

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 NO. 32760)

UNION
PACIFIC'S
SUBMISSION

UNION PACIFIC'S OPENING STATEMENT:

This arbitration involves a dispute between Union Pacific Railroad ("Union Pacific" or "UP") and a employee not represented by a labor organization. The New York Dock Conditions were imposed by the Surface Transportation Board in the 1996 merger approval of the Union Pacific and Southern Pacific ("Southern Pacific" or "SP") railroads. The unrepresented employee, John E. Grother, contends events related to the merger resulted in a decrease of his salary. Consequently, he seeks a displacement allowance under the New York Dock conditions (hereinafter "New York Dock"). Although Mr. Grother has retained an attorney, he has chosen to be the member of this arbitration committee representing himself. Union Pacific is represented by its General Director of Labor Relations, W. E. Loomis.

QUESTIONS AT ISSUE:

The parties to this arbitration have not agreed on a joint question(s) at issue. Union Pacific's questions of issue 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?

UNION PACIFIC'S STATEMENT OF FACTS:

On August 6, 1996, the Surface Transportation Board, in Finance Docket 32760, approved the common control and merger of the rail carriers controlled by Union Pacific Corporation and the rail carriers controlled by Southern Pacific Rail Corporation. Approval of the application was subject to the protective conditions set out in New York Dock Ry. - - Control - - Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) a copy of which is attached as Union Pacific Exhibit 1.

John E. Grother had been employed by Southern Pacific for 28 years prior to the merger, having served in a variety of management positions. At the time of the merger, Mr. Grother was Terminal Superintendent at Tucson, Arizona. Following the merger, he was selected to be the Senior Manager of Terminal Operations at Tucson, effective April 16, 1997, which was the same job he already held. Two and one-half months later, on July 1, 1997, Mr. Grother was reassigned to the position of Manager of Intermodal Operations in Houston, Texas. At that time, his salary was reduced from \$6,200 per month to \$4,928 per month.

Nearly six years later, by letter dated May 12, 2003, Mr. Grother notified Union Pacific Vice President of Law, James Dolan, he was in the process of obtaining a lawyer to represent him in arbitration pursuant to New York Dock concerning his "merger transaction related demotion effective July 1, 1997." He contended he was a "displaced employee" under New York Dock. Mr. Grother identified the dispute as his desire to obtain compensation in the amount of \$107,370 as the result of either a settlement between the parties or arbitration in accordance with Article IV of New York Dock. A copy of Mr. Grother's May 12, 2003 letter is attached as **Union Pacific Exhibit 2.**

On June 16, 2003, Mr. Grother sent a letter to the National Mediation Board (NMB) and requested information on the neutral selection process, including biographies. A copy of Mr. Grother's June 16, 2003 letter to the NMB is attached as **Union Pacific Exhibit 3.**

On July 7, 2003, Roland Watkins, Director, Arbitration Services for NMB replied to Mr. Grother and informed him a copy of Mr. Grother's June 16 letter was being sent to Mr. Dolan for comment. By copy to Mr. Dolan, Mr. Watkins requested his comments by the close of business on July 21, 2003. A copy of Mr. Watkin's July 7, 2003 letter to Mr. Grother is attached as **Union Pacific Exhibit 4.**

Mr. Dolan referred Mr. Grother's 5/12/03 letter to Marilyn Ahart, Union Pacific's Director of Protection Management. On July 18, 2003, Mrs. Ahart responded to Mr. Grother, stating she did not believe he qualified as a displaced employee under New York Dock. Mrs. Ahart found no evidence Mr. Grother's demotion was as a result of the merger transaction. Further, she did not think he was an eligible "employee" under New York Dock. Finally, Mrs. Ahart questioned whether Mr. Grother's claim for New York Dock benefits had been filed in a timely manner. A copy of Mrs. Ahart's July 18, 2003 letter to Mr. Grother is attached as **Union Pacific Exhibit 5.**

On July 18, 2003, Mrs. Ahart also replied to Mr. Watkins, in Mr. Dolan's behalf, and included a copy of her reply to Mr. Grother of that date. A copy of Mrs. Ahart's July 18, 2003 letter to Mr. Watkins is attached as Union Pacific Exhibit 6.

On July 21, 2003, Mr. Watkins wrote to Mr. Grother in response to his letter of June 16, which had been received by NMB on June 23. Mr. Watkins characterized Mr. Grother's letter as a request for "arbitration pursuant to Article IV, of New York Dock labor protective conditions involving a dispute between you and the Union Pacific Railroad Company." With his letter, Mr. Watkins attached the names of thirty qualified neutrals and requested Mr. Grother and Union Pacific "provide a list of fifteen (15) preferred arbitrators from this list." by Friday, August 1, 2003. A copy of Mr. Watkin's July 21, 2002 letter to Mr. Grother is attached as Union Pacific Exhibit 7.

On July 28, 2003, Mr. Grother sent a letter to Mrs. Ahart, in which he suggested the parties seek a settlement rather than pursue arbitration. In that letter, he briefly commented on the points Mrs. Ahart had made in her July 18 letter. Mr. Grother also stated he had addressed some of his issues to the Union Pacific Ombudsman in December, 2002, "in an appeal based primarily on the publicly published Official Website Policy of UNION PACIFIC stating that ALL UPRR employees have a fundamental right to fair treatment." A copy of Mr. Grother's July 28, 2003 letter to Mrs. Ahart is attached as Union Pacific Exhibit 8.

Union Pacific and, it is assumed, Mr. Grother furnished the requested list of 15 neutrals. On August 11, 2003, Mr. Watkins sent a list of seven neutrals to Mr. Grother, with copy to Mrs. Ahart, and requested the parties to notify his office as soon as a selection has been made. A copy of Mr. Watkin's August 11, 2003 letter to Mr. Grother is attached as Union Pacific Exhibit 9.

Also on August 11, 2003, Mr. Grother wrote to Mr. Watkins, with copy to Mrs. Ahart, and stated

he had retained Gordon P. MacDougall as his attorney. A copy of that letter is attached as Union

Pacific Exhibit 10.

On August 15, 2003, Mrs. Ahart replied to Mr. Grother's July 28, 2003 letter. She reiterated her position he did not qualify as a displaced employee under New York Dock for the reasons identified in her July 18 letter. She stated that since Mr. Grother had referred this matter to arbitration pursuant to Article IV of New York Dock, the parties should proceed with that process. A copy of Mrs. Ahart's August 15, 2003 letter to Mr. Grother is attached as Union Pacific Exhibit 11.

As indicated in the above correspondence, Mr. Grother also engaged in an exchange of correspondence with Butch Ethington, the Union Pacific Ombudsman, during this same period of time. In Union Pacific's view, that correspondence adds nothing which is not otherwise discussed in this submission. However, in order to present a complete record, that correspondence is attached as Union Pacific Exhibit 42.

During September and October 2003, the parties engaged in several telephone conversations concerning the selection of a neutral member of the arbitration committee which would resolve Mr. Grother's claim. Copies of written correspondence between the parties and the NMB are attached as Union Pacific Exhibit 12.

Eventually, on January 21, 2004, the NMB appointed Ms. Lynette Ross to be the neutral/referee member of the New York Dock arbitration committee. A copy of the NMB's letter of appointment is attached as Union Pacific Exhibit 13.

Shortly after the appointment of Ms. Ross, Mr. MacDougall and Mr. Loomis engaged in a series of telephone discussions and facsimile transmissions concerning an arbitration agreement.

The parties were unable to agree upon a few items, most notably the timing and order of the parties' written submissions to the arbitration committee. On February 20, 2004, Gordon P. MacDougall, as attorney for John E. Grother, filed a petition before the Surface Transportation Board (STB) to "ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS." A copy of Mr. Grother's petition to the Surface Transportation Board (STB) is attached as Union Pacific Exhibit 13.

Union Pacific filed a response to the STB, opposing Mr. Grother's petition. Union Pacific's position, in part, was that there is no requirement in New York Dock for a pre-hearing agreement on procedural matters. If there is a disagreement on procedural matters, the proper venue for resolution is the neutral member of the arbitration committee, in this case Ms. Ross. A copy of Union Pacific's opposition is attached as Union Pacific Exhibit 14.

Mr. MacDougall sent a supplemental letter to the STB, dated March 12, 2004, objecting that Union Pacific had "...characterized the identity of the petitioner, John E. Grother, as a 'management employee'" A copy of Mr. Grother's letter is attached as Union Pacific Exhibit 16.

On April 21, 2004, the STB served its decision in response to Mr. Grother's petition, a copy of which is attached as Union Pacific Exhibit 17. The Board responded, in part, with the following language:

"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 the arbitration proceeding customarily handled by the arbitrator, i.e., scheduling and making procedural determinations concerning this 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.”

On April 23, 2004, Mr. MacDougall sent a letter to the STB requesting a correction in certain language in the April 21 Decision. The STB rejected Mr. MacDougall’s proposed revisions on June 10, 2002. A copy of Mr. MacDougall’s letter of request and the STB decision is attached as Union Pacific Exhibit 18.

In accordance with the STB’s decision, the parties resumed their efforts to reach agreement on the matters in dispute, but they were only partially successful. On June 7, 2004, Mr. MacDougall, Mr. Loomis and Ms. Ross participated in a telephone conference call, during which Ms. Ross decided the few outstanding issues. Shortly thereafter the parties signed an arbitration agreement, a copy of which is attached as Union Pacific Exhibit 19. Section E of that June 18, 2004, agreement is of particular significance. In that Section, the parties agreed the issue of the measure of compensation or benefits due Mr. 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, except as stated on page 43, Union Pacific’s submission does not deal with the issue of compensation or ~~benefits~~ due to Mr. Grother, if any, but only with “... the interpretation, application, or enforcement of New York Dock conditions to Grother and Union Pacific.”

SUMMARY OF UNION PACIFIC’S POSITION:

- As a claimant alleging to be due a displacement allowance under New York Dock, Mr. Grother has an obligation to identify the transaction which caused the adverse affect. He incorrectly identified the Union Pacific/Southern Pacific merger as the transaction.

- To be entitled to a displacement allowance under New York Dock, Mr. Grother must be a “Displaced Employee” under New York Dock, which means Mr. Grother must have been an “employee” and must have been placed in a worse position “as a result of a transaction...”.
- At the time of his salary reduction, Mr. Grother was not an “employee” of Union Pacific as that term is used in New York Dock.
- His salary reduction was not “as a result of a transaction...”.
- Therefore, Mr. Grother is not a “displaced employee” under New York Dock and is not entitled to a “displacement allowance” under those protective conditions.
- Further, Mr. Grother’s long delay has prejudiced Union Pacific’s ability to defend itself against his claim. Thus, in addition to the reasons set forth above, Mr. Grother’s claim should be barred under the doctrine of Laches.

UNION PACIFIC’S ARGUMENT IN SUPPORT OF ITS POSITION:

1 - For Grother to prevail in his claim, he must have been an “employee” under New York Dock

Mr. Grother’s claim as the result of his salary reduction is a claim for a displacement allowance under New York Dock. Article I, Section 5 of New York Dock sets forth the terms and conditions of a displacement allowance:

“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.”¹

¹ Union Pacific Exhibit 1, page 4

Based on the clear language of Section 5, in order for Mr. Grother to be eligible to receive a displacement allowance he must be a "displaced employee." The term "displaced employee" is defined in Article I, Section 1 (b) of New York Dock:

"(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."²

That definition contains multiple requirements in order to be a "displaced employee" under New York Dock. The first requirement is being an "employee" of the railroad. There is no dispute Mr. Grother was an employee in the dictionary sense of the word. The American Heritage Dictionary of the English Language, 1977, defines an "employee" as "A person who works for another in return for financial compensation." However, within the realm of railroad labor protection, the term "employee" has a specific meaning as a result of being defined by the Interstate Commerce Commission, its use in the Railway Labor Act and interpretation by several previous New York Dock arbitration committees. A review of the history of the term "employee" in the railroad industry clearly establishes it is a term of art which does not include railroad officials like Mr. Grother.

2 - History of the term "employee" in Federal legislation governing railroad labor

From 1917 to 1920 the Federal government controlled the US railroads. Even with the return of the railroads to private ownership after World War I, there was considerable sentiment in favor of legislation which would retain some of the government control of railroad labor-management relations which had evolved during the period of Federal control. The Transportation Act of 1920 was a massive piece of legislation, a portion of which, Title III, dealt with "DISPUTES BETWEEN

² Union Pacific Exhibit 1, page 2

CARRIERS AND THEIR EMPLOYEES AND SUBORDINATE OFFICIALS.” Title III

established the “Railroad Boards of Labor Adjustment” as a way to settle labor disputes and thus have labor peace in the industry. The Act itself did not define just which persons who received financial compensation from a railroad were subject to the terms of Title III. That task was left to the Interstate Commerce Commission (ICC). Specifically, Paragraph 5 of Section 300 of the Act provided:

“The term ‘subordinate’ official includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.”

A reading of Paragraph 5 clearly reflects an understanding on the part of Congress that in addition to the rank and file employees of a railroad, many of whom were already union members and covered by a collective bargaining agreement (CBA), there were officials who were not members of a labor organization or covered by a CBA. Further, Congress realized a portion of those “officials of carriers” should be considered as eligible for unionization and coverage by a collective bargaining agreement. Congress gave the ICC the job of reviewing the ranks and levels of “officials of carriers” to determine which were “subordinate officials”, eligible for unionization and, by exclusion, which were “officials” not eligible for unionization. The intention was that disputes involving employees and subordinate officials, but not officials, would be referable to the Railroad Boards of Labor Adjustment. A copy of Section 300 of the Transportation Act of 1920 is attached as **Union Pacific Exhibit 20.**

After several hearings on the matter, the ICC issued its order known as “Ex Parte 72” on February 5, 1924. The ICC determined the term “subordinate official” included the following:

“AUDITORS. This class shall include traveling auditors engaged in auditing station accounts, checking transportation and other papers, etc., who are not vested with discretionary power to determine the scope or character of their duties.

“CLAIM AGENTS. This class shall include claim agents below the rank of assistant general claim agent or chief claim agent. It does not include the so-called ‘claim investigators.’ We are of the opinion that such employees who are engaged in clerical work are not ‘officials of carriers.’

“FOREMEN, SUPERVISORS AND ROAD MASTERS. 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.

“TRAIN DISPATCHERS. This class shall include chief, assistant chief, trick, relief and extra dispatchers, excepting only such chief dispatchers as are actually in charge of dispatchers and telegraphers and in actual control over the movement of trains and related matters, and have substantially the authority of a superintendent with respect to those and other activities. This exception shall apply to not more than one chief dispatcher on any division.

“TECHNICAL ENGINEERS. This class shall include civil, mechanical, electrical and other technical engineers inferior in rank to engineers of maintenance of way, chief engineers and division engineers; engineers of maintenance of way and other mechanical engineers. We are of opinion that instrument men, rod men, chain men, designers, draftsmen, computers, tracers, chemists and others engaged in similar engineering or technical work are not ‘officials of carriers.’

“YARD MASTERS. This class shall include yard masters and assistant yard masters excepting general yard masters at large and important switching centers where of necessity such general yard masters are vested with responsibilities and authority that stamp them as officials.

“STOREKEEPERS. This class shall include storekeepers or foremen of stores who are not vested with authority to make purchases. It does not include general storekeepers and assistant general storekeepers.

“SUPERVISORY STATION AGENTS. The duties and responsibilities of supervisory station agents vary so widely that they can not all be consistently designated subordinate officials. This class will be subdivided, therefore, as follows:

“(a) Supervisory station agents who, in addition to their supervisory duties, are required to

perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar routine duties are employees and, although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials.

“(b) Except those referred to in the next succeeding paragraph, supervisory station agents whose duties are wholly supervisory and who are not required to perform routine office work, as outlined in the preceding paragraph, are designated as subordinate officials.

“(c) Supervisory station agents at large and important stations whose duties are wholly supervisory, and who are of necessity vested with greater responsibilities, duties and authority than the agents hereinbefore classed as subordinate officials, may be designated officials and excluded from the class of subordinate officials.”

“Subordinate officials” were that group of officials subject to the dispute resolution process contained in the Transportation Act of 1920. By exclusion, all officials not determined to be subordinate officials were not subject to the dispute resolution process of the Transportation Act of 1920. A copy of the ICC’s February 5, 1924 Order is attached as Union Pacific Exhibit 21.

By the mid 1920's, it became apparent the Transportation Act of 1920 was not successful in achieving its goal of peace in the railroad industry. As a result of the urging of President Calvin Coolidge, a committee of railroad executives and union representatives prepared draft legislation for Congress. That proposal, which became the Railway Labor Act, was signed into law on May 20, 1926. The Railway Labor Act machinery for the resolution of disputes replaced the dispute resolution process contained in Title III of the Transportation Act of 1920.

Section 1, Fifth of the Act (as it was written in 1926) defined “employee” as “every person in the service of a carrier . . . 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 order hereafter entered by the Commission - - -”:

“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.”

A copy of Section 1 of the Railway Labor Act is attached as **Union Pacific Exhibit 22.**

Note that the committee of railroad labor and management which framed the Railway Labor Act agreed the only persons defined as employees or subordinate officials by the ICC (the work the ICC had already performed in Ex Parte 72) would be covered by the Railway Labor Act. Thus, the language of the Railway Labor Act excludes “officials” from the definition of “employees” covered by the Act and such employees are not subject to unionization under the Act.

2 - When job (employee) protection became applicable in the railroad industry, it was meant to apply to only those who are “employees” under the Railway Labor Act.

Job protection in the railroad industry began in 1936, ten years after the effective date of the Railway Labor Act. The original protection document was a 1936 agreement known as the Washington Job Protection Agreement (WJPA). The WJPA provided a means for carriers to consolidate separate railroad facilities. In return, there was compensation protection for “employees of signatory carriers represented by signatory organizations”. A copy of the WJPA is attached as

Union Pacific Exhibit 23.

The WJPA was a voluntary protection agreement between rail management and rail labor. However, the Transportation Act of 1940 made labor protection mandatory in ICC merger cases. Specifically, the Act amended the Interstate Commerce Act by adding Section 5(2)(f). That Section reads as follows:

“As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval, the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this Act, an agreement pertaining to protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.”

Following the enactment of Section 5(2)(f), the ICC developed a series of standard employee protections. These standard protections were more or less routinely required as a condition for ICC approval of transactions under Section 5(2). In order of their adoption, they include the so-called Oklahoma conditions (1944), the New Orleans Conditions (1952) and the Southern-Central of Georgia conditions (1962 - clarified in 1963 and 1967). The specific terms of those labor protective conditions are not relevant to this case involving Mr. Grother.

In 1970, Congress enacted the Rail Passenger Service Act of 1970 (RSPA). Section 405 of the Act requires a “fair and equitable arrangement(s) to protect the interests of employees, including

employees of terminal companies, affected by a discontinuance of intercity rail passenger service.”

It also requires that protective arrangements in no event provide benefits less than those established pursuant to Section 5(2)(f) of the Interstate Commerce Act. The standard set of protective conditions arising out of the RSPA became known as Appendix C-1 conditions. Appendix C-1 basically adopted the core of benefits originally provided under the WJPA with two exceptions. First, it only required twenty days’ advance notice. Second, it did not require a pre-consummation implementing agreement, but authorized the carrier to proceed with the transaction before agreement was reached or pending the outcome of arbitration. Affected employees were to be made whole after the fact.

In 1976 Congress revised Part 1 of the Interstate Commerce Act by the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act). The 4-R Act amendment added one sentence to former Section 5(2)(f):

“Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to Section 565 of Title 45 [section 405 of the Rail Passenger Service Act].”

Against this history of labor protection decisions, the ICC, in the late 1970's, formulated three new sets of labor protective conditions which would have general applicability to the following situations -- merger/control applications, abandonments or trackage rights and leases. Merger/control applications are subject to the New York Dock conditions; abandonments are subject to the Oregon Short Line conditions; and trackage rights and leases are subject to the Mendocino Coast Railway conditions.

In the instant case involving Mr. Grother, he contends he is covered under the New York Dock conditions. (Union Pacific Exhibit 1) Mr. Grother relies on Article IV of the New York

Dock conditions:

“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.”

Mr. Grother contends that, at the time of his salary reduction, he was an employee of Union Pacific not represented by a labor organization. Thus, he reasons, he is covered by Article IV. Union Pacific disagrees. Union Pacific’s position is Mr. Grother was an official of Union Pacific, neither an “employee” nor “subordinate official”, at the time of his salary reduction, and, therefore, he is not covered by the New York Dock protective conditions.

3 - Previous New York Dock arbitration committees have recognized that employees who are “officials” of the railroad do not qualify for benefits under New York Dock.

Several arbitration committees established pursuant to Article IV of New York Dock have examined this very point in great detail. The findings of those awards vary in whether the individual person making a claim under New York Dock was, or was not, determined to be an “employee” eligible for New York Dock benefits, but all of these awards agree on one point. That point is not everyone employed by a railroad is an “employee” for purposes of New York Dock. Quotations from several of those awards follow:

New York Dock Arbitration Award - Dana R. Bond and Michael J. Topolosky v. Union Pacific Railroad Company (1985, Stallworth) (**Union Pacific Exhibit 24**)

"There is no dispute that an individual who renders service and receives compensation is an employee in both the dictionary sense and the legal sense. The critical question is whether an employee, such as the Claimants or even the President of a Carrier are "employees" as intended for the purpose of New York Dock.

"Article IV of New York Dock states, in relevant part,

"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.

"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 industrial use of the term "employee" supports this contention.

* * * * *

New York Dock Arbitration Award - James M. Benham v. Delaware & Hudson Railway Company (1986, O'Brien) (**Union Pacific Exhibit 25**)

"Unfortunately, the ICC has never formulated a precise definition of either "employee" or "official." However, as a result of ICC administrative rulings; judicial decisions; and arbitration opinions under the New York Dock Conditions, criteria have evolved to assist us in determining whether Mr. Benham was an employee as he claims, or an official as the Carrier asserts.

"For instance, the ICC has considered the level and the amount of supervisory authority held by one claiming New York Dock protection significant. Also, whether the position occupied by one seeking protective benefits was subject to representation by a labor organization, though not actually represented by any organization, has been considered important. Moreover, whether a claimant possessed skills which were readily transferable was deemed a relevant factor. Evidently, it was assumed that such individuals enjoy sufficient skills to enable them to protect themselves from the consequences of a consolidation and therefore do not require the protection afforded those employees whose skills are indigenous to the railroad industry.

"An individual's rank and job title have not been considered controlling elements when determining whether an individual claiming protective benefits is an employee or an official. Rather it is the nature and job content of his/her position that is determinative. However, one's salary has been deemed a relevant consideration. This Committee wishes to state that, in our view, the degree of supervisory and policy making responsibility required of a position being evaluated must also be weighed.

"This Committee agrees with the reasoning of the U.S. Court of Appeals for the Fourth Circuit in Edwards v. Southern Railway Company, 376 F. 2d, 665, wherein it quoted the ICC as follows:

'... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. 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....Each proceeding therefore, must of necessity be decided upon the record.

"Though the precise question before the ICC in the above referenced proceeding was whether a subordinate official of a railroad was an employee under the Railway Labor Act, nevertheless the reasoning of the ICC is equally applicable to disputes such as the one at hand."

* * * * *

New York Dock Arbitration Award - B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v. Union Pacific Railroad Company (1987, Seidenberg) (Union Pacific Exhibit 26)

"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."

"In the past 50 years history of the adjudication of labor protection disputes, there has been no court decision or arbitration award, with the exception of the

Curley Award, that has held that an individual employed by a railroad, regardless of position, was entitled to labor protection because his job tenure or job status was disrupted or adversely affected by a merger. Protection has only been accorded to rank and file employees and not to those individuals holding positions which could be denominated as executive, professional, administrative or supervisory."

New York Dock Arbitration Award - John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Company. (1987, O'Brien) (**Union Pacific Exhibit 27**)

"The pivotal question which must be decided by this Committee is whether Messrs. Adams, Dominick and Williamson were "employees" or "officials" of the Carrier when they were terminated in July, 1986? If it is determined that the Claimants were officials then they are not eligible for the protective conditions provided by the New York Dock Conditions. Courts and arbitration committees which have adjudicated claims under the New York Dock Conditions have clearly and consistently ruled that officials of a railroad are not entitled to benefits under the New York Dock Conditions."

New York Dock Arbitration Award - Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (1988, Stallworth) (**Union Pacific Exhibit 28**)

"However, the Committee concludes that the term 'employee' as used in the language above (Article IV of NYD) is not used in a general sense, but rather is a term of art defined by widespread past and current industrial relations practice specific to the railroad industry. Therefore, the dispute here centers on whether the Claimant is an 'employee' as that term is used in this Agreement."

New York Dock Arbitration Award - James V. Nekich v. Burlington Northern Santa Fe Railroad (1996, Ver Ploeg) (**Union Pacific Exhibit 29**)

"Although New York Dock could be read literally to extend benefits to *all* non-union employees, the reasoning and holdings of subsequent decisions interpreting its terms persuasively demonstrate that its coverage is not so unlimited. Rather, the key distinction appears to be whether an unrepresented railroad employee has occupied

a "labor" or a "management" position. The former would qualify under the New York Dock Conditions while the latter would not.

"Although the distinction between "labor" and "management" is self evident with respect to many positions, that is not always true. In such cases, such as this, 'It has left to arbitration the exact line to be drawn between these categories.' In the Matter of the Arbitration Between Gerald J. Huggins et. al. v. Norfolk & Western Ry. Co. (1985. Harris)"

* * * * *

There are several other awards by arbitration committees established pursuant to Article IV of New York Dock which go the point not everyone employed by a railroad is a "employee" for purposes of New York Dock. To avoid repetition, they are not quoted herein, but are referenced below and attached as exhibits.

New York Dock Arbitration Award - Ross F. Povirk and the Transportation and Communications International Union v. Union Pacific Railroad Company (1998, Stallworth) (**Union Pacific Exhibit 30**)

New York Dock Arbitration Award - G. L. Dixon and the Transportation and Communications International Union v. Union Pacific Railroad Company (1998, Stallworth) (**Union Pacific Exhibit 31**)

New York Dock Arbitration Award - B. W. Isabell and the Transportation and Communications International Union v. Union Pacific Railroad Company (1998, Stallworth) (**Union Pacific Exhibit 32**)

4 - Mr. Grother's duties and responsibilities were those of an "official", not a "subordinate official."

At the time of Mr. Grother's self-described "demotion" on July 1, 1997 he was the Senior Manager Terminal Operations (SMTO) in Tucson, Arizona. 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. 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:

- Developing, implementing and executing the safety process
- Direct the execution of the transportation plan for the terminal to ensure that all quality of service objectives are met or exceeded
- Operate the terminal at or below annual transportation budget
- Ensure terminal failure prevention activities are executed to achieve cost of quality business objectives
- Coordinate terminal activities with HDC, NCSC, adjoining Service Unit to meet business objectives
- Manage terminal work force level to ensure transportation needs are met and within budget
- Manage the efficient use of locomotives and fuel to ensure that freight car cycles are effectively managed while in the terminals
- Lead and develop both managers and agreement employees to the extent that their individual performance and employee involvement activities determine successful accomplishment of company business objectives
- Respond to emergency situations or service interruptions

In Mr. Grother's own words, he was "in command" of the terminal at Tucson.³ 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). The terminal he commanded had an annual budget of approximately \$2.5

³ Union Pacific Exhibit 2, page 42

million per year and processed approximately ⁴ 700 cars per day. Approximately four subordinate officers (MTOS and MYOS) reported to Mr. Grother, and he reported directly to the service unit superintendent.

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 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. In short, a Senior Manager of Terminal Operations has the authority to hire and fire.

Since being hired in June, 1969 for the management training program, Mr. Grother held a variety of management positions with Southern Pacific. They included:

Assistant Trainmaster

Trainmaster

Terminal Superintendent (Avondale, Louisiana)

Assistant to the Vice President

Assistant Division Superintendent

General Manager - Amtrak

Manager Joint Facilities

Senior Manager Budgets

⁴ The term "approximately" is used repetitively in this section because the timing of Mr. Grother's claim places Union Pacific in the position of estimating what was in effect at Tucson more than six years ago.

prior to becoming Terminal Superintendent at Tucson in 1995.⁵ In his own words, Mr. 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 . . .”⁶ The importance of his position at
Tucson is emphasized by his statement he was “SELECTED BY UPRR TO BE ITS SENIOR
OFFICER FOR THE TUCSON DISTRICT, INCLUDING TUSCON AND NOGALES YARDS.”

⁷ This selection came after 28 years as a manager with Southern Pacific, during which he had been
selected for “. . . MANY PROMOTIONS, HAD ELEVEN (11) ‘GROOMING MOVES’ AT THE
REQUEST OF THE SPTCO. . .”⁸ This included assignment by the Southern Pacific President “TO
REPRESENT SPTCO AS LEAD NEGOTIATOR FOR THE PROPOSED SALE OF THE
PENINSULA COMMUTE SERVICE TO THE PUBLIC ENTITIES NEAR SAN FRANCISCO .
.. WHICH WAS A \$450 MILLION TRANSACTION.”⁹

As noted earlier, a significant factor in the determination of whether a position is that of an
“official” or a “subordinate official” is whether the position was subject to union representation.
This is mentioned in some of the New York Dock arbitration committee awards quoted above.
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

⁵ Union Pacific Exhibit 2, page 6. Highlights thereon are were made by Mr. Grother.

⁶ Union Pacific Exhibit 2, page 4

⁷ Union Pacific Exhibit 2, page 6

⁸ Union Pacific Exhibit 2, page 5

⁹ Ibid.

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."

One of the factors previous New York Dock arbitration boards have considered in determining whether an individual was an official, and therefore not covered by New York Dock, was the transferability of that particular employee's skills to other industries. For example:

"For instance, the ICC has considered the level and the amount of supervisory authority held by one claiming New York Dock protection significant. Also, whether the position occupied by one seeking protective benefits was subject to representation by a labor organization, though not actually represented by any organization, has been considered. **Moreover, whether a claimant possessed skills which were readily transferable was deemed a relevant factor. Evidently, it was assumed that such individuals enjoy sufficient skills to enable them to protect themselves from the consequences of a consolidation and therefore do not require the protection afforded those employees whose skills are indigenous to the railroad industry.**" See UNION PACIFIC EXHIBIT 25, PAGE 9 (emphasis added)

* * * * *

"This committee further wishes to observe that although the Claimants did not immediately secure employment following elimination of their positions in July, 1986 (Mr. Williamson has still not obtained employment), **nevertheless their skills as salesmen were certainly more transferable than the skills of most railroad employees.** Obviously, the position of sales representative is not unique to the railroad industry unlike that of a conductor or an engineer, for example...." See UNION PACIFIC EXHIBIT 27, PAGE 10 (emphasis added)

* * * * *

"The Committee agrees with the Carrier that in Adams, Dominick & Williamson and Delaware and Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a

conductor or locomotive engineer. The Undersigned Committee concludes that a similar result should be found in the instant case as Mr. Povirk's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Povirk was not under daily supervision, **and, most significantly, Mr. Povirk possessed managerial and sales skills which are easily transferable to almost any other industry or service.** (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44)." See UNION PACIFIC EXHIBIT 30, PAGE 29 (emphasis added)

* * * * *

"Notably, the most significant factor of all is that Mr. Dixon possessed managerial skills that arguably are transferable to almost any other industry or service." See UNION PACIFIC EXHIBIT 31, PAGE 30

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 education, training and skills, as follows:

"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." See UNION PACIFIC EXHIBIT 2, PAGE 6

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.

Mr. Grother was much more than a subordinate official. He was an official as that term has been used in the several New York Dock arbitration cases cited above. Because he was an official at the time of his salary reduction, he is not considered an “employee” for purposes of New York Dock, and thus is not eligible for a displacement allowance.

5 - Mr. Grother was not placed in a worse position “as a result of” the UP-SP merger.

In addition to being an “employee”, there is a second requirement for a person to be considered a displaced employee under New York Dock. That second requirement is the person must have been placed in a worse position as a result of a transaction.

“(b) ‘Displaced employee’ means an employee of the railroad who, **as as a result of the transaction** is placed in a worse position with respect to his compensation and rules governing his working conditions.”¹⁰ (emphasis added)

Mr. Grother bears the burden of proof to identify the transaction that resulted in the worse position. He tries to do that on the first page of his May 12, 2003 letter to James V. Dolan (Exhibit 2), Mr. Grother says “THIS LETTER CONCERNS GROTHER’S MERGER TRANSACTION RELATED DEMOTION EFFECTIVE JULY 1, 1997, WHICH HAS CLASSIFIED GROTHER AS A NEW YORK DOCK ‘DISPLACED EMPLOYEE’.”¹¹

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

¹⁰ Union Pacific Exhibit 1, page 1

¹¹ Union Pacific Exhibit 2, page 5

plan implemented by his superiors. He describes how management made the decision to eliminate flat switching at Phoenix, AZ, a smaller yard approximately 120 rail miles west of Tucson, and incorporate that switching into Tucson.

About two and one-half months after his appointment as Senior Manager of Terminal Operations at Tucson, and after his new Union Pacific superiors had observed his overall ability as a manager, Mr. Grother says he was “. . . **ORDERED TO TAKE A 21% PAY CUT TO HOUSTON INTERMODAL, OR HIT THE STREET!**”¹² Note carefully, however, Mr. Grother never clearly explains the link between the “consolidation experiment” and his demotion.

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 does not believe the “consolidation experiment” is even merger related. In the Spring of 1997, the merger had not yet been implemented for operations in the Tucson, AZ area. When the STB approves a railroad merger subject to the New York Dock conditions, the parties are not free to immediately intermingle operations, facilities and equipment the moment the decision becomes effective. Article I, Section 4 of New York Dock sets forth the procedural requirements for implementing a merger. Those requirements include serving a 90-day notice, followed by negotiation between the parties to reach a merger implementing agreement. If the parties are unable to agree after 30 days of negotiation, the dispute may be submitted to arbitration. Section 4(b) of Article I states:

“(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.”¹³

¹² Union Pacific Exhibit 2, page 11

¹³ Union Pacific Exhibit 1, page 3

In June, 1997, with regard to Tucson, there was no merger implementing agreement or arbitration decision.¹⁴ There were agreements with some unions to modify former Southern Pacific agreements so they would more closely conform to existing agreements on the former Union Pacific. For the train, engine and yard crafts (T,E&Y), these agreements became effective in late 1997. One example is the "modification" agreement with the United Transportation Union, which is attached as Union Pacific Exhibit 33. Note that this agreement was not signed until the 20th of October, 1997, following receipt of a message from UTU General Chairman, J. K. Kein it had been ratified by the membership.¹⁵

On the first page of the UTU "modification" agreement, the following language appears:

"The parties understand that this document is the result of voluntary negotiations outside of merger negotiations and that the provisions entered into below are separate and apart from merger notices. Complete negotiations beginning with the service of notice under New York Dock conditions must still be handled for each merger area and those requirements are not waived by this Agreement. However, in order to reach a mutually satisfactory understanding for the handling of future UP/UTU SP West negotiations with regards to the collective bargaining agreement that will be selected by the Carrier and to equalize many of the pay and work rules on the UP system, **IT IS AGREED:**"

Note that in the fall of 1997, which was several months after Mr. Grother's demotion, UTU and UP had a written understanding that negotiations toward a merger implementing agreement had not yet begun. In fact, the merger implementing agreement with UTU for the territory encompassing Phoenix and Tucson, known as the Arizona Hub, was not signed until June 23, 1999. A copy of that

¹⁴ With regard to the operating crafts (i.e., the train, yard and engine service employees Mr. Grother was responsible for) there is not a single implementing agreement for the UP-SP merger. Instead, the railroad was divided into "hubs", and separate implementing agreements were negotiated for each hub. The Arizona Hub agreement (see Union Pacific agreement 34) contains both Tucson and Phoenix.

¹⁵ Page 10 and page 28 of Union Pacific Exhibit 33, respectively

merger implementing agreement is attached as Union Pacific Exhibit 34. What Mr. Grother experienced in the Spring of 1997 was not the effect of the UP-SP merger, because that did not occur in the Tucson area until more than two years later. The former Southern Pacific was still being managed, albeit by UP managers, as a separate property from Union Pacific.

Previous New York Dock arbitration awards have recognized that protective conditions do not protect against any adverse effect which may occur, just those that occur "as a result of a transaction." 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. For examples of such arbitration awards, see Union Pacific Exhibit 41.

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. STB approval is not required for a rail carrier to change the location at which classification work is performed on its railroad. There were no new rights gained by UP from the merger that permitted the consolidation. Both Tucson and Phoenix are stations served by the former SP, but not UP, prior to the merger. There was no merger of UP and SP yards and trackage in the Phoenix and Tucson areas. There were no former UP operating employees within 300 miles of either Tucson or Phoenix. In fact, there were no former UP operating employees in the entire state of Arizona. The trainmen and switchmen who hold seniority in the Tucson Hub today are either former SP pre-merger employees or employees hired since the date of the merger.¹⁶

¹⁶ After the UP-SP merger, and as the result of negotiations pursuant to New York Dock, all of the former SP and the entire Western portion of UP, was divided into "hubs", which became new seniority districts. The Arizona hub encompasses Phoenix and Tucson and extends from Yuma, AZ to Lordsburg, NM, all of which was

Similarly, the ability to transfer Mr. Grother to Houston was not dependent upon the merger.

Prior to the merger, SP managers were transferred to and from Houston on a regular basis because Houston was a location with a large pre-merger SP presence.

Even though Mr. Grother views what took place at Tucson in the Spring of 1997 to be implementation of the merger, the facts show he was not adversely affected as a result of the merger. UP management selected Mr. Grother to stay on at Tucson as the Senior Manager of Terminal Operations, which was the same position, although under a different title, he held with Southern Pacific prior to the merger. In fact, Grother states that, unlike other former Southern Pacific officials, he was not required to "interview for his own job."

"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 (sic) - 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..."¹⁷

UP also states 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. However, Mr. Grother states Tom S. Parr was selected by UP to replace him as Senior MTO at

former SP trackage.

¹⁷ Ibid. Page 6

Tucson.¹⁸

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.

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. Mr. Grother will argue that "but for" the UP-SP merger, the situation which led to his demotion would never have occurred. He will argue that "but for" the merger, there would have been no experiment to consolidate the switching from Phoenix into Tucson. He may also argue that "but for" the merger he would not have ended up reporting to Union Pacific managers who allegedly treated him in an unfair manner. From Union Pacific's perspective, however, there are two flaws in that argument. The first flaw is that the "but for" argument has been disregarded by previous New York Dock arbitration committees which found "but for" arguments are not sufficient evidence to justify a causal nexus between a merger transaction and being placed in a worse position. The following case, which arose on Union Pacific, is one example:

New York Dock Arbitration Award - United Transportation Union (S. G. Nelson) v. Union Pacific Railroad Company (1994, Hays) (**Union Pacific Exhibit 35**)

"It is true, as the organization urges, that 'but for' the transaction Mr. Cleveland

¹⁸ Union Pacific Exhibit 2 - page 4

might not have been in a position to exercise seniority to the yard position which resulted in claimant's displacement. However there is a legally significant difference between the initial cause (transaction) and the intervening/independent cause (seniority preference) that impacted claimant. To extend the organization's argument to its logical conclusion, 'any' exercise of seniority by a transferee, at 'any' time in the future, could result in the carrier being liable for protection to anyone bumped or furloughed (UPRR/MPRR v. UTU (C&T), Case No. 1, W. E. Fredenberger, Jr., 1986). We read nothing in the New York Dock Conditions which would persuade us that they were intended to be applied in such broad fashion into perpetuity."

The second flaw in the "but for" argument is that either of the assertions put forth for Mr. Grother's demotion,, the switching experiment championed by Mr. Grother or the job performance supported by Union Pacific, could have taken place without the merger. Neither of those reasons was dependent upon the merger for authority to implement. Both of those reasons, like the seniority moves in the Nelson arbitration referenced above, could have taken place prior to the merger just as easily as after the merger. In the Nelson case, the arbitration committee found that a post-merger displacement of a junior employee by a senior employee was not as a result of a merger because the senior employee had the right to displace the junior employee prior to the merger. Similarly, in this case involving Mr. Grother, consolidation of switching formerly done at Phoenix into Tucson was not as a result of the merger because it could have been implemented by SP at any time prior to the merger. Union Pacific gained no new rights from the merger which affected its ability to make assignments of its officials or adjust their salary based on job performance.

Mr. Grother had the option of rejecting the job at Houston, and offering his skills and experience to another employer, but he opted for the transfer to Houston. At first reading, that may sound harsh, but it must be remembered that as an official of Union Pacific, Mr. Grother did not have a collective bargaining agreement which permitted him to select jobs through a seniority process of

bidding and bumping. Reassignment of officials is something which happened for decades prior to the merger and will happen for decades following the merger.

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 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.

6 - Mr. Grother's claim for a displacement allowance is barred under the doctrine of Laches.

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. This is a delay of more than 70 months, or nearly six years. Union Pacific's position is Mr. Grother slept on his rights, to the detriment of Union Pacific in being able to defend itself, and, thus, his claim is barred under the doctrine of Laches.

Although New York Dock does not contain specific time limits for filing claims, several arbitration committees have found that a long delay is contrary to a goal of good labor-management relations and disadvantages the railroad in defending against the claim. In many cases, the arbitration committee has denied the claim under the doctrine of Laches.

New York Dock Arbitration Award - United Transportation Union (R. L. Shankel, R. E. Porter and L. Chapman) v. Union Pacific Railroad Company (1993, LaRocco) (**Union Pacific Exhibit 36**)

"The time limits in the applicable working agreement are not binding on claims progressed under Section 11 of the New York Dock Conditions. *Brotherhood Railway Carmen v. Norfolk and Western Railway*, WJPA § 13 Committee (1/14/86;

Peterson). Although there are not any express time limits in Section 11 of the New York Dock Conditions, either party may invoke the equitable doctrine of laches where one party fails to assert a right for an unreasonable length of time and the delay prejudices the opposing party. *Transportation-Communications International Union v. Union Pacific Railway Company*, NYD § 11 Arb. (Rehmus; 12/30/92). An employee's unreasonable delay in progressing a claim for protective benefits which prejudices the Carrier is barred under the doctrine of laches. *Transportation Communication International Union v. Union Pacific Railway Company*, NYD § 11 Arb. (6/26/90; LaRocco)."

New York Dock Arbitration Award - International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forger and Helpers (D. L. Haver and G. L. Galbreath) v. Southern Railway Company, (1990, Muessig) (**Union Pacific Exhibit 37**)

"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 (sic) in bias or prejudice (sic) 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."

New York Dock Arbitration Award - *Transportation-Communications International Union (R. Tefft) v. Union Pacific Railroad Company*, (1990, LaRocco) (**Union Pacific Exhibit 38**)

"The New York Dock Conditions do not contain an express time limitation for filing claims for displacement and dismissal allowances. *BRS v. B&O*; NYD § 11 Arb. (Peterson, 2/28/87). *BRC v. BN*; NYD § 11 Arb. (Marx, 8/30/84). However, an employee's unreasonable delay in progressing a claim for protective benefits which

operates to prejudice the Carrier, is barred under the doctrine of laches. CR v. IBEW; NYD § 11 Arb. (S. L. L. L., 12/16/85). RED and C&W; Appdx C-1 Arb. (Dolnick, 1/25/73). The Neutral Member of this Committee, in BRAC v. N&W; 4/7/65 Agreement Arb. (LaRocco, 7/1/86), defined the doctrine of laches and justified its application to protective claims as follows:

"Even in the absence of express time lime limits, the doctrine of laches operates to bar a claim which is filed beyond a reasonable time period and prejudices the opposing party. The purpose of the doctrine is to prevent stale claims. Allowing old, stale claims to perpetually fester hardly promotes stable and predictable railroad labor-management relations. As stated above, a delay, even an unreasonable delay, is insufficient to invoke the laches defense. The Carrier must also demonstrate the Claimant's procrastination operated to its prejudice."

Other arbitration committees have considered the doctrine of laches and recognized its applicability to New York Dock cases. However, given the specific facts of that particular case, the committee found laches was not to that individual claim. One example of such a case is:

New York Dock Arbitration Award - Ronald F. Sysak (Attorney representing 28 individual machinists) v. Union Pacific Railroad Company (1987, Seidenberg) (Union Pacific Exhibit 39)

"In conclusion we find the Claimants could have been more expeditious in progressing their claims. Nevertheless, the lapse of time that occurred until these claims reached this point of adjudication, is not so extended or protracted as to warrant or support invoking the doctrine of Laches. Accordingly, we hold that the Carrier's request to invoke the Doctrine of Laches is dismissed."¹⁹

In the Seidenberg Award cited immediately above, the delay in handling the claims extended from as a meeting in October, 1985, until October, 1986, a period of one year. Contrast that with the delay of nearly six years in the instant claim involving Mr. Grother. Clearly, his delay has placed

¹⁹ The issue of Laches was only a portion of Union Pacific's defense in the Seidenberg Award, and the claims for the 28 individual machinists involved therein were denied on the basis their furloughs were not linked to as a transaction.

Union Pacific at a disadvantage 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 recollections of people still with the railroad have grown dim.

What reason(s) does Mr. Grother offer for the nearly six-year delay between his demotion and the date he first notified Union Pacific of his claim under New York Dock.? His reasons are sprinkled throughout his May 12, 2003 letter to Mr. Dolan. Beginning on page 15 of that letter, Mr. Grother starts a disjointed explanation, running to approximately page 42 of his letter, of why he waited until 2003 to allege he was covered by New York Dock.²⁰

“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
—:”

The numbered paragraphs which follow list Mr. Grother’s reasons for delay (as summarized by Union Pacific).

#1 (page 16) UPRR’s corporate culture was such that Mr. Grother would “surely have been immediately dismissed” if he had sought arbitration.

#2 (page 16) UPRR President Davis’ response to Mr. Grother’s displayed such a total lack of regard for what happened to Mr. Grother that he (Grother) felt further appeal was “too high of an ‘individual risk’.”

²⁰ See Union Pacific Exhibit 2, commencing on the bottom of page 15. Mr Grother’s explanation of the long delay in linking his demotion to New York Dock appears to run until the solid line on the upper part of page 42.

#3 (page 17) "The difference between UPRR reality and what UPRR publicly stated as its 1997 visions and values ..."

#4 (page 17) A pattern of mistrust and fear of UPRR retaliation was created when Mr. Grother was demoted.

#5 (page 18) Mr. Grother alleges he never received any oral or written warning of personal poor performance.

#6 (page 18) UPRR's demotion policy stated in most cases the employee's present salary level is retained.

#7 (page 18) Mr. Grother alleges his Houston supervisor warned him UP would "make life unbearable for you" if Grother sued UPRR.

#8 (page 19) Mr. Grother states other employees transferred to Intermodal at Houston did not receive a salary reduction.

#9 (page 20) Mr. Grother did not find out until July 31, 2002 someone had placed a notation about discipline on his "secret" personal record.

#10 (page 21) Constant dead ends and patterns of misinformation are why no one in their right mind would request an arbitration case earlier than age 55.

#11 (page 26) The UPRR ombudsman's response to Mr. Grother was that his (the ombudsman's) investigation revealed the reason for Grother's demotion was poor job performance.

#10 (page 31) Mr. Grother states the "... the concept of a manager being reduced in compensation as a result of demotion was unheard of at UPRR in 1997." Grother cites language in the Summary of Plan Changes Effective January 1, 1999 for the UPRR pension plan.

#12 (page 32) Mr. Grother applied for other positions subsequent to his July 1, 1997 reassignment to Houston, but was not the successful applicant for any of them.

#13 (page 33) Mr. Grother has a sick wife and was afraid UPRR would deny him medical insurance coverage under COBRA. Mr. Grother says by waiting until he attained age 55, then retiring, he would be eligible for retirement medical coverage.

#14 (page 35) Mr. Grother contends the salary reduction accompanying his demotion reduced his benefits under the pension plan.

#15 (page 36) For the layman, arbitration is a difficult path to follow.

#16 (page 37) Mr. Grother cites another manager who was "demoted and transferred", but did not suffer a salary reduction.

#17 (page 38) Mr. Grother cites the tax penalty for making reductions from a 401-K prior to reaching age 55.

#18 (page 39) psychological and philosophical clashes occur as an aftermath of mergers which makes a person fearful of pursuing appeal, arbitration or litigation.

#19 (page 40) "Given that Grother is harassed and threatened almost weekly with losing his job...", how could he file for arbitration before reaching age 55.

#20 (page 39) Mr. Grother says the amount of severance paid by UP for involuntary terminations has been continually reduced. Therefore, he waited until age 55 before filing for arbitration because he feared being put on the top of the 'elimination list'.

#21 (page 40) Mr. Grother says he had been incorrectly advised the National Railroad Adjustment Board was the correct venue for individual arbitration.

After reading through all of the above, Union Pacific thinks an accurate summary of Mr. Grother's explanation for the delay is that he waited until he attained age 55 before requesting arbitration under New York Dock because he was fearful of retaliation from UP. In Mr. Grother's view, such retaliation would have resulted in termination and placed him in a position without medical coverage for his family.

One of the reasons Mr. Grother cites as justification for his long delay in asserting coverage under New York Dock is his subjective fear of being terminated, and the resulting loss of his medical insurance. Upon attaining the age of 55 (in this case on November 24, 2001), Mr. Grother became eligible to elect to retire, and begin receiving a pension, while retaining eligibility for retiree medical insurance. However, had Mr. Grother chosen this option, he would have been required to share a portion of the cost of his pre-65 retirement medical benefits. If Mr. Grother's employment had been

terminated for any reason prior to having reached age 55, he would not have been eligible for retirement medical benefits, but the termination would have been a qualifying event requiring Union Pacific to offer Mr. Grother the opportunity to continue his medical insurance coverage for an additional 18 months, at his own expense, under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. § 161 et seq.

Mr. Grother tries to bolster his justification for his long delay in asserting coverage under New York Dock by alleging he had to wait until attaining age 55 because he feared such a claim would result in his termination before he was eligible for a pension. As a matter of fact this argument is based on a false premise. Mr. Grother had fully vested long ago under both the Railroad Retirement Act and the Union Pacific pension program. An early termination might have reduced his monthly benefits, but it would not have effected a loss of his pension rights. In addition, Mr. Grother compounds this argument by adding a second level of specious reasoning when he contends if he had been dismissed, Union Pacific would have doubled his misery by denying him benefits under COBRA. While there is an exception under COBRA, that permits employers to deny continuation of coverage to employees terminated for "gross misconduct", 29 U.S.C. § 1163, neither Mr. Grother's demotion nor his subjective fear of termination for filing a New York Dock claim could reasonably have been asserted to be "gross misconduct". Mr. Grother is therefore speculating, without any evidence, that Union Pacific would both have terminated his employment and violated federal law to deny him medical insurance.

There is also no evidence that Union Pacific has ever denied COBRA continuation benefits to any former employee under the "gross misconduct" exception. Since the employee bears the full cost of COBRA's continuation provisions, there is no logical reason why Union Pacific should ever

elect to do so. Mr. Grother tries to support his subjective fear by citing a passage from an unauthenticated document, dated November 16, 2001, referring to a former Union Pacific employee named Francisconi²¹. Francisconi was a Union Pacific manager who was discharged in 1997 for improper requests for reimbursement of alleged business expenses. Although Francisconi attempted to contest his termination, alleged as part of a claim of intentional infliction of emotional distress that he had been threatened with the loss of COBRA coverage, he was in fact granted such continuation benefits under COBRA. Union Pacific denied that it had ever threatened to assert the “gross misconduct” exception to withhold COBRA coverage and was vindicated at trial by a jury verdict of no cause of action on all of Francisconi’s claims. As a result, there is no evidence in this case that Union Pacific has ever violated federal law by denying COBRA coverage or has ever even threatened to rely upon 29 U.S.C. § 1163 to deny continuation coverage to any employee on the basis of alleged “gross misconduct”.

What is of far more interest in this case is the timing of how Mr. Grother alleges that Mr. Francisconi’s unsuccessful claims influence his delay in filing this claim. Whatever the document is that Mr. Grother alleges to have relied upon, it is clearly dated November 16, 2001. Refer again to Mr. Grother’s exhibit 35.²² This was only 8 days prior to Mr. Grother’s 55th birthday, when Mr. Grother would have been eligible for retiree health insurance and COBRA continuation coverage would become irrelevant. The first time Mr. Grother could have possibly relied upon Mr. Francisconi’s allegations, approximately 52 months (over 4 years) had passed from the date of his

²¹ See Union Pacific Exhibit, Page 109, which is exhibit 35 that was attached to Mr. Grother’s May 12, 2003, letter to Mr. Dolan

²² Ibid.

salary reduction. Mr. Grother's alleged fear that he might lose COBRA coverage could not have arisen until he had already been sitting on his claim for four years and even then would only have been cause for him to delay another week. These arguments clearly do nothing to justify Mr. Grother's extraordinary delay in timely filing this New York Dock claim.

Many of the people Mr. Grother paints as villains have left the employment of Union Pacific. Former president Jerry Davis and former Vice President of Operations Art Shoener are two of the executives whose names appear repeatedly in Mr. Grother's May 12, 2003 letter to Mr. Dolan. Mr. Grother states it was Mr. Shoener who gave a "direct order" that "all Phoenix flat switching would be consolidated at Tucson."²³ It was Mr. Davis who presided over a company where the corporate culture, according to Mr. Grother, was "dysfunctional."²⁴ Both of those people are no longer employed by UP, and had already left prior to Mr. Grother's first assertion of coverage under New York Dock. 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 Union Superintendent, and Mr. Grother's immediate supervisor. Mr. Packard will be present as a witness at the hearing scheduled for October 12, 2004.

Many of the documents and records relating to 1997, which Mr. Grother has sought, are no longer available. UP can understand Mr. Grother's frustration with this, but Mr. Grother also needs to understand large corporations are not required, and can not afford, to retain each and every record forever. Of particular significance here is Mr. Grother's quest for a copy of a form 15121 which allegedly lists the reason for his 1997 demotion as "disciplinary." That form is no longer available.

²³ Union Pacific Exhibit 2, page 7

²⁴ Union Pacific Exhibit 2, 16

As Lisa Brewster, an employee in UP's Human Resources department told Mr. Grother, UP's computer systems have changed since 1997.²⁵ UP now uses People Soft instead of a former systems known as PINS. UP has been able to locate a payroll entry form, attached as UNION PACIFIC EXHIBIT 40, which is a data entry form for the action taken with Mr. Grother effective July 1, 1997, which is clearly labeled as a "demotion." Note the "COMMENTS" section on that form on the second page where it states "(see comment section of 15121 system for justification of demotion) - Notes Entered: 6/27/97 1:13:27 PM- Disciplinary action." As stated above, the 15121 system is no longer maintained or available.

Mr. Grother's long delay in initiating his allegation of being covered under New York Dock worked to his advantage in the compensation and reimbursement he received for relocation from Tucson to Houston. The moving expenses applicable to an employee covered by New York Dock are set forth in Article I, Section 9 of New York Dock, which reads:

"9. Moving expenses.- Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is 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 member of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to 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 the transaction, shall not considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within

²⁵ Union Pacific Exhibit 2, pps. 90 & 91

90 days after the date on which the expenses were incurred.” (See Union Pacific Exhibit 1, Page 5)

Under New York Dock, Mr. Grother would have been entitled to be reimbursed for “... all expenses of moving his household and other personal effects for the traveling expenses of himself and member of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days...” However, Mr. Grother did not come forth in a timely manner with his contention of being an eligible employee under New York Dock, and nobody at UP who was involved in the reimbursement process considered him to be covered under New York Dock. Therefore, Mr. Grother was reimbursed for moving expenses under a policy applicable to Union Pacific officials, which included several items not provided by New York Dock. The most significant of these additional items of compensation include:

One month's salary	\$ 4,928.00
“Gross Up” on the salary (so it was not eroded by taxes)	\$ 3,473.50
Expenses related to sale of his residence	<u>\$ 2,456.00</u>
	\$ 10,857.50 ²⁶

The items shown above yielded Mr. Grother more than ten thousand dollars in addition to what he would have been entitled to under New York Dock.

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. Surely, Mr. Grother is not

²⁶ See Union Pacific Exhibit 43

entitled to cherry pick among alternate benefit programs to obtain only the best from each.

The effects of Mr. Grother's long delay in filing a claim under New York Dock has resulted in a situation where UP is not able to completely defend itself against Mr. Grother's allegation his demotion was related to the UP-SP merger. His long delay has prejudiced UP's ability to fully defend itself against Mr. Grother's claim and should be barred under the doctrine of Laches.

UNION PACIFIC'S SUMMARY ARGUMENT

John Grother claims his salary was reduced as a result of the UP-SP merger, a transaction in which the New York Dock protective conditions were imposed. Grother contends he is a "displaced employee" under New York Dock entitled to a "displacement allowance." Union Pacific disagrees. At the time he contends he was adversely affected, he was not an "employee" of Union Pacific for purposes of the New York Dock conditions. Further, Mr. Grother's salary was not reduced "as a result of a transaction" Therefore, Union Pacific contends, Mr. Grother does not meet the requirements of a "displaced employee" under New York Dock.

In addition, although the New York Dock conditions do not contain specific time limits in which a claim must be progressed, Mr. Grother's long delay is unreasonable under the doctrine of Laches, thereby prejudicing Union Pacific's ability to defend against his claim.

Union Pacific believes it has supported its position with clear and substantial evidence, and respectfully requests this Board to answer Union Pacific's first question at issue:

- (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?

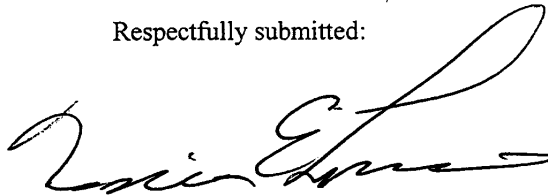
in the negative

and its second question at issue:

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

in the affirmative.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "William E. Loomis", written in a cursive style.

William E. Loomis
September 14, 2004
Omaha, Nebraska

UNION PACIFIC EXHIBITS

- 1 Labor protective conditions set out in New York Dock Ry.--Control --Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), i.e., the New York Dock conditions
- 2 John Grother's May 12, 2003 letter to James V. Dolan, Union Pacific Railroad Law Dept.
- 3 John Grother's June 16, 2003 letter to Roland Watkins, National Mediation Board
- 4 Roland Watkins' July 7, 2003 letter to John Grother
- 5 Marilyn Ahart's, Union Pacific Railroad Director Protection Management, July 18, 2003 letter to John Grother
- 6 Marilyn Ahart's July 18, 2003 letter to Roland Watkins
- 7 Roland Watkins' July 21, 2003 letter to John Grother
- 8 John Grother's July 28, 2003 letter to Marilyn Ahart
- 9 Roland Watkins' August 11, 2003 letter to John Grother
- 10 John Grother's August 11, 2003 letter to Roland Watkins
- 11 Marilyn Ahart's August 15, 2003 letter to John Grother
- 12 Written correspondence between the parties and the NMB concerning the selection of a neutral member for this arbitration committee
- 13 Roland Watkins' January 21, 2004 letter appointing Lynette A. Ross as the "neutral/referee member) of the arbitration committee to resolve the dispute between John Grother and Union Pacific Railroad
- 14 John Grother's February 20, 2004 petition to the Surface Transportation Board to "Establish Procedures For Arbitration Under New York Dock Employee Protective Conditions"
- 15 Union Pacific Railroad's March 4, 2004 opposition to John Grother's petition
- 16 John Grother's March 12, 2004 supplemental letter to the Surface Transportation Board
- 17 Surface Transportation Board's decision - Finance Docket No. 32760 (Sub-No. 42), served April 21, 2004

- 18 John Grother's April 23, 2004 post-decision letter to the Surface Transportation Board requesting a correction in the language of the April 21, 2004 decision
- 19 Memorandum of Agreement between John E. Grother and Union Pacific Railroad Company concerning the arbitration committee established to resolve the dispute between these two parties
- 20 Section 300 of the Transportation Act of 1920
- 21 Interstate Commerce Commission, Regulations of February 5, 1924, Ex Parte No. 72
- 22 Section 1 of the Railway Labor Act (Title 45 - United States Code - Chapter 8 - §151)
- 23 Washington Job Protection Agreement of May, 1936
- 24 New York Dock Arbitration Award - Dana R. Bond and Michael J. Topolosky v. Union Pacific Railroad Company (1985, Stallworth)
- 25 New York Dock Arbitration Award - James M. Benham v. Delaware & Hudson Railway Company (1986, O'Brien)
- 26 New York Dock Arbitration Award - B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v. Union Pacific Railroad Company (1987, Seidenberg)
- 27 New York Dock Arbitration Award - John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Company. (1987, O'Brien)
- 28 New York Dock Arbitration Award - Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (1988, Stallworth)
- 29 New York Dock Arbitration Award - James V. Nekich v. Burlington Northern Santa Fe Railroad (1996, Ver Ploeg)
- 30 New York Dock Arbitration Award - Ross F. Povirk and the Transportation and Communication International Union v. Union Pacific Railroad Company (1998, Stallworth)
- 31 New York Dock Arbitration Award - G. L. Dixon and the Transportation and Communication International Union v. Union Pacific Railroad Company (1998, Stallworth)
- 32 New York Dock Arbitration Award - B. W. Isabell and the Transportation and Communications International Union v. Union Pacific Railroad Company (1998, Stallworth)

- 33 Agreement - October 20, 1997, between Union Pacific Railroad and United Transportation Union (SP-West) - "Modification" Agreement
- 34 Agreement - June 23, 1999, between Union Pacific Railroad and United Transportation Union (SP-West) - Merger Implementing Agreement
- 35 New York Dock Arbitration Award - United Transportation Union (S. G. Nelson) v. Union Pacific Railroad Company (1993, LaRocco)
- 36 New York Dock Arbitration Award - United Transportation Union (R. L. Shankel, R. E. Porter and L. Chapman) v. Union Pacific Railroad Company (1993, LaRocco)
- 37 New York Dock Arbitration Award - International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (D. L. Haver, G. L. Galbreath) v. Southern Railway Company (1990, Muessig)
- 38 New York Dock Arbitration Award - Transportation-Communications International Union (R. Tefft) v. Union Pacific Railroad Company (1990, LaRocco)
- 39 New York Dock Arbitration Award - Ronald F. Sysak (Attorney representing 28 individual machinists) v. Union Pacific Railroad Company (1987, Seidenberg)
- 40 Union Pacific Railroad payroll authority form dated June 27, 1997, relating to Mr. Grother's demotion
- 41 New York Dock Arbitration Award - Brotherhood of Maintenance of Way Employes (C. E. Hardesty) v. The Atchison, Topeka and Santa Fe Railway Company (1986, LaRocco) and New York Dock Arbitration Award - United Transportation Union (T. B. Barnes, et. al.) v. Norfolk & Western Railway Company (1986, Peterson)
- 42 Correspondence written to Mr. Grother by Union Pacific Railroad Ombudsman Butch Ethington
- 43 1997 payroll information for Mr. Grother

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.

(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 any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision. - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended transaction 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 affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(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. 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 cease 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.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation Allowance.- A dismissed employee entitled to protection under this appendix, may at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump-sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.- No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is 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, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to 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 the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

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. Arbitration of disputes. - (a) 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, except Sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select 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.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE H

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under Sections 1 or 2 of the Article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad

and employees of any other enterprise within the definition of common carrier by railroad in Section 1(3) of Part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad; shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept 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 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.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 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 USC 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.

**VIA CERTIFIED MAIL FOR DELIVERY OF OFFICIAL
NOTIFICATION OF NEW YORK DOCK ARBITRATION DISPUTE**

TO: MR. JAMES V. DOLAN
UP COUNSEL AND DOS
ROOM 830
1416 DODGE STREET
OMAHA, NE 68179

May 12, 2003

LAW DEPT.

MAY 16 2003

REC'D UPRR

I AM IN THE PROCESS OF RETAINING A LAWYER TO REPRESENT MYSELF FOR A POTENTIAL NATIONAL MEDIATION BOARD ARBITRATION PURSUANT TO THE NEW YORK DOCK CONDITIONS. I AM A UNION PACIFIC RAILROAD ("UPRR") MANAGER BY THE NAME OF JOHN E. GROTHER ("GROTHER"). THIS LETTER CONCERNS GROTHER'S MERGER TRANSACTION RELATED DEMOTION EFFECTIVE JULY 1, 1997, WHICH HAS CLASSIFIED GROTHER AS A NEW YORK DOCK "DISPLACED EMPLOYEE". THIS LETTER REPRESENTS **OFFICIAL NOTICE** THAT GROTHER'S DISPUTE IS TO OBTAIN "AMOUNT OF COMPENSATION REQUESTED" ON ATTCH. 2 (PG. 4), \$107,370, AS THE RESULT OF SOME ACTION:

1. EITHER, A SETTLEMENT BETWEEN THE PARTIES,
2. OR, SHOULD THIS OFFICIAL NOTICE OF A DISPUTE, NOT BE SETTLED IN THIRTY (30) DAYS, THEN IMPLEMENTATION OF THE ARTICLE IV ARBITRATION PROVISION OF THE NEW YORK DOCK CONDITIONS, FINANCE DOCKET NO. 28250, APPENDIX III, REGARDING NON-AGREEMENT EMPLOYEES ADVERSELY AFFECTED BY A MERGER TRANSACTION, WILL BE ACTIVATED. AN APPEAL TO THE SURFACE TRANSPORTATION BOARD WILL BE PURSUED, IF REQUIRED.

I ATTEMPTED TO SETTLE THIS ARBITRATION DISPUTE ISSUE BASED ON UPRR'S PUBLICLY PUBLISHED STATEMENT THAT: **"A DISCRIMINATION FREE WORKPLACE AND FAIR TREATMENT ARE FUNDAMENTAL RIGHTS OF ALL ...EMPLOYEES"**.

OMBUDSMAN REPRESENTATIVE MR. BUTCH ETHINGTON HAS ADVISED THAT THE UPRR "FAIR TREATMENT" CREDO WILL NOT SETTLE THIS REQUEST FOR COMPENSATION ISSUE.

THEREFORE, I HAVE INITIATED DISCUSSIONS WITH ATTORNEY MICHAEL WOLLY, OF THE WASHINGTON D.C. FIRM OF ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON AND WOLLY, P.C. THE FOLLOWING IS SUBMITTED ON INFORMATION AND BELIEF, FOR THE RESPONSE OF UPRR WITHIN THIRTY (30) DAYS; OR ON OR BEFORE JUNE 16, 2003, IN ACCORDANCE WITH ARTICLE IV, OF SAID NEW YORK DOCK CONDITIONS.

INTRODUCTION, UPRR PUBLICLY HERALDED POLICIES :

GROTHER IS GRATEFUL TO BE A MEMBER OF THE UPRR TEAM WHICH IS "BUILDING AMERICA" tm. GROTHOR BELIEVES THAT THE LONG EXISTING POLICIES OF UPRR, AS PUBLICLY PUBLISHED IN UPRR'S "VISION & VALUES", UPRR'S REPUTATION AND COMMITMENT TO THE UNDERLYING CRITERIA OF THE BALDRIDGE AWARD, WILL PROVIDE UPRR WITH THE WORLD-CLASS OBJECTIVITY TO EXAMINE WHAT FINANCIAL AND EMOTIONAL DENIGRATION HAS BEEN DONE TO THE LIVES OF THE GROTHOR'S AND SETTLE THIS ISSUE.

GROTHER IS OF THE OPINION THAT THE LOTUS NOTE TRANSMITTED TO ALL EMPLOYEES FROM PRESIDENT & COO IKE J. EVANS DATED 8/8/02 WILL PROVIDE UPRR GUIDANCE:

"FOR OVER 140 YEARS, THE MEN AND WOMEN AT UNION PACIFIC HAVE PROVEN THAT THEY CAN BE TRUSTED TO DO WHAT'S RIGHT."

THE BOTTOM PAGE ONE POLICY AND PRACTICES STATEMENT, PUBLICLY PUBLISHED IN "DIVERSITY SECTION OF THE UPRR WEBSITE" SHOULD BE GUIDANCE, AS IT'S "UPRR CREDO".

TO ILLUSTRATE, AS PUBLISHED IN THE 2002 POLICY FOR VALUES, (EXH 1): " WE PUT ALL ISSUES ON THE TABLE AND ATTEMPT TO RESOLVE THEM THROUGH CONSTRUCTIVE DEBATE AND CHALLENGE" THIS SHOULD INCLUDE THE ISSUE OF DETERMINING THE "FAIRNESS" OF TAKING 21% OF GROTHER'S MONTHLY INCOME AND RETIREMENT LOSSES BECAUSE, HE WAS SIMPLY AT TUCSON IN 1997 DURING A MERGER RELATED EXPERIMENT TO CONSOLIDATE YARDS! THE 2002 POLICY ALSO SAYS "... DO NOT KILL THE MESSENGER BEARING BAD NEWS". THIS HAS ALREADY HAPPENED TO GROTHER ONCE, WHEN GROTHER WARNED SENIOR UPRR MANAGERS IN APRIL 1997 THAT THE BELOW MERGER RELATED SWITCHING CONSOLIDATION EXPERIMENT WOULD NOT WORK.

GROTHER IS HOPEFUL THAT THE 2003 POLICY OF VALUES WILL BE HONORED AND THAT GROTHER DOES NOT RECEIVE A REPEAT DISREGARD OF THE 1997 UPRR VALUES WHICH WERE DISPLAYED PROMINENTLY ON GROTHER'S UPRR PROVIDED "VALUE'S DESKTOP STAND- 10" LONG X 4.5" HIGH" IN 1997, WHEN HE WAS SAVAGELY DEMOTED ON FOUR DAYS NOTICE TO ACCEPT OR QUIT, BECAUSE VPO SHOENER ORDERED A MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT SHORTLY AFTER SHOENER'S INITIAL ROLLOUT REVIEW OF HIS NEW UPRR TERRITORY, WHICH THEN INCLUDED ARIZONA.

GROTHER'S DEMOTION 7/1/97 WAS A DIRECT NEXUS OF THE 1997 UP-SP MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT OF COMBINING THE ENTIRE FLAT SWITCHING FOR PHOENIX INTO TUCSON BETWEEN MAY 16, 1997 & JUNE 26, 1997.

THE UPRR VALUES ON GROTHER'S 1997 DESK INCLUDED, THE FOLLOWING AND OTHER VALUES SHOWN ON EXHIBIT 2:

1. TREAT OTHERS LIKE YOU WANT TO BE TREATED"

(THOSE WHO CUT GROTHER'S WAGES 21% WOULD NOT HAVE WANTED THIS TO OCCUR TO THEM; INCLUDING, PRIOR TO THE MERGER-UPRR MANAGERS. NOTWITHSTANDING THE FACT THAT MANY MERGER RELATED CAR DELAYS, LAWSUITS

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 GROTHOR HAD BEEN MAKING SINCE SEPTEMBER 1995.

GROTHOR'S STANDARD OF PERFORMANCE HAD NEVER BEEN BELOW "OUTSTANDING" AT ANY TIME AND GROTHOR 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 GROTHOR 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, GROTHOR 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, GROTHOR 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 GROTHOR WAS ON THE UP/SP COMMON POINT MERGER TEAM (GROTHOR 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, GROTHOR 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, GROTHOR 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 GROTHOR'S STRONG PERSONAL RECORD AND EXCELLENT PERFORMANCE, GROTHOR WAS SELECTED AS UPRR'S CHOICE TO BE SRMTO APRIL 16, 1997. GROTHOR'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 GROTHOR'S SEVERE DEMOTION, GROTHOR 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 GROTHOR'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. GROTHOR 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 GROTHOR HAD PERFORMED EXCELLENTLY AS THE INCUMBENT ON GROTHOR'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 GROTHOR 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 GROTHOR 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 GROTHOR 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 GROTHOR'S SPECIFIC INQUIRY ABOUT GROTHOR'S FINANCIAL REQUEST TO AVOID FINANCIAL AND EMOTIONAL DENIGRATION FOR LIFE, AND
- DID NOT HAVE ANYONE INVESTIGATE GROTHOR'S STATEMENT REGARDING "HOW...THE ISSUES OF DISCRIMINATION RELATE TO MY SUDDEN DOWNGRADE"

PRESIDENT DAVIS'S LETTER IS STRONG CORROBORATION THAT THE NEXUS OF GROTHOR'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 GROTHOR DEMOTION :

AS CORROBORATION OF THE 1997 UPRR CORPORATE CULTURE, WHICH SEVERELY DEMOTED GROTHOR, 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, GROTHOR ADVISED THAT THIS MERGER TRANSACTION EXPERIMENT WAS DOOMED. NOT ONLY WERE HIS WARNINGS IGNORED; BUT, WHEN THE EXPERIMENT FAILED, GROTHOR 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, GROTHOR FEELS 'THE 33,000 MILES OF BUILDING AMERICA'tm.

NONETHELESS, GROTHOR AS AN EX-SPTCO MANAGER, WAS "OUTSIDE THE UPRR OLD BOY NETWORK" OF LONG-TERM ALLEGIANCES. IN ADDITION, BASED ON THE 1997 UPRR 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. GROTHOR, 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 REBENDORF 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 GROTHOR, 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 GROTHOR'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, GROTHOR WAS BEING DEMOTED 21%, OR \$1,272 / MONTH AND BEING TRANSFERRED & DENIGRATED. SHOENER HAD THE ABOVE "NEW IDEA" AND GROTHOR 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 GROTHOR, IN WRITING, ADVISED SENIOR MANAGEMENT THAT THE MERGER CONSOLIDATION EXPERIMENT FAILURE WAS CERTAIN, BASED ON THE LACK OF RESOURCES AT TUCSON, GROTHOR 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, GROTHOR'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, GROTHOR JUST FOUND OUT JULY 31, 2002, FOR THE FIRST TIME AFTER CONSIDERABLE INQUIRIES AND EFFORT, THAT "SOMEONE" HAD PLACED ON THE SECRET-TO-GROTHOR ONLINE PERSONAL RECORD SYSTEM THAT GROTHOR 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 GROTHOR 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 GROTHOR HAS DEVELOPED A REALISTIC FEAR OF TRUSTING SOME IN UPRR MANAGEMENT.

AT FIRST, GROTHOR ATTEMPTED WORKING WITH THE LOCAL HR PERSON, LINDA BUTTRILL TO OBTAIN INFORMATION ON THE 1997 DEMOTION POLICY OF UPRR AND WHY GROTHOR WAS NON-PROMOTABLE, INCLUDING OBTAINING GROTHOR'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 GROTHOR'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 GROTHOR 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 GROTHOR WHEN GROTHOR 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 GROTHOR, 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 GROTHOR 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 GROTHOR 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 GROTHOR'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). GROTHOR 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, GROTHOR 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), GROTHOR 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 GROTHOR'S PERSONAL RECORDS IN DECEMBER 2001 (OR AN INCREDULOUS COINCIDENCE), GROTHOR 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, GROTHOR 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, GROTHOR 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 GROTHOR WITH THIS.

GROTHOR 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 GROTHOR 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-GROTHOR 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 GROTHOR'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 GROTHOR'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 (GROTHOR) 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 GROTHOR, 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 GROTHOR 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 GROTHOR'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-GROTHOR 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 GROTHOR'S REQUEST FOR COMPENSATION FAIRNESS; IN PART, BECAUSE HE HAD RECEIVED FEEDBACK FROM PACKARD AND MURPHY, THE PERSON'S WHO SEVERELY DISPLACED GROTHOR THAT GROTHOR'S 1997 DEMOTION WAS RELATED TO "POOR PERFORMANCE" AS:

"WE LOOKED AT A LOT OF PEOPLE AND GROTHOR DID NOT PERFORM AS WELL AS THEM".

FINALLY, ON 3/10/03 OMBUDSMAN ETHINGTON ADVISED IN WRITING THAT GROTHOR'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 GROTHOR HAD WORKED 28 YEARS TO OBTAIN?

THE ABOVE IS NOT LOGICAL FOR SEVERAL REASONS;
INCLUDING, BUT NOT LIMITED TO:

- A. PACKARD HAD SELECTED GROTHOR AS THE SENIOR MTO (SRMTO) AT TUCSON EFFECTIVE APRIL 16, 1997 AFTER HAVING THE OPPORTUNITY TO OBSERVE GROTHOR'S PERSONAL PERFORMANCE FOR 3.5 MONTHS AND REVIEW GROTHOR'S OUTSTANDING RECORD.

HOW COULD GROTHOR'S PERSONAL PERFORMANCE DETERIORATE SO MUCH IN TWO (2) MONTHS; ESPECIALLY, WITH GROTHOR'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 GROTHOR HAD DECIDED.

- B. IN GROTHOR'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS, GROTHOR 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 GROTHOR 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 GROTHOR.

- C. UPRR HAS BEEN REQUESTED, AS PART OF GROTHOR'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 GROTHOR, 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 GROTHOR'S CASE, AS GROTHOR'S HIGHER PAY BETWEEN 1995-1997 WILL NOT BE ALLOWED IN THE CALCULATION OF HIS UPRR PENSION. THE GROTHOR'S WILL BE FINANCIALLY HARMED FOREVER! GROTHOR 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. GROTHOR WAS PERPLEXED BY HIS SEVERE 1997 PAY REDUCTION THAT WAS RELATED TO GROTHOR'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 GROTHOR'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 GROTHOR IS SURE THAT HIS PRESENT WAGE HAS CONTINUED TO ESCALATE MUCH HIGHER THAN GROTHOR'S, AS GROTHOR IS STILL TRYING TO GET BACK TO GROTHOR'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 GROTHOR'S DIMINISHED CHECK WHICH WAS RECEIVED MARCH 1, 2001 WHICH ADVISED GROTHOR "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 WIPE 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. GROTHOR COULD NOT AFFORD TO LOSE A SUBSTANTIAL PORTION OF GROTHOR'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 GROTHOR 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 GROTHOR'S CONTROL, HOW COULD GROTHOR 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 GROTHOR) HAD BEEN OFFERED EIGHTEEN (18) MONTHS OF SEVERANCE PAY PER MY RECORDS. ON DECEMBER 28, 2000, GROTHOR 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, GROTHOR'S SUPERVISOR FRYAR WOULD NOT TRAIN GROTHOR 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. GROTHOR 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 RETALLATION, ACTIONS OF PREJUDICE AND DISCRIMINATION ACTUALLY PERPETRATED BY UPRR AGAINST GROTHOR 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 GROTHOR ARE STILL EMPLOYED BY UPRR AND SHOULD BE READILY ABLE TO DOCUMENT THE DETAILED "JUSTIFICATION" WHY GROTHOR'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 GROTHOR'S RECORD OVER SIX MONTHS AND GROTHOR'S PERSONAL PERFORMANCE FROM JAN. THROUGH APRIL 1997 (3.5 MONTHS OF DAILY REVIEWS OR POSSIBLY MORE, DEPENDING ON PACKARD'S ARRIVAL).

WHY WAS GROTHOR 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 GROTHOR'S BELOW FINANCIAL DENIGRATION FOR LIFE AS A DISPLACED EMPLOYEE, GROTHOR 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". GROTHOR HAS BEEN DEPRIVED OF OVER \$107,000 THOROUGH 6/1/03.

- UPRR AND RAILROAD RETIREMENT HAVE BEEN REDUCED FOR A LIFETIME FOR BOTH GROTHOR AND HIS WIFE.
- CONSISTENTLY BEEN REJECTED IN HIS EFFORTS TO SEEK PROMOTION, OR EVEN, A LATERAL TRANSFER! GROTHOR 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.

GROTHOR'S TREATMENT BY UPRR COMPARED TO OTHERS WHO WERE IN COMMAND ROLES -"COMPARATIVE JUSTICE":

COMPARING THE "DEMOTION DISCIPLINE" EXECUTED ON GROTHOR 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 GROTHOR'S PENSIONS. GROTHOR 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 GROTHOR'S ATTACHMENT 2 COMPENSATION DISPUTE CLAIM, PLEASE CONSIDER GROTHOR'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)?"

GROTHOR HAS NOT LET THE ABOVE UNFAIRNESS AND TREATMENT AS A DISPLACED EMPLOYEE DESTROY HIS WILLINGNESS TO BE A "TEAM PLAYER". EXHIBIT 44 INDICATES GROTHOR'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)

GROTHOR'S FINANCIAL AND EMOTIONAL PAIN AS A DIRECT NEXUS TO A FAILED MERGER EXPERIMENT IS NOT OVER; AND, GROTHOR'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

JOHN GROTHER

ENCLOSURES:
ATTACHMENT TWO (pgs 1-4)
AND EXHIBITS 1-54

**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 INCREASES
- THEREFORE, IF ASSUME A 3.0% ANNUAL SALARY INCREASE
- APPLY SAID SALARY INCREASE TO THE ANNUAL/MONTHLY LOSS TIMES .030.
- $(.030 \times \$15,264) = \$458 \times 6 \text{ YEARS} =$ \$ 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 \$6,318/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 GROTHOR 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.

LOSS OF FRINGE BENEFITS**DEPRIVED OF BENEFITS ATTACHED TO HIS PREVIOUS
EMPLOYMENT BY THE DEMOTION & TRANSFER TO HOUSTON**

1. LOSS OF FREE TRANSPORTATION (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; THEREFORE, A LOSS OF \$573 IN FLEX CREDITS FOR A \$ 15,264 REDUCTION IN ANNUAL WAGES:

<u>YEAR</u>	<u>ANNUAL SALARY</u>	<u>FLEX CREDIT</u>	<u>EST CREDIT LOSS</u>
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 OFFSET
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

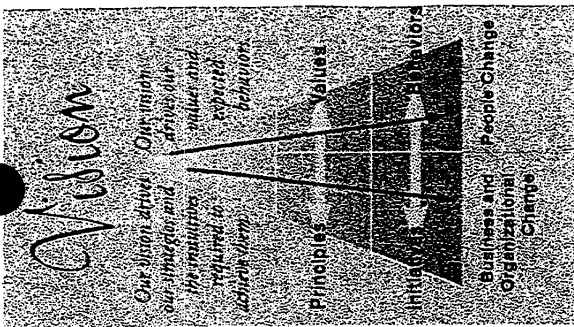
AMOUNT OF COMPENSATION REQUESTED = \$ 107, 370
PLUS, MINIMUM PENSION LOSSES ARE ESTIMATED EXCEEDING TWO HUNDRED THOUSAND DOLLARS,
SHOULD GROTHOR'S LIVE TO BE 80 YEARS OLD! \$ 200,000

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.



TRANSFORMATION

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.

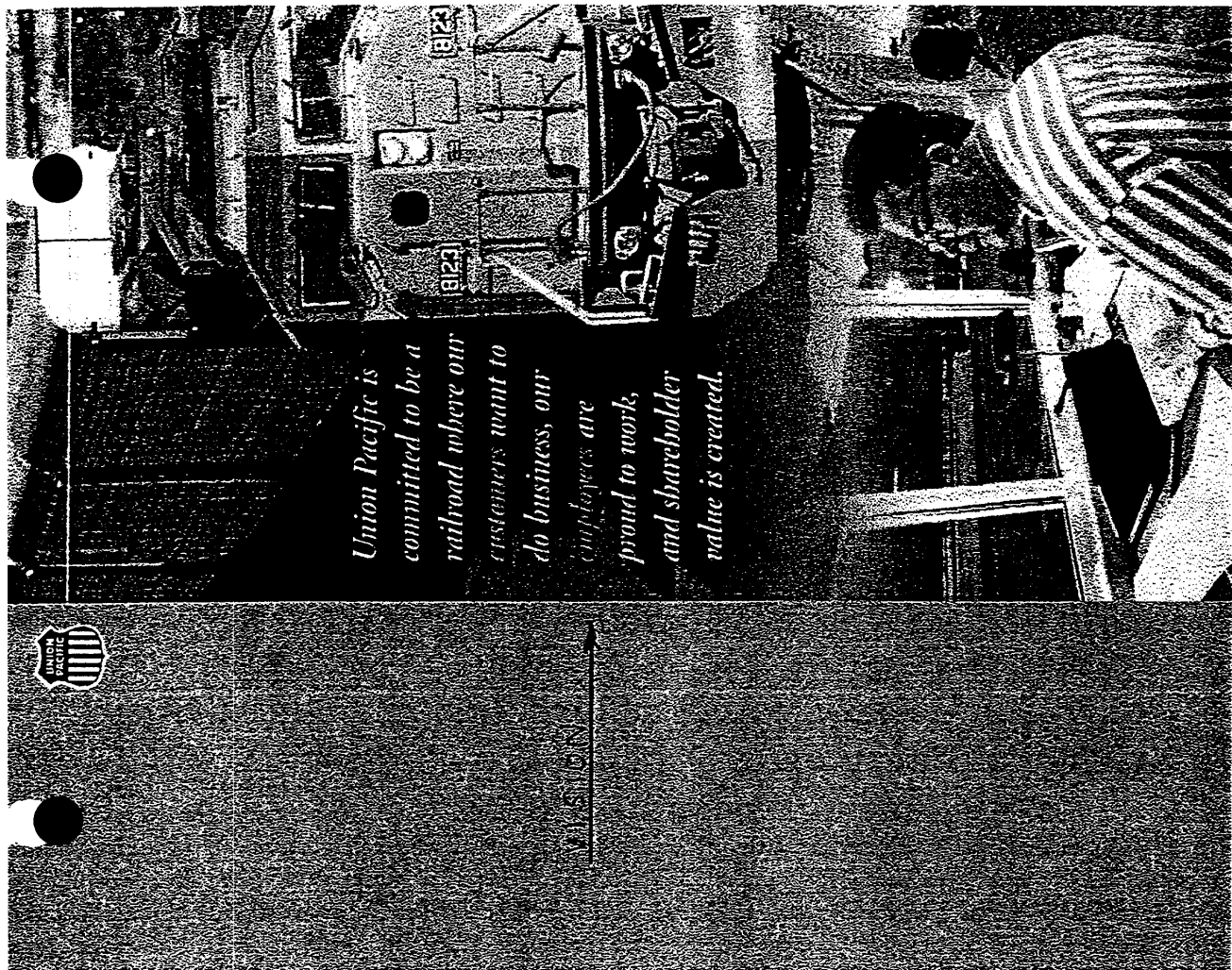
We will use our focus on quality as the foundation for improved responsiveness to our customers and employees.

