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Before the

SURFACE TRANSPORTATION BOARD

FEB 22 2005
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Finance Docket No. 32760 (Sub-No. 42)

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

(Arbitration review)

SUPPLEMENT TO PETITION FOR REVIEW

ENTERED
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Public Record

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Due Date: February 22, 2005

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(Arbitration review)

Preliminary statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix 10. Carrier's Hearing Exhibits. UH44 thru

UH50. (October 12, 2004).

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dix 1, 32).[21/]

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

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

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

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

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

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

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

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

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

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

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

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

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

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22/ Appendix 8, 8-20.

23/ Appendix 8, 21.

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

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

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

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

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

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

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

ARGUMENT

Introduction and Summary

Review of an arbitration decision[25/] involving employee protective conditions[26/] imposed by the Board under 49 U.S.C. 11326 is limited to recurring or otherwise significant issues of general importance regarding the interpretation of the conditions. The Board will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987)(Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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

Attorney for John E. Grother

February 22, 2005

Certificate of service

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

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

Gordon P. MacDougall

February 22, 2005 GORDON P. MacDOUGALL

APPENDIX 1

IN THE MATTER OF THE ARBITRATION

BETWEEN

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

AND

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

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

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

OPINION AND AWARD

Before: Arbitration Committee

Members:

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

I. INTRODUCTION

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

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

II. STATEMENT OF THE ISSUES

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

"A. Applicability of New York Dock Employee conditions.

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

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

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

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

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

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

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

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

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

III. RELEVANT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

NEW YORK DOCK CONDITIONS
Finance Docket No. 28250
APPENDIX III

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

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

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

* * *

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

* * *

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

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

* * *

ARTICLE IV

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

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

IV. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. THE POSITION OF THE PARTIES

A. The Grother Member

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] V.S.=Verified Statement.

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

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

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

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

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

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

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

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

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

B. The Carrier Member

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. DISCUSSION AND FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. AWARD

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

Lynette A Ross
Lynette A. Ross
Neutral Member

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

William E. Loomis 1/4/2005
Carrier Member

Dated: December 21, 2004

APPENDIX 2

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

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

July 18, 2003

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

Dear Mr. Grother:

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

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

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

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

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

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

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

Sincerely,

Marilyn J. Ahart

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

APPENDIX 3

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

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



EMPLOYEE'S SUBMISSION

(Corrected Copy--9/17/04)

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

Attorney for John E. Grother

September 14, 2004

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

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

EMPLOYEE'S SUBMISSION

ISSUES IN DISPUTE:

A. Applicability of New York Dock Employee conditions.

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

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

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

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

Organization of this Submission

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

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

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

I. PROCEDURAL STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

6. The STB on April 21, 2004, ruled that the arbitration procedures should be determined by the arbitrator; and because the arbitrator controls the arbitration, she should be the person who determines where and how the proceedings should be conducted. The STB stated that absent agreement between Employee and UP, resolution should be sought by the neutral arbitrator. Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review). (Ex. E-11).

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

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

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

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

II. EMPLOYEE'S POSITION ON PROCEDURES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clearly, Employee has gone far beyond demonstrating a prima

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. EMPLOYEE IS NOT GUILTY OF LACHES.

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

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

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

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

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

VI. CONCLUSION

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

Respectfully submitted,

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

Attorney for John E. Grother

September 14, 2004

VERIFIED STATEMENT
OF JOHN E. GROTHER

(Causality)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

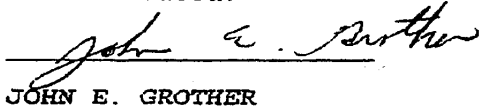
4. I have been advised by UP that I was displaced at Tucson based upon "performance standards." (Ex. E-4). However, no oral counseling or coaching was received before I was advised on June 26, 1997 to quit or accept a wage reduction and transfer to Houston. I did not receive a written interim Performance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

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

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

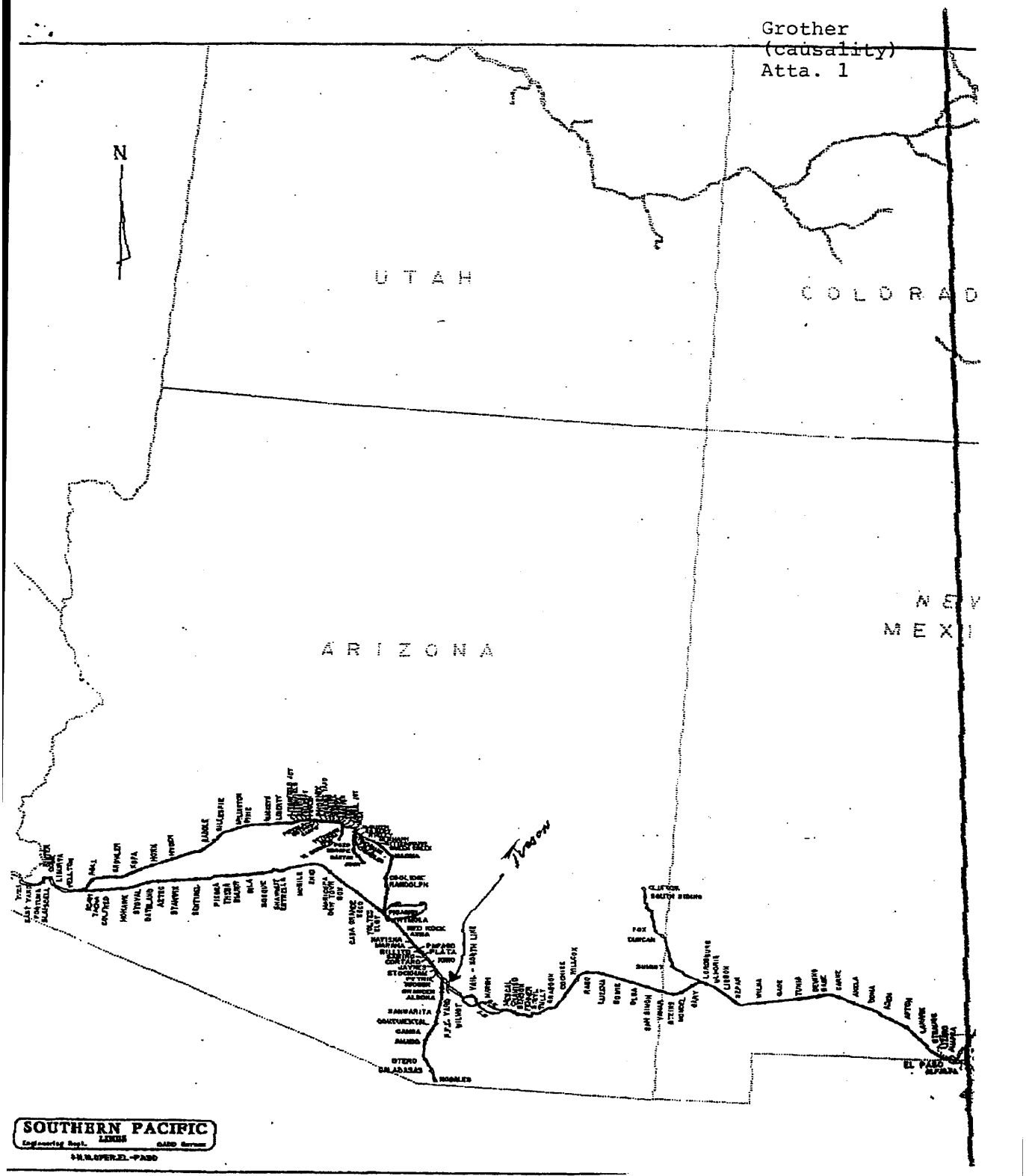
Under the penalties of perjury, I hereby affirm the foregoing verified statement is true and correct as stated.



JOHN E. GROTHER

Dated at
Houston, TX
September 14, 2004

Grother
(causality)
Atta. 1



Grother
(causality)
Atta. 2

EXHIBIT

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

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

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

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

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

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

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

C. CONCLUSION:

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

Grother
(causality)
Atta. 3

C. E. ETHINGTON

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

November 10, 2003

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

Dear Mr. Grother:

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

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

Sincerely,

Butch Ethington

Butch Ethington
Ombudsman and Director of Ethics

UNION PACIFIC RAILROAD COMPANY

JERRY DAVIS
PRESIDENT AND
CHIEF OPERATING OFFICER

1416 DODGE STREET
ROOM 1230
OMAHA, NEBRASKA 68179-1230

Grother
(causality)
Atta. 4

September 4, 1997

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

Dear John:

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

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

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

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

Sincerely,

Jerry Davis

Grother
(causality)
Annex 1

VERIFIED STATEMENT
OF LELAND R. HOLSINGER

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

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

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

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

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

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

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

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

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

VERIFICATION

STATE OF ARIZONA)
COUNTY OF PIMA)

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

Leland R. Holsinger

Dated at
Tucson, AZ
September 8, 2004

Grother
(causality)
Amnex 2

VERIFIED STATEMENT
OF KEN KROEGER, JR.

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

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

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

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

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

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

Attachments 1-2

VERIFICATION

STATE OF ARIZONA)
COUNTY OF PIMA)

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

Ken Kroeger, Jr.

09-09-04

Dated at
Tucson, AZ
September 12, 2004

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

Mr. Davis:

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

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

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

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

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

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

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

LE 28 Newsletter

UPDATE 28

The Newsletter of
B L E Division 28

Oct.-Dec. 1997

TCS/CMS Cutover Creates Chaos in Tucson

By Ken Kroeger

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

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

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

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

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

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

AGREEMENT VOTE RESULTS

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

President's Corner

Taking Advantage

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

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

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

VERIFIED STATEMENT
OF JOHN E. GROTHER

(Job Classification)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

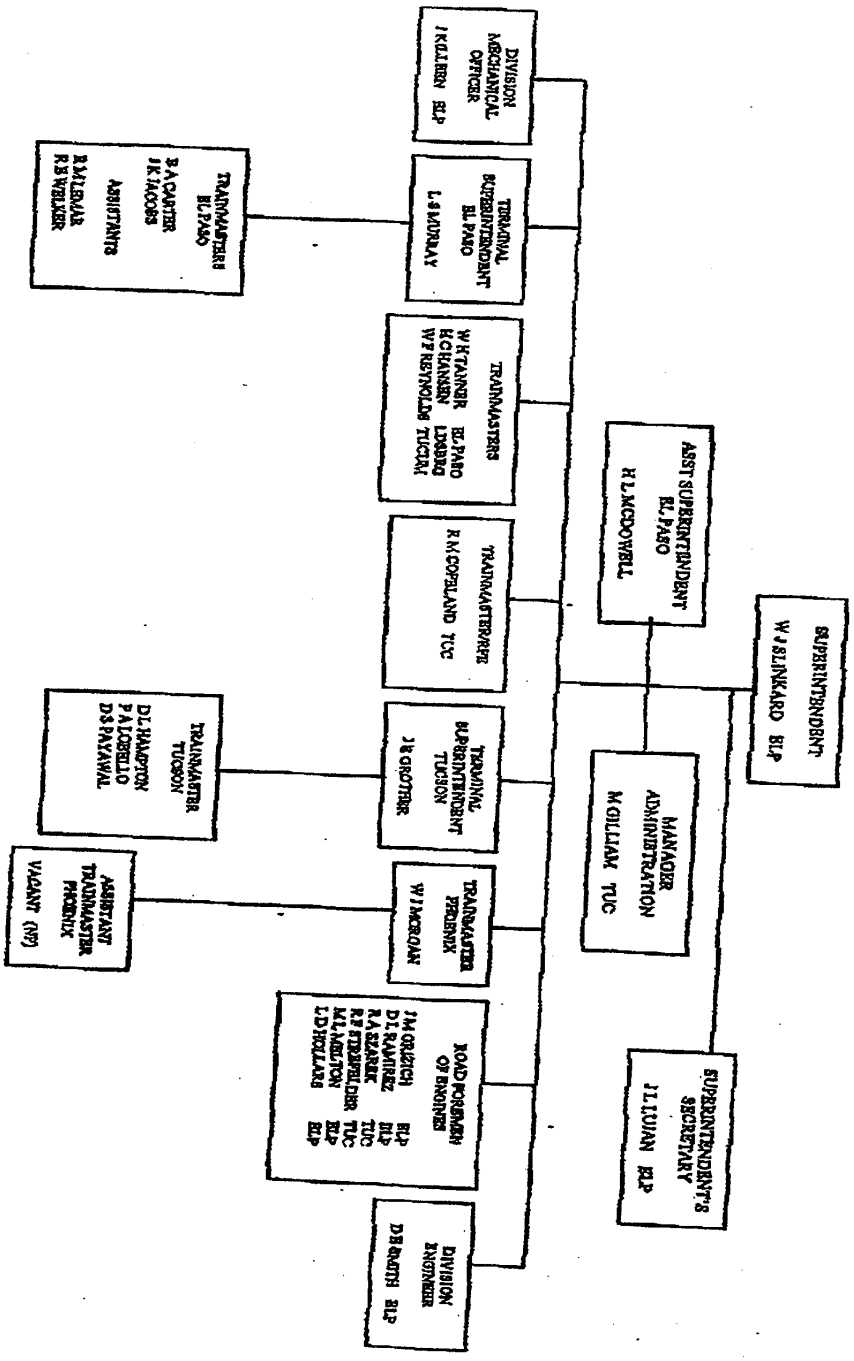
Under the penalties of perjury, I affirm the foregoing verified statement is true and correct as stated.

JOHN E. GROTHER

Dated at
Kingwood, TX
September 14, 2004

Grother
(Job classification)
Atta. 1

EL PASO DIVISION



Grother
(Job classification)
Atta. 2

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

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

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

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

TOTAL NUMBER ACTUAL WORK WEEKS 47

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

Grother
(Job Classification)
Atta. 3
Att.

AGREEMENT BETWEEN THE UNION PACIFIC RAILROAD COMPANY

And its Employees Represented By

UNION PACIFIC UNION YARDMASTERS COUNCIL

* * * * * * * *

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

IT IS HEREBY AGREED:

ARTICLE I - WAGES

Section 1 - First General Wage Increase

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

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

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

Section 2 - Second General Wage Increase

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

Section 3 - Third General Wage Increase

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

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

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

Section 4 - Signing Bonus

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

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

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

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

Section 5 - Adjustment of UTU(Y) Rates

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

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

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

ARTICLE II - PRESERVED RATES

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

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

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

ARTICLE IV -COLLECTIVE BARGAINING AGREEMENT AND SENIORITY ZONES

Section 1 - WRSA Agreement

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

Section 2 - UTU(Y) Agreement

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

Section 3 - Seniority Zones

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

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

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

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

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

Section 4 - Seniority Dates

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

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

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

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

Section 5 - Maintenance of Membership

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

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

ARTICLE V - REVERSE ATTRITION ARRANGEMENTS

Section 1 - Elimination of Attrition Agreements

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

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

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

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

and SAU&G.

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

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

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

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

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

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

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

Section 2 - Conversion Option

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

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

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

Section 3 - Temporary Vacancies

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

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

ARTICLE VI - HEALTH AND WELFARE

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

ARTICLE VII - GENERAL PROVISIONS

Section 1 - Effect of this Agreement

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

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

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

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

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

Section 2 - Future Negotiations

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

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

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

FOR THE CARRIER:

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

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

FOR THE UNION PACIFIC UNION YARDMASTERS COUNCIL:

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

/s/ Mike D. Thompson
General Chairman, UPUYC

/s/ David J. Just
General Chairman, UPUYC

APPROVED:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 2 - Payment of Cost-of-Living Allowances

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

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

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

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

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

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

Section 3 - Application of Cost-of Living Allowances

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

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

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

Section 4 - Continuation of Part C

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

ARTICLE III - DENTAL BENEFITS

Section 1 - Continuation of Plan

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

Q and A's

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

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

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

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

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

   A. No.

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

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

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

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

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

   A. No (see Side Letter #4).

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

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

Q and A's

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

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

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

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

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

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

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

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

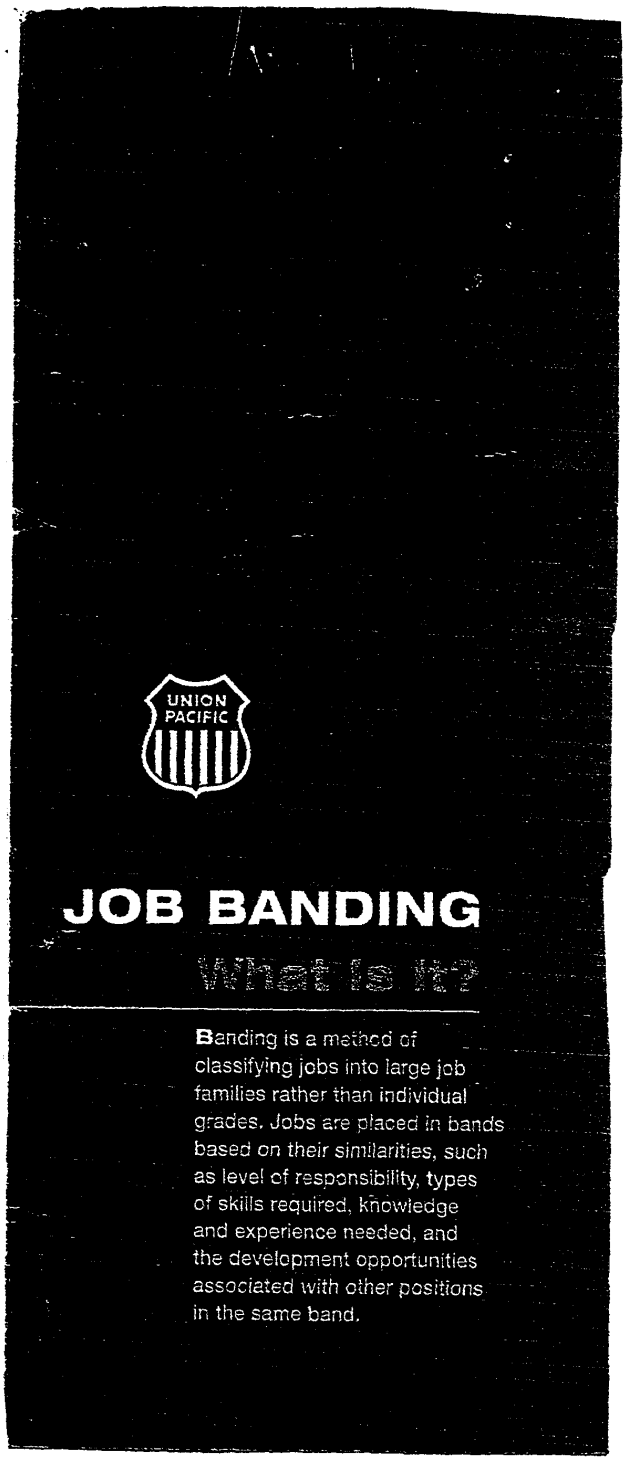
12. Q. If I don't send in my election form, what will my status be on January 1, 2000?

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

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

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

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(Job Classification
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(1)

JOB BANDING: What is it?

Overview/Strengths of Banding

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

What Stays the Same?

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

What's Different?

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

Question & Answer Section

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

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

(2)

Comparative Analysis

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

Program Basics

Salary Bands and Ranges

Salary Structure (four bands):

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

Each band includes a broad grouping of jobs

Promotional Move

Employees move from one band to a higher band

Developmental Transfer

Employees move to a different position in the same band

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

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

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

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

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

Question & Answer Section (continued)

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

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

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

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

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

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

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

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

11. What other companies are using Job Banding?

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

12. What changes will banding itself initiate?

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

A B C D

SERVICE UNIT STRUCTURE

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

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

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

Grother
(Job Classification)
Atta. 5

VERIFIED STATEMENT
OF JOHN E. GROTHER

(Laches)

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

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

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

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

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

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

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

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

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

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

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

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

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

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

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

JOHN E. GROTHER

Dated at
Kingwood, TX
September 14, 2004

APPENDIX 4

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

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

EMPLOYEE'S SUBMISSION

PART II- EXHIBITS

Exhibit 2 Only

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

Attorney for John E. Grother

September 14, 2004

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

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

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

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

GROTHER'S EXCELLENT PERFORMANCE BACKGROUND :

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

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

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

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

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

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

IS IT LOGICAL THAT A MANAGER OF SUCH DEPTH AND LONGEVITY WOULD DESERVE A 21% DEMOTION, AFTER A 1.5

MONTH MERGER RELATED YARD EXPERIMENT FAILED, WHICH WAS ORDERED IN MAY 1997 BY UPRR VP SHOENER?

GROTHER WAS HIGHLY REGARDED AS A PERSON WHO COULD GET THE JOB DONE THROUGH THE CREATION OF PROCESS MANAGEMENT BASED ON HIS AIR FORCE FAIL-SAFE TRAINING, FORMAL EDUCATION (INCLUDING AN MBA,) AND IN-DEPTH PROCESS TRAINING AT SPTCO. IN FACT, GROTHER WAS SELECTED BY SPTCO VPO BILL LACY TO BE THEIR SOLE "COORDINATOR, PRODUCTIVITY IMPROVEMENT PROGRAM", INCLUDING MULTIPLE TERMINAL AND BLOCKING STRATEGY STUDIES, WITH IMPLEMENTATION TIMELINES AND DETAILED PROCESSES, WHICH WERE FOLLOWED BY THE SERVICE UNITS.

REGARDING TUCSON, GROTHER WAS SELECTED TO BE SPTCO TERMINAL SUPERINTENDENT (SENIOR MANAGER TERMINAL OPERATIONS OR SRMTO IN UPRR TERMINOLOGY) OF THE TUCSON DISTRICT FROM NOGALES-THRU TUCSON TO PIACACHO – INCLUDING ALL YARDS EFFECTIVE SEPTEMBER 16, 1995 AT A MONTHLY SALARY OF $6,200. BASED ON GROTHER'S STRONG PERSONAL RECORD AND EXCELLENT PERFORMANCE, GROTHER WAS SELECTED AS UPRR'S CHOICE TO BE SRMTO APRIL 16, 1997. GROTHER'S SELECTION WAS SO STRONG THAT UPRR DID NOT REQUIRE THE PERSONNEL REVIEW SELECTION PROCESS CONDUCTED BY UPRR TO DETERMINE WHO WOULD KEEP THEIR EX-SPTCO POSITIONS WHICH WERE CONDUCTED IN JANUARY 1997 (EXH. 9). THEREFORE, ONLY TWO MONTHS BEFORE GROTHER'S SEVERE DEMOTION, GROTHER WAS SELECTED BY UPRR TO BE ITS SENIOR OFFICER FOR THE TUCSON DISTRICT, INCLUDING TUCSON AND NOGALES YARDS.

CORROBORATION OF NEXUS BETWEEN VPO SHOENER'S DECISION TO CONSOLIDATE SWITCHING AND DEMOTION :

NOTWITHSTANDING THAT THE UP-SPTCO MERGER WAS EFFECTIVE SEPTEMBER 11, 1996, THE IMPLEMENTATION WAS ROLLED OUT IN TERMINAL CONTROL SYSTEM (TCS) REGIONS. TUCSON WAS IN THE LAST REGION TO BE CUTOVER TO TCS

(EXH. 8). THE FIRST TCS CUTOVER WAS NOT COMPLETED UNTIL MAY 2, 1997 (1.5 MONTHS BEFORE DECISION MADE TO DEMOTE GROTHER) REGARDING THE FORMER D&RGW PORTION OF THE SPTCO. CLEARLY, THE MERGER IMPLEMENTATION WAS SLOW AND PAINFUL! AS PART OF THE INITIAL MERGER IMPLEMENTATION ROLL-OUT, UPRR VPO ARTHUR SHOENER PERFORMED HIS AN INITIAL IN-DEPTH REVIEW OF UPRR *ARIZONA OPERATIONS IN EARLY 1997 TO DETERMINE WHAT* WAS "DESIRABLE TO REALIZE MERGER BENEFITS". VPO *SHOENER REACHED THE MERGER TRANSACTION RELATED* DECISION TO CLOSE THE PHOENIX FLAT SWITCHING OPERATION AND MOVE "ALL FLAT SWITCHING" TO TUCSON, DESPITE THE 1% GRADE AND LACK OF OTHER RESOURCES, INCLUDING TRACK CAPACITY FOR THAT VOLUME AND TWO ON-GOING MAINTENANCE OF WAY (M OF W) CURFEW'S STOPPING TUCSON OPERATIONS, IN EACH DIRECTION FROM *0700-1900 MONDAY THOROUGH FRIDAY. GROTHER'S ATTORNEY* CONFIDENTIAL JOURNAL INDICATES THAT BOTH M OF W CURFEWS STARTED TUESDAY, MAY 6, 1997, AFTER GETTING THE M OF W EQUIPMENT ORGANIZED ON MONDAY, MAY 5, 1997.

ONE **CORROBORATION OF THE NEXUS TO THE UP-SP MERGER TRANSACTION** IS SHOENER'S DIRECT ORDER (BASED ON HIS MERGER TRANSACTION TRIP TO REVIEW EX-SPTCO *TERRITORY) TO SEVERAL UPRR MANAGERS; INCLUDING, BUT* NOT LIMITED TO DTO H. LAWSON MCDOWELL AND SERVICE *UNIT SUPERINTENDENT KEN C. PACKARD) THAT ALL PHOENIX* FLAT SWITCHING WOULD BE CONSOLIDATED AT TUCSON.

THE OMAHA WORLD-HERALD STATED AUGUST 19, 2000 THAT:

"U.P. CORPORATION WILL ELIMINATE ANOTHER 1,600 JOBS IN THE NEXT 16 MONTHS AS IT **MOPS UP THE LAST DETAILS OF *ITS 1996 MERGER WITH THE S.P.*" "DURING THE FIVE YEAR MERGER TRANSITION PERIOD, WHICH CONTINUES FOR ANOTHER YEAR, U.P. HAS *CONSOLIDATED OR DISPERSED OF REDUNDANT TRAIN FACILITIES AND ABANDONED RAILINES*".**

THE ABOVE ARTICLE WAS WRITTEN IN AUGUST 2000 OVER THREE (3) YEARS SINCE THE MERGER TRANSACTION YARD ***CONSOLIDATION EXPERIMENT WAS ORDERED BY UPRR VP SHOENER DISPERSING ALL PHOENIX FLAT SWITCHING TO TUCSON FROM PHOENIX.*** SINCE UPRR WAS STILL MOPPING UP THE DETAILS OF THE MERGER EXPERIMENTS IN 2000, THE **NEXUS IS CLEAR,** THAT A MAY 1997 YARD CONSOLIDATION SWITCHING EXPERIMENT THAT WAS ORDERED AS PART OF THE MERGER IMPLEMENTATION "SAVINGS PROCESS", ACROSS THE NEWLY MERGED UPRR SYSTEM, COULD NOT BE DEFINED AS ANYTHING OTHER THAN A MERGER TRANSACTION NEXUS.

PROGRESSIVE RAILROADING ARTICLE JANUARY 2003 UNDERSCORES THE CORROBORATION OR **NEXUS** AS IT PORTRAYS THE LENGTH OF DELAY RELATED TO THE UPRR ROLL-OUT STRATEGY:

"ALTHOUGH IT TOOK UNION PACIFIC **SEVERAL YEARS** TO GET ITS POST-MERGER ACT TOGETHER-BY IMPROVING SERVICE,... CUTTING COSTS-MANAGEMENT IS COUNTING ON THE REVAMPED FRANCHISE **(THE DIRECT RESULT OF MERGER TRANSACTION EXPERIMENTS INCLUDING YARD CONSOLIDATION EXPERIMENTS)**...TO ACT AS TOP-LINE SPRINGBOARDS" (PARENTHESIS INSERT ADDED) (SEE EXH. 50).

AS IN MOST MERGERS, UPRR MANAGERS WERE NOT INTERESTED IN THE OPINIONS OF EX-SPTCO MANAGERS. GROTHER DID PROVIDE A DOCUMENTED LIST OF THE RESOURCES AND BLOCKING THAT WOULD BE REQUIRED **BEFORE ATTEMPTING TO CONSOLIDATE.** THAT LIST WAS IGNORED BY THE 1997 UPRR CORPORATE CULTURE, WHICH REQUIRED THE MERGER TRANSACTION EXPERIMENT TAKE PLACE PROMPTLY AS ORDERED BY THE HASTY VPO DECISION.

ACCORDING TO WITNESSES AND DOCUMENTATION, GROTHER EXPRESSED CONCERN REGARDING THE FACT TUCSON WAS SURROUNDED ON BOTH SIDES BY MAINTENANCE-OF-WAY (M OF W) CURFEWS WHICH PROHIBITED THE OPERATION OF

TRAINS, IN ANY DIRECTION, BETWEEN THE HOURS OF 0700-1900 M-F. IN FOOTBALL PARLANCE, THE TRAMPLED PLAYING FIELD WAS CUT IN HALF (BY THE LACK OF OPERATIONAL TIME ACCOUNT CURFEW AND THE OTHER TEAMS SIZE WAS DOUBLED (BY CONSOLIDATING PHOENIX FLAT CAR SWITCHING INTO TUCSON), WHICH WAS A SURE RECIPE FOR DISASTER, WHICH WAS NOT GROTHER'S DECISION OR CONTROL!

UNDER PRESENT UPRR OPERATIONS, UPRR TAKES GREAT CARE WITH M OF W CURFEWS AND EVEN DETOURS TRAINS AND OTHER ACTIVITIES TO ENSURE THAT THE TERMINAL WILL SURVIVE. GROTHER OVERHEARD MANY CONFERENCE CALL STATEMENTS BY REGIONAL VP STEVE BARKLEY REGARDING THE CURFEWS ON EITHER SIDE OF SAN ANTONIO TO DENNIS THOLEN AND OTHERS CONCLUDING JULY 21, 2000 THAT "WE CAN NOT LET HIM (GARY DAVIDSON) FAIL FROM THESE CURFEWS". TRAINS WERE DETOURED AND OTHER SEVERE MEASURES WERE TAKEN TO SAVE GARY DAVIDSON (A PRIOR TO THE UP-SPTCO MERGER MANAGER OF UPRR). ANYONE WHO WAS IN ATTENDANCE ON BARKLEY'S JULY 2000 CONFERENCES COULD CORROBORATE THE FACT THAT M OF W CURFEW'S WILL ADVERSELY AFFECT A TERMINAL'S PERFORMANCE AND THAT IS NOT THE TIME FOR MERGER RELATED YARD CONSOLIDATION EXPERIMENTATION. UNFORTUNATELY, THAT WAS JUST THE CASE IN 1997, AS ALL WERE "PILING ON THE BELEAGUERED EX-SPTCO MANAGEMENT AT TUCSON", TO EXTEND THE METAPHOR OF THE "TRAMPLED PLAYING FIELD".

THE MERGER TRANSACTION EXPERIMENT WAS STARTED EFFECTIVE MAY 14, 1997 WHICH WAS ABOUT TWENTY (20) MONTHS AFTER GROTHER HAD PERFORMED EXCELLENTLY AS THE INCUMBENT ON GROTHER'S TUCSON TERRITORY ASSIGNMENT. SENIOR UPRR MANAGEMENT QUICKLY REALIZED THAT THE TWO (2) M OF W CURFEWS, LACK OF CAPACITY, LACK OF PERSONNEL, 1% GRADE ISSUE, TRACK CONDITIONS, AND OTHER TUCSON RESOURCE DEFICIENCIES HAD CREATED A FAILURE, JUST AS GROTHER PREDICTED. IN DESPERATION, CAPACITY STUDY, PROCESS AND "BULLYING SWITCHING

EXPERTS" WERE FLOWN IN TO SHOW THE EX-SPTCO MANAGERS "HOW TO RAILROAD". THEY WERE QUICKLY BROUGHT TO REALITY AND HAD TO PUBLICLY ADMIT THAT IT COULD NOT BE DONE. DURING THE WEEK OF JUNE 16, 1997, CONFIDENTIAL MEETINGS WERE HELD TO DETERMINE WHO WOULD BE THE SCAPEGOAT AND A LITTLE OVER ONE-MONTH INTO THE MERGER TRANSACTION EXPERIMENT, THE GROTHER DEMOTION AND 21% PAY CUT DECISION WAS MADE BEHIND DOORS, IN TUCSON, BY SENIOR UPRR MANAGEMENT.

THE DECISION TO DEMOTE GROTHER WAS MADE WITH COMPLETE DISREGARD FOR THE FACTS. SHOENER WAS THE GENESIS OF THIS MERGER TRANSACTION DECISION, AS TESTIFIED TO BY MANY WITNESSES. THEREFORE, WHY PUNISH THE LOCAL MANAGER, WHO JUST HAPPENED TO BE THERE?

AS INDICATED BY THE WEB SITE OF THE BLE UNION, EXH. 8, THE CONTINUING UPRR ROLLOUT PROBLEMS AT TUCSON CONTINUED FOR SEVERAL MONTHS AFTER THE DEMOTION OF GROTHER, WHICH DOES NOT MATCH STATEMENTS MADE IN PRESIDENT JERRY DAVIS'S RESPONSE TO GROTHER'S APPEAL (EXH. 10), CONCERNING GROTHER'S SEVERE DEMOTION.

PRESIDENT DAVIS STATED ON SEPTEMBER 4, 1997 IN PART:

"IN **JUNE** THE SERVICE LEVELS TO OUR CUSTOMERS, BOTH EXTERNAL AND INTERNAL, DETERIORATED TO THE POINT IMMEDIATE ACTION HAD TO BE TAKEN. WE BELIEVE THAT A CHANGE IN MANAGEMENT WAS NECESSARY FOR IMPROVEMENT TO OCCUR." (EXH.11).

IN FACT, THE DIFFICULTIES AT TUCSON WERE STILL OCCURRING IN SEPTEMBER, 1997, WHEN UPRR PRESIDENT DAVIS FINALLY RESPONDED TO GROTHER (EXH. 8). THE ONLY THINGS, WHICH KEPT, TUCSON TERMINAL BARELY FLUID IN SEPTEMBER 1997 WERE THAT:

1) THE M OF W CURFEWS ON BOTH SIDES HAD ENDED, AND

2) THE "JUNE SERVICE LEVEL PROBLEM" AT TUCSON WAS THE MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT HAD BEEN SUDDENLY ENDED JUNE 26, 1997, JUST AFTER GROTHER WAS ORDERED TO TAKE A 21% PAY CUT TO HOUSTON INTERMODAL, OR HIT THE STREET!

UPRR PRESIDENT DAVIS DID NOT STATE THAT MY DEMOTION WAS FOR "PERSONAL PERFORMANCE ISSUES OR ANY TYPE OF DISCIPLINARY REASON". DAVIS STATED IT WAS SIMPLY RELATED TO THE "JUNE SERVICE FAILURE", WHICH WAS THE DIRECT RESULT OF NEARLY DOUBLING THE VOLUME, WITH NO INCREASE IN RESOURCES AND A 12 HOUR PER DAY M OF W CURFEW ON BOTH SIDES OF TUCSON. (DOCUMENTATION OF ABOVE AVAILABLE TO PRESENT)

PRESIDENT DAVIS HAD SO LITTLE REGARD FOR THE DISPLACED DEMOTION OF GROTHER THAT DAVIS:

- TOOK ALMOST TWO MONTHS TO RESPOND,

- DID NOT USE THE QUALITY PROCESS TO DETERMINE THE ROOT CAUSE OF THE JUNE 1997 SERVICE FAILURE,

- DID NOT EVEN BOTHER TO ADDRESS GROTHER'S SPECIFIC INQUIRY ABOUT GROTHER'S FINANCIAL REQUEST TO AVOID FINANCIAL AND EMOTIONAL DENIGRATION FOR LIFE, AND

- DID NOT HAVE ANYONE INVESTIGATE GROTHER'S STATEMENT REGARDING "HOW...**THE ISSUES OF DISCRIMINATION RELATE TO MY SUDDEN DOWNGRADE"**

PRESIDENT DAVIS'S LETTER IS STRONG ***CORROBORATION*** THAT THE **NEXUS** OF GROTHER'S DEMOTION WAS THE JUNE SERVICE FAILURE, WHICH HAS A DIRECT NEXUS TO THE LATE MAY MERGER RELATED DECISION BY VPO SHOENER TO CONSOLIDATE TERMINALS WITHOUT DOING A CAPACITY

STUDY IN ADVANCE OR GOING THROUGH A PROPER SIMULATION STUDY OF ISSUES PRIOR TO THE ATTEMPTED YARD CONSOLIDATION IMPLEMENTATION, INCLUDING THE POSTPONEMENT OF THE TWO (2) STRANGLING M OF W CURFEWS.

FURTHERMORE, THE RECORDS DO NOT INDICATE THAT THERE HAD EVER BEEN AN ATTEMPT TO CONSOLIDATE **ALL** FLAT SWITCHING FROM PHOENIX TO TUCSON BEFORE THE 1997 UP-SP MERGER TRANSACTION NEXUS; NOR, HAS THERE BEEN ONE SINCE OF ANYTHING NEAR THE SAME VOLUME MAGNITUDE. THE LATE MAY, 1997 SWITCHING CONSOLIDATION EXPERIMENT HAD A DIRECT NEXUS OR TIMING WITH THE MERGER ROLLOUT RELATED TO THE UPRR SYSTEM IMPLEMENTATION, WHEN MANAGERS INEXPERIENCED WITH THE TERRITORY SOUGHT A QUICK "MERGER RETURN", AND WOULD NOT LISTEN.

GROTHER HAD ACCESS TO THE 1997 UPRR CAPACITY STUDY WHICH DOCUMENTED, THAT CONSOLIDATION OF THAT VOLUME COULD NOT BE DONE; ESPECIALLY, WITH PHOENIX ALSO SENDING ALL MILL-RUN WESTBOUND TRAFFIC TO TUCSON AND WEST COLTON WAS ALSO BLOCKING THE LAPXM'S SO POORLY THAT THEY HAD TO BE OPERATED INTO TUCSON BECAUSE THEY HAD TO BE PROPERLY RE-BLOCKED (EXH. 12 IS CORROBORATION).

THIS MERGER RELATED YARD CONSOLIDATION EXPERIMENT WAS AN IMPOSSIBLE TASK. MANY PRIOR-TO-MERGER UPRR MANAGERS WERE ALSO IN AGREEMENT, BEFORE THE MERGER CONSOLIDATION EXPERIMENT, THAT FAILURE WAS THE ONLY POSSIBLE OUTCOME, AS SWITCHING CAPACITY WAS LACKING.

CONDITIONS IN 1997 WHICH CORROBORATE THE MERGER TRANSACTION NEXUS FOR GROTHER DEMOTION :

AS ***CORROBORATION*** OF THE 1997 UPRR CORPORATE CULTURE, WHICH SEVERELY DEMOTED GROTHER, THE WALL STREET JOURNAL ON AUGUST 25, 1999 INDICATED, IN PART (EXH 13):

1. "WHEN SOMETHING HAPPENED, " **YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY**" (ABOVE PROVES NEXUS TO GROTHER'S DEMOTION. AFTER THE UPRR MERGER WAS APPROVED, ROLLOUT FIELD VISITS WERE TAKEN AND THE MERGER TRANSACTION EXPERIMENT OF CONSOLIDATING THE PHOENIX AND TUCSON FLAT SWITCHING TERMINALS WAS ORDERED THEREAFTER BY VPO SHOENER).

2. "THEIR CULTURE WAS DYSFUNCTIONAL AND CHARACTERIZED BY NONCOMMUNICATION"

3. "TROUBLED ... 1997-98 ..." "FREIGHT SERVICE HAD COLLAPSED, STRANDING MIDWESTERN CROPS, SNARLING WEST COAST PORTS AND DELAYING SHIPMENTS OF GOODS FROM CHEMICALS TO PAPER"
(THE WHOLE UPRR SYSTEM WAS FOULED).

4. "BUT MANY PEOPLE BLAME UNION PACIFIC MANAGEMENT. THEY SAY UNION PACIFIC **TRIED TO CUT COSTS DURING THE INTEGRATION, NOT HIRING PEOPLE AND CRAMMING CARS INTO FEWER YARDS"**
(ABOVE IS EXACTLY WHAT HAPPENED AT TUCSON DURING THE MERGER TRANSACTION YARD ***CONSOLIDATION EXPERIMENT OF MOVING PHOENIX SWITCHING INTO TUCSON, WITHOUT BENEFIT OF CAPACITY, PROCESS, PROPER RESOURCE STUDY!***

5. "MEANWHILE, MR. DAVIDSON REINFORCES HIS PUSH FOR GREATER FLEXIBILITY BY SHOWING **HE IS WILLING TO TRY ANYTHING".**
(ABOVE IS GREAT; BUT, WHY RUIN THE GROTHER'S LIVES?)

WHEN A MERGER RELATED TRANSACTION SWITCHING EXPERIMENT WAS ATTEMPTED WITHOUT BENEFIT OF: AN ADVANCE CAPACITY STUDY, INSUFFICIENT SIMULATION OF VOLUME IMPACT, NO PROPER IN-DEPTH DISCUSSIONS WITH LOCAL MANAGEMENT, NO POSTPONEMENT OF M OF W CURFEWS ON BOTH SIDES OF TUCSON YARD, LACK OF RESPECT

FOR THE DIFFICULTIES OF FLAT SWITCHING ON TUCSON'S ONE PERCENT (1%) GRADE AND NO ATTEMPT TO PROVIDE THE RESOURCES REQUESTED TO MAKE THE GOAL WORK; ANY YARD CONSOLIDATION EXPERIMENT WOULD FAIL.

IN MUCH THE SAME WAY AS ENRON'S VICE PRESIDENT OF CORPORATE DEVELOPMENT, MS. SHERRON WATKINS, BELIEVED SHE HAD A DUTY TO ADVISE SENIOR MANAGEMENT OF AN IMPENDING FAILURE, GROTHER ADVISED THAT THIS MERGER TRANSACTION EXPERIMENT WAS DOOMED. NOT ONLY WERE HIS WARNINGS IGNORED; BUT, WHEN THE EXPERIMENT FAILED, GROTHER WAS VICARIOUSLY DISPLACED AND ADVISED TO ACCEPT A 21% IN SALARY AT HOUSTON TEXAS, IN A DIFFERENT DEPARTMENT, OR "HIT THE STREET"!

AFTER 28 YEARS OF DEDICATED SERVICE, MAINLY AS AN OPERATING DEPARTMENT MANAGER WORKING 12+ HOUR DAYS/NIGHTS/WEEKENDS/HOLIDAYS/DERAILMENTS/INJURIES/ HAZARDOUS MATERIAL RELEASES/INCIDENTS AND SO FORTH, GROTHER FEELS 'THE 33,000 MILES OF BUILDING AMERICA"tm.

NONETHELESS, GROTHER AS AN EX-SPTCO MANAGER, WAS "OUTSIDE THE UPRR OLD BOY NETWORK" OF LONG-TERM ALLEGIANCES. IN ADDITION, BASED ON THE 1997 UPPR CORPORATE CULTURE AND THE MERGER TRANSACTION SWITCHING CONSOLIDATION FAILURE, SENIOR UPRR MANAGERS UNDERTOOK AN AGGRESSIVE PROGRAM OF REMOVING, DEMOTING, DENIGRATING (UNTIL RESIGNED) EX-SPTCO MANAGERS UNTIL ***ALL SPTCO MANAGERS WHO WERE AT TUCSON WHEN THE MERGER WAS ANNOUNCED ARE GONE!***

MSSERS. JOHN E. GROTHER, DAVID L. HAMPTON, PAUL A. LOBELLO, RAY SZAREK AND ROBERT STREFELDER WERE EITHER "ASKED TO" OR DID RESIGN AS MANAGERS AND EX-ROCK ISLAND SERVICE UNIT MGR. KEN C. PACKARD WAS LATER DEMOTED; BUT, ***WITH NO REDUCTION IN WAGES!*** EX-SPTCO MANAGER DAN S. PAYAWALL TRAGICALLY DIED DURING THE STRESS-FILLED TWELVE (12) HOUR PLUS DAYS OF

THE CONSOLIDATION TRANSACTION EXPERIMENT, WHEN HIS PANCREATIC CANCER CAME OUT OF REMISSION, "AFTER DAILY STRESSFUL CONFRONTATIONS WITH THE UPRR SWITCHING EXPERTS", AND DIED DURING SAID YARD EXPERIMENT.

GROTHER KNOWS WHAT HE WAS TOLD BY MASSEURS. KEN C. PACKARD AND THOMAS F. MURPHY ON JUNE 26, 1997 AS THE REASON FOR GROTHER BEING DEMOTED, WAGES CUT, ETC:

"**WE WANT OUR OWN PEOPLE IN TUCSON",** (PACKARD)

"**UNION PACIFIC WANTS ITS OWN MANAGERS ON THE SUNSET ROUTE"** (MURPHY)

THE ABOVE UPRR MANAGERS DID NOT SAY ONE WORD ABOUT POOR PERSONAL PERFORMANCE IN 1997; NOR, IS THERE ANY DOCUMENTATION KNOWN TO GROTHER, THAT INDICATES A "POOR PERSONAL PERFORMANCE ISSUE". GROTHER WAS NEVER PROVIDED AN ORAL OR WRITTEN WARNING OF PERSONAL PERFORMANCE ISSUES OR PLACED ON A PERSONAL DEVELOPMENT PROGRAM. GROTHER WAS NEVER ASKED TO SIGN ANY DOCUMENT, WHICH STATED THAT GROTHER'S PERFORMANCE WAS THE REASON FOR THE 1997 DEMOTION.

THE POOR PERFORMANCE STATEMENTS HEREIN; REGARDING GROTHER ARE "DEFAMATION", WHICH CAN BE PROVEN TO BE 100% FALSE. IT IS A PRETEXT (A COVER UP), IN PART, FOR PREJUDICE AGAINST FORMER MANAGERS OF SPTCO.

PARTIAL LIST OF REASONS FOR THE DELAY IN THE PRESENTATION OF THIS DISPUTE (INCLUDES THREATS OF RETALIATION, ACTIONS BY UPRR WHICH CREATED A PATTERN OF MISTRUST AND FEAR OF UPRR PUBLIC STATEMENTS, WHICH ALLEGE ONE TYPE OF CORPORATE BEHAVIOR AND ANOTHER TYPE OF BEHAVIOR OCCURS, WHICH WOULD FURTHER INTIMIDATE ANY EMPLOYEE INTO A FEAR TO TAKE ARBITRATION ACTION :

1. THE UPRR CORPORATE CULTURE IN 1997 WAS DYSFUNCTIONAL, ABUSIVE AND "GUNSLINGER" PER MR. R.F. DAVIDSON" ACCORDING TO EXHIBIT 13 FROM THE WALL STREET JOURNAL (WSJ) ARTICLE REFERRING TO 1997-98. THEREFORE, GROTHER SURELY WOULD HAVE BEEN IMMEDIATELY DISMISSED HAD GROTHER DARED TO TRANSMIT ANOTHER, STRONGER APPEAL THAN GROTHER'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS (EXH. 10), OR ATTEMPT ANY TYPE LEGAL ACTION. AS ANYONE EVEN "NEAR WHERE SOMETHING HAPPENED", WAS ELIMINATED.

   MR. R.F. DAVIDSON IS QUOTED IN EXHIBIT 13:

   "SOMETIMES YOU MAKE THE DECISION AND THEN ANALYZE THE PROBLEM"

   (ABOVE AND BELOW ARE HOW GROTHER WAS DEMOTED & FINANCIALLY/EMOTIONALLY DENIGRATED FOR LIFE!)

   UPRR VP JOHN REBENSDORF IS QUOTED (EXH. 13) BY WSJ DESCRIBING 1997-98 AS THE DAYS OF LEADING BY FEAR:

   " WHEN SOMETHING HAPPENED, YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY"

   BUT FOR UPRR'S ABOVE 1997 CORPORATE CULTURE BEING THE CREDO USED TO JUDGE THE FAILED MERGER YARD CONSOLIDATION EXPERIMENT OF PLACING ALL PHOENIX SWITCHING INTO TUCSON, GROTHER WOULD NOT HAVE BECOME A DISPLACED EMPLOYEE.

   WHEN VPO SHOENER'S MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT FAILED BETWEEN LATE MAY AND JUNE 1997, GROTHER WAS TRANSFERRED AND DEMOTED (DISPLACED) JULY 1, 1997 AND FINANCIALLY DENIGRATED FOR LIFE.

2. IN THE SEPTEMBER 1997 RESPONSE TO GROTHER'S APPEAL,

PRESIDENT DAVIS DISPLAYED SUCH A TOTAL LACK OF REGARD FOR THE ISSUES OF FAIRNESS, DISCRIMINATION, PROCESS MANAGEMENT TO DETERMINE THE ROOT CAUSE OF THE TUCSON 1997 JUNE SERVICE FAILURE AND THE FINANCIAL DENIGRATION OF GROTHER, THAT ANY FURTHER APPEAL TO FAIRNESS IN 1997 WAS TOO HIGH OF AN "INDIVIDUAL RISK".

3. IN 1997, THE UPRR VISION AND VALUES DESKTOP PLACARD WAS DISPLAYED PROMINENTLY ON GROTHER'S DESK STATING ALLEGED PROPER BEHAVIOR FOR UPRR (EXH. 2): (BELOW ARE FEW 1997 UPRR PUBLICLY PUBLISHED VALUES)

   " TREAT OTHERS LIKE YOU WANT TO BE TREATED",

   " TRY NEW IDEAS...ENCOURAGE CHANGE"

   " TRUST IS ESSENTIAL"

   IN THE MEANTIME, GROTHER WAS BEING DEMOTED 21%, OR $1,272 / MONTH AND BEING TRANSFERRED & DENIGRATED. SHOENER HAD THE ABOVE "NEW IDEA" AND GROTHER WAS FINANCIALLY AND EMOTIONALLY DENIGRATED FOR LIFE

THE DIFFERENCE BETWEEN UPRR REALITY AND WHAT UPRR PUBLICLY STATED AS ITS 1997 VISIONS AND VALUES IS A STARK AND DEVASTATING CONTRAST; ESPECIALLY, FOR EX-SPTCO MANAGERS! TO ILLUSTRATE FURTHER THE UNDERLYING "TRUST DISCONNECTS IN 1997 AND THEREAFTER", SEE MOST OF THE PARAGRAPHS BELOW.

4. IN APRIL-MAY 1997 WHEN GROTHER, IN WRITING, ADVISED SENIOR MANAGEMENT THAT THE MERGER CONSOLIDATION EXPERIMENT FAILURE WAS CERTAIN, BASED ON THE LACK OF RESOURCES AT TUCSON, GROTHER WAS IGNORED AND THEN PUNISHED WITH A TWO SALARY RATE GRADE DEMOTION IN 2 MONTHS, FOR JUST BEING THERE. GOES TO PATTERN OF MISTRUST AND FEAR OF UPRR RETALIATION.

5. GROTHER HAS ORALLY AND IN WRITING REQUESTED PERFORMANCE DEVELOPMENT REVIEWS (PDR'S) FROM SUPERVISORS DATING BACK TO 1997. AT THIS WRITING, ONLY YEAR 2000 HAS BEEN RECEIVED (SEE EX'S 13A-C). GROTHER ADVISED IN APRIL 2003 THAT 2001 PDR HAS BEEN "LOST".

MORE IMPORTANTLY, GROTHER NEVER RECEIVED ANY ORAL OR WRITTEN WARNING (PROGRESSIVE OR OTHERWISE) OF PERSONAL POOR PERFORMANCE AT TUCSON IN 1997. THERE WAS NO UPRR DEVELOPMENT ACTION PLAN. NO DISCUSSIONS OF POOR PERFORMANCE. GROTHER WAS NEVER ASKED TO SIGN ANY DOCUMENT, WHICH STATED THAT GROTHER HAD BEEN A POOR PERFORMER. NO PROGRESSIVE DISCIPLINE.

THERE WAS ONLY A FOUR (4) WORKDAY NOTICE TO TAKE THE $1,272 CUT IN WAGES IN HOUSTON OR "HIT THE STREET" ON JUNE 26, 1997.

6. UPRR DEMOTION POLICY IN 1997 STATED THAT:

"IN *MOST CASES*, THE EMPLOYEE'S PRESENT SALARY LEVEL IS RETAINED" (SEE EXH. 14).

IN CONTRAST TO THE ABOVE PUBLISHED POLICY, GROTHER'S SALARY WAS DRASTICALLY REDUCED; WHICH CORROBORATES THAT HE EXPERIENCED PREJUDICE AS AN EX-SPTCO MANAGER, FOR A MERGER EXPERIMENT FAILURE.

7. NEW HOUSTON SUPERVISOR, MR. DON F. FRYAR, STATED ON SATURDAY, AUGUST 2, 1997; IN PART:

" YOU CAN NOT WORK AROUND HERE DURING ANY TYPE OF LAWSUIT, AS THEY (UPRR) WOULD MAKE LIFE UNBEARABLE FOR YOU" (NO WITNESSES OF COURSE; BUT, INTIMIDATING, HARASSING AND A THREAT OF SEVERE RETALIATION.)

FRYAR RETIRED FEBRUARY 1, 2003; THEREFORE FRYAR'S ORDERS TO NOT PUSH BACK AGAINST UNFAIR TREATMENT, HOPEFULLY; NO LONGER HAVE ANY STANDING.

THIS WAS GROTHER'S SECOND WARNING OF IMMEDIATE RETALIATION, SHOULD GROTHER COMPLAIN OR SEEK ARBITRATION. MR. KEN C. PACKARD (PRIOR BOSS), HAD ADVISED GROTHER ON JUNE 26, 1997 (DAY OF DEMOTION NOTIFICATION) THAT:

"YOU KNOW, THEY CAN FURTHER DEMOTE YOU. YOU ARE NOT GETTING ANY YOUNGER". "YOU BETTER TAKE DEMOTION AND BE HAPPY"

8. GROTHER FOUND OUT ONLY AFTER THEY TOOK BUYOUTS OR RETIRED, THAT THE FOLLOWING TWO EX-SPTCO MANAGERS HAD BEEN DEMOTED FROM THE OPERATING DEPARTMENT (WHERE THEY MANAGED TRAIN OPERATIONS LIKE GROTHER), WERE TRANSFERRED TO INTERMODAL ON THE SAME JOB AND IN THE SAME PLACE AS GROTHER JUST BEFORE GROTHER AND YET THEIR WAGES WERE NOT REDUCED, OR THEIR SUBSEQUENT PENSIONS AFFECTED:

   MASSEURS HARRY L. STARK AND JOE D. CROW

GROTHER HAD BEEN TREATED DIFFERENTLY AS THE ABOVE SIMILARLY SITUATED PERSONS AT UPRR IN 1997. ONE REASON FOR BEING TREATED DIFFERENTLY WAS THAT THOSE UPRR MANAGERS IN DIRECT CHARGE OF THE 1997 TUCSON DEMOTION DECISION OF GROTHER, MASSEURS KEN C. PACKARD AND THOMAS F. MURPHY MADE IT CLEAR (SEE MIDDLE OF PAGE 15 ABOVE), THAT EX-SPTCO MANAGERS WERE NOT WELCOME IN THE MERGED UP-SPTCO COMPANY.

IN ADDITION, PRIOR TO THE MERGER MANAGERS OF UPRR WERE ALSO TREATED CONSIDERABLY DIFFERENT REGARDING THE EXTREMELY ADVERSE SERVICE FAILURES IN 1997. SHOWN

ON EXHIBIT 15 ARE THOSE PRIOR-TO-THE- MERGER UPRR MANAGERS WHO MADE THE LOCAL HOUSTON NEWSPAPER BECAUSE OF SPECTACULAR SERVICE FAILURES (I.E. MASSEURS CHARLES MALONE, AND GREG "BUBBA" GARRISON).

THESE TWO SAMPLES OF PRIOR TO THE MERGER MANAGERS OF UPRR SUFFERED NO PERSONAL REDUCTION IN PAY DESPITE THOUSANDS OF DELAYED CARS, HUGE LAWSUITS AND LARGE CUSTOMER SETTLEMENTS AGAINST UPRR ACCORDING TO THE HOUSTON NEWSPAPERS (EXH. 16). SURELY, THEY WERE ALSO PERCEIVED TO HAVE "PERFORMANCE PROBLEMS" OR PERFORMANCE WHICH WAS THAT WHICH WAS NOT WANTED; YET, THEIR WAGES AND PENSION WERE NOT DENIGRATED FOR LIFE-**WHY NOT? IN COMPARISON, GROTHER'S 1997 PERFORMANCE RESULTED IN NO LAWSUITS, CUSTOMER SETTLEMENTS OR STB THREATS TO TAKE TRACKAGE!**

THE SYSTEM-WIDE UP-SP MERGER CUSTOMER DELAY AND SERVICE FAILURE ISSUES ARE WELL DOCUMENTED (EX'S 17-22).

9. TO FURTHER ILLUSTRATE PACKARD AND MURPHY'S POSSIBLE PREJUDICE AGAINST EX-SPTCO MANAGERS, GROTHER JUST FOUND OUT **JULY 31, 2002,** FOR THE FIRST TIME AFTER CONSIDERABLE INQUIRIES AND EFFORT, THAT "SOMEONE" HAD PLACED ON THE SECRET-TO-GROTHER ONLINE PERSONAL RECORD SYSTEM THAT GROTHER HAD BEEN DEMOTED ON JULY 1, 1997 FOR "DISCIPLINARY REASONS" (SEE EXHIBIT 23).

   EXHIBITS 23, 24 AND 26 PROVIDE PART OF THE CORROBORATE FOR DELAY THAT GROTHER INCURRED OR THE NEED TO KEEP REQUESTING INFORMATION OVER SEVERAL MONTHS AND FROM SEVERAL PEOPLE, JUST TO OBTAIN THE NEW, "BACK-STABBED INSIGHT" INTO THE SECRET UPRR ONLINE SYSTEM, WHICH ALSO FURTHER CORROBORATES WHY GROTHER HAS DEVELOPED A REALISTIC FEAR OF TRUSTING SOME IN UPRR MANAGEMENT.

AT FIRST, GROTHER ATTEMPTED WORKING WITH THE LOCAL HR PERSON, LINDA BUTTRILL TO OBTAIN INFORMATION ON THE 1997 DEMOTION POLICY OF UPRR AND WHY GROTHER WAS NON-PROMOTABLE, INCLUDING OBTAINING GROTHER'S PERSONAL RECORD. ALL THESE REQUESTS ENDED IN DEADENDS, UNLESS OTHERS WERE INVOLVED AT A LATER DATE TO PROVIDE THE "REAL INFORMATION AND ANSWERS"

10. TO FURTHER CORROBORATE GROTHER'S CONCERN ABOUT THE "DISINGENUOUS ISSUE OR FEAR OF SOME IN THE UPRR SYSTEM". THE CONSTANT DEADENDS AND PATTERNS OF MISINFORMATION ARE WHY NO ONE IN THEIR RIGHT MIND WOULD REQUEST AN ARBITRATION CASE EARLIER THAN 55:

A. ON JANUARY 3, 2003 THE UPRR OMBUDSMEN, MR. BUTCH ETHINGTON ORALLY ADVISED GROTHER THAT:

"I CAN NOT GET ANYONE TO COME FORWARD AND ADMIT THAT THEY PLACED THE STATEMENT THAT YOU WERE DEMOTED FOR DISCIPLINARY REASONS ON YOUR ONLINE RECORD. IT IS A MYSTERY".

THE ABOVE UPRR DEAD-END, THAT NO ONE CAN FIND THE PERPETRATOR WHO RUINED ONE'S CAREER, IS THE RESPONSE GIVEN TO GROTHER WHEN GROTHER WROTE TO THE UPRR OMBUDSMEN SEEKING **FAIR TREATMENT,** WHICH IS PUBLICLY STATED ON THE UPRR WEBSITE TO BE:

" **A FUNDAMENTAL RIGHT OF ALL UPRR EMPLOYEES**".

THE ABOVE UPRR FEEDBACK CONTINUES THE PATTERN OF STONE-WALLING AND FEAR INSTILLATION BECAUSE:

- IN ALL UPRR DATA SYSTEM KNOWN TO GROTHER, THE UPRR COMPUTER EXPERTS HAVE DEVELOPED A MEANS TO BACK TRACK ELECTRONICALLY AND DETERMINE WHO MADE THE COMPUTER ENTRY; YET, UPRR NOW STATES

THEY CAN NOT DETERMINE THE PERSON WHO ENTERED THAT CAREER KILLING ENTRY ON THE ONLINE PR SYSTEM

- THE OMBUDSMEN ALSO STATED THAT PAGE 2 OF THE FORM 15121 USED TO DEMOTE GROTHER IN 1997 **HAS BEEN SHREDDED** AND CAN NOT BE RETRIEVED IN ANY WAY AS ONLY PAGE 1 HAS BEEN INPUT INTO THE SUCCEEDING SYSTEM. PAGE 2 OF THE FORM 15121, PER EXHIBIT 14, MAY HAVE ALLEGEDLY CONTAINED THE MANDATORY JUSTIFICATION, WHICH IS REQUIRED TO WARRANT SUCH A HUGE DOWNWARD SALARY ADJUSTMENT. FOR ALL GROTHER CAN FIND OUT, PAGE 2 MAY HAVE BEEN BLANK AND NO WAGE REDUCTION JUSTIFICATION WAS STATED! EVERYONE WAS JUST SIMPLY "IN A HURRY IN 1997" AND GROTHER'S DEMOTION WAS RUBBER-STAMPED THRU!

- THE POSITION OF OMBUDSMEN HAS THE SELF-STATED PURPOSE OF "... MAKING SURE THE COMPANY'S CULTURE AND ORGANIZATION ARE DOING THE RIGHT THING FOR THE EMPLOYEES" (EXH. 25). GROTHER IS OF THE OPINE THAT, TO DATE, ALTHOUGH THE OMBUDSMEN HAS APPARENTLY MADE A DECISION, THE FACTS OF FAIR TREATMENT ABOUT SHOENER'S DECISION HEREIN HAVE BEEN IGNORED, AS THEY SPEAK FOR THEMSELVES.

  OF COURSE, UPRR MAY BE IN A SHORT TERM DOWNWARD FINANCIAL CYCLE BECAUSE OF THE WAR AND BUSINESS CYCLE; BUT THAT IS NO REASON TO THROW THE "FUNDAMENTAL RIGHT TO FAIR TREATMENT FOR ***ALL EMPLOYEES"***, OUT THE WINDOW.

B. IN 2001, GROTHER REQUESTED A COPY OF HIS PERSONAL RECORD (PR). AFTER EXPERIENCING SOME POSSIBLE MISINFORMATION FROM HR REPRESENTATIVE LINDA BUTTRILL THAT THE ONLY WAY TO LOOK AT YOUR PR WAS IN THE OFFICE, IN FRONT OF A SUPERVISOR (EXH. 26A), GROTHER FINALLY RECEIVED COPIES OF TWO SETS, WHICH

HAD ALL THE INFORMATION, INCLUDING RECORDS OF PROCESS TRAINING WHILE WITH SPTCO (EX'S 26B &26C).

IN WHAT APPEARS TO BE RETALIATION FOR JUST REQUESTING GROTHER'S PERSONAL RECORDS IN DECEMBER 2001 (OR AN INCREDULOUS COINCIDENCE), GROTHER WAS ORDERED TO SUBMIT TO TWO ALLEGED FRA RANDOM DRUG AND ALCOHOL TESTS ALMOST BACK-TO-BACK! AFTER 33 YEARS WITHOUT A FRA RANDOM TEST, GROTHER WAS ORDERED TO SUBMIT ON SATURDAY A.M. FEBRUARY 2, 2002. THEN, BECAUSE HE HAD A SCHEDULED VACATION IN APRIL, THE NEXT "RANDOM FRA TEST" GOT DELAYED UNTIL MAY 2, 2002 (EX'S 27A-27B). BOTH TESTS WERE NEGATIVE; BUT, THE STATISTICAL RARENESS OF TWO FRA RANDOM TESTS, NEARLY BACK-TO-BACK APPEARS DESIGNED TO INSTILL FEAR AND "MORE APPRECIATION FOR RETALIATION".

C. IN 2002, GROTHER FINALLY IS ABLE TO OBTAIN A COPY OF THE 1997 DEMOTION POLICY (EXH. 14) FROM THE COMPENSATION DEPARTMENT, AFTER BEING ADVISED BY THE HR REPRESENTATIVE (LINDA BUTTRILL-EXH. 24), THAT SHE BASICALLY COULD NOT ASSIST GROTHER WITH THIS.

GROTHER WAS ALSO ORALLY ADVISED BY LOCAL HR REPRESENTATIVE, LINDA BUTTRILL, "WHY DO YOU WANT TO KNOW WHAT UPRR'S 1997 DEMOTION POLICY WAS, **YOU CAN NOT DO A DARN THING ABOUT WHAT HAPPENED TO YOU!" ALSO, AND IN WRITING "...I DOUBT THAT A REBUTTAL WOULD BE OF MUCH USE AT THIS TIME" (EXH. 26A).**

AS GROTHER BEGAN TO ASK MORE QUESTIONS OF MS. LISA BREWSTER (THE COMPENSATION DEPARTMENT) REGARDING WHO HAD THE ABILITY TO ENTER AND OBTAIN DATA REGARDING THE SECRET-TO-GROTHER ONLINE SYSTEM, BREWSTER'S FINAL E-MAIL (UPRR LOTUS NOTE) USED THE "UPRR SECRECY ICON". THE SENDER MUST SPECIFICALLY SELECT THIS SECRECY ICON FOR USE. IT ALLOWS THE SENDER TO TRANSMIT AN E-MAIL ***WHICH CAN NOT BE***

COPIED OR FORWARDED TO ANOTHER PARTY.

EX'S 29A-29C INDICATE GROTHER'S EFFORTS TO PRESENT BREWSTER'S RESPONSE "IN RED" SO ALL CAN SEE THE VAGUE AND VEILED RESPONSE, FOR A REVIEW.

WHAT WAS BREWSTER TRYING TO HIDE?

IT IS GROTHER'S OPINE THAT BREWSTER DID NOT WANT IT KNOWN TO "OTHERS" WHO HAD E-MAIL, THAT A SECRET-TO-UPRR- EMPLOYEE SYSTEM EXISTED, WHICH CAN BE USED TO DESTROY ONE'S CAREER (GROTHER) WITH FALSE DATA ENTERED (DEMOTED FOR DISCIPLINARY REASONS), THAT WAS AVAILABLE TO DECISION MAKERS, WHO CAN MAKE PROMOTION DECISIONS FROM ONLINE SYSTEM.

IN A COMPANY THAT PUBLICLY STATES THAT FAIR TREATMENT IS A "FUNDAMENTAL RIGHT", THE ABOVE EGREGIOUS LACK OF BUSINESS ETHICS CONCERNING THE ENTRY OF FALSE DATA AND APPEARING TO HIDE THE FACTS, UNDERSCORES ANOTHER REASON **INDIVIDUALS FEAR TO FILE A NEW YORK DOCK ARBITRATION DISPUTE.**

D. BREWSTER ALSO INDICATED THAT I SHOULD SEEK A DETAILED EXPLANATION FROM MR. KEN C. PACKARD, THE TUCSON SUPERVISOR OF GROTHER, REGARDING WHY THE SALARY DECREASE TOOK PLACE. BREWSTER'S EXH. 48 STATED HER INABILITY TO GO ANY FURTHER. BREWSTER'S ADVICE WAS A TYPICAL CATCH-22 RESPONSE, GIVEN THE FACT THAT GROTHER HAD ATTEMPTED TO GET A RESPONSE FROM PACKARD SIX TIMES, INCLUDING THREE UPRR COMPANY E-MAILS, TWO AOL E-MAILS AND EXH. 49 CERTIFIED LETTER TO PACKARD'S BUSINESS ADDRESS. PACKARD DID NOT HAVE THE "RESPECT FOR EMPLOYEES" TO ANSWER ANY OF THE ABOVE INQUIRIES.

