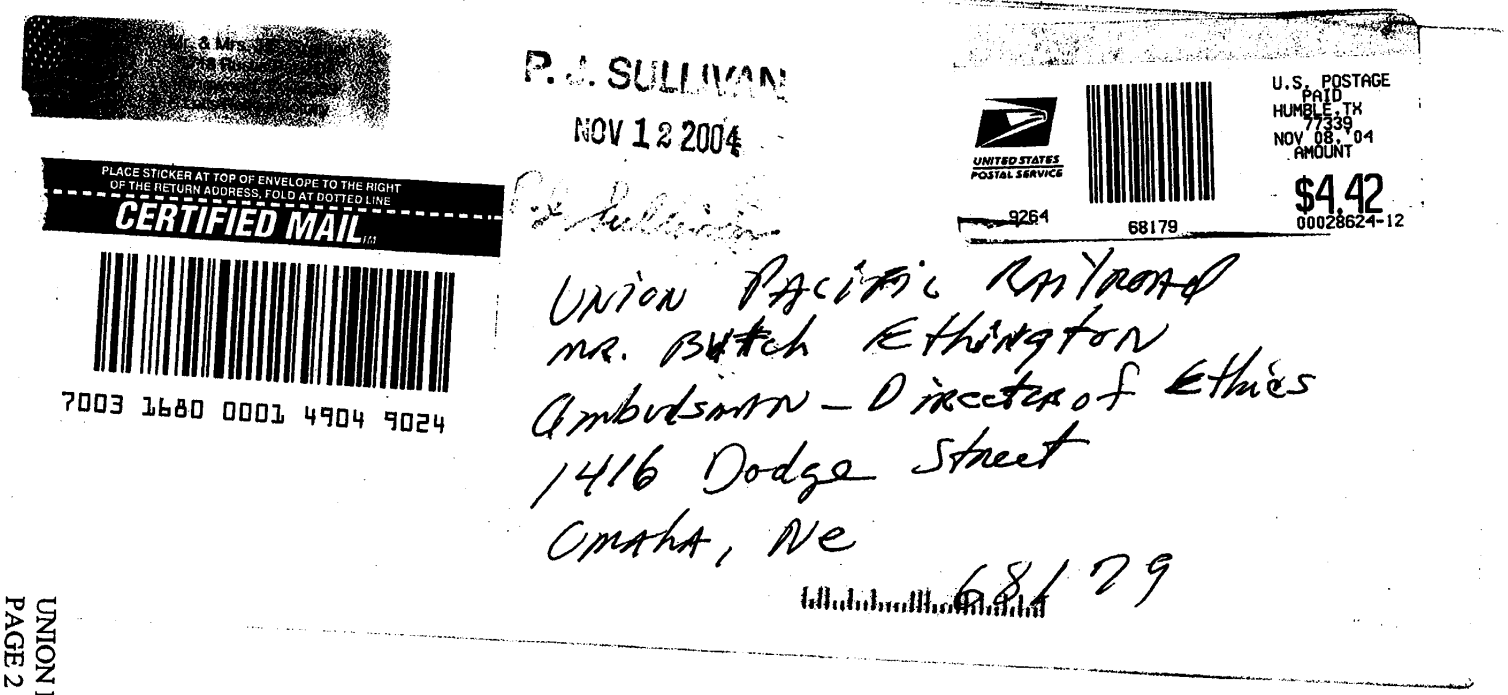
Since you have current actions pending against the railroad (for EEO and New York Dock issues), I believe that those are the proper forums through which to resolve your claim(s).

I am sure the arbitrator or hearing officers, by considering all of the evidence, will render a fair and impartial judgement.

Sincerely,

Butch Ethington
Ombudsman & Director of Ethics
Union Pacific

UNION PACIFIC EXHIBIT 52
PAGE 1 OF 34


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AMBUDSMAN - DIRECTOR of ETHICS
1416 DODGE STREET
OMAHA, NE
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Via Certified Mail-7003 1680 0001 4904 9024

Mr. Butch Ethington
Ombudsman-Director of Ethics
1416 Dodge Street
Omaha, Ne 68179

November 8, 2004

Dear Mr. Ethington,

Subject: New Evidence that I was treated unethically in 1997

Reference my previous correspondence to you regarding 1997 Unethical Practices, attached Exh.'s 1 and 3 are sworn Arbitration testimony by my alleged 1997 supervisor Kenneth C. Packard which clearly state that:

1. "...**the service issues and everything, they were insurmountable, no matter who was in charge"** (Pres. Davis's letter referred to service failure). (If no one could do yard consolidation, why severe reduction in wages?)

2. Regarding the 1997 required justification to warrant a wage reduction (Exh. 2), Packard Exh. 3 concerning writing anything on Form 15121: "No, I'm not familiar with the form at all"

(Therefore, my alleged supervisor did not provide any 1997 justification as required and my wages should not have been reduced without justification!)

In view of: 1) New UP **sworn evidence, 2)** Exh. 2 Policy of UP that usually a persons wages were not reduced in 1997, 3) that when wages were reduced special justification by the supervisor was required and Packard states no knowledge of writing such justification, and 4) that my similarly situated Houston MIO peers (Harry Stark and Joe Crow) displaced from Operations to the same job in the same City were not reduced in wages per UP payroll records; are you now willing to reconsider my request for **Fair Treatment,** which is publicly published Policy of UP to be a ***fundamental right* of ALL Union Pacific Employees** and allow the prior requested reimbursement of rightfully earned wage level after 28 years of dedicated service in 1997? Please advise.

Sincerely,

John Grother

Attachments-Exh's 1-3

John Grother

Exh. 1

Now, the issues that went on at Tucson, the service issues and everything, they were insurmountable no matter who was in charge. It was a tough time for the Union Pacific railroad.

MS. ROSS: Thank you.

MR. [redacted] First of all I'm going to take that damn thing off because it catches on my arm every time I move. I'm going to make an assumption, Lynette, just making sure you understand my presentation. I'm going to make an assumption that you have read the submissions and studied the exhibits and I'm not going to go through them *ad*

EXH. 2

DEMOTION POLICY 1997 Rev. 3/1/96

Demotion justification	If an employee is transferred to a lower job grade due to his/her inability to perform the duties of the prior position, the SRG and job grade of the new (lower) position will apply on the effective date of the transfer.
What about salary changes?	In most cases, the employee's present salary level is retained. However, if you believe a salary adjustment is warranted, provide Operating HR with your justification and we will try to obtain Railroad HR sign-off on the 15121.
What if it isn't a demotion?	If an employee is transferred to a lower grade for reasons other than performance, use "other" on the 15121 with reasons noted in the "comments" section of the form.

Exh. 3

[redacted]

Q That's this comment here?

A Right.

MR. MacDOUGALL: Did you write on this one? Did you write anything on this one, the 151-21?

MR. PACKARD: No, I'm not familiar with the form at all.

[redacted]

Q I believe you testified earlier you came back from Denver to Tucson with Tom Murphy and at that time this process was in motion?

A The arrangements for his transfer were in motion.

MR. MacDOUGALL: When was this, a day or two before the end of June? Murphy and you spoke to him? If you recall.

MR. PACKARD: June-July.

MR. MacDOUGALL: That's pretty close.