■ 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.



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.



4/19/97

10' long

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

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 will deliver...
it depends on me.

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

Slide 1 of 2

"FOR YOUR DESIRE"
- AS A REMINDER
OF WHAT IS IMPORTANT
POLICY IN FEB, 1997

EX 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.

501-34/925

June 3, 1988

W.J.L.
JUN 03 1988

cc: m k

W P x

JUN 7 19

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 Bachold 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. MOHAM

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

UNION PACIFIC EXHIBIT 2
PAGE 55 OF 146

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
el

cc: Mr. E. L. Johnson

EXH. 4.B.

218-64
March 8, 1988

PERSONAL

Messrs.	H. D. Fisher	P. D. Lively
	R. D. Bredenberg	J. D. Daniels
	L. G. Simpson	D. K. Medley
	L. F. Furlow	J. W. Lynch
	M. D. Ongerth	G. A. Greblo
	G. L. Pollitt	G. R. Fetty
	L. L. Phipps	M. L. Wells
	K. L. Miller	A. M. Henson
	E. L. Hord	L. L. Jenkins
	G. D. Barnett	R. R. McClanahan
	J. E. Grother	J. W. Clark
	G. L. Murdock	

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

UNION PACIFIC EXHIBIT 2
PAGE 58 OF 146

N. NO.

NEW OFFICER'S
FA NO.

5 Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

B T Wilson #9497
From PRA 207
11/16/79 to
5/15/80

5 Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

J C Wirich #9537
From PRA 457
11/16/79 to
5/15/80

5 Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

P G Negrete #6440
From PRA 207
11/16/79 to
5/15/80

5 Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79 to 5/15/80

U C Barton #0494
From PRA 207
11/16/79 to
5/15/80

Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

J W Wilshire #9499
From PRA 207
11/16/79 to
5/15/80

Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

L G Powell #7162
From PRA 207
11/16/79 to
5/15/80

Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

M R Stearman #8426
From PRA 607
11/16/79 to
5/15/80

Actg Asst Rd Foreman of Engs-Houston
New posn. 11/16/79-5/15/80

J C Malone #5436
From PRA 607
11/16/79 to
5/15/80

Coordinator-Performance Improvement
Program-San F
New posn. 11/16/79

J E Grother ✓
11/16/79 → 8/16/81

Actg Asst Rd Foreman of Engs-Houston
Formerly held by L F Epperson

L F Epperson
To PRA
11/19/79

Temp. vacant
11/20/79

OPERATING

PeopleSoft

Report ID: upc41000

 Page No. 1
 Run Date 12/04/2001
 Run Time 07:12:04

EMPLOYEE JOB WORK HISTORY

 Employee ID: 0050020
 SSAN: 526663917
 NAME: Grother, John E

 Exp Rtn Dt:
 Serv Unit:

START/DT	TYPE	CHG	STAT	TITLE	LOCATION	UNION	DEPT.	CO	JOB	CD
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		
04/01/84	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884		
03/01/83	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		
02/01/77	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		
01/01/76	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		
02/01/75	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		
02/01/74	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

 UNION PACIFIC EXHIBIT 2
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SYSTEM OF UPRA WHICH DID NOT
ROLLOUT UNTIL OCTOBER 1, 1997.

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[q=cache:JGkTR22Dgi8C:members.aol.com/blewestern/4-97.htm+tcs/cms+cutover+creates+chaos+in+tucson&hl=en](http://www.google.com/search?q=cache:JGkTR22Dgi8C: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

000000 P P P P P P P R R R R R R J J E E E E E E G G G G G G G G
00000000 P P P P P P P P R R R R R R R J J E E E E E E G G G G G G G G
00 00 P P P P P P P R R R R R R J J E E G G
00 00 P P P P P P P R R R R R R J J E E E E E E G G G G G G
00 00 P P P P P P P R R R R R R J J J J E E E E E E G G G G G G
00 00 P P R R R R J J J J E E G G G G
00000000 P P R R R R J J J J J J E E E E E E G G G G G G G G
000000 P P R R R R J J J J E E E E E E G G G G G G G G

FROM: OPRMXG --SPTSVH02 DATE AND TIME 01/28/97 12:48:01
TO: OPRPAL --SPTSVH02 LOBELLO, PAUL OPRDSP --SPTSVH02 PAYAWAL, DAN
OPRDLH --SPTSVH02 HAMPTON, D.
CC: OPRHLH --SPTSVH02 MCDOWELL, LAWSON OPRJEG --SPTSVH02 GROTHOR, 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 JEG DETERMINED A KEEPER!
EARLIER AND NOT INTERVIEWED.
FOR SRMT0

EXH. 10

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000000 PPPPPP RRRRRR JJ EEEEE GGGGGGG
00000000 PPPPPPP RRRRRR JJ EEEEE GGGGGGG
00 00 PP PP RR RR JJ EE GG
00 00 PPPPPP RRRRRR JJ EEEEE GG GGG
00 00 PPPPPP RRRRRR JJ JJ EEEEE GG GGG
00 00 PP RR RR JJ JJ EE GG GG
00000000 PP RR RR JJJJJ EEEEE GGGGGGG
000000 PP RR RR JJJJ EEEEE GGGGGGG

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ROM: OPRJEG --SPTSUM02 DATE AND TIME 07/15/97 23:37:01
 O: OPRJEG --SPTSUM02 GROTHER, JOHN

ROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120
 SUBJECT: LETTER TO DAVIS

R. J. E. DAVIS
 RESIDENT AND CEO

JULY 15, 1997

DEAR MR. DAVIS,

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 DISCRIMINATION 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"

UNION PACIFIC EXHIBIT 2
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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 1X 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 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.

WE 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 PRIORITY: NORMAL AND DELIVERY REPORT

UNION PACIFIC EXHIBIT 2

: BASIC" CONCERNING A MULTITUDE OF PHX REPLAN CHANGES (ATTCH WAS NOT URGENT).

IS NOTHING "NORMAL OR BASIC" ABOUT THE IMPACT OF THE PHOENIX REFLAN
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
OBTAIN SOME TYPE OF MTO POSITION (IF NOT THE SENIOR MTO) IN THE ARIZONA AREA
AND WITHOUT THE 21X WAGE REDUCTION. IF ALLOWED, THIS PROPOSAL WOULD ALLOW THE
P, TO UTILIZE MY EXPERIENCE IN ARIZONA, WITHOUT THE COST OF MANY RELOCATIONS.
R, IF NOT IN AZ, IN SOME SOUTHWESTERN LOCATION (MY WIFE HAS LUPUS AND
VASCULAR NECROSIS), IN OPERATIONS WHERE A REDUCTION IN WAGES WOULD NOT
E A PART OF THE ASSIGNMENT.

COURSE, I WILL CONTINUE TO PERFORM AS DIRECTED; BUT, I FELT THIS LETTER
AS NEEDED TO ADDRESS THE ISSUES PROPERLY; ESPECIALLY SINCE YOU HAVE BEEN
SSOCIATED WITH BOTH RAILROADS INVOLVED IN THIS MERGER.

SINCERELY,

JOHN E GROTHER
MIO - HOUSTON

HOME 520-575-5511

"CUSTOMERS SIGN OUR PAYCHECKS"
]


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000000 PPPPPP RRRRRR JJ EE EE GGGGGGGG
00000000 PPPPPPPP RRRRRRR JJ EEEEEEE GGGGGGGG
00 00 PP PP RR RR JJ EE GG
00 00 PPPPPPPP RRRRRRR JJ EEEEEEE GG GGGG
00 00 PPPPPPPP RRRRRRR JJ JJ EEEEEEE GG GGGG
00 00 PP RR RR JJ JJ EE GG GG
00000000 PP RR RR JJJJJJ EEEEEEE GGGGGGGG
000000 PP RR RR JJJJ EEEEEEE GGGGGGGG

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ROM: OPRJEG --SPTSVM02 DATE AND TIME 04/22/97 11:52:21
 O: OPRDSP --SPTSVM02 PAYAWAL, DAN OPRDLH --SPTSVM02 HAMPTON, D.
 OPRPAL --SPTSVM02 LOBELLO, PAUL

ROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120

** RESENDING NOTE OF 04/22/97 12:04

ROM: DAVE J. BLAKE@UP (DJBLAKE @ NOTES)

O: MIKE J. GALLAGHER @ UP (MJGALLAG @ NOTES)

C: 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

TRY TO MAKE THAT CONNECTION CONSISTENTLY.

DELIVERY PRIORITY: NORMAL

DELIVERY REPORT: BASIC

'9608 0 6 2223 07/15/97 U610 XB N078 VB99B01

1. THIS HAS BEEN CHANGED SINCE TO DIRECT LAPXM TO PRX.
2. ILLUSTRATES "PRIORITY AND URGENCY" FOR WHICH I WAS DOWNGRADED OTHERS PLANNED, I WAS SCAPEGOAT.

JERRY DAVIS
PRESIDENT AND
CHIEF OPERATING OFFICER

UNION PACIFIC RAILROAD COMPANY

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,

000000 PP RR RR JJJJ EEEEE EGGGGGG

DN: DJBLAKE --NOTES

DATE AND TIME

06/10/97 10:48:34

FM: DAVE J. BLAKE/UP (DJBLAKE & NOTES)

ROGER J. HOWREY & UP (RHOWREY & NOTES) -Gave
OPRWZF & SPTSVM02 (OPRWZF & SPTSVM02),
JOHN E. READY & UP (JEREADY & NOTES),
ROBERT G. JONES (OPRXXJ & SPTSVM02),
HUGH J. ROGER & UP (HJROGER & NOTES) *Gave Bryant*
BILL R. WILKIE (OPUBEM & SPTSVM02) *Tom McClellan*
JIM P. KOSCIELNIAK (OPRJPK & SPTSVM02),
JOHN E. BROTHER (OPRJEG & SPTSVM02),
LAUSON MCDOWELL & UP (LMCDOWEL & NOTES), *St Louis*
KEN L. CARGILE & UP (KLCARGIL & NOTES),
GARY R. DAVIDSON & UP (GRDAVIDS & NOTES) -*SAT AMERICA*
MICHAEL J. GORMAN & UP (MJGORMAN & NOTES),
KEN C. PACKARD & UP (KCPACKAR & NOTES) -*commia*
PAUL R. FLOWERS & UP (PRFLOWER & NOTES)

TE: 06-10-97 10:53:22 AM

SUBJECT: 1MLATU 09 BLOCKING

REVIEWED CONSIST ON 1MLATU 09 OUT OF GLANIS (AEI CORRECTED)

E 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)
1 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
1 - 272 MAGNA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGNA TURN
6 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
3 - 272 MAGNA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGNA TURN
2 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
1 - 272 MAGNA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGNA TURN
1 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
- 272 MAGNA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGNA TURN
2 - 280 TUCSON (FROM WCLTN)
5 - 272 MAGNA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGNA TURN

2 MORE CARS TO SWITCH-UP TO 100 PER DAY
DEPTIONS:

CONSIST OUT OF WEST COLTON INDICATED 95% CORRECT BLOCKING, REVISED AEI
NBIST INDICATES MILLRUM 272/270
AS WELL AS 280 TRAFFIC.

TRAIN WILL HAVE TO BE TAKEN INTO TUCSON AND RESWITCHED AS QUANTITY OF
SWITCHING PRECLUDES HANDLING AT PICACHO

EASE HANDLE FOR CORRECTION

LIVERY PRIORITY: NORMAL

LIVERY REPORT: BASIC

EXHIBIT 12

FOR TUCSON MAY-JUNE 9,
DURING PEAK OF
YARD CONSOLIDATION

PHX INTO TUCSON
(MARGER 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 !!

UNION PACIFIC EXHIBIT 2
PAGE 69 OF 146

1999

ter Some Crippling Chaos,
 tion Pacific Can See the Light
 / DANIEL MACHALABA
 aff Reporter of THE WALL STREET JOURNAL

USTON — Some of the signs that Union Pacific Corp. is slowly making
 ogress have to do with speed, like the long plume of grayish smoke
 ailing almost horizontally from a locomotive as it barrels along here at
 0 miles per hour.

hat 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
 an fitful puffs. Union Pacific's merger with Southern Pacific Rail Corp.
 melding two cultures, 53,000 employees, 7,000 locomotives, 155,000
 eight cars and 36,000 miles of railroad routes covering the western
 wo-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
 reekdown" in safety.

of addressing the mess fell to Richard Davidson, Union Pacific's
 chairman and chief executive, who also was in charge during the railroad's
 reekdown. For more than a year he has been working to deliver on a promise
 hat he would remake the nation's largest railroad, with new equipment,
 revamped management and a more open, flexible style. In the process, he has
 een addressing the martinet within. For Mr. Davidson is a diehard railroad
 nan 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
 he days when hard-bitten ex-Civil War officers filled the executive ranks
 f 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
bulled out your gun and shot the guy in charge of the territory," says John
 ebensdorf, 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."

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,
 culture, which seemed to discourage teamwork and communication.
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."

*
 → GROTHER WAS "SHOT"
 FOR MERGER
 EXPERIMENT=YARD
 CONSOLIDATION

000 employees. He is setting up a unit to coordinate planning the company's sales force and its operating managers, and boosting capital spending to make up for years of cutbacks.

Last September, Mr. Davidson met with 100 Union Pacific field officers in Kansas City, Mo., and urged them to undergo a personal transformation. Then he shared the results of a review by his senior managers that depicted him as 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 your weakness."

Mr. Davidson is shifting authority from the Omaha headquarters to managers in 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

Not all of them. Mr. Davidson's personal style still draws criticism. 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.

blems 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 the West, 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 passes 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."

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 40% from 27% 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."

And 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

Business 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 \$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 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 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.

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" 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."

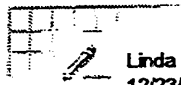
*
QUALITY PROCESS
NOT USED IN
GROTH'S
DEMOTION !!

part1_dec44353.24829e_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.cw10-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

EXH. 13A



Linda D. Buttrill

12/23/2002 11:53 AM

= ONE MONTH FOR 1/6th OF DATA REQUESTED

To: John E. Grother
cc:

MORE "DEAD-ENDS" = See 13C REQUEST

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 ^{5 1/2} FIVE (6) YEARS BEING MAILED TO MY HOME ADDRESS BELOW:

1718 RUSTIC PARK DRIVE
KINGWOOD, TX 77339

EXH. 13B

John E. Grother
11/26/2002 01:14 AM
.....

NO RESPONSE

USUAL DEADLINE

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 DEAD END

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

DEMOTION POLICY 1997

EXH. 14

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**

<u>NAME</u>	<u>FROM JOB TO JOB</u>
\$ 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, GROTHOR'S TERRITORY HAD NO SUCH
LAWSUITS AND HUGE SETTLEMENTS WHEN GROTHOR 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 short-handed 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.

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."

'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

EXH-19

Union Pacific reports progress on slowdown

Train speeds improve slightly, filing states

By CHARLES BOISSEAU
Houston Chronicle

DATED 1/14/98

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. 11
Page 1 of

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 bally-hooded 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

RAIL: Company hurt by self-professed arrogance

ERH au
(CONT.)

Page 2 of 2

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 railroad-

ing. "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-grow-

ing 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 s- at keeping the weaker line

→ (OR DEMOTION)

WESS

Dow Jones
+101.87
Close 7,826.61

NYSE
+6.64
Close 500.54

Amex
+5.00
Close 672.85

NASDAQ
+25.34
Close 1,626.56

Gold
-1.1
Close 303

EXH. 19

Railroad vows to bring trees

Christmas: Union Pacific says it won't be a Grinch, despite transportation gridlock.

Art Wong Nov 1997
writer

LONG BEACH - Not wanting to be a Grinch, Union Pacific officials promised that the "massive mess" snarling traffic on its tracks, deliveries of Christmas trees to Southern California would not be delayed. "We won't let that happen," said Union Pacific Vice President Robert Starzel, speaking at a special hearing held by the California Public Utilities Commission.

Starzel testified that the railroad had implemented a long-planned plan that is designed to ease a two-month backlog, but he said a complete return to normalcy isn't expected until early next year.

Port and steamship officials said, saying they are beginning to see improvements. They asked Starzel not to intervene, which would worsen the situation. But other shippers complained that the delays are continuing to see lengthy.

"I see it getting worse," said Lindsay of Lindsay Lumber, speaking on behalf of the local lumber industry. "The trains are taking six to eight weeks to get from Oregon to Long Beach 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 South-



Robert Starzel, Union Pacific vice president, addresses members of the Public Utilities Commission at a hearing on the railroad tieup Wednesday in Long Beach. John Hayes / Associated Press

ern California to Chicago.

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. Starzel said other railroads are at their capacity. The company is acquiring another 300 employees. It already has 8,200 employees hiring and training more workers.

"The recovery plan is working, but it takes time to get back," Starzel said.

Stockholders sue Union Pacific over stock flop

Patie Fairbank
Associated Press

LONG BEACH - Shareholders are suing Union Pacific over its stock's sharp decline, claiming the nation's largest railroad knew long ago that the merger with Southern Pacific would fail.

A class-action lawsuit represents Union Pacific shareholders who bought stock between March 4 and June 1, 1997, the Omaha

Nebraska-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 in-

"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 earnings would range from \$7

quarter results could range from a break even to substantial loss. Schulman said the "stock-drop" case he has filed should win.

"It's not because it's not a case, but because the court will fight hard," he said.

UNION PACIFIC EXHIBIT 2
PAGE 84 OF 146

ifc
Jul
12,

Dow sues railroad over delays

UP denies union's claim that it's violating safety regulations

By JENALIA MORENO 3/18/98
Houston Chronicle

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 at 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 Alinsworth, spokeswoman for the Midland, Mich.-based company.

"The service disruptions have affected numerous of our product lines with our key industry segments," Alinsworth 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.

Questions taxpayers will be grappling with include:

■ How do you calculate capital gains on investments?

■ Should you switch your regular individual Retirement Account to a Roth IRA?

■ How does the new tax law affect the planned sale of your home?

■ What tax traps does your plan face?

■ How do you avoid using the tax laws if you need help with taxes or any other tax-related questions, call the Houston Chronicle's Tax Hotline on Thursday, 713-256-8410. Tax experts will be on hand to answer your questions for free from 8:30 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.

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 qualified people as possible."

Union Pacific spokesman Bromley said the company is meeting its program of directional running and is operating in manner. He said engineers complete a program to familiarize themselves with the tracks they are allowed to operate on alone.

Directional running has signs of relieving congestion

Houston according to day's report U.S. Su Transport Board.

That stated that ton's rail were become more fluid. were 288 cars in Engle Yard last and 401 fewer in the Settle Yard.

Paul Broussard, consultant

You know if companies like Dow Chemical are hurting, you can just imagine what smaller shippers are experiencing.

The company is now planning to construct a rail line less than a mile long along Liberty Road to connect those two yards. Union Pacific acquired the Englewood Yard in its merger with Southern Pacific. The company now must circumvent the city to move cars from yard to the other.

"Connecting those two tracks would not only save hours, but prove productivity between the yards," said Union Pacific spokesman Mark Davis.

In its weekly report, Union Pacific also announced it had reached agreement with the Mexican railroad Ferrocarril Mexicano and Texas Mexican Railroad to alleviate the rail traffic backlog in Laredo.

TFM and Texas Mexican, which are jointly owned by Kansas Southern Railway Co. and the Mexican transportation company Transportación Maritima Mexicana, agreed to accept an additional cars daily from Union Pacific. TFM typically accepts 500 Union Pacific cars en route to Mexico daily.

TFM also agreed to urge Mexican agricultural officials to inspect in rail yards instead of on the La International Bridge when the cars are crossing into Mexico.

Union Pacific agreed to run additional locomotives through Laredo, Monterrey.

Both railroads agreed to send empty northbound trains through less congested Brownsville crossings.

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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 Cliff 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 Du-

Pont.

"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'

12/5/97

By DAVID IVANOVICH
Houston Chronicle Washington Bureau

Board extends order on Union Pacific

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 Matthew 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 in-

ability to obtain raw materials ship out products, had asked board to continue the order.

Robert Evans of the National Industrial Transportation League dictated Union Pacific would need other three months to resolve its traffic problems.

Many critics blame Union Pacific woes on the company's merger with Southern Pacific Rail Corp. last year, a move that made Union Pacific the nation's biggest rail carrier in the nation, employing 53,000 workers and controlling 36,000 miles of track. Union Pacific also is the nation's largest hauler of chemical products, much of which is produced along the Gulf 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 Dick 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 13 1/4 Thursday to close at 62 1/2. 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.

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 plain that is home to the busiest segment of the nation's largest railroad.

Nearly 500 workers in the summer heat grind ends of the rails smooth, cut new rail bed and lay concrete ties in a \$366 million 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 di-

verse 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.

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, and difficulties merging with

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 system wide 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 left farmers and grain elevators store much of last year's harvest in hopes of improving market

Page 1 of 1

EXH 228

Page 2 of

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.

The Orange County Register **NATION/WORLD** Saturday, Sept. 19, 1998

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

EXH. 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 WHO HAS BEEN SO ADVERSELY AFFECTED FOR THE REST OF THEIR LIFE.

Lisa Brewster

Lisa Brewster
07/31/2002 04:26

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

See
Prior Page
EXH. 23A

- UNDERLINED AND/OR
- LOWER CASE STATEMENTS

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 DEADEND

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

UPRR employee site Search | Crew Boards | New Stuff | UP Online | Help/Info | Feedback

UP Online

Updated: Wed, Aug 09, 2000 02:28 PM CST

August 9, 2000

Ombudsmen Helps Make System Work for Employees

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.

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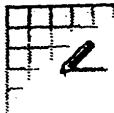
[Send Ideas/Comments](#)

EXH. 26 A

DEAD END

"DO NOT WASTE MY
TIME TYPE OF
RESPONSES"

Linda D. Buttrill

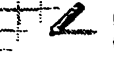


Linda D. Buttrill
03/10/2002 05:46 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hello John. Yes 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 supervisor at that time, they may be able to shed some light on the decision.



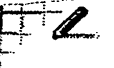
Linda D. Buttrill
03/07/2002 08:05 AM

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
{ 26
26



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.

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Exh 26

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.

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 EVERYTHING, INCLUDING WITHOUT LIMITATION BOTH POSITIVE 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

UNION PACIFIC EXHIBIT 2
PAGE 95 OF 146

TURNED
OUT THE
IS "ANOTHER
SECRET
ONLINE RECORD

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



UNION PACIFIC RAILROAD Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name John E. Grother
(Print) (First, M.I., Last) 526-66-3917
B: SSN or Employee ID No. 526-66-3917
C: Employer Name UNION PACIFIC RAILROAD
Street 5500 Wallisville Rd.
City, ST ZIP Houston TX 77020
DER Name and Telephone No. CHARLIE SHOGREN John Litzan 402-271-4600
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

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 John E. Grother Date 02/02/02
Month Day Year

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:

Fogle Ind. Examiners 4784 Hwy 346 South
Alcohol Technician's Company Company Street Address
Michael J. Van Arsdale Ht. Worth TX 76164
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip Phone Number
Michael J. Van Arsdale 21202
Signature of Alcohol Technician 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 1/1
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

Affix
Or
Print
Screening Results
Here

RET ID# 011487
DATE 02-02-02
TEST NO. 0339
ID#
526-66-3917
AS ID# 026055
SCREENING
G/210L TIME

000 AUTO 12:37

Affix
Or
Print
Confirmation Results
Here

Affix
With
Tamper Evident Tape

Affix
Or
Print
Additional Results (e.g.
Calibration Check)
Here

Affix
With
Tamper Evident Tape



UNION PACIFIC RAILROAD Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

#26

Exh 27B

FORM 20834
REV. 501

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name John Grother
(Print) (First, M.I., Last)
B: SSN or Employee ID No. 526-66-3917
C: Employer Name UNION PACIFIC RAILROAD Englewood
Street 5500 Willisville Rd.
City, ST ZIP Houston TX 77020
DER Name and Telephone No. CHARLIE SHOGREN John Lietzan
DER Name 402-376-9554 DER Phone Number 800-840-3784
D: Reason for Test: ☒ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Affix
Or
Print
Screening Results
RBT I# 814487
DATE 05-02-02
TEST NO. 8565
ID#
526-66-3917
AS I# 626800
SCREENING
5/2/02 TIME
0000 AUTO 17:42

TAPE

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 John Grother Date 5/2/02
Month Day Year

Affix
Or
Print
Confirmation Results
Here

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 ☐ SIT. 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.)

Affix
With
Tamper Evident Tape

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

Eagle Ind. Examiners
Alcohol Technician's Company 4741 Hwy 377 S.
Company Street Address
Michael Van Arsdale
Company City, State, Zip FL 14000 TX 7606 Phone Number (817) 560-8014
(PRINT) Alcohol Technician's Name (First, M.I., Last)
Michael Van Arsdale
Signature of Alcohol Technician Date 5/2/02
Month Day Year

Affix
With
Tamper Evident Tape

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 5/2/02
Month Day Year

COPY 1 - ORIGINAL - FORWARD TO:

(OW) 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.

28B

John E. Grother
08/28/2002 01:31 PM
.....

To: Lisa Brewster
cc:

Subject: Re: ON-LINE SYSTEM ACCESS

nted
AT → [8/28/2002 07:56 AM]
(See Attached)

ANSWER MADE
UNPRINTABLE BY
"ICON OF SECRECY."
COULD NOT BE
FORWARDED OR COPIED.

WHY RESPOND IN
MANNER THAT COULD
NOT BE PRINTED?

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..

GKH. 298

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 CHANGES TO PERSONNEL WITHIN THE RR
WHAT IS THE PURPOSE OF THIS ON-LINE SYSTEM?
PERSONNEL FILE AS WELL AS PAYROLL
WHO HAS ACCESS?

IS ACCESS RESTRICTED TO CERTAIN BAND LEVELS? *YES ABOVE*

DOES MY CURRENT SUPERVISOR HAVE ACCESS? *HOW?*

DO I HAVE ACCESS? *HOW?* *HOW? INTO A HR FILE WAS ACCESS*
WE WON'T THINK SO

PEES

DO BAND C OR D MANAGERS HAVE DIRECT ACCESS? *IT SHOULD PROBABLY DEPEND ON*
ACCESS A REQUEST WOULD HAVE TO BE MADE TO THE SECURITY DATA 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 RELAYING*
ANY OF THESE INFORMATION, I CAN ONLY TELL YOU THAT INFORMATION
IF RESTRICTED INFORMATION, HOW IS ACCESS CONTROLLED?
PERSONNEL FILE - BUT I WOULD NOT BEIN TO PROVIDE IT.
PLEASE ADVISE.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

**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)

<u>JOB APPLIED</u> <u>FOR - DATE</u>	<u>CONFIRMATION</u> <u>REQUEST NUMBER</u>	<u>RESULTS/</u> <u>REMARKS</u>
1. Mgr. Term1 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. Term1. Oprns. (SMT0)-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 Term1. 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. Term1. Oprns (SMT0)-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. 37A

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 OPNS (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

his position is two SALARY RATE GRADES
1 REG 17 vs. (19) below the SR. MTO POSITION

WHICH I PERFORMED AT TUCSON (NOW BAND B vs. BAND C)
FOR 22 MONTHS. { 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

UNION PACIFIC EXHIBIT 2
PAGE 105 OF 146

Applications accepted from: 07/19/00 through 07/23/00

EXH. 32B
Submitted 7/24/99

Profile ID Title

HGR YARD OPERATIONS

Grade Band 8

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 HARKIN Phone: 8-627-2120
Company: UPRR
Bus Group: OPER

Job Profile # 72017 - HGR 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
Plan and manage Supervisor Yard Operations and agreement employees
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/SYO (1-2 yrs.) Proficient
CSC (1 yr.) Working knowledge

Special Training, Skills, or Education:

Undergraduate Degree
Written/Oral communication skills
TQMS
ATCS
Computer skills (HDST/PC)
Dr. Awareness

Desired Education Level: Bachelor Degree or equivalent

Travel Requirements: 0-25% travel may be required

6007R03 - JVN 3725 07/18/00

UNION PACIFIC EXHIBIT 2
PAGE 106 OF 146

EXH. 3A

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"

UNION PACIFIC EXHIBIT 2
PAGE 107 OF 146

Date: 1/28/00 Time: 03:41:33 PM

THAN MYSELF WHO HAD WORKED THE
JCS 11

Confidential #

EXH. 33B
3047/52663917

SR MGR TERM OPRNS (TUCSON AZ)

Applications accepted from: 08/04/99 through 08/10/99

File ID Title

07 SR MGR TERM OPRNS Grade Level 19

Department: TRANS - FIELD OPERATIONS JVN 3047
Location: TUCSON AZ Start Date: ASAP
Status: Full Time Vacancies: 1
Contact: ROYCE HARDIN X Phone: 8-629-2120
Company: UPRR
Job Group: OPER

Profile # 72007 - SR MGR TERM OPRNS

C Purpose of Position:

Ensure the quality of the transportation product of the terminal meets or exceeds the standards set by the business objectives and customer expectations.

Primary Accountabilities of the Position: ✓

Ensure safe performance of all terminal T&T employees through planning, implementing and executing the safety process
Ensure the execution of the transportation plan for the terminals
Ensure that all quality of service objectives are met or exceeded
Manage the terminal at or below annual transportation budget
Ensure terminal failure prevention activities are executed to achieve cost of quality business objectives
Coordinate terminal activities with HBC, MCSC, adjoining Service
Manage terminal work force level to ensure transportation needs are met and within budget
Manage the efficient use of locomotives and fuel to ensure that tight car cycles are effectively managed while in the terminals
Develop and develop both managers and agreement employees to the extent that their individual performance and employee involvement activities determine successful accomplishment of company business objectives
Respond to emergency situations or service interruptions

Required Experience:

1/1/90 (2 yrs.) Working
(2 yrs.) Working
(2 yrs.) Working
(1 yr.) Working
Specialized function (1 yr.) Working

Training, Skills, or Education:

Management training program
Leadership seminars
Postgraduate Degree

UNION PACIFIC EXHIBIT 2
PAGE 108 OF 146

EXHIBIT 35

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, [the 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

UNION PACIFIC EXHIBIT 2
PAGE 109 OF 146

EXH. 30A



(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,

Administrator
Group Long-Term Care Plan from CNA

Enclosure(s)

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EXH. 36 B



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

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**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**

EXH. 36E

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

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EW 360

John Hancock Financial Services, Inc.

333 West Everett
Post Office Box 2986
Milwaukee, WI 53201-2986



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

GE Capital Assurance

Long Term Care Division
1650 Los Gatos Drive
San Rafael, Ca. 94903-1899
(415) 492-7000

EXH 36E

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 / JR

Jennifer Rogers
Senior Underwriting Specialist
LTC Underwriting Department

LTC4BAW #430

cc: Ms Diane L Dussault

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 crash-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

Last changed: July 18, 1999

her way for employees to win

s workers rights

ION

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re Court ruled in
U.S. Equal Em-
nity Commission
n employer on a
ven if the worker
agreed to submit

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 employ-
Your Money ers have begun
requiring work-
ers 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.

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 House cook, never tried to arbitrate his grievance with his employer. Instead, he filed a claim with the EEOC, alleging that in firing him, the company had violated the Americans with Disabilities Act.

Of about 80,000 claims filed with the EEOC every year, only about 400 end up in court. Baker's case was among the half of 1 percent that do.

The EEOC enters the case

As with other claims it pursues, the EEOC first tried to settle with Waffle House out of court. When those attempts failed, the EEOC sued the company, seeking not only a court order requiring Waffle House to stop discriminating, but an award on Baker's behalf, including back pay and compensatory and punitive damages.

An appeals court ruled the EEOC had no right to seek damages for a victim who had agreed not to take a claim to court. But in a 6-3 decision the Supreme Court overturned the lower court's ruling, saying the EEOC was not bound by a contract to which it was not a party.

Writing for the majority, Justice John Paul Stevens said the EEOC "the master of its own case."

Justice Clarence Thomas, who opposed the ruling, wrote the dissenting opinion. He claimed the EEOC should not be allowed to sue on behalf of an employee that whom 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

Thursday April 29, 2001
1 8 9 10 11

Nation HOUSTON CHRONICLE

Sub commander gets letter of reprimand

Associated Press

PEARL HARBOR, Hawaii — USS Greenville Cmdr. Scott Waddle was found guilty of two violations of military law Monday and punished with a letter of reprimand for the submarine collision that killed nine men and boys aboard a Japanese fishing vessel.

Waddle also received a two-month suspension from duty, but his command was suspended for 30 days. The Waddle will receive full pay until he retires in October.

Waddle's punishment was announced by the Navy. Waddle says one of the reasons he was punished was because he will retire in October.

The punishment was imposed by Adm. Thomas Fargo, who said Waddle "acted in a professional sense of duty and courage" and "rapidly surfaced the submarine on Feb. 9 from the collision with a commercial boat, saving the vessel for high school students."

Fargo imposed the punishment at an "admiral's mast" attended by Waddle, a military attorney and several officers at Pearl Harbor Navy Base.

"I understand and accept the punishment that Admiral Fargo imposed. He treated the family and with dignity and respect, and I thank him for that," said Waddle of Austin.

All other officers of the Greenville also escaped court-martial. Those included the

chief of the deck, Lt. jg. Michael Coen, and the executive officer, Lt. Cmdr. Gerald Pfeifer.

The violations represented dereliction in the performance of his duty and "negligent hazarding of a vessel," the admiral said.

Fargo issued the letter of reprimand and formally relieved Waddle of his command. He had been suspended shortly after the collision.

"These actions will effectively terminate his career," Fargo said, adding that he followed a Court of Inquiry's recommendation in not holding a court-martial that could have led to more severe punishment.

The Japanese government said the punishment means the United States has accepted responsibility for the collision.

"The Japanese government considers that the U.S. government has acknowledged all responsibilities regarding this incident," said Kazumiko Koshikawa, spokesman for Prime Minister Yoshiro Mori. "The Japanese government does not at this point plan to make any specific demand to the United States."

The Navy said Waddle will receive his pension and full retirement pay.

Waddle plans to travel to Japan to meet with the families of the victims. He previously apologized and accepted responsibility for the collision.

Additional coverage online: www.houstonchronicle.com/nation
Video: Adm. Thomas Fargo details Waddle's punishment.

Corrections

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KXH. 4/0
Page 1 of 2

The Air Force

a brand NEW day

A.F. TIMES 8/5/02

Commander is
back with a wing
— and soon a star

By Bruce Roffsen
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,

'My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence.'



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 re-

lieved from their jobs a weak squadron commander and a first sergeant. But actually, the report concluded, New had treated just the symptoms.

New also didn't provide the new squadron commander and base safety officer a safety evaluation of the rescue squadron, called

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 Ai

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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 thers, 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 Roltsen can be reached at (703) 750-8647 or brofse@atpco.com.

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.

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.



Associated Press

Steve Clark, former Arkansas attorney general, is reflected in the glass frame of his recently acquired Texas law license.

"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.

HOUSTON
CHRONICLE

MARCH 12, 2001

Houston Chronicle ★★★

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."

and

Exh.
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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

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**Healthy Hound's
Tip of the Day**

Chronic stress that lasts more than a month may increase your risk

WAS GROTHER "TREATED"
FAIRLY AND WITH RESPECT"
WHEN DEMOTED IN 1997?

EQUAL EMPLOYMENT OPPORTUNITY

Since 1964, the EEOC has been responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, sex, religion, national origin, age, disability, or genetic information. It is also illegal to discriminate against a person because of pregnancy, childbirth, or related medical conditions. Federal laws protect employees and job applicants from discrimination in hiring, firing, promotion, salary, benefits, job training, and other terms of employment. The EEOC is responsible for investigating complaints of discrimination and enforcing the laws through mediation, conciliation, and litigation.

EXH-43

RECEIVED WITH PAY CHECK APRIL 26, 2002

IT'S TIME AMERICA HEARD YOUR STORY.

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™



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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,

A handwritten signature in dark ink, appearing to read "Dick", with a stylized flourish at the end.

Dick Davidson

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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 prod-

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.

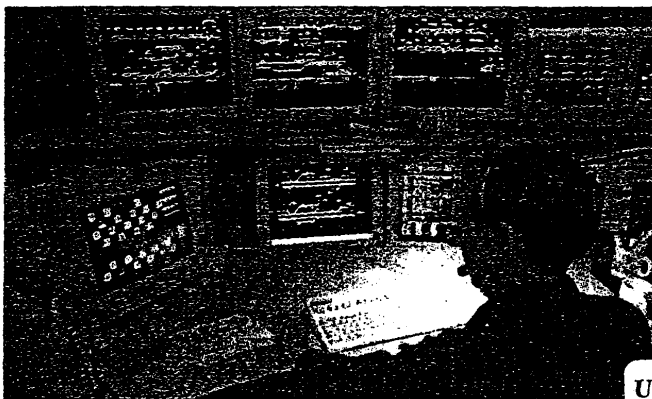
■ Major commodities hauled in Texas: chemicals, export grain, gravel and automobiles.

uct 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



Terminal train dispatcher Billy Duke keeps trains moving at the new dispatching office in Spring.

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Continued from Page 1B.

spread calls to make changes to more competitive rail service.

While the rail merger was only approved with terms requiring Union Pacific to open a few of its lines to competing carriers, there 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 overseas.

"All modes of transportation supposedly have been deregulated, but the very nature of a 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 — 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 Pipeline 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's 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 did happen again, Emmett doesn't believe it will.

The 1997 breakdown wound up costing shippers hundreds of millions of dollars. 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 forced Union Pacific to refuse 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 direc-

tion. 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."

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Ex # 46

Union Pacific Railroad
Ms. Janice Arthur (Via Certified Mail)
Director-Pensions
1700 Farnam Street
10th Floor North
Omaha, Ne 68102

August 25, 2002

Not Answered Yet!

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 attaches 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,
JB6

Exh. 47

This is Google's cache of <http://www.apa.org/monitor/jul98/merger.html>.
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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.

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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

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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

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UNION PACIFIC EXHIBIT 2

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).

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HUMAN RESOURCES
DEPARTMENT

UNION PACIFIC RAILROAD COMPANY

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,

A handwritten signature in cursive script that reads "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

LAST OF SIX TRYS TO
CONTACT. NO RESPONSE
EVER SENT.

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 whopping 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. Pritchard
416 Dodge Street
BSU #1
Omaha, NE
68179-0004

2. Article Number

COMPLETE THIS SECTION ON DELIVERY

A. Signature ☒ Agent
☒ Addressee
X JUL 11, 2002
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

John Grother

UNION PACIFIC EXHIBIT 2
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SPECIAL CLASS FOCUS

Attitude ADJUSTMENT

UP focuses on the future by promulgating a can-do spirit, pushing productivity and promoting process change

BY JEFF STAGL, MANAGING EDITOR

In the lobby of Union Pacific Railroad's Omaha, Neb., headquarters, you can see paintings and artifacts that depict milestones in the railroad's nearly century-and-a-half history. A stroll through the more than 80-year-old office building reveals other pictures chronicling the G.I.'s past achievements, as well.

But UP executives would prefer that you look across the street: there, you'll see structural steel rising 19 stories and sections of shimmering exterior glass — on the shell of UP's new \$200-million headquarters, which the railroad plans to occupy in August 2004.

The office tower symbolizes the

into North America's largest Class 1.

The SP merger broadened UP's network, providing additional mainlines that don't all flow through Nebraska and opening more east-west, north-south lanes into and out of Mexico and Canada.

Although it took UP several years to get its post-merger act together — by improving service, developing products and cutting costs — management is confident on the railroad's prospects and renewed can-do spirit to act on top-line numbers.

"I think we can grow 3 percent to 5 percent each year," says chairman and chief executive officer Dick Davidson.

"I think we can grow 3 percent to 5 percent each year."

— Dick Davidson, chairman and CEO

future, a progression toward a more modern, growth-oriented mind set and away from "traditional railroad thinking."

"We're really only a 6-year-old company," says President and Chief Operating Officer Ike Evans, referring to the 1996 merger with Southern Pacific Railroad that transformed UP



Dick Davidson

"The keys are quality, process and productivity improvements, and driving out failure costs so that we can generate more revenue."

The railroad took some serious spring-board leaps last year. After solid first and second quarters, the railroad posted a record third quarter, earning an all-time

high \$437 million in net income, \$619 million in operating income and \$2.4 billion in operating revenue.

75 IN 2005

Thus, UP's operating ratio of 78.3 during that span set a quarterly record and its 79.7 ratio during 2002's first nine months improved 12.2 points compared with the same 2001 period, remaining south of 80.

"Next up, a 75 ratio. We'll get there in 2005," says Davidson.

Ever closer to that destination, UP plans to take a major bite out of an estimated \$6 billion transportation buyout market over the next 18 months, currently dividing Northern, Santa Fe and UP's rail of 24 percent of the market, trucking being the major rival of the rails.

"I think we can get 1.5 percent a year. If we can get just one-half of 1 percent, that's good," says Evans. "We'll get there with new products, service and reliability. It's not rocket science."

Trucks aren't necessarily the enemy, Evans believes. UP can gain market share by working with them instead of making an offensive move on the trucking industry. He adds, "Trucks can't do it alone, and there's enough business for everyone."

For example, UP could carry a shipment the middle 1,000 miles of a 1,500-mile move while trucks carry the freight 250 miles on each end — the crux of traditional intermodal.

January 14, 2003

2 X 17, 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.

Page 3

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.)

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 graffiti 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

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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

From:

LOCAL

CHAIRMAN

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. / 520-320-9897 fax

520-557-6795 pg. / 520-247-4961 cell

DIVISION

OFFICERS

PHOTO

UNION PACIFIC EXHIBIT 2

<http://216.239.51.100/search?q=cache:a6Cs-VixySQC:www.ble28.org/svob5.htm+personal+records+union+pacific+railroad&hl=en&ie=UTF-8> 11/22/02

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 or 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

UNION PACIFIC EXHIBIT 2
PAGE 144 OF 146

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.

Not for management

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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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 your case squarely in the hands of the EEO group.

Sincerely,
Butch Ethington
Ombudsman

John E. Grother

CORROBORATION OF "BEING DISPLACED"

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
PAGE for QUESTIONS
CREATING ABOVE
3/9/03 RESPONSE.

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 Messieurs 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".

UNION PACIFIC EXHIBIT 2
PAGE 146 OF 146

VIA CERTIFIED MAIL

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

June 16, 2003

LAW DEPT.

JUN 20 2003

Dear Mr. Roland Watkins,

REC'D UPRR

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 DBS-RM 830

UNION PACIFIC EXHIBIT 3
PAGE 1 OF 6

Attachment A - New York Dock Conditions, Finance Docket No. 28250, Appendix 3

[[Home](#)] [[Up](#)]

[[National Salary Plan Factors and Progression Levels, Appendix AA through Appendix FF](#)]

To Return to the Rules and Agreements Index Page, [Click Here](#).

Attachment "A"

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.

(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.

which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in Section 1(3) of Part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept 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 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.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 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 USC 11347 before February 5, 1976 and

**VIA CERTIFIED MAIL FOR DELIVERY OF OFFICIAL
NOTIFICATION OF NEW YORK DOCK ARBITRATION DISPUTE**

TO: MR. JAMES V. DOLAN
UP COUNSEL AND DOS
ROOM 830
1416 DODGE STREET
OMAHA, NE 68179

May 12, 2003

I AM IN THE PROCESS OF RETAINING A LAWYER TO REPRESENT MYSELF FOR A POTENTIAL NATIONAL MEDIATION BOARD ARBITRATION PURSUANT TO THE NEW YORK DOCK CONDITIONS. I AM A UNION PACIFIC RAILROAD ("UPRR") MANAGER BY THE NAME OF JOHN E. GROTHOR ("GROTHOR"). THIS LETTER CONCERNS GROTHOR'S MERGER TRANSACTION RELATED DEMOTION EFFECTIVE JULY 1, 1997, WHICH HAS CLASSIFIED GROTHOR AS A NEW YORK DOCK "DISPLACED EMPLOYEE". THIS LETTER REPRESENTS **OFFICIAL NOTICE** THAT GROTHOR'S DISPUTE IS TO OBTAIN "AMOUNT OF COMPENSATION REQUESTED" ON ATTCH 2 (PG. 4), \$107,370, AS THE RESULT OF SOME ACTION:

1. EITHER, A SETTLEMENT BETWEEN THE PARTIES,
2. OR, SHOULD THIS OFFICIAL NOTICE OF A DISPUTE, NOT BE SETTLED IN THIRTY (30) DAYS, THEN IMPLEMENTATION OF THE ARTICLE IV ARBITRATION PROVISION OF THE NEW YORK DOCK CONDITIONS, FINANCE DOCKET NO. 28250, APPENDIX III, REGARDING NON-AGREEMENT EMPLOYEES ADVERSELY AFFECTED BY A MERGER TRANSACTION, WILL BE ACTIVATED. AN APPEAL TO THE SURFACE TRANSPORTATION BOARD WILL BE PURSUED, IF REQUIRED.

I ATTEMPTED TO SETTLE THIS ARBITRATION DISPUTE ISSUE BASED ON UPRR'S PUBLICLY PUBLISHED STATEMENT THAT: **"A DISCRIMINATION FREE WORKPLACE AND FAIR TREATMENT ARE FUNDAMENTAL RIGHTS OF ALL ...EMPLOYEES".**

OMBUDSMAN REPRESENTATIVE MR. BUTCH ETHINGTON HAS ADVISED THAT THE UPRR "FAIR TREATMENT" CREDO WILL NOT SETTLE THIS REQUEST FOR COMPENSATION ISSUE.

THEREFORE, I HAVE INITIATED DISCUSSIONS WITH ATTORNEY MICHAEL WOLLY, OF THE WASHINGTON D.C. FIRM OF ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON AND WOLLY, P.C. THE FOLLOWING IS SUBMITTED ON INFORMATION AND BELIEF, FOR THE RESPONSE OF UPRR WITHIN THIRTY (30) DAYS; OR ON OR BEFORE JUNE 16, 2003, IN ACCORDANCE WITH ARTICLE IV, OF SAID NEW YORK DOCK CONDITIONS.

INTRODUCTION, UPRR PUBLICLY HERALDED POLICIES :

GROTHER IS GRATEFUL TO BE A MEMBER OF THE UPRR TEAM WHICH IS "BUILDING AMERICA" tm. GROTHOR BELIEVES THAT THE LONG EXISTING POLICIES OF UPRR, AS PUBLICLY PUBLISHED IN UPRR'S "VISION & VALUES", UPRR'S REPUTATION AND COMMITMENT TO THE UNDERLYING CRITERIA OF THE BALDRIDGE AWARD, WILL PROVIDE UPRR WITH THE WORLD-CLASS OBJECTIVITY TO EXAMINE WHAT FINANCIAL AND EMOTIONAL DENIGRATION HAS BEEN DONE TO THE LIVES OF THE GROTHOR'S AND SETTLE THIS ISSUE.

GROTHER IS OF THE OPINION THAT THE LOTUS NOTE TRANSMITTED TO ALL EMPLOYEES FROM PRESIDENT & COO IKE J. EVANS DATED 8/8/02 WILL PROVIDE UPRR GUIDANCE:

"FOR OVER 140 YEARS, THE MEN AND WOMEN AT UNION PACIFIC HAVE PROVEN THAT THEY CAN BE TRUSTED TO DO WHAT'S RIGHT."

THE BOTTOM PAGE ONE POLICY AND PRACTICES STATEMENT, PUBLICLY PUBLISHED IN "DIVERSITY SECTION OF THE UPRR WEBSITE" SHOULD BE GUIDANCE, AS IT'S "UPRR CREDO".



Track/Confirm - Intranet Item Inquiry - Domestic

Item: 7002 2410 0002 3584 7115

Date/Time Mailed: 05/13/2003 14:15

Destination	ZIP Code: 68179	City: OMAHA	State: NE
Origin	ZIP Code: 77339	City: HUMBLE	State: TX

Class: Priority Mail

Weight: lb: 1 oz: 10

Special Services	Associated Labels	Amount
CERTIFIED MAIL	7002 2410 0002 3584 7115	\$2.30
RETURN RECEIPT		\$1.75

Event	Date	Time	Location
DELIVERED	05/15/2003	07:23	OMAHA NE 68102
Firm Name: UNION PACIFIC RR			
Recipient : 'D SHROEDER'			
Request Delivery Record			
View Delivery Signature and Address			
ARRIVAL AT UNIT	05/15/2003	05:02	OMAHA NE 68108
ACCEPT OR PICKUP	05/13/2003	14:15	HUMBLE TX 77339

Enter Request Type and Item Number:

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UNION PACIFIC EXHIBIT 3
PAGE 6 OF 6



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

JSM

(2) 692-5000

LAW DEPT.

JUL 15 2003

REC'D UPRR

July 7, 2003

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

Re: New York Dock Arbitration Request

Dear Mr. Grother:

Reference is made to your letter received at the NMB's office on June 23, 2003, requesting the National Mediation Board to assign arbitration pursuant to Article IV, of the New York Dock conditions.

We are sending a copy of your letter to Mr. James V. Dolan, Counsel for the Union Pacific Railroad. By copy of this letter, we are hereby requesting Mr. Dolan to furnish this office with any comments he may care to make in regard to this matter by the close of business July 21, 2003. Your comments may be submitted by facsimile.

Upon receipt of such comments you will be advised further.

Sincerely,

Roland Watkins
Director, Arbitration Services

Copy to:

Mr. J. V. Dolan, Counsel
Union Pacific Railroad

UNION PACIFIC RAILROAD COMPANY

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



1416 DODGE STREET
OMAHA, NEBRASKA 68179

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).

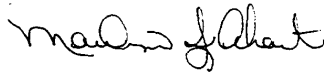
Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

UNION PACIFIC EXHIBIT 5
PAGE 10F 2

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,

A handwritten signature in cursive script, appearing to read "Marilyn J. Ahart".

Marilyn J. Ahart

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

UNION PACIFIC RAILROAD COMPANY

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



1416 DODGE STREET
OMAHA, NEBRASKA 68179

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,

A handwritten signature in dark ink, appearing to read "Marilyn J. Ahart". The signature is fluid and cursive.

Marilyn J. Ahart

cc: Mr. John Grother
Mr. J. V. Dolan



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

July 21, 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 your letter received at the NMB's office on June 23, 2003, 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 light of concerns raised about the arbitrators provided in cases of this nature, enclosed is a list of thirty (30) qualified neutrals. You and the Carrier are each requested to provide a list of fifteen (15) preferred arbitrators from this list. Your information will be kept confidential and used only for the purposes of this case. The Board will promptly provide you with a panel of seven neutrals after receiving your preferences. The lists, along with other relevant information will be considered by the Board in compiling the panel of seven arbitrators. The lists must be submitted by 4:00 p.m., Friday, August 1, 2003. You may submit the information by facsimile. The number for Arbitration Services is 202-692-5086.

Sincerely.

A handwritten signature in black ink, appearing to read "Roland Watkins", with a stylized flourish at the end.

**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 EXHIBIT 7
PAGE 1 OF 1**

Union Pacific Railroad
Attn: Ms. Marilyn J. Ahart
Director Protection Management-Law Dept.
1416 Dodge Street
Omaha, Ne. 68179

July 28, 2003

Dear Ms. Ahart,

Reference your letter of July 18, 2003, I would like to again suggest that the parties seek a fair settlement, without the time and expense of Arbitration.

I was displaced by a failed Merger Transaction yard consolidation experiment (nexus), which was ordered by Union Pacific Railroad (UPRR) Executives in early 1997, who were unfamiliar with Arizona operating conditions, and attempted to more than double the switching volume into Tucson Yard by moving ALL East and West traffic to and from Phoenix to Tucson, without the benefit of a yard capacity analysis. I have twenty boxes of organized material, thrown out as trash, which corroborate reality in 1997. Moreover, my Attorney and I have found some other cases which indicate opines other than the Maeser case. Finally, there is no strict time limit for filing arbitration and I have several good and substantial reasons why I could not come forward before; including, but not limited to the failure of President Davis to address issues of discrimination and UPRR Value failures in my 7/15/97 appeal letter (Exh. 10 in letter to Dolan 5/13/02), threats of retaliation, documented retaliation (i.e placing untrue nefarious statements on the secret to me Online PR system), and the 1996 Fransconi case wherein UPRR management intentionally delayed a terminated managers Cobra medical insurance coverage as retaliation, which endangered his spouse.

I addressed some of the above issues to the UPRR Ombudsmen on 12/15/02, in an appeal based primarily on the publicly published Official Website Policy of UPRR stating that ALL UPRR employees have a fundamental right to fair treatment. Concerning the alleged facts by the Ombudsman that "...your performance was not what was needed", two prior-to-the-Merger managers of UPRR (Malone and Garrison were "not what was needed" in Houston during 1997); yet, they and many others were not reduced in pay when displaced by Merger Service Failures (Exh. 1). In comparison to Tucson, Houston was such a monstrous service failure that it created huge settlements and law suits by customers and was almost the casual reason for the STB continuing emergency service orders and potential Merger

concessions. The Ombudsman, whose job it is to see that employees do not fall through the organizational cracks, found that it was appropriate for his 1997 successor to ignore my statements about discrimination, failures of the UPRR Values, and reduce my salary, while all other service failure persons were uncut. The Ombudsman responded, after years of my dead-end questioning that "The fact that you were treated differently is because they were in different jobs with different responsibilities and performance (Exh. 2). This type of lack of fair treatment reply is opposite the strict definitions of the UPRR Values, UPRR Business Ethics and issues of discrimination.

On my desk 6/26/97, when I was given four days notice to take a draconian \$1,272 per month demotion of two SRG's or quit after 28 years of railroad service (same date said Merger yard consolidation experiment announced as a failure), was the 1997 UPRR Values cardboard desktop reminder statement (Exh. 3) indicating, in part, "Treat others like you want to be treated", "Trust is essential" & "Try new ideas...encourage change". What happened to me?

It is clear to me that there is a dramatic and consistent contrast between the publicly published Policies of UPRR and the actions of UPRR. Therefore, if the parties can not reach a settlement, I regrettably plan to do the following:

1. Continue the Arbitration process.
2. Appeal to the STB, if needed, based on a Lace Curtain exception.
3. After retirement: a) speak and write my true story regarding "Building America" to every entity, including ALL newspapers, magazines, Malcom Baldrige Committee, award committees, Legislators, etc., and b) Re-activate the Unionization of managers, starting with UPRR.

Since an at-will employee does not appear to be entitled to the UPRR fundamental right fair treatment, despite a clear written policy, as are those who have representation; or, were pre-merger managers of UPRR, perhaps, the Teamsters are eager for a million members or a newly designated Union?

Should you wish to discuss the above, I can be reached at 281-359-5667 after 2:00 P.M. CT., as I relegated to night duty as continuing retaliation.

Exh. 1- 1997 Service Failures
Exh. 2-Ombudsman 3/10/03
Exh. 3-1997 Values

Sincerely,

JEG
John Grother

EXH. 1

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 short-handed 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.

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."

'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

EXH. 2

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
3/9/03 RESPONSE.

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 Messieurs 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".

UNION PACIFIC EXHIBIT 8
PAGE 4 OF 5

1999 Values of Union Pacific

EXH. 3

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

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

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 will deliver...
it depends on me.™



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

August 11, 2003

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

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

Dear Mr. Grother:

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

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

Sincerely.

A handwritten signature in cursive script, reading "Roland Watkins".

Roland Watkins
Director, Arbitration Services

Copy to:

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

Via facsimile to 202-692-5086

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

August 11, 2003

Dear Mr. Roland Watkins,

This letter is to advise all concerned that I have retained the services of Attorney Gordon P. MacDougall for the pending Arbitration issue. I still plan to be one member of the Arbitration Committee.

Mr. MacDougall and the Union Pacific Railroad Representative may be able to explore with your Office the possible Arbitrators for the instant case.

Mr. MacDougall can be reached at: (202) 223-9738
Suite 410
1025 Connecticut Ave NW
Washington, DC 20036

Should you have any questions, I am working new hours again and will only be available at 281-359-5667 between 0600-0745 ET on M-Th and all day Friday.

Sincerely,



John Grother

Cc: Ms. Marilyn J. Ahart
Union Pacific Railroad

UNION PACIFIC RAILROAD COMPANY

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



1416 DODGE STREET
OMAHA, NEBRASKA 68179

August 15, 2003

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

Dear Mr. Grother:

This is in reference to your July 23, 2003 letter regarding your earlier request for arbitration pursuant to the New York Dock labor protective conditions.

For the reasons identified in my July 18, 2003 letter you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. Since you have requested the National Mediation Board (NMB) to assign arbitration pursuant to Article IV of the New York Dock labor protective conditions, we should proceed with that process.

As the NMB has now provided a panel of seven potential arbitrators, please contact me to complete the process of selecting the neutral member for this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marilyn J. Ahart".

Marilyn J. Ahart

JOB STATUS REPORT

TIME : 09/24/2003 13:13
NAME : UPRR LAB REL OMAHA
FAX# : 402-271-2463
TEL# : 402-271-2463

DATE, TIME
FAX NO./NAME
DURATION
PAGE(S)
RESULT
MODE

09/24 13:12
912023318343
00:01:23
04
OK
STANDARD
ECM



UNION PACIFIC RAILROAD

LABOR RELATIONS

1416 Dodge Street, Room 332, Omaha, Nebraska 68179

FAXCOM

DATE: September 24, 2003

TO: Gordon MacDougall

FAX NO: (202) 331-8343

FROM: BILL LOO HIS

PHONE (402) 271-5446

Number of Pages: Three (Not including this sheet)

UNION PACIFIC EXHIBIT 12
PAGE 1 OF 19

COMMENTS: During our telephone conversation this morning I said I would send



UNION PACIFIC RAILROAD
LABOR RELATIONS
1416 Dodge Street, Room 332, Omaha, Nebraska 68179

FAXCOM

DATE: September 24, 2003

TO: Gordon MacDougall

FAX NO: (202) 331-8343

FROM: BILL LOOMIS

PHONE: (402) 271-5446

Number of Pages: Three (Not including this sheet)

COMMENTS: During our telephone conversation this morning I said I would send
an example of an arbitration agreement. Here is an agreement we used recently
with the Brotherhood of Locomotive Engineers. My direct fax to my computer is
(402) 233-2499.

From fax (402) 271-2463

UNION PACIFIC EXHIBIT 12
PAGE 2 OF 19

MEMORANDUM OF AGREEMENT
BETWEEN
UNION PACIFIC RAILROAD COMPANY
AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

For the purpose of establishing an Arbitration Board:

IT IS AGREED THAT:

- A. There shall be established an Arbitration Board which shall be known as the "Union Pacific - Western Lines Personal Leave Day Board" and hereinafter referred to as the "Board."
- B. The Board shall have jurisdiction only to decide the "Question at Issue" set forth in Attachment "A". The Board shall not have jurisdiction of disputes involving any other matter, including disputes growing out of requests for changes in rates of pay, rules or working conditions, nor shall it have authority to change existing agreements or establish new rules.
- C. The Board shall consist of three (3) members. The Union Pacific (Carrier) Member shall be W. E. Loomis. The Brotherhood of Locomotive Engineers (Organization) Member shall be E. L. Pruitt, Jr. The Neutral Member and Chairman of the Board shall be D. E. Eischen. Party members of the Board may be changed at any time by the respective parties designating them.
- D. The compensation and expenses of the Carrier Member shall be borne by the Carrier. The compensation and expenses of the Organization Member shall be borne by the Brotherhood of Locomotive Engineers. The compensation and expenses of the Neutral Member shall be equally borne by the Carrier and the Organization.
- E. Should a determination be made by the Neutral Member that a third or additional party has an interest in this dispute, the Board shall give due notice of such possible interest to such other party or parties, and shall afford same an opportunity to be heard. Such party or parties shall be given a reasonable period of time to present its or their position to the Board, and

shall be afforded the same full and fair hearing procedures as are provided herein for the parties hereto, but not including appearance at any executive session of the Board convened for the purpose of considering and adopting any proposed Award.

- F. The parties shall, ten (10) days prior to the hearing, exchange copies of their written submissions containing: all of the relevant facts upon which they rely, together with all documentary evidence in exhibit form; the agreement or rules involved, and their arguments in support of their respective positions. At the same time the parties exchange copies of their submissions, each party shall furnish the Neutral Member a copy of its submission.

The Neutral Member shall have the authority to require the production of such additional evidence, either oral or written, including rebuttal briefs, as he may desire from the parties, provided such additional evidence pertains to the issue or issues presented by one or both of the parties..

- G. The Board shall meet in Chicago, Illinois on December 6, 2002, to hear and adjudicate the dispute set forth in Attachment "A".
- H. At such hearing, the parties may be heard in person, by counsel or by other authorized representatives, as they may elect, to present statements of fact, supporting evidence and data, and arguments of their position. Either party may have representatives give oral statements, so long as the person making the statement and the nature of the statement was identified in party's written submission. The opposite party may request such a representative to provide clarification as to any aspect of his or her statement.
- I. The Board shall make findings of fact and render a written Award on the "Question At Issue" within thirty (30) days of the hearing, or as near thereto as possible. The Award shall be final and binding on both parties and if in favor of the Organization, shall specify a remedy and direct the Carrier to comply therewith on or before the date named.

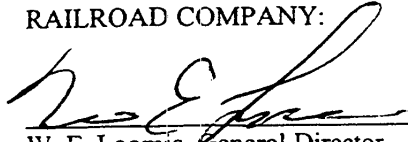
Each member of the Board shall have one vote and any two members of the Board shall be competent to render an award, or make any decisions as may be necessary to carry out the functions of the Board.

In the event a dispute arises involving the interpretation or application of the Board's Award, the Board shall, upon the request of either party, interpret the Award in light of the dispute.

- J. The Board hereby established shall continue in existence until it has adjudicated the "Question At Issue", after which it shall cease to exist, except for interpretation of its Award, as provided in paragraph I.
- K. The time limits provided herein may be extended by mutual agreement.

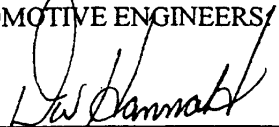
This Agreement is entered into this ____ day of October, 2002.

FOR UNION PACIFIC
RAILROAD COMPANY:



W. E. Loomis, General Director
Employee Relations Planning

FOR BROTHERHOOD OF
LOCOMOTIVE ENGINEERS:



D. W. Hannah, General Chairman
Union Pacific Western Lines GCA

ATTACHMENT "A"

Question At Issue:

In the application of Article VI, Section 3(d) of the May 31, 1996 Agreement between the National Carriers' Conference Committee and the Brotherhood of Locomotive Engineers, what method of computation is to be used in determining whether an employee thereunder has qualified for personal leave days by virtue of having "been credited with at least 150 days for work during the preceding calendar year?"

JOB STATUS REPORT

TIME : 09/26/2003 09:47
NAME : UPRR LAB REL OMAHA
FAX# : 402-271-2463
TEL# : 402-271-2463

DATE, TIME
FAX NO./NAME
DURATION
PAGE(S)
RESULT
MODE

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912023318343
00:00:53
03
OK
STANDARD
ECM



UNION PACIFIC RAILROAD

LABOR RELATIONS

1416 Dodge Street, Room 332, Omaha, Nebraska 68179

FAXCOM

DATE: September 26, 2003

TO: Gordon MacDougall

FAX NO: (202) 331-8343

FROM: BILL LOOMIS

PHONE: (402) 271-5446

Number of Pages: Two (Not including this sheet)

UNION PACIFIC EXHIBIT 12
PAGE 6 OF 19

COMMENTS: As discussed during our telephone conversation this morning, I am



UNION PACIFIC RAILROAD
LABOR RELATIONS
1416 Dodge Street, Room 332, Omaha, Nebraska 68179

FAXCOM

DATE: September 26, 2003

TO: Gordon MacDougall

FAX NO: (202) 331-8343

FROM: BILL LOOMIS

PHONE: (402) 271-5446

Number of Pages: Two (Not including this sheet)

COMMENTS: As discussed during our telephone conversation this morning, I am
sending a copy of the National Mediation Board's July 7, 2003 letter to Mr.
Grother, copy to J. V. Dolan. I am also sending a copy of the NMB's April 28,
2000 memorandum to rail carriers and labor organizations concerning the procedures
NMB follows in assigning neutrals to New York Dock cases.

From fax (402) 271-2463

UNION PACIFIC EXHIBIT 12
PAGE 7 OF 19



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

5000

LAW DEPT.

JUL 15 2003

REC'D UPRR

July 7, 2003

John Grother
8 Rustic Park Drive
Wood, TX 77339

Re: New York Dock Arbitration Request

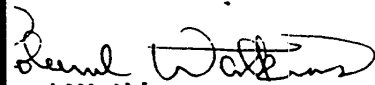
Mr. Grother:

Reference is made to your letter received at the NMB's office on June 2003, requesting the National Mediation Board to assign arbitration pursuant to Article IV, of the New York Dock conditions.

We are sending a copy of your letter to Mr. James V. Dolan, Counsel for the Union Pacific Railroad. By copy of this letter, we are hereby requesting Mr. Dolan to furnish this office with any comments he may care make in regard to this matter by the close of business July 21, 2003. Your comments may be submitted by facsimile.

Upon receipt of such comments you will be advised further.

Sincerely,


Gerald Watkins
Director, Arbitration Services

Copy to:

J. V. Dolan, Counsel
Union Pacific Railroad



(202) 692-5000

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins *Roland Watkins*
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

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

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

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

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,

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

W. E. Loomis

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

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

UNION PACIFIC EXHIBIT 12
PAGE 10 OF 19

LAW OFFICES
GORDON P. MACDOUGALL
1026 CONNECTICUT AVE. N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-6738

October 6, 2003

REC'D

OCT - 7 2003

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

BY HAND

Labor Relations

Re: NYD Claimant-John E. Grother

Dear Mr. Watkins:

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

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

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

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

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

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

Very truly yours, UNION PACIFIC EXHIBIT 12
PAGE 11 OF 19

Gordon P. MacDougall

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

- 2 -

UNION PACIFIC EXHIBIT 12
PAGE 12 OF 19



(202) 692-5000

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins *Roland Watkins*
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

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

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

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

UNION PACIFIC EXHIBIT 12
PAGE 13 OF 19



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CORRECTED COPY

(202) 692-5000

October 6, 2003

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

Dear Mr. Loomis:

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

Sincerely,

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

Roland Watkins
Director, Arbitration Services

cc: Gordon MacDougall



UNION PACIFIC RAILROAD

LABOR RELATIONS

1416 Dodge Street, Room 332, Omaha, Nebraska 68179

FAXCOM

DATE: October 14, 2003

TO: Roland Watkins

National Mediation Board

FAX NO: (202) 692-5086

FROM: BILL LOOMIS

PHONE: (402) 271-5446

Number of Pages: One (Not including this sheet)

COMMENTS: This concerns the request of John E. Grother for arbitration
in accordance with Article IV of the New York Dock labor protective conditions.

From fax (402) 271-2463

**UNION PACIFIC EXHIBIT 12
PAGE 15 OF 19**

JOB STATUS REPORT

TIME : 10/14/2003 16:06
NAME : UPRR LAB REL OMAHA
FAX# : 402-271-2463
TEL# : 402-271-2463

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UNION PACIFIC RAILROAD

LABOR RELATIONS

1416 Dodge Street, Room 332, Omaha, Nebraska 68179

FAXCOM

DATE: October 14, 2003

TO: Roland Watkins

National Mediation Board

FAX NO: (202) 692-5086

FROM: BILL LOOHS

PHONE: (402) 271-5446

Number of Pages: One (Not including this sheet)

UNION PACIFIC EXHIBIT 12
PAGE 16 OF 19

COMMENTS: This concerns the request of John E. Grother for arbitration

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

October 15, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

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

Sincerely,

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

W. E. Loomis

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

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

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

TELEPHONE
AREA CODE 202
223-9738

December 31, 2003

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

REC'D
JAN - 5 2004
Labor Relations

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

Dear Mr. Watkins:

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

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

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

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

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

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

Very truly yours,

cc: John E. Grother
William E. Loomis

Gordon P. MacDougall

UNION PACIFIC EXHIBIT 12
PAGE 18 OF 18

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,

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

W. E. Loomis

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

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

UNION PACIFIC EXHIBIT 12
PAGE 19 OF 19



(202) 692-5000

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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.

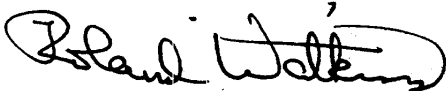
The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" *Id.* The Court of Appeals further determined that "no justiciable controversy existed"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

- 3 -

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

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

By direction of the NATIONAL MEDIATION BOARD.



Roland Watkins
Director, Arbitration Services

Copies to:

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

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

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

Before the
SURFACE TRANSPORTATION BOARD

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

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

(Arbitration Review)

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

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

Attorney for John E. Grother

Dated: February 20, 2004

UNION PACIFIC EXHIBIT 14
PAGE 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 TRANSPORTA-
TION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL
CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

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

Preliminary Statement

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NRAB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C.

153. Here, Grother, as an unrepresented employee, does not

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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


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

Attorney for John E. Grother

Certificate of Service

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

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

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Washington DC
February 20, 2004


GORDON P. MacDOUGALL

UNION PACIFIC EXHIBIT 14
PAGE 10 OF 15



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

APPENDIX 1
Page 1 of 3

(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

UNION PACIFIC EXHIBIT 14
PAGE 11 OF 15

- 2 -

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

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

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

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

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

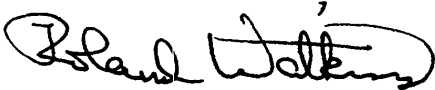
The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" *Id.* The Court of Appeals further determined that "no justiciable controversy existed"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

- 3 -

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

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

By direction of the NATIONAL MEDIATION BOARD.



**Roland Watkins
Director, Arbitration Services**

Copies to:

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

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

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

PART 301—RULES OF PROCEDURE

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

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

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

§ 301.1 General duties.

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

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

§ 301.2 Classes of disputes.

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

facts and all supporting data bearing upon the disputes.

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

§ 301.3 Organization.

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

§ 301.4 Jurisdiction.

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

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

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

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

§301.5

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

§301.5 Form of submission.

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

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

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

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

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

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

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

vise 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 type-written 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]

Before the
SURFACE TRANSPORTATION BOARD

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

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY

--- CONTROL AND MERGER ---

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

(Arbitration Review)

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

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

Dated: March 4, 2004

UNION PACIFIC EXHIBIT 15
PAGE 1 OF 42

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

BACKGROUND INFORMATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ 49 CFR § 1108.2(b)

¹¹ 49 CFR § 1108.2(b)

IV. Location of the Hearing

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

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

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

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

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

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

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

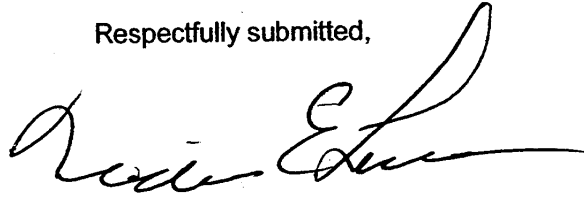
2/20/2004 petition, Article IV of the NYD protective conditions provides the remedy of arbitration to employees not represented by a labor organization just as it does to employees who are represented by a labor organization. This attempt on the part of Grother to distinguish this case from the usual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

VII. Summary

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

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

Respectfully submitted,



Certificate of Service

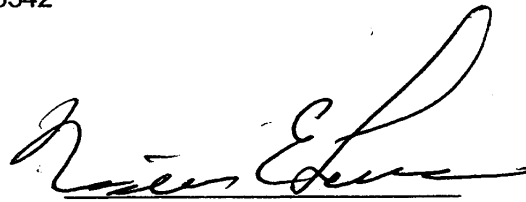
I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

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

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

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

Omaha, NE
March 4, 2004


WILLIAM E. LOOMIS

Before the
SURFACE TRANSPORTATION BOARD

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

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

(Arbitration Review)

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

Preliminary Statement

John E. Grother (Grother, or employee), ancillary to review of a forthcoming arbitration award, and in aid of the arbitration prescribed by the Surface Transportation Board (STB), petitions the STB to establish certain procedures for implementing the non-agreement employee arbitration provisions of the New York Dock employee protective conditions, with respect to the current dispute between Grother and his employer (carrier), Union Pacific Railroad Company (UP). Specifically, employee desires (1) 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- (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 1570, 1579 n.75 (D.C. Cir. 1987).

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

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

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

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

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NRAB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C.

Here, Grother, as an unrepresented employee, does not

assess 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

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.^{1/}

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 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,

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

UNION PACIFIC APPENDIX 1
SHEET 11 OF 15

APPENDIX 1
Page 1 of 3

(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 dispute 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

UNION PACIFIC EXHIBIT 15
PAGE 21 OF 42

- 2 -

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

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

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

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

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

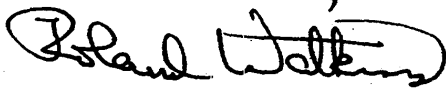
The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" *Id.* The Court of Appeals further determined that "no justiciable controversy existed"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

- 3 -

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

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

By direction of the NATIONAL MEDIATION BOARD.



**Roland Watkins
Director, Arbitration Services**

Copies to:

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

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

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

PART 301—RULES OF PROCEDURE

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

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

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

§301.1 General duties.

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

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

§301.2 Classes of disputes.

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

facts and all supporting data bearing upon the disputes.

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

§301.3 Organization.

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

§301.4 Jurisdiction.

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

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

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

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

§ 301.5

§ 301.5 Form of submission.

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

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

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

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

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

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

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

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

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

§ 301.6 General.

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

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

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

§ 301.7 Hearings.

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

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

§ 301.8 Appearances.

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

§ 301.9 Awards.

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

NATIONAL RAILROAD ADJUSTMENT BOARD.

By Order of _____ Division

Attest: _____
(Secretary)

VIA CERTIFIED MAIL

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 O&S-RM 830



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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

2) 692-5000

January 21, 2004

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

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

Dear Ms. Ross:

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

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

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

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

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

- 2 -

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

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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 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.

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

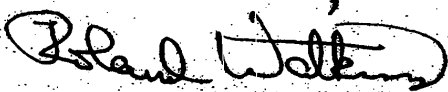
The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and impair its ability to constitute a significant force for conciliation." *Id.* The Court of Appeals further determined that "no justiciable controversy existed"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

- 3 -

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

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

By direction of the NATIONAL MEDIATION BOARD.



Roland Watkins
Director, Arbitration Services

Copies to:

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

Gordon P. MacDougall
Representative for John E. Grother
Room 410
1825 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 certain railroads 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 Kashner 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. Those 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,

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*, 31 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), modified at 49 CFR 1115.8. This accords with our general practice not to entertain interlocutory appeals except in extraordinary circumstances. [FN2] Moreover, the limited scope of review provided by the *Lace Curtain* criteria militates against Commission involvement prior to a final arbitration decision except in extraordinary circumstances. Our consideration of interlocutory appeals from intermediate decisions of arbitrators would impede the process, and should not be undertaken unless clearly justified. Union Pacific implicitly acknowledged this point in suggesting

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

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

We are not ignoring the adverse effect of delay on consummation of the UPRR/MPPRR-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.

Loreta R. McGee

Secretary

N1 "Union Pacific" refers, collectively, to Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri-Kansas-Texas Railroad Company.

N2 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.

While 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.

N3 We do not read the arbitrators April 13th letter as preventing any party from subsequently seeking review of

Slip Copy

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

UNION PACIFIC APPENDIX 4
SHEET 4 OF 4

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

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

1989 WL 239106 (I.C.C.)

END OF DOCUMENT



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(2) 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

UNION PACIFIC APPENDIX 5
SHEET 2 OF 9

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.

My 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

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

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

UNION PACIFIC EXHIBIT 15
PAGE 35 OF 42



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

CORRECTED COPY

02) 692-5000

October 6, 2003

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

Dear Mr. Loomis:

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

Sincerely,

A handwritten signature in cursive script, reading 'Roland Watkins', is written over a horizontal line.

Roland Watkins
Director, Arbitration Services

cc: Gordon MacDougall

LAW OFFICES
GORDON P. MACDOUGALL
1008 CONNECTICUT AVE. N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

October 6, 2003

REC'D

OCT - 7 2003

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

BY HAND

Labor Relations

Re: NYD Claimant-John E. Grother

Dear Mr. Watkins:

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

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

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

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

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

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

Very truly yours, UNION PACIFIC EXHIBIT 15
PAGE 37 OF 42

Gordon P. MacDougall
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

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins *Roland Watkins*
Director, Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

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

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

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



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

October 15, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to your letter of August 11, 2003 in connection with John E. Grother's request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions. Enclosed with your letter was a list of seven (7) qualified neutrals. During 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

c. 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 now or about August 11, 2003, when the undersigned was engaged. Previously, you had furnished Mr. Grother, and the carrier, with names of individuals for consideration as the neutral member of the arbitration committee.

Unfortunately, the carrier has insisted upon a system of electing 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 his 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

c: John E. Grother

William E. Loomis

UNION PACIFIC EXHIBIT 15
PAGE 41 OF 42

LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 3312
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 alternate 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

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

REC'D
MAR 15 2004
Labor Relations
TELEPHONE
AREA CODE 202
223-9798

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: LeMoyné 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,

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

UNION PACIFIC EXHIBIT 16
PAGE 1 OF 1

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.

LAW OFFICES
GORDON P. MACDOUGALL
1026 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9788

April 23, 2004

Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

REC'D

APR 29 2004

Labor Relations

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, UNION PACIFIC EXHIBIT 18
PAGE 1 OF 3


Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

- 2 -

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

UNION PACIFIC EXHIBIT 18
PAGE 3 OF 3

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,

UNION PACIFIC EXHIBIT 19
PAGE 1 OF 4

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

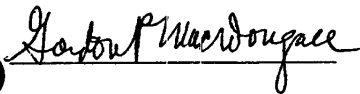
out the functions of the committee. If an initial decision is in favor of Grother, it shall declare the applicability of New York Dock to him for the STB authorization(s) and, if a further decision is issued, it shall specify a remedy and direct the carrier to comply therewith on or before the date named 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).

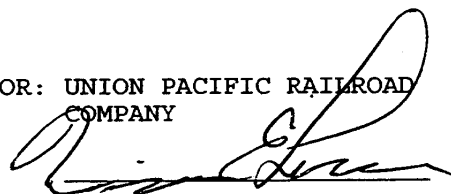
I. The time limits provided herein may be extended, or shortened, by mutual agreement of the parties.

Signed this 18th day of June, 2004.

FOR: JOHN E. GROTHER



FOR: UNION PACIFIC RAILROAD
COMPANY



be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying the judgments, decrees, and awards referred to in subdivision (e) of section 206.

TRANSPORTATION ACT.
Use of revolving fund.
Ante, p. 462.
Issue of indebtedness to United States.

(f) A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification.

EXECUTION OF POWERS OF PRESIDENT.

Execution of powers of the President.

SEC. 211. All powers and duties conferred or imposed upon the President by the preceding sections of this Act, except the designation of the agent under section 206, may be executed by him through such agency or agencies as he may determine.

Agent may be designated for.
Exception.
Ante, p. 461.
Post, pp. 1145, 1858, 1863.

TITLE III.—DISPUTES BETWEEN CARRIERS AND THEIR EMPLOYEES AND SUBORDINATE OFFICIALS.

Railroad disputes.

SEC. 300. When used in this title—

(1) The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation;

Meaning of terms.
"Carrier."

(2) The term "Adjustment Board" means any Railroad Board of Labor Adjustment established under section 302;

"Adjustment Board."

(3) The term "Labor Board" means the Railroad Labor Board;

"Labor Board."

(4) 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; and

"Commerce."

(5) The term "subordinate official" includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.

"Subordinate official."

SEC. 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute.

Duty enjoined to avoid disputes interrupting operations of roads.

Mutual conferences between carriers and employees to decide.

Board to decide if no agreement made.

SEC. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.

Boards of Labor Adjustment.
Establishment and composition of.

SEC. 303. Each such Adjustment Board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the Adjustment Board's own motion, or (4)

Disputes as to grievances, rules or working conditions.

Hearings, etc., by boards.

25

1

REGULATIONS OF FEBRUARY 5, 1924

Page 1

- - - -

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 5th day of February, A.D., 1924.

Ex Parte No. 72.

Regulations designating the classes of employees that are to be included within the term "subordinate official" under Title III of the Transportation Act, 1920.

It appearing, That paragraph (5) of Section 300 of the Transportation Act, 1920, provides:

- (5) The term "subordinate official" includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.

It further appearing, That public hearing was had on March 15, 1920, "for the purpose of determining what classes of officials of carriers shall be included within the term 'subordinate official', as that term is used in Sections 300 to 313, both inclusive, of said Transportation Act, 1920", and the Commission having prescribed by regulation duly formulated and issued on March 23, 1920, that the term "subordinate official" as used in said portion of said Act shall include employees of the classes and ranks therein designated.

It further appearing, That, pursuant to petitions duly filed a further public hearing was had on October 1, 1920, after which the regulations aforesaid were modified on November 1, 1920, and further modified on November 24, 1920.

And it further appearing, That, pursuant to petitions duly filed a further public hearing was had on December 5, 1923, for the purpose of determining with respect to train dispatchers and supervisory agents whether the regulations aforesaid should be modified or supplemented.

It is ordered, and the Commission hereby prescribes that the term "subordinate official" as used in said portions of said Act shall include the following, and that these regulations shall supersede the aforesaid regulations of March 23, 1920, November 1, 1920, and November 24, 1920, which are hereby set aside.

AUDITORS. This class shall include traveling auditors engaged in auditing station accounts, checking transportation and other papers, etc., who are not vested with discretionary power to determine the scope or character of their duties.

CLAIM AGENTS. This class shall include claim agents below the rank of assistant general claim agent or chief claim agent. It does not include the so-called "claim investigators". We are of the opinion that such employees who are engaged in clerical work are not "officials of carriers".

FOREMEN, SUPERVISORS AND ROAD MASTERS. 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, boiler-makers, blacksmiths, sheet metal workers, electricians, car men, and their helpers and apprentices, with rank and title beneath that of general foreman.

TRAIN DISPATCHERS. This class shall include chief, assistant chief, trick, relief and extra dispatchers, excepting only such chief dispatchers as are actually in charge of dispatchers and telegraphers and in actual control over the movement of trains and related matters, and have substantially the authority of a superintendent with respect to those and other activities. This exception shall apply to not more than one chief dispatcher on any division.

TECHNICAL ENGINEERS. This class shall include civil, mechanical, electrical and other technical engineers inferior in rank to engineers of maintenance of way, chief engineers and division engineers; engineers of maintenance of way and other technical engineers. We are of opinion that instrument men, rod men, chain men, designers, draftsmen, computers, tracers, chemists and others engaged in similar engineering or technical work are not "officials of carriers".

YARD MASTERS. This class shall include yard masters and assistant yard masters excepting general yard masters at large and important switching centers where of necessity such general yard masters are vested with responsibilities and authority that stamp them as officials.

STOREKEEPERS. This class shall include storekeepers or foremen of stores who are not vested with authority to make purchases. It does not include general storekeepers and assistant general storekeepers.

SUPERVISORY STATION AGENTS. The duties and responsibilities of supervisory station agents vary so widely that they can not all be consistently designated subordinate officials. This class will be subdivided, therefore, as follows:

(a) Supervisory station agents who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar routine duties are employees and, although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials.

(b) Except those referred to in the next succeeding paragraph, supervisory station agents whose duties are wholly supervisory and who are not required to perform routine office work, as outlined in the preceding paragraph, are designated as subordinate officials.

(c) Supervisory station agents at large and important stations whose duties are wholly supervisory, and who are of necessity vested with greater responsibilities, duties and authority than the agents hereinbefore classed as subordinated officials, may be designated officials and excluded from the class of subordinate officials.

The above definitions include all of the classes of employees whose claim to recognition as "subordinate officials" were presented at the hearings. The list of subordinate officials above prescribed may be enlarged or restricted after due notice and hearing, if and when occasion warrants.