WHAT IS PACKARD HIDING, THAT HE WILL NOT RESPOND, TO THE PERSON PACKARD FINANCIALLY DESTROYED?

E. GROTHER AND ALL OTHER SERVICE UNIT PHONES (TO OTHER WITNESSES) RECEIVED AN ALL POINTS VOICE MAIL MESSAGE MONDAY, JUNE 16, 1997 FROM PACKARD WHICH GROTHER TAPED AND FORWARDED IN GROTHER'S JULY 15, 1997 APPEAL LETTER TO PRESIDENT DAVIS WHICH STATED:

" ... THAT CONSIDERING THE RESOURCES THAT WE HAD AVAILABLE, THE ENTIRE SERVICE UNIT WAS DOING AN OUTSTANDING JOB..."

GROTHER WAS DEMOTED LESS THAN TWO WEEKS AFTER THE ABOVE SUPPORTING REMARKS – WHAT TYPE OF DISINGENUOUS BEHAVIOR DOES THIS REFLECT?

F. CONCERNING THE ALLEGED SHREDDING OF THE JUSTIFICATION USED TO DEMOTE GROTHER 2 SRG'S, AND THE UNKNOWN DATA ENTRY PERSON, WHO PLACED "DEMOTED FOR DISCIPLINARY REASONS" ON THE SECRET-TO-GROTHER ONLINE SYSTEM USED TO SELECT PERSONS FOR PROMOTION, BOTH ARE EXAMPLES OF A "CALLOUS DISREGARD" FOR THE PERSONAL RECORDS OF EMPLOYEES WHICH CREATES MISTRUST AND FEAR OF RETALIATION. EXH. 52 INDICATES A LETTER FROM BLE REPRESENTATIVE SVOB TO SUPERINTENDENT ROYCE HARDIN AT TUCSON WHICH COMPLAINS OF UPRR DISCARDING SENSITIVE PR DATA IN THE TRASH DUMPSTER, WHERE UNAUTHORIZED PERSONS COULD OBTAIN DISCIPLINE AND INTIMATE DETAILS OF INVESTIGATIONS (INCLUDING DRUG AND ALCOHOL VIOLATION). SVOB STATES "...THEY WERE DISPOSED OF IN A MANNER WHICH MADE THEM ACCESSIBLE TO **OTHER EMPLOYEES**, TRESPASSERS, OR THIEVES FOR WHATEVER ILLICIT OR **NEFARIOUS** PURPOSE MIGHT BE DEVISED (E.G. EXTORTION, BLACKMAIL, IDENTITY THEFT).

GROTHER'S CRITICAL DATA WAS ALSO "GARBAGE DUMPED" (SHREDDED) AND "**OTHER EMPLOYEES**" ACTUALLY DID PERFORM A **NEFARIOUS** PURPOSE (SECRET ENTRY ON THE

SECRET ONLINE SYSTEM), WHICH ENDED GROTHER'S ABILITY TO BE PROMOTED. UPRR'S LACK OF FAIRNESS IN THE CONTROL OF CRITICAL RECORDS AND THE ABILITY OF **OTHERS** TO USE THE SECRET-TO-GROTHER ONLINE SYSTEM FOR RETALIATION CORROBORATES ANOTHER REASON TO NOT CONSIDER ARBITRATION, AN EARLIER AGE THAN 55.

11. INITIALLY, ON DECEMBER 28, 2002 THE OMBUDSMEN STATED THAT PACKARD HAD STATED 1997 WAS A "VERY CONFUSING TIME" AND PACKARD "COULD NOT REMEMBER WHAT HAPPENED". THEN AFTER A LITTLE "SPINNING TIME BY PACKARD", ON JANUARY 14, 2003, THE OMBUDSMEN ORALLY ADVISED THAT HE WOULD NOT BE ABLE TO FURTHER PROCESS GROTHER'S REQUEST FOR COMPENSATION FAIRNESS; IN PART, BECAUSE HE HAD RECEIVED FEEDBACK FROM PACKARD AND MURPHY, THE PERSON'S WHO SEVERELY DISPLACED GROTHER THAT GROTHER'S 1997 DEMOTION WAS RELATED TO "POOR PERFORMANCE" AS:

"WE LOOKED AT A LOT OF PEOPLE AND GROTHER DID NOT PERFORM AS WELL AS THEM".

FINALLY, ON 3/10/03 OMBUDSMAN ETHINGTON ADVISED IN WRITING THAT GROTHER'S 7/1/97 DEMOTION REASON WAS:

"THE EXPLANATION WAS GIVEN THAT YOUR PERFORMANCE WAS NOT WHAT WAS NEEDED". (EXHIBIT 55)

(SOUNDS LIKE A MERGER RELATED DECISION TO ME AS WITNESSES AND DOCUMENTATION ARE AVAILABLE TO TESTIFY THAT THE YARD CONSOLIDATION EXPERIMENT CAUSED TUCSON TO HAVE A JUNE 1997 SERVICE FAILURE)

HOW IS THE ABOVE UPRR EXPLANATION APPROPRIATE JUSTIFICATION TO TAKE AWAY TWO SRG'S OR $1,272/MO., WHICH GROTHER HAD WORKED 28 YEARS TO OBTAIN?

THE ABOVE IS NOT LOGICAL FOR SEVERAL REASONS; INCLUDING, BUT NOT LIMITED TO:

A. PACKARD HAD SELECTED GROTHER AS THE SENIOR MTO (SRMTO) AT TUCSON EFFECTIVE APRIL 16, 1997 AFTER HAVING THE OPPORTUNITY TO OBSERVE GROTHER'S PERSONAL PERFORMANCE FOR 3.5 MONTHS AND REVIEW GROTHER'S OUTSTANDING RECORD.

   HOW COULD GROTHER'S PERSONAL PERFORMANCE DETERIORATE SO MUCH IN TWO (2) MONTHS; ESPECIALLY, WITH GROTHER'S BACKGROUND AS A SOLID, OUTSTANDING PERFORMER FOR 28 YEARS?

   THE ONLY LOGICAL REASON FOR THE "JUNE SERVICE FAILURE" IS THE SHOENER MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT STARTING MAY 16, 1997 AND PEAKING MID-JUNE (SLIGHTLY OVER ONE MONTH), IN A MERGER EXPERIMENT FAILURE, WHICH WAS NOTHING GROTHER HAD DECIDED.

B. IN GROTHER'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS, GROTHER STATED:
" I HAD NO INDICATION OF PERSONAL UNSATISFACTORY PERFORMANCE BEFOREHAND..."
ABOVE STATEMENT WAS NOT DISPUTED BY PRESIDENT DAVIS, AS DAVIS REFERS TO A **JUNE** SERVICE FAILURE. THE STATEMENT BY PACKARD TO THE OMBUDSMEN THAT SAID FAILURE WAS THE RESULT OF POOR PERSONAL PERFORMANCE OF GROTHER IS **DEFAMATION OF CHARACTER, AS IT WAS SIMPLY A MERGER YARD CONSOLIDATION EXPERIMENT THAT FAILED DUE TO LACK OF CAPACITY/CURFEWS AND NOT DUE TO ANY DECISION OR FAULT OF GROTHER.**

C. UPRR HAS BEEN REQUESTED, AS PART OF GROTHER'S FAIRNESS LETTER REQUEST FOLLOW-ON, TO VERIFY THE FOLLOWING ISSUES, WHICH WILL CONCLUSIVELY

CORROBORATE THAT, THE "PERSONAL PERFORMANCE" OF GROTHER WAS NOT THE ACTUAL REASON FOR GROTHER'S 1997 DEMOTION. UPRR CAN AND SHOULD PROVIDE THIS **FAIRNESS** DATA. AS OF THIS WRITING, UPRR HAS NOT PRODUCED THE FOLLOWING EXH. 53 VERIFICATIONS REQUESTED BY GROTHER, WHICH WOULD CLEARLY DEMONSTRATE THAT TUCSON TERMINAL WAS ORDERED IN 1997 TO PERFORM AN IMPOSSIBLE MERGER RELATED TASK AND FAILED:

- PRODUCE OR REPRODUCE THE 1997 TUCSON YARD CAPACITY MODEL WHICH CONCLUSIVELY STATED THAT ALL EAST AND WEST TRAFFIC TO & FROM PHOENIX AND PICACHO SETOUT TRAFFIC COULD NOT BE SWITCHED AT TUCSON BECAUSE OF EXCESSIVE VOLUME FOR 1997 YARD CONDITIONS (I.E. NO E/E SWITCHING LEAD, BAD TRACKS). (IF UNAVAILABLE, USE 2002 DATA WHICH MUST INCLUDE **ALL THE E/W TRAFFIC, INB/OUTBOUND FOR PHOENIX.**

  SHOULD THE LATEST UPRR CAPACITY STUDY INDICATE THAT IT IS SUDDENLY POSSIBLE TO CONSOLIDATE **THE ENTIRE EAST AND WEST TRAFFIC DESTINED TO & FROM PHOENIX AT TUCSON, WHY NOT DOING IT?**

  THERE ARE GOOD REASONS THAT THIS MERGER RELATED YARD CONSOLIDATION EXPERIMENT WAS NOT DONE BEFORE MID-MAY 1997; NOR, HAS **ALL EAST AND WEST TRAFFIC TO AND FROM PHOENIX BEEN ATTEMPTED AGAIN, WITH SWITCHING CONSOLIDATED AT TUCSON.** THE FACTS AND NEXUS SPEAK FOR THEMSELVES!

- THE ENGINEERING DEPARTMENT SHOULD BE ASKED TO CONFIRM THAT TUCSON HAD M OF W CURFEWS ON BOTH SIDES OF TUCSON DURING THE PERIOD MAY 16 – JUNE 26, 1997, WHICH WOULD NOT ALLOW TRAINS TO ARRIVE OR DEPART TUCSON BETWEEN THE HOURS OF 0700-1900 M-F.

- **ALL THE MANAGERS AND UNION OFFICIALS WHO**

WERE AT TUCSON DURING SHOENER'S EXPERIMENT SHOULD BE INTERVIEWED TO DETERMINE IF IT WAS GROTHER'S "POOR PERSONAL PERFORMANCE" OR THE EFFECT OF THE PHOENIX MERGER EXPERIMENT. THESE PERSONS WOULD INCLUDE MASSEURS BOB STREFELDER, RAY SZAREK, DAVID HAMPTON, TOM F. MOORE (UTU), KEN KROEGER (BLE), H. L. MCDOWELL, AND ANY MEMBER OF THE 1997 SAFETY COMMITTEE.

- THE UPRR MANAGERS WHO DEMOTED GROTHER, MASSEURS KEN C. PACKARD AND THOMAS F. MURPHY ARE STILL EMPLOYED BY UPRR. IT WOULD APPEAR HIGHLY APPROPRIATE THAT THESE TWO MANAGERS SHOULD BE ASKED TO "RECREATE THE DETAILED PERSONAL PERFORMANCE FAILURE ISSUES OF GROTHER".

WHAT DID GROTHER DO THAT WAS SO HEINOUS TO DESERVE SUCH A WHOOPING $1,272/MO WAGE CUT?

- WHAT WERE GROTHER'S HEINOUS POOR PERSONAL PERFORMANCE FAILURES THAT RESULTED IN GROTHER BEING CUT TWO SALARY RATE GRADES OR ONE BAND IN CURRENT UPRR SALARY PARLANCE? SURELY, ANY PERSONAL PERFORMANCE THAT WAS SO HEINOUS, SHOULD BE EASY TO RECALL IN DETAIL? WHAT IS THE "EVIDENCE", WHICH WAS AND HAS NEVER BEEN SHOWN OR DISCUSSED WITH GROTHER ABOUT HIS "PERSONAL PERFORMANCE"? SUCH A HEINOUS ACT, RESULTING IN A $1,272 MONTH PAY CUT, MUST BE MEMORABLE, AS OTHER "SERVICE FAILURE MANAGERS" WERE NOT CUT IN PAY!

  IN DIRECT CONTRAST, IT APPEARS CRYSTAL CLEAR THAT OTHER UPRR MANAGERS IN THE INFAMOUS 1997 SYSTEM-WIDE SERVICE FAILURES HAD MERGER RELATED SERVICE PROBLEMS; YET, NONE OF THE PRIOR TO THE MERGER UPRR MANAGERS WERE REDUCED IN PAY OR PENSION! UPRR COMPENSATION RECORDS MAINTAINED TO SATISFY THE IRS SHOULD READILY CORROBORATE NO OTHER SERVICE FAILURE WAGE REDUCTIONS.

THEREFORE, THERE HAS BEEN NO DISSIPATION OF EVIDENCE AS ON-THE-GROUND WITNESSES OF GROTHER'S MAY-JUNE 1997 "PERSONAL PERFORMANCE" ARE THERE AND THE WAGE CUT COMPARISONS ARE READILY AVAILABLE. IN ADDITION, STABLE AND PREDICTABLE LABOR MANAGEMENT RELATIONS HAVE NOT BEEN AFFECTED BY DISPLACING AN EX-SPTCO MANAGER.

- CORROBORATION THAT WEST COLTON WAS ALSO CREATING RE-SWITCHING FOR TUCSON DURING MAY-JUNE, 1997 SHOULD ALSO BE CONFIRMED. BASED ON ONE SAMPLE DOCUMENT DATED JUNE 10, 1997 (EXH. 12), THE LAPXM PER THE SERVICE PLAN WAS TO OPERATE DIRECTLY TO PHOENIX. HOWEVER, INVARIABLY TUCSON WOULD RECEIVE A MESSAGE ON NEARLY A DAILY BASIS STATING THAT THE ENTIRE TRAIN HAD TO YARDED AT TUCSON AND RESWITCHED STEM TO STERN AS WEST COLTON HAD MILL OR MINE-RUN THE TRAIN WITH PHOENIX AND TUCSON TRAFFIC MIXED. THIS PROBLEM WAS KNOWABLE ONLY AFTER GOING BY THE SCANNER. **WEST COLTON WAS ALSO DUMPING ON TUCSON!**

  MOREOVER, THE REVERSE WAS ALSO TRUE, AS PHOENIX WAS SENDING ALL WEST TRAFFIC TO TUCSON ALSO INSTEAD OF OPERATING A PXLAM AS AGREED.

- ASK REGIONAL VP STEVE BARKLEY TO CORROBORATE THE SERVICE EFFECTS OF PLACING AN M OF W TWELVE (12') HOUR DAYLIGHT CURFEW ON BOTH SIDES OF A TERMINAL LIKE SAN ANTONIO OR TUCSON. WHAT IS DONE NOW TO PROTECT SUCH TERMINALS?

  ASK BARKLEY IF SUCH A DOUBLE CURFEW WOULD BE A GOOD TIME TO ATTEMPT DOUBLING THE VOLUME OF TRAFFIC COMING INTO SAID TERMINAL.

- ASK THE QUALITY DEPARTMENT IF THEY CAN DETERMINE WHO WAS FLOWN TO TUCSON AROUND THE

- FIRST WEEK OF JUNE 1997 AND LEFT IN DISMAY STATING SOMETHING LIKE - IT IS IMPOSSIBLE TO DO WHAT UPRR HAS ASKED TUCSON TO DO. HOW CAN YOU PLAN WITH 12' CURFEWS ON BOTH SIDES, NEARLY DOUBLE THE VOLUME AND NO INCREASE IN PERSONNEL OR TRACKAGE? HE THOUGHT IT BEST TO LEAVE ASAP BEFORE "SOMEONE" DECIDED TO HOLD HIM ACCOUNTABLE FOR A TRAIN DISPATCHING SCENARIO WHICH CAUSED RANDOM AND BUNCHED ARRIVALS OF BOTH THE EASTBOUND AND WESTBOUND TRAIN FLEETS DURING DARKNESS AS MAIN TRACK OPERATIONS WERE CLOSED BY M OF W CURFEWS ON BOTH SIDES OF TUCSON STARTING MAY 1997.
  (I THINK HIS FIRST NAME WAS DAVE-I THINK. SOME HAVE SUGGESTED IT MAY HAVE BEEN DAVID WHALEN OR DAN WHITE; BUT UPRR EXPENSE ACCOUNTS SHOULD SELECT.

10. BASED ON HUNDREDS OF DISCUSSIONS BY GROTHER, THE CONCEPT OF A MANAGER BEING REDUCED IN COMPENSATION AS A RESULT OF DEMOTION WAS UNHEARD OF AT UPRR IN 1997. THAT BELIEF WAS SO STRONG; THAT, HR PERSONNEL ISSUED EXH. 30, "SUMMARY OF PLAN CHANGES: EFFECTIVE JANUARY 1, 1998 CONCERNING EX-SPTCO PENSION PLAN RIGHTS WHICH STATED:

"***IN NO CASE*** WILL YOUR BENEFIT UNDER THE **AMENDED** PLAN BE LESS THAN THE PLAN BENEFIT YOU EARNED THROUGH DECEMBER 31, 1998"

THE ABOVE DOES NOT APPEAR TO BE TRUE IN GROTHER'S CASE, AS GROTHER'S HIGHER PAY BETWEEN 1995-1997 WILL NOT BE ALLOWED IN THE CALCULATION OF HIS UPRR PENSION. THE GROTHER'S WILL BE FINANCIALLY HARMED FOREVER! GROTHER WAS MAKING $6,200 MONTH IN SEPTEMBER 1995 AND HIS WAGES **MAY** NOT RETURN TO THAT LEVEL UNTIL 2005, OR LATER. THAT IS AN ESTIMATED **EIGHT YEAR PUNISHMENT** JUST TO EARN THE SAME AMOUNT AND A LIFETIME OF PENSION / RAILROAD RETIREMENT LOSSES, "FOR JUST BEING IN TUCSON", WHEN SOMEONE ELSE MADE AN INITIAL MERGER

RELATED DECISION WITHOUT USING THE "QUALITY PROCESS" AND GROTHER WAS SEVERELY SCAPEGOATED?

12. PARAGRAPH 9 ABOVE CONCERNS AN ENTRY THAT WAS MADE ON THE ONLINE PERSONNEL SYSTEM WHICH WAS SECRET-TO-GROTHER; YET, KNOWN AND USED BY MANAGERS OF UPRR WHO MADE DECISIONS ON GROTHER'S ABILITY TO BE CONSIDERED FOR PROMOTION 1997-2003

THIS ONLINE ENTRY WAS PARTIALLY ACCOUNTABLE FOR GROTHER NOT BEING PROMOTED OR EVEN SELECTED FOR A LATERAL TRANSFER FOR THE LAST 5.5 YEARS AS THOSE WHO PROMOTE HAD EITHER ACCESS TO THIS SECRET ONLINE SYSTEM FROM THEIR OWN AUTHORITY OR THROUGH HR AND OTHER UPRR REPRESENTATIVES. THIS ONLINE SYSTEM HAS BEEN USED BEHIND GROTHER'S BACK TO DESTROY GROTHER'S CAREER AND NOW THE OMBUDSMEN SIMPLY STATES "NO ONE WANTS TO COME FORWARD FOR ENTERING THIS DEMOTED FOR DISCIPLINARY REASONS ON YOUR ONLINE PERSONAL RECORD".

AS CORROBORATION, EXHIBIT 31 INDICATES A PARTIAL LIST OF UPRR POSITIONS APPLIED FOR AND THE UPRR LACK OF RESPONSE OR RETALIATION REGARDING MY RESUME. IN SUMMARY, GROTHER APPLIED FOR SIX POSITIONS BACK TO ARIZONA IN 1999-2000 AND GROTHER ONLY RECEIVED ONE RESPONSE WHICH BASICALLY STATED TO GROTHER THAT BASED ON ALL APPLICANTS, YOUR EXPERIENCE, EDUCATION, TRAINING, ARE NOT ACCEPTABLE. THIS COMPUTER GENERATED RESPONSE WAS RECEIVED **REGARDLESS OF THE FACT THAT GROTHER HAD PERFORMED 22 MONTHS AT THE SAME LOCATION (TUCSON) IN THE # 1 POSITION AT TUCSON ITSELF OR TWO SALARY RATE GRADES ABOVE THE POSITION WHICH HAD GROTHER APPLIED FOR (EX'S. 32A-32B). EXHIBITS 33A – 33B IS ANOTHER POSITION THAT GROTHER WAS NOT EVEN SELECTED TO BE INTERVIEWED; DESPITE, GROTHER'S 22 MONTHS, ON THAT EXACT JOB AS INCUMBENT.**

WHY DID UPRR'S ROYCE HARDIN'S COMPUTER GENERATED, "TRY AGAIN LATER RESPONSE" IMPLY THAT GROTHER WAS NOT QUALIFIED FOR A POSITION THAT HE HAD BEEN THE SUPERVISOR OF FOR 22 MONTHS? (GOES TO PATTERNS OF MISTRUST AND RETALIATION).

13. IN 1997, THE UPRR MANAGERS WHO ARBITRARILY DEMOTED GROTHER KNEW THAT GROTHER HAD A VERY SICK WIFE WITH SYSTEMIC LUPUS AND **GROTHER COULD NOT RISK THE LOSS OF MEDICAL INSURANCE FOR HIS WIFE, AS THAT WOULD CERTAINLY RESULT IN HER DEATH!**

A. THERE WAS A CRITICAL QUESTION IF INSURANCE WOULD BE MADE AVAILABLE UNDER COBRA IN 1997. TO ILLUSTRATE ANOTHER CORROBORATION OF "CREATING FEAR OF RETALIATION". IN FRANCISCONI V. UNION PACIFIC RAILROAD, CASE NO. 20000 408-CA, VPO SHOENER APPARENTLY DENIED FRANCISCONI'S SICK WIFE COBRA COVERAGE IN 1997 (EXH. 35). SUCH A **DENIAL OF COBRA** WOULD HAVE BEEN VERY DESTRUCTIVE TO GROTHER'S WIFE, IF NOT LIFE THREATENING. THEREFORE, THE RISKS WERE TOO HIGH WITH THAT TYPE OF 1997 CORPORATE CULTURE RETALIATION "ALLOWED" AND "ACCEPTED".

IF AN INDIVIDUAL HAD TO MAKE MEDICAL INSURANCE PAYMENTS, EVEN IN 1997, THE COST WOULD HAVE BEEN STAGGERING. AARP SOURCES INDICATE THE "FAMILY MONTHLY PREMIUM" MAY HAVE BEEN OVER $600 A MONTH AND POSSIBLY MORE FOR A SEVERE PRE-EXISTING CONDITION, ASSUMING IT WOULD BE POSSIBLE TO EVEN OBTAIN INSURANCE FOR ONE'S PRE-EXISTING CONDITIONS. EXHIBITS 36B-36E ARE A FEW EXAMPLES OF HOW HARD IT IS FOR MRS. GROTHER TO OBTAIN ANY TYPE OF INSURANCE, INCLUDING THE NEW LONG TERM CARE UPRR HAS RECENTLY OFFERED THOROUGH ANOTHER COMPANY (CMA).

B. IT IS NOTEWORTHY THAT COBRA APPEARS TO ONLY PROVIDE COVERAGE FOR EIGHTEEN (18) MONTHS. IF

DISMISSED IN 1997 FOR FILING AN ARBITRATION, LAWSUIT OR SIMPLY REQUESTING ANOTHER APPEAL, THAT WOULD MEAN THAT WHEN THE COBRA COVERAGE RAN OUT, GROTHER WOULD HAVE BEEN 52 YEARS OLD AT THAT TIME AND **WITHOUT** MEDICAL INSURANCE FOR HIS WIFE - AN ILL LUPUS PATIENT, UNLESS FOUND EMPLOYMENT ELSEWHERE.

ALL READERS - CONSIDER THIS PLEASE:
ALL OF US ARE ONLY ONE JOB AWAY FROM A HEALTH INSURANCE DISASTER.

AN ESTIMATED INSURANCE BILL OF $600 PLUS PER MONTH WOULD BE A HEFTY BILL FOR GROTHER; ESPECIALLY, IF TERMINATED IN 1997 FOR ANY NUMBER OF POSSIBLE "SPIN DOCTOR ACCUSATIONS". IMAGINE LIVING ON GROTHER'S UPRR PENSION, ESTIMATED AT LESS THAN $400 PER MONTH IN 1997, AS GROTHER WAS, AND IS "TOO YOUNG" FOR RAILROAD RETIREMENT BENEFITS. THAT WOULD HAVE BEEN GROTHER'S "FAIRNESS REWARD" FOR 28 YEARS OF DEDICATED AND LOYAL RAILROAD SERVICE TO SPTCO AND TEN MONTHS WITH UPRR.

WOULD ANYONE IN THEIR RIGHT MIND DARE TO FILE FOR AN UNCERTAIN ARBITRATION PROCESS, UNDER THE ABOVE FINANCIAL CONDITIONS?

IT IS GROTHER'S UNDERSTANDING THAT NOW THAT GROTHER HAS REACHED FIFTY-FIVE (55) THAT GROTHER IS CATEGORIZED AS AN OFFICIAL "RETIREE" BY THE UPRR PENSION PROGRAM (I.E. ELIGIBLE; BUT NOT REQUIRED, TO FILE FOR GROTHER'S UPRR PENSION). AS A "RETIREE", GROTHER IS NOW ALLEGEDLY ELIGIBLE TO OBTAIN MEDICAL INSURANCE FROM THE UPRR, ASSUMING THAT GROTHER FILED FOR HIS SEVERELY AGE AND DEMOTION REDUCED UPRR PENSION AND PAID THE COST OF SUCH MEDICAL INSURANCE COVERAGE. WITHOUT SAID MED. INSURANCE, GROTHER HAS BEEN PARALYZED WITH NO FUNDS.

IN SUMMARY, BEFORE REACHING AGE 55, GROTHER WAS NOT ELIGIBLE FOR THIS SUBSIDIZED UPRR MEDICAL

INSURANCE COVERAGE AND COULD NOT RISK SEEKING RECOVERY OF GROTHER'S COMPENSATION AND FRINGE BENEFITS TAKEN AWAY AS A DISPLACED EMPLOYEE. EVEN AT AGE 55, ONE GIVES UP A WHOOPING 50% OF ONE'S UPRR RETIREMENT, IF THEY START RETIREMENT AT AGE 55!

MOREOVER, IT TOOK GROTHER SEVERAL YEARS TO OBTAIN EVIDENCE OF WRONGFUL UPRR BUSINESS ETHICS, UNFAIRNESS, INTIMIDATION AND RETALIATION BY CERTAIN UPRR MANAGERS, INCLUDING AN APPEAL "TO FAIR TREATMENT", WHICH IS ALLEGED AS THE FUNDAMENTAL RIGHT OF *ALL UPRR* EMPLOYEES. ALL THE ABOVE EFFORTS HAVE LED TO NO APPROPRIATE RESPONSE FROM UPRR, CONCERNING COMPENSATION FOR BEING A DISPLACED EMPLOYEE. LAST UPRR ANSWER WAS 3/10/03 ON FAIRNESS!

MUCH OF THE DELAY PRESENTING THIS DISPUTE COULD HAVE BEEN REDUCED. IF SELECT UPRR REPRESENTATIVES HAD BEEN FORTHCOMING AND LESS RETALIATORY IN THEIR ACTIONS AND RESPONSES AS REQUIRED BY UPRR BUSINESS ETHICS.

14. IN 2001, UPRR OFFERED A VOLUNTARY EARLY RETIREMENT PROGRAM TO UPRR NON-AGREEMENT (MANAGER) PERSONNEL, AT WHICH TIME GROTHER WAS 54 YEARS OLD. ONE OF THE WARNINGS IN THE UPRR'S VERP VHS TAPE WAS THAT IF YOU ARE NOT 55 YEARS OLD, DO NOT ACCEPT THIS OFFER, UNLESS INDEPENDENTLY WEALTHY, OR COULD ACCEPT A SUBSTANTIAL DROP IN YOUR PENSION. THIS IS CORROBORATION THAT AGE 55 IS THE POINT WHERE UPRR PENSION BENEFITS PROVIDE "BARE BONES BENEFITS".

    SAID 2001 VERP ALSO CLEARLY DISPLAYED JUST HOW BADLY GROTHER'S UPRR PENSION HAD BEEN DAMAGED BY THE 1997 DEMOTION. WHEN COMPARED TO ANOTHER MANAGER WITH COMPARABLE AGE AND USING GROTHER'S OLD 1997 EARNING LEVEL (ESCALATED BY AVERAGE OF .035% PER ANNUM FOR INCREASES), GROTHER'S DISMAL

VERP PACKAGE WAS GREATLY REDUCED IN COMPARISON. THE OMBUDSMEN (271-2113) ADVISED FEBRUARY 2, 2001 THAT THE VERP HAD SUCH A "RETIREMENT REDUCTION", IN GROTHER'S CASE, BECAUSE IT WAS ONLY BASED ON ONE'S LAST THREE YEARS OF PAY (1998-2000) IF YOU WERE A EX-SPTCO OFFICER WHICH ELIMINATED GROTHER'S HIGHER EARNINGS IN 1996-1997. THE VERP ALSO RESULTED IN QUESTIONS WHICH EXPOSED THE FACT THAT THE "PENSION PLAN OF UPRR FOR EX-SPTCO PERSONNEL" DOES NOT ALLOW WAGES BEFORE JANUARY 1, 1998 TO BE INCLUDED IN THE "FAE" PENSION CALCULATIONS OF UPRR, CREATING GROTHER A SUBSTANTIAL PENSION REDUCTION.

GROTHER IS STILL AWAITING A RESPONSE FROM THE PENSION DEPARTMENT TO COMPUTE RETIREMENT DAMAGE. EXHIBIT 46 INDICATES AN AUGUST 25, 2002 REQUEST.

15. TO THE LAYMAN, BINDING ARBITRATION BY THE NATIONAL MEDIATION BOARD APPEARS TO BE EXTREMELY DIFFICULT FOR AN INDIVIDUAL, WHO IS NOT REPRESENTED BY A UNION. IN ADDITION, ARTICLES HAVE BEEN WRITTEN WHICH INDICATE THAT SOME ARBITORS MAY FEEL PRESSURED TO RENDER DECISIONS THAT WILL NOT ALIENATE COMPANIES WHO MAY HIRE THEM AGAIN, AS OPPOSED TO THE SOLE EMPLOYEE WHO HAS NO FUTURE BUSINESS TO OFFER. BELOW ARE SPECIFIC EXAMPLES OF HOW AN INDIVIDUAL WOULD BECOME CONCERNED ABOUT THE POSSIBILITY OF RECOVERY FROM ARBITRATION WITH THE RISKS STATED IN PUBLICLY PUBLISHED DOCUMENTATION. GIVEN ONE'S CAREER HAS ALREADY BEEN ENDED AND CRITICAL MEDICAL INSURANCE FURTHER AT RISK, HOW COULD ONE REASONABLY FILE FOR ARBITRATION BEFORE ALL KNOWN FACTS (AVAILABLE, AS MANY ARE NOT MADE READILY AVAILABLE) FACTS WERE OBTAINED FROM SOME RECALCITRANT PERSONS AND THE INSURANCE ISSUE IS PROTECTED AT AGE 55 ("RETIREE"). BELOW ARE A FEW SAMPLES OF ARTICLES WHICH CREATE EXTREME FEAR IN REQUESTING ARBITRATION AS AN INDIVIDUAL.

A. RAILWAY AGE ARTICLE DATED JULY 18, 1999 ON NEW YORK DOCK/STB AGREEMENT WHICH DISCUSSES "CRAM-DOWN" REGARDING AN ALLEGED BIAS BY "RAIL REGULATORS" (I.E. SURFACE TRANSPORTATION BOARD), WHICH AFFECTED ARBITOR DECISIONS (EXH. 37):

"MYRON (BROTHERHOOD OF M OF W) INSISTS RAIL REGULATORS SO OFTEN OVERTURNED ARBITRATED DECISIONS FAVORABLE TO EMPLOYEES DURING THE 1980'S THAT **ARBITORS BECAME CONDITIONED TO GRANTING RAILROADS UNDUE PREFERENCE."**

B. EXH. 38 INDICATES AN ARTICLE FROM AARP WHICH QUOTES PAUL PALEFSKY, A LAWYER IN SAN FRANCISCO FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION STATING:
" ...ARBITORS MAY FEEL PRESSURED TO RENDER DECISIONS THAT WILL PLEASE (OR AT LEAST WON'T ALIENATE) COMPANIES THAT MAY HIRE THEM AGAIN."

C. SEVERAL ATTORNEYS HAVE STATED THAT AN INDIVIDUAL FILING ARBITRATION IS AT A DISADVANTAGE, AS YOU HAVE "NO REPEAT BUSINESS TO OFFER AN ARBITOR" AND ARBITORS NEED TO MAKE A LIVING TOO. SUCH STATEMENTS DO NOT INSPIRE AN INDIVIDUAL CLAIMANT TO COME FORWARD.

16. GROTHER WAS PERPLEXED BY HIS SEVERE 1997 PAY REDUCTION THAT WAS RELATED TO GROTHER'S SEVERE DEMOTION BECAUSE A PRIOR TO MERGER MGR. WITH UPRR WAS "DEMOTED AND TRANSFERRED FROM OMAHA SAFETY DEPARTMENT" TO TUCSON ON/ABOUT FEBRUARY 15, 1997 (FOUR MONTHS BEFORE GROTHER'S DEMOTION DECISION). HE BRAGGED THAT HE HAD CONNECTIONS AT UPRR HQ. AND HIS HIGHER PAY FROM HIS OMAHA SAFETY JOB WOULD NOT BE REDUCED; DESPITE HIS DEMOTION. HIS NAME WAS THEODORE F. INGRAM AND GROTHER IS SURE THAT HIS PRESENT WAGE HAS CONTINUED TO ESCALATE MUCH HIGHER THAN GROTHER'S, AS GROTHER IS STILL TRYING TO GET BACK TO GROTHER'S 1995 LEVEL OF PAY! WHY WAS

GROTHER TREATED DIFFERENTLY THAN INGRAM, WHO HAD BEEN DEMOTED AND TRANSFERRED? ALL THE ABOVE INCONSISTENT WAGE REDUCTION TREATMENTS CREATE FEAR OF RETALIATION AND MORE DISCRIMINATION.

17. UPRR PROVIDED AN INSERT WITH GROTHER'S DIMINISHED CHECK WHICH WAS RECEIVED MARCH 1, 2001 WHICH ADVISED GROTHER "IF YOU RETIRE AND TAKE A CASH DISTRIBUTION FROM YOUR 401(K) PLAN, YOU'LL PAY INCOME TAX ON THE TAXABLE PORTION OF THE DISTRIBUTION - PLUS A 10% FEDERAL TAX PENALTY, **IF YOU ARE UNDER AGE 55 WHEN YOU SEPARATE FROM THE COMPANY".**

THIS AGAIN GOES TO THE ISSUE OF BEING UNABLE TO TAKE ANY REALISTIC ARBITRATION ACTION BECAUSE ONE WOULD BE WIPED OUT FINANCIALLY, AS A MANAGEMENT INDIVIDUAL, UNTIL AGE 55 IS REACHED.

THIS APPEARS TO ALSO MEAN THAT SHOULD ONE HAVE BEEN TERMINATED (BEFORE AGE 55), AS RETALIATION FOR FILING ARBITRATION OR EVEN A FURTHER APPEAL TO SENIOR MANAGEMENT AND TAKE A CASH DISTRIBUTION FROM ONE'S 401(K) TO PAY FOR MEDICAL INSURANCE AS YOUR "EARLY UPRR PENSION" IS ESTIMATED AT LESS THAN $400 PER MONTH IN 1997, THE RESULT WOULD BE FURTHER FINANCIAL PUNISHMENT IN PERPETUITY. MEDICAL INSURANCE AND LIVING EXPENSE WITHDRAWALS WOULD ELIMINATE ONE'S DEMINIMUS LIFETIME SAVINGS. GROTHER COULD NOT AFFORD TO LOSE A SUBSTANTIAL PORTION OF GROTHER'S SAVINGS PLAN ON "UNNECESSARY TAXATION".

OF COURSE, ONE WOULD TRY TO OBTAIN REPLACEMENT EMPLOYMENT. HOWEVER, THE SPECIALIZED SKILLS OF RAILROADING (ESPECIALLY AS AN OPERATING OFFICER) ARE NOT HIGHLY MARKETABLE. AGE IS ALSO A FACTOR. AGE FIFTY-ONE AND UP IS A "HARD SELL" WITH ONLY MARKET SPECIFIC RAILROAD MANAGEMENT SKILLS.

18. IT IS WELL ESTABLISHED THAT PSYCHOLOGICAL AND PHILOSOPHICAL CLASHES OCCUR AS AN AFTERMATH OF MERGERS. PER MITCHELL LEE MARKS, PHD, "...WORKERS THAT REMAIN WILL BECOME ... SCARED..." (EXH. 47) THUS BEING "SCARED"; ESPECIALLY GIVEN BEING DEMOTED TWO SALARY RATE GRADES WITHIN THREE MONTHS OF THE MERGER TRANSACTION VP'S ARRIVAL (FOR NO FAULT OR DECISION OF YOUR OWN), DOES CREATE FEAR TO FURTHER APPEAL, ARBITRATE OR SEEK OTHER LITIGATION.

19. GIVEN THAT GROTHER IS HARASSED AND THREATENED ALMOST WEEKLY WITH LOSING HIS JOB OF 34 YEARS FOR ANYTHING FROM "FAILURES OF THE UPRR REPORTING SYSTEMS (I.E. SOMEONE ENTERED THE WRONG DEPARTURE DELAY CODE") TO OTHER ISSUES TOTALLY OUT OF GROTHER'S CONTROL, HOW COULD GROTHER DARE TO FILE ARBITRATION BEFORE AT LEAST AGE 55?

20. THE INVOLUNTARY SEVERANCE PROGRAMS AT UPRR FOR NON-AGREEMENT (MANAGERS) HAVE CONTINUED A PATTERN OF BEING CONTINUOUSLY REDUCED SINCE THE MERGER. INITIALLY, THOSE WITH OVER TWENTY YEARS OF SERVICE (LIKE GROTHER) HAD BEEN OFFERED EIGHTEEN (18) MONTHS OF SEVERANCE PAY PER MY RECORDS. ON DECEMBER 28, 2000, GROTHER HAD JUST TURNED 53 YEARS OF AGE AND UPRR ANNOUNCED THAT SEVERANCE PAY WAS REDUCED TO TWELVE (12) MONTHS FOR THOSE OVER TWENTY YEARS OF SERVICE. THEREFORE, SHOULD ONE APPEAL, FILE ARBITRATION OR TAKE ANY OTHER ACTION, ONE COULD READILY BE IDENTIFIED FOR "INVOLUNTARY SEVERANCE", DEPENDING ON "CONTROLLED CONDITIONS". UPRR HAS THE ABILITY TO INITIATE ANOTHER ROUND OF INVOLUNTARY BUYOUTS AT ANY TIME AND THOSE THAT FIGHT BACK WILL GO TO TOP OF "ELIMINATION LIST". WITHOUT AGE 55 MEDICAL INSURANCE, THERE IS NO FINANCIALLY REASONABLE WAY TO ARBITRATE.

TO ILLUSTRATE UPRR'S APPROPRIATE RIGHT AND CONTINUING EFFORTS TO REDUCE MANAGEMENT PERSONNEL, EXH. 51 IS A RECENT OMAHA WORLD-HERALD ARTICLE DATED JANUARY 14, 2003 INDICATING, IN PART:

"...THERE MAY BE MANY INSTANCES WHERE AFFECTED PEOPLE WON'T BE OF RETIREMENT AGE"

"...EMPLOYEES ARE NOT BEING OFFERED EARLY RETIREMENT" "

"...SEVERANCE PACKAGES WERE BASED ON YEARS OF SERVICE BUT DECLINED TO GIVE DETAILS"

"WHEN UPRR CUT JOBS IN 2001, EMPLOYEES WERE OFFERED A SEVERANCE PACKAGE AND A BUYOUT PROGRAM"

GROTHER HAD TO WAIT UNTIL HIS 55TH BIRTHDAY TO EVEN START ASKING FOR HIS PERSONAL RECORD, IN FEAR THAT THIS WOULD RESULT IN RETALIATION, WHICH IT APPARENTLY DID, IN THE FORM OF TWO URINALYSIS TESTS, NEARLY BACK TO BACK. ALSO, AS FURTHER RETALIATION, GROTHER'S SUPERVISOR FRYAR WOULD NOT TRAIN GROTHER ON THE BUDGET DUTIES NEEDED TO BECOME FRYAR'S REPLACEMENT, WHEN FRYAR RETIRED FEBRUARY 2003. THE SEARCH FOR RECORDS, 1997 DEMOTION POLICY, INTERVIEWS OF DEMOTION PAY CUTS, ETC., HAS BEEN VERY FRUSTRATING WITH NUMEROUS DEADENDS AND MISDIRECTION.

21. GROTHER HAD BEEN ADVISED THAT THE NATIONAL RAILROAD ADJUSTMENT BOARD WAS THE VENUE FOR **INDIVIDUAL ARBITRATION**; BUT, THAT WAS INCORRECT FOR EMPLOYEES NOT PROTECTED BY AN AGREEMENT (EXH. 54) RESEARCH CREATED ADDITIONAL DELAY IN THIS SUBMISSION. ALSO, FINDING LEGAL COUNSEL, TAKES TIME.

IN SUMMARY, THE UPRR HAS NOT BEEN ADVERSELY AFFECTED BECAUSE OF ANY DELAY IN SUBMITTING THIS DISPUTE. THE DELAY IN SUBMITTING THIS DISPUTE WAS CAUSED BY

DOCUMENTED FEAR OF RETALIATION, ACTIONS OF PREJUDICE AND DISCRIMINATION ACTUALLY PERPETRATED BY UPRR AGAINST GROTHER AND OTHERS WHO DARED TO LITIGATE (I.E. 1996 FRANSCONI CASE WHERE UPRR DELAYED COBRA HEALTH INSURANCE FOR LITIGANTS WIFE), DELAYS IN GATHERING EVIDENCE DUE TO UPRR REPRESENTATIVES EFFORTS TO CREATE DEAD-ENDS, MISDIRECTION, SHREDDING KEY DOCUMENTS, ALLEGED DISINGENUOUS BEHAVIOR. MOREOVER, THE PERSONS WHO DEMOTED GROTHER ARE STILL EMPLOYED BY UPRR AND SHOULD BE READILY ABLE TO DOCUMENT THE DETAILED "JUSTIFICATION" WHY GROTHER'S "PERSONAL PERFORMANCE" SUDDENLY BECAME "NOT WHAT WAS NEEDED" AFTER:

A) PERSONAL PERFORMANCE BEING OUTSTANDING FOR 28 YRS.
B) TWENTY (20) MONTHS AS THE INCUMBENT ON THE JOB,
C) JUST (2) MONTHS AFTER BEING SELECTED AS UPRR'S SENIOR MANAGER TERMINAL OPERATIONS (SRMTO) AT TUCSON AS THE RESULT OF REVIEWING GROTHER'S RECORD OVER SIX MONTHS AND GROTHER'S PERSONAL PERFORMANCE FROM JAN. THROUGH APRIL 1997 (3.5 MONTHS OF DAILY REVIEWS OR POSSIBLY MORE, DEPENDING ON PACKARD'S ARRIVAL).

WHY WAS GROTHER DEMOTED TWO SALARY RATE GRADES ($1,272 PER MONTH); WHEN, NO OTHER UPRR MANAGER IN 1997 WAS REDUCED IN PAY DURING THE SYSTEM WIDE SERVICE FAILURES?

IN COMPARISON, DESPITE GROTHER'S BELOW FINANCIAL DENIGRATION FOR LIFE AS A DISPLACED EMPLOYEE, GROTHER HAS PERFORMED IN A STABLE AND PREDICTABLE PATTERN SINCE JULY 1, 1997:

- FINANCIALLY (DEMOTED GRADE 19 TO 17, OR BAND C TO B) AND ADVERSELY AFFECTED AS A "DISPLACED EMPLOYEE". GROTHER HAS BEEN DEPRIVED OF OVER $107,000 THOROUGH 6/1/03.

- UPRR AND RAILROAD RETIREMENT HAVE BEEN REDUCED FOR A LIFETIME FOR BOTH GROTHER AND HIS WIFE.

- CONSISTENTLY BEEN REJECTED IN HIS EFFORTS TO SEEK PROMOTION, OR EVEN, A LATERAL TRANSFER! GROTHER HAS DOCUMENTED A FEW OF HIS NUMEROUS APPLICATIONS (EXH. 31) ON CNET AND THE RECENTLY "IMPROVED INTERNAL UPRR CNET SYSTEM", WHICH ALL RESULTED IN ONLY ONE PHONE INTERVIEW.

GROTHER'S TREATMENT BY UPRR COMPARED TO OTHERS WHO WERE IN COMMAND ROLES -"COMPARATIVE JUSTICE":

COMPARING THE "DEMOTION DISCIPLINE" EXECUTED ON GROTHER BY UPRR, FOR JUST BEING IN THE WRONG PLACE WHEN SHOENER MADE A MERGER CONSOLIDATION EXPERIMENT, WITH "DISCIPLINE" ISSUED TO OTHERS IN "COMMAND ROLES". EVEN RECENT MILITARY COMMANDERS WHO WERE "IN COMMAND" WHEN ***LOSS OF LIVES OCCURRED BY ACCIDENTS, HAVE NOT BEEN FINANCIALLY AFFECTED LIKE GROTHER'S PENSIONS. GROTHER WAS NOT INVOLVED IN ANY LOSS LIFE ISSUES, CUSTOMER SETTLEMENTS, LAWSUITS.***

1. EXH. 39 INDICATE THE RESULT OF THE HIGH PROFILE NEWS CASE OF USS GREENEVILLE CMDR. SCOTT WADDLE WHO WAS "IN COMMAND" WHEN HIS SUBMARINE SURFACED AND ***KILLED NINE (9) JAPANESE SAILORS. THE NAVY SAID WADDLE WILL RECEIVE HIS PENSION AND FULL RETIREMENT PAY!***

2. EXH. 40 CONCERNS THE FATE OF COLONEL LARRY D. NEW'S, WHO WAS COMMANDER AT NELLIS AFB 57TH OPERATIONS GROUP WHEN TWELVE (12) ***AIRMEN WERE KILLED.*** HE WAS TEMPORARILY SIDELINED IN A STAFF JOB ACCOUNT MEDIA

SCRUTINY; BUT HE RECEIVED ***NO LOSS OF PAY OR RETIREMENT BENEFITS.*** IN FACT, "GENERAL (SELECT) NEWS" WAS APPROVED AUGUST, 2001 TO BECOME A GENERAL AND HE ASSUMED COMMAND OF THE 325TH FIGHTER WING AT TYNDALL AFB, FL ON JULY 12, 2002, TRAINING ACTIVE DUTY JET PILOTS.

3. EXH. 41, MR. STEVE CLARK, PRIOR ATTORNEY GENERAL OF ARKANSAS AND CANDIDATE FOR GOVERNOR OF ARKANSAS IN 1990 WAS FOUND GUILTY OF USING THE STATE'S CREDIT CARD, A FELONY CONVICTION. IN JUNE 2000, HE WAS GIVEN ***A SECOND CHANCE*** BY THE TEXAS BOARD OF LAW EXAMINERS, WHO ALLOWED HIM TO TAKE THE TEXAS BAR EXAM BECAUSE "***WE BELIEVE IN REHABILITATION IN TEXAS AND YOU LOOK LIKE YOU'VE HAD ENOUGH"***

PARTIAL LIST OF MORE UPRR POLICIES WHICH SUPPORT COMPENSATING GROTHER AS A DISPLACED EMPLOYEE:

1. THE BUSINESS CONDUCT POLICY OF UPRR, AS NOTED ON UP ONLINE JUNE 28, 2002 (AGAIN EXH. 42) STATES, IN PART, "IN THE CONDUCT OF BUSINESS, EACH EMPLOYEE MUST ADHERE TO HIGH ETHICAL STANDARDS. THESE INCLUDE HONESTY (I.E. ***TRUTHFUL DEALING WITH EVERYONE, INCLUDING...FELLOW EMPLOYEES) AND FAIRNESS (I.E. TREATING ANOTHER IN THE SAME MANNER AS YOU WOULD EXPECT TO BE TREATED.)"***

2. GROTHER IS HOPEFUL THAT THE BELOW COMPANY WIDE PUBLISHED STATEMENT BY PRESIDENT AND COO IKE J. EVANS IN THE LOTUS NOTE TO ALL EMPLOYEES DATED FEBRUARY 4, 2002, WILL ALLOW A FAIR AND IMPARTIAL REVIEW OF THIS DISPUTE ISSUE:

" INTERNALLY, ALL OF US MUST HEIGHTEN OUR EFFORTS TO 'WALK THE TALK'. TO ME, ***THIS MEANS MATCHING THE EVERYDAY BEHAVIOR WITH THE VISION AND VALUES OF THE COMPANY. THIS IS A PREREQUISITE TO US ADVANCING INTO THE HIGHEST RANKS OF U.S. BUSINESS."***

FURTHERMORE, PRESIDENT IKE EVAN'S LOTUS NOTE JUNE 3, 2002 CONCERNING UPRR'S REPUTATION STATUS: "WE WANT TO ENHANCE THE REPUTATION OF THE UNION PACIFIC AND THE MEN AND WOMEN, LIKE YOU, WHO WORK HARD EVERY DAY TO MAKE US ONE OF THE BEST COMPANIES IN THE WORLD." GROTHER HAS WORKED HARD FOR 34 YEARS, (ESPECIALLY AS A 12 HOUR PLUS DAY OPERATING OFFICER) "BUILDING AMERICA" tm; BUT, HIS REPUTATION HAS BEEN RUINED BY THE TUCSON DEMOTION DISPLACEMENT. CAN THE REVIEWERS OF THIS DISPUTE AT LEAST RESTORE GROTHER'S COMPENSATION, AS GROTHER'S REPUTATION IS TARNISHED FOREVER?

3. EVEN IN TODAY'S 2003 UPRR CORPORATE CULTURE, IT IS STILL VERY DIFFICULT TO OBTAIN INFORMATION REGARDING WHY ONE HAS BEEN DISPLACED AND PIGEONHOLED. IT IS HOPED THAT THE "2002 UNION PACIFIC VALUES AND LEADERSHIP BEHAVIORS" (EXH 1), THE UPRR BALDRIDGE AWARD COMMITMENT, AND UPRR'S DESIRE TO ENHANCE ITS REPUTATION; ALL REVIEWED IN THEIR TOTALITY, WILL ALLOW UPRR TO FAIRLY ASSESS GROTHER'S LOSS AND PROVIDE REIMBURSEMENT TO "WALK-THE-TALK", AS DESCRIBED IN UPRR'S BUSINESS CONDUCT POLICY OR ETHICS AS SHOWN ON EXH. 42.

4. AS PART OF THE 2002 UPRR "BUILDING AMERICA" tm AD CAMPAIGN, THE GROTHERS RECEIVED A "IBM SIZED CARD" (EXH. 43) WITH GROTHER'S SEVERELY REDUCED PAYCHECK AT THEIR HOME STATING ON ONE SIDE

   "ITS TIME AMERICA HEARD YOUR STORY"

GROTHER WOULD PREFER TO SETTLE THIS MERGER RELATED TRANSACTION EXPERIMENT DEMOTION ISSUE WITHOUT BEING REQUIRED TO DETAIL THE GROTHER'S FINANCIAL AND EMOTIONAL DENIGRATION STORY TO THE NATIONAL MEDIATION BOARD NEUTRAL, AND SHOULD AN APPEAL BE NEEDED, TO THE SURFACE TRANSPORTATION BOARD.

WHOMEVER THE UPRR DECISION MAKERS ARE CONCERNING GROTHER'S ATTACHMENT 2 COMPENSATION DISPUTE CLAIM, PLEASE CONSIDER GROTHER'S FAIRNESS MANTRA:

HOW WOULD YOU WANT TO BE TREATED AS THE RESULT OF JUST BEING IN THE WRONG PLACE, AT THE WRONG TIME, WHEN A 1.5 MONTH MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT WAS ORDERED WITHOUT CAPACITY-RESOURCE PROCESS STUDIES AND M OF W CURFEWS ON EACH SIDE?

"WOULD YOU WANT A 21% OR $1,272 CUT IN WAGES, RETIREMENT AND A RUINED CAREER, FOR SOMEONE ELSE'S VICARIOUS MERGER EXPERIMENT DECISION?"(EXH. 42)?"

GROTHER HAS NOT LET THE ABOVE UNFAIRNESS AND TREATMENT AS A DISPLACED EMPLOYEE DESTROY HIS WILLINGNESS TO BE A "TEAM PLAYER". EXHIBIT 44 INDICATES GROTHER'S CONTINUING ABILITY AND WILLINGNESS TO ASSIST THE UPRR TO OBTAIN CRITICAL LEGISLATION.

MR. R.F. DAVIDSON IS QUOTED IN AN JULY 2, 2002 HOUSTON CHRONICLE ARTICLE DESCRIBING UPRR EXPENDITURES OF UNDER HALF A BILLION TO SETTLE THE 1997-8 MERGER RELATED SYSTEM-WIDE SERVICE FAILURE DEBACLES; INCLUDING CUSTOMER SETTLEMENTS AND LAWSUITS. IT WAS **DESCRIBED AS UPRR'S WORST PUBLIC DRUBBING, AND:**

"...THE PAIN FROM THE MERGER LASTED LONGER THAN ANYONE ANTICIPATED" (EXH. 45)

GROTHER'S FINANCIAL AND EMOTIONAL PAIN AS A DIRECT NEXUS TO A FAILED MERGER EXPERIMENT IS NOT OVER; AND, GROTHER'S PUBLIC AND PRIVATE DRUBBING CONTINUES!

IN SUMMARY, PURSUANT TO THE NEW YORK DOCK PROTECTIVE CONDITIONS, FINANCE DOCKET NO. 28250, APPENDIX III, ARTICLE IV, THIS IS OFFICIAL NOTICE THAT SHOULD THE PARTIES BE UNABLE TO SETTLE THIS DISPUTE

REGARDING GROTHER'S DISPLACED COMPENSATION AND FRINGE BENEFITS WITHIN THIRTY (30) DAYS, OR JUNE 16, 2003, SAID AVERAGE MONTHLY COMPENSATION AND FRINGE BENEFITS DISPUTE WILL BE REFERRED TO ARBITRATION.

ANY QUESTIONS, PLEASE CALL GROTHER AT 281-359-5667, AFTER 1500 CT, AS GROTHER IS STILL WORKING THE NIGHT SHIFT AFTER 34 YEARS OF LOYAL AND DEDICATED SERVICE.

SINCERELY,

JEG

ENCLOSURES:
ATTACHMENT TWO (pgs 1-4)
AND EXHIBITS 1-54

JOHN GROTHER

ATTACHMENT TWO – FINANCIAL LOSSES CREATED AS DIRECT RESULT OF GROTHER DEMOTION JULY 1, 1997 BECAUSE OF MERGER EXPERIMENT TO CONSOLIDATE

AVERAGE MONTHLY COMPENSATION LOSS:

MO. AVERAGE PAY FOR 12 MONTH PERIOD PRIOR 7/1/97 = $6,200

LESS: MO. PAY@ "TAKE IT OR LEAVE IT" HOUSTON JOB = $4,928

MONTHLY GROTHER LOSS IN COMPENSATION = $1,272

PERIOD OF TIME	PER MONTH	TIMES # OF MONTHS	HISTORICAL LOSS
7/1/97 – 6/30/98	$1, 272	12	$ 15, 264
7/1/98 – 6/30/99	1, 272	12	15,264
7/1/99 – 6/30/00	1,272	12	15,264
7/1/99 – 6/30/01	1,272	12	15,264
7/1/00 – 6/30/02	1,272	12	15,264
7/1/02 – 6/30/03	1,272	12	15,264

TOTAL DISPLACED EMPLOYEE BASE WAGE COMPENSATION LOSS THRU 6/30/03 $ 91,584.00

- THE ABOVE DATA ASSUMES NO SALARY INCREARES
- THEREFORE, IF ASSUME A 3.0% ANNUAL SALARY INCREASE
- APPLY SAID SALARY INCREASE TO THE ANNUAL/MONTHLY LOSS TIMES .030.
- (.030 x $15,264) = $458 X 6 YEARS = $ 2,748.00

BASE WAGE LOSS, PLUS EFFECT OF ASSUMED 3.0% ANNUAL SALARY INCREASES $ 94,332.00

(ABOVE SUB-TOTAL REPRESENTS SIX YEARS AS DISPLACED EMPLOYEE AND DOES NOT INCLUDE THE FRINGE BENEFITS NEXT UNDER).

THE ABOVE DOES ATTEMPT TO RECOGNIZE SOME NORMATIVE AMOUNT WHICH REPRESENTS THE GENERAL TYPE OF 3.0% SALARY INCREASES OVER THIS TIME FRAME. HAD I BEEN IN THE TUCSON OR OTHER "OPERATING DEPARTMENT JOB" (OPRNS), IT IS NOT UNCOMMON TO RECEIVE AN ANNUAL SALARY INCREASE OF 5-7% EACH YEAR AND GET A BONUS ON TOP OF THAT, WHICH THEN BECOMES A PART OF ONE'S FINAL RETIREMENT AND PENSION COMPENSATION CALCULATIONS.

I WAS ALSO DENIED THE ABILITY TO INCREASE MY SALARY SUBSTANTIALLY BECAUSE I REACHED THE SALARY CAP FOR MY DEMOTED SRG @ $61,140 WITHIN SIX MONTHS OF BEING ASSIGNED TO INTERMODAL. IN CONTRAST, MY PRIOR POSITION , THEN OCCUPIED BY **TOM S. PARR, WAS GIVEN AN IMMEDIATE INCREASE TO $6,338/MO.** EFFECTIVE 7/1/97. MOREOVER, PARR'S GRADE 19 SRG HAD A CAP OF $78,264; WHICH MEANS, MR. PARR WAS ABLE TO GET MORE INCREASES ON THE NEXT REVIEW; WHEREAS, MY SRG WAS CAPPED OUT, OR "AT THE TOP OF MY SALARY RANGE". IT WOULD BE VERY INTERESTING TO COMPARE THE PAY RAISES, BONUS'S, EXPENSE ACCOUNTS AND OTHER FRINGE BENEFITS (I.E PROMOTION OF PARR TO DTO @ WEST COLTON, RETIREMENT, ETC.) BETWEEN MIO GROTHER AND DTO PARR SINCE 7/1/97.

The requested amount of $107, 370 is greatly understated because:

- Wages/bonuses/expense accounts and other fringe benefits (starting 7/1/97) provided to my Tucson replacement, Mr. Thomas Parr, have and will greatly outpace my TO DATE AND pension earnings (See Parr's vs. Grother total compensation in the UPRR data bases)

- Includes no recognition of the emotional denigration and stress that both my wife and I have endured for almost six years. Includes assistance toward the restoration of my tarnished reputation, which is irreparable.

- Fact we will now need to move from Houston upon retirement.

- No compound interest or loss of use of money for 6 years is recognized.

NOTWITHSTANDING THE ABOVE, I AM WILLING TO ACCEPT THE $107, 370 (REDUCED BY APPROPRIATE TAXES) , TO RESOLVE UNFAIR TREATMENT FROM A MERGER YARD CONSOLIDATION EXPERIMENT ORDERED BY UPRR VPO.

ATTCH 2: PAGE 3 OF 4

LOSS OF FRINGE BENEFITS

DEPRIVED OF BENEFITS ATTACHED TO HIS PREVIOUS EMPLOMENT BY THE DEMOTION & TRANSFER TO HOUSTON

1. LOSS OF FREE TRANSPORTAION (I.E. COMPANY PROVIDED VEHICLE). AS A SPTCO. TERMINAL SUPERINTENDENT, ON DUTY AND ON CALL 24 HOURS PER DAY, THE SPTCO. APPROPRIATELY PROVIDED FREE TRANSPORTATION TO / FROM WORK AND TO ACCIDENTS, INCIDENTS, PERSONAL INJURIES ON A 24 / 7 / 365 DAYS PER YEAR BASIS. AFTER THE UP-SP MERGER, UPRR CONTINUED TO PROVIDE FREE TRANSPORTATION FOR "FIRST RESPONDERS" UNTIL 6/30/2000, WHEN MOST CARS WERE RECALLED (SOME STILL RECEIVE SOME TYPE OF VEHICLE REIMBURSEMENT; BUT, I HAVE NO ACCESS TO THAT INFORMATION TO DETERMINE ANY CONTINUING CLAIM:

(IF INFORMATION WERE MADE AVAILABLE ABOUT ANY CURRENT RE-IMBURSEMENT FOR THE BAND C, THEN THE BELOW LOSS SHOULD BE AMENDED ACCORDINGLY).

IN BOTH TUCSON AND HOUSTON, MY ONE WAY COMMUTE TO WORK WAS AND IS APPROXIMATELY 25 MILES ONE WAY. THEREFORE, TO COMPENSATE FOR MY PAST LOSS OF FREE TRANSPORTATION, I AM WILLING TO STIPULATE THAT THE "IRS RATE PER MILE" WILL BE PROVIDED AS "BACK COMPENSATION" BASED ON THE MINIMUM OF 50 MILES ROUNDTRIP PER DAY x 260 WORKING DAYS PER YEAR (I HAVE WORKED EVERY SATURDAY), LESS 25 VACATION DAYS OR 235 DAYS PER YEAR OF CAR USE:

PERIOD OF TIME	# OF DAYS	MILES PER DAY	IRS RATE	LOSS
7/1/97 – 6/30/98	235	50	$ .315	$ 3,701.25
7/1/98 - 6/30/99	235	50	$.325	$ 3,818.75
7/1//99 – 6/30/00	235	50	$.325	$ 3,818.75
LOSS OF FREE TRANSPORTATION COMPENSATION				$ 11,338.75

2. **LOSS OF MEDICAL FLEX CREDITS AS A FRINGE BENEFIT:**

FLEX CREDITS WERE BASED ON TOTAL COMPENSATION TO CALCULATE THE REDUCTION OF ONE'S MEDICAL COST. THEREFORE, AS YOUR COMPENSATION WENT DOWN, ONE WOULD HAVE FEWER FLEX CREDITS. BASED ON 1999 DATA, EACH FLEX CREDIT WAS ESTIMATED AT WORTH $26.61; THERFEFORE, A LOSS OF $573 IN FLEX CREDITS FOR A $ 15,264 REDUCTION IN ANNUAL WAGES:

YEAR	ANNUAL SALARY	FLEX CREDIT		EST CREDIT LOSS
1998	TO BE DETERMINED	TBD	*	550.00
1999	$ 62, 976	2, 367	**	573.62
2000	$ 62,184	TBD	*	575.00

ESTIMATED LOSS OF FLEX CREDIT USE TO OFSET MEDICAL COSTS , DENTAL & FLEXIBLE SPENDING = $ 1,698.62

- TO BE DETERMINED MEANS THAT ACTUAL VALUES NEED CORROBORATION FROM UPRR RECORDS, AS I HAVE MISPLACED THESE RECORDS; THEREFORE, AN ESTIMATED VALUE WAS UTILIZED FOR THIS INITIAL CALCULATION.
- FLEX CREDITS WERE DISCONTINUED IN 2001 AS "UNFAIR".

(** $62,976/2,367 CREDITS = $26.61 PER CREDIT OF VALUE. IF WAGES CUT $15,264/$26.61= 573.62 LOST FLEX CREDITS/YEAR.

EXCLUDING EXTREMELY ADVERSE AFFECT ON RETIREMENT BENEFIT CALCULATIONS, THE MINIMUM GRAND TOTAL WAGE AND FRINGE BENEFIT LOSS, WITHOUT INTEREST, FOR N.Y. DOCK DISPUTE THRU JUNE 30, 2003 IS = $ 107, 370

AMOUNT OF COMPENSATION REQUESTED = $ 107, 370

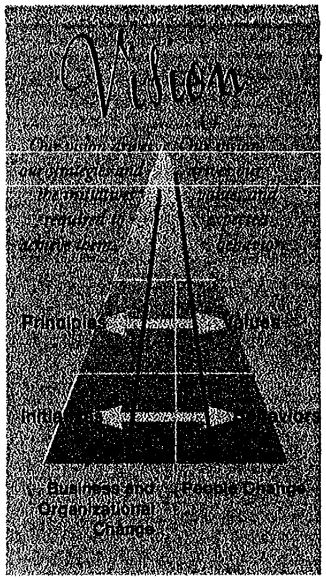
PLUS, MINIMUM PENSION LOSSES ARE ESTIMATED EXCEEDING TWO HUNDRED THOUSAND DOLLARS, SHOULD GROTHER'S LIVE TO BE 80 YEARS OLD! $ 200,000

MIN. EST. GRAND TOTAL OF ESTIMATED LOSS $ 310,000 (EXCLUDING TUCSON REAL ESTATE LOSSES)

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, and shareholder value is created.

UP VALUES AND LEADERSHIP BEHAVIORS

- **Safety:** *Safety comes first. We are each personally responsible for working safely and choosing the safest approach.*
  - We daily remind ourselves and other employees that safety is the company's first and overriding priority.
  - The safe way is the efficient way.
  - We report honestly but we find no accident acceptable and insist that all of us work on prevention of accidents.
- **Quality Principles:** *Customer Focus, Continuous Improvement, Teamwork, and Managing with Data are the way we run the business.*
  - We expect continuous improvement in all areas of our business by focusing on root causes of problems and creating action plans, time lines, and milestones to solve them.
  - Every action we take and every decision we make considers the customers' needs.
  - We will train our people to use and be skilled in Quality Principles and require them to demonstrate these skills as a daily habit.
- **Respect for Employees:** *We recognize all UP employees are critical to our success, and that ideas and aspirations exist at all levels in the organization. We value diversity in our workforce and the experiences, capabilities, and different viewpoints that each individual contributes.*
  - We act with respect for all employees.
  - We address our employees' developmental needs and build on their strengths by coaching and training.
  - We promote and reward managers for their leadership skills as well as their technical knowledge and abilities.
- **Commitment:** *We make realistic commitments to customers, employees and shareholders, and keep them.*
  - We set challenging, but achievable objectives.
  - We assure that we have the capability to meet our commitments.
  - We support each other in keeping commitments made to ourselves and others.
- **Accountability:** *The success of our company depends on our individual efforts. Each of us is responsible for the outcome of our efforts.*
  - We must make every employee aware that meeting our business objectives is critical to the success of the Company.
  - We accept personal responsibility for achieving the commitments we make.
  - We make no excuses, take responsibility for failures, but learn from our mistakes.