MR. PACKARD: I'm not exactly sure

November 10, 2003

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

Dear Mr. Grother:

I received your letter via regular mail dated November 2, 2003 regarding your accepting a lesser salary and position in 1997. You were given a choice at that time according to Mr. Ken Packard, Superintendent. There was no unethical practice. The choices and decisions made during that merger period were difficult for many people. The fact that you were one of the managers who were given difficult choices is unfortunate, but not unethical.

I will not rehash the personnel evaluations and decisions made by management and you so long ago. Mr. Jerry Davis responded to your petition in September of 1997.

Sincerely,

Butch Ethington
Ombudsman and Director of Ethics

VIA CERTIFIED LETTER

December 15, 2002

Union Pacific Railroad-Ombudsman
Attn: Mr. Butch Ethington (Confidential)
1416 Dodge Street
Omaha, NE 68179

Rcvd 12/30/02 cee

Mr. Ethington,

This refers to our discrimination discussion today and Union Pacific Railroad ("UPRR") President and Chief Operating Officer Ike Evans letter dated August 5, 2002 (Exh.1), and the Building America Brochure enclosed therewith (i.e. "Building America is about how we act with each other"). Specifically, I am convinced that I have "**not been treated** appropriately within the **values** and **attributes** inherent in Union Pacific's reputation". My fellow managers have not afforded me respect, **FAIRNESS (A FUNDAMENTAL UPRR EMPLOYEE RIGHT)**, or ethical behavior. Below, I shall indicate a few of the facts which I have recently (starting 7/31/02) been allowed to know so far, about my two salary rate grade ("SRG") demotion on July 1, 1997 from Senior MTO at Tucson, Arizona to MIO at Houston, Texas-a whopping $1,272 per month.

The purpose of this letter is to request **COMPENSATION & FAIRNESS:**

1) Compensation reimbursement - see Attachment 2 for details,
2) Deletion of unknown-to-me demotion "disciplinary reasons" from my on-line, people-soft, hard copy personal record, and any other records,
3) Immediate appropriate raise to salary Band C (Attch 2 details the math)- $ 7,528/month effective 1/1/03 & $ 7,791 effective 7/1/03, OR present wages of Mr.Thomas Parr (my replacement in July 1997 @ Tucson, Az.)
4) Give 2002-$2,500 bonus, like other MIO'S with same PDR's in Houston.
4) Consideration for future promotion, and 2003 Bonus like other MIO's.

BACKGROUND

I was an Ex-Southern Pacific Transportation Company ("SPTCo") Manager with "Outstanding" Performance Ratings spanning a career of 28 years in various Operating, Marketing and Joint Facility positions in 1997. I had been consistently promoted as indicated by Exh. 2 (Personal Record) and received numerous types of special recognition, compensation and assignments; including being appointed by SPTCo President Mohan to be

the SPTCo's lead negotiator for a $450 Million Peninsula right-of-way sale to the State and Counties in the San Francisco Bay area. (Exh.'s 3-6).

I was highly regarded by most of my peers as a person who could get the job done through the creation of process management based on my Air Force fail-safe (redundant system) training, formal education (including an MBA), and in-depth process training at SPTCo. In fact, I was specially selected by SPTCo VPO Lacy to be their sole "Coordinator, Productivity Improvement Program", which included multiple Terminal and Blocking studies with implementation timelines / detailed implementation processes, which were followed by the respective Service Units, after each evaluation.

LOGIC TEST NUMBER ONE:
BASED ON THE ABOVE RECOGNITION, DUTIES AND PROMOTIONS BY SPTCo, IS IT LOGICAL THAT A MANAGER OF SUCH DEPTH AND LONGEVITY WOULD DESERVE A 21% CUT IN PAY AND DEMOTION, AFTER A TWO-MONTH MERGER RELATED YARD CONSOLIDATION EXPERIMENT FAILED?

After a cross training assignments as General Manager Amtrak/Transit Systems, and Joint Facilities (where SPTCo managers negotiated with UPRR managers), I returned to the Operating Department of SPTCo as Terminal Superintendent (SrMTO) Tucson, Arizona effective 9/16/95 with a salary of $6,200 a month. After a thorough Jan-Mar 1997 review of my strong personal record and "Outstanding" performance, I was verbally selected by Union Pacific Railroad ("UPRR") to be Senior Manager Terminal Operations ("SMTO") by UPRR. After eighteen (18) months as the incumbent, as corroborated by my personnel record, I was OFFICIALLY designated by the UPRR as SMTO effective April 16, 1997, which was ONLY 2.5 months before my discriminatory demotion on July 1, 1997!

During the Arizona UP-SP Merger implementation rollout in early 1997, UPRR VPO Arthur Shoener performed his initial review of UPRR operations and interviewed several persons regarding how the operations could be consolidated or modified, which was "desirable to realize, UP-SP merger benefits". VPO Shoener reached the merger-related decision to close the phoenix flat switching operation and move "**ALL** flat switching" to Tucson, despite the 1% Tucson switching grade and lack of other resources,

including track capacity for that volume, an on-going twelve hour maintenance of way (M of W) curfew on both sides of Tucson, and there was no flat switching lead on the Eastend (which in 1997 required that all "tailing switch movements of any size" obtain Dispatcher authority before entering the Main Track to switch).

As in most mergers, UPRR managers were not interested in the opinions of ex-SPTCo managers. I did provide a documented list of the resources and blocking that would be required, **BEFORE ATTEMPTING TO CONSOLIDATE ALL PHOENIX WITH TUCSON SWITCHING.** That list was ignored by the 1997 UPRR corporate culture. Said culture required that the merger transaction experiment take place promptly as ordered by the hasty VPO decision without benefit of even a capacity-model study in advance.

According to the existing documentation, I expressed extreme concern regarding the fact Tucson was surrounded on both sides by twelve-hour maintenance-of way (M of W) curfews, which prohibited the operation of trains, in any direction, between the hours of 0700-1900 M-F. In simple language, the trampled playing field was cut in half (by the lack of operational time account M of W curfews and the other teams size was doubled (by consolidating ALL Phoenix flat car switching at Tucson), which was a recipe for disaster, none of which was within my decision or control!).

Under present UPRR operations, UPRR attempts to take great care with curfews and even detours trains and other activities are performed to ensure that the Terminal will survive. That was not the case in 1997, as ALL were "piling on the beleaguered ex-SPTCo management at Tucson" (to extend the metaphor of the "trampled playing field").

The merger transaction experiment was started effective May 14, 1997, which was about twenty (20) months after I had been successfully performing as "Outstanding", on my Tucson assignment. Senior UPRR management quickly realized that the two (2) M of W curfews, lack of capacity, lack of personnel, 1% grade issue, track conditions, and other Tucson resource deficiencies had created a failure, just as others and I had predicted. In desperation, capacity, process and "bullying switching experts" were flown in to show the ex-SPTCo managers how to railroad.

Experts were quickly brought to reality and had to publicly admit that it could not be done with **ALL** the Phoenix traffic coming to Tucson, including Westbound, insufficient trackage and 12' M of W curfews in both directions. During the week of June 17, 1997, confidential meetings were held to determine who would be the scapegoat, and a little over one-month into this merger consolidation experiment, my demotion and 21% pay cut decision was made by senior management. I was orally advised June 26, 1997 to be gone July 1, 1997, as UPRR wanted its own people in Tucson!