By the Commission.

(SEAL)

GEORGE B. MCGINTY,

Secretary

§ 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, United States Code, as of December 31, 1995, 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 tippie, or the loading of coal at the tippie.

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."

(May 20, 1926, ch. 347, § 1, 44 Stat. 577; June 7, 1934, ch. 426, 48 Stat. 926; June 21, 1934, ch. 691, § 1, 48 Stat. 1185; June 25, 1936, ch. 804, 49 Stat. 1921; Aug. 13, 1940, ch. 664, §§ 2, 3, 54 Stat. 785, 786; June 25, 1948, ch. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning act May 20, 1926, ch. 347, 44 Stat. 577, as amended, known as the Railway Labor Act, which enacted this chapter and amended sections 225 and 348 of former Title 28, Judicial Code and Judiciary. Sections 225 and 348 of former Title 28 were repealed by section 39 of act June 25, 1948, ch. 646, 62 Stat. 992, section 1 of which enacted Title 28, Judiciary and Judicial Procedure. Section 225 of former Title 28 was reenacted as sections 1291 to 1294 of Title 28. For complete classification of this Act to the Code, see this section and Tables.

CODIFICATION

In par. First, "subtitle IV of title 49" substituted for "the Interstate Commerce Act [49 U.S.C. 1 et seq.]" on authority of Pub. L. 95-473, § 3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

Provisions of act Aug. 13, 1940, § 2, similar to those comprising par. First of this section, limiting the term "employer" as applied to mining, etc., of coal, were formerly contained in section 228a of this title. Provisions of section 3 of the act, similar to those comprising par. Fifth of this section, limiting the term "employee" as applied to mining, etc., of coal, were formerly contained in sections 228a, 261, and 351 of this title, and section 1532 of former Title 26, Internal Revenue Code, 1939.

As originally enacted, par. Seventh contained references to the Supreme Court of the District of Columbia. Act June 25, 1936 substituted "the district court of the United States for the District of Columbia" for "the Supreme Court of the District of Columbia", and act June 25, 1948, as amended by act May 24, 1949, substituted "United States District Court for the District of Columbia" for "district court of the United States for the District of Columbia".

As originally enacted, par. Seventh contained references to the "circuit court of appeals". Act June 25, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals".

As originally enacted, par. Seventh contained references to the "Court of Appeals of the District of Columbia". Act June 7, 1934, substituted "United States Court of Appeals for the District of Columbia" for "Court of Appeals of the District of Columbia".

AMENDMENTS

1940-Act Aug. 13, 1940, inserted last sentence of par. First, and second par. of par. Fifth.

1934-Act June 21, 1934, added par. Sixth and redesignated provisions formerly set out as par. Sixth as Seventh.

RESTRICTION ON ESTABLISHMENT OF NEW ANNUITIES OR PENSIONS

Pub. L. 91-215, §7, Mar. 17, 1970, 84 Stat. 72, provided that: "No carrier and no representative of employees, as defined in section 1 of the Railway Labor Act [this section], shall, before April 1, 1974, utilize any of the procedures of such Act [this chapter], to seek to make any changes in the provisions of the Railroad Retirement Act of 1937 [section 228a et seq. of this title] for supplemental annuities or to establish any new class of pensions or annuities, other than annuities payable out of the Railroad Retirement Account provided under section 15(a) of the Railroad Retirement Act of 1937 [subsection (a) of section 228o of this title], to become effective prior to July 1, 1974; nor shall any such carrier or representative of employees until July 1, 1974, engage in any strike or lockout to seek to make any such changes or to establish any such new class of pensions or annuities: Provided, That nothing in this section shall inhibit any carrier or representative of employees from seeking any change with respect to benefits payable out of the Railroad Retirement Account provided under section 15(a) of the Railroad Retirement Act of 1937 [subsection (a) of section 228o of this title]."

SOCIAL INSURANCE AND LABOR RELATIONS OF RAILROAD COAL-MINING EMPLOYEES; RETROACTIVE OPERATION OF ACT AUGUST 13, 1940; EFFECT ON PAYMENTS, RIGHTS, ETC.

Sections 4-7 of act Aug. 13, 1940, as amended by Reorg. Plan No. 2 of 1946, §4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095, with regard to the operation and effect of the laws amended, provided:

"SEC. 4. (a) The laws hereby expressly amended (section 1532 of Title 26, I.R.C. 1939 [former Title 26, Internal Revenue Code of 1939] and sections 151, 215, 228a, 261, and 351 of this title), the Social Security Act, approved August 14, 1935 (section 301 et seq. of Title 42), and all amendments thereto, shall operate as if each amendment herein contained had been enacted as a part of the law it amends, at the time of the original enactment of such law.

"(b) No person (as defined in the Carriers Taxing Act of 1937 [section 261 et seq. of this title]) shall be entitled, by reason of the provisions of this Act, to a refund of, or relief from liability for, any income or excise taxes paid or accrued, pursuant to the provisions of the Carriers Taxing Act of 1937 or subchapter B of chapter 9 of the Internal Revenue

Code [section 1500 et seq. of former Title 26, Internal Revenue Code of 1939], prior to the date of the enactment of this Act [Aug. 13, 1940] by reason of employment in the service of any carrier by railroad subject to part I of the Interstate Commerce Act [49 U.S.C. 10501 et seq.], but any individual who has been employed in such service of any carrier by railroad subject to part I of the Interstate Commerce Act as is excluded by the amendments made by this Act from coverage under the Carriers Taxing Act of 1937 and subchapter B of chapter 9 of the Internal Revenue Code, and who has paid income taxes under the provisions of such Act or subchapter, and any carrier by railroad subject to part I of the Interstate Commerce Act which has paid excise taxes under the provisions of the Carriers Taxing Act of 1937 or subchapter B of chapter 9 of the Internal Revenue Code, may, upon making proper application therefor to the Bureau of Internal Revenue [now Internal Revenue Service], have the amount of taxes so paid applied in reduction of such tax liability with respect to employment, as may, by reason of the amendments made by this Act, accrue against them under the provisions of title VIII of the Social Security Act [section 1001 et seq. of Title 42] or the Federal Insurance Contributions Act (subchapter A of chapter 9 of the Internal Revenue Code) [section 1400 et seq. of former Title 26].

"(c) Nothing contained in this Act shall operate (1) to affect any annuity, pension, or death benefit granted under the Railroad Retirement Act of 1935 [section 215 et seq. of this title] or the Railroad Retirement Act of 1937 [section 228a et seq. of this title], prior to the date of enactment of this Act [Aug. 13, 1940], or (2) to include any of the services on the basis of which any such annuity or pension was granted, as employment within the meaning of section 210(b) of the Social Security Act -or section 209(b) of such Act, as amended (sections 410(b) and 409(b), respectively, of Title 42). In any case in which a death benefit alone has been granted, the amount of such death benefit attributable to services, coverage of which is affected by this Act, shall be deemed to have been paid to the deceased under section 204 of the Social Security Act (section 404 of Title 42) in effect prior to January 1, 1940, and deductions shall be made from any insurance benefit or benefits payable under the Social Security Act, as amended [section 301 et seq. of Title 42], with respect to wages paid to an individual for such services until such deductions total the amount of such death benefit attributable to such services.

"(d) Nothing contained in this Act shall operate to affect the benefit rights of any individual under the Railroad Unemployment Insurance Act [section 351 et -eq. of this title] for any day of unemployment (as defined in section 1(k) of such Act [section 351(k) of this title]) occurring prior to the date of enactment of this Act. [Aug. 13, 1940]

"SEC. 5. Any application for payment filed with the Railroad Retirement Board prior to, or within sixty days after, the enactment of this Act shall, under such regulations as the Federal Security Administrator may prescribe, be deemed to be an application filed with the Federal Security Administrator by such individual or by any person claiming any payment with respect to the wages of such individual, under any provision of section 202 of the Social Security Act, as amended (section 402 of Title 42).

"SEC. 6. Nothing contained in this Act, nor the action of Congress in adopting it, shall be

taken or considered as affecting the question of what carriers, companies, or individuals, other than those in this Act specifically provided for, are included in or excluded from the provisions of the various laws to which this Act is an amendment.

"SEC. 7. (a) Notwithstanding the provisions of section 1605(b) of the Internal Revenue Code [section 1605(b) of former Title 26, Internal Revenue Code of 1939], no interest shall, during the period February 1, 1940, to the eighty-ninth day after the date of enactment of this Act [Aug. 13, 1940], inclusive, accrue by reason of delinquency in the payment of the tax imposed by section 1600 with respect to services affected by this Act performed during the period July 1, 1939, to December 31, 1939, inclusive, with respect to which services amounts have been paid as contributions under the Railroad Unemployment Insurance Act [section 351 et seq. of this title] prior to the date of enactment of this Act.

"(b) Notwithstanding the provisions of section 1601(a)(3) of the Internal Revenue Code [section 1601(a)(3) of former Title 26, Internal Revenue Code of 1939], the credit allowable under section 1601(a) against the tax imposed by section 1600 for the calendar year 1939 shall not be disallowed or reduced by reason of the payment into a State unemployment fund after January 31, 1940, of contributions with respect to services affected by this Act performed during the period July 1, 1939, to December 31, 1939, inclusive, with respect to which services amounts have been paid as contributions under the Railroad Unemployment Insurance Act [section 351 et seq. of this title] prior to the date of enactment of this Act [Aug. 13, 1940]: Provided, That this subsection shall be applicable only if the contributions with respect to such services are paid into the State unemployment fund before the ninetieth day after the date of enactment of this Act."

AGREEMENT OF MAY, 1936, WASHINGTON, D.C.

This agreement is entered into between the carriers listed and defined in Appendices "A", "B" and "C" attached hereto and made a part hereof, represented by the duly authorized Joint Conference Committee signatory hereto, as party of the first part, and the employes of said carriers, represented by the organizations signatory hereto by their respective duly authorized executives, as party of the second part, and, so far as necessary to carry out the provisions hereof, is also to be construed as a separate agreement by and between and in behalf of each of said carriers and its employes who are now or may hereafter be represented by any of said organizations which now has (or may hereafter have during the life of this agreement) an agreement with such carrier concerning rates of pay, rules or working conditions.

The signatories hereto, having been respectively duly authorized as aforesaid to negotiate to a conclusion certain pending issues concerning the treatment of employes who may be affected by coordination as hereinafter defined, hereby agree:

Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employes affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore, the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement.

Section 2. (a) The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein when it refers to other than parties to this agreement means any carrier subject to the

provisions of Part I of the Interstate Commerce Act; when it refers to a party to this agreement it means any company or system listed and described in appendices A, B or C as a single carrier party to this agreement.

(c) The term "time of coordination" as used herein includes the period following the effective date of a coordination during which changes consequent upon coordination are being made effective; as applying to a particular employee it means the date in said period when that employee is first adversely affected as a result of said coordination.

Section 3. (a) The provisions of this agreement shall be effective and shall be applied whenever two or more carriers parties hereto undertake a coordination; and it is understood that if a carrier or carriers parties hereto undertake a coordination with a carrier or carriers not parties hereto, such coordination will be made only upon the basis of an agreement approved by all of the carriers parties thereto and all of the organizations of employees involved (parties hereto) of all of the carriers concerned. No coordination involving classes of employees not represented by any of the organizations parties hereto shall be undertaken by the carriers parties hereto except in accord with the provisions of this agreement or agreements arising hereunder.

(b) Each carrier listed and established as a separate carrier for the purposes of this agreement, as provided in Appendices "A", "B" and "C", shall be regarded as a separate carrier for the purposes hereof during the life of this agreement; provided, however, that in the case of any coordination involving two or more railroad carriers which also involves the Railway Express Agency, Inc., the latter company shall be treated as a separate carrier with respect to its operations on each of the railroads involved.

(c) It is definitely understood that the action of the parties hereto in listing and establishing as a single carrier any system which comprises more than one operating company is taken solely for the purposes of this agreement and shall not be construed or used by either party hereto to limit or affect the rights of the other with respect to matters not falling within the scope and terms of this agreement.

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employees of each such carrier 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 coordination, including an estimate of the number of employees of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

Section 6. (a) No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long 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 of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in 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 which he elects to decline.

(b) The protection afforded by the foregoing paragraph shall be made effective whenever appropriate through what is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last twelve (12) months in which he performed service immediately preceding the date of his displacement (such twelve (12) months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee, and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

Section 7. (a) Any employee of any of the carriers participating in a particular coordination who is deprived of employment as a result of said coordination shall be accorded an allowance (hereinafter termed a coordination allowance), based on length of service, which (except in the case of an employee with less than one year of service) shall be a monthly allowance equivalent in each instance to sixty percent (60%) of the average monthly compensation of the employee in question during the last twelve months of his employment in which he earned compensation prior to the

date he is first deprived of employment as a result of the coordination. This coordination allowance will be made to each eligible employee while unemployed by his home road or in the coordinated operation during a period beginning at the date he is first deprived of employment as a result of the coordination and extending in each instance for a length of time determined and limited by the following schedule:

Length of Service	Period of Payment
1 yr. and less than 2 yrs.	6 months
2 yrs. and less than 3 yrs.	12 "
3 yrs. and less than 5 yrs.	18 "
5 yrs. and less than 10 yrs.	36 "
10 yrs. and less than 15 yrs.	48 "
15 yrs. and over	60 "

In the case of an employee with less than one year of service, the total coordination allowance shall be a lump sum payment in an amount equivalent to sixty (60) days pay at the straight time daily rate of the last position held by him at the time he is deprived of employment as a result of the coordination.

(b) For the purposes of this agreement the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(c) An employee shall be regarded as deprived of his employment and entitled to a coordination allowance in the following cases:

1. When the position which he holds on his home road is abolished as result of coordination and he is unable to obtain by the exercise of his seniority rights another position on his home road or a position in the coordinated operation, or

2. When the position he holds on his home road is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of said coordination, or by other employees, brought about as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his home road or a position in the coordinated operation.

(d) An employee shall not be regarded as deprived of employment in case of his resignation, death, retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furloughed because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of a particular coordination who is not deprived of his employment within three years from the effective date of said coordination.

(e) Each employee receiving a coordination allowance shall keep the employer informed of his address and the name and address of any other person by whom he may be regularly employed.

(f) The coordination allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the coordination allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a coordination allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a coordination allowance accordingly if any is due.

(g) An employee receiving a coordination allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(h) If an employee who is receiving a coordination allowance returns to service the coordination allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a coordination allowance. During the time of such reemployment however he shall be entitled to protection in accordance with the provisions of Section 6.

(i) If an employee who is receiving a coordination allowance obtains railroad employment (other than with his home road or in the coordinated operation) his coordination allowance shall be reduced to the extent that the sum total of his earnings in such employment and his allowance exceeds the amount upon which his coordination allowance is based; provided that this shall not apply to employees with less than one year's service.

(j) A coordination allowance shall cease prior to the expiration of its prescribed period in the event of:

1. Failure without good cause to return to service in accordance with working agreement after being notified of position for which he is eligible and as provided in paragraphs (g) and (h).
2. Resignation.
3. Death.
4. Retirement on pension or on account of age or disability in accordance with the current rules and practices applicable to employees generally.
5. Dismissal for justifiable cause.

Section 8. An employee affected by a particular coordination shall not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief, etc., under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

Section 9. Any employee eligible to receive a coordination allowance under Section 7 hereof may, at his option at the time of coordination, resign and (in lieu of all other benefits and protections provided in this agreement) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of Service	Separation Allowance
1 year and less than 2 yrs.	3 months' pay
2 years and less than 3 years	6 " "
3 years and less than 5 years	9 " "
5 years and less than 10 years	12 " "
10 years and less than 15 years	12 " "
15 years and over	12 " "

In the case of employees with less than one year's service, five days' pay, at the rate of the position last occupied, for each month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 7.

(b) One month's pay shall be computed by multiplying by 30 the daily rate of pay received by the employee in the position last occupied prior to time of coordination.

Section 10. (a) Any employee who is retained in the service of any carrier involved in a particular coordination (or who is later restored to service from the group of employees entitled to receive a coordination allowance) who is required to change the

point of his employment as result of such coordination and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter, (not to exceed two working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier responsible and the organization of the employee affected. No claim for expenses under this Section shall be allowed unless they are incurred within three years from the date of coordination and the claim must be submitted within ninety (90) days after the expenses are incurred.

(b) If any such employee is furloughed within three years after changing his point of employment as a result of coordination and elects to move his place of residence back to his original point of employment, the carrier shall assume the expense of moving his household and other personal effects under the conditions imposed in paragraph (a) of this section.

(c) Except to the extent provided in paragraph (b) changes in place of residence subsequent to the initial changes caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 11. (a) The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of any of the carriers involved in a particular coordination (or who is later restored to such service from the group of employees entitled to receive a coordination allowance) who is required to change the point of his employment as a result of such coordination and is therefore required to move his place of residence:

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reim-

bursed by his employing carrier 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 coordination to be unaffected thereby. The employing carrier 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 party.

2. If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by coordination and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this Section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within three years after the effective date of the coordination.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and the carrier, respectively; these two shall endeavor by agreement within ten days after their appointment to select the third appraiser, or to select some person author-

ized to name the third appraiser, and in the event of failure to agree then the Chairman of the Interstate Commerce Commission shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 12. If any carrier shall rearrange or adjust its forces in anticipation of a coordination, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this agreement as an employee immediately affected by a coordination, this agreement shall apply to such an employee as of the date when he is so affected.

Section 13. In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement (or of the agreement entered into between the carriers and the representatives of the employees relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement. Each party to this agreement may name such persons from time to time as each party desires to serve on such Committee as its representatives in substitution for such original members. Should the Committee be unable to agree, it shall select a neutral referee and in the event it is unable to agree within 10 days upon the selection of said referee, then the members on either side may request the National Mediation Board to appoint a referee. The case shall again be considered by the Committee and the referee and the decision of the referee shall be final and conclusive. The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Section 14. Any carrier not initially a party to this agreement may become a party by serving notice of its desire to do so by mail upon the members of the Committee established by Section 13 hereof. It shall become a party as of the date of the service of such notice or upon such later date as may be specified therein.

Section 15. This agreement shall be effective June 18, 1936, and be in full force and effect for a period of five years from that date and continue in effect thereafter with the privilege that any carrier or organization party hereto may then withdraw from the agreement after one year from having served notice of its intention so to withdraw; provided, however, that any rights of the parties hereto or of individuals established and fixed during the term of this agreement shall continue in full force and effect, notwithstanding the expiration of the agreement or the exercise by a carrier or an organization of the right to withdraw therefrom.

This agreement shall be subject to revision by mutual agreement of the parties hereto at any time, but only after the serving of a sixty (60) days notice by either party upon the other.

For the participating carriers listed in Appendix A:

H. A. ENOCHS
JNO. G. WALBER
WM. WHITE

For the participating carriers listed in Appendix B:

C. A. CLEMENTS
E. J. CONNORS
C. M. DUKES

For the participating carriers listed in Appendix C:

H. A. BENTON
W. J. JENKS
J. B. PARRISH

For the participating carriers:

H. A. ENOCHS
Chairman, Joint Conference Committee

For the participating organizations of employees:

A. JOHNSTON, by W.J.B.
Grand Chief Engineer, Brotherhood of Locomotive Engineers

D. B. ROBERTSON
President, Brotherhood of Locomotive Firemen and Enginemen

J. A. PHILLIPS
President, Order of Railway Conductors of America

A. F. WHITNEY
President, Brotherhood of Railroad Trainmen

T. C. CASHEN
President, Switchmen's Union of North America

E. J. MANION
President, Order of Railroad Telegraphers

J. G. LUHRSEN
President, American Train Dispatchers' Association

A. O. WHARTON
President, International Association of Machinists

J. A. FRANKLIN
President, International Brotherhood of Boilermakers,
Iron Ship Builders and Helpers of America

RAY HORN
President, International Brotherhood of Blacksmiths,
Drop Forgers and Helpers

JOHN J. HYNES
President, Sheet Metal Workers' International Association

C. J. McGLOGAN
Vice-President, International Brotherhood of Electrical Workers

FELIX H. KNIGHT
President, Brotherhood Railway Carmen of America

J. J. McNAMARA
President, International Brotherhood of Firemen and Oilers

F. H. FLJOZDAL

President, Brotherhood of Maintenance of Way Employes

G. M. HARRISON

President, Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes

A. E. LYON

Acting President, Brotherhood of Railroad Signalmen of America

M. S. WARFIELD

President, Order of Sleeping Car Conductors

JAMES J. DELANEY

President, National Organization Masters, Mates and
Pilots of America

WM. L. BROWN

President, National Marine Engineers' Beneficial Association

International Longshoremen's Association

GEO. M. HARRISON

Chairman, Railway Labor
Executives' Association.

Signed at Washington, D. C.

May 21, 1936.

APPENDIX A covers Carriers in Eastern Territory, parties to Agreement.

APPENDIX B covers Carriers in Western Territory, parties to Agreement, of which following are Southern Pacific Company (Pacific Lines) connections:

Alameda Belt Line
 Atchison, Topeka & Santa Fe Railway Co.
 Chicago Rock Island & Pacific Railway Co.
 Denver & Rio Grande Western R. R. Co.
 Denver & Salt Lake Railway Co.
 East Portland Freight Terminal
 Great Northern Railway Co.
 Northern Pacific Railway Co.
 Northern Pacific Terminal Co. of Oregon
 Northwestern Pacific R. R. Co.
 Ogden Union Railway & Depot Co.
 Oregon, California & Eastern Ry. Co.
 Railway Express Agency, Inc.
 San Diego & Arizona Eastern Ry. Co.
 Southern Pacific Company (Pacific Lines)
 Spokane, Portland & Seattle Ry. Co.
 Texas & Pacific Railway
 Texas & New Orleans Railroad Co.
 Tidewater Southern Ry. Co.
 Union Pacific Railroad Co.
 Western Pacific Railroad Co.

APPENDIX C covers Carriers in Southeastern territory, parties to Agreement.

IN THE MATTER OF ARBITRATION BETWEEN

DANA R. BOND

AND

UNION PACIFIC RAILROAD COMPANY

AND

MICHAEL J. TOPOLOSKY

AND

UNION PACIFIC RAILROAD COMPANY

Pursuant to Article IV of the New York
Dock Conditions Imposed by the Interstate
Commerce Commission in Finance Docket No.
30,000.

Before Arbitration Committee

Members: R D. Meredith
Senior Director
Labor Relations

Carrier Member

Robert V. Broom, Esq.
Representing Michael J. Topolosky, Jr.

Claimant Member

Thomas R. Wolff, Esq.
Representing Dana R. Bond

Claimant Member

Lamont E. Stallworth
Arbitrator

Neutral Member

Appointment of Neutral Arbitrator

January 31, 1985

Hearing Held

Omaha, Nebraska
April 19, 1985

Post Hearing Carrier Memorandum Received

June 14, 1985

Post Hearing Claimant Memorandum Received

June 18, 1985 and
June 21, 1985.

THE ISSUE

The Parties submitted the following issues:

1. Was D. R. Bond, at the time of his termination from the service of Union Pacific Railroad Company, an "employee" subject to the protection of the New York Dock conditions?
2. Was M. J. Topolosky, at the time of his termination from the service

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of Union Pacific Railroad Company, an "employee" subject to the protection of the New York Dock conditions?

The Parties agreed that if it were determined that either of the Claimants were employees subject to the protection of New York Dock conditions that their entitlements would be determined in a subsequent arbitral proceeding.

In addition, the question of whether Mr. Bond and/or Mr. Topolosky were adversely affected by a transaction within the meaning of the New York Dock conditions and the question of whether they are entitled to any compensation are not at issue before this Arbitration Committee.

RELEVANT NEW YORK DOCK CONDITION PROVISIONS

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.

STATEMENT OF FACT

THE MERGER

On September 15, 1980, three western railroads filed applications with the Interstate Commerce Commission (ICC) seeking authorization to create a major new rail network to link shipping, industries and communities in a 21-state area spanning the western two-thirds of the nation. In their joint applications, Union Pacific (UP), Missouri Pacific (MP) and Western Pacific (WP) said the new system would create a financially strong, highly competitive rail system which would provide efficient and reliable transportation service.

During the ICC proceedings on the UP/MP/WP applications, P. A. Jordan, then Vice President-Labor Relations and Personnel for UP, submitted a verified statement and gave testimony covering the following: to explain the methods and procedures used in the Labor Impact Exhibits, to offer a general description of the labor effects of the proposed consolidation and to discuss the labor protection

which will be afforded employees affected by the consolidations. (Carriers Exhibit "A" & "B") (Mr. Jordan died March 26, 1984).

After two years of hearings and testimony, the ICC, on September 13, 1982, voted to approve the consolidation of the UP, MP and WP Railroads. This decision was only a vote and the written, formal decision was to be issued later.

The formal decision, Finance Docket 30, 000, was issued on October 20, 1982 (Carrier's Exhibit "C").

In addition, the ICC held that the "New York Dock" conditions would apply in this case. The Commission held:

We find that the protection of New York Dock is appropriate for the protection of applicants employees affected by this proceeding without any modification. The New York Dock conditions are significantly more protective of labor interests than any previously imposed set of employee protective conditions, and they satisfy the statutory requirement of 49 U.S.C. 11347. *New York Dock Railway v. U. S.*, 609 F. 2d 83 (2d Cir. 1979). We have consistently rejected modifications similar to those proposed here in prior consolidation proceedings. We continue to reject them for the reasons set forth in those cases. We find no unusual circumstances in this proceeding requiring imposition of conditions in excess of the statutory minimum (pages 620-621)

The ICC summarized the New York Dock conditions as follows:

In New York Dock, 350 I.C.C. 60, we described the minimum protection to be afforded those employees affected by a consolidation, absent a voluntarily negotiated agreement. The protections of New York Dock include a mandated 90-day notice of employment actions; negotiated implementation of employment changes resulting from a consolidation with compulsory arbitration disputes; compensation of dismissed employees and differential compensation of displaced employees, at the rate of their last year of employment, for six years after impact (or for their period of employment if less than six years); reimbursement of moving expenses; and protection against loss from the same of a home.

Three competitor railroads, the Southern Pacific, Santa Fe and Kansas City Southern, sought to block the merger. On December 9, 1982, the United States Court of Appeals for the District of Columbia rejected the pleas of these three railroads and refused to block Union Pacific Corporation's acquisition of Missouri Pacific Corporation and Western Pacific Railroad. In addition, the Court did allow the three protesting railroads 10 days to seek a stay from the United States Supreme Court. The protestants did appeal but Chief Justice W. E. Burger rejected their request for a stay. The merger

was then completed on December 22, 1982.

Claimants' Employment Records
D. R. Bond

Mr. Bond began his service with the Carrier on August 1, 1973. On September 7, 1983, Mr. Bond's service with the Carrier was terminated. (The question of the reason for Mr. Bond's termination is not at issue in this arbitration).

The following listing details Mr. Bond's employment record with the Carrier:

<u>DATE</u>	<u>POSITION</u>
8/1/73	Director-Cost and Economic Analysis
9/1/74	Director-Credit and Collection
9/1/75	Assistant Controller-Accounting Operations

Thus, at the time of his termination, Mr. Bond was Carrier's Assistant Controller-Accounting Operations. The principal accountabilities of that assignment are summarized as follows: (1) to direct Accounting Operations in a manner which ensures accurate and timely reporting to management and appropriate regulatory bodies; (2) to prepare budgets and forecasts exclusive of revenue and operating expenses; (3) to protect railroad assets through a program of operation and financial audits (4) to maintain general Railroad accounts; (5) to properly account for all property and equipment; (6) to operate the payroll programs of the Railroad Company; (7) to supervise and review all tax information, accounts and returns in the Carrier's interest; (8) to establish and maintain an effective Banking Operations section; and (9) to supervise subordinates by providing an environment for maximum efficiency, individual growth and motivation.

In addition, the dimensions of that assignment may be summarized as follows: direct reports- 1 director and 3 managers (one of three managers reporting to the Assistant Controller-Accounting Operations was the Manager-Personnel Accounting, Mr. Topolosky's position); indirect reports- 12 managers, 57 non-agreement employees and 199 agreement employees, total budget (including payroll) - \$5.5 million; payroll and related expenses - \$5.2 million; operating

expenses - \$900 million; other income and expenses - \$26 million; taxes - \$60 million; and, total assets- \$2300 million. (See Position Description of Assistant Controller-Accounting Operations Carrier's Exhibit "E").

The following listing details Mr. Bond's compensation record with the Carrier:

<u>DATE</u>	<u>COMPENSATION</u>
1973	\$30,000 (salary)
1974	\$33,000 (salary)
1975	\$38,000 (salary)
	\$ 5,000 (bonus)
1976	\$41,000 (salary)
	\$10,000 (bonus)
1977	\$45,575 (salary)
	\$12,000 (bonus)
1978	\$51,048 (salary)
	\$18,000 (bonus)
1979	\$57,000 (salary)
	\$22,000 (bonus)
1980	\$62,700 (salary)
	\$30,000 (bonus)
1981	\$69,600 (salary)
	\$30,000 (bonus)
1982	\$77,256 (salary)
	\$20,000 (bonus)

The Assistant Controller-Accounting Operations position was one of only four direct reports to the Controller and was responsible for all accounting operations. In addition, Mr. Bond's position at the time of his termination ranked 63rd in the Carrier's Salary Administration System out of a total of approximately 22,750 employees.

M. J. Topolosky

Mr. Topolosky began his service with the Carrier on January 1, 1974. On September 15, 1983, Mr. Topolosky's service with the Carrier was terminated. (The question of the reason for Mr. Topolosky's termination is not at issue in this arbitration).

The following listing details Mr. Topolosky's employment record with the Carrier.

<u>DATE</u>	<u>POSITION</u>
1/1/74	Manpower Planning Systems Supervisor

6/1/74	Manager Manpower Planning Systems
9/1/75	Manager Industrial Engineering Systems
3/1/78	Manager Industrial Engineering Installation
9/1/78	Manager Accounting Control Systems
10/27/78	Director Accounting Control Systems
2/1/80	Manager Personnel Accounting

Thus, at the time of his termination, Mr. Topolosky was Carrier's Manager Personnel Accounting. The principal accountabilities of that assignment may be summarized as follows: (1) ensure all personnel are paid and ensure the corresponding accounting distribution is received on a timely basis; (2) improve efficiencies for reporting time, preparing payrolls and administering benefits; (3) monitor withholding and disbursements other than payroll to ensure compliance with stipulated provisions and to ensure maximizing of cash flow opportunities; (4) verify the integrity of payroll data by establishing and maintaining centralized internal contracts; (5) maintain an efficient Personnel Accounting organization; and, (6) ensure employee records are maintained and communicated in an accurate and timely manner.

In addition, the dimensions of that assignment may be summarized as follows: direct reports- 2 managers; indirect reports- 6 non-agreement employees and 31 agreement employees; payrolls- 29,000 employees and \$577.8 MM annual salaries; and, employee records- \$170.1 MM annual amounts withheld and \$114.7 MM annual amounts paid by Company (See Position Description of Manager Personnel Accounting Carrier's Exhibit "V").

The following listing details Mr. Topolosky's compensation record with the Carrier:

<u>DATE</u>	<u>COMPENSATION</u>
1/1/74	\$19,500
1/1/75	\$21,440
1/1/76	\$23,376
1/1/77	\$25,944
1/1/78	\$28,020
9/1/78	\$31,220
10/1/79	\$35,760
10/1/80	\$39,336
10/1/81	\$43,656
10/1/82	\$48,240

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Thus, at the time of his termination the Manager Personnel Accounting was

one of the only three managers reporting to the Assistant Controller-Accounting Operations and was responsible for ensuring all personnel were paid.

On January 23, 1985 the Claimants' attorneys and the Carrier representative jointly requested the National Mediation Board to appoint a referee to serve as the neutral member of the instant New York Dock Arbitration Committee (Carriers Exhibit "HH"). On January 31, 1985 the Parties were notified that Professor Lamont E. Stallworth had been nominated by the NMB to serve as the referee. (Carrier Exhibit "II"). The Parties agreed to hear the claims of Messrs. Bond and Topolosky in one arbitral proceeding. It is within this factual context that the instant dispute arises.

CLAIMANTS' POSITION

The Claimants maintains that common sense; appropriate use of the English language; applicable principles of law and numerous other factors clearly establish that the Claimants were employees of the Carrier at the time they were terminated. The Claimants point out that the American Heritage dictionary defines "employee" as:

"a person who works for another in return for financial or other compensation".

According to the Claimants it is a well established legal principle that:

"Words are to be given their natural, received, popular, every-day, approved and recognized meaning...where there is not reason for a contrary construction, where a different meaning is not apparent or obvious, or definitely indicated, or required by the context". (See 73 Am Jur 2nd, page 205-206). (Also Uniform Statutory Construction Act, Section 2.)

Also according to the Claimants they clearly match the dictionary every day meaning or the word "employee" The Claimants were individuals who worked for the Carrier in return for financial compensation. The question then becomes whether another meaning was clearly intended.

Claimants further maintain that there is clear legal basis for the "every day" definition of "employee" being applied to the case at hand. For example, the Rail Passenger Service Act, 42 USC Sec. 565 (f) defines an employee in pertinent part, as: "an active full-time employee, including any such employee during a period of furlough or while on leave of absence by a railroad or terminal

company".

The Claimants also maintain that they were "employees" for purposes of New York Dock conditions at the time of their termination, as defined in 49 U.S.C. 1245.3. The Claimants point out that Congress provided a system to classify the number of employees in various categories each year by the railroad and that classification system was and is available to limit the application of New York Dock and any order issued by the Interstate Commerce Commission 49 U.S.C. 1245.7. The Claimants further point out that this system was not utilized in any way in Finance Order 30,000. Finance Order 30,000 was issued for the Carriers merger consolidation with Western Pacific and Missouri Pacific Railroads.

The Claimants assert that the Carrier has attempted to argue its position in reliance on a number of cases that are not only distinguishable, but in most instances predate New York Dock and the Railroad Revitalization and Regulatory Reform Act of 1976. See, e.g. Zinger v. Blanchett, 549 F2d 901; Edwards v. Southern Railroad, 376 F 2d. 665 C. A. 4, 1967); Norfolk & Western Railroad Co. and the New York & Chicago & St. Louis Railroad Co.

The Claimants also assert that nothing in the history of the railroads or the Interstate Commerce Commission restricts the word "employee". The Claimants point out that on at least one occasion the ICC held that subordinate officials including general conductors, foremen, supervisors and inspectors were "employees" See, e. g. In the Matter of Riggs 266 ICC 85.

The Claimants, relying on the Verified Statement of Philip A. Jordan, Vice President-Labor Relations and Personnel of the Carrier, maintain that he represented to the ICC that, among other things, "The principal adverse work force impact will be felt by non-agreement employees" and further that "we made the assumption that the non-agreement work force would qualify for substantially the same benefits as the protective conditions applicable to agreement employees".

The Claimants argue that the Carrier has not and cannot show one definition of an employee excluding the Claimants. The Claimants further argue that the ICC ruling allowing the Carriers merger/consolidation is without restriction; without modification and therefore it would be in appropriate for the Carrier now to indiscriminately restrict and modify the order of the ICC after obtaining ICC approval for the merger/consolidation.

The Claimants also argue that the closest definition restricting employees' protection since New York Dock is found in Western Railroad Agreement 364 I.C.C. 782, where reference is made to the Staggers Rail Act of 1980: "Employee" does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, or a member of the board of directors, or any person performing similar functions". Accordingly, the Claimants conclude that they are employees subject to protection of New York Dock conditions.

CARRIER POSITION

The Carrier maintains that the term "employees" as used in Article IV of the New York Dock conditions is a term of art which includes rank and file employees and subordinate officials but excludes officials such as the Claimants.

The Carrier further maintains that the Ex Parte 72 decisions of the Interstate Commerce Commission, the cited Courts of Appeals cases and the cited arbitration award all support the Carrier's position that officials are not entitled to ICC-imposed labor protection.

The Carrier also maintains that the Claimants, Mr. Bond, as the Assistant Controller-Accounting Operations and Mr. Topolosky, as the Manager Personnel Accounting, did not satisfy the definition of "employee"; they were officials and therefore, are not covered by the New York Dock conditions. According to the Carrier the instant claims are without merit and should be denied.

OPINION

The Parties submitted the following issues to the Arbitration Committee:

1. Was D. R. Bond, at the time of his termination from the service of Union Pacific Railroad Company, an 'employee' subject to the protection of the New York Dock conditions?
2. Was M. J. Topolosky, at the time of his termination from the service of Union Pacific Railroad Company, an 'employee' subject to the protection of the New York Dock conditions?

The Arbitration Committee (hereinafter called the Committee) has carefully examined and considered the rather extensive record in this matter. The Committee concludes as follows:

1. D. R. Bond at the time of his termination from service of the Carrier was not an "employee " subject to the protection of the New York Dock conditions.
2. M. J. Topolosky at the time of his termination from service of the Carrier was not an "employee " subject to the protection of the New York Dock conditions.

The findings, reasoning and conclusions of the Committee are set forth below.

There is no factual dispute in this matter concerning the positions which the Claimants held at the time of their respective terminations from service. There is also no dispute concerning the actual functions and responsibilities the Claimants performed as set forth in their job descriptions. In addition, there is no dispute that the Claimants were not represented by a labor organization at the time of their terminations from service. Consequently, this dispute is strictly a matter of interpretation and application of New York Dock conditions.

It is generally accepted that in interpretation disputes the burden of proof rests with the Claimants. In this particular case it is the burden of the Claimants to prove that the word "employee" as set forth in New York Dock was intended to encompass their positions. In support of its position the Claimant advance five (5) arguments: (1) that they are "employees" as defined in the dictionary; (2) that New York Dock does not define or limit the word employee ; (3) that the Carrier did not attempt to exclude their positions in the proceedings before the IOC; (4) that Carrier's Vice President of Labor Relations represented before the IOC that the

would be afforded New York Dock or equivalent protection if the ICC were to impose such conditions; and (5) the ICC approved Carrier's merger/consolidation and imposed New York Dock conditions without restrictions and without modification. Under the circumstances the Committee does not find these arguments to be persuasive.

There is no dispute that an individual who renders service and receives compensation is an employee in both the dictionary sense and the legal sense. The critical question is whether an employee, such as the Claimants or even the President of a Carrier are "employees" as intended for the purposes of New York Dock.

Article IV of New York Dock states, in relevant part,

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 Committee's view one must consider the normal or industry definition of the meaning of "employee". The Committee notes that neither New York Dock nor its legislative history assist in defining this word for the purposes of New York Dock conditions. However, Section 1, Fifth of the Railway Labor Act sets forth those individuals in the railroad industry who are both subject to and entitled to union representation. Section 1, Fifth states 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.

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. It is worth noting that the frames 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).

Under the Transportation Act of 1920; paragraph 5 of Section 300 the term subordinate official is defined:

The term subordinate official includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.

The term subordinate official is further defined in the ICC order known as "Ex Parte 72". Here, the ICC found that the term "subordinate official" included the following: Auditors; Claim Agents; Foremen, Supervisors, and Road Masters; Train Dispatchers; Technical Engineers; Yard Masters; Store Keepers; and Supervisory Station Agents. (Ex Parte 72 was issued on February 5, 1924). The Committee notes that it is the responsibility and authority of the ICC to determine whether a particular position is that of an employee, subordinate official or official. Since its February 5, 1924 Order (Ex Parte 72) and the enactment of the Railway Labor Act, the ICC has had numerous Ex

Parte 72 proceedings. An examination of these determinations, indicate that no position equivalent to Assistant Controller-Accounting Operations or Manager Personnel Accounting was found to come within the definition of employee/subordinate official (Carrier Exhibit "VVV").

The Committee is further persuaded that the term "employee" or non-agreement (not represented) employee is given further industry meaning by virtue of the most recent union organizing campaign conducted by BRAC in the late 1970's. BRAC sought to organize some 1300 positions of the Carrier within its craft and class which included rank and file employees and subordinate officials. BRAC did not attempt to represent the positions of Assistant Controller-Accounting Operations and Manager Personnel Accounting. This undisputed fact is not controlling; however it does support the Carrier's position that positions held by Claimants were not considered to be employee or subordinate official positions. It should be noted that BRAC attempted to organize Senior Analysts Supervisors; Senior Specialists/Specialists Analysts; Supervisors and Specialist in the Accounting Department.

Therefore, based upon the foregoing, the Committee is of the opinion that the Claimants are neither employee or subordinate officials under New York Dock. This leaves open the question whether officials or principal managers are afforded protection under New York Dock.

An examination of Circuit Court of Appeals decisions and arbitral awards clearly support the conclusion that officials are not entitled to labor protection. See, e.g. McDow v. Louisiana Southern Railway Company 219 F. 2d 650 (C.A. 5, 1955); Edwards v. Southern Ry. Co. 376 F 2d. 665 (C.A. 4, 1967); and Zinger v. Blanchette 549 F. 2d. 901 (C.A. 3, 1977).

The Committee notes that these decisions may have predated New York Dock, however, the concept and purpose of the applicable labor protection is involved is similar. See, e. g. Oklahoma conditions; New Orleans conditions and the Southern-Central of Georgia conditions. It should also be noted that

Consideration by Congress of employee protective measures was in terms of aiding railroad 'labor' ('workers, ' those 'who toil, ' and those belonging to unions). (See, e.g. discussion by George H. Harrison in Hearings Before Senate Committee on Interstate Commerce on the Transportation Act of 1940, 76th Cong., 1st Sess, at 34 (1939) and debate at 84 Cong. Rec. 9881-7 (1939). Therefore the Committee is of the opinion that these decisions are relevant.

McDow v. Louisiana Southern Railway Company supra is noteworthy on two bases: (1) it supports the contention that the "ordinary every day usage of the term "employee" as used in the railroad industry must be accepted and (2) that high level management such as a vice president are not protected. In McDow the plaintiff was a former vice president of the Company. He sought a court decision as to whether he was an "employee". The district court, in finding for the Company, stated:

Reasons: This case turns on the definition of the word 'employee' Nowhere in the Interstate Commerce Act is employee defined. Consequently, its meaning in ordinary every day usage must be accepted, unless the legislative history of Section 5(2) (f) of the Act would indicate otherwise. A study of the legislative history of that section leaves no doubt that the term 'employee' as used therein does not include the vice-president and general manager of a railroad. Hearings before Committee on Interstate and foreign Commerce on H. R. 2531 and 4862, 76th Congress, 1st Sess. (1930) at pages 193, 216, 1291, 1296, 1720, 1721, 1722; 84th Cong. Rec. 9881-7 (1939). Nor does the every day meaning of the word 'employee' include the vice-president and general manager of a railroad.

Similarly in Edwards v. Southern Railway Company, supra the plaintiff was a stockholder, chief engineer and son of the controlling stockholder. He was not a union member and was not covered by any collective bargaining agreement. He sought protection under the Oklahoma conditions which had been imposed by the IOC.

The Court held Edwards was not entitled to protection since he was not an "employee". Specifically, the Court held:

Neither the Interstate, Commerce Commission nor the Oklahoma conditions imposed by the IOC provide a definition of "employee". We believe, however, that 'employee' as used in the present context by Congress and the IOC surely does not include the principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidation. Edwards occupied in the small family-owned

railroad an important managerial position and, moreover, stood in a unique personal relationship to the controlling interests. We believe our decision that he is not entitled to the benefit of the protective order is supported by the legislative history of Section 5(2) (f) of the Interstate Commerce Act and by other relevant railroad law.

The court further reasoned that:

Edwards carried sufficient responsibilities, especially considered against the background of immediate family relationship, to remove him from the category of subordinate official. In *Beeler v. Chicago R. I. & P. Ry.*, 169 F. 2d 557 (10th Cir. 1948), cert denied, 335 U.S. 903, 69 S. Ct. 407, 93 L. Ed. 437 (1949), the Tenth Circuit held that an agent yardmaster was an official--as distinguished from a 'subordinate official' --and therefore not an 'employee' within the Railway Labor Act definition.

Our decision that Edwards is not an 'employee' is in accord with the principles laid down in the ICC decision cited by the district court. In the Matter of Rigs Concerning the Class of Employees and subordinate Officials to Be Included Within the Term 'Employee' Under the Railway Labor Act, 266 I.C.C. 85 (1946). The ICC, holding that certain subordinate officials, including general roadmasters and foremen and supervisors and inspectors of signals, were 'employees' under the Railway Labor Act, stated that:

in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control, without exception. 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.* * * Each proceeding, therefore, must of necessity be decided upon the record * * *. *Supra*, 266 I.C.C. at 92.

Although Edwards involved, in part a familial relationship, the Committee is of the opinion that it supports the contention that officials are not protected.

The Committee believe s that it is particularly noteworthy that one federal district court considering ICC job protection provisions has ruled that 'employees' encompass persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act but not, inter alia, officers, or department heads, and those in the next echelon, such as assistants and staff members to the department heads. In the Matter of Florida E. C. Ry., No. 4827-J, S. D. Fla., (January 5, 1960.)

The courts definition of "employee" as excluding "officers and department heads and those in the next echelon such as assistants and staff members to the 'department heads'" is applicable to the Claimants. Mr. Bond was responsible for all accounting operations and Mr. Topolosky was responsible for all personnel accounting.

In another case, Zinger v. Blanchette, supra involving a professional employee for a carrier (i.e. railroad attorney), it was contended that the ICC was required to protect "all affected railroad employees" and that he was an "employee". The Court first found there was nothing which prohibited Zinger's early retirement. The Court next commented on whether Zinger was an "employee":

Since he has failed to prove any breach of the protective agreement, we need not decide whether the plaintiff would be considered an 'employee' within the terms of the statute of the ICC order. We doubt that he would on the record here because of the lack of evidence to establish the meaning which the railroads and the ICC placed upon the word in their negotiations. Our research and that of counsel has not uncovered any authoritative court decision or ruling of the ICC in which a person in Mr. Zinger capacity has been considered an 'employee' under 5 (2) (f) of the Interstate Commerce Act....

In the Committee's opinion the Claimants held positions with the Carrier which were equal to Mr. Zinger's position. In fact, a review of Mr. Bond's and Mr. Topolosky's position descriptions reveals their positions were superior to Mr. Zinger's in responsibility and decision-making authority (Carrier Exhibits "E" and "V").

In a recent case a court of appeals case held that a supervisor who was a part of management of the railroad was not an "employee" for purposes of protective labor conditions. (Revised Interstate Commerce Act, 49 U.S.C A 11347.) Newborne v. Grand Trunk Western Railroad Company 758 F 2d 193 (C.A. 6, April 4, 1985). In finding that the claimant was a part of management at the time of his termination, the court set forth seven(7) factors in determining why the claimant was not protected by New York Dock and the Emergency Railroad Transportation Act of 1933.

These factors are set forth below:

UNION PACIFIC EXHIBIT 24
PAGE 16 OF 10

(1) appellant was a supervisor, (2) his salary was \$43,200 a year, (3) he clearly would not have been eligible to be part of the railroad bargaining unit representing "employees", (4) the record strongly suggests that plaintiff's skills were transferable; (5) he did acquire a new job shortly after being terminated by Grand Trunk Western as an administrative vice-president at a salary of \$45,000 a year; (6) he was one of only 17 executives with his former employer who were protected under a Salary Continuation Plan; and, finally, (7) Newbourn, under the Continuation Plan, continued to receive his previous salary for six months after his dismissal.

The Court further set forth the weight given to these factors:

Facts 1, 2, and 3 numbered above are not dispositive of this appeal. When, however, facts 4, 5, 6 and 7 are added, they appear to tip the balance in favor of affirmance of the District Court's judgement.

The facts in Newbourn are distinguishable from the instant case. However, the Committee notes that the court in Newbourn did distinguish the claimant as being a part of management at the time of his termination. This distinction apparently in the Court's view brought the claimant outside of the definition of employee. The claimants in the instant case were undoubtedly managerial employees.

The question of whether officials are protected has also arisen in at least one arbitral proceeding. Award No. 51 of the Arbitration Committee, ICC F. D. No. 23011. In that decision, Referee David R. Douglass held that:

The record in this case shows that the claimant was not employed in any craft or class covered by the bargaining unit during the period from February 1, 1964, until September 20, 1966. During said period of time the claimant was an official of this carrier and, as such, had voluntarily placed himself in a position beyond the coverage of the protective features as prescribed by the ICC in Finance Docket 23011. The claimant was not an employee, within the contemplation of the protective features, at the time of the merger or at the time yardmaster positions were abolished.

The Committee is of the opinion that the Claimant's were officials at the time of their termination from service and therefore are not protected by New York Dock condition.

Lastly, the Claimants contend that representation and assurances made by the Carrier's Vice President of Labor Relations before the IOC indicate that, among other things, all non-agreement employees would be afforded the same or equivalent protection as provided in New York Dock conditions. The Committee is persuaded that the Vice President was using the term "non-agreement employe" in a fashion not intending to extend the term to encompass officials or principle managers. Therefore, the Committee is of the opinion that any representations and assurances made before the IOC which did not expressly include the Claimants positions were not intended to apply to the Claimants. This assertion goes to the heart of this dispute i.e. whether the Claimants are employes or subordinate officials. The Committee has concluded that the Claimants are neither employes or subordinate officials under New York Dock condition. The Committee further concluded that the usual industry definition of employe was intended to be used in New York Dock cases.

CONCLUSION

For the foregoing reasons, the Committee concludes that the Claimants were not "employees" subject to the New York Dock conditions at the time of their termination from service.

AWARD

Claim is denied.

Robert V. Broom - "dissent"

Robert V. Broom
Claimant Member

R. D. Meredith

R. D. Meredith
Carrier Member

Thomas R. Wolff "dissent"

Thomas R. Wolff
Claimant Member

Lamont E. Stallworth

Lamont E. Stallworth
Neutral Member

City of Chicago

County of Cook

State of Illinois

Signed this 25 th day of September, 1985

ARBITRATION ESTABLISHED UNDER ARTICLE I, SECTION 11 (a)
OF THE NEW YORK DOCK CONDITIONS

* * * * *

In the matter of arbitration between: *

James M. Benham *

-and- *

Delaware and Hudson Railway Company *

* * * * *

ARBITRATION COMMITTEE

Robert M. O'Brien - Neutral Member
Douglas J. Broda - James M. Benham's Member
Daniel J. Kozak - Carrier Member

APPEARANCES

For James M. Benham - Douglas J. Broda - Attorney
McClung, Peters and Simon

For Delaware and Hudson Railway Company:

Daniel J. Kozak - Staff Officer - Labor Relations

BACKGROUND

The facts evidence that in 1984, Guilford Transportation Industries (hereinafter referred to as Guilford) acquired the Delaware and Hudson Railway Company (hereinafter referred to as the Carrier. In Finance Docket No. 29772, the Interstate Commerce Commission (hereinafter referred to as the ICC) imposed the labor protective conditions set forth in NEW YORK DOCK RY.- CONTROL-BROOKLYN EASTERN DISTRICT, 360 ICC 60 (1979) (hereinafter referred to as the New York Dock Conditions) on this acquisition. It should be noted that the Carrier had previously assumed control of the Boston and

Maine Corporation, headquartered in North Billerica, Mass. and the Maine Central Railway Company, headquartered in Portland, Maine. James M. Benham (hereinafter referred to as the Claimant) has submitted the instant claim pursuant to ICC Finance Docket No. 29772.

The evidence reveals that the Claimant entered the Carrier's service on January 14, 1969. He held a clerical position and was represented by the Brotherhood of Railway, Airline and Steamship Clerks (hereinafter referred to as BRAC) until January 14, 1980, when he was promoted to Data Research Analyst in the Sales and Marketing Department. This position was not represented by any labor organization on this property. On November 17, 1982, the Claimant was promoted to the position of Manager, Pricing and Marketing-Intermodal. Mr. Benham held this position until he resigned from the Carrier's service in 1984. This position was also a non-bargaining unit position on this property.

According to the Carrier, in his capacity as Manager, Pricing and Marketing-Intermodal, Mr. Benham was responsible for conducting market analyses and developing marketing and pricing strategies regarding intermodal service. The Carrier contends that Mr. Benham was required to exercise independent thinking and judgment in this position as well as individual initiative. However, Mr. Benham, through his attorney, claims that the Carrier has greatly exaggerated his duties and responsibilities. The Claimant insists that he in no way set or contributed to Company policy. Rather, he merely plugged

raw data into a formula determined by the Carrier to arrive at a price for transactions or shipping. The Claimant explained that while his job title made it appear that he held a managerial position, in actuality his duties were primarily clerical in nature.

On June 15, 1984, Mr. Benham was advised that he was being transferred from Albany, N.Y. to Guilford's corporate headquarters located in North Billerica, Mass., effective July 2, 1984. The Claimant's transfer was part of a corporate and department restructuring brought about by Guilford's acquisition of the Delaware and Hudson Railway Company, the Boston and Maine Corporation and the Maine Central Railway Company. Save for regional sales functions, Guilford consolidated all of its Marketing Department activity in North Billerica. The Claimant was one of nineteen (19) individuals employed by the respective Marketing Departments of both the Carrier and the Maine Central Railroad who were transferred to North Billerica. Fifteen (15) of these employees did, in fact, transfer whereas four (4) elected to resign from their positions with the Carrier.

Mr. Benham elected to transfer to North Billerica and was afforded relocation expenses in accordance with the Carrier's Corporation Relocation Policy. However, Mr. Benham did not find the working conditions at North Billerica favorable and by early August, 1984, he decided to resign from the Carrier's service. On August 6, 1984, he tendered his resignation to Mr. T.C. Perry, Vice President - Marketing & Sales. Mr. Perry agreed to retain the Claimant on the

payroll through October 1, 1984. His resignation was accepted by the Carrier on August 13, 1984. In mid-August, 1984, Mr. Benham obtained employment with Distribution Unlimited, Inc. as a sales manager. Approximately four (4) months later, he was promoted to the position of Assistant Vice President - Sales and Administration for this same company.

Approximately one (1) year after his resignation, James Benham retained the services of Attorney Homer E. Peters of the law firm of McClung, Peters, Simon and Arensberg. On September 10, 1985, Mr. Peters wrote to Mr. B. E. Rice, Vice-President - Human Resources for Guilford, on behalf of the Claimant. In that letter, Mr. Peters requested a separation allowance for Mr. Benham pursuant to Section 7 of the New York Dock Conditions. The Carrier advised Mr. Peters that, in its opinion, Mr. Benham had been an official of the Delaware and Hudson Railway Company and, as such, was not entitled to the protective benefits set forth in the New York Dock Conditions. Mr. Peters requested that the claim of Mr. Benham be submitted to arbitration.

On March 6, 1986, the undersigned Robert M. O'Brien was advised that he had been mutually selected to serve as the Neutral Member of the Arbitration Committee being established under Article I, Section 11, of the New York Dock Conditions to adjudicate Mr. Benham's claim. The aforementioned Arbitration Committee (hereinafter referred to as the Committee) met on May 2, 1986, to hear the claim of James Benham. Mr. Benham appeared at that hearing, represented by

counsel, and proffered extensive evidence in support of his claim for a separation allowance. The Carrier also submitted voluminous evidence to support its position that as an official, Mr. Benham was not entitled to labor protection benefits. In addition, both parties were given the opportunity to submit Reply Submissions to the Committee. The respective Reply Submissions were received by the Committee on or about July 1, 1984. Based on the entirety of the extensive record before us, this Committee renders the following decision.

CLAIMANT'S POSITION

Mr. Benham contends that he was an "employee" of the Carrier at the time he was relieved of employment on July 2, 1984, notwithstanding Guilford's argument that he was an "official," not an "employee." The Claimant insists that he had no supervisory authority or policy making responsibility whatsoever; he had no authority to hire or fire; he could not expend funds; he supervised no employees; and he merely set rates from a formula approved by the Carrier. In Mr. Benham's opinion, his duties as Manager, Pricing and Marketing-Intermodal were more clerical than managerial.

The Claimant further avers that the Railway Labor Act definition of an "employee" should be rejected by this Committee since labor protective statutes such as the Transportation Act of 1940 and its progeny, New York Dock, have absolutely no relation to the Railway Labor Act. The Claimant maintains that other Federal statutes have given the

term "employee" a much broader definition. According to the Claimant, the legislative history relating to the Transportation Act of 1940 clearly demonstrates that Congress intended labor protective agreements to encompass all those individuals in its employ, not merely those who are subject to union representation as claimed by the Carrier. For all these reasons, the Claimant insists that he was an employee of the Carrier when his employment terminated and therefore was entitled to the labor protective benefits mandated by the New York Dock Conditions.

Mr. Benham further asserts that the Carrier never gave him advance (i.e. 90 day) notice of his transfer to North Billerica as required by the New York Dock Conditions. Rather, it caused him to believe that he had no choice but to relocate to North Billerica or lose his job. The Carrier therefore violated Section 4 of the New York Dock Conditions, in Mr. Benham's opinion.

Mr. Benham stresses that he was entitled to a separation allowance in accordance with Section 7 of the New York Dock Conditions. He also contends that he was entitled to the protective conditions prescribed by the BRAC Master Implementing Agreement dated October 17, 1984, inasmuch as he was an employee of the Carrier who was not represented by a labor organization. Even outside the New York Dock Conditions and the BRAC Master Implementing Agreement, the Claimant submits that he was entitled to redress under 49 U.S.C 11347 inasmuch as he was placed in a much "worse position" as a

result of his forced transfer to North Billerica in July, 1984.

Based on all the foregoing, the Claimant argues that, under the New York Dock Conditions; the Washington Job Protection Agreement; and the BRAC Master Implementing Agreement, he is entitled to one year's salary less the \$4500.00 voluntarily paid him by the Carrier when he resigned.

CARRIER'S POSITION

The Carrier interposes three principal arguments to Mr. Benham's claim for a separation allowance. Initially, the Carrier contends that Mr. Benham is not entitled to a separation allowance pursuant to Section 7 of the New York Dock Conditions since he was not an "employee" as that term is customarily used in the railroad industry and applied in the New York Dock Conditions. The Carrier insists that the degree of responsibility and the level of independent judgment required of the Claimant in his capacity as Manager, Pricing and Marketing - Intermodal made him an "official," not an "employee." Yet, according to the Carrier, the ICC always intended labor protective benefits to be afforded only to "employees" of a railroad, and not to its "officials."

Even assuming, strictly arguendo, that the Claimant was protected under the New York Dock Conditions, nevertheless, he was still not entitled to a separation allowance, in the Carrier's opinion, since he was not a "dismissed employee" as that term is defined in Section 1 (c) of the New York Dock

Conditions. The Carrier stresses that Mr. Benham was not a "dismissed employee" since he voluntarily resigned his employment.

Finally, the Carrier avers that inasmuch as Mr. Benham was an official, he was beyond the scope of the BRAC Master Implementing Agreement. Consequently, the protective conditions set forth in that Agreement were inapplicable to him. For all these reasons, the Carrier respectfully requests this Committee to deny the Claimant's request for a separation allowance.

FINDINGS AND OPINION

While the underlying question before this Committee is whether the Claimant is entitled to any of the protective benefits mandated by the New York Dock Conditions, there are actually three (3) issues which must be resolved, namely whether Mr. Benham was an "employee" or an "official" of the Carrier; if so, was he a "dismissed employee" as that term is defined in Section 1 (c) of the New York Dock Conditions; and finally, was the Claimant entitled to the protective conditions provided by the BRAC Master Implementing Agreement dated October 17, 1984 ? Each of these issues shall be addressed individually in this Opinion.

WAS JAMES M. BENHAM AN "EMPLOYEE" OR AN "OFFICIAL" ?

This determination is crucial since if, in fact, the Claimant was an official of the Carrier when he left its service in August, 1984, then he is not entitled to the protective conditions provided by the New York Dock

Conditions. Conversely, were he found to be an employee of the Carrier, then Article IV of the New York Dock Conditions would govern his claim for a separation allowance.

Unfortunately, the ICC has never formulated a precise definition of either "employee" or "official." However, as a result of ICC administrative rulings; judicial decisions; and arbitration opinions under the New York Dock Conditions, criteria have evolved to assist us in determining whether Mr. Benham was an employee as he claims, or an official as the Carrier asserts.

For instance, the ICC has considered the level and the amount of supervisory authority held by one claiming New York Dock protection significant. Also, whether the position occupied by one seeking protective benefits was subject to representation by a labor organization, though not actually represented by any organization, has been considered important. Moreover, whether a claimant possessed skills which were readily transferable was deemed a relevant factor. Evidently, it was assumed that such individuals enjoy sufficient skills to enable them to protect themselves from the consequences of a consolidation and therefore do not require the protection afforded those employees whose skills are indigenous to the railroad industry.

An individual's rank and job title have not been considered controlling elements when determining whether an individual claiming protective benefits is an employee or an official. Rather, it is the nature and job content of his/her

position that is determinative. However, one's salary has been deemed a relevant consideration. This Committee wishes to state that, in our view, the degree of supervisory and policy making responsibility required of a position being evaluated must also be weighed.

This Committee agrees with the reasoning of the U.S. Court of Appeals for the Fourth Circuit in Edwards v. Southern Railway Company, 376 F. 2d, 665, wherein it quoted the ICC as follows:

"... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. 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.... Each proceeding therefore, must of necessity be decided upon the record."

Though the precise question before the ICC in the above referenced proceeding was whether a subordinate official of a railroad was an employee under the Railway Labor Act, nevertheless the reasoning of the ICC is equally applicable to disputes such as the one at hand. In our judgment, the entire record must be examined to ascertain whether Mr. Benham was an employee or an official of the Carrier when he tendered his resignation in August, 1984.

After thoroughly examining the plethora of evidence and arguments advanced by both the Claimant and the Carrier what is clear to this Committee is that the Claimant possessed attributes of both an employee and those of an official when he held the position of Manager, Pricing and Marketing -

Intermodal . For example, it appears that he did not supervise any employees; he had no authority to either hire or fire employees; his salary was less than that earned by many unionized rank and file employees on the property; and Mr. Benham's supervisory and policy making responsibilities were limited. According to the Claimant, he merely applied rates based on a predetermined formula calculated by management. Were our analysis to end here, this Committee would be inclined to agree with the Claimant that he was an employee, not an official as claimed by the Carrier.

However, the facts also evidence that Mr. Benham's position as Manager, Pricing and Marketing - Intermodal, was never represented by a labor organization on the Delaware and Hudson Railway Company. Nor, evidently, did any labor organization ever attempt to represent this position. Moreover, the Claimant obviously enjoyed skills which were easily transferable. Mr. Benham declared in his Affidavit to this Committee that he obtained employment with Distribution Unlimited, Inc. as a sales manager in the middle of August, 1984. It is significant that Mr. Benham obtained gainful employment approximately two (2) weeks after he tendered his resignation to the Carrier.

It is also noteworthy, in the opinion of this Committee, that in his capacity as Manager, Pricing and Marketing - Intermodal, Mr. Benham was entitled to numerous fringe benefits which were not granted rank and file employees, or if they were, were less beneficial than those afforded him.

Moreover, when Mr. Benham transferred to North Billerica, he was given the relocation expenses that other officials of the Carrier received. Mr. Benham was also retained on the payroll for two (2) months after he tendered his resignation which is not a benefit afforded rank and file employees.

After weighing and evaluating all of the foregoing considerations, this Committee is compelled to conclude that James Benham was not an "employee" of the Carrier and therefore was not entitled to the protective benefits prescribed by the New York Dock Conditions.

WAS JAMES M. BENHAM A "DISMISSED EMPLOYEE ?"

Even were Mr. Benham deemed to be an employee, not an official, of the Carrier at the time of his resignation, he still would not be entitled to the protective benefits of the New York Dock Conditions, in the opinion of this Committee, since he simply was not a "dismissed employee" as that term is defined in Article I, Section 1 (c), of the New York Dock Conditions. Article I, Section 1 (c), defines a dismissed employee as one who is "... deprived of employment with the railroad because of the abolition of his position...."

However, it is obvious that Mr. Benham was not deprived of his employment with the Delaware and Hudson Railway Company. The Claimant's position as Manager, Pricing and Marketing - Intermodal was not abolished by the Carrier. Rather, he voluntarily resigned this position when he found the working conditions at North Billerica not to his liking.

It is clear to this Committee that the separation allowance provided by Article I, Section 7, of the New York Dock Conditions was not available to Mr. Benham since he was not a dismissed employee. By its very terms, Article I, Section 7, provides a separation allowance only to dismissed employees. Moreover, there is no claim before this Committee that Mr. Benham was coerced into resigning his position with the Carrier. It was entirely a voluntary decision on his part for the reasons expressed in his August 6, 1984, letter of resignation which reasons he reiterated in the Affidavit he submitted to this Committee.

Inasmuch as James Benham was not a "dismissed employee" as that term is defined in Article I, Section 1 (c), of the New York Dock Conditions, he would not be entitled to a separation allowance even were he considered an employee of the Carrier at the time of his resignation.

WAS JAMES M. BENHAM ENTITLED TO THE PROTECTION PROVIDED BY THE BRAC 1984 MASTER IMPLEMENTING AGREEMENT ?

It is the considered opinion of this Committee that as an official of the Carrier, the Claimant was not entitled to any of the protective benefits provided by the BRAC Master Implementing Agreement. The provisions of that Agreement were obviously not extended to officials of the Carrier. Furthermore, it must be noted that the BRAC Agreement was executed on October 17, 1984, two (2) months after Mr. Benham tendered his resignation to the Carrier. Even were that Agreement retroactive as he claims, nevertheless Mr. Benham would not be entitled to its protective benefits since his

position as Manager, Pricing and Marketing - Intermodal, never fell within the scope of the BRAC collective bargaining agreements. The Claimant's position was not encompassed within BRAC's jurisdiction even though Mr. Benham retained his BRAC seniority while serving as an official of the Carrier. In our judgment, Mr. Benham was simply not a protected employee working under the scope of the BRAC Agreement and was therefore not entitled to the protective conditions which BRAC secured for its members by the October 17, 1984, Master Implementing Agreement.

AWARD

James M. Benham was not entitled to a separation allowance under the New York Dock Conditions nor was he entitled to the protective benefits provided by the 1984 BRAC Master Implementing Agreement. Accordingly, his claim must be denied.

Robert M. O'Brien
Robert M. O'Brien, Neutral Member
Dated: 11/29/86

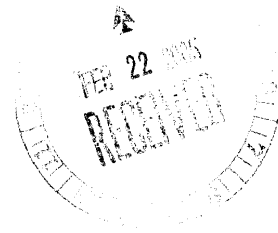
Douglas J. Broda, Claimant's Member
Dated:

Daniel J. Kozak 12/2/86
Daniel J. Kozak, Carrier Member
Dated:

In the Matter of Arbitration :
Between :
B.J. Maeser, T. P. Murphy, E.M. :
Sengheiser and K.W. Shupp :
and :
Union Pacific Railroad Co., :
Missouri Pacific Railroad Co. Pur- :
suant to New York Dock Conditions :
Imposed by the Interstate Commerce :
Commission in Finance Docket No. :
30,000 :

.. .. .

Arbitrator : Jacob Seidenberg, Esquire
Hearing : August 19-20, 1987 St. Louis,
Missouri
Appearances : Claimants
Bill T. Walker, Esquire
Jonathan McKee, Esquire
Frank Baxendale, Esquire
all of Law Firm of Bill
T. Walker & Associates
Carriers
Richard A. Judes, Esquire,
Counsel
Richard A. Meredith, Esquire,
General Director of Labor
Relations
Post Hearings Briefs - Received : October 20, 1987
" " Reply Briefs - Received: November 2, 1987
Issues : (1) Are Claimants "employees"
within the meaning of
New York Dock Conditions?
(2) Are the Claimants entitl-
ed to either a dismissal
or displacement or sever-
ance allowance under New
York Dock Conditions?
(3) Did the Claimants receive
the proper vacation allow-
ances they were entitled
to receive for year 1984?



AWARD AND DECISION

- (4) Did the Union Pacific RR interrupt the Claimants business or employment relationship with the Missouri Pacific RR?

Background: This dispute arises as a result of the merger effected between the Union Pacific RR, the Western Pacific RR and the Missouri Pacific which, upon ICC approval, became effective on December 22, 1982. The Carriers' petition for approval of the merger was filed with the ICC on September 15, 1980 and resulted in two years of hearings. The ICC imposed New York Dock Labor Protection Conditions as part of its approval.

The gravamen of the dispute arises from the decision of the merged Carriers to consolidate the existing Marketing Departments into one department of the UP located in Omaha, Nebraska. The Union Pacific extended an offer to the Claimants to become part of the merged Department at their existing MP salaries, but the offers were not accepted for the reasons hereinafter stated.

The Claimants were individuals who had long periods of employment with the Missouri Pacific and had been employed in Marketing and Sales Department in St. Louis, Missouri.

The specific jobs, salaries and length of service of the Claimants when their employment ceased were:

B.J. Maeser - General Manager - Marketing Commodities
\$75,000 employed from 1951.

T.P. Murphy - Administrative Assistant to General Manager - Marketing Commodities - \$39,720 -
1950

E.M. Sengheiser - Director of Marketing, Chemicals and
Petroleum Products, \$61,000 from 1957.

K.W. Shupp - Supervisor- Files, Mail and Supplies -
\$38,760 - 1941.

The record discloses that Claimant Maeser executed on July 15, 1983 a Separation Allowance Memorandum wherein he stated that, in lieu of accepting proffered employment with the Union Pacific RR in Omaha which would require a change in residence, he elected to resign from the Missouri Pacific RR and accept a lump sum severance of \$35,000. The Claimant wrote at the bottom of his Separation Memorandum:

"I hereby reserve my right to seek such benefits
to which I am legally entitled." (Carrier Ex. #43)

A similar Separation Allowance was executed on July 15, 1983 by Claimant Shupp (Carrier Ex. #10). On June 17, 1983 Claimant Murphy (Carrier Ex. #26) and Claimant Sengheiser (Carrier Ex. #22) executed the same Separation Allowances.

On February 10, 1983, Claimant Shupp wrote Missouri Pacific Assistant Vice President Colvin that, in addition not to electing to transfer to Omaha, and instead electing to take his severance pay, he was also electing to take his UPRR and railroad retirement pension (Carrier Ex. #9).

The antecedent for the aforesaid Claimants' actions was a January 27, 1983 Memorandum from then Vice President of Traffic, G.A. Craig, to all non-agreement employees in the Sales and Marketing Department who had been offered a position in Omaha, stating they also had the option of receiving a retirement allowance, if

they elected to resign their employment and not transfer to Omaha. The Severance Allowance was based on length of service with the Missouri Pacific with a cap of \$35,000. The Craig Memorandum stated, inter alia, that the offer was not available to any employee who was offered a position in St. Louis and that the employee's decision to accept or reject the offer of severance pay in lieu of transfer to Omaha, had to be made before 5:00 PM, February 14, 1983 (Carrier Ex. #1).

After the merger was legally effected in December 1982, the Carrier distributed certain memoranda and a booklet (Claimants' Ex. #4) which purportedly set forth the benefits available to non-agreement employees of the merged railroad, which were the UP benefits.

As stated early in 1983, the Carrier offered employment to the Claimants in Omaha at their present salaries in the merged Marketing Department. The Claimants refused the offer to transfer and took severance allowances after tending their resignations. After the Claimants took their separation allowances, left the employment of the Carrier they then filed a law suit in the Missouri State Courts in 1985 for an alleged interrupted business relationship. The Carrier moved in 1986 to have the suit removed to the federal court for the Eastern District of Missouri. Subsequently the Carrier filed a motion to compel arbitration of this dispute pursuant to the provisions of the New York Dock Conditions. On October 23, 1986 the parties executed a stipulation to arbitrate. The parties selected the Undersigned to be the Arbitrator from a

list furnished them by the National Mediation Board. At the arbitration hearing held on August 19-20, 1987 the parties presented their respective positions, by witnesses and in writing.

The arbitration hearing resulted in a 505 page transcript, 61 Claimants Exhibits and 6 Carrier Exhibits, plus extensive post hearing and reply briefs.

The relevant Statutes, Decisions, Awards and Rulings are the following

New York Dock Conditions which state in part:

"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 the 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 ...

....

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employee, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction ...

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 the protective period be paid a monthly displacement allowance...

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 ...

"7. Separation allowance - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided for in this appendix) accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

...

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 been entitled under this appendix, this appendix will apply to such 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."

Railway Labor Act (45 U.S.C. Chapter 8) in Section 151, Fifth states in part:

"Fifth. The term 'employee' as used herein includes every person in the service of the 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 ..."

Section 11347 (49 U.S.C.) states in part:

"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 ..."

Rail Passenger Service Act (45 U.S.C. 565) states in part:

Section 565

...

(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 terminal company, (2) a retired employee of a railroad or terminal company and (3) the dependents of any employee to in clause (1) and (2) of this sentence."

Milwaukee Railroad Restructuring Act (Title 45, Chapter 18)

states in part: "Section 902(4)

... the term 'employee'

- (A) includes any employee of the Milwaukee Railroad who worked on a line of each 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 board of directors or any other person performing such functions."

Rock Island Railroad Transition and Employee Assistance Act

(Title 45, Chapter, 19) states in part in Section 1002:

"(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."

The 1980 Staggers Act P.L. 96-448 contains the same definition of "employees" as set forth in the Milwaukee and Rock Island Statutes.

The detailed respective positions are:

Claimants

B.P. Maeser

The Claimant maintains he is an employee of the Carrier within the meaning of the ICC imposed New York Dock Conditions. He asserts that he became a "displaced" employee as a result of the

offered job in Omaha as Director of Pricing Services for the reasons subsequently set forth. The Claimant asserts that the language and the rulings of the ICC regarding "employee" and "subordinate official" or the language of the Railway Labor Act purporting to define "employee" or the language of the Rail Passenger Service Act defining "railroad employee" are not relevant, because these statutes, the orders and rulings issued thereunder were for the purpose of making clear what was the area of collective bargaining. These statutes sought to delineate the parties who could properly negotiate collective bargaining agreements.

The Claimant states those considerations which compelled the Congress, the ICC and the National Mediation Board to ensure that labor unions and carriers in the railroad industry would be able to freely, and without limitation, negotiate for wages and terms and conditions of employment, are not the same considerations which motivated the Congress to enact legislation to ensure that employees should not be adversely affected by merger or consolidations of two or more railroads. The Congress that enacted the Railway Labor Act was a Congress with different concerns than the Congress that enacted 49 USC 11347 mandating that the ICC provide for arrangements that would ensure the affected employees would not be in a worse employment position for at least four years or less, as a result of a railroad merger or consolidation.

The Claimant stresses the purpose of this arbitration proceeding is to effectuate the Congressional will and intent as stated in the aforesaid Section 11347. The Claimant stresses that

a long line of ICC decisions reveal a consistent Agency policy to carry out the Congressional intent. The Claimant insists that Section 151 of the Railway Labor Act was not intended to provide a generic definition of an employee in the railroad industry. Its purpose was to limit that class of employees subject to unionization, including subordinate officials, as so declared eligible by the Commission. The Claimant maintains that Congress, neither in 1926 nor 1934 was enacting guidance as to who were to be "employees" under New York Dock.

The Claimant asserts that the industry use of the term "employee" relates to the administration and effect of the Railway Labor Act. It is significant, however, that industry discussions of protective conditions concerning adverse effects of mergers frequently use specific language to embrace consideration of "all employees."

The Claimant states that when the cited Court cases are analyzed, it appears the Fifth Circuit held in the McDow case that the District court should not have decided whether a former vice president of the railroad was an "employee" for the benefits of protective conditions. The District Court had held that a study of the legislative history of the ICC Act left no doubt that the term "employee" did not include a vice president and general manager of the railroad. In the Edwards case the Fourth Circuit Court held that a stockholder and Chief Engineer of a small family owned railroad was not an employee for purposes of protective benefits. The Claimant stresses that the significant language of the Court's

decision was that the protective conditions were not intended to cover those employees who were in a position to protect themselves from the adverse effects of the merger. The Claimant states this concept was endorsed in the Newborne case when the Sixth Circuit held that a former supervisor was not an "employee" because he possessed transferable skills and was able to take care of himself, and in fact did.

The Claimant notes the ICC in its Burlington Northern Decision (348 ICC 962) stated that it was deferring to those familiar with labor law (arbitrators) with respect to the complexities of protective conditions disputes. The Claimant contends this is the reason that one should not look either to the ICC or the Courts for authoritative decisions on this issue. The Claimant notes that the ICC in the Bell case made it clear that its authority to classify employees under the Railway Labor Act does not extend to classifying employees for the purpose of employee protection coverage.

The Claimant maintains that the ICC has applied a narrow meaning to its organic legislation in determining its jurisdiction to decide when employees are covered by protective conditions of New York Dock. The Claimant adds that despite Section 11347 has its roots in the 1936 Washington Job Protection Agreement, the legislation must be viewed in light of general welfare and not within the narrow interest of railroad carriers and labor unions. The Claimant stresses that there is no language in the relevant legislation that would indicate the congressional intent was to deny

the Claimants the benefits of New York Dock Conditions. He further stresses that it is to ignore reality to contend that it was the intent of Congress to deny the Claimants the benefit of New York Dock, and to maintain that only subordinate officials and other employees eligible for unionization, will be adversely affected by a merger.

The Claimant notes that on those specific occasions when the Congress has definitely addressed the question as to those employees who should be covered by protective conditions, i.e., the Milwaukee Railroad Restructuring Act (1979); Rock Island Railroad Transition and Employee Assistance Act (1980) and Staggers Rail Act (1980), it made all employees eligible for the protective conditions below the rank of top corporate officers. The Claimant states this Congressional action is consistent with the philosophy that protection should be afforded those who have little or no control over the merger developments which precipitated their need for protection.

The Claimant stresses the definition of displaced or dismissed employees set forth in New York Dock applies to all the Claimants in this proceeding due to the circumstances of their departures from the Carrier's service.

The Claimant states that if they are employees under New York Dock, then, by virtue of Article IV they are entitled to substantially the same level of protection even if they are not dismissed or displaced employees. The Claimant adds Article IV of New York Dock

is not ambiguous. It notes that the Carrier negotiated an Implementing Agreement with the Brotherhood of Railway and Airline Clerks and the Claimants are entitled, as a minimum, to receive those benefits.

The Claimant asserts that New York Dock establishes minimum conditions and employees are entitled to negotiate more favorable conditions than those in New York Dock, and Article IV clearly states that non-agreement employees are to be treated substantially the same as agreement employees. The Claimant stresses the argument that under Dock, relief is limited to those employees who are dismissed or displaced as contemplated by Article I, Section 1(b) and (c), ignores Article IV. The Claimant further notes that Article I, Section 4 that provides for negotiation or settlement by arbitration of disputes involving displacement or dismissal of employees or re-arrangement of forces.

The Claimant states there is no merit to the Carrier's position that it would be impossible to administer agreements that afforded non-agreement employees the same level of protection that union members obtained through negotiations. The Claimant asserts that the work "substantially" provides a practical standard for administering the level of benefits. The several union implementing agreements have or should have a thread of commonality reflecting a carrier policy of fairness to all. It was the intent of Congress that non-agreement employees should be the beneficiaries of the same policy. The Claimant asserts there is no valid reason why all railroad employees should not enjoy the same level of job protec-

tion on ICC sustained mergers.

The Claimant states that the interpretation of Article IV that would require non-agreement employees to be dismissed or displaced as defined in New York Dock would deny the Claimants the higher level of protection accorded senior clerks under the BRAC Implementing Agreement No. 1. The Claimant adds that if the Claimants are entitled to the same benefits, they are entitled to higher severance pay.

With respect to the facts why Claimant did not accept the transfer to Omaha, he testified that he was the victim of a vendetta launched against him by Vice President Colvin. Although he had come up through the ranks, starting as a messenger in 1951 to become General Manager-Marketing-Pricing in 1979, and had been rewarded with numerous promotions, raises and substantial bonuses, his 32 years of faithful service was cast aside at the time of the merger because Mr. Colvin wanted to punish him for previously disciplining M.L. Holland, his close friend.

The Claimant testified he was a displaced employee when Mr. Colvin stated there was no place for him in the Business Groups of the merged Department, despite his 32 years of experience in all facets of marketing-pricing traffic work, as well as conducting negotiations for rates with important MP customers.

Claimant Maeser testified that he was demoted by virtue of the Omaha job offer. He stated he would be forced in Omaha to work for individuals who had formerly worked for him. He added that his opportunities to earn further promotions, salary increases and bo-

nuses were virtually dead since his present salary would place him at the midpoint of the offered Director's job.

The Claimant stated that the proffered job in Omaha was such an indignity and blow to his pride that Mr. Colvin knew that he would not accept it and thus Colvin achieved his goal of getting rid of him. The Claimant stated he talked to Vice President Ostrow about the job being offered him and he asked whether there was anything that could be done about it. Mr. Ostrow stated he would see what could be done but the Claimant never heard from him. Mr. Ostrow told the Claimant to discuss the matter with Mr. Barger who was coordinating merger activities. The latter repeatedly told the Claimant he would take the matter up with UP Vice President Craig, but it was not until April 14, 1983 that he was told that VP Craig said nothing could be done for the Claimant. The Claimant stated he made several attempts to ascertain when the Carrier wanted him to leave, although initially he had been told it wanted him to "turn out the lights" in St. Louis. Finally Mr. Barger told him his services would be terminated on July 15, 1983, but on June 22, 1983, he received an abrupt telephone call from Mr. Barger ordering him "to pack his things and go." A security officer appeared at his office to ensure that he promptly left that day. The Claimant denied the Carrier's allegations that he intended to take any computer printouts of carrier customers when he left.

The Claimant summarized the specific reasons for not accepting the Omaha job. In the first place his proposed job was downgraded because it carried 1308 Hays points while his Missouri Paci-

fic job carried 1560 points. He was being shunted outside of the Marketing Group and would have had to work for people whom he had formerly supervised. The UP incumbent of the job offered to him was to be promoted to Manager, but this individual would be two levels below what the Claimant already was. On an overall basis the Claimant maintained he was not going to be utilized in the marketing area where he had demonstrated competence and ability for many years and was being reduced to service functions where he would be serving individuals who had formerly worked for him. The Claimant added the testimonial letters he received from customers were ample proof there was no merit to the Carrier's allegations that he was not able to get along with customers. The Claimants stated he was being put down by the proffered job offer in Omaha and publically humiliated. He was also placed in a worse position because his opportunities to obtain bonuses and future wage increases were appreciably diminished.

The Grievant stated that under all these facts and circumstances of his situation, he was clearly a displaced or dismissed employee who was placed in a worse position as a direct result of the merger.

The specific monetary aspects of Mr. Maeser's claim will be set forth in the Section dealing with damages.

E.M. Sengheiser

Claimant Sengheiser presented the same analysis of the New York Dock Conditions, the Congressional legislation, and the relevant rulings thereunder that Claimant Maeser advanced, to show

that he was also an employee within the coverage of New York Dock Conditions, and he was also a dismissed or displaced employee thereunder and entitled to the afforded protection. Sengheiser further stated that as an employee under New York Dock, he was entitled to the same level of protection afforded the union employees by their negotiated implementing agreement, even if he were not a dismissed or displaced employee under New York Dock.

The Claimant states that he was an employee rather than official of the Carrier because he did not have the authority to hire or fire; he could not discipline, promote or demote, or formulate Company policy. His authority was confined only to making recommendations, and he had no way of knowing what weight was accorded his recommendations. The Claimant added his authority to make marketing contracts was limited to acting within expressed guidelines. He noted that he was at least seven reporting levels below the ultimate decision making level.

The Claimant stresses that since he did not hold an executive level position he therefore was an employee within the purview of New York Dock protective conditions.

The Claimant concedes that he occupied a non-union position, but that does not go to the core issue as to whether he was in a position to take care of himself under the merger. The Claimant asserted that he had no transferable skills and therefore was an employee properly entitled to receive the protection of New York Dock.

The Claimant states he became a displaced or dismissed em-

ployee when the Carrier refused to negotiate with him or give him any assurances with regard to the offered Omaha job. The Claimant asserted that the security of the offered Omaha job was illusory in that he was being transferred to Omaha for the purpose of training a UP-successor after which he would be discharged or demoted as had happened to other MOP employees such as Messrs. Coale, Mc Laughlin and Looney.

The Claimant explained that the position offered him was the largest revenue producing commodity group in Omaha, and the other six commodity groups were held by UP personnel. This situation made him apprehensive and he believed that as soon as he imparted his knowledge to a UP manager, he would be replaced. He stated he was concerned that once he moved to Omaha and took the position, he would lose his rights to severance pay and other benefits. This was the reason he sought some assurance from the Carrier that he would not be terminated or demoted as soon as he trained a UP employee in his job. The Claimant states the Carrier's refusal to negotiate on the items he raised, was proof positive that the Carrier's offer was illusory and not made in good faith. This conclusion is buttressed by the fact that all the other Group Product Managers were receiving salaries in excess of his.

The Claimant further states that under Article IV of New York Dock, even if it is found that he was not a displaced or dismissed employee under Dock, he was entitled to receive substantially the same level of protection that the Carrier had negotiated with BRAC. At the very least, the Claimant maintains he is entitled to sever-

ance pay at 17½ months service, and as a dismissed employee he is entitled to receive all the benefits for protected employees.