- **Simplicity:** *We keep things simple and focus on what is really important.*
  - We require that decisions be made at the lowest appropriate level.
  - We analyze and stay focused on the "critical few" items, which directly cause the results we want, while constantly removing low- or no-value steps from our business processes.
  - We define each individual's "critical few" in job agreements and make PDRs the performance drivers.
- **Communication:** *We will ensure an environment of open communications, where ideas are freely exchanged and listening is valued.*
  - We encourage 360-degree feedback, and we listen with respect.
  - We encourage novel thinking, evaluate ideas based on their merit regardless of source, and do not kill the messenger bearing bad news.
  - We put all issues on the table and attempt to resolve them through constructive debate and challenge.

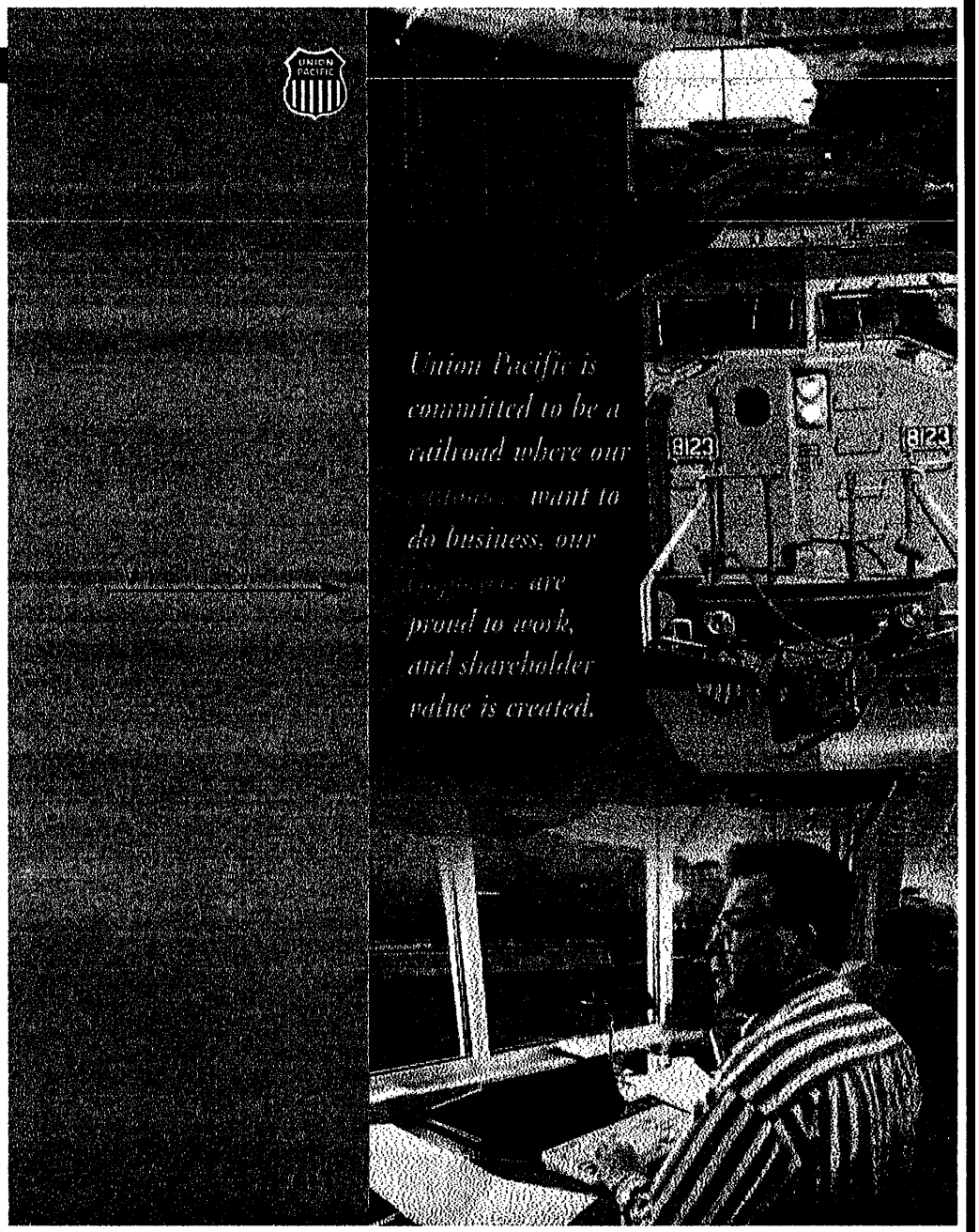
Union Pacific TRANSFORMATION

EXH. 4

BUSINESS PRINCIPLES

- **Recognize employees as critical to success.**
  Our employees are a critical asset; without them, we would not be able to serve our customers.
- **Recognize customers as critical to success.**
  Our customers depend on us for consistent and reliable service; we depend on them for their continued business.
- **Sell what we can deliver.**
  Our ability to match our customer commitments with network capacity is a key to our future success as a Company.
- **Deliver what we sell.**
  Our decentralized operating structure and network design capability will allow us to better meet our delivery commitments.
- **Maximize return on each dollar invested.**
  We will consider our shareholders' perspective with every investment decision we make.
- **Performance excellence.**
  We will use our focus on quality as the foundation for improved responsiveness to our customers and employees.
- **Lead effectively at all levels and strive for excellence.**
  We will use communication, training and performance feedback to develop leadership at all levels of our organization.

TRANSFORMATION



VALUES AND VISIONS 1997

EXH. 2.

UNION PACIFIC VALUES

We are dedicated to creating and maintaining a customer-focused environment...

...where people can be the best they can be."

– LEADERSHIP TEAM

IT DEPENDS ON ME

- *My team's success depends on me*
- *My contribution counts*
- *We all lead by the example we set*
- *Treat others like you want to be treated*
- *Enjoy your work; it's OK to have fun*

KEEPING OUR COMMITMENTS

- *Make commitments that are clear and realistic*
- *Do what we say we're going to do*
- *Create a sense of urgency*

BETTER, SIMPLER, SAFER

- *Safety is my responsibility*
- *Try new ideas... encourage change*
- *Focus on process improvement and timely results*
- *Keep it simple*
- *Emphasize the critical few*

OPEN COMMUNICATIONS

- *Tell it like it is*
- *Be here now... listen and respond with respect*
- *Share ideas and encourage different points of view*
- *Understand the requirement... when in doubt ask*

WE ARE ALL PART OF THE UNION PACIFIC TEAM

- *Trust is essential*
- *Respect differences*
- *Recognize and reward the contributions of individuals and teams*
- *My success depends on my team's success*

We will deliver... *it depends on me.*™

10" long

STOP 1 of 2

FOR YOUR DESK

AS A REMINDER

OF WHAT IS IMPORTANT

POLICY IN FEB, 1997

EXH 2

VALUES AND VISION 1997

EXH. 2

UNION PACIFIC VALUES

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10" long

STAFF Exh 2

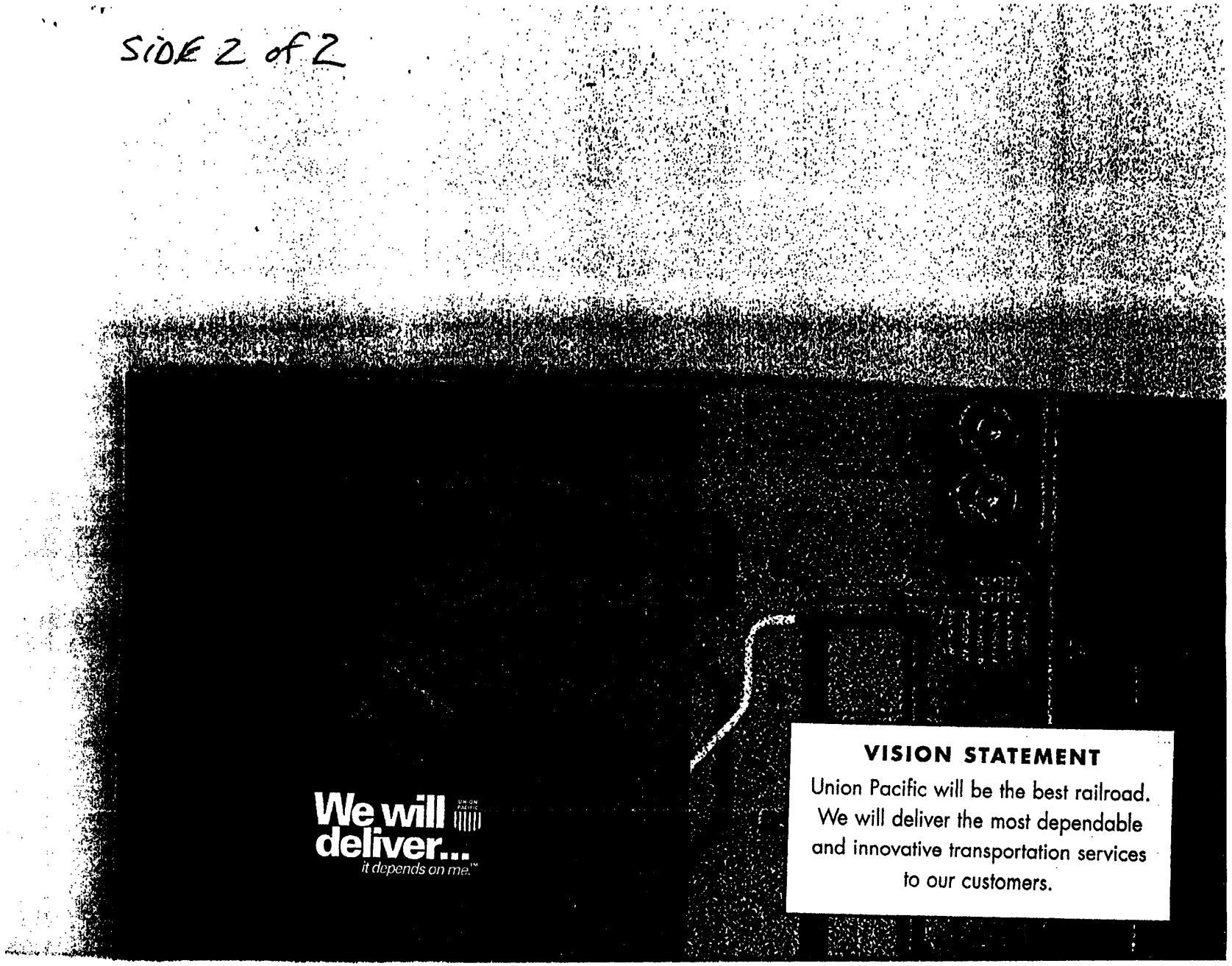
FOR YOUR DESK

AS A REMINDER

– AS WHAT IS IMPORTANT

POLICY IN FEB, 1997

SIDE 2 of 2


We will deliver...
it depends on me.™
VISION STATEMENT
Union Pacific will be the best railroad. We will deliver the most dependable and innovative transportation services to our customers.



EMM 5

521-34/925

cc: mkm

WPX

June 3, 1988

W.J.L.
JUN 03 1988

JUN 7 1988

Mr. W. J. Lacy:

Caltrans and the Joint Powers Board have requested that we open negotiations for a contract extension effective in June of 1990 on the current peninsula commute contract. We have countered that our interest is in selling the peninsula. We are in agreement with Caltrans that we will start a negotiating process to harmonize these two goals to the extent that that is possible.

We think it appropriate that John Grother be the lead negotiator and draw on others in the company as the need arises. I would suggest that John MacDonald Smith and Ray Mesick will be invaluable resources to him.

Burch Bachtold and myself will review the status of negotiations every quarter.

The Caltrans negotiating team will consist of Joe Browne, George Gray and O. J. Solander. If you or Mr. Grother are contacted by anyone from Caltrans, it is appropriate to schedule an initial meeting with them at our convenience, but not before you and our negotiating team meet with Mr. McNear and myself. Please advise if you are contacted by Caltrans.

D. M. MOHAN

cc: Mr. D. K. McNear
Mr. J. E. Grother
Mr. J. M. Smith
Mr. R. E. Mesick

R. W. McC.
JUN 3 1988
JUN 3 1988

EXH. 7A

2116
WLB
WRS

110-1
December 23, 1986

Mr. J. E. Grother:

Please refer to your letter of December 4, file 1000-40-A, requesting authority to execute agreements involving passenger trains/transit matters.

You are hereby authorized to execute agreements which pertain to passenger trains/transit operation matters. This authority applies with the respect to the following companies only:

Southern Pacific Transportation Company
St. Louis Southwestern Railway Company
Dallas Terminal Railway and Union Depot Company
Northwestern Pacific Railroad Company
Visalia Electric Railroad Company

You may, when the proposal has been approved, execute agreements except bonds and deeds. As an exception to this authority, you may execute agreements covering grants of easements or licenses to public bodies for passenger trains/transit operation purposes, which have been properly approved, if terminable upon abandonment by the user of the easement or license granted.

W. J. Lacy

cc: Mr. E. L. Johnson

Exh 4.B.

218-64
March 8, 1988

PERSONAL

Messrs. H. D. Fisher
R. D. Bredenberg
L. G. Simpson
L. F. Furlow
M. D. Ongerth
G. L. Pollitt
L. L. Phipps
K. L. Miller
E. L. Hord
G. D. Barnett
J. E. Grother
G. L. Murdock
P. D. Lively
J. D. Daniels
D. K. Medley
J. W. Lynch
G. A. Greblo
G. R. Fetty
M. L. Wells
A. M. Henson
L. L. Jenkins
R. R. McClanahan
J. W. Clark

Referring to my letter June 22, 1987, establishing a Special Awards Program for non-agreement employees whose efforts have significantly improved operating performance, productivity, or profitability and who have directed their attention to areas of greatest importance to the organization:

It is my pleasure to announce the top five candidates chosen to receive the Special Awards of $2,500:

Mr. J. E. Grother, General Manager-AMTRAK, Amtrak Department
Mr. D. J. Maxey, Geotechnical Engineer, Engineering Department
Mr. J. D. Puffer, Manager Divisions Clerical Operations, Operating Department
Mr. K. R. Regalia, Special Project Manager, Operating Department
Mr. M. D. Wasina, General Foreman, Mechanical Department

W. J. Lacy

EXH. 5

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179-0323

March 11, 1996

To: UP / SP Common Point Team Members / JOHN GROTHER

On November 30, 1995, Union Pacific and Southern Pacific filed the application for merger. This filing was the culmination of an enormous collective effort that began in August. Each of you contributed to this effort through your work with the Common Point team (made up of 38 individuals from both the Union Pacific and Southern Pacific).

During the two primary crunch months in particular, from our team's kickoff meeting on August 17 through the information transfer meetings on October 18, the travel and hours put in by each sub-team and team member were extraordinary (and somewhat unprecedented). The boxes of files in the Washington depository and quality of the operating plan are clear testimony to the Common Point team's contribution. These efforts will also help springboard the follow-up planning efforts for actual merger implementation, placing the railroad way ahead of where we have been in prior merger situations at a comparable time.

Please accept our sincere appreciation and thanks for your work on this project. As a further token and remembrance of this effort, we present you with the UP-SP Common Point Team watch (and regret that the process of obtaining and distributing it has taken as long as this).

Sincerely,

Richard Gray

Buck Hord

Brad King

CN. NO.		NEW OFFICER'S EA NO.
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	B T Wilson From PRA 207 11/16/79 to 5/15/80 #9497
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J C Wirich From PRA 457 11/16/79 to 5/15/80 #9537
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	P G Negrete From PRA 207 11/16/79 to 5/15/80 #6440
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79 to 5/15/80	U C Barton From PRA 207 11/16/79 to 5/15/80 #0494
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J W Wilshire From PRA 207 11/16/79 to 5/15/80 #9499
65	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	L G Powell From PRA 207 11/16/79 to 5/15/80 #7162
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	M R Stearman From PRA 607 11/16/79 to 5/15/80 #8426
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J C Malone From PRA 607 11/16/79 to 5/15/80 #5436
0	Coordinator-Performance Improvement Program-San F New posn. 11/16/79	J E Grother 11/16/79 THRU → 8/16/81
5		L F Epperson To PRA 11/19/79
5	Actg Asst Rd Foreman of Engs-Houston Formerly held by L F Epperson	Temp. vacant 11/20/79

OPERATING

EXH. 7

PeopleSoft

Report ID: upc41000

Page No. 1
Run Date 12/04/2001
Run Time 07:12:04

EMPLOYEE JOB WORK HISTORY

Empl ID: 0050020
SSAN: 526663917
NAME: Grother,John E

Exp Rtn Dt:
Serv Unit:

START/DT	TYPE CHG	STAT	TITLE	LOCATION	UNION	DEPT.	CO	JOBCD
08/16/01	NA Lat Lev	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
07/31/01	NABaseBen	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
04/01/01	NA Ttl Chg	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
03/01/01	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/00	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/99	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/98	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
07/01/97	NA Demote	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
04/16/97	NA SP-UP	Act	Sr Mgr Ter	Tucson, Az	N/A	Trns Ws Rg	01	N72007
09/16/95	NA Pro Exc	Act	Terminal S	Tucson, Az	N/A	Sp History	70	N88884
09/01/95	NA-Promo	Act	Sr Mgr Bud	San Franci, Ca	N/A	Sp History	70	N88884
05/01/94	NA Ttl Chg	Act	Sr Mgr Bud	San Franci, Ca	N/A	Sp History	70	N88884
09/01/92	NA Ttl Chg	Act	Mgr Joint	San Franci, Ca	N/A	Sp History	70	N88884
11/01/89	NA-Merit	Act	Gen Mgr Am	San Franci, Ca	N/A	Sp History	70	N88884
01/01/88	NA Ttl Chg	Act	Gen Mgr Am	San Franci, Ca	N/A	Sp History	70	N88884
01/01/87	N/A Salary	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
12/01/86	N/A Salary	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/85	NA Ttl Chg	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
05/01/85	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
12/01/84	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
12/01/83	NA Ttl Chg	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
06/01/82	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
05/01/81	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
07/01/80	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
06/01/80	NA Ttl Chg	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
11/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
09/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
03/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
06/01/78	NA Ttl Chg	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
03/01/78	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
12/01/77	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
05/01/77	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
11/01/76	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
06/01/76	NA Ttl Chg	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
12/01/75	N/A Salary	Act	Planner	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/75	NA Ttl Chg	Act	Planner	Los Angele, Ca	N/A	Sp History	70	N88884
12/01/74	N/A Salary	Act	Asst Term	West Coltn, Ca	N/A	Sp History	70	N88884
07/01/74	N/A Salary	Act	Asst Term	West Coltn, Ca	N/A	Sp History	70	N88884
06/01/74	NA Ttl Chg	Act	Asst Term	West Coltn, Ca	N/A	Sp History	70	N88884
08/01/73	N/A Salary	Act	Trainmaste	Long Beach, Ca	N/A	Sp History	70	N96008
03/01/73	NA Ttl Chg	Act	Trainmaste	Long Beach, Ca	N/A	Sp History	70	N96008
06/01/72	NA Ttl Chg	Act	Asst Train	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/71	NA Ttl Chg	Act	Asst Train	West Coltn, Ca	N/A	Sp History	70	N88884
06/01/69	NA Nw Hire	Act	Management	San Franci, Ca	N/A	Sp History	70	N88884

End of Report

"CUTOVER" IS "TCS COMPUTER SYSTEM OF UPRR WHICH DID NOT ROLLOUT UNTIL OCTOBER 1, 1997.

EXH. 8

This is G o o g l e's cache of http://members.aol.com/blewestern/4-97.htm.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
To link to or bookmark this page, use the following url: http://www.google.com/search?q=cache:JGkTRZ2Dgi8C:members.aol.com/blewestern/4-97.htm+tcs/cms+cutover+creates+chaos+in+tucson&hl=en

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These search terms have been highlighted: **tcs cms cutover creates chaos tucson**

UPDATE 28

The Newsletter of

B L E Division 28

Oct.-Dec. 1997

TCS/CMS Cutover Creates Chaos in Tucson

By Ken Kroeger

"I begged them to wait, telling them we're not ready for this cutover, but no one would listen to me!" declared Local Chairman Ken Kroeger, with regard to the recent TCS/CMS cutover implemented on October 1. And the cutover has proven to be just as stressful and chaotic as was predicted. "My engineers don't know if they are going to work in 12 minutes or 12 hours," Ken told UP's Chief Operating Officer Jerry Davis at a dinner meeting on October 15 at the Westward Look. In a letter e-mailed from Kroeger to Mr. Davis on September 29, Kroeger stated that he was "appalled by some of the recent decisions being made by the management of Union Pacific" and then went on to say "the facts speak for themselves," citing: the numerous rail accidents occurring in the current year, many involving fatalities; the FRA scrutinizing of the company's operations; the continual loss of customers due to poor service; the huge amounts of money being wasted in "overtime" pay; and frequent gridlock occurring on the rails. Using words like "tailspin" and "meltdown," Kroeger went on to communicate his frustration to Davis regarding the lack of response to his pleas for help, and the frequently stated excuse that the shortage of manpower in UP Management is the reason for many of the problems, which were stated in detail in the September 29 communication. In the final paragraph of the letter, Kroeger begged Mr. Davis to postpone the cutover until some of these problems were corrected and everything could be put in place for a smooth transition.
Early on September 30, Kroeger received a phone call from an angry and defensive Davis,

telling him he had no right to tell him who or what is wrong with the Company. A week later, however, after receiving a similar letter from frustrated UTU Legislative Representative Jim Critchley in Tucson, Mr. Davis invited Ken Kroeger, Jim Critchley, and BLE Division 28 Legislative Representative Rob Svob, to a dinner meeting on October 15. Because Critchley was unable to get back in time from a run to El Paso, UTU Local Chairman Tom Moore attended the meeting on his behalf.

The cutover was implemented as planned on October 1, and Local Chairman Kroeger's phone began ringing constantly with questions and complaints from frustrated engineers who could not figure out when they were going to work, could not figure out how to perform various functions on the new program, and were unable to talk to a dispatcher.

During the week of October 5, UTU Local Chairman Moore and Kroeger were on hand at the yard office to learn the new system from the trainers UP had sent to train operating employees and to help their members with the numerous problems being experienced.

Kroeger encouraged BLE Members to call the UP Safety Hotline to report these problems as a safety hazard, based on the fact that train crews were unable to go to work rested due to the lack of information as to when they would be called to duty. In the dinner meeting on October 15, Kroeger presented Mr. Davis with an extensive report, including examples, documenting the problems and comparing the non-user-friendly UP computer program with the previously-used SP computer program. The report also included copies of articles from the Yuma newspapers covering the recent hazmat incident, which UP Management in Yuma refused to acknowledge as a hazardous situation for the train crews involved.

Mr. Davis stated that he could see the difference in the two computer programs and agreed that a menu-driven program is easier to use. He said he would look into the possibilities of changing the UP program to a menu-driven program. He was aware of the incident in Yuma and would investigate this further and get back to me on it.

AGREEMENT VOTE RESULTS

The agreement passed, 65% (589 votes) for and 35% (302 votes) against, on the whole system. Div. 28 voted to pass the agreement 89% for (121 votes) and 10% against (14 votes), and 1% abstained (1 vote). To see the complete breakdown, go to internet web site http://www.c-zone.net/rogers/vote.html.

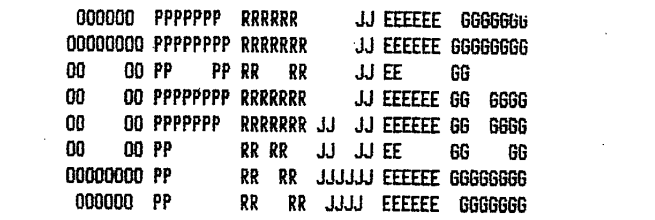
President's Corner

Taking Advantage:

Union Pacific's lack of respect for our agreement and working conditions is causing a great deal of tension and stress amongst our fellow engineers.Our union officers are having to restructure the boards daily to conform with our agreement. Fifteen-hour trips, poor reliefs, and no line-ups are distressing enough, but when we don't even get paid correctly, that's the ultimate slap in the face! The frustration level is at an all time high!

It is imperative at this time that we get the cooperation of every BLE Div. 28 member. Despite what anyone may tell you, our agreement has not changed (yet). Tying up for rest, deadhead placement, and marking up to the bottom of the board are all within the scope of our current working agreement. You

Exh. 9



FROM: OPRMXG --SPTSVM02 DATE AND TIME 01/28/97 12:48:01
TO: OPRPAL --SPTSVM02 LOBELLO, PAUL OPRDSP --SPTSVM02 PAYAWAL, DAN
OPRDLH --SPTSVM02 HAMPTON, D.
CC: OPRHLM --SPTSVM02 MCDOWELL, LAWSON OPRJEG --SPTSVM02 GROTHER, JOHN

FROM: MAI
SUBJECT: INTERVIEW SCHEDULE WITH SUPT WED 1-29-97 AT TUCSON
PLEASE ARRANGE TO MEET WITH THE SUPERINTENDENT ON WEDNESDAY 1-29-97 TO BE INTERVIEWED AT THE TIME INDICATED BELOW:

PAUL LOBELLO	-	7:30 AM
DAVE HAMPTON	-	8:30 AM
DAN PAYAWAL	-	3:30 PM

YOU DON'T NEED TO BRING ANYTHING TO THE INTERVIEW. THE INTERVIEW WILL LAST ABOUT 45 MINS.

THANKS!
END

JRG DETERMINED A KEEPER EARLIER AND NOT INTERVIEWED!

EXH. 10

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 000000  PPPPPPP  RRRRRR      JJ EEEEEE  GGGGGGG
00000000 PPPPPPPP RRRRRRR     JJ EEEEEE GGGGGGGG
00    00 PP    PP RR    RR     JJ EE      GG
00    00 PPPPPPPP RRRRRRR     JJ EEEEEE GG  GGGG
00    00 PPPPPPP  RRRRRRR JJ  JJ EEEEEE GG  GGGG
00    00 PP       RR RR   JJ  JJ EE      GG    GG
00000000 PP       RR  RR  JJJJJJ EEEEEE GGGGGGGG
 000000  PP       RR   RR  JJJJ  EEEEEE  GGGGGGG
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FROM: OPRJEG --SPTSVM02 DATE AND TIME 07/15/97 23:37:01
TO: OPRJEG --SPTSVM02 GROTHER, JOHN

FROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120
SUBJECT: LETTER TO DAVIS

MR. J. E. DAVIS
PRESIDENT AND CEO

JULY 15, 1997

DEAR MR. DAVIS,

THIS LETTER CONCERNS MY JULY 1, 1997 DOWNGRADE (ON FOUR DAYS NOTICE) FROM SENIOR MANAGER TRAIN OPERATIONS AT TUCSON, AZ ($6,200/MO) TO MANAGER INTERMODAL OPERATIONS AT HOUSTON, TX ($4,928/MO), A 21% WAGE REDUCTION AFTER 28 YEARS OF LOYAL AND DEDICATED SERVICE (SINCE 1989, I RECEIVED ONE $60/MO RAISE IN SEP 1995 WHEN TRANSFERRED TO TUCSON).

IT IS WITH HEAVY HEART THAT I AM WRITING YOU IN AN ATTEMPT TO RECONCILE HOW THE "UP VALUES SYSTEM" AND THE ISSUES OF DESCRIMINATION RELATE TO MY SUDDEN DOWNGRADE. I HAD NO INDICATION OF PERSONAL UNSATISFACTORY PERFORMANCE BEFOREHAND, ALTHOUGH THERE WAS TALK THAT THE PHOENIX REPLAN WAS NOT WORKING AS OTHERS HAD DESIGNED. IN FACT, ON JUNE 16, 1997, I RECEIVED A RECORDED VOICE MAIL FROM SUPERINTENDENT K.C. PACKARD "... THAT CONSIDERING THE RESOURCES THAT WE HAD AVAILABLE, THE ENTIRE SERVICE UNIT WAS DOING AN OUTSTANDING JOB ...". A FEW MONTHS BEFORE THAT, WE HAD ALL BEEN ELATED WHEN IT WAS FORMALLY ANNOUNCED THAT WE HAD ALL BEEN SELECTED AFTER A MERGER SELECTION PROCESS TO BE PART OF THE "UP TEAM".

OF COURSE I UNDERSTOOD THAT TUCSON WAS UNDER EXTREME PRESSURE DUE TO THE PARTIAL CLOSURE OF PHOENIX YARD; BUT, THE RESOURCES I REQUESTED TO KEEP TUCSON CURRENT WERE NOT PROVIDED. TO ILLUSTRATE, TUCSON WAS IN THE POSITION OF NOT BEING ABLE TO ADD MORE SWITCH ENGINES OR CALL EXTRAS AS NEEDED UNTIL JUNE 26, 1997, THE DAY THAT SIX AUGMENTORS WERE FINALLY ALLOWED ON THE TUCSON BOARD AND THE DAY I WAS INFORMED OF MY DOWNGRADE (I HAD REQUESTED MORE SWITCHMEN IN WRITING FOR OVER A YEAR BEFORE THESE AUGMENTORS WERE ALLOWED). IN ADDITION, ON THIS SAME DAY, I WAS REQUESTED TO SIGN A NOTICE THAT ALLOWED TUCSON TO MILL RUN TOGETHER CERTAIN TRAFFIC WHICH ELIMINATED SOME OF THE MULTIPLE HANDLING ON OUR 1% GRADE WITH A FOREMAN AND ONE SWITCHMAN. SEVERAL OTHER CHANGES HAVE BEEN ALLOWED SINCE MY DOWNGRADE WHICH HAD BEEN PREVIOUSLY REQUESTED INCLUDING BUT NOT LIMITED TO OPERATING THE LAPXM DIRECTLY TO PHX IN LIEU OF SWITCHING AT TUCSON, ADDITIONAL PERSONNEL AT PHOENIX, PICACHO AND TUCSON, BLOCKING CONSOLIDATIONS/CHANGES, IMPROVED COMMUNICATIONS IN THE 22ND STREET TOWER, ADDITIONAL LOCOMOTIVES IN SHUTTLE SERVICE BETWEEN TUCSON AND PHOENIX, ADDITIONAL TRACKAGE TO MAKE BLOCKS/HOLD INTERMODAL EQUIPMENT AND SO FORTH.

CONCERNING THE SPECIFIC CRITICISM THAT ONE YARDMASTER DID NOT START HIS JOBS IN A PROMPT FASHION ON TWO DIFFERENT OCCASIONS, THAT ACT IS DIRECTLY RELATED TO YARDMASTER DISSIBIO'S EFFORTS TO PERSUADE HIS SENIOR MANAGER AUDIENCE TO RESTORE AN ADDITIONAL YDM POSITION IN THE TOWER, WHILE KEEPING THE 36TH ST YARDMASTER POSITION. IN LIEU OF CONSIDERING DISSIBIO'S ACTIONS AS REPRESENTATIVE OF THE TERMINAL, DISSIBIO SHOULD HAVE BEEN HELD ACCOUNTABLE BY THOSE WHO DIRECTLY OBSERVED HIS ACTIONS BASED ON PROGRESSIVE DISCIPLINE.

I HAVE CONTINUED TO RECEIVE SOME PROFS INFORMATION ON CONTINUING CHANGES TO THE PHOENIX REPLAN, SOME OF WHICH IS NOTED AS AN URGENT CHANGE ON THE SUBJECT LINE AND THEN SHOWN AS "DELIVERY PRIOITY: NORMAL AND DELIVERY REPORT

AS BASIC" CONCERNING A MULTITUDE OF PHX REPLAN CHANGES (ATTCH WAS NOT URGENT). THERE IS NOTHING "NORMAL OR BASIC" ABOUT THE IMPACT OF THE PHOENIX REPLAN ON MYSELF AND MY FAMILY; ESPECIALLY CONSIDERING THE PLAN WAS NOT MINE AND THE ESSENTIAL RESOURCES WERE NOT PROVIDED AS REQUESTED UNTIL MY DOWNGRADE.

AFTER MUCH REFLECTION, I WRITE THIS LETTER IN THE HOPE THAT I COULD POSSIBLY RETAIN SOME TYPE OF MTO POSITION (IF NOT THE SENIOR MTO) IN THE ARIZONA AREA AND WITHOUT THE 21% WAGE REDUCTION. IF ALLOWED, THIS PROPOSAL WOULD ALLOW THE UP TO UTILIZE MY EXPERIENCE IN ARIZONA, WITHOUT THE COST OF MANY RELOCATIONS. OR, IF NOT IN AZ, IN SOME SOUTHWESTERN LOCATION (MY WIFE HAS LUPUS AND AVASCULAR NECROSIS), IN OPERATIONS WHERE A REDUCTION IN WAGES WOULD NOT BE A PART OF THE ASSIGNMENT.

OF COURSE, I WILL CONTINUE TO PERFORM AS DIRECTED; BUT, I FELT THIS LETTER WAS NEEDED TO ADDRESS THE ISSUES PROPERLY; ESPECIALLY SINCE YOU HAVE BEEN ASSOCIATED WITH BOTH RAILROADS INVOLVED IN THIS MERGER.

SINCERELY,

JOHN E GROTHER
MIO - HOUSTON

HOME 520-575-5511

"CUSTOMERS SIGN OUR PAYCHECKS"
ND

```
          OOOOOO    PPPPPP   RRRRRR       JJ EE    EE   GGGGGGG
         OOOOOOOO PPPPPPPP RRRRRRR      JJ EEEEEEE GGGGGGGG
         OO     OO PP     PP RR    RR      JJ EE       GG
         OO     OO PPPPPPPP RRRRRRR      JJ EEEEEE GG   GGGG
         OO     OO PPPPPPP  RRRRRRR JJ   JJ EEEEEE GG   GGGG
         OO     OO PP       RR RR   JJ   JJ EE       GG    GG
         OOOOOOOO PP       RR  RR  JJJJJJ EEEEEEE GGGGGGGG
          OOOOOO  PP       RR   RR  JJJJ  EEEEEEE  GGGGGGG
```

FROM: OPRJEG --SPTSVM02 DATE AND TIME 04/22/97 11:52:21
TO: OPRDSP --SPTSVM02 PAYAWAL, DAN OPRDLH --SPTSVM02 HAMPTON, D.
OPRPAL --SPTSVM02 LOBELLO, PAUL

FROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120
*** RESENDING NOTE OF 04/22/97 12:04
FROM: DAVE J. BLAKE@UP (DJBLAKE @ NOTES)

TO: MIKE J. GALLAGHER @ UP (MJGALLAG @ NOTES)
CC: LAWSON MCDOWELL @ UP (LMCDOWEL @ NOTES),
JOHN E. GROTHER (OPRJEG @ SPTSVM02)
DATE: 04-22-97 12:07:26 PM
SUBJECT: TUCSON BEER BLOCK - LATC - LATUM

MIKE, PLEASE UPDATE TAG TABLE AT LA TO PROVIDE A 281 (TUCSON) TAG FOR BEER
DESTINED TO TEMPE (27050)
THIS WILL SUPPORT A PURE PHOENIX HEAD END BLOCK FOR TUCSON TO SETOVER TO TUPXF
WHEN CLOSE CONNECTION
REQUIRES. THE TEMPE TRAFFIC MOVES ON A LATER CONNECTION AND CAN BE SWITCHED
OUT OF THE TUCSON SWITCH
BLOCK TO MAKE THAT CONNECTION CONSISTENTLY.

DELIVERY PRIORITY: NORMAL
DELIVERY REPORT: BASIC

D

99608 0 6 2223 07/15/97 U610 XB N078 VB99801

1. THIS HAS BEEN CHANGED SINCE TO DIRECT LAPXM TO PWX.

2. ILLUSTRATES "PRIORITY AND URGENCY" FOR WHICH I WAS DOWNGRADED OTHERS PLANNED, I WAS SCAPEGOAT.

EXH. 11

UNION PACIFIC RAILROAD COMPANY

JERRY DAVIS
PRESIDENT AND
CHIEF OPERATING OFFICER

1416 DODGE STREET
ROOM 1230
OMAHA, NEBRASKA 68179-1230

September 4, 1997

Mr. John Grother
Manager-Intermodal Operations
Union Pacific Railroad Company
6800 Kirkpatrick Boulevard
Houston, TX 77026-3995

Dear John:

Thank you for your letter of July 15 concerning your transfer from Tucson to Houston. I appreciate your feedback and understand the difficulties you may be experiencing as a result of your reassignment.

Brad King, Vice President-Transportation, tells me that there were many factors contributing to the problems at Tucson. In June, the service levels to our customers, both external and internal, deteriorated to the point where immediate action had to be taken. We believe that a change in management was necessary for improvement to occur.

While it is not always easy, changes in staffing are sometimes necessary as we look at our work force and strive to handle all the business that comes our way. I'm sure you can understand that Union Pacific must continually fine tune our operations so that we can be more efficient and responsive to customer needs.

Again, thank you for your letter and your continued commitment to our company.

Sincerely,

Jerry Davis

EXHIBIT 12

FOR TUCSON MAY-JUNE 97 DURING PEAK OF YARD CONSOLIDATION PHX. INTO TUCSON (MERGER EXPERIMENT)

1) EVEN WEST COLTON WAS MILL RUNNING TRAINS INTO TUCSON (OUT OF CONTROL AT WEST COLTON)

2) TO LEFT ARE SOME WHO CAN CORROBORATE HOW TUCSON WAS INUNDATED FROM BOTH PHOENIX AND WEST COLTON.

3) MORE SAMPLES ARE AVAILABLE, CAPACITY STUDIES, AND STATEMENTS FROM THOSE WHO WERE THERE CAN SPEAK TO "PERSONAL (GROTHER, PERFORMANCE!

ADDITIONAL WORK; NOT LOCAL CAUSED; BUT, FROM WEST COLTON!!

000000 PP RR RR JJJJ EEEEEE GGGGGG

FROM: DJBLAKE --NOTES DATE AND TIME 06/10/97 10:48:34
FROM: DAVE J. BLAKESUP (DJBLAKE § NOTES)

TO: ROGER J. MOWREY § UP (RJMOWREY § NOTES), Gene
OPRWZF § SPTSVM02 (OPRWZF § SPTSVM02),
JOHN E. READY § UP (JEREADY § NOTES),
ROBERT G. JONES (OPRRXJ § SPTSVM02),
HUGH J. ROGER § UP (HJROGER § NOTES), Gene Bryant
BILL R. WILKIE (OPUBRW § SPTSVM02) Tom W. COLTON
CC: JIM P. KOSCIELNIAK (OPRJPK § SPTSVM02),
JOHN E. GROTHER (OPRJEG § SPTSVM02),
LAWSON MCDOWELL § UP (LMCDOWEL § NOTES), St Louis
KEN L. CARGILE § UP (KLCARGIL § NOTES),
GARY R. DAVIDSON § UP (GRDAVIDS § NOTES), - San Antonio
MICHAEL J. GORMAN § UP (MJGORMAN § NOTES),
KEN C. PACKARD § UP (KCPACKAR § NOTES); Omaha
PAUL R. FLOWERS § UP (PRFLOWER § NOTES)
DATE: 06-10-97 10:53:22 AM
SUBJECT: 1MLATU 09 BLOCKING

I REVIEWED CONSIST ON 1MLATU 09 OUT OF GLAMIS (AEI CORRECTED)

THE BLOCKING ON THIS SCHEDULE OUT OF WEST CLTN (CORRECTED) IS AS FOLLOWS:

5 - 280 TUCSON (FROM LA)
2 - 270 PHOENIX(FROM LA) FOR SETOUT PICACHO FOR ATUPX
3 - 280 TUCSON (FROM WCLTN)
3 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
2 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
16 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
3 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
2 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
1 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
1 - 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
17 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN
2 - 280 TUCSON (FROM WCLTN)
5 - 272 MAGMA (FROM WCLTN) FOR SETOUT PICACHO FOR MAGMA TURN

62 MORE CARS TO SWITCH - UP TO 100 PER DAY

EXCEPTIONS:

1. CONSIST OUT OF WEST COLTON INDICATED 95% CORRECT BLOCKING, REVISED AEI CONSIST INDICATES MILLRUN 272/270
AS WELL AS 280 TRAFFIC .

2. TRAIN WILL HAVE TO BE TAKEN INTO TUCSON AND RESWITCHED AS QUANTITY OF RESWITCHING PRECLUDES HANDLING AT PICACHO

PLEASE HANDLE FOR CORRECTION

DELIVERY PRIORITY: NORMAL

DELIVERY REPORT: BASIC

ND

EXH. 13

ugust 25, 1999

After Some Crippling Chaos,
Union Pacific Can See the Light
By DANIEL MACHALABA
Staff Reporter of THE WALL STREET JOURNAL

HOUSTON -- Some of the signs that Union Pacific Corp. is slowly making progress have to do with speed, like the long plume of grayish smoke trailing almost horizontally from a locomotive as it barrels along here at 50 miles per hour.

That would have been an uncommon sight around this hub in the troubled period of 1997-98, when hardly anything moved fast enough to generate more than fitful puffs. Union Pacific's merger with Southern Pacific Rail Corp. -- melding two cultures, 53,000 employees, 7,000 locomotives, 155,000 freight cars and 36,000 miles of railroad routes covering the western two-thirds of the U.S. -- had turned into a nightmare. Freight service had collapsed, stranding Midwestern crops, snarling West Coast ports and delaying shipments of goods from chemicals to paper. A string of fatal accidents had the Federal Railroad Administration blaming a "fundamental breakdown" in safety.

The job of addressing the mess fell to Richard Davidson, Union Pacific's chairman and chief executive, who also was in charge during the railroad's breakdown. For more than a year he has been working to deliver on a promise that he would remake the nation's largest railroad, with new equipment, revamped management and a more open, flexible style. In the process, he has been addressing the martinet within. For Mr. Davidson is a diehard railroad man who can still thrill to the throb of a powerful locomotive at the age of 57, but who must shed an antiquated style of management that has roots in the days when hard-bitten ex-Civil War officers filled the executive ranks of railroad companies.

"You're sort of a gunslinger," Mr. Davidson says. "Sometimes you make the decision and then analyze the problem." His managers use similar language to describe the old days of leading by fear. "When something happened, you pulled out your gun and shot the guy in charge of the territory," says John Rebensdorf, a vice president of the company's railroad subsidiary, Union Pacific Railroad Co. "Now, you find out why it happened and make sure it doesn't happen again."

GROTHER WAS "SHOT" FOR MERGER EXPERIMENT=YARD CONSOLIDATION

'Dysfunctional' Culture

When inspectors from the Federal Railroad Administration descended on Union Pacific's headquarters in Omaha, Neb., in 1997 following a series of fatal accidents on the railroad, they were surprised by the company's top-down, military culture, which seemed to discourage teamwork and communication. "Their culture was dysfunctional and characterized by noncommunication," says Jolene Molitoris, head of the FRA in Washington. "They were separated from each other in a way that almost guaranteed problems."

f his 53,000 employees. He is setting up a unit to coordinate planning etween the company's sales force and its operating managers, and boosting apital spending to make up for years of cutbacks.

ast September, Mr. Davidson met with 100 Union Pacific field officers in Kansas City, Mo., and urged them to undergo a personal transformation. Then e shared the results of a review by his senior managers that depicted him s cold, aloof, too demanding, resistant to innovation and reluctant to raise. "It's like an alcoholic," he says. "To get better, you have to admit our weakness."

Mr. Davidson is shifting authority from the Omaha headquarters to managers n the field. Central management was making many of the daily decisions such as when and how to run trains. "We're a detail business, but it was too much detail at the wrong level," says Brad King, a Union Pacific Railroad executive vice president. Some executives are now urging Mr. Davidson to vacate the railroad's command center in Omaha. Already, some dispatchers have been moved to Houston, Fort Worth, Texas, and Southern California to be closer to their territories.

Strike Teams and Loops

The devolution began to make itself felt after the railroad's breakup into three regions last summer. Jeff Verhaal, who heads the company's western region, sent out roving "strike teams" of repairmen to the California desert to handle emergencies faster. "We couldn't wait for Omaha to do it," he says.

Steve Barkley, head of the southern region, says he reorganized the operating plan in the Houston area to move trains more efficiently. Shifting cars had entailed moving trains back and forth, yo-yo fashion, on a single track and often blocking traffic. Mr. Barkley devised a way to move cars through a loop that kept those single tracks open on a regular basis. The new setup cuts 24 hours from many shipments and keeps more than 400 freight cars a day out of busy yards.

To counter fatigue, the railroad is phasing in new work arrangements with assigned days off. It is also arranging for hotels to be built for its crews (and other guests) that will feature noise-abating walls and windows, heavy curtains to seal out light and 24-hour diners. And it is letting crews nap aboard trains as long as 45 minutes under certain conditions.

All this is a departure for Mr. Davidson, who remembers when railroads didn't pay to lodge train crews away from home. When he was a brakeman in Kansas, a conductor let the future CEO sleep on his couch. As a manager, Mr. Davidson says he fired at least a dozen people for sleeping on the job. But with recent evidence that napping can lead to safer operations, Mr. Davidson says, "you really have to put old habits behind you."

Applying the Blowtorch

Maybe not all of them. Mr. Davidson's personal style still draws criticism. Union Pacific managers say he remains brusque and impatient. "Put a blowtorch to his a," he told his chief engineer when informed during a track inspection that a crew boss was running behind schedule.

Many problems remain. Changing the culture won't happen overnight. "What we are trying to do will probably take five years," says Robert Bauman, a Union Pacific director. But riding with Mr. Davidson on inspection trains through 10 states, it's possible to find a number of places where the company appears to be back on track.

Union Pacific Announces Plans to Repurchase Track, Save Lines (Aug. 25, 1998)

Union Pacific Is to Restructure Centralization of Management (Aug. 20, 1998)

The last car on the inspection train is called the theater car. Its seats face backward, toward a large rear window through which Mr. Davidson and his executives watch the track stretching out behind them. The boss discusses plans to expand mainline tracks in Kansas and Nebraska to handle more trains. He chides his chief engineer for a rough ride the night before. "I had a nightmare that I was on a bucking bronco and was about to fall off the horse," Mr. Davidson says.

At one point in Nebraska, he can hardly contain his glee when his train races between two speeding freight trains on recently upgraded triple track. "This is how it's supposed to work," he says. "Man, man. It's phenomenal."

Another time, though, Mr. Davidson appears glum when he sees that rainy weather has idled work gangs and equipment laying sections of second track. "We're a month behind," he says. "It's a shame."

A Backlash Spurred

Mr. Davidson's efforts come at a crucial juncture. Union Pacific is emerging from its worst crisis and one that has spurred a backlash against railroads. Customers angry about lost shipments and delayed freight have been heaping blame on big rail mergers and clamoring for stiffer federal regulation. Although railroads still haul about 40% of the nation's freight traffic, reflecting their lock on bulk shipments of coal and grain, their spotty delivery record has sent many of the more lucrative consumer-goods shipments to trucks. Trucks have boosted their share of the nation's freight bill to 80% from 77% in 1990.

Overhauling Union Pacific is a critical test for Mr. Davidson, the only pure railroader heading one of the major U.S. railroads. He started as a brakeman in Kansas and rose through the operations side. David Goode, head of Norfolk Southern Corp., is a Harvard-educated tax attorney. John Snow at CSX Corp. is a Ph.D. economist and former official with the Department of Transportation. Robert Krebs at Burlington Northern Santa Fe Corp. is a Harvard M.B.A. who worked in railroad operations.

Critics wonder how Mr. Davidson kept his job, and they doubt he can make the needed changes. Tall and brawny with a booming voice, Mr. Davidson is aware of the skeptics. But he says the railroad has learned from its "painful experience."

With the learning has come revamping in all directions. To send a message that every worker counts, Mr. Davidson has granted 200 stock options to each

But progress has been made elsewhere, with the man and the railroad. Union Pacific executives say Mr. Davidson is more relaxed now that the trauma of the service crisis is behind him and the company has sold off businesses he didn't care about. (The latest slated for disposal is trucking firm Overnite Transportation.) His personal life, too, has settled down. Twice divorced, Mr. Davidson last year married a woman who worked for Union Pacific in community affairs for nearly 20 years.

He keeps his old workaholic ways, arriving at the office by 6 a.m., and says he doesn't have time for hobbies except raising cattle in his hometown of Allen, Kan., and working out. A former baggage car on his inspection train has been converted into an exercise room.

On the business side, freight-car inventory, a measure of congestion, is 15% better than at the worst of the crisis. Average train speeds -- a key measure for timely delivery -- are up, which means that trains are less frequently having their top speed of 70 mph dragged down by being stalled or forced to roll at a snail's pace through congested yards. The number of sidings blocked by stalled trains is down, which is essential in the many places where sidings provide two-way traffic for single tracks. Even in Houston, the center of the service meltdown, the tracks are clear. A year ago a long row of parked freight trains there was "like a big billboard saying, 'We're screwed up,' " Mr. Davidson says.

Financial results are improving. Analysts expect Union Pacific to earn between $2.90 and $3 a diluted share this year. That is still less than the $3.38 a share the company earned from continuing operations in 1996, when it bought Southern Pacific, but better than last year, when the company posted a net loss of $633 million, or $2.57 a share.

Pointing the Finger

To this day, Mr. Davidson's view of the service debacle differs from that of most people. He blames Southern Pacific's equipment problems, train accidents, weather and track repairs. But many people also blame Union Pacific management. They say Union Pacific tried to cut costs during the integration, not hiring enough people and cramming freight cars into fewer yards.

= YARD CONSOLIDATIONS !

"They did almost everything wrong you can do," says Phillip Yeager, chairman of Hub Group Inc., a Lombard, Ill., freight-marketing company. "Union Pacific was trying to maintain their stock performance and failed miserably." Union Pacific shares, which got as high as $72.4375 in New York Stock Exchange trading in July 1997, before the merger problems surfaced, closed yesterday at $54.50, up 68.75 cents.

Union Pacific directors say they are happy they stuck with Mr. Davidson. "If we were to look around the country for a guy to deal with the crisis, Dick was the guy. There wasn't anyone with his credentials and knowledge," says Richard Cheney, the former secretary of defense who is chief executive officer of oil-services giant Halliburton Co. and a Union Pacific director.

Customers still complain about service. "It's too much of a crapshoot," says

Dennis Williams, manager of transportation services at Roseburg Forest Products Co. in Roseburg, Ore. "You just can't count on them to deliver on time." The American Trucking Association in Alexandria, Va., recently suggested that truckers could do a better job running railroads.

'A Long Way to Go'

Mr. Davidson acknowledges that Union Pacific "still has a long way to go" to satisfy customers. But he dismisses the trucking group's offer: "I wouldn't be so bold to offer to run their trucks for them, and I really don't think they want to run the railroad industry."

Meanwhile, Mr. Davidson reinforces his push for greater flexibility by showing he is willing to try anything. He recently reinstated quality programs that had lapsed during the company's merger problems. He bought back a rail line in Kansas that had been sold in a cost-cutting move. Even the old way of slamming freight cars into one another in giant "hump yards" is giving way to a gentler approach; Union Pacific recently opened a spiffy new yard in California with such gradual slopes that cars glide to a stop.

He wants to use the Internet and make it easier to do business with railroads. When Union Pacific sent salespeople to the Los Angeles area, some potential customers didn't know anything about the company. "They think Union Pacific was a movie made in 1939," he says.

There's a lot at stake, says Dennis Duffy, executive vice president of operations of Union Pacific Railroad, and some say a potential Davidson successor. "If we don't change, we'll be a dinosaur and lucky to be alive," Mr. Duffy says.

Back in Kansas City, Mr. Davidson is showing off a Union Pacific freight yard when he sees a coal train so long that it requires locomotives at both the front and back. "I'm still old-fashioned," Mr. Davidson says. "I always expect to see a caboose on the end."

--part1_dec44353.24f82f9e_boundary--

---------- Headers ----------
Return-Path: <dennishoes@earthlink.net>
Received: from rly-za01.mx.aol.com (rly-za01.mail.aol.com [172.31.36.97]) by air-za03.mail.aol.com (v60.28) with ESMTP; Fri, 27 Aug 1999 15:27:30 -0400
Received: from snipe.prod.itd.earthlink.net (snipe.prod.itd.earthlink.net [207.217.120.62]) by rly-za01.mx.aol.com (v60.28) with ESMTP; Fri, 27 Aug 1999 15:27:02 -0400
Received: from earthlink.net (pool0362.cvx10-bradley.dialup.earthlink.net [209.178.183.107])
by snipe.prod.itd.earthlink.net (8.9.3/8.9.3) with ESMTP id MAA18955;
Fri, 27 Aug 1999 12:26:48 -0700 (PDT)
Message-ID: <37C6E638.D9004A71@earthlink.net>
Date: Fri, 27 Aug 1999 12:25:45 -0700

* QUALITY PROCESS NOT USED IN GROTHER'S DEMOTION !!

EXH. 13 A

Linda D. Buttrill
12/23/2002 11:53 AM = ONE MONTH FOR 1/6th OF DATA REQUESTED

To: John E. Grother MORE "DEAD-ENDS" - See 8C REQUEST
cc:

Subject: Re: PDR'S

John, this has really been a difficult time of the year - a mountain of reports due. But I have checked the data base and there is only one (1) PDR in the Southern Region system for you, that is January 2000 thru December 2000. I am sending it, via U.S.Mail, today. When the Intermodal group left the region, I no longer had access to their files. You might want to check with Fryar.

John E. Grother

John E. Grother
11/26/2002 01:19 AM

To: Linda D. Buttrill@UP
cc:

Subject: PDR'S

WOULD APPRECIATE COPIES OF MY PDR'S FOR THE LAST 5½ FIVE (6) YEARS BEING MAILED TO MY HOME ADRRESS BELOW:

1718 RUSTIC PARK DRIVE
KINGWOOD, TX 77339

EXH. 13B

NO RESPONSE

USUAL DEADEND

John E. Grother
11/26/2002 01:14 AM

To: Don F. Fryar (DIRECT SUPERVISOR)
cc:

Subject: PDR'S

WOULD APPRECIATE COPIES OF MY PDR'S FOR PAST 5 YEARS BEING MAILED TO MY RESIDENCE WHILE I AM RECOVERING SUCH THAT I MAY REVIEW MY POSITIVES AND NEGATIVES.

Exh. 13C

Union Pacific Railroad
Attn: Ms. Linda Buttrill
24125 Aldine-Westfield Road
Spring, TX. 77373

December 30, 2002

NO RESPONSE TO DATE

MORE DEADEND

Dear Ms. Buttrill,

This refers to attached copy of request for six (6) years of PDR reports.

I appreciate the Performance Development Report (PDR) which you sent for the year 2000 and your advice to contact Mr. Fryar. I did contact Mr. Fryar with a written lotus request dated 11/26/02; however, he choose not to respond thus far and Mr. Fryar appears to be on 2002 vacation until the date of his retirement (Feb 1, 2003). Therefore, that suggestion is another dead-end.

Do you have anyway to obtain the missing PDR REPORTS from Premium Services for 2001 and 2002?

Moreover, do you have anyway to obtain the Service Unit PDR's for 1996 through 1999? I am especially interested in 1996-1997.

I have requested copies of these for each of the foregoing years; yet, Mr. Fryar choose not to provide them, just as Mr. Fryar has done this time.

Thanking you in advance for your cooperation. Please send the requested data to my home address.

John Grother JL

Attach: Grother lotus note 11/26/02
Buttrill lotus note 12/23/02

Exh. 14

DEMOTION POLICY 1997 Rev. 3/1/96

Demotion justification	If an employee is transferred to a lower job grade due to his/her inability to perform the duties of the prior position, the SRG and job grade of the new (lower) position will apply on the effective date of the transfer.
What about salary changes?	In most cases, the employee's present salary level is retained. However, if you believe a salary adjustment is warranted, provide Operating HR with your justification and we will try to obtain Railroad HR sign-off on the 15121.
What if it isn't a demotion?	If an employee is transferred to a lower grade for reasons other than performance, use "other" on the 15121 with reasons noted in the "comments" section of the form.

EXHIBIT 15

PARTIAL LIST OF PRIOR TO THE MERGER UNION PACIFIC MANAGERS WHOSE TITLES AND RESPONSIBILITIES WERE REDUCED IN 1996-1997; BUT , WITHOUT ANY KNOWN REDUCTION IN THEIR MONTHLY COMPENSATION

NAME	FROM JOB TO JOB
$ CHARLES O. MALONE	HOUSTON HUB GENERAL MANAGER TO OMAHA DISPATCH CENTER
$ GREGORY "BUBBA" GARRISON	HOUSTON SR DTO TO OMAHA STAFF
THEODORE F. INGRAM	HIGH LEVEL SAFETY STAFF POSITION - FIELD MTO AT TUCSON. (DEMOTED TWO + SALARY RATE GRADES; BUT, NO PAY CUT.
# RAY J. PERRY	HOUSTON SR DTO TO OMAHA STAFF

$ SEE EXHIBIT 16 FOR DESCRIPTION OF SEVERE SERVICE ISSUES IN HOUSTON & GULF COAST WHICH RESULTED IN NUMEROUS SETTLEMENTS WITH CUSTOMERS, LAWSUITS, AND SO FORTH; BUT, NO REDUCTION IN THE PAY FOR THE ABOVE MANAGERS.

(IN COMPARISON, GROTHER'S TERRITORY HAD NO SUCH LAWSUITS AND HUGE SETTLEMENTS WHEN GROTHER WAS REMOVED ACCOUNT "WE WANT UNION PACIFIC PEOPLE IN TUCSON")

"RE-ASSIGNED" IN 2001 FROM HOUSTON WITH NO CUT IN PAY.

EXH. 16

Union Pacific workers shun OT

Railroad making management changes to deal with backlogs

12/24/97

By CHARLES BOISSEAU
Houston Chronicle

Union Pacific Railroad reported Tuesday its freight delays worsened in the past week because it is shorthanded as more train crews are taking time off, presumably for the Christmas holidays.

Also, the Omaha, Neb.-based railroad said it reassigned its two top supervisors in the Houston area and will bring in a new manager with more authority to oversee its troubled Gulf Coast operations.

In its weekly filing to the U.S. Surface Transportation Board, the nation's largest railroad said that "over the last two weeks, UP ... experienced a deterioration in service in the Gulf Coast area."

As a result, the railroad's average train speed slipped last week to an average of 14.1 mph from 14.2 mph.

The slowdown forced the number of freight cars on the railroad's 36,000-mile system to swell by 3,616 cars to 336,863. That's 27,000 cars above the desired maximum and the highest since the week before Thanksgiving.

Since summer, Union Pacific has been struggling with an unprecedented traffic jam that began in the Houston area and has spread throughout much of its 36,000-mile system. To try to resolve the congestion, the STB imposed an emergency order until March 15 to allow competitors to operate more freely over Union Pacific's lines in the Houston area.

Union Pacific spokesman John Bromley said the deterioration is "almost entirely due to a shortage of train crews. This is concentrated in the Houston area and the Houston to New Orleans line."

"It's worse this time than it traditionally is," Bromley said.

He speculated that workers are "laying off" and not reporting for work because they've already put in such long hours and may feel they've made enough money.

"A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year," Bromley said.

Asked if the company still hopes to get operations running normally by Jan. 1 as it has promised federal regulators, Bromley said: "It's going to be pretty hard to do, with this crew shortage."

Union Pacific also mentioned in its filing with the Surface Transportation Board that service suffered as "personnel and shippers have been learning to operate new routes and use new tools" since the carrier switched over former Southern Pacific lines in the Houston area to Union Pacific's computer system.

> 'A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year.'
>
> John Bromley, Union Pacific spokesman

To help catch up in the Gulf Coast region, Union Pacific said it will continue to operate through Christmas, while most of the rest of its mainline operations will shut down late Christmas Eve through Christmas Day.

Texas Railroad Commission Chairman Charles Matthews said the worsening service "points out that until the STB ... revisits the UP-SP merger and begins to make some meaningful changes, in particular in the Houston and Gulf Coast area, this rail crisis is going to drag on longer than anybody expected."

He reiterated his support for a commission plan that would force Union Pacific to divest a substantial amount of track in the Houston area to increase competition.

Union Pacific also confirmed a number of personnel changes at its local offices, located in Spring.

Effective Jan. 1, Houston hub General Manager Charles Malone — the railroad's top local manager here as the traffic jam began and worsened this summer and fall — was reassigned to the carrier's Omaha, Neb., dispatch center.

Malone is being replaced by Ed Handley, an ex-safety project coordinator for the Federal Railroad Administration whom Union Pacific hired in October as an assistant general manager.

Union Pacific also said it will beef up local management here by creating a new job with more authority.

Steve Barkley — who manages Union Pacific's massive central dispatching center in a football-field-size bunker beneath Omaha — was given a new position in charge of the railroad's Southern and Central Region. His official title will be announced after approval by the railroad's board of directors, Bromley said. Barkley will relocate here after Jan. 1. Handley will report to Barkley.

Moreover, the carrier said it reassigned Greg Garrison, who had served as Union Pacific's No. 2 local manager as superintendent, transportation services. Replacing Garrison will be Ray Perry, who currently is in charge of the carrier's massive North Platte, Neb., terminal. Garrison was relocated to Omaha with an unknown title, Bromley said. Also, an existing superintendent here, Jeff Crandall, was promoted to general superintendent, transportation.

Union Pacific, by far the largest railroad in the Houston area, employs slightly more than 2,000 workers in Harris County.

Asked if the carrier was displeased with the jobs done by the displaced managers, Bromley said: "We're trying to strengthen the management down there and put the best people in the best slots."

EX 14-19

Union Pacific reports progress on slowdown

Train speeds improve slightly, filing states

DATED 1/14/98

By CHARLES BOISSEAU
Houston Chronicle

Union Pacific Railroad reported Tuesday it is making progress in recovering from a traffic slowdown during the holidays.

In a weekly filing with federal regulators, the carrier said average train speeds hit 14.6 mph in the week ended Jan. 9, up from 12.3 mph the previous week. The average was the fastest since Union Pacific began providing the data in mid-September, but still below the 17.9 mph average a year ago.

Because of the faster traffic, the Omaha, Neb.-based railroad was able to move about 7,000 cars from its system, leaving it with 333,193. Officials said 310,000 is the maximum cars Union Pacific's 36,000-mile system can support without delays like those that have plagued the railroad for months and provoked the ire of shippers and regulators.

"The numbers show we are making some improvements," Union Pacific spokesman John Bromley said. "Basically we're seeing a pretty fluid (railroad) with the exception of that one area where all this started."

Bromley referred to the Houston terminal — where the railroad's congestion problems began last summer — and the Houston-to-New Orleans corridor. In these areas, traffic "still is pretty congested," he said.

The railroad hopes for improvements here in early February when it starts operating trains in two directions over tracks running from Houston to Memphis, Tenn., and southern Missouri. One track will be used exclusively for northbound freight, another for southbound traffic.

The railroad's recovery efforts had faltered the last two weeks, as it reported many train workers chose to stay home for the holidays. But in its latest report to the Surface Transportation Board, the railroad said fewer trains are now delayed because of a lack of manpower.

Also on Tuesday, a Union Pacific freight train derailed at 3:25 a.m. igniting a fire on a busy corridor in east Fort Worth, damaging a trestle spanning the Trinity River. No injuries were reported in the derailment, which involved eight cars, with one carrying a load of salt and the others empty, Bromley said.

Union Pacific has been under fire since last summer because of traffic congestion and safety problems that have plagued its operations. The widespread delays have caused additional costs estimated in the hundreds of millions of dollars for scores of shippers.

Many customers and state regulators have blamed the problems on the merger with Southern Pacific Rail Corp., which made Union Pacific once again the nation's largest railroad and gave it a commanding share of the Houston and Gulf Coast market — Texas' busiest rail corridor.

Because of the service problems, the federal Surface Transportation Board has issued an emergency order until March 15 that, among other things, requires Union Pacific to report on its progress each week.

For its part, Burlington Northern Santa Fe Railway Co. — the nation's second-largest carrier — said in its own quarterly progress report to the STB that Union Pacific's congestion has hampered its ability to serve the area.

Burlington Northern said because of the congestion it "has serious reservations about its ability long-term to fulfill the competitive role" the railroad and the agency had anticipated.

"BNSF's operational experiences to date, in light of the cost and unreliability of service over the trackage rights lines, raise serious questions as to whether BNSF will be able to provide rail customers viable long-term competitive service, particularly in South Texas and along the Gulf Coast," the carrier said.

The Fort Worth-based railroad was granted the right to operate over Union Pacific tracks as a condition of the UP-Southern Pacific merger.

Burlington Northern spokesman Jim Sabourin said Tuesday, "At this point we're not asking for anything specific (from the board). We are continuing to bring this to the board's attention.

"We are unable to take advantage or capitalize on the trackage rights because of the congestion," he said.

EXH. 18
Page 1 of 2

THE ORANGE COUNTY REGISTER, FRIDAY, OCT. 3, 1997

Railroad merger rides off the tracks to chaos

TRANSPORTATION: Union Pacific has lost millions and slipped in safety since its ballyhooed buyout of Southern Pacific Rail Corp.

By DANIEL MACHALABA
The Wall Street Journal

Its railroad safety record, marred by three fatal crashes in three months, is being characterized as a "fundamental breakdown" by federal regulators. Its route system west of the Mississippi River has slipped into near gridlock in many places, with thousands of freight cars backed up in the Houston area alone. Its chairman was forced to publicly apologize in August to its big customers.

So bad has service become that customers say Union Pacific Corp., the nation's largest railroad, can't account for millions of dollars of shipments for weeks at a time. Riviana Foods Corp., a Texas rice producer, tried to ship a freight car full of rice from Missouri to Tennessee in early August. A month later, the car was spotted on a track in Devil's Slide, Utah. The latest word is that it was somewhere in Texas. "I still don't know where it's at," says Terry Nickens, Riviana's distribution manager.

Is this any way to run a railroad?

Union Pacific's attempts to put together the biggest railroad merger in history is fast becoming one of the industry's biggest debacles. With high hopes last year, the company bought Southern Pacific Rail Corp. for $3.9 billion and promised to begin merging the systems this summer into a seamless link between the West Coast and the Midwest.

Instead, with amazing speed, the merger has unraveled in recent weeks into a series of service and safety quagmires. Analysts estimate the carrier has already lost about $125 million in revenue as customers diverted shipments. Hundreds of customers have threatened to take away business, and the Federal Railroad Administration could well impose stiff fines on the company for safety violations. The company concedes that its ser-

Please see RAIL Page 4

EXH 18 (CONT.)

Page 2 of 2

RAIL: Company hurt by self-professed arrogance

FROM 1

vice problems will reduce its third-quarter earnings by 10 percent to 15 percent. And the stock price has fallen 13 percent in the past month.

Wednesday, things got worse. The Dallas-based company said it would abandon an embarrassing plan to move goods by ship through the Panama Canal — a plan that was rejected this week by its customers. Instead, in an even more remarkable step, it agreed to hand over some of its business to competing railroads and to "borrow" the services of dozens of former managers from Eastern railroads to help untangle the mess.

The setbacks have startled industry observers, who only a few months ago expected the merger to go smoothly, especially because Union Pacific had had a sterling reputation in railroading.

"They thought they could conquer the world," says William Withuhn, transportation curator at the Smithsonian Institution in Washington, D.C., and a widely recognized expert on railroads. "They were counting on having a great success. But they just didn't plan it right. It fell apart."

Union Pacific acknowledges that it has been caught by surprise — and humbled by the experience. Richard Davidson, its chief executive, said in an interview after a recent meeting with more than 200 angry chemical-company officials and other shippers in Houston: "I never imagined in my wildest dreams that I'd be down here apologizing for our service." Wednesday, a Union Pacific spokesman said, "There's no denying we have severe service problems, but we are making headway."