The decision to demote me was made with complete disregard for the truth; because, the **FACTS SPEAK FOR THEMSELVES!** Shoener was the genesis of this merger consolidation decision, as testified to by many witnesses. Therefore, why punish the local manager, who just happened to be in the wrong place at the wrong time?

As indicated by the web site of the BLE Union (Exh. 7), the problems at Tucson continued for several months, after my demotion, which does not match statements made in President Jerry Davis's response to my appeal (Exh. 8- see APPEAL to Davis), concerning this discriminatory demotion.

LOGIC TEST NUMBER TWO:
WHY WOULD I WRITE THE THEN PRESIDENT OF UPRR ON JULY 15, 1997 A LETTER REQUESTING A DIFFERENT JOB, WITH THE SAME $6,200/ MO. COMPENSATION, IF I HAD BEEN ADVISED THAT I HAD BEEN DEMOTED FOR DISCIPLINARY REASONS IN JUNE? THE FACTS SPEAK FOR THEMSELVES!

President Davis's letter stated on September 4, 1997 in part. (Exh. 9):
"In **JUNE,** the service levels to our customers, both external and internal, deteriorated to the point where immediate action had to be taken." and "We believe that a change in management was necessary for improvement to occur." The conflicts in Davis's letter included; but, were not limited to:

a. Service difficulties in Tucson were still roaring in September 1997 when Mr. Davis responded to me September 4, 1997 (see Exh 7 Union Web Site).
b. b. The issues keeping Tucson Terminal barely fluid in September were: 1) the 12-hour per day M of W curfews on both sides had ended,

2) THE "JUNE PROBLEM" AT TUCSON ENDED (THE MERGER CONSOLIDATION EXPERIMENT WAS ENDED JUNE 26, 1997!)

LOGIC TEST NUMBER THREE:
IF I HAD ACTUALLY BEEN DEMOTED FOR A PROPERLY DOCUMENTED AND REPORTED DISCIPLINARY REASON ON JULY 1, 1997, WHY WAS THIS ALLEGED "FACTUAL DEMOTION REASON " NOT SIMPLY STATED IN UPRR PRESIDENT DAVIS'S SEPTEMBER 4, 1997 RESPONSE TO MY APPEAL? (SEE EXH. 9)

The author of Mr. Davis's letter had so little regard (i.e. respect for employees) for my discriminatory demotion, that the response took almost two months, did not use the Quality Process to determine the root cause of the June 1997 service failure and did not even bother to address or answer my specific questions about my financial denigration for life.

President Davis's letter **CORROBORATES** that the ONE cause of my demotion was the **JUNE SERVICE FAILURE**, which was directly related to the late May 1997 merger decision to consolidate yards, without doing a capacity study in advance or going through an in-depth simulation study of issues prior to the attempted consolidation implementation merger experiment, including the postponement of the two (2) strangling M of W curfews. The late May 1997 **TOTAL** switching consolidation experiment was the result of UPRR managers, inexperienced with the territory; seeking a "quick cost cut", who would not listen to reason or perform due diligence.

I have access to the 1997 UPRR capacity study which documented, after the experiment began, that consolidation of such volume ***COULD NOT BE DONE***; especially, with Phoenix also sending ALL Mill-Run Eastbound and Westbound traffic to Tucson and M of W curfews surrounding it.

It was an impossible task! Even many prior-to-the-merger UPRR managers were also in agreement (before the yard merger consolidation experiment), that failure was the only possible outcome.

As **CORROBORATION** of the 1997 UPRR Corporate Culture, which created my arbitrary demotion, the Wall Street Journal on August 25, 1999 indicated, in part, the 1997 ***ATTITUDES AND BEHAVIOR OF***

UPRR (Exh. 10):

a. "When something happened," **YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY"**.

(When the merger experiment of consolidating switching terminals was ordered by VPO Shoener and failed in less than two months, I was shot!)

b. "Their culture was dysfunctional and characterized by noncommunication"

c. "Troubled...1997-98..." "freight service had collapsed, stranding Midwestern crops, snarling west coast ports and delaying shipments of goods from chemicals to paper" (The whole UPRR system was fouled).

d. "But many people blame Union Pacific management. They say Union Pacific **TRIED TO CUT COSTS DURING THE INTEGRATION, NOT HIRING PEOPLE AND CRAMMING CARS INTO FEWER YARDS"**

(Above is exactly what happened at Tucson during the merger yard **CONSOLIDATION EXPERIMENT OF MOVING ALL PHOENIX SWITCHING INTO TUCSON, WITHOUT BENEFIT OF CAPACITY, PROCESS, PROPER RESOURCE STUDY!**

e. "Meanwhile, Mr. Davidson reinforces his push for greater flexibility by showing he is willing to try anything"

(Above are great; but why ruin the Grother's lives?)

In much the same way as Enron's Vice President of Corporate Development, Ms. Sherron Watkins, believed she had a duty to advise senior management of an impending failure, I advised that this merger experiment was doomed. Not only were my warnings ignored; but also, when the experiment failed, I was discriminatorily demoted and advised to accept a 21% cut in salary at Houston, Texas, in a different sub-department, or "Hit the Street"!

In 1997, after 28 years of dedicated service, eleven "grooming moves", mainly as an Operating department manager working 12 hour plus days/nights/weekends/holidays/derailments/injuries/accidents/hazardous material releases/incidents and so forth, "I felt the 33,000 miles of Building America tm"

Based on the 1997 UPRR Corporate Culture and after the June 1997 merger switching consolidation experiment failure, senior UPRR managers undertook an aggressive program of removing, demoting, denigrating (until resigned) ex-SPTCo managers until **all ex-SPTCo Operating Officers who were at Tucson when the merger was announced were gone, for perceived discriminatory reasons.**

Masseurs. John E. Grother, H. Lawson McDowell, David L. Hampton, Paul A. Lobello, Ray Szarek and Bob Strefelder were "removed " by various means and Ex-Rock Island UPRR Service Unit Superintendent Ken C. Packard was "demoted" (BUT, **WITH NO REDUCTION IN WAGES!).** Ex-SPTCo manager Dan S. Payawall tragically died during the stress-filled twelve (12) hour plus days of this June 1997 yard consolidation transaction experiment, when his pancreatic cancer came out of remission.

THE QUESTION AT ISSUE:

Is Grother to be made whole for the lost compensation and fringe benefits which resulted from the two SRG discriminatory demotion July 1, 1997 based on UPRR's Policy that every employee has a **fundamental right to fairness and free of discrimination?**

Since the UP-SP Merger, I have been concerned for several years why I was unable to be promoted or even be transferred after years of C-NET attempts and it now appears that the reason has come forth!

On July 31, 2002, I was advised in part the following (Exh.11): "The online record indicates **DISCIPLINARY ACTION**" as the reason for your July 1, 1997 demotion!

You can imagine ***MY SHOCK AND CONCERN*** to find out that I have been deceived and a separate, online system exists, which has been providing information to prospective UPRR hiring managers. These prospective internal hiring managers, of course, would look no further than "demoted for disciplinary reasons", before discarding all my C-NET applications. In combination with the word "demoted" on my Official PR, my reputation has been and continues to be badly tarnished, and the damage is almost irreparable.

I have never been told anything about my "disciplinary action" (why not? – Was a "disciplinary reason created as a cover-up for discrimination?).