T.P. Murphy

The Claimant asserted he was an employee entitled to the protective benefits of New York Dock despite his job title as assistant to the General Manager, Marketing Commodities, when his employment terminated in June 1983.

The Claimant adopted all the reasons set forth in the analysis made in Claimant Maeser's Submission as to why he was a New York Dock covered employee. The Claimant asserts that he has not carried out the duties described in his Job Description, such as coordinating the administrative subsections of the Marketing Department; assisting the General Manager, Marketing, by providing him with statistical data, reports and special projects; protecting the Carrier's interests at various committees; assisting the Assistant Vice President - Marketing, by preparing background information to aid the AVP when he called on major shippers.

The Claimant testified, on the contrary, that his actual duties for the past ten years were to perform personal acts and favors for Carrier officials. The Claimant stated he did personal favors for several AVP's such as depositing their payroll checks, chauffeuring these officials and members of their families to airports and other locations on non Carrier functions. The Claimant took care of the automobiles of these officials and assisted in performing certain repair duties at their homes.

The Claimant maintained his duties were menial and not the

sort of duties that a high ranking official performs in the course of his executing his formal job duties. The Claimant states he did not supervise any employees; he could not fire or hire anyone, and he certainly was not a policy making official.

The Claimant stresses his work record since his termination reveals he was not able to protect himself from the adverse consequences of the merger. His post merger jobs were as a baggage handler for a small airline and at present to deliver daily newspapers. The Claimant states to hold that only union employees are entitled to the protection of New York Dock Conditions is to ignore reality.

The Claimant asserts he was a dismissed employee because he was never offered a job in Omaha. He notes that when the January 27, 1983 list of invitees to the Omaha orientation meeting was distributed, he was not on that list. The Claimant states this list was prepared before he officially informed the Carrier that he was unable to transfer to Omaha. The Carrier was aware he could not transfer to Omaha because of his wife's health.

The Claimant maintains that he was not offered a job in St. Louis as Assistant Manager Rate Quotation, because this position was a token position. Since this job was for a short term if the Claimant had accepted, it would have meant he had to forfeit his Severance Allowance. The Claimant asserted he was not in a financial position to terminate his employment without the severance payment. For this reason the Claimant stated he sought to obtain an assurance from the Carrier that when the temporary job in St. Louis ceased, he would still be eligible to receive the Severance Allowance. The Claimant adds that Mr. Barger's letter of April 28,

1983 was not an unequivocal assurance that the Claimant would receive the guarantee he requested. In any event, the letter from Mr. Barger was not such a high carrier official who could give him the guarantee he needed. The Claimant stated that under the circumstances, he was forced to take the severance allowance rather than run the risk of receiving nothing at a later date when the temporary St. Louis job ended.

The Claimant states that since the Carrier had no intention to transfer him to Omaha, he was forced into a no-win position when his job was abolished. He was beyond question a dismissed employee under New York Dock.

The Claimant advances the same arguments previously set forth by the other Claimants to show that the Claimant is an employee under New York Dock, even though not a dismissed or displaced employee, and was entitled to the same level of protection afforded labor union members. The Claimant also presented the same arguments that the other Claimants did to demonstrate that Congress intended non-agreement employees to enjoy the same protective condition benefits that union members did from their implementing agreements.

The Claimant notes that other MOP employees, after the transfer, were given jobs in St. Louis and received full protective benefits. The Claimant asserts he only wanted to be treated the same way as these employees were, especially in light of his more than thirty years of devoted service to the Carrier.

W.K. Shupp

Claimant Shupp, Supervisor of Files, Mail and Supplies con-

tends that he was an employee of the Carrier within the meaning and intent of the New York Dock, for all the reasons advanced by the other Claimants. He was not only an employee but he was a dismissed employee because he was never offered a position in Omaha. He asserts proof that he was not to be transferred to Omaha can be gleaned from the fact that he was not invited to attend the Omaha meeting in January 1983 to get acquainted with this new community and he was not offered a specific job in Omaha. The Claimant added that there was no specific job in the UP organization that was comparable to his position in St. Louis. He stated his supervisors could not tell him what kind of job he would have in Omaha except to state that it would be in the file room. However he was never able to evaluate what kind of position he would occupy.

The Claimant states the testimony of the MOP officers reveals that they did not know specifically whether he was offered a job in Omaha. He maintained, in short, the Carrier overlooked him in the crunch and the pressures of the reorganization.

The Claimant testified that the only UP job in Omaha somewhat comparable to his, was held by John Lenahan and it paid several thousand dollars less than his MOP job.

The Claimant maintains that because he could not get a satisfactory explanation as to what kind of job to which he might be transferred, he had no recourse but to sign the separation allowance agreement, for otherwise he might be left without either a job or the separation allowance. He had no choice but to protect himself because he was a dismissed employee.

The Claimant asserts his MOP job was that of a head clerk in the Mail Room with no duties of an official of the Carrier. He had no policy making functions and could not hire or fire anyone. He was an employee and a dismissed employee under New York Dock.

The Claimant also advances the same Article IV arguments set forth herein by the other Claimants.

Carrier's Position

With respect to issues of whether the Claimants were employees under the New York Dock Conditions and to the ancillary issue as to whether they were displaced or dismissed employees thereunder, the Carrier states both issues must be answered in the negative.

The Carrier states that the Claimants both by virtue of their rank in the Company and because of their status of non union employees, they were officials rather than employees of the Carrier. The Carrier stresses the Claimants occupied positions of such rank and responsibility that they must be considered as having held official positions, and therefore they were not employees within the meaning of New York Dock Conditions, and consequently not entitled to the benefits of New York Dock.

The Carrier notes that Claimant Maeser was the General Manager for Marketing Commodities charged with the responsibility of maximizing MOP revenues through effective marketing and pricing procedures. He received a salary of \$75,000 annually plus large bonuses. He reported to the Assistant Vice President of Marketing, and in turn directly supervised five Marketing Directors, an Administrative Assistant and a Secretary, as well as indirectly reporting

UNION PACIFIC EXHIBIT 26
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to him 41 non-union and 24 union employees. The Carrier states Claimant Maeser supervised an annual payroll of \$2,400,00 and the 1981 gross revenues of his Department were \$1.7 billion.

The Carrier asserts it is clear that Claimant Maeser was a high ranking official and not an employee who was subject to unionization, and therefore outside the scope of New York Dock Conditions.

With respect to Claimant Sengheiser, he was a Director of Marketing-Chemicals and Petroleum Products, charged with developing marketing and pricing strategems for maximizing revenues for his assigned commodities. He directly supervised four Marketing Managers and indirectly supervised six non-union and 8 union employees. He supervised an annual payroll of \$556,600 and the value of the 1980 gross revenues of the commodities he handled was \$377,000,000.

The Carrier states Claimant Sengheiser received an annual salary of \$61,000. He held an important high ranking official position and was not subject to unionization and therefore he could not be considered an employee entitled to New York Dock benefits.

With respect to Claimant Murphy, the Carrier asserts that his job as Administrative Assistant to the General Manager-Marketing Commodities, required him to maintain the efficient operations of the Marketing Department by coordinating the administrative activities of the subsections of the Department, and to give assistance to both Assistant Vice President and General Manager in preparation of calls to major shippers, and also furnish background information

on rate proposals and pending legislation.

Claimant Murphy was paid \$39,720 annually. The Carrier asserts that, while Claimant attempted at the arbitration hearing to downgrade the importance of his position and convey there was little to his job other than personal service duties for various officials, the Carrier stated this testimony should be disregarded and credence be given to Vice President Colvin's testimony that Claimant Murphy performed somewhat limited external duties for Carrier officials when their official duties required them to be at least 50% of their time away from their offices.

Mr. Colvin testified that Claimant Murphy performed the duties described in his official Job Description and these duties were components of an important job. The Carrier stated that the Administrative Assistant position qualifications required years of training on clerical and supervisory assignments to gain the experience to execute the duties of the job effectively. The Carrier states the Claimant was an official and not an employee of the Carrier.

With respect to Claimant Shupp, the Carrier states that his position of Supervisor of Files, Mail and Supplies of the traffic Department required him to provide administrative support for this Department, by maintaining adequate clerical staff and services by maintaining current freight tariff files, furnishing and distribution mail between the Department, the general offices, shippers and government agencies. He had to maintain services and information to MP personnel. The Carrier adds Mr. Shupp supervised 13

persons with an annual payroll of \$287,000. His annual salary at the time of his resignation was \$38,760.

The Carrier states that Claimant had an important official position which was outside the scope of unionization. Carrier officers such as Vice President Colvin and Assistant Director of Labor Relations Naro regarded the job as an important official post and part of management.

The Carrier states that all four Claimants held official positions and were not employees as the term was used in New York Dock. It further states that the Claimants do not meet the requirements of Article IV since they were not employees of the Carrier not represented by a labor organization. Since they were not employees, they derived no rights under Article IV of the New York Dock. This Article asserts that non agreement "employees" who are dismissed or displaced will receive substantially the same dismissal, displacement, and separation allowances to which agreement employees are entitled. Article IV makes it clear that its provisions apply only to non agreement "employees." Since the Claimants are not employees they derive no rights from Article IV.

The Carrier further contends, arguendo, that even if any of the Claimants were "employees" under New York Dock, they still would not be entitled to any of the benefits thereunder, because none of them was either a dismissed or displaced employee.

The Carrier stresses that each Claimant was not dismissed or displaced because they were offered a position in Omaha in the consolidated Marketing Department with no reduction in salary or

other basic compensation. It adds that if the Claimants had accepted these offered positions, they could not claim to be dismissed or displaced employees. The Carrier states that the Claimants suggest that by rejecting the Carrier's job offers, they became dismissed or displaced employees.

The Carrier adds that a review of the testimony of each Claimant reveals that they were not dismissed or displaced employees.

The Carrier notes that Claimant Maeser turned down the job because of its alleged lowered responsibilities which he regarded as an indignity to him. It adds that Claimant Maeser spurned the offered job despite he would suffer no reduction in salary, only because he did not like the job. The Carrier maintains that under New York Dock he cannot be a dismissed or displaced employee because he resigned his employment due to his personal feelings about the proffered job. He was not adversely affected when he suffered no financial loss. He was upset because he was not made one of the nine Group Managers in the consolidated Department.

With respect to Claimant Sengheiser, he admitted that Vice President Colvin offered him a position as a Group Market Manager at the same salary, but he rejected the offer because the Carrier would not accede to the several conditions he attached to his conditional acceptance, the primary one being a six month trial period and the option of receiving severance pay at the end of this period, and then a two year contract at the end of the trial period to maintain his present job and salary. The Carrier asserts

that the Claimant made it clear in writing that if the Carrier did not accept all his conditions, it could then treat his letter of conditions as a notification of his election to resign and accept severance pay. The Carrier states it refused to agree to the conditions laid down by the Claimant in order for him to transfer to Omaha, thereupon, the Claimant resigned and took his severance pay. This act did not make him a dismissed or displaced employee within the meaning of New York Dock.

The Carrier asserts that it offered Claimant Murphy two rather than one job. It notes Claimant Murphy admitted he received Vice President Craig's January 1983 letter offering him a comparable job in Omaha at his present salary, albeit the job was unspecified. The Carrier adds that although it met its obligation to Claimant Murphy by its Omaha job offer, it went further and offered him a job in St. Louis but Mr. Murphy rejected this job offer unless the Carrier would guarantee him employment until he was 55 years old, four years away, or allow him the \$35,000 severance pay if this St. Louis job ceased. The Carrier stated that its coordinating official, Mr. Barger wrote Claimant Murphy stating that he would be allowed severance pay if his St. Louis job was terminated and no comparable jobs were offered him. However, Mr. Murphy did not regard Mr. Barger's letter as giving the kind of assurance he needed, despite the fact that a copy of Mr. Barger's letter was sent to two ranking Carrier officers, Vice President Ostrow and Mr. Colvin. After receiving Mr. Barger's offer Claimant Murphy then modified his demand, i.e., he would take the St. Louis

job if the Carrier would guarantee that it would last until February 1984, when the Claimant would be eligible for an early retirement. The Carrier asserted that when it rejected this last condition, Claimant Murphy resigned and took his severance pay.

The Carrier maintains that Claimant Murphy could not be considered a dismissed or displaced employee after having rejected two job offers of a salary equal to his then present job.

The Carrier concludes by contending Claimant Shupp was also offered a job at his present salary in Omaha. The Carrier admits the Claimant was not offered a specific job in Omaha, but was told by Marketing Vice President Ostrow that it would be in the Mail Room and similar to his St. Louis job. In his letter of resignation, Mr. Shupp admitted he had been offered a job in Omaha, but he had exercised his option to retire early and collect his severance pay.

The Carrier notes that at the Arbitration Hearing Claimant Shupp testified his wife was employed in St. Louis and would not have relocated to Omaha. The Carrier adds since Mr. Shupp was eligible for early retirement, he refused to transfer to Omaha, and took his severance pay and early retirement. After Mrs. Shupp was eligible to retire from her job, both Mr. & Mrs. Shupp retired to Oklahoma. These facts show that Claimant Shupp refused the Omaha job for personal reasons, and therefore could not be considered as a New York Dock displaced or dismissed employee.

Vacation Pay Claims

In addition to claims filed by the four Claimants for dis-

placed or dismissed employee allowances, as well as additional severance allowances pursuant to the provisions of New York Dock, the Claimants maintained that the Carrier erred in computing their vacation allowances under the Union Pacific rather than the Missouri Pacific formula. The dispute devolved on how the 1984 aspect of the vacation pay should have been calculated.

There are five documents in the record bearing directly on this question.

Claimant's Exhibit #1 was a Question and Answer Sheet prepared on January 26, 1983, covering subject matters raised at a January 24, 1983 employee meeting pertaining to the Omaha move. The question raised was whether vacation rights on the Missouri Pacific would be "grandfathered?" The answer given was that a MP employee who had an accrued vacation greater than that provided by the UP vacation plan, would have his or her vacation frozen until he had sufficient service to qualify for more vacation under the UP plan. This Q&A memorandum was signed by Mr. Barger who was the Carrier coordinator of the move of MP employees from St. Louis to Omaha.

In a letter dated January 28, 1983 (Claimants' Ex. #2) from Chairman Kenefick of the MP Board, it stated, inter alia that MP employees would not receive less vacation than they were entitled to receive under the MP plan. In Claimants' Exhibit #3, MP Vice President Angst, wrote MP employees on February 9, 1983, that under the UP vacation plan, they would not provide less vacation than that provided for by the MP plan.

In February 1983 the UP distributed a booklet to UP and MP employees explaining the UP Benefit Program (Claimants' Ex. #4).

This booklet stated in part at page 0-3:

"Vacation Rights at Termination

If you are terminated for any reason, you will receive full pay for vacation time not taken in current year plus vested vacation accumulated for the following year. Vacation accrual is based on complete months of service."

On April 28, 1983, UP Vice President Jordan, Personnel, wrote to ranking officials of both Carriers that the following was the UP vacation policy for current MP employees (Claimants' Ex. #5).

"Vacation time will be determined by years of continuous service as outlined in the Union Pacific Railroad Benefit Handbook. In no event, however, will current transferred Missouri Pacific ... employees receive less vacation than they were entitled to under their respective vacation schedules as of December 31, 1982."

Claimants' Position

The Claimants contend the Carrier erred when it paid them their accrued vacation in June and July 1983 under the UP formula. They received less vacation pay than they would have received under the MP formula.

The Claimants stress ranking officials stated in writing that MP employees would not receive less vacation than they were entitled to under the MP Plan. The January 26, 1983 Q&A Sheet stated that vacation rights under the MP were "grandfathered." Both Chairman of the Board Kenefick and VP Agnst asserted MP employees would enjoy a vacation that would not be less than they enjoyed under the MP plan as of December 31, 1982.

The Claimants contend there is no merit to the Carrier's position that the UP Benefit Booklet issued in February 1983 put the MP employees on notice that their vacation benefits were to be computed in accordance with the UP formula. The Claimants further contend that this Booklet cannot be held to have put the MP employees on notice that it constituted a repudiation of the representations made by ranking officials of both the MP and the UP. If any ambiguity exists, it should be construed against the Employer. It cites the Missouri State Court case of Hinkeldey vs Cities Service Oil Co. (1971) in support of this principle.

The Claimants also stress that UP Vice President Jordan's April 28th letter was circulated more than two months after the UP Booklet was issued.

Carrier's Position

The Carrier maintains that it correctly calculated the 1984 vacation pay for the Claimants after they resigned their positions. Of all the exhibits cited only Exhibit #4 (booklet) is relevant. This booklet clearly set forth the UP's completed months of service formula would be used to determine vacation accrual for calculating the amount of vacation pay due an employee at termination.

The Carrier states that since all employees received the booklet upon leaving its employ, its terms are binding on them under Missouri Law. The Carrier states the Claimants are in error in contending they were not properly put on notice that the booklet repudiated Management's prior representations. The Car-

rier states that if Claimants' Exhibits 1, 2, 3, and 5 are considered Management representations, the Claimants have failed to understand these Exhibits, because they did not address the issue in dispute. All that these Exhibits state is that no former MP employee would receive fewer weeks of vacation as a UP employee than he had received from the MP. However these Exhibits do not go to the issue of whether the old MP vacation accrual system or the UP's completed month method should be used to calculate vacation rights at termination of the employee.

The Carrier states all of the cited exhibits pertain to vacation rights that a former MP employee will receive as a UP employee. These exhibits do not address the matter of vacation pay at termination. This issue is addressed only in the Benefits Booklet, and in this Booklet the completed months of service formula is adopted.

The Carrier states the Claimants should have expected that the merger would have brought about a change in employee benefits. They should have carefully read the Benefits Booklet. The Carrier states that under Missouri law the Claimants were put on constructive notice of the booklet's contents even if they did not read it.

The Carrier sets forth its reasons why the Hinkeldey case is not in point and lends no support to the Claimants' position.

The Carrier states there is no valid basis to sustain the claims for additional vacation pay and they should be denied.

Interruption of Claimants' MP Business Relationship by UP Claim

Claimants' Position

The Claimants contend that the UP took certain intentional actions prior to the Merger that interrupted the MP employees existing business relations with the MP. The Claimants stated both in depositions by UP and MP officials, and in testimony adduced at the Arbitration proceeding, it showed the UP influence and caused the MP to reorganize and modify its activities so as to more closely reflect UP activities thus to disadvantage the Claimants.

The Claimants contend that the UP specifically compelled the MP to reorganize its Marketing and Sales Department so as to deny them ranking positions in the merged Marketing Department. The Claimants specifically alluded to the UP influence to have the MP adopt the Hay Job Evaluation System which was already in effect in the UP. The Claimants contend that the existence and use of the Hay System permitted the UP personnel to get the better jobs in the merged Department.

The Claimants stated that, although the former MP executives asserted the MP Marketing Department was reorganized and the Hay System was adopted allegedly to permit the MP to function more effectively in a deregulated economy, in effect, it was reorganized basically to reflect the UP organization even though the senior former MP officers stated they were interested in the organization of the Departments of the Southern Pacific and the Santa Fe railroads. The Claimants maintain that the evidence shows it was the UP organization that the MP followed. The Claimants add that as

a result of using the UP format in the MP Marketing Department, several MP ranking jobs were eliminated and MP marketing officers were not able to fit into the UP existing organizational set up.

Claimant Maeser alluded to the deposition of President Kenefick of the Union Pacific admitting he had conversations with Mr. Flannery then President of the Missouri Pacific in November or early December 1982 prior to approval of the Merger.

The Claimants further state the MP adopted certain UP pricing measures such as the Tank Car Allowance, the Manhattan Project which was a sensitive UP internal traffic study. Vice President Angst's analysis of UP's "hot shot" marketing personnel compared them to MP personnel work in the same field. Claimant Maeser testified that joint actions were conducted despite an October 29, 1982 memorandum from MP Vice President-Law-Hermelly who notified all MP Department Heads that until the ICC approved the Merger the MP key employees should treat the MP and UP as independent railroads for business purposes.

Carrier's Position

The Carrier states there is no merit to the Claimants' allegations that the UP interfered with their business relationship with MP and so violated Missouri State tort law. In the first place the Carrier states if there was a state law theory of recovery, it was preempted by federal law such as New York Dock. The Carrier asserts that Section 10 of Article I of New York Dock sets forth a comprehensive uniform scheme of federal law limiting

the pre merger activities of carriers. The Carrier adds to allow state law to regulate this conduct would place a constitutionally impermissible burden on interstate commerce. It adds that the ICC was established to create a body of uniform federal law such as New York Dock in order to prevent differing state law requirements in interstate commerce.

The Carrier stresses that any state law which would work to change what carriers may or may not do prior to a merger must be considered pre-empted by federal law.

The Carrier states that even if the claims under state law were not pre-empted, the claims would have to be denied because the Claimants did not prove that the Carriers had engaged in tortious conduct under Missouri State law. It adds that among the necessary elements necessary to prove that the Carriers committed the tort, it is necessary to prove by substantial evidence, and not by conjecture or speculation, that the UP took measures with the intent to cause the MP to terminate the Claimants' employment. Since each Claimant refused to accept the job offered them in Omaha in the merged railroad, these Claimants cannot state what the UP did that caused them to lose their jobs. The Carrier stresses that the Claimants lost their jobs because they voluntarily terminated their employment with the Carrier.

The Carrier states that factually there was no basis for the state law claims. At the time of the Merger the railroad industry was in a state of change occasioned by deregulation. Vice President Colvin testified that MP instituted changes in its Marketing Department in order to be able to function more profitably

in a competitive market. Mr. Colvin added it was deregulation that brought about the reorganization of the Department and the introduction of the Hay System of Job Evaluation. These moves were not instigated by UP for the purpose of interfering with the Claimants' MP employment. The Carriers state these charges are nothing more than wild speculation and should be dismissed.

Damages

Each Claimant listed the following amount of damages due him. All the Claimants stated by virtue of having to retire from the Carrier prior to their normal retirement age, they were assessed a penalty for early retirement, and another penalty for not being a Carrier employee at the time of their retirement.

Claimant Maeser

\$71,250.00 - all the benefits as a displaced employee under New York Dock or, alternatively, under Article IV thereof- additional severance pay

\$4,807.75 - additional vacation benefits

\$110,592.00 - pension penalty resulting from early retirement

\$5,368,716.00 - interference with business relationship

\$5,555,360.75

Claimant Sengheiser

\$51,445.00 - all benefits due a displaced employee under New York Dock, or alternatively under Article IV additional severance pay

\$66,690.05 - pension penalty resulting from early retirement

\$4,071.30 - additional vacation benefits

\$10,069,239.00 - interference with business relationship

\$10,191,364.35

Claimant Murphy

\$21,270.00 - additional severance pay
\$ 2,634.15 - additional vacation pay
\$34,919.42 - pension penalties - early retirement
\$5,600,000.00 - interference with business relationship
\$5,658,823.57

Claimant Shupp

\$17,275.00 - all benefits due a dismissed employee
under New York Dock, or alternatively
under Article IV thereof additional
severance pay
\$2,732.23 - additional vacation pay
\$2,800,000.00 - interference with business relationship
\$2,820,007.00

The individual Claimants request the Arbitrator to award them the above listed items of monetary damage.

The Carrier, on the other hand, requests the Arbitrator to deny each and every claim item because whatever losses the Claimants incurred or suffered was the result of their own mistakes by involuntarily quitting the employ of the Carrier.

Findings:

The core, but not the exclusive, dispute in this case arises out of the differing meanings that the parties ascribe to the word "employee." While the Carrier contends that this term is a work of art in industrial and labor relations and generally refers to rank and file employees susceptible to union organization, the Claimants, on the other hand, assert that term "employee" as used in merger labor protection conditions is not confined to the limited area of union management situations, but must be given a wider scope and meaning when applied to merger situations and, therefore, labor protection conditions embrace all persons employed by the merged carriers, who are adversely affected by the merger, except the very top corporate officers.

We find from our study of the record, and the history of merger protection conditions that there is a definite and close relationship in the railroad industry between union labor relations and the protective conditions prescribed by the Congress and the Interstate Commerce Commission for merger affected personnel. [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, profession-

al or supervisory in nature.]

We find the Claimants are in error when they contend that the past rulings and activities of the ICC pursuant to the Railway Labor Act and the rulings of the National Mediation Board do not circumscribe the ambit of persons eligible to receive the benefits of labor protection conditions allegedly because these prior rulings were intended basically to determine those employees who were eligible to engage in collective bargaining, and they did not purport to determine who was eligible for, or covered by, the prescribed merger protective labor conditions.

We are unable to accept the Claimants' broad interpretation of "Employee" because we find that it overlooks or ignores the genesis of labor protection conditions in this industry, i.e., how it came about and what it was to cover.

Labor merger protective conditions as we know it stem back to 1936 when the carriers and all the functioning labor unions in the industry negotiated the Washington Job Protection Agreement. This was a product of collective bargaining and intended to cover only the membership of the signatory unions. There is no evidence that the WJPA was ever intended to apply to all railroad personnel. The antecedents of the WJPA resulted from the efforts of the railroad brotherhoods during the depression of the 1930's to get the Congress of the United States to enact a law that would freeze employment of its railroad membership. The Brotherhoods were successful in getting the U.S. Senate to consider the Wheeler-Crozier bill which did provide for a freeze in railroad employment. This

bill also provided it would not become operative if labor and management could negotiate an agreement with respect to dismissal compensation. At this juncture, because of the legislative leverage exercised by the railroad unions, the Carriers agreed to the 1936 WJPA which afforded protection to railroad employees affected by coordinations, which meant mergers, pooling or consolidation of railroad facilities. There can be no doubt that the railroad brotherhoods negotiated the WJPA for the benefit of their membership and not railroad personnel generally. The Brotherhoods were concerned that mergers would reduce employment, with the attendant loss of union members, and this was one, but not the only one, of the reasons why the Brotherhoods were the protagonists in all the efforts to secure merger protection for union members from the Congress and from the ICC.

However, even after the 1936 WJPA, the ICC expressed doubts whether it had the authority to impose protective conditions in mergers under its existing legislative charter. This matter was put to rest when the U.S. Supreme Court held in the Lowden Case in 1939 (308 U.S. 225) that the ICC could impose protective conditions in merger consolidations in order to carry out a National policy of railroad consolidations. Nevertheless, the Brotherhoods were not content to rest upon the Lowden decision and they pushed to get legislation to ensure that the ICC had the authority to act in these matters. The Unions' efforts in this matter resulted in Congress enacting the 1940 Transportation Act. This legislation amended the ICC Act in Section 5(2)(f) which provided

for mandatory protection for four years of ICC approved transactions. It must be stressed that it was the railroad brotherhoods who were the proponents for the enactment of Section 5(2)(f) for the benefit of their members.

The ICC moved forward in prescribing protective conditions in other than mergers when it imposed in 1944 labor protection in an abandonment matter (Oklahoma Conditions). Here the ICC departed somewhat from the provisions of the WJPA with respect to giving unions advance notice and the need to negotiate an implementing agreement.

In 1948 the railroad unions took issue with the ICC when the latter issued its New Orleans Conditions, maintaining that the four year period in Section 5(2)(f) was only a minimum and not a maximum period of protection. The U.S. Supreme Court in 339 U.S. 143 (1950) eventually sustained the Union's position. In all the proceedings, either before the ICC or the court, the railroad brotherhoods were the moving parties acting in behalf of their membership rather than for all persons employed in the industry.

It is noteworthy that in the later mergers involving the Burlington Northern and the Penn Central these carriers and the labor organizations representing their work force negotiated labor protection conditions even before the ICC approved the mergers, and the ICC then accepted and imposed these negotiated protective conditions as an integral part of their approval of these mergers. These Carriers negotiated these protective conditions as a quid pro quo for getting the Unions to abstain from objecting or pro-

testing the proposed mergers. These are the reasons why we cannot accept the Claimants' contention that there is no nexus between the collective bargaining relationship in this industry and the imposition of labor protection conditions in the industry. The labor protection conditions were basically brought about by railroad brotherhoods for its members and were not intended to be directed to or established for all personnel employed in the industry who might be adversely affected by the merger. There is no history to show that merger protection conditions prescribed by the ICC have as broad a scope as the Claimants contend, i.e., covered all employees in a generic sense. All the history of this subject militates against the position of the Claimants.

We turn now to the Claimants' reliance on the Congressional definition of "employee" as provided for in 1973 Regional Railroad Reorganization act and the 1979 Milwaukee Railroad Restructuring Act and the 1980 Rock Island Railroad Transition and Employee Assistance Act. The Claimants assert that the definition of "employee" in these Acts reveal a Congressional intent to extend protective benefits to all employees except the few top corporate officers.

We are initially constrained to note that the Congressional action in these three situations does not involve or represent merger situations between viable railroads. It rather represents Congressional action coping with emergencies created by bankruptcies and liquidations of major carriers that could wreck havoc on the affected geographical areas. Congress felt compelled to pass the

3RR Act to ensure railroad service would continue after the bankruptcy of the Penn Central and the six other northeast carriers. The creation of the Conrail System was an unprecedented act for the federal government to take and the Congress wanted to ensure that all persons employed by all these carriers that constituted Conrail would be treated equally with the federal funds involved. It must be noted that the employee protection benefits granted by the Regional Railroad Reorganization Act came from the treasury of the federal government as a part of a \$2.5-billion grant and not from any carrier.

The Milwaukee Reorganization Act and the Rock Island Employee Assistance Act also represented extraordinary measures by the federal government to ensure that the citizens of that part of the country were not left without rail service and that the employees of those carriers received various forms of assistance in making an adjustment when these two carriers stopped operations, such as supplementary unemployment insurance, priority in railroad placement, etc. The Rock Island was actually in the process of being liquidated when Congress enacted these emergency measures. However, none of these situations represent the normal circumstances under which the ICC imposes labor protection conditions in the usual merger situation.

However, it is noteworthy that in the legislation for both these carriers, i.e., Rock Island and Milwaukee, when it came to providing specific employee protection provisions the legislation emphasized the role of employees represented by labor unions. For

example, the Milwaukee Act stated:

"Section 9(a):

The Milwaukee Railroad and labor unions representing employees of such railroad may, not later than 20 days, enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad."

The Rock Island Act states:

"Section 106(a):

No later than 5 days after the enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island RR and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board may enter into an agreement providing protection for employees of such railroad who may be adversely affected as a result of a reduction in service by such railroad."

We stress that these three cited situations do not represent the usual and normal merger occurrences and it is also noteworthy that Congress wanted the labor protection conditions negotiated by the cognizant labor unions on those properties representing their membership. The aforesaid legislation shows that employee protection even in non merger situations is an integral part of the collective bargaining process of railroad labor relations, and therefore the ICC definitions of employees and subordinate officials must be given great weight in merger protection matters, just as it is in determining what group of employees may engage in collective bargaining in railroads. "Employees" in labor protection condition is a word of art and is not intended to be given a general and all encompassing meaning as the Claimants contend.

We find, in the instant case, that the term "employees" as used in New York Dock excludes the Claimants from coverage because a review of their duties and responsibilities reveals that they occupied or held positions that are properly categorized as Managerial, Administrative or Supervisory personnel rather than rank and file employees who could properly be represented by a labor union.

We find that Claimant Maeser, who as the General Manager-Marketing-Commodities, with the responsibility of supervising the work of six Managers of several Commodity groups as well as supervising 65 rank and file employees, union and non union, and earning \$75,000 annually plus substantial bonuses, is not and was not an "employee" as this term is applied either in general parlance of labor relations or labor protection conditions.

We will subsequently set forth why Mr. Maeser also is not an Article IV "non-agreement" employee.

In the same vein, we also find Claimant Sengheiser, a Marketing Director of Chemical and Petroleum Products, one of the several commodity groups in Marketing Division under General Manager Maeser, supervising 18 employees, directly and indirectly, and earning \$61,000 annually, had duties and responsibilities that transcended those of an "employee" and thus was outside the purview of Article I of New York Dock. He was a Manager even though he did not have the direct authority to hire or discharge a member of his group. He could make recommendations in this area and his recommendations were persuasive.

We find that Claimant Murphy was assigned administrative duties which he filled in varying degrees. We are not at liberty to overlook the fact that if Mr. Murphy was only performing menial and messenger duties, he was not paid the salary of a menial or a messenger when he received \$39,720. This is not the salary paid a menial or a messenger. His annual salary is consonant with the duties set forth in his Job Description. There is also testimony in the record to indicate that he performed duties for the Marketing Vice President and the Assistant Vice President that were not of a menial nature and were in keeping with an Administrative Assistant to a ranking executive. Our overall view of Claimant Murphy's job duties lead us to conclude that he was an administrative, and not a rank and file, employee and therefore not entitled to New York Dock protection.

We likewise find Claimant Shupp a supervisory employee and beyond the scope of New York Dock protection. He was the supervisor in overall charge of the Files, the Mail Room and Supplies, supervising approximately 14 employees. He received an annual salary of \$38,760 and was entrusted with the duties of ensuring that the files were intact and the Mail Room operated efficiently under his supervision and adequate supplies were maintained. There can be no doubt that he was a bona fide supervisory employee not within the scope of Articles I and IV of New York Dock. As a supervisor, he was not a rank and file employee as that term was intended to apply to those individuals entitled to merger protection.

[We have no doubt that there were individuals employed by the

MP who were disadvantageded or whose economic well being adversely affected by the merger of these two Carriers. However, that is not the criterion for labor protection.] The rationale and history of these benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

In the past 50 years history of the adjudication of labor protection disputes, there has been no court decision or arbitration award, with the exception of the Curley Award, that has held that an individual employed by a railroad, regardless of position, was entitled to labor protection because his job tenure or job status was disrupted or adversely affected by a merger. Protection has only been accorded to rank and file employees and not to those individuals holding positions which could be denominated as executive, professional, administrative or supervisory.

It is not unknown in our system of labor law to exclude certain working personnel from existing statutory benefits of a given law. Under the Fair Labor Standards Act, administrative, professional and supervisory personnel are excluded from the overtime provisions. The National Labor Relations act excludes supervisors from its coverage. Many Court cases have held that an employee who works without supervision or control of an employer, is an independent

contractor and not an employee. Our present day labor relations law recognizes that there are many persons working for a Company who are not "employees" of that Company for the purposes of receiving the benefits that a given law may bestow or grant "employees" of said Company. We repeat that the word or term "employee" is a word of art and is not used in its generic sense, in application of New York Dock Conditions.

In short we find that it was the Claimants' job duties and responsibilities that removed them from that class of persons who were entitled to receive the protection of New York Dock.

We now turn to the Claimants' reliance on Article IV of New York Dock to support their claims. We find the operative word in this Article is "employee." We find that this Article covers the situations of individuals who are engaged in tasks or jobs which are within the scope of a labor organization, but because of extrinsic factors, or the nature of their job make it inappropriate for the individual to be a member of a labor union, i.e., the secretary to the President of the Company, or employee in the industrial relations department. It is not the work per se that makes the individual a non agreement employee but rather the confidential or private nature of the job that makes it compromising for them to be individuals in good standing in the Union.

Another example of such a non agreement employee would be, on certain properties, a yardmaster or a supervisor in the mechanical shops. In cases where, on some part of the Carrier property these crafts or classes of employees are unionized, and on other

parts of the property they are not. Even where such employees are not in a union, they would be considered non agreement employees within Article IV who are entitled to, or eligible for, coverage by Article IV. It is recognized that the Yardmaster or Shop Supervisor performs work that is or could be within the scope of a union contract even though these individuals are not represented by a labor union, and so they are entitled to receive substantially the same benefits and level of protection accorded to members of labor organizations.

We do not find the Claimants in this case to be the non agreement type of employees mentioned in Article IV. The Claimants are not employees because the basic nature of their duties are either managerial, administrative or supervisory and they did not perform work which was susceptible to union organization or union coverage.

We find the weight of court and arbitral authority has held, with the exception of the Curley Award on this property, that individuals holding jobs of the nature and character as the Claimants, are not employees within the purport and meaning of both Article I and Article IV of New York Dock.

Arguendo, and most importantly, even if it could be contended that the Claimants were protected employees within the purview of New York Dock, the facts of record disclose that they were neither "dismissed" nor "displaced" employees. [It is a distortion of the concept of an employee disadvantaged by a merger, to hold that when such an employee has been offered a relatively comparable job at the same salary in the merged company, that this employee is a dis-

missed or displaced employee and thus adversely affected.]

We find that when a legal merger has occurred, it is to be expected that there will be disruptions in the organizational life of the affected personnel. It is not possible "to make an omelet without breaking the eggs." It is unrealistic to expect two major carriers could be integrated and each employee would have the same position he or she formerly held in the old company.

For example, Claimant Maeser cannot properly contend he was a displaced employee when the Carrier offered him a job at his MP salary but with somewhat different responsibilities. To be "adversely affected" under New York Dock, the criterion is financial and not emotional loss. Even if Mr. Maeser's feelings and pride were hurt by the new job, these personal feelings do not transmute him into a displaced person within the meaning of New York Dock.

We find that Claimant Sengheiser could not properly attach conditions to the Carrier's job offer at his same salary, and then maintain he did not receive a job offer in the merged Carrier because the Carrier would not accede to his conditions, and such a failure resulted in his becoming a displaced or dismissed employee. While Claimant might have been apprehensive about accepting the Omaha job offer, he cannot maintain that he did not receive a job offer that paid him his former salary with substantially the same job responsibilities. Under New York Dock, even if he had been dismissed after transferring to Omaha, he would still have been protected if he could prove a causal nexus between his later dismissal and the merger. However, he was not at liberty to reject

a comparable job offer on the potential basis that he might be subsequently terminated after he had effected a transfer to Omaha. These apprehensions, real or illusory, did not make Claimant Sengheiser a dismissed or displaced employee under New York Dock.

We find with respect to Claimant Murphy that the Carrier made him a bona fide offer in an effort to accommodate him in light of his compelling and poignant personal situation, but he refused to accept the Carrier's offer for a St. Louis job and kept pressing the Carrier for additional concessions to the point where the Carrier refused to concede. We find the Carrier made a bona fide offer to let the Claimant remain in St. Louis in a temporary position and still preserve his right to a severance allowance when this temporary job ceased. The Claimant rejected this offer, and thus he cannot contend with merit that he was dismissed or displaced because he doubted the alleged authority of the Carrier official who made him the offer, especially since that Carrier official was the official charged with coordinating all the transfers from St. Louis to Omaha. The Claimant was not entitled to demand the Carrier guarantee him a St. Louis job until he was eligible for an early retirement, and still insist the Carrier did not offer him a job and so converted him into a dismissed or displaced employee.

We find the record does not support Claimant Shupp's contentions, i.e., he was not offered a job in Omaha. While the Carrier admits it did not designate a specific job for Mr. Shupp, it told him that he would receive his regular salary and have a job in his area of competence, namely a job in the File and Mail room. The

fact that he was not offered a specific job, but given assurance of economic security, did not make Supervisor Shupp a dismissed or displaced employee within New York Dock. It could be expected in a massive transfer of this nature that the Carrier will not be able to delineate every specific job to which an employee would be transferred.

In short, we find the Carrier made bona fide job offers to the four Claimants which they rejected for various reasons. We find this was not permissible and their actions did not convert their status into that of dismissed or displaced employees. On the record before us, we have no recourse but to find that the Claimants rejected the Carrier's job offers and instead elected to resign their positions and take the proffered severance allowances. Such a course of action removed them from New York Dock.

Interruption of Claimants' Business Relationship

We find no credible evidence to support the Claimants' charges that the Union Pacific engaged in a deliberate course of conduct to have the Missouri Pacific interfere with or terminate their employment.

We find that MP engaged in certain acts in order to be able to cope with the conditions in the industry brought about by deregulation. We find that MP's reorganization of its Marketing Department and instituting a Job Evaluation System as the Hay System, was not a wilful plot contrived to hurt or disadvantage the Claimants. The actions of the MP to reorganize its Marketing department in order to cope with the consequences of deregulation and

the discussions conducted with the UP to prepare for the merger, were actions that were carried on under a color of right permitted by the Interstate Commerce Commission. We find no probative evidence to show that the actions complained of by the Claimants were the result of a UP conspiracy to interrupt their employment relationship with the MP. There is no evidence that the UP actions were even conducted with an awareness of the Claimants, or with any design to harm them. The fact that the UP offered all four Claimants jobs at their former salaries is proof that the UP did not seek or attempt to interrupt the Claimants' business relationship with the MP.

Vacations

We find the Claimants' position with respect to the contested vacation allowances more persuasive than the position advanced by the Carriers.

We find the evidence introduced by the Claimants with regard to the memoranda and notices issued by MP and UP officials clearly conveyed to the Claimants and other MP personnel that their MP vested vacation rights would be "grandfathered" and they would not lose any of their vacation rights which they had earned while they were in the employ of MP.

We find that the UP Booklet on Benefits (Claimant Ex. #4) did not put the Claimants on actual notice that the other material issued by UP and MP officials were modified by this Booklet. We find that the four line reference to termination of employment affecting vacations in a 73 page booklet, the circulation and distri-

bution of which was questioned by some of the Claimants, was not such a notice that could overcome the broad and comprehensive memoranda and letters that in fact were given the claimants by responsible Carrier officials.

We find that the Claimants could properly rely upon the specific notices addressed to them about the MP vested vacation rights they would possess as a result of the merger, rather than an obscure paragraph in a detailed booklet. The overt evidence of record could easily lead the Claimants to conclude that they would not be deprived of their MP vacation rights as a result of the merger.

In summary with respect to the several claims filed by the Claimants, we find the following:

- (1) Because of the managerial, administrative and supervisory responsibilities exercised by the Claimants in their respective positions, we find that the Claimants were not "employees" within the meaning and intent of Article I and Article IV of the New York Dock Conditions;
- (2) Because the Claimants were offered substantially comparable positions of responsibility at their MP salaries, which offers they rejected for questionable reasons, and instead elected to resign their MP employment and collect their severance allowances, we find that the Claimants were not dismissed or displaced employees within the meaning and intent of

Article I of the New York Dock Conditions;

- (3) We find no merit to, and hereby deny, the claims that the Union Pacific tortiously interrupted with the Claimants' business relationship with the Missouri Pacific;
- (4) We find that the Carriers erred in computing the Claimants' accrued 1984 MP vacation allowances, and they are hereby directed to compute these allowances pursuant to the MP vacation formula.

Award: Claims disposed of in accordance with the aforesaid Findings.



(Jacob Seidenberg, Arbitrator)

December 17, 1987

ARBITRATION ESTABLISHED UNDER ARTICLE I, SECTION 11
OF THE NEW YORK DOCK CONDITIONS

In the matter of arbitration between: *
*
John F. Adams, Joseph Dominick and *
James Williamson *
*
-and- *
*
Delaware & Hudson Railway Company *

ARBITRATION COMMITTEE

Robert M. O'Brien - Neutral Member
Homer E. Peters - Claimants' Member
Daniel J. Kozak - Carrier Member

APPEARANCES

For the Claimants:

Homer E. Peters, Esq,
McClung, Peters and Simon

For the Delaware and Hudson Railway Company:

Daniel J. Kozak - Assistant Vice-President-
Labor Relations

BACKGROUND

On April 23, 1982, Guilford Transportation Industries (hereinafter referred to as Guilford) acquired control of the Boston & Maine Corporation (hereinafter referred to as the Boston & Maine or the B & M). In Finance Docket No. 29720, the Interstate Commerce Commission (hereinafter referred to as the ICC) imposed the labor protective conditions set forth in NEW YORK DOCK RY. - CONTROL - BROOKLYN EASTERN DISTRICT, 360 ICC 60, (1979) (hereinafter referred to as the New York

Dock Conditions) on this acquisition. Guilford subsequently acquired the Delaware & Hudson Railway Company (hereinafter referred to as the Delaware & Hudson or the Carrier) and the Maine Central Railroad Company (hereinafter referred to as the Maine Central). The ICC also imposed the New York Dock labor protective conditions on these two acquisitions.

The facts evidence that all three (3) Claimants - John F. Adams, Joseph Dominick and James Williamson - were employed by the Delaware and Hudson as District Sales Managers when their employment was terminated on or about July 22, 1986. Mr. Williamson was a District Sales Manager in North Carolina earning a yearly salary of \$26, 844.70. Mr. Adams worked as a District Sales Manager in Virginia and earned a salary of \$27, 405.07. Mr. Dominick worked as a District Sales Manager in Pennsylvania, and he earned a salary of \$27, 038.28.

The Claimants were assigned to Guilford's Marketing and Sales Department although they worked out of their respective residences. Messrs. Adams and Williamson had worked as sales representatives for the Delaware and Hudson since the 1960's and Mr. Dominick had been a sales representative since 1981. Before they became sales representatives (actually Assistant District Sales Managers), each of the Claimants held a position represented by the Brotherhood of Railway, Airline and Steamship Clerks (hereinafter referred to as BRAC). They still hold seniority in BRAC and are carried on the BRAC rosters.

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As District Sales Managers, the Claimants' primary responsibility was to secure new freight business and to service and maintain communications with existing customers of the Carrier. They did not not supervise and employees nor did they establish policy for the Delaware and Hudson. The Claimants asserted that they had no authority to set, negotiate or change freight rates with customers. Rather, all rates were established by the Marketing and Sales Department located in North Billerica, Massachusetts.

The facts further evidence that on March 3, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter referred to as the BMWE) struck the Maine Central. Shortly thereafter, the BMWE extended its picketing to the Boston & Maine and to the Delaware and Hudson. The strike lasted until May 16, 1986. According to the Carrier, this strike and its attendant picketing caused all three Guilford railroads to suffer massive losses in traffic and revenue. Consequently, Guilford petitioned the United States District Court for the District of Maine for permission to abolish 725 agreement positions on the three Guilford railroads. It should be noted that the U. S. District Court for the District of Maine had jurisdiction over a lawsuit which had been filed on behalf of Guilford agreement employees.

On July 21, 1986, the U. S. District Court granted Guilford permission to abolish 725 agreement positions. But it also ordered Guilford to simultaneously abolish 93 management positions. On July 23, 1986, Guilford abolished these positions, including the 93 management positions.

According to the Carrier, the Claimants' positions were abolished pursuant to the Court's July 21, 1986 Order. The Claimants ~~were~~ offered positions in the Marketing Department at North Billerica, Mass., but they declined to transfer. It should be noted that Mr. Dominick secured employment as a salesman in November, 1986; and Mr. Adams obtained employment as a sales administrator on October 6, 1986. Neither Claimant is working in the railroad industry. As of the date of the arbitration hearing, Mr. Williamson had not obtained employment.

On August 25, 1986, Attorney Homer E. Peters submitted claims on behalf of Messrs. Adams, Dominick and Williamson for a separation or severance allowance under the New York Dock Conditions. Those claims were denied by the Delaware and Hudson since, in its view, the three Claimants had served as "officials," not as "employees." The parties agreed to consolidate the three claims into a single arbitration proceeding since the issues raised by the claims were identical. The parties mutually selected the undersigned Robert M. O'Brien to serve as the Neutral Member of the Arbitration Committee that was established pursuant to Article I, Section 11, of the New York Dock Conditions.

The Arbitration Committee (hereinafter referred to as the Committee) met on February 19, 1987, to hear the claims submitted by Messrs. Adams, Dominick and Williamson. Both parties submitted extensive evidence and arguments in support of their respective positions at the February 19, 1987,

hearing. They also filed Reply Submissions following the hearing. Based on the entirety of the extensive record presented by the parties, this Committee renders the following decision on the claims now before us.

CLAIMANTS' POSITION

It is the Claimants' contention that they were employees of the Delaware & Hudson when their employment was terminated in July, 1986. They emphatically denied that they were managerial employees as the Carrier claimed. They stress that their skills were not readily transferable as evidenced by their difficulty in obtaining employment; that they did not exercise independent judgment; that their salaries were less than the wages earned by many BRAC represented employees; and that they had no authority to negotiate rates or to issue rebates to customers. The Claimants also maintain that they had no supervisory authority over any employees. Moreover, their District Sales Manager positions were on the bottom of the organization chart for Guilford's Marketing and Sales Department.

It is the Claimants' position that they are "dismissed employees" as that term is used in the New York Dock Conditions and that they are therefore entitled to a "dismissal allowance" under Article I, Section 6, of the New York Dock Conditions. The Claimants maintain that they are also entitled to protection under Article I, Section 4, of the New York Dock Conditions since they were "[E]mployees of the railroad who are not represented by a labor

organization...." According to the Claimants, they are therefore entitled to a "separation allowance" under the Master Implementing Agreement which the Delaware and Hudson negotiated with BRAC on October 17, 1984.

Based on all the foregoing, the Claimants contend that they are entitled to one year's salary pursuant to the provisions of the Washington Job Protection Agreement which Agreement is incorporated by reference into the New York Dock Conditions less the wages earned by Messrs. Adams and Dominick during the year following their termination.

POSITION OF THE DELAWARE AND HUDSON RAILWAY

It is the position of the Delaware and Hudson that the Claimants are not entitled to a dismissal or a separation allowance since they were not employees as that term is normally used in the railroad industry and applied under the New York Dock Conditions. Rather, for a considerable period of time, the Claimants had been employed as officials in its Marketing and Sales Department. However, according to the Carrier, the Interstate Commerce Commission intended labor protective benefits to be afforded only to employees of a railroad, not to its officials.

The Carrier stresses that the Claimants' positions were beyond the scope of any collective bargaining agreement on its property. Indeed, the Carrier submits that no labor organization has ever attempted to represent its District Sales Managers. These positions were therefore neither subject to nor entitled to union representation, according to

the Carrier. Consequently, the Claimants were neither employees nor subordinate officials and are therefore not entitled to protective benefits under the New York Dock Conditions, in the Carrier's opinion.

It is also the Carrier's position that even assuming that the Claimants are covered under the terms and conditions of the New York Dock Conditions, they are still not entitled to protective benefits since they have failed to establish that they were deprived of employment as a result of a "transaction" as defined in Section 1(a) of the New York Dock Conditions. It is the Carrier's contention that the Claimants' positions were abolished as a result of a Federal District Court Order following the 1986 BMW strike, not because of any "transaction."

For all the foregoing reasons, the Carrier urges this Committee to deny the Claimants' requests for a dismissal or a separation allowance.

FINDINGS AND OPINION

The pivotal question which must be decided by this Committee is whether Messrs. Adams, Dominick and Williamson were "employees" or "officials" of the Carrier when they were terminated in July, 1986 ? If it is determined that the Claimants were officials then they are not eligible for the protective conditions provided by the New York Dock Conditions. Courts and arbitration committees which have adjudicated claims under the New York Dock Conditions have clearly and consistently ruled that officials of a railroad

are not entitled to benefits under the New York Dock Conditions.

The question before this Committee is not one of first impression. Indeed, the Neutral Member of this Committee addressed a similar issue on this property involving one James M. Benham who had been employed by the Carrier as Manager, Pricing and Marketing - Intermodal. As observed in the Benham Award, the Interstate Commerce Commission has never formulated a precise definition of either "employee" or "official." However, as a result of ICC administrative rulings; judicial decisions; and arbitration awards under the New York Dock Conditions, criteria have evolved to assist tribunals in resolving the question of "employee" vs. "official." These standards, which are explained on pages 9 and 10 of the Benham Award, are equally applicable to this proceeding, in our judgment, and shall therefore be incorporated by reference herein.

Quite frequently, the distinction between an "employee" and an "official" is not all that clear. In the final analysis, this is a factual question that must be resolved by carefully examining the nature and the job duties of an individual(s) who is claiming the protective benefits provided by the New York Dock Conditions. It is obvious to this Committee that the Claimants' District Sales Manager positions possessed characteristics of both an "employee" and an "official." For instance, like most rank and file employees, the Claimants did not supervise any employees. In fact, there were no subordinates responsible to them. Also,

the Claimants' respective salaries were less than the wages earned by some BRAC represented employees on the Delaware and Hudson. Moreover, the Claimants had no authority to either set or negotiate rates with customers. Evidently, this was the sole responsibility of Guilford's Marketing and Sales Department.

Additionally, the Claimants insist that they did not formulate sales policy for the Delaware and Hudson. They also claim that they had less independence than the Carrier suggests and that their itinerary was routinely reviewed by their supervisor, James Bean, Vice-President of Sales, who frequently changed it. The Claimants also deem it noteworthy that their positions were on the very bottom of the organization chart for the Guilford Marketing and Sales Department.

Clearly, the foregoing job duties and responsibilities of the Claimants were more akin to those of an employee than to those of an official. Yet, the position of District Sales Manager also possessed many of the attributes of an official of the Carrier. For example, District Sales Managers on this property have never been represented by a labor organization nor has any labor organization ever attempted to represent them. That the Claimants retained their seniority on the BRAC roster(s) clearly did not bring their positions under the BRAC agreements with the Delaware and Hudson, in the judgment of this Committee.

It must also be observed that unlike rank and file employees, the Claimants worked out of their respective residences and were not under the daily supervision of any management representative. Moreover, like other Carrier officials, the Claimants received an automobile allowance for using their personal vehicles while discharging their sales duties. Despite the Claimants' insistence to the contrary, the Carrier has convinced this Committee that the Claimants were required to exercise independent judgment and initiative in their capacity as District Sales Managers.

This Committee further wishes to observe that although the Claimants did not immediately secure employment following elimination of their positions in July, 1986 (Mr. Williamson has still not obtained employment), nevertheless their skills as salesmen were certainly more transferable than the skills of most railroad employees. Obviously, the position of sales representative is not unique to the railroad industry unlike that of a conductor or an engineer, for example. Moreover, the Claimants were entitled to a number of fringe benefits which were not available to rank and file employees on this property; or, if they were, were less beneficial than the perquisites available to the Claimants.

After carefully weighing all of the foregoing job duties and responsibilities of District Sales Managers on this property, it is the considered opinion of this Committee that Messrs. Adams, Dominick and Williamson were not "employees" as that term is commonly understood in the railroad industry and under the New York Dock Conditions. Rather, in our view,

the Claimants were Carrier "officials." Consequently, they were not entitled to the protective benefits provided by the New York Dock Conditions following their terminations in July, 1986, despite their many years of exemplary service on behalf of the Delaware and Hudson Railway. In the light of this determination, this Committee finds it unnecessary to address the additional issues raised by the parties during the arbitration proceeding.

AWARD

John F. Adams, Joseph Dominick and James Williamson were not "employees" of the Delaware and Hudson Railway Company but were Carrier "officials." Accordingly, they were not entitled to a separation allowance or a dismissal allowance under the New York Dock Conditions. The claims they submitted on August 25, 1986, are therefore denied.

Robert M. O'Brien
Robert M. O'Brien - Neutral Member
Dated: 10/22/87

Homer E. Peters under protest
Homer E. Peters - Claimants' Member
Dated:

Daniel J. Kozak
Daniel J. Kozak - Carrier Member
Dated: 11/27/87

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In the Matter of Arbitration Between

Gerald Thomas

and

Brotherhood of Locomotive Engineers

and

Union Pacific Railroad Company

Pursuant to Article IV of the New York
Dock Conditions Imposed by the Inter-
state Commerce Commission in Finance
Docket No. 30,000

Before Arbitration Committee

Members:

Wayne E. Naro
Director of Labor Relations

Carrier Member

John E. Cook
Director of Labor Relations

Carrier Member

J.L. Dayton
Vice President

Employee Organization
Member

Prof. Lamont E. Stallworth
Labor Arbitrator

Neutral Member

Appointment of Neutral Arbitrator

November 4, 1987

Hearing Held

Salt Lake City, Utah
February 17, 1988

ISSUES IN DISPUTE:

The Parties submitted the following issues to the
Arbitration Committee:

1. Should the claim be denied because it was filed in an untimely manner?
2. Was G. Thomas, at the time of his removal from a non-agreement position, an "employee" subject to the protection of the New York Dock conditions?

general desire for a more streamlined and efficient labor relations/personnel function. Any merger-related transactions affecting labor relations or personnel were completed long before the actions affecting the Claimant's position, according to the Carrier.

(Carrier's Submission, pp. 5-6).

The Organization disputes this interpretation of the facts, and asserts that the changes described by the Carrier were directly related to its original merger. The Parties could not resolve these disputes and they are part of the claim before this Committee. It is within this factual context that the instant dispute arises.

EMPLOYEE ORGANIZATION'S POSITION

The Organization's position is that the Claimant was affected by a merger-related transaction when he lost his non-assignment position. Furthermore, the Organization argues that the Claimant is an employee intended to be covered by the New York Dock conditions.

The Organization contends that the Claimant is a "subordinate official," entitled to protective benefits. According to the Organization, the Claimant's job was an entry-level position, subordinate to two Assistant Directors and a Director of Labor Relations. The Organization points out that the job carries approximately 478 job evaluation points, less than other jobs in which the Claimants have been held to be "

subordinate officials," subject to New York Dock protection. (Organization Submission, pp. 2-3).

At the hearing the Organization argued that the Claimant was never allowed to exercise independent management authority. The Organization contends that this factor distinguishes the instant case from the arbitration decisions relied upon by the Carrier.

In support of its position, the Organization also relies upon the Carrier's alleged promises to protect employees affected by the merger, contained in its representations before the I.C.C. before the merger was approved. According to the Organization, the Carrier specifically stated through its representative Mr. Jordan that the principal employees to be affected would be non-agreement employees, and the Carrier specifically agreed to the adoption of the New York Dock conditions to protect affected employees. Therefore, the Organization contends, the Carrier intended that the New York Dock conditions apply to non-agreement employees affected by the merger. (Organization Submission, pp. 11-12).

The Organization also points out a sequence of events involving the reorganization of the Personnel and Labor Relations Departments, which it contends resulted in the termination of the Claimant's non-agreement position. The Organization argues that these reorganizations were made as a result of the general merger which created the new Union Pacific Railroad. (Organization Submission, p. 11).

The Organization also contends that the Carrier erred when it denied the claim on the basis that it was not filed in a timely manner. According to the Organization, there is no time limit governing the filing of a claim which seeks the protective benefits of the New York Dock Agreement. There is a section requiring the filing of a claim for losses from home removal, one of the benefits sought by this Claimant, which requires filing within a year of the date the employee is required to move. According to the Organization, the Claimant met this deadline. (Organization Submission, pp. 14-15).

Therefore the Organization argues that the claim may not be denied on the basis of timeliness. In addition, the Organization contends that the Claimant was an employee protected by the New York Dock conditions and that he was affected by a merger-related transaction.

CARRIER'S POSITION:

The Carrier contends that the claim should be denied first on procedural grounds, i.e. because it was not filed timely and because the Claimant is not an employee intended to be covered by the Agreement. Secondly, the Carrier argues that the claim should be denied on its merits, because the Claimant was not affected by a merger-related transaction.

In support of its position on the procedural issues, the Carrier acknowledges that there are no precise time limits in the New York Dock conditions. However, according to the Carrier, there is an inherent obligation to file a claim in a timely

manner, and the Claimant violated that obligation. The Carrier cites a number of arbitration opinions allegedly supporting its position. (Carrier Submission, pp. 12-15).

The Carrier contends that the most important issue in the case is whether the Claimant is an employee, as that term is used in the New York Dock conditions. According to the Carrier, he is not, because he occupied a position as an "official," rather than an "employee" or "subordinate official."

The Carrier contends that the term "employee" includes only those employees and subordinate officials who are both subject to and entitled to union representation, but who are not represented. (Carrier Submission, p. 18). The Carrier further argues that the Claimant does not fall into this category, for a number of reasons. The Carrier presents a very detailed history of the word "employee" as it has been used in a variety of labor relations laws in the railroad industry.

According to the Carrier, a review of the "Ex Parte 72" decisions by which the I.C.C. determines who is a subordinate official, do not reveal any position comparable to the Claimants in which the employee was found to be a subordinate official. (Carrier Submission, p. 24). The Carrier also relies upon arbitration decisions which it contends demonstrate that the Claimant should be viewed as an official, rather than a subordinate official. The Carrier also relies upon decisions which have determined that an official is not entitled to the New York Dock protections. (Carrier Submission, pp. 25-41).

The Carrier also argues that the Claimant did not lose his position because of a merger-related transaction. According to the Carrier, all merger-related transactions were completed before the Claimant lost his position. Furthermore, the Carrier contends that the loss of the Claimant's position resulted from other organizational changes within the railroad which were simply designed to improve its overall efficiency and operation. For example, the Carrier notes that the Portland, Oregon office never conducted labor relations for the Western Pacific or Missouri Pacific Railroads. Therefore, the closing of that office was not a result of the Union Pacific's merger with these other two railroads, but rather a simple organizational change to improve the efficiency of the Carrier. (Carrier Submission, pp. 41-43).

The Carrier also points out that since it did not need the authorization of the I.C.C. in order to effect the change which caused the Claimant to lose his job, then it could not have been a merger-related transaction. According to the Carrier, it had the right to merge its labor relations offices before the merger without I.C.C. approval, and therefore it retained this right after the merger. (Carrier Submission, pp. 44-45).

The Carrier also argues that the loss of the Claimant's position through the Involuntary Force Reduction Program does not make it a merger-related transaction either. Lastly, the Carrier contends that if the Committee were to rule in the Claimant's favor, he is not entitled to non-agreement fringe benefits,

because this would be compensation at a level above that of agreement employees, and the New York Dock conditions mandate only comparable benefits. (Carrier Submission, pp. 49-50).

For all of the foregoing reasons, the Carrier contends that the claim should be denied, on both procedural and substantive grounds.

OPINION:

This case involves a claim to benefits under the New York Dock Agreement, which protects certain employees such as those affected by the merger of the Western Pacific, Missouri Pacific and Union Pacific Railroads. The principal issue in the dispute is whether the Claimant, a Manager (trainee) Labor Relations is an employee intended to be covered by the Agreement. The Organization contends that he is, and the Carrier disputes this interpretation of the Agreement.

The Parties submitted the following issues to the Arbitration Committee:

1. Should the claim be denied because it was filed in an untimely manner?
2. Was G. Thomas, at the time of his removal from a non-agreement position, an "employee" subject to the protection of the New York Dock conditions?
3. Did G. Thomas lose his non-agreement position of Manager Labor Relations because of a merger-related transaction?
4. If so, to what level of benefits is G. Thomas entitled

The Arbitration Committee (Committee) has carefully considered the evidence, documents and arguments presented by each side and concludes that the claim should not be denied because it was

filed in an untimely manner. However, the committee further concludes that the Claimant was not an employee entitled to protection under the New York Dock conditions, at the time he lost his non-agreement position. Therefore there is no need to address the third and fourth issues. The Committee's findings, conclusions and reasoning are set forth below.

Timeliness Issue

The Carrier presents a threshold issue challenging the timeliness of the Claimant's filing of his claim. According to the undisputed evidence presented by the Carrier, the first notice it received of the claim was an undated letter received by it on July 21, 1987, about ten and one half months after the effective date of the Claimant's job loss on August 30, 1986.

The Carrier contends that this filing is beyond the reasonable limits and the claim should be denied on these grounds alone.

The Carrier acknowledges that the New York Dock conditions establish no precise time limit for the filing of claims. Nevertheless, the Carrier contends that inherent in the Agreement is an obligation to file claims within a reasonable time limit, which the Claimant exceeded in this case.

The Committee concurs with the Carrier's principle, but not its result. A filing party does have the responsibility to file his claim within a reasonable time after the occurrence giving rise to the claim. If he does not do so, the claim may be dismissed under the principle of laches. However, in this case

the Committee concludes that the delay does not rise to the level where laches bars the claim, for the following reasons.

First, the single case relied upon by the Carrier which barred a claim on the basis of laches involved a two-year delay, as opposed to the ten months at issue here. (NRAB Second Division Award No. 22971). The other cases relied upon by the Carrier actually permitted the claims to go forward under the New York Dock Agreement, even though they involved delays longer than the claim at issue here. United Transportation Union and San Diego & Arizona Eastern Railway Company, (1984, Vernon, Arb.); Certain Designated Claimants and Union Pacific Railroad Company (1987, Seidenberg, Arb.).

Although the Carrier attempts to distinguish these cases, the Committee is not convinced by the distinctions offered by the Carrier. For example, the Carrier argues that the Claimant, as a Manager in the Labor Relations Department, should have known of the obligation to file a claim in a reasonable and timely manner, unlike the unsophisticated mechanics who were claimants in the case decided by Arbitrator Seidenberg. However, the Organization presented evidence that the Claimant did not become aware of his rights under the Agreement until months after the loss of his job, and suggests that the Carrier breached its obligation to inform him of his rights. In view of the Organization's arguments, the Committee is not persuaded by the Carrier's distinction.

Second, even if the Claimant should have known of his rights under the Agreement and should have filed more quickly, the Carrier has not demonstrated that it was injured by the delay. This is an important factor in determining when to apply the doctrine of laches to bar a claim.

Third, one of the major benefits sought by the Claimant is a loss from removal from his home. The New York Dock conditions mandate a one-year time limit from the date the employee is required to move for the filing of claims for these benefits. There is no dispute that the Claimant filed within this limit. Furthermore, this section provides some evidence concerning what the Parties considered a reasonable time limit for filing claims in general.

Therefore, the Committee concludes that the claim should not be barred on the grounds that it was not filed in a timely manner. Considering the circumstances surrounding the filing of the claim, the date on which it was filed did not unfairly prejudice the Carrier.

The Status of the Claimant as a Covered Employee

The second procedural issue raised by the Carrier, and the one most critical to the resolution of this dispute, is the question of whether the Claimant is an employee entitled to the benefits of the New York Dock conditions. The Committee concludes that he is not, for the reasons outlined below.

The Organization bases its claim on Article IV of the New

York Dock conditions, which contains the following relevant provision,

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.

There is no dispute that the Claimant was not represented by a labor organization at the time he lost his job. Rather the dispute in this case centers on whether he was an "employee" entitled to benefits under this provision.

Clearly, the Claimant, at the time he lost his job, was an "employee" in the most simple sense, under any dictionary definition and under standard industrial relations parlance. As a Manager (trainee) Labor Relations he rendered service to the Carrier and received compensation for it.

However, the Committee concludes that the term "employee" as used in the language above is not used in a general sense, but rather is a term of art defined by widespread past and current industrial relations practice specific to the railroad industry. Therefore, the dispute here centers on whether the Claimant is an "employee" as that term is used in this Agreement.

The Organization of course bears the burden of establishing this claim, since it is the Party which filed the claim. Thus, the Organization also bears the burden of establishing this crucial aspect of the claim, i.e. that the Claimant is an employee entitled to New York Dock benefits, under the language cited above.

the term "employees" as used in Article IV of the New York Dock conditions is a term of art which includes rank and file employees and subordinate officials but excludes officials....

(Organization Submission, p. 10; Bond and Topolosky v. Union Pacific Railroad, Stallworth, Arb., 1985).

The Organization does not argue for a broader interpretation of the term "employee" in the New York Dock conditions. Rather, it argues that the Claimant was a "subordinate official," at the time he lost his job.

The Organization also concurs with the Carrier about the definition of a "subordinate official." Both cite language from the Transportation Act of 1920, which states,

The term subordinate official includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.

(Section 300, paragraph 5 of the Transportation Act of 1920).

The I.C.C. primarily has defined the term "subordinate official" through a series of opinions issued under the general order known as "Ex Parte 72." That order does not refer to the Claimant's position in its detailed listing of "subordinate officials." (Carrier Exhibit R). Nor has the Organization demonstrated any later proceedings under "Ex Parte 72" which designate this position as that of a "subordinate official." (Carrier's Exhibit PP). In addition the Organization has not identified a position designated as a "subordinate official" that is substantially similar to the one held by the Claimant.

Furthermore, in examining the duties of subordinate officials as sketchily outlined in Ex Parte 72 and in the later proceedings, the Committee concludes that none of the positions identified as "subordinate officials" involve duties and authority similar to the Claimant's. Although some of those holding subordinate official jobs are first-line supervisors, the Claimant's job involved making, enforcing and interpreting rules and regulations to guide these supervisors. And while he may not have had complete authority to formulate and enforce policy, his role in doing so sets him apart dramatically from the subordinate officials, whose duties involve either routinely obeying such guidelines, or other technical and clerical duties. (Compare Carrier's Exhibit C, Claimant's duties, with Carrier Exhibits R and PP).

The Organization also suggests that the Claimant should be considered a "subordinate official" because he reports to an Assistant Director and a Regional Director. In making this argument it appears that the Organization is relying upon a federal district court decision in which the judge held,

"employees" encompasses persons "(including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act" but not, inter alia, "officers" or "department heads and those in the next echelon, such as assistants and staff members to the department heads."

(In the Matter of Florida E.C. Ry., No. 4827-J, S.D.Fla. 1960).

According to the Organization, the Claimant, occupying a position two levels below the department head, is not in the

"next echelon" below a department head, and therefore, should be considered a subordinate official rather than an official.

The Committee does not concur with this analysis. First, although the job description submitted by the Carrier, which is not disputed by the Organization, states that the Claimant was to report directly to the Assistant Director, it also states that he was to suggest revisions of obsolete work rules to the Regional Director as well. (Carrier's Exhibit C, p. 3). This would place him as a staff member to the department head.

Even if his rank did not place him automatically in this position, the kind of policy development the job entails is more like that of an official than a subordinate official. For example, developing and implementing contract administration procedures is more like the work of an official than a subordinate official, who probably would simply carry out these procedures.

The Organization also argues, however, that the Claimant's job cannot be evaluated on the job description alone, because he was only a trainee at the time of his displacement, and had not attained the full authority or level of duties contemplated by the Carrier in its description. For example, the Organization presented evidence that the Claimant's authority in the grievance procedure was only as the "first officer of appeal." (Organization Exhibit E, p. 2). This evidence, however, actually supports the Carrier's position, since it is clear that the Claimant had the authority on his own to resolve grievances at

that level if possible. Furthermore, the document presented by the Organization as evidence on this point appears to place the Claimant in the same position of authority as other managers who were not trainees.

In further support of its case, the Organization also points out that in another dispute decided by the Undersigned Neutral Member a Claimant in a position similar to this Claimant was identified as a subordinate official. (Kelley and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees v. Union Pacific Railroad Company, (Stallworth, Arb., 1987)). According to the Organization, the Claimant in Kelley had a higher job rating than the Claimant in the instant dispute, but was still considered a "subordinate official." Because both cases involved the Union Pacific merger and the extent of New York Dock conditions to employees holding similar jobs, the Organization apparently contends that the Claimant in this case should be regarded in the same fashion as the Kelley Claimant. However, in fact, the Carrier in the Kelley case waived the issue of whether the Claimant was an employee under the terms of the New York Dock conditions, in order to reach the substantive issue of whether he was affected by a merger-related transaction. There was no finding by the Undersigned that the Claimant was in fact a subordinate official. Furthermore, the waiver of that issue applied only to the resolution of that dispute, and the Organization may not use it

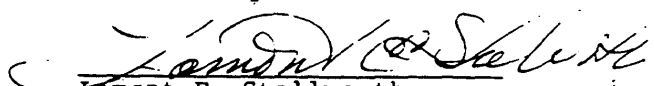
to prove that the Claimant here was a subordinate official of the Carrier as well.

Having determined that the Claimant was not a subordinate official, there is no need for the Committee to address whether an official is covered by the terms of the New York Dock conditions. This point has been well settled in earlier opinions, both through lawsuits and arbitrations. See Bond & Topolosky, supra, pp. 12-16. Furthermore, the Organization accepted this position in its submission, when it acknowledges that the Claimant must be a subordinate official in order to be covered.

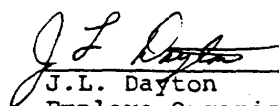
Furthermore, because the Committee has determined that the Claimant is not an "employee" as that term is used in the New York Dock Agreement, there is no need to proceed to the merits of his claim. Thus, there is no need to examine whether his job loss occurred as a result of a merger-related transaction.

AWARD

The claim is denied. The Organization has failed to prove that the Claimant was an employee entitled to protection under the New York Dock Agreement.


Lamont E. Stallworth
Neutral Member

Wayne E. Naro
Carrier Member


J.L. Dayton
Employee Organization
Member

Signed this ~~5~~⁴ day of April, 1988.

City of Chicago
County of Cook
State of Illinois

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IN THE MATTER OF THE ARBITRATION BETWEEN

James V. Nekich

EMPLOYEE

and

Burlington Northern Santa Fe Railroad

EMPLOYER

ARBITRATOR: Christine D. Ver Ploeg

DATE AND PLACE OF HEARING: September 12, 1996
Offices of Leonard, Street and Deinard
St. Paul, Minnesota

DATE OF CLOSE OF RECORD: November 5, 1996

DATE OF AWARD: December 6, 1996

ADVOCATES

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James V. Nekich, Grievant

ISSUE:

Is James Nekich covered by the terms of the New York Dock conditions?

BACKGROUND

This case has been brought by James Nekich, who is employed by the Burlington Northern Santa Fe Railroad (hereinafter "Carrier"). The dispute which gives rise to this Arbitration stems from the Carrier's refusal to grant Mr. Nekich benefits provided pursuant to the New York Dock conditions. Mr. Nekich submits that this refusal violates the terms of those conditions; the Carrier submits that it does not.

The parties agree on most of the background facts pertinent to this arbitration. It is undisputed that in 1989 the Carrier hired Mr. Nekich as a Dispatcher, which was a unionized position. In 1991 he was promoted to the position of Assistant Chief Dispatcher, which was a supervisory but still unionized position. At approximately this same time Mr. Nekich applied for, and was approved for, consideration for participation in the "This Way Up" program.

In May of 1994 the Carrier promoted Mr. Nekich to a new created position, Quality Coordinator, in the newly created Quality Department. This moved Mr. Nekich from a union to a non-union position, and in January of 1995 he was advanced an additional pay grade due to his "superior" performance.

Meanwhile, in mid-1994 senior management of the then separate Burlington Northern and Santa Fe Pacific railroads decided to merge. Both railroads filed their application for this merger with the ICC in October of 1994, which the ICC approved in August of 1995. In its August 1995 decision the ICC conditioned approval of the merger on the Carrier's compliance with "the labor protective conditions set out in New York Dock Ry. --Control--Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), generally known as the New York Dock Conditions.

Article IV of the New York Dock Conditions reads:

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.

The apparent intent of the New York Dock Conditions, as determined in subsequent decisions interpreting its terms, has been to cushion the harsh impact of railroad mergers by providing special benefits to railroad employees who are, for some unique reason, not represented by a union. The apparent purpose of the protections has been to at least partially protect employees whose skills are narrowly specialized within the railroad industry. This rationale has been expressed as follows:

The rationale and history of the benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. In the Matter of Arbitration Between B. J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

Despite the literal language of the New York Dock Conditions--which could be read to mean that *all* railroad employees not in a union are eligible for the same benefits as the unionized employees--subsequent decisions have established that:

...the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather...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. In the Matter of Arbitration Between B. J. Maeser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

It is against this backdrop that in November of 1995 the Carrier wrote to Mr. Nekich advising him that it had eliminated the entire Quality Department, including his position of Quality Coordinator. In response, Mr. Nekich exercised his seniority to return to the position of Dispatcher, a union position. That bid resulted in Mr. Nekich being required to re-locate to Texas, after living his entire life in Minnesota.

The issue currently in dispute is whether Mr. Nekich fell within the terms of the New York Dock Conditions, so that the Carrier was obliged to grant him the associated benefits under those Conditions. The Carrier submits that Mr. Nekich does not meet the New York Dock tests; Mr. Nekich submits that he does.

The parties were unable to resolve their differences concerning this matter in earlier discussions, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and the arbitrator met for a hearing on this matter on September 12, 1996. The parties submitted post-hearing briefs as well as additional submissions, the last of which the Arbitrator received on November 6, 1996.

RELEVANT CONTRACT LANGUAGE

Article IV of the New York Dock Conditions reads:

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.

DISCUSSION AND DECISION

It is undisputed that the ICC's approval of the Carrier's merger in the fall of 1995 was subject to its complying with the New York Dock Conditions. It is also undisputed that the New York Dock Conditions provide certain benefits and guarantees to non-union employees who are affected by merger-related transactions in the railroad industry. The question this case raises is whether Mr. Nekich, an employee affected by the Carrier's merger, falls within the coverage of New York Dock so that he is entitled to its benefits. To answer this question it has been necessary to address the following underlying questions.

1. Who is covered by the New York Dock Conditions?

Although New York Dock could be read literally to extend benefits to *all* non-union employees, the reasoning and holdings of subsequent decisions interpreting its terms persuasively demonstrate that its coverage is not so unlimited. Rather, the key distinction appears to be whether an unrepresented railroad employee has occupied a "labor" or a "management" position. The former would qualify under the New York Dock Conditions while the latter would not.

Although the distinction between "labor" and "management" is self evident with respect to many positions, that is not always true. In such cases, such as this, "It has left to arbitration the exact line to be drawn between these categories." In the Matter of the Arbitration Between Gerald J. Huggins et. al. v. Norfolk & Western Ry. Co. (1985, Harris).

Thus, this case requires determining whether Mr. Nekich's now eliminated position of Quality Coordinator was more clearly a labor or more clearly a management position. That finding will, in turn, determine his eligibility for coverage under New York Dock.

In determining whether the Quality Coordinator position was a labor or a management position, I have weighed most heavily the evidence concerning "the level of responsibility that is inherent in the position..." *Id.* This weighing process has included consideration of "the level and the amount of supervisory authority" held by Mr. Nekich, as well as his policy making responsibility. See In the Matter of the Arbitration Between James Benham v. Delaware and Hudson Ry. Co. (1986, O'Brien).

2. Did Mr. Nekich's job responsibilities as Quality Coordinator constitute management responsibilities?

In determining that Mr. Nekich's job responsibilities as Quality Coordinator were more clearly labor than management responsibilities, I have been most persuaded by the following evidence.

First, it is undisputed, and highly relevant, that Mr. Nekich had no authority to supervise, evaluate, hire or fire any other employees. Rather, he appears to have worked largely under the direction of a higher level manager, serving as a liaison between the scheduled and the management employees to identify and facilitate ways in which to improve the Carrier's overall levels of performance. Simply serving as a liaison to management, and to the Carrier's shippers, did not make Mr. Nekich a manager.

Second, not only did Mr. Nekich have no supervisory authority over other employees, he had no authority to order changes in policy to implement the methods he identified for improving quality. He was not even invited nor did he attend Division meetings.

All of this evidence suggests that Mr. Nekich's job responsibilities as a Quality Coordinator did not rise to the level of a management position.

3. Does other evidence concerning Mr. Nekich's job responsibilities as a Quality Coordinator overcome or bolster the above finding?

In reaching the above finding, I have not been persuaded by the following evidence:

a. *Mr. Nekich remained a dues paying member of the Union.* The evidence is undisputed that Mr. Nekich voluntarily remained a dues paying Union member, apparently in order to preserve his seniority status within the Union. However, the Carrier did not require Union membership as a condition of his employment as Quality Coordinator.

b. *A union organizer suggested organizing the Quality Coordinators.* This fact alone is not proof that the Quality Coordinator position was, in fact, a union-type position.

c. *Mr. Nekich wore jeans to work.* The evidence is undisputed that some management personnel also wore jeans to work.

d. *The Carrier did not pay for Mr. Nekich's closing costs upon his move to Texas.* The evidence establishes that closing costs were not part of the relocation package given to management personnel.

e. *Mr. Nekich claims that the Carrier's failure to inform him of or to pay him certain benefits has been retaliatory.* There is no evidence to support this claim.

AWARD

For the above reasons I find that Mr. Nekich's position as a Quality Coordinator was more clearly a labor than a management positions. Thus, he fell within the coverage of the New York Dock Conditions and should be given the appropriate benefits under its terms. I will retain jurisdiction of this matter in the event that the parties cannot agree concerning the implementation of this award.

December 6, 1996


Christine D. Ver Ploeg

IN THE MATTER OF THE ARBITRATION BY AND BETWEEN

James V. Nekich

EMPLOYEE

-and-

Burlington Northern Santa Fe Railroad

EMPLOYER

ARBITRATOR: Christine D. Ver Ploeg

DATE OF RECEIPT OF POST-HEARING BRIEFS: August 3, 1998

DATE OF AWARD: September 8, 1998

ADVOCATES

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James V. Nekich, Grievant

ISSUE:

How do the terms of the New York Dock conditions apply to James Nekich?

BACKGROUND

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This matter has been brought by James Nekich, who is employed by the Burlington Northern Santa Fe Railroad (hereinafter "Carrier"). On September 12, 1996, the Parties met for an Arbitration Hearing to address the question whether Mr. Nekich was covered by the terms of the New York Dock conditions. The Parties submitted post-hearing briefs and on December 6, 1996, this Arbitrator issued an award finding that Mr. Nekich was covered by the New York Dock conditions and should be given appropriate benefits under its terms.

In addition this Arbitrator retained "jurisdiction of this matter in the event that the Parties cannot agree concerning the implementation of this award." During the following 1-1/2 years the Parties have been unable to agree on the benefits to be given Mr. Nekich, and the issue has now been presented for further review and decision.

Award in this case has been based upon review of the following provisions of the New York Dock conditions, the Parties' written briefs, and additional submissions.

NEW YORK DOCK CONDITIONS

FINANCE DOCKET NO. 28250

1.

Definitions

(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.

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 receiving 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 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.

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.

7.

Separation Allowance - A dismissed employee entitled to protection under this appendix may at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump-sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

8.

Fringe benefits - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

DISCUSSION AND DECISION

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Mr. Nekich's brief of August 3, 1998 sets forth his position concerning the benefits to which he believes he is entitled. Those proposals have served as the framework for the following discussion.

1. Test period

The New York Dock conditions provide for a calculation of displacement and dismissal allowances based upon a twelve-month "test period". (Section 5 (a) and Section 6 (a)). Mr. Nekich submits that the appropriate test period would be the twelve months of 1995, a time during which he was paid as Quality Coordinator. By contrast, the Carrier submits that because on November 15, 1995, it notified Mr. Nekich by letter that his position was being abolished, the twelve-month test period should be November 1, 1994 through November 1, 1995.

Decision on this question requires interpreting New York Dock's directive that the test period represents "the last twelve months in which he performed services immediately preceding the date of his displacement. . ." It is undisputed that Mr. Nekich was paid through January 22, 1996 as a Quality Coordinator. As such, I find that it was after that date that his position ceased for purposes of determining the test period. Thus the test period shall be deemed to have run from January 22, 1995 to January 22, 1996.

2. Calculating "total compensation" during the twelve month's test period.

New York Dock provides allowances for displaced and dismissed workers pursuant to a formula applied to the "total compensation" received by the employee "during the twelve month test period." The Parties strenuously disagree concerning what monetary items are properly included as part of that "total compensation."

In deciding this question I have been guided by the panel's decision in Great Northern Pacific and Burlington Lines Inc. -- Merger -- Great Northern Railway, Interstate Commerce Commission, 1989 ICC Lexis 100 (March 16, 1998). In that case, as in this, the protected

Employee was to be provided a monthly allowance based upon his salary level at the time of the merger (his base salary) to which would be added all future "general wage increases" granted by the carrier. In that decision the Commission found:

A general wage increase is a wage increase applied to all employees in a group or subgroup for the purpose of economic adjustments, such as cost of living changes, sharing of profits, or increases in salary for a position in order to be competitive with salaries of comparable positions. It does not include merit increases or raises due to job promotions. Nor does it include consideration of the age-earning cycle since that concept recognizes improved job performance and achievement derived from experience, and is thus an increase based on merit.

Based upon the above analysis, the Commission concluded that "the CPI (Consumer Price Index) is a reasonable surrogate to reflect "general wage increases." I agree with that reasoning, and for that reason adopt a wage increase based upon the CPI effective January 1, 1996 and January 1, 1997: 2.8% and 2.9% respectively.

Also consistent with the Commission's decision in the above case, I find that neither can the "total compensation" used as a basis for calculations include bonuses, a one-time vacation payout, or increases which assume that Mr. Nekich would have advanced one pay grade each year. The Commission has clearly stated in the above case that "under the compensation guarantee, a protected Employee's allowance is based upon two things: (1) "salary level at the time of the merger (his base salary)" and "all future general wage increases granted by the carrier." The above items do not fall within either category and thus are not properly included in the calculations when comparing Mr. Nekich's remuneration during the test period with what he has received since that time.

3. Fringe Benefits

The Parties agree that the New York Dock conditions are quite vague concerning payment of fringe benefits. Article I, Section 8 simply states, "No employee of the railroad who is affected by a transaction shall be deprived, during his protection, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, etc. . . ."

Therefore, with this limited guidance, I award the following fringe benefits to Mr. Nekich:

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A. Pension contributions

Following the merger the Carrier ceased to cover Mr. Nekich as an active participant in the Burlington Northern 401(K) plan. Mr. Nekich seeks the contribution the Carrier would otherwise have provided. The Carrier has expressed a willingness to provide the basic match, of 35% on up to 6% contributed on a before-or-after tax basis. However, it protests paying the second match, of up to 40% of the first 6%, which is submits is an incentive match.

I have considered the arguments and agree that while the first match is owed to Mr. Nekich, the second match is a variable element of the fringe package and as such does not fall within the definition of fringe benefits set forth in Article I, Section 8:

No employee of the railroad who is affected by a transaction shall be deprived, during his protective period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

Unlike the items enumerated above, this second match is not automatic and does not "continue to be accorded" under the same conditions "year to year".