The carrier's executives concede that they overestimated their ability to combine giant rail systems operating hundreds of thousands of freight cars. Its own long record of success, unmatched through much of the late 1980s and early 1990s, might have bred overconfidence. "We are arrogant," Greg Garrison, Union Pacific's Houston superintendent, said last month. "We consider ourselves the best."

Union Pacific's woes raise troubling questions about how well railroads can transport goods in the nation's ever-growing economy. For more than a decade, the industry has been on an unprecedented merger binge that was supposed to give the remaining five powerful railroads a better chance at competing against trucks, which now earn nearly 80 percent of the nation's freight revenues. That improvement, in turn, was supposed to help reduce everything from highway congestion to air pollution to fuel consumption. Consumers would gain, too, because railroads can haul goods about 20 percent more cheaply than trucks can, with much of the saving to be passed on to the public.

But Union Pacific's problems suggest that the railroads are a long way from fulfilling this promise and that shippers might be discouraged from using them. Chemical companies on the Gulf Coast have been switching to trucks whenever possible because Union Pacific's delays have cost them an estimated $100 million in plant closings, lost revenues and extra expenses.

In Waverly, Ohio, Mill's Pride Inc., a maker of prefabricated kitchens that had turned to railroads to save money, says it has dropped Union Pacific and the railroad industry entirely.

"They give us excuses. They have derailments, floods, breakdowns, snow, just stuff you wouldn't think would happen," says Armando Sanchez, the distribution manager.

A Union Pacific spokesman says floods in Texas as well as hurricane-related damage in the Gulf Coast region compounded the problems. The company tried to persuade its labor unions to agree to new flexible work rules, but the unions didn't go along until last month. By then, the snarl had spread to Union Pacific's facilities in the Los Angeles/Long Beach harbor complex, where as many as 3,000 containerized shipments have been piling up for lack of freight cars. "I've never seen it this bad," says David McLean, director of global marketing for Circle International Inc. of San Francisco, which arranges freight transportation for major firms.

Through its buyouts, Union Pacific also encouraged an exodus of many Southern Pacific executives and managers, whom industry officials said were skilled at keeping the weaker line going.

→ (OR DEMOTION?)

EXH. 19

NESS

Dow Jones	NYSE	Amex	NASDAQ	Gold
+101.87	+6.64	+5.00	+25.34	+1.10
Close 7,826.61	Close 500.54	Close 672.65	Close 1,626.56	Close 303.50

Railroad vows to bring trees

hristmas: Union Pacific says it won't be a rinch, despite transportation gridlock.

Art Wong Nov 8 '97
ff writer Sunday

ONG BEACH – Not wanting be a Grinch, Union Pacific lroad officials promised that pite a "massive mess" snarling ffic on its tracks, deliveries of ristmas trees to Southern Calinia would not be delayed.

We won't let that happen," said ion Pacific Vice President Rob- Starzel, speaking at a special ring held by the California blic Utility Commission.

n apologetic Starzel testified t the railroad had implemented unprecedented plan that is inning to ease a two-month dlock, but he said a complete urn to normalcy isn't expected il early next year.

'ort and steamship officials eed, saying they are beginning see improvements. They asked ulators not to intervene, which ld worsen the situation. But aller shippers complained that y are continuing to see lengthy ays.

We see it getting worse," said rin Lindsay of Lindsay Lumber Paramount, speaking on behalf he local lumber industry. "The blem is cars are taking six to t weeks to get from Oregon to Angeles that used to take a week."

The delays have resulted in a shortage of lumber, which has driven up its cost by about 15 percent, he said.

Starzel said the congestion stems from serious mistakes made by Union Pacific this summer as it tried to merge with Southern Pacific railroad. It closed some Southern Pacific yards in Houston, not realizing how vital they were.

That began to back up trains in the Southwest and then throughout its system, which extends to Southern California. The problems grew because the two railroads don't have common computer systems. A greater-than-expected surge in holiday shipments overwhelmed Union Pacific, which has yet to negotiate new labor agreements that would allow it to use Union Pacific workers to help on its newly acquired Southern Pacific routes, such as those in Southern California.

The gridlock has left cargo piled up on the docks. About 16 ships have been diverted.

United Parcel Service diverted about $50 million worth of cargo. Union Pacific paid 7,000 truckers to haul stalled cargo from Southern California to Chicago.



Robert Starzel, Union Pacific vice president, addresses m bers of the Public Utilities Commission at a hearing on the road tieup Wednesday in Long Beach. John Hayes / Associated

Starzel said new labor agreements should be completed by the beginning of the year, and a merging of the computer systems finished by spring.

Meanwhile, Union Pacific has taken the "revolutionary" step of asking other railroads to take its coal and grain shipments. Bu said other railroads are als their capacity. The company is acquiring another 300 loc tives. It already has 8,200. An hiring and training more wor

"The recovery plan is g working, but it takes time to g back," Starzel said.

tockholders sue Union Pacific over stock flop

Katie Fairbank
ociated Press

DALLAS – Shareholders are ag Union Pacific over its stock's ent slide, claiming the nation's rest railroad knew long ago that merger with Southern Pacific s off track.

A class-action lawsuit represent- Union Pacific shareholders o bought stock between March 4 Oct. 1 accuses the Omaha, Neb.-based railroad of misrepresenting its safety record and failing to disclose problems involving last year's merger.

The lawsuit, filed here Tuesday, contends that even as the railroad touted the benefits of the $5.4 billion merger, top railroad officials knew that combining the two lines would be costly. It also claims that the optimistic announcements inflated stock prices.

"It's a fair statement to say there is no doubt that the directors and officers knew very well that those statements about the merger were false," Steven Schulman, a lawyer for the stockholders, said. Union Pacific spokesman John Bromley on Thursday would not comment.

Railroad executives said last month that fourth-quarter profits would range from $74 to $149 million. On Monday, they said the quarter results could range break even to substantial lo

Schulman said the typ "stock-drop" case he has fil hard to win.

"It's not because it's not a g case, but because the compa fight hard," he said.

Although Union Pacific s rose above $72 in mid-July starting the year at $62, it since dropped to $58.50.

Exh 2

Dow sues railroad over delays

UP denies union's claim that it's violating safety regulations

By JENALIA MORENO
Houston Chronicle

3/18/98

Union Pacific Railroad was sued Tuesday by one of its biggest customers and accused of violating safety regulations by a union leader – the same day it announced signs of congestion relief in the Gulf Coast and Laredo areas.

Dow Chemical Co., in a suit filed in state district court in Angleton, claims rail service delays have cost the company more than $25 million in the past nine months and that the railroad breached its contract by failing to provide reasonable service.

The chemical company said it has been forced to use trucks to move its products and raw materials.

The company's Freeport and Plaquemine, La., manufacturing facilities depend on Union Pacific for service because no other railroad provides service to those plants, Dow said.

Some of the company's 115 manufacturing plants worldwide have been forced to close down for days at a time because of service delays, said Anne Ainsworth, spokeswoman for the Midland, Mich.-based company.

"The service disruptions have affected numerous of our product lines with our key industry segments," Ainsworth said. "Our losses are continuing to mount."

Attorneys for the nation's largest railroad had not yet received the suit and a spokesman declined to comment. This is the second suit filed against Union Pacific over service delays. Entergy Corp. filed a similar suit several months ago.

Shippers from around the nation met in Houston last month to discuss rail service delays and attorneys instructed them on how they could recoup their transportation losses, estimated to be $2 billion nationally.

At that meeting, Dow's transportation manager, Harry Ignatowski, said he was

See UNION on Page 8C.

Tax hotline

Filing a tax return this year will be no easy matter for many people, especially when you consider the number of new laws on the books.

Question: Taxpayers will be inundated with information about changes in the tax code. How do you decide what's worth paying attention to?

■ How do you decide what's worth paying attention to?

■ Should you withdraw money from your individual retirement account to pay for higher education expenses?

■ How do the new rules affect your estate planning?

■ What's the best way to save for your retirement?

Taxpayers can get answers to these questions and other tax-related questions from Houston CPAs from 7 a.m. to 7 p.m. Thursday by calling 713-260-9810. The service will be open Saturday and Sunday from 10 a.m. to 4:30 p.m.

Union 3/18/98

Continued from Page 1C.

frustrated "because this thing has gone on six or seven months and there's not an end in sight. All I want is my service back."

The filing proves how badly local shippers have been affected by the rail crisis, said Paul Broussard, a transportation consultant in Houston.

"You know if companies like Dow Chemical are hurting, you can just imagine what smaller shippers are experiencing," he said.

> 'You know if companies like Dow Chemical are hurting, you can just imagine what smaller shippers are experiencing.'
>
> **Paul Broussard, consultant**

The shippers he represents are still totaling how much they have been damaged by the crisis that began last summer, Broussard said.

Also on Tuesday, Dennis Penning, the general chairman of the Brotherhood of Locomotive Engineers, accused the railroad of unsafe practices and threatened to call a strike.

Although his division of the union group unanimously has agreed to strike, international leaders last week voted against calling such an action.

Penning, who represents 1,100 Union Pacific engineers, accused the railroad of rushing its implementation of directional running – running trains in only one direction on specific tracks – last month by forcing engineers to operate over unfamiliar tracks.

"We're an accident looking for a place to happen. They're violating our safety rights out in the field like you wouldn't believe to relieve their congestion," Penning said from his St. Louis office. "I'm going to do whatever it takes to stop this."

The accusations came the day before the National Transportation Safety Board begins a three-day meeting to discuss Union Pacific's safety record.

David Bolger, Federal Railroad Administration spokesman, said he has heard of only one engineer who said he was unfamiliar with the tracks he was assigned to operate over after the directional running program was implemented on Feb. 1. The agency is investigating that complaint and has overseen the switch to directional running in the past month.

"They seem to be investing a great deal in the Houston area," Bolger said. "They're trying to get as m qualified people as possible."

Union Pacific [illegible] Broussard said he considers it to be meeting its projections of [illegible] running and is operating in a s manner. He said engineers m complete a program to familiar themselves with the tracks be they are allowed to operate the t alone.

Directional running has sho signs of relieving congestion in Houston area, cording to Tu day's report to U.S. Surfa Transportat Board.

That rep stated that Ho ton's rail ya were becom more fluid. Th were 282 fe cars in Englew Yard last we and 401 fewer c in the Setteg Yard.

The company is now planning construct a rail line less than a m long along Liberty Road to conn those two yards. Union Pacific quired the Englewood Yard in in its merger with Southern Paci The company now must circumna gate the city to move cars from yard to the other.

"Connecting those two trac would not only save hours, but prove productivity between the yards," said Union Pacific spok man Mark Davis.

In its weekly report, Union Pac also announced it had reached agreement with the Mexican railr Transportación Ferroviaria Me cana and Texas Mexican Railway alleviate the rail traffic backlog Laredo.

TFM and Texas Mexican, wh are jointly owned by Kansas S Southern Railway Co. and the Me can transportation company Tra portación Marítima Mexicana agreed to accept an additional cars daily from Union Pacific. Th typically accepts 500 Union Paci cars en route to Mexico daily.

TFM also agreed to urge Mexic agricultural officials to inspect c in rail yards instead of on the Lar International Bridge when the c are crossing into Mexico.

Union Pacific agreed to run ad tional locomotives through Laredo Monterrey.

Both railroads agreed to send empty northbound trains through less congested Brownsville crossi

20 B

LAW

DuPont Sues Norfolk Over Rail Delays

By DANIEL MACHALABA
Staff Reporter of THE WALL STREET JOURNAL

DuPont Co. sued Norfolk Southern Corp., seeking damages for rail-service breakdowns following Norfolk's operation of parts of the former Conrail.

The suit, filed Friday in U.S. District Court in Alexandria, Va., accuses Norfolk Southern of breaching its contract with DuPont to provide timely, uninterrupted and reliable service. The Wilmington, Del., chemicals manufacturer said the rail-service snafus caused DuPont to slow production lines, use more-expensive substitute transportation and acquire substitute materials at higher costs.

DuPont spokesman Clif Webb said the disruptions affected almost a dozen plants in the company's nylon, fluoroproducts and chemicals-solutions businesses, among others, and occurred from June 1, 1999, through the present. He said DuPont "incurred expenses and suffered losses amounting to millions of dollars."

The lawsuit comes after several years of increasing customer frustration with rail service following big railroad mergers and customers' inability to get Congress or federal regulators to promote more competition in the rail industry.

In 1997 and 1998, massive service failures followed Union Pacific Corp.'s takeover of Southern Pacific Rail Corp. Then, soon after they began operating their respective portions of Conrail on June 1, 1999, Norfolk Southern and CSX Corp. became mired in freight congestion, delivery delays and communication snafus. CSX isn't involved in the lawsuit filed by DuPont.

"Too frequently, rail customers have had to live with whatever service their railroad gives them," said Edward Emmett, president of the National Industrial Transportation League, which represents rail, truck and ocean freight customers. "If there's no relief to be found in the marketplace, I expect more shippers will turn to the courts."

Some analysts, however, don't expect a wave of similar lawsuits, because Norfolk Southern has sought to resolve such customer issues expeditiously. In addition, the magnitude of its service problems never approached the full gridlock experienced by Union Pacific customers.

The DuPont suit "likely represents more the exception than the rule," said Scott Flower, an analyst at Salomon Smith Barney Inc.

Norfolk Southern, based in Norfolk, Va., declined to comment on specifics of the DuPont suit. But Norfolk Southern spokesman Robert Fort said the company has "been working with all customers who have had service-related claims from last year, and we have made a good-faith effort to work with DuPont, but we have been unable to resolve these issues."

In its suit, DuPont said Norfolk Southern had represented that transit times along the former Conrail routes would be as good as or better than transit times before the Conrail acquisition. But DuPont said that Norfolk Southern's performance deteriorated immediately after June 1, 1999, with transit times for loaded and empty railcars as well as cycle times for DuPont's rail fleet increasing dramatically.

Among the Norfolk Southern service breakdowns it experienced, DuPont said in its suit, were "'lost cars,' blocked rail sidings, discontinued or slowed intermodal service, reduced average train speeds and increased dwell times in yards."

DuPont said timely rail service is critical because the company's facilities are not designed to stockpile outgoing or incoming materials.

Railroad emergency is 'not yet over'

11/5/97

Board extends order on Union Pacific

By DAVID IVANOVICH
Houston Chronicle Washington Bureau

WASHINGTON – Federal regulators late Thursday extended an emergency order imposed on Union Pacific Railroad's operations, unpersuaded that the nation's largest railroad has overcome the operational woes that caused massive backups in Houston and much of the West.

But the federal Surface Transportation Board's order fell far short of the more radical steps proposed by the Texas Railroad Commission, which wanted Union Pacific to turn over control of some of its track in Houston.

The Surface Transportation Board announced Thursday night it would keep Union Pacific under emergency status until March 15, and give competitors Burlington Northern-Santa Fe and Texas Mexican Railway Co. the right to use Union Pacific's Houston lines in the area.

Previous emergency orders issued Oct. 31 had given only Texas Mexican the right to serve some of Union Pacific's customers along its Houston lines.

"While service is showing signs of improvement, the service recovery to date is not broad enough in scope. Given the improvement that is still needed, we have concluded that the emergency is not yet over," the board said.

The board also will require even more extensive reporting requirements on Union Pacific than it had in the past.

Union Pacific Chief Executive Dick Davidson, in a written statement, said the board had given all parties in the issue a fair hearing.

"We look forward to completing our service recovery as rapidly as possible in order to regain the confidence of our customers," Davidson said.

Some Union Pacific customers were surprised by the board's order, which went further than they had expected.

"I think this is probably as good as it's going to get from the board," said Maureen Healey, director of transportation services for the Washington-based Society of the Plastics Industry, a trade group which has been one of Union Pacific's biggest critics. "It's still going to take a lot of cooperating among the railroads, trying to get them to talk to one another and get the business taken care of."

Texas Railroad Commission Chairman Charles Matthews, who had asked the board to force Union Pacific to divest a portion of its rail lines in Houston as a way to promote rail competition in the area, blasted the decision.

"It appears to be very, very minor relief for the Houston area, which is disappointing," Matthews said. "It's Houston and the Gulf

See UNION on Page 4C.

Union

Continued from Page 1C.

Coast that are hurt the worst."

Matthews has pointed to a study conducted by Bernard Weinstein at the Center for Economic Development and Research at the University of North Texas, which estimated that the service problems have cost Texas businesses $762 million.

"They just still don't seem to get it," Matthews said. "It's amazing. No matter how many Texans go up there to testify, they just don't seem to pay any attention to us."

The board declared the initial rail emergency in response to massive rail congestion problems that began in Union Pacific's Houston operation and quickly spread throughout the West.

Union Pacific's Englewood Yard in northeast Houston was ground zero for the railroad's troubles. Company officials have said one of their biggest mistakes was to stop making up trains at the company's busy Strang Yard in La Porte and try to consolidate all shipments out of the massive Englewood operation.

Davidson had assured the board back in October that his railroad could resolve the traffic problems by shortly after Thanksgiving.

And on Wednesday, Davidson claimed victory over the traffic woes and told reporters his railroad would be running smoothly again by the end of the year.

Union Pacific's customers, many of whom have been forced to curtail production, lay off employees, even shut down plants because of an inability to obtain raw materials or ship out products, had asked the board to continue the order.

Robert Evans of the National Industrial Transportation League predicted Union Pacific would need at other three months to resolve its traffic problems.

Many critics blame Union Pacific woes on the company's merger wit Southern Pacific Rail Corp. last year a move that made Union Pacific th biggest rail carrier in the nation, em ploying 53,000 workers and control ling 36,000 miles of track. Union Pa cific also is the nation's larges hauler of chemical products, much o which is produced along the Gul Coast.

Davidson said company officials have thrown their budget for the year out the window, sparing no cost to fix the operational troubles.

Industry analysts earlier this summer were expecting Union Pacific Railroad's parent company, Union Pacific Corp., to post a profit of about $1.20 a share for the fourth quarter. Wall Street railroad analysts Doug Cummins and Tony Hatch now are looking for a 40-cent-per-share loss.

Union Pacific's stock, which was selling around 72 in early August, fell 1¾ Thursday to close at 62⅞ Thursday on the New York Stock Exchange.

Texas Mexican, which is 49 percent owned by Kansas City Southern Railroad Co., is currently moving about half a dozen cars in the Houston area each day. The company will be able to serve customers along Union Pacific's line only until the emergency order is lifted.

Chronicle staffer Charles Boisseau contributed to this report.

2

Union Pacific spending big to unclog rail lines

RAILROADS: The company is upgrading key segments on the Nebraska plains to ease its costly, merger-related congestion.

By JOE RUFF
The Associated Press

NORTH PLATTE, Neb. — Welding machines the size of semitrailer trucks straddle new Union Pacific rail lines in this vast expanse of Nebraska's western plains that is home to the busiest segment of the nation's largest railroad.

Nearly 800 workers in the summer heat grind ends of the rails smooth, cut new rail bed and lay concrete ties in a $366 million track expansion and maintenance project just east of North Platte.

About 40 percent of Union Pacific's trains hit this 108-mile stretch, carrying cargo as diverse as airplane wings, automobiles, frozen vegetables and coal, traveling from Los Angeles to Chicago, Wyoming to Texas.

The track work here and around Union Pacific's 36,000-mile network already is making progress at easing congestion that made the railroad an object of ridicule and the target of customer lawsuits last year. But much remains to be done to smooth out the stormy 1996 merger of Union Pacific and Southern Pacific.

The price tag for upgrading track and trains is running at least $200 million above the $1.4 billion Union Pacific had projected. The work now is expected to take two more years than the five years originally planned.

Still, things are going well enough that the railroad showed off some of its expansion on a recent media tour of its routes to Wyoming coal fields.

Like the rest of Union Pacific's 23-state system, travel slowed through this stretch last year because of congestion that cost the U.S. economy an estimated $4 billion in stalled production and more-expensive transportation.

Only now is traffic picking up, and railroad executives hope putting a third track down will speed service still more.

If all goes as planned, trains will go 70 mph instead of 60. Instead of 125 trains each day, more than 200 could roar through daily by year's end. When one track undergoes maintenance, the other two will run full speed.

But Union Pacific has a long way to go to please its customers, said Ed Rastatter, director of policy for the National Industrial Transportation League, which represents about 1,000 rail and truck users.

Most agree the crisis is over, but they're still not getting the service they expect, Rastatter said. Merger benefits were supposed to include faster transportation times, but unforeseen delays in service continue and train times are too slow, he said.

"Almost everybody thinks they have a long way to go to normal, let alone where they want to be with the benefits of the merger," he said.

The merger that created the biggest U.S. railroad quickly challenged the notion that bigger is better.

A surge in business surprised Union Pacific in 1997, even as it suffered from a rash of wrecks and difficulties merging with Southern Pacific's aging equipment.

Average train speeds systemwide now are at about 14 mph, slower than the precrisis 18 mph. Union Pacific lost $633 million over the past three quarters, including settlements with customers angry over money lost to delivery delays.

While the worst may be over, the railroad still faces a difficult fall.

Union Pacific and Burlington Northern are warning farmers that they do not have enough rail cars to handle what is expected to be an unusually difficult harvest season.

Low grain prices and reduced exports in the aftermath of Asia's economic crisis have led farmers and grain elevators to store much of last year's harvest in hopes of improving markets.

Page 1 of 1

EXHIBIT A

EXH 228

Page 2 of 2

The Orange County Register **NATION/WORLD** Saturday, Sept. 19, 1998

Union Pacific might be ordered to divest

The federal government Friday raised the possibility of forcing **Union Pacific** to divest some of its rail lines if service did not improve by the end of the year.

In a submission to the Surface Transportation Board, the Department of Transportation said it did not support allowing the railroad an indefinite amount of time to restore service to the levels seen before its 1996 merger with **Southern Pacific**.

The Department of Transportation noted some improvement in service, but expressed concern that Union Pacific's performance would deteriorate in the coming months as grain and other shipments increased.

A Transportation Board emergency order last year against Union Pacific that allowed other railroads to compete for customers on UP tracks expired Thursday.

EXH. 23A

John E. Grother
07/31/02 02:39 AM

To: Lisa Brewster@UP
cc:
Subject: Re: Letter dated July 25, 2002

MY DIRECT SUPERVISOR WAS MR. KEN C. PACKARD, WHO STILL APPEARS TO BE AN ACTIVE EMPLOYEE AS NOTED ON COED. DO YOU THINK HE KNOWS WHERE THE 15121 IS FILED?

WOULD MR. PACKARD HAVE BEEN THE PERSON ACCOUNTABLE FOR FILLING OUT THE 15121?

WHY WOULD MR. PACKARD STILL HAVE THE 15121? WOULD IT NOT BE ON MICROFICHE OR HARD COPY?

HE HAS NOT RESPONDED TO MY TWO LOTUS NOTES ABOUT THIS ISSUE; BUT, HE MAY RESPOND TO YOURS.

NOTWITHSTANDING THE PROBLEM THAT THE CONTACTS YOU ARE TRYING TO REACH ARE ON VACATION, WHICH IS EXASPERATING AT BEST, PERHAPS WE CAN FOCUS ON FOUR SIMPLE QUESTIONS:

1. IS THERE A 15121 ON SOME HR HARD COPY FILE OR MICROFICHE? THERE MUST BE A PROCESS? I don't know. Our systems have changed at least twofold.

I HAVE REQUESTED & RECIEVED MY PERSONAL RECORD TWICE & THERE IS NOT ONE IOTA OF INFORMATION THEREIN ABOUT THE 1997 DEMOTION, OR ANY "DISCIPLINE" OR RATIONAL RELATED THERETO.

2. WAS JUSTIFICATION FOR A WAGE REDUCTION REQUESTED AND APPROVED? Yes, in the online system it indicates an electronic approval from Brad King and Art Schoener.

WHAT WAS THE BASIS FOR SUCH A HORRIFIC WAGE REDUCTION ($ 1,272/MO) ; WHEN ALL AROUND THE COUNTRY IN 1997, UPRR WAS BEING SUED BY SHIPPERS FOR SERVICE FAILURES; BUT, NO LAW SUITS IN MY TERRITORY? The online record indicates disciplinary action.

3. MAY I OBTAIN A COPY OF THE 15121? If the old system and the archive is brought up, yes. I don't have any idea of what it looked like in 1997.

4. WAS PERFORMANCE STATED AS THE REASON FOR MY DEMOTION OR "OTHER"? As I indicated above, the only note I can see in the online system was the demotion was for disciplinary reasons.

IF "OTHER", WHAT REASONS ARE NOTED IN THE "COMMENTS" SECTION OF THE 15121? Since we don't have a copy of the actual 15121, I don't know.

FORGIVE ME FOR ROLLING ON; BUT, PART OF MY TRANSITION IS TO WORK 1730-0530; 5-6 DAYS A WEEK AND SOMETIMES I GET A LIL' CONCERNED WHEN I RE-VISIT THE "FAIRNESS" OF THIS 1997 EVENT.

HOWEVER, SINCE I WILL BE FINANCIALLY PENALIZED FOR THE REST OF MY ENTIRE LIFE, I FEEL I AM ENTITLED TO SOME REASONABLE EXPLANATION AS TO WHY I HAVE BEEN SINGLED OUT AS SCAPEGOAT OF THE DECADE.

THANKING YOU IN ADVANCE FOR YOUR UNDERSTANDING OF THIS PAINFUL DEMOTION ISSUE.

I

E&H. 23B

To: John E. Grother@UP
cc:

Subject: Re: Letter dated July 25, 2002

Mr. Grother, I have not been able to find anyone who knows if the old system (15121) is archived anywhere. Therefore, I will not be able to do anything more on that front. I will forward you a copy of the form that is included in one of our more recent systems. That is all the luck I have had. The reference to disciplinary/performance is due to the policy statement in effect at that time, which I forwarded to you already.

Take care,
Lisa Brewster
John E. Grother

John E. Grother
08/01/02 09:19 PM

To: Lisa Brewster@UP
cc:
Subject: Re: Letter dated July 25, 2002

THANK YOU FOR THE TIME YOU HAVE DEDICATED TO THE FAIR REVIEW OF THIS ISSUE.

HOWEVER, I STILL WOULD APPRECIATE IT IF YOU WOULD REVIEW YOUR ANSWER IN RED TO #3 BELOW
WHERE YOU ANSWERED "YES" ; TO PROVIDING A COPY OF THE 15121 ("IF THE OLD SYSTEM AND ARCHIVE IS BROUGHT UP, YES") ; AND , PROVIDE ME WITH A COPY OF THAT 15121 DOCUMENT.

UPRR POLICY STATES EMPLOYEES SHALL BE TREATED WITH RESPECT AND FAIRNESS, "JUST LIKE YOU WOULD LIKE TO BE TREATED".

IF YOU CAN NOT ACTIVATE THE EQUIPMENT NECESSARY TO OBTAIN MY 15121, WHO, IS IN POSITION TO ACTIVATE SAID EQUIPMENT OR SYSTEM?

IN THE MEANTIME, IS IT POSSIBLE TO OBTAIN A COPY FROM THE "ON LINE RECORD" WHICH INDICATES DISCIPLINARY ACTION AND THE NAMES OF THE PARTIES WHO APPROVED THIS DEMOTION IN HARD COPY FORMAT TO MY HOME ADDRESS?

IN CONCLUSION, THEREFORE, I ONCE AGAIN AM REQUESTING THAT THE TRUTH FINALLY BE MADE AVAILABLE TO THE EMPLOYEE WOULD HAS BEEN SO ADVERSELY AFFECTED FOR THE REST OF THEIR LIFE.
Lisa Brewster

Lisa Brewster [redacted]

To: John E. Grother@UP
cc: Ken C. Packard@UP, Linda D. Buttrill@UP

~~Subject: Re: Letter dated July 25, 2002~~

Please see my comments in red.
John E. Grother

Prior Page

EXH. 24

Linda D. Buttrill
07/09/2002 03:34 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

ANOTHER SLOW RESPONSE WITH DEAD END

John, As I have indicated on several occasions to you, I do not have a copy of this policy you are requesting. If you want to continue to pursue the 'demotion' and 'reduction in pay' from your 1997 assignment; maybe you should speak with someone in the EEO group. You can reach them at 402-271-4435, or 1-866-877-3362.
John E. Grother

WHY? EEO ISSUE?

John E. Grother
07/02/2002 03:55 AM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

IT HAS BEEN OVER 100 DAYS SINCE I INITIALLY REQUESTED A COPY OF THE UNION PACIFIC 1997 DEMOTION POLICY AND THE IMPLEMENTING GUIDELINES, IF ANY.

ARE YOU NOW IN A POSITION TO PROVIDE SAID DOCUMENTS OR ADVISE ME TO WHOM I SHOULD BE ADDRESSING THIS REQUEST PLEASE?

---------- Forwarded by John E. Grother on 07/02/2002 03:52 AM ----------

John E. Grother
05/09/2002 04:51 AM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

AS REQUESTED BELOW ON 3/27/02:

ARE YOU NOW ABLE TO PROVIDE THE "OFF-THE-SHELF FILED 1997 DEMOTION POLICY" OF THE UNION PACIFIC RAILROAD?

ALSO, ARE THERE ANY IMPLEMENTING GUIDELINES OR PROCEDURES THAT WENT WITH THE POLICY, THAT ARE ALSO AVAILABLE?

---------- Forwarded by John E. Grother on 05/09/2002 04:47 AM ----------

John E. Grother
03/27/2002 10:28 PM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

UPOnline

Updated: Wed, Aug 09, 2000 02:28 PM CST

August 9, 2000

Ombudsmen Helps Make System Work for Employees

UP Online Main Page
SECTIONS:
Stock Report
Omaha News
St. Louis News
Want Ads
Employee Discounts
EMPLOYMENT INFO:
Open Mkwt Opptys
CNET
UP Career Link
UP ONLINE FEEDBACK:
Send Ideas/Comments

Do you have a work-related problem that you haven't been able to solve at a local level by talking to your supervisor? Maybe it's time to call Union Pacific's Ombudsman, Butch Ethington.

The ombudsman's office, created almost a decade ago, is designed to assist employees with issues they feel need executive office involvement. Employees are encouraged to talk with their supervisors first about any issues or concerns they may have.

Ethington took over the ombudsman chores when Mike Phillips moved to a new position in Labor Relations in March. Ethington had been tapped to provide a list of potential candidates for the position before President Ike Evans eventually asked him if he'd take the job.

"I said I'd be willing to do anything to help this company," Ethington said. His background as the former director of internal auditing and as head of the company's business conduct committee made him a perfect choice, not to mention his background working on a B&B gang during the summers when he was in college. His last position as director of environmental and ethics compliance took him to the field for audits to ensure the company is complying with environmental regulations.

"Sometimes in large organizations, people can fall through the cracks because they can't get connected to the right channels. I'm interested in making sure the company's culture and organization are doing the right thing for the employees."

Ethington sees the ombudsman's office as a place for employees to turn when they can't find the answers. "I try to make the system work like it's suppose to," he said. "Sometimes in large organizations, people can fall through the cracks because they can't get connected to the right channels. I'm interested in making sure the company's culture and organization are doing the right thing for the employees."

On the other hand, Ethington said the ombudsman's office was never designed to over-ride authority.

EXH. 26A

DEADEND

"DO NOT WASTE MY TIME TYPE OF RESPONSES"

Linda D. Buttrill

Linda D. Buttrill
03/10/2002 05:46 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hello John . Yest you can make notes of what is in your personal record. Since the files are maintained in Omaha, far removed from the managers/supervisors that actually made 1997 decisions, I doubt that a rebuttal would be of much use at this time. However, if you are able to discuss with your supevisor at that time, they may be able to shed some light on the decision.

Linda D. Buttrill
03/07/2002 08:05 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hi John. My suggestion was to review your Personal Record. A hard copy 'generally' has more information than is documented in the computer. The procedure for doing that is to have your present manager request the record and sit with you during the review. Records cannot be copied or taken out of the presence of your supervisor. Secondly, whoever you worked for in Tucson at the time of the change should have knowledge of why that decision was made. If neither of these suggestions produce the information you're looking for, I don't know where you would find it.

NOT TRUE (See 26B 26C)

Linda D. Buttrill
03/06/2002 09:28 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

I would be happy to meet with you; however, I have no information that details your move from Sr. MTO to MIO. The only thing I have access to is the database information which associates this title change with the move from Tucson to Houston.

I suggest that your time would be better spent by either reviewing your Personal Record (with your supervisor) or talking to the manager/supervisor who recommended this change.

Exh 28B

Wayne E. Huddleston
02/04/2002 03:13 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

John, we have sent you a copy of everything that is in your personal record file.

Is there something specific that you were looking for that wasn't in the file?

I have the file in my office and would be happy to review it with you if you want to. Please call me in Omaha at 271-3312.

TURNED OUT THERE IS ANOTHER SECRET RECORD ONLINE

---------- Forwarded by Wayne E. Huddleston on 02/04/2002 03:07 PM ----------

Linda S. Jensen 02/04/2002 03:06 PM

To: Wayne E. Huddleston@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

---------- Forwarded by Linda S. Jensen on 02/04/2002 03:05 PM ----------

John E. Grother
02/04/2002 12:51 PM

To: Linda S. Jensen@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

HOW CAN I OBTAIN A COPY OF EVERTHING , INCLUDING WITHOUT LIMITATION BOTH POSTIVE AND NEGATIVE ISSUES, IN MY PERSONAL RECORD?

Linda S. Jensen

Linda S. Jensen 02/04/2002 09:13 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

The copy that was forwarded to you is the entire hard copy personal record that we have in Records

EXH. 26
C

Management.
I am forwarding a copy of your training history and exam history that is in Peoplesoft... There are no entries of discipline on your record in Peoplesoft...
John E. Grother

John E. Grother
02/03/2002 11:55 AM

To: Linda S. Jensen@UP
cc:

Subject: REQUEST FOR COPY OF PERSONAL RECORD

I APPRECIATE THE TWO DIFFERENT WAYS YOU USED TO PRINT THE WORK HISTORY. THAT WAS VERY CONSIDERATE OF YOU.

HOWEVER, I AM NOT CERTAIN THAT I HAVE MY ENTIRE PERSONAL RECORD.

SPECIFICALLY, I WOULD APPRECIATE A COPY OF ANY AND ALL POSITIVE (AWARDS, ACCOLADES,POSITIVE STATEMENTS, ETC.) AND NEGATIVE (DEMOTIONS, DISCIPLINE, LETTERS OF REPRIMAND, LETTERS OF UNSATISFACTORY PERFORMANCE, ETC) THAT ARE PRESENT IN MY PERSONAL RECORD.

I CAN BE REACHED AT 8-678-5303 SHOULD YOU HAVE ANY QUESTIONS.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

---------- Forwarded by John E. Grother on 02/03/2002 11:50 AM ----------

Wayne E. Huddleston
12/03/2001 03:37 PM

To: Linda S. Jensen@UP
cc: John E. Grother@UP

Subject: REQUEST FOR COPY OF PERSONAL RECORD

Linda, would you please send John a copy of his personal record.

---------- Forwarded by Wayne E. Huddleston on 12/03/2001 03:35 PM ----------

Mitzy A. Graybeal 12/03/2001 09:49 AM

To: Wayne E. Huddleston@UP
cc:

Subject: REQUEST FOR COPY OF PERSONAL RECORD

For your handling. Thanks.

---------- Forwarded by Mitzy A. Graybeal on 12/03/2001 09:48 AM ----------

William J. Behrendt
12/03/2001 09:33 AM

EXHIBIT A

FORM 20834
REV. 5/01

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Affix Or Print Screening Results Here

RBT IV# 011407
DATE 02-02-02
TEST NO. 0339
ID#
526-66-3917
AS IV# 026865
SCREENING
G/210L TIME
0000 AUTO 12:37

TAPE

EVIDENCE

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last) John E. Grother

B: SSN or Employee ID No. 526-66-3917

C: Employer Name UNION PACIFIC RAILROAD
Street 5500 Gullisville Rd.
City, ST ZIP Houston TX. 77020

DER Name and Telephone No. ~~CHARLIE SHOGREN~~ John Lichton 402-271-4800 ~~1800) 840-3784~~
DER Name DER Phone Number

D: Reason for Test: ☑ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 02/02/02

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☑ BAT ☐ STT DEVICE: ☐ SALIVA ☑ BREATH* 15-Minute Wait: ☐ Yes ☑ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Additional Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

Eagle Ind. Examiners — Alcohol Technician's Company
4784 Hwy 346 South — Company Street Address
Michael A Van Alsdale — (PRINT) Alcohol Technician's Name (First, M.I., Last)
Ft. Worth TX. 76116 817) 560-8114 — Company City, State, Zip Phone Number
Michael Van A — Signature of Alcohol Technician
2/2/02 — Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year: / /

COPY 1 – ORIGINAL – FORWARD TO:
(YELLOW) University Services
Arsenal Business Center, Bldg. 4
5301 Tacony Street
Philadelphia, PA 19137

COPY 2 – EMPLOYEE RETAINS
(GREEN)

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-877-0565 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-271-5796

Exh 27B

FORM 20834
REV. 5/01

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

#26

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last) John Grother

B: SSN or Employee ID No. 526-66-3917

C: Employer Name / Street / City, ST ZIP: UNION PACIFIC RAILROAD Engineering, 5500 Wallisville Rd., Houston TX 77020

DER Name and Telephone No.: ~~CHARLIE SHOGREN~~ John Lietzau ~~402-326-46~~ ~~(800) 840-3784~~
DER Name / DER Phone Number

D: Reason for Test: ☑ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

Affix Or Print Screening Results Here

RBT IU# 014407
DATE 05-02-02
TEST NO. 0565
ID#
~~526-66-3917~~
AS IU# 026055
SCREENING
C/210L TIME
.000 AUTO 17:42

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 5 12 02

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☑ BAT ☐ STT DEVICE: ☐ SALIVA ☑ BREATH* 15-Minute Wait: ☐ Yes ☑ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Additional Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

Alcohol Technician's Company: Eagle Ind. Examiners
Company Street Address: 4711 Hwy 377 S.
(PRINT) Alcohol Technician's Name (First, M.I., Last): Michael Van Arsdale
Company City, State, Zip / Phone Number: Ft. Worth TX 76116 (817) 560-5414
Signature of Alcohol Technician: Michael Van Arsdale
Date Month Day Year: 5 12 02

STEP 4: TO BE COMPLETED BY EMPLOYER IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year: / /

COPY 1 – ORIGINAL – FORWARD TO:
(YELLOW) University Services
Arsenal Business Center, Bldg. 4
5301 Tacony Street
Philadelphia, PA 19137

COPY 2 – EMPLOYEE RETAINS
(GREEN)

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-877-0565 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-271-5796

29A

John E. Grother
08/27/2002 04:23 PM

INITIAL REQUEST

To: Lisa Brewster@UP
cc: (bcc: John E. Grother)

Subject: ON-LINE SYSTEM ACCESS

STILL TRYING TO GET A REPLY FROM MR. PACKARD; BUT, IN THE MEANTIME, MAY I PLEASE UNDERSTAND A LITTLE MORE ABOUT THE ON-LINE SYSTEM:

WHAT IS THE PURPOSE OF THIS ON-LINE SYSTEM?

WHO HAS ACCESS?

IS ACCESS RESTRICTED TO CERTAIN BAND LEVELS?

DOES MY CURRENT SUPERVISOR HAVE ACCESS? HOW?

DO I HAVE ACCESS? HOW?

DO BAND C OR D MANAGERS HAVE DIRECT ACCESS?

COULD ANY MANAGER LEVEL, OR JUST BAND LEVELS C & D REQUEST VERBALLY OR IN WRITING THAT SOMEONE IN HR PROVIDE THEM WITH A PRINT-OUT OF SAID ON-LINE DATA FOR A SELECTED PERSON ,OR IS THIS INFORMATION RESTRICTED IN ANY WAY BY BAND LEVEL OR OTHERWISE?

IF RESTRICTED INFORMATION, HOW IS ACCESS CONTROLLED?

PLEASE ADVISE.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

John E. Grother
08/28/2002 01:31 PM

To: Lisa Brewster
cc:

Subject: Re: ON-LINE SYSTEM ACCESS

ANSWER MADE UNPRINTABLE BY "ICON OF SECRECY." COULD NOT BE FORWARDED OR COPIED.

WHY RESPOND IN MANNER THAT COULD NOT BE PRINTED?

Dated AT [8/28/2002 07:56 AM]

(See Attached)

Message stated:

"MR. GROTHER - I AM LEAVING ON MATERNITY LEAVE IN FIVE DAYS. SO I APOLOGIZE FOR BEING SHORT WITH THIS E-MAIL. I HAVE INDICATED RESPONSES IN RED BELOW.

LISA BREWSTER"

ANSWER BLOCKED { } OR WRITTEN IN RED ON THE NEXT PAGE..

GRH. 29E

John E. Grother
08/27/2002 04:23 PM

To: Lisa Brewster@UP
cc: (bcc: John E. Grother)

Subject: ON-LINE SYSTEM ACCESS

STILL TRYING TO GET A REPLY FROM MR. PACKARD; BUT, IN THE MEANTIME, MAY I PLEASE UNDERSTAND A LITTLE MORE ABOUT THE ON-LINE SYSTEM: IT WAS USED BY PERSONNEL TO RECORD CHANGES TO PERSONNEL WITHIN THE RR.
WHAT IS THE PURPOSE OF THIS ON-LINE SYSTEM? ✓
HR PERSONNEL DID, AS WELL AS PAYROLL
WHO HAS ACCESS? ✓

IS ACCESS RESTRICTED TO CERTAIN BAND LEVELS? SEE ABOVE

DOES MY CURRENT SUPERVISOR HAVE ACCESS? HOW?
THE CURRENT RECORD KEEPING SYSTEM USED IS PEOPLESOFT AND I DO NOT KNOW)
DO I HAVE ACCESS? HOW? WITHIN THE FIELD HAS ACCESS.
& I WOULDN'T THINK SO.
DO BAND C OR D MANAGERS HAVE DIRECT ACCESS? IT WOULD PROBABLY DEPEND ON NEEDS ACCESS - A REQUEST WOULD HAVE TO BE MADE TO THE SECURITY TEAM TO BE GRANTED ACCESS.
COULD ANY MANAGER LEVEL, OR JUST BAND LEVELS C & D REQUEST VERBALLY OR IN WRITING THAT SOMEONE IN HR PROVIDE THEM WITH A PRINT-OUT OF SAID ON-LINE DATA FOR A SELECTED PERSON ,OR IS THIS INFORMATION RESTRICTED IN ANY WAY BY BAND LEVEL OR OTHERWISE? I WOULD NOT BE COMFORTABLE RELEASING INFORMATION TO JUST ANYONE. IN YOUR CASE, I GAVE YOU YOUR INFORMATION.
IF RESTRICTED INFORMATION, HOW IS ACCESS CONTROLLED?
SYSTEMATICALLY - BUT, I COULDN'T BEGIN TO EXPLAIN IT.
PLEASE ADVISE.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

EXH.
30

Pension Plan for Salaried Employees of
Union Pacific Corporation and Affiliates

Summary of Plan Changes
Effective January 1, 1999

The plan was amended to include several changes effective January 1, 1999. These changes may have little or no effect on your plan benefit. Alternatively, your benefit may grow at a slower rate in the future or not grow at all for a period of time. In some cases, your benefit may increase as a result of these changes. In no case will your benefit under the amended plan be less than the plan benefit you earned through December 31, 1998. The following summarizes the changes made to the plan.

Compensation

- The plan uses actual monthly base pay, plus overtime and certain paid incentives, to determine compensation. Beginning January 1, 1999, the plan will determine compensation using the base rate of pay in effect on the first day of each month, plus overtime and certain paid incentives.

- Pay from certain acquired companies (such as Chicago and North Western, Missouri Pacific, and Western Pacific) is currently included as plan compensation. Beginning January 1, 1999, the plan generally will not include any pay earned from an acquired company.

- Pay while in agreement service with a participating company is included as plan compensation if the agreement service is directly followed by five years of non-agreement employment. Beginning January 1, 1999, the plan will not include any pay for a period of agreement service (that is not covered by the plan).

- Compensation for part-time employees is adjusted by multiplying monthly pay by the following ratio: 190 divided by the hours worked during the month. Beginning January 1, 1999, the plan will determine compensation for part-time employees using actual monthly base pay, plus overtime and certain paid incentives, with no adjustment.

- For part-time employees, compensation during an unpaid absence is determined using the base pay rate in effect at the start of the absence if the employee returns to work after the absence, or if the absence is for a family or medical leave. Beginning January 1, 1999, no compensation will be credited during an unpaid absence for part-time employees.

EXHIBIT 31

C-NET JOBS APPLIED FOR AND UPRR RESPONSE (IF ANY)

JOB APPLIED FOR – DATE	CONFIRMATION REQUEST NUMBER	RESULTS/ REMARKS
1. Mgr. Terml Oprns (MTO)-Tucson (SRG 18) (Royce Hardin decision maker) Position was one SRG below what I had worked for 22 months	2879526663917 Applied 3/17/99	Resume was Recvd. C-Net said position filled 3/23/99
2. Mgr. Yard Oprns. (MYO)-Tucson (SRG 17) Position was two SRG's below what I had worked for 22 months.	2914526663917 Applied 4/6/99 (Royce Hardin decision maker)	Resume was Recvd. No other response
3. Sr. Mgr. Terml. Oprns. (SMTO)-Tucson (SRG 19) (Exh's 30A & 30B) (Royce Hardin) Position Exact SAME as I had performed for 22 mo. @ Tucson.	3047526663917 Applied 8/9/99	Resume was Recvd. No interview as "NOT Qualified"
4. Mgr. Intmdl Terml. Oprns (MITO)-Long Beach (Band C) (Gary Davidson decision maker) Position was Band C, at which level I had already performed. Position given to Marie Bedwell–est. age 38 & I was 53	3301526663917 Applied 12/23/99	Resume was Recvd. No interview as "NOT Qualified"
5. Sr. Mgr. Terml. Oprns (SMTO)-Phoenix (Band C) (Royce Hardin decision maker) Position same as I worked in Tucson for 22 mo., except Phoenix.	3293526663917 Applied 12/23/99	Resume was Recvd. No other response
6. Supt. Intmdl Oprns. (SIO)- Los Angeles (Band D) Position was a promotion of two Bands from Demoted Status.	3372526663917 Applied 1/28/00 (Greg Workman decision maker)	Resume was Recvd. No other response

7. Mgr. Terml. Oprns. Not Received No system response
(MTO)- Freeport, Tx Applied 6/6/00 (Dennis Tholen decision maker)
(Band C) (Charlie A. Bishop "personally lobbied my application", with no results, except "They don't want you. You are not young enough to handle an outside operating district"

8. Mgr. Terml. Oprns. 3648526663917 Resume was Recvd.
(MTO)-Tucson Applied 6/21/00 No other response
(Band C) (Royce Hardin decision maker)
(Position was one SRG below where I had performed for 22 months)
Position would have been a Promotion from my Demoted Status.

9. Mgr. Yard Oprns. 3725526663917 Resume was Recvd.
(MYO)-Tucson Applied 7/24/00 No other response
(Band B) (Royce Hardin decision maker)
(Position was one Band below that which I performed at Tucson for 22 months or two Salary Rate Grades). (Exh's 31A & 31B)
My selection would have been a lateral from my Demoted Status.

10. Mgr. Yard Oprns. Not received Received call from
(MYO)-Bloomington Applied 10/31/00 David Bader indicating
(Band B) Position was lateral transfer "unacceptability".
back to Train Operations.
(Unsure; but ,Dennis Tholen may have been actual decision maker)

11. Various Operating No calls – No feedback for about 2 years,
Positions on new C-NET (Since new system started)
System which is allegedly continuously
Searching for Operating Department Matches.

EXH. 32A

Page: 1 Document Name: untitled

Rs004R10

Thank You For Using the Union Pacific Job Posting System

JOHN, your resume has been received and is being considered along with other candidates who have applied for the OPER MGR YARD OPRNS (TUCSON) position in the ~~OPER~~ Department.

Your Confirmation Number is:
3725526663917

Number of lines in your Resume 199

>>> ENTER to Continue >>>

PF Keys

PF1-Help PF4-Close CNet

This Position is two SALARY RATE GRADES (SRG 17 vs. 19) below the SR. MTO POSITION WHICH I PERFORMED AT TUCSON FOR 22 MONTHS. (NOW BAND B vs. BAND C UNDER PRESENT SYSTEM)

I DID NOT RECEIVE A RESPONSE TO MY APPLICATION, FOR THIS "BELOW- LATERAL TRANSFER."

Date: 7/24/00 Time: 06:05:03 PM

EXH. 32B
SUBMITTED 7/24/99

Applications accepted from: 07/19/00 through 07/25/00

Profile ID Title

72017 MGR YARD OPERATIONS

Grade Band B

LATERAL TRANSFER FROM CURRENT DEMOTED POSITION.

Department: TRANS - FIELD OPERATIONS JVN 3725
Location: TUCSON, AZ. Start Date: ASAP
Job Status: Full Time Vacancies: 1
Contact: ROYCE HARDIN Phone: 8-629-2120
Company: UPRR
Bus Group: OPER

Job Profile # 72017 - MGR YARD OPERATIONS

Basic Purpose of Position:

Execution of the daily transportation plan to achieve business objectives and customer satisfaction within the terminal confines.

Primary Accountabilities of the Position:

- Manage the safety process for terminal TE&Y employees
- Manage the terminal transportation plan to ensure that all quality of service business objectives are met or exceeded. Manage TE&Y expenses within assigned budgetary limits commensurate with volume of business
- Lead and manage Supervisor Yard Operations and agreement employees in execution of transportation plan
- Execute action plans to achieve cost of quality business objectives
- Coordinate and plan daily activities with centralized functional areas
- Monitor work force levels to ensure all jobs are covered and execute corrective action plans
- Execute locomotive shut down policy
- Communicate (close the loop) company policies and directives to terminal employees

Desired Experience:

- Yard, Road Train Service (3-4 yrs.) Proficient
- Management Trainee (1-2 yrs.) Proficient
- Yardmaster/SYD (1-2 yrs.) Proficient
- NCSC (1 yr.) Working knowledge

Special Training, Skills, or Education:

- Undergraduate Degree
- Written/Oral communication skills
- TQMS
- ATCS
- Computer skills (HOST/PC)
- Drug awareness

Desired Education Level: Bachelor Degree or equivalent

Travel Requirements: 0-25% travel may be required

RS007R03 - JVN 3725 07/18/00

EXH. 33A

Page: 1 Document Name: untitled

Page 1 of 2 CNet Notice Rst4F1

09/22/99

Dear John:

Thank you for your application for the position of MGR TERMINAL OPERATIONS (TUCSON AZ).

I have reviewed all of the resumes for consideration and have assigned interviews to those individuals who possess a combination of experience, education, and skills which appropriately meet the requirements of this position. While I cannot extend an interview opportunity to you, your time and interest in applying for the position are appreciated. I encourage you to continue to seek developmental opportunities for which you are qualified within Union Pacific.

Sincerely,

Delete Notice ( ) (Y/N)

PF Keys

PF3-Exit PF4-Close CNet PF8-Next Page

ABOVE SHOULD HAVE BEEN THE FORM LETTER FOR "UNQUALIFIED" REGARDING ATTACHED POSITION WHICH MEANS THIS DOCUMENT SHOULD HAVE BEEN POSITION TITLED "SENIOR MGR. TERMINAL OPERATIONS; NOT MGR. TERMINAL OPERATIONS - TUCSON. THE POSITION OF SENIOR CLOSED 8/10/99 AND THIS WAS THE CLOSEOUT ONE MONTH LATER INDICATING POSITION WAS FILLED BY SOMEONE "MORE QUALIFIED" THAN MYSELF WHO HAD WORKED THE POSITION ITSELF FOR 22 MONTHS!!

Date: 1/28/00 Time: 03:41:33 PM

confirmation #

Exh. 33B

3047/52663917

SR MGR TERM OPRNS (TUCSON AZ)
Applications accepted from: 08/04/99 through 08/10/99

rofile ID Title
--------- -------
)007 SR MGR TERM OPRNS Grade Level 19

Department: TRANS - FIELD OPERATIONS JUN 3047
.ocation: TUCSON AZ Start Date: ASAP
Job Status: Full Time Vacancies: 1
Contact: ROYCE HARDIN Phone: 8-629-2120
Company: UPRR
Bus Group: OPER

Profile # 72007 - SR MGR TERM OPRNS

ic Purpose of Position:

ure the quality of the transportation product of the terminal meets exceeds the standards set by the business objectives and customer ectations.

mary Accountabilities of the Position:

sure safe performance of all terminal TE&Y employees through veloping, implementing and executing the safety process
rect the execution of the transportation plan for the terminals ensure that all quality of service objectives are met or exceeded
erate the terminal at or below annual transportation budget
sure terminal failure prevention activities are executed to
hieve cost of quality business objectives
ordinate terminal activities with HOC, NCSC, adjoining Service
it to meet business objectives
nage terminal work force level to ensure transportation needs are
t and within budget
nage the efficient use of locomotives and fuel to ensure that
eight car cycles are effectively managed while in the terminals
ad and develop both managers and agreement employees to the
tent that their individual performance and employee involvement
tivities determine successful accomplishment of company business
jectives
spond to emergency situations or service interruptions

ired Experience:

Q/HYQ (2 yrs.) Working
N (2 yrs.) Working
O (2 yrs.) Working
P (1 yr.) Working
ntralized function (1 yr.) Working

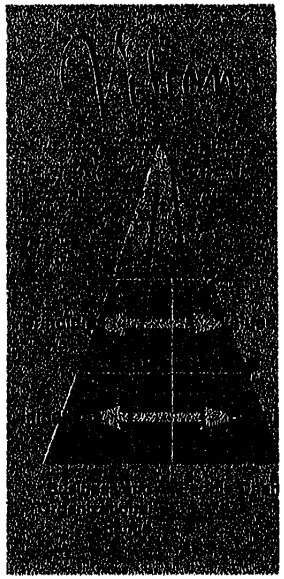
cial Training, Skills, or Education:

nagement training program
adership seminars
dergraduate Degree

Union Pacific is committed to be a railroad where our customers want to do business, our employees are proud to work, and shareholder value is created.

UP VALUES AND LEADERSHIP BEHAVIORS

- **Safety:** *Safety comes first. We are each personally responsible for working safely and choosing the safest approach.*
  - We daily remind ourselves and other employees that safety is the company's first and overriding priority.
  - The safe way is the efficient way.
  - We report honestly but we find no accident acceptable and insist that all of us work on prevention of accidents.
- **Quality Principles:** *Customer Focus, Continuous Improvement, Teamwork, and Managing with Data are the way we run the business.*
  - We expect continuous improvement in all areas of our business by focusing on root causes of problems and creating action plans, time lines, and milestones to solve them.
  - Every action we take and every decision we make considers the customers' needs.
  - We will train our people to use and be skilled in Quality Principles and require them to demonstrate these skills as a daily habit.
- **Respect for Employees:** *We recognize all UP employees are critical to our success, and that ideas and aspirations exist at all levels in the organization. We value diversity in our workforce and the experiences, capabilities, and different viewpoints that each individual contributes.*
  - We act with respect for all employees.
  - We address our employees' developmental needs and build on their strengths by coaching and training.
  - We promote and reward managers for their leadership skills as well as their technical knowledge and abilities.
- **Commitment:** *We make realistic commitments to customers, employees and shareholders, and keep them.*
  - We set challenging, but achievable objectives.
  - We assure that we have the capability to meet our commitments.
  - We support each other in keeping commitments made to ourselves and others.



- **Accountability:** *The success of our company depends on our individual efforts. Each of us is responsible for the outcome of our efforts.*
  - We must make every employee aware that meeting our business objectives is critical to the success of the Company.
  - We accept personal responsibility for achieving the commitments we make.
  - We make no excuses, take responsibility for failures, but learn from our mistakes.
- **Simplicity:** *We keep things simple and focus on what is really importa*
  - We require that decisions be made at the lowest appropriate level.
  - We analyze and stay focused on the "critical few" items, which directly cause the results we want, while constantly removing low- or no-value steps from our business processes.
  - We define each individual's "critical few" in job agreements and make PDRs the performance drivers.
- **Communication:** *We will ensure an environment of open communicati where ideas are freely exchanged and listening is valued.*
  - We encourage 360-degree feedback, and we listen with respect.
  - We encourage novel thinking, evaluate ideas based on their merit regardless of source, and do not kill the messenger bearing bad news.
  - We put all issues on the table and attempt to resolve them through constructive debate and challenge.

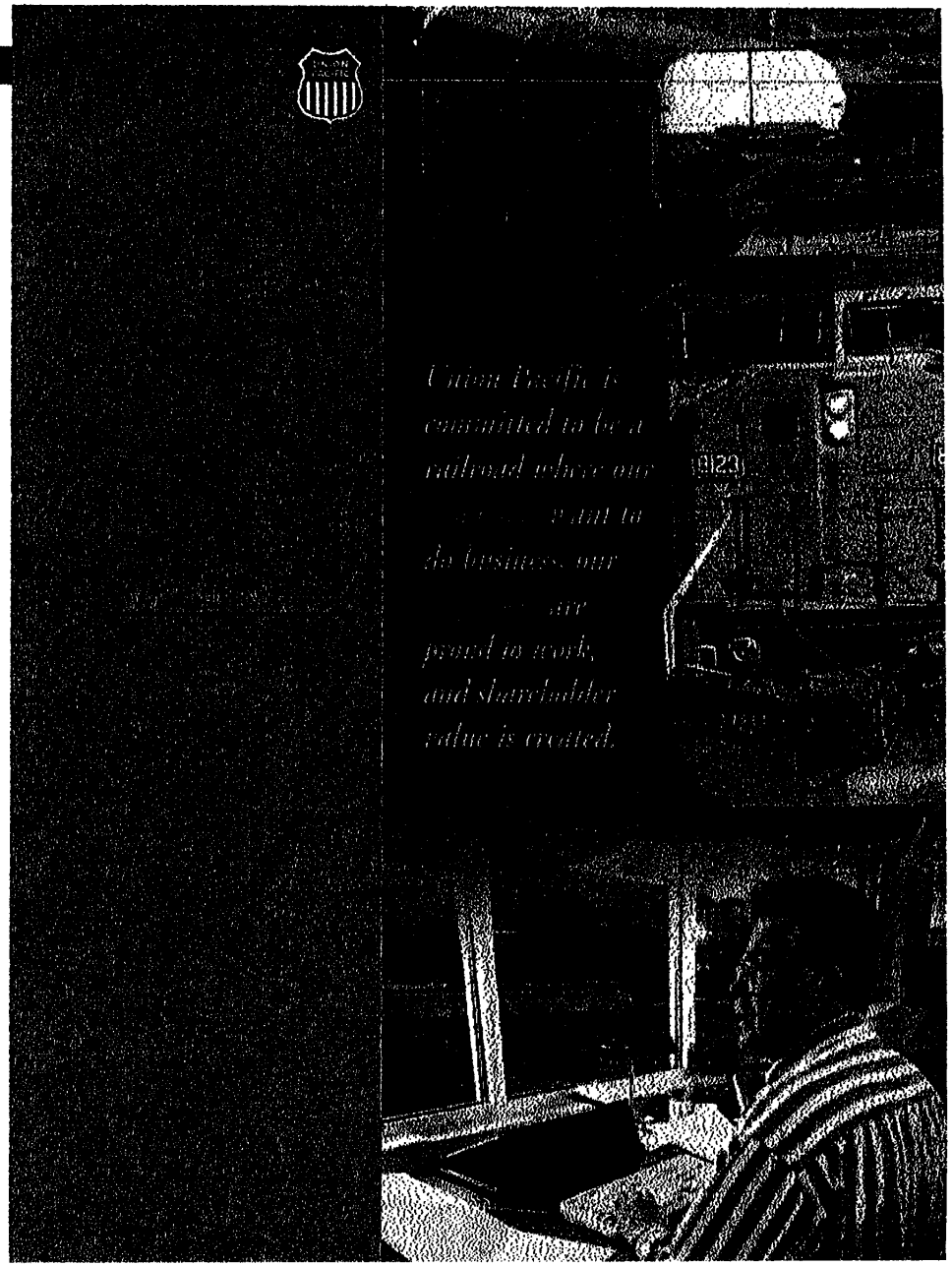
TRANSFORMATION

E.H. 3749

BUSINESS PRINCIPLES

- **Recognize employees as critical to success.**
  Our employees are a critical asset; without them, we would not be able to serve our customers.
- **Recognize customers as critical to success.**
  Our customers depend on us for consistent and reliable service; we depend on them for their continued business.
- **Sell what we can deliver.**
  Our ability to match our customer commitments with network capacity is a key to our future success as a Company.
- **Deliver what we sell.**
  Our decentralized operating structure and network design capability will allow us to better meet our delivery commitments.
- **Maximize return on each dollar invested.**
  We will consider our shareholders' perspective with every investment decision we make.
- **Performance excellence.**
  We will use our focus on quality as the foundation for improved responsiveness to our customers and employees.
- **Lead effectively at all levels and strive for excellence.**
  We will use communication, training and performance feedback to develop leadership at all levels of our organization.

TRANSFORMATION



Exh. 348
pg 1 of 2

award. Jenkins also is a safety captain and member of a QIT team.

As timekeeper, Jenkins also offers timekeeping training for both new and experienced timekeepers. "Steve is willing to share information he has learned with anyone who will benefit from it in order to do his or her job better," said Bell.

In his spare time, Jenkins also organizes the Tie-North newsletter, keeping his gang informed of local work group and companywide happenings.

The World Class Employee Award recognizes Track Programs employees for their hard work and exceptional contributions to quality and safety improvements. UP Online will feature individual profiles of other award winners in future issues.

▲ top

A Lifelong Balancing Act
Decide to Keep Your Life in Balance



Balancing the disappointments of life can sometimes be overwhelming – but there are behaviors and actions that can help.

U.P. SUGGESTION

Act on adverse situations as much as you can. Take decisive action, rather than detaching completely from problems and wishing they would just go away.

Watch for additional tips in upcoming issues of UP Online. All are designed to help you maintain a balance when life takes a difficult turn.

Employees interested in a group presentation on resilience -- a process of adapting in the face of trauma and stress, or "bouncing back" from difficult experiences -- should contact Denny Holland at dwhollan@up.com or 271-4155.

▲ top

Railroads Urge More Public/Private Partnerships



The nation's railroads last week urged Congress to support "public-private financing partnerships for railroad infrastructure improvement projects" in order to realize the public benefits that would come if more freight is moved by rail, reports *AAR.org.*

In testimony before the House Transportation and Infrastructure Committee's Railroad Subcommittee, Edward R. Hamberger, president of the Association of American Railroads (AAR), said that greater use of rail can yield significant "public benefits, such as reduced congestion, cleaner air, improved safety and enhanced mobility."

UP Online

Need to catch up?
View the past 5 issues.
You will be given the option to view additional issues.

For a specific article – Search:

UP Online **editions appear Mondays, Wednesdays and Fridays.**

June 30, 2003

In This Issue:

- New Market for Feed Supplements
- UP Sells Colorado Branch to RA
- Foreman Is World Class Nominee
- Lifelong Balancing Act
- Public/Private Partnerships Urged
- Rail Freight Traffic Declines
- Service Delivery Index
- UPLINC Schedule
- 'Most Wanted' Cars
- Stock Report

Mexico Is New Rail Market For Animal Feed Supplement



Meat and bone meal from Nebraska is moving to Mexico by rail through a new arrangement with Union Pacific, Nebraska Byproducts and ConAgra Trade Group.

Nebraska Byproducts produces the meat and bone meal, and ConAgra Trade Group markets the product and transloads it from truck to rail at Darr, Neb.

"It's a win-win-win situation," said Greg Brown, product manager. Previously, the packinghouse sold the meat and bone meal, which is used primarily for animal feed and pet food, locally and moved it by truck as the plant is not serviced by rail. Mexico is a more lucrative market for the product, and ConAgra Trade Group approached UP about moving it through UP's Mexican gateways, Brown said.

"ConAgra Trade Group was looking for new opportunities," he said. "In this particular market, there are not a lot of new opportunities, as it's pretty mature. This is an opportunity we are excited about."

SECTIONS:
Stock Report
Omaha News
St. Louis News
Want Ads
Employee Discounts
EMPLOYMENT INFO:
Open Mgmt Opptys
CNET
UP Career Link
UP ONLINE FEEDBACK:
Send Ideas/Comments

Alert Status

UP is currently at **Alert Level 2: "Heightened Security Awareness."** This applies when there is a general non-specific threat of possible terrorist activity involving railroad personnel and facilities.

REMEMBER: Report all suspicious activity to RMCC at **1-888-877-7267** (1-888-UPRRCOP).

Ethics

This policy allows an employee to give cash or gifts to a host or hostess who provides a gratuitous product or service, such as a meal or lodging, in lieu of a reasonable "expense . . . which the employee normally would have incurred." The In Lieu Policy explains: "The purchase of a gift for the hostess in appreciation of a gratuitous meal served to an employee while traveling on company business, at the home of a fellow employee or business associate, would represent an example of an appropriate 'in lieu of' expense." Each of Francisconi's expense claims, some of which involved stays with his father in Pocatello, Idaho, was approved by his supervisor.

¶3 In 1987, Francisconi was temporarily transferred to Omaha, Nebraska, to work as a safety representative for Arthur Shoener, a Union Pacific executive. During this time, Francisconi became intimate with another employee whom, he later learned, also had an intimate relationship with Mr. Shoener. Francisconi alleges that Mr. Shoener incurred some malevolence against him as a result of his relationship with the employee. In 1994, after this assignment, Union Pacific published a policy entitled "Union Pacific General Rules for Administering Discipline Effectively" (the UPGRADE Policy), and delivered a copy to Francisconi. Union Pacific then implemented the UPGRADE Policy. The UPGRADE Policy provides for a formal disciplinary process, including a formal hearing regarding an employee's conduct prior to termination.

¶4 On April 26, 1996, Francisconi was directed to attend a meeting in Omaha, Nebraska (the Omaha Meeting), without being told the purpose of the meeting. At the meeting, six Union Pacific officers and agents, including auditors, supervisors, and a railroad policeman, confronted Francisconi for four hours. Union Pacific accused Francisconi of abusing the In Lieu Policy, and presented some grounds and documents capable of being construed as evidence of abuse, such as altered receipts he had submitted. He was also accused of lying, theft, fraud, and abuse of his position. Further, Francisconi was told that Union Pacific was considering having him criminally prosecuted, which would lead to a search of his relatives' homes.

¶5 Although Francisconi did not believe he was at fault, he asked what he could do to keep his job. He was told, "Well, the first thing you can do to save your job is to fill out a statement." Francisconi wrote and signed, at Union Pacific's direction, a statement which included the following:

> I . . . freely and voluntarily admit to making in lieu of expense purchases not in accordance to the intent of the policy. I didn't include the itemized receipts for these purchases and I altered receipts to remove the itemized items listed on the receipts. I was aware that the items purchased were being given to my wife, my sister and my son and other people that my Dad chose to give them to. I also admit to including personal time with company time while I was in Pocatello on weekends and being reimbursed by the company for the time spent there for expenses. I was wrong in what I have done and am extremely sorry for misusing the expense account system.

Also during the meeting, the highest level of the UPGRADE Policy was mentioned as a possible way to resolve the matter.