President Davis's letter of September 4, 1997 does not mention anything about discipline, only that service had deteriorated in June 1997 (during VPO Shoener's merger yard consolidation experiment). I had no idea there were negative remarks on some "secret-to-me", online record.

I requested a hard copy of what I was told was my "entire Personal Record" twice, to work on my UPRR resume, and there was not one word therein about "disciplinary action in 1997", or any other time. Ms. Linda S. Jensen (Exh 12) wrote, "There are no entries of discipline".

Moreover, I asked the Local HR manager Buttrill if she had knowledge of anything negative on my record, which would explain why I was demoted and she replied March 6, 2002 "The only thing I have access to is the "database information", which associates this title change with the move from Tucson to Houston"(Exh. 13a and 13b).

THE ABOVE RESPONSE COULD LEAD ONE TO BELIEVE THAT THE REASON FOR MY DEMOTION (I.E. DISCIPLINARY REASON), MAY HAVE BEEN PUT IN THE ONLINE DATABASE "BETWEEN" MARCH 6, 2002 (BUTTRILL'S STATED RESEARCH DATE) AND JULY 31, 2002 (BREWSTER'S RESEARCH RESULTS).
COULD THAT BE POSSIBLE?

WHAT OTHER EXPLANATION IS POSSIBLE FOR THE DIFFERENT RESULTS FOUND BY TWO SEPARATE HR MANAGERS?

Also, on March 7, 2002, the Local HR manager Buttrill states:

"My suggestion was to review your Personal Record. A hard copy PR 'generally' has more information than is documented in the computer" and "If neither of these suggestions produce the information ...(PR review or Former Supervisor feedback)... I don't know where you would find it." Apparently, Ms. Buttrill was not aware that the compensation section of the HR Department would have on file the 1997 Demotion Policy.

IN DIRECT OPPOSITE TO THE ABOVE ADVICE, MY HARD COPY PR INDICATED NOTHING ABOUT THE "SECRET REASON" FOR MY DEMOTION. THE "DISCIPLINARY REASON" WAS FOUND IN THE "ON-LINE SYSTEM" ON 7/31/02, AFTER MS. BUTRILL STATES SHE CHECKED "DATABASE INFORMATION" ON OR BEFORE 3/6/02 AND FOUND NO REASON FOR MY DEMOTION – WHY NOT?

The local HR manager Buttrill suggested my Tucson supervisor could advise me why I was demoted 2-SRG's. I sent four Lotus Notes, two AOL e-mails, and Certified Letter to Mr. Ken C. Packard. He has **not responded yet!**

WHAT WOULD LOGIC INFER ABOUT PACKARD'S NON-RESPONSE? (See Exh. 14a-14b unanswered requests to Packard).

Local HR manager Buttrill also suggested that I contact the EEO Group and provided their Phone number for some unknown reason July 9, 2002? At that time, I was unaware of ALL the discriminatory acts which had taken place; especially, the July 31, 2002 information that disciplinary reasons had been placed on a secret online file which affected my promotability.

Ms. Lisa Brewster was helpful and provided Exh.15 (1997 POLICY), which indicates, in part: "***IN MOST CASES THE EMPLOYEES PRESENT SALARY LEVEL IS RETAINED***". WHY WAS MINE NOT RETAINED?

I have been unable to obtain Page 2, Form 15121 data from 1997, which allegedly indicates the heinous "comments" justification provided to reduce $1,272 per month. It seems incredulous to me that such a huge pay reduction could be taken from one's fellow employee without some hard copy evidence being maintained forever, or at least some type of CD-ROM,

microfiche or other accessible file created. Surely, Mssrs. Packard and Murphy can remember what heinous activity I did, which was undisclosed to me in 1997 (or thereafter) and discriminatorily placed in the online system, creating a "secret to me discipline record", which would end my career!

Perhaps, the above managers could be asked to re-create the discipline charges for ALL to see, understand the underlying evidence, and rebut?

Would it be FAIR to know why I could not ever get promoted again (i.e. account an on-line system "disciplinary demotion" notation for all UPRR hiring Managers to review) and why I have lost over $100,000 through March, 2003 and stand to lose another estimated $200-300,000 in retirement (including Tucson Real Estate losses), assuming that my wife and I live 20 years into retirement (see Attachment 2).

My extensive research of other persons demoted or "demonstrating a significant change in job title" (which have the logical appearance of a demotion-i.e. Vice president to General Manager, etc.), indicates that I am the only person I can find during the System-wide 1997 service failures, who was forced to take a 21% cut in pay, **OR QUIT!** A partial list of managers who retained **all their wages** through the severe service disruptions during 1997 is shown on Exhibits 16 and 17 (i.e. comparative and/or statistical disparate treatment proofs indicating discrimination).

Even those prior-to-the-Merger UPRR managers who made the local Houston Newspaper related to spectacular service failures (i.e. Mssrs Charles Malone and Greg "Bubba" Garrison) ***HAD NO PAY CUTS; DESPITE THOUSANDS OF DELAYED CARS, LAW SUITS AND HUGE CUSTOMER SETTLEMENTS AGAINST UPRR (EXH. 18).***

LOGIC TEST NUMBER FOUR:

IS IT LOGICAL THAT I DID SOMETHING SO HEINOUS AFFECTING CUSTOMER SERVICE, THAT I DESERVED A WHOOPING 21% PAY CUT, WHEN ALL AROUND THE UPRR SYSTEM THERE WERE NUMEROUS, INCREDULOUS SERVICE FAILURES, WITHOUT DEMOTION PAY REDUCTIONS?

(I.E. UNJUSTIFIED EXCLUSIONARY EFFECT?)

WHY WAS I SINGLED OUT FOR A SEVEN-YEAR SALARY PUNISHMENT, FOR JUST BEING IN TUCSON, WHEN SOMEONE MADE A DECISION, WITHOUT THE QUALITY PROCESS?

The System-wide service delays in 1997 are well documented (Exh's 19-25); yet, in ALL the managers demoted, I fail to find any (at this writing), who were reduced in pay during 1997, out of hundreds interviewed.

One specific ***CORROBORATION*** of 1997 differences in the application of the official UPRR demotion policy, which is **EXACTLY ON POINT** and demonstrates clearly that others, similarly situated, were treated better is:

MESSRS. HARRY L. STARK AND JOE D. CROW WERE BOTH EX-SPTCo OPERATING OFFICERS, JUST LIKE MYSELF AND THEY WERE ALSO DEMOTED FROM HIGHER PAYING POSITIONS AND PLACED IN THE SAME INTERMODAL DEPARTMENT, IN THE SAME CITY (HOUSTON), ON THE SAME JOB (MIO), A FEW MONTHS BEFORE MYSELF; BUT, THEY DID NOT HAVE THEIR HIGHER OPERATING DEPARTMENT PAY REDUCED, WHICH IS CLEARLY DISCRIMINATORY AND APPLYING POLICY IN A NON-STANDARD MANNER TO SIMILARLY SITUATED EMPLOYEES. (I.E. INFERENTIAL DISPARATE TREATMENT)

Discriminatory intent can be inferred from the fact that similarly situated persons are treated differently in a similar employment situation.