B. Family Health Care Coverage

Mr. Nekich notes that his coverage under the Burlington Northern Medical/Dental Plans terminated on January 31, 1996, and that he was then assigned to a plan with higher deductibles with less coverage.

I find that this change represents the loss of a fringe benefit and as such the Carrier is obliged to reimburse Mr. Nekich for any out-of-pocket costs he may have incurred because of the change in policy.

C. Stock Options

Because of the merger Mr. Nekich lost the opportunity to receive 100 shares of stock options. This is a loss of a fringe benefit for which Mr. Nekich should be reimbursed.

4. Fringe Benefits not Awarded

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A. Performance Award/Bonus

Based upon the above reasoning, I have not awarded the performance award/bonus requested by Mr. Nekich. Similar to the above discussion concerning the incentive match portion of the Carrier's Pension Plan, I find that bonuses are variable, not granted "under the same conditions" year to year. Instead, they are based upon the Carrier's meeting extraordinary goals. As such, they cannot be included in either the amounts calculated as part of the twelve month test period, or in current compensation, or as a fringe benefit.

B. Computer

I have also not included the use of a computer, as that represents Company supplied equipment for which there is no entitlement.

C. Separation Allowance/Relocation Allowance

Mr. Nekich believes that under the circumstances he is entitled to either:

"(a) separation allowance, plus displacement/dismissal allowance to date, including all appropriate compensation and fringe benefits, and relocation allowance; or,

(b) displacement/dismissal allowance, including all appropriate compensation and fringe benefits, plus option to remain in Texas or relocate back to Minnesota with relocation allowance."

The question of the compensation and fringe benefits owed to Mr. Nekich has already been discussed above. Thus, it is necessary to consider his entitlement to a separation allowance and a relocation allowance, if he so chooses.

1. Separation Allowance

The Carrier protests payment of a separation allowance on the grounds that: (1) Mr. Nekich was never dismissed, instead he exercised his seniority to take the position as dispatcher; (2) even if Mr. Nekich was dismissed, he failed to elect a separation allowance either at the time that his job was abolished or within 7 days of the issuance of the December 6, 1996, Arbitration decision, so

that his demand is not timely; and (3) a separation allowance is mutually exclusive from all other New York Dock benefits.

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I have considered the above arguments but do not agree that Mr. Nekich has forfeited his entitlement to a separation allowance. The Company's argument overlooks the fact that by the Carrier's failure to advise Mr. Nekich of his rights under the New York Dock conditions it narrowed his range of options. The reality is that in January of 1996 Mr. Nekich was forced to choose between quitting his job without any assurance of New York Dock benefits or accepting another position in Texas based on seniority. Without waiving his rights, he chose the latter. This is a critical fact. Now that Mr. Nekich has been found to fall within the New York Dock conditions, it is only proper that he now be given the opportunity to exercise his right to a separation allowance.

Thus, if Mr. Nekich should choose to exercise this option he should be given his displacement allowance to date (as calculated per the above discussion) plus his separation allowance pursuant to Section 9.

Section 9 provides a separation of allowance of twelve month's pay for employees with more than 15 years of service. It is unclear how Mr. Nekich has calculated that amount to be \$100,000. This seems excessive. Any such calculations should be based upon the above discussion concerning the "total compensation" as considered in the context of the twelve-month test period.

2. Relocation Allowance

Mr. Nekich also argues that because the Carrier failed to acknowledge his New York Dock rights, it should now bear the burden of providing a relocation allowance to permit his return to Minnesota.

I have considered this argument but cannot agree that the New York Dock conditions can be so broadly construed as to restore an employee to his original or favored domicile. Article I, Section 9 and Section 12 both apply to an employee who is "required to change the point of his

employment within his protective period as a result of the transaction and who is therefore required to move his residence." Notwithstanding Mr. Nekich's reasonable argument that had he been properly advised of his benefits under the New York Dock conditions he might never have left Minnesota, I am unable to read the conditions to support so broad a damage claim.

This finding may well have been different if the evidence in the underlying case had demonstrated bad faith on the part of the Carrier. However, the facts in the original arbitration by no means clearly compelled a finding that Mr. Nekich fell outside of the New York Dock benefits. Although the ultimate conclusion was that Mr. Nekich had, by a preponderance of the evidence, demonstrated that he fell within rather than without the terms of New York Dock, the evidence was never so compelling as to suggest that the Company's original determination was either in bad faith or clearly erroneous. To now order a relocation allowance to permit Mr. Nekich and his family to return to Minnesota would be unduly punitive and finds no support within the express provisions New York Dock conditions.

AWARD

The above described benefits are hereby awarded. This arbitrator shall retain jurisdiction of this matter in the event that the Parties cannot agree concerning the implementation of this award.

Dated: September 8, 1998


Christine D. Ver Ploeg

SPECIAL BOARD OF ARBITRATION

PURSUANT TO ARTICLE I, SECTION 11
OF NEW YORK DOCK CONDITIONS
IMPOSED BY THE SURFACE TRANSPORTATION BOARD (STB) IN
FINANCE DOCKET No. 32760

IN THE MATTER OF ARBITRATION BETWEEN

PARTIES Ross F. Povirk and the Transportation
TO and Communications International Union - ASD
DISPUTE

and

Union Pacific Railroad Company
Southern Pacific Railroad Company

STATEMENT OF CLAIM:

The Organization submitted that this Arbitration Board, constituted pursuant to Article I, Section 11 of the New York Dock Conditions is asked to resolve the following issues:

1. Did Mr. Ross Povirk lose his non-agreement position of Regional Account Manager because of a merger-related transaction?
2. If the answer to Question (1) is in the affirmative, then is Mr. Povirk an employee as defined by the New York Dock Conditions?
3. If yes, to what level of benefits is he entitled to under the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Povirk's case and in regard to procedure:

1. Was R.F. Povirk, at the time of the discontinuation of his management position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Povirk's case and in regard to the merits:

1. If any of the Claimants were employees under the New York Dock Conditions, was the elimination of their jobs due to a transaction subject to the New York Dock benefits?

2. Does R.F. Povirk's failure to bump onto a clerical position with his clerical seniority, entitle Mr. Povirk to New York Dock protection benefits?

BACKGROUND: This dispute concerns the Grievant, Mr. Ross R. Povirk's separation from his employment with the Carrier effective November 30, 1996. Mr. Povirk worked as a Regional Account Manager in Belle Vernon, Pennsylvania, at the time of his termination and was a non-agreement employee. Mr. Povirk held a clerk seniority roster date of December 12, 1983. Mr. Povirk's initial hire date was September 16, 1969; however, he was furloughed from July 16, 1982 until December 12, 1983 and his service date was therefore changed to December 12, 1983.

On August 6, 1996 the Surface Transportation Board through Finance Docket No. 32760, Decision No. 44, approved with certain conditions the merger and common control of the rail carriers controlled by the Union Pacific Railroad (Union Pacific Railroad and the Missouri Pacific Railroad) and the Southern Pacific Rail

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Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation and the Denver and Rio Grande Railroad Company). As a condition of approval, the Surface Transportation Board imposed the New York Dock Conditions on the merger which are protective conditions to benefit employees as defined by the agreement. (TCU Exhibit No. A).

Subsequent to this merger, on November 1, 1996, Mr. Povirk was verbally notified that he was not selected for a position in the recently merged UP/SP Rail systems. Shortly thereafter, Mr. Povirk received a severance packet and letter dated November 8, 1996. The Organization notes that the November 8, 1996, severance letter makes specific reference to the "Union Pacific/Southern Pacific Severance Program Marketing and Sales", and that the letter expressly stated:

As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of the Southern Pacific Railroad Company and the Union Pacific Railroad. I understand that you have been advised that your employment will terminate as part of the reduction in force. The effective date of your termination will be November 30, 1996. I'm writing to discuss the financial arrangements related to your separation from employment.

On December 18, 1996, the Parties reached agreement on certain benefits negotiated for agreement-covered employees known as the Implementing Agreement No. NYD-217. Subsequent to this agreement, the Union Pacific Railway abolished twenty-one (21) Marketing and Sales Agreement positions. According to the Organization, this

UNION PACIFIC EXHIBIT 30
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transaction was connected to the above-referenced transaction wherein non-agreement positions such as the one held by Mr. Povirk were abolished in the Marketing and Sales Department, including Mr. Povirk's position.

Following the termination of Mr. Povirk's non-agreement position effective November 30, 1996, the Organization informed the Carrier, specifically Mr. Bruce Feld, Senior Manager for Labor Relations, in a letter dated January 7, 1997, that the Organization considered Mr. Povirk to be in a "dismissed status" under the terms of the New York Dock Conditions. (TCU Exhibit No. E). The Organization asserts that in its January 7, 1997, letter it also informed the Carrier that Mr. Povirk held seniority as a Union member but did not possess enough seniority to displace the remaining agreement-covered employees on the roster. In addition, the Organization's January 7, 1997, letter identified additional agreement-covered positions in the Marketing and Sales Department abolished under the notice served in accordance with the Implementing Agreement NYD-217, reached, as stated earlier, on December 18, 1996.

According to the Organization, the January 7, 1997, letter identified the transaction that entitles Mr. Povirk to the New York Dock Conditions benefits and stated that Mr. Povirk was an "employee" under the terms of Article IV of the New York Dock Conditions because his position was no more than a subordinate salesman. Accordingly, the Organization filed a claim on Mr.

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Povirk's behalf in its January 7, 1997 letter requesting a "dismissal allowance" of \$3,400.00 per month and a continuation of Mr. Povirk's fringe benefits. At the time Mr. Povirk's job was discontinued, Mr. Povirk's annual salary was \$40,800.00.

In the early part of 1997, the Parties exchanged correspondence regarding their respective positions on this issue and their ongoing disagreement over the interpretation and application of the New York Dock Conditions. (Carrier Exhibit No. B-2). The Carrier took the position in its January 27, 1997, response that the Organization lacked standing to represent Mr. Povirk over a change in his status during a period when the employee is working outside the scope of the Organization's representative jurisdiction, as stated in the Railway Labor Act. (TCU Exhibit No. G).

The Carrier also asserted that Mr. Povirk's claim involved an interpretation of the New York Dock Article III definition of "employee", as interpreted in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987, and that Mr. Povirk's position did not fit the standard interpretation of the term "employee" under the New York Dock Conditions. The Carrier argued that Mr. Povirk's former position was not subject to unionization and was best described as administrative, managerial, professional or supervisory in nature. (TCU Exhibit No. G). The Parties continued to exchange correspondence regarding their respective positions on this issue

and their ongoing disagreement over the interpretation and application of the New York Dock Conditions through March and April of 1997.

The Parties were unable to resolve their differences on this issue. Pursuant to the decision of the Interstate Commerce Commission in Finance Docket No. 32760, the Parties agreed to submit the matter to special arbitration for resolution by this Committee. It is within this factual context that the instant dispute arises.

POSITION OF THE ORGANIZATION:

The Organization contends that when the Carrier terminated Mr. Povirk's non-agreement position of Regional Account Manager for Belle Vernon, Pennsylvania but did not offer him a position on the newly merged UP/SP system, that it is clear that Mr. Povirk became a "dismissed employee" under the New York Dock Conditions. The Organization asserts that as a "dismissed employee" Mr. Povirk is entitled to receive for the protection period of six (6) years no less than the equivalent of one-twelfth of the compensation received by him in the last twelve (12) months of employment in which he earned compensation prior to the date he was first deprived of employment. The Organization also argues that Mr. Povirk is entitled under New York Dock Conditions to receive during his protection period benefits that were attached to his previous employment such as free transportation, hospitalization, pensions, reliefs under the same conditions.

The Organization submits that the following provisions of the New York Dock Conditions are applicable to the instant grievance:

ARTICLE I

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

(b) "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 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.

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 the 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 wage increases.

8. *Fringe benefits* - No employee of the railroad who is affected by a transaction shall be deprived, during his protective period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

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.

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.

The Organization argues that there is no dispute that Mr. Povirk was indeed affected by a "transaction" as defined above in the New York Dock Conditions. The Organization asserts that Article I, Section 11(e) specifically requires that it is the employee's obligation to identify the transaction and relate explicit and pertinent facts of the transaction on which the employee relies to support his or her case. The Organization submits that it is then the Carrier's burden to prove that factors other than the transaction affected the employee.

In the instant grievance, the Organization argues that it did in fact identify the transaction and specific facts in regard thereto as required by Article I, Section 11(e). The Organization points out such facts in particular include where the Carrier admits in its letter and package to Mr. Povirk that he is being terminated as a result of the consolidation of the Southern Pacific Transportation Company and the Union Pacific Railroad. It is the Organization's position that it has proven the "causal nexus" between the merger and the termination action taken against Mr. Povirk by the Carrier. The Organization asserts that the burden then must shift to the Carrier to prove other than a transaction affected the employee and that the Carrier failed in its burden.

The Organization also notes that Carrier erroneously quoted and paraphrased Article III of the New York Dock Conditions, as it admits in its April 15, 1997 letter. (TCU Exhibit No. I). The Organization assumes that the intended language by the Carrier was

in fact from Article IV and proceeds with its argument and position statement based on that assumption.

The Organization contends that the single dispute with the Carrier concerns Mr. Povirk meeting the definition of the term "employee" under the New York Dock provisions. While the Organization recognizes the case the Carrier relies on and the result offered in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), the Organization also notes that there are two important differences in that case as compared to the instant dispute. The Organization states that in denying New York Dock benefits to the claimants in the above-referenced case, Arbitrator Seidenberg found that the non-agreement employees affected had managerial, administrative and supervisory responsibilities and that the employees were offered comparable positions and salaries but declined them.

The Organization argues that in the instant case Mr. Povirk was not offered a position on the merged UP/SP system nor did he have managerial, administrative and supervisory responsibilities assigned to his position. The Organization notes that the Carrier failed to deny these facts.

The Organization also challenges the Carrier's position that Mr. Povirk's position is not subject to unionization. The Organization argues that just as Mr. Povirk's prior non-agreement Chief Clerk position was unionized in 1979, Mr. Povirk's former non-agreement position of Regional Account Manager is also subject to unionization.

Notwithstanding the Carrier's position, the Organization submits and denies that an employee's non-agreement position must be subject to unionization to be considered an "employee" under the provisions of the New York Dock Conditions. The Organization relies on the recent decision by Arbitrator Christine D. Ver Ploeg, In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), in which the arbitrator considered the level and amount of supervising authority and degree of policy making in the position to determine whether a non-agreement position was labor related or imbued with management responsibilities. (TCU Exhibit No. I). See also, In the Matter of Arbitration Between James Benham v. Delaware and Hudson R. Co., Arb. O'Brien, 1986). As the Organization notes, Arbitrator Ver Ploeg held that the claimant's job responsibilities as a Quality Control Manager did not rise to the level of a management position, but rather was clearly more of a labor position and that the claimant was therefore entitled to the appropriate benefits under the terms of the New York Dock Conditions.

The Organization further asserts that the words of the Interstate Commerce Commission are instructive on this point:

... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding,

therefore, must of necessity be decided upon
the record.*** (supra, I.C.C. at 92).
(Employees' Submission at page 15).

The Organization argues that in the instant claim the record evidence clearly establishes that Mr. Povirk's position of Regional Account Manager was more of a labor position than that of a managerial position. The Organization notes that Mr. Povirk had no authority to hire, fire, supervise, or evaluate any other employees and had no authority to order changes in company policy. The Organization maintains that Mr. Povirk was no more than a salesman selling transportation to the Carrier's customers and that Mr. Povirk had his position eliminated as a result of the merger of Union Pacific and Southern Pacific Railroads.

The Organization relies on the decision in The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) for the proposition that the claim must be sustained because the Organization established that the claimant lost his job as a result of a merger-related transaction. Similarly, in the instant case, the Organization argues that the claim should be sustained on the same grounds.

The Organization also notes that the Carrier refuses to acknowledge that Mr. Povirk is entitled to dismissal allowance and has not furnished the same to the Grievant. In addition, the Organization asserts that Mr. Povirk's average earnings over the
months proceeding his dismissal is \$3,400.00

UNION PACIFIC EXHIBIT 30
PAGE 12 OF 34

Based on the foregoing, the Organization asserts that the instant claim should be sustained in favor of Mr. Povirk and that he is entitled to full benefits as an "employee" as defined by the New York Dock Conditions. The Organization requests that the Arbitrator answer the question posed by the statement of the issue as framed by the Organization in the affirmative and render a decision that Mr. Povirk is entitled to substantially the same level of protection and benefits afforded to members of labor organizations.

POSITION OF THE CARRIER:

The Carrier first presents its procedural arguments. According to the Carrier, the instant dispute should be dismissed because Mr. Povirk was not an "employee" as contemplated by the New York Dock Conditions at the time his management position as Regional Account Manager was discontinued by the Carrier. The Carrier points out that the substantive merits of this case are only relevant if in fact it is determined by the Committee that Mr. Povirk is found to be an "employee" entitled to New York Dock Conditions benefits. The Carrier submits that the instant case should be decided on that procedural issue first and decided in favor of the Carrier.

In addressing the procedural issue of whether Mr. Povirk is an "employee" entitled to New York Dock Conditions benefits, the Carrier first notes that railroad employee protection originated

from the Depression era, when railroad consolidations were taking place and the government sought assurances that no railroad jobs would be lost. The Carrier asserts that it is necessary to consider for whom the legislated railroad protections were intended.

The Carrier asserts that starting with the Emergency Railroad Transportation Act of 1933, and then from the Washington Job Protection Agreement, through the Interstate Commerce Commission's involvement and the Transportation Act of 1940, railway employee protection was addressed. The Carrier notes that from 1940 to 1997, railway employee protection evolved into many forms or reiterations until the creation of the present day New York Dock Conditions.

The Carrier contends that when the Surface Transportation Board approved the merger of the Southern Pacific and Union Pacific Railroads, it did so by also imposing the New York Dock Conditions. It is the Carrier's position that at the crux of the instant dispute is whether Mr. Povirk, as well as other affected employees, can meet the definition of "employee" under the New York Dock Conditions and therefore receive New York Dock protections and benefits. The Carrier maintains that Mr. Povirk does not meet the New York Dock definition of "employee" and is therefore ineligible for such mandated New York Dock benefits.

The Carrier asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York

Dock protection. Specifically, that provision of the Railway Labor Act provides:

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 employees organizations be regarded as 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, 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 Carrier argues that it is clear from the provision referenced above that the scope of unionization and the definition of the term "employee" includes only rank and file employees and subordinate officials but not officials or management employees. The Carrier asserts that the Railway Labor Act definition of "employee" is also used in New York Dock Condition cases. The Carrier relies on the Committee's decision in Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1) and asserts that the term "employee" means an agreement employee or one subject to unionization. The Carrier submits that the committee

found that when the ICC employed the phrase "employees of the railroad who are not represented by a labor organization" it was extending protection only to those employees and subordinate officials who are both subject to and entitled to union representation but are not represented. In accordance with Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1), the Carrier contends that this definition of employee is the industry definition and the definition used in the New York Dock cases. See also, In the Matter of Florida E.C. Ry., No. 4827-J, D.S. Fla. (January 5, 1960) (the term "employees" encompasses persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act but not officers, department heads, nor those in the next echelon, such as assistants and staff members to the department heads).

The Carrier argues that the ICC has never taken a broad view of the term "employee" and that New York Dock protections were not intended for management at a level above subordinate officials. See, Huggins, Rudloff, Kloess, and Moore and Norfolk and western Railway Co., (1985) (Carrier's Exhibit D-5). Rather, the Carrier asserts that claimants such as Mr. Povirk retain their rights to classified service while holding a management position and have the opportunity to exercise their union seniority when their management positions are eliminated, but are not due protection for their management positions under New York Dock Conditions. Id.

The Carrier notes that examining the job functions and responsibilities of the employee is required to determine whether an employee is an "employee" who is eligible for New York Dock Conditions benefits. In cases relied upon the Carrier, several factors to consider when reviewing job functions include both the level of responsibility held by the employee and whether an employee's job skills are transferable outside of the railway industry. See, e.g. Bond and Topolsky, supra; Newbourn v. Grand Trunk Western Railroad Co., 758 F.2nd 193 (1985); and Benham and Delaware and Hudson Railway Co., (1986) (Carrier's Exhibit Nos. D-6 and D-7).

The Carrier also relies on the decision in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), wherein it was stated:

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.

The rational and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain

work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

In the instant case, the Carrier argues that a review of Mr. Povirk's non-rank and file managerial position of Regional Account Manager indicates that he was a ranked personnel whose management and sales skills could be transferred outside of the railway industry. Specifically, the Carrier notes that Mr. Povirk's position of Manager of Regional Sales/Regional Account Manager is classified for Affirmative Action purposes as an Official/Manager under the Affirmative Action guidelines. (Carrier Exhibit F-1).

The Carrier submits that Mr. Povirk's position was substantially similar to the position held by the claimants in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) wherein claimants as District Sales Managers were found ineligible for New York Dock benefits because they were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. Not under daily supervision.
3. Given an automobile allowance for personal use.
4. In possession of skills that were easily transferable.

The Carrier points out that the Committee in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer. The Carrier asserts that a similar result should be found in the instant case as Mr. Povirk's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Povirk was not under daily supervision, and, most significantly, Mr. Povirk possessed managerial and sales skills which are easily transferable to almost any other industry or service. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44). In addition, the Carrier maintains that Mr. Povirk, along with the other claimants, was offered a severance package that was not offered to agreement employees. (See Carrier Exhibit Nos. A-4, B-4 and C-4).

The Carrier contends that the burden of proving that Mr. Povirk is an "employee" entitled to New York Dock protections rests with the Organization and that the Organization has failed to meet their burden. See, Gerald Thomas & BLE and UPRR (1988) (Carrier's Exhibit No. D-4). The Carrier specifically notes that the Organization failed to prove that Mr. Povirk was a subordinate employee as listed by the ICC in Ex Parte 72 (February 5, 1924). See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5) and Carrier's Exhibit D-10 (ICC job title position indices).

instant case. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

The Carrier submits that any analysis of what is meant by a "position not subject to unionization" must be done on a de facto basis, with an examination of the position based on the facts at hand. The Carrier notes that this is especially important given that only the National Mediation Board has the jurisdiction to determine whether a position should be a member of a class or craft under the Railway Labor Act. The Carrier asserts that in outlining the definition of an employee eligible for New York Dock benefits, it is clear that Mr. Povirk's position fails to meet the accepted requirements because:

1. His position was not unionized nor subject to unionization.
2. His duties could be described as being administrative, managerial, professional or supervisory in nature.
3. His position was not exclusive to the railroad industry and his skills were transferable.

Based on these procedural arguments, the Carrier asserts that the instant claim should be dismissed.

With regard to the substantive issues, the Carrier argues that the elimination of Mr. Povirk's position was not due to a "transaction" under New York Dock Conditions. The Carrier submits that under Article I of the New York Dock Conditions, "transaction" is defined as "any action taken pursuant to authorizations of this

v. United Transportation Union (C&T), (1994) and International Association of Machinists and Aerospace Workers and CSX Transportation, (1995) (Carrier Exhibits D-18 and D-19, respectively).

Based on the foregoing, the Carrier respectfully requests that the Committee dismiss this claim on procedural grounds because:

The term "employees" as used in Article IV of the New York Dock Conditions is a term of art which includes rank and file employees and subordinate officials, but excludes employees who are not subject to unionization or have positions that are managerial, supervisory, administrative or professional, such as the positions held by the Claimants herein: Manager Contract Administration, Regional Sales Manager and Senior Tax Representative.

(Carrier's Submission at page 31). The Carrier also requests that, in the alternative, the instant claim be denied because the elimination of Mr. Povirk's position was not due to a transaction as defined by New York Dock Conditions.

OPINION:

The Committee has carefully considered the facts, evidence and arguments presented by the Parties and concludes that under the provisions of the New York Dock Conditions, Mr. Povirk is not an "employee" as envisioned by the New York Dock Conditions. Therefore, Mr. Povirk is not entitled to New York Dock benefits and protections. Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the

Committee's opinion that the instant grievance must be denied on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirety. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Povirk is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier. The Carrier specifically asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection:

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 employees organizations be regarded as 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, 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.

(Carrier's Submission at page 14).

The Committee also recognizes the statement by the Interstate Commerce Commission as provided by the Organization:

... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, therefore, must of necessity be decided upon the record.*** Supra I.C.C. at 92.

(Employees' Submission at page 15).

In the instant dispute, the record provides evidence as to Mr. Povirk's position as Regional Account Manager and raises the issue of whether this position is more labor-related than managerial. The Committee notes that Mr. Povirk's position duties were primarily those of an independent salesman. The record demonstrates that Mr. Povirk's position involved:

1. Considerable contact with customers of the Carrier

2. Responsibility for all commodities in the region except for automotive and intermodal
3. Full authority and latitude in dealing with his customers, except for pricing and servicing customers
4. Collaborating with the operating side of the railroad to create pricing and service commitments
5. Accountability for a \$24.3 million dollar revenue plan
6. Development of any business opportunities he deemed profitable

These job characteristics for the position held by Mr. Povirk were supplied by the Carrier and were not disputed by the Organization.

The Committee notes that Mr. Povirk's managerial sales position was substantially similar to the position held by the claimants in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) wherein claimants as District Sales Managers were found ineligible for New York Dock benefits because they were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. Not under daily supervision.
3. Given an automobile allowance for personal use.
4. In possession of skills that were easily transferable.

The Committee agrees with the Carrier that in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier

Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer. The Undersigned Committee concludes that a similar result should be found in the instant case as Mr. Povirk's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Povirk was not under daily supervision, and, most significantly, Mr. Povirk possessed managerial and sales skills which are easily transferable to almost any other industry or service. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44).

Notably, the record evidence demonstrates that Mr. Povirk was not under daily supervision. As the Carrier asserted in its April 15, 1997 letter to the Organization:

The Carrier wishes to make clear that the "Subject to unionization" criteria, which you refer to in your letter, is not the sole criteria upon which it relies in determining that these employees are not subject to coverage by New York Dock. These employees occupy positions which clearly were not contemplated by the extraordinary job protection couched in the New York Dock conditions. Each of these employees had a level of responsibility and duties, as well as salary, which was above that of a clerical employee. More fundamentally, each of these employees had a position that offered skills which are clearly more transferable than that of a railroad clerk.

(Carrier's Exhibit No. A-2).

The Committee is in agreement with the Carrier on this point. Notably, the most significant factor of all is that Mr. Povirk possessed managerial and sales skills that arguably are transferable to almost any other industry or service. (See e.g., Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175).

The Organization asserts that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) applies to the instant case. However, as the Carrier correctly asserts, the parties in P.J. Kelley stipulated that the claimant was an "employee" for New York Dock Condition purposes. In that case, the parties specifically agreed:

The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several other similarly situated employees who are not directly involved in this case.

(Carrier's Submission at page 24).

It is clear that, unlike the instant grievance, in the case of P.J. Kelley the Committee did not have to resolve the threshold issue of whether the claimant was indeed an "employee" for New York Dock Conditions. Accordingly, the Committee does not find that particular case relied upon the Organization to be controlling.

(Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

Similarly, the Committee notes that the case of In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), is also distinguishable from the instant grievance. The Committee observes that in the Nekich case the claimant's position was that of a quality coordinator, a position that required the employee to serve as a liaison between management and classified employees. In that case, Arbitrator Ver Ploeg found that the claimant therefore was not an administrative, managerial, professional or supervisory employee.

The Carrier asserts that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Povirk's transferable managerial and sales job skills. See also, Hoffman and Burlington Northern Santa Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee). The Committee must agree. Mr. Povirk's Regional Account Manager position was an independent sales position that afforded contact with customers and input on pricing, a company car with insurance and no daily supervision. As such, Mr. Povirk's position is more dissimilar to the position in Nekich and more akin to the position in the Adams award, cited supra.

At this juncture the Committee finds it useful to reiterate the observations of Arbitrator Seidenberg, who was confronted with a similar issue in the case of The Matter of Arbitration Between E.J. Maeser et. al and Union Pacific RR Co. et al. (Arb. Seidenberg, 1987), wherein he noted:

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.

The rationale and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

The Committee is mindful of the purpose behind the protective conditions set forth in the New York Dock Conditions and the Great Depression era genesis of legislative history which created railway

employee job protection. However, the Committee must also note that New York Dock Conditions benefits were designed to protect a certain type of employee, simply put, those employees who would find it most difficult to secure a position outside of the railway industry.

Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended, i.e., to aid and protect those rank and file employees and subordinate officials who to their detriment are economically affected by the merger of railway systems. In the instant case, the Committee concludes that the position of Regional Account Manager is clearly not a rank and file position, or even a subordinate official position. As such, the Committee must conclude that Mr. Povirk is not an "employee" as envisioned by the New York Dock Conditions and is not eligible for New York Dock benefits.

Having decided in favor of the Carrier on the threshold procedural issue of whether Mr. Povirk's position falls within the definition of "employee" under New York Dock Conditions, the Committee need not reach the substantive merits presented by the instant claim.

AWARD

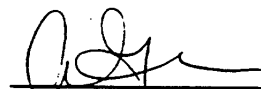
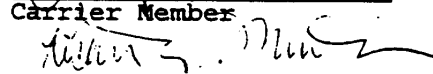
The Committee, after careful consideration of the instant dispute identified above, concludes that the claim must be dismissed as the Claimant, Mr. Povirk, is not an "employee" under New York Dock Conditions.

Adopted at Chicago, Illinois on the 16th day of July, 1998


Lamont E. Stallworth, Ph.D.
Neutral Member


Labor Member

Labor Member


Carrier Member

Carrier Member

LES:ONG

Case No. 2
Page No. 1

IN THE MATTER OF ARBITRATION BETWEEN

STATEMENT OF CLAIM:

1. Did Mr. Grover Dixon lose his non-agreement position of Manager-Contracts & Administration because of a merger-related transaction?
2. If the answer to Question (1) is in the affirmative, then is Mr. Dixon an employee as defined by the New York Dock Conditions?
3. If yes, to what level of benefits is he entitled to under the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Dixon's case and in regard to procedure:

1. Was G.L. Dixon, at the time of the discontinuation of his management position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Dixon's case and in regard to the merits:

1. If Mr. Dixon was an "employee" under the New York Dock Conditions, was the elimination of his job due to a transaction subject to the New York Dock benefits?

BACKGROUND: This dispute concerns the Claimant, Mr. Grover L. Dixon's, separation from his employment with the Carrier effective December 31, 1996. Mr. Dixon was originally employed by the Texas and New Orleans Railroad Company on March 10, 1959. The Texas and New Orleans Railroad Company was later merged with the Southern Pacific Railroad Company. On May 30, 1995, Mr. Dixon was moved from an agreement position to a non-agreement position of Manager-Contract Administration. Mr. Dixon's new non-agreement position was located in the Chemical Division of the Marketing Department located in Denver, Colorado. Mr. Dixon held this position at the time his job was discontinued effective December 31, 1996. According to the Carrier, at the time the instant claim was filed, Mr. Dixon had exercised his clerical seniority to a clerk position with the Carrier.

The Carrier states that the principle responsibilities for the position of Manager-Contract Administration, the non-agreement position which Mr. Dixon held until December 31, 1996, can be summarized as follows:

1. Responsible for the contract and tariff work of twenty-three (23) managers
2. Supervise two (2) pricing representatives and two (2) senior pricing representatives
3. Coordinate and progress contracts
4. Oversee and progress pricing compliance issues
5. Coordinate and progress selective increases
6. Administration of contracts, contract rates and tariff publications
7. Manage price quotation function

(Carrier Exhibit No. A-3).

In addition, according to the Carrier, Mr. Dixon was also expected to initiate projects as needed and manage them to completion. The Carrier notes that in his position as Manager-Contract Administration, Mr. Dixon had latitude regarding the implementation of solutions to problems and made decisions without consulting his manager. Mr. Dixon's manager was the Managing Director-Petrochemicals who in return reported to the Senior Vice President of Marketing. Mr. Dixon earned an annual salary of \$38,580.00 at the time his position was discontinued.

On August 6, 1996, the Surface Transportation Board through Finance Docket No. 32760, Decision No. 44, approved with certain conditions the merger and common control of the rail carriers controlled by the Union Pacific Railroad (Union Pacific Railroad and the Missouri Pacific Railroad) and the Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation and the Denver and Rio Grande Railroad Company). As a condition of approval, the Surface Transportation Board imposed the New York Dock Conditions on the merger which are protective conditions to benefit employees as defined by the Agreement. (TCU Exhibit No. A).

Subsequent to this merger, on November 1, 1996, Mr. Dixon was verbally notified that he was not selected for a position in the recently merged UP/SP Rail systems. Shortly thereafter, Mr. Dixon received a severance packet and letter dated November 8, 1996. The Organization notes that the November 8, 1996 severance letter makes specific reference to the "Union Pacific/Southern Pacific Severance Program Marketing and Sales", and that the letter expressly stated:

As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of the Southern Pacific Railroad Company and the Union Pacific Railroad. I understand that you have been advised that your employment will terminate as part of the reduction in force. The effective date of your termination will be December 31, 1996. I'm writing to discuss the financial arrangements related to your separation from employment.

(TCU Exhibit No. B).

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On December 18, 1996, the Parties reached agreement on certain benefits negotiated for agreement-covered employees known as Implementing Agreement No. NYD-217. Subsequent to this agreement, the Union Pacific Railway abolished twenty-one (21) Marketing and Sales Agreement positions. According to the Organization, this transaction was connected to the above-referenced transaction wherein non-agreement positions such as the one held by Mr. Dixon were abolished in the Marketing and Sales Department, including Mr. Dixon's position.

Mr. Dixon's non-agreement position was abolished on December 31, 1996 and Mr. Dixon opted not to participate in the Carrier's separation program. Mr. Dixon, therefore, exercised his seniority to an agreement covered position on January 2, 1997. According to the Organization at this juncture Mr. Dixon held seniority on the Southern Pacific (Eastern Lines) Seniority District Roster No. 3 and displaced a junior employee on Position No. 383, Head File clerk, rate of pay \$2,828.87 per month. The Organization notes that Mr. Dixon was therefore placed in a worse position as a result of the abolishment of his non-agreement position which was at a higher rate of pay or \$3,215.00 per month.

Following the termination of Mr. Dixon's non-agreement position effective December 31, 1996, Mr. Dixon faxed to Mr. Bruce Feld, Senior Manager for Labor Relations, Union Pacific Railroad, on February 10, 1997, a request for a Test Period Average (TPA) as Mr. Dixon considered himself a "displaced employee" under the terms of the New York Dock Conditions. (TCU Exhibit No. D).

would be lost. The Carrier asserts that it is necessary to consider for whom the legislated railroad protections were intended.

The Carrier submits that starting with the Emergency Railroad Transportation Act of 1933, and then from the Washington Job Protection Agreement, through the Interstate Commerce Commission's involvement and the Transportation Act of 1940, railway employee protection was addressed. The Carrier notes that from 1940 to 1997, railway employee protection evolved into many forms or reiterations until the creation of the present day New York Dock Conditions.

The Carrier contends that when the Surface Transportation Board approved the merger of the Southern Pacific and Union Pacific Railroads, it did so by also imposing the New York Dock Conditions. It is the Carrier's position that at the crux of the instant dispute is whether Mr. Dixon as well as other affected employees, can meet the definition of "employee" under the New York Dock Conditions and therefore receive New York Dock protections and benefits. The Carrier maintains that Mr. Dixon does not meet the New York Dock definition of "employee" and is therefore ineligible for such mandated New York Dock benefits.

The Carrier asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection. Specifically, that provision of the Railway Labor Act provides:

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 employees organizations be regarded as 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, preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipples, or the loading of coal at the tipple.

The Carrier argues that it is clear from the provision referenced above that the scope of unionization and the definition of the term "employee" includes only rank and file employees and subordinate officials, but not officials or management employees. The Carrier asserts that the Railway Labor Act definition of "employee" is also used in New York Dock Condition cases. The Carrier relies on the committee's decision in Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1) and asserts that the term "employee" means an agreement employee or one

subject to unionization. The Carrier submits that the committee found that when the ICC employed the phrase "employees of the railroad who are not represented by a labor organization" it was extending protection only to those employees and subordinate officials who are both subject to and entitled to union representation but are not represented. In accordance with Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1), the Carrier contends that this definition of employee is the industry definition and the definition used in the New York Dock cases. See also, In the Matter of Florida E.C. Ry., No. 4827-J, D.S. Fla. (January 5, 1960) (the term "employees" encompasses persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act but not officers, department heads, nor those in the next echelon, such as assistants and staff members to the department heads).

The Carrier also argues that the ICC has never taken a broad view of the term "employee" and that New York Dock protections were not intended for management at a level above subordinate officials. See, Huggins, Rudloff, Kloess, and Moore and Norfolk and western Railway Co., (1985) (Carrier's Exhibit D-5). Rather, the Carrier asserts that claimants such as Mr. Dixon retain their rights to classified service while holding a management position and have the opportunity to exercise their union seniority when their management positions are eliminated, but are not due protection for their management positions under New York Dock Conditions. Id.

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The Carrier notes that examining the job functions and responsibilities of the employee is required to determine whether an employee is an "employee" who is eligible for New York Dock Conditions benefits. In cases relied upon the Carrier, several factors to consider when reviewing job functions include both the level of responsibility held by the employee and whether an employee's job skills are transferable outside of the railway industry. See, e.g. Bond and Topolsky, supra; Newbourn v. Grand Trunk Western Railroad Co., 758 F.2nd 193 (1985); and Benham and Delaware and Hudson Railway Co., (1986) (Carrier's Exhibit Nos. D-6 and D-7).

The Carrier also relies on the decision in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), wherein it was stated:

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.

The rationale and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their

jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

In the instant case, the Carrier argues that a review of Mr. Dixon's non-rank and file managerial position of Manager-Contract Administration indicates that he was a ranked personnel whose management skills could be transferred outside of the railway industry. Specifically, the Carrier notes that Mr. Dixon's position of Manager-Contract Administration was classified for Affirmative Action purposes as an Official/Manager of the Carrier's company. (Carrier Exhibit F-1). The Carrier points out that Mr. Dixon's position required the supervision of four employees and held responsibility for contracts, pricing compliance and pricing quotations. The Carrier reiterates that Mr. Dixon's position was not subject to unionization.

The Carrier submits that Mr. Dixon's position was substantially similar to the position held by the claimants in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) wherein claimants as District Sales Managers were found ineligible for New York Dock benefits because they were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. Not under daily supervision.

3. Given an automobile allowance for personal use.
4. In possession of skills that were easily transferable.

The Carrier points out that the committee in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer. The Carrier asserts that a similar result should be found in the instant case as Mr. Dixon's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Dixon was not under daily supervision, and, most significantly, Mr. Dixon possessed managerial skills that are easily transferable to almost any other industry or service. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175). In addition, the Carrier maintains that Mr. Dixon, along with the other claimants, was offered a severance package that was not offered to agreement employees. (See, Carrier Exhibit Nos. A-4, B-4 and C-4).

The Carrier contends that the burden of proving that Mr. Dixon is an "employee" entitled to New York Dock protections rests with the Organization and that the Organization has failed to meet their burden. See, Gerald Thomas & BLE and UPRR (1988) (Carrier's Exhibit No. D-4). The Carrier specifically notes that the Organization failed to prove that Mr. Dixon was a subordinate employee as listed

by the ICC in Ex Parte 72 (February 5, 1924). See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5) and Carrier's Exhibit D-10 (ICC job title position indices).

The Carrier further contends that with regard to In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), that case is distinguishable from the instant claim as are the other cases cited by the Organization. The Carrier asserts that in the Nekich decision the claimant's position was Quality Coordinator who served as a liaison between management and classified employees. Accordingly, Arbitrator Ver Ploeg held that the claimant in Nekich was not an administrative, managerial, professional or supervisory employee. The Carrier also notes that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Dixon's transferable managerial contract administration job skills. For a similar case to Nekich, see also Hoffman and Burlington Northern Santa Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee).

With regard to The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) the Carrier argues that the parties in that case stipulated that the claimant was an

"employee" for New York Dock Condition purposes. Because the committee did not even need to reach the issue of whether the claimant in P.J. Kelley was indeed an "employee" for New York Dock Conditions, the Carrier avers that it is not applicable to the instant case. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

The Carrier submits that any analysis of what is meant by a "position not subject to unionization" must be done on a de facto basis, with an examination of the position based on the facts at hand. The Carrier notes that this is especially important given that only the National Mediation Board has the jurisdiction to determine whether a position should be a member of a class or craft under the Railway Labor Act. The Carrier asserts that in outlining the definition of an employee eligible for New York Dock benefits, it is clear that Mr. Dixon's position fails to meet the accepted requirements because:

1. His position was not unionized nor subject to unionization.
2. His duties could be described as being administrative, managerial, professional or supervisory in nature.
3. His position was not exclusive to the railroad industry and his skills were transferable.

Based on these procedural arguments, the Carrier asserts that the instant claim should be dismissed.

With regard to the substantive issues, the Carrier argues that the elimination of Mr. Dixon's position was not due to a

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"transaction" under New York Dock Conditions. The Carrier submits that under Article I of the New York Dock Conditions, "transaction" is defined as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." The Carrier maintains that no evidence has been presented to demonstrate that these non-agreement positions could not have been abolished without ICC approval.

The Carrier additionally argues that the New York Dock Conditions define a "displaced employee" as "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". Furthermore, the Carrier states that a "dismissed employee" is defined under New York Dock Conditions as:

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 a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

Moreover, the Carrier contends that in light of the award In the Matter of Arbitration Between Union Pacific Railroad Company and Brotherhood of Railway Signalman, (Arb. Dana Eischen, 1994) (Carrier Exhibit D-20), it is well-established that the Organization must demonstrate a causal nexus between the merger and the alleged transaction. The Carrier refutes the Organization's assertion that it has established a "causal nexus" between the termination action against Mr. Dixon and the ICC's merger

authorization. Rather, the Carrier asserts that the Organization did not prove that Mr. Dixon's position was eliminated as a result of a New York Dock transaction and that the Organization failed to show that Mr. Dixon was placed in a worse position due to a New York Dock transaction.

The Carrier notes that the Organization relies almost solely on the severance package letter from Vice President of Human Resources Barbara V. Schaefer to Mr. Dixon wherein she states:

As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of Southern Pacific Transportation Company and Union Pacific Railroad. I understand that you have been advised that your employment will be terminated as a part of this reduction in force.

(Carrier Exhibit No. B-4). The Carrier asserts that this letter from the Carrier's department of Human Resources was not approved by the Carrier's Labor Relations department and accordingly Labor Relations should not be held by what the Human Resources department independently distributed. As support for its position, the Carrier relies on the award in Transportation Communications International Union and CSX Transportation, Inc., (Arb. Seidenberg, 1995) (Carrier Exhibit D-14) wherein the arbitrator stated:

The Committee notes the Organization's reliance on Director Patterson's letter...What is more significant is that Mr. Patterson was not a Carrier's officer who was vested with the authority to determine policy as to which employees were entitled to receive New York Dock benefits.

The Carrier maintains that the Organization failed to identify the transaction and specify those facts which are pertinent to that of the transaction being asserted. Se, e.g., Transportation-Communications International Union - BRAC and Union Pacific Railroad, Case Nos. 6, 7, & 8 (Carrier Exhibits Nos. D-16 and 17). The Carrier also argues, as stated previously on different grounds, that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) does not apply as an example of a New York Dock transaction because, unlike the instant grievance, there was sufficient evidence that an intermingling of work, employees, operations and functions had occurred in that case. (Carrier's Exhibit No. D-15).

Based on the foregoing, the Carrier respectfully requests that the Committee dismiss this claim on procedural grounds because:

The term "employees" as used in Article IV of the New York Dock Conditions is a term of art which includes rank and file employees and subordinate officials, but excludes employees who are not subject to unionization or have positions that are managerial, supervisory, administrative or professional, such as the positions held by the Claimants herein: Manager Contract Administration, Regional Sales Manager and Senior Tax Representative.

(Carrier's Submission at page 31). The Carrier also requests that, in the alternative, the instant claim be denied because the elimination of Mr. Dixon's position was not due to a transaction as defined by New York Dock Conditions.

OPINION:

The Committee has carefully considered the facts, evidence and arguments presented by the Parties and concludes that under the provisions of the New York Dock Conditions, Mr. Dixon is not an "employee" as envisioned by the New York Dock Conditions. Therefore, Mr. Dixon is not entitled to New York Dock benefits and protections. Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the Committee's opinion that the instant grievance must be denied on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirety. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Dixon is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier. The Carrier specifically asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection:

Fifth. The term "employee" as used herein includes every person in the service of a

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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 offers: 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 employees organizations be regarded as 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, 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.

(Carrier's Submission at page 14).

The Committee also recognizes the statement by the Interstate Commerce Commission as provided by the Organization:

... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, therefore, must of necessity be decided upon the record.*** (supra I.C.C. at 92).

(Employees' Submission at page 15).

In the instant dispute, the record provides evidence as to Mr. Dixon's position as Manager-Contract Administration and raises the issue of whether this position is more labor-related than managerial. The Committee notes that Mr. Dixon's position required him to supervise four (4) other employees, and work independently by making decisions without consulting his manager. The record demonstrates that Mr. Dixon's position involved:

1. Responsible for the contract and tariff work of twenty-three (23) managers
2. Supervise two (2) pricing representatives and two (2) senior pricing representatives
3. Coordinate and progress contracts
4. Oversee and progress pricing compliance issues
5. Coordinate and progress selective increases
6. Administration of contracts, contract rates and tariff publications
7. Manage price quotation function

(Carrier Exhibit No. A-3).

Mr. Dixon's job characteristics noted above were supplied by the Carrier and were not disputed by the Organization.

The Committee considers the award in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) to be instructive in the instant case. In Adams, the claimants were District Sales Managers and ultimately held to be ineligible for New York Dock benefits because they were not considered "employee(s)" under New York Dock Conditions as their positions were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. Not under daily supervision.
3. Given an automobile allowance for personal use.
4. In possession of skills that were easily transferable.

The Committee notes the point made by the Carrier that in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer.

The Undersigned Committee is of the opinion that a similar result as the one reached in Adams must be reached in the instant case. The record demonstrates that Mr. Dixon's Manager-Contract Administration position was not covered by any collective bargaining agreement, nor was it apparently subject to unionization. The Organization offered the unsupported argument that Mr. Dixon's position could be subject to unionization but did not credibly explain under what circumstances. In addition, the record evidence demonstrates that Mr. Dixon supervised other employees and he himself was not under daily supervision. As the Carrier asserted in its April 15, 1997 letter to the Organization:

The Carrier wishes to make clear that the "Subject to unionization" criteria, which you refer to in your letter, is not the sole criteria upon which it relies in determining that these employees are not subject to

coverage by New York Dock. These employees occupy positions which clearly were not contemplated by the extraordinary job protection couched in the New York Dock conditions. Each of these employees had a level of responsibility and duties, as well as salary, which was above that of a clerical employee. More fundamentally, each of these employees had a position that offered skills which are clearly more transferable than that of a railroad clerk.

(Carrier's Exhibit No. A-2). The Committee is in agreement with the Carrier on this point. Notably, the most significant factor of all is that Mr. Dixon possessed managerial skills that arguably are transferable to almost any other industry or service. (See e.g., Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175).

The Organization asserts that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) applies to the instant case. However, as the Carrier correctly asserts, the parties in P.J. Kelley stipulated that the claimant was an "employee" for New York Dock Condition purposes. In that case, the parties specifically agreed:

The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several other similarly situated employees who are not directly involved in this case.

(Carrier's Submission at page 24).

It is clear that, unlike the instant grievance, in the case of P.J. Kelley that Committee did not have to resolve the threshold issue of whether the claimant was indeed an "employee" for New York Dock Conditions. Accordingly, the Committee does not find that particular case relied upon the Organization to be controlling in the instant dispute. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

Similarly, the Committee notes that the case of In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), is also distinguishable from the instant grievance. The Committee observes that in the Nekich case the claimant's position was that of a quality coordinator, a position that required the employee to serve as a liaison between management and classified employees. In that case, Arbitrator Ver Ploeg found the claimant therefore was not an administrative, managerial, professional or supervisory employee.

The Carrier asserts that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Dixon's transferable managerial job skills. See also, Hoffman and Burlington Northern Santa Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee). The Committee must agree. Mr. Dixon's Manager-Contract Administration position was an independent oversight position that required supervision of other employees, contact with shippers, pricing compliance and

increases oversight, and the ability to make decisions without consulting his manager. As such, Mr. Dixon's position is more dissimilar to the position in Nekich and more akin to the position in the Adams award, cited supra.

At this juncture the Committee finds it useful to reiterate the observations of Arbitrator Seidenberg, who was confronted with a similar issue in the case of The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. et al. (Arb. Seidenberg, 1987), wherein he noted:

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.

The rationale and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

The Committee is mindful of the purpose behind the protective conditions set forth in the New York Dock Conditions and the Great

Depression era genesis of legislative history which created railway employee job protection. However, the Committee must also note that New York Dock Conditions benefits were designed to protect a certain type of employee, simply put, those employees who would find it most difficult to secure a position outside of the railway industry.

Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended, i.e., to aid and protect those rank and file employees and subordinate officials who to their detriment are economically affected by the merger of railway systems. In the instant case, the Committee concludes that the Manager-Contract Administration position is clearly not a rank and file position, or even a subordinate official position. As such, the Committee must conclude that Mr. Dixon is not an "employee" as envisioned by the New York Dock Conditions and is not eligible for New York Dock benefits.

Having decided in favor of the Carrier on the threshold procedural issue of whether Mr. Dixon's position falls within the definition of "employee" under New York Dock Conditions, the Committee need not reach the substantive merits presented by the instant claim.

AWARD

The Committee, after careful consideration of the instant dispute identified above, finds that the claim must be dismissed as the Claimant, Mr. Dixon, is not an "employee" under New York Dock Conditions.

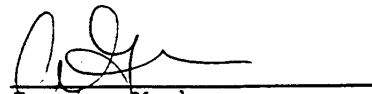
Adopted at Chicago, Illinois on the 16th day of July, 1998.

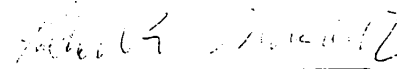

Lamont E. Stallworth, Ph.D.

Neutral Member


Labor Member

Labor Member


Carrier Member


Carrier Member

LES:CHG

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SPECIAL BOARD OF ARBITRATION
PURSUANT TO ARTICLE I, SECTION 11
OF NEW YORK DOCK CONDITIONS
IMPOSED BY THE SURFACE TRANSPORTATION BOARD (STB) IN
FINANCE DOCKET NO. 32760

IN THE MATTER OF ARBITRATION BETWEEN

PARTIES TO DISPUTE B.W. Isabell and the Transportation
and Communications International Union - ASD

and

Union Pacific Railroad Company
Southern Pacific Railroad Company

STATEMENT OF CLAIM:

The Organization submits that this Arbitration Board, constituted pursuant to Article I, Section 11 of the New York Dock Conditions, is asked to resolve the following issues:

1. Did Mr. Bennie W. Isabell lose his non-agreement position of Manager - Senior Tax Representative because of a merger-related transaction?
2. If the answer to Question (1) is in the affirmative, then is Mr. Isabell an employee as defined by the New York Dock Conditions?
3. If yes, to what level of benefits is he entitled to under the New York Dock Conditions?

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The Carrier submits the following statement of issue with respect to Mr. Isabell's case and in regard to procedure:

1. Was B.W. Isabell, at the time of the discontinuation of his management position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Isabell's case and in regard to the merits:

1. If Mr. Isabell was an employee under the New York Dock Conditions, was the elimination of his job due to a transaction subject to the New York Dock benefits?

BACKGROUND: This dispute concerns the Claimant, Mr. Bennie W. Isabell's, separation from his employment with the Carrier effective January 31, 1997. Mr. Isabell's non-agreement position of Manager-Senior Tax Representative was located in Houston, Texas. Mr. Isabell began his employment with St. Louis Southwestern Railway Lines in April 1971. The St. Louis Southwestern Railway eventually merged with the Southern Pacific Railroad Company. Mr. Isabell's seniority date on the clerical roster was April 21, 1971. Mr. Isabell was promoted to his non-agreement position of Manager-Senior Tax Representative in 1992. Mr. Isabell held this position at the time his job was discontinued effective January 31, 1997. According to the Carrier, at the time the instant claim was filed, Mr. Isabell had exercised his clerical seniority to a clerk position with the Carrier in Texas.

The Carrier states that the principle responsibilities for the position of Senior Tax Representative, the non-agreement which Mr. Isabell held until January 31, 1997, can be summarized as follows:

1. Develop a plan for tax reduction
2. Prepare tax returns and exemptions
3. Investigate special improvement districts
4. Analyze tax bills and advise appropriate handling
5. Audit tax bills for errors

(Carrier Exhibit No. C-1).

In addition, according to the Carrier, Mr. Isabell's position as Senior Tax Representative included a large number of special projects, including projects that included negotiations with tax authorities. Mr. Isabell was expected to develop strategies for tax reductions, have knowledge of IRS regulations, capital gains tax, corporate income tax and property valuation. The Carrier notes that Mr. Isabell has a Bachelor's degree in Business Administration and Spanish from Prairie View A&M University in Texas. (Carrier Exhibit C-1, C-3).

Mr. Isabell's position of Manager-Senior Tax Representative required him to report to the Regional Director of Property Tax, who in turn reports to the Assistant Vice President and Counsel - Taxes. Mr. Isabell earned an annual salary of \$40,140.00 at the time his position was discontinued on January 31, 1997.

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On August 6, 1996, the Surface Transportation Board through Finance Docket No. 32760, Decision No. 44, approved with certain conditions the merger and common control of the rail carriers controlled by the Union Pacific Railroad (Union Pacific Railroad and the Missouri Pacific Railroad) and the Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation and the Denver and Rio Grande Railroad Company). As a condition of approval, the Surface Transportation Board imposed the New York Dock Conditions on the merger which are protective conditions to benefit employees as defined by the agreement. (TCU Exhibit No. A).

Subsequent to this merger, in January of 1997, Mr. Isabell was verbally notified that he was not selected for a position in the recently merged UP/SP Rail systems. Shortly thereafter, Mr. Isabell received a severance packet and letter dated January 31, 1997. The Organization notes that the January 31, 1997 severance letter makes specific reference to the "Union Pacific/Southern Pacific Severance Program Marketing and Sales", and that the letter expressly stated:

As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of the Southern Pacific Railroad Company and the Union Pacific Railroad. I understand that you have been advised that your employment will terminate as part of the reduction in force. The effective date of your termination will be January 31, 1997. I'm writing to discuss the financial arrangements related to your separation from employment.

(TCU Exhibit No. B).

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On December 18, 1996, the Parties reached agreement on certain benefits negotiated for agreement-covered employees known as Implementing Agreement No. NYD-217. Subsequent to this agreement, the Union Pacific Railway abolished twenty-one (21) Marketing and Sales Agreement positions.

Mr. Isabell's non-agreement position was abolished on January 31, 1997, and Mr. Isabell opted not to participate in the Carrier's separation program. Mr. Isabell exercised his seniority to an agreement-covered position on February 3, 1997. According to the Organization at this juncture Mr. Isabell held seniority on the Southern Pacific (Eastern Lines) Seniority District Roster No. 3 and displaced a junior employee on Position No. 283, Chief Clerk IC, rate of pay \$2,744.06, Houston, Texas. The Organization notes that Mr. Isabell was therefore placed in a worse position as a result of the abolishment of his non-agreement position which was at a higher rate of pay or \$3,345.00 per month.

Following the termination of Mr. Isabell's non-agreement position effective January 31, 1997, Mr. Isabell faxed to Mr. Bruce Feld, Senior Manager for Labor Relations, Union Pacific Railroad, on February 3, 1997 a request for a Test Period Average (TPA) as Mr. Isabell considered himself a "displaced employee" under the terms of the New York Dock Conditions. (TCU Exhibit No. C).

The Carrier took the position in its February 13, 1997 response that Mr. Isabell's dispute involved an interpretation of the New York Dock Article III definition of "employee", as interpreted in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987). The Carrier asserted that Mr. Isabell's former position as Senior Tax Representative was not subject to unionization and did not fit the standard interpretation of the term "employee" under the New York Dock Conditions.

The Parties continued to exchange correspondence regarding their respective positions on this issue and their ongoing disagreement over the interpretation and application of the New York Dock Conditions through March and April of 1997. (TCU Exhibit Nos. E, F, and G).

The Parties were unable to resolve their differences on this issue. Pursuant to the decision of the Interstate Commerce Commission in Finance Docket No. 32760, the Parties agreed to submit the matter to special arbitration for resolution by the Undersigned. It is within this factual context that the instant dispute arises.

POSITION OF THE ORGANIZATION:

The Organization contends that when the Carrier terminated Mr. Isabell's non-agreement position of Senior Tax Representative, but

did not offer him a position on the newly merged UP/SP system, that Mr. Isabell clearly became a "displaced employee" under the New York Dock Conditions. The Organization asserts that as a "displaced employee" Mr. Isabell is entitled to receive for the "protective period" of six (6) years a "displacement allowance" of no less than the difference between the monthly compensation received by him in the position he retains and the average monthly compensation received by him in the position from which he was displaced.

The Organization submits that the following provisions of the New York Dock Conditions are applicable to the instant grievance:

ARTICLE I

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

(b) "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 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,

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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.

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 the 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 wage increases.

8. **Fringe benefits** - No employee of the railroad who is affected by a transaction shall be deprived, during his protective period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

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.

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.

The Organization argues that there is no dispute that Mr. Isabell was indeed affected by a "transaction" as defined above in the New York Dock Conditions. The Organization asserts that Article I, Section 11(e) specifically requires that it is the employee's obligation to identify the transaction and relate explicit and pertinent facts of the transaction on which the employee relies to support his or her case. The Organization submits that it is then the Carrier's burden to prove that factors other than the transaction affected the employee.

In the instant grievance, the Organization argues that it did in fact identify the transaction and specific facts in regard thereto as required by Article I, Section 11(e). The Organization points out that such facts particularly include the Carrier's admission in its severance letter and package to Mr. Isabell that he is being terminated as a result of the consolidation of the Southern Pacific Transportation Company and the Union Pacific Railroad. It is the Organization's position that it has proven the

"causal nexus" between the merger and the termination action taken against Mr. Isabell by the Carrier. The Organization asserts that the burden shifts to the Carrier to prove something other than a merger transaction affected Mr. Isabell. The Organization argues that the Carrier wholly failed to carry this burden of proof.

The Organization also notes that the Carrier erroneously quoted and paraphrased Article III of the New York Dock Conditions, as it admits in its April 15, 1997 letter. (TCU Exhibit No. F). The Organization assumes that the intended language by the Carrier was in fact taken from Article IV and proceeds with its argument and position statement based on that assumption.

The Organization contends that the Carrier relies heavily upon the text of a comment by Arbitrator Seidenberg in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), and that the Parties are in dispute over the definition of the term "employee" under the New York Dock provisions. While the Organization recognizes the result offered in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), the Organization also notes that there are two important differences in that case as compared to the instant dispute. The Organization states that in denying New York Dock benefits to the claimants in the above-referenced case, Arbitrator Seidenberg found that the non-agreement employees affected had managerial, administrative and supervisory responsibilities and that the employees were offered comparable positions and salaries but declined them.

The Organization argues that in the instant case Mr. Isabell was not offered a position on the merged UP/SP system nor did he have managerial, administrative and supervisory responsibilities assigned to his position. The Organization notes that the Carrier failed to deny these facts.

The Organization also challenges the Carrier's position that Mr. Isabell's abolished position was not subject to unionization. The Organization asserts that just as the clerical positions in the Tax Department, including the Senior Tax Representative, were recognized as being within the craft or class covered by the Clerks' Agreement, TCU Exhibit No. H, these positions are definitely subject to further coverage under the Agreement and are subject to unionization. (See Employees's Submission at page 11).

Notwithstanding the Carrier's position, the Organization denies that an employee's non-agreement position must be subject to unionization to be considered an "employee" under the provisions of the New York Dock Conditions. The Organization relies on the recent decision by Arbitrator Christine D. Ver Ploeg, In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), in which the arbitrator considered the level and amount of supervising authority and degree of policy making in the position to determine whether a non-agreement position was labor-related or imbued with management responsibilities. (TCU Exhibit No. I). See also, In the Matter of Arbitration Between James Benham v. Delaware and Hudson R. Co.

(Arb. O'Brien, 1986). As the Organization notes, Arbitrator Ver Ploeg held that the claimant's job responsibilities as a Quality Control Manager did not rise to the level of a management position, but rather was clearly more of a labor position and that the claimant was therefore entitled to the appropriate benefits under the terms of the New York Dock Conditions.

The Organization further asserts that the words of the Interstate Commerce Commission are instructive on this point:

"... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, therefore, must of necessity be decided upon the record.****" Supra I.C.C. at 92. (Employees' Submission at page 15).

The Organization argues that in the instant grievance the record evidence clearly establishes that Mr. Isabell's position of Manager - Senior Tax Representative was more of a labor position than a managerial position. The Organization notes that Mr. Isabell had no authority to hire, fire, supervise, or evaluate any other employees and had no authority to order changes in company policy. The Organization maintains that Mr. Isabell's only duty was to handle tax accounts for the railroad and that as such Mr. Isabell was no more than a tax accountant for the Carrier who had his position eliminated as a result of the merger of Union Pacific and Southern Pacific Railroads.

The Organization relies on the decision in The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) for the proposition that the claim must be sustained because the Organization established that the claimant lost his job as a result of a merger-related transaction. Similarly, in the instant dispute, the Organization argues that the claim should be sustained on the same grounds.

The Organization also notes that the Carrier refuses to acknowledge that Mr. Isabell is entitled to displacement allowance and has not furnished the same to the Mr. Isabell. In addition, the Organization asserts that Mr. Isabell's average earnings over the twelve months proceeding his dismissal is \$3,345.00 per month.

Based on the foregoing, the Organization asserts that the instant claim should be sustained in favor of Mr. Isabell and that he is entitled to full benefits as an "employee" as defined by the New York Dock Conditions. The Organization requests that the Arbitrator answer the question posed by the statement of the issue as framed by the Organization in the affirmative and render a decision that Mr. Isabell is entitled to substantially the same level of protection and benefits afforded to members of labor organizations.

POSITION OF THE CARRIER:

The Carrier first presents its procedural arguments. According to the Carrier, the instant dispute should be dismissed because Mr. Isabell was not an "employee" as contemplated by the New York Dock Conditions at the time his management position was discontinued by the Carrier. The Carrier points out that the substantive merits of this case are only relevant if in fact it is determined by the Arbitrator that Mr. Isabell is found to be an "employee" entitled to New York Dock Conditions benefits. The Carrier submits that the instant case should be decided on this procedural issue first and decided in favor of the Carrier.

In addressing the procedural issue of whether Mr. Isabell is an "employee" entitled to New York Dock Conditions benefits, the Carrier first notes that railroad employee protection originated from the Depression era, when railroad consolidations were taking place and the government sought assurances that no railroad jobs would be lost. The Carrier asserts that it is necessary to consider for whom the legislated railroad protections were intended.

The Carrier submits that starting with the Emergency Railroad Transportation Act of 1933, and then from the Washington Job Protection Agreement, through the Interstate Commerce Commission's involvement and the Transportation Act of 1940, railway employee protection was addressed. The Carrier notes that from 1940 to 1997, railway employee protection evolved into many forms or reiterations until the creation of the present day New York Dock Conditions.

The Carrier contends that when the Surface Transportation Board approved the merger of the Southern Pacific and Union Pacific Railroads, it did so by also imposing the New York Dock Conditions. It is the Carrier's position that at the crux of the instant dispute is whether Mr. Isabell, as well as other affected employees, can meet the definition of "employee" under the New York Dock Conditions and therefore receive New York Dock protections and benefits. The Carrier maintains that Mr. Isabell does not meet the New York Dock definition of "employee" and is therefore ineligible for such mandated New York Dock benefits.

The Carrier asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection. Specifically, that provision of the Railway Labor Act provides:

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 employees organizations be regarded as 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

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operations consisting of the mining of coal, 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 Carrier argues that it is clear from the provision referenced above that the scope of unionization and the definition of the term "employee" includes only rank and file employees and subordinate officials but not officials or management employees. The Carrier asserts that the Railway Labor Act definition of "employee" is also used in New York Dock Condition cases. The Carrier relies on the Committee's decision in Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1) and asserts that the term "employee" means an agreement employee or one subject to unionization. The Carrier submits that the Committee found that when the ICC employed the phrase "employees of the railroad who are not represented by a labor organization" it was extending protection only to those employees and subordinate officials who are both subject to and entitled to union representation but are not represented. In accordance with Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1), the Carrier contends that this definition of employee is the industry definition and the definition used in the New York Dock cases. See also, In the Matter of Florida E.C. Ry., No. 4827-J, D.S. Fla. (January 5, 1960) (the term "employees" encompasses persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act

but not officers, department heads, nor those in the next echelon, such as assistants and staff members to the department heads).

The Carrier argues that the ICC has never taken a broad view of the term "employee" and that New York Dock protections were not intended for management at a level above subordinate officials. See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5). Rather, the Carrier asserts that claimants such as Mr. Isabell retain their rights to classified service while holding a management position and have the opportunity to exercise their union seniority when their management positions are eliminated, but are not due protection for their management positions under New York Dock Conditions. Id.

The Carrier notes that examining the job functions and responsibilities of the employee is required to determine whether an employee is an "employee" who is eligible for New York Dock Conditions benefits. In cases relied upon the Carrier, several factors to consider when reviewing job functions include both the level of responsibility held by the employee and whether an employee's job skills are transferable outside of the railway industry. See, e.g. Bond and Topolsky, supra; Newbourne v. Grand Trunk Western Railroad Co., 758 F.2nd 193 (1985); and Benham and Delaware and Hudson Railway Co., (1986) (Carrier's Exhibit Nos. D-6 and D-7).

The Carrier also relies on the decision in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et

al (Arb. Seidenberg, 1987), wherein it was stated:

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.

The rationale and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

In the instant case, the Carrier argues that a review of Mr. Isabell's non-rank and file managerial position indicates that he was a ranked personnel whose professional accounting skills could be transferred outside of the railway industry. Specifically, the Carrier notes that Mr. Isabell's position of Senior Tax Representative is placed in the Professional category for Affirmative Action computations. The Carrier submits that the Senior Tax Representative involved plan development, analyzing tax bills and giving recommendations regarding the handling of tax

matters and auditing. The Carrier points out that while the Organization initially claimed that Mr. Isabell was subject to the collective bargaining agreement on the property, the Organization did not reargue that claim when the appeal was denied. The Carrier maintains that the scope of the rule agreement indicates that Mr. Isabell's position was neither clerical, nor listed as a position under the agreement as is the case for the other affected claimants (Mr. Dixon and Mr. Povirk). See, Carrier's Exhibit C-6).

The Carrier submits that Mr. Isabell's position required knowledge of IRS regulations, capital gains tax, corporate income tax and property valuation. The Carrier notes that Mr. Isabell also possessed a Bachelor's Degree in Business Administration. The Carrier therefore asserts that Mr. Isabell's skills are clearly transferable and highly marketable in the job workplace outside of the railway industry. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175). In addition, the Carrier maintains that Mr. Isabell, along with the other claimants, was offered a severance package that was not offered to agreement employees. (See, Carrier Exhibit Nos. A-4, B-4 and C-4).

The Carrier contends that the burden of proving that Mr. Isabell is an "employee" entitled to New York Dock protections rests with the Organization and that the Organization has failed to meet their burden. See, Gerald Thomas & BLE and UPRR (1988) (Carrier's Exhibit No. D-4). The Carrier specifically notes

that the Organization failed to prove that Mr. Isabell was a subordinate employee as listed by the ICC in Ex Parte 72 (February 5, 1924). See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5) and Carrier's Exhibit D-10 (ICC job title position indices).

The Carrier further contends that with regard to In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), that case is distinguishable from the instant grievance as are the other cases cited by the Organization. The Carrier asserts that in the Nekich decision the claimant's position was Quality Coordinator who served as a liaison between management and classified employees. Accordingly, Arbitrator Ver Ploeg held that the claimant in Nekich was not an administrative, managerial, professional or supervisory employee. The Carrier also notes that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Isabell's transferable accounting job skills. For a similar case to Nekich, see also Hoffman and Burlington Northern Santa Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee).

With regard to The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) the Carrier argues
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that the parties in that case stipulated that the claimant was an "employee" for New York Dock Condition purposes:

The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several similarly-situated employees who are not involved directly in this case.

(Carrier Exhibit No. D-15). The Carrier therefore argues that because the committee did not even need to reach the issue of whether the claimant in P.J. Kelley was indeed an "employee" for New York Dock Conditions, that case is not applicable to the instant case. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

The Carrier submits that any analysis of what is meant by a "position not subject to unionization" must be done on a *de facto* basis, with an examination of the position based on the facts at hand. The Carrier notes that this is especially important given that only the National Mediation Board has the jurisdiction to determine whether a position should be a member of a class or craft under the Railway Labor Act. The Carrier asserts that in outlining the definition of an employee eligible for New York Dock benefits, it is clear that Mr. Isabell's position fails to meet the accepted requirements because:

1. His position was not unionized, nor subject unionization.

2. His duties could be described as being administrative, managerial, professional or supervisory in nature.

3. His position is not exclusive to the railroad industry and his skills were transferrable.

Based on these procedural arguments, the Carrier asserts that the instant claim should be dismissed.

With regard to the substantive issues, the Carrier argues that the elimination of Mr. Isabel's position was not due to a "transaction" under New York Dock Conditions. The Carrier submits that under Article I of the New York Dock Conditions, "transaction" is defined as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." The Carrier maintains that no evidence has been presented to demonstrate that these non-agreement positions could not have been abolished without ICC approval.

The Carrier also argues that the New York Dock Conditions define a "displaced employee" as "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". Furthermore, the Carrier states that a "dismissed employee" is defined under New York Dock Conditions as:

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 a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

Moreover, the Carrier contends that in light of the award in In the Matter of Arbitration Between Union Pacific Railroad Company and Brotherhood of Railway Signalman, (Arb. Dana Eischen, 1994) (Carrier Exhibit D-20), it is well-established that the Organization must demonstrate a causal nexus between the merger and the alleged transaction. The Carrier refutes the Organization's assertion that it has established a "causal nexus" between the termination action against Mr. Isabell and the ICC's merger authorization. Rather, the Carrier asserts that the Organization did not prove that Mr. Isabell's position was eliminated as a result of a New York Dock transaction and that the Organization failed to show that Mr. Isabell was placed in a worse position due to a New York Dock transaction.

The Carrier notes that the Organization relies almost solely on the severance package letter from Vice President of Human Resources Barbara V. Schaefer to Mr. Isabell wherein she states:

As you know, the Company is reducing the size of its nonagreement work force due to the consolidation of Southern Pacific Transportation Company and Union Pacific Railroad. I understand that you have been advised that your employment will be terminated as a part of this reduction in force.

(Carrier Exhibit No. B-4). The Carrier asserts that this letter from the Carrier's department of Human Resources was not approved by the Carrier's Labor Relations department and accordingly Labor Relations should not be held by what the Human Resources department

independently distributed. As support for its position, the Carrier relies on the award in Transportation Communications International Union and CSX Transportation, Inc., (Arb. Seidenberg, 1995) (Carrier Exhibit D-14) wherein the arbitrator stated:

The Committee notes the Organization's reliance on Director Patterson's letter... What is more significant is that Mr. Patterson was not a Carrier's officer who was vested with the authority to determine policy as to which employees were entitled to receive New York Dock benefits.

The Carrier maintains that the Organization failed to identify the transaction and specify those facts which are pertinent to that of the transaction being asserted. Se, e.g., Transportation-Communications International Union - BRAC and Union Pacific Railroad, Case Nos. 6, 7, & 8 (Carrier Exhibits Nos. D-16 and 17). The Carrier also argues, as stated previously on different grounds, that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) does not apply as an example of a New York Dock transaction because, unlike the instant grievance, there was sufficient evidence that an intermingling of work, employees, operations and functions had occurred in that case. (Carrier's Exhibit No. D-15).

Based on the foregoing, the Carrier respectfully requests that the Committee dismiss this dispute on procedural grounds because:

The term "employees" as used in Article IV of the New York Dock Conditions is a term of art which includes rank and file employees and subordinate officials, but excludes employees who are not subject to unionization or have positions that are managerial, supervisory, administrative or professional, such as the positions held by the Claimants herein: Manager Contract Administration, Regional Sales Manager and Senior Tax Representative.

(Carrier's Submission at page 31). The Carrier also requests that, in the alternative, the instant claim be denied because the elimination of Mr. Isabell's position was not due to a transaction as defined by New York Dock Conditions.

OPINION

The Committee has carefully considered the facts, evidence and arguments presented by the Parties and concludes that under the provisions of the New York Dock Conditions, Mr. Isabell is not an "employee" as envisioned by the New York Dock Conditions. Therefore, Mr. Isabell is not entitled to New York Dock benefits and protections. Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the Committee's opinion that the instant claim must be dismissed on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirety. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Isabell is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier. The Carrier specifically asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection:

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 employees organizations be regarded as 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, 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.

(Carrier's Submission at page 14).

The Committee also recognizes the statement by the Interstate Commerce Commission as provided by the Organization:

... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, therefore, must of necessity be decided upon the record.*** (supra I.C.C. at 92).

(Employees' Submission at page 15).

In the instant dispute, the record provides evidence that Mr. Isabell's position required knowledge of IRS regulations, capital gains tax, corporate income tax and property valuation. Mr. Isabell also possessed a Bachelor's Degree in Business Administration. A review of Mr. Isabell's job duties raises the issue of whether his position of Manager-Senior Tax Representative is more labor-related than managerial. The Carrier states that the principle responsibilities for the position of Senior Tax Representative, the non-agreement position which Mr. Isabell held until January 31, 1997, can be summarized as follows:

1. Develop a plan for tax reduction
2. Prepare tax returns and exemptions

3. Investigate special improvement districts
4. Analyze tax bills and advise appropriate handling
5. Audit tax bills for errors

(Carrier Exhibit No. C-1). Based on the record evidence, the Committee concludes that Mr. Isabell's position duties were primarily those of an accountant specializing in tax matters rather than a rank and file employee. The Committee must therefore agree with the Carrier that Mr. Isabell's skills are clearly transferable and highly marketable in the job workplace outside of the railway industry.

The Committee finds the award in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) to be instructive in the instant case. In Adams, the claimants were District Sales Managers and ultimately held to be ineligible for New York Dock benefits because they were not considered "employee(s)" under New York Dock Conditions as their positions were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. Not under daily supervision.
3. [The Claimants were] Given an automobile allowance for personal use.
4. [The Claimants were also] In possession of skills that were easily transferable.

The Committee notes the point made by the Carrier that in Adams, Dominick & Williamson and Delaware & Hudson Railway Co.,

(1987) (Carrier Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer.

The Undersigned Committee is of the opinion that a similar result as the one reached in Adams must be reached in the instant case. The record demonstrates that Mr. Isabell's position of Manager - Senior Tax Representative was not covered by any collective bargaining agreement, nor was it apparently subject to unionization. The Organization offered the unsupported argument that Mr. Isabell's Senior Tax Representative position could be subject to unionization but did not credibly explain under what circumstances. In addition, the record evidence demonstrates that Mr. Isabell was not under daily supervision. The Carrier asserts, and the Committee agrees, that most significant of all is that Mr. Isabell possessed accounting and tax management skills that arguably are transferable to almost any other industry or service. (See e.g., Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175).

The Organization argues that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) applies to the instant case. However, as the Carrier correctly asserts, the parties in P.J. Kelley stipulated that the claimant

was an "employee" for New York Dock Condition purposes. In that case, the parties specifically agreed:

The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several other similarly-situated employees who are not directly involved in this case.

(Carrier's Submission at page 24).

It is clear that, unlike the instant claim, in the case of P.J. Kelley that Committee did not have to resolve the threshold issue of whether the claimant was indeed an "employee" for New York Dock Conditions purposes. Accordingly, the Committee does not find that particular case relied upon the Organization to be controlling. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

Similarly, the Committee notes that the case of In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), is also distinguishable from the instant claim. The Committee observes that in the Nekich case the claimant's position was Quality Coordinator, a position that required the employee to serve as a liaison between management and classified employees. Arbitrator Ver Ploeg found the claimant was not an administrative, managerial, professional or supervisory employee.

The Carrier asserts that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Isabell's transferable accounting job skills. See also, Hoffman and Burlington Northern Sante Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee). The Committee must agree. Mr. Isabell's accounting and tax representation work was primarily an accounting position with tax-related issues, and Mr. Isabell apparently did not require daily supervision. As such, Mr. Isabell's position is more dissimilar to the position in Nekich and more akin to the position in the Adams award, cited supra.

The Committee finds it useful to reiterate at this juncture the observations of Arbitrator Seidenberg, confronted with a similar issue in the case of The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. et al. (Arb. Seidenberg, 1987), wherein he noted:

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.

The rational and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

The Committee is mindful of the purpose behind the protective conditions set forth in the New York Dock Conditions and the Great Depression era genesis of legislative history which created railway employee job protection. However, the Committee must also note that New York Dock Conditions benefits were designed to protect a certain type of employee, simply put, those employees who would find it most difficult to secure a position outside of the railway industry.

Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended; i.e., to aid and protect those rank and file employees and subordinate officials who to their detriment are economically affected by the merger of railway systems. In the instant case, Mr. Isabell's Manager - Senior Tax Representative position is clearly not a rank and file position, or even a subordinate official position. As such, the

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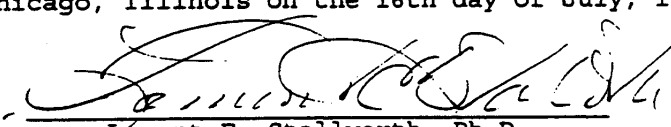
Committee must conclude that Mr. Isabell is not an "employee" as envisioned by the New York Dock Conditions and is not eligible for New York Dock benefits.

Having decided in favor of the Carrier on the threshold procedural issue of whether Mr. Isabell falls within the definition of "employee" under New York Dock Conditions, the Committee need not reach the substantive merits presented by the instant grievance.

AWARD

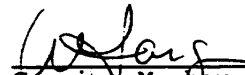
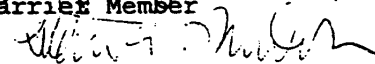
The Committee, after careful consideration of the instant dispute identified above, finds that the instant claim must be denied as the Claimant, Mr. Isabell, is not an "employee" under New York Dock Conditions.

Adopted at Chicago, Illinois on the 16th day of July, 1998


Lamont E. Stallworth, Ph.D.
Neutral Member


Labor Member

Labor Member


Carrier Member

Carrier Member

LES:CHG

UNION PACIFIC EXHIBIT 32
PAGE 33 OF 33

AGREEMENT

between the

UNION PACIFIC RAILROAD COMPANY

and the

**UNITED TRANSPORTATION UNION
(SP WEST)**

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

The parties understand that this document is the result of voluntary negotiations outside of merger negotiations and that the provisions entered into below are separate and apart from merger notices. Complete negotiations beginning with the service of notice under New York Dock conditions must still be handled for each merger area and those requirements are not waived by this Agreement. However, in order to reach a mutually satisfactory understanding for the handling of future UP/UTU SP West negotiations with regards to the collective bargaining agreement that will be selected by the Carrier and to equalize many of the pay and work rules on the UP system,

IT IS AGREED:

I. MUTUAL COMMITMENT

A. Union Pacific agrees that the SP-West UTU collective bargaining agreement (CBA), as amended by this Agreement, will be the governing collective bargaining agreement for the following territory: Starting either with the Portland Hub (as defined in the applicable merger implementing agreement/award) and The Dalles or one crew change point south out of Portland and The Dalles; to Elko, Nevada; to Yermo, California, and ending either one crew change point west out of El Paso or one crew change point northeast, east and southeast out of El Paso.

NOTE: The trackage between Barstow, California and Mojave, California will be joint trackage for both SP and UP South employees until that area is under a single collective bargaining agreement.

B. SP-West UTU agrees the collective bargaining provisions set forth below, in Sections II- XI and attachments (A-E) will constitute agreed-upon changes to the SP-West UTU collective bargaining agreement.

II. PROTECTION

A. All- SP West trainmen/switchmen (not including UP borrow outs on the SP) with a seniority date prior to June 1, 1997, working under the provisions of the SP-West UTU CBA as amended, will receive one test period average (TPA) composed of two parts - one part based on the employee's wages for calendar year 1996 and one part based on the employee's productivity fund payments earned in the productivity fund year 1996, if any. The wages part of the TPA shall be computed in accordance with the provisions of New York Dock. The total amount, wages plus productivity fund payments will be divided by twelve (12) to achieve a monthly TPA.

NOTE 1: In accordance with New York Dock, an employee's TPA will not include certain taxable and non- taxable items such as but not limited to relocation, lump sums, lump sum claims settlements, protection payments and away-from-home meal allowances. It will include the \$12.50 for in lieu meal allowances.

NOTE 2: Without prejudice to either party's position, the 1996 TPAs will include claim settlements paid in that year, including penalty payments, whether attributable to that test period or not. During the protective period, similar payments will be used as an offset to the monthly protection. This does not include lump sum claim settlements such as, but not limited to, the electric switch settlement nor the other items referred to in the Agreement and the letter included as Attachment "F" hereto.

B. Each employee who receives a TPA under Section II(A), above, will be automatically certified as a protected employee at the time of implementation of this amendment to the SP-West UTU Collective Bargaining Agreement. This protection shall be known as "Interim protection" and shall apply until the employee is covered by a New York Dock implementing agreement/award. Interim protection shall apply to all employees regardless of whether pre-July 9, 1990 crew consist protected or not. (See Paragraph F, below, for protection coverage after the employee's New York Dock protective period expires.) Any protection afforded because of this section and which occurs prior to the beginning of an employee's New York Dock protective period under a separate New York Dock implementing agreement/award, will be separate and apart from that protection and will not be used as an offset against the employee's New York Dock protective period.

EXAMPLE

	Emp A*@	Emp B*@	Emp C#	Emp D*@
Date of Hire	5/20/78	6/13/62	4/10/94	7/7/67
Eff. Date of Agmt	11/1/97	11/1/97	11/1/97	11/1/97
Date of Interim Prot	11/1/97	11/1/97	11/1/97	11/1/97
Date of Mer Imp Agmt	12/1/97	1/1/98	4/1/98	8/1/98
Merger Protection	NYDock	NYDock	NYDock	NYDock
Exp of NY Dock	12/1/03	1/1/04	4/1/02	8/1/04
Crew Consist Prot	Yes	Yes	No	Yes

*Crew Consist Protected employee

@NYDock protection for 6 years (based on length of service with a maximum of 6 years of service)

#NYDock protection for 4 years (based on length of service with 4 years of service)

The purpose of this example is to show that the interim protection is not offset against the number of years entitled under New York Dock.

C. Employees now covered by a protective arrangement may elect to continue coverage under that arrangement consistent with the New York Dock labor protective conditions.

Note : In accordance with Paragraph C, above, employees eligible for Peninsula Commute Service (PCS) or Siskiyou labor protection may elect to retain that coverage and convert to the protection afforded by this agreement upon expiration of the PCS or Siskiyou protection. (Employees who elect that protection shall remember that productivity funds have been converted to protection under this agreement and are not available under PCS and Siskiyou protection).

D. Each SP-West employee who worked a minimum of 150 yard shifts in 1996 as a regularly assigned yard employee will have that portion of his/her TPA that is based on calendar year 1996 wages increased by 14.82%. This is a one-time adjustment to equalize SP yard rates with National yard rates and will only apply to those SP-West employees who meet the requirements set forth in this Paragraph D. This increase will not apply to that portion of the TPAs based upon productivity fund payments.

E. Each SP-West UTU certified employee's TPA (wages plus productivity fund) will be subject to change based on future wage and COLA adjustments. The time period for computing such changes will begin with the implementation of this Agreement and shall run for the length of the employee's New York Dock protection. If this Agreement is initiated prior to August 14, 1997, then the July 1, 1997 National Increase shall apply if this Agreement is subsequently approved.

F. After expiration of the employee's New York Dock protective period, each pre-July 9, 1990 crew consist protected SP-West UTU employee will continue as a Crew Consist Protection protected employee for the employee's remaining employment in the craft of trainman/switchman subject to the following: the employee's TPA will be at the amount of the employee's final protection rate established in accordance with Paragraph E, above, and shall not be subject to future increases. The handling of crew consist protection payments and offsets will continue to be handled in the same manner as under New York Dock as detailed in this Agreement.

G. The TPAs for full-time and part time union officers will be based on the officer's own TPA or a TPA average derived from the two employees directly above and the two employees directly below the official, working at the official's normal work location and on the official's seniority roster. In calculating such an average, UP will "de-select" any employees with unusually low or high earnings. Full time and part time union officers are defined as General Committee and Local Committee officers.