¶6 After the meeting, Francisconi experienced extreme anxiety, lack of sleep, and an outbreak of hives. The assistant vice-president of Union Pacific, Mr. Campbell, telephoned Francisconi several times demanding his resignation and that he release Union Pacific from liability. Mr. Campbell, knowing that Francisconi's wife was experiencing health problems, threatened that Francisconi would not be insured from April 30, 1996, would not receive COBRA medical coverage, would not be paid for the month of May, and would be criminally prosecuted. Mr. Campbell did not retract these threats even after Francisconi explained that his wife was scheduled for surgery. Further, "[t]he health care benefits department of [Union Pacific] was directed by . . . the human resources director of the railroad operations department, which was headed by Mr. Shoener, not to offer COBRA coverage to" Francisconi's wife. These directions were initially followed, causing the surgery to be rescheduled until Francisconi's wife finally obtained COBRA coverage.

¶7 Union Pacific then terminated Francisconi for alleged willful disregard of the In Lieu Policy and for intent to deceive Union Pacific in his use thereof. He now appeals the district court's summary dismissal of his claims.

STANDARD OF REVIEW

EXH. 30A



INSURANCE IN TOUCH WITH BUSINESS (UPRR CONNECTED PROGRAM)

PO Box 946760
Maitland, FL 32794-6760

July 18, 2002

DOROTHY D GROTHER
1718 RUSTIC PARK DR
KINGWOOD TX 77339

Underwriting Co.: Continental Casualty Company
Application Number: 10170-1010
Account Name: CNA Group Benefits Long-Term Care Program

Dear DOROTHY GROTHER:

Thank you for your recent application for Long-Term Care Insurance.

We are sorry that we are unable to issue the insurance for which you have applied. Our decision is based on your history of response to questions 2.a., 2.e., 2.i., 3 and question 5 listed on your application. While we realize you may be disappointed, we want to assure you we made this decision only after careful consideration of your health history.

Occasionally, as in your case, a particular condition or combination of conditions will prevent us from issuing coverage. We hope that you understand that without such an underwriting review we would need to raise our premiums substantially, greatly limiting the availability of this product.

You may request reconsideration of this decision. All requests for reconsideration should be submitted in writing within 60 days of receipt of this letter by sending the reasons for your request and any documentation you may have to support your request. Please send this information to the Group Long Term Care Underwriting Department at the address listed above. Ordinarily, you will receive notification of the final determination within 60 days following receipt of your request. If special circumstances require an extension of time, you will be notified of such extension within 60 days.

Again, thank you for choosing CNA; we appreciate your interest in this plan. If you have any further questions, please let us know.

Sincerely,

Jody Ross

Administrator
Group Long-Term Care Plan from CNA

Enclosure(s)

EXH. 36B

AARP Life Insurance Program from NEW YORK LIFE

New York Life Insurance Company
AARP Operations
Customer Service
P.O. Box 30712
Tampa, FL 33630-3712

October 26, 2001

Mrs. Dorothy D Grother
1718 Rustic Park Dr
Humble, TX 77339

Dear Mrs. Dorothy D Grother:

Thank you for your request for insurance under the AARP Life Insurance Program from New York Life Insurance Company.

We regret to inform you that based on the health information you provided, we must decline your request for insurance.

We appreciate your interest in the AARP Life Insurance Program from New York Life. If you believe the information we have received from you is inaccurate, please write me and we will be happy to review this matter with you.

Sincerely,

Maria Echazabal

Maria Echazabal
Underwriting Associate
Customer Service

EXH. 30 E

North American Company
for Life and Health Insurance
Office: 20700 Ventura Boulevard, Suite 220 / Woodland Hills, CA 91364
Mailing Address: P.O. Box 4193 / Woodland Hills, CA 91365-4193
Telephone: (818) 716-0004 Fax: (818) 716-0006

DOROTHY D GROTHER
1718 RUSTIC PARK DRIVE
KINGWOOD TX 77339

OCTOBER 29, 2001

RE: LW00184094
DOROTHY D GROTHER

Thank you for applying to North American for your life insurance needs. We are not able to approve your application due to the reason stated below:

medical history and current medical findings

If you submitted money with your application in exchange for a Conditional Receipt, it will be promptly refunded. This notice and the refund void the Conditional Receipt and no coverage is provided under its terms.

If your policy was assigned to North American, we have returned the original paperwork to your agent. A letter of release has been sent to your existing Insurer.

We regret that we are not able to be of service to you at this time. If you have any questions, please contact your agent.

Underwriting Department
87 /3XH

Exh 36D

John Hancock Financial Services, Inc.

333 West Everett
Post Office Box 2986
Milwaukee, WI 53201-2986

John Hancock
FINANCIAL SERVICES

Susan Stinard
Senior Underwriter

February 8, 2002

Dorothy Grother
1718 Rustie Park Drive
Kingwood, TX 77339

Dear Ms. Grother:

Thank you for your application for Long Term Care insurance with this company. I am sorry to inform you that after careful consideration and a review of your medical history we cannot provide coverage for you.

Our decision was based on your medical history of an abnormal MRI of the brain. Additionally our decision was affected by your history of rheumatoid arthritis and systemic lupus erythematosus under treatment with multiple prescription medications as documented in your medical records provided by Dr.. Cavanar-Johnson.

If you have any questions regarding the medical history contained in this letter, please feel free to forward a copy of this letter to your primary care physician. If your physician feels this information is incorrect or inaccurately stated, we would be happy to re-evaluate your medical history based on a corrected statement from your physician.

Any conditional receipt coverage that you may have requested when you applied is no longer in effect. Any initial premium made in connection with this application will be refunded.

Thank you for considering John Hancock for your insurance needs and we appreciate the opportunity to review your application.

Sincerely,

Susan J. Stinard

Susan Stinard
Senior Underwriter

Reference#: 5037729

EXH 30E

GE Capital Assurance

Long Term Care Division
1650 Los Gamos Drive
San Rafael, Ca. 94903-1899
(415) 492-7000

November 1, 2001

Mr. Dorothy D. Grother
1718 Rustic Park Dr
Kingwood, TX 77335

RE: UDG4239360

Dear Mr. Dorothy D. Grother:

Per your request, we corresponded with Dr. Mary Cavnar Johnson on this date regarding the reasons for our decision on your long term care application.

We suggest that you contact your physician to discuss the information provided in our letter.

Sincerely,

Jennifer Rogers /B

Jennifer Rogers
Senior Underwriting Specialist
LTC Underwriting Department

LTC4BAW #430

cc: Ms Diane L Dussault

EXHIBIT 39

UTU Message Board

[Contents | Search | Post | Reply | Next | Previous | Up]

Railway Age article on New York Dock/STB agreement revisions

From:
Date: 18 Jul 1999
Time: 20:26:28
Remote Name: 205.188.197.58

Comments

"Cram-down" casts a menacing cloud over upcoming negotiations RAILWAY AGE July 19, 1999 COMMENTARY By Frank N. Wilner

Just a few months ago, Union Pacific Chairman Dick Davidson was optimistic that railroads and their unions could negotiate an end to a bitter controversy known as "cram-down." Dream on. Last month Davidson's chief labor negotiator, John Marchant, told the Industrial Relations Research Association how essential cram-down is to carrier efficiency. Fellow panelist Linda Morgan, chairman of the Surface Transportation Board-the agency that gives a final thumbs up or down to cram-down proposals even decades after mergers are consummated-appeared to agree by distancing herself from a Clinton administration proposal to banish cram-down legislatively. Offering a blistering rebuke of the process, and of STB as its facilitator, was Brotherhood of Maintenance of Way official Joel Myron.

Cram-down is a shorthand term for the ability of merged railroads to override the Railway Labor Act and collective bargaining agreements to the extent-and this is a legal term-"necessary" to enable the unifying carriers to achieve intended efficiencies of the unification. There is no time limit on "necessary" transactions and it is not uncommon for contract overrides to be sought decades following a merger. Fourteen years after Missouri Pacific was merged into UP, UP successfully moved to override a local collective bargaining agreement to facilitate consolidation of work assignments and seniority rosters.

In exchange for overriding collective bargaining agreements, merged railroads pay damages to adversely affected workers-payments Morgan termed "substantial." When the two sides can't agree on the trade-off, arbitrators decide. Hence, the term cram-down.

Railroads are the only industry where Congress permits an override of private-sector contracts for the benefit of merging companies, their customers, and investors. But railroads also are the only industry where adversely affected employees' pre-transaction incomes and benefits are protected for up to six years. The process flows from the voluntarily negotiated Washington Job Protection Agreement of 1936 as embodied in a 1979 regulatory decision-blessed by the courts-called New York Dock, which relates to a merger involving New York Dock Railway.

Although New York Dock's Article I, Section 4 sets out procedures and a timetable by which separate collective bargaining agreements of unifying railroads are harmonized-selection and assignment of employees, transfer of work, and merging of seniority-Myron says it conflicts with Section 2 that mandates rules and working conditions may be changed only through Railway Labor Act bargaining procedures. The courts disagree, but Myron and the AFL-CIO Executive Council won't retreat. The matter has become so disruptive that the bi-partisan leadership of the House Transportation and Infrastructure Committee encouraged the sides to negotiate a settlement. Talks broke down.

Marchant takes issue with the term cram-down. "Employers can't just go out and change operations following a merger," he said. Railroads must give 90 days notice, make an attempt voluntarily to negotiate an implementing agreement under New York Dock guidelines, and submit to binding arbitration if an agreement cannot be reached. Myron insists rail regulators so often overturned arbitrated decisions favorable to employees during the 1980s that arbitrators became conditioned to granting railroads undue preference. Morgan says she's trying to "level the playing field" and "eliminate" expectation by either side of a "favorable" STB arbitration review.

If railroads and their unions had to bargain under the sometimes interminable procedures of the Railway Labor Act, said UP's Marchant, railroads would become further hobbled in competing with trucks.

When UP and the MP merged, he said, efficiency dictated that a 100-year-old locomotive repair facility at Omaha be closed and the work shifted to a five-year-old facility at Little Rock. New York Dock procedures provided the key to unlocking what Marchant called a rapid and equitable solution for selecting the new work force, determining seniority, and protecting the earnings of those adversely affected. Similarly, following the UP-Southern Pacific merger, six separate collective bargaining agreements threatened efficient operations at Salt Lake City. UP again turned to New York Dock procedures to choose a single surviving agreement. Short of arbitration, a peaceful resolution would have been impossible, said Marchant, because each vested interest wanted to "cherry-pick" terms most favorable.

"Carriers have huge investments in mergers and were we to resort to the Railway Labor Act for implementing agreements we'd have strikes that would devalue mergers and give unions an unconscionable amount of leverage," said Marchant. "We'd have to take out our checkbooks," he said, displaying his for effect.

The enemy, of course, is non-unionized truckers, but Serbs and ethnic Albanians may live together peacefully before rail management and labor settle contract-override differences. Under this menacing cloud, the two sides will begin in November industry-wide bargaining for a new wage-benefits-rules agreement. God save the railroad industry. xxxxx

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Last changed: July 18, 1999

EXHIBIT 38

her way for employees to win

es workers rights

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workplace disputes to arbitration. The EEOC is not bound by such contracts, the high court ruled.

"The Supreme Court recognized what Congress intended when it established the EEOC: that it must have the power to enforce civil rights laws," says AARP lawyer Tom Osborne. "Had the decision gone the other way, the agency would have been stripped of its clout."

AARP filed a friend-of-the-court brief in support of the EEOC.

The case involved Eric Scott Baker, who in 1994 was a short-order cook at a Waffle House restaurant in West Columbia, S.C. After two weeks on the job, he had a seizure at work and shortly thereafter was fired.

Like other employees of Waffle House, Inc., Baker had agreed that any grievance he had against the company would be resolved through arbitration, a dispute resolution system that bypasses the judicial system.

Buoyed by recent court decisions, some employers have begun requiring workers to waive their right to jury trials—including potential class action suits—and submit job-related disputes to arbitration instead. Some companies insert such agreements into job application forms, and, workers' advocates say, job seekers have little choice but to sign on the dotted line.

Your Money

About 6 percent of all American workers are covered by workplace arbitration agreements, notes Robert Meade, senior vice president of the American Arbitration Association (AAA). Proponents of arbitration say it offers a quick, cost-effective alternative to litigation.

Keeping results fair

But when employers impose mandatory arbitration on workers as a condition of employment, the results can be "brutally unfair," claims Cliff Palefsky, a lawyer in San Francisco and co-founder of the National Employment Lawyers Association.

Compared to a lawsuit, Palefsky contends, arbitration gives plaintiffs less access to evidence in the employer's control, less chance of being awarded punitive damages and no opportunity to have the case heard in an open courtroom. Moreover, he charges, arbitrators may feel pressured to render decisions that will please (or at least won't alienate) companies that may hire them again.

AAA's Meade counters that reputable arbitrators operate by a code of ethics that requires them to disclose any conflicts of interest.

Besides, arbitration provides a venue for workers whose complaints those that could win big awards.

Baker, the former Waffle Hou cook, never tried to arbitrate his gri ance with his employer. Instead, I filed a claim with the EEOC, allegi that in firing him, the company ha violated the Americans with Disab ities Act.

Of about 80,000 claims filed with th EEOC every year, only about 400 en up in court. Baker's case was amon the half of 1 percent that do.

The EEOC enters the case

As with other claims it pursues, th EEOC first tried to settle with Wa fle House out of court. When tho attempts failed, the EEOC sue the company, seeking not only court order requiring Waffle Hou to stop discriminating, but an awa on Baker's behalf, including ba pay and compensatory and puniti damages.

An appeals court ruled the EEC had no right to seek damages fo victim who had agreed not to take l claim to court. But in a 6-3 decisi the Supreme Court overturned t lower court's ruling, saying t EEOC was not bound by a contr to which it was not a party.

Writing for the majority, Just John Paul Stevens said the EEOC "the master of its own case."

Justice Clarence Thomas, who or headed the EEOC, wrote the c senting opinion. He claimed t EEOC should not be allowed to ' on behalf of an employee that wh an employee has agreed not to do himself."

Know what you're signing

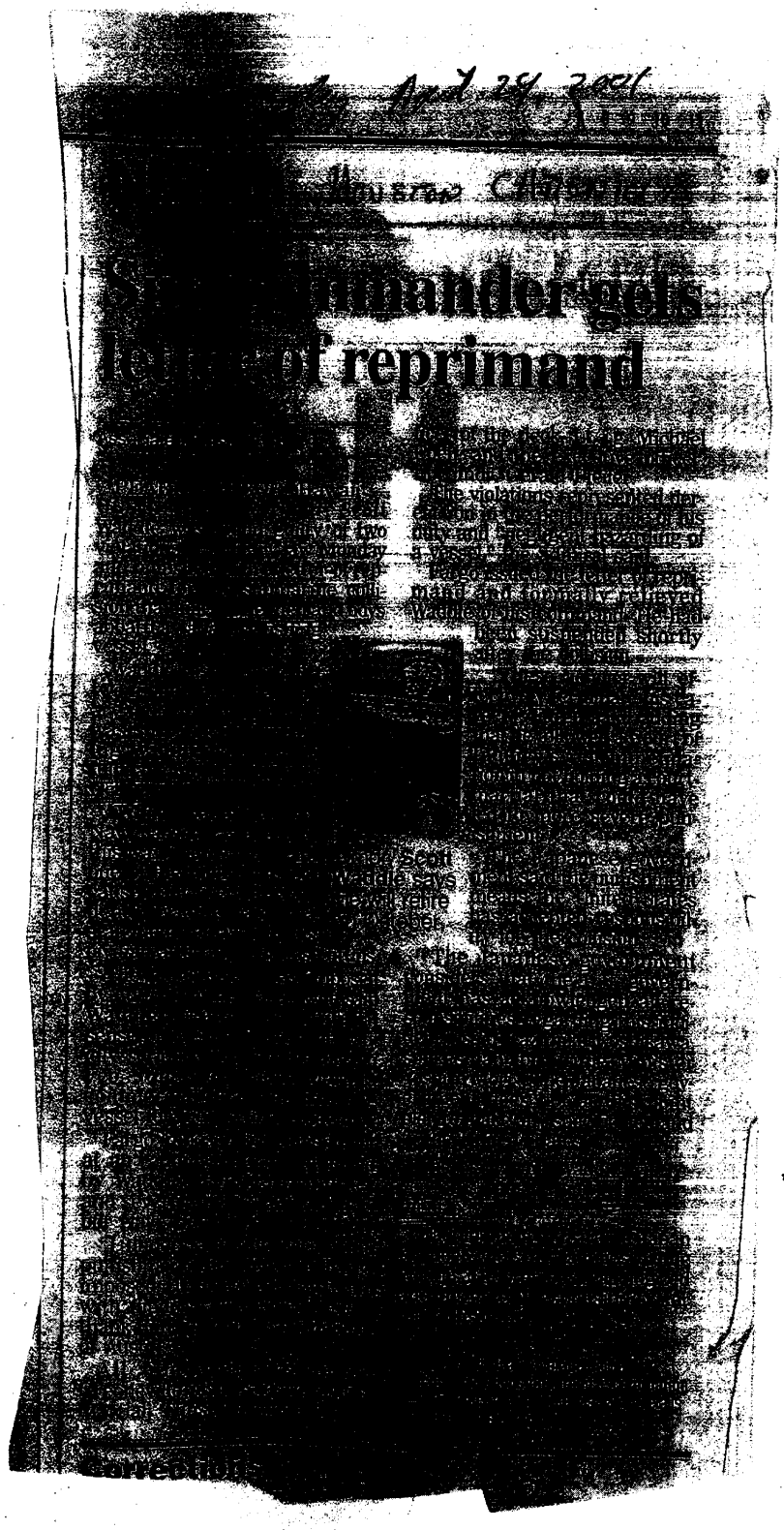
RECENT COURT decisions have given companies the green light to require workers to submit disputes to arbitration instead of litigation.

Be on the lookout for arbitration clauses in any documents you're asked to sign, and be sure you understand the consequences, advises Robert Meade of the American Arbitration Association.

"Weigh the pros and cons," he says. Weigh how much you want that particular job against how im-

Article from AARP MAGAZINE

EXH 39



April 28, 2004

[illegible] commander gets letter of reprimand

EXH. 4/0
- Page 1 of 2

a brand NEW day

A.F. Times 8/5/02

Commander is back with a wing — and soon a star

By Bruce Rolfsen
TIMES STAFF WRITER

Two years after he was denied command of a fighter wing, Col. Larry D. New's career appears to be back on track.

New was handed the flag of command for the 325th Fighter Wing at Tyndall Air Force Base, Fla., on July 12. The wing trains the service's active-duty F-15C Eagle pilots and is taking on the same job for the F-22 Raptor.

New also is in line to pin on his brigadier general star this year.

His career hit difficulties after a 1998 helicopter accident at Nellis Air Force Base, Nev., that killed 12 airmen. New then was commander of Nellis' 57th Operations Group.

An Air Force accident-investigation board faulted New for not taking stronger actions to improve the safety of operations in the helicopter squadron. Also, family members of some of the lost airmen sought support from U.S. lawmakers to stop New's promotion.

The head of Air Combat Command in 2000 put a hold on New's wing-command posting. The air combat commander then was Gen. John Jumper, the man who now is the Air Force chief



ROBERT COOPER

Col. Larry New speaks at the July 12 change-of-command ceremony for the 325th Fighter Wing at Tyndall Air Force Base, Fla.

New told Air Force Times in a written statement, "My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence."

New's command represents the turnaround of a career that was in trouble since the deaths of the airmen in the crash.

Fatal accident

On Sept. 3, 1998, two HH-60G Pave Hawk helicopters assigned to the 66th Rescue Squadron collided during a night-training mission.

An accident-investigation board concluded that aircrew error was the immediate cause of the accident. But the board also found the rescue squadron suffered a wide range of woes, from a grueling overseas-deployment schedule to poor morale to an inexperienced cadre of pilots.

Investigators said New believed he had solved the 66th Rescue Squadron's problems when he relieved from their jobs a weak squadron commander and a first sergeant. But actually, the report concluded, New had treated just the symptoms.

'My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence.'
COL. LARRY D. NEW

New also didn't provide the new squadron commander and base safety officer a safety evaluation of the rescue squadron, called the Operational Health Readiness Assess-

Force Base, Fla.

Gen. Mike Ryan, who then was chief of staff, had approved the wing posting, and the routine wheels of changing command were turning for an April 2001 ceremony.

Then the outgoing Air Combat Command head Gen. Richard Eberhart started a review of New's proposed assignment. Jumper succeeded Eberhart at Air Combat Command and in July 2000 denied New command of the 33rd Fighter Wing.

Jumper wrote that while New is a "highly capable officer with a career-long record of exceptional performance, the continuing media scrutiny surrounding (him) would impair his ability to effectively command the 33rd FW."

Brighter fortunes

Instead of getting his wing command, New stayed in a desk job at the Pentagon with the Joint Chiefs of Staff office. But his fortunes got brighter in 2001 when he was among the more than three dozen Air Force colonels nominated for brigadier general.

Family members of the crash victims challenged New's promotion. But then-Air Force Secretary Whit Peters and Defense Secretary William Cohen defended his performance.

In August 2001, the Senate approved New's promotion and in the same month he became Air Combat Command's director of requirements.

When New was asked what lessons from his experience he

EXH. 40 —
page 2 of 2

of staff and who has approved New's latest assignment as commander of the 325th Fighter Wing.

"The previous decision to delay General (select) New's command opportunity was based on my judgment that his effectiveness in command would be impaired by an ongoing investigation," Jumper said in a statement to Air Force Times.

"This would not have been fair to General New or the airmen in his wing. With the investigation completed, the Air Force is right to take full advantage of General New's leadership and qualifications to command," he said.

ment, written by the Air Force Safety Center at New's request.

The new squadron commander had been in his job three weeks when the crash occurred.

Board president Col. Denver L. Pletcher concluded about New's performance, "... I believe the 57th OG commander failed to mitigate known safety hazards within the squadron that directly contributed to this accident."

After the accident and a staff assignment at the Pentagon, New in 2000 had been on track to become commander of an F-15 unit, the 33rd Fighter Wing at Eglin Air

would share with student fliers, he said, "What I try to impart on all airmen is that we are part of a cause that is much bigger than ourselves. Our calling in the military is most certainly challenging and has an inherent level of risk.

"... They are part of a force that takes great measures to provide our young men and women with the best equipment, training and support to ensure we accomplish the mission with the greatest emphasis on safety." □

Bruce Rolfsen can be reached at (703) 750-8647 or brolfse@atpco.com.

EXH. 41 →

HOUSTON CHRONICLE MARCH 12, 2001

SECOND CHANCE

Former Arkansas attorney general who lost his law license gains redemption in Texas

Associated Press

AUSTIN — Eleven years ago, at age 43, Steve Clark was attorney general of Arkansas and thinking about challenging the incumbent governor, Bill Clinton.

Ten years later, he was working at a Half Price Books in Austin, making $6.50 an hour while flunking the Texas bar exam. Even if he had passed, he might not have gotten a law license because of a felony conviction in Arkansas, according to Saturday's editions of the Austin American-Statesman.



Associated Press

Steve Clark, former Arkansas attorney general, is reflected in the glass frame of his recently acquired Texas law license.

Today, Clark is on the rebound. He passed the bar exam on the third try, got his Texas law license in June and started a general civil and mediation practice as a solo Austin practitioner.

"It's very wonderful to say to somebody, 'I'm a lawyer and mediator,'" Clark said. "It is redemption."

Under Arkansas rules, Clark can never get his law license back in that state because of his felony conviction.

Clark is the most prominent of a handful of former felons practicing law in Texas, where lawyers who lose a license because of a felony conviction can get it back. A 1997 survey by the American Bar Association indicated that few states permanently disbar lawyers.

Over the past five years, records show, four petitions for reinstatement involving felony convictions were approved. Texas has more than 66,000 lawyers.

Clark, then 31, in 1978 ran for attorney general, a position Clinton gave up to run for governor. Both men, who are

See CLARK on Page 17A.

Clark

Continued from Page 13A.

Democrats, won. By the end of the 1980s, Clinton was looking to run for president. Clark dreamed of becoming governor.

But in January 1990, just after Clark announced that he was running for governor, the Arkansas Gazette reported that Clark's office had spent $115,729 on travel and meal expenses in 1988.

That article triggered an official investigation, and Clark dropped his race for governor. He was found guilty of using his state credit card to pay for meals and travel for family and political contributors. He was fined $10,000 and ordered to pay restitution.

The Internal Revenue Service also said he owed $465,000 in back taxes, penalty and interest. He negotiated and paid $75,500.

Determined to get a law license, Clark met with the Texas Board of Law Examiners. They decided he was morally fit to be a lawyer.

He remembers what a board official told him: "We believe in rehabilitation in Texas, and you look like you've had enough."

hronicle

and

as a manifest block in Seadrift, Texas, for movement to Freeport, where the cars are built into a 45- to 70-car unit train that moves north. Some of the cars go to Chicago for delivery to the Belt Railway Company of Chicago (BRC), where they continue in manifest service on other railroads. The rest go to Dow's Midland, Mich., facility.

"We are seeing dramatic improvements in the overall movement of Dow's shipments across all roads," said Carver. "The project will generate substantial savings for both Dow and the railroad, a real win-win solution."

One of the biggest benefits is having cars arrive on time. Previously, Dow cars took an average of six days to travel from Freeport to Chicago, and under the worst-case scenario, the time was 21 days. "Now, our average is four days, and we never take more than six days," Carver said, adding that Dow's expectation is that cars be delivered on the date committed 90 percent of the time.

With the pilot now in actual use, team members are looking forward to building on its success and expanding the service concept to other locations, such as Dow cars moving from Freeport to Plaquemine, La., Plaquemine to Chicago, and Freeport to sites in the west, northeast and southeast, Carver said. The team also is challenging Dow to convert barge and truck business between the impacted points to the new rail service, while working with Network Planning and Service Design to keep a tight control on costs.

This project was a team effort of the entire Chemical Marketing and Sales Team, led by Ed Sims and Doug Glass.



shareholders and community partners: **Employees are expected to apply the following principles of behavior in carrying out their business duties.**

1. Loyalty. No employee should be, or appear to be, subject to influences, interests or relationships that conflict with the best interests of the Corporation.
2. Compliance with Applicable Laws. The Corporation and its employees are expected to comply with law and regulations applicable to the Corporation's activities.
3. Observance of Ethical Standards. In the conduct of business, each employee must adhere to high ethical standards. These include honesty (i.e., truthful dealing with everyone, including customers, suppliers, shareholders and fellow employees) and fairness (i.e., treating another in the same manner as one would expect to be treated.) – *Business Conduct Policy*

CAR LOADINGS for:

7-day totals
182,463
June 22
19,945
June 23
17,277
June 24
26,876
June 25
29,034
June 26
28,171



Chronic stress that lasts more than a month may increase your risk

EXH. 43

WAS GROTHER "TREATED FAIRLY AND WITH RESPECT" WHEN DEMOTED IN 1997?



EXH. 43

RECEIVED WITH PAY CHECK APRIL 26, 2002



Union Pacific's new television campaign will reach across America, telling an important story. Yours. The story of the men and women of Union Pacific and the truly indispensable role you play in our nation's growth. To learn more about the campaign, visit www.uprr.com.

BUILDING AMERICA℠

UNION PACIFIC

EXH. 44

UNION PACIFIC CORPORATION

DICK DAVIDSON
CHAIRMAN

February 16, 2000

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339-2963

Dear Mr. Grother:

Last year I asked for your help in communicating to Congress the immense achievements of the railroad industry—and Union Pacific—in cutting rates, improving safety and increasing investment since being deregulated by the Staggers Rail Act in 1980.

The response was terrific. Over 2,800 letters, e-mails, faxes and phone calls were logged from Union Pacific employees and retirees to representatives in Washington, urging them to oppose any measure—such as H.R. 2784, S. 621 and S. 747—that would re-regulate the industry and send it back to the 1970's when government interference left railroads poorly managed and often bankrupt. Joining forces with other advocates, we were able to slow the momentum of some opportunistic shipper groups who wanted to see our industry stifled by government control.

However, we cannot afford to relax our efforts despite these successes. It will take continued vigilance to ensure that Congress stays on the right track and passes a reauthorization bill that is good for railroads and good for the country that depends on them.

Let me say in closing that I am proud to be a part of a company whose employees and retirees care so much about keeping it as strong and vital in this new century as it was in the last. Again, thank you for your hard work for Union Pacific and for your extra effort with this legislative challenge. As a team, we can ensure that railroaders—not government—continue to run railroads.

Sincerely,

Dick

Dick Davidson

1416 DODGE STREET, OMAHA, NE 68179

Page 1 of 2

Tuesday, July 2, 2002

EXH. 45



Photos by Melissa Phillip / Chronicle

At the height of Union Pacific's post-merger problems, rail cars averaged as much as 50-hour waits at the company's Englewood Yard on Liberty Road. Five years later, massive efforts have returned the freight carrier to normal service to avert future crises.

Better rail service doesn't end gripes

Union Pacific back to normal; shippers crave competition

By BILL HENSEL JR.
Houston Chronicle

FIVE years ago, the troubled merger of Southern Pacific and Union Pacific nearly paralyzed rail traffic in Houston and points north.

Despite the near-meltdown in service in 1997 and into 1998, massive efforts by Union Pacific to improve service have brought the carrier back to normal.

Customer service is also better and the company is reporting record profits, spokesman John Bromley said. The company hauled in record net income of $222 million in the first quarter of 2002.

While shippers agree that customer service is considerably better than it was five years ago, that doesn't mean they all are happy.

The source of their ire is the lack of rail competition in the Houston area. It is an ever-present annoyance for shippers like Sam Slovack of Basell USA.

"We are not in a meltdown condition. Traffic is moving," Slovack said. "Is it moving at what we believe to be competitive rates? No. Do we see room for improvements in service levels? Absolutely. But if you have no competition, there is no drive nor desire to improve the product offering."

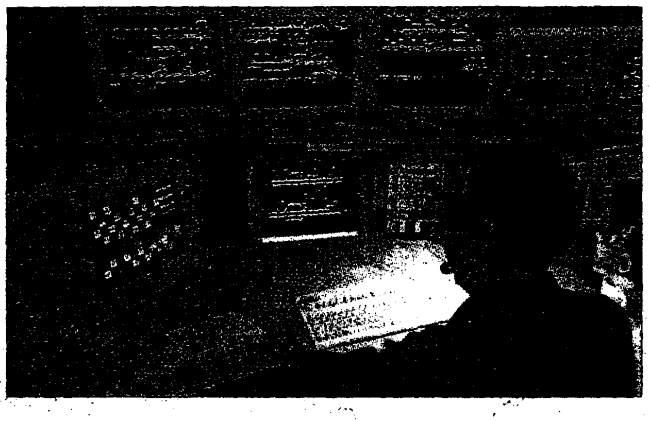
Shippers generally agree they would like to see more competition, said Diane Duff, head of the Alliance for Rail Competition, which represents a group of freight rail customers and industry trade associations in the ongoing debate over rail competition.

"I can generally state that my members are far happier with their rail service today than they were five years ago," Duff said. "But that wouldn't take too much. My experience has been that rail customers on the whole are thrilled when their stuff arrives with any regularity at all."

It's not a problem isolated to Houston. The number of mergers since 1980 has whittled the number of major railways in the nation to only a handful.

In the midst of the crisis, there

See UP on Page 12B.



Terminal train dispatcher Billy Duke keeps trains moving at the new dispatching office in Spring.

COMPANY AT A GLANCE

- Nation's largest rail network with service in 23 states and Mexico.
- $10.83 billion in revenues in 2001.
- Employs 2,250 in the Houston area with an annual payroll of $132 million.
- Operates 165 trains a day in the Houston area.
- Major commodities hauled in Texas: chemicals, export grain, gravel and automobiles.

UP Page 2 of 2

Continued from Page 1B.

were widespread calls to make changes to ensure more competitive rail service.

While the rail merger was only approved with terms requiring Union Pacific to open up a few of its lines to competing carriers, here was a strong push to open the system far more during the crisis. There's still plenty of talk of the need for more opening, but the chance of it happening has faded as service has improved.

Union Pacific dominates the local rail shipping business because it owns the great majority of the lines, said Ed Emmett, president of the National Industrial Transportation League. The group represents big shippers before government regulatory agencies.

That's a major concern for the chemical plants along the Ship Channel that depend on trains to move their huge output overland.

"All modes of transportation supposedly have been deregulated, but the very nature of railroad is if you have a chemical plant, you are served by a railroad — and if you don't like that railroad, you can't call another one," said Emmett, a former member of the Interstate Commerce Commission.

Most shippers just want the ability to have another railroad physically serve their plants or at least have the ability to get around "bottleneck rates," he said.

That urge sparked the formation of a venture combining a group of large chemical makers with the Burlington Northern and Santa Fe Railway Co. to build their own 13-mile spur line.

The $80 million project, called San Jacinto Rail Ltd., would cut the cost of shipping in and out of the four plants in the Bayport area: Atofina Petrochemicals, Basell, Equistar Chemicals and Lyondell Chemical Co.

Since the petition asking to build the line was filed by San Jacinto and Burlington Northern last August, the Surface Transportation Board originally was to have completed its investigation and review by August. But it will take more time because the agency is doing an environmental analysis, said Joe Dettmar, deputy director of the board's office of proceedings.

"We can't put out a final decision until the environmental process is complete, and it is pretty clear that it is not going to be completed" on time, Dettmar said.

While the huge traffic tie-up in 1997 at Union Pacific's Englewood yard in Houston could happen again, Emmett doesn't believe it will.

The 1997 breakdown wound up costing the railroad hundreds of millions of dollars. Enraged customers, whose shipments were delayed, demanded reimbursement because the shipments hurt their businesses.

The rail slowdown triggered lawsuits filed by the likes of Phillips Petroleum and Air Liquide America Corp. The lawsuits contended Union Pacific refused to acknowledge the extent of its service problems and "set out on a campaign to deceive Air Liquide and other shippers," the company's lawsuit charged.

Union Pacific denied those allegations. It has since settled that lawsuit and most of the others. Only one suit is still pending against the carrier from that period.

At the height of the problems, the average time a car spent at the Englewood Yard in Houston was as long as 50 hours, Union Pacific Chairman and Chief Executive Officer Dick Davidson said. Now it is a bit more than half that.

Union Pacific has taken advantage of its recent turnaround by launching a marketing campaign aimed at shoring up its image. The "branding" campaign marks the first such move in years for Union Pacific, which suffered one of its worst public drubbings as a result of the problems emanating from Houston after the merger.

Steve Barkley, a regional vice president with Union Pacific, was dispatched to Houston in 1998 to attack the problems the Southern Pacific merger caused.

One solution was simple — trains in Houston were being moved by dispatchers in Omaha and Fort Worth, Barkley said. The company dealt with that by creating a local dispatching office that was also designed to maximize cooperation with its biggest competitor, Burlington Northern.

The idea for the shared office to coordinate train movements was hatched during a Sunday afternoon meeting in 1998 involving top executives from both companies.

"This was groundbreaking," said Rod Richardson, superintendent of the coordinating center, which is in Spring and focuses on dispatching trains in the area from Brownsville to New Orleans. "It has worked a lot better than anyone could have imagined."

One advantage of the setup is that what they call "colorblind" dispatching. The system reduces conflict between the competing interests of the railways by setting priorities based on the kind of cargo rather than the train line.

Intermodal traffic, products carried on stack cars or trailer cars, have the highest priority, followed by chemicals, said Stan Bubela, joint director of the Spring dispatching center.

For example, say a Burlington Northern chemical train is about to leave the South Yard, headed west to Rosenberg. If a Union Pacific intermodal train is heading east into Houston on the same tracks, dispatchers would normally decide to keep the intermodal train coming and hold the chemical train back until the intermodal train is past.

If the trains are carrying similar cargo, the priority goes to the crew that worked the longest.

The staff of the center is also a mix, with 95 Union Pacific employees, 24 Burlington Northern employees and 31 who work on behalf of both companies. An employee of the TexMex Railway, a joint operation of Kansas City Southern and TMM, also is at the center.

Union Pacific also made use of the added track from the merger by creating lines where all the trains run in the same direction. The advantage of this is easy enough to see — it reduced the number of times a train had to pull off the track to let another pass by 41,000 times a year. But initially it slowed operations instead.

"We knew it was going to be a wonderful thing, but the changeover itself was very painful," Davidson said. "It took about two months to make the changes work effectively."

Average train speed had slowed to about 7 mph during the height of the slowdown, Davidson said. It is back up to about 15 or 16 mph or even higher today, he said.

"It never will be as fast along the Gulf Coast because you have so much business originating and terminating there," he said.

Union Pacific also has since integrated its operations with the old Southern Pacific system by installing a new computer system.

Davidson noted that Union Pacific has spent $150 million in the Houston area alone to implement changes and make good on promises of improved service. Much of the improvements were needed because Southern Pacific had not kept up with maintenance improvements, he said.

"Southern Pacific had been neglected because they really had been cash-strapped," he said.

Union Pacific also had to spend several hundred million dollars to settle lawsuits the slowdown triggered. Davidson did not reveal the settlement figure, only acknowledging it was under half a billion dollars.

In the case of Air Liquide, the company has relied on Union Pacific for years to ship products from its manufacturing plants to national distribution points. The company ships products such as liquid argon and carbon dioxide, supercooled gases that are subject to rapid evaporation, meaning reliable delivery and transit times are paramount.

Phillips Petroleum leveled similar allegations in its lawsuit — that slowdowns and delays cost the company millions because it could not serve its customers properly.

Attorney Ronald Krist, who represented Phillips in its suit against Union Pacific, said the company did a good job of promptly settling the case, but he declined to discuss the terms.

"Railroad law is heavily laden with rules and regulations that limit damages, but in this case it was resolved very reasonably for both sides," Krist said.

Union Pacific paid out another $34 million in 2000 when it agreed to settle a shareholder lawsuit. That suit, like the others, claimed the company made false and misleading statements about service and congestion following the merger.

Davidson said he never questioned that the problems would eventually be straightened out. But he acknowledged that the "pain" from the merger lasted longer than anyone anticipated.

"It has all paid off," Davidson said. "Our service is better than it was prior to the merger, operations are clearly more safe and customer satisfaction levels are at an all-time high."

Exh. 46

Union Pacific Railroad
Ms. Janice Arthur (Via Certified Mail)
Director-Pensions
1700 Farnam Street
10th Floor North
Omaha, Ne 68102

August 25, 2002

Dear Ms. Arthur,

Thank you for your attachment 1 response of 8/14/02: however, I am still concerned about a logical "WHAT IF ISSUE", as I am trying to mathematically determine how badly my retirement was affected by my July 1, 1997 demotion.

Referring to attachment 2, STRICTLY ASSUMING that my higher compensation for 36 consecutive months before 1998 (namely, July 1994-June 1997) were used to calculate my Base Company Annuity (like prior to the merger "UP Employees"), in lieu of spreading the SPRC earnings over 5 years. Based on attachment 3 rough calculations, it appears that my Base Company Annuity would be approximately $ 1,959. That estimated number is about $ 230 per month greater than UP 2002 Benefit Statement of $ 1, 729 * or $ 55,292, assuming a 20 year life span after retirement at age 65. Correct? Am I also correct that my July 1, 1997 demotion has forever removed my higher earnings (July 1994-June 1997) from FAE consideration and my wife and I will be penalized for the remainder of our lives? By how much money?

Finally, is it correct that had I only maintained my $6,200 per month wage level that I initially started back on August 1, 1995 between January 1, 1999 until December 31, 2001, my estimated UP 2002 Benefit Statement would have been about $ 1,955 per month at age 65 (attachment 4)? *
(A $226 /MONTH SHORTFALL FROM ESTIMATED 1729 AT 65, *
I believe it would be relatively easy to enter the compensation figures I have estimated on attachs 3 and 4, or verifiable data (with bonus), from the Union Pacific compensation system into the standard pension computation model.

Please advise the results of these "WHAT IF" scenarios, as I am concerned about "FAIRNESS". Thanking you in advance for your cooperation.

Attachments @ 4
1718 Rustic Park Drive, Kingwood Tx 77339

Sincerely,

Exh. 47

This is G o o g l e's cache of http://www.apa.org/monitor/jul98/merger.html.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
To link to or bookmark this page, use the following url: http://www.google.com/search?q=cache:_DMCjB3avPgC:www.apa.org/monitor/jul98/merger.html+%22How+groups+merge:++the+effects+of+merger+integration+patterns%22&hl=en&ie=UTF-8

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from the *APA Monitor*

VOLUME 29 , NUMBER 7 -July 1998

Some corporate mergers, like marriages, end up on the rocks

Psychologists' corporate counseling eases the way for mergers and acquisitions.

By Scott Sleek
Monitor staff

Two giant automakers have barely walked down the corporate aisle together, and already organizational psychologists are predicting a divorce.

Like newlyweds who discover they can't agree on anything, Daimler-Benz and Chrysler Corp. appear destined for trouble in the merger they announced in April, says psychologist Mitchell Lee Marks, PhD, a San Francisco–based management consultant.

'Daimler-Benz has a strong sense of cultural superiority; it regards itself as the pre-eminent automobile manufacturer in the world,' Marks says. 'Chrysler, by contrast, is 'just' the number-three automaker in the United States. You can almost hear the folks in Stuttgart saying, 'We'll show them how to run a car company!"

And that superior air will probably irk Chrysler's top managers, he predicts.

Marks speaks from observational experience. He's been involved in more than 50 mergers during the past 15 years. And he's seen far too many newly allied companies discover their corporate cultures fit together poorly.

In fact, up to 80 percent of corporate mergers and acquisitions fail to garner the expected financial gains, mainly because the deal-makers fail to anticipate the psychological and philosophical clashes that can undermine the alliance, industrial/organizational (I/O) psychologists say.

Yet new mergers are being announced almost daily. And the trend is becoming a big line of business for I/O psychologists who specialize in helping two or more companies join forces effectively. Some psychologists are using tenets of marital therapy to help companies maintain a workable union.

'It's not inevitable that [merged companies] will fail, if they pay attention to the right things—like immediately resolving their different ways of doing business,' says organizational psychologist Addie Perkins Williamson, PhD, of Stamford, Conn., who works with companies that enter mergers and acquisitions.

What goes wrong?

While top executives of two companies may decide that merging operations makes sense competitively, the human antipathy toward change often infects the work force and erodes the alliances, psychologists say. At the top level, executives may find they're unwilling to adopt their partners' way of doing business, as Northwest Airlines and KLM Royal Dutch Airlines found when they joined forces in 1993.

The two companies began deriding each other's cultures in the business press, took their differences to court and, earlier this year, disbanded the alliance, notes Marks. Such cultural clashes can occur even between merging companies from the same country, says Rich Michaels of Michaels McVinney, Inc., a Boston-based corporate education and development firm. (Michaels' firm uses many techniques grounded in psychological research and theory.)

A prime example, says Michaels, is GTE's 1997 purchase of BBN Corp., a technology firm that was in the forefront of developing the Internet. BBN is a research-oriented company made up of scientists and technology 'wizards,' he says. Many of those valuable employees resigned because they thought GTE would impose a new, much more businesslike atmosphere on their workplace, he notes.

'They weren't in fear of losing their jobs,' Michaels says. 'They were just worried about what this new culture was going to be like.'

Employee morale can plummet as soon as a merger or acquisition is announced, psychologists say. Workers almost immediately fear that they'll lose seniority or expected promotions. They lament the loss of control of their jobs. And at worst, they worry about losing their jobs as the new partners combine operations and shed redundancies.

Top talent may leave the company altogether, and workers that remain will become angry or scared, and thus unproductive, says Marks.

Morale appears to be most at risk among employees in the company being acquired, says Gary Mottola, PhD, senior market analyst with Peco Energy Co. in Philadelphia. Mottola was involved in a recent study on the effects of mergers and acquisitions on employees. He and his colleagues recruited 263 college students to participate in a role-playing experiment. Some participants role-played middle-level managers in two fictitious companies—'Acme Corp.,' a large manufacturing firm that was

acquiring 'Bolt Corp.'

The researchers found that employees of both the Bolt and Acme corporations felt more threatened and less committed to their 'jobs' the more they had to adapt to new policies, pay scales and technology systems.

Previous studies have shown a similar resistance or decline in morale among employees who fear their organizational culture will disappear in an acquisition, Mottola adds.

Making the alliance work

Psychologists use a variety of techniques to help newly aligned companies keep their best workers and maintain healthy morale. Williamson and her colleagues, Erika Hayes, PhD, of Tulane University and Cheryl Henderson, PhD, of Stamford, Conn., try to help companies develop realistic expectations about a merger, just as they would help romantic partners anticipate some of the struggles they'll encounter after they marry. They encourage companies, in the premerger (premarital) stage, to really learn about and understand each other and to make sure they each have the same expectations about the merger.

For example, they worked with a large American corporation that bought a foreign travel agency. At first, the corporation was only interested in enhancing its economies of scale and had no desire to learn about the travel agency's business strategy, Williamson says. But in merger talks, officials at the agency convinced the acquiring corporation to absorb the agency's successful business practices, and not just its personnel and equipment.

Unfortunately, few executives take this step before entering a merger agreement, Henderson notes. After the merger is under way, Williamson, Hayes and Henderson encourage companies to address and resolve problems before they escalate out of control. For example, executives should immediately tell key employees that they're needed, lest those workers resign for fear of being laid off, Hayes says.

Both Mottola and the co-author of the merger study, Samuel L. Gaertner, PhD, professor of psychology at the University of Delaware, suggest a common group identity model, which guides two parties from a 'them and us' to a 'we' mind set. Even simple steps, like forming a whole new company name instead of hanging on to the name of one of the partners, can create a stronger sense of unity.

Marks uses a variety of approaches to help companies make a smooth merger, particularly in the area of employee relations. For example, he's helped companies develop programs to minimize the stress that employees may feel in the midst of a merger. The programs are designed to help workers:

• Understand and manage the stress they're feeling over the merger.

• Consider new ways of thinking, rather than embracing the old way of doing business.

• Stay informed about the merger progress and the implications it has for their jobs.

• Find ways to get involved in building the newly formed entity so they have a stronger sense of control and investment in their jobs.

Marks says that more companies are recognizing the need to address work force issues immediately

after embarking on a merger, he adds.

'I'm getting called in not just frequently, but earlier in the process,' he says. 'It used to be executives waited until all hell broke loose, until they lost their top talent. Now I'm getting called in before the government even approves the deal.'

Further reading

'Joining Forces: Making One Plus One Equal Three in Mergers, Acquisitions and Alliances,' by Mitchell Lee Marks and Philip H. Mirvis (Jossey-Bass, 1998).

'How Groups Merge: The Effects of Merger Integration Patterns on Anticipated Commitment to the Merged Organization,' by Gary Mottola, PhD, Samuel Gaertner, PhD, Betty Bachman, PhD, and John Dovidio, PhD, *Journal of Applied Social Psychology* (August 1997, Vol. 27, No. 15, p. 1335–1358).

Cover Page for This Issue

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Exh. 48

UNION PACIFIC RAILROAD COMPANY

HUMAN RESOURCES
DEPARTMENT

1416 DODGE STREET
OMAHA, NEBRASKA 68179

August 16, 2002

John Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Dear Mr. Grother:

I am in receipt of your certified letter dated August 5, 2002. I can completely understand your frustration with the lack of detail that I have been able to find for you. Unfortunately, I do not have the knowledge of how things were handled systematically from a Human Resources standpoint in 1997. The systems that were used then have since merged with others which makes backtracking difficult.

Regarding the reasons behind your 'demotion', I would suggest that you speak directly with Mr. Ken Packard who you indicated was your supervisor at the time. If anyone can shed any detail on your situation, I would hope he could. I do know that Mr. Packard is still working with Union Pacific here in Omaha. As far as how the systems have recorded or detailed the situation, I don't believe more researching will necessarily give you what you are looking for, which is a detailed explanation as to why the demotion/salary decrease was given to you.

Again, I apologize for my lack of help in this matter. I hope that Mr. Packard will be able to give you what you are looking for.

Sincerely,

Lisa Brewster

Lisa Brewster

Exh. 49

VIA CERTIFIED MAIL

October 28, 2002

To: Mr. K.C. Packard
Director Transportation Services
1416 Dodge Street, CBSU #1
Omaha, Ne. 68179-0004

From: Mr. J.E. Grother

Subject: Discipline reason for 1997 Demotion of Grother

This is my sixth (6) attempt to contact you by E-mail or otherwise.

Sorry to bother you after over five (5) years; but I had a near death experience in February 2002 and I need the below questions answered before I can go to my grave.

You will recall that during late June 1997, I was advised by Mr. Tom F. Murphy and you, that I was reassigned to Houston Intermodal with a whooping 21% reduction in wages or $1,272 per month. When you and Mr. Murphy debriefed me separately in June 1997, no one stated why I was being demoted, except that Union Pacific Railroad (UPRR) wanted its own people in Tucson and UPRR wants Prior-UPRR persons running the Sunset Route.

I realize that the Service Unit was unable to shift all the flat switching from Phoenix to Tucson, as that was a near doubling of volume, without any more trackage made available in May-June 1997. Moreover, even the UPRR capacity model personnel said, "this merger experiment will not work".

Also, you will painfully remember that we had Maintenance of Way (MofW) curfews on both sides of Tucson during that yard consolidation merger experiment. Tucson could only operate trains between 1900 and 0700, which is also the general time span when both the Eastbound and Westbound fleets of trains were converging on an overwhelmed Tucson.

We were not allowed any new hiring, augmenting or train blocking relief until one day after I was advised of my 1997 Demotion!

While all the above was going on, on my desk was sitting the Union Pacific Vision and Values "1997 Desktop Stand" which stated, in part, "our values" include: "***TREAT OTHERS AS YOU WOULD LIKE TO BE TREATED".***

Was anyone else reduced 21% or $1,271 per month, as a result of someone else's merger yard consolidation experiment?

What about all the thousands of cars delayed elsewhere (i.e. Houston, Gulf Coast, etc.). Was anyone at these locations and others cut two SRG's for those spectacular service failures, which lasted beyond 6-9 months?

Surely, you would agree, that no one in their right mind, would think losing 21% of their wages was "Fair Treatment"; especially when other, Prior-UPRR managers were not reduced in pay for long periods of horrendous service failures and lawsuits against UPRR?

I have a few basic questions, which I desperately need answered please:

Are you now able to advise me specifically, at this time, what I did at Tucson that was so HEINOUS, other than being an Ex-Southern Pacific manager, that I deserved being demoted two SRG's, which will require at least seven years from 1997 to just restore my September 1995 salary level?

Who made the decision to demote me and on what specific basis, evidence or charges?

Why was I not allowed to defend myself?

Why was I not allowed a "developmental action plan"?

Logic Tests:

If I had known in June-July 1997, that I was being demoted for alleged "disciplinary reasons", why would I have had the GALL to write then UPRR President Jerry Davis on July 15, 1997, asking for an appeal to save my wages, career and retirement?

More importantly, when President Davis responded after almost two months, why did his ghostwriter say nothing about me being demoted for alleged "disciplinary reasons"?

Finally, why was I never advised that "discipline reasons" had been placed on my record until July 31, 2002?

The reasons these questions are directed to you include; but, are not limited to:

1. I was advised by Linda Buttrill, of Houston HR, that these questions should be sent to my 1997 Tucson supervisor.

2. I was advised on July 31, 2002, that an on-line record exist with information in place regarding my 1997 demotion which states that it was a "disciplinary action" and I want to know NOW - "for what please".

It appears that over these last 5.5 years, every attempt I made to get promoted has been rejected, as I had this unknown-to-me "disciplinary action" entry in the on-line system which is a very quick way for hiring managers to reject someone for promotion consideration!

Please advise, such that I may clear my secret on-line record.

I can be reached at 678-5303 should you wish to discuss the above.

Thanking you in advance for your cooperation.

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
UNION PACIFIC RAILROAD
MR Ken C. PACKARD
416 Dodge Street
CBSU #1
OMAHA, NE
68179-0004

2. Article Number

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X NOV 4 2002 ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

JG

John Grother

EXH. 50

Attitude ADJUSTMENT

UP focuses on the future by promulgating a can-do spirit, pushing productivity and promoting process change



January 14, 2003

EXH. 51

UP job cuts become reality

OMAHA, Neb. -- The president of Union Pacific Railroad (UP) warned employees in a recent e-mail that aggressive cost-cutting and job cuts were coming in the first quarter of 2003. One round of those cuts came Monday (January 13), when 53 employees in the information technology department lost jobs, according to a report by Grace Shim that appeared in the Omaha World-Herald.

President Ike Evans warned in a Thursday e-mail sent to employees that each department would have to cut costs.

"While the scope of these plans will vary by department, these cost reductions will be felt across all areas of the company, primarily in administrative functions," he said in the e-mail.

Union Pacific spokeswoman Kathryn Blackwell would not say how many employees lost jobs Monday but did say it was likely some of those affected were managers. Blackwell said the job cuts were immediate.

An Omaha employee of Union Pacific, who spoke on the condition of anonymity, said 53 workers in the information technology department in Omaha lost jobs Monday. The employee also said at least 26 workers in the crew management department in Omaha lost jobs last week.

Two crew management employees in Omaha, who also spoke on the condition that they not be named, said more job cuts are anticipated in the department.

Union Pacific Corp., the Omaha-based company whose largest unit is its railroad, had announced in December that it was drafting a plan to cut costs by as much as 20 percent.

Evans said in a recent e-mail to employees that 2002 was "a very good year," but cited these factors as the reason for cuts in 2003: higher employee wages, double-digit increases in health care benefits, higher fuel prices resulting from the threat of war in the Middle East and political strife in Venezuela, and soaring insurance costs since the Sept. 11 terrorist attacks.

"A continuing soft economy is a backdrop to all of these challenges," Evans said in the e-mail.

In the past, Evans said, the company met similar challenges through productivity improvements, price increases and careful budgeting, but the company is not earning its cost of capital, which is the basic return that investors and lenders expect from their investment in the company.

"We need to take a bolder step," he said of 2003.

UP's cuts come at a time of improved earnings for the company, which reported record revenues of $3.2 billion for the third quarter.

For the first nine months of 2002, the company reported net income of $963 million. During the first nine months of 2001, the company posted $691 million in net income.

UP will report its fourth-quarter 2002 results Jan. 22.

"Some have asked why we need to take these tough actions at a time when we are setting financial and operating records. The answer is simple: It is better to act from a position of strength while you have choices, rather than to wait until financial weakness forces even more severe actions," Evans wrote in the e-mail.

Union Pacific spokeswoman Blackwell said employees are not being offered early retirement. She said that severance packages were based on years of service but declined to give details.

One of the Union Pacific employees said managers who lose their jobs would get a maximum of one year's pay if they have 20 or more years' tenure. If a manager chose to revert to union membership, then the union member with the least seniority would lose his job, the employee said.

The employee said no department is being asked to cut more than 20 percent of its staff.

When Union Pacific cut jobs in 2001, employees were offered a severance package and a buyout program.

In this round of cuts, Blackwell said there may be many instances where affected people won't be of retirement age.

Blackwell said the company is targeting aspects of the business that don't add value. The company can do more things efficiently because of technology and does not need as many people, she said.

(The preceding report by Grace Shim appeared in the Omaha World-Herald Tuesday, Jan. 14, 2003.)

EXH. 52A

14. The 3rd and the 5th principles of the Code were violated in the Spring of 1998 at the UP Tucson Yard Office, in the course of some "spring cleaning." Information regarding discipline proceedings gathered by the Southern **Pacific** Transportation Company was discarded by **Union Pacific** carrier officials in a seemingly negligent manner--exposing that information to public display. The **Union Pacific Railroad**, by its careless disposal of discipline **records**, failed to take appropriate precautions to prevent the possible misuse of that data. (see photos enclosed)

15. Contrary to **Union Pacific's** unstated premise regarding the sanctity of **personal records** and data, this incident of improper disposal of **records** shows--not careful stewardship--but rather callous disregard for the **personal records** of employees and disregard for the privacy rights of those employees. The old discipline **records** which we found next to the dumpster near the Tucson Yard Office contained names, social security numbers, the intimate details of investigations (including drug and/or alcohol violations--old "Rule G" offenses), and carrier comments about the final disposition of those cases. These were **records** of current employees. The unsealed boxes of files were stacked next to the dumpster in plain sight for several days until the trash removal service hauled them away. It would seem that **records** of this nature should have been shredded or incinerated to prevent their accidental dissemination; yet they were disposed of in a manner which made them accessible to other employees, trespassers, or thieves for whatever illicit or nefarious purpose might be devised (e.g., extortion, blackmail, identity theft).

16. Engineer Howard has expressed concern that, given the UP's new policy on graffit of a sexual or racial nature found on company property (effective 05 Dec 01)--and the reporting requirements imposed by that policy--he may be unjustly categorized as a less than upstanding employee by the existence of the prank time claim.

17. We believe that the removal of this offensive record from Engineer

EXH. 52B

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These search terms have been highlighted: **personal records union pacific railroad**

HOME

BLE DIVISION 28

TUCSON, AZ.

E-MAIL ME

11/27/2001 LAST UPDATED

LOCAL CHAIRMAN

LEGISLATIVE PAGE

DIVISION OFFICERS

PHOTO

From:

R.S. Svob, Jr., Chairman
Arizona State Legislative Board
Brotherhood of Locomotive Engineers
1534 E. Water St.
Tucson, AZ 85719-3344
520-327-5864 ph. / 520-320-9697 fax
520-557-6795 pg. / 520-247-4961 cell

EXH. 53

Via CERTIFIED MAIL
Union Pacific Railroad
Human Relations Department
Attn: Ms. M. Uwakwe
1416 Dodge Street
Omaha, Ne 68179

January 28, 2003

Ms. M. Uwakwe,

Further the issues of **"FAIRNESS TO ALL EMPLOYEES" AND THE ACCOUNTABILITY OF MANAGERS FOR NOT FOLLOWING UNION PACIFIC RAILROAD'S (UPRR) PUBLICLY PUBLISHED "BUSINESS ETHICS", WHO DEMOTED ME 2 SRG'S DESPITE A 1997 DEMOTION POLICY THAT STATED "IN *MOST CASES, THE EMPLOYEE'S PRESENT SALARY LEVEL IS RETAINED" (EXH.1).***

Recommend that corroboration of total compensation fairness be obtained simply by requesting a few comparisons from the Compensation Dept.:

1. Compare what has been paid to Thomas Parr, my 1997 **mentor-assisted,** youthful replacement from 1997 to present in terms of monthly salary, bonus, expense accounts, annual increases, fringe benefits and retirement benefits to my pigeon-holed position.

   The difference is incredible, as I have been unfairly pigeon-holed in a dead-end job and probably will not even get back to my 1995 wage level of $6,200/month until 2005 of later (ten year penalty). If I had been allowed to keep my 1997 wage level, like others who were similarly situated, this huge differential in pay and retirement would not exist.

2. Compare what has been paid to Masseurs Charles O. Malone and Gregory "Bubba" Garrison since they were demoted and transferred in 1997 as a result of the "Railroad making changes to deal with backlogs" per Exhibit 2. THEIR DEMOTIONS WERE DUE TO **EXTREME SERVICE FAILURES, WHICH OCCURRED IRONICALLY IN THE SAME HOUSTON AREA THAT I WAS TRANSFERRED TO IN 1997, AS THE RESULT OF ALLEGED TUCSON SERVICE FAILURE; BUT, NO CUT IN WAGES FOR THOSE MANAGERS WHO WERE PRIOR TO THE MERGER UPRR MANAGERS!**

THEIR SERVICE FAILURE WAS AT LEAST FIFTY (50) TIMES GREATER THAN ANY "JUNE SERVICE FAILURE" WHICH OCCURRED AT TUCSON IN THE SUMMER OF 1997. THEIR "SERVICE FAILURE" RESULTED IN THE RAILROAD MAKING PERSONNEL CHANGES, JUST LIKE MY ALLEGED SERVICE FAILURE; YET NO ONE WAS CUT IN THEIR PAY! THE NEWSPAPER ARTICLE'S SUBTITLE REGARDING "RAILROAD MAKING MANAGEMENT CHANGES ..."; (EXH. 3) IS ALMOST EXACTLY WHAT PRESIDENT DAVIS SAID IN HIS SEPTEMBER 4, 1997 LETTER; BUT, THEY HAD NO PAY CUTS. THEIR SERVICE FAILURE HAD HUGE CUSTOMER SETTLEMENTS, EXTREME LAWSUITS AND ALMOST THE LOSS OF SOME MERGER TERRITORY TO OTHERS (STB ACTION) IN COMPARISON, I HAD NONE OF THE ABOVE!

You can see on Exhibit 2 that "Since summer (1997) UPRR has been struggling with an unprecedented traffic jam... has spread throughout much of its 36,000 mile system". Why was I the only one reduced in wages? The above system-wide service failures had demotions and transfers; but I was unfairly singled out to lose the wage level I had worked 28 plus years of loyal and dedicated service to obtain!

The last comparison, per my attorney-only 1997 Journal entry, Theodore (Ted) F. Ingram was demoted from a very high level in the UPRR Safety Department in Omaha to Tucson as an MTO on or about February 1997. This was approximately four (4) months before my demotion, after a failed merger yard consolidation experiment. Upon Ingram's arrival, Ingram stated that he had "**CONNECTIONS IN OMAHA**" and his very high Omaha monthly salary would be retained "as is", despite his lowered salary rate grades in Tucson. Why disparate treatment for similarly situated persons?

In comparison, I had "**no connections in Omaha**" as an Ex-SPTCO manager and I was financially denigrated for life!

DO ALL THE ABOVE APPEAR AS "FAIRNESS TO ALL EMPLOYEES" AND PROPER BUSINESS ETHICS TO HR?

Attaches: Exhibits 1-3

John Grother

Exh. 54

Arbitration
Frequently Asked Questions

1. **Q: What is the current daily pay rate for arbitrators working in the railroad industry?**
   A: $300.00 per day

2. **Q: Is there a separate roster for airline arbitrators?**
   A: The NMB has a single Roster of Arbitrators from which arbitrators can be selected for airline and railroad cases.

3. **Q: Can an individual railroad employee process a claim?**
   A: Yes, via the National Railroad Adjustment Board (NRAB) in Chicago.

4. **Q: Can an award under the RLA be appealed?**
   A: Yes...to the U.S. District Court within 2 years from the date of the award.

Arbitration Menu

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ARBITRATION | DOCUMENTS & FORMS | FOIA | COMMENTS & SUGGESTIONS
RELATED WEB SITES

EXH. 55

Butch Ethington
03/10/03 12:32 PM

To: John E. Grother@UP
cc: Mariette C. Uwakwe@UP
Subject: Re: REQUEST FOR 1997 POOR PERFORMANCE DETAILS

I spoke with Ken Packard, Dennis Tholen, and Tom Murphy about your demotion in 1997. The explanation was given that your performance was not what was needed. They made clear to me that the action was explained to you and you were given options. You chose to move and take a lower paying job. I am satisfied that the action was appropriate to the needs and practices at that time. The fact that others got treated differently is because they were in different jobs with different responsibilities and performance. You appealed to President Jerry Davis. Rene Orosco, the Ombudsman at that time, looked into your situation and responded appropriately at that time. He was closer to the situation, in time and information, than I am now. I believe that matter was settled, obviously not to your liking.

As for the reason for your lack of promotion in the interim, I believe the comment on the Form 15121 data base has nothing to do with that. Only by digging into the forms did that comment surface. I believe it has no bearing on your lack of interview success. I believe you should talk to the hiring managers about why you were not selected for various positions and get direct feedback.

You allege age and Viet Nam veteran status as a basis for discrimination in your treatment. That puts you case squarely in the hands of the EEO group.

Sincerely,
Butch Ethington
Ombudsman

John E. Grother

John E. Grother
03/09/03 11:33 AM

To: Butch Ethington@UP
cc: Jill E. Augustyne@UP, Mariette C. Uwakwe@UP, Jill E. Thomsen@UP
Subject: Re: REQUEST FOR 1997 POOR PERFORMANCE DETAILS

See Next Two Pages for Questions Creating Above Response.

3/9/03

Mr. Ethington,

I need a clarification please, as I am sensing a Catch-22 situation.

As you know, there were several issues in my 12/15/02 letter concerning the reasons why I was demoted. To illustrate:

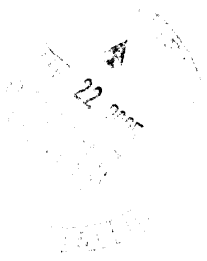
1) I was orally advised June 26, 1997 (given days notice to transfer or resign after 28 years of dedicated and loyal service) by Messeurs Packard and Murphy that my demotion was basically because I was a former manager of Southern Pacific Manager and U.P. wanted its own people in Tucson and on the former Sunset Route of the SPTCo.

2) Next, I discovered on 7/31/02, after years of effort regarding why I could not get promoted, that "someone had secretly placed on my Online Personal Record the statement that I was demoted 7/1/97 for "DISCIPLINARY REASONS".

APPENDIX 5

BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED PURSUANT TO
ARTICLE IV OF THE NEW YORK DOCK EMPLOYEE CONDITIONS

JOHN E. GROTHER :
:
vs. :
:
UNION PACIFIC RAILROAD COMPANY :



EMPLOYEE'S SUBMISSION

PART II-EXHIBITS

(Does Not Include Exhibit E-2)

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

September 14, 2004

CONTENTS

Ex. E-1. New York Dock protective conditions (7pp).

Ex. E-2. Grother letter and attachments, dated May 12, 2003 (Exhibit contains its separate table of contents)

Ex. E-3. Grother Letter to NMB, dated June 16, 2003 (1p).

Ex. E-4. UP Letter to Grother, dated July 18, 2003)(2pp).

Ex. E-5. Pocket List of Railroad Officials, Summer 2004 (7pp).

Ex. E-6. NMB designation of Lynette A. Ross, dated January 21, 2004 (3pp).

Ex. E-7. STB F.D. No. 32760 (Sub-No. 42), Grother pet. to Est. Procedures, filed February 20, 2004 (15pp).

Ex. E-8. Grother Supplement to E-7, filed March 5, 2004 (2pp).

Ex. E-9. STB FD 32760 (Sub-No. 42). UP Opposition to Ex. E-7 pet., filled March 5, 2004 (42pp).

Ex. E-10. STB FD 32760 (Sub-No. 42). Grother letter re Ex. E-9, filed March 12, 2004 (1p).

Ex. E-11. STB FD 32760 (Sub-No. 42). STB Decision dated Arpil 19, 2004 (served Apr. 21, 2004) (3pp).

Ex. E-12. STB FD 32760 (Sub-No. 42). Letter from Grother re Ex. E-11, filed April 26, 2004 (2pp).

Ex. E-13. STB FD 32760 (Sub-No. 42). STB Notice dated and served June 10, 2004 (1p).

Ex. E-14. UP Letter to Lynette A. Ross, dated May 3, 2004 (4pp).

Ex. E-15. Grother letter to Lynette A. Ross, dated May 28, 2004 (8pp).

Ex. E-16. Memorandum of Agreement-UP/Grother, dated June 18, 2004 (4pp).

Ex. E-17. Letter from UP to Grother, dated June 23, 2004 (1p)

Ex. E-18. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 131 (D.C. Cir. 2004) (9pp).

Ex. E-19. ICC FD 32760, Railroad Merger Application, Vol. 3, Operating Plan, dated November 30, 1995 (15pp).