Based on hundreds of interviews, the issue of a manager being reduced in compensation as a result of demotion was virtually unheard of in 1997. That concept was so strong; that, HR personnel issued Exh. 26A "Summary of plan Changes" effective January 1, 1999 concerning ex-SPTCo Pension Plan Rights which stated " ***IN NO CASE WILL YOUR BENEFIT UNDER THE AMENDED PLAN BE LESS THAN THE PLAN BENEFIT YOU EARNED THROUGH December 31, 1998."***

The above statement does not appear to be true in my case, as my highest pay to date is the 36 consecutive months between July 1994- June 1997, which will not be allowed in the calculation of my UPRR pension, as no monies before 1998 are included for ex-SPTCo managers. I shall be financially impaired for the rest of my life! The above quoted HR statement could only be made; if, it were believed by HR personnel ***that no one demoted would lose their wage base; which, is not true in my discriminatorily demoted case.***

Regarding any delay in submitting this request for compensation and personal record correction. I have already experienced the following partial list of facts; which I had to be exposed to before composing this request:

1. Not aware of the on-line **SECRET** reports until Jul 31, 2002, at which time I was Lotus Note advised (Exh. 11) only that an unknown-to-me online system stated "Demoted, disciplinary reasons". From that SURPRISE date until now, information has been requested and many dead-ends have been encountered in trying to obtain the facts (Exh. 26B through 26E). The latest dead-end is the comments section of ALL form 15121's in 1997 have been shredded after retaining only page one data.

2. After just requesting my "Official Personal Record" in November 2001 to determine why I was "not promotable", I was instructed to submit to two "random drug tests" in a row (Feb 2 and May 2, 2002). These tests were only separated by that much time because I was on a previously scheduled April vacation. Such close timing between "random tests" seems statistically implausible, after 33 years of dedicated service without a single random drug test. These have the appearance to me of being retaliation, harassment and continuing discrimination, for simply just requesting my Personal Record!

3. Although my PDR was identical with my two peer MIO's at Settegast and Englewood (both in Houston), they both received a $2,500 bonus February 2002, for their 2001 performance (which was identical to mine), indicating a continuing pattern of discrimination.

4. Advised by my new Houston Supervisor, Mr. Don F. Fryar on Saturday, August 2, 1997 while driving Settegast to Englewood Ramp, in part:

"YOU CAN NOT WORK AROUND HERE DURING ANY TYPE OF LAWSUIT, AS THEY WOULD MAKE LIFE UNBEARABLE FOR YOU." (NO WITNESSES OF COURSE BUT INTIMIDATING, HARASSING AND DISCRIMINATORY THREAT).

5. Even the local HR representative Buttrill was so "disturbed" by my dead-end search for facts about my discriminary demotion, that she referred me 7/09/02 to the EEO group for some unknown EEO reason (Exh. 13b).

6. Requested training on the Budget and other Computer Drive functions needed to be understood before being considered for promotion to Senior MIO or SeniorMTO at Englewood or anywhere on the System. Fryar failed to provide the training requested and appeal to Fryar's boss ended with a continuation of Grother on the night shift and less chance of promotion!

I AM TRYING TO RECONCILE THE ABOVE PARTIAL LIST OF DISCRIMINATORY STATEMENTS, ACTIONS AND BEHAVIORS, WHICH HAVE OCCURRED, WITH THE BELOW PUBLICLY PUBLISHED POLICIES OF UPRR.

THE PUBLICLY PUBLISHED POLICIES OF UPRR:

1. UPRR web site – General Public – Diversity (Exh. 27)

"Policy and Practice"

" A DISCRIMINATION FREE WORKPLACE AND FAIR TREATMENT ARE FUNDAMENTAL RIGHTS OF ALL UNION PACIFIC EMPLOYEES".

I HAVE BEEN DENIED THIS FUNDAMENTAL RIGHT!

To partially illustrate, it **is not fair to enter undisclosed data into an online system, which is used by internal managers who hire and not make that same information available to the affected employee for rebuttal. It is not fair to enter data in a discipline system without telling the employee about said entry. It is not fair to take away my monthly income when hundreds of other managers were involved in locations with more**

severe service failures in 1997. It is not fair to treat similarly employed persons with different policies, concerning demotion and so forth.

2. UPRR web site-General Public-Diversity (Exh. 28)

"Equal opportunities are afforded to ALL employees"

" ...employment without regard to....status as a Vietnam-era Veteran..."

"This policy applies to all terms and conditions of employment, including, but not limited to, ... demotion, ... transfer, ...compensation..."

(AS HAS BEEN FOREVER NOTED IN MY PERSONAL RECORD AND MY INTERNAL RESUME, I SERVED AND RETIRED WITH AN HONORABLE DISCHARGE FROM THE USAF RESERVE, AFTER SERVICE DURING 1969-71 ON ACTIVE DUTY AND THEREAFTER AS AN ACTIVE RESERVIST, INCLUDING USAFR RETIREMENT.

3. UPRR Website-Executive-Business Conduct Guidelines (Exh. 29)

"Simply stated, ***OUR POLICY REQUIRES EVERY UNION PACIFIC RAILROAD COMPANY EMPLOYEE TO PRACTICE HONEST, INTEGRITY, AND FORTHRIGHTNESS IN EVERY ASPECT OF DEALING WITH EMPLOYEES, ..."***

(I WAS NOT TOLD THAT I WAS DEMOTED FOR DISCIPLINE, ADVISED OF ANY DISCIPLINE PROBLEM, GIVEN AN OPPORTUNITY TO CONFRONT MY ACCUSERS, DEFEND MYSELF IN ANY MANNER, OR BE PLACED ON A DEVELOPMENTAL ACTION PLAN TO CORRECT ANY PERFORMANCE ISSUES).

4. THE 2002 POLICY FOR VISION AND VALUES (Exh. 30)

"We put all issues on the table and attempt to resolve them through a constructive debate a challenge", which should include resolving this compensation issue without fear of reprisal. The 2002 Policy also states:

" ... do not kill the messenger bearing bad news". This already happened to me in 1997, when I simply warned my UPRR Tucson supervisor, that the merger switching consolidation experiment of moving ALL Phoenix switching into Tucson could not be done.

5. THE 1997 VISION AND VALUES (Exh. 31– DESKTOP DISPLAYED)

The 1997 VALUE DESKTOP STAND was prominently displayed on my desk in early 1997. The 1997 Values included, in part, the following and other values shown on Exhibit 31, WHICH I GOT TO STARE AT, WHILE I WAS BEING DISCRIMINATORILY DEMOTED:

"TREAT OTHERS LIKE YOU WANT TO BE TREATED"

(Those who cut my wages 21% would have NOT WANTED THAT TO HAPPEN TO THEM AND SUCH REDUCTIONS DID NOT OCCUR TO OTHER MANAGERS WHOSE TERRITORIES WERE INVOLVED IN SEVERE SERVICE FAILURES WITH HUGE SETTLEMENTS, LAWSUITS AND GRID-LOCKED SERVICE OVER MANY MONTHS!)

"TRY NEW IDEAS...ENCOURAGE CHANGE"

(I WAS FINANCIALLY RUINED AFTER VPO SHOENER HAD AN UNRESEARCHED MERGER IDEA TO CONSOLIDATE ALL YARD SWITCHING FROM PHOENIX TO TUCSON'S 1% GRADE).

"TRUST IS ESSENTIAL"

(THE ABOVE VALUES AND OTHERS WERE NOT HONORED AS PUBLISHED IN 1997. CAN ONE NOW OBTAIN FAIRNESS IN 2002?)