H. All protection afforded and referenced in this Article II will be income (wage plus productivity fund where applicable) protection only. There will be no hours computation/hours protection for any afforded/referenced protection. Protection offsets are set forth in the Q&A's.

I. Employees will be eligible for the interim protection upon implementation of this Agreement. They shall become eligible for New York Dock and Crew Consist Protection only upon implementation or imposition of the negotiated merger proposal for each Hub, and if the SP-West agreement is applicable in that Hub after the merger. The parties agree to use best efforts to achieve a negotiated settlement.

III. NATIONAL WAGES AND RULES

A. SP-West UTU wage rates will now equal the national wage rates. (A copy of those wage rates is attached as Attachment E.) Previous lump sum payments provided for in the November 11, 1991 and May 8, 1996 National Agreements will not be made; however, future lump sum payments will be made in accordance with national agreements.

B. All provisions of the November 11, 1991 and May 8, 1996 National Agreements will apply to territory governed by the SP-West UTU collective bargaining agreement unless specifically provided for in this Agreement. Agreement provisions which will apply include, but are not limited to, the following: Promotion to Conductor, Expenses Away from Home, Road/Yard Work, Special Relief-Customer Service-Yard Crews, Interdivisional Service and Basic Day.

C. The current SP-West UTU eating rule will apply for local and road switcher service. Yard service will be governed by the national standard for eating in yard service. The Carrier will continue to pay the \$12.50 in lieu of allowance for pool freight runs until an area has been finalized in the merger with an agreement or award. Once an area has

been incorporated in a merger Hub, then the national \$1.50 in lieu of allowance will be paid on all pool freight runs.

D. All current employees (employees working in train/yard service at the time of implementation of this agreement) will have the entry rate provisions waived and will be paid at 100% of the National wage rate.

E. All new hires after the date of implementation will be subject to the following: entry rates will start at 85% of the national rate provided for in Section III(A), above, for first-year employees; at 90% for second-year employees; at 95% for third-year employees; and, at 100% for fourth year employees. These employees will be entitled to the 5% bump for promotion as provided for in Article VIII of the May 8, 1996, UTU National Agreement. Employees promoted to another craft will not restart their protection.

F. Current employees will retain the 100% entry rate of pay percentage at the time of promotion to another craft.

G. The SP-West UTU collective bargaining agreement will be subject to the National Moratorium set forth in the May 8, 1996, National Agreement, and all local notices and re-opener provisions in conflict with that Moratorium are null and void.

IV. CREW CONSIST

A. Because of the extended protection for crew consist protected employees provided for in Section II, above, all SP-West UTU special allowances and productivity fund payments will cease with the implementation of this Agreement.

B. (1) The standard crew for all through freight and for all hours-of-service relief will be one (1) conductor. There will be no car count or train length limitations in the operation of crews with one (1) conductor. There will be no car count, train length or work event restrictions of any type in the operation of crews with one (1) conductor/foreman and (1) brakeman/helper

(2) Trains operated with a crew of one (1) conductor will be restricted to no more than three work events en route between the initial and final terminals, subject to the following:

- a. A work event is considered to be a straight pick-up or set-out.
- b. Picking-up, setting-out or exchanging one or more locomotives and setting-out a bad order car shall not be considered a work event.
- c. Work performed in the initial and/or final terminal will be governed by applicable rules, including all national rules.
- d. Should a conductor be required to exceed three work events en route between terminals, the conductor shall also be paid the missing brakeman's wages. Only one such payment will be made regardless of the number of excess work events performed.

(3) The standard crew for local and road switcher service will be one (1) conductor and one (1) brakeman.

(4) The standard crew for yard service shall be determined according to the following:

- a. The Carrier may operate the same percentage of yard jobs foreman-only in a merged hub as it was entitled to operate foreman-only on May 19, 1997.

EXAMPLE: In the merged Los Angeles Hub, prior to merger UP had 30 switch engines and under the agreement was entitled to operate all 30 foreman-only. In the same merged hub, prior to the merger SP had 60 switch engines. In the merged Los Angeles Hub, the carrier may operate one-third of the switch engines foreman-only.

- b. The Carrier may establish utility positions in accordance with Attachment "A" to this agreement which may assist any number of both road and yard assignments at any location within a hub.

(5) The standard crew for non-revenue (including work train) service will be one (1) conductor/foreman. If the local chairman for the territory involved believes the assignment warrants a crew of one (1) conductor/foreman and (1) brakeman/helper, the local chairman and the local carrier officer responsible for that territory will conduct a joint check of the assignment to determine if a brakeman/helper is needed. If unable to agree, the criteria shall be that a brakeman/helper shall be needed if the assignment works four (4) or more hours on the ground or riding the outside of the equipment.

V. DISABILITY/LIFE INSURANCE/MEDICAL

A. All current SP-West UTU employees and subsequent new-hire employees who will work under the SP-West UTU collective bargaining agreement will be covered for medical benefits by the applicable National Plan (health, dental and, as of 1/1/99, vision).

B. Current SP-West UTU employees will continue to receive the disability and life insurance coverage now afforded them under the UTU SP-West collective bargaining agreement, if any, subject to Section C, below, for six years from January 1, 1998, whether a merger implementing agreement is or is not reached for each hub. Those former SP-West trainmen (Salt Lake - East) who transferred to the Salt Lake City Hub will continue their disability for the same period so the group benefit ends on the same day. After the end of the six year protective period, the disability and life insurance policies will be eliminated from the SP-West UTU collective bargaining agreement, unless otherwise provided. It is understood this Agreement is made without prejudice to the positions of either party regarding whether or not such benefits are subject to preservation under New York Dock. This Agreement will not be cited by any party in any other negotiations or proceedings.

C. The SP-West UTU agreement covering disability premium payments will be upgraded to \$63.10. This is not a guarantee for benefit levels; it is only a guarantee for the amount of premium paid by the carrier per employee. Such payments will cease in accordance with Section V(B), above.

D. The UTU Committee may discuss joining the Union Pacific Employees Health Systems (UPEHS). The Carrier agrees that is a matter between the UTU and UPEHS.

VI. EXTRA BOARDS

A. The seniority extra board and no-bid vacancy rules will be amended as follows:

1. All seniority extra boards will become rotary extra boards working first-in, first-out.
2. Whenever a vacancy goes no-bid, the Carrier may fill that vacancy from the reserve board if available, or then the senior furloughed employee. If none available, then the junior employee on the extra board covering that position will be assigned. Vacancies on the extra board will be filled from the reserve board or the senior furloughed employee.

B. Extra Board types, guarantee rates and rules shall be as set forth in Attachment "B" to this agreement.

VII. ROTARY POOL FREIGHT SERVICE

A. All through freight service will be rotary pool freight service with blue print board provisions for placing employees in the proper order at the home terminal and at the far terminal. Blue Print provisions are attached hereto as Attachment "C" and will be applicable as each merger Hub is implemented. Employees are not runaround if used on the train for which called.

B. Assigned pool freight conductors will be allowed to trade pool turn positions with other conductors in the same pool subject to the following conditions:

1. The UTU Local Chairman or their designated representative shall submit the request to Carrier's CMS on behalf of the conductors wishing to exchange pool turns.
2. Both conductors shall be at their home terminal when the request is made in order to avoid any disruptions to the operation of the pool. However, an exchange may be made where one conductor is on vacation provided the vacation turn is vacant or concurrence is reached with the conductor temporarily assigned.

3. A trade may be made at any time up to call time provided the conductor who must accept the call is rested and available. A conductor may initiate only two trades per year.

4. No time claims involving runarounds or other penalties arising out of the trading/exchanging of turns under these provisions shall be progressed by or in behalf of any employee.

5. It is the intent of the parties that conductors will limit the use of these provisions to those situations in which they would otherwise have no choice and would be required to miss their turn.

VIII. CLAIMS SETTLEMENT

A. All time claims and grievances of record (a time claim or grievance of record is a time claim or grievance that has been denied by the carrier at any level, including Timekeeping; any claims involving the GRIDPAD arbitration and any claims involving gainsharing) submitted by either an employee or by the UTU as of December 31, 1996, will be settled and resolved by the payment of \$3700.00 to each SP-West UTU employee who performed service as a trainman/switchman between January 1, 1990 and December 31, 1996, and who is still in active service with the Carrier or who retired in 1997.

NOTE: It is possible time claim and grievance settlements will be reached with other organizations. Should any individual be entitled to a time claim and grievance settlement payment under this Agreement and under any other agreement, the maximum amount due such an individual will be \$3700.00.

B. This settlement does not cover outstanding discipline, medical and non-monetary (such as seniority disputes) cases but covers all other time claims and grievances and gainsharing claims, including those cases which have been docketed for arbitration but not argued and those cases argued at arbitration but where no decision has been rendered.

C. This settlement is final and binding and is made with prejudice regarding the GRIDPAD and gainsharing claims and hereinafter the organization shall not file nor progress any GRIDPAD or gainsharing claims. This settlement is without prejudice or precedent to either party's position with regard to the subject matter of all other time claims and grievances and will not be cited by either party in any future claims conferences, arbitration or negotiation.

D. Since the settlement of all time claims and grievances of record will create a new environment for the grievance process, the following will apply:

1. Formal local conferences are eliminated, however, local chairpersons are encouraged to handle claims and other issues directly with the Carrier's designated Labor Relations managers, assistant managers and labor relations officers; and,
2. The Carrier will no longer reimburse local chairpersons/union officials or employees for attending time claim/grievance conferences.
3. The SP local chairpersons will have access to Carrier records in a manner consistent with UP local chairpersons. Access will be available from home if the Local Chairperson owns sufficient technology, or at the on-duty point.

IX. REGION/SYSTEM AND RESERVE BOARDS

A. All current SP-West UTU train/yard service employees will retain "no furlough" status. Employees transferred to SP-West UTU collective bargaining agreement control as a result of a UP/SP merger implementing agreement and all new hires will not have such status. The Region/System Board Agreement will continue until an agreement or award is reached for each separate merger Hub and then a reserve board agreement will apply to that Hub using the provisions found in Attachment "D" to this agreement. Those provisions will include reserve board eligibility for SP-West UTU employees now entitled to "no furlough" status.

X. 401K PLAN

The current SP-West UTU 401K Plan will no longer be available for future deposits for monies paid after the close of business December 31, 1997. The current UP 401K Plan applicable to train service employees (road and yard) will apply to SP-West UTU train service employees (road and yard) after that date. The parties are negotiating agreements merging the 401K plans.

XI. MORATORIUM

Articles II-Protection and IV-Crew Consist and Attachment (D) are covered by a separate moratorium than the one described in III (F). Since they are in part, crew consist related, the provisions of these two articles and attachment are not subject to change through the Railway Labor Act Section 6 process prior to the attrition of all crew consist protected employees. This does not prevent the parties from voluntarily entering into agreements to modify these provisions.

XII. IMPLEMENTATION

This agreement will be effective in two parts. Article I - Mutual Commitment, Article II - Protection, Article III - National Wages and Rules, Article IV - Crew Consist, Article V - Disability/Life Insurance/Medical, Article VIII - Claims Settlement and Article XI - Moratorium shall become effective on the first day of the first month following notification from the UTU this Agreement has been approved so long as ten (10) days' notice is given the Carrier. The Carrier will begin processing the claim settlement checks as soon as possible. In order to give Timekeeping and CMS sufficient time to make the necessary programming changes, the remaining articles shall be effective on the first day of the first payroll period following a ten (10) days' notice by the Carrier to the UTU.

XIII. SAVINGS CLAUSE

Should any portion of this Agreement including attachments or any of the attached Questions and Answers conflict with the SP-West UTU collective bargaining agreement, this Agreement shall govern.

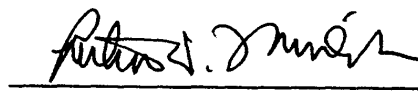
Signed at San Francisco, California, this 20 day of October, 1997.

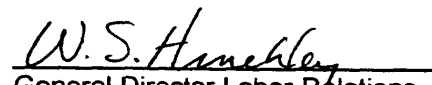
FOR THE ORGANIZATION:


General Chairman UTU

Vice-President UTU

FOR THE CARRIER:


AVP Employee Relations


General Director Labor Relations

QUESTIONS AND ANSWERS

- Q1. Will Article XXVI (Plant Rationalization) and Article XXVII (Scope Rule) remain as part of the UTU SP-West collective bargaining agreement?
- A1. No. Both of those articles will be eliminated with the implementation of this Agreement.
- Q2. When an employee is force-assigned to a no-bid position under Article VI(A)(2), how long will the employee be required to stay on that assignment?
- A2. The employee will remain on the assignment in accordance with existing agreement provisions.
- Q3. Under Article VIII(A) (Claims Settlement), what constitutes "active service with the Carrier?"
- A3. An employee who is working for Union Pacific Railroad Company or who is on a bona fide leave of absence or who is dismissed and later reinstated.
- Q4. Under Article IX (Region/System and Reserve Boards), what is a "current SP-West train service employee" for purposes of the "no furlough" status?
- A4. A current employee for "no furlough" status is an employee holding seniority on the SP-West trainman/switchman roster prior to the effective date of this agreement. The "no furlough" status will only be applicable when working in train/yard service and not in other crafts or non-agreement assignments.
- Q5. Under Article III(D) (National Wages and Rules), will employees on bona fide leaves of absence, dismissed and later reinstated, etc. receive 100% of the National Wage Rate as provided for in that section?
- A5. Such employees, upon return to service, will be compensated at 100% of the National Wage Rate.
- Q6. Will all SP-West trainmen-switchmen (not including UP borrow outs on the SP) with a seniority date prior to June 1, 1997, working under the provisions of the SP-West UTU collective bargaining agreement who are on a bona fide leave of absence or dismissed and later reinstated be eligible for protection under this agreement upon return to active service?
- A6. Yes. The TPAs for such employees will be calculated in accordance with the procedure set forth in Paragraph G of Article II.
- Q7. In Article V, will employees on a bona fide leave of absence or dismissed and later reinstated be considered "current SP-West employees" who are now eligible for the disability and life insurance coverage provided for in that paragraph?
- A7. Yes, upon return to service if previously eligible and entitled to those benefits.

Q8. How will the TPA be calculated for an employee who has less than 12 months compensated service in 1996.

A8. Standard New York Dock conditions will apply. If the employee has more than twelve months service but was off for an entire month then the next previous month with earnings is used, if an employee only had nine months total service then the total is divided by nine.

Q9. Is compensation referred to as "in lieu of" vacation for employees assigned to Region/System Boards excluded from an employees' TPA?

A9. No. Such compensation is not a double payment and will be included in an employee's TPA.

Q10. How will reductions from protection be calculated?

A10. In an effort to minimize uncertainty concerning the amount of reductions and simplify this process, the parties have agreed to handle reductions from Interim, New York Dock and Crew Consist Protection as follows:

1. Pool freight assignments - 1/15 of the monthly test period average will be reduced for each unpaid absence of up to 48 hours or part thereof. Absences beyond 48 hours will result in another 1/15 reduction for each additional 48 hour period or part thereof.
2. Five day assignments - 1/22 of the monthly test period average will be reduced for each unpaid absence of up to 24 hours or part thereof. Absences beyond 24 hours will result in another 1/22 reduction for each additional 24 hour period or part thereof.
3. Six and Seven day assignments - The same process as above except 1/26 for a six day assignment and 1/30 for a seven day assignment.

NOTE: Assigned rest days for five and six day assignments and Region/System Boards will not be used to offset protection payments.

4. Extra board assignments - 1/30 of the monthly test period average will be reduced for each unpaid absence of up to 24 hours or part thereof. Absences beyond 24 hours will result in another 1/30 reduction for each additional 24 hour period or part thereof. Absences on the extra board shall be calculated from the time of unavailability (layoff, missed call, etc) until the next time called for service. For example: If an employee lays off on Monday at noon, marks up the next day Tuesday and does not work until 2AM on Wednesday then they shall be off for protection purposes for thirty-eight (38) hours and shall be deducted 2/30 of their protection.

ATTACHMENT A

UTILITY POSITIONS

Utility positions may be established under the following conditions:

- A. Utility positions may be established in any yard or at any outside point where a regular assignment may be established.
- B. Utility positions may assist both road and yard crews in the performance of their duties. It is not intended that the Utility position will perform the conductor's or foreman's paperwork. It is not the intent of this agreement to create engineer only positions and have the utility assignment perform the groundwork for that engineer. The Utility position is to assist both assignments with ground crews assigned and single assignments permitted by current rules.
- C. Utility positions will be paid the applicable foreman's rate of pay.
- D. If a Utility position is called extra at the same yard or outside point and in the same starting time bracket for the yard and within one and one-half hours for outside points for four (4) consecutive days, the position shall be bulletined as a regular utility assignment.
- E. Utility positions established in yards shall be governed by yard starting time rules, where applicable. Utility positions established at outside points shall be governed by starting time rules governing locals or road switchers, if any. The five (5) day work week provisions shall apply to assignments established in yards and assignments established at road points may be established for 5, 6 or 7 days with the days being consecutive.
- F. Utility positions established in yards will be restricted to the road/yard service zone limits established by applicable National Agreements, currently 25 miles. Utility positions established at outside points will be governed by road limits of 25 miles in all directions. Employees assigned to Utility positions will not be required to drive their own vehicles within these limits while performing their duties.
- G. If an employee assigned to or working a Utility position is assigned to a crew because a conductor/foreman or brakeman/helper has failed to show for work or has gone home sick, the Utility person shall remain with the crew for the remainder of the shift. The Utility person shall be paid the rate of the position worked or of the utility position whichever is greater.

Questions and Answers for Attachment A Utility Positions

Q 1. What facilities must be at the location of the utility assignment?

A 1. The same facilities that are required for a yard crew or local/road switcher.

Q 2. Must the Utility position have the same on and off duty point?

A 2. Yes.

Q 3. Can this assignment work alone?

A 3. The purpose of this assignment is to expedite traffic by assisting other crews. In performing those duties, the Utility assignment is intended to be attached to or work in concert with another crew. The Utility assignment shall be assigned to only one crew at a time and shall be in personal, radio, signal or other contact with the crew it is assisting prior to performing duties for or in conjunction with that crew.

Q 4. Can you give some examples to answer 3?

A 4. A Utility person may be required to do whatever a brakeman/helper could do when instructed to do so by the conductor/foreman.

Q 5. What impact does the utility person have on the calculation of work events?

A 5. None.

Q 6. May a Utility person assist crews from more than one seniority district?

A 6. Yes. In some locations crews from different seniority districts will perform work. A Utility person who holds seniority at such a location may assist any crew that operates into, out of and/or through that location.

Q 7. If a Utility person is attached to a crew and the crew is entitled to an arbitrary payment will the Utility person also receive the arbitrary?

A 7. Yes, if their seniority date would have qualified them for the payment if they had been a regular assigned member of the crew.

Q 8. May a Utility person be used off of their seniority district?

A 8. Yes, if current agreements permit the crew he/she is working with to be so used. For example; a yard crew may be used within the road/yard zone in accordance with the National Agreement even if it is outside their seniority district and a Utility person working with that crew may also be used in the same manner as part of that crew.

Q 9. If a Utility person is assigned in accordance with paragraph (G), does he/she lose the Utility person designation?

A 9. Yes, the Utility person would then be part of another crew and could no longer act as a Utility person.

Q 10. Is the answer to Question 9 intended to apply to road assignments?

A 10. No the provisions are not intended to supersede or circumvent applicable vacancy procedures for road assignments. The provisions are not intended to have Utility positions go beyond the mileage or road/yard zone limitations.

Q 11. If a conductor/foreman fails to show or has gone home sick and a brakeman/helper is assigned to the job and the Utility person is assigned who becomes the conductor/foreman?

A 11. The brakeman/helper if qualified; otherwise, the utility person.

Q 12. Is the Carrier required to assign the utility person as a permanent member of a crew in the above situation?

A 12. No.

Q 13. How will a Utility person know whether they are assigned to a crew or just assisting a crew in that situation?

A 13. They will be so instructed by a supervisor. Should any doubt arise the utility person should specifically ask. If so instructed he/she should contact CMS at the first opportunity and advise that they have been made part of the crew and should so indicate on their time record when tying-up.

Q 14. If an assignment is bulletined or called with a crew comprised of a conductor and one brakeman or a foreman and one helper may the Carrier operate this assignment as two assignments?

A 14. No.

Q 15. Does the presence and/or attachment of a Utility position affect the answer to Question 14?

A 15. No.

Q 16. What assignments may be assisted by a road Utility position and/or a yard Utility position?

A 16. The road and/or yard Utility positions may assist both road and yard assignments.

Q 17. What seniority will be used for filling Utility assignments?

A 17. Yardman's seniority in a yard and brakeman's seniority for road assignments.

Q 18. May relief Utility positions be established?

A 18. Yes, at the same location on the road unless mutually agreed otherwise or in the same terminal.

Q 19. When will road or yard Utility positions qualify for overtime?

A 19. In accordance with applicable yard overtime agreement provisions.

ATTACHMENT B

GUARANTEED EXTRA BOARDS

I. Conductor, brakemen and yardmen extra boards that currently exist shall continue to exist during the interim period; however, they shall be subject to the provisions of Articles II-VIII of this Attachment B.

Note: Extra Board coverage, consolidations and locations shall be further handled in each of the merger Hub negotiations, however, the types of extra boards, pay and layoff provisions shall be as provided in this Agreement.

II. The guarantee on these extra boards shall be as follows:

A. **Combination brakeman/switchman
or separate brakeman**

1925 miles per pay period at the brakeman's basic local freight rate of pay for the 1-80 car bracket.

B. **Yardman**

11 days per pay period at the 5-day yard helper rate of pay.

C. **Conductor or Conductor/brakeman
or Conductor/brakeman/switchman**

1925 miles per pay period at the conductor's basic local freight rate of pay for the 1-80 car bracket.

These rates of pay are subject to all subsequent adjustments in wages and COLA.

III. Payment of the guarantee will be made in the payroll half following the payroll half in which the guarantee payment was incurred.

IV. The Reserve Board, as provided for in Article IX of this Agreement, will not be used to supplement the guaranteed extra boards.

V. All guaranteed extra boards (GXB) will be regulated by the Carrier subject to the obligation of the Carrier to keep a sufficient number of employees on such boards to permit reasonable absence privileges (including personal leave and vacation). In that regard, Carrier agrees to maintain a minimum number of extra board employees equal to twenty percent (20%) of the assignments (positions) protected by such board.

VI. Employees shall take promotion to conductor as follows:

A. All employees must take promotion to conductor subject to the following: A pre-October 31, 1985 employee who can hold any job other than a conductor's position will not be obligated to take the conductor's examination. If, however, the employee is later unable to hold such a position, the employee will be given thirty (30) days in which to take promotion. Failure to do so will disqualify the employee from holding a position. When conditions exist that require an employee to take the conductor's examination, such employee will also be subject to any penalties that may be imposed through the National Agreement. Employees cannot use this provision to allege that lack of promotion keeps them from holding a higher paying position for purposes of protection. For example, a brakeman cannot pass up promotion and if unable to hold any position claim a dismissal allowance. The employee would be treated as holding a conductor's position. All post-October 31, 1985 employees must take promotion to conductor at the earliest opportunity.

B. The Carrier will hold promotion classes on a regular basis to provide the opportunity for non-promoted trainmen to qualify. Mileage and/or time limits as a brakeman/yardman that may have existed previous to the 1991 National Implementing Agreement governing promotion are no longer applicable.

VII. A. All earnings received by an employee assigned to a guaranteed extra board will be used in computing the employee's guarantee. Time claim payments for periods of time when not assigned to a guaranteed extra board will be paid in addition to guarantee payments made to an employee. Penalty claim payments due employees assigned to a guaranteed extra board will be paid in addition to the earnings received as a guaranteed extra board employee. Such computations will not include non-taxable income such as meal, lodging and personal auto mileage payments. Protection payments are not considered earnings for computing extra board guarantee. All guarantee payments will be calculated and paid prior to protection being calculated and paid.

B. A GXB employee standing first out who lays off, lays off on call, misses call or is not available for call will have the guarantee reduced by the amount he would have earned had he not laid off on call, missed call or not been available for call with a minimum reduction of one guaranteed day.

C. An employee who lays off when other than first out will have his guarantee reduced by one (1) day for each 24-hour period or portion thereof.

D. An employee assigned to a GXB who is unavailable for more than two (2) occurrences per pay period or who is unavailable for more than eighty-four (84) combined hours per pay period, will forfeit his guarantee for that pay period. Elected union representatives who are unavailable because of union work will not be subject to this Section (D) but will be covered by Section (E) of this Article VII of Attachment B.

E. An employee who misses a call as a result of another GXB employee laying off on call, missing call or not available for call when that other GXB employee is first out will have his guarantee reduced by one (1) day for each 24- hour period or portion thereof.

F. The guarantee reductions shall not apply for absences due to Bereavement Leave, Personal Leave Days, Vacations, Rules Classes, Jury Duty, Physical Examinations or other instances where the employee is held at the instruction of the Carrier.

VIII. A. An employee added to a GXB will be paid a guarantee for the day added provided the employee meets the availability requirements of this Agreement. All earnings made on the day added will be included in the computation of the guarantee. Guarantee will not be paid to an employee on the day reduced from a GXB if notified by 1:30 P.M. If an employee is reduced from a GXB but is not notified by 1:30 P.M., then the employee will be paid the guarantee for that day unless the employee voluntarily bid off the GXB.

B. All guarantee compensation paid to employees will be considered as service rendered for vacation pay and qualification purposes.

ATTACHMENT C

BLUEPRINT POOL PROVISIONS

The following shall govern pool freight crews:

- I. Pool freight crews who are run around by other pool freight crews in the home terminal, or en route between the home terminal and far terminal will, upon arrival at the far terminal be given the same relative position on the list that they held prior to leaving the home terminal, except that crews who become first out before having required rest shall stand first out after rest period, and upon return to home terminal shall be given the same relative position on board as was held prior to leaving the home terminal on the last trip.
- II. Pool freight crews who are run around by other pool freight crews in the far terminal, or en route between the far terminal and the home terminal, will upon arrival at the home terminal be given the same relative position on the list at the home terminal that they held prior to leaving the far terminal except as provided in I, above.
- III. Crews requesting extra rest in accordance with the rest rule will retain their position on the blue print board. In the event the crew is run around during the rest period, they will be placed first out at the expiration of their rest period.
- IV. At the time of pool adjustments, crews added to the pool in accordance with schedule rules will not be considered as run around when other pool crews arriving at the home terminal are placed ahead of them under the provisions of this Agreement.
- V. Upon arrival at the home or far terminal, trainmen who have been run around as indicated in paragraphs I and II, will notify proper officer as to their standing on the list at those points. The Carrier will not be subjected to penalty payments because trainmen fail to furnish information or furnish incorrect information. This does not, however, estop the Carrier from taking disciplinary action when it is developed the employees have furnished incorrect information. In addition no runarounds will be claimed because crews were not called or depart in accordance with the agreement because of that incorrect information.
- VI. Merger implementing agreements/awards will handle mark up provisions for pools with multiple destinations.

ATTACHMENT D

RESERVE BOARDS

I. The Carrier shall establish two levels of Reserve Boards for eligible employees working under the SP-West UTU Agreement. These Reserve Boards will be known as regular and ready reserve boards.

II. To be eligible to occupy either of these two reserve boards, an employee must have a seniority date on the SP-West pre-merger roster prior to June 1, 1997 and must be working in train/yard service at the time application is placed for one of the reserve boards. Employees who are on the roster but not working in train/yard service must, upon returning to train/yard service, work a minimum of sixty (60) days in train/yard service prior to becoming eligible for a reserve board position.

III. Reserve Board positions are not available to employees hired subsequent to June 1, 1997. If employees currently working under another UP agreement come under the provisions of the SP-West UTU Agreement as a result of a merger agreement and they were eligible to hold a reserve board under their prior agreement, they shall be entitled to hold a reserve board position, seniority permitting under this Agreement. No employee may hold a reserve board position (ready or regular) if an employee not eligible to hold a reserve board is working in the trainman/switchman craft within the Hub. All non-eligible employees must be displaced prior to reserve boards slots becoming available.

IV. A regular reserve board shall be established for each seniority district created under the SP-West agreement as a result of the merger. An employee on a regular reserve board shall be paid 70 % of the wage portion of their TPA as set forth in Article II (A) of the agreement.

V. A ready reserve board shall be established at each location where an extra board exists. An employee on a ready reserve board shall be paid 85% of the wage portion of their TPA as set forth in Article II (A) of the agreement. The ready reserve board shall be governed by the following:

A. An employee on a ready reserve board that protects road vacancies must be conductor qualified.

B. An employee on a ready reserve board is subject to recall upon 48 hours' notice. Notice shall include telephone notice or attempted notice by telephone. The 48 hours shall begin at the first attempt to notify an employee. A reasonable telephone recall shall be a minimum of three(3) telephone attempts in each eight (8) hours for forty-eight hours.

C. Employees who fail to mark up within the 48-hour period shall have their pay stopped at the end of the 48-hour period and may be subject to discipline.

D. Employees on the ready reserve board retain the right to layoff, use personal leave, and take scheduled vacations as provided for in current agreement rules. Employees laying off for other than a paid absence will have their reserve board pay reduced on a day for day basis.

E. Employees on the ready reserve board for a minimum of 30 consecutive days may request to be released from the board, seniority permitting. Such employee may move to the regular reserve board but must remain on the ready reserve board until their replacement is marked up on the ready reserve board. Nothing in this paragraph restricts the right of an employee to make application to working assignments, regular or extra.

F. Employees on the ready reserve board shall be recalled in junior order to extra boards (road, yard or combination) to provide temporary support when additional forces are needed on either a short term or long term basis. If the need is long term, the regular recall provisions from the other reserve board shall continue to apply, and when sufficient forces from the other reserve board have marked up, the ready reserve board employees shall be released back to the ready reserve board, seniority permitting.

Note: If the ready reserve employee is recalled under the regular recall provisions to a permanent vacancy, they will not be released but their reserve board position shall then be available for assignment.

G. The number of ready reserve board positions shall not be less than fifteen (15) percent of total extra board positions at each location. If surplus eligible manpower is available the ready reserve board shall be filled prior to filling any regular reserve board positions.

H. The Organization may elect to have a supplemental extra board in lieu of a ready reserve board. The supplemental extra board shall be paid at 85% of the regular extra board rate and shall be used when the regular extra board is exhausted. The employee first out at noon of each day shall be rotated to the bottom of the board. The Carrier shall determine the number of employees to have on the supplemental board but not less than 15% of the number of extra board positions if sufficient manpower is available. Employees hired subsequent to the June 1, 1997 shall not have rights to hold the supplemental extra board unless permitted by the Carrier.

VI. An employee placed on a reserve board shall remain in that status until:

A. The employee is displaced by another employee through the exercise of seniority.

- B. The employee resigns from the Carrier's employment.
- C. The employee is recalled to active service. Such recall shall be in junior order.
- D. The employee exercises seniority in accordance with applicable rules.
- E. The employee is discharged from employment by the Carrier in accordance with the applicable discipline rules.

VII. Employees on reserve boards must maintain their work proficiencies while in such status by successfully completing any retraining or refresher programs required of active employees to maintain those proficiencies which may include the passing of tests or examinations (including physical examinations) administered for purposes of determining whether such proficiencies have been maintained. Employees on a reserve board are "in-service employees" and hence subject to the same physical and rules examinations as other employees. The company's requirement that employees who have been out of service for six months or more must take physical and rules exams does not apply to reserve board employees.

VIII. Employees to be examined while in reserve board status will be notified by certified mail sent to their home address. Employees who fail to respond or fail to pass the exams will have their reserve pay stopped until such time as they do pass the applicable exam. Employees who fail to respond within sixty (60) days of a second notice may be subject to disciplinary action.

IX. Employees on the regular reserve board must hold themselves available for return to service upon thirty (30) days notice (reserve board pay shall continue for only seven (7) days) and must return to service in compliance with such thirty days' notice. Failure to comply with any of these requirements could result in forfeiture of all seniority rights in accordance with applicable discipline rules. Calculation of the seven (7) and thirty (30) day time periods shall begin with written notification (postmark date on the envelope) by certified mail from CMS to the employee. Efforts will first be made to contact the employee by telephone.

X. An employee who returns to service within the first seven days of the thirty day recall period will receive reserve board pay until the end of the seventh day in addition to all other earnings.

Note: Employees on the reserve board are paid as if holding a five-day assignment. The seven-day period would include five days of pay and two "rest days".

XI. Other employment while on the regular reserve board is permissible and there shall be no offset for outside earnings. Other employment includes all employment except that employment which would conflict with the best interests of Union Pacific. If an employee is concerned whether employment conflicts with the best interests of Union Pacific, the General Director of Labor Relations should be contacted.

Note: Employees on the regular reserve board shall be eligible to accept "borrow out" status at other locations on Union Pacific. Borrow out status shall last no longer than six months without renewing the borrowed out status with CMS and the General Chairman.

XII. Vacation pay received while on a reserve board will offset reserve board pay. Time spent in reserve status will not count toward determining whether the employee is eligible for vacation in succeeding years, but will be counted as compensation earned towards vacation pay. It will count in determining the length of vacation to which an employee, otherwise eligible, is entitled.

XIII. Employees on the reserve board are not eligible for Holiday pay, Bereavement Leave, Jury Pay and all other similar allowances except employees on the ready reserve board will be eligible for personal leave.

XIV. Employees in reserve status are covered by Health and Welfare Plans, Union Shop, dues check off, discipline rules and the grievance procedures that are applicable to employees in active service.

XV. It is understood that the reserve boards (both ready and regular) will not operate when all eligible employees on the appropriate seniority roster on the date of this agreement are placed on either a guaranteed extra board position or a regular assignment.

August 6, 1997
Side Letter No. 1

Gentlemen:

This refers to our negotiations modifying the SP-West UTU collective bargaining agreement and that portion dealing with protection offsets when not working. These offsets were set forth in the Questions and Answers. During our discussions the UTU pointed out that current agreements permit Local Chairpersons to layoff of pool turns and the extra board to handle union business and to hold their turns and if they move to first out they are held first out until they mark up again. It was the UTU's position that the offsets for pool layoffs and extra board layoffs should not be the same for those Local Chairpersons who hold their turn as compared to regular employees who are not governed by these same conditions.

In recognition of the difference it was agreed that Local Chairpersons who lay off Union Business would be deducted 1/30 for each 24 hour period or part thereof laid off until marked back up when holding pool or extra board assignments and they hold their turns. If they do not hold their turn then the regular offset provisions will apply.

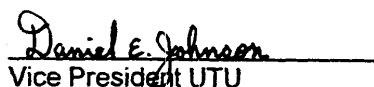
Should the above properly reflect our understanding please sign below.

Yours truly,



W.S. Hinckley
General Director Labor Relations

Agreed:


General Chairman UTU
Vice President UTU

August 6, 1997
Side Letter No. 2

Gentlemen:

In our SP-West UTU Collective Bargaining Agreement modifications we created a new form of wage protection called "Crew Consist Protection" in Article II (F). The question arose in negotiations concerning the status of this protection since most protection is regulatory, i.e. New York Dock, Mendicino, Oregon Short Line, etc or National, i.e. Article IX Interdivisional Protection.

We agreed that the "Crew Consist Protection" carries the same force and affect as the other types of protection. We emphasized this in Question and Answer No. 13 which allows an employee to select "Crew Consist Protection" over New York Dock protection in merger areas. The same would be true in the future if a transaction provided some type of protection, such as Mendicino, an employee covered under "Crew Consist Protection" would have to elect between keeping this protection or accepting the protection under the new transaction.

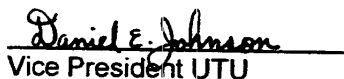
Should the above properly reflect our understanding please sign below.

Yours truly, ¹



W.S. Hinckley
General Director Labor Relations

Agreed:


General Chairman UTU
Vice President UTU

utuspwestagmt08/06/97

August 6, 1997
Side Letter No. 3

Mr. Kevin Klein
General Chairman, UTU
1860 El Camino Real, Suite 201
Burlingame, California 94010

Dear Sir:

This refers to Article II (G) of the SP-West UTU modification agreement. During our discussions you raised the issue of three legislative representatives and one international officer. It was your position that all four of these individuals should be covered under that section of the agreement should they return to active service with the carrier.

It was agreed that the matter would be settled in a manner consistent with your position and without prejudice to either parties' respective position regarding the status of legislative representatives and international officers.

Yours truly,



W. S. Hinckley
General Director Labor Relations

Agreed:


General Chairman, UTU

To: William S. Hinckley
cc:
From: JOSEPH K. KLEIN
Date: 10/19/97 08:52:03 AM
Subject: Modification of the UTU (SP West) CBA

To: RDMEREDI--NOTES Richard D. Meredit WSHINCKL--NOTES William S. Hinckle

From: Kevin Klein
General Chairperson
UTU UP(SP-West) Trainmen & Switchmen
Subject: Modification of the UTU (SP West) CBA
Gentlemen:

This is to advise that the proposal to modify the United Transportation Union (SP West) collective bargaining agreement had been approved by the membership.

This note will serve as the required notice from UTU to UP for the purpose of implementation as set forth in Article XII of the modification agreement.

Please proceed with the implementation advising this committee of the process accordingly.

Kevin Klein
415/692-8888 - Fax 415/692-6769
E-mail: UTUGO887@aol.com ** PROFS: OPUJKK

MERGER IMPLEMENTING AGREEMENT

**Southwest Territory
(Arizona, El Paso and Dalhart Hubs)**

between the

**UNION PACIFIC
SOUTHERN PACIFIC TRANSPORTATION COMPANY
And
UNITED TRANSPORTATION UNION**

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

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

IT IS AGREED:

I. Southwest Territory

- A. The Southwest Territory shall be comprised of three separate hubs – Arizona, El Paso and Dalhart.
- B. The Southwest territory shall encompasses the following area: the territory from milepost 292.33 East of Pratt Kansas westward to milepost 731.5 West of Yuma, Arizona: BNSF trackage rights to Childress (not including) and Lubbock (including) that connect to this line; and the lines from El Paso to Alpine (not including) and Toyah (not including) and shall include all main and branch lines, industrial leads and stations between the points identified.

NOTE: Employees with a home terminal within any of the three hubs (Arizona, El Paso or Dalhart) may work to points outside their hub without infringing on the rights of any other employee in other hub. Employees from outside any of the three hubs may work to points within those three hubs without infringing on the rights of any employee within those hubs. The three

hubs identify the on duty points for assignments and not the boundaries of assignments. (This note is further explained in Side letter No. 2)

II. Seniority and Work Consolidation.

The following seniority consolidations will be made:

- A. The Southwest Territory shall be divided into three hubs as follows:
1. Arizona - The territory between Yuma (including) and Lordsburg (not including).
 2. El Paso - The territory between Lordsburg (including) and Alpine (not including), Toyah (not including) and Vaughn (not including).
 3. Dalhart - The territory between Vaughn (including) and Pratt (including), Childress (not including) and Lubbock (including).
- B. New seniority districts will be formed and combined switchman, conductor, brakeman, fireman and hostler rosters shall be created for the employees on the current SP (SSW/SPWL/SPWL) seniority rosters and on the current UP seniority rosters and who are assigned and working in either the Arizona, El Paso or Dalhart Hub on implementation date or on an SP region system board from a point within one of the hubs but working outside the three hubs or UP employees borrowed out to other locations that will return to one of three hubs upon release. This does not include borrow outs to any of the three hubs. Employees who are furloughed shall be placed on rosters in the Hub where they were working at the time of furlough. (The term "employees" is used throughout as a generic term to include all UTU-C,T,&Y/T&S represented employees and, where applicable, all UTU-E represented employees.)
- C. There may be some SPEL and SSW employees who have held their seniority in abeyance pending the formulation of the final Hubs. These employees will now be required to exercise that seniority in either the Dalhart or El Paso Hubs as appropriate or by default become a permanent trainman in the Hub now working. The exercise of that seniority is based on the ability to hold a position. The Organization and the Carrier will agree on the cap for each zone and the entire Hubs.

D. The new seniority rosters for each hub will be created as follows:

1. Arizona Hub - All former SPWL employees working or furloughed in the hub on the day of implementation of this Agreement shall be listed in the same position as they now are listed with respect to all other employees who remain in the hub. This will apply for all rosters in the Arizona Hub.
2. El Paso Hub - This hub shall be comprised of three zones. Zones 1 and 2 shall have the top part of their roster prior righted with the other zone roster then placed on the bottom. An employee will only have prior rights in one of the two road zones.

Zone 1 - Road Service El Paso-Lordsburg and El Paso-Vaughn

Zone 2 - Road Service El Paso-Toyah/Alpine

Zone 3 - Yard service El Paso

- a. For Zone1 (road service El Paso-Lordsburg and El Paso-Vaughn), combined conductor and brakeman rosters shall be constructed by dovetailing SPWL (Tucson and Rio Grande seniority districts) brakemen and conductors using each employee's earliest retained UTU brakemen's and conductor's date. (SP switchmen with seniority prior to 9/21/72 will be placed on the list using their 9/21/72 date)
- b. For Zone 2 (road service El Paso-Toyah/Alpine), a combined conductor's roster shall be established in the following manner:
 - i. A temporary list will be constructed by dovetailing UP and SPEL brakemen using each employee's earliest retained UTU brakeman's date. Only brakemen and switchmen promoted to conductor will be included on this temporary list. This temporary list will be used as a template to determine the designation (SPEL or UP) of each position (slot) on the combined El Paso Hub conductor zone 2 roster. Slots on the combined El Paso Hub conductor zone 2 roster will be allocated (UP or SPEL) according to the corresponding position on this brakeman list.
 - ii. For the purpose of placement on the combined conductor's roster two lists will be made. The lists will be as follows :
 - 1) All SPEL conductors by earliest retained UTU conductor's date.
 - 2) All UP conductors by earliest retained UTU conductor's date.

- iii. The two conductor lists (UP and SPEL) in item ii above will be used to fill the combined conductor roster slots. If slot 1 on the combined roster is UP and slot 2 is SPEL then the first conductor on the UP conductor list is placed on slot 1 and the first conductor on the SPEL conductor list is placed on slot 2. This shall continue until all conductors are placed on the roster.
- iv. Once placed on the roster, the order of employees shall be maintained.
- c. For Zone 2 (road service El Paso-Toyah/Alpine), the combined brakemen's roster shall be constructed by dovetailing UP and SPEL brakemen using each employee's earliest retained UTU brakemen's date.
- d. Zone 1 and zone 2 rosters shall now be top and bottomed
- e. For Zone 3 (yard service El Paso), a combined switchman's roster shall be established for the El Paso Hub (Zone 3) by dovetailing UP, SPEL and SPWL switchmen using each employee's earliest retained UTU switchman's date.
- f. All employees hired after July 1, 1999 shall be placed on the bottom of the rosters of all three zones without any prior rights. (Employees hired after July 1, 1999 and prior to implementation shall have their seniority date established per the SPWL CBA to avoid later confusion when the rosters are formulated, based on differing CBA provisions.)
- g. All employees placed on any El Paso Hub roster may work all assignments protected by those rosters in accordance with their seniority. Prior rights employees may only be forced to assignments outside their prior rights zone so long as the home terminal of the forced assignment is El Paso. Post implementation employees may be forced to any assignment protected by an El Paso roster.

EXAMPLE: A Zone 2 prior right employee may be forced to any assignment in their zone, to any yard assignment in El Paso and any Zone 1 assignment that has a home terminal in El Paso such as the pools to Lordsburg and Vaughn. They would not be forced to the Clifton locals at Lordsburg.

- h. A combined fireman's dovetailed roster for UP, SPEL and SPWL firemen shall be created for the El Paso Hub. The combined roster shall apply to Zone 3. SPWL firemen shall be ranked first on the

Zone 1 roster followed by dovetailed UP and SPEL firemen. Dovetailed UP and SPEL firemen shall be ranked first on the Zone 2 roster followed by the SPWL firemen. All employees hired after July 1, 1999 shall be placed on the bottom of the rosters of all three zones without any prior rights. (Employees hired after July 1, 1999 and prior to implementation shall have their seniority date established per the SPWL CBA to avoid later confusion when the rosters are formulated, based on differing CBA provisions.) Employees entering engineer training prior to the implementation of this merger Agreement shall complete their training pursuant to the agreement under which they entered training.

3. Dalhart Hub – Except as provided in the Tucumcari Agreement, all former SPWL and SSW employees in the Dalhart Hub on the date of implementation of this Agreement shall be dovetailed for all rosters.
- E. If any of the processes used to create the new seniority rosters for the Arizona, El Paso and Dalhart Hubs results in employees having identical seniority dates, seniority ranking will be determined by the employee's earliest retained hire date with the carrier.
 - F. It is possible that an employee will have two dates due to work on two or more different rosters. In this case an employee will be allowed to use the oldest retained service date (SP or UP) that involves work in the Zone or Hub. Regarding firemen rosters, placement thereon will be based upon each employee's earliest date of entry into the craft.
 - G. Employees placed on either the Arizona, El Paso or Dalhart rosters (and an employee may be placed on rosters for only one hub) shall relinquish all seniority outside the new hub upon implementation of this Agreement and all seniority inside each of the three hubs held by employees outside the hubs shall be eliminated. When an employee places in the Hub from the inactive roster, the employee will be placed on the roster in their proper order as if they had participated in the roster formulation described above at time of implementation
 - H. Employees who are on an authorized leave of absence or who are dismissed and later reinstated will have the right to displace to the appropriate roster, provided his/her seniority at time of displacement would have permitted him/her to hold that selection. The parties will create an inactive roster in each hub for all such employees until they return to service at which time they will be placed on the appropriate seniority rosters and removed from the inactive roster. Engineers with an engineer's seniority date prior to January 1, 1998 shall be placed on the inactive roster.

I. Specific and Unchanged Assignments

1. Assignments at Yuma and El Centro (Imperial Valley) protected by the West Colton source of supply shall be governed as follows:
 - a. The assignments shall be prior righted to SP employees holding seniority in the Hub on the day the LA Hub agreement is implemented.
 - b. If an assignment goes no bid/application then it shall be filled by an employee from the Arizona Hub. LA Hub SP prior right employees shall have bid/application rights to vacancies on these assignments and shall not have displacement rights to them if they are held by an employee from the Arizona Hub unless the assignment LA Hub employees displace from is an Imperial Valley assignment.
2. All other assignments at Yuma shall remain Arizona Hub assignments. Through attrition, all Yuma and El Centro assignments shall become Arizona Hub assignments.
3. Employees who are on assignments that are not changed on the day of implementation shall remain on those assignments unless they make application to another vacancy or are displaced by employees with displacement rights under the controlling CBA. This Agreement does not create displacement rights due to its implementation.

III. POOL OPERATIONS/ASSIGNED SERVICE

The following operations may be instituted:

- A. Dalhart - Childress/Lubbock/Amarillo via Dalhart or Stratford as one pool with Dalhart as the home terminal.
- B. Dalhart - Vaughn with Dalhart as the home terminal.

NOTE: Tucumcari - Vaughn and Dalhart - Tucumcari shall continue to operate as separate pools until the final movement of the home terminal to Dalhart.

- C. Dalhart-Springfield with Dalhart as the home terminal.
- D. El Paso - Vaughn with El Paso as the home terminal.
- E. El Paso - Toyah/Alpine as one pool with El Paso as the home terminal. The Carrier will not give notice to combine the pools until either the new lodging

facility is built at Toyah or the pool's away from home lodging is at Pecos. Crews will not be deadheaded between Toyah and Alpine for return trips.

- F. El Paso - Lordsburg with El Paso as the home terminal.
- G. Tucson - El Paso with Tucson as the home terminal.
- H. Tucson - Lordsburg with Tucson as the home terminal.
- I. Tucson - Nogales/Phoenix as one pool with Tucson as the home terminal. Through freight pool service to Nogales shall be run in turnaround service with no away from home lodging. Tucson pool crews working to Nogales and return shall be paid in combination service if they perform deadhead and service in the same tour of duty. Through freight service to Phoenix may be run as either turnaround or straightaway service on a trip by trip basis.
- J. Tucson - Yuma with Tucson as the home terminal.
- K. Phoenix - Yuma with Phoenix as the home terminal.
- L. Dalhart-Pratt with Dalhart as the home terminal, subject to the arrangements set forth in Side Letter No. 4.
- M. Any pool freight, local, work train, hostler or road switcher service may be established in accordance with the controlling CBA.
- N. None of the Employees in (A) through (L) above shall be restricted, in or between the terminals of their assignment, as to where they may set out or pick up cars or leave or receive their train. The type and amount of work shall be governed by the controlling CBA. All Employees may operate over any and all tracks and alternate routings between locations.
- O. New pool operations not covered in this implementing Agreement between Hubs or within a Hub will be handled per Article IX of the 1985 National Agreement.
- P. The different pools identified in this Agreement may be established individually or in groups. If not established at time of implementation they shall be established upon ten days written notice to the General Chairperson. Existing pools will remain in place until replaced by new pools.

IV. EXTRA BOARDS

- A. Train service extra boards will be established at the following locations:
 - 1. Dalhart - (road) Except for any extra board work between Pratt and Liberal Kansas, this extra board will cover the remainder of the Dalhart Hub, turnaround hours of service relief for trains heading to

Dalhart from all directions (including those from Pueblo that have reached Springfield). This board will also protect any yard service vacancies in the territory involved.

2. Pratt – (road) This extra board will cover all of the area between Pratt (including) and Liberal (including) Kansas and turnaround hours of service relief for trains heading to Pratt from all directions. (Turnaround HOS work from the East shall be no further than Inman on the UP line and Ellinore on the trackage rights line) This board will also protect any yard service vacancies in the territory involved.
3. El Paso – (yard) This extra board will cover the El Paso Terminal.
4. El Paso Northwest– (road) This extra board will cover the area between El Paso and Vaughn (not including) and Lordsburg (including) and the assignments that go on duty in El Paso that work in these two directions and turnaround hours of service relief for trains heading to El Paso from these directions.
5. El Paso East – (road) This extra board will cover the area between El Paso and Toyah(not including) and between El Paso and Alpine (not including), except as provided in Section 11. below, the assignments that go on duty in El Paso that work in these two directions, and turnaround hours of service relief for trains heading to El Paso from these directions.
6. Tucson (yard) – This extra board will cover the Tucson terminal and any yard assignments which may be established at Nogales..
7. Tucson (road) – This extra board will cover the area between Lordsburg (not including), Gila Bend (including) and Nogales (including) and the assignments that go on duty in Tucson that work in these directions and turnaround hours of service relief for trains heading to Tucson from these directions.
8. Phoenix (yard) – This extra board will cover the Phoenix terminal.
9. Phoenix (road) – This extra board will cover the area between Picacho (not including) and Hyder (not including) and the assignments that go on duty in Phoenix that work in these directions and turnaround hours of service relief for trains heading to Phoenix from these directions.
10. Yuma (road) – This extra board will cover the area between Niland (including all the El Centro branch), Gila Bend (not including) and Hyder (including) and turnaround hours of service relief for trains

heading to Yuma from these directions but no further West than Niland.

11. Alpine (road) – to cover hours of service relief for trains heading to Alpine that are within 65 miles of Alpine and all other non pool assignments in this area. The San Antonio Hub shall protect the odd numbered assignments and the El Paso hub shall protect the even numbered assignments.

- B. The Carrier shall give ten days notice of the creation of each extra board if not given at the time of notice of implementation of this agreement. The Carrier shall give ten days notice of the discontinuance of any pre-merger extra boards that are not discontinued at the time of implementation of this agreement. Notice may be given individually or for more than one extra board.

V. TERMINAL AND OTHER CONSOLIDATIONS

- A. The several yards at El Paso shall be combined into a single terminal. Yard Employees shall not be restricted as to where in the terminal they can operate. The new terminal/switching limits shall be as follows:

SUBDIVISION/LINE		MILEPOST
Valentine		820.0
Lordsburg		1291.54#1 1319.87#2
Carrizozo		1300.54

- B. The provisions of A above will not be used to enlarge or contract the current limits except to the extent necessary to combine into a unified operation.
- C. With the implementation of this Agreement all areas, trackage, stations and facilities in each of the hubs shall be common to all employees working in their respective hub as a single unified system. Employees shall not be restricted within a hub as to where they can operate except on the basis of CBA provisions that set forth limits of an assignment such as the radius of a road switcher.

- D. Road crews may receive/leave their trains at any location within the consolidated terminals and may perform work within the terminals pursuant to the controlling collective bargaining agreement, including National Agreement provisions.
- E. Carrier will designate the on/off duty points for all road and yard crews. Such on/off duty points will have appropriate facilities as currently required by the controlling collective bargaining agreement and/or by governmental statute or regulation.

VI. AGREEMENT COVERAGE

A. General Conditions for Terminal Operations.

- 1. Initial delay and final delay will be governed by the controlling collective bargaining agreement, including the Duplicate Pay and Final Terminal Delay provisions of the 1985 and 1991 National and Implementing Agreements.
- 2. Employees will be transported to/from their trains to/from their designated on/off duty point in accordance with Article VIII, Section 1 of the October 31, 1985 National Agreement. The Carrier shall designate the on/off duty points for Employees.
- 3. The current application of National Agreement provisions regarding road work and Hours of Service relief under the combined road/yard service zone, shall continue to apply. Yard Employees at any location within a Hub may perform such service in all directions out of their terminal.
- 4. SPEL and SSW trainmen who have earned their vacation for the year 2000 in 1999 shall be allowed to take the number of weeks provided in their current vacation agreement for the year 2000.
- 5. SPEL/SSW trainmen shall be entitled to exercise personal leave buy back provisions for the calendar year 1999 (after November 1, 1999) whether or not they are still covered by the former SPEL/SSW contract at year end.

B. General Conditions for Pool/Assigned Operations in Article III.

- 1. The terms and conditions of the pool operations set forth in Article III (A-L) shall be the same except where specifically provided otherwise in those Sections. The terms and conditions are those of the surviving collective bargaining agreement as modified by subsequent

national agreements, awards and implementing documents and those set forth in this Agreement.

2. **Twenty-Five Mile Zone** - Pool employees may receive their train up to twenty-five miles on the far side of the terminal and run on through to the scheduled terminal. Employees shall be paid an additional one-half (½) basic day for this service in addition to the miles run between the two terminals. If the time spent in this zone is greater than four (4) hours, then they shall be paid on a minute basis.

EXAMPLE: An El Paso-Vaughn crew receives their westbound train fifteen (15) miles east of Vaughn and runs to El Paso. They shall be paid the actual miles established for the El Paso - Vaughn run and a minimum of an additional one-half basic day for handling the train from the point fifteen (15) miles east of Vaughn back through that terminal. (See Q&A's for additional information.)

3. **Turnaround Service/Hours of Service Relief**. Except as provided in (2) above, turnaround hours of service relief at both home and away from home terminals shall be handled by extra boards, if available, prior to using pool employees in turn around service. Employees used for this service may be used for multiple trips in one tour of duty in accordance with the surviving CBA. Extra boards may handle this in all directions out of a terminal. At El Paso where there is more than one road extra board, the extra boards shall protect their primary road area of coverage for this service; however, in an emergency, employees from one road extra board may be used to protect service covered by another road extra board. At away from home terminals, if pool crews are used for hours of service relief due to unavailability of extra men, they will be placed first out for the next straight away trip (or deadhead) to their home terminal and will not be used for a second hours of service relief or turnaround if other crews (extra or regular) are rested and available.
4. Nothing in this Section B (2) and (3) prevents the use of other employees to perform work currently permitted by prevailing agreements, including, but not limited to yard employees performing Hours of Service relief within the road/yard zone, ID employees performing service and deadheads between terminals, road switchers handling trains within their zones and using an employee from a following train to work a preceding train and payments required by the controlling CBA shall continue to be paid when this work is performed.

5. Employees, both pool and extra board, when called in turnaround hours of service relief, shall be considered called as in combination deadhead/service and shall be paid as such.

C. **Agreement Coverage** – Employees working in the Arizona, El Paso and Dalhart Hubs shall be governed, in addition to the provisions of this Agreement, by the Collective Bargaining Agreement selected by the Carrier, including all addenda and side letter agreements pertaining to that agreement and previous National Agreement/Award/Implementing Document provisions still applicable. Except as specifically provided herein the system and national collective bargaining agreements, awards and interpretations shall prevail. None of the provisions of these agreements are retroactive. The Carrier has selected the SP West modified UTU Agreements.

1. The Carrier will provide copies of the designated collective bargaining agreement to those employees who do not have a copy at the earliest possible date, but no later than by date of implementation of this Agreement.

D. **Other Provisions**

1. **Overtime** - Employees who have an engine/train service seniority date prior to October 31, 1985 shall begin overtime at the expiration of eight (8) hours for those through freight runs that are one hundred sixty miles or less and on runs in excess of one hundred sixty miles overtime will begin when the time on duty exceeds the miles run divided by twenty, or in any case, when on duty in excess of ten hours. When overtime, initial terminal delay and final terminal delay accrue on the same trip, allowance will be the combined initial and final terminal delay time or overtime, whichever is the greater. Employees hired after October 31, 1985 shall be paid overtime in accordance with the National rules governing same and in the same manner previously paid on the Union Pacific prior to the merger.
2. **Personal Leave** - Requests for personal leave day(s) will be granted or rejected at the time requested. If granted, the day(s) will commence at the time granted and the employee's mark up for return to service will be pending in increments of twenty-four (24) hours from that time depending on the number of days granted. Other than the extra board rest day and union business layoffs, employees must take all personal leave days to which entitled before they will be permitted to take a non-compensated lay off day.

NOTE: Non-compensated does not refer to absences due to a disability that is covered by Railroad Retirement Disability benefits or

CBA group insurance benefits.

3. **Rest Day** - Employees who are New York Dock or SP/UP crew consist protected, who are on guaranteed extra boards shall be entitled to one (1) rest day (a 24-hour period or portion thereof) during the pay period for which no deduction in their New York Dock or crew consist protection shall be made subject to the following conditions:
 - a. At the time of the rest day, the employee must be other than first out.
 - b. The rest day must be taken at any time commencing 12:00 noon Monday and concluded by 11:59PM Thursday.
 - c. The rest day cannot exceed twenty-four hours.
 - d. The rest day will be considered an absence for Guarantee Extra Board purposes and appropriate deduction will be made from that guarantee.
4. **Application Process** - Rules governing the advertising of assignments, both road and yard, are modified as follows: Vacancies on existing positions shall be filled through the application process. Employees may submit multiple standing applications. The senior employee with an application on file will be assigned to the vacancy and all other lesser applications shall be automatically withdrawn. New applications may be submitted at any time and applications for a job may be withdrawn by the submitting employee at any time prior to filling a vacancy for that position. Newly created positions (other than on existing pools and extra boards) will continue to be advertised for bids when first established in accordance with the controlling collective bargaining agreement. The senior employee making application for such positions shall be assigned.
5. **First-In/First-Out** - Employees in pool freight service will operate and/or deadhead on a first-in/first-out basis. Provisions providing for special placement after deadheading or laying off are eliminated.
6. **Displacement** - Employees with displacement rights exercising in pool freight service must displace the junior employee in the pool and will assume that position on the Board.
7. **Held Away from Home Time** - Employees in all pool freight service shall be governed by the current SP West HAHT provisions for Interdivisional Service.

VII. PROTECTION.

- A. Due to the parties voluntarily entering into this agreement the Carrier agrees to provide New York Dock wage protection (automatic certification) to all prior right employees who are listed on either an Arizona, El Paso or Dalhart Hub roster and working an assignment (including a Reserve Board) or furloughed on July 1, 1999. (The term working shall also include those employees disciplined and later returned to work and those full time Union Officers should they later return to service with the Carrier.) This protection will start with the effective (implementation) date of this Agreement. The provisions of Attachments "B" and "F" (August 6, 1997 letters) to the SP West Modification Agreements, Q&As relating to TPAs and Side Letter No. 1 to this Agreement shall be applicable to TPAs determined under this agreement. Employees who elect to retain protection under another agreement shall use the TPA as provided in that agreement. The employees must comply with the requirements associated with New York Dock conditions or their protection will be reduced for such items as layoffs, bidding/displacing to lower paying assignments when they could hold higher paying assignments, etc. Protection offsets due to unavailability are set forth in the Questions and Answers and Side Letter #1.
- B. This protection is wage only and hours will not be taken into account.
- C. Employees required to relocate under this agreement will be governed by the relocation provisions of New York Dock. In lieu of New York Dock provisions, employees required to relocate may elect one of the following options:
1. Non-homeowners may elect to receive an "in lieu of" allowance in the amount of \$10,000 upon providing proof of actual relocation.
 2. Homeowners may elect to receive an "in lieu of" allowance in the amount of \$20,000 upon providing proof of actual relocation.
 3. Homeowners in Item 2 above, who provide proof of a bona fide sale of their home at fair value at the location from which relocated, shall be eligible to receive an additional allowance of \$10,000.
 - (a) This option shall expire five (5) years from date of application for the allowance under Item 2 above.
 - (b) Proof of sale must be in the form of sale documents, deeds, and filings of these documents with the appropriate agency.

4. With the exception of item 3 above, no claim for an "in lieu of" relocation allowance will be accepted after two (2) years from date of implementation of this agreement.
 5. Employees receiving an "in lieu of" relocation allowance pursuant to this implementing agreement will be required to remain at the new location, seniority permitting, for a period of two (2) years.
 6. Under no circumstances shall an employee be permitted to receive more than one (1) "in lieu of" relocation allowance under this implementing agreement or other relocation agreement concurrent with this agreement.
 7. Seniority relocations from Yuma to Phoenix and Tucson shall be treated as required to relocate.
- D. There will be no pyramiding of benefits.
- E. Employees who were employed after the year 1995 shall use the twelve month period prior to implementation for determining their TPA. SPEL and SSW Employees currently covered by an interim protection TPA shall use that TPA as adjusted in Side Letter No. 10. UPTP and SPEL Employees without interim protection, who were hired into train service prior to January 1, 1996 shall use calendar year 1996 for determining their TPA as adjusted in Side Letter No. 10. SPWL employees with an interim protection shall retain that TPA. The TPA for union officers will be based on the two employees above and two employees below the officer with regular work records on the pre-merger roster or their regular TPA, whichever is larger.
- F. Employees will be treated for vacation, payment of arbitraries and personal leave days as though all their service on their original railroad had been performed on the merged railroad. Employees assigned to an Arizona, El Paso or Dalhart Hub seniority roster with a seniority date prior to July 1, 1999 shall have entry rate provisions waived and employees hired after that date shall be subject to the rate progression provisions of the controlling CBA. Those employees leaving the Southwest Territory will be governed by the CBA where they then work.
- G. National Termination of Seniority provisions shall not be applicable to employees hired prior to the effective date of this Agreement.

VIII. FAMILIARIZATION

- A. Employees involved in the consolidation of the Arizona, El Paso and Dalhart Hubs covered by this Agreement whose assignments require performance of duties of a new geographic territory not familiar to them will be given familiarization opportunities as quickly as possible. Employees will not be required to lose time or ride the road on their own time in order to qualify for these new operations.
- B. Employees will be provided with a sufficient number of familiarization trips in order to become familiar with the new territory. Issues concerning individual qualification shall be handled with local operating officers. If disputes occur under this Article they may be addressed directly with the appropriate Director of Labor Relations and the General Chairperson for expeditious resolution.

IX. CREW CONSIST

- A. Except as provided below, the crew consist agreement of the CBA selected by the Carrier shall govern all employees in the Arizona, El Paso and Dalhart Hubs. The governing CBA does not provide for special allowances and/or productivity funds and no one shall be entitled to any such payment even if previously paid one under a different CBA. The current productivity funds shall be frozen at time of implementation and the proceeds paid out in a normal manner to those pre implementation participants.
- B. The UPTP employees who are currently entitled to share in the UP productivity fund distribution shall be handled in accordance with the provisions of Side Letter No. 3. SPEL and SSW employees with a trainman's seniority date prior to November 29, 1988 shall be handled in accordance with Side Letter No. 10.
- C. Employees with a trainman's date on or prior to January 30, 1998 shall be eligible to hold a reserve board.
- D. There will be a total of five (5) reserve boards in the territory covered by this agreement, i.e., one (1) in the Arizona Hub, three (3) in the El Paso Hub (one for each prior rights zone), and one (1) in the Dalhart Hub. Employees with reserve board rights must displace non-reserve board right employees from positions that they are required to cover, prior to placing on a reserve board.

X. IMPLEMENTATION

- A. The Carrier will give at least thirty (30) days written notice of its intent to implement this Agreement.
- B.
 - 1. After notice of acceptance of this agreement, the appropriate Labor Relations Personnel, CMS Personnel, General Chairmen and Local Chairmen will convene a workshop to implement assembly of the merged seniority rosters. At this workshop, the representatives of the Organization will participate with the Carrier in constructing consolidated seniority rosters as set forth in Article II of this Implementing Agreement.
 - 2. Dependent upon the Carrier's manpower needs, the Carrier may develop a pool of representatives of the Organization, with the concurrence of the General Chairmen, which, in addition to assisting in the preparation of the rosters, will assist in answering trainmen's questions, including explanations of the seniority consolidation and implementing agreement issues, discussing merger integration issues with local Carrier officers and CMS or the assignment of trainmen to positions.
 - 3. The roster slotting workshop will be held in Omaha and implementation agreement issues will be handled in the field.
- C. Upon implementation the Carrier may begin consolidating extra boards and pools and relocating employees as provided elsewhere in this agreement.
- D. Upon implementation but prior to pools being combined, such as El Paso to Alpine/Toyah, the Carrier may call the first out SP and first out UP Employee to go together, over the entire run, for familiarization purposes in addition to using other methods.
- E. After all assignments are made, trainmen assigned to positions which require them to relocate will be given the opportunity to relocate within the next thirty (30) day period. During this period, the affected trainmen may be allowed to continue to occupy their existing positions. If required to assume duties at the new location immediately upon implementation date and prior to having received their thirty (30) days to relocate, such trainmen will be paid normal and necessary expenses at the new location until relocated. Payment of expenses will not exceed thirty (30) calendar days.
- F. The Carrier may at its option, elect to phase-in the actual pool and extra board consolidations which are necessary in the implementation of this

agreement. Trainmen will be given ten (10) days' notice of when their specific relocation/reassignment is to occur.

XI. HEALTH AND WELFARE

- A. Employees currently are under either the National Plan or the Union Pacific Hospital Association. Employees coming under a new CBA will have six months from the implementation of this agreement to make an election as to keeping their old coverage or coming under the coverage of their new CBA. Employees who do not make an election will have been deemed to elect to retain their current coverage. Employees hired after the date of implementation will be covered under the plan provided for in the surviving CBA.
- B. If an employee is covered under a group life and/or disability insurance policy provided for in his/her collective bargaining agreement and that collective bargaining agreement is not the surviving collective bargaining agreement, the Carrier shall continue the premium payments required at the time of implementation of this agreement for those employees presently covered under those provisions for a period of six years, beginning January 1, 1998.

This Agreement is entered into this 23rd day of June 1999.

For the Organization:

[Signature]
General Chairperson UTU UP

[Signature]
General Chairperson UTU SP West

[Signature]
General Chairperson UTU SSW

[Signature]
General Chairperson UTU SP East Road

[Signature]
General Chairperson UTU SP East Yard

For the Carrier:

[Signature]
General Director Labor Relations

[Signature]
Assistant Vice President Southern Region

[Signature]
General Director Labor Relations

Art Dennis
General Chairperson UTU-E

M.B. Enthey, Jr.
Vice-President UTU

P.C. Thompson
Vice-President UTU

June 23, 1999
Side Letter No. 1

Gentlemen:

During our discussions on New York Dock and Crew Consist Protection we discussed the issue of a pool employee taking a single day paid absence such as a Personal Leave day or single day vacation and the impact it will have on his/her protection. In an effort to simplify the process and to provide the pool employee with an alternative the parties agree that a pool employee shall have one of the following options:

- (1) Elect a single paid personal leave or vacation day and hold their turn so that if it obtains a first out status they will be first out when they are marked up no less than 24 hours later, with no deduction from their protection; or
- (2) Elect a minimum of two consecutive days paid personal leave days on pools whose round trip district miles are 400 or less or a minimum of three consecutive days on pools whose round trip district miles are more than 400 miles and not hold their turns. If the minimum number of consecutive days are met for each round trip, then no deduction will be made in their protection.

Question #1: If the round trip district miles of a run are 390 miles and initial and or final terminal delay make a payment over 400 miles how many personal leave days must be used.

Answer #1: Only the district miles are used for determining the number of personal leave days to be used. In this case two personal leave days would qualify for no deduction.

Question #2: If the round trip district miles are over 400 miles how is a deadhead counted.

Answer#2: Deadheads are already taken into account by using a 1/15th offset for pools. Since most pools do not average 15 round trips per month a 1/15th offset is less than using the average for each pool. As a result the round trip district miles are used for determining the number of personal leave days that would substitute for no offset and in this case three personal leave days would qualify.

- (3) Elect a single paid personal leave or vacation day and not hold their turn resulting in payment of a single day with a corresponding 1/15th deduction from protection.

The option must be selected by the employee at the time the personal leave or vacation day is granted. Employees must file the protection form each time they take paid days in accordance with the above options.

UNION PACIFIC EXHIBIT 34
PAGE 20 OF 52

Yours truly,

W S Hinckley
W. S. Hinckley
General Director Labor Relations

Agreed:

Kudsf
General Chairperson UTU

J. W. Wier
General Chairperson UTU

[Signature]
General Chairperson UTU

Robert J. Ross
General Chairperson UTU

Don L. Hallen
General Chairperson UTU

Joe P. Smith
General Chairperson UTU

June 23, 1999
Side Letter No.2

Gentlemen:

During negotiations the parties spent considerable discussion concerning the intent and meaning of the NOTE in Article I. It was agreed that further detail would be provided in a side letter explaining how different types of operations would be affected. The following is meant to give further definition to the NOTE:

Road Switchers: Road Switcher agreements in the controlling CBA provide for a 25 mile limit unless specifically provided otherwise. A road switcher that goes on duty inside the Hub or zone, would be governed by the 25 mile provisions even though the 25 miles would take the assignment into the adjoining Hub or zone. For example, a road switcher at Pratt (Dalhart Hub assignment) could operate 25 miles into another hub.

Locals on duty inside the Hub: Current locals that go on duty inside a hub may continue to operate to points outside the Hub. New locals that operate in more than one Hub shall be established in accordance with Article IX of the October 31, 1985 National Agreement.

Locals on duty outside the Hub: Current locals that go on duty outside a hub may continue to operate to points inside that hub. New locals that go on duty outside a hub and operate into that hub shall be established in accordance with Article IX of the October 31, 1985 National Agreement.

Current Pools and Pools established by Merger Agreements: These pools may operate between their designated terminals even if outside the hub. They may operate up to 25 miles beyond the terminal when picking up a train in accordance with the 25 mile provisions of Article VI.

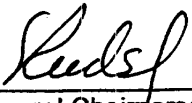
New Pools created after this Agreement: New pool operations not covered in this implementing Agreement whether between hubs or within a hub shall be handled per Article IX of the 1985 National UTU Agreement.

Operations (including, but not limited to, yard assignments, road switchers, locals, work train or pools) may operate into out of, through, between and among the various zones of the El Paso Hub.

Yours truly,

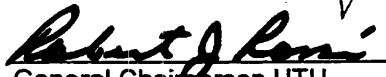

W.S. Hinckley

Agreed:


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU

June 23, 1999
Side Letter No. 3

Dear Sir:

This refers to Article IX B wherein the parties agreed to set forth in a side letter the details covering the handling of UP crew consist protected employees currently entitled to share in the productivity fund once the Southwest Territory Merger Agreement is implemented. In keeping with that Article the following shall govern:

1. The Carrier shall continue to make productivity fund plugs for all trips up to close of business the day before implementation day.
2. On implementation day the fund shall be frozen and the proceeds paid out in the normal and usual manner based on the trip credits up to implementation day.
3. The value of a trip credit at the close of the 1999 productivity fund year shall be used to determine each covered employee's trip credit payment in future years. This payment shall be subject to future wage and cola increases.
4. In February, each covered employee shall receive an amount equal to the number of trip credits earned in the previous calendar year as determined by the crew consist agreement multiplied by the 1999 trip credit value as adjusted for future increases.

Example: At the close of the 1999 productivity fund year the trip credit value is \$30.00. The Southwest Territory Merger Agreement is implemented on October 1, 1999. A covered employee shall share in the productivity fund for the period from October 1, 1998 (the beginning of the new fund year) to September 30, 1999. This distribution will be made at the regular time as provided in the agreement. During the period between October 1, and December 31, 1999 the employee earns 60 trip credits. In February 2000, the employee will receive a payment of \$1800.00 (\$30 x 60). In the calendar year 2000 the employee earns 400 trip credits and in February 2001 the employee shall receive a payment of \$12,000.00.

5. Productivity fund payments are not included in an employee's New York Dock TPA and post merger implementation trip credit payments are not used as an offset to the TPA.
6. Upon retirement or resignation an employee shall be paid their final payment for trip credits earned in the last year within 60 days of leaving the service.

7. These payments are individual payments and no group fund is created. When an employee leaves the Carrier's service these payments cease for that employee and are not shared by other employees.

NOTE: Special allowances are also eliminated, however they have been included in the TPA of the employees.

Yours truly,

W.S. Hinckley
W.S. Hinckley

Agreed:

[Signature]
General Chairperson UTU - TSP

June 23, 1999
Side Letter No. 4

Gentlemen:

During negotiations the parties spent considerable discussion concerning the application of Article III. L. and the phasing out of the home terminal of the Pratt pool turns from Pratt to Dalhart.

The agreement establishes the home terminal of the pool at Dalhart but contemplates that employees who were continuously working and residing at Pratt or vicinity from the date notice was served to begin negotiation (notice dated March 24, 1999) to the date of implementation may continue to maintain their residences at that location so long as pool freight service between Dalhart and Pratt and extra board work at Pratt continues to exist and such employees possess sufficient seniority to hold such assignments. These employees, whose names shall be provided by the Organization, subject to verification by the Carrier, will be allowed to continue to reside at Pratt on an attrition basis, subject to the following:

1. Any or all of such employees may elect to relocate to Dalhart immediately upon implementation and receive the relocation benefits set forth in Article VII.
2. Trainmen performing service in the Dalhart-Pratt pool who continue to reside at Pratt under this attrition arrangement will continue to be entitled to their percentage of the turns in the pool that existed prior to this merger except as provided in (3) below, although the home terminal of the pool will be Dalhart. They will be afforded reverse lodging at Dalhart and layoff privileges at Pratt. No new pool turns will be added at Pratt under any circumstances.
3. When a Pratt employee covered by this attrition arrangement vacates his/her pool assignment through retirement, resignation, normal course of seniority, voluntary relocation, etc., or 4. below, such position will no longer be maintained at Pratt, but will be readvertised at Dalhart.
4. An extra board and other regular (non-pool) assignments at Pratt (including those headquartered at Liberal) will be maintained at Pratt and will fall under the jurisdiction of this hub. If there are unfilled positions on any of these assignments, the junior trainman in the Dalhart-Pratt pool specifically named as covered by this side letter will be required to take such position or assignment, and the resulting vacant pool turn will be readvertised at Dalhart.

Note: This does not permit the Carrier to artificially inflate the extra board or other assignments for the purpose of attriting pool turns to Dalhart, and when extra board or other assignments are reduced, the employees specifically named as covered by this side letter may reclaim Pratt pool turns under this arrangement.

5. Employees covered by this arrangement will not be entitled to HAHT pay at either end of the pool runs. The pool will be operated to provide for minimal time at the away from home terminal when possible.

Yours truly,



W. S. Hinckley
General Director Labor Relations

AGREED;


General Chairperson UTU - SSW
General Chairperson UTU - SPWL

June 23, 1999
Side Letter No. 5

Gentlemen:

This refers to our several discussions concerning Yuma and the Carriers plans for assignments at that location and the extra board plans for that area.

Currently Yuma is the away from home terminal for West Colton crews. In addition there are a couple of assignments (local/road switcher) that work east and a couple of assignments (local/ road switcher) that work west from Yuma. Sometimes the Carrier has run the Imperial Valley assignments from Yuma and sometimes from West Colton.

In addition to the provisions of this Agreement, the following will apply:

1. There will be one extra board at Yuma and the extra board at Yuma will be used to fill short term vacancies on all assignments that have Yuma or El Centro as a home terminal.
2. The extra board will perform hours of service relief/turnaround service as far west as Niland (MP 667) in the LA Hub and as far east as is negotiated this Hub.
3. LA Hub prior rights are to be attrited.

Yours truly,
W.S. Hinckley
W.S. Hinckley

Agreed:

[Signature]
General Chairperson UTU

[Signature]
General Chairperson UTU

[Signature]
General Chairperson UTU

[Signature]
General Chairperson UTU

[Signature]
General Chairperson UTU

[Signature]
General Chairperson UTU

UNION PACIFIC EXHIBIT 34
PAGE 28 OF 52

June 23, 1999
Side Letter No. 6

Gentlemen:

This has reference to the Merger Implementing Agreement for the Southwest Territory entered into this date.

During our negotiations there was considerable discussion surrounding the operational changes resulting from a merger of UP and SP operations. Specifically, it was your observation that the merged operation might possibly require an increased amount of transporting of employees, and your Organization has concerns regarding the quality of the vehicles presently used for transporting employees, as well as the drivers of said vehicles.

It was Carrier's position that there are existing procedures available to resolve any complaints regarding deficiencies in crew transportation and, as such, this was not a proper topic for inclusion in a Merger Implementing Agreement.

Without prejudice to the positions of the respective parties as set forth above, the Carrier believes it is in the best interests of all parties that routine, unannounced safety audits of crew transportation contractors be conducted, and that a process be established for prompt investigation and, if necessary, resolution of complaints of specific instances of deficiencies in this area. In this regard, this will confirm my advice given you during our negotiations that Carrier agreed it would direct its designated manager to contact a Local Chairman to be designated by your Organization for the purpose of scheduling and conducting field safety audits of transportation contractors in the hub. These safety audits will include, but not be limited to, inspection of vehicles, unannounced rides, interviewing crews, and meeting drivers. These safety audits will be performed no less frequently than quarterly.

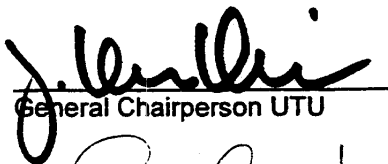
If issues are raised by the safety audits which cannot be resolved to the satisfaction of your Organization, they may be referred to the appropriate Labor Relations Officer by the General Chairman for discussion in conference at the earliest possible date to seek a resolution. The conference will include the appropriate Regional Vice President or his designate.

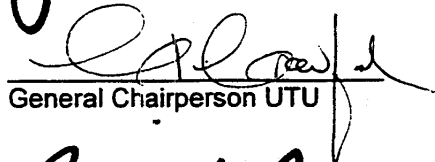
Yours truly

W. S. Hinckley
General Director-Labor Relations

Agreed: 
General Chairperson UTU

UNION PACIFIC EXHIBIT 34
PAGE 29 OF 52


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU

June 23, 1999
Side Letter No. 7

Gentlemen:

This has reference to our negotiations covering the Merger Implementing Agreement entered into this date between the Union Pacific Railroad Company, Southern Pacific Lines and the United Transportation Union. During these negotiations, the Organization expressed concern that employees who expire on the Hours of Service Law would not be transported in a timely manner to the destination terminal.

This will confirm the advice given to you, i.e., that when an employee ties up on the Hours of Service before reaching the objective terminal, the Carrier will make every reasonable effort to relieve subject employee and transport him to the tie up point, expeditiously. The Carrier recognized the interests of the railroad and its employees are best served when a train reaches the final terminal within the hours of service. In the event this does not occur, the Carrier is committed to relieving that employee and providing transportation as soon as practical. It is understood that this commitment contemplates transportation in the form of passenger vehicle, and employees shall not be transported to the tie-up point after Hours of Service tie-ups by means of train except in case of emergency or extraordinary circumstances which make providing a vehicle impossible.

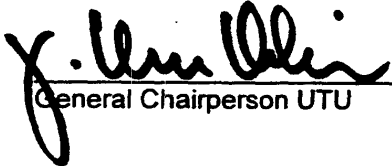
In the event the Organization feels that this commitment is not being observed at a particular location, the General Chairman shall promptly contact the Director of Labor Relations in writing stating the reasons or circumstances thereof. Within ten (10) days after being contacted the Director of Labor Relations will schedule a conference between the parties to discuss the matter and seek a resolution. The conference will include the appropriate Regional Vice President or his designate.

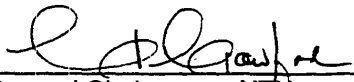
Yours truly,


W. S. Hinckley
General Director-Labor Relations

Agreed:


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU

June 23, 1999
Side Letter No. 8

Gentlemen:

In discussing various issues involved with the merger of the Southwest Territory the parties hereto realize that the merger of the former properties into a unified system is a complex undertaking and with the changes in operations and seniority territories, employees covered by this Agreement will be required to perform service on unfamiliar territory.

Familiarization will be a large undertaking, and it is to the benefit of both parties that this process begin as soon as possible so that implementation can occur in a more orderly and rapid manner. Therefore, it is understood that Carrier may begin qualifying employees on unfamiliar territory, to the extent feasible based upon operational and manpower constraints, between time of execution of this implementing Agreement and date of implementation thereof.

It is understood that familiarization will be accomplished in accordance with Article VIII Familiarization of this Agreement. Employees making familiarization trips which involve greater mileage than their existing (pre-merger) runs will be paid actual mileage to the new objective terminal. Local UTU officers will work with local Carrier officers to implement this Side Letter in the most effective manner.

If the foregoing adequately and accurately sets forth our agreement in this regard, please so indicate by signing in the space provided for that purpose below.

Yours truly,


W. S. Hinckley
General Director-Labor Relations

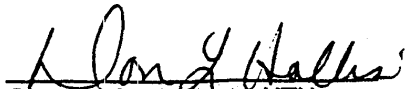
Agreed:


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU


General Chairperson UTU

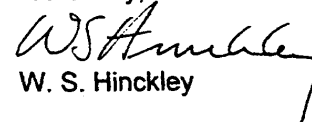
June 23, 1999
Side Letter No. 9

Gentlemen:

This has reference to the Merger Implementing Agreement for the Southwest Territories entered into this date.

During our discussions regarding vacations, the Carrier's attention was directed to the fact that certain former Rock Island trainmen on the SSW are entitled to use their former Rock Island seniority date for purposes of determining length of vacation. This letter will confirm Carrier's commitment to preserve and honor said arrangement.

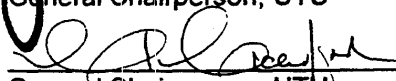
Yours truly,

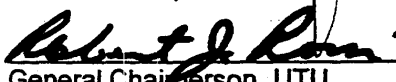

W. S. Hinckley

Agreed:


General Chairperson, UTU


General Chairperson, UTU


General Chairperson, UTU


General Chairperson, UTU


General Chairperson, UTU


General Chairperson, UTU

June 23, 1999
Side Letter No. 10

Gentlemen:

During negotiations of the Southwest territory Hubs the issues of TPA's and productivity funds were discussed. It was agreed that a more detailed explanation was needed and the parties have developed the following to give further detail to the employees:

A. SSW and SPEL trainmen and yardmen shall have their TPA's adjusted as follows:

1. Those employees with a trainman's seniority date prior to November 29, 1988 shall have their TPA adjusted and a productivity account created. The adjustment shall be made by taking the UPTP per share credit value for 1999, the number of trips worked by each covered employee in the 12 months prior to October 1, 1999 and multiplying the two. This total amount shall then be divided by twelve and the monthly TPA shall be reduced by this amount.

Example: The per trip credit value for the UPTP for 1999 is \$35 per trip. (this amount is just an example and is not the actual amount) Employee A worked two hundred trips in 12 month time period. Multiple $\$35 \times 200$ for a total of \$7000. Divide \$7000 by 12 for a total of \$583.33. The monthly TPA shall be reduced by \$583.33.

2. Those employees with an interim TPA shall then have the adjusted TPA increased in accordance with the General Wage increase of July 1, 1997.
3. Those employees certified under this agreement shall have their TPA increased in accordance with the July 1, 1999 General Wage increase.
4. Those employees who worked a minimum of 150 yard shifts in 1996 as a regularly assigned yard employee will have their TPA increased by 14.82%. This is a one time adjustment and will only apply to those SPEL and SSW employees who meet the requirements set forth in this paragraph 4.

B. UPTP employees shall have their TPA's adjusted as follows:

1. Those employees with a TPA based on the calendar year 1996 shall have the TPA increased in accordance with the General Wage increase of July 1, 1997.
2. Those employees certified under this agreement shall have their TPA increased in accordance with the July 1, 1999 General Wage increase.

- C. SPEL and SSW trainmen with a trainman's seniority date prior to November 29, 1988 shall have a productivity fund account created in A. above. Once created the accounts will be handled in accordance with the provisions of sections 3 through 7 of Side Letter No. 3.