Ex. E-20. ICC FD 32760, Environmental Assessment, No. 2, dated April 12, 1996 (22pp).

Contents (Cont.)

Ex. E-21. STB FD 32760 (Sub-No. 21), UP/SP Merger--Oversight, Applicants' Report on Merger and Condition Implementation, dated July 1, 1997 (6pp).

Ex. E-22. 29 U.S.C. §§152, 157, 164(a) (2pp).

Ex. E-23. 45 U.S.C. §151, 181; 49 U.S.C. 11326 (2pp).

Ex. E-24. Arbitrator's Decision and Award, Thomas M. Curley, et al. v. Missouri Pacific Railroad Company (David H. Brown, 1987) (11pp).

NYD, Art. IV
UP/SP-Grother
Exhibit E-1

required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss during the time necessary for such move, and for a reasonable time thereafter not to exceed 5 working days. The extent of the responsibility of the railroad under this provision and the ways and means of transportation shall be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however*, that changes in place of residence which are not a result of a transaction, which are made subsequent to the initial change and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent as provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. *Definitions.*—(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further,* that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall ceaee while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

serve as chairman. If any party fails to selects its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not repesented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpreation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits establisted under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

Ex. E-3

National Mediation Board (NMB)
Attn: Mr. Roland Watkins
Washington, D.C. 20572

June 16, 2003

Dear Mr. Roland Watkins,

I have been advised that your Office is the contact point for individuals applying for NMB Arbitration. Pursuant to the attached excerpt from the New York Dock (NYD) Article IV, and oral information from your Office, this letter is to request the assignment of an Arbitration Committee.

In accordance with Article IV, I have provided Union Pacific Railroad ("UPRR") a thirty (30) day notice (attached in part) to resolve this dispute ("Dispute"), concerning myself being defined as a Displaced Employee (Non-Agreement person). The issue involves UPRR's failed Merger Transaction related yard consolidation experiment to operate ALL the switching for Phoenix from Tucson, Arizona in late May 1997, which resulted in my demotion and reduction in wages of $1,272 per month and other fringe benefits effective 7/1/97. UPRR has not responded to my certified letter dated 5/12/03, attached in part, requesting Dispute resolution.

I am hereby requesting Neutral selection data, including biographies, for referees, who would be available for the states of Arizona, Texas, California and Washington D.C. please. I am uncertain if witnesses are able to testify; but, Tucson Arizona would be an appropriate site for an Arbitration, if ALL those employees present in 1997 are allowed to testify in person.

NMB-2 appears to apply to Mediation; so, not prepared. Please advise immediately what may additionally be required to activate the entire NMB Arbitration process, including any deposits or pre-payments required. I would appreciate a return call to discuss the entire NMB Arbitration Process to 281-359-5667 between 1300-1800 CT please (night worker).

By copy to UPRR, this is Official Notice to UPRR of my intent to refer said Dispute to an Arbitration Committee, as no UPRR response to attached certified letter.

Attachments:
NYD Conditions

Sincerely, JEG

Ex. E-4

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. J. E. Grother
1718 Rustic Park Dr.
Kingwood TX 77339

Dear Mr. Grother:

This is in reference to your May 12, 2003 letter to Mr. James V. Dolan in which you requested to be certified for New York Dock protective benefits as a result of the merger between the Union Pacific and Southern Pacific Railroads. As this is a protection issue, it has been referred to my office for handling. All future New York Dock related correspondence between you and Union Pacific Railroad should also be directed to me.

I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger.

In addition, to be considered for coverage an individual must satisfy the term of "employee" as it is defined in the Railway Labor Act and by New York Dock cases. As Arbitrator Seidenberg wrote (in relevant part) in his 1987 case of The Matter of Arbitration Between B. J. Maeser et.al and Union Pacific RR Co. et al.:

> "A review of the history of labor protection conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature."** (emphasis added).

Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

Finally, even though the New York Dock conditions do not have strict time limits for filing time claims, an unreasonable time has expired between the implementation of the merger and your first claim for protective coverage. Considerable arbitral authority has held that the doctrine of laches does apply in cases such as this.

Your claim for coverage as a displaced employee under the New York Dock labor protective conditions is respectfully declined.

Sincerely,

Marilyn J. Ahart

cc: Mr. Roland Watkins
Mr. J. V. Dolan

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. Roland Watkins
National Mediation Board
Washington DC 20572

Dear Mr. Watkins:

This is in reference to your July 7, 2003 letter to Mr. James V. Dolan regarding Mr. John Grother's request to have the National Mediation Board assign arbitration pursuant to Article IV, of the New York Dock labor protective conditions.

Attached is a copy of my response to Mr. Grother. As indicated in my letter, Union Pacific is confident his claim for New York Dock protective benefits has absolutely no merit. However, in accordance with Article IV of the New York Dock labor protective conditions, please assign a neutral member to this case.

Since my office handles New York Dock protective issues at Union Pacific Railroad, please address future correspondence related to this case to me at 1416 Dodge St., PNG06; Omaha, NE 68179.

Your assistance in this matter is greatly appreciated.

Sincerely,

Marilyn J. Ahart

cc: Mr. John Grother
Mr. J. V. Dolan

3rd Quarter 2004
Summer 2004
Vol. 110, No. 3
Serial No. 439

The Pocket List of Railroad Officials

Linking Buyers and Suppliers Since 1895

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ABBREVIATIONS OF RAILROAD OFFICIALS' TITLES

Acct. ..... Accountant
Act. ..... Acting
Agr. Agt. ..... Agricultural Agent
Arch. ..... Architect
Asst. ..... Assistant
Atty. ..... Attorney
Aud. ..... Auditor
Aud. Disb. ..... Auditor Disbursements
Aud. Frt. Accts. ..... Auditor Freight Accounts
Aud. Rev. ..... Auditor of Revenue

B. & B. Mast. ..... Bridge and Building Master
Brdg. Eng. ..... Bridge Engineer

Car Acct. ..... Car Accountant
Car For. ..... Car Foreman
Chman. ..... Chairman
Ch. of Board ..... Chairman of the Board
Chman. Exec. Comm. ..... Chairman Executive Committee
Chem. ..... Chemist
Ch. Acct. Off. ..... Chief Accounting Officer
Ch. Carp. ..... Chief Carpenter
Ch. Clm. Agt. ..... Chief Claim Agent
Ch. Drafts ..... Chief Draftsman
Ch. Elect. ..... Chief Electrician
Ch. Eng. ..... Chief Engineer
Ch. Mech. Off. ..... Chief Mechanical Officer
Ch. Oper. Off. ..... Chief Operating Officer
Ch. Person. ..... Chief of Personnel
Ch. Police ..... Chief of Police
Ch. Surg. ..... Chief Surgeon
Clm. Agt. ..... Claim Agent
Clm. Atty. ..... Claims Attorney
Coal Frt. Agt. ..... Coal Freight Agent
Coal Traf. Mgr. ..... Coal Traffic Manager
Commerce Atty. ..... Commerce Attorney
Comr. ..... Commissioner
Compt. ..... Comptroller
Conslt. Eng. ..... Consulting Engineer
Cont. ..... Controller
Coun. ..... Counsel

Diesel Supvr. ..... Diesel Supervisor
Dist. Eng. ..... District Engineer
Dist. Str. Kpr. ..... District Store Keeper
Dist. Supt. ..... District Superintendent
Div. Car For. ..... Division Car Foreman
Div. Eng. ..... Division Engineer
Div. For. ..... Division Foreman
Div. M.M. ..... Division Master Mechanic
Div. Rd. Mast. ..... Division Road Master
Div. Str. Kpr. ..... Division Store Keeper
Div. Supt. ..... Division Superintendent

Elec. Eng. ..... Electrical Engineer
Elec. Supvr. ..... Electrical Supervisor
Eng. ..... Engineer
Eng. Brdgs. ..... Engineer Bridges
Eng. B. & B. ..... Engineer Bridges & Buildings
Eng. Bldgs. ..... Engineer Buildings
Eng. Constr. ..... Engineer Construction
Eng. M.W. ..... Engineer Maintenance of Way
Eng. Struct. ..... Engineer Structures
Eng. Tests ..... Engineer Tests
Eng. Trk. ..... Engineer Track
Exec. Asst. ..... Executive Assistant
Exec. V.P. ..... Executive Vice President

1 V.P. ..... First Vice President
For. ..... Foreman
For. Car. Dept. ..... Foreman Car Department
For. Car Repairs ..... Foreman Car Repairs
For. Car Shops ..... Foreman Car Shops
For. Paint. ..... Foreman Painters
For. Rnd. Hse. ..... Foreman Round House
For. Sig. Maint. ..... Foreman Signal Maintenance
4 V.P. ..... Fourth Vice President
Frt. Clm. Agt. ..... Freight Claim Agent
Frt. Traf. Mgr. ..... Freight Traffic Manager
Fuel Agt. ..... Fuel Agent
Fuel Supvr. ..... Fuel Supervisor

Gen. Acct. ..... General Accountant
Gen. Air Brk. Insp. ..... General Air Brake Inspector
Gen. Atty. ..... General Attorney
Gen. Aud. ..... General Auditor
Gen. Car For. ..... General Car Foreman
Gen. Car Insp. ..... General Car Inspector
Gen. Coal Frt. Agt. ..... General Coal Freight Agent
Gen. Coun. ..... General Counsel
Gen. For. ..... General Foreman
Gen. For. B. & B. ..... General Foreman Buildings & Bridges
Gen. For. Car Dept. ..... General Foreman Car Department
Gen. For. Car Rep. ..... General Foreman Car Repairs
Gen. For. Eng. Hse. .... General Foreman Engine House
Gen. For. Loco. Dept. ..... General Foreman Locomotive Department
G.F.A. ..... General Freight Agent
G.F. & P.A. ..... General Freight & Passenger Agent
Gen. Frt. Traf. Mgr. ... General Freight Traffic Manager
Gen. Loco. For. ..... General Locomotive Foreman
Gen. Mgr. ..... General Manager
Gen. Mech. Insp. ..... General Mechanical Inspector
G.P.A. ..... General Passenger Agent
Gen. Rd. Mast. ..... General Road Master
Gen. Sig. Insp. ..... General Signal Inspector
Gen. Solr. ..... General Solicitor
Gen. Str. Kpr. ..... General Store Keeper
Gen. Supt. ..... General Superintendent
Gen. Supt. Trans. ..... General Superintendent Transportation
Gen. Traf. Agt. ..... General Traffic Agent
Gen. Traf. Mgr. ..... General Traffic Manager

Ind. Agt. ..... Industrial Agent
Ind. Dev. ..... Industrial Development
Ind. Eng. ..... Industrial Engineer
Ind. Mktg. Mgr. ..... Industrial Marketing Manager

Joint Mgr. ..... Joint Manager
Jr. Exec. ..... Junior Executive

Light Rail Sys. Eng. ..... Light Rail System Engineer
Loco. & Car For. ..... Locomotive & Car Foreman
Loco. For. ..... Locomotive Foreman

Mgr. ..... Manager
Mast. B. & B. ..... Master Bridges & Buildings
Mast. Carp. ..... Master Carpenter
M.M. ..... Master Mechanic
Mech. Eng. ..... Mechanical Engineer
Mech. Insp. ..... Mechanical Inspector
Mech. Supt. ..... Mechanical Superintendent

Off. Eng. ..... Office Engineer
Off. Mgr. ..... Office Manager
Oper. Mgr. ..... Operation Manager

Pass. Trf. Mgr. ..... Passenger Traffic Manager
Pension Off. ..... Pension Officer
Pres. ..... President
Prin. Asst. Eng. ..... Principal Assistant Engineer
Pur. Agt. ..... Purchasing Agent

R.E. Agt. ..... Real Estate Agent
R.E. & Tax Agt. ..... Real Estate & Tax Agent
Res. Eng. ..... Resident Engineer
R. of W. Agt. ..... Right of Way Agent
Rd. For. Eng. ..... Road Foreman of Engines
Rd. For. Loco. ..... Road Foreman of Locomotives
Rd. Mast. ..... Road Master
Rnd. Hse. For. ..... Round House Foreman

2 V.P. ..... Second Vice President
Sec. ..... Secretary
Sig. Eng. ..... Signal Engineer
Sig. Insp. ..... Signal Inspector
Sig. Supvr. ..... Signal Supervisor
Sls. Mgr. ..... Sales Manager
Spec. Eng. ..... Special Engineer
Sta. ..... Stationer
Stat. ..... Statistician
Str. Kpr. ..... Store Keeper
Supt. ..... Superintendent
Supt. B. & B. ..... Superintendent Bridges & Buildings
Supt. Car Dept. ..... Superintendent Car Department
Supt. Car Serv. ..... Superintendent Car Service
Supt. Car Shops ..... Superintendent Car Shops
Supt. Commun. ..... Superintendent Communication
Supt. Din. Cars ..... Superintendent Dining Cars
Supt. Equip. ..... Superintendent Equipment
Supt. Mchy. ..... Superintendent Machinery
Supt. M.P. ..... Superintendent Motive Power
Supt. M.P. & E. ..... Superintendent Motive Power & Equipment
Supt. Police ..... Superintendent of Police
Supt. Safety ..... Superintendent Safety
Supt. Shops ..... Superintendent Shops
Supt. Sig. ..... Superintendent Signals
Supt. Strs. ..... Superintendent Stores
Supt. Tele. ..... Superintendent Telegraph
Supt. Telo. ..... Superintendent Telephone
Supt. Term. ..... Superintendent Terminals
Supt. Trans. ..... Superintendent Transportation
Supvr. ..... Supervisor
Supvr. B. & B. ..... Supervisor Bridges & Buildings
Supvr. Commun. ..... Supervisor Communication
Supvr. Tele. & Sig. ..... Supervisor Telegraph & Signals
Supvr. Trk. ..... Supervisor of Track
Supvr. Wk. Equip. ..... Supervisor Work Equipment

Tax Agt. ..... Tax Agent
Tax Commr. ..... Tax Commissioner
3 V.P. ..... Third Vice President
Trk. Supvr. ..... Track Supervisor
Traf. Mgr. ..... Traffic Manager
Tr. Mast. ..... Train Master
Trans. Asst. ..... Transportation Assistant
Trav. Eng. ..... Traveling Engineer
Treas. ..... Treasurer

Valua. Eng. ..... Valuation Engineer
V.P. ..... Vice President

Weld. Supvr. ..... Welding Supervisor
Wks. Mgr. ..... Works Manager

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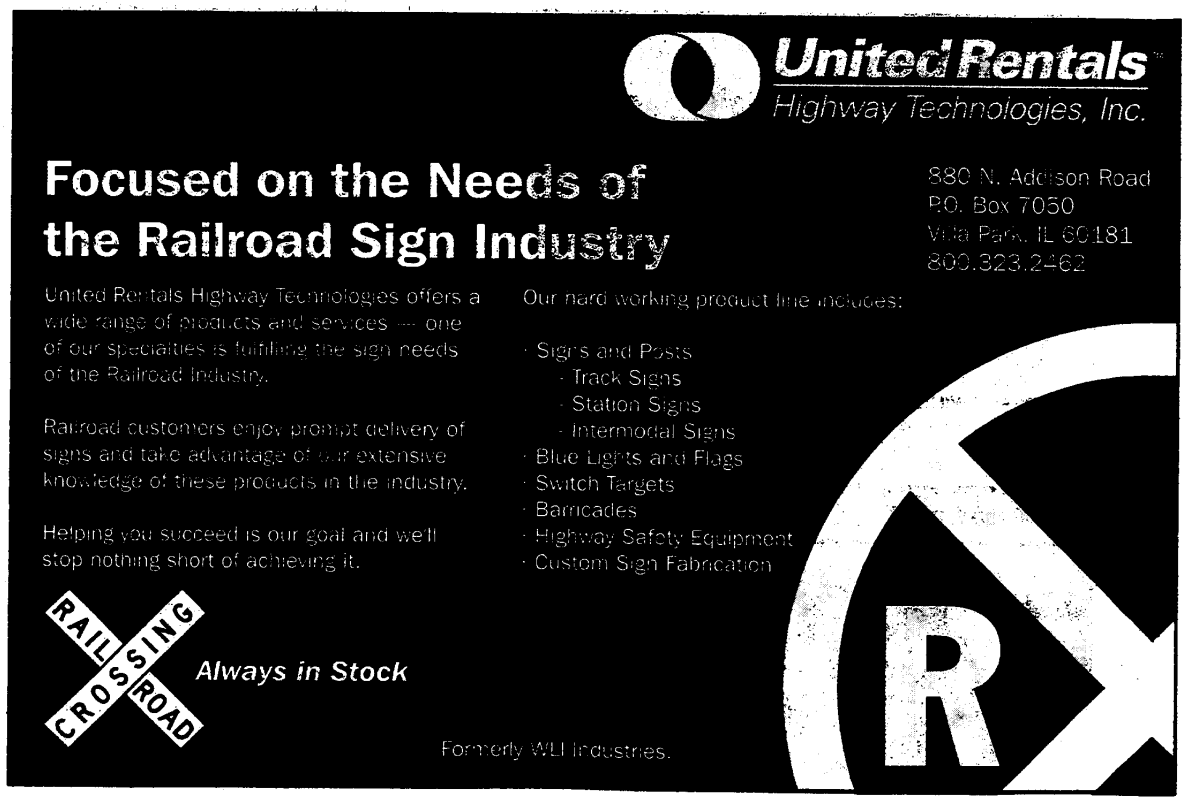
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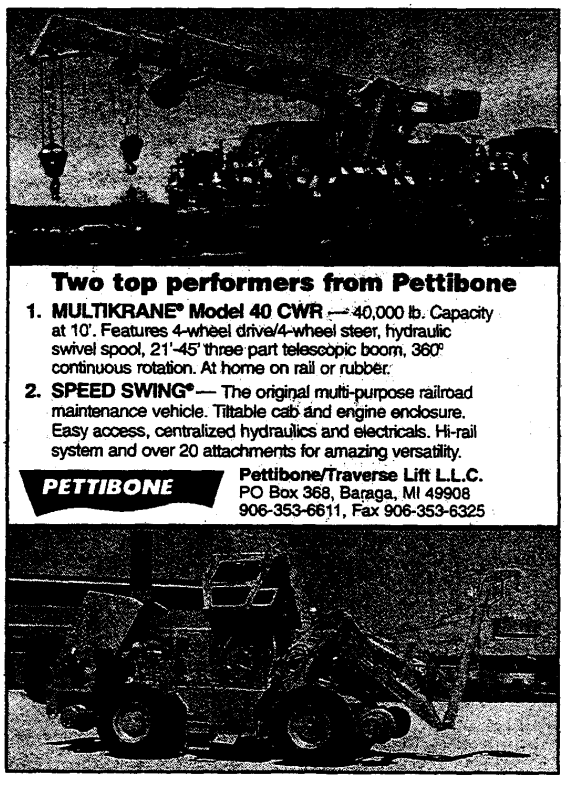
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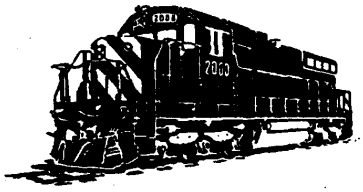
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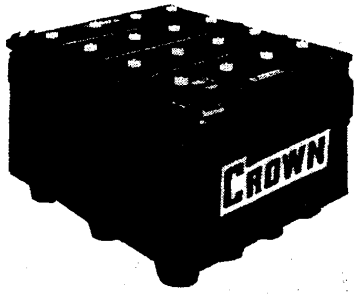
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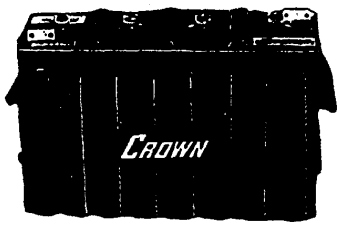
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NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

> **This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of**

> administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.



Roland Watkins
Director, Arbitration Services

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Gordon P. MacDougall
Representative for John E. Grother
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Washington, DC 20036

Mr. W. E. Loomis
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Employee Relations Planning
1416 Dodge Street
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Omaha, NE 68179

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SURFACE TRANSPORTATION BOARD

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SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES
FOR ARBITRATION UNDER NEW YORK DOCK
EMPLOYEE PROTECTIVE CONDITIONS

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GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Dated: February 20, 2004



Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES
FOR ARBITRATION UNDER NEW YORK
DOCK EMPLOYEE PROTECTIVE CONDITIONS

Preliminary Statement

John E. Grother (Grother, or employee), ancillary to review of a forthcoming arbitration award, and in aid of the arbitration prescribed by the Surface Transportation Board (STB), petitions the STB to establish certain procedures for implementing the non-agreement employee arbitration provisions of the New York Dock employee protective conditions, with respect to the current dispute between Grother and his employer (carrier), Union Pacific Railroad Company (UP). Specifically, employee desires (1) that the order of written arbitration submissions be first employee, then carrier, followed by an employee reply, and (2)

Washington DC be designated the site for hearing by the arbitration committee.

Background

Grother was employed by Southern Pacific Transportation Company (SPTC) as part of its yard force at Tucson, AZ, at the time of the STB's August 1996 approval of Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (Aug. 6, 1996)(UP/SP), wherein the STB imposed the so-called New York Dock (NYD)[1/] employee protective conditions for the benefit of affected SPTC employees. UP/SP, 1 S.T.B. at 452-53. He claims to have been first adversely affected in 1997, as a result of problems with the attempted consolidation of switching between the Phoenix Yard and the Tucson Yard.

Grother was not (and is not) represented by a labor organization. He invokes Article IV of the NYD conditions, as a non-agreement employee, 360 I.C.C. 60, 90:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

1/ New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979).

At Grother's initiative, the National Mediation Board (NMB), on January 21, 2004, designated Lynette A. Ross, as the "neutral/referee member" for arbitration of the Grother/UP dispute under NYD. (Appendix 1).[2/] The NMB states its designation is "ministerial," and the NMB's action only provides a qualified arbitrator...in extending comity to the ICC's dispute resolution process. (Appendix 1, p. 2). The neutral/referee member has not been involved in discussions among the partisan members of the arbitration committee concerning any terms to govern the arbitration.

The partisan parties, while in agreement in principle for most of the terms to govern the proposed arbitration,[3/] have come to an impasse with respect the extent and presentation of a written record, and the place for hearing. UP suggests the record be developed by a single, but simultaneous, written submission by carrier and by employee, which would be similar to the ex parte rules in place at the National Railroad Adjustment Board, conducted at NRAB offices in Chicago, IL. 29 CFR 301. (Appendix 2). UP urges that the arbitration hearing be conducted in Chicago, IL. To the contrary, Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its

---

2/ The other two members of the committee are William E. Loomis (UP) for the carrier, and Grother for the employee.

3/ UP does not believe a written arbitration agreement is necessary prior to an arbitration committee hearing. UP apparently is of the view the parties can participate simply by appearing at a designated time and place. Nevertheless, the partisan parties have exchanged views as to the appropriate process.

written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFR 1108.8. Grother urges that the arbitration hearing be held in Washington, DC, where the NMB and STB are both located.

The issues involve the interpretation, applicability, and enforcement of the NYD employee protective conditions for the involved Grother and UP, and will likely center upon eligibility of Grother for employee protection, causality, asserted laches, and the measure of any compensation or other benefits.

ARGUMENT

I. THE ARBITRATION SHOULD BE DESIGNED TO TO DEVELOP A FULL WRITTEN RECORD FOR STB REVIEW AT MINIMUM EXPENSE TO EMPLOYEE.

A. UP Would Frustrate Effective STB Review. The general practice in NYD arbitration, particularly where an individual or small number of employees are involved, is not to have a transcript of the oral hearing. There is considerable expense involved with a transcript, particularly when expedition is required.[4/] The no transcript procedure is projected to be followed here. The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled.

4/ An arbitration decision ordinarily is to be issued within 45 days after the hearing is concluded and the record closed. NYD, Art. I, § 11(c).

The UP proposal for the simultaneous exchange of written submissions, to be followed by the oral hearing, would serve to transfer the usual written reply submission and argument, into "live" oral submissions, without a record of the evidence and argument for the STB to review. This would deprive the STB of effective review for the resultant arbitration award, and perhaps necessitate the conduct of additional submissions to the STB to supplement the record at the time of agency review.

The NYD arbitration process is part the STB's decisional mechanism, with an award being an "order" of the STB, which is carried out in lieu of direct STB action. American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 845-46 (D.C. Cir. 1995); International Broth. of Elec. Workers v. ICC, 862 F.2d 330, 335-39 (D.C. Cir. 1988); United Transp. Union v. Norfolk and Western R. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987).[5/]

2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8.[6/]

A. STB Consideration. The STB rejected simultaneous filings in establishing its three-step procedure. Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564, 576 (1997).

5/ The arbitration process is a delegation by the STB to the arbitrator of the STB's authority to implement employee conditions. Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 5 I.C.C.2d 234, 236 1989). Arbitration is essentially an extension of the STB's action. Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

6/ The STB's arbitration rules do not specifically apply to arbitration involving NYD conditions. In the same vein, NRAB arbitration does not extend to NYD conditions.

B. NYD Causality Procedure. The simultaneous submissions urged by UP would be particularly unfair here, where UP challenges Grother's claim to have been affected by the transaction--the matter of causality. The NYD conditions specify that the employee should first identify the transaction and specify the facts, followed by the carrier's evidence. NYD, Art. I, § 11(e), 360 I.C.C. at 88:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Thus, UP's simultaneous submission could not fully cover the matter of causality, but would allow UP to first present its case not in written form in advance of the oral hearing, but at the hearing itself, with Grother to respond extemporaneously at the hearing. Such tactics should be discouraged in the interest of a fair hearing, and in developing a complete and reviewable record. The STB's NYD conditions contemplate answering statements, not simultaneous statements.

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NARB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C. 153. Here, Grother, as an unrepresented employee, does not

possess the full range of representation. The single submission procedure of the NRAB would be inappropriate here.

D. Cost of Proceedings. Arbitration is not inexpensive. For a single individual, the sum may be significant. The three-stage written submissions will minimize the ultimate cost for resolving the issues. The UP proposal for one set of simultaneous submissions likely will result in prolix proceedings, and result in additional costs. Moreover, because of the novelty of some of the anticipated issues, and the impact of any award upon future proceedings, it is likely that one or more of the parties will seek review of the award by the STB. Here, the compensation claim is for approximately $108,000.

Although the cost of arbitration and resultant final agency action may not be avoided, American Train Dispatchers Ass'n v. ICC, 949 F.2d 413, 414 (D.C. Cir. 1991), the STB should aim to minimize the expense in this situation.

II. THE HEARING SHOULD BE HELD IN WASHINGTON DC, NOT CHICAGO IL.

The hearing location should be Washington, DC, where the facilities of the NMB and STB are situated, rather than Chicago, IL, where the NRAB has its headquarters. The expenses for Grother would be minimized by a Washington location. Moreover, access by the parties, and the arbitrator, to unpublished material at the NMB and STB would be readily available in Washington, DC.

Hearing at Chicago IL would be inappropriate. While UP may have access to facilities at Chicago, Grother and his counsel do

not. Moreover, the arbitration involved in this NYD case involves a comity arrangement between NMB and STB.

III. REFERRAL OF THE WRITTEN SUBMISSION PROCESS AND HEARING LOCATION TO THE ARBITRATOR WOULD BE INAPPROPRIATE.

The STB should not refer the matter of simultaneous or three-part written submissions, or the hearing location, to the arbitrator, as such would not be appropriate.[7/]

The matter of the written submissions, as indicated above, goes to the record available to the STB on review, particularly in the absence of a hearing transcript; and a multi-staged submission process is actually required by STB for NYD Art. I, §11(e). Thus, it is for the STB to determine the procedures for the submissions.

The hearing location likewise is for the STB. The arbitration committee is subject to the protective conditions mandated by the STB, such that the facilities maintained by in Washington DC should be available to the parties in an inexpensive manner.

CONCLUSION

The STB should determine that, in the absence of agreement, the involved NYD arbitration should be conducted by the three-stage written submission process, with hearing at Washington DC.

Respectfully submitted,

7/ The arbitrator should, of course, schedule the hearing date, and presumably will do so after consultation with the partisan parties of the arbitration committee.

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

William E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street-Rm. 332
OMAHA NE 68179

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Washington DC
February 20, 2004

GORDON P. MacDOUGALL

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

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It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins
Director, Arbitration Services

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Kingwood, TX 77339

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PART 301—RULES OF PROCEDURE

Sec.
301.1 General duties.
301.2 Classes of disputes.
301.3 Organization.
301.4 Jurisdiction.
301.5 Form of submission.
301.6 General.
301.7 Hearings.
301.8 Appearances.
301.9 Awards.

AUTHORITY: Sec. 3, 44 Stat. 578, as amended; 45 U.S.C. 153.

SOURCE: Circular 1, Oct. 10, 1934, unless otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151-162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) *First Division.* The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) *Second Division.* The Second Division will have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) *Third Division.* The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) *Fourth Division.* The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

§ 301.5 Form of submission.

(a) *Parties.* All parties to the dispute must be stated in each submission.

(b) *Statement of claim.* Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) *Statement of facts.* In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts," then each party shall show separately the facts as they respectively believe them to be.

(d) *Position of employees.* Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(f) *Signatures.* All submissions must be signed by the parties submitting the same.

(g) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of_____Division

Attest:_____

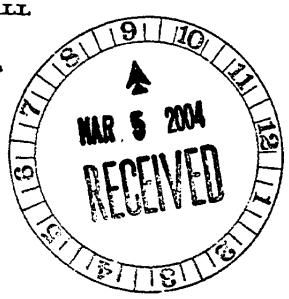
[Secretary]

210236

Ex. E-8

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE. N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738



March 5, 2004

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20036

Re: Finance Docket No. 32760, (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

This is to supplement the petition, filed February 20, 2004, in the captioned proceeding, with the one-page letter from the Arbitrator, dated March 1, 2004.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

ENTERED
Office of Proceedings
MAR 5 2004
Part of
Public Record

MAR - 4 2004

Lynette A. Ross
Arbitrator

1220 Fairway Drive
Lawrenceburg, KY 40342-9706

(502) 859-9003
(502) 859-9004 (fax)
E-mail: lynetteross@hotmail.com

March 1, 2004

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street
Room 332
Omaha, NE 68179

Re: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm my receipt of a copy of Mr. MacDougall's petition, dated February 20, 2004, before the Surface Transportation Board (STB), to establish arbitration procedures regarding the above-captioned case. I appreciate your efforts to keep me informed of the status of this case.

As we discussed during a recent telephone conference, once the procedural issues set forth in the petition are resolved, we will resume contact in order to schedule a mutually acceptable hearing date.

Very truly yours,

Lynette A Ross

Lynette A. Ross

21023 Ex. E-9



Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
- - - CONTROL AND MERGER - - -
SOUTHERN PACIFIC RAILROAD CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

ENTERED
Office of Proceedings
MAR 5 2004
Part of
Public Record

(Arbitration Review)

UNION PACIFIC RAILROAD COMPANY'S OPPOSITION TO THE PETITION OF JOHN E. GROTHER SEEKING INTERLOCUTORY APPEAL ON PRE-ARBITRATION PROCEDURAL MATTERS

William Loomis
Union Pacific Railroad Company
1416 Dodge Street, Rm. 332
Omaha, NE 68179
(402) 271-5446

Dated: March 4, 2004

Union Pacific Railroad Company ("Union Pacific") opposes John E. Grother's "PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS." In this remarkable Petition, Mr. Grother asks as an interlocutory appeal for the Surface Transportation Board (STB) to address procedural issues in an arbitration proceeding on labor protective conditions. At this point in the process, Mr. Grother has not even attempted to present the procedural issues to the neutral/referee member of the arbitration committee. In the Petition, Mr. Grother asks the STB to require the parties to abandon the customary process and utilize a procedure the STB has specifically determined does not apply to arbitration conducted pursuant to labor protective conditions. In addition, Mr. Grother asks the STB to require the arbitration hearing to be held in Washington, D.C. for the convenience of his attorney.[1] Union Pacific believes that these are both routine procedural issues that should be resolved by the arbitration committee. Mr. Grother's Petition is premature because at this time there is no arbitration decision for the STB to review. Union Pacific requests the STB to decline involvement in this interlocutory appeal and decline jurisdiction at least until these matters have been referred to the arbitration committee for resolution.

BACKGROUND INFORMATION

The Surface Transportation Board approved the merger of Union Pacific and Southern Pacific, Finance Docket 32760 in August, 1996, and imposed the

[1] See Union Pacific Appendix 1 - Grother's 2/20/2004 petition to the STB.

New York Dock labor protective conditions (NYD).[2] At the time of the merger, John E. Grother (Grother) was a management employee of Southern Pacific not represented by a labor organization, and remains in that capacity with Union Pacific (UP) today. Grother contends he is entitled to a displacement allowance under NYD as the result of an event which took place in May, 1997. Grother wrote to the National Mediation Board (NMB) in June, 2003, and requested the "assignment of an Arbitration Committee."[3] Eventually, Lynette A. Ross was appointed as the "neutral/referee member" of the arbitration committee to resolve the dispute between Grother and Union Pacific.[4]

I. This Interlocutory Appeal of Procedural Disputes is Not Properly Before the STB

This dispute involving Grother and Union Pacific is simply not ripe for involvement by the STB. No decision, interlocutory or final, has been issued by the arbitration committee. In fact, as noted above, Mr. Grother has not even attempted to present his procedural issues to the arbitration committee. No hearing has been held. The Interstate Commerce Commission has previously recognized its involvement in a NYD arbitration process prior to a final arbitration decision would only serve to impede the process.

> "This accords with our general practice not to entertain interlocutory appeals except in limited circumstances. [FN2] Moreover, the limited scope of review provided by the lace curtain criteria militates against Commission involvement prior to a final arbitration decision except in extraordinary circumstances. Our consideration of interlocutory appeals from intermediate decisions of arbitrators

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[2] New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1970), aff'd sub nom. New York Dock Ry. v. United States, 609 F. 2d 83 (2nd Cir. 1979).
[3] See Union Pacific Appendix 2 - Grother's June 16, 2003 letter to the NMB.
[4] See Union Pacific Appendix 3 - NMB's January 22, 2004 letter appointing Lynette A. Ross.

would impede the process, and should not be undertaken unless clearly justified."

FN2 reads: "49 CFR 1113.15 provides for interlocutory appeals from an administrative Law Judge (ALJ) only if: (a) the ALJ's ruling denies or terminates any person's participation; (b) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (c) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (d) the ALJ finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party."[5]

This dispute involving Grother and Union Pacific does not fall within any of the limited exceptions above and presents no extraordinary circumstances. Procedural disputes such as the ones presented herein are routinely resolved by the neutral/referee member. These issues simply do not warrant the direct involvement of the STB.

II. Mr. Grother's Preferred Submission Process Has No Application to Arbitration Conducted Pursuant to Labor Protective Conditions

On pages 4 and 5 of his 2/20/2004 petition, Grother asks the STB to impose his preferred "three-step" process for filing written submissions.

". . . Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFRR 1108.8."[6]

Grother prefers this three-step process over the customary simultaneous exchange of written submissions to the arbitration committee prior to the hearing. He argues the simultaneous exchange would somehow frustrate effective STB

[5] See Union Pacific Appendix 4 - Interstate Commerce Commission Decision - Finance Docket No. 30800 (Sub-No. 28) - decided August 1, 1989.
[6] Grother's 2/20/2004 petition - pp. 4-5.

review. Grother argues "The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled."[7] He refers to the "considerable expense involved with a transcript" and argues that the three-step procedure for filing written submissions will produce a "reviewable record" while allowing the parties to avoid the cost of a transcript. Grother's argument reflects the mistaken view that arbitration under Article I, Section 11 of the New York Dock conditions is merely a perfunctory step on a path toward an ultimate review of the arbitration record by the STB. Given the STB's "Lace Curtain" standard for review of arbitration decisions, he is ill advised to so cavalierly look past the determinations of the arbitration committee.[8] If Grother was really concerned over building a complete written record, he would consider the cost of a transcript.

Further, if Grother was really concerned about building a complete record in writing, he would ask for a four-step procedure for filing written submissions under which both he and UP would have the opportunity to file a pre-hearing written rebuttal. Of course that would deprive him of the last word prior to the hearing.

III. Mr. Grother Misrepresents His Preferred Briefing Process As Having Application to Arbitration Under Labor Protective Conditions

On page 6 of his 2/20/2004 petition, Grother attempts to justify the use of a three-step process because that is the process used in STB arbitration.

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[7] Grother's 2/20/2004 petition - p. 5.

[8] How the submission process that has been effectively utilized in hundreds of New York Dock arbitrations somehow "would deprive the STB of effective review" is unclear to Union Pacific. Grother's 2/20/2004 petition - p.6.

> "2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8."[9]

The problem with that argument is the arbitration committee to which Ms. Ross was appointed as neutral/referee member is arbitration pursuant to Article I, Section 11 of the New York Dock conditions, not STB arbitration. The STB arbitration procedures set forth in 49 CFR 1108 are "intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation or service subject to the statutory jurisdiction of the STB."[10] In footnote 6 on page 6 of his 2/20/2004, Grother concedes the "STB's arbitration rules do not specifically apply to arbitration involving NYD conditions." That is quite an understatement, because 49 CFR § 1108.2(b) precludes the use of the STB arbitration procedures for arbitration pursuant to the New York Dock labor protective conditions:

> "Nor are they available for arbitration that is conducted pursuant to labor protective conditions."[11]

For the reason set forth above, Union Pacific believes the procedure for filing written submissions urged by Grother is not appropriate in a matter involving NYD arbitration. If the partisan members of the arbitration committee are unable to agree on this procedural matter, the proper forum for its resolution is through the assistance of the neutral/referee member of the committee, not the STB.

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[9] Grother's 2/20/2004 petition - p. 6.
[10] 49 CFR § 1108.2(b)
[11] 49 CFR § 1108.2(b)

IV. Location of the Hearing

There is also the matter of the location of the hearing. Grother lives and works in the vicinity of Houston, TX. Ms Ross lives in Lawrenceburg, KY and Union Pacific's headquarters is in Omaha, NE. The only connection between this dispute and Washington, D.C. is that is where Grother's attorney has his office.[12] Union Pacific favors a location which is neutral ground for the partisan members, and a location, like Chicago, which can be reached by a single direct airline flight from an airport near each of the arbitration committee member's base. Union Pacific's position is that the neutral member of the arbitration committee should determine the location of the hearing if the partisan members cannot agree. Surely, the STB does not want to get involved in routine procedural matters arising under arbitration pursuant to the NYD protective conditions, such as the location of the hearing.

V. There is no requirement in New York Dock for a pre-hearing agreement on procedural matters between the partisan members.

There is no requirement in the New York Dock protective conditions for the partisan members of an arbitration committee to reach agreement on the procedural details prior to the hearing. A careful reading of Article I, Section 11 of the NYD conditions (Arbitration of disputes) reveals no obligation for the partisan members to reach agreement on anything. Nevertheless, in this specific case, and based on the desire for a smooth flowing and efficient process, UP's

[12] The location of NMB and STB offices is, of course, irrelevant to this matter. Properly prepared parties will have no need for "unpublished material" in Washington, D.C. Grother's 2/20/2004 petition - p.8.

member of the arbitration committee, William Loomis, has discussed several aspects of the upcoming arbitration with Grother's attorney, Gordon P. MacDougall. These discussions have been in the form of telephone conversations and facsimile transmissions. Through this process, the partisan members have reached an understanding on several issues leaving only two issues outstanding. The neutral/referee member, Ms. Ross, has been contacted by the partisan members only twice, jointly via telephone, regarding the dates she proposed for the hearing and to advise that the partisan members were attempting to settle a couple of procedural issues. Instead of the seeming confusion which a reader of Grother's 2/20/2004 petition might infer, the discussions between MacDougall and Loomis thus far have been orderly and productive. The next step should be a discussion between the three members of the arbitration committee, and if the outstanding items cannot be settled by agreement, that task should fall to Ms. Ross as the neutral member, i.e. tie-breaking member, of the committee.

VI. The New York Dock arbitration process does not distinguish between employees represented by a labor organization and those who are not.

Grother obviously places some significance on the fact he is not represented by a labor organization and attempts to argue the arbitration process under New York Dock is different depending on whether an employees is, or is not, covered by a collective bargaining agreement. Union Pacific is unable to discern a distinction in the procedures for arbitration under New York Dock on this basis because there is none. As referenced on page 3 of Grother's

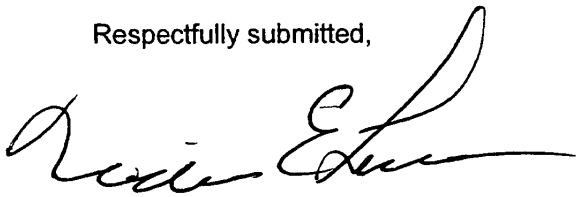
2/20/2004 petition, Article IV of the NYD protective conditions provides the remedy of arbitration to employees not represented by a labor organization just as it does to employees who are represented by a labor organization. This attempt on the part of Grother to distinguish this case from the usual and customary procedures used in other NYD arbitration has already caused considerable delay to the resolution of this dispute. Grother's letter to the NMB requesting arbitration was sent more than six years after the date of the event which he claims entitles him to a displacement allowance.[13] More than five months elapsed between NMB's August 11, 2003 letter, which furnished a panel of seven neutrals, and NMB's letter of January 21, 2004 appointing Ms. Ross as the neutral/referee member. See Union Pacific Appendix 5 for the part Grother's contention of different handling for employees not represented by a labor agreement played in that delay. Now, we have Grother's 2/20/2004 petition, which appears to be yet another action to delay the commencement of arbitration.

VII. Summary

Union Pacific requests STB to declare lack of jurisdiction in this matter at this time, and remand the procedural issues involving the filing of written submissions and the location of the hearing to the already established arbitration committee for prompt resolution.

[13] See Union Pacific Appendix 2. This is not to imply there was no on-property handling prior to Grother's letter of June 16, 2003 requesting assignment of an arbitration committee. There was communication between Grother and various employees of Union Pacific in the period between May, 1997 and May, 2003. However, the first statement of claim contending he is a displaced employee as a result of the Union Pacific/Southern Pacific merger transaction is Grother's letter dated May 12, 2003 to James V. Dolan.

Respectfully submitted,



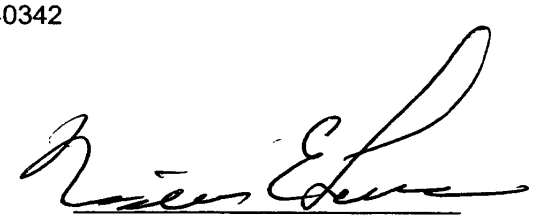
Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342



Omaha, NE
March 4, 2004

WILLIAM E. LOOMIS

UNION PACIFIC APPENDIX 1
SHEET 1 OF 15

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Dated: February 20, 2004

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES
FOR ARBITRATION UNDER NEW YORK
DOCK EMPLOYEE PROTECTIVE CONDITIONS

Preliminary Statement

John E. Grother (Grother, or employee), ancillary to review of a forthcoming arbitration award, and in aid of the arbitration prescribed by the Surface Transportation Board (STB), petitions the STB to establish certain procedures for implementing the non-agreement employee arbitration provisions of the New York Dock employee protective conditions, with respect to the current dispute between Grother and his employer (carrier), Union Pacific Railroad Company (UP). Specifically, employee desires (1) that the order of written arbitration submissions be first employee, then carrier, followed by an employee reply, and (2)

Washington DC be designated the site for hearing by the arbitration committee.

Background

Grother was employed by Southern Pacific Transportation Company (SPTC) as part of its yard force at Tucson, AZ, at the time of the STB's August 1996 approval of Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (Aug. 6, 1996)(UP/SP), wherein the STB imposed the so-called New York Dock (NYD)[1/] employee protective conditions for the benefit of affected SPTC employees. UP/SP, 1 S.T.B. at 452-53. He claims to have been first adversely affected in 1997, as a result of problems with the attempted consolidation of switching between the Phoenix Yard and the Tucson Yard.

Grother was not (and is not) represented by a labor organization. He invokes Article IV of the NYD conditions, as a non-agreement employee, 360 I.C.C. 60, 90:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

1/ New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979).

At Grother's initiative, the National Mediation Board (NMB), on January 21, 2004, designated Lynette A. Ross, as the "neutral/referee member" for arbitration of the Grother/UP dispute under NYD. (Appendix 1).[2/] The NMB states its designation is "ministerial," and the NMB's action only provides a qualified arbitrator...in extending comity to the ICC's dispute resolution process. (Appendix 1, p. 2). The neutral/referee member has not been involved in discussions among the partisan members of the arbitration committee concerning any terms to govern the arbitration.

The partisan parties, while in agreement in principle for most of the terms to govern the proposed arbitration,[3/] have come to an impasse with respect the extent and presentation of a written record, and the place for hearing. UP suggests the record be developed by a single, but simultaneous, written submission by carrier and by employee, which would be similar to the ex parte rules in place at the National Railroad Adjustment Board, conducted at NRAB offices in Chicago, IL. 29 CFR 301. (Appendix 2). UP urges that the arbitration hearing be conducted in Chicago, IL. To the contrary, Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its

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2/ The other two members of the committee are William E. Loomis (UP) for the carrier, and Grother for the employee.

3/ UP does not believe a written arbitration agreement is necessary prior to an arbitration committee hearing. UP apparently is of the view the parties can participate simply by appearing at a designated time and place. Nevertheless, the partisan parties have exchanged views as to the appropriate process.

written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFR 1108.8. Grother urges that the arbitration hearing be held in Washington, DC, where the NMB and STB are both located.

The issues involve the interpretation, applicability, and enforcement of the NYD employee protective conditions for the involved Grother and UP, and will likely center upon eligibility of Grother for employee protection, causality, asserted laches, and the measure of any compensation or other benefits.

ARGUMENT

I. THE ARBITRATION SHOULD BE DESIGNED TO TO DEVELOP A FULL WRITTEN RECORD FOR STB REVIEW AT MINIMUM EXPENSE TO EMPLOYEE.

A. UP Would Frustrate Effective STB Review. The general practice in NYD arbitration, particularly where an individual or small number of employees are involved, is not to have a transcript of the oral hearing. There is considerable expense involved with a transcript, particularly when expedition is required.[4/] The no transcript procedure is projected to be followed here. The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled.

4/ An arbitration decision ordinarily is to be issued within 45 days after the hearing is concluded and the record closed. NYD, Art. I, § 11(c).

The UP proposal for the simultaneous exchange of written submissions, to be followed by the oral hearing, would serve to transfer the usual written reply submission and argument, into "live" oral submissions, without a record of the evidence and argument for the STB to review. This would deprive the STB of effective review for the resultant arbitration award, and perhaps necessitate the conduct of additional submissions to the STB to supplement the record at the time of agency review.

The NYD arbitration process is part the STB's decisional mechanism, with an award being an "order" of the STB, which is carried out in lieu of direct STB action. American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 845-46 (D.C. Cir. 1995); International Broth. of Elec. Workers v. ICC, 862 F.2d 330, 335-39 (D.C. Cir. 1988); United Transp. Union v. Norfolk and Western R. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987).[5/]

2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8.[6/]

A. STB Consideration. The STB rejected simultaneous filings in establishing its three-step procedure. Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564, 576 (1997).

5/ The arbitration process is a delegation by the STB to the arbitrator of the STB's authority to implement employee conditions. Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 5 I.C.C.2d 234, 236 1989). Arbitration is essentially an extension of the STB's action. Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

6/ The STB's arbitration rules do not specifically apply to arbitration involving NYD conditions. In the same vein, NRAB arbitration does not extend to NYD conditions.

B. NYD Causality Procedure. The simultaneous submissions urged by UP would be particularly unfair here, where UP challenges Grother's claim to have been affected by the transaction--the matter of causality. The NYD conditions specify that the employee should first identify the transaction and specify the facts, followed by the carrier's evidence. NYD, Art. I, § 11(e), 360 I.C.C. at 88:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Thus, UP's simultaneous submission could not fully cover the matter of causality, but would allow UP to first present its case not in written form in advance of the oral hearing, but at the hearing itself, with Grother to respond extemporaneously at the hearing. Such tactics should be discouraged in the interest of a fair hearing, and in developing a complete and reviewable record. The STB's NYD conditions contemplate answering statements, not simultaneous statements.

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NARB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C. 153. Here, Grother, as an unrepresented employee, does not

possess the full range of representation. The single submission procedure of the NRAB would be inappropriate here.

D. Cost of Proceedings. Arbitration is not inexpensive. For a single individual, the sum may be significant. The three-stage written submissions will minimize the ultimate cost for resolving the issues. The UP proposal for one set of simultaneous submissions likely will result in prolix proceedings, and result in additional costs. Moreover, because of the novelty of some of the anticipated issues, and the impact of any award upon future proceedings, it is likely that one or more of the parties will seek review of the award by the STB. Here, the compensation claim is for approximately $108,000.

Although the cost of arbitration and resultant final agency action may not be avoided, American Train Dispatchers Ass'n v. ICC, 949 F.2d 413, 414 (D.C. Cir. 1991), the STB should aim to minimize the expense in this situation.

II. THE HEARING SHOULD BE HELD IN WASHINGTON DC, NOT CHICAGO IL.

The hearing location should be Washington, DC, where the facilities of the NMB and STB are situated, rather than Chicago, IL, where the NRAB has its headquarters. The expenses for Grother would be minimized by a Washington location. Moreover, access by the parties, and the arbitrator, to unpublished material at the NMB and STB would be readily available in Washington, DC.

Hearing at Chicago IL would be inappropriate. While UP may have access to facilities at Chicago, Grother and his counsel do

not. Moreover, the arbitration involved in this NYD case involves a comity arrangement between NMB and STB.

III. REFERRAL OF THE WRITTEN SUBMISSION PROCESS AND HEARING LOCATION TO THE ARBITRATOR WOULD BE INAPPROPRIATE.

The STB should not refer the matter of simultaneous or three-part written submissions, or the hearing location, to the arbitrator, as such would not be appropriate.7/

The matter of the written submissions, as indicated above, goes to the record available to the STB on review, particularly in the absence of a hearing transcript; and a multi-staged submission process is actually required by STB for NYD Art. I, §11(e). Thus, it is for the STB to determine the procedures for the submissions.

The hearing location likewise is for the STB. The arbitration committee is subject to the protective conditions mandated by the STB, such that the facilities maintained by in Washington DC should be available to the parties in an inexpensive manner.

CONCLUSION

The STB should determine that, in the absence of agreement, the involved NYD arbitration should be conducted by the three-stage written submission process, with hearing at Washington DC.

Respectfully submitted,

7/ The arbitrator should, of course, schedule the hearing date, and presumably will do so after consultation with the partisan parties of the arbitration committee.

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

William E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street-Rm. 332
OMAHA NE 68179

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Washington DC
February 20, 2004

GORDON P. MacDOUGALL

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

> **This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of**

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins
Director, Arbitration Services

Copies to:

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179

PART 301—RULES OF PROCEDURE

Sec.
301.1 General duties.
301.2 Classes of disputes.
301.3 Organization.
301.4 Jurisdiction.
301.5 Form of submission.
301.6 General.
301.7 Hearings.
301.8 Appearances.
301.9 Awards.

AUTHORITY: Sec. 3, 44 Stat. 578, as amended; 45 U.S.C. 153.

SOURCE: Circular 1, Oct. 10, 1934, unless otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151-162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) *First Division.* The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) *Second Division.* The Second Division will have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) *Third Division.* The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) *Fourth Division.* The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

§ 301.5 Form of submission.

(a) *Parties.* All parties to the dispute must be stated in each submission.

(b) *Statement of claim.* Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) *Statement of facts.* In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts," then each party shall show separately the facts as they respectively believe them to be.

(d) *Position of employees.* Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(f) *Signatures.* All submissions must be signed by the parties submitting the same.

(g) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of _____ Division

Attest: _____

(Secretary)

UNION PACIFIC APPENDIX 2
SHEET 1 OF 1

VIA CERTIFIED MAIL

June 16, 2003

National Mediation Board (NMB)
Attn: Mr. Roland Watkins
Washington, D.C. 20572

LAW DEPT.
JUN 20 2003
REC'D UPRR

Dear Mr. Roland Watkins,

I have been advised that your Office is the contact point for individuals applying for NMB Arbitration. Pursuant to the attached excerpt from the New York Dock (NYD) Article IV, and oral information from your Office, this letter is to request the assignment of an Arbitration Committee.

In accordance with Article IV, I have provided Union Pacific Railroad ("UPRR") a thirty (30) day notice (attached in part) to resolve this dispute ("Dispute"), concerning myself being defined as a Displaced Employee (Non-Agreement person). The issue involves UPRR's failed Merger Transaction related yard consolidation experiment to operate ALL the switching for Phoenix from Tucson, Arizona in late May 1997, which resulted in my demotion and reduction in wages of $1,272 per month and other fringe benefits effective 7/1/97. UPRR has not responded to my certified letter dated 5/12/03, attached in part, requesting Dispute resolution.

I am hereby requesting Neutral selection data, including biographies, for referees, who would be available for the states of Arizona, Texas, California and Washington D.C. please. I am uncertain if witnesses are able to testify; but, Tucson Arizona would be an appropriate site for an Arbitration, if ALL those employees present in 1997 are allowed to testify in person.

NMB-2 appears to apply to Mediation; so, not prepared. Please advise immediately what may additionally be required to activate the entire NMB Arbitration process, including any deposits or pre-payments required. I would appreciate a return call to discuss the entire NMB Arbitration Process to 281-359-5667 between 1300-1800 CT please (night worker).

By copy to UPRR, this is Official Notice to UPRR of my intent to refer said Dispute to an Arbitration Committee, as no UPRR response to attached certified letter.

Attachments:
NYD Conditions
Certified ltr. to UPRR

Sincerely,

JEG

John Grother

cc: UPRR 085-Rm 830

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

WEL JAN 26 2004
REC'D JAN 26 2004
Labor Relations

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

> **This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of**

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

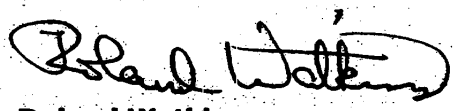
A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.



Roland Watkins
Director, Arbitration Services

Copies to:

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179

Surface Transportation Board (S.T.B.)

*1 UNION PACIFIC/MKT MERGER--UTU IMPLEMENTING AGREEMENT ARBITRATION REVIEW

Decided: August 1, 1989

INTERSTATE COMMERCE COMMISSION DECISION
Finance Docket No. 30800 (Sub-No. 28)

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

On April 18, 1989, Union Pacific [FN1] filed a motion requesting the Commission to: (1) stay its "notice of appeal," filed March 2, 1989; and (2) direct the Arbitration Committee, notwithstanding the pendency of the appeal, to resume the arbitration process immediately and to move forward promptly to arrive at an implementing agreement. The United Transportation Union (UTU) replied. For the reasons discussed below, we will dismiss the appeal and deny the motion.

BACKGROUND

In Union Pacific Corp. et al.--Cont.--MO-KS-TX Co. et al., 4 I.C.C.2d 409 (1988), we approved the acquisition of control, by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), and Missouri Pacific Railroad Company (MPRR), of the Missouri-Kansas-Texas Railroad Company (MKT), the Oklahoma, Kansas and Texas Railroad Company (OKT), and the Galveston, Houston & Henderson Railroad Company (GHH). In doing so, we imposed the labor protective conditions set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). The decision is currently on review in RLEA v. ICC, No. 88-1391 (D.C.Cir., argued Apr. 28, 1989).

On June 1, 1988, Union Pacific served notice upon representatives of the UTU that it intended fully to integrate the personnel, facilities, and operations of MKT, the OKT, and the GHH into their MPRR counterparts. Negotiations failed to yield an agreement. On November 21, 1988, UTU formally requested arbitration to prescribe the terms of an implementing agreement. Proceedings before Arbitrators Richard Kasher and Robert Peterson were held in December 1988 and January 1989.

On February 14, 1989, the Arbitration Committee entered its Findings and Award (the arbitration decision). The arbitrators did not believe that the parties had availed themselves of a fair opportunity to negotiate a standard New York Dock implementing agreement. The arbitrators found that the reason an implementing agreement was not reached on a voluntary, collectively bargained basis was that both Union Pacific and the UTU were polarized on a number of issues the arbitrators believed were not proper subjects for a New York Dock implementing agreement. The arbitrators' intent in issuing the Findings and Award was to identify those issues that they believed should be removed from the bargaining table because they fell outside the scope of their understanding of an ordinary New York Dock implementing agreement. Arbitration decision, at 17. The arbitrators thus directed the parties to negotiate an implementing agreement addressing the remaining issues within 30 days from the date of the findings (id., at 18), and authorized the parties, in the event negotiations failed, to petition the arbitrators to impose an implementing agreement.

*2 On March 2, 1989, Union Pacific filed with this Commission a protective "notice of appeal" to the arbitration decision. Union Pacific argued that the arbitrators erred in removing certain issues from the bargaining table. These issues, in Union Pacific's view, were and are proper subjects for a New York Dock implementing agreement, and consequently may not be dismissed from the arbitration process. Union Pacific acknowledged, however, that we might wish to await the outcome of the further negotiations prescribed in the arbitration decision,

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and any subsequent decision by the Arbitration Committee, before establishing procedures for hearing and addressing the merits of Union Pacific's appeal.

On March 18, 1989, the Arbitration Committee announced that in the light of Union Pacific's protective appeal, it would not proceed with an arbitration hearing scheduled for March 20, 1989. By letter dated April 13, 1989, it stated its willingness to continue if both parties withdrew the matter from the Commission, with prejudice, and agreed to the principles of the February 14th ruling.

On March 20, 1989, UTU filed a pleading styled an "answer" to Union Pacific's notice of appeal and a "counterclaim for enforcement of award." UTU argued that the arbitration decision was not ripe for review, since it does not constitute an arbitrated implementing agreement. UTU also argued, alternatively, that if the arbitration agreement is ripe for review then the Commission should affirm it.

By decision served April 17, 1989, the Director of the Commission's Office of Proceedings issued a decision holding in abeyance Union Pacific's notice of appeal. The Director noted that subsequent negotiations ordered by the arbitrators or any ensuing arbitration might yield results satisfactory to both parties, thus mooting the issues raised in Union Pacific's pleading. The decision required the parties to file quarterly reports with this Commission so that we may be informed of the status of their ongoing negotiations and any subsequent arbitration.

Following this decision, Union Pacific filed a motion to stay its notice of appeal. Union Pacific is unwilling to withdraw its appeal because it does not wish to be precluded from challenging pertinent aspects of the February 14th findings and award. Union Pacific is concerned that the arbitrators' refusal to proceed is not only delaying the completion of an implementing agreement, it is also delaying indefinitely the consolidation of the operations of UPRR/MPRR and MKT, and the realization of the public interest benefits associated with that consolidation. Therefore, Union Pacific urges us to stay its appeal pending the completion of arbitration, and to enter an order directing the Arbitration Committee, notwithstanding the pendency of the appeal, to resume the arbitration process immediately and to move forward promptly to arrive at an implementing agreement. UTU responded to the motion, saying that if the Commission orders arbitration to go forward, it should make it clear that arbitration must proceed on the basis of the February 14th Findings and Award.

DISCUSSION AND CONCLUSIONS

*3 Union Pacific filed its request for review of the arbitrators' Findings and Award under 49 C.F.R. 1117.1, invoking our jurisdiction under the standards announced in Chicago and North Western Tptn. Co.–Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C.Cir.1988). There, we concluded that we would exercise jurisdiction to review decisions issued under the arbitration provisions of the labor protective conditions we have imposed under 49 U.S.C. 11347. We found that our jurisdiction resided in the statutory mandate to impose the conditions. Id. at 733.

Subsequent to Lace Curtain, we have defined our role in reviewing arbitration decisions on a case-by-case basis. See, e.g., Norfolk & W. Ry. Co. and New York, C & St. L.R. Co. Merger, 5 I.C.C.2d 234 (1989) (Norfolk). Cases to date have involved our review of a final award of an arbitrator. There is nothing in them to suggest that preliminary or interim findings by an arbitrator during the arbitration process will be reviewed before the arbitrator issues a final decision.

Following our decision in Norfolk, but subsequent to Union Pacific's filing of its petition on March 2, 1989, we adopted a rule codifying that an appeal of right is permitted to review arbitration decisions, and that the appeal must be filed within 20 days of a final arbitration decision. See Ex Parte No. 55 (Sub-No. 75), Deadline for Requesting Commission Review of Arbitration Decisions, served May 8, 1989 (54 Fed.Reg. 1984), May 9, 1989), codified at 49 CFR 1115.8. This accords with our general practice not to entertain interlocutory appeals except in limited circumstances. [FN2] Moreover, the limited scope of review provided by the Lace Curtain criteria militates against Commission involvement prior to a final arbitration decision except in extraordinary circumstances. Our consideration of interlocutory appeals from intermediate decisions of arbitrators would impede the process, and should not be undertaken unless clearly justified. Union Pacific implicitly acknowledged this point in suggesting

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we might hold its protective appeal in abeyance, pending the arbitrators' final decision.

The arbitrators' February 14th Findings and Award is not a final decision of the arbitration committee. The arbitrators deliberately did not address the specifics of the items which they believed should be included in an implementing agreement. Rather, they stated their hope that with the removal of negotiating roadblocks, the parties would bargain realistically and in good faith to reach a valid implementing agreement consistent with the New York Dock conditions. This action does not justify interlocutory review of the February 14th decision. Indeed, it reflected the arbitrators' mediation role.

We are not ignoring the adverse effect of delay on consummation of the UPRR/MPRR-MKT consolidation. But, on balance, this concern does not outweigh our interest in the arbitration process being free of our interference through interlocutory review.

*4 Accordingly, we will deny Union Pacific's motion and dismiss its pending appeal of the February 14th decision without prejudice. This action should moot Union Pacific's request that we direct the arbitrators to proceed. It should also satisfy the arbitrators' legitimate concern about their role vis-a- vis this Commission. [FN3]

The decision of the Director of the Office of Proceedings, served April 17, 1989, is vacated. We expect that our dismissal of the appeal will remove any obstacle standing in the way of the Arbitration Committee in continuing with the negotiations, and that the arbitration process will resume promptly. Appeals to the arbitrators' final decision (as well as the February 14 decision as relevant) may be filed pursuant to 49 CFR 1115.8. [FN4]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Union Pacific's "notice of appeal," filed March 2, 1989, is dismissed, and its motion, filed April 19, 1989, is denied.

2. This decision is effective on August 8, 1989.

Noreta R. McGee

Secretary

FN1 "Union Pacific" refers, collectively, to Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri-Kansas-Texas Railroad Company.

FN2 49 CFR 1113.15 provides for interlocutory appeals from an administrative Law Judge (ALJ) only if: (a) the ALJ's ruling denies or terminates any person's participation; (b) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (c) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (d) the ALJ finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

FNWhile we do not have specific rules regarding interlocutory appeals from arbitrators, if we were to apply the above criteria, the interlocutory appeal in this proceeding would not be justified.

FN3 We do not read the arbitrators April 13th letter as preventing any party from subsequently seeking review of

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their final decision, as influenced by the February 14th decision. Instead, we read their request that the parties adopt the February 14th decision as one that simply allows the process to continue under the framework and limitations of that decision.

FN4 It would be inappropriate for us broadly to rule, as UTU requests, that Union Pacific is bound by the February 14th decision. We have made clear that, for the purpose of the arbitration process it is so bound.

1989 WL 239106 (I.C.C.)

END OF DOCUMENT

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NATIONAL MEDIATION BOARD
WASHINGTON. D.C. 20572

(202) 692-5000

August 11, 2003

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Re: New York Dock: Union Pacific Railroad Company
And John Grother

Dear Mr. Grother:

Reference is made to the exchange of correspondence requesting arbitration pursuant to Article IV, of New York Dock labor protective conditions involving a dispute between you and the Union Pacific Railroad Company.

In accordance with the request, I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records.

Sincerely.

Roland Watkins
Director, Arbitration Services

Copy to:

Ms. Marilyn J. Ahart
Director Protection Management
Union Pacific Railroad Company
1416 Dodge Street
PNG06
Omaha, NE 68179

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499

September 30, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to John E. Grother's June 16, 2003 letter to you concerning neutral selection data in connection with his request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions, to resolve a dispute with Union Pacific Railroad. I have been assigned to handle this arbitration for Union Pacific. Mr. Grother's August 11, 2003 letter to you advised he has retained the services of Attorney Gordon P. MacDougall for the pending arbitration issue.

Your letter of August 11, 2003 to John E. Grother, with copy to Marilyn Ahart at Union Pacific, enclosed a panel of seven neutrals and requested the parties notify your office "...as soon as a selection has been made." This is to advise Ms. Ahart and I have had three telephone conversations with Mr. MacDougall for the purpose of selecting a neutral from your panel by means of alternate strikes. Mr. MacDougall is unwilling to use the alternate strike method to reduce the panel to a single neutral.

During our telephone conversation today, Mr. MacDougall said he has talked with you on this matter. He alleges you said the neutral selection process for New York Dock arbitration set forth in your April 28, 2000 memorandum is not applicable to cases stemming from Article IV of New York Dock, where the individual is not represented by a labor organization. Is that correct and, if so, what process is applicable?

Sincerely,

W. E. Loomis

cc: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

CORRECTED COPY

October 6, 2003

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street, Room 322
Omaha, NE 68179

Dear Mr. Loomis:

I received your letter concerning a recent conversation with Mr. Gordon MacDougall, counsel for John Gother. I did not offer any opinion as to the applicability of New York Dock. As you and Mr. MacDougall are aware, I merely furnished a list pursuant to a request initiated by Mr. Gother. With this letter, I am requesting of you and Mr. MacDougall that any further inquiry on this matter must be in writing. I will not respond to any further phone calls on this matter.

Sincerely,

Roland Watkins
Director, Arbitration Services

cc: Gordon MacDougall

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9736

October 6, 2003

REC'D
OCT - 7 2003
Labor Relations

Mr. Roland Watkins
National Mediation Board
1301 K St., NW-#250E
Washington DC 20572

BY HAND

Re: NYD Claimant-John E. Grother

Dear Mr. Watkins:

I am in receipt of a letter from Mr. W.E. Loomis (UP-Employee Relations Planning), dated September 30, regarding selection of a neutral in the entitled matter. I have a somewhat different version of the events to date.

1. We have conducted three telephone discussions, 9/24, 9/26, and 9/30, during which a number of matters were discussed, such as likely issues, procedures, location, and possible terms for an arbitration agreement. I believe these discussions, for the most part, have been helpful. However, during the 9/26 discussion, Mr. Loomis referred to your August 11, 2002 letter, addressed to Mr. Grother:

> "I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records."

Mr. Loomis maintained that the alternate striking process is mandatory in selecting a neutral, in accordance with your April 28, 2000 memorandum, attached, which he forwarded to me following our telephone conference. I agreed, at his suggestion, to inquire whether this is your understanding of the two sentences quoted above from your August 11 letter to Mr. Grother--that selection means alternate striking.

2. I advised Mr. Loomis during our brief 9/30 conversation that my understanding is the April 28, 2000 memorandum is mandatory only as to the persons addressed, i.e., railroad carriers and rail labor organizations and, as such, alternate striking is not mandatory here, where the controversy does not involve a rail labor organization party.