6. BUSINESS CONDUCT POLICY OF UPRR AS STATED BY 'UP ONLINE' JUNE 21, 2002 (Exh. 32) – IN PART:

"IN THE CONDUCT OF BUSINESS, EACH EMPLOYEE MUST ADHERE TO HIGH ETHICAL **STANDARDS**. ***THESE INCLUDE HONESTY (I.E. TRUTHFUL DEALING WITH EVERYONE, INCLUDING ...FELLOW EMPLOYEES) AND FAIRNESS (I.E.***

TREATING ANOTHER IN THE SAME MANNER AS YOU WOULD EXPECT TO BE TREATED."

(WOULD MESSRS. PACKARD AND MURPHY WANT THEIR WAGES REDUCED 21% IN 1997 AND STILL NOT BE BACK TO THEIR 1995 LEVEL OF COMPENSATION UNTIL 2004 OR LATER?)

7. LOTUS NOTE February 4, 2002 to ALL employees from President and COO Ike J. Evans (**can** this be used to evaluate my Attch 2 request?):

"Internally, all of us must heighten our efforts to '***WALK THE TALK'.*** TO ME, ***THIS MEANS MATCHING THE EVERYDAY BEHAVIOR WITH THE VISION AND VALUES OF THE COMPANY. THIS IS A PREREQUISITE TO US ADVANCING INTO THE HIGHEST RANKS OF U.S. BUSINESS."***

8. UPRR reminder card received with reduced paycheck October 22, 1999:

"ALL EMPLOYEES WILL BE TREATED FAIRLY AND WITH RESPECT" (Exh. 33).

9. President Evans's LOTUS NOTE June 2002 to ALL employees concerning UPRR reputation states:

"WE WANT TO ***ENHANCE THE REPUTATION OF UNION PACIFIC AND THE MEN AND WOMEN, LIKE YOU, WHO WORK HARD EVERY DAY TO MAKE US ONE OF THE BEST COMPANIES IN THE WORLD".***

(I HAVE NOW WORKED VERY HARD FOR 33+ YEARS, ESPECIALLY AS A 12-HOUR DAY- PLUS OPERATING OFFICER; BUT MY REPUTATION HAS BEEN RUINED BY THE TUCSON DEMOTION PIGEONHOLING REMARKS PLACED IN THE ONLINE SYSTEM. MY SEVERE CUT IN WAGES WAS EXTREMELY UNFAIR AS: OTHER EX-SPTCo OPERATING MANAGERS WERE DEMOTED TO POSITIONS IN INTERMODAL AT THE SAME CITY (HOUSTON), THE SAME JOB AND THEY WERE NOT CUT IN WAGES; AND

PRIOR-TO-THE-MERGER UPRR MANAGERS, WHO WERE LOCATED AT SERVICE FAILURE LOCATIONS WHICH RESULTED IN LAWSUITS AND CUSTOMER CLAIM SETTLEMENTS WERE NOT REDUCED IN COMPENSATION WHEN DEMOTED/TRANSFERRED!

MY PERSONAL 1997 ACTIONS DID NOT RESULT IN ANY LAWSUITS OR CUSTOMER SETTLEMENTS PER MY DOCUMENTATION!

10. COMPARISON BETWEEN THE "UNKNOWN DISCIPLINE DEMOTION" EVOKED ON MYSELF BY UPRR IN 1997, FOR JUST BEING IN THE WRONG PLACE WITH DISCIPLINE ISSUED TO OTHERS IN "COMMAND ROLES", INCLUDING MILITARY COMMANDERS WHO WERE "IN COMMAND" WHEN ***LOSS OF LIVES OCCURRED BY ACCIDENTS; BUT, THESE "MANAGERS" HAVE NOT BEEN FINANCIALLY AFFECTED FOR LIFE, LIKE ME:***

A. Exh. 34 is result of high profile NEWSPAPER case of USS Greenville COMDR. Scott Waddle who was "in command" when his submarine surfaced and NINE (9) JAPANESE SAILORS WERE KILLED. THE NAVY SAID WADDLE WILL RECEIVE HIS PENSION AND FULL RETIREMENT PAY.

B. Exh. 35 concerns Colonel Larry New, who was Commander at Nellis AFB 57th Operations Group when ***TWELVE (12) AIRMEN WERE KILLED.*** After a temporary sideline to a staff position account MEDIA ***SCRUTINY, HE HAS NOW BEEN SELECTED AS A GENERAL.*** NO LOSS OF PAY OR RETIREMENT BENEFITS OCCURRED.

C. Exh. 36, Mr. Steve Clark, prior Attorney General of Arkansas and Candidate for Governor of Arkansas in 1990 was found guilty of using the State's credit card (felony conviction). In June 2000, he was given ***A SECOND CHANCE BY TEXAS BOARD OF LAW EXAMINERS, WHO ALLOWED HIM TO TAKE THE TEXAS BAR EXAM BECAUSE " WE BELIEVE IN REHABILITATION IN TEXAS AND YOU LOOK LIKE YOU'VE HAD ENOUGH"***

11. Exh. 37 is urging employees, as a paycheck insert received 4/26/02:

"IT'S TIME AMERICA HEARD YOUR STORY"
I HAVE VERY BRIEFLY AND PAINFULLY TOLD MY STORY. I DO NOT WANT TO TELL IT AGAIN; THEREFORE, I LOOK FORWARD TO A FAIR RESPONSE FROM UPRR.

12. LOTUS NOTE 8/8/02 FROM PRESIDENT & COO IKE EVANS TO ALL EMPLOYEES:

"***FOR OVER 140 YEARS, THE MEN AND WOMEN AT UNION PACIFIC HAVE PROVEN THAT THEY CAN BE TRUSTED TO DO WHAT'S RIGHT"***

13. **PARTIAL LIST OF FAIRNESS QUESTIONS FOR THE REVIEWERS OF THIS COMPENSATION REQUEST TO CONSIDER:**

- What was the Operating Department's and or UPRR's record in 1997 of applying my same discipline or punishment to others, who had been alleged to have violated the same rule, standard or conduct?

- Why was I given NO NOTICE OF INADEQUATE WORK or performance standard, including the possible consequences of failure to comply or opportunity to respond? Why no PDR or counseling sheet of any type issued to me before leaving or to my demoted duty station?

- Why was there no disciplinary issue raised on ANY KNOWN TO ME performance appraisals and no previous disciplinary actions?

- Why have I never been made aware of any investigation, documentation of poor performance, or given a defined time period and guidelines in which to correct an alleged deficiency?

- Did UPRR conduct a thorough investigation, including adequate, impartial investigation of the multiplicity of factors affecting performance at Tucson Terminal (root cause analysis) before making a decision about taking an alleged "disciplinary action"?

- What evidence supports the alleged disciplinary reason, including allowing myself an opportunity to respond to the charges? Was the investigation of the alleged infraction FAIR and OBJECTIVE?

- Was truly substantial proof of misconduct or performance discrepancy gathered, not flimsy or slight, to form the alleged basis for taking disciplinary action (i.e. who are the witnesses and why was I not afforded an opportunity to confront the witnesses against me)?

- Have similarly situated employees (similar records and alleged infractions) received the same discipline (i.e. two SRG reductions)?

- What was the Operating Department and / or UPRR's record in 1997, or anytime, for taking "similar disciplinary action" for this type of infraction?

- Were ALL EMPLOYEES held accountable for the performance standards established for their positions?