Yours truly,

W. S. Hinckley
W. S. Hinckley

Agreed:

Robert L. Hall
General Chairperson UTU - SSW

Robert J. Lami
General Chairperson UTU - SPEL-T

Robert J. Lami
General Chairperson UTU - SPEL-Y

UTU QUESTIONS AND ANSWERS SOUTHWEST TERRITORY

Article I -SOUTHWEST TERRITORY

- Q1. How far west of Yuma may an Arizona Hub employee work?
A1. As far as Niland for hours of service work and the area of assignments that go on duty at Yuma and El Centro when they hold those assignments or fill them on a short term vacancy basis.
- Q2. When the language says "not including" a point may employees work into that point and if so what work may they do?
A2. Yes, employees may work into those points. For example, LA Hub pool employees may work into Yuma and perform any work permitted by applicable agreements for that class of service with Yuma as their final terminal.

Article II - SENIORITY AND WORK CONSOLIDATION

- Q3. Are full time union officers including full time state legislative board representatives, Company officers, medical leaves and those on leave working for government agencies covered under Article II.H.?
A3. Yes
- Q4. How many employees are covered by the inactive roster referenced in Article II.H.?
A4. The "inactive roster" noted in Article II.H, refers to the status of employees who are not in active service who pre-merger were on a UP/SSW/SPEL or SPWL roster with rights to work in the Southwest Territory. Such employees include those on leave of absence for government, union and company service, medical leave including disability, etc. Because those employees have rights to exercise seniority upon return to active service but may not do so from inactive status, such employees will be required to select a Hub upon their return to active service, contingent upon the employee having rights to the selected hub pre-merger. It is not possible to predict the number of people who may return from inactive status and, thereafter, the Hub that such people may select upon their return. Therefore, eligibility to mark up in a Hub must be determined for each individual upon that individuals return to active status.
- Q5. Are their exceptions to Article II.G. with respect to seniority being eliminated?
A5. Yes, there is a side letter (No. 3) to the Portland Hub Zone 1 agreement that covers the system hostlers in Eugene. Since the UP agreement they are coming under has no provisions for system hostlers they have a one time election to place in an area covered by the SP West Agreement.

ARTICLE III - POOL/ASSIGNED SERVICE OPERATIONS

Q6. Will existing pool freight terms and conditions apply on all pool freight runs?

A6. No. The terms and conditions set forth in the surviving collective bargaining agreements and this document will govern. Pools will be regulated between 3800-4200 miles per month.

Q7. How will the crews know the miles of the new assignments?

A7. The parties will meet and review the mileage and a chart will be given to timekeeping, Local Chairmen and posted at various locations.

ARTICLE IV - EXTRA BOARDS

Q8. How many extra boards will be established at implementation?

A8. The number is not known at this time. There will be a phase in of the familiarization process and they will be consolidated and established as this process proceeds.

Q9. Are these guaranteed extra boards?

A9. Yes. The pay provisions and guarantee offsets and reductions will be in accordance with the surviving CBA guaranteed extra board agreement.

Q10. When will the Yuma extra board cover all the assignments provided for in this agreement.

A10. When this Agreement is implemented and notice is served to combine the extra boards?

ARTICLE V - TERMINAL CONSOLIDATIONS

Q11. Are the national road/yard Zones covering yard employees measured from the new terminal limits where the yard assignment goes on duty?

A11. The new terminal/station limits where the yard employee goes on duty will govern.

ARTICLE VI - AGREEMENT COVERAGE

Q12. When the surviving CBA becomes effective what happens to existing claims filed under the other collective bargaining agreements that formerly existed in the Southwest Territory?

A12. The existing claims shall continue to be handled in accordance with those agreements and the Railway Labor Act. No new claims shall be filed under those agreements once the time limit for filing claims has expired for events that took place prior to the implementation date.

Q13. How will vacations for 2000 be handled?

A13. Vacations for 2000 will be scheduled under the provisions of the surviving CBA. The number of weeks allotted will be based on the number earned in 1999 under the CBA the employees were working prior to implementation.

Q14. If an employee in the 25 mile zone is delayed in bringing the train into the original terminal so that it does not have time to go on to the far terminal, what will happen to the employee?

A14. Except in cases of emergency, the employee will be deadheaded on to the far terminal.

Q15. Is it the intent of this agreement to use employees beyond the 25 mile zone?

A15. No. These provisions only apply to outbound employees at their initial terminal within 25 miles of the initial terminal.

Q16. In Article VI B2, is the ½ basic day for operating in the 25 mile zone frozen and/or is it a duplicate payment/ special allowance?

A16. No, it is subject to future wage and COLA adjustments and it is not a duplicate payment/special allowance and thus applies equally to pre and post 1985 employees and employees hired/promoted subsequent to the provisions of this agreement.

Q17. How is an employee paid if they operate in the 25 mile zone?

A17. If an employee is transported to his/her train 10 miles East of Vaughn and takes the train to El Paso and the time spent is one hour East of Vaughn and 11 hours between Vaughn and El Paso with no initial or final delay earned, (total time on duty 12 hours) the employee shall be paid as follows:

- A. One-half basic day for the service East of Vaughn because it is less than four hours spent in that service.
- B. The road miles between Vaughn and El Paso.
- C. Overtime, if any, based on the governing CBA provisions, calculated on the miles between Vaughn and El Paso and the 11 hours travel time between those two points.

Q18. Are miles in the 25 mile zone added to the district miles of the run?

A18. No, and time spent in the zone does not factor into the computation of overtime; however, if the time spent within the zone, if factored into the computation of overtime, would produce road overtime earnings for the tour of duty in excess of the minimum four (4) hour payment, the higher overtime earnings would apply in lieu of the minimum four hour payment.

EXAMPLE: An employee on a 130 mile run works 6 hours in the 25 mile zone and 7 hours completing their trip to the far terminal. The employee shall compute his/her time in two ways:

1. 6 hours at straight time in the 25 mile zone and 130 miles for the 7 hours (straight time) on the 130 mile trip; or

2. 13 hours on duty for a 130 mile trip, eight hours at straight time and 5 hours overtime;

And shall be paid the greater amount.

- Q19. How will initial terminal delay be determined when performing service in the 25 mile zone?
- A19. Initial terminal delay for employees entitled to such payments will be governed by the applicable collective bargaining agreement and will not recommence when the employee operates back through the on duty point. Operation back through the on duty point shall be considered as operating through an intermediate point.
- Q20. Is it the intent of this agreement to use employees in the 25-mile zone if not qualified to operate on that territory?
- A20. No, it is not the intent of this Agreement to require employees to operate against their will within the 25 mile zone if not qualified on such territory.
- Q21. If the away from home terminal is outside the hub where the home terminal is located, will the 25 mile zone rule apply?
- A21. If the away from home terminal is in a Hub that also has a 25 mile zone rule then this rule will apply for employees covered by this Agreement while at the away from home terminal. If the away from home terminal is in a Hub that does not have a similar rule, then the rule will not apply while at that away from home terminal.
- Q22. Where is the 25 mile zone measured from?
- A22. The same terminal limits as used by yard crews in their road/yard zone. If none then station limits will apply.
- Q23. Does the language of VI B 3 prohibit the use of pool freight employees in straight away combination deadhead/service from picking up a train whose employee had earlier expired under the Hours of Service Act?
- A23. No, the language of Article VI B 4 clearly preserves that service. The language of VI B 3 provides that extra boards will be used before pool employees in turnaround hours of service relief and does not require that they be used prior to pool employees in straight away service.
- Q24. May employees run through their destination terminal up to 25 miles?
- A24. No, the twenty-five mile provisions are only for obtaining a train on the far side of a terminal and not for running through their destination terminal.
- Q25. How will an employee be paid who is used in the twenty-five mile zone to obtain a train, brings the train into the original on-duty terminal (now an intermediate point) and then deadheaded on to the far terminal because of insufficient time to continue with the train?

- A25. The employee will be paid under the twenty-five mile provisions for the work in that Zone and deadheaded in combination deadhead/service. For example on a run of 190 miles, if an employee worked 8 hours in the 25 mile zone and then deadheaded on to the far terminal they would be paid 8 hours plus 190 miles. Employees will be deadheaded to the far terminal in these situations.

ARTICLE VII - PROTECTION

- Q26. What-rights does an employee have if he/she is already covered under labor protection provisions resulting from another transaction?

- A26. Section 3 of New York Dock permits employees to elect which labor protection they wish to be protected under. By agreement between the parties, if an employee has three years remaining due to the previous implementation of Interdivisional Service the employees may elect to remain under that protection for three years and then switch to the number of years remaining under New York Dock. It is important to remember that an employee may not receive duplicate benefits, extend their protection period or count protection payments under another protection provision toward their test period average for this transaction. This also applies to those receiving ID protection as a result of the implementation of the service to Vaughn.

- Q27. How will reductions from protection be calculated?

- A27. In an effort to minimize uncertainty concerning the amount of reductions and simplify this process, the parties have agreed to handle reductions from New York Dock protection as follows:

1. **Pool freight assignments** - 1/15 of the monthly test period average will be reduced for each unpaid absence of up to 48 hours or part thereof. Absences beyond 48 hours will result in another 1/15 reduction for each additional 48 hour period or part thereof.
2. **Five day assignments** - 1/22 of the monthly test period average will be reduced for each unpaid absence of up to 24 hours or part thereof. Absences beyond 24 hours will result in another 1/22 reduction for each additional 24 hour period or part thereof.
3. **Six & seven day assignments** - The same process as above except 1/26 for a six day assignment and 1/30 for a seven day assignment.

NOTE: There shall be no offset from protection for rest days on five day and six day assignments.

4. **Extra board assignments** - 1/30 of the monthly test period average will be reduced for each unpaid absence of up to 24 hours or part thereof. Absences beyond 24 hours will result in another 1/30 reduction for each additional 24 hour period or part thereof.

NOTE: Absences on the extra board shall be calculated from the time of unavailability (layoff, missed call, etc) until the next time called for service. For example: If a employee lays off on Monday at noon, marks up the next day, Tuesday, and does not work until 2 AM on Wednesday, then they shall be off for protection purposes for thirty-eight (38) hours and shall be deducted 2/30 of their protection.

- Q28. Why are there different dollar amounts for non-home owners and homeowners?
A28. New York Dock has two provisions covering relocating. One is Article I, Section 9, Moving Expenses and the other is Section 12, Losses from Home Removal. The \$10,000 is in lieu of New York Dock moving expenses and the remaining \$20,000 is in lieu of loss on sale of home.
- Q29. Why is there one price on loss on sale of home?
A29. It is an in lieu of amount. Employees have an option of electing the in lieu of amount or claiming New York Dock benefits. Some people may not experience a loss on sale of home or want to go through the procedures to claim the loss under New York Dock.
- Q30. What is loss on sale of home for less than fair value?
A30. This refers to the loss on the value of the home that results from the Carrier implementing this merger transaction. In many locations the impact of the merger may not affect the value of a home and in some locations the merger may affect the value of a home.
- Q31. If the parties cannot agree on the loss of fair value what happens?
A31. New York Dock Article I, Section 12(d) provides for a panel of real estate appraisers to determine the value before the merger announcement and the value after the merger transaction.
- Q32. What happens if a employee sells the home for \$20,000 to a family member?
A32. That is not a bona fide sale and the employee would not be entitled to either an in lieu of payment or a New York Dock payment for the difference below the fair value.
- Q33. What is the most difficult part of New York Dock in the sale transaction?
A33. Determine the value of the home before the merger transaction. While this can be done through the use of professional appraisers, many people think their home is valued at a different amount.
- Q34. Who is required to relocate and thus eligible for the allowance?
A34. A employee who can no longer hold a position at his/her location and must relocate to hold a position as a result of the merger. This excludes employees who are borrow outs or forced into one of the three hubs and released and employees who have to exercise seniority due to a non merger event.

Q35. Are there any seniority moves that will be treated as required to relocate?

A35. Yes and the following is an example:

Example 1: The Yuma portion of the Tucson-Yuma pool is moved to Tucson. Senior employees from Yuma who bid in the turns in Tucson are eligible for the allowance.

Q36. Will the new extra board at Alpine also be covered?

A36. Since this is a result of the merger agreement the initial position(s) is eligible for a relocation.

Q37. At what time did an employee need to be a home owner to qualify as a home owner for relocation purposes?

A37. New York Dock protects home owners due to loss on sale of home that are caused by the merger. While other Hubs had an earlier date, due to the time lapse between the first and this Hub the Carrier has agreed to cover as home owners those who owned those who owned a home on or before October 1, 1998.

Q38. Will employees be allowed temporary lodging when relocating?

A38. Employees entitled to a relocation allowance shall be given temporary lodging for thirty (30) consecutive days as long as they are marked up.

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

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

Q40. Will the Carrier offer separation allowances?

A40. The Carrier will review its manpower needs at each location and may offer separation allowances if the Carrier determines that they will assist in the merger implementations.

Q41. How will Union Officers' TPAs be established?

A41. The Carrier will average the two above and two below (on the pre-merger rosters) in any service. If greater than their regular TPA it shall be used. Employees with unusually high or low TPAs will not be considered.

Q42. How will an employee be advised of their test period earnings?

A42. Test period averages will be furnished to each individual and the General Chairmen.

Q43. Is vacation pay received during the test period considered as compensation?

- A43. Yes, and used to determine if the TPA has been reached for the month when paid.
- Q44. Regarding the above question, if an employee is on vacation the entire month and the vacation pay thereof is less than his TPA, would he be entitled to draw a displacement for the difference?
- A44. Yes.
- Q45. How is length of service calculated?
- A45. It is the length of continuous service an employee has in the service of the Carrier with a month of credit for each month of compensated service.
- Q46. If an employee has three years of trainman's service, and one year of clerical service how many years of NYD protection will they have?
- A46. Four.
- Q47. How will the employees know which jobs are higher rated?
- A47. The Carrier will periodically post job groupings identifying the highest to lowest paid jobs.
- Q48. Will specific jobs be identified in each grouping?
- A48. Pools, locals and extra boards may be identified separately but yard jobs and road switchers will not be.
- Q49. If an employee has worked full time in yard service the previous 12 months,, will he/she have to place in road service if it is the highest paying assignment to keep from having offsets?
- A49. Recognizing that some employees have spent considerable time in the yard and have not been on the road in some time, the Carrier will allow these employees to remain in yard service. It will be the responsibility of the Local Chairmen to identify these individuals.
- Q50. If an employee has started their NYD protection in another Hub and they elect to place in one of the three Southwest Territory Hubs, will they start their NYD protective period over?
- A50. No, they will continue on with the same time period that started with the implementation of the other Hub.
- Q51. If an employee is displaced does an offset to his/her TPA begin immediately upon being notified?
- A51. By agreement between the parties, the Carrier will allow an employee up to three hours after being notified to make a displacement without an offset being applied.

Article IX -FAMILIARIZATION

- Q52. Are there a set number of trips that an employee will take in learning new territory?
A52. No, since employees have differing experiences the number of trips will vary and the local chairmen will work with local operating officers on the number and type of trips needed.
- Q53. An employee who makes familiarization trips only on the portion of the geographic territory where he intends to work may later exercise seniority or be forced to another part of the territory with which he is not familiar. Does this Agreement apply to the necessary additional familiarization trips?
A53. Yes, no matter how much time has elapsed from date of implementation of this Agreement.
- Q54. Who will approve an employee as being properly familiarized on a new territory?
A54. Carrier officer.
- Q55. If an unqualified extra employee stands first out for an assignment and the next extra employee is qualified, may the first out extra employee be run-around?
A55. No; however, the Carrier will attempt to place employees unfamiliar with extra board assignments on a familiarization board (paid the same as if on the extra board) to learn the area prior to marking up on the extra board. If the above happens, then the Carrier may call the next out employee to be a pilot, use a qualified officer to ride with them or use one of the peer training employees.
- Q56. If the next out employee is used as a pilot, how shall they be compensated?
A56. The same as if they had operated the train.

Article X - IMPLEMENTATION

- Q57. On implementation will all employees be contacted concerning job placement?
A57. No, the implementation process will be phased in and employees will remain on their assignments unless abolished or combined and then they may place on another assignment. When the Carrier posts the notice on pool changes and increases and decreases in extra boards Local Chairman will assist in handling the bidding, application and placement process at that time and employees may be contacted for placement if insufficient bids/applications are received. The new seniority rosters will be available for use by employees who have a displacement.
- Q58. During the execution of this Agreement, it is possible that the parties may discover errors or omissions relating to mile post designations, crew district mileages, etc. Is it the intent of either party to hold the other party to such items because there was simply not time to verify them for accuracy?
A58. No, these type of clerical errors may be corrected when discovered.

Side Letters

- Q59. Do the provisions of side letter #4 apply to trainmen in the Salina Hub who have held their seniority in abeyance and were working Pratt, Kansas trainmen positions on March 24, 1999?
- A59. Yes, if they return to Pratt in the initial Hub seniority slotting.
- Q60. Do the provisions of side letter #4 apply to trainmen who were in trainman training at Pratt on March 24, 1999?
- A60. Yes, if they reside at or in the vicinity of Pratt and if in the Hub at the initial Hub seniority slotting.

SOUTHWEST HUB MILEAGE CHART

<u>Pool</u>	<u>Mileage</u>
Pratt -- Dalhart	242
Dalhart -- Vaughn	195
El Paso -- Vaughn	229
El Paso -- Toyah	191
El Paso -- Alpine	220
El Paso -- Lordsburg	149
Tucson -- El Paso	310
Tucson -- Lordsburg	161
Tucson -- Nogales (turnaround)	132
Tucson -- Phoenix	121 (130 basic day)
Tucson -- Phoenix (turnaround)	242
Tucson -- Yuma	254
Phoenix - Yuma	278

These are base miles. In El Paso, if a location different from the one used for base miles, is used for receiving or leaving a train and trainmen are currently paid additional miles they are retained.

SUPPLEMENTAL MERGER IMPLEMENTING UNDERSTANDING
Southwest Territory
(Arizona, El Paso and Dalhart Hubs)

between the

UNION PACIFIC
SOUTHERN PACIFIC TRANSPORTATION COMPANY
And
UNITED TRANSPORTATION UNION

During the final negotiating session and read through of the initialed Southwest Territory Implementing proposal, several questions arose concerning the intent of certain provisions. Since some of the issue would take detail to explain the parties agreed to enter into this supplemental understanding to clarify the merger proposal.

- A. **Engineers in training** – It is anticipated that at the time of implementation their will be engineers in training in the Dalhart and El Paso Hubs that will have started training under an agreement different than the SPWL UTU-E agreement. The merger proposal provides that these engineers in training shall continue under the terms and conditions of the agreement they started until they have completed training. However, should the General Chairmen representing engineers in training in these Hubs reach an agreement with the SPWL UTU-E General Chairperson on transitioning these employees to the SPWL UTU-E Agreement then that agreement, if approved by the Carrier, shall be applied.
- B. **Deadheading between Alpine and Toyah** – The Agreement provides that employees will not be deadheaded between Alpine and Toyah for return trips. The question then arose about trains that were enroute between Alpine or Toyah and El Paso and how they would be handled. After much discussion it was agreed that the intent of the language was to not deadhead a crew between the two terminals and then tie them up at the other terminal. It was further understood that it would benefit train movement and return employees to the home terminal quicker if the following was agreed:
1. If a train is laid down between Sierra Blanca and El Paso heading west and an away from home crew is used in combination service to bring it into El Paso, a crew from either Toyah or Alpine may be used.
 2. If a train is East of Sierra Blanca and heading west and an away from home crew is used in combination service to bring it into El Paso, the first crew used will be a crew from the away from home terminal on the same line. If none are rested and available then a crew from the other away from home terminal may be used.

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- C. **Dalhart hours of service relief** – The agreement calls for Dalhart extra board crews to provide turnaround hours of service relief as far as Springfield Colorado. It was agreed the Carrier would contact the UPED General Chairman to coordinate this with his committee prior to making any change in the current handling of hours of service relief in this territory.
- D. **Dalhart / Springfield pool operations** – The agreement calls for short pool service to Springfield. Currently there is no agreement with the Pueblo employees for a Pueblo – Springfield short pool to connect up with the Dalhart-Springfield pool. The Carrier will not commence Dalhart - Springfield service until permitted (negotiation or arbitration) to operate Pueblo – Springfield. The Carrier will serve an Article IX notice on the UPED to commence negotiations.
- E. **Dalhart-Tucumcari short pool productivity fund adjustment** – While side letter No. 10 sets forth the method to create the SSW productivity fund, it was noted that when the Dalhart – Tucumcari pool is abolished and the longer Dalhart – Vaughn pool is implemented that the number of starts per employee would be reduced. It was therefore agreed that the employees on the attached list would have each start during the test period counted as .5 starts (except as noted for the number 5 listed employee who borrowed out part of the time). Until placed in the long pool, each start after implementation shall also count as .5 starts for productivity fund credit.
- F. **Productivity funds** – The productivity fund portions of Side Letters No. 3 and 10, while part of the New York Dock Implementing Agreement for the Southwest Hubs are not limited to the six (6) year New York Dock maximum protection, but will continue for each individual covered by these two (2) side letters until such time as they leave the craft covered by the original UPTP Crew Consist Agreement.
- G. **Alpine extra board (relocation)**– Since the Alpine extra board is a new assignment established due to the merger, the initial occupant of the assignment(s) will be entitled to relocation benefits if they meet the usual criteria. Subsequent filling of vacancies on the assignment(s) are seniority moves not covered under the relocation provisions.
- H. **Alpine extra board (bidding)** – The Alpine extra board is shared by employees from both the San Antonio Hub and the El Paso Hub. If an assignment at these locations goes no bid by the Hub that has rights to it, then employees from the other Hub may bid them in. If it goes no bid from both Hubs then employees from the Hub that has prior rights will be forced.

- I. **Transferees** – The Agreement calls for the certifying of employees under New York Dock already in the hub. It is understood that certain employees may still come into the hub prior to implementation. It is agreed that if they would have been certified in the Hub area that they move from that they would be so certified in this Hub.
- J. **Pratt phase out** – It was agreed that the parties would get together after implementation to develop further provisions for the phase out of Pratt as a home terminal using the provisions of the implementing agreement as the guidelines.
- K. **Tucson - Yuma pool relocations** – The Tucson - Yuma pool shall be prior righted to those Yuma trainmen working in Yuma on March 24, 1999 and with a seniority date prior to August 6, 1996. The odd numbered slots will be filled by those from Tucson and the even numbered from those from Yuma. Each Yuma conductor relocating to Tucson at the initial single ending of the pool and assigned in the pool shall be placed on a specific turn by name. They shall have prior rights only to that turn. These prior rights shall no longer be effective at the end of the sixth year after implementation and at that time all conductor positions in the pool shall be available to conductors based on their Arizona Hub seniority. If a relocating Yuma conductor moves off their prior right spot during the six year period then he/she shall no longer be prior righted to that pool position. Once voluntarily vacated the turn will be open to the roster based on Hub seniority.

This supplemental understanding is part of the merger implementing agreement and is entered into this 23rd day of June, 1999.

For the Organization :

Don L. Haller
General Chairperson UTU

J. V. [Signature]
General Chairperson UTU

[Signature]
General Chairperson UTU

Robert J. [Signature]
General Chairperson UTU

For the Carrier:

W. S. Humbley
General Director Labor Relations

M. A. Hartman
General Director Labor Relations

A. G. Handley
Assistant Vice President
Southern Region


General Chairperson UTU


General Chairperson UTU

Vice President UTU

Vice President UTU

ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

UNION PACIFIC RAILROAD COMPANY

vs.

UNITED TRANSPORTATION UNION (C&T)

Pursuant to Section 11 of Article I of the New York Dock
Conditions imposed by the Interstate Commerce Commission in
Finance Docket No. 30,000

CASE NO. 2

THE ISSUE

Based on the parties' inability to stipulate to the precise
issue to be resolved, we have determined the following issue to
have been raised by the credible evidence of record:

Does Salina Yardman S. G. Nelson qualify for protection
payments under New York Dock Conditions as a result of being
displaced and/or dismissed from a regular yard assignment at
Salina on December 17, 1985, following a consolidation of
assignments under Finance Docket 30,000?

BACKGROUND

On October 20, 1982, the Interstate Commerce Commission
(hereinafter ICC) rendered a Decision in Finance Docket No.
30,000, approving of the merger of Union Pacific Railroad Company
(hereinafter UP), Missouri Pacific Railroad Company (hereinafter
MP) and Western Pacific Railroad Company (hereinafter WP). This
merger was effective December 22, 1982. The ICC adopted and
imposed employee protective conditions as set forth in New York
Dock Railway-Control-Brooklyn Eastern District, 350 I.C.C. 60
(1979).

In addition to the consolidation of operations in two major common terminals, Kansas City and Omaha-Council Bluffs, the (combined) carrier also sought to consolidate and coordinate UP and MP operations at seven other locations, including, inter alia, Salina, Kansas. Negotiations to effect consolidated and coordinated operations at these (seven) locations resulted in seven separate agreements being consummated in May, 1985.

The agreement applicable to the claim involved in this dispute is the UP, MP-UTU(C&T) Agreement, which states in pertinent part as follows:

ARTICLE I - PURPOSE

Effective on or after May 1, 1985, all work now being performed by MP in and around Salina will be consolidated into a single combined operation with all work performed by UP employees under the applicable UP schedule rules.

ARTICLE II - SENIORITY:

(a) UP employees affected by the abolishment of the Salina-McPherson Local and MP employees affected by the abolishment of the McPherson-El Dorado Local shall exercise UP or MP seniority in accordance with applicable UP or MP rules.

(b) Service on the assignment(s) shall be governed by the following:

- (i) UP crews shall be governed by UP schedule rules
- (ii) MP crews shall be governed by MP schedule rules

(c) UP employees and MP employees shall be given the opportunity to share equitably in the manning of the Salina-El Dorado Local(s). Work opportunities on the assignment(s) shall be apportioned as follows:

- (i) Union Pacific - five (5) months
- (ii) Missouri Pacific - seven (7) months

(d) Co-effective with the effective implementation date of this Agreement, UP employees shall man the assignment(s) for five months, with home terminal Salina.

(e) A bulletin shall be posted prior to the expiration of the five months to MP employees for the next seven months with home terminal El Dorado.

(f) At the expiration of the seven months, the above described cycle shall be repeated.

(g) Vacancies shall be filled from the extra board of the railroad from which the employees working the assignment(s) came.

Such agreement actually became effective on June 1, 1985.

When the service on the new (combined) local was transferred to MP employees, effective November 1, 1985, a dispute arose over whether additional employees, not directly involved by such change, were also protected. Such dispute was ultimately appealed to arbitration; designated Committee Chairman W. E. Fredenberger, Jr., authored the decision, stating in pertinent part as follows:

"Even if the November 1, 1985 transfer was not itself a transaction under the New York Dock Conditions, we are persuaded that the displacements and dismissals suffered by UP employees as the result of the November 1 transfer were the result of the consolidation of the UP and MP local on June 1, 1985. The Organization's point is well taken that these employees simply did not suffer adverse effect because it was postponed due to the fact that UP employees operated the Salina-El Dorado Local for the first five months from June 1 to October 31, 1985. MP employees who lost their positions as a result of the abolishment of the MP McPherson-El Dorado Local on June 1, 1985, and MP employees who were in the chain of bumping initiated by that event, received full protection. Although the carrier protected UP employees in June in fact those employees did not suffer a loss of positions or earnings and set forth a chain of bumping until November 1, 1985 when the local was transferred to MP employees. The fact that adverse effect on UP employees of the June 1 transaction was postponed does not change the fact that adverse effect resulted from the consolidation of the UP and MP locals on June 1. That the November 1 transfer was a creature of agreement between the parties is a factor supporting the Organization. That

-3-

agreement was entered into pursuant to Article I, Section 4 of the New York Dock Conditions to implement the consolidation of the UP and MP locals. In our opinion that very agreement provides the causal nexus between the consolidation and the adverse effect upon UP employees.

We must conclude that the Organization has met its burden of proof under Article I, Section 11(e) of the New York Dock Conditions. It has identified two transactions either of which have resulted in adverse effect upon UP employees. This case is distinguishable from Cases 1 and 2 decided by this Committee. In those cases the adverse effect upon employees was caused by the operation of working agreements unrelated to a transaction. In the instant case the adverse effect was caused by the operation of the agreement entered into pursuant to Article I, Section 4 of the New York Dock Conditions which implemented the transaction" (Award No. 3, June 24, 1976).

Those protected (UP) employees who were holding positions on the Salina-El Dorado Local on the abolishment date (October 31, 1985), were Conductor S. G. Schmidt and Brakemen E. A. Dickerman and C. E. Rucker. The displacements and other seniority movements associated with the abolishment of this local assignment were as follows:

November 4, 1985 - E. A. Dickerman bumped Brakeman P. S. Nelson off the Salina-Oakley Pool.

November 4, 1985 - P. S. Nelson bumped Conductor B. E. Cleveland off the Abilene-Solomon Zone Local.

November 5, 1985 - B. E. Cleveland placed on the Conductors Extra Board displacing no one.

November 12, 1985- B. E. Cleveland was cut from the Conductors Extra Board and bumped Brakeman E. R. Pickrell off the Abilene-Solomon Zone Local.

November 21, 1985- E. R. Pickrell bumped B. L. Johnson off the regular Switchmen's Board, DP03, B. L. Johnson bumped C. S. Boyer off the DP03, C. S. Boyer placed on the Switchmen's Extra Board and G. L. Todd was furloughed from the Switchmen's Extra Board.

November 29, 1985- B. E. Cleveland placed on the Brakemen's Extra Board, displacing no one.

December 16, 1985- Brakeman B. E. Cleveland was added, per his request on a voluntary exercise of his (dual) seniority to the regular Switchmen's Yard Board, DP03, displacing regular assigned Switchman L. A. Nestler.

THE EVIDENCE

In September the carrier finalized the list of employees determined to be eligible for protective benefits; such list did not include Switchman S. G. Nelson (hereinafter claimant). The evidence of record indicates that Switchman Nelson had been regularly assigned to the Yard Switchmen's Board since June 2, 1985 and was not displaced or required to move during the initial transactions occurring in November, 1985. However, on December 17, 1985 (47 days after the abolishment of the Local), Claimant Nelson was displaced from his position on the (regular assigned) Switchmen's Board to the Switchmen's Extra Board. Such displacement was the result of B. E. Cleveland's decision to exercise his seniority.

Ultimately responding to such displacement, beginning in April and continuing through September (1986) Switchman Nelson filed pay claims seeking the protection of New York Dock. Such claims were summarily declined by the carrier, explaining in pertinent part as follows:

"Our records do not reflect that you are a protected employee in that you were not working on an assignment which was abolished, were not displaced by an employee whose position was abolished, or were not placed in a worse position with respect to your compensation as a result of the transaction."

On December 2, 1986, the organization joined in the demand payment from the carrier, alleging that Mr. Nelson had been adversely affected by the abolishment of the Salina-El Dorado Local on October 31, 1985; ergo he (sic) was entitled to all (New York Dock) protections.

Such demand was timely denied by the carrier and the dispute was thereafter properly processed to arbitration. Accordingly, an evidentiary hearing was convened where all relevant evidence and arguments were admitted into the record.

FINDINGS

The material facts and the initial "transaction" are not in dispute; our responsibility is to determine if the organization's proof regarding the displacement of Claimant Nelson to the Switchmen's Extra Board establishes an uninterrupted causal relationship to the abolishment and consolidation of the Salina-McPherson Local and the McPherson-El Dorado Local (transaction). In making such determination we subscribe to the threshold qualifying criteria often adopted by other (New York Dock) arbitration committees "...that loss of earnings, and/or abolishment of positions, by themselves, do not entitle employees to the labor protective benefits..."; the movant must clearly prove some causal nexus between the "transaction" and the adverse impact on the claimant (IOMMA v. C&O, R. M. O'Brien Chairman).

The organization's claim is rooted in the fact that Mr. Cleveland's decision to exercise his seniority over claimant is directly traceable to his (Cleveland's) being bumped from the Abilene-Soloman Local by P. S. Nelson (November 4, 1985).

Counsel for the claimant resourcefully reasons that although claimant was not in the original chain of bumping, "but for" the merger and consolidation Mr. Cleveland would not have been placed in a position to exercise the (dual) seniority option, which ultimately resulted in claimant's displacement.

The carrier rejects such inventive reasoning, arguing that the effects of the "transaction" essentially ended when Mr. Cleveland "placed" on the Brakemen's Extra Board, displacing no one. The fact that such individual (Cleveland) thereafter elected to exercise his (dual) yard seniority is of no consequence or probative value. The exercise of seniority by the transferees, including the effects of bumping upon less senior yard employees, resulted from the application of the seniority provisions contained in the UP agreements and not from the consolidation (transaction).

The carrier's arguments have merit. Any adverse effect from the exercise of seniority by the transferee (Cleveland) to a yard position was the result of the contractual authority and application of UP agreements, not as a direct and proximate (foreseeable) result of the consolidation of the two locals. It is true, as the organization urges, that "but for" the transaction Mr. Cleveland might not have been in a position to exercise seniority to the yard position which resulted in claimant's displacement. However there is a legally significant difference between the initial cause (transaction) and the intervening/independent cause (seniority preference) that impacted claimant. To extend the organization's argument to its

logical conclusion, "any" exercise of seniority by a transferee, at "any" time in the future, could result in the carrier being liable for protection to anyone bumped or furloughed (UPRR/MPRR v. UTU (C&T), Case No. 1, W. E. Fredenberger, Jr., 1986). We read nothing in the New York Dock Conditions which would persuade us that they were intended to be applied in such broad fashion into perpetuity.

AWARD

Based on the credible evidence of record, we answer the pivotal issue as follows:

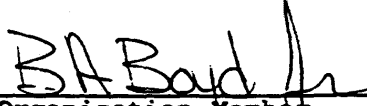
Salina Yardman S. G. Nelson does not qualify for protection payments under New York Dock Conditions as a result of being displaced and/or dismissed from a regular yard assignment at Salina on December 17, 1985, following a consolidation of assignments under Finance Docket 30,000.

We hereby retain jurisdiction to ensure the proper interpretation and application of this award.

Rendered January 5, 1994.


DON B. HAYS, Neutral Member


Carrier Member
Union Pacific Railroad Company
Concur/Dissent


Organization Member
United Transportation Union
Concur/Dissent

ARBITRATION COMMITTEE

File NYD 97

In the Matter of the	)	Pursuant to Article 1,
Arbitration between:	)	Section 11 of the
	)	New York Dock Conditions
UNITED TRANSPORTATION UNION	)	
	)	
Organization,	)	I.C.C. Finance Docket No. 30000
	)	
and	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Carrier.	)	
		OPINION AND AWARD

Hearing Date: July 1, 1993
Hearing Location: Sacramento, California
Date of Award: August 27, 1993

MEMBERS OF THE COMMITTEE

Employees' Member: J. L. Easley
Carrier Member: L. A. Lambert
Neutral Member: John B. LaRocco

QUESTION AT ISSUE

Is the Organization barred under the Doctrine of Laches from arbitrating claims for moving allowances made by trainmen R.L. Shankel, R.E. Porter, and L. Chapman, for losses sustained from home removal on July 24, 1987 (under New York Dock Labor Protection Conditions)?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad Company (UP), the Missouri Pacific Railroad Company (MP) and the Western Pacific Railroad Company (WP). [I.C.C. Finance Docket No. 30,000.] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343 and 11347.

At the neutral member's request, the parties waived the Section 11(c) time limit for issuing this decision.¹

II. BACKGROUND AND SUMMARY OF THE FACTS

The issue herein involves claims made by three different claimants who previously resided at Oroville, California. For purposes of the Question at Issue, the claims have been consolidated.

A. Claimant Chapman

Sometime in early 1987, Claimant Chapman filed for a dismissal allowance as a consequence of having been cutoff the Oroville, California extra board on September 4, 1985. Subsequently, Claimant Chapman went to work at Portola, California. In September 1988, Claimant Chapman filed a claim for losses associated with his change in residence, and more specifically, on the sale of his Oroville home.

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PAGE 2 OF 7

¹ Most sections pertinent to this case appear in Article 1 of the New York Dock Conditions. Thus, the Committee will only cite the particular section number, unless the section is part of a different article.

The Carrier denied the claim on November 3, 1988, on the basis that Claimant Chapman had failed to identify a transaction as required by Section 11(e) of the New York Dock Conditions.²

B. Claimant Porter

Claimant Porter last worked in Oroville on July 22, 1984. In early 1988, he filed for a displacement allowance contending that he had been cut from the Oroville working list due to a relaxation of D. T. & I. conditions on the Beiber Line, that is, the rail line connecting the former WP with the Burlington Northern Railroad. On September 14, 1988, Claimant Porter filed a claim for losses for home removal under Article 4 of the New York Dock Conditions. With this claim, he asserted that he was cutoff off the Oroville extra board on July 24, 1987.³ When the Carrier received Claimant Porter's home removal claim in early October, 1988, it subsequently denied the claim on the basis that Claimant Porter had failed to identify a transaction as required by Section 11(e) of the New York Dock Conditions.

C. Claimant Shankel

Claimant Shankel filed a house removal claim which the Carrier received on or about January 5, 1988. On February 8, 1988, the Carrier denied the claim on the basis that the elimination of the D. T. & I. Conditions did not trigger employee protection.

² In the meantime, the Carrier also denied Claimant's request for dismissal allowance on April 10, 1987 contending that the Oroville extra board had been reduced because the Carrier had abolished a Fiber Optic work train at Oroville due to a decline in business.

³ The record is unclear and vague about Claimant Porter's work history at Oroville.

D. Claims Handling

In early January, 1989, the Local Chairman wrote the Carrier a lengthy dissertation about the three claims but the former General Chairman did not appeal the Carrier's denial of the three claims.

On February 7, 1992, the current General Chairman appealed the three home removal loss claims on behalf of Claimants Chapman, Porter and Shankel. The current General Chairman vigorously argued that Claimants' loss of work opportunities at Oroville and the consequential losses on the sales of their homes (they were compelled to move to other points to perform compensated service) was inextricably related to the UP's 1982 acquisition of the WP. The Carrier defended the claims on the basis that the reduction in the Oroville trainmen's board was due to a decline in business and any reduction in traffic caused by the elimination of the D. T. & I. Conditions do not entitle affected employees to benefits under the New York Dock Conditions.

When the current General Chairman appealed the claims, the Carrier invoked the equitable doctrine of laches contending that the claims had not been promptly appealed and progressed to an arbitration tribunal under Section 11 of the New York Dock Conditions. The parties have placed this threshold issue before the Committee.

If the claims are barred by laches, the claims have forever expired. On the other hand, if laches is inapplicable to these cases, the Organization will be free to progress the claims to a Section 11 tribunal and the Carrier will be free to raise, without prejudice, its defenses on the merits of the claims.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Organization raises two points. First, while there may have been a slight delay in progressing the claims, the delay was not long enough to invoke the equitable doctrine of laches. The delay did not harm the Carrier in any fashion. Second, the Carrier failed to timely advise the Claimants that they were entitled to protective benefits under Article 4 of the New York Dock Conditions.

B. The Carrier's Position

During 1988, the Carrier declined all three claims. Yet, neither the Claimants nor the Organization appealed the denials until February, 1992. More than three years elapsed between the denials and the current General Chairman's improvident attempt to resuscitate the stale claims. The Carrier was prejudiced by the delay because it is no longer able to find documentation in its files outlining the circumstances surrounding the reduction in manpower on the Oroville extra board in the mid-1980s. Thus, the claims have expired under the doctrine of laches.

IV. DISCUSSION

The time limits in the applicable working agreement are not binding on claims progressed under Section 11 of the New York Dock Conditions. *Brotherhood Railway Carmen v. Norfolk and Western Railway*, WJPA § 13 Committee (1/14/86; Peterson). Although there are not any express time limits in Section 11 of the New York Dock Conditions, either party may invoke the equitable doctrine of laches where one party fails to assert a right for an unreasonable length of time and the delay prejudices the opposing party. *Transportation-Communications International Union v. Union Pacific Railway Company*, NYD § 11 Arb. (Rehmus; 12/30/92).

An employee's unreasonable delay in progressing a claim for protective benefits which prejudices the Carrier is barred under the doctrine of laches. *Transportation Communications International Union v. Union Pacific Railway Company*, NYD § 11 Arb. (6/26/90; LaRocco).

In *BRAC v. Norfolk and Western*, 1965 Merger Agreement Arbitration (LaRocco, 7/1/86), this Referee explained the underlying policy of the laches doctrine. "The purpose of the doctrine is to prevent stale claims. Allowing old, stale claims to perpetually fester hardly promotes stable and predictable railroad labor-management relations. As stated above, a delay, even an unreasonable delay, is insufficient to invoke the laches defense. The Carrier must also demonstrate that Claimant's procrastination operated to its prejudice."

The delay between the denials and the current General Chairman's appeals was three years and three months. Although Claimants received denial letters during the calendar year 1988, neither they nor the Organization further handled the matter until the current General Chairman belatedly attempted to resurrect what had already become stale claims. Claimants procrastinated by sitting on their rights for an unreasonable period of time.

The delay prejudiced the Carrier since it is no longer able to competently defend itself on the merits due to a dissipation of evidence. Because of the unreasonable delay, the Carrier rightly concluded that Claimants had abandoned their claims. Litigating their claims at this late date would be unfair to the Carrier because it no longer has possession of documentary evidence which, in its view, would show the real reason why Claimants were cut from the Oroville extra board.

Finally, Claimants did not offer any valid excuse for the lengthy delay. Contrary to the Organization's assertion, the record reflects that the Claimants were fully apprised of their rights

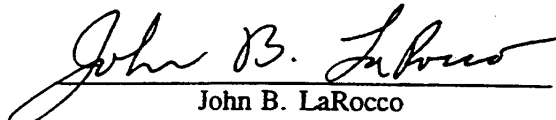
under the New York Dock Conditions inasmuch as they initiated claims for home removal losses.

In summary, the doctrine of laches permanently bars these claims.

AWARD AND ORDER

The Answer to the Question at Issue is Yes.

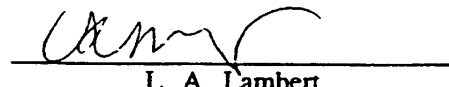
Dated: August 27, 1993



John B. LaRocco
Neutral



J. L. Easley
Employees' Member



L. A. Lambert
Carrier Member

----- X
: In the Matter of Arbitration
:

: Between
:

: Southern Railway Company
:

: And
:

: International Brotherhood of Boilermakers,
: Iron Ship Builders, Blacksmiths, Forgers
: and Helpers
: ----- X

FINDINGS AND AWARD

QUESTION AT ISSUE:

Are D. L. Haver and G. L. Galbreath entitled to a
"dismissal allowance" under the New York Dock
protective conditions as the result of their
furlough on September 6, 1985?

BACKGROUND: The two Claimants in the case before the Board occupied Boilermaker positions in the Carrier's Atlanta Diesel Shop. On September 5, 1985 they were furloughed. This is the action which triggered the claim now to be resolved.

Prior to their furlough, the Norfolk Southern Corporation had obtained approval on March 19, 1982 to take control of the Norfolk and Western and the Southern Railways. The approval order included the requirement that New York Dock Conditions apply.

In accordance with the normal procedure, the Parties executed an Implementing Agreement on January 25, 1982. This document provided the particulars of the coordination of certain work and the conditions set forth in New York Dock.

The two claims were submitted to the Carrier by letter dated September 12, 1988. Following an exchange of correspondence, it became clear that the main basis for the claims was the contention that certain repair work of Atlanta based locomotives, as well as modification of some locomotive toilet systems, had been done in the Carrier's Roanoke Shop rather than the Atlanta Shop. The Claimants contended that this deprived them of work and resulted in their furlough. Because the parties could not agree on a resolution of the claims, it was properly progressed to this Arbitration Committee.

FINDINGS: The Board has carefully reviewed and considered the submissions of the parties, the record developed on the property as well as the various holdings on which the parties have relied. The Carrier, as a threshold matter, contends that these claims were not filed in a timely manner. The Claimants waited about three years after the occurrence of the events upon which their claims are based before they were submitted to the Carrier. 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 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.

It is to the benefit of both parties to initiate and process claims in an expeditious manner. Often times there is a period of uncertainty with respect to the movement of work between shops following mergers: and, at times, this results in gradual, incremental changes. As a consequence, it may well be difficult to clearly identify the specific time at which the claimed adverse effect became apparent. In other words, there may be a gradual erosion of work which is not readily apparent or easily identified. However, such was not the case here. The Claimants were furloughed on September 6, 1985. As of this date, they state they were placed in a "worse position". One of the Claimants signed his claim on July 20, 1988. The other Claimant signed on August 15, 1988. They gave no reason for waiting almost three years from the time that they claimed to have been put in a "worse position" until their claims were filed. In the circumstances that we find here, such a delay was unreasonable. Therefore, the Board finds that the claims are barred.

AWARD

As specified in the Findings.

G. C. Edwards
G. C. Edwards
Carrier Member

E. Muessig
Eckehard Muessig
Neutral Member

Alan M. Scheer
Alan M. Scheer
Organization Member

Dated: February 13, 1990

ARBITRATION COMMITTEE

In the Matter of the	)	
Arbitration Between:	)	
	)	
TRANSPORTATION-COMMUNICATIONS	)	Pursuant to Article 1,
INTERNATIONAL UNION,	)	Section 11 of the New
	)	York Dock Conditions
Organization,	)	
	)	I.C.C. Finance Docket
and	)	No. 30,000
	)	
UNION PACIFIC RAILROAD	)	Case No. 3
COMPANY,	)	Award No. 3
	)	
Carrier.	)	

Hearing Date: March 27, 1990
Hearing Location: Sacramento, California
Date of Award: June 26, 1990

MEMBERS OF THE COMMITTEE

Employees' Member: J. L. Gobel
Carrier Member: L. A. Lambert
Neutral Member: John B. LaRocco

QUESTION AT ISSUE

Is clerical employe R. Tefft entitled to New York Dock protection as a result of a displacement in 1986?

Carrier File No. 891734
Organization File No. R-15-1334-172

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad Company (UP), the Missouri Pacific Railroad Company (MP) and the Western Pacific Railroad Company (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

This Committee is duly constituted by a letter agreement dated January 25, 1990. At the Neutral Member's request, the parties waived the Section 11(c) time limit for issuing this decision.¹

II. BACKGROUND AND SUMMARY OF THE FACTS

On May 14, 1986, the Carrier notified the Organization, pursuant to Section 4 of the New York Dock Conditions, of the Carrier's intent to consolidate MP crew dispatching functions, timekeeping tasks and administrative support work performed at Kansas City with similar functions performed by UP clerical employees at Omaha. The parties signed Implement Agreement No.

¹ All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will cite only the particular section number in this Opinion.

29 governing the transaction on July 16, 1986. Attachment A to Implementing Agreement No. 29 listed the clerical positions to be abolished at Omaha upon execution of the transaction. Among the jobs slated for abolishment was Clerk T. M. Beals' Crew Dispatcher position. When the transaction occurred in November, 1986, Clerk Beals exercised his seniority to a Work Order Clerk position occupied by Clerk J. C. Zybert. Clerk Zybert exercised his seniority to displace Claimant from his Property Analyst position on November 14, 1986 and Claimant, in turn, displaced junior clerical employee S. E. Moore on November 18, 1986. The Carrier did not provide Claimant with a calculation of his test period average earnings under the New York Dock Conditions. Claimant, who had a monthly protected rate of \$2,326.51 under the amended February 7, 1965 Job Stabilization Agreement, did not file for New York Dock benefits. Claimant opted for New York Dock protective benefits when he transferred to St. Louis on January 26, 1988 under a subsequent implementing agreement.

In the meantime, during 1987, the Organization progressed a claim on behalf of Clerk Brewer to a New York Dock Section 11 Arbitration Committee sitting with this Referee. On March 1, 1988, the Committee held that an employee affected by a chain of displacements traceable to the abolition of a position due to a New York Dock transaction must be accorded protective status under the New York Dock Conditions.

On August 24, 1989, the Organization filed the instant claim seeking New York Dock protection for Claimant retroactive to his November 14, 1986 displacement.

The sole issue in this case is whether Claimant timely initiated a claim for New York Dock protective benefits arising out of the November, 1986 transaction.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The doctrine of laches is inapplicable to this case since Claimant did not unreasonably delay the filing his claim and, even he had, any dilatoriness on Claimant's part did not prejudice the Carrier.

On this property, a New York Dock Arbitration Committee has ruled that an elapsed time of four years between the date of adverse affect and the initiation of a grievance did not bar a claim. TCU v. UP; NYD § 11 Arb. (Stallworth, 11/26/88). Indeed, there is a landmark decision that laches does not extinguish a claim filed under the Oregon Short Line Conditions because employees, even by their procrastination, cannot waive their rights grounded in federal law. UTU v. SPT; OSL § 4 Arb. (Fredenberger, 9/26/86).²

When Claimant was displaced in November, 1986, the Carrier applied the novel, but incorrect theory that only the immediate incumbent of a job abolished as the result of a transaction was entitled to New York Dock protection. The Carrier's faulty interpretation of the New York Dock Conditions was rejected in the Brewer case. The Brewer decision triggered Claimant's

Like the Oregon Short Line Conditions, a federal statute mandated the ICC to promulgate the New York Dock Conditions.

realization that he had been entitled to New York Dock protective benefits as of November, 1986. Claimant timely filed this claim after the Brewer decision.

Lastly, the Carrier cannot invoke the equitable doctrine of laches because it comes to this Committee with unclean hands. The Carrier deliberately misled Claimant into believing that he was not eligible for New York Dock protective status and further failed to provide Claimant with his test period average earnings in November, 1986. The Carrier, not Claimant, is responsible for any delay in the filing of this claim. Moreover, the Carrier has not suffered any prejudice even if the claim was not instituted in a timely fashion inasmuch as Claimant's requested remedy covers only the thirteen months between the November, 1986 transaction and the January, 1988 transaction.

B. The Carrier's Position

The doctrine of laches can bar a protection claim. RED v. C&WI; Appdx. C-1 Arb. (Dolnick, 1/25/73). In this case, Claimant did not file a claim for New York Dock benefits until thirty-three months after his displacement from the Property Analyst position. During this time, the Carrier accorded Claimant his protected rate under the February 7, 1965 Job Stabilization Agreement. Claimant accepted those benefits without any complaint. While the Carrier emphatically denies that it told Claimant that he was not entitled to New York Dock protection, the mere fact that the Carrier did not provide him with test period average earnings would not prevent Claimant from grieving inasmuch as Clerk Brewer timely filed a claim for New York Dock

benefits. Also, even if Claimant was awaiting the outcome of the Brewer case, he never explained why he delayed filing this claim for an additional eighteen months after the Arbitration Committee issued the Brewer decision.

The delay prejudiced the Carrier. If it had known that Claimant wanted to elect New York Dock protection, it could have compelled him to perform extra work to earn additional compensation to equal his monthly New York Dock displacement allowance. An employee cannot retroactively claim New York Dock benefits at any time. Under the Organization's theory, an employee could go back six years, annul his job stabilization agreement protection and then claim New York Dock benefits depriving the Carrier of any opportunity to maximize the employee's earnings.

IV. DISCUSSION

The New York Dock Conditions do not contain an express time limitation for filing claims for displacement and dismissal allowances. BRS v. B&O; NYD § 11 Arb. (Peterson, 2/28/87). BRC v. BN; NYD § 11 Arb. (Marx, 8/30/84). However, an employee's unreasonable delay in progressing a claim for protective benefits which operates to prejudice the Carrier, is barred under the doctrine of laches. CR v. IBEW; NYD § 11 Arb. (Seltzer, 12/16/85). RED and C&WI; Appdx C-1 Arb. (Dolnick, 1/25/73). The Neutral Member of this Committee, in BRAC v. N&W; 4/7/65 Agreement Arb. (LaRocco, 7/1/86), defined the doctrine of laches and justified its application to protective claims as follows:

Even in the absence of express time limits, the doctrine of laches operates to bar a claim which is filed beyond a reasonable time period and prejudices the opposing party. The purpose of the doctrine is to prevent stale claims. Allowing old, stale claims to perpetually fester hardly promotes stable and predictable railroad labor-management relations. As stated above, a delay, even an unreasonable delay, is insufficient to invoke the laches defense. The Carrier must also demonstrate that Claimant's procrastination operated to its prejudice.

In RED v. C&WI, Arbitrator Dolnick declined to apply laches to a claim which was delayed for fifteen months following the carrier's initial denial because the petitioning party engaged in alternate, affirmative steps to attempt to resolve the claim. Thus, the carrier was on continuing notice that the claim was alive. However, Arbitrator Dolnick clearly confirmed that laches was a defense available to the carrier. He simply found that the carrier was not prejudiced by the delay. The UTU v. SPT case decided by Referee Fredenberger only intimated that laches may not be an appropriate defense in a dispute brought under Section 4 of the Oregon Short Line Conditions. This claim does not fall within the compulsory interest arbitration provisions of Section 4 of the New York Dock Conditions. This is an ordinary Section 11 grievance, and thus, laches may be applicable.

Claimant procrastinated by sitting on his rights for an unreasonable period of time. He pursued no alternate efforts to procure New York Dock protective status leading the Carrier to conclude that Claimant wished to retain protection under the amended February 7, 1965 Job Stabilization Agreement. Claimant waited thirty-three months before filing a claim for New York

Dock protection. Unlike the case decided by Referee Dolnick, Claimant evinced no early intent that he was pursuing a claim under the New York Dock Conditions. On the contrary, Claimant not only enjoyed protection under the Job Stabilization Agreement but he also attained New York Dock protective status from a subsequent transaction long before filing the instant claim. Even if Claimant was waiting for the outcome of the Brewer case, he still failed to initiate a claim for an additional eighteen months. Claimant never justified this delay.

Claimant's delay in bringing this claim prejudiced the Carrier because it cannot retroactively act to minimize the amount of Claimant's displacement allowances. Furthermore, the Carrier detrimentally relied on Claimant's apparent manifestation that he desired continued Job Stabilization Agreement protection. Although the Organization asserted that the Carrier deceived Claimant into thinking that he was not entitled to New York Dock protection, the Organization has not brought forward any evidence to support its bare assertion. The record is void of any evidence showing the Carrier surreptitiously concealed Claimant's potential right to New York Dock protective status.

Finally, in TCU v. UP, NYD § 11 Arb. (Stallworth, 11/26/88), the Arbitration Committee rejected the Carrier's attempt to impose a strict ninety day filing period, following an initial displacement, for an employee to file for New York Dock benefits. Nonetheless, the Arbitration Committee observed that laches may be a valid defense. It simply declined to impose a standard filing period, since, as we discussed above, Section 11 of the

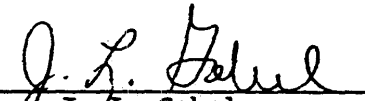
New York Dock Conditions contains no fixed timed limit for initiating a claim.

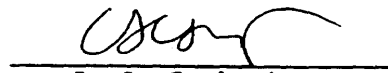
This claim is stale. Due to Claimant's unreasonable delay which prejudiced the Carrier, this claim is barred by laches.

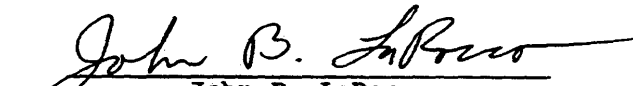
AWARD AND ORDER

The Answer to the Question at Issue is No.

DATED: June 26, 1990


J. L. Gobel
Employees' Member


L. A. Lambert
Carrier Member


John B. LaRocco
Neutral Member

In the Matter of Arbitration :
Before a Sole Member Arbitra- :
tion Committee :

Under :
ICC Finance Docket No. 30,000 :
(New York Dock Employee Pro- :
tective Conditions) :

.. .. .

AWARD AND DECISION

Parties To Dispute

Certain Designated Claimants and
Union Pacific Railroad Company

Sole Member of Arbitration
Committee

: Jacob Seidenberg, Esquire

Hearing

: March 12, 1987 - Salt Lake City, Utah

Appearances

: Claimants
Ronald F. Sysak, Esquire, Counsel

Carrier

D. J. Smith, Senior Director, Labor
Relations

1st Hearing Brief Received

: April 17, 1987 - From Claimants

Stipulated Issue

: "Whether certain designated Claimants
(set forth in Appendix A) are entitled
to benefits contained in Article I,
Section 6 of the New York Dock Conditions
as a result of being furloughed from ser-
vice commencing April 26, 1984?"

Background

: The gravamen of this dispute is whether

28 individual furloughed machinists in the Carrier's Mechanical Department in
its Salt Lake City, Utah Facility are entitled to the protective benefits of
the New York Dock Conditions which the Interstate Commerce Commission prescrib-
ed when it approved the consolidation of the Union Pacific Railroad, the Mis-
souri Pacific Railroad and the Western Pacific Railroad, which merger was fin-
ally consummated on December 22, 1982. The Claimants are represented by a Law
Firm rather than by their designated bargaining agent, the IAMAW.

The Claimants are Machinists employed in the Salt Lake City Mechanical Department Facility of the Union Pacific RR, who maintain they were furloughed on varying dates in 1984, 1985 and 1986. The furloughs that initiated these claims commenced in April 1984 and they pertained only to apprentices and helpers. The records, however, show that these Claimants have been intermittently furloughed and recalled prior to 1985. The records indicate that only Journeyman Machinist (J. O'Neal) and Machinist Helpers (J. D. Murray and K.P. Caputo) have not yet been recalled from furlough (Carrier Ex. "X").

There is a collateral dispute which is not before this Arbitration Committee but which is currently pending before the National Railroad Adjustment Board. The dispute arose when the Carrier furloughed 16 Machinist Helpers and Apprentices in April 1984. The Organization maintains that the Carrier breached the existing Schedule Agreement by failing to maintain a contractually required ratio between journeymen and apprentice machinists.

The antecedents of the dispute before this Arbitration Committee are the transfer of 34 Machinists and one Machinist Apprentice from the Western Pacific Shop Facility at Stockton, California to the UP Shop Facility at Salt Lake City. The transfer was agreed to and effected by, an Implementing Agreement that was executed between the Carrier and the IAMAW on September 19, 1983.

The record indicates that on March 3, 1983, after the Merger was completed in December 1982, the Carrier served on the six Organizations representing the labor force of the Mechanical Department, a notice of intent to coordinate certain WP Mechanical Department work and forces at Stockton and Sacramento with the UP forces at Salt Lake City and Pocatello, Idaho. One of the Organizations so served was the IAMAW. The IAMAW negotiations were protracted and it was not

until September 19, 1983 that the Implementing Agreement was executed. The Agreement provided for the abolishment of the 34 machinists and the one machinist apprentice positions at Stockton and their establishment at Salt Lake City. These new jobs were posted at Salt Lake City. The WP Stockton employees bidding for and receiving them, had their seniority dovetailed on the Salt Lake City roster. The parties also executed a side bar letter stating that the Stockton facility would be a running repair terminal and that the Salt Lake City facility would be for heavy repairs. The side bar letter cited examples of both running repair work and heavy repairs to be performed at these two facilities.

The September 19, 1983 Implementing Agreement also incorporated the provisions of the ICC New York Dock Conditions.

The relevant provisions of the New York Dock Conditions state:

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

...

(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 a 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 than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal ..."

Relevant portions of the September 19, 1983 Implementing Agreement state:

"It is Agreed:

1. As prescribed by the I.C.C., UP-Purchase-MP, WP, Finance Docket 30,000 the Labor Protective Conditions as set forth in the New York Conditions ... are incorporated herein and made a part hereof, shall be applicable to this transaction.

"2. As a result of this transaction, WP will in part transfer locomotive maintenance repair operations from its Stockton and Sacramento Mechanical Department facilities and thirty-four Machinist positions and one Machinist Apprentice position at Stockton ...

3. (a) On the effective date of this Agreement, thirty-four Machinist positions and one Machinist Apprentice position on the WP at Stockton will be abolished and thirty four Machinist positions and one Machinist Apprentice position will be established on UP at Salt Lake City, Utah ..."

The Carrier's side letter to the September 19, 1983 Implementing Agreement states in part:

..."

In view of the concern expressed as to the work requirement of the employees remaining at Stockton, you were advised that our Stockton locomotive facility will be a running repair terminal ... Examples of the work to be performed at Stockton after October 23, 1983, are as follows:

1. Periodic inspections of local units
2. Changing injectors, water pumps, etc.
3. Locomotive work repair reports and daily locomotive inspections
4. Removal and installation of traction motors
5. Removal and installation of power assemblies
6. Other duties that may be assigned in connection with running repair locomotives.

The heavy repairs previously performed by your craft at Stockton, such as the following, will no longer be performed at Stockton:

1. Removal and installation of locomotive engines
2. Removal and installation of air compressors
3. Removal and installation of locomotive trucks."

The instant dispute was precipitated by the dismissal of the 16 Machinist Helpers and Machinists in April 1984 and the Journeymen Machinists in June 1985 and thereafter. As previously stated the dismissal of the 16 Apprentices and Helpers is being adjudicated before the NRAB, and only the Journeymen furlough dispute is before this Arbitration Committee.

The furloughed Journeymen filed subsequent claims and Claimants maintain they are entitled to allowances under the New York Dock Conditions as a result of

34 WP machinists from Stockton being dovetailed into the Salt Lake City

machinists' seniority roster pursuant to the terms of the September 19, 1983 Implementing Agreement.

The Carrier denies that the Claimants are entitled to receive N.Y. Dock Protection benefits because their furloughs were not the result of a "transaction" but rather because of adverse economic conditions that the Carrier encountered in 1984 and thereafter.

The Carrier also interposed a procedural objection to the progressing of these claims, contending they are barred by the doctrine of Laches. The Claimants, on the other hand, denied the Laches can be properly invoked in this case in light of the facts of record.

The detailed respective positions of the parties with respect to the interposed procedural objections are:

Carrier -

(1) Laches

The Carrier states the chronology of the claim filing showed that the Journeymen Claimants began to file Claims with Mr. Smith, Labor Relations Director, starting on or about June 26, 1985, requesting a lump sum separation allowance pursuant to Section 7, Appendix III of the New York Dock Conditions. Mr. Smith replied to the several Claimants over a period from July 19, 1985, taking issue with their contention that they were "dismissed employees" under N.Y. Dock in as much as the Claimants had failed to identify the "transaction" that caused their dismissal.

The record further shows that other Claimants wrote in August 1985 to J. F. McDonough, UP Chief Mechanical Officer in Omaha. Mr. McDonough also denied the claims he received in August 1985 on the same grounds as did Labor Relations Director Smith. A number of the Claimants then wrote early in Octo-

ber 1985 to the Chief Executive Officers and the Board of Directors of the Union Pacific Railroad, reiterating that they had applied to the Labor Relations Department for separation allowances and requesting a specific answer as to why they had been furloughed. The Claimants stated that, while the Railroad had the burden of proof under the New York Dock Conditions to show that there were factors other than a transaction that had caused their lack of employment, the railroad had not given them the specifics as to why they had been laid off. The Claimants asserted they had only been furnished a general statement but given no specifics. The Claimants also stated that they had not been able to obtain from the Carrier information as to who was the proper officer with whom they could file their claims.

On October 14, 1985, D.A. Moresette, Director of Labor Relations Shop Crafts - wrote the Claimants setting forth reasons why they did not qualify for the requested lump sum separation allowances under New York Dock Conditions.

On October 16, 1985 Mr. Moresette invited the Claimants to meet with him in Salt Lake City on October 24, 1985. This meeting was held, and in addition to Mr. Moresette, the Carrier representatives were Senior Director of Labor Relations Smith, Chief Clerk Horton, Salt Lake City Shops, Superintendent of Shops Leetman and Manager of Transportation Benesh. Nineteen Claimants attended the meeting. The parties exchanged their respective positions. The Carrier stated it set forth the options that were available to the Claimants if the Carrier did not change its position. Mr. Smith prepared a four page Memorandum of this October 24, 1985 meeting (Carrier Ex. E).

The Carrier stated that it requested the Claimants inform them if they were going to arbitrate their claims. Claimant Crandall was designated to act as the Claimants' spokesman. He stated he would advise the Carrier of the in-

tentions of the group as soon as they had the opportunity to discuss and evaluate their claims.

The Carrier states it made several attempts in the several following months to discuss the matter with Mr. Crandall. It asserts that Mr. Crandall informed them that group lacked the funds to pursue the matter to arbitration.

The Carrier stated it did not hear anything further from Mr. Crandall until May 1986 when he told the Carrier by way of a telephone conversation that the Claimants had not been able to decide whether to proceed to arbitration. The Carrier alleges Mr. Crandall informed it that he thought the group was losing interest with the passage of so much time. The Carrier stated it assumed the Claimant had abandoned their claims.

The Carrier stated the matter was presented anew when it received a letter dated October 17, 1986 from the Law Firm stating that it represented 28 named Claimants who were now claiming, instead of lumpsum separation allowances, dismissal allowances pursuant to Section 6 of Article I, of New York Dock. The Carrier asserts that, of the 28 Claimants now represented by the Law Firm, 19 had previously filed claims for lump sum separation allowances.

The Carrier asserts that the 19 Claimants who previously filed claims for lump sum separation allowances failed to pursue these claims diligently and ineffect had "sat on their rights." It adds the October 16, 1986 claims filed by the Law Firm were not a continuation of the original claims but are new claims and claims which have been broadened from lump sum separation allowances to dismissal allowances, thus considerably increasing the Carrier's financial liability.

The Carrier further maintains that the nine new Claimants have never filed any previous claims until the Law Firm's October 17, 1986 Letter was

received. These nine Claimants have acquiesced in their furloughs for periods ranging from one year four months to two years and six months, and there can be no question that these nine Claimants are barred by Laches. They cannot be allowed to join with the other 19 Claimants who had filed earlier lump sum separation allowances.

The Carrier stresses that the employees have the responsibility to submit a claim within the requisite time limits, and it is not the responsibility of the Carrier to advise them of the time limits. An employee is charged with knowing his Contract and he has a bargaining representative with whom he can consult on these matters.

The Carrier stresses that it advised the Claimants at the October 24, 1985 meeting that if they intended to proceed to arbitration they should do so expeditiously.

The Carrier states that the first claim filed under Article I, Section 6, of the New York Dock Conditions was the October 17, 1986 claim filed by the Law Firm, and it covers Claimants' furloughs from service beginning April 26, 1984. Under these facts, the Arbitration Committee should dismiss the claim under the Doctrine of Laches. The Carrier cites several arbitration awards which it alleged sustained its position as to the Laches Doctrine.

2. (Claims Improperly Filed)

The Carrier asserts another procedural objection is that under Section 11, of Article I, disputes arising out of the interpretation or application of New York Dock Conditions may be progressed by either the employees or their authorized representatives. The IAMAW has never progressed a claim for these members under New York Dock. While the employees may progress their claims individually if they do not wish to avail themselves of the IAMAW, they cannot

substitute a Law Firm to act in their stead. The Carrier states the only recourse for the Claimants would have been to progress the claims individually. Since the Claimants have not filed claims personally, the Carrier requests the Arbitration Committee to dismiss the claims as being procedurally defective.

Procedural Objections - Claimants' Reply

(1) Laches

The Claimants deny that they have slept on their rights in this dispute. As soon as they were able to ascertain from the Carrier the channels in which they had to move, and after determining upon review of the relevant facts and the Law, that there was merit to their claims, they sought appropriate representation, and proceeded with dispatch to adjudicate their claims.

The Claimants rely on the testimony of Kenneth Caputo to show that a number of the Claimants devoted two years to carrying on a dialogue with the Carrier in an effort to secure protection under the New York Dock Conditions to get lump sum separation allowances.

Mr. Caputo states that when he and other Claimants were furloughed in April 1984 they took no immediate action because they expected to be recalled shortly. Mr. Caputo further stated that Mr. Cocking, the Superintendent of the Carrier's Salt Lake City Mechanical Department, had earlier told the employees that as a result of the Western Pacific merger, they all had protection for six years. In addition he added that a number of employees in the Diesel Shop were receiving buy outs from the Carrier in the amount of \$25,000. It was for these reasons, Mr. Caputo stated that the employees were not immediately concerned. However, after three months had passed without anything happening, the Claimants tried to get information from the Carrier about New York Dock Conditions.

Mr. Caputo testified that he went to a lawyer with his information who told him it appeared that they were covered by New York Dock, but that they had to first exhaust their remedies within the Company before they could institute a law suit. On this basis, the Claimants consulted with the IAMAW Local Chairman, and then met with the IAMAW General Chairman, Mr. Kostakis. The Claimants introduced a letter dated December 26, 1984, sent to the Union officials, as well as the General Chairman's reply dated January 8, 1985 (Claimants Ex. #-). The General Chairman's letter stated the Claimants were not covered because their furloughs were caused by an economic decline, and not because of a transaction arising from the merger.

Mr. Caputo stated that after they received Mr. Kostakis' letter, they began to write to Labor Relations Department in March 1985 through August 1985. For some time they received no reply from the Labor Relations Department. At one time they turned their case over to an attorney who specialized in ICC matters but he was not able to produce any results. They then went to a labor attorney in Sacramento. When this individual learned that the Claimants were taking issue with their Union he dropped the case because he stated he did a lot of business with the Union.

Mr. Caputo testified that in 1985 the Claimants held a meeting with the IAMAW General Chairman. He added that Mr. Kostakis stated he would file a claim on their behalf. Since the group had no confidence in him it did not take advantage of his offer. He said that the General Chairman did not mention anything about time limits with respect to the claims.

Mr. Caputo also alluded to the meeting held in October 1985 with Mr. Smith and other Carrier officials. As a result of that meeting, the group started in earnest to find an attorney who was competent in the area of railroad labor

law. This was difficult to obtain, and it was not until they were referred to the present Law Firm in the summer of 1986 that they were able to secure proper representation.

The Claimants contend that Laches is not applicable under the record of this case. They were not aware of the nature of their "rights" until the facts were developed that could reasonably lead them to conclude that their furloughs were connected to the UP and WP merger so as to make them covered by the New York Dock Conditions.

The Claimants asserted they were only aware that a merger had occurred and that they were furloughed at various time after the WP machinists were moved to Salt Lake City from Stockton. The Claimants encouraged the Claimant's ignorance and when the Carrier learned that the Claimants were claiming coverage under New York Dock, it denied that there was such coverage. Consequently, the Claimants had no reason to believe that they had valid claims until they developed sufficient information which could effectively refute the Carrier's contention that their furloughs were solely related to business conditions. Such information was not obtained until it retained present Counsel who began to develop the needed data by pre-arbitration discovery.

The Claimants assert that the Carrier was aware of the Claims since the summer of 1984 and Mr. Smith was specifically informed of the Claims by a March 1985 letter.

The Claimants further contend that the Carrier has not been injured by the delay. There is no allegation that any evidence has been destroyed. The exhibits attached to the Carrier's Submission belie such a claim.

The Claimants allege that the Carrier does not come into this proceeding with clean hands. The Local Shop Manager told the employees they would be

protected for six years and posted a notice to that effect. The Claimants assert that since the Carrier broke its promise to the employees, it should not be permitted to invoke the equitable doctrine of laches.

The Claimants assert that the Laches Doctrine has to be reviewed in light of the substantive nature of their case. Until the Claimants could show that the facts upon which the September 1983 Implementing Agreement was premised, i.e., sufficient work would be transferred from Stockton to Salt Lake City, were not true, would it be able to link the transfer of work and employees from Stockton to Salt Lake City was responsible for their furloughs and have a factual basis to progress their claims. The Carrier should not be allowed to punish the Claimants for seeking to prepare thoroughly their claims.

The Claimants contend that, while the Carrier sought arbitration as early as October 1985, they were still not privy to sufficient facts to process a viable claim.

The Claimants state the cases cited by the Carrier to support its position on Laches are distinguishable on their facts from this case.

The Claimants deny there is any merit to the Carrier's contention that the Law Firm has filed a new claim because it is not now seeking a lump sum separation allowance. Under the New York Dock Claimants are not limited to a single remedy.

The Claimants state the Carrier was not a helpless victim incurring unnecessary liability as a result of their alleged inactivity. The Carrier was an active participant in allowing the case to be dormant until the Claimants could hire competent counsel, and to secure evidence to present a strong factual case to show that their furloughs were merger related and covered by the New York Dock Conditions.

The Claimants state that the record of this case does not support the Carrier's invocation of laches.

Merits

Claimants

The Claimants assert that the Carrier denied them the protection benefits they were contractually entitled to receive when the Carrier started in 1984 to furlough them from the Salt Lake City Facilities. They further assert that the Carrier is in error in contending that these furloughs were not related to a transaction brought about by the UP and WP merger. The Claimants maintain that their furloughs were caused by the transfer of 35 WP machinist positions from Stockton to Salt Lake City Shops, without the transfer of an accompanying sufficient amount of locomotive repair work to support the transfer of these 35 positions.

The Claimants state, arguendo, that even if the Carrier had transferred an adequate amount of work from Stockton, it, nevertheless, still improperly furloughed the machinist helpers and apprentices in April 1984, in light of existing provisions of the collective bargaining agreement, as well as the established past practices at Salt Lake City pertaining to the furlough of members of the Machinists. They state the April 1984 furlough of the helpers and apprentices was unusual and done for the express purpose of avoiding paying the protection benefits of the New York Dock Conditions.

The Claimants deny that their furloughs were solely caused by adverse business conditions confronting the Carrier in 1984, 1985 and 1986.

The Claimants contend the Carrier is in error in relying on the September 19, 1983 Implementing Agreement, in as much as the Carrier did not provide the Union with all the relevant data pertaining to the amount of heavy repair

work that continued to be done at Stockton and the periodic maintenance work that had to be performed at Stockton. The Claimants assert that if the Carrier had furnished the Union all the relevant and material data, the Union would have been able to negotiate a more appropriate Implementing Agreement than the one it did.

The Claimants also maintain that the post merger actions of the Carrier were at variance with the sworn representations that the Carrier made to the Interstate Commerce Commission when it was seeking approval for the merger.

The Claimants contend that, in addition to all the above stated reasons as to why they were entitled to receive the protection afforded by New York Dock, ranking officials made representations to the employees that they had coverage under New York Dock Conditions for six years or a lesser period depending on their length of service with the Carrier, and certain employees acted on these representations to their ultimate disadvantage.

With respect to the Carrier's contention that the Claimants were not entitled to receive NY Dock benefits because their furloughs were caused by unfavorable economic conditions rather than the merger, the Claimants state that a review of selected financial data reveals that there was in the period from 1982, when the WP was acquired up to 1985, a continued growth in major areas of the railroad. Although the Carrier was down from a high 1981, there was steady progression in many areas and there existed a safe maintenance margin between expenses and revenues, even though the Carrier was making expenditures for new equipment and roadway.

The Claimants state that when 1982 is compared with 1981, there was a drop in freight, railway operating income, tonnage, net income and net railway operating income and carloadings. The 1981 year was a very good year for the

Carrier and 1982 was the start of the era of deregulation. However, 1982 improvements commenced both financially and trackwise. Freight increased from \$1,748,687,000 to \$1,784,483,000. Railroad operating revenue increased from \$1,773,337,000 to \$1,809,311,000; tonnage increased from \$83,572,000 to \$87,750,634; expenses dropped from \$1,604,369,000 to \$1,602,010; net income increased from \$105,028,000 to \$118,760,000; net railway operating revenue increased from \$168,968,000 to \$207,301,000; carloadings from 1,347,000 to 1,389,000.

The Claimants assert that in 1983 the Carrier undertook to upgrade, over a period of five years, 926 miles of the WP at a total cost of \$90 million. There were also expenditures of over \$5 million to reline and expand tunnels along the "Feather River Route." The Carrier undertook to build a connector line of 56 miles to enable it to haul coal from Wyoming to Arkansas power plants. There was an increase in 1983 over 1982 for road expenditures from \$71,680,000 to \$90,397,000.

The Claimants add that in 1984 there were increases over 1983 in some areas such as freight, railway operating revenue, tonnage, carloadings. Net railway operating revenue decreased and expenses increased, as did road expenditures. In 1985 the picture was mixed in that there were decreases in freight, railway operating income and expenses while there were increases in net income, tonnage, carloadings and net railway operating income. There was a sharp increase in expenditures for the roadway. Moreover, in 1985 the Carrier offered to purchase Missouri Pacific RR for \$108,000,000.

The Claimants state, by way of summary, that the Carrier suffered a sharp downturn in 1982 and a milder one in 1985, but the Carrier continued to grow by merging with two other railroads, contemplated a new merger, bolstering

existing and acquired routes and creating a new line. The record shows that the Carrier was streamlining its operations in order to compete effectively in the period of deregulation.

The Claimants state that with respect to the April 1984 furloughs, while there were fluctuations throughout the year, on an overall basis, it was a successful year with the quarterly data reflecting improvements over the same quarters in the previous two years with respect to freight and railway operating revenues.

In short, the Claimants maintain that their furloughs were not due to any serious economic problems caused by the Carrier, and the data relied upon by the Carrier to justify the furloughs only represented general fluctuations in business.

The Claimants assert that the evidence shows that they were furloughed in 1984, 1985 and 1986 because the Carrier failed to transfer sufficient work from Stockton to the Salt Lake City facility to support the transfer of 35 machinists, and therefore it cannot be contended that these transferred machinists followed their work to Salt Lake City.

Preliminarily, the Claimants assert there was not sufficient heavy repair work at Stockton to occupy 35 machinists. If the ratio of machinists to locomotives held at Stockton in 1983 is analyzed, it shows the WP had 143 locomotives and approximately 52 machinists and a locomotive held count on a daily basis from August to October of 1.4, 1.2 and 1.8. However, no WP machinist was furloughed. The evidence shows that there were 149 machinists in August 1983 at Salt Lake City and by November 1983 there were 217. The WP ratio of machinists to locomotives held on a monthly basis was more than one machinist per locomotive. If the same ratio was applied at Salt Lake City there would

have been in excess of 500 machinists in August, September and October 1983.

The Claimants state that on the average the UP had 10 machinists for each locomotive serviced daily while WP had 40 machinists per locomotive. The Claimants state the UP knew that when it submitted its merger application to the ICC it had too many machinists at Stockton. It did not state to the ICC that it proposed to transfer 35 machinists to Salt Lake City from Stockton. Instead the petition stated that 33 positions would be abolished at Stockton and paid protection benefits. However, the Claimants assert that after the merger it transferred the 35 machinists to Salt Lake City and then laid off Salt Lake City machinists, and avoided paying these furloughed machinists New York Dock benefits.

The Claimants note that data from the Association of American Railroads show the UP suffered a decrease of 6.7% from 1982 to 1984 in the number of locomotives it had in service, while the WP suffered a reduction of 27%. Nevertheless, there was no reduction in WP machinists while the UP machinists were furloughed.

The Claimants assert further proof that the transfer of 35 machinists out of a force of 54 machinists at Stockton, a transfer of approximately 75% of that force, was excessive. This is evidenced by the fact that in July 1986, the Carrier only transferred 27% of the machinists force to the Little Rock facility to perform heavy duty repair and other work. It follows that the transfer of 75% of the machinist force from Stockton to Salt Lake City to perform heavy repair work represented an excess number of transfers.

The Claimants also contend that the Carrier's furloughs in April 1984 of 16 helpers and apprentices was discriminatory and calculated to avoid paying New York Dock benefits. It asserts the Carrier had not in the past furloughed

all machinist helpers and apprentices and left the journeymen untouched. The Claimants contended the past practice at the Salt Lake City facility was to utilize a ratio between journeymen machinists and helpers and apprentices when effecting a furlough in this craft. The Claimants alluded to the testimony of Local Chairman Sleator that prior to April 1984 the Carrier had never laid off all the apprentices at one time. (Tr. 71).

The Claimants state the Carrier's furlough activities were at variance with the representations that the Carrier made to the ICC in seeking approval of the UP-WP merger. The Carrier did not indicate that there would be a transfer of 35 machinist positions from Stockton to Salt Lake City when it would consolidate the work of these two facilities. The Claimants aver that if such a transfer had been disclosed the IAMAW would have become more involved and given closer scrutiny to the impact of such consolidation. While it may appear that the Union agreed to the transfer of the 35 machinists, the Union acted on the basis of false representations as to the amount of heavy repair work to be performed at Stockton by WP employees.

On the basis of this record, the Claimants assert that any UP employee who was furloughed while a WP employee was employed, is entitled to NY Dock Conditions benefits.

The Claimants state there were other representations made to employees at Salt Lake City by responsible management officers that lulled them into a false sense of security.

The Claimants alluded to the testimony adduced at the arbitration wherein it was testified that Mr. Cocking, Superintendent of the Salt Lake City facility, in the fall of 1983 informed the employees that they would all receive the protection guarantee of the New York Dock Conditions. The testimony showed

he made this promise on two occasions and then a notice was posted in the Shop for a short time and then removed. The Claimants allude to the testimony of Dale Larsen, an electrician who had received a notice of recall in October 1983. Since he had a job in outside industry, he called the Carrier and spoke to Superintendent Cocking seeking advise as to whether he should leave his present job and accept the recall. Mr. Larsen testified that Mr. Cocking told him that he would have protection for five years because of the Western District people that were transferring to Salt Lake City. Larsen said on the basis of that information he resigned his job and returned to the employ of the UP (Tr. 157-58). He also testified he was subsequently furloughed in 1986.

The Claimant added that it was not only Superintendent Cocking who gave assurances of protection to Mechanical Department employees, but Labor Relations Director Smith also informed Local Chairman Sleator in the summer of 1984 that all Salt Lake City machinists were guaranteed their jobs for six years, and for that reason he was unwilling to agree to keep two senior machinist helpers in lieu of the two least senior journeymen machinists (Tr. 74).

The Claimants stated based on these representations they undertook substantial financial commitments and were seriously disadvantaged as a result thereof. The Claimants alluded to the testimony of Jerry Boren, who testified that he undertook to purchase a home based on the representation of Mr. Cocking made in August 1983. When he was subsequently laid off in the summer of 1985 he had difficulty in meeting his mortgage payments (Tr. 55).

The Claimants maintain that the Carrier should now be estopped from denying the protection which its officers promised the affected employees and upon upon which representations they relied on to their detriment.

The Claimants assert the Carrier has, and will continue to pay New York

Dock benefits to WP employees transferred to Salt Lake City. The Claimants add that these WP employees were paid benefits based on furloughs for the same economic reasons that caused UP employees to be furloughed, but without receiving New York Dock benefits. The Claimants maintain that WP employees cannot receive benefits unless they can establish a connection between their furlough and the merger. The Claimants maintain that since the Carrier has paid benefits to WP employees, some by buyouts, it must be that the Carrier has recognized the furlough was merger connected. This is prima facie evidence that the furloughs were merger related. The Claimants contend that the protection benefits should be applied in even handed manner. To sanction the payment of benefits to WP employees and to deny the same benefits to UP employees when the same causal event giving rise to the payment in effect is the same furlough, is discriminatory treatment. The Claimants listed in their Ex. #27 nine machinists who transferred to Salt Lake City from Stockton who were guaranteed protection allowances.

The Claimants urge the Arbitration Committee to remember that its analysis should concentrate on the Salt Lake City facility rather than the data on a system-wide basis. While an entire shop could be laid off at Omaha, it might not affect a single employee in Salt Lake City. Despite what the system-wide data shows, what is significant is whether there was a loss of maintenance work at Salt Lake City and not a decline in revenue throughout the Company. The Claimants contend that machinist employment depends on the number of serviceable locomotives and volume of maintenance work at the facility. The Claimants further contend that by June 1983 both the number of serviceable locomotives and amount of maintenance work had increased at Salt Lake City.

The Claimants state, by way of summary, that the claims for protection

benefits should be sustained because the Carrier did not transfer sufficient work to Salt Lake City - the dovetailing of the Stockton machinists on the Salt Lake City roster caused the Claimants to be furloughed at various times during 1984 and 1986; the payment of New York Dock benefits to WP employee establishes that the furloughs were merger related; UP Claimants furloughed had at the same time and for the same reasons are entitled to receive the same benefits under New York Dock Conditions; part of the reduction in Carrier revenues came about because of the heavy capital expenditures made for improving the line of road during the 1984-86 period.

The Claimants also suggest that the Arbitration Committee bifurcate its award. It should first determine whether there is liability on the part of the Carrier. If it so determines, it should offer the parties a short period of time to negotiate on the measure of damages. If the parties cannot resolve this matter, then the Arbitration Committee should be reconvened on the positions submitted by the parties on their calculations on the damages issue.

Carrier

The Carrier urges that the claims be denied for lack of merit, if they are not dismissed for laches. The claims lack merit because the furloughs in 1984, 1985 and 1986 were not the result of a "transaction," a transaction being defined in the New York Dock Conditions as "any action taken pursuant to actions of this [IC] Commission.

The Claimants have failed to identify the alleged transaction and the pertinent facts relied upon to prove the transaction.