3. Mr. Loomis asserts I am unwilling to use the alternate strike method to reduce the panel to a single neutral, but he does not mention my other suggestions, apparently in the belief the alternate strike scheme is binding. However, it is possible the discussions may prove more fruitful if the April 28, 2000 memorandum was not intended, and does not apply, to non-labor situations.

Very truly yours,

Gordon P. MacDougall

Atty. for John E. Grother

cc: W.E. Loomis
Union Pacific RR Co.
1416 Dodge St.-Rm. 332
Omaha, NE 68179

(By overnight express)

John E. Grother
1718 Rustic Park Drive
Kingwood TX 77339

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572
(202) 692-5000

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

A number of months ago, the National Mediation Board (Board) began experimenting with a new procedure for providing the parties with balanced panels in New York Dock cases. Since many of you may not have been involved with New York Dock cases recently, pleased be advised that the following procedures will apply governing the selection of a neutral to resolve disputes in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions:

- Upon receipt of a request from a party for a neutral, the Board will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals. Each party will be requested to provide a list of fifteen (15) preferred neutrals from that list. **This information is confidential and will be used only for the purpose of the selection of a neutral for that dispute.**

- The lists, along with other relevant information, will be considered by the Board in compiling a panel of seven (7) neutrals. The Board will then promptly provide the parties with such a panel. The parties will use the strike method to derive at a neutral and will immediately inform the Board of the selection.

These procedures will not prevent the parties from mutually deciding on a neutral, but will apply only when the parties are unable to agree on a neutral.

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-6446
FAX (402) 233-2499

October 15, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to your letter of August 11, 2003 in connection with John E. Grother's request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions. Enclosed with your letter was a list of seven (7) qualified neutrals. During telephone discussions with Mr. Grother's attorney, Gordon P. MacDougall, Union Pacific has attempted to reduce that list to a single neutral by means of the alternate strike method. Unfortunately, our efforts in this regard have not been successful. For your records, and only for the purpose of this case, had the alternate strike method been utilized, Union Pacific's three strikes would have been Barbara C. Deinhardt, Ira F. Jaffe and Robert M. O'Brien.

Sincerely,

W. E. Loomis

CC: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9736

December 31, 2003

Mr. Roland Watkins
Director, Arbitration Services
National Mediation Board
Washington DC 20572

REC'D
JAN - 5 2004
Labor Relations

Re: New York Dock: Union Pacific Railroad Company
and John E. Grother

Dear Mr. Watkins:

This is in reference to the June 23, 2003 request by Mr. John E. Grother for arbitration pursuant to the New York Dock employee protective conditions, and the various exchange of correspondence subsequent thereto.

Mr. Grother, during all relevant periods, has been a non-agreement employee; and he was not associated with counsel until on or about August 11, 2003, when the undersigned was engaged. Previously, you had furnished Mr. Grother, and the carrier, with the names of individuals for consideration as the neutral member of an arbitration committee.

Unfortunately, the carrier has insisted upon a system of selecting a neutral by an alternate strike method, apparently recently prescribed or utilized in situations involving carriers and labor organizations. There have been no meaningful discussions since receipt of the carrier's October 15, 2003 letter to you.

The alternate strike method is deemed prejudicial to Mr. Grother, particularly in light of contemplated issues peculiar to this non-agreement employee, which appear to include matters of official vis-a-vis employee, in contrast with management vis-a-vis labor.

Accordingly, under the circumstances, this is to request that you select the neutral member of the arbitration committee. From Mr. Grother's standpoint, you may wish to consider a person heretofore either named or unnamed, or not on any previous list, and either with or without railroad industry experience, as may be appropriate.

Mr. Grother's preference for location of any hearing by the arbitration committee would be the Washington DC area.

Very truly yours,

Gordon P. MacDougall

cc: John E. Grother
William E. Loomis

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499

January 6, 2004

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to the December 31, 2003 letter from Gordon P. MacDougall, who is representing John E. Grother in his request for arbitration in accordance with Article IV of the New York Dock labor protective conditions.

Thus far, the Board's and Union Pacific's handling of this matter has been in strict compliance with your April 28, 2000 memorandum which sets forth the procedure to be followed when the Board is requested to furnish a neutral to resolve New York Dock disputes. The procedure broke down when Mr. MacDougall was unwilling to utilize the strike method to reduce the list of seven neutrals furnished with the Board's letter of August 11, 2003 to a single neutral. Without offering any explanation why, Mr. MacDougall now states, in his December 31, 2003 letter, that the alternate strike method is "... prejudicial to Mr. Grother...."

The Board will note Union Pacific's letter of October 15, 2003 contains its three strikes, thus reducing the list of neutrals to four. Union Pacific does not object to Mr. MacDougall's request for the Board to select the neutral member of the arbitration committee. In fact, this appears to be the only option left to move this matter forward. However, Union Pacific's position is the Board should comply with its own stated procedure by making that selection from among the four neutrals remaining on the list.

Sincerely,

W. E. Loomis

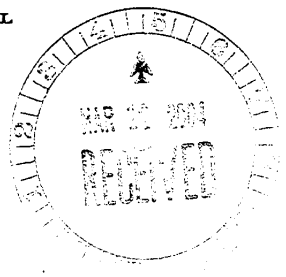
CC: John E, Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

Ex. E-10

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738



March 12, 2004

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

Petitioner is in receipt of the opposition by Union Pacific Railroad Company (UP), filed March 5, 2004. The Board's rules do not permit a reply absent unusual circumstances, and petitioner will not answer the facts and arguments which it deems erroneous, at this time.

However, UP has characterized the identity of the petitioner, John E. Grother, as a "management employee" (UP Opp. 3), analogous to the term of art ("managerial employee") under the NLRA, in lieu of the RLA definitions for railroad and airline personnel (subordinate official/employee). Cf. 29 U.S.C. 152(f); 45 U.S.C. 151, fifth, 182. For a recent decision and summary of cases, see: LeMoyne Owen College v. NLRB (No. 03-1031, USCA-DC Cir., Feb. 10, 2004), 72 U.S. Law Week 1497-98 (2/24/04).

We wish the record to show that petitioner disagrees with UP's characterization of his identity; and that he is not a "management employee," now or previously.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

34500
EB

SERVICE DATE - APRIL 21, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY
--CONTROL AND MERGER--SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: April 19, 2004

John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP) who is not represented by a labor organization, has filed a petition asking the Board to establish the procedures to be used in an arbitration proceeding to consider claims against UP for benefits under the New York Dock conditions.[1] The petition will be denied.

BACKGROUND

In approving the acquisition and control of the Southern Pacific Rail Corporation (SP) and its rail carrier subsidiaries by the Union Pacific Corporation and its rail carrier subsidiaries, the Board imposed the New York Dock conditions for the protection of affected employees.[2] Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner filed his claim with UP under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization the same level of protection as accorded to represented employees. In a letter dated June 16, 2003, petitioner asked the National Mediation Board (NMB) to select a neutral for an arbitration committee to consider his claim. In a letter dated January 21, 2004, the NMB designated Ms.

[1] New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

[2] Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 452-53, 553 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

Lynette A. Ross as the neutral arbitrator to handle the dispute.[3] NMB's letter indicated that the arbitrator "is responsible for scheduling and other appropriate procedural determination concerning the arbitration process."[4]

The petition indicates that the parties, while agreeing to most of the terms for the proposed arbitration, have been unable to agree on the extent and presentation of a written record and the place for an oral hearing. Petitioner proposes that the record be developed in a three-step process similar to the Board's arbitration procedures in 49 CFR 1108.8, whereby the complaining party proceeds first with a written statement, the defendant proceeds next, and the complainant has an opportunity to reply. Petitioner also asks that the hearing be held in Washington, DC. UP proposes that the parties submit single and simultaneous written submissions, followed by an oral hearing in Chicago, IL.

In his petition, Mr. Grother asserts that the procedures proposed by UP would not produce an adequate record for the Board to review. He argues that simultaneous submissions, with no opportunity for written responses, would not enable the parties to address fully the issue of causality, if UP were to contend that petitioner was not adversely affected by the transaction. Petitioner states further that the hearing should be held in Washington, DC, where the parties and the arbitrator would have access to unpublished material of the NMB and the Board.

In its response in opposition to the petition, UP asserts that the petition is premature because it raises routine procedural issues that, if they cannot be agreed upon by the parties, should be resolved by the neutral member of the arbitration committee. Citing 49 CFR 1108.2(b), UP states further that the Board's three-step arbitration procedures referred to by petitioner are designed for disputes involving the payment of money or involving rates and practices related to rail transportation or service subject to Board jurisdiction, and not for a New York Dock arbitration proceeding. UP requests that the Board dismiss the petition for lack of jurisdiction at this time, and remand the procedural issues to the arbitration committee for resolution.

DISCUSSION AND CONCLUSIONS

---

[3] The other members of the panel are Mr. Grother and Mr. W. E. Loomis, representing UP.

[4] Petitioner supplemented the record on March 5, 2004, forwarding a letter from Ms. Ross. Petitioner also submitted a comment/letter on March 12, 2004, expressing disagreement with UP's characterization of Mr. Grother as a management employee.

Under the deferential Lace Curtain standards of review,[5] the Board may review final decisions issued by arbitrators under the New York Dock labor protection conditions. The Board may also consider interlocutory appeals from an arbitrator's decision prior to a final arbitration decision in extraordinary circumstances. Union Pacific/MKT Merger–UTU Implementing Agreement, Finance Docket No. 30800 (Sub-No. 28) (ICC served Aug. 8, 1989).

Here, however, the Board has not been asked to review an arbitrator's decision. Rather, the petition seeks to have the Board become involved in a preliminary phase of this arbitration proceeding customarily handled by the arbitrator, i.e., scheduling and making procedural determinations concerning the arbitration process. These functions are properly encompassed within the arbitrator's authority to resolve disputes under the New York Dock labor protection conditions. Because the arbitrator controls the arbitration, she should be the person who determines where and how those proceedings should be conducted. Petitioner should attempt to reach an agreement with UP on the matters it has raised, and, if no agreement can be reached, seek resolution by the neutral arbitrator. Accordingly, the petition will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

---

[5] Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Broth. Of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standards, the Board does not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error.

Ex. E-12

210675

ENTERED
Office of Proceedings
APR 26 2004
Part of
Public Record

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

APR 26 2004
RECEIVED

April 23, 2004

Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

This is to request that the decision in the entitled proceeding, served April 21, 2004, be corrected in the following respects, at page 1, final paragraph, 2nd sentence, and 3rd sentence, with text to be stricken indicated by dash, and to be added by underline, as follows:

> Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance, among other benefits, under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner ~~filed his claim with UP~~ invoked arbitration under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization substantially the same level of protection as accorded to represented employees.

Although the decision correctly states petitioner seeks a displacement allowance, such is not the entire basis for his benefits. Moreover, petitioner did not file a "claim" with UP under New York Dock's Article IV, but invoked arbitration under that provision. Perhaps the use of "claim" as both a noun and verb may have caused the misleading sentences. The NYD conditions embrace more than displacement allowances, and also include matters such as fringe benefits, moving expenses, etc. 360 I.C.C. at 87-90. Finally, the word substantially should be added to the second sentence, so as to track the exact wording of Article IV, 360 I.C.C. at 90.

The paragraph as it presently stands does not correctly reflect the record filed with the Board, and does not correctly reflect the language of the NYD conditions.

Very truly yours,

Gordon MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

Ex. E-13

34764
SEC

SERVICE DATE - LATE RELEASE JUNE 10, 2004

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY
–CONTROL AND MERGER–SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

June 10, 2004

NOTICE TO THE PARTIES:

On April 26, 2004, John E. Grother, the petitioner in this arbitration proceeding, submitted a letter requesting minor modifications to the background section of the Board's decision that was served on April 21, 2004. Petitioner notes that he initiated this proceeding by invoking arbitration under Article IV of the New York Dock conditions, rather than filing a claim with his employer under Article IV. He also seeks two other modifications in the decision. The requested modifications are not material to the Board's decision and need not be made.

Vernon A. Williams
Secretary

Ex. E-14

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499

MAY - 7 2004

May 3, 2004

Lynette A. Ross, Arbitrator
1220 Fairway Drive
Lawrenceburg, KY 40342-9706

Dear Ms. Ross:

Re: New York Dock Arbitration: John Grother and Union Pacific Railroad Company

This refers to your March 1, 2004 letter confirming receipt of Mr. McDougall's February 20, 2004, petition to the Surface Transportation Board. In that letter you said "we will resume contact in order to schedule a mutually acceptable hearing date" once the procedural issues set forth in the petition are resolved.

A copy of the STB's April 21, 2004 decision is attached, in which the Board characterized the outstanding procedural issues raised by Petitioner as extent and presentation of the written record and place for an oral hearing. The Board's decision directed the Petitioner to "attempt to reach agreement with UP on the matters it has raised, and if no agreement can be reached, seek resolution by the neutral arbitrator."

Subsequent to the STB's decision, Mr. McDougall and I have spoken and it appears we are unable to agree on these two matters without your assistance. Accordingly, this letter is to advise UP is ready to discuss these matters, in person or by telephone, at the earliest mutually convenient date you recommend.

Sincerely,

W. E. Loomis

Attachment

cc: Gordon P. McDougall
Suite 410
1025 Connecticut Ave., NW
Washington, DC 20036

John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

34500
EB

SERVICE DATE - APRIL 21, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY
–CONTROL AND MERGER–SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: April 19, 2004

John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP) who is not represented by a labor organization, has filed a petition asking the Board to establish the procedures to be used in an arbitration proceeding to consider claims against UP for benefits under the New York Dock conditions.[1] The petition will be denied.

BACKGROUND

In approving the acquisition and control of the Southern Pacific Rail Corporation (SP) and its rail carrier subsidiaries by the Union Pacific Corporation and its rail carrier subsidiaries, the Board imposed the New York Dock conditions for the protection of affected employees.[2] Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner filed his claim with UP under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization the same level of protection as accorded to represented employees. In a letter dated June 16, 2003, petitioner asked the National Mediation Board (NMB) to select a neutral for an arbitration committee to consider his claim. In a letter dated January 21, 2004, the NMB designated Ms.

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[1] New York Dock Ry.–Control–Brooklyn Eastern Dist. 360 I.C.C. 60 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

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Lynette A. Ross as the neutral arbitrator to handle the dispute.[3] NMB's letter indicated that the arbitrator "is responsible for scheduling and other appropriate procedural determination concerning the arbitration process."[4]

The petition indicates that the parties, while agreeing to most of the terms for the proposed arbitration, have been unable to agree on the extent and presentation of a written record and the place for an oral hearing. Petitioner proposes that the record be developed in a three-step process similar to the Board's arbitration procedures in 49 CFR 1108.8, whereby the complaining party proceeds first with a written statement, the defendant proceeds next, and the complainant has an opportunity to reply. Petitioner also asks that the hearing be held in Washington, DC. UP proposes that the parties submit single and simultaneous written submissions, followed by an oral hearing in Chicago, IL.

In his petition, Mr. Grother asserts that the procedures proposed by UP would not produce an adequate record for the Board to review. He argues that simultaneous submissions, with no opportunity for written responses, would not enable the parties to address fully the issue of causality, if UP were to contend that petitioner was not adversely affected by the transaction. Petitioner states further that the hearing should be held in Washington, DC, where the parties and the arbitrator would have access to unpublished material of the NMB and the Board.

In its response in opposition to the petition, UP asserts that the petition is premature because it raises routine procedural issues that, if they cannot be agreed upon by the parties, should be resolved by the neutral member of the arbitration committee. Citing 49 CFR 1108.2(b), UP states further that the Board's three-step arbitration procedures referred to by petitioner are designed for disputes involving the payment of money or involving rates and practices related to rail transportation or service subject to Board jurisdiction, and not for a New York Dock arbitration proceeding. UP requests that the Board dismiss the petition for lack of jurisdiction at this time, and remand the procedural issues to the arbitration committee for resolution.

DISCUSSION AND CONCLUSIONS

---

[3] The other members of the panel are Mr. Grother and Mr. W. E. Loomis, representing UP.

[4] Petitioner supplemented the record on March 5, 2004, forwarding a letter from Ms. Ross. Petitioner also submitted a comment/letter on March 12, 2004, expressing disagreement with UP's characterization of Mr. Grother as a management employee.

Under the deferential Lace Curtain standards of review,[5] the Board may review final decisions issued by arbitrators under the New York Dock labor protection conditions. The Board may also consider interlocutory appeals from an arbitrator's decision prior to a final arbitration decision in extraordinary circumstances. Union Pacific/MKT Merger–UTU Implementing Agreement, Finance Docket No. 30800 (Sub-No. 28) (ICC served Aug. 8, 1989).

Here, however, the Board has not been asked to review an arbitrator's decision. Rather, the petition seeks to have the Board become involved in a preliminary phase of this arbitration proceeding customarily handled by the arbitrator, i.e., scheduling and making procedural determinations concerning the arbitration process. These functions are properly encompassed within the arbitrator's authority to resolve disputes under the New York Dock labor protection conditions. Because the arbitrator controls the arbitration, she should be the person who determines where and how those proceedings should be conducted. Petitioner should attempt to reach an agreement with UP on the matters it has raised, and, if no agreement can be reached, seek resolution by the neutral arbitrator. Accordingly, the petition will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

---

[5] Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Broth. Of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standards, the Board does not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error.

Ex. E-15

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

May 28, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Re: Grother/Union Pacific-NYD

Dear Ms. Ross:

This is in response to the letter, dated May 3, 2004, from William E. Loomis, regarding the procedural posture of this proceeding. The STB on April 21 issued its decision (subject to request for ministerial corrections, filed April 26). I agree it is time to move forward, but suggest discussion likely will prove more meaningful if written positions are first exchanged prior to a conference call among all members or representatives of the Committee.

By way of background, this arbitration involves a non-agreement employee not represented by an employee organization, with displaced employee wage losses estimated at $108,000, exclusive of other benefits. The events giving rise to the proceeding commenced in 1997, some 7 years ago. There have not been any conferences on the property concerning this dispute. There has been no indication of pressing time constraints for the arbitration process. The employee desires a written record, insofar as practicable, due to the unusual nature of this case, and also in recognition by the partisan parties that there is a substantial likelihood the cause will be reviewed by another agency and/or court, irrespective of the arbitration outcome. Indeed, even with regard to causality, there is recent judicial authority challenging the notion of limited review for a New York Dock arbitration ruling on causality. Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 35-36 (D.C. Cir. 2004).

In the absence of prior conferences, the issues cannot be determined in advance with certainty, although it appears eligibility, causality, asserted laches, and measure of compensation or other benefits. The limited sum directly sought, $108,000, renders the expenses of arbitration, including counsel fees, an important consideration to the employee, and perhaps also suggests additional carrier motivations or considerations in connection with the 1997-98 operational meltdown of the two merging carriers.

The carrier's May 3 letter might suggest only two outstanding procedural issues. Attached is a fourth draft (MA-4D), leaving open the hearing location, item C; and Appendix 1 being Grother's suggested schedule for pre-hearing submissions. These embrace the two matters brought to the attention of the STB. Unfortunately, there are matters in addition to the two referenced issues.

1. Additional Objections. UP objects to MA-4D,item E(1), first sentence, "or by other representatives as they may elect;" and to E(2), second sentence, relating to additional evidence, as well as to E(3), third sentence, relating to post-hearing briefs. The employee member is unable to appreciate UP's objection to E(1), but understand's UP's objections to E(2) and E(3) are based upon UP's view that these matters should be determined by the neutral member, rather than by the Committee. However, UP can best explain its position. UP also notes objection to item E, first sentence, where reference is made to Appendix 1, and to item F, in line 13, with reference to Appendix 1. Again, UP can best explain its position, as it appears the objection is not to the content of the items, but to Appendix 1 in its entirety.

Employee strongly believes that any additional evidence should be a Committee decision; likewise, post-hearing briefs should be permitted by Committee action as part of the adopted procedures. Arbitration under NYD Art, I, §11 is by Committee, whereas arbitration under Art. I, §4 is by referee.

2. Pre-Hearing Submissions. Where, as here, causality is anticipated to be a major, if not the most important, issue to be resolved, it is essential that the claimant have an effective opportunity to rebut the carrier's case for denial. The NYD procedures provide, NYD, Art. I, §11(e):

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It then shall be the railroad's burden to prove that factors other than a transaction affected the employee.

It is the employee's position that he should have an opportunity for a written response to the carrier's submission on causality, and that the matter not be left to oral "Perry Mason" or "Law & Order" live presentations, absent special circumstances. We are dealing with events dating back to 1997 (and perhaps earlier) such that written submissions are to be preferred. Further, the procedure suggested in Appendix 1 should be followed for all issues, not just causality, for causality would appear interrelated to other anticipated issues, and two or more separate procedures, dependant upon multiple issues, would be unwieldy. However, the partisan parties appear in agreement to bifurcate the arbitration, such that the measure of compensation and/or benefits be deferred. MA-4D, item D.

3. Hearing Location. Employee in his letter to the NMB, dated June 16, 2003 (received June 23), suggested selection of a neutral who would be available for Arizona, Texas, California and Washington, DC, with Tucson, AZ an appropriate site if all employees present in 1997 are allowed to testify. Subsequently, employee through counsel, has expressed a preference for Washington, DC,

with an understanding "live" testimony may not be necessary in this proceeding. Upon that assumption, Washington, DC is the preferred location, not only for travel expenses, but importantly as the location of the STB and NMB, where much written material is available, and where personnel at STB or NMB, or other federal agencies, may be contacted for information.

Of course, if the arbitration process is to be open-ended, with substantial "live" testimony, employee in that event would prefer Tucson, AZ.

Accordingly, upon reflection, it may prove preferable to defer naming the hearing location until after completion of the pre-hearing written submissions, under the suggested procedure of Appendix 1, when the issues may have become better known or clarified, along with the nature and extent of the proffered material.

Very truly yours,

Attorney for John E. Grother

cc: L.A. Ross
W.E. Loomis

J.E. Grother

MA-4D

(fourth draft)

MEMORANDUM OF AGREEMENT

BETWEEN

JOHN E. GROTHER

AND

UNION PACIFIC RAILROAD COMPANY

****

WHEREAS, John E. Grother (Grother) and Union Pacific Railroad Company (Union Pacific) are in dispute as to the interpretation, application, or enforcement of the so-called New York Dock protective conditions prescribed by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (August 6, 1996); a neutral/referee having been designated January 21, 2004 by the National Mediation Board; and a decision having been issued April 21, 2004 by the STB in its Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review),

IT IS AGREED:

A. There shall be established an arbitration committee (committee), which shall consist of three members. The member representing Grother shall be John E. Grother. The member representing Union Pacific shall be William E. Loomis. The neutral member and chairperson shall be Lynette A. Ross. Either Grother or Union

Pacific may change its member of the committee by advance written notice to the other members of the committee.

B. The compensation and expenses of the Grother member shall be borne by John E. Grother. The compensation and expenses of the Union Pacific member shall be borne by Union Pacific Railroad Company. The compensation and expenses of the neutral member shall be borne equally by Grother and Union Pacific.

C. The committee shall hold its initial hearing at _____, on a date to be determined by the committee. The time and place for subsequent hearings, if any, shall be determined by the committee.

D. The committee shall have jurisdiction only to decide questions concerning the interpretation, application, or enforcement of New York Dock conditions to Grother and Union Pacific. The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation or some benefits.

E. At the hearing, the parties may be heard in person, by counsel, or by other representatives as they may elect, and they may present statements of fact, supporting evidence, data and argument, in accordance with the procedural arrangement attached hereto as Appendix 1. The committee shall have the authority to require the production of such additional evidence, either oral or written, as it may desire from either party. The parties, at their discretion, may present post-hearing briefs within 20 days following the close of the hearing.

F. Within 45 days after the conclusion of the initial hearing and close of that record, which determines the applicability of New York Dock to Grother, the committee shall render a written decision, which shall become effective when signed by two members. If the decision finds that New York Dock is applicable to Grother, and that he may be due some compensation or some benefits, the partisan members will then attempt to agree on the measure of such compensation or benefits. If the partisan members are unable to agree on such compensation or benefits, the committee will, upon a request submitted by Grother or Union Pacific within 60 days from the effect date of the first decision, hold a subsequent hearing to determine the measure of compensation or benefits due. See Appendix 1. Within 45 days after the subsequent hearing is concluded and the record is closed, the committee shall render a decision, setting forth the measure of compensation or benefits due Grother, which shall become effective when signed by two members.

G. Each member of the committee shall have one vote, and two members of the committee shall be competent to adopt a decision or make such other rulings and decisions as may be necessary to carry out the functions of the committee. If an initial decision is in favor of Grother, it shall declare the applicability of New York Dock to him for the STB authorization(s) and, if a further decision is issued, it shall specify a remedy and direct the carrier to comply therewith on or before the date named in the decision.

H. The committee shall continue in existence until its decision(s) have become effective, after which it shall cease to exist, except for interpretation of its decision(s).

I. The time limits provided herein may be extended, or shortened, by mutual agreement of the parties.

Signed this _____day of May, 2004.

FOR: JOHN E. GROTHER

FOR: UNION PACIFIC RAILROAD COMPANY

APPENDIX 1

The following procedures shall govern the service of submissions by the partisan parties in advance of the hearings:

Initial Hearing. Grother shall serve his initial written submission (applicability phase) upon Union Pacific by an overnight express delivery service, with copy to the neutral member, on or before 90 days from the date the Memorandum of Agreement is signed or becomes effective. Union Pacific shall serve its initial written opposition submission (applicability phase), upon Grother by an overnight express delivery service, with copy to the neutral member, on or before 60 days from receipt of Grother's initial submission; Grother, at his option, may serve a reply written submission upon Union Pacific by an overnight express delivery service, with copy to the neutral member, on or before 20 days following receipt of Union Pacific's written opposition submission.

Subsequent Hearing. The schedule and procedures for advance submissions for any subsequent hearing(s)s shall be by agreement of the partisan parties or, failing agreement, by the committee.

MA-5D

MEMORANDUM OF AGREEMENT

BETWEEN

JOHN E. GROTHER

AND

UNION PACIFIC RAILROAD COMPANY

****

WHEREAS, John E. Grother (Grother) and Union Pacific Railroad Company (Union Pacific) are in dispute as to the interpretation, application, or enforcement of the so-called New York Dock protective conditions prescribed by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (August 6, 1996); a neutral/referee having been designated January 21, 2004 by the National Mediation Board; and a decision having been issued April 21, as clarified June 10, 2004, by the STB in its Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review), and a telephone conference held June 7, 2004, among the parties and the neutral/referee, and without prejudice to the differing positions of the parties, but for the purpose of establishing procedures to permit the arbitration to proceed in light of the views of the neutral/referee,

IT IS AGREED:

A. There shall be established an arbitration committee (committee), which shall consist of three members. The member representing Grother shall be John E. Grother. The member representing Union Pacific shall be William E. Loomis. The neutral member and chairperson shall be Lynette A. Ross. Either Grother or Union Pacific may change its member of the committee by advance written notice to the other members of the committee.

B. The compensation and expenses of the Grother member shall be borne by John E. Grother. The compensation and expenses of the Union Pacific member shall be borne by Union Pacific Railroad Company. The compensation and expenses of the neutral member shall be borne equally by Grother and Union Pacific.

C. The committee shall hold its initial hearing at Washington, D.C. on October 12, 2004. The time and place for subsequent hearings, if any, shall be determined by the committee.

D. The partisan members of the committee shall serve written submissions, one upon the other, simultaneously, with copy to the neutral/chairperson, by sending via a second day delivery service on September 14, 2004. At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statements of fact, supporting evidence, data and argument. The committee shall have the authority to require the production of such additional evidence, either oral or written, as it may desire from either party. The parties, at their discretion, may present post-hearing briefs within 20 days following the close of the hearing.

E. The committee shall have jurisdiction only to decide questions concerning the interpretation, application, or enforce-

ment of New York Dock conditions to Grother and Union Pacific. The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation and some benefits.

F. Within 45 days after the conclusion of the initial hearing and close of that record, which determines the applicability of New York Dock to Grother, the committee shall render a written decision, which shall become effective when signed by two members. If the decision finds that New York Dock is applicable to Grother, and that he may be due some compensation or some benefits, the partisan members will then attempt to agree on the measure of such compensation or benefits. If the partisan members are unable to agree on such compensation or benefits, the committee will, upon a request submitted by Grother or Union Pacific within 60 days from the effective date of the first decision, hold a subsequent hearing to determine the measure of compensation or benefits due. The schedule and procedures for advance submissions for any subsequent hearing(s) shall be by agreement of the partisan parties or, failing agreement, by the committee. Within 45 days after the subsequent hearing is concluded and the record is closed, the committee shall render a decision, setting forth the measure of compensation or benefits due Grother, which shall become effective when signed by two members.

G. Each member of the committee shall have one vote, and two members of the committee shall be competent to adopt a decision or make such other rulings and decisions as may be necessary to carry

out the functions of the committee. If an initial decision is in favor of Grother, it shall declare the applicability of New York Dock to him for the STB authorization(s) and, if a further decision is issued, it shall specify a remedy and direct the carrier to comply therewith on or before the date named in the decision.

H. The committee shall continue in existence until its decision(s) have become effective, after which it shall cease to exist, except for interpretation of its decision(s).

I. The time limits provided herein may be extended, or shortened, by mutual agreement of the parties.

Signed this 18TH day of June, 2004.

FOR: JOHN E. GROTHER

FOR: UNION PACIFIC RAILROAD COMPANY

Ex. E-17

June 23, 2004

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

Dear Mr. MacDougall:

I have signed and enclosed the original copy of the memorandum of agreement concerning the New York Dock arbitration between John E. Grother and Union Pacific Railroad. As discussed during our telephone conversation on June 18, 2004, a copy is enclosed for Ms. Ross and Mr. Grother. If any party has a question relating to this memorandum of agreement, please let me know and I will schedule a conference call.

Sincerely,

William E. Loomis

Enclosure:

cc:

Lynette A. Ross w/encl
1220 Fairway Drive
Lawrenceburg, KY 40342

John E. Grother w/encl
1718 Rustic Park Drive
Kingwood, TX 77339

William E. Loomis
General Director

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710
ph. (402) 544-5446 fx. (402) 233-2499
beloomis@up.com

UNION PACIFIC RAILROAD COMPANY *f/k/a* Southern Pacific Transportation Company, Petitioner,

v.

SURFACE TRANSPORTATION BOARD and United States of America, Respondents.

Southern Pacific Empowered Employees Committee, Intervenor.

No. 02-1340.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 12, 2003.

Decided Feb. 3, 2004.

Background: Carrier petitioned for review of order of Surface Transportation Board declining to set aside arbitrators' finding that outsourcing was causally related to merger in manner bringing it within reach of *New York Dock*'s provisions, and that named complainants represented "employees" for purposes of *New York Dock* eligibility.

Holdings: The Court of Appeals, Stephen F. Williams, Senior Circuit Judge, held that:

(1) order was "final order" reviewable by Court of Appeals;

(2) Board acted arbitrarily and capriciously in declining to set aside finding that outsourcing was causally related to merger; and

(3) Board acted arbitrarily and capriciously in allowing organization to refuse to identify which nonunion employees it purported to represent.

Reversed.

Henderson, Circuit Judge, filed opinion concurring in judgment.

1. Arbitration ⇐73.2

Order of Surface Transportation Board, declining to set aside arbitrators' finding that outsourcing was causally related to merger in manner bringing it within reach of *New York Dock*'s provisions, and that named complainants represented "employees" for purposes of *New York Dock* eligibility, was "final order" over which Court of Appeals had jurisdiction, where order completed liability phase of proceeding that parties agreed to bifurcate, and all that remained to be decided was amount of benefits for each employee. 28 U.S.C.A. § 2342(5); 49 U.S.C.A. § 11326(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Carriers ⇐34

For an order of the Surface Transportation Board to be final, as required for the Court of Appeals to have jurisdiction, two conditions must be satisfied: the order must not be tentative or interlocutory in nature, and it must be an action in which rights or obligations have been determined or from which legal consequences will flow. 28 U.S.C.A. § 2342(5).

3. Carriers ⇐34

The factors for determining whether an order of the Surface Transportation Board is final, as required for the Court of Appeals to have jurisdiction, are interpreted pragmatically to assure that courts neither improperly intrude into the agency's decisionmaking process nor squander judicial resources through piecemeal review. 28 U.S.C.A. § 2342(5).

4. Arbitration ⇐77(6)

Surface Transportation Board acted arbitrarily and capriciously in declining to set aside arbitrators' finding that outsourcing by carrier was causally related to merger in manner bringing it within reach

granting its 1988 approval for the merger of the Denver & Rio Grande and the Southern Pacific, the Board imposed its standard requirements, known as the *New York Dock* conditions. See 49 U.S.C. § 11326(a); *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, aff'd sub nom. *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir.1979).

In 1989 the merged carrier consolidated various activities. Among these were the prior railroads' Denver and San Francisco computer systems, which the carrier joined in a "Management and Information Services" ("MIS") division at Southern Pacific's computer headquarters in San Francisco. And in 1992 the carrier gave notice of further consolidations between operations of Southern Pacific and the former Denver & Rio Grande; as a result, it and the Transportation Communications Union entered into a 1992 Implementing Agreement governing protection for certain groups of potentially affected employees.

In 1993 a task force headed by Thomas Matthews, the carrier's Senior Vice President and Chief Administrative Officer, recommended that the carrier outsource the functions of its merged MIS department. It proceeded to do so, engaging a completely separate firm, Integrated Systems Solutions Corporation ("ISSC"), to perform the department's functions. Many of the MIS employees moved to ISSC. A dispute arose between the carrier and some noncontract, nonunion MIS employees over whether this outsourcing was subject to the *New York Dock* conditions imposed in 1988. In December 1993 four such employees, together with the Southern Pacific Empowered Employees Committee ("SPEEC," pronounced "speak"), a self-described "voluntary organization" purporting to represent such employees, invoked arbitration under Article IV of the *New York Dock* conditions.

The parties agreed to bifurcate the arbitration, initially addressing only those issues applicable to all claimants. After a lengthy and unexplained delay, the panel issued a decision on March 20, 2000 (the "2000 Award"), finding that the MIS outsourcing was causally related to the 1988 merger in a manner bringing it within the reach of *New York Dock*'s provisions, and that the named complainants and SPEEC-represented individuals were "employees" rather than management for purposes of *New York Dock* eligibility. See generally *Newbourne v. Grand Trunk W. R.R. Co.*, 758 F.2d 193, 195 (6th Cir.1985). The carrier appealed to the Board; while that appeal was pending, the panel issued a second decision on February 10, 2001, rejecting the carrier's claim that a key witness's recantation required it to vacate its 2000 Award.

On September 17, 2002 the Board issued the decision now at issue ("Board Decision"). It applied its highly deferential "*Lace Curtain* standard"—established in review of an arbitration over a "lace curtain allowance," which is awarded for expenses incurred "preparing a newly-purchased home for occupancy." *Chicago & N. W. Transp. Co.—Abandonment* ("*Lace Curtain*"), 3 I.C.C.2d 729, 730 n. 2 (1987), aff'd sub nom. *International Bhd. of Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C.Cir. 1988). As the Board said:

> Under the *Lace Curtain* standard, we limit our review of arbitrators' decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." ... We do not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error.

employee. See *Hart Surgical*, 244 F.3d at 234–35 (holding that court has jurisdiction under the Federal Arbitration Act to review arbitration awards that determined only liability and not damages). While those damages might amount to nothing for any given individual, the chance that the remaining proceedings will moot the case by giving victory to Union Pacific as to all claimants seems remote. See *Public Utilities Comm.*, 894 F.2d at 1377. Nor does it appear that the issues likely to arise in such proceedings would much overlap with the claims that are central here, so that serious duplication of appellate effort seems unlikely. We find the Board's decision "final" for purposes of our jurisdiction.

Standard of review

The carrier argues that we should review the arbitration panel's decision directly, rather than limiting our inquiry to whether the Board acted arbitrarily and capriciously in the application of its *Lace Curtain* standard. Compare *Association of American Railroads v. Surface Transp. Bd.*, 162 F.3d 101, 112 (D.C.Cir.1998) (Sentelle, J. concurring in part and dissenting in part) (stating that the court may be required to directly review the arbitrator's decisions when the Board has applied *Lace Curtain* review), with *Swonger v. Surface Transp. Bd.*, 265 F.3d 1135, 1139–40 (10th Cir.2001) (stating without explicitly deciding that judicial review is limited in this situation to whether the Board properly declined to review the arbitration panel's decision). In *Association of American Railroads* the Board had issued an order, under a cognate labor protection provision, 49 U.S.C. § 10902(d), requiring arbitration for disputes arising under that order, and we upheld the Board. Judge Sentelle noted in his concurrence that the court's decision did *not* address the scope of our review if an arbitration decision emerging from such a scheme should reach us after the Board denied review under its *Lace Curtain* standard. 162 F.3d at 111–12. He contrasted that scenario with ordinary arbitration arising out of a party's "voluntary act, either at the time of the dispute or at an earlier time in a contract providing for such arbitration," *id.* at 111, and reasoned that the Board could not, by combining its arbitration mandate with *Lace Curtain* review, "finesse a litigant" out of its statutory right to judicial review under the standard principles of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). *Association of American Railroads*, 162 F.3d at 112. Accordingly, he said, we would have to either "directly review" the arbitrator's decision as a final agency decision, or find some other remedy. *Id.* Union Pacific argues for precisely such direct review.

Whether the Board can finesse a litigant out of its statutory right to judicial review under standard APA principles presents a serious question. Compare *International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 336 (D.C.Cir.1988) (noting that, had the ICC not elected to mandate arbitration, "all disputes over employee protective conditions would have remained solely within the primary jurisdiction of the agency"). And we note that although this court has repeatedly rejected claims that the Board's *Lace Curtain* standard of review is too *broad* in scope, see, e.g., *United Transp. Union v. ICC*, 43 F.3d 697 (D.C.Cir.1995); *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 811–12 (D.C.Cir.1993) (per curiam); *International Bhd. of Elec. Workers*, 862 F.2d at 332, we have never before addressed the argument that the standard is too *narrow*, or that the resulting layers of deference unlawfully place the arbitration result beyond judicial review. See 5 U.S.C. § 706; *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282, 107 S.Ct. 2360, 96

tion approval to consolidate our clerical positions, thereby establishing the Carrier's unfettered regulatory authority and discretion to implement any subsequent consolidations or personnel actions impacting on our clerical personnel, including the MIS employees, arising from the D&RGW–SP transaction," *id.* at 2–3. Rather than showing that the 1993 outsourcing was causally related to the 1988 merger, this opaque statement says only that the carrier wrote its 1992 *New York Dock* notice as broadly as possible so that it could implement "any subsequent consolidations or personnel actions . . . arising from the D&RGW–SP transaction." *Id.* at 2. It thus begs the question the arbitration panel was to answer: whether the 1993 outsourcing in fact was a consolidation or personnel action directly "arising from" the Denver & Rio Grande/Southern Pacific merger. Compare *Brotherhood of Locomotive Eng'rs v. ICC*, 885 F.2d 446, 451 (8th Cir.1989) (approving arbitrator's finding of a "reasonably direct causal connection"—more than "a mere but for standard"—between the merger and the adverse action).

Not only did the Lamb Declaration not adduce a single fact tending to establish a causal relation between the 1988 merger and 1993 outsourcing, but the timing and character of the transactions undermine any such idea. Thomas Matthews—who was primarily responsible for the outsourcing and who did not join the carrier until 1991, three years after the merger—explained that the outsourcing was done for financial reasons entirely unrelated to the merger. See Matthews Declaration at 1–2. No evidence was offered contradicting those reasons. Given that an outsourcing is on its face utterly different from a consolidation, and that the merged carriers had *already* consolidated their computer systems, it would take some specific evidence to establish causality, rather than the vague, question-begging conclusions offered by Lamb.

In *American Train Dispatchers Ass'n v. CSX Transportation, Inc.*, the Board explained that under its *Lace Curtain* standard it would vacate arbitration awards "when there is egregious error," meaning that the award is "irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." 9 I.C.C.2d 1127, 1130–31 (1993) (internal quotations and citation omitted). But here the arbitration panel found the Lamb Declaration to be "pivotal" even though it provided no support whatever for a finding of causation, and all other evidence pointed away from such a finding. We conclude therefore that the arbitration panel's finding that the 1993 outsourcing was causally related to the 1988 merger was "actually and indisputably without foundation in reason and fact," and that the Board acted in an arbitrary and capricious manner in not "reviewing" the 2000 Award, even under the Board's generous *Lace Curtain* standard of review.

[5] Although this error is reason enough to vacate the Board's order, the Board and arbitrators committed a second plainly egregious error in upholding SPEEC's persistent refusal to identify the MIS employees that it purported to represent. See *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587 (D.C.Cir.2001) ("If a plaintiff presents two or more alternative grounds as routes to its hoped-for ultimate victory, a court does not lose jurisdiction over the second claim once it has ruled in the plaintiff's favor on the first claim; victory on the first claim doesn't moot the second." (citation omitted)). The Board first argues that the carrier is precluded from making this argument because it did not do so below. The record shows other-

tive a declaration by a founding member of SPEEC to the effect that 287 MIS employees attended an initial SPEEC meeting, that a majority at that meeting "designated SPEEC to represent them," and that "such majority made a financial contribution" to fund the arbitration proceeding. 2000 Award at 25; see also Markovich Declaration at 4–5. SPEEC submissions evidently allude to "sign-up sheets" distributed at several meetings and to lists of persons who "signed up," see 1997 letter, but SPEEC never disclosed any such lists or sign-up sheets.

* * *

The Board's decision is accordingly reversed.

So ordered.

KAREN LeCRAFT HENDERSON, Circuit Judge, concurring in the judgment:

I concur in the majority's holding that the arbitration panel committed egregious error in finding the 1993 MIS outsourcing causally related to the 1988 merger and that the Surface Transportation Board therefore acted arbitrarily and capriciously in denying review of the erroneous arbitration award. I do not join the majority's discussion of what it terms the "second plainly egregious error" of the arbitration panel, upheld by the board—namely, failing to require SPEEC to identify the employees it represented. Maj. op. at 37–38.* Whether or not the majority is correct that this failure was "procedural error," there is, as the majority apparently recognizes, no need to address the issue in light of our having found egregious error in the panel's substantive decision. *See* maj. op. at 38 ("As the award and the order are also subject to vacation on substantive grounds, this procedural error can entail no immediate additional remedy."). In the unlikely event that an employee makes a future *New York Dock* claim related to the 1993 outsourcing (notwithstanding our substantive holding in favor of Union Pacific), at that time, as the majority indicates, the Board might have occasion to decide whether the claim is barred by collateral estoppel because the claimant was a party to this arbitration with a full and fair opportunity to litigate the causality issue. *See* maj. op. at 38 ("In the event of further *New York Dock* claims by MIS employees, it will remain for the Board in the first instance to determine the preclusive effects of the judgment."); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–481, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (collateral estoppel applies only when party against which earlier decision is asserted had " 'full and fair opportunity' to litigate that issue in the earlier case") (quoting *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 328–29, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971)) (footnote omitted); *see e.g., Bhd. of Locomotive Eng'rs v. CSX Transp. Inc.*, 9 I.C.C.2d 713, 723 (1993) (finding no collateral estoppel because employees were not parties to earlier proceedings); *id.* at 727–28 (two commission members dissenting because it appeared employees seeking labor protection were represented by union in prior proceeding). Until such time, discussion of the procedural issue is hypothetical. Accordingly, I see no reason to address it in our review of the STB decision now before the court.



* I also do not join in the majority's speculation on whether the court should—in another case—conduct direct review of an arbitrator's decision. *See* maj. op. at 34–36.

Before the

INTERSTATE COMMERCE COMMISSION

Ex. E-19

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

RAILROAD MERGER APPLICATION

VOLUME 3

OPERATING PLAN (EXHIBIT 13), LABOR IMPACT EXHIBIT,
DENSITY CHARTS (EXHIBIT 14), AND SUPPORTING STATEMENTS

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NEW MANIFEST BLOCKS AT MAJOR TERMINALS

Terminal	Yard	Block Name
ODEM TX	UP	N LIT ROCK AR
OKLA CITY OK	UP	HERINGTON KS
OKLA CITY OK	UP	KAN CITY MO
OKLA CITY OK	UP	WICHITA KS
ORANGE TX	SP	ENGLEWOOD
ORANGE TX	SP	LIVONIA LA
ORANGE TX	SP	N LIT ROCK AR
ORANGE TX	SP	SETTEGAST TX
OROVILLE CA	UP	ROSEVILLE CA
PARSONS KS	UP	PINEBLUFF AR
PHOENIX AZ	SP	HERINGTON KS
PHOENIX AZ	SP	N LIT ROCK AR
PINE BLUFF AR	SP	ANGLETON TX
PINE BLUFF AR	SP	ARLINGTON TX
PINE BLUFF AR	SP	CITY INDUSTRY CA
PINE BLUFF AR	SP	FT WORTH TX
PINE BLUFF AR	SP	LAKE CHARLES LA
PINE BLUFF AR	SP	LIVONIA LA
PINE BLUFF AR	SP	LONGVIEW TX
PINE BLUFF AR	SP	MONROE LA
PINE BLUFF AR	SP	ORANGE TX
PINE BLUFF AR	SP	REISOR LA
PINE BLUFF AR	SP	SETTEGAST TX
PINE BLUFF AR	SP	SO SAN ANTONIO TX
PINE BLUFF AR	SP	SPRING TX
POCATELLO ID	UP	FTWORTH TX
POCATELLO ID	UP	GREEN RIVER WY
POCATELLO ID	UP	PROVO UT
POCATELLO ID	UP	SLCITY ROPER UT
POCATELLO ID	UP	WEST COLTON CA
PROVISO IL	UP	C BLUFFS IA
PROVISO IL	UP	EIGHTENST KS
PROVISO IL	UP	HERINGTON KS
PROVISO IL	UP	MARTINEZ
PROVISO IL	UP	MIRA LOMA CA
PROVISO IL	UP	PHOENIX AZ
PROVISO IL	UP	SLCITY ROPER UT
PROVO UT	SP	DENVER CO
PROVO UT	SP	WEST COLTON CA
RENO/SPARKS NV	SP	ELKO NV
RENO/SPARKS NV	SP	NPLATTE NE
ROSEVILLE CA	SP	ALBINA OR
ROSEVILLE CA	SP	ANAHEIM CA
ROSEVILLE CA	SP	CITY INDUSTRY CA
ROSEVILLE CA	SP	ELKO NV
ROSEVILLE CA	SP	ENGLEWOOD
ROSEVILLE CA	SP	GEMCO CA

NEW MANIFEST BLOCKS AT MAJOR TERMINALS

Terminal	Yard	Block Name
SETTEGAST TX	UP	DALLAS TX
SETTEGAST TX	UP	ENGLEWOOD
SETTEGAST TX	UP	HEARNE TX
SETTEGAST TX	UP	NPLATTE NE
SETTEGAST TX	UP	SALEM-CR-AVON
SETTEGAST TX	UP	SALEM-CR-CONWAY
SETTEGAST TX	UP	STRANG TX
SHREVEPORT LA	UP	N LIT ROCK AR
SHREVEPORT LA	UP	RODEMACHER LA
SHREVEPORT LA	UP	SETTEGAST TX
SO SAN ANTONIO TX	UP	SAN ANTONIO TX
SPRING TX	UP	CHICAGO-BRC
SPRINGFLD IL	SP	CHICAGO-BRC
STOCKTON CA	UP	BAKERSFIELD CA
STOCKTON CA	UP	FRESNO CA
STOCKTON CA	UP	ROSEVILLE CA
STOCKTON CA	UP	WEST COLTON CA
STPAUL MN	UP	BUTLER WI
STRANG TX	SP	LIVONIA LA
STRANG TX	SP	N LIT ROCK AR
STRANG TX	SP	SALEM-CR-AVON
STRANG TX	SP	SALEM-CR-CONWAY
STRANG TX	SP	SETTEGAST TX
TAYLOR TX	UP	EIGHTENST KS
TEXARKANA AR	UP	HOPE AR
TEXARKANA AR	UP	MT PLEASANT TX
TEXARKANA AR	UP	SALEM-CR-COLUMBUS
TEXARKANA AR	UP	SALEM-CR-SELKIRK
TUCSON AZ	SP	CITY INDUSTRY CA
TUCSON AZ	SP	HERINGTON KS
TUCSON AZ	SP	MIRA LOMA CA
TUCSON AZ	SP	N LIT ROCK AR
TUCSON AZ	SP	SPRING TX
TUCSON AZ	SP	YUMA AZ
VILLA GROVE IL	UP	PINEBLUFF AR
W CHICAGO IL	UP	CHICAGO-BRC
WARM SPRINGS CA	SP	ALBINA OR
WEST COLTON CA	SP	ARDEN NV
WEST COLTON CA	SP	ARLINGTON CA
WEST COLTON CA	SP	DENVER CO
WEST COLTON CA	SP	FTWORTH TX
WEST COLTON CA	SP	HERINGTON KS
WEST COLTON CA	SP	LIVONIA LA
WEST COLTON CA	SP	MILPITAS CA
WEST COLTON CA	SP	MIRA LOMA CA
WEST COLTON CA	SP	MONTCLAIR CA
WEST COLTON CA	SP	N LIT ROCK AR

SP Train Densities

Segment				Adj. 1994 Base Trns/Day			Post-Merger Trns/Day			Change in # of
From Station	To Station	Road	Miles	Psgr.	Frgt.	Total	Psgr.	Frgt.	Total	of Trains/Day
Sparks NV	Roseville CA	SP	139	1	13	14	1	20	21	7
Roseville CA	Sacramento CA	SP	18	9	20	29	9	23	32	3
El Paso TX	Lordsburg NM	SP	148	1	28	29	1	44	45	15
Lordsburg NM	Cochise AZ	SP	85	1	29	30	1	44	45	15
Cochise AZ	Tucson AZ	SP	78	1	29	30	1	44	45	15
Tucson AZ	Nogales AZ	SP	63	0	1	1	0	1	1	0
Tucson AZ	Picacho AZ	SP	50	1	25	26	1	40	41	16
Picacho AZ	Phoenix AZ	SP	71	0	3	3	0	2	2	-1
Picacho AZ	Yuma AZ	SP	203	1	25	26	1	38	39	13
Yuma AZ	West Colton CA	SP	195	1	27	28	1	38	39	11
West Colton CA	City of Industry CA	SP	34	1	38	39	1	41	42	3
City of Industry CA	Bartolo CA (via UP)	SP	8	0	7	7	9	29	38	2
		UP		9	21	29				
Bartolo CA	Los Nietos CA	SP	4	0	7	7	0	2	2	-5
Los Nietos CA	Slauson Jct. CA	SP	9	0	7	7	0	2	2	-5
City of Industry CA	Los Angeles CA (via SP)	SP	19	1	32	33	1	34	35	3
Los Angeles CA	Slauson Jct. CA	SP	6	0	19	19	0	26	26	6
Slauson Jct. CA	Long Beach CA	SP	14	0	22	22	0	26	26	4
Los Angeles CA	Burbank Jct. CA	SP	8	35	6	41	35	3	38	-3
Burbank Jct. CA	Palmdale CA	SP	57	13	4	17	13	2	15	-2
Burbank Jct. CA	Oxnard CA	SP	55	19	6	25	19	5	24	-2
Oxnard CA	Santa Barbara CA	SP	37	10	6	16	10	5	15	-2
Santa Barbara CA	San Luis Obispo CA	SP	119	4	6	10	4	5	9	-2
San Luis Obispo CA	San Jose CA	SP	203	2	5	7	2	5	7	0
San Jose CA	Niles Jct. CA	SP	18	8	5	13	8	3	11	-2
Niles Jct. CA	Oakland CA (parallel routes)	SP	25	8	5	13	8	20	28	3
		UP		0	12	12				
West Colton CA	Palmdale CA (via Hiland)	SP	80	0	9	9	0	13	13	4
Palmdale CA	Mojave CA	SP	34	0	13	13	0	15	15	2
Mojave CA	Bakersfield CA	SP	67	0	14	14	0	15	15	2
Bakersfield CA	Fresno CA	SP	108	0	13	13	0	14	14	2
Fresno CA	Stockton/Lathrop CA	SP	106	0	13	13	0	15	15	2
Stockton/Lathrop CA	Martinez CA (via Mococo)	SP	48	0	0	0	0	4	4	4
Stockton/Lathrop CA	Sacramento CA	SP	46	0	13	13	0	15	15	2
Sacramento CA	Martinez CA	SP	57	9	8	17	9	7	16	-1
Martinez CA	Oakland CA	SP	32	17	8	25	17	11	28	3
Roseville CA	Marysville CA	SP	34	2	15	17	2	18	20	4
Marysville CA	Dunsmuir CA	SP	174	2	15	17	2	20	22	5
Dunsmuir CA	Klamath Falls OR	SP	106	2	15	17	2	20	22	5
Klamath Falls OR	Chemult OR	SP	74	2	15	17	2	22	24	6

Estimated Changes in Millions of Gross Tons

Segment				Adj. 1994 Base	Post Merger	% Change
From Station	To Station	Road	Miles	Tons	Tons	in Tons/Yr.
Provo UT	Salt Lake City UT (via SP)	SP	44	40	29	-42%
		UP		10		
Salt Lake City UT	Ogden UT (via UP)	SP	36	30	54	-48%
		UP		74		
Ogden UT	Alazon NV	SP	178	24	38	63%
Alazon NV	Winnemucca NV (UP-SP joint)	SP	182	23	59	9%
		UP		31		
Winnemucca NV	Flanigan NV (via UP)	SP	152	0	10	-62%
		UP		25		
Flanigan NV	Klamath Falls OR	SP	219	0	0	No Change
Winnemucca NV	Sparks NV	SP	175	22	35	58%
Sparks NV	Roseville CA	SP	139	20	33	63%
Roseville CA	Sacramento CA	SP	18	41	58	41%
El Paso TX	Lordsburg NM	SP	148	65	84	29%
Lordsburg NM	Cochise AZ	SP	85	60	74	24%
Cochise AZ	Tucson AZ	SP	78	60	76	27%
Tucson AZ	Nogales AZ	SP	63	3	4	25%
Tucson AZ	Picacho AZ	SP	50	59	82	39%
Picacho AZ	Phoenix AZ	SP	71	5	7	31%
Picacho AZ	Yuma AZ	SP	203	60	73	23%
Yuma AZ	West Colton CA	SP	195	59	73	24%
West Colton CA	City of Industry CA	SP	34	68	47	-32%
City of Industry CA	Bartolo CA (via UP)	SP	8	11	33	-7%
		UP		25		
Bartolo CA	Los Nietos CA	SP	4	11	4	-62%
Los Nietos CA	Slauson Jct. CA	SP	9	9	3	-63%
City of Industry CA	Los Angeles CA (via SP)	SP	19	49	47	-4%
Los Angeles CA	Slauson Jct. CA	SP	6	29	28	-5%
Slauson Jct. CA	Long Beach CA	SP	14	34	28	-19%
Los Angeles CA	Burbank Jct. CA	SP	8	15	11	-27%
Burbank Jct. CA	Palmdale CA	SP	57	9	8	-15%
Burbank Jct. CA	Oxnard CA	SP	55	9	8	-13%
Oxnard CA	Santa Barbara CA	SP	37	9	8	-13%
Santa Barbara CA	San Luis Obi CA	SP	119	8	7	-15%
San Luis Obi CA	San Jose CA	SP	203	8	7	-19%
San Jose CA	Niles Jct. CA	SP	18	9	7	-19%

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Enginemen (Cont.)	Marysville, KS	Year 2	3	0	0	
	Memphis, TN	Year 2	9	0	0	
	Mineola, TX	Year 2	1	0	5	To Be Negotiated
	Monroe, LA	Year 2	0	1	0	
	N Little Rock, AR	Year 2	34	0	0	
	Nampa, ID	Year 2	1	0	0	
	North Platte, NE	Year 2	0	4	0	
	Oakland, CA	Year 2	1	3	0	
	Oakley, KS	Year 2	0	16	0	
	Ogden, UT	Year 2	0	14	0	
		Year 3	12	0	0	
	Oroville, CA	Year 2	1	0	0	
	Palestine, TX	Year 2	12	0	59	To Be Negotiated
	Pekin, IL	Year 2	0	6	0	
	Phoenix, AZ	Year 2	1	0	0	
	Pine Bluff, AR	Year 2	1	15	0	
	Pocatello, ID	Year 2	5	0	0	
	Poplar Bluff, MO	Year 2	0	0	25	To Be Negotiated
	Portland, OR	Year 1	1	0	0	
		Year 2	0	47	0	
	Portola, CA	Year 2	26	0	0	
	Pratt, KS	Year 2	0	34	0	
	Proviso, IL	Year 2	2	0	0	
	Provo, UT	Year 2	1	0	0	
	Pueblo, CO	Year 2	39	0	0	
		Year 3	8	0	0	
	Quincy, IL	Year 2	17	0	0	
	Reno, NV	Year 1	3	0	0	
	Roseville, CA	Year 2	0	36	0	
		Year 3	0	2	0	
	S. Morrill, NE	Year 2	1	0	0	
	Sacramento, CA	Year 2	3	0	0	
	Salem, IL	Year 2	0	24	0	
	Salina, KS	Year 2	0	5	0	
	Salt Lake City, UT	Year 2	62	5	5	To Be Negotiated
	San Antonio, TX	Year 2	21	0	0	
	Seattle, WA	Year 2	0	3	0	
	Shreveport, LA	Year 2	3	10	0	
	Smithville, TX	Year 2	0	0	29	To Be Negotiated
	Sparks, NV	Year 2	0	10	0	
	St. Louis, MO	Year 2	14	0	0	
	St. Paul, MN	Year 2	5	0	0	
	Stockton, CA	Year 2	26	0	20	To Be Negotiated
		Year 3	8	0	0	
	Sweetwater/Toyah, TX	Year 2	0	30	0	
	Taylor, TX	Year 2	0	0	5	To Be Negotiated
	Texarkana, TX	Year 2	2	0	0	
	Topeka, KS	Year 2	1	0	0	
	Troup, TX	Year 2	1	0	0	
	Tucson, AZ	Year 2	0	71	0	
	Tucumcari, NM	Year 2	0	0	26	To Be Negotiated
	Tyler, TX	Year 2	7	0	0	
	Van Buren, AR	Year 2	6	0	0	
	Victoria, TX	Year 2	9	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
ıginemen (Cont.)	Waco, TX	Year 2	1	0	0	
	Warm Springs, CA	Year 1	2	0	0	
	Winfield, KS	Year 2	2	0	0	
	Yermo, CA	Year 2	10	0	0	
	Yuma, AZ	Year 3	0	0	4	Tucson, AZ
	Total Enginemen		**772**	**663**	**251**	
iborers	Denver, CO	Year 1	3	0	3	Pocatello, ID
		Year 2	0	0	10	N Little Rock, AR
	Eugene, OR	Year 1	7	0	0	
		Year 3	4	0	2	Albina, OR
	Houston, TX	Year 3	5	0	0	
	Kansas City, MO	Year 1	1	0	7	El Paso, TX
	Los Angeles, CA	Year 2	4	0	0	
	Oakland, CA	Year 1	1	0	0	
	Pueblo, CO	Year 2	3	0	0	
	Sacramento, CA	Year 3	0	0	3	Denver, CO
	San Antonio, TX	Year 1	4	0	0	
	Stockton, CA	Year 1	0	0	5	Roseville, CA
		Year 3	0	0	8	Roseville, CA
	Total Laborers		**32**	**0**	**38**	
achinists	Colton, CA	Year 1	1	0	0	
	Denver, CO	Year 1	5	0	10	Pocatello, ID
		Year 2	0	0	39	N Little Rock, AR
	Eugene, OR	Year 3	0	0	3	Albina, OR
	Ft. Worth, TX	Year 2	15	0	0	
	Grand Jct., CO	Year 2	0	0	6	Denver, CO
	Houston, TX	Year 3	0	0	18	El Paso, TX
	Kansas City, MO	Year 1	0	0	15	El Paso, TX
	Los Angeles, CA	Year 2	0	0	22	Denver, CO
	Oakland, CA	Year 1	2	0	0	
	Pine Bluff, AR	Year 1	1	0	1	Desoto, MO
	Pocatello, ID	Year 2	2	0	21	Denver, CO
	Pueblo, CO	Year 2	0	0	4	Denver, CO
	Sacramento, CA	Year 3	0	0	22	Denver, CO
	San Antonio, TX	Year 1	1	0	0	
	Stockton, CA	Year 3	0	0	21	Roseville, CA
	Total Machinists		**27**	**0**	**182**	
aintenance of Way	Beaumont, TX	Year 1	2	0	0	
	Colton, CA	Year 1	2	0	0	
	Denison, TX	Year 1	0	2	0	
	Denver, CO	Year 1	4	0	0	
	El Paso, TX	Year 1	0	2	0	
	Ft. Worth, TX	Year 1	0	1	0	
	Grand Jct., CO	Year 1	0	1	0	
	Gypsum, KS	Year 3	0	0	5	Mobile Gang
	Haswell, KS	Year 3	4	0	0	
	Hoisington, KS	Year 1	0	0	6	Salina, KS
		Year 3	3	0	0	
	Horace , KS	Year 3	0	0	5	Mobile Gang
	Houston, TX	Year 1	14	0	0	
	Kansas City, KS	Year 1	7	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Maintenance of Way (Cont.)	Klamath Falls, OR	Year 1	0	1	0	
	Laramie, WY	Year 1	0	17	0	
	Las Vegas, NV	Year 1	0	1	0	
	Lindsborg, KS	Year 3	3	0	3	Mobile Gang
	Los Angeles, CA	Year 1	0	1	0	
	McCracken, KS	Year 3	4	0	0	
	Mobile Gang	Year 1	244	45	0	
		Year 2	62	0	0	
	N Little Rock, AR	Year 1	0	10	0	
	Ogden, UT	Year 1	2	0	0	
	Paragould, AR	Year 1	2	0	0	
	Phoenix, AZ	Year 1	0	1	0	
	Pine Bluff, AR	Year 1	10	0	0	
	Pittsburg, CA	Year 1	0	5	0	
	Pocatello, ID	Year 2	0	0	2	Denver, CO
	Pueblo, CO	Year 1	0	1	0	
	Roseville, CA	Year 1	0	2	0	
	Salt Lake City, UT	Year 1	2	0	0	
	Scott City, KS	Year 3	5	0	0	
	St. Louis, MO	Year 1	9	0	0	
	Texarkana, TX	Year 1	4	0	0	
	Wells, NV	Year 1	6	0	0	
	Whitelaw, KS	Year 3	0	0	3	Mobile Gang
	Wichita, KS	Year 1	0	1	0	
	Total Maintenance of Way		**389**	**91**	**24**	
Non Agreement	Addis, LA	Year 1	0	0	1	Colfax, CA
	Amarillo, TX	Year 1	1	0	0	
	Anaheim, CA	Year 1	1	0	0	
	Atlanta, GA	Year 1	7	0	0	
	Avondale, LA	Year 1	0	0	1	Kansas City, MO
		Year 2	1	0	0	
	Bakersfield, CA	Year 1	0	0	1	Omaha, NE
	Beaumont, TX	Year 2	1	0	0	
	Benecia, CA	Year 1	0	0	1	Houston, TX
	Cheyenne, WY	Year 1	0	0	1	Denver, CO
		Year 2	0	0	3	Denver, CO
	Chicago, IL	Year 1	5	0	1	Decatur, IL
		Year 1	0	0	1	Jacksonville, FL
		Year 1	6	0	1	Toledo, IL
		Year 2	6	0	0	
	Cincinnati, OH	Year 1	4	0	0	
	Colfax, CA	Year 1	1	0	1	San Antonio, TX
	Colorado Springs, CO	Year 1	1	0	0	
	Colton, CA	Year 1	5	0	2	Omaha, NE
		Year 2	1	0	3	Oakland, CA
		Year 2	0	0	1	Omaha, NE
	Dallas, TX	Year 1	7	0	1	Austin, TX
		Year 1	0	0	10	Omaha, NE
		Year 2	3	0	0	
	Denver, CO	See Appendix				
	Detroit, MI	Year 1	6	0	0	
	Dolores, CA	Year 2	1	0	0	
	Dunsmuir, CA	Year 1	3	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Non Agreement (Cont.)	Eads, CO	Year 1	1	0	0	
	East St. Louis, IL	Year 1	1	0	0	
		Year 2	1	0	0	
	El Paso, TX	Year 1	2	0	1	Houston, TX
		Year 2	3	0	0	
	Elko, NV	Year 2	1	0	0	
	Eugene, OR	Year 1	2	0	0	
		Year 2	1	0	0	
	Fresno, CA	Year 1	2	0	0	
	Ft. Worth, TX	Year 2	1	0	1	Colorado Springs, CO
	Grand Jct., CO	Year 1	1	0	0	
		Year 2	1	0	2	Salt Lake City, UT
	Grand Prairie, TX	Year 1	1	0	0	
	Guadalajara, MX	Year 1	1	0	1	Mexico City, MX
	Gurdon, AR	Year 2	1	0	0	
	Helper, UT	Year 1	0	0	1	Salt Lake City, UT
	Herington, KS	Year 1	1	0	0	
		Year 2	1	0	0	
	Hinkle, OR	Year 1	0	0	1	Spokane, WA
	Houston, TX	Year 1	33	0	1	Denver, CO
		Year 1	0	0	1	El Paso, TX
		Year 1	0	0	1	Herington, KS
		Year 1	0	0	1	Kansas City, MO
		Year 1	3	0	1	Laredo, TX
		Year 1	0	0	4	Omaha, NE
		Year 1	3	0	4	San Antonio, TX
		Year 2	7	0	3	Longview, TX
		Year 2	0	0	6	Omaha, NE
		Year 2	3	0	1	St. Louis, MO
		Year 3	0	0	2	El Paso, TX
	Kansas City, KS	Year 1	5	0	1	Omaha, NE
		Year 1	0	0	1	Palestine, TX
		Year 1	0	0	1	Shreveport, LA
		Year 1	0	0	3	West Colton, CA
		Year 2	5	0	0	
	Kansas City, MO	Year 1	2	0	1	Council Bluffs, IA
	Klamath Falls, OR	Year 1	1	0	0	
	Lafayette, LA	Year 1	0	0	1	Livonia, LA
		Year 2	1	0	0	
	Lake Charles, LA	Year 1	1	0	0	
		Year 2	1	0	0	
	Laredo, TX	Year 1	2	0	0	
	Lenexa, KS	Year 2	0	0	6	Salt Lake City, UT
		Year 3	0	0	3	Salt Lake City, UT
	Long Beach, CA	Year 1	1	0	1	Chicago, IL
		Year 1	0	0	3	Lathrop, CA
		Year 1	0	0	1	Los Angeles, CA
		Year 1	0	0	1	N Little Rock, AR
		Year 1	0	0	1	Oakland, CA
		Year 1	0	0	1	Texarkana, TX
	Los Angeles, CA	Year 1	21	0	5	Montery Park, CA
		Year 1	0	0	16	Omaha, NE
		Year 2	4	0	0	
	Lufkin, TX	Year 2	1	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Non Agreement (Cont.)	Marysville, KS	Year 1	0	0	1	El Paso, TX
	Memphis, TN	Year 1	0	0	1	Brownsville, TX
		Year 1	0	0	1	Tucson, AZ
	Memphis, TN (Cont.)	Year 2	2	0	0	
	Mesquite, TX	Year 1	0	0	1	Houston, TX
	Mexico City, MX	Year 1	6	0	0	
	Minturn, CO	Year 1	1	0	0	
	Montclair, CA	Year 2	1	0	0	
	Monterey Park, CA	Year 1	2	0	7	Omaha, NE
		Year 2	3	0	1	St. Louis, MO
	Monterey, CA	Year 1	0	0	1	Los Angeles, CA
		Year 1	0	0	1	Omaha, NE
	Monterrey, MX	Year 1	3	0	0	
	N Little Rock, AR	Year 1	1	0	0	
	New Orleans, LA	Year 1	0	0	1	Laramie, WY
	New York, NY	Year 1	2	0	0	
	Oakland, CA	Year 1	5	0	1	Houston, TX
		Year 1	0	0	2	Omaha, NE
		Year 1	0	0	1	Roseville, CA
	Omaha, NE	See Appendix				
	Philadelphia, PA	Year 1	10	0	0	
	Phoenix, AZ	Year 1	2	0	0	
		Year 2	1	0	0	
	Pine Bluff, AR	Year 1	6	0	1	Desoto, MO
		Year 1	0	0	1	El Paso, TX
		Year 1	0	0	1	Laramie, WY
		Year 1	0	0	1	Livonia, LA
		Year 1	0	0	3	N Little Rock, AR
		Year 1	0	0	1	Omaha, NE
		Year 2	5	0	0	
	Pittsburgh, PA	Year 1	2	0	0	
	Pocatello, ID	Year 1	2	0	1	Roseville, CA
		Year 2	0	0	1	Omaha, NE
		Year 3	0	0	1	Tucson, AZ
	Portland, OR	Year 1	29	0	2	Calgary, AL
		Year 1	0	0	1	Nampa, ID
		Year 1	0	0	1	Omaha, NE
		Year 1	0	0	1	Seattle, WA
		Year 1	0	0	1	Spokane, WA
		Year 1	0	0	1	Texarkana, TX
		Year 2	2	0	0	
	Pueblo, CO	Year 1	2	0	1	Cheyenne, WY
		Year 1	0	0	1	Omaha, NE
		Year 2	3	0	0	
	Reno, NV	Year 1	0	0	1	Sacramento, CA
	Roseville, CA	Year 1	8	0	5	Omaha, NE
		Year 1	0	0	1	Pocatello, ID
		Year 1	0	0	1	Sacramento, CA
		Year 1	0	0	1	Salt Lake City, UT
		Year 1	0	0	1	Tucson, AZ
		Year 2	1	0	1	Omaha, NE
	Sacramento, CA	Year 1	8	0	1	Denver, CO
		Year 1	0	0	1	Sedalia, MO
		Year 2	1	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Non Agreement (Cont.)	Salida, CO	Year 1	1	0	0	
	Salt Lake City, UT	Year 1	3	0	1	Laramie, WY
		Year 1	0	0	1	Omaha, NE
	Salt Lake City, UT (Cont.)	Year 2	1	0	0	
	San Antonio, TX	Year 1	9	0	1	Ft. Worth, TX
		Year 1	0	0	1	Omaha, NE
		Year 2	5	0	1	Omaha, NE
	San Francisco, CA	Year 1	108	0	3	Chicago, IL
		Year 1	0	0	1	Denver, CO
		Year 1	0	0	1	Ft. Worth, TX
		Year 1	0	0	1	Houston, TX
		Year 1	0	0	1	Laredo, TX
		Year 1	0	0	1	Los Angeles, CA
		Year 1	0	0	79	Omaha, NE
		Year 1	0	0	1	Roseville, CA
		Year 1	0	0	12	Sacramento, CA
		Year 1	0	0	1	San Antonio, TX
		Year 1	0	0	2	San Francisco, CA
		Year 1	0	0	23	St. Louis, MO
		Year 1	0	0	1	Tucson, AZ
		Year 2	65	0	133	Omaha, NE
		Year 2	0	0	42	St. Louis, MO
		Year 3	2	0	15	Omaha, NE
	Schriever, LA	Year 1	1	0	0	
	Scott City, KS	Year 1	2	0	0	
		Year 2	1	0	0	
	Spring, TX	Year 1	4	0	0	
		Year 2	0	0	3	Livonia, LA
	St. Louis, MO	See Appendix				
	Stockton, CA	Year 1	2	0	3	Roseville, CA
		Year 2	1	0	0	
	Strang, TX	Year 2	2	0	0	
	Texarkana, TX	Year 1	1	0	0	
	Tokyo, JP	Year 1	1	0	0	
	Toronto, CN	Year 1	0	0	2	Vancouver, BC
	Tracy, CA	Year 1	0	0	1	Denison, TX
	Tucson, AZ	Year 1	2	0	1	El Paso, TX
		Year 1	0	0	1	Ft. Worth, TX
		Year 1	0	0	1	Omaha, NE
		Year 2	2	0	0	
	Victoria, TX	Year 2	1	0	0	
	Walnut Creek, CA	Year 1	19	0	0	
	Washington, DC	Year 1	0	0	1	Omaha, NE
	Winnemucca, NV	Year 1	1	0	0	
	Yermo, CA	Year 2	3	0	0	
	Yuma, AZ	Year 2	2	0	0	
	Total Non Agreement (See Appendix)		523	0	494	
Railway Supervisors	Avondale, LA	Year 1	1	0	0	
	Denver, CO	Year 1	3	0	2	Pocatello, ID
		Year 2	0	0	5	N Little Rock, AR
	El Paso, TX	Year 1	0	1	0	
	Eugene, OR	Year 1	2	0	0	

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Signalmen (Cont.)	San Francisco, CA (Cont.)	Year 1	0	0	21	Omaha, NE
	Scott City, KS	Year 3	1	0	0	
	Tucson, AZ	Year 1	1	0	0	
	Utica, KS	Year 3	1	0	0	
	Total Signalmen		47	0	43	
Trainmen	Alpine, TX	Year 2	5	0	0	
	Amelia, TX	Year 2	12	0	0	
	Avondale, LA	Year 2	29	0	0	
	Bakersfield, CA	Year 2	0	9	0	
	Big Spring, TX	Year 2	0	0	29	To Be Negotiated
	Bloomington, IL	Year 2	1	0	0	
	Boone, IA	Year 2	0	22	0	
	Brownsville, TX	Year 2	2	0	0	
	Cheyenne, WY	Year 2	0	28	0	
	Chicago, IL	Year 2	0	21	0	
	Chickasha, OK	Year 2	0	0	12	To Be Negotiated
	Clinton, IA	Year 2	0	3	0	
	Coffeyville, KS	Year 2	9	0	0	
	Corpus Christi, TX	Year 2	4	0	0	
	Council Bluffs, IA	Year 2	0	5	0	
	Council Grove, KS	Year 2	21	0	0	
	Dalhart, TX	Year 2	0	18	0	
	Dallas, TX	Year 2	7	14	0	
	Del Rio, TX	Year 2	0	16	0	
	Denver, CO	Year 2	17	16	0	
	Des Moines, IA	Year 2	1	0	0	
	Duncan/Enid, OK	Year 2	0	17	0	
	Dunsmuir, CA	Year 2	17	14	0	
	E. St. Louis, IL	Year 2	1	0	0	
	Eagle Grove, IA	Year 2	1	0	0	
	El Paso, TX	Year 2	11	42	0	
	Elko, NV	Year 1	5	0	0	
		Year 2	12	0	0	
	Eugene, OR	Year 1	12	0	0	
		Year 3	17	0	0	
	Fremont, NE	Year 2	0	4	0	
	Ft. Madison, IA	Year 2	0	40	0	
	Ft. Worth, TX	Year 2	15	19	0	
	Galesburg, IL	Year 2	0	1	0	
	Galveston, TX	Year 2	8	0	0	
	Grand Jct., CO	Year 2	26	0	5	To Be Negotiated
		Year 3	17	0	0	
	Harlingen, TX	Year 2	5	0	0	
	Hearne, TX	Year 3	4	0	0	
	Herington, KS	Year 2	18	0	0	
	Hinkle, OR	Year 2	0	4	0	
	Hoisington, KS	Year 2	32	0	0	
	Houston, TX	Year 2	74	8	0	
	Illmo, IL	Year 2	20	0	0	
		Year 2	0	0	15	To Be Negotiated
	Janesville, WI	Year 2	1	0	0	
	Jefferson City, MO	Year 2	4	0	0	
	Kansas City, KS	Year 3	32	0	3	Herington, KS

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Trainmen (Cont.)	Kansas City, MO	Year 2	13	0	0	
	Kingsville, TX	Year 2	0	1	0	
	Klamath Falls, OR	Year 2	0	0	20	To Be Negotiated
	La Grande, OR	Year 2	1	0	0	
	Lafayette, LA	Year 2	3	2	0	
	Lake Charles, LA	Year 2	8	0	0	
	Las Vegas, NV	Year 2	11	0	0	
	Livonia, LA	Year 2	0	6	0	
	Los Angeles, CA	Year 2	0	13	0	
		Year 3	108	0	0	
	Marshalltown, IA	Year 2	1	0	0	
	Marysville, KS	Year 2	3	0	0	
	Memphis, TN	Year 2	15	0	0	
	Mineola, TX	Year 2	1	0	5	To Be Negotiated
	Monroe, LA	Year 2	0	1	0	
	N Little Rock, AR	Year 2	37	0	0	
	Nampa, ID	Year 2	1	0	0	
	North Platte, NE	Year 2	0	4	0	
	Oakland, CA	Year 2	1	4	0	
	Oakley, KS	Year 2	0	18	0	
	Ogden, UT	Year 2	0	15	0	
		Year 3	23	0	0	
	Oroville, CA	Year 2	2	0	0	
	Palestine, TX	Year 2	13	0	63	To Be Negotiated
	Pekin, IL	Year 2	0	7	0	
	Phoenix, AZ	Year 2	1	0	0	
	Pine Bluff, AR	Year 2	3	17	0	
	Pocatello, ID	Year 2	5	0	0	
	Poplar Bluff, MO	Year 2	0	0	33	To Be Negotiated
	Portland, OR	Year 1	3	0	0	
		Year 2	0	52	0	
	Portola, CA	Year 2	28	0	0	
	Pratt, KS	Year 2	0	38	0	
	Proviso, IL	Year 2	6	0	0	
	Provo, UT	Year 2	2	0	0	
	Pueblo, CO	Year 2	43	0	0	
		Year 3	16	0	0	
	Quincy, IL	Year 2	19	0	0	
	Reno, NV	Year 1	5	0	0	
	Roseville, CA	Year 2	0	20	0	
		Year 3	12	4	0	
	S. Morrill, NE	Year 2	1	0	0	
	Sacramento, CA	Year 2	9	0	0	
	Salem, IL	Year 2	0	26	0	
	Salina, KS	Year 2	0	6	0	
	Salt Lake City, UT	Year 2	80	10	5	To Be Negotiated
	San Antonio, TX	Year 2	25	0	0	
	Seattle, WA	Year 2	0	3	0	
	Shreveport, LA	Year 2	5	11	0	
	Smithville, TX	Year 2	0	0	31	To Be Negotiated
	Sparks, NV	Year 2	0	11	0	
	St. Louis, MO	Year 2	27	0	0	
	St. Paul, MN	Year 2	5	0	0	
	Stockton, CA	Year 2	31	0	39	To Be Negotiated

Effects on Applicant Carriers' Employees

Classification	Current Location	Year	Jobs Abolished	Jobs Created	Jobs Transferred	Transfer Location
Trainmen (Cont.)	Stockton, CA (Cont.)	Year 3	10	0	0	
	Sweetwater/Toyah, TX	Year 2	0	33	0	
	Taylor, TX	Year 2	0	0	4	To Be Negotiated
	Texarkana, TX	Year 2	6	0	0	
	Topeka, KS	Year 2	2	0	0	
	Troup, TX	Year 2	2	0	0	
	Tucson, AZ	Year 2	0	79	0	
	Tucumcari, NM	Year 2	0	0	16	To Be Negotiated
	Tyler, TX	Year 2	8	1	0	
	Van Buren, AR	Year 2	7	0	0	
	Victoria, TX	Year 2	12	0	0	
	Waco, TX	Year 2	2	0	0	
	Warm Springs, CA	Year 1	2	0	0	
	Winfield, KS	Year 2	3	0	0	
	Yermo, CA	Year 2	20	0	0	
	Yuma, AZ	Year 3	0	0	48	Tucson, AZ
	Total Trainmen		1,081	683	328	
Yardmasters	Avondale, LA	Year 2	8	0	0	
	Beaumont, TX	Year 2	3	0	0	
	Eugene, OR	Year 1	6	0	0	
		Year 3	5	0	0	
	Grand Jct., CO	Year 3	6	0	0	
	Houston, TX	Year 2	13	0	0	
	Kansas City, KS	Year 3	5	0	0	
	Lafayette, LA	Year 2	2	0	0	
	Los Angeles, CA	Year 1	2	0	0	
	Oakland, CA	Year 1	3	0	0	
		Year 2	2	0	0	
	Portland, OR	Year 2	6	0	0	
	Proviso, IL	Year 2	3	0	0	
	Sacramento, CA	Year 2	1	0	0	
	San Antonio, TX	Year 2	5	0	0	
	Shreveport, LA	Year 2	5	0	0	
	St. Louis, MO	Year 2	5	0	0	
	Stockton, CA	Year 3	5	0	0	
	Total Yardmasters		85	0	0	

Service Date: April 12, 1996
Comment Due Date: May 3, 1996

ENVIRONMENTAL ASSESSMENT

FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY

-CONTROL AND MERGER-

SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
SPCSL CORPORATION, AND
THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

VOLUME 2 OF 5
RAIL LINE SEGMENTS, RAIL YARDS AND INTERMODAL FACILITIES



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CHAPTER 2.0
RAIL LINE SEGMENT, RAIL YARD, AND INTERMODAL FACILITY IMPACTS ARIZONA

This chapter provides an analysis of the potential environmental impacts resulting from increased traffic on rail segments and increased activity at rail yards and intermodal facilities in Arizona as part of the proposed merger. In analyzing these impacts, the Surface Transportation Board's (Board) Section of Environmental Analysis (SEA), consistent with its environmental rules at 49 CFR Part 1105.7(e), specifically considered: (1) impacts to air quality, (2) impacts to noise, (3) impacts to local, regional and national transportation systems, and (4) impacts to safety.

The following rail line segments, rail yards, and intermodal facilities would meet or exceed the Board's environmental analysis thresholds:

- Yuma to Picacho (SP).
- Picacho to Tucson (SP).
- Tucson to Cochise (SP).
- Cochise to Lordsburg, New Mexico (SP).
- Yuma rail yard (SP).
- Phoenix rail yard (SP).
- Nogales rail yard (SP).
- Phoenix intermodal facility (SP).

Each rail line segment, rail yard, or intermodal facility is discussed in this chapter by impact category, as follows:

- Air quality (Section 2.1).
- Air quality at grade crossings (Section 2.2).
- Noise (Section 2.3).
- Transportation systems (Section 2.4).
- Safety (Section 2.5).

If a rail line segment, rail yard, or intermodal facility would not experience impacts in any one of these categories as a result of proposed merger, no analysis was necessary. Accordingly, no discussion is provided.

Chapter 1 of this volume describes the thresholds established for analysis of potential air quality and noise impacts and the methods used to evaluate these and other potential impacts.

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Tucson AZ	Cochise AZ	78	15.1	51%	27%
Cochise AZ	Lordsburg NM	85	14.6	48%	24%
Tucson AZ	Nogales AZ	63	0.3	25%	25%

Two of the three rail segments listed above (Tucson to Cochise and Cochise to Lordsburg, New Mexico) were assessed for air quality impacts because they would exceed the Board's analysis thresholds. The estimated increased emissions from these two segments are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Tucson - Cochise	501	11.2	34.9	261.2	18.9	5.7
Cochise - Lordsburg NM	501	5.4	16.7	125.3	9.1	2.7
Total		**16.6**	**51.6**	**386.5**	**28.0**	**8.4**

Key:

HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Emissions from Increased Rail Yard Activity

The proposed merger would lead to an increase in rail yard activity of 22.6 percent in the Nogales Yard. This activity includes fueling, switching, and assembling of trains. The estimated increased emissions from this rail yard are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Yard	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Nogales	501	0.0	0.1	1.0	0.1	0.0

Key:

HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen oxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

The Pima AQCR (502) includes Pima County, portions of which are designated as nonattainment for sulfur dioxide (SO_2), total suspended particulates (TSP), particulate matter (PM-10), and carbon monoxide (CO). In considering potential environmental impacts, SEA assessed the potential air quality impacts of increased activity along the two rail segments. SEA concludes that increased rail operations would contribute to increased levels of ozone as well as other pollutants in the Pima nonattainment area.

Emissions from Increased Rail Segment Activity

The proposed merger would lead to changed activity on three rail segments that pass through or are connected to the Pima AQCR (502). The total length (in miles), the change in the number of trains per day on the segment, and the percent change in annual gross ton miles for each of these segments would be as follows:

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Tucson AZ	Cochise AZ	78	15.1	51%	27%
Picacho AZ	Tucson AZ	50	15.7	61%	39%
Tucson AZ	Nogales AZ	63	0.3	25%	25%

Two of the three rail segments listed above (Picacho to Tucson and Tucson to Cochise) were assessed for air quality impacts because they would exceed the Board's analysis thresholds. The estimated increased emissions from these two segments are shown below. The impacts of these emissions are discussed below in the section on Analysis of Activity.

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Tucson - Cochise	502	11.2	34.9	261.2	18.9	5.7
Picacho - Tucson	502	11.3	35.0	262.2	19.0	5.7
Total		**22.5**	**69.9**	**523.4**	**37.9**	**11.4**

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Analysis of Activity

The increased rail segment activity in this AQCR would result in increased levels of all

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Yuma - Picacho	503	20.5	63.8	477.2	34.6	10.3
W. Colton CA - Yuma	503	0.1	0.5	3.4	0.2	0.1
Total		**20.6**	**64.3**	**480.6**	**34.8**	**10.4**

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Emissions from Increased Rail Yard Activity

The proposed merger would lead to an increase in rail yard activity of 58.6 percent in the Yuma Yard. This activity would include fueling, switching, and assembling of trains. The estimated increased emissions from this rail yard are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Yard	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Yuma	503	0.0	0.1	0.7	0.0	0.0

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Analysis of Combined Activity

This section discusses the impact to the Mohave-Yuma AQCR based on the combined estimated emissions from the rail segments and the rail yard related to the proposed merger. The total estimated increases in pollutant emissions are listed below:

Emissions from Increased Rail Segment Activity

The proposed merger would lead to changed activity on two rail segments that pass through or are connected to the Maricopa AQCR (504). The total length (in miles), the change in the number of trains per day on the segment, and the percent change in annual gross ton miles for each of these segments would be as follows:

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Yuma AZ	Picacho AZ	203	13.4	52%	23%
Picacho AZ	Phoenix AZ	71	-0.9	-31%	-31%

One of the two rail segments listed above (Yuma to Picacho) was assessed for air quality impacts because it would exceed the Board's analysis thresholds. The estimated increased emissions from this segment are shown below. The impacts of these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Segment	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Yuma - Picacho	504	17.1	53.1	397.7	28.8	8.6

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

Emissions from Increased Rail Yard Activity

The proposed merger would lead to an increase in rail yard activity of 25.3 percent in the Phoenix rail yard. This activity would include fueling, switching, and assembling of trains. The estimated increased emissions from this rail yard are shown below. The impacts from these emissions are discussed below in the section on Analysis of Combined Activity.

Rail Yard	AQCR (ID No.)	Estimated Increase in Emissions (tons per year)				
		HC	CO	NO_2	SO_2	PM-10
Phoenix	504	0.2	0.5	3.5	0.3	0.1

Key:
HC = hydrocarbons, CO = carbon monoxide, NO_2 = nitrogen dioxide, SO_2 = sulfur dioxide, PM-10 = particulate matter less than 10 microns in diameter

definition of significance (as defined in Prevention of Significant Deterioration at 40 CFR 51.166) for all pollutants. The increased rail segment activity in this AQCR would result in increased levels of all pollutants, with the greatest increase in NO_2. These estimates of increased emissions are conservative, however, because they do not account for offsetting decreases that could result from truck-to-rail diversions. Overall, SEA concludes that while the proposed action is not subject to National Ambient Air Quality Standards General Conformity regulations, the proposed merger would result in increased levels of all pollutants in the Maricopa AQCR, primarily from mobile rail segment emissions.

2.1.5 Central Arizona (AQCR 505)

Rail operations in the Central Arizona AQCR associated with the proposed merger that require analysis, as specified by the Board's environmental rules at 49 CFR 1105.7(e)(5), consist of portions of two rail segments (Yuma to Picacho and Picacho to Tucson). There are no intermodal facilities or rail yards in this AQCR that exceed the Board's analysis thresholds. Based on increased activity levels as a result of the proposed merger, SEA examined the Central Arizona AQCR for potential air quality impacts. SEA concludes that adverse impacts to air quality could result from increased rail segment activity in this AQCR.

The Central Arizona AQCR (505) includes the counties of Gila and Pinal, portions of which are designated as nonattainment for total suspended particulates (TSP) and particulate matter (PM-10). In considering potential environmental impacts, SEA assessed the potential air quality impacts of increased activity along two rail segment and the rail yard. SEA concludes that increased rail operations would contribute to increased levels of ozone in the Central Arizona nonattainment area.

Emissions from Increased Rail Segment Activity

The proposed merger would lead to changed activity on three rail segments that pass through or are connected to Central Arizona AQCR (505). The total length (in miles), the change in the number of trains per day on the segment, and the percent change in annual gross ton miles for each of these segments would be as follows:

Origin Station	Destination Station	Miles	Change in # of Trains/Day	%Change in Trains/Day	%Change in Tons/Year
Picacho AZ	Phoenix AZ	71	-0.9	-31%	31%
Yuma AZ	Picacho AZ	203	13.4	52%	23%
Picacho AZ	Tucson AZ	50	15.7	61%	39%

Two of the three rail segments above (Yuma to Picacho and Picacho to Tucson) were

2.3 Noise Analysis

SEA performed noise analyses to identify noise-sensitive land uses where the proposed changes in operations could result in increases in noise exposure that meet or exceed the Board's environmental analysis thresholds at 49 CFR 1105.7(e)(6). The following discussion provides an estimate of the number of noise-sensitive receptors (e.g., residences, schools, churches) where the Board's thresholds would be exceeded, potentially causing an adverse increase in noise exposure. The noise level impact assessment was based on the baseline and projected activity level data provided by UP/SP.

2.3.1 Increased Rail Segment Activity

West Colton, California to Yuma

This rail segment, which currently has 27.7 trains/day, would experience an increase of 11.1 trains/day (a 24.1 percent change in gross ton-miles per year) as a result of the proposed merger. The projected increase in train volume and gross ton-miles on this segment would cause less than a 2 dBA increase in the L_{dn}. No adverse noise impacts are expected.

Yuma to Picacho

This rail segment, which currently has 25.8 trains/day, would experience an increase of 13.4 trains/day (a 23 percent change in gross ton-miles per year) as a result of the proposed merger. The projected increase in train volume and gross ton-miles on this segment would cause less than a 2 dBA increase in the L_{dn}. No adverse noise impacts are expected.

Picacho to Tucson

This rail segment currently has 25.7 trains/day and would experience an increase of 15.7 trains/day (a change of 38.6 percent in gross ton-miles per year) as a result of the proposed merger. This change in through train activity would result in an increase in the L_{dn} of 2.1 dBA. Most of these noise impacts would occur at or near grade crossings where train horns are sounded as a warning. Currently, the noise impact zone at grade crossings extends approximately 750 feet perpendicular to the tracks, whereas after the proposed merger the noise impact zone would increase to 1,000 feet. The only large population center that could be affected by noise from this line segment is the City of Tucson.

The line segment cuts through the northwestern portion of Tucson, commencing at the yard along Aviation Parkway between 22nd and 36th Streets. Although much of the alignment is bordered by industrial and commercial land uses, there are some dense residential areas with

there would be no noise impacts within the 65 dBA L_{dn} contour.

2.4 Transportation Systems

The Board's environmental rules at 49 CFR 1105.7(e)(2) require a description of the effects of the proposed merger on local and regional transportation systems. The primary transportation impacts of the proposed merger are related to: (1) additional truck traffic generated at those intermodal facilities where intermodal activity is projected to increase, and (2) increases in roadway delays at grade crossings as a result of increased train traffic on rail segments.

The impacts near intermodal facilities would result from increased truck traffic using local roadways to enter and exit the intermodal facility. For those facilities with an expected increase of 50 trucks or more per day, SEA analyzed the impacts of this increased traffic on the local roadway system in terms of increases in daily and peak hour traffic. SEA collected traffic count data from local and state transportation officials for this analysis. While the offsetting benefits of the proposed merger were not quantified at the local level, the traffic impacts from added truck traffic at intermodal facilities would be partially offset in many localities by truck-to-rail diversions and consolidation of operations. SEA concludes that the impacts from the single intermodal facility in Arizona would not cause adverse impacts on the local transportation system.

SEA addressed the concerns of local communities about increased traffic delays at grade crossings through an evaluation of vehicle delay and wait times at grade crossing locations. It is important to note that the acceptability of delays at grade crossings varies substantially based on local conditions such as the location of land uses by type, availability of alternative travel routes, the degree of use by emergency vehicles, and other local variables. While the time of delay at grade crossings would increase proportionately with the increase in train traffic, most of the grade crossings in Arizona carry fewer than 5,000 vehicles per day. SEA concludes that increases in vehicle delay and/or wait time due to merger-related operational changes would not be excessive.

2.4.1 Intermodal Facilities

Phoenix

The SP Phoenix facility is located on West Harrison Street. Truck transportation to the facility is via U.S. Route 60, Interstate 17 and 7th Avenue or 15th Avenue. This intermodal facility currently serves approximately 68 trucks per day. After the proposed merger, this facility would experience an average increase of 50 trucks per day based on UP/SP projections. SEA obtained Average Daily Traffic (ADT) counts for the vicinity of the intermodal facility from the City of Phoenix. A count performed in 1994 showed an ADT of 25,396 along 7th Avenue, north of Lincoln Avenue. The projected increase of 50 trucks per day at this facility represents a 0.4 percent increase in ADT on

Tucson to Cochise

On the Tucson to Cochise line, average rail traffic is proposed to increase from 29.6 to 44.7 trains per day, a train volume increase of about 51 percent. There are 14 grade crossings on this segment, 2 of which have ADT counts greater than 5,000 vehicles per day. At typical speed grade crossings along the route (e.g., train speed of 55 mph), delay to vehicle traffic would increase from 50 minutes (pre-merger) to 76 minutes (post-merger) over a 24-hour period. At the highest speed grade crossings (e.g., train speed of 70 mph), delay to vehicle traffic would increase from 44 minutes (pre-merger) to 66 minutes (post-merger) over a 24-hour period. At the lowest speed grade crossings (e.g., train speed of 40 mph), delay to vehicle traffic would increase from 62 minutes (pre-merger) to 93 minutes (post-merger) over a 24-hour period. The maximum queue length per train due to peak hour vehicle traffic would range from one to nine vehicles, and the corresponding delay per vehicle would vary from 1.04 to 1.35 minutes.

Cochise to Lordsburg, New Mexico

On the 85-mile Cochise to Lordsburg, New Mexico line, average rail traffic is proposed to increase from 30.3 to 44.9 trains per day, a train volume increase of about 48 percent. There are nine grade crossings in Arizona, none of which have ADT counts greater than 5,000 vehicles per day. At typical and high speed grade crossings along the route (e.g., train speed of 70 mph), delay to vehicle traffic would increase from 45 minutes (pre-merger) to 67 minutes (post-merger) over a 24-hour period. At the lowest speed grade crossings (e.g., train speed of 60 mph), delay to vehicle traffic would increase from 49 minutes (pre-merger) to 73 minutes (post-merger) over 24-hour period. The maximum queue length per train due to peak hour vehicle traffic would range from one to three vehicles, and the corresponding delay per vehicle would vary from 1.04 to 1.11 minutes.

2.5 Safety

SEA assessed a number of safety issues associated with the proposed merger, including the probability of increased accidents at grade crossings, and the risks associated with increased shipments of hazardous commodities.

2.5.1 Grade Crossing Safety

Accidents at grade crossings are a function of the number of trains, train speed, number of train tracks, grade crossing condition and warning facilities, roadway condition and number of lanes, and amount of roadway traffic. Since the proposed merger would not result in any new grade crossings and would affect only the number of trains passing through existing grade crossings, the probability of an increase in the number of accidents at grade crossings would

activities in Arizona are summarized below:

- Natural Resources Conservation Service does not have any comments on this proposal.

- Arizona Department of Environmental Quality does not have any comments on this proposal.

2.7 Suggested Mitigation

No specific mitigation measures were suggested for the proposed changes to rail line segment, rail yard, or intermodal facility operations in Arizona by the various parties consulted in the process of preparing the EA for the proposed merger. (See **Volume 5**, Appendices D and E, for agency consultation lists.)

2.8 SEA Recommended Mitigation

This section contains the mitigation measures that SEA recommends that the Board impose in any final decision approving the changes to rail line segment, rail yard, or intermodal facility operations in Arizona. SEA will consider all comments on the EA in making its final recommendation to the Board. The Board will consider SEA's recommendations and the environmental record in making its final decision. SEA's recommended mitigation is as follows.

Air Quality

1. UP/SP shall consult with appropriate Federal, state, and local agencies responsible for regulating air quality in AQCRs 501, 502, 503, 504, and 505 concerning any possible mitigation measures to reduce any potential adverse emissions from the rail segments, rail yards, and intermodal facilities in these regions. UP/SP shall advise SEA of the results of these consultations.

Noise

1. To reduce potential noise level impacts to sensitive receptors along the Yuma to Picacho, Picacho to Tucson, Tucson to Cochise, and Cochise to Lordsburg, New Mexico rail line segments, UP/SP shall consult with appropriate state and local agencies to develop noise abatement plans. The Applicant shall advise SEA of the results of these consultations and provide SEA with a copy of any resulting noise abatement plans.

Ex. E-21

UP/SP-303

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY -- OVERSIGHT

APPLICANTS' REPORT ON MERGER AND CONDITION IMPLEMENTATION

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July 1, 1997

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of Way Employees and the Brotherhood of Railroad Signalmen, although a tentative agreement has been reached with BMWE to consolidate UP and SP work in California.

b. Non-Agreement Employees

Implementing agreements with unionized employees are not the only prerequisite for integrated operations. There also must be an orderly integration of the non-agreement employees who manage and administer the railroad.

As the merger date approached, human resources experts from the two railroads worked through such issues as employee selection, severance packages, adjustments to compensation, employee benefits, training for new positions and communications with employees. Under the resulting plans, all UP and SP non-agreement employees were assured that they would be offered a "good job or a good severance" -- and that is what happened.

Interested SP and UP applicants were considered and interviewed for non-agreement jobs with the new system, and the best employee was selected for each merged-company position. On a company-wide basis, over 580 non-agreement employees qualified for severance packages. A number of UP and SP departments, including Marketing, Finance, Labor Relations, Law, Risk Management and Contract Services, are fully integrated. Most of the remaining departments should be fully integrated by the end of July.

The non-agreement integration process is proceeding smoothly, and UP and SP managers are cooperating effectively. UP/SP's management capabilities will continue to improve as employees learn their new jobs and continue to work with each other. As employees relocate, primarily to Omaha and St. Louis, redundant facilities have been or are being closed, with SP's headquarters offices in Denver and San Francisco expected to be vacated by year-end.

3. Merger-Related Capital Investments

In their merger application, UP and SP proposed to invest over $1.3 billion in capital over four years, beyond the amounts the two railroads would have spent separately, to implement their merger and achieve its benefits. UP/SP is now on course to spend even more than that to combine the two railroads. Total merger-related capital investment is likely to exceed $1.5 billion over a five-year period. Such investments were entirely beyond SP's means.

This massive infusion of capital has begun in earnest. This year, UP/SP is spending over half a billion dollars on merger-related capital projects. UP/SP is coordinating its capital investments with the phased implementation of the merger by targeting spending on those projects that are necessary to build the foundation for future service improvements and efficiencies. For example, UP/SP is investing $108.8 million -- $57.8 million more than UP would

Portland. Volumes have already increased to the point that UP/SP is considering adding an additional train. Significant numbers of loads are being handled in international steamship containers that would have moved empty before the merger. Clearance work to be completed next year will allow the service to be expanded to include high-cube doublestacks.

d. Sunset Route Intermodal Service

An important merger objective was to deploy UP's service planning capability and operating systems to cure SP's chronic service problems. UP/SP planners have entirely redesigned SP's intermodal services on the Sunset Route connecting Memphis, New Orleans, Houston, and San Antonio with El Paso, Tucson, Phoenix, and Southern California. This "re-plan" went into effect on May 13. SP intermodal trains on this route were unreliable and inefficient because they did extensive switching and block exchanging en route, often stopping seven or eight times between origin and destination. As well as impairing service, this increased SP's costs and caused severe terminal congestion.

UP/SP simplified the operation of intermodal trains in this corridor by emphasizing ramp-to-ramp services and limiting the amount of work that trains perform en route.[6/]

[6/] Under normal conditions, no train adds or sets out cars more than three times between origin and destination, eliminating 118 weekly setouts and pickups. Terminal congestion is reduced, because the new service plan eliminates (continued...)

To improve service further, UP/SP and NS are shifting one set of trains from the New Orleans gateway to the Memphis gateway. The new Sunset Route schedules will reduce crew costs, while also improving reliability.

e. Midwest-California Intermodal Service

UP/SP will shortly institute a similar restructuring of SP intermodal services connecting Chicago, St. Louis and Kansas City with California in order to provide more reliable and customer-responsive service.[7] SP intermodal service in this corridor has been unreliable because SP operated separate westbound trains from each of three intermodal ramps in Chicago and from St. Louis, each with traffic to multiple destination ramps in California. Those trains swapped blocks or were switched at many locations en route.

The merged system will restructure SP's intermodal service so that trains from the three Chicago ramps (IMX,

---

[6] (...continued)
26 setouts and pickups at City of Industry, 36 at Tucson, 36 at Pine Bluff, 9 at El Paso, and 11 at San Antonio.

[7] UP/SP had intended to implement this restructuring, and to launch several of the other new services described in this report, during June, but was prevented from doing so by the interim stay granted to the UTU. In its decision vacating the UTU stay, the Board expressed doubt that the stay could have had the severe impacts described by UP/SP in a June 19 petition, which the Board correctly noted should have been filed earlier. Finance Docket No. 32760 (Sub-No. 22), Decision served June 26, 1997, p. 2 n.2. UP/SP assures the Board that it did experience the service delays and financial costs described in that filing, and apologizes for its delay in bringing those facts to the Board's attention. UP/SP appreciates the Board's prompt action on the UTU appeal.

§ 152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 164. Construction of provisions

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

§ 151. Definitions; short title

When used in this chapter and for the purposes of this chapter—

First. The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of title 49, as of December 31, 1995,[1] and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad; and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

[1] So in original.

45 UNITED STATES CODE

§ 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

49 UNITED STATES CODE

49 § 11326

§ 11326. Employee protective arrangements in transactions involving rail carriers

(a) Except as otherwise provided in this section, when approval is sought for a transaction under sections 11324 and 11325 of this title, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) of this title. Notwithstanding this part, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Board (or if an employee was employed for a lesser period of time by the rail carrier before the action became effective, for that lesser period).

(b) When approval is sought under sections 11324 and 11325 for a transaction involving one Class II and one or more Class III rail carriers, there shall be an arrangement as required under subsection (a) of this section, except that such arrangement shall be limited to one year of severance pay, which shall not exceed the amount of earnings from the railroad employment of that employee during the 12-month period immediately preceding the date on which the application for approval of such transaction is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of that employee with the acquiring carrier during the 12-month period immediately following the effective date of the transaction. The parties may agree to terms other than as provided in this subsection.

(c) When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers, this section shall not apply.

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ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

THOMAS M. CURLEY, CHARLES O. ERNST, KENNETH GROH,
MARTIN MOLLAND, TERRY MARTIN, WARREN RICHTER,
ROBERT SANFORD, and BILL TRAUTMAN, Claimants

VS.

MISSOURI PACIFIC RAILROAD COMPANY, Carrier

Pursuant to Article IV of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000.

ARBITRATOR: DAVID H. BROWN, selected by the Parties

APPEARANCES: For the Carriers:

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For the Claimants oe

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THE ISSUES

ISSUE No. 1 Did Claimants have their right to arbitration?

ISSUE NO. 2 Are Claimants "employees" within the meaning of New

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Furthermore, relative to the use or abuse of judicial discovery procedures, we are of the opinion that an arbitrator under New York Dock has inherent power to authorize discovery in aid of arbitration. Certainly there is nothing in the record which would justify the denial of Claimants' right to arbitration under Section 11,

DECISION

We hold that the dispute before us is arbitrable.

ISSUE NO* 2 (Remstated)

ARE THE CLAIMANTS "EMPLOYEES" WITHIN THE MEANING OF NEW YORK DOCK CONDITIONS?

THE EVIDENCE

Martin Leonard Holland, at the time his employment with MoPac was terminated on June 17, 1983, held the position of Director of Marketing, Lumber, Forest Products and Paper, drawing a salary of

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$57,600.00 per year.

At the time of the severance of his employment relationship with the carrier, Mr. Holland was-five levels on the organizational chart below MoPac President R. G. Flannery, Mr. Holland reported to General Manager Marketing@4ommodities B. J. Maeser. who reported to Assistant Vice President Marketing J. R. Colvin, who reported to Vice Presidentm@Harketing J. M. Ostrow, who reported to Senior Vice President@@Marketinq G. A. Craig, who reported to President Flannery.

Mr. Holland had commenced his employment with MoPac in 1962, beginning as a mail clerk and working in a total of 27 different jobs during his railroad-career. In his position as a director of



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marketing, Mr. Holland had three people who reported to him directly and ten reporting to him indirectly, including a secretary who worked for the entire group. The principal function of the group was to Wake rate adjustments that hopefully would get us some business that

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Sep 13 04 02:00p John E. Grother 2813594702 p.4

produced a profit'.

Unlike some of his superiors, Mr. Holland received no special benefits such as bonuses, country club memberships, co4pany automobile or use of a company plane or business car. Nevertheless, Mr. Holland was said to be 'totally responsible for marketing and revenues associated with lumber, forest products, paper and consumer goods" amounting to over $184 million per annum. His written job description included the following: (1) directing the operation of the annual Lumber, Forest Products, Paper and Consumer Goods Commodity Module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on a course of action essential to the achievement of revenue and profitability of objectivities; and (3) establishing priorities and measuring the result of the productivity of subordinates,

Upon his leaving the carrier, Mr. Holland commenced working for an insurance agency owned by his family. Mr. Holland testified that in his hew oployment he received none of the fringe benefits which he received with -the railroad, and that he is making substantially less money,

However, before he left the carrier, Mr. Holland was offered a job in Omaha comparable with the one which he had in St. Louis. He refused

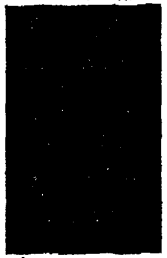


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such offer because of family considerations and was then offered a better job in Omaha, paying $80 thousand per year with the prospect of an annual bonus amounting to $20 thousand. Again he opted for personal considerations and refused the offer. Mr. Holland's expertise is, and his experience has been, in the establishment of freight rates. In his last position with the railroad he had no authority to hire or fire employees but could recommend disciplinary action.

Charles Ernst, at the time of his leaving the employment of Carrier, was Director of Marketing Coal, Ores, Aggregates and Metals, being paid a salary of $55,080 per year. Mr. Ernst began his employment with MoPac in 1958 as a messenger. Ten years later he was promoted to his first supervisory position. As of the date of the hearing herein Mr. Ernst was fiftywfive years of age.

In his position as a director of marketing with MoPac Mr. Ernst was at the same organizational level as Mr. Holland and in the same chain of command. And although his salary was slightly less than Mr. Holland's, he supervised eighteen people and was said to be responsible for nearly 600million in revenue per year.

Like Mr. Holland, his chief responsibility was working out-rates with retpect to the commodities under his jurisdiction.

Sep 13 04 02:00p John E. Grother 2813594702 P.5
09/13/04 15:49 TX/RX NO.5356 P.005

effects of numerous mergers, To contend that only subordinate officials and other employees eligible for unionization will suffer adverse effects from a merger is to ignore reality.

On three, and only three, occasions, the Congress of the United States has definitively addressed the question of what employees should be covered by protective conditions imposed for the purpose of minimizing the adverse effects resulting from reduction of jobs in the railroad industry. Actually, Congress has found it easier to simply exclude certain classes of employees while affording broad coverage for the remainder, Let us examine the legislation.

On November 4. 1979, Congress passed the Milwaukee Railroad Restructuring Act (now Title 45, Chapter 18, Sections 901 et seq). Section 908 made provision for negotiations between the Milwaukee Road and labor organizations representing the employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad (conditions quite similar to those resulting from mergers, control or consoildations). Section 907 made provision for preferential hiring for all employees separated or furloughed from the Milwaukee (other than for cause) prior to April 1. 1984, and Section 909 provided for suDolementary unemployment Insurance for all employees affected by reduction In service. (all underlining supplied) And Section 902 (4) states:

'..the term 'employee' -

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Sep 13 04 02:00p John E. Grother 2813594702 P.6



image:

'(A) includes any employee of the Milwaukee Railroad who worked on a line of such railroad the sale of which became effective on October 1. 1979; but
'(S) does not includt any individual serving as president, vice. president, secretary, treasurer, comptroller, counsel, member of the board of directorg, or any other person performing such functions;'

Pursuant to Section 908, negotiations between the Milwaukee and the labor representatives of its employees took place, The result was adoption of New York Dock Protective Conditions in an instrument identified as Appendix S. Most significantly, Milwaukee management then made the terms of Appendix B applicable to all nonmagreement employees except those excluded by Section 902 (4)(A)e

On May 309 1980, the Congress passed the Rock Island Railroad Transition and Employee Assistance Act (now Title 45, Chapter 19, Sections 1001 et seq).

Section 1001 cited a need for adequate protection provisions to insure uninterrupted continuation of services over Rock Island lines and avoid serious repercussions on the economies of the states served

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Sep 13 04 02:00p John E. Grother 2813594702 P.7

by the railroad, Section 1002 included the following among its

*Definitions":
'(,,4) 'employee' includes any employee of the Rock Island Railroad a,s of August 1. 1979, but does not Include any individual serving as president, vice@president,,secretary, treasurer, comptroller. counsel, member of the board of directors, or any other person performing such functions;Q
Section 1005 imposed on the Secretary of Transportation and *the

representatives of the various classess and crafts of employees' (not 'labor organizations as in the Milwaukee conditions) responsibility

for negotiating protective conditions, with proviso that if they were

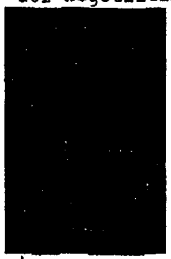


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un ab l e to re ach agreement . the S ecret ary wou l d un i l at er a l l y pr es c r i be

such conditions,

(2) On October 14, 1980, the Sta/gers Rail Act of 1980, Public Lae 96-448 was enacted. Section 219(g) states:

> Khe Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendmentsmade by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to Section 11347 of Title 49, United State Code. For purposes of this subsection the

Sep 13 04 02:01p John E. Grother 2813594702 P.8
09/13/04 15:49 TX/RX NO.5356 P.008

term 'employees' does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions."

From the foregoing it is evident that each time the Congress has made provision for protective conditions for employees adversely affected by circumstances or events other than mergers, Congress has extended eligibility to all employees below the rank of vice president. The drawing of this line of demarcation is consistent with the philosophy that the protection is due only to those employees who have had little if any control over developments which precipitated the need for protection, It will be remembered that this thinking was advanced by the U. S. Circuit Court of Appeals in Edwards ve Southern Railwayl supra.

This doctrine is also consistent-with the definition of gemployee" found in the unabridged Webster's Third New International Dictionary (G. & C. Merriam Co.), reading as follows: 'One employed b another, .y usually in a position below the executive level and usually for wagesO. (Emphasis supplied)

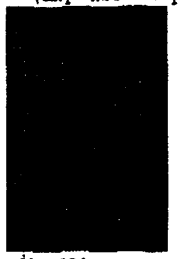


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SUYYA;Y OF RATIONALE

We summarize the reasons for our holding on this issue:

14 We believe that while all of the congressional legislation reflects an intent to cover a broad range of employees with protection against the adverse effect of mergers, none of such legislation indicates an intent to exclude from protection employees at the level of these claimants, None of the claimants had the power to affect the merger of MPwUP4P nor the influence to cushion its impact. Claimants were not really executives of MoPac, and in spite of the large sums of income for which they were nominally responsible, we would venture to say that none of their names was ever mentioned in the company's annual report to its stockholders.

2. The use of the definition Oemployee" found in the Railway Labor Act is insupportable. Such act has no relevancy insofar as the scope of employee protective conditions is concerned, The fact that the Interstate Commerce Commission Act authorizes the NMB to appoint arbitrators is likewise not relevant to the Issue before us.

3. The court cases and arbitral awards relied on by the carrier have been carefully considered. We are unable to recognize them as authoritative precedent.

4. We believe our decision is consistent with the authority delegated us ty the Interstate Commerce Commission and with the

09/13/04 15:49 TX/RX NO.5356 P.010

Commission's consistent adherence to what it perceives to be the intent of Congress.

[redacted]

image:

DECISION

We hold that each of the claimants was an employee of MoPac within themeaning of New York Dock conditions,

ISSUE NO, 3 (Remstated)

IF THE CLAIMANTS ARE EMPLOYEES WITHIN THE MEANING OF-NEW YORK DOCK ARE THEY "DISMISSED EMPLOYEES" UNOER THE TERMS OF NEW YORK DOW"

ANALYSIS AND OPINION

m"m

Since each of the claimants was offered a position in Omaha comparable to that which he occupied in St. Louis, none of the claimants is a dismissed employee under the definition set forth in New York Dock conditions,

DECISION

Sep 13 04 02:02p John E. Grother 2813594702 P.11

09/13/04 15:49 TX/RX NO.5356 P.011

APPENDIX 6

(1) GH25

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE, N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

September 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Re: Grother/Union Pacific-NYD

Dear Ms. Ross:

This is in response to the carrier's submission, received September 14, 2004, with particular reference to the statement, at p. 41, that Mr. Ken Packard will be present as a witness at the hearing scheduled for October 12. Thus, the carrier's case--on the critical issue of causality--has not been presented by any advance written submission of facts or statements from knowledgeable personnel; rather, it has been deferred, and is now projected to be through "live" testimony from Mr. Packard, former Service Unit Superintendent (Division Superintendent). I deem it highly unfair, prejudicial, and serves to deny a fair hearing to the employee, for the carrier's case to be presented in this manner--the employee first learning of the only known opposition statement orally at the hearing, without advance opportunity to check facts or to gather further information, and in an environment (Washington DC) far removed from Tucson AZ. I expressed a premonition the carrier might advance what it has now seeks to achieve procedurally, per my letter of May 28, 2004. (Employee Ex. E-15).

I attempted to reach W.E. Loomis yesterday, having finished my initial review of the carrier's written submission over the weekend, to first raise my concerns with him. However, I am advised he is on vacation until September 28. In accordance with his wishes expressed on his answering tape, I am sending a copy of this letter to Mr. Richard D. Meredith, by overnight express.

I consider this tactic of deleting a critical element for a written submission, with substitution by a "live" hearing submission, to be contrary to the Memorandum of Agreement (MOA) governing procedures for this arbitration. (Employee Ex. E-16; UP Ex. 19). Paragraph D provides that the partisan parties shall serve written submissions. To be sure, there is a safety valve for witnesses should such become necessary, but the written submission and witness provisions must be read together and in harmony with each other; here, the "live" and unannounced testimony is to be from the employee's asserted immediate supervisor, and such oral submission on an important matter would be contrary to the agreement for written submissions in advance of the hearing.

It is my request that the committee direct the carrier member to serve the written statement of Mr. Ken C. Packard, in its entirety, to be verified under oath, on or before October 1, 2004, or else the individual be precluded from appearing at the October 12 hearing. This is not onerous--the employee has submitted five verified statements in his written submission.

Very truly yours,

Atty. for John E. Grother

cc: W.E. Loomis
R.D. Meredith

(2)

UNION PACIFIC RAILROAD

FAX TRANSMITTAL COVER SHEET

TO: Ms. Lynette Ross

CC: Mr. Gordon MacDougall

FROM: Marilyn Ahart

PHONE: (402) 544-2614

DATE: September 27, 2004

PAGES INCLUDING COVER: 3

Ms. Ross

This is the Carrier's response to Mr. MacDougall's letter of September 21, 2004.

A copy of this letter will also be mailed to all parties today.

Marilyn Ahart

September 24, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

Dear Ms. Ross:

This refers to Mr. Gordon P. MacDougall's letter of September 21, 2004. In that letter, Mr. MacDougall asks for the following:

> *"It is my request that the committee direct the carrier member to serve the written statement of Mr. Ken C. Packard, in its entirety, to be verified under oath, on or before October 1, 2004, or else the individual be precluded from appearing at the October 12 hearing."*

Union Pacific opposes Mr. MacDougall's request for the following reason:

The Memorandum of Agreement between John E. Grother and Union Pacific Railroad Company dated June 18, 2004, provides for the following in Paragraph D:

> *"At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statement of fact, supporting evidence, data and argument."* (emphasis added)

The Memorandum of Agreement has no requirement for a written statement. The Memorandum of Agreement does not link the requirement for a written submission with the opportunity to present witnesses - the requirement and the opportunity occur at different times (pre-hearing and at the hearing). The Memorandum of Agreement clearly provides "the parties ... may present witnesses" without restriction. On this basis alone, Mr. MacDougall's request must be denied.

In addition, Union Pacific opposes Mr. MacDougall's request for the following reasons:

(1) Mr. MacDougall's preference for "verified statements" over live testimony stands centuries of Anglo-American jurisprudence on its head. Live testimony, where the fact-finder may judge a witness's credibility, is always preferable to "verified statements." This is especially true in this case where the "verified statements" are clearly self-serving or Grother-serving. Mr. Packard, Mr. Grother's immediate supervisor on the Tucson Service Unit (not, as Mr. MacDougall wrongfully says, "asserted immediate supervisor") should be allowed to testify without the requirement of a written statement.

William E. Loomis
General Director

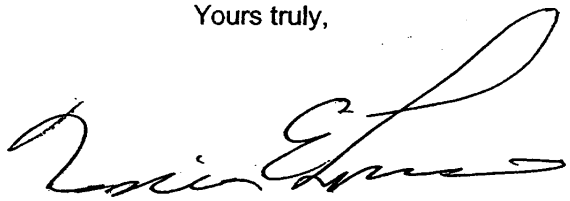
UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710

(2) Mr. MacDougall implies that witness testimony from Mr. Packard will somehow surprise Mr. Grother. Nothing could be farther from the truth. Union Pacific advised Mr. Grother in its submission that Mr. Packard would be a witness at the hearing. In fact, Union Pacific specifically advised Mr. Grother in its submission that Mr. Packard was "a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997." Mr. MacDougall cannot claim surprise.

(3) Finally, Mr. MacDougall furnishes no support for his request other than his opinion. In the first paragraph of his letter, he says, "I deem it highly unfair..." In the third paragraph, he says, "I consider this tactic..." "I deem" and I consider" cannot serve as justification for Mr. MacDougall's request.

Based on all the foregoing, there can be no doubt Mr. MacDougall's request is without merit and must be denied. The Surface Transportation Board saw no merit in his repeated protestations and neither should this Committee. Paragraph D clearly gives Union Pacific the right to present witnesses at the hearing without any preconditions such as written statements.

Yours truly,



W. E. Loomis
General Director
Labor Relations

CC: John E. Grother
Gordon P. MacDougall

(3)

Sent via fax to Messrs. MacDougall and Loomis
Sent via U. S. Priority Mail to Messrs. Grother, MacDougal and Loomis

Lynette A. Ross
Arbitrator

1220 Fairway Drive
Lawrenceburg, KY 40342-9706

(502) 859-9003
(502) 859-9004 (fax)
E-mail: lynetteross@hotmail.com

September 28, 2004

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Mr. Gordon P. MacDougall, Esq.
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St., Stop 0710
Room 332
Omaha, NE 68179-0710

Re: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm the telephone conference conducted on this date, among the Committee members in this case, with Mr. MacDougall representing Member Grother. The purpose of the conference was to discuss Mr. Grother's procedural request of September 21, 2004, communicated to the Carrier and Neutral Members through his Representative.

Specifically, the Grother Member submits that Pargaraph D of the June 18, 2004 Memorandum of Agreement, governing the upcoming arbitration hearing, requires the Carrier Member to tender a "verified statement under oath" to the Grother Member prior to the hearing, and as a pre-condition of any live testimony by its witness, Mr. Ken Packard. The Grother member requests receipt of Mr. Packard's statement on or before October 1, 2004, and essentially asks the Neutral Member to direct the Carrier Member to furnish the statement or else Mr. Packard shall be precluded from appearing at the October 12, 2004 hearing. By letter dated September 24, 2004, the Carrier Member submitted his response, disagreeing with the September 21, 2004 request.

During our telephone conference, Mr. MacDougall, as Representative of Mr. Grother, and Carrier Member Loomis amplified the positions set forth in their above-referenced letters. Mr. Loomis related that, as an individual directly familiar with Mr.

Grother's circumstances at the time of the event which gave rise to his claim, Mr. Packard is expected to provide his views on the causality issue and convey his understanding of Mr. Grother's duties as SMTO in Tuscon. Mr. Grother will have an opportunity to respond to Mr. Packard's statements at the hearing.

After giving careful consideration to the parties' positions in light of Paragraph D, referenced above, the Neutral Member finds that Paragraph D allows the Carrier Member to present Mr. Packard as a Carrier witness without the pre-condition of submitting a "verified statement". Therefore, the Grother Member's procedural request is denied.

Mr. Grother is reminded that, as a Member of the Committee, notwithstanding the fact that to this point he has provided two witness "verified statements", under Paragraph D he retains an equal right to present witnesses without tendering any written statements, in advance, to the other Committee Members. Furthermore, as Paragraph D clearly sets forth, at the conclusion of the hearing, both parties may present post-hearing briefs within 20 days of the close of the hearing.

Very truly yours,

Lynette A Ross

Lynette A. Ross

(4)

September 28 2004

VIA FAX AND U.S. MAIL

Gordon P. MacDougall
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Dear Mr. MacDougall:

RE: John E. Grother New York Dock arbitration

On page 3 of Mr. Grother's submission, dated September 14, 2004 (corrected copy 9/17/04), the last sentence in footnote 1 states:

> "However, slip opinions will be furnished to committee members upon request."

This letter is a request that such slip opinions be furnished to me in sufficient time for review prior to the hearing date.

Thank you.

Sincerely,

W. E. Loomis

CC: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

William E. Loomis
General Director

UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710
ph. (402) 544-5446 fx. (402) 233-2499
beloomis@up.com

(5)

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GORDON P. MACDOUGALL
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WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

September 29, 2004

W.E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St.-Stop 0710
Omaha NE 68179

VIA FAX/US MAIL

Re: Union Pacific/Grother

Dear Mr. Loomis:

Your facsimile of yesterday came to my attention today. You seek copies of published opinions, referring to Grother's submission, at p. 3, n.1, "However, slip opinions will be furnished to committee members upon request."

At this time, such would be quite an undertaking, coming some two weeks after the partisan parties exchanged their submissions, and less than two weeks before hearing. Grother's intent was to supply these published opinions, which are available on the bookshelves of many public libraries, in the event members of the committee so desire. Please note the use of the plural "members."

Grother's offer was premised upon the geographical location of the neutral member. Grother will undertake the task of providing two sets if one is requested by the neutral member. The other would be forwarded to yourself as desired.

However, the Union Pacific law department, at Omaha, is believed to have more than a complete set of the very opinions cited in the Employee's submission. I spoke today with one of the several attorneys I deal with in that department. I am advised their library resources are available to you; indeed, I rather suspect the law department would prefer you secure your legal materials from UP in Omaha, rather than from Grother's attorney. Accordingly, Grother is unwilling to go to the expense of reproducing these materials merely at the request of one (UP) committee member.

I am sorry, but I must decline your request at this time.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: L.A. Ross
J.E. Grother

(6)

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GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
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AREA CODE 202
223-9738

October 6, 2004

Lynette A. Ross (502) 859-9004
William E. Loomis (402) 501-0120

VIA FAX & US MAIL

Re: Union Pacific/Grother

I have arranged to have our Tuesday, October 12 hearing to be covered by a reporter.

This is at the expense of Employee, inasmuch as I am advised the carrier does not wish to participate in this expense.

The reporting service is: Beta at 910-17th Street, NW. Tel: (202) 638-2400.

I am advised the transcript is usually available within 10 days.

The reporter is authorized to administer oaths, should such be desired. My suggestion is that each of the partisan parties bring a set of their submissions for use of the reporter.

I am available for any of your thoughts concerning this matter by telephone anytime tomorrow.

Very truly yours,

Gordon P. MacDougall

GH-26

CROSS REFERENCE TO J. E. GROTHER AND U.P. SUBMISSION EXHIBITS

DATE	DESCRIPTION	JEG	UP
	New York Dock employee protective conditions	E-1	1
5-12-03	John E. Grother (separate binder Exhibit 2)	E-2	2
6-16-03	JEG to National Mediation Board	E-3	3
7- 7-03	NMB Roland Watkins' letter to JEG		4
7-18-03	UP Marilyn Ahart's letter to JEG	E-4	5
7-18-03	UP Marilyn Ahart's letter to Roland Watkins	E-4	6
7-21-03	NMB Roland Watkins letter to JEG		7
7-29-03	JEG letter to UP Marilyn Ahart		8
8-11-03	NMB Roland Watkins letter to JEG		9
8-11-03	JEG letter to NMB Roland Watkins		10
8-15-03	UP Marilyn Ahart's letter to JEG		11
Sept-Oct. 2003	Written correspondence between the parties and the NMB concerning the selection of a neutral member for this arbitration committee		12
	Pocket List of Railroad Officials, Summer 2004	E-5	
1-21-04	NMB Roland Watkins' designation of Lynette A Ross	E-6	13
2-20-04	JEG Petition to Establish Procedures STB FD No. 32760 (Sub-No. 42)	E-7	14
3- 5-04	JEG Supplement to E-7	E-8	
3- 4-04	UP Opposition to JEG Ex. E-7	E-9	15
3-12-04	GPM letter to STB re Ex. E-9	E-10	16
4-19-04	STD Decision re JEG Ex. E-7	E-11	17
4-23-04	GPM letter to STB re Ex. E-11	E-12	18
6-10-04	STD Notice re JEG Ex. E-7	E-13	
5- 3-04	UP to Lynette A. Ross	E-14	
5-28-04	JEG to Lynette A. Ross	E-15	

6-18-04	UP/JEG Memorandum of Agreement	E-16	19
	Section 300 of the Transportation Act of 1920		20
2- 5-24	ICC Regulations, Ex Parte No. 72		21
	Section 1 of the Railway Labor Act, 45 USC Ch. 8, §151	E-23	22
May, 1936	Washington Job Protection Agreement		23
1985	NYD Arb. Award Dana R. Bond and Michael J. Topolosky v. Union Pacific Railroad Co. (Stallworth)		24
1986	NYD Arb. Award James M. Benham v. Delaware & Hudson Railway Company (O'Brien)		25
1987	NYD Arb. Award B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v. Union Pacific Railroad Company (Seidenberg)		26
1987	NYD Arb. Award John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Co. (O'Brien)		27
1998	NYD Arb. Award Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Co. (Stallworth)		28
1996	NYD Arb. Award James V. Nekich v. Burlington Northern Santa Fe Railroad (Ver Ploeg)		29
1998	NYD Arb. Award Ross F. Povirk and the Transportation and Communication International Union v. Union Pacific Railroad Co. (Stallworth)		30
1998	NYD Arb. Award G. L. Dixon and the Transportation and Communication International Union v. Union Pacific Railroad Co. (Stallworth)		31
1998	NYD Arb. Award B. W. Isabell and the Transportation and Communication International Union v. Union Pacific Railroad Co. (Stallworth)		32
10-20-97	Agreement between UP and United Transportation Union "Modification" Agreement		33
6-23-99	Agreement between UP and UTU - Merger Implementing Agreement		34

1993	NYD Arb. Award UTU (S. G. Nelson) v. Union Pacific Railroad Co. (LaRocco)	35
1993	NYD Arb. Award R. L. Shankel, R. E. Porter and L. Chapman v. Union Pacific Railroad Co. (LaRocco)	36
1990	NYD Arb. Award International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (D. L. Haver, G. L. Galbreath) v. Southern Railway Co. (Muessig)	37
1990	NYD Arb. Award Transportation-Communications International Union (R. Tefft) v. Union Pacific Railroad Co. (LaRocco)	38
1987	NYD Arb. Award Ronald F. Sysak (Attorney representing 28 individual machinists) v. Union Pacific Railroad Co. (LaRocco)	39
6-27-97	UP payroll authority form relating to JEG demotion	40
1986	NYD Arb. Award Brotherhood of Maintenance of Way Employes (C. E. Hardesty) v. The Atchison, Topeka and Santa Fe Railway Co. (LaRocco) and NYD Arb. Award United Transportation Union (T. B. Barnes, et. al) v. Norfolk & Western Railway Co. (Peterson)	41
	"Correspondence written to Mr. Grother by Union Pacific Railroad Ombudsman Butch Ethington"	42
1997	"1997 payroll information for Mr. Grother"	43
6-23-04	UP Wm. E. Loomis' letter to Gordon P. MacDougall	E-17
	Union Pacific R.R. Co. v. Surface Transp. Bd., 358 F3d 131 (D.C. Cir. 2004)	E-18
11-30-95	ICC FD 32760, Railroad Merger Application, Vol. 3, Operating Plan	E-19
4-12-96	ICC FC 32760 Environmental Assessment,No. 2	E-20
7- 1-97	STB FD 32760 (Sub-No. 21) UP/SP Merger--Oversight, Applicants' Report on Merger and Condition Implementation	E-21
	29 U.S.C. §§152, 157, 164(a)	E-22
	45 U.S.C. §151, 181; 49 U.S.C. 11326	E-23
1987	Arbitrator's Decision and Award, Thomas M. Curley, et al. v. Missouri Pacific Railroad Company (David H. Brown)	E-24

REFERENCES TO EXHIBITS IN UP'S SUBMISSION

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14	6 (mistakenly referred to as Exhibit 13)
15	6 (mistakenly referred to as Exhibit 14)
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E-23	16, 18, 24, 26
E-24	22

industrial switching, ie: industrial lead / spur switching, pulling and spotting, but everything else would be done in Tucson for Phoenix.

This verified statement is to present facts in support of John E. Grother being a subordinate official (non-agreement employee) at Tucson ending 7/1/97, with displacement to Houston with a wage cut and the causality of said displacement, being directly related to the UP-SP Merger in 1996.

As the union representative of the Trainmen and Conductors working into and out of Tucson, I participated in the Tucson Safety and Labor Management Steering Committee and later the Tucson SHEOP Committee under UP. Discussion at these meeting during the time period of January through June 1997, discussing all aspects of the Tucson, Yuma and Phoenix operation as well as all safety concerns. Yard speeds had been reduced from 10mph to 5mph in Tucson yard rather than going in and making the needed repairs. Union representatives from both yard and road indicated that this plan would fail without sufficient staffing in the ranks of the yard employees and road employees. We also indicated that Tucson yard was already working to capacity with its own work and couldn't

handle this 'new business'. While I believe that Grother was acutely aware of the obstacles facing the non-agreement employees in Tucson, they none the less gave it all they could and attempted to comply with the new orders from Omaha.

At no time prior to this period or after it failed miserably in June of 1997 has the railroad attempted to do all the Phoenix work in Tucson. Adding to the difficulties during this period the railroad had an ongoing Maintenance of Way curfew both east and west of Tucson, thus restricting all traffic into and out of Tucson yard from 0700 to 1900 daily creating more congestion and backup. The non-agreement employees in Tucson put their best foot forward and tried as they might but were unable to overcome the many obstacles and road blocks that were thrown against them. The failure of this merger yard consolidation program was not the fault of Grother or for that manner any of the non-agreement employees in Tucson as they gave it their all. The people in Omaha who orchestrated this plan without major repairs to trackage or increased staffing of personal in Tucson yard are the ones who caused this plan to fail!

Prior to the implementation of this plan, things were going very smoothly in Tucson except for the ongoing manpower problems and physical repairs that are always needed at the railroad and which are always affected by budgetary constraints. During Union discussions with Grother about adding more jobs or overtime, it was clear that he had to get permission before he could do anything that would affect the UP budget. During my observations of Grother during 1995-1997, he displayed no poor or inadequate personal performance concerning the operation of Tucson Terminal; especially given all the new people from Omaha and other UP personnel who were ordering what Tucson must do. Grother was a good, qualified non-agreement employee with many years of experience with the railroad and I was shocked when they laid the blame of the failed Phoenix to Tucson switching plan at his feet and gave him four days to quit or take a severe demotion to Houston, Texas, an undue burden on him and his family.

VERIFICATION

STATE OF ARIZONA)

COUNTY OF PIMA)

Under the penalties of perjury, I hereby affirm the foregoing *Verified Statement* is true and correct as stated.

Tom F Moore

TOM F. MOORE

Dated at

Tucson, AZ

September 14, 2004

AV-28

REPLY VERIFIED STATEMENT
OF JOHN E. GROTHER

My name is John E. Grother, I am the same person of the same name who has submitted three verified statements in this proceeding, dealing with causation, job classification, and laches.

I have read the submission presented by committee member William E. Loomis (Loomis), on behalf of Union Pacific Railroad Company (UP). This reply verified statement responds to asserted factual matters advanced by Loomis in his Submission.

Opening Statement

1. Page 1, final para., "Union Pacific is represented by its General Director of Labor Relations, W.E. Loomis."

Response: It is my understanding that the title of Mr. Loomis is "General Director-Employee Relations Planning." (Emp. Ex. E-5, p. 3),

Statement of Facts
(Causality & Job Classification; Displaced Employee)

2. Page 2, 2d para. "John E. Grother had been employed by Southern Pacific for 28 years prior to the merger, having served in a variety of management positions."

Response: I was a Southern Pacific (SP) employee for 27 years prior to the merger. The term management positions is incorrect; for example, I was a trainee at one point, among other positions. For my job history, see: Emp. Ex. E-3{7}; UP Ex. 2, p. 60.

3. Page 3, final para. "Mrs. Ahart found no evidence Mr. Grother's demotion was as a result of the merger transaction."

Response: Mrs. Ahart made no finding concerning "evidence." The Ahart correspondence speaks for itself. (Emp. Ex. E-4; UP Ex. 5, 6, 11).

4. Page 5, para. 3. "...Mr. Grother also engaged in an exchange of correspondence with Butch