- Was the discipline assessed reasonably related to the seriousness of the issue? Was it reasonably related to my personal record (i.e. length of service-28 years and overall performance)? Does a minor infraction merit harsh discipline for a lifetime?

Whomever the decision makers are concerning my Attachment 2 compensation request, please consider my "fairness MANTRA":

"HOW WOULD YOU WANT TO BE TREATED AS THE RESULT OF BEING IN THE WRONG PLACE, AT THE WRONG TIME, WHEN A TWO-MONTH MERGER YARD CONSOLIDATION EXPERIMENT WAS ORDERED WITHOUT CAPACITY, RESOURCE AND PROCESS STUDIES? WOULD YOU WANT A 21% CUT IN WAGE, SEVERELY REDUCED RETIREMENT AND A RUINED CAREER?

LOGIC TEST NUMBER FIVE:
IF I WERE PROPERLY ADVISED IN 1997 THAT I HAD BEEN DEMOTED FOR SOME ALLEGED HEINOUS REASON WHICH WOULD BE SHOWN ON MY RECORD AS "DEMOTED FOR

DISCIPLINARY REASON", WHY WOULD I HAVE THE GALL TO BE REQUESTING "TOTAL FAIRNESS IN COMPENSATION TODAY", AS I STILL DO NOT EVEN KNOW WHAT COMMENTS ARE HIDDEN IN THE "15121 COMMENTS SECTION", AS IT HAS BEEN STATED FORM 15121 DOES NOT APPEAR TO BE RETRIEVABLE (Exh. 26C).

14. On November 14, 2002, Exh. 39 was sent to you, and you returned a voice mail November 21, 2002 that the issue of determining why I was demoted in 1997 and reduced two SRG's had been referred to Mr. Brad King (first discipline endorser for 1997). You have now advised the Mr. King and Mr. John Holm (spelling?) have no recollection of my financial ruin Form and Mr. Packard states it was a confusing time and something should have been sent to me or provided to me in the form of a PDR. At this writing, I am concerned that Ms. Nancy Quinn will "somehow find" some long lost file that "should have been sent to you" or some other pretextual documentation that was NOT MADE AVAILABLE IN 1997. It is my belief that a thorough investigation of "unbiased witnesses" will rebut any pretextual allegations offered at this late date, especially after the comments section document, Page 2 of Form 15121 (that provided the "alleged heinous reason(s)" for a 2 SRG discriminatory demotion), has now been shredded.

15. Exh. 40 indicates another "lack of response issue" wherein the Pension Department has not been able to answer my questions regarding the lifetime of financial denigration that was accomplished by my July 1997 discriminatory demotion. Since SPTCo managers do not start calculating Pension Benefits until January 1, 1998 per the PLAN, my UPRR Pension will be undercompensated during the remainder of my life due to my discriminatory demotion effective July 1, 1997.

Despite the above partial list of actions and statements, I am grateful to be a member of the UPRR Team which is "Building America" tm, and I continue to believe in being a Team Player (Exh. 38).

NONETHELESS, IN ACCORDANCE WITH UPRR POLICY, PLEASE CONSIDER THIS LETTER AS:

1) OFFICIAL NOTICE that I am of the belief that discriminatory and unfair actions have taken place against me based on my **VIETNAM ERA**



VETERAN status. One reason is referred to herein (i.e. denied an equal opportunity for promotion consideration by secret-to-me online data stating I was demoted for "disciplinary reasons", ***WHICH WAS AVAILABLE TO MANAGERS WHO HIRE OR PROMOTE),*** and other actions and statements which may be further detailed, if time and circumstances permit or require.

This is also OFFICIAL NOTICE that I have received Ethnic Slurs from my present supervisor, Mr. Don F. Fryar, complete with intimidating threats should said slurs be reported. The latest Ethnic Slur against persons of German descent, which included witnesses, was September 18, 2002 at 0945. Fryar asked me twice "ARE YOU A NAZI?" I did not respond. Witnesses were Quality Terminal Services (QTS) contractor personnel, Manager Roy Daily and Leadman Jason Tingle. Since UPRR signs the QTS invoices for lifts and so forth, I am uncertain if the above will be afraid to truthfully answer separate questioning as Fryar can usually intimidate QTS (I.e. Fryar obtained a job for son Jeff at Englewood as QTS Foreman for a few months ending late November 2002, when Jeff was hired by the UPRR).



2) A request for Compensation Reimbursement payment as shown on Attachment 2 (see page 4 of 6, line "Amount of Compensation Requested").

3) Request implementation of ALL "**COMPENSATION AND FAIRNESS" ISSUES STATED ON PAGE 1 HEREOF.**

I had intended this letter (which has been a work in progress for a considerable time, based on constant dead-ends and newly forthcoming data) for Ms. Kathleen Vance; but, your efforts to determine the truth regarding who discriminatorily placed discipline on my record, reach a conclusion based on the facts, consider compensation for this UNFAIRNESS, ETC., ARE REFRESHING.

IN COORDINATION WITH MS. VANCE AND/OR OTHER HR EXPERTS, PLEASE ADVISE WHAT CAN BE DONE ON OR BEFORE FEBRUARY 1, 2003 TO CORRECT THIS LIFETIME EMOTIONAL AND FINANCIAL DENIGRATION, WHICH RESULTED FROM THE ABOVE LIST OF UNFAIR AND

DISCRIMINATORY ACTIONS (AS ONLY BRIEFLY AND PARTIALLY OUTLINED ABOVE).

Should anyone have any questions, I can be reached 1730-0530 Monday-Friday at 713-678-5303 after I return from disability for Pituitary Tumor Surgery or between 1400-1700 CT at 281-359-5667.

Enclosures:
Exh 1-40
Attach 2

Sincerely,

JOHN GROTHER

Subj:	**CAPACITY ANALYSIS AT TUCSON 1997-2003**
Date:	1/6/03 11:23:29 AM Central Standard Time
From:	Johnace51
To:	ButchEthington@UP.com

Mr. Ethington,

Concerning the issue of my performance at Tucson circa 1997:

1. Would the Capacity Model Department consider either review their 1997 notes on the inability of Tucson to switch ALL East and West Traffic from Phoenix, Pichacho and LAPXM at Tucson on its 1% grade without the present E/E lead extension; or, use 2002 data with ALL E/W TRAFFIC coming to Tucson for flat switching, including any Pichacho setouts which were not authorized by Management in 1997?

I believe this would indicate clearly what an impossible task was experimented with; especially, with two M of W curfews in effect on either side of Tucson.

2. What specifically was so heinous about my PERSONAL JUNE 1997 PERFORMANCE compared to my "exact MIO peers" at Houston who had no salary reductions; and, the newsworthy failed service areas, where the U.P. paid huge customer settlements and Lawsuits and yet the pre-merger Managers of U.P. experienced no wage reductions?

PLEASE ADVISE HOW THIS FAIRNESS ISSUES CAN BE RESOLVED?

JOHN GROTHEER

MR Ethington,
In case you DIDN'T GET these AOL emails.
Thank you
JEG

, 2003 America Online: Johnace51

Subj: CORROBORATION OF 1997 PERFORMANCE
Date: 1/4/03 8:29:48 AM Central Standard Time
From: Johnace51
To: ButchEthington@UP.com

MR. ETHINGTON,

1) REGARDING A LIST OF UNBIASED PERSONS WHO SHOULD BE ABLE TO CORROBORATE MY PERFORMANCE IN LATE MAY-JUNE 1997 ACCOUNT THEY WERE ALSO EYE WITNESSES TO THE SWITCHING NIGHTMARE ON A 1% GRADE, THE FOLLOWING PARTIAL LIST IS SUBMITTED:

(YOU MAY NEED TO ASSIST THEIR MEMORIES BY ADVISING THEM THAT THIS WAS THE MERGER RELATED YARD CONSOLIDATION EXPERIMENT TO MOVE ALL THE FLAT SWITCHING FROM PHOENIX TO TUCSON WHILE WE HAD 12 HOUR M OF W CURFEWS IN EFFECT ON BOTH SIDES OF TUCSON, NO AUTHORITY TO AUGMENT ADDITIONAL PERSONNEL, AND NO SWITCHING LEAD EXTENSION ON E/E.)

DAVID L. HAMPTON: EX-OPERATIONS MANAGER FOR SPTCO & U.P., NOW EAST END CONDUCTOR TO EL PASO.
WAS MTO IN MAY-JUNE 1997.

R.L. "BOB" STREFELDER: EX-ROAD FOREMAN OF ENGINES & SELECTED AS MOP FOR U.P.. AWARE CONGESTION & PERSONNEL ISSUES CREATED BY CONSOLIDATION OF YRDS.

RAY SZAREK: EX-RF FOR SPTCO & MOP FOR U.P.
NOW TUCSON ENGR; BUT, MANAGER DURING 1997 PROBLEMS WITH MANPOWER AND CONGESTION.

PAUL A. LOBELLO: EX-OPERATIONS MTO FOR SPTCO & U.P.;
NOW WITH KCS IN ARK. OR LOUISIANA. MTO IN 1997.

LEE R. HOLSINGER: EX-SPTCO OPS & MECH MGR.
WAS CONDUCTOR IN 1997

TOM F. MOORE: UTU REP IN 1997

JIM CRITCHLEY: UTU REP IN 1997

KEN KROEGER: BLE DIV 28 REP IN 1997

ANY MEMBER OF THE 1997 SAFETY COMMITTEE.

2) REGARDING U.P.'S WEBSITE UNDER "GENERAL PUBLIC", DIVERSITY, "AFFIRMING DIVERSITY", U.P. STATES UNDER POLICY AND PRACTICES:

UNION PACIFIC EXHIBIT 52
PAGE 31 OF 34

"A DISCRIMINATION-FREE WORKPLACE AND FAIR TREATMENT ARE FUNDAMENTAL RIGHTS OF ALL UNION PACIFIC EMPLOYEES"

IT IS MY HOPE THAT AFTER INTERVIEWING SOME OF THE PERSONS ABOVE, THE GROSS LACK OF FAIR TREATMENT AND LACK OF BUSINESS ETHICS (I.E. FAIRNESS) WHICH WAS PERPETRATED AGAINST ME WILL BE CLEAR AND WE CAN RESOLVE THIS ISSUE QUICKLY OF UNFAIRNESS.

SIMPLY BASED ON THE FACTS WHICH ARE NOW KNOWN, IT IS CLEAR THAT SOMETHING VERY UNUSUAL OCCURRED AND NO ONE WANTS TO STEP FORWARD A CLAIM A PART IN THIS UNFAIRNESS. THEREFORE, IT MUST BE CLEAR ALREADY THAT AN INJUSTICE HAS BEEN DONE BY THE 1997 COMPANY'S CULTURE AND THE ORGANIZATION NOW NEEDS TO DO THE RIGHT THING FOR THE EMPLOYEE.

JOHN GROTHER

Saturday, January 04, 2003 America Online: Johnace51

VIA LETTER FOR DELIVERY ASSURANCE

Subj:	FOLLOW-ON QUESTIONS
Date:	1/3/03 4:24:15 PM Central Standard Time
From:	Johnace51
To:	ButchEthington@UP.com

GROTHER

MR. ETHINGTON,

AFTER OUR CONVERSATION 1/3/02 @ 1400, I WAS REVIEWING WHAT YOU HAD SAID, AS RELATED BY MR. PACKARD WHEREIN HE STATED:

"WE LOOKED AT A LOT OF DIFFERENT PEOPLE AND OTHER PEOPLE PERFORMED BETTER"

(AS A RESULT OF THIS ANALYSIS, I WAS DEMOTED $1,272/MONTH WHEN UP'S 1997 VISION AND VALUES STATEMENT SAID "TREAT OTHERS LIKE YOU WANT TO BE TREATED" AND OTHERS WERE BEING DEMOTED AND TRANSFERRED WITHOUT ANY CUT IN WAGES, INCLUDING MY TWO PEERS AT ENGLEWOOD RAMP?).

1. ABOVE PACKARD STATEMENT IS NOT CONSISTENT WITH MYSELF BEING SELECTED BY PACKARD FOR SRMTO LESS THAN TWO MONTHS BEFORE THE DECISION TO SEVERELY DEMOTE ME WAS REACHED.

IT IS ALSO NOT CONSISTENT WITH MR. PACKARD LEAVING ME A VOICE MAIL A FEW WEEKS BEFORE THE DEMOTION STATING WE WERE DOING A GREAT JOB GIVEN THE CONSOLIDATION EXPERIMENT AND THE CURFEWS ON BOTH SIDES OF TUCSON AT THAT TIME.

2. ASSUMING THAT ONE'S PERFORMANCE WAS ACTUALLY LESS THAN SOMEONE ELSE'S, IS THAT A REASON TO REDUCE YOUR SALARY BY TWO SRG'S OR $1,272?

MY REPLACEMENT RECEIVED A SIGNING BONUS TO $6,338 PER MONTH?

3. IF 2 ABOVE IS CORRECT, WHY WERE THE WAGES OF OTHER MANAGERS NOT REDUCED DURING THE 1997 SERVICE FAILURES, ACROSS THE SYSTEM, WHEN THOSE MANAGERS WERE DEMOTED AND TRANSFERRED BECAUSE OTHER PEOPLE SELECTED FOR THEIR JOBS, MAY HAVE BEEN PERCEIVED AS "ABLE TO PERFORM BETTER"?

LASTLY, DID ROYCE HARDIN EVER DETERMINE WHY HE DID NOT HAVE AN OPPORTUNITY TO RESPOND TO FOUR OF MY 5 CONFIRMED JOB REQUESTS?

ALSO, WHY DID I RECEIVE A "FORM RESPONSE" FOR THE MYO POSITION AT TUCSON INDICATING THAT A MORE QUALIFIED PERSON HAD BEEN SELECTED (ESTIMATED AT 29 YEARS OLD WITH AUTO FACILITY EXPERIENCE) , WHEN I HAI WORKED A JOB TWO LEVELS OF DIFFICULTY (SRMTO) ABOVE THAT FOR 22 MONTHS AT TUCSON?

IN ADDITION, I HAD PERFORMED AS THE SOLE ASSISTANT DIVISION SUPERINTENDENT FOR THE SPTCO ON THE LARGEST DIVISION IN THE USA, FROM YUMA TO FRESNO AND ST. LUIS OBISPO FOR EIGHTEEN MONTHS.

HOW COULD I NOT BE QUALIFIED TO BE AN MYO AT TUCSON?

PLEASE ADVISE.

JRG