The Carrier states the Claimants were furloughed because of a decline in its business that began in 1981 and continued through 1985. This decline in business occasioned substantial reductions in force of the Mechanical Depart-

ment in 1981, 1982 and 1983. However, in 1983, based on a projected increase in business, forces were recalled and between September 1983 and March 1984, there were over 650 positions established system-wide. Nevertheless by March 1984 the projected business increase had not been realized, and reductions were again made on a system-wide basis. In April 1984, 321 positions were reduced in the Mechanical Department, including 101 IAMAW jobs. Because of the continued adverse business conditions, furloughs continued and between April 1, 1984 and July 31, 1984 a total of 703 jobs were abolished system-wide. Unfavorable business conditions continued, and from the period of January 1, 1985 to April 30, 646 Mechanical Department net jobs were abolished, of which 30 were in Salt Lake City (Carrier Ex. W).

The Carrier states that all during this period all the Claimants had experienced a history of furlough, recall to service and furlough as a result of these unsettled business conditions. The Carrier states a review of the Claimants' employment records as set forth in its Exhibit "X" will reveal the furloughs that the Claimants experienced prior to the April 1984 and June 1985 furloughs.

The Carrier notes that in March 1983 it served notices on several Organizations in the Mechanical Department, including the IAMAW, of its intent to coordinate the work and forces at Stockton and Salt Lake City. It adds that the negotiations with the IAMAW were protracted and complex. This Organization was very concerned with the work being transferred as well as the system-wide furloughs. There were several negotiating sessions devoted to identifying the work to be transferred and the employees to be transferred. The negotiations culminated in the execution of the September 19, 1983 Implementing Agreement, which provided, among other things, for New York Conditions to be applied

to those employees transferred to Salt Lake City, and in a side letter to the Agreement, the Carrier listed in detail the work that would be performed at Stockton and Salt Lake City.

The Carrier asserts in light of these facts, it is difficult to understand how the Claimants can contend that the transferred work was in part or in whole responsible for their layoffs. The Carrier adds that it is significant that the authorized representative of the employees, the IAMAW, has never progressed a claim alleging a violation of the 1983 Implementing Agreement. There can be no doubt if the Organization believed that the affected employees identified in the Implementing Agreement were denied New York Dock benefits as a result of the work transferred from Stockton to Salt Lake City, it would have aggressively progressed claims thereunder. The failure of the Organization to pursue such claims is recognition that no legitimate claims exist.

The Carrier stresses that the Organization was clearly apprized of the identity of the affected employees as a result of the "transaction" and their test earnings (Carrier Ex. "Z"). If the Organization objected to those individuals who were identified as being eligible for New York Dock benefits, it would have protested and negotiated further.

The Carrier maintains that the Claimants are in effect in this proceeding seeking to renegotiate the 1983 Implementing Agreement, namely, by contesting whether the Carrier has in effect transferred the identified work as being responsible for the Claimants' furloughs. Such a matter is not within the jurisdiction of this Arbitration Committee. The Carrier states, arguendo, even if it were within this Committee's jurisdiction, the issue before it is not how to implement the September 1983 Agreement, or to resolve questions that were not at issue during the negotiations of the 1983 Agreement, but rather whether the Claimants were entitled to the benefits set forth in Section 6 of Article I of

New York Dock.

The Carrier asserts the Claimants are in error in contending the dovetailing and transfer of employees onto the machinists roster at Salt Lake City resulting in the furloughs here in issue. The Carrier notes that the transfer of the 35 machinists was pursuant to the September 1983 Implementing Agreement and the Claimants were not furloughed until April 1984 and June 1985. There is a complete lack of causal nexus between the "transaction" covered by the 1983 Implementing Agreement and the subsequent furloughs.

The Carrier states that the Claimants' reference to its Labor Impact Studies submitted to the ICC with respect to the proposed merger were based on 1979 traffic levels and it was not able to predict the changes in the economy and the effects of deregulation that followed.

The Carrier states that in 1983 it negotiated a 1983 implementing agreement with all the shop craft unions and transferred a number of employees from these various crafts in 1983 to Salt Lake City and received no complaints from any of these crafts. Because the negotiations with the Machinists were the most difficult, and one of the most troublesome issues concerned machinists who had been laid off early in 1983. The Carrier adds that in order to relieve some of the pressure created by this issue it offered \$10,000 separation allowances, i.e., to four machinists at Stockton and to eight at Salt Lake City. Thus 12 machinists were removed from the labor force.

The Carrier states while it projected an upturn in business in September 1983 and started to recall employees, and did recall 650 employees between September 1983 and March 1984. However, the expected upturn in business did not materialize and it commenced making furloughs in April 1984.

The Carrier reiterates that the Claimants have not met their burden of

proof to identify the transaction that caused their furloughs. The Carrier admits that the WP employees were affected by a transaction, but not the Claimants. The Carrier stresses the fact that the Claimants were on a merged roster caused by a consolidation of facilities and operations did not automatically entitle them to New York Dock benefits. The Carrier states that even if the seniority rosters had not been consolidated, the Claimants would have been furloughed as a result of the business decline.

The Carrier states that, with regard to the testimony of the Claimant witnesses that few WP locomotives were observed being repaired at the Salt Lake City facility, it was because of new business on the WP, that locomotives capable of hauling heavier tonnage were assigned to WP territory and the WP locomotives dispersed through the Carrier system.

The Carrier takes issue with the Claimants' analysis that Shop Forces employment depends on the number of locomotives at a given facility. It states its ability to employ mechanics and other craft employees depends on its revenue dollars. Absent such revenue, it has to furlough mechanics. The Carrier asserts that management decisions are not made on the basis of the ratios explicated by the Claimants.

The Carrier states that it has found no evidence to show that the April 1984 furloughing of all helpers and apprentices prior to furloughing machinists was unique. The Carrier asserts that its established practice was to furlough helpers and apprentices before journeymen because the latter could perform the work of the former. Moreover, it asserts that Salt Lake City was not the only facility when helpers and apprentices were furloughed at the time.

The Carrier further states that it could not find any evidence that former Superintendent Cocking assured the employees that they were protected for

● six years or any other appropriate period under New York Dock Conditions. The Carrier adds it has discussed the matter of posted bulletins with Chief Clerk Horton who stated he was in charge of all correspondence emanating from the Superintendent's office, and there were no bulletins posted of the nature testified to by the Claimant witnesses.

Labor Relations Director Smith testified that he gave no such assurances of New York Dock Conditions as the Claimants have ascribed to him.

The Carrier stated that the alleged variances in the number of machinists transferred to Salt Lake City comparison to the number transferred to Little Rock can be explained by the fact that these are two different facilities.

The Carrier also explained that there have been no reductions in the number of machinists at Stockton because the Organization interposed no objections to it subcontracting repair work to the Morrison-Knudsen Company if no reductions were made.

In summary, the Carrier states that the New York Dock Conditions were not designed to prohibit it from furloughing employees. They only required the payment of protection benefits when the employees were affected by an ICC authorized transaction. In the instant case the furloughs were caused by a severe decline in business and not by a "transaction," and therefore there is no merit to the claims, and the Arbitration Committee should deny them.

Findings: (Laches)

When we review the facts on this issue, while we find that the Claimants may not have progressed their claims with all possible expedition, nevertheless, when all the circumstances surrounding these claims are considered, we determine that it would not be appropriate to invoke the doctrine of laches in this case.

We find from the record that the journeymen Claimants commenced in the summer of 1985 to importune the Carrier's Labor Relations Department, and continued it into the fall of 1985, and also began to write to the Chief Executive officers and members of the Board of Directors about their inability to secure New York Dock Conditions benefits to assist them, from the rigors of their furloughs. The journeymen Claimants did start to progress their claims, albeit in a somewhat unauthorodox manner, relatively soon after their 1985 furloughs. It is true that there were some furloughs in April 1984 but they primarily concerned helpers and apprentices, and the primary thrust of this case devolves upon the furloughs of the journeymen machinists. The latter started their actions relatively promptly even though they did not do it as efficiently as possible. Part of this delay resulted from the Claimants' decision not to invoke the services of their collective bargaining representative. The Claimants expended a considerable amount of time seeking to obtain a competent representative which they did not get until they retained the Law Firm in the middle of 1986.

We find that another reason why it would be inappropriate to invoke Laches is that there are no specific time limits prescribed for progressing New York Dock disputes, and the record is patently clear that the Carrier has been singularly aware since 1985 that the Claimants were intent on pressing their claims for New York Dock protection benefits after their furloughs. The Carrier reasonably could not have been surprized when it received the current claims filed by the Law Firm in October 1986. We also have to take cognizance that these claimants were journeymen mechanics and not sophisticated practitioners of the arcane field of railroad labor law, and who knew how to proceed expeditiously through the labyrinths of prescribed ICC protection conditions,

We also find that these individual Claimants could proceed as individuals in progressing their claims, and had the right to proceed as individuals by retaining a law firm to prosecute their individual claims by giving the Law firm a power of attorney. The claims being progressed were the claims of the individual affected Claimant and not those of the Law Firm.

In conclusion we find the Claimants could have been more expeditious in progressing their claims. Nevertheless, the lapse of time that occurred until these claims reached this point of adjudication, is not so extended or protracted as to warrant or support invoking the doctrine of Laches. Accordingly, we hold that the Carrier's request to invoke the Doctrine of Laches is dismissed.

Findings (Merits)

We find that the weight of the evidence of record does not support the Claimants' request for protection benefits prescribed by the New York Dock Conditions, either in the form of separation or dismissal allowances.

We find that the Claimants were furloughed due to the fluctuations of unfavorable business conditions confronting the Carrier in 1983, 1984 and 1985 rather than as a result of a transaction that came about as a result of the merger between the Union Pacific and Western Pacific Railroads.

We first must note preliminarily, that these Claimants are not unacquainted with, or strangers to, furloughs during the tenure of their Carrier employment. The record shows all these journeymen Claimants had been previously furloughed prior to the 1985 furloughs, some of them more than once. A review of Carrier's Exhibit "X" discloses, for example, that Claimant Crandall had earlier been furloughed on January 1, 1982; Claimant Moser on April 5, 1981 and June 9, 1982; and Claimant Vamianakis on April 15, 1981 and June

9, 1982. Absent any evidence to the contrary, we conclude that the furloughs of the claimants set forth in the Carrier's Exhibit "X" were also the result of declines in Employer's business. The Claimants were not strangers to such furloughs and they should not have been surprized to learn in 1985 that the Carrier's business conditions were again precipitating a series of furloughs. It was not a unique or novel situation for them since they had experienced these regrettable situations in the past without a merger.

We find that the operational and financial data presented by the Carrier supports its contention that it was seriously disadvantaged by business conditions in 1983 and 1984 that resulted in declines in employment systemwide. Factors such as an increase in stored freight cars and locomotives in 1983 and the decline in freight train miles, gross ton miles, freight revenue (carloadings increased) were all elements that resulted in a reduction of 903 Mechanical Department jobs for the period from April 1, 1984 to July 31, 1984. The Carrier continued to reduce jobs by 604 in 1985 because of a continued decline in business. The Salt Lake City facility was not the only facility to experience reduction in employment (See Letter dated January 8, 1985 to the Claimants from IAMAW General Chairman setting forth a list of installations where furloughs have been effected because of decline in Carrier business).

The record is clear there has been a considerable fluctuation in Carrier employment between 1981 and 1985 due to the ebb and flow of Carrier's business. We find no probative evidence in the record to persuade us that the job reductions that were effected in the Mechanical Department, especially in Salt Lake City, were merger caused. Nor do we find probative evidence in the record to convince us that the 1983 transfer of 35 machinists from Stockton to Salt Lake City caused or resulted in the 1985 furlough of the Claimants.

We find no causal nexus between the realignment of forces and the furloughs.

It must first be noted that the Carrier could not effect any transfer or alignment of its forces under the Merger unless it first negotiated an implementing agreement with the requisite labor organizations. The Carrier and the IAMAW made such an Agreement in September 1983. This Agreement permitted the Carrier to transfer the 35 machinists to Salt Lake City and describe the work to be transferred. It is noteworthy that no journeymen furloughs occurred at Salt Lake City until June 1985. This time lag between September 1983 and June 1985 does not suggest that the Carrier failed to transfer a sufficient amount of repair work to Salt Lake City to accompany the transferred 35 machinists and thus caused the furloughs of the Salt Lake City journeymen. If the situation existed at the Salt Lake City facility as the Claimants aver, it is reasonable to conclude that the Claimants would have been furloughed sooner than in 21 months that elapsed between the transfer of work and the furloughs.

We find interesting and provocative the Claimants' statistical analysis of the work situation in Salt Lake City both before and after the transfer of the men and work. However, we do not find dispositive the relationship allegedly existing between the amount of held locomotives in the shop and the number of machinists, or the number of machinists relative to the locomotives in the System as well as other cited relationships. What we do find dispositive is the Carrier's inexorable rejoinder that it is the amount of revenue dollars budgeted to, and made available for, the Mechanical Department that determines the level of employment in that Department. It is the budgetary constraints placed upon the Mechanical Department rather than the amount of work in the Shop to be performed that determine how many journeymen will be employed. The Carrier stresses that it is the amount of money allocated to

the Mechanical Department that determines the employment level and not the sophisticated statistical analysis presented by the Claimants. We find no compelling reason not to accept the Carrier's statement.

We are also constrained to state that we must accept the terms of the September 1983 Implementing Agreement, especially as it pertains to the kind and type of work and number of machinists transferred from Stockton to Salt Lake City. Regardless of whether it provided for the proper amount of work and men to be transferred to the Salt Lake City facility from Stockton we lack the authority or are in a legal position to reform that Agreement which was negotiated in good faith after extended negotiations. An Arbitration Committee established under the New York Conditions has no authority to amend or modify an Implementing Agreement negotiated pursuant to the New York Dock Conditions.

In reply to the plea of the Claimants that it is palpably unfair and unreasonable to allow the machinists transferred from Stockton to be protected under New York Dock, but not the Claimants, we must state that the Carrier agreed with the IAMAW, that the Stockton employees who followed their work would be protected. These employees were protected because they were directly and immediately affected by the Merger. The Claimants can also gain protection, provided, they can demonstrate by the weight of credible evidence that they were adversely affected by a transaction that resulted from the merger. Not all employees who were disadvantaged after a merger were entitled to protection benefits of New York Dock. Not every alignment of forces constitutes a transaction. If after a merger occurred an employee received lesser earnings or lost all earnings, he would not necessarily be entitled to New York Dock protection, if his diminished earnings were the result of a decline in the Carrier's business or any other reason that was not subsumed under a "transaction."

In the case at hand, we find that the Claimants have not proved by clear and convincing evidence that their post merger furloughs were the direct result of a transaction created by the merger, i.e., that the realignment of machinist forces of the Stockton and Salt Lake City facilities was the direct and proximate cause of their furloughs. We find, instead, that such a factor as a decline in the Carrier's business caused their furloughs.

We find no reason to depart from these conclusions because of the Claimants' allegations that the representatives of Carrier, namely, Superintendent Cocking and Labor Relations Director Smith led them to believe that they were covered by the benefits of New York Dock, and they acted on these representations to their detriment, and therefore the Carrier should be estopped to deny them the aforesaid protection.

We find no merit in these contentions because there is a lack of proof to support these allegations. We find no evidence as to the existence of a notice posted in the Shops setting forth such alleged protection. The Carrier asserted that the Chief Clerk who was in charge of such matters, stated that no such notice ever existed. Moreover, Mr. Cocking was not the Agent of the Carrier either to grant or deny protection benefits. He was not the official who could bind the Carrier to such a significant and important obligation. The Claimants had recourse to their bargaining representative, who would have been able to tell them definitively as to the metes and bounds of their protection, if any.

We note that Mr. Smith testified categorically that he had never made the representations ascribed to him.

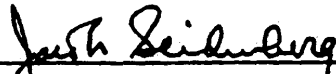
In short, we find the matter of granting protection benefits under New York Dock Conditions cannot be imputed to the Carrier on the basis of apparent agency. The evidence in this record does not support this doctrine of law.

In summary, we conclude, that on the basis of the aforestated Findings, that the Claimants are not entitled to the protection benefits of the New York Dock Conditions because their furloughs were not linked to a transaction.

It should also be noted that the parties agreed at the Arbitration hearing held on March 12, 1987 that the Undersigned would be the Sole Member of the Arbitration Committee.

AWARD: (1) Request to invoke Laches denied.

(2) Claims for protection benefits under New York Dock Conditions denied.



Jacob Seidenberg, Sole Member
of Arbitration Committee

May 18, 1987

UNION PACIFIC
Payroll Authority - Non Agreement Positions (NAPS)
Transportation (54) Department

Lotus Notes Number: 3550

Composed by: Gwen Ryan

Control Number: L093

Company:	UNION PACIFIC RAILROAD CO	☐ FICA	☐ Hourly	☐ Exempt	☐ Not Exempt
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ACTION TO BE TAKEN:

☐ Abolish Position ☐ Change Employee Salary ☐ Change Position Title : Location : Cost Center : Budget Group ☐ Create Position (w/Candidate)	☐ Create Salary Continuation ☒ Fill Vacant Position ☐ Vacate Position
--	--

Additional Documents:

☐ Employee Relocation	☐ Geographic Supplement	☐ Policy Exception	☐ Shift Differential
☐ New Employee	☐ From Agreement	☐ Return from Leave of ABS	
☐ Temporary	☐ Return from Suspension	☐ Return from Salary Continuation	
☐ From UP Corp/Sub Unit -			

EMPLOYEE PRESENT

SSN:	526663917	Date Last Hired:	06/01/69	Dept.	
Last Name:	GROTHER	First Name:	JOHN	MI:	E
Position Title:	SR MGR TERM OPRNS	Position Number:	834300114	Cost Center:	
Work Location:	PIMA , AZ	Monthly Salary:	\$6,200	PR No.:	033
Grade:	19	SRG:	\$6,348	SRG %:	97.7%
Band:		MRV:		MRV %:	0.0%
Part Time Hourly Rate:		Part Time Standard Hours:		Is employee currently on a geographical supplement?	☐ Yes ☐ No

Last Increase

Effective Date:	04/16/97	Type:		Amount:	
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PROPOSED

Proposed Action:	Demotion	Position Number:	391300301	Position Title:	MGR IMDL OPRNS
Monthly Salary:	\$4,928	SRG:		Work Location:	HOUSTON , TX
Amount of Change:	\$-1,272	SRG%:	0.0%	PR No.:	041
% of Change:	-20.5%	Cost Center:	Z4141	Proposed MRV:	
Band:		Grade:	17	% of Proposed	0.0%

08/12/2004 05:01:10 PM

NAPS: Archived - Control Number: L093

1

Dept.		Part Time Hourly Rate:		MRV:	
				Part Time Standard Hours:	

Echelon Code:	
Proposed Effective Date:	07/01/97

DEPARTING EMPLOYEE

Effective Date:	05/31/97				
SSN:	412947005				
Last Name:	HAMPTON	First Name:	GUY	MI:	L
Cause of Personnel Change: Return to Agreement					
Resignation / Leave of Absence Code:					
To UP Corp/Sub Unit:					

ABOLISH POSITION AUTHORITY

Abolish Date:			
Abolish Position Title:		Abolish Position Number:	
Abolish Work Location:			

CNET

CNet Number:		CNet Exception Reason:	
Restruct Req #:		Explanation:	

DEPARTMENT APPROVER

Does NAPS need department approval:	☐ YES ☒ NO
Department Approver:	

COMPENSATION

Control Number:	L093	Location:	
Class:		Rpt Unit:	
Degree:		Benefits Date:	01/15/98
Grade:		PINs Date:	
Job ID:		Payroll Acct.:	01/23/98 09:31:41 AM
ICC Number:			

COMMENTS

(see comment section of 15121 system for justification of demotion)

-Notes Entered:6/27/97 1:13:27 PM-

Disciplinary action.

DOCUMENT HISTORY

Form Status Date: 6/27/97 12:57:45 PM
Form Created Date: 6/27/97 12:57:45 PM
Addition Action: Transfer Employee
Author Title: MGR TRANSP ADMIN
Author Signature Date: 6/27/97
First Approval: BRAD KING VP TRANSPORTATION 6/27/97
Second Approval:
Approval: A. L. SHOENER EXEC VICE PRES OPERATION 6/27/97
Cobra Date: 2/20/98 1:10:13 PM

08/12/2004 05:01:10 PM

NAPS: Archived - Control Number: L093

2

Medical Date: 2/20/98 11:02:21 AM

08/12/2004 05:01:10 PM

NAPS: Archived - Control Number: L093

UNION PACIFIC EXHIBIT 40
PAGE 3 OF 3

ARBITRATION COMMITTEE

In the Matter of the	)	OPINION AND AWARD
Arbitration Between:	)	
	)	Pursuant to Article I,
BROTHERHOOD OF MAINTENANCE OF	)	Section 11 of the New York
WAY EMPLOYES,	)	Dock Conditions
	)	
Organization,	)	
	)	
and	)	ICC Finance Docket No. 30249
	)	
THE ATCHISON, TOPEKA AND	)	
SANTA FE RAILWAY COMPANY,	)	
	)	
Carrier.	)	Claim of C. E. Hardesty

Hearing Date: January 30, 1986
Place of Hearing: Sacramento, California
Date of Award: May 12, 1986

MEMBERS OF THE COMMITTEE

Employes' Member: C. F. Foose
Carrier Member: G. M. Garmon
Neutral Member: John B. LaRocco

ORGANIZATION'S QUESTION AT ISSUE

Is former Toledo, Peoria and Western Railroad Employee C. E. Hardesty entitled to a displacement allowance under Section 5 of the New York Dock Conditions when his position of Motor Track Inspector/Repairman was abolished, effective November 16, 1984.

CARRIER'S QUESTION AT ISSUE

Is Claimant C. E. Hardesty, named in the General Chairman's claim letter of January 1, 1984, entitled to the displacement allowance for the dates claimed within the Brotherhood's Claim? (Carrier's File 11-1300-240-5)

OPINION OF THE COMMITTEE

I. INTRODUCTION

On or about December 17, 1980, the Interstate Commerce Commission (ICC) approved the Atchison, Topeka and Santa Fe Railway Company's petition to control and acquire the Toledo, Peoria and Western Railroad (TP&W). [Finance Docket No. 30249.] On August 17, 1983, the ICC approved the merger of TP&W into the Santa Fe. The merger became effective on January 1, 1984. As a result of the merger, the former TP&W became the Peoria District on the Santa Fe's Illinois Division. To compensate and protect employees adversely affected by the acquisition and the subsequent merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Carrier pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

Hearing on this dispute was held on January 30, 1986. Both parties filed prehearing submissions. The Carrier filed a post-hearing brief which was duly received by the Neutral Committee Member on March 6, 1986. At the Arbitrator's request, the parties waived the Section 11(c) forty-five day limitation period for issuing this decision.¹

¹ All sections pertinent to this case are set forth in Article 1 of the New York Dock Conditions. Thus, the Arbitrator will only cite the particular section number.

II. BACKGROUND AND SUMMARY OF THE FACTS

About seven months prior to the merger, the Carrier invited the Organization to negotiate the terms and conditions of an implementing agreement. Bargaining ensued and the parties entered into a July 12, 1983 Memorandum Agreement which called for the consolidation of employee seniority rosters. Also, the July 12, 1983 Memorandum Agreement provided that, on the effective date of the merger, TP&W maintenance of way workers would become Carrier employees covered by the schedule Agreements between the Organization and the Santa Fe. Former TP&W workers were accorded preferential rights to service on the former TP&W territory. In Section 3, the parties incorporated the New York Dock Conditions.

At the time of the merger, Claimant occupied a TP&W Motor Track Inspector/Repairman position. The Santa Fe did not have any position precisely comparable to Motor Track Inspector. On the Santa Fe, Track Supervisors, appointed positions, perform track inspection duties in conjunction with their supervisory duties. During a September 26, 1983 meeting, the Carrier informed the Organization that, sometime subsequent to the merger, the Carrier intended to replace the two TP&W Motor Track Inspector positions with two Track Supervisor positions. On October 10, 1983, the Carrier confirmed, in writing, the understanding reached at the September 26, 1983 meeting. The parties agreed to place TP&W Motor Track Inspectors on a separate seniority roster for the entire Illinois Division. Also, Paragraph 4 of the October 10, 1983 letter reads:

"You [the Organization's General Chairmen] indicated that you were concerned that the Carrier would have the aforementioned two Motor Track Inspectors doing Track Supervisors' work after the merger becomes effective. The Carrier indicated it was its intention to eventually establish two Track Supervisor positions on the former TP&W and, if possible, the former TP&W Track Inspectors will be promoted to said positions. It was agreed that before any Track Supervisors are assigned on the former TP&W, the Carrier will contact you and advise of its intentions, as well as attempt to work out a method for promoting and/or assigning the former TP&W Track Inspectors to said positions." [Brackets added for clarification.]

After the effective date of the merger, Claimant continued to work as a Motor Track Inspector on the new Peoria District. In February and March, 1984, Claimant voluntarily relinquished his Foreman and Assistant Foreman seniority. He expressly retained both his Motor Track Inspector and Trackman seniority.

On November 5, 1984, the Carrier notified General Chairman Fleming that on November 16, 1984, it intended to appoint two Section Foremen ^{4/10/85} (~~without any Motor Track Inspector seniority~~) to two newly established Track Supervisor positions on the Peoria District and concurrently abolish the two Motor Track Inspector positions. The Carrier implemented the changes on November 16, 1984. As a result of the abolition of his Motor Track Inspector position, Claimant exercised his seniority to a Trackman's position on the section gang at Gilman, Illinois.

Claimant seeks a New York Dock displacement allowance measured by the difference between his Motor Track Inspector hourly rate (\$12.4970) and his wages as a track laborer (\$11.1871 per hour).

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Organization first argues that the abolition of Claimant's position and the Carrier's appointment of two employees (~~who did not hold any Motor Track Inspector seniority~~^{4/1/86}) to the Track Supervisor positions constituted New York Dock transactions. The Section 1(a) definition of a transaction is broad and analogous to the definition of a coordination under the Washington Job Protection Agreement. Before implementing a transaction, the Carrier is obligated to tender the Organization proper notice and negotiate or arbitrate an implementing agreement. The Carrier's November 5, 1984 correspondence failed to conform to the Section 4 notice requirements. The Carrier unilaterally effectuated the transaction without an implementing agreement. If the Carrier implements a transaction without satisfying the Section 4 prerequisites, those employees, like Claimant, adversely affected by the unauthorized transaction are entitled to New York Dock protective benefits.

Alternatively, the Organization avers that Claimant was placed in a worse position with respect to his compensation as the result of the merger and a series of related transactions. But for the January 1, 1984 merger, Claimant would have indefinitely retained his higher rated Motor Track Inspector position. The consolidation of seniority rosters was also a transaction. Due to the seniority roster consolidation, the Carrier later replaced Claimant's position with a supervisory position. The harmful event affecting employees might occur long

after implementation of the transaction. RLEA v. DRGW, OSL Arb. (Spears, 1/9/81). Claimant's consequential reduction in earnings triggered his right to receive a displacement allowance.

Finally, the Organization asserts that the Carrier breached the July 12, 1983 Agreement. The Agreement absolutely preserved Claimant's Motor Track Inspector seniority. In addition, the Carrier led the Organization to believe that Claimant and his fellow Motor Track Inspector would be promoted to Track Supervisors. Despite its representations, the Carrier arbitrarily appointed two workers without ^{CH/EMB} any Motor Track Inspector seniority to the newly established Track Supervisor positions.

The Organization's General Chairman never acquiesced in the Carrier's changes. He detrimentally relied on the Carrier's (ultimately false) representation that Claimant would be placed on any position created to replace his Motor Track Inspector position. The Carrier's November 5, 1984 notice was inadequate and issued only days before the Carrier implemented the changes. The General Chairman was deprived of an opportunity to respond. Before he could object, the Carrier abolished Claimant's Motor Track Inspector job forcing him to displace to a laborer's position.

B. The Carrier's Position

Well before the merger, the Carrier fully and frankly disclosed its intention to eliminate the two Motor Track Inspector positions and, in their stead, create Track Supervisor positions. The parties reached an enforceable agreement during

their September 26, 1983 discussions. The agreement was confirmed in the Carrier's October 10, 1983 letter. The Carrier complied with the agreement. It sent advance written notice, on November 5, 1984, to the Organization that it was establishing the supervisory positions to replace the Track Inspector positions.

Although the Organization acknowledged that it received the November 5, 1984 notice, it waited more than two months before raising an objection. The Organization's General Chairman was under an immediate duty to speak. If he had quickly responded to the November 5, 1984 notice, the Organization and the Carrier might have worked out an arrangement for promoting Claimant to Track Supervisor. By failing to timely object, the Organization is equitably estopped from later challenging the propriety of the Carrier's action.

Contrary to the Organization's contentions, the responsibilities of a Track Supervisor encompass more than track inspection duties. The Carrier reasonably determined that two Section Foremen, both former TP&W employees, were the most capable workers for the new positions. The Carrier could have abolished Claimant's position, combined supervisory duties with the inspection work and established a Track Supervisor job even if the merger had not occurred. Therefore, the abolition of Claimant's Motor Track Inspector position was not a merger-related change requiring ICC approval and, therefore, not a transaction.

The Organization has neither identified a New York Dock transaction nor demonstrated a nexus between a transaction and the abolishment of Claimant's Motor Track Inspector position. To activate New York Dock protection, the grieving employee must show a connection between a Section 1(a) transaction and the adverse employment effect. SIUNA v. C&O, NYD § 11 (Dennis, 4/22/85). An employee is not presumptively entitled to New York Dock benefits merely because he incurs a post-merger loss of compensation. Public Law Board No. 3160, Award No. 1 (Dolnick).

Besides his Motor Track Inspector seniority, Claimant held seniority as a Track Foreman, Assistant Track Foreman and Trackman at the time of the merger. Claimant freely relinquished his Foreman and Assistant Foreman seniority and the appurtenant preferential right to those positions on the former TP&W territory. If Claimant had retained his Foreman's seniority, Claimant could have displaced to a Foreman's position when his Motor Track Inspector position was abolished. A position was available since the two workers appointed to the new Track Supervisor positions vacated Section Foreman jobs. Moreover, the monthly rate of a Section Foreman exceeds the straight time earnings of a Motor Track Inspector. Thus, Claimant, by forfeiting his Foreman's seniority, placed himself in a position where he could not obtain a position with compensation equal to or greater than his Motor Track Inspector wages even though positions producing more compensation were available on the Peoria District. See Sections 5(a) and 5(b) of the New York Dock Conditions.

III. DISCUSSION

Section 11(e) of the New York Dock Conditions sets forth the Organization's burden of going forward and the Carrier's burden of proof. As the moving party, the Organization must identify a Section 1(a) transaction (or transactions) and specify "...pertinent facts of that transaction relied upon." The Carrier's burden of proof is conditional. If the Organization first fulfills its burden of going forward, then the Carrier assumes the burden of proving "...that factors other than a transaction affected the employee." On the other hand, if the Organization fails to either identify a transaction or specify pertinent facts, the Carrier prevails regardless of whether or not it has satisfied its burden of proof.

The Organization has identified several events which, from its perspective, constitute New York Dock transactions. Section 1(a), which defines a transaction, states:

"'Transaction' means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed."

While the definition is broad, not every force adjustment constitutes a transaction. Similarly, an employee's displacement does not absolutely trigger an entitlement to protective benefits. In this instance, the Organization improperly attempts to label any and every work force change as a New York Dock transaction. The record does not contain any evidence that the Carrier transferred work or employees beyond the former TP&W territory when it abolished Claimant's position on November 16, 1984. Like Claimant, the employees placed in the new Track

Supervisor positions were former TP&W workers. Put differently, the former TP&W could have abolished Claimant's Motor Track Inspector position even if the merger had not occurred. Thus, the elimination of Claimant's position, standing alone, was not a transaction.

Alternatively, the Organization argues that Claimant was directly affected due to the January 1, 1984 merger (which is undeniably a transaction) and a series of events emanating from the merger. Specifically, the Organization contends the July 12, 1983 Agreement and the consolidation of seniority districts were New York Dock transactions. We disagree.

The July 12, 1983 Agreement was a merger implementing agreement voluntarily negotiated in anticipation that the ICC would impose the New York Dock Conditions. The Agreement conferred New York Dock protective benefits on maintenance of way workers displaced or furloughed as a result of the TP&W-Santa Fe merger or a merger-related transaction. We note, however, that consolidating seniority districts is generally not construed as a New York Dock transaction. Thus, the Organization must show some link, aside from seniority consolidation, between Claimant's displacement and the merger.

Before the merger, the Carrier warned the Organization that it intended to create two Track Supervisor positions on the former TP&W to replace the existing Motor Track Inspector jobs. The Organization was aware that the Motor Track Inspector positions would eventually be abolished. Pursuant to a September 26, 1983 discussion, the Carrier promised to notify the

Organization prior to establishing the new positions. In compliance, the Carrier tendered the required notice on November 5, 1984. After carefully perusing the July 12, 1983 Agreement and the Carrier's October 10, 1983 letter (confirming the September 26, 1983 meeting), we do not find any constraints on the Carrier's discretion to eliminate Motor Track Inspectors (except the obligation to provide advance notification). At most, the Organization merely implored the Carrier to consider Claimant as a suitable candidate for promotion to Track Supervisor.

The Carrier selected two former TP&W workers to fill the Track Supervisor positions because the Carrier believed that the two Section Foremen were better qualified for the new positions. The Carrier concluded that Claimant lacked the requisite fitness and ability to competently execute the duties of a Track Supervisor. The Organization has not explained how the Carrier's evaluation (even if it was incorrect) of Claimant's capacity to perform supervisory work was intertwined with the TP&W-Santa Fe merger. As discussed at the onset, Section 11(e) of the New York Dock Conditions mandates the Organization to come forward with pertinent facts connecting the grieving worker's displacement to a transaction. The Organization has not satisfied its Section 11(e) burden of going forward.

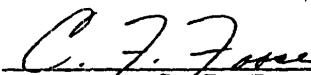
The Organization has made a veiled accusation that the Carrier removed work from the scope of the working agreement when it combined track inspection work with supervisory duties in a single position. We lack the authority to pass judgment on this

allegation since it involves the interpretation and application of the relevant schedule Agreement.

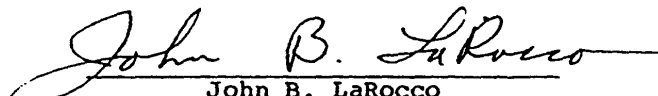
AWARD

The Answer to the Questions at Issue is "No."

DATED: May 12, 1986


C. F. Foose
Employees' Member


G. M. Garmon
Carrier Member


John B. LaRocco
Neutral Member

AWARD NO. 1
CASE NO. 1
ISSUES "A" - "E"

ARBITRATION BOARD
NEW YORK DOCK LABOR PROTECTIVE CONDITIONS
(IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET 29430)

UNITED TRANSPORTATION UNION)
)
vs.) FINDINGS & AWARD
)
NORFOLK & WESTERN RAILWAY COMPANY)

QUESTION AT ISSUE:

"Do the individuals as catalogued under the separate Issues, 'A' thru 'E' which are listed herein, meet the criteria of either a 'displaced' or 'dismissed' employee as set forth in the New York Dock II Conditions?

ISSUE 'A'

All the individuals set forth below had a seniority rank of 351 or higher and were "furloughed" on the date of the consolidation (June 1, 1982):

Rank	Name	Rank	Name
351	T. B. Barnes	381	J. B. Jones
355	G. M. Watters	383	D. E. Hill, Jr.
356	J. M. Balok	385	M. I. Lowell
367	J. H. VanLandingham	386	S. A. Brinkley, Jr.
368	J. L. Machen	388	R. D. Croft
371	E. B. Joyner	390	V. L. Elliott
372	Y. D. Hale	392	D. R. Yates
374	J. C. Booher	394	D. Ore, III
375	J. L. Webster	397	D. V. Bayse, Sr.
378	J. E. Polansky	399	W. D. Ramsey
		548	S. O. Loftin

ISSUE 'B'

Employees who were regularly assigned to the yard extra board on the date of the consolidation and were subsequently 'furloughed' on June 5 or 7, 1982. These individuals are:

Rank	Name	Rank	Name
341	A. E. Edwards	350	L. O. Myers, III
342	M. E. McCoy	360	G. W. Thorne
		363	L. Harris

ISSUE 'C'

Employees who were either on regular assignments or on the yard brakemen's extra board on the date of the consolidation (June 1, 1982) and subsequently displaced due to the one day annulments under wage schedule rules. These employees are:

Rank	Name	Rank	Name
48	J. J. McKinney	302	C. E. Gipson
95	R. A. Odom	308	J. D. Castello, Jr.
221A	M. B. Land	312	R. L. Henderson
269	Z. Artis, Jr.	329	C. W. Askew
299	C. Gist		

ISSUE 'D'

The individuals herein allege that when the carrier placed 14 former Southern employees, who were furloughed at the time of the consolidation and on the bottom of the consolidated seniority roster, that they were adversely affected. They are:

Rank	Name	Rank	Name
200	E. L. Futrell	293	C. G. Yurko
240	R. Webb	299	C. Gist
264	W. E. Myers	303	K. R. Minsterman
268	T. B. Brooks	305	D. K. Lee
272	J. R. Roberson	308	J. D. Castello, Jr.
275	L. W. Burns	310	F. E. Pettus, Jr.
276	B. L. Riddick	311	G. W. Johnson
279	L. W. Sewell, Jr.	314	K. L. Simmons
281	J. C. Taylor	317	B. J. Whitley
282	J. E. Lassiter	326	D. L. Cyrus
283	W. E. Askew	329	C. W. Askew
287	A. W. Patrick	333	G. E. Revell
289	W. E. Troester	341	A. E. Edwards
290	L. G. Peoples	342	M. E. McCoy
291	J. Futrell	348	R. E. Felton
292	J. Orsini	359	J. R. Kasney

ISSUE 'E'

This case involves 23 employees that were either assigned to regular positions or on the yard extra board on the date of the 'transaction,' and were subsequently displaced and/or furloughed due to the fluctuations in the volume of traffic at Norfolk Terminal, which result-

ed in the abolishment of regularly assigned positions or the regulation of the yard extra board. These individuals are:

Rank	Name	Rank	Name
272	J. R. Roberson	314	K. L. Simmons
274	L. W. Burns	315	M. H. McCotter
282	J. E. Lassiter	316	J. C. Swope
283	W. E. Askew	317	B. J. Whitley
299	C. Gist	320	C. M. Kirkland
303	K. R. Minsterman	326	D. L. Cyrus
304	V. A. Roberts	332	D. A. Felts, Jr.
305	D. K. Lee	333	G. E. Revell
306	V. O. Owes	339	C. R. Wamsley
308	J. D. Castello, Jr.	348	R. E. Felton, Jr.
311	G. W. Johnson	359	J. R. Kasney
		363	L. Harris"

JOINT STATEMENT OF FACTS:

The instant claims were filed pursuant to Article 1, Section 11, of the New York Dock II protective conditions (Finance Docket No. 28250, 354 ICC, 399, modified at 360 ICC 60 (February 9, 1979); New York Dock Railway, et al v. United States of America and ICC, 609 F2d. 83 (Second Circuit, 1979)) which were imposed by the Interstate Commerce Commission (ICC), in connection with its decision to approve the coordination of operations, facilities and personnel of the Norfolk and Western Railway Company (NW) and the Southern Railway Company (SR) in Finance Docket 29430 (Sub-No. 1) (ICC in Finance Docket No. 29430 (Sub-No. 1), service date of March 25, 1982).

In anticipation of the ICC approving said coordination, Implementing Agreements were entered into between the Carriers and the Employees represented by the United Transportation Union (UTU) covering consolidations at certain "common points" (Cincinnati, Ohio; Norfolk, Lynchburg, Danville, and Bristol, Virginia; Durham and Winston-Salem, North Carolina), but unless there was to be an integration of personnel (rosters), no implementing agreements were negotiated.

The parties also entered into an agreement (Memorandum of Agreement dated May 5, 1982) to establish a procedure to facilitate timely handling of claims filed pursuant to FD 29430 (Sub-No. 1). Said agreement contains forms to be used by employees who believe themselves to be entitled to the benefits and provides for the handling of appeals culminating in arbitration prescribed by Article 1, Section 11, of the New York Dock II Conditions. All

claims involved in the instant proceedings have been handled on the property in compliance with the agreement and are properly before this Board for adjudication.

The New York Dock II Conditions contain the following definitions:

"Transaction" means any action taken pursuant to authorization of this Commission on which these provisions have been imposed.

"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.

"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 abolishment 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.

"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."

POSITION OF THE EMPLOYEES (UTU):

It is the position of the Employees that these claimants are entitled to the benefits enunciated in New York Dock II Conditions because each of them were "placed in a worse position with respect to compensation and/or rules governing working conditions" as they each became either "displaced" or "dismissed" employees, as those terms are defined in New York Dock II, when the seniority rosters were combined. This resulted in a lower standing on the rosters by all except the first 19 NW employees.

New York Dock II defines a "transaction" as any action taken pursuant to authorization of the ICC on which these (NYD II) employee protection conditions have been imposed. It certainly cannot be said that the employees of the Southern Railway could have been added to the Norfolk and Western Railway rosters and the work force thereby consolidated without the express authorization of the ICC. The combining of the rosters was, therefore, a "transaction" within the meaning as defined in NYD II.

These claimants have made a prima facie case that they each have been placed in a worse position with respect to compensation when earnings dropped below the average in any period equal to less than the "average monthly time paid for." Because of the many variable (new schedule rules, possible differences in size of the work force, probably differences in volume of work, and a host of other factors) the drop in average compensation is inferentially caused by the consolidation. The amount of each claimant's compensation is the test of whether or not he has been placed in a worse position and the eligibility of an employee for an allowance depends upon whether any of the difference in compensation is a result of the "transaction."

While we recognize that in order to be recognized as either a "displaced" or a "dismissed" employee, a claimant must establish that his "worse position" is "as a result of a transaction," we maintain that the whole of the consolidation of the NW and the SR as requested in their application was a "transaction," but that is not to say that no other action taken pursuant to the ICC authorization (such as job abolishments or the combining of seniority rosters as was done here) is not also to be considered "transactions." If this were not so, then certainly the definition of the term "transaction" would have been worded differently in the NYD II Conditions. As it stands, the Implementing Agreements between the parties to this dispute were made "pursuant" to the ICC authorization and the application of the terms of those agreements trigger many "transactions," or actions that could not have taken place without ICC authority contained in its Service Order in FD 29430 (Sub No. 1).

It has been the position of the Carrier in the handling of these claims on the property, that the accepted touchstone for determining whether an employee qualifies for either a displacement or a dismissal allowance is the loss of a job or the loss of earnings due to being involved in a chain of displacements that resulted from a "transaction." In deciding questions of this nature, other Boards of Arbitration have considered, among other things, (1) the loss of a pretransaction assignment, (2) the claimant being involved in a chain of displacements, or (3) his post-transaction assignment being so changed that the employee suffers a money loss -- all of which must flow from a transaction and result in the claimant's loss of earnings. Claimant is entitled to the average monthly compensation of his test period "so long after (his) displacement as he is able, 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. . . ." Each of the claimants in the instant case was placed in a worse position when he was repositioned to a lower relative ranking on the seniority roster which was placed into effect by the Implementing Agreement (NS-02-OPS-Norfolk Terminal). Each claimant's loss of earnings can readily be seen by a glance at the Earnings Record attached to this submission in the "Issue" section under which his claim is categorized.

It is expected that the Carrier will quote from several awards involving what may be deducted from an employee's guarantee. The Employees would object to this and request the Board not to consider that position as having any relevance to the Issue at Question because that issue is not now before this Board. It is, rather, to be determined here whether or not the involved claimants are "displaced" or "dismissed" employees and, therefore, entitled to the employee protective benefits of the New York Dock II Conditions.

In conclusion, the Employees are confident that we have sufficiently shown that the claimants in the instant case are each "displaced" or "dismissed" employees in that they each have been placed in a worse position with respect to their compensation and/or rules governing their working conditions as a direct result of a "transaction" (i.e., the integration of the seniority rosters of the two carriers and the resulting combining of the work forces at Norfolk Terminal, Portlock and Lambert's Point Yards.) To say it another way, each of these claimants has suffered a loss in his earnings and has amply established that said loss is at least in part attributal to the consolidation of the operations and personnel of the NW and the SR at Norfolk as explicitly approved by the ICC in Finance Docket No. 29430 (Sub No. 1).

It is our further position that the Question at Issue should be answered in the affirmative in the case of each and every individual claimant listed in this submission. We, therefore, respectfully request that this Honorable Board answer the Question at Issue in the affirmative.

POSITION OF THE CARRIER:

It is the position of the Carrier that the request to be recognized as protected employees under the provisions of the New York Dock II Conditions due to the NW-SR Consolidation, by the individuals named in ISSUES "A" thru "E," is completely without merit and should be denied, for the reasons set forth below. The Carrier will address each issue separately.

ISSUE "A"

The employees listed in Issue "A" were in furlough status as yardmen at the time of the consolidation. They were subsequently recalled to service on June 7, 1982, and again furloughed on July 12, 1982 due to the normal operations on the Norfolk Terminal, and the day to day fluctuation of traffic to be handled at that location. The Carrier asserts that in order to be recognized as either a "displaced" or a "dismissed" employee, one must be able to establish a direct causal relationship between the transaction, which New York Dock Conditions define, as "*** any action taken pursuant to authorization of this Commission ***," and the alleged adverse effect. However, in the instant complaint, neither the Organization, nor the individuals making the claim, have yet to provide a factual basis establishing a causal relationship between their furlough subsequent to June 1, 1982 and a specific event flowing from the transaction. Rather, they have been content to rely upon the mere allegation that their furlough was somehow precipitated by the NW and SR consolidation. As stated previously, the claimants herein were already in a furloughed status on the date of the "transaction," and did not meet the criteria of a "displaced" nor a "dismissed" employee.

In support of this statement, the Board's attention is directed to the following excerpts extracted from awards which have dealt with this identical issue:

Issue No. 4 of Amtrak Board of Arbitration No. 15:
(Referee Moore)

"*** In order for an employee to receive the dismissal allowance outlined in Article I, Section 6, he must fall within the definition of 'dismissed employee' set forth in Article I, Section I(c).

The protective conditions do not require the Carrier to speculate on which furloughed employee might have been working at some future date had the Carrier not joined Amtrak." (Underscoring added)

Award No. 4 of Special Board of Adjustment No. 922:
(Referee David H. Brown)

"QUESTION AT ISSUE: Is R. P. Robertson entitled to the benefits of the protective conditions set forth in the New York Dock II Conditions in view of the NW and IT decision to consolidate their respective facilities, operations and services at St. Louis, Missouri and Decatur, Illinois on May 8, 1982.

STATEMENT OF FACTS: Mr. R. P. Robertson is a former Illinois Terminal train service employee with seniority date of February 15, 1980, and was in furloughed status on May 8, 1982, when the N&W-IT Consolidation took place.

ANALYSIS AND FINDINGS: Amtrak Board of Arbitration No. 15 (Preston J. Moore, Referee) in its Issue No. 4 resolved an analogous case. In answering the issue in the negative, the Amtrak Board observed:

'*** In order for an employee to receive the dismissal allowance outlined in Article I, Section 6, he must fall within the definition of, "dismissed employee" set forth in Article I, Section I(c). The protective conditions do not require the Carrier to speculate on which furloughed employees might have been working at some future date had the carrier not joined Amtrak.'

We affirm the reasoning and the decision of such Board.

AWARD: The issue is answered in the negative." (Underscoring added)

In summary, the Carrier would point out the following basic facts:

1. The claimants herein were "furloughed" as yardmen at the time of the "transaction" (June 1, 1982), and, therefore, could not, under the definitions as set forth in the New York Dock II Conditions, be either "displaced" or "dismissed" employees.

2. Claimants Barnes, Watters and Balok even though recalled on 5-27-82 elected to wait until after June 5, to mark-up, and therefore could not hold a place on the Extra Board, they did however, continue working in the

Maintenance of Way Department until recalled on June 7, 1982.

3. Previous Arbitration Boards have held that "furloughed" employees are not entitled to protection due to the fact that they could not show a causal connection resulting in their being "furloughed."

We, therefore, respectfully request that the "QUESTION AT ISSUE" -- ISSUE "A", be answered in the Negative.

ISSUES "B", "D" AND "E"

A number of the claimants involved in Issues "B", "D" and "E" have filed various claims alleging to have been adversely affected due to one or more of the following:

(1) During the period June 5 and/or 7, 1982 there were approximately six (6) former Southern employees working from the consolidated roster while claimants were furloughed. These employees were identified by claimants as:

Name	Seniority Rank	Seniority Date
S. E. Hudson	19	10-20-55
M. L. Myers	72	01-10-67
C. W. Smith	97	06-07-67
J. M. Smith, Jr.	201	01-07-72
D. D. Hill	227	01-10-72
A. L. Stokes	251	10-20-72

(2) That due to the Carrier (NW) recalling fourteen (14) additional yardmen, who were all furloughed at the time of the "transaction," the employees on the yard extra board alleged that they lost earnings for the period June 21 thru July 12, 1982. The employees added to the yard extra board on June 21, 1982 were:

Name	Seniority Rank	Seniority Date
G. W. Hunter	423	10-25-72
H. W. Cleaver	511	10-03-74
A. E. Gatling	520	02-10-75
P. Newby, Jr.	522	09-15-75
F. A. Foreman	526	06-19-75
C. D. Fulford	528	06-23-76
J. T. Banks	537	10-09-78
W. W. Wilson	540	04-09-79
W. O. Roundtree, Jr.	546	05-07-79
H. E. Golden, III	547	05-08-79

S. K. Potter	553	01-01-80
K. W. Burgess, Jr.	555	06-14-80
B. L. Little	557	09-27-80
J. H. Stuart	559	06-12-81

(3) That displacements and/or furloughs which occurred subsequent to the "transaction" caused a loss of earnings, which they allege was as a direct result of the NW-SR Consolidation.

In addressing these three issues generally the Carrier would point out that: First, the allegations made under (1) do not have credence due to the fact that the Consolidated Seniority Roster for Brakemen at Norfolk Terminal was negotiated and agreed to under "ARTICLE III," of the Implementing Agreement for Norfolk Terminal, and that the former Southern employees named therein were "slotted" (placed on the consolidated roster) in accordance with the percentages set forth in Section A of Article III. Second, the regulation of the yard extra boards has always been provided for under the applicable Wage Schedule Agreements, as a method of attempting to maintain a normal level of earnings for employees on such extra boards. In this regard the Board's attention is directed to Article 41, Section 3 of the United Transportation Union-T Wage Schedule Agreement covering yardmen, effective January 1, 1970, which states in part as follows:

"The yardmen's extra list will be adjusted as follows:

The number of yardmen assigned to the yardmen's extra list will, upon request of the local chairman, be reduced when the monthly wages or yardmen assigned to the list average less than 20 basic days' pay. It is understood that this amount is not to be regarded as maximum pay. For the purpose of adjusting the extra list, the actual earnings of extra brakemen during the previous semi-monthly payroll period ('checking period') will be used. Check will be made on the 5th and 20th of each month. In addition, if the local chairman can show at the end of any work week that the extra list is not averaging the equivalent of five (5) basic days for such week, the extra list will be reduced accordingly."
(Underscoring added)

Therefore, any employee regularly assigned to the yard brakemen extra board on the date of the consolidation, and who was subsequently furloughed by the regulation of said board, was affected by the operations of the Wage Schedule Rules Agreement and not the "Consolidation."

Claimants' position on issue (2) relative to the fourteen (14) "Southern" employees being placed on the extra board, also, lacks merit in that the former SR employees were recalled to service in accordance with the applicable schedule agreement and as a direct response to the Carrier's need for additional yardmen due to the temporary increase in the coal traffic at that time.

Neither the claimants nor the Organization have shown that the need to recall additional employees did not exist. In fact, under Article 41, Section 3, quoted above, from June 21 thru July 12, 1982, there were four (4) Mondays on which, if the crews were not making five (5) days or forty (40) hours per week, the Local Chairman could have requested the board be reduced. However, at no time during the said period did the Local Chairman make such request. The Carrier affirmly states that the need for additional (employees) did exist and the Carrier acted accordingly.

Issue (3) involves various dates wherein the claimants were effected subsequent to the date of the "transaction" due to the fluctuations in the volume of traffic, and in accordance with the Wage Schedule Rules their positions were abolished or they were in a chain of displacements as a result thereof. The Carrier has stated time and time again that the employees that make claim for protective benefits under the New York Dock II Conditions, have the responsibility to show a causal connection between their loss of earnings and the Norfolk and Western -- Southern Consolidation as opposed to mere allegations, as in the instant claims herein involved.

In support of the Carrier's position the Board's attention is directed to the following awards that have previously dealt with the effects of application of Wage Schedule Rules in the matter of protective benefits and employees rights thereto:

Special Board of Adjustment No. 770, UTU vs. NW, Paul N. Guthrie, Chairman and Neutral Member:

*** A review of the applicable agreement reveals that they were designed to protect employees from adverse affects which might flow from the merger transactions involved. They were clearly not designed to protect employees from other possible adverse affects which might flow from other causes or situations ***.
(Underscoring added)

Special Board of Adjustment No. 868, Award No. 1, UTU-(E) vs. NW, Arthur T. Van Wart, Chairman and Neutral Member:

"Employee Protection Agreements such as the Washington Job Protection Agreement of 1936 and the January 10, 1962, Merger Protection Agreement, were designed, as their names indicate, to provide protection to employees against adverse effects flowing from the transactions authorized by the various Finance Dockets issued by the Interstate Commerce Commission, and not adverse effects arising from other causes." (Underscoring added)

Special Board of Adjustment pursuant of Section 11 of the New York Dock II Conditions, Case No. 4, UTU vs. NW, Mr. Robert E. Peterson, Chairman and Neutral Member, held in part:

"*** In the Board's opinion, the protective benefits of the New York Dock II Conditions were designed to provide protection to employees against adverse affects flowing from an authorized transaction, not adverse affects flowing from other causes, or, as here, a reduction in compensation as a consequence of contractual payments for a previously earned vacation. As stated in Special Board of Adjustment No. 842, and also held by several other boards of adjustment, contractual unavailability is the same as voluntarily electing to make oneself unavailable. The Question at Issue must be answered in the negative.

AWARD:

Claimant R. W. Collins is not found to be entitled to the benefits of the protective conditions set forth in the New York Dock II Conditions in view of the NW and IT decision to consolidate their respective facilities, operations and services at St. Louis, Missouri and Decatur, Illinois on May 8, 1982." (Underscoring added)

In conclusion, the Carrier reiterates that the claimants involved in ISSUES "B", "D" and "E" are not supported by the provisions of the New York Dock II Conditions for all the reasons previously stated and therefore, respectfully requests that the QUESTION AT ISSUE: ISSUES "B", "D" and "E" be answered in the negative.

ISSUE "C"

Although some of the claimants herein also filed claims under either Issues "D" or "E", the underlying factor in this case is that subsequent to the "transaction" the Carrier annulled various assignments at various times due to day-to-day fluctuations in the number of cars to be handled.

The annulment of assignments is provided for under the Wage Schedule Rules Agreement UTU-T, as Article 3, Section 7(a), (b),

(c) and (d) and reads as follows:

"Section 7

(a) In event a regular or regular relief job or assignment is annulled for one day or more the yard service employee or employees holding the job or assignment may exercise their seniority in accordance with the rules.

(b) If assigned yardmen do not elect to exercise their seniority under the above paragraph, they may fill any open vacancy on a day or days their assignments are annulled and their rights to fill such an open vacancy will be on the basis of their seniority in the grade of the vacant position and their qualifications for the position. Exercise of seniority to fill an open vacancy will be permitted only on a vacancy in the same ninety minute starting time period of the annulled assignment. A yardman taking an open vacancy under this paragraph will be paid the rate of pay covering the grade of the open position he fills, and at straight time rates. Service in excess of eight hours for each tour of duty will be paid for under the overtime rules. When yardmen under this paragraph have been placed and there are additional vacancies, schedule rules will apply except when necessary to use yardmen from the emergency list.

When an open vacancy exists for yard conductor, and a regular or emergency yard conductor from an annulled crew elects to take the open vacancy under provisions of this paragraph (b), the senior regular or emergency yard conductor used on the crew will work as conductor of such crew. If a vacancy for yard brakemen is thus created on the crew, the regular or emergency yard conductor from the annulled crew will be permitted to fill the yard brakeman vacancy if his seniority as yard brakeman entitles him to such yard brakeman vacancy.

(c) When an assignment, excepting work trains, is to be annulled, the yardman regularly assigned to such assignment will be given not less than three hours notice ahead of the starting time of the assignment for the purpose of providing opportunity for exercise of seniority under above paragraphs (a) and (b). An employee desiring to exercise seniority under above paragraphs (a) and (b) will do so not less than three hours ahead of starting time of his annulled assignment.

(d) In the event yardmen do not elect to exercise their

seniority as provided for in paragraphs (a) and (b) above they may mark up on the extra list for the day or days their assignments are annulled and take vacancies in their turn either as conductor, brakeman, car retarder operator or switchtender according to their qualifications and be paid the rate covering the grade of service for which they are called. They will take their turn on the extra list in accordance with rules covering the operation of extra lists. A yardman will not mark up on the extra list earlier than 12:01 A.M. of the calendar day the annulment is effective.

A yardman marking up on the extra list may remain thereon for the calendar day or days his assignment is annulled. When known sufficiently in advance when his assignment will be restored, he will not be called for extra service at or after the beginning of the ninety minute starting time period of the shift preceding the starting time of his regular assignment.

When a yardman, under the provisions of this paragraph, stands first out on the extra list and is not qualified for the first vacancy he will remain first out on the list until he stands for a vacancy for which he is qualified.

When a yardman marks up on the extra list under the provisions of this paragraph he will be compensated for service while on the extra list at straight time rates. Service in excess of eight hours for each * * *."
(Underscore added)

The claimants listed under Issue "C" have based their claims on the fact that a "former Southern" employee, who had already displaced into the consolidated terminal, either had his position annulled for one or more days and elected, under Article 3, Section 7(a), to exercise his seniority; or, a "former Southern" employee was in the chain of displacements and subsequently displaced the claimant; thereby creating a causal connection.

The Carrier's position has consistently been that:

(1) The so-called "Southern" employees involved, were "active employees" and displaced onto position in the Consolidated Terminal on June 1, 1982, the date of the "transaction." Since June 1, 1982 they were no longer "Southern" but Norfolk Southern employees operating under former NW Wage Schedule Rules Agreements with the the United Transportation Union. They therefore

had the same rights under Article 3, Section 7, as any former NW yard service employee. The rule in question had the same provisions prior to the consolidation and therefore, the same situation could have occurred regardless of the consolidation. The Carrier affirmly states that, the employees that were adversely affected by the initial displacement into the terminal on June 1, 1982, were certified and that subsequent displacements by them under wage schedule rules do not trigger adverse effects.

(2) The displacements complained of were entirely due to the operation of the Rules Agreement and not the "transaction."

(3) The same situation could have occurred regardless of whether the consolidation had taken place or not.

The Carrier would again call the Board's attention to Board Awards previously cited in this submission.

The Carrier, therefore, respectfully requests that the QUESTION AT ISSUE -- ISSUE "C" be answered in the negative.

FINDINGS AND OPINION OF THE BOARD:

The Board has given careful consideration and study to the respective positions of the parties as hereinbefore recorded; the record as presented and developed on the property and presented to this Board through a Joint General Submission; the oral and rebuttal arguments offered at the Board's hearing on the issues; and, the awards of past boards of adjustment as included in both the ex parte submissions and in the Joint General Submission.

In making determinations with respect to each issue, the Board has kept in mind that Section 11(e) of the New York Dock Conditions places the burden of proof upon the parties to a dispute in the following manner:

"(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 Board will also here note with respect to a general argument offered by the Employees, that the Board does not find that the entering into of either an Implementing Agreement or the combining of seniority rosters may be construed as a "transaction" in application of the New York Dock Conditions.

Section 4 of Article 1 of the New York Dock Conditions provides for the negotiation of an implementing agreement. It states, in pertinent part:

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

It thus appears evident that while the parties are encouraged by New York Dock Conditions to enter into implementing agreements to especially provide for the selection of forces from all employees involved, that such action is not defined as lessening the necessity of an aggrieved party to show a direct causal nexus between a transaction and an adverse affect upon their employment relationship in meeting the definition of of a "Displaced" or "Dismissed" employee, supra, under the New York Dock Conditions.

As has been held in decisions of past boards of arbitration, the New York Dock Conditions neither contemplate nor extend blanket certification to employees as being adversely affected or entitled to a "displacement" or "dismissal" allowance merely because they are on a roster in either an active or inactive status on the date of a consolidation or transaction. Entitlement to such protective benefit status flows from each transaction as authorized by the ICC, not, as here, from an implementing agreement or the consolidation of rosters.

Issue "A"

Before commenting upon the merits of the dispute at issue, the Board would note the record shows that although Claimants Barnes, Watters and Balok had been recalled to service from furlough as yardmen on May 27, 1982, that each of these individuals had elected at that time to remain in the Maintenance of Way Department. They did not thereafter mark up on the brakemen's extra board until after the June 1, 1982 consolidation of the Norfolk Terminal operations and services, i.e., on June 10, 1982 and July 9, 1982 for Claimants Barnes and Balok, respectively, and on an unspecified date with respect to Claimant Watters.

The record also shows that all employees on the consolidated roster below Claimant VanLandingham (Seniority rank No. 367) were in a "furloughed" status on the date of the consolidation (June 1, 1982), and that such employees had been furloughed on various dates prior to June 1, 1982. In this latter regard it is noted,

for example, that the first named Claimant with respect to Issue "A" (Claimant VanLandingham), with a seniority date of July 22, 1980 on the NW, was furloughed by NW on May 20, 1982. The last named Claimant for Issue "A" (Claimant Loftin - No. 548), with a seniority date of May 17, 1979 on the SR, had been furloughed by SR on October 16, 1981.

A total of 559 active and inactive employees from both the NW and the SR are shown to have been placed on the consolidated roster for Norfolk Terminal, the consolidated seniority roster being attached to the Implementing Agreement of February 9, 1982 as Appendix C-2.

The consolidated seniority roster was established on an equity basis by integrating the respective seniority rosters of yard service employees of the SR Albemarle District into the rosters of the NW Norfolk Terminal Yard Service employees on a percentage basis (Yard Conductors: 93% NW - 7% SR; Yard Brakemen: 95% NW - 5% SR), with employees hired subsequent to the effective date of the agreement in the consolidated Norfolk Terminal to be placed on the bottom of the roster. (Article III-A and Article IV of Norfolk Terminal Implementing Agreement dated February 9, 1982.)

Turning now to the merits of the issue. In studying the composition of the New York Dock Conditions, the Board thinks it significant that the authors of such protective conditions elected to restrict a "Transaction" to be: "Any action taken pursuant to authorizations of the Commission on which these provisions have been imposed." It is significant in that it is not provided within such definition, or in other provisions of the New York Dock Conditions, that the protective provisions were to be imposed with respect to any action taken by a carrier relative to operation of its facilities and services

This finding is further supported in study of those provisions of the New York Dock Conditions which govern entitlement to a "Displacement Allowance." The Conditions stipulate payment of such an allowance to an employee who is placed in a worse position with respect to compensation and rules governing working conditions "as a result of a transaction." No mention is made of an employee being placed in a worse position with respect to circumstances found to be unrelated to a transaction.

In this same respect, the New York Dock Conditions restrict its definition of a "Dismissed" employee to: "[An] employee 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." Here,

it is significant that no mention is made of an employee deprived of a position as the result of work force determinations made under normal operating circumstances, much less to those employees deprived of positions as a result of having been furloughed prior to a transaction.

It therefore seems evident that the purpose of the New York Dock Conditions was to protect employees against the adverse affects of a transaction, not to insulate all employees against all consequences of an employment relationship.

Thus, it must be concluded that merely because previously furloughed employees came to be placed on a consolidated seniority roster in connection with the consolidation of operations and services did not automatically entitle them to protective allowances pursuant to the New York Dock Conditions. It must be presumed that even had the rosters not been consolidated the Claimants would nonetheless have remained in a furloughed status with respect to work opportunities on their former railroads.

~~Since the Claimants in Issue "A" are found to have been in a furloughed status on the date of the consolidation as a result of past work force determinations by both the NW and SR, and not as a direct result of the consolidation on June 1, 1982, this Board has no alternative but to hold that the Claimants are not found to meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.~~

ISSUE "B"

Article I, entitled "Schedule Agreement," of the Norfolk Terminal Implementing Agreement of February 9, 1982 states in part:

"A. NW Schedule Agreements will be effective in Norfolk Consolidated Terminal for all yard service employees."

Included in the aforementioned NW Schedule of Rules Agreement is provision for the regulation of yard extra boards, namely, Section 3 of Article 41, supra. This rule stipulates the yardmen's extra list will be adjusted at various times upon request of the local chairman of the Organization. In this respect, the Board understands the accepted practice with respect to application of the rule to permit the Carrier to make adjustments to the board and the local chairman to request subsequent adjustments off the board. It is evident, therefore, that work opportunities for employees on the yard extra board are governed by the rise and fall of business conditions.

In the case of the five named Claimants in Issue "B", they were furloughed on June 5 or 7, 1982 as the result of the regulation

of the extra list which was purportedly made in pursuance of the provisions of the aforementioned rule which stipulate the board may be adjusted when extra brakemen are found not to have been averaging the equivalent of five basic days for the prior work week.

There is no showing of record that adjustment of the yard extra list in this instance was handled in a manner any different from the normal regulation of the board, or that there was a causal connection between Claimants being cut from the extra board and the consolidation of the Norfolk Terminal.

On the basis of the record, it must be held that the change in Claimants' employment status was attributable to factors related to regulation of the extra list in pursuance of applicable agreement rules, and not as the direct result of the June 1, 1982 consolidation.

~~On the basis of the above findings and determinations, the Board must hold that Claimants in Issue "B" are not found to meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.~~

ISSUE "C"

As the Carrier points up in its ex parte submission to the Board, the underlying factor in this case is that subsequent to the consolidation on June 1, 1982, it annulled various assignments in concert with day to day fluctuations in the number of cars to be handled at the consolidated Norfolk Terminal. It submits the annulment of assignments is provided for under Section 7 of Article 3 of the applicable Schedule Rules Agreement, supra, and is related to unforeseen changes in operational needs of service, and that jobs at the Norfolk Terminal have been regularly annulled in direct proportion to the supply of coal available for loading.

Although we do not find it on claim forms as submitted, there is a suggestion of record that some of the Claimants believed they had been adversely affected because the employee from the consolidated roster who displaced them either as the result of a direct bump or a series of bumps was a former SR employee.

The Board has reviewed the circumstances in each of the claims listed and is satisfied, in the absence of probative evidence to the contrary, that the assignments were annulled on a daily basis as the result of normal fluctuations in business and not the direct result of the consolidation of the Norfolk Terminal. The fact that in some instances a former NW employee may have been displaced by a former SR employee on the basis of the manner in

which seniority was slotted on an equity basis may not be considered as dictating that the annulment or displacement was in some manner directly related to the consolidation.

As has been held by many past boards of arbitration, once employees have exercised seniority to other positions or assignments, and displacements have been completed, other employees who may be affected by subsequent rearrangements of forces or displacements are not entitled to protective benefits upon assertion that such circumstance had an indirect relationship to the transaction. In this respect, see Award 23-11 in application of Appendix C-1 Protective Conditions (Dr. Jacob Seidenberg, Referee) whereby it was stated:

"[Protection] provisions in the railroad industry have been in effect since 1936 when the Carriers and the major Labor Organizations negotiated the Washington Job Protection Agreement providing for protection for railroad employees effected by railroad coordinations. . . . Consequently, there is a respectable body of case 'law' or decisional authority to help in determining what is a 'displaced employee'. . . .

We find that the prevailing and almost unanimous weight of arbitral authority is that the mere loss or reduction in earnings per se does not render or place an employee in the status of a 'displaced employee.' Neither the Congress of the United States, nor the Secretary of Labor or the contracting parties to protective benefit agreements, intended to affirm absolute and complete financial protection to any railroad employee who might be in some way tangentially adversely effected by a merger, coordination, or as in the instant case, by a statutorily authorized discontinuance of railroad passenger service.

[It] was the loss of a regular job that was to be the basis for affording protection. . . .

[Because] the Claimant had less ready access to temporary passenger assignment after the transaction . . . does not make him an employee displaced from his regular position as a result of the transaction.

[A] reduction in earnings from work performed in an extra capacity other than his regular assignment does not establish the Claimant to be a displaced employee under Appendix C-1."

It must, therefore, be concluded from the facts of record that

~~The Claimants in Issue "C" do not meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.~~

ISSUE "D"

Basically, the issue in dispute is drawn from the statements of claim as initially filed by several of the Claimants, such as by the first of the named Claimants, Claimant Futrell, whereby he stated, as is here pertinent, the following:

"I was affected from June 21, 1982 through July 12, 1982 by the call office of the N&W calling Southern men at the bottom of the roster to report for work on the N&W Extra List.

Southern men listed below:

* * * * *

The Southern men above called to work the N&W Extra List was not really needed as you can see they worked about three weeks which affected my earnings.

The above Southern men were not part of the five per cent slotted in with the active N&W roster. They were at the bottom of the N&W Roster List, which affected my earnings."

Another Claimant, Claimant Revell, described the claim to be related to the following concerns:

"I am requesting this claim because of the Southern Railway men that marked up on the Extra Board on the date of June 21, 1982. In which I could have been working the eight on and eight off shift. But because of the Southern men that did mark up, after being called to mark up on the date of June 21, 1982, I George E. Revell feel that I have a claim of claiming for Adversely Affect Benefits under the Attachment "A" of the New York Dock II."

Claimant Johnson described the basis of the claim to be as follows:

"The Southern trainmen above were not included into the five percent merged with N&W trainmen's seniority roster in accordance with the NW-Sou merger agreement on June

1st 1982. The Southern trainmen I wrote about marked up on the N&W trainmen's extra list from June 21, 1982 thru June 25, 1982 and remained on the extra list until July 12, 1982. During this time work that was normally here and available for me was diverted to former Southern trainmen; (See Attachment 'B') that were not part of the five percent equity allocation as provided for [in] the Southern & N&W merger agreement of 6-1-82. The records reflect that from June 21, 82 thru July 12, 1982 (See Attachment 'A') I, Gary W. Johnson, was on the trainmen's extra list and was adversely affected and lost time and money due to these Southern men merging with N&W trainmen June 1, 1982."

Contrary to contentions of the Claimants that the additional employees were not needed or that it was not proper to have called the former Southern employees, the record as presented to the Board shows that Carrier's Chief Clerk had recorded the following statement with respect to the claims:

"Southern trainmen were recalled to service June 21, 1982, due to a temporary increase in export coal business. Norfolk and Western trainmen hired after the Southern trainmen were also recalled to service. Extra list was affected in the same manner as if 'new hires' had been added to list. Trainmen were recalled in accordance with UTU agreed-to equity slots."

The record also shows that the Carrier had denied the claims in view of, as it stated, the fact that the Claimants were assigned to the yard extra list prior to and after the consolidation and as such were not adversely affected by the NS consolidation.

The record further indicates the Carrier had advised the majority of the Claimants as follows in denying their individual claims:

"The fact that former Southern men were able to work at various times in June or July of 1982, when you were unable, does not entitle you to be recognized as having been adversely affected. Past boards have repeatedly ruled that fluctuations in the volume of traffic are outside the umbrella of protection afforded by any protective agreement. Besides which, when the parties agreed to integrate the seniority rosters of the two properties on an equity basis, they gave each individual the same relative standing on the roster they had prior to the consolidation. Therefore, the fact that Southern employees appear ahead of NW employees in sequential order or vice versa, is irrelevant, since everyone is in the same position they were prior to the consolidation."

In the Board's opinion, that Claimants may have suffered a loss of earnings subsequent to the consolidation as a result of the regulation of the extra list, or the use of former SR employees off the consolidated roster, may not be held to presume that they were adversely affected by the consolidation. In this respect, we think it clear that the same affect or impact on hours and wages might well have been experienced had employees called for increased work needs not been former SR employees but employees of the former NW, or, in other words, any employee off the consolidated roster.

In regard to the suggestion made by Claimants that the former SR employees who were called for service were not in fact on the consolidated seniority roster. The roster which is attached to the February 9, 1982 Implementing Agreement lists the names of the 14 former employees of SR who have been identified by Claimants. Further, data contained on the roster reflects the fact these former SR employees had attained seniority dates on the former SR which predated the Norfolk Terminal Implementing Agreement or the consolidation of rosters.

If some question remains, as certain of the Claimants appear to suggest, as to whether former SR employees were properly slotted on the consolidated seniority roster, or that certain former SR employees should not have been placed on the roster, then that is not a matter for this Board to here decide.

The Board would note, however, that it appears some individual Claimants may be confused with respect to the manner in which the seniority rosters of the former NW and SR were consolidated. The rosters were integrated on the basis of total man-hours worked during a specified 12-month period by employees in the separate yards of both the NW and SR. The consolidation of the rosters in this manner does not, in the Board's opinion, suggest that there was to be an allocation of assignments per se with respect to future work opportunities in the consolidated Norfolk Terminal. It would therefore seem to the Board that once an employee, regardless of past carrier affiliation, attained a position or rank on the consolidated roster, that such employee was entitled to exercise seniority in accordance with all rights and privileges embodied in the applicable (NW) Schedule of Work Rules Agreement. In other words, once the rosters were consolidated both the NW and the SR employees became as one, and there was no division of work applicable to the number of assignments or work that could thereafter be performed by employees of one or the other of the former railroads in the consolidated Norfolk Terminal.

In regard to the need for additional employees at the times in question, as the Carrier hereinabove set forth in its position,

neither the Claimants nor the Organization have shown that the need to recall additional employees did not exist and, further, at no time during the periods in question had the local chairman made a request to have the board be reduced. In this same connection, the record reveals that in one letter of claim, albeit from an individual not here listed as a claimant, but otherwise listed as a Claimant in Issue "A" (Claimant VanLandingham), but who likewise protested the use of the former SR employees as having affected his work opportunities, stated, among other things: "The increase in coal export was the reason these [former SR] men were called to work . . ."

Under the circumstances of record, the Board must conclude that the claimants in Issue "D" do not meet the criteria of either a "displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

ISSUE "E"

As set forth in the description of this issue, it concerns the fact that on various dates the Claimants, who were either assigned to regular positions or on the yard extra board on the date of the consolidation (June 1, 1982), were subsequently displaced and/or furloughed due to fluctuations in the volume of traffic at Norfolk Terminal and which had resulted in abolishment of regularly assigned positions or the regulation of the yard extra board.

There is no question from review of the record but that Claimants were displaced or furloughed subsequent to the date of consolidation (June 1, 1982) as the result of such things as a general decline in business, the coal miners vacation (which caused the abolishment of 14 assignments on July 2, 1982), and other fluctuations or declines in business as demonstrated by the Carrier in the presentation of various statistical data.

Since it is evident from the record as presented and developed that neither the Claimants nor the Organization have been able to show by clear and convincing probative evidence that the position of the Carrier with respect to Claimants having been affected by a decline in business is not without basis in fact, this Board has no alternative but to hold that the affects of such decline in business be viewed as a circumstance beyond the scope of protection contemplated by the New York Dock Conditions. This is a principal which has been adopted or endorsed by innumerable past decisions of boards of arbitration. It was recently set forth in an Award issued in a dispute between the United Transportation Union and the San Diego & Arizona Eastern Railway (Chairman and Neutral Member Gil Vernon), which likewise involved

application of the New York Dock Conditions. In this Award it was stated:

"The Carrier contended that several factors, including a decline in business adversely affected the Claimant. Before discussing how these and other factors affected the Claimant, a major argument by the Union must be addressed. They contend that a decline in business defense is not available or valid in arbitrations under the 'New York Dock' conditions. They point out that under other protective provisions such as the Washington Job Protection Agreement and the Amtrak C-1 conditions, the language specifically mentions fluctuations and changes in the volume of employment. They submit that in (sic) the absence of such language in the 'New York Dock' conditions is significant. Being aware of such provisions, if the framers of the language intended to make such a defense available, the organization suggests they would have included them in the instant conditions.

The Neutral does not find the absence of specific references to changes in the volume of employment sufficiently significant to conclude that a reduction in business defense is not available. This is so because the language of the conditions clearly sets forth that, to be considered protected, an employee must be adversely affected as a 'result' of a transaction. Thus, it is clearly implied that factors other than a transaction which may adversely affect an employee do not turn on the protective provisions. Only adverse effect as a 'result' of a transaction qualifies an employee for protective benefits and no benefits flow from adverse impact due to other causes. Certainly the Neutral cannot ignore that the use of the word 'result' requires a causal relationship between the transaction and the adverse impact. Therefore, on the other hand, the Neutral cannot ignore any evidence which suggests that the adverse situation was a result of other causes. One must draw the inference from the language that any causes of adverse impact other than a transaction must be weighed and considered by the Arbitrator.

The fact that the writers of the language failed to enumerate any specific examples of other possible causes, such as a decline in business or fluctuations in employment, does not overcome the implied requirement to show, to the exclusion of other reasons, a causal nexus between the transaction and the employee's adverse employment situation. Contrary to the Union's argument,

it seems that in view of the unqualified requirement for a causal nexus between a transaction and adverse impact, that if the writers wished to preclude certain defenses, they would have explicitly stated so. It is noted that other Arbitrators have held the reduction in business volume is a legitimate defense under New York Dock conditions. For instance see SBA No. 915 - New York Dock Railway v. Brotherhood of Railway, Airline and Steamship Clerks (Arbitrator Zumas)..."

For the reasons stated above, this Board has to conclude that the claimants in Issue "E" do not meet the criteria of either a "Displaced" or "Dismissed" employee as contemplated by the New York Dock Conditions.

AWARD:

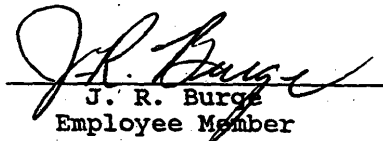
The Question at Issue is answered in the negative. The individuals as catalogued under the separate Issues "A" thru "E" as listed hereinbefore do not meet the criteria of either a "Displaced" or "Dismissed" employee as set forth in the New York Dock II Conditions.



Robert E. Peterson, Chairman
and Neutral Member



G. C. Edwards
Carrier Member



J. R. Burge
Employee Member

Roanoke, VA
August 29, 1986

August 15, 2003

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

Dear Mr. Grother:

I have been asked by Mr. Davidson to respond to your letter dated July 30, 2003.

As you have alleged that you have been the subject to discrimination in the past and have made these charges known to the EEO group they have responded to the EEO state office. The Texas EEO office will respond to your charges in the near future.

Your position change, which occurred in 1997, was reviewed by Mr. Jerry Davis and found to be appropriate. The fact that others were treated differently is because they had different skills and abilities that were considered in the operating position reorganization and assignments that occurred at that time.

The annual PDR process is a performance review procedure that is managed by your supervisor. I reviewed your 2001 and 2002 PDR results and procedures with Don Fryar and Charlie Bishop. I believe the appropriate steps were followed and your PDR properly reviewed with you at year end. You were provided a development plan for 2003 and will not receive any bonus for 2002 performance.

Your current promotional opportunities are dependent upon your individual skills and abilities and recent job performance as evaluated by interviews and recommendations. You should speak to hiring managers that have interviewed you about how you might improve your chances for achieving promotional opportunities. Hiring managers have the best information as to why individual candidates are selected or not.

Sincerely,

Butch Ethington
Ombudsman

CC: Dick Davidson - Chairman - via e-mail
Ike Evans - President - via e-mail
Dennis Duffy - Executive VP Operations - via e-mail
Yvonne Method-Walker - via e-mail
Jim Bell - via e-mail
Elaine Myers - via e-mail

UNION PACIFIC EXHIBIT 42
PAGE 1 OF 3

September 8, 2003

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

Dear Mr. Grother:

I received your letter of September 1, 2003. You cover the same ground that you raised in previous letters. You ask in your letter if I am willing to reconsider - - I am not willing to reconsider. The organizational events of 1997 are long past. You have had, and continue to have, ample opportunity to prove and improve your skills and abilities in daily, weekly, monthly and yearly performance. I believe you should focus on excelling at your current job responsibilities.

Sincerely,

Butch Ethington
Ombudsman and Director of Ethics

CC: Dick Davidson - Chairman - via e-mail
Ike Evans - President - via e-mail
Dennis Duffy - Exec. VP Operations - via e-mail
Ms. Yvonne Method- Walker - via e-mail
Mr. Jim Bell
Ms. Elaine Myers

UNION PACIFIC EXHIBIT 42
PAGE 2 OF 3

September 10, 2003

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

Dear Mr. Grother:

Mr. Stan McLaughlin, VP-Quality, asked me to respond to your letter to him dated August 30, 2003. In your letter you ask Mr. McLaughlin: "Can you assist in this Fair Treatment appeal?" Mr. McLaughlin has assigned the review of your letter to me. Your appeal is denied.

The organizational events of 1997 are long past. You have had, and continue to have, ample opportunity to prove, and improve, your skills and abilities in daily, weekly, monthly and yearly performance. I believe you should focus on excelling at your current job responsibilities.

Sincerely,

Butch Ethington
Ombudsman and Director of Ethics

CC: Stan McLaughlin - VP - Quality - via e-mail

UNION PACIFIC EXHIBIT 42
PAGE 3 OF 3

PRS027

MSG 502 - MORE INFORMATION AVAILABLE -HIT ENTER-
YTD TIME SUMMARY - 23

SOC SEC NO ==> 526663917

EMPLOYEE NAME ==> GROTH

J E

COMPANY CODE => 9X

YEAR ==> 97

CLASS OF TIME ==>

-----YTD TIME SUMMARY ATTRIBUTES-----

CLS OF TIME	ALPHA DESCRIPTION	UNION CODE	UNT IN	MILES/ OTHERS	YTD HOURS	EXTENDED PAY
001	STRAIGHT TIME	00	1		1960.00	41,968.04
314	TRANSP HOUSEHOLD GOODS NON TAX	00	3	1		14,859.14
315	TRAVEL OLD TO NEW NON TAX	00	3	1		267.36
318	QUALIFIED RESIDENCE	00	3	1		2,456.00
322	ONE MONTH SALARY	00	3	1		4,928.00
325	GROSS UP	00	3	1		3,473.50
334	MEALS OLD TO NEW LOCATION	00	3	2		701.33
335	MEALS PRE MOVE	00	3	1		2,135.83
336	MEALS TEMP LIVING	00	3	1		3,397.70
380	OLD-NEW AUTO MILEAGE NON TAX	00	3	1		98.58
381	OLD-NEW AUTO MILEAGE	00	3	1		240.99

() ENTER NEXT TOPIC OR 98 - MAIN MENU, 99 - PRIMARY MENU

UNION PACIFIC EXHIBIT 43

PAGE 1 OF 3

ate: 9/8/04 Time: 10:23:52 AM

PRS027

MSG 504 - INQUIRY COMPLETED
YTD TIME SUMMARY - 23

SOC SEC NO ==> 526663917 EMPLOYEE NAME ==> GROTHERR J E
COMPANY CODE => 9X YEAR ==> 97 CLASS OF TIME ==>

-----YTD TIME SUMMARY ATTRIBUTES-----

CLS OF TIME	ALPHA DESCRIPTION	UNION CODE	UNT IN	MILES/ OTHERS	YTD HOURS	EXTENDED PAY
382	DISCOUNT POINTS	00	3	1		3,588.00

() ENTER NEXT TOPIC OR 98 - MAIN MENU, 99 - PRIMARY MENU

UNION PACIFIC EXHIBIT 43
PAGE 2 OF 3

ate: 9/8/04 Time: 10:24:21 AM

PRS027

MSG 504 - INQUIRY COMPLETED
YTD TIME SUMMARY - 23

SOC SEC NO ==> 526663917 EMPLOYEE NAME ==> GROTHERR J E
COMPANY CODE => 9X YEAR ==> 97 CLASS OF TIME ==> 001

-----YTD TIME SUMMARY ATTRIBUTES-----

CLS OF TIME	ALPHA DESCRIPTION	UNION CODE	UNT IN	MILES/ OTHERS	YTD HOURS	EXTENDED PAY
001	STRAIGHT TIME	00	1		1960.00	41,968.04

2 months (June & May) @ 6200 12,400
4 months (July, Aug, Oct, Dec) @ 4928⁰¹ 19,712⁰⁴
2 months (Sept, Nov) @ 4928⁰⁰ 9,856⁰⁰
41,968⁰⁴

) ENTER NEXT TOPIC OR 98 - MAIN MENU, 99 - PRIMARY MENU

UP System

May	6,200
June	6,200
July	4,928 ⁰¹
Aug	4,928 ⁰¹
Sept	4,928
Oct	4,928 ⁰¹
Nov	4,928 ⁰⁰
Dec	4,928 ⁰¹
<u>41,968⁰⁴</u>	

SP System

Jan	6,200
Feb	6,200
Mar	6,200
Apr	6,200
<u>24,800</u>	
Total	41,968 ⁰⁴
	24,800
<u>66,768⁰⁴</u>	

UNION PACIFIC EXHIBIT 43
PAGE 3 OF 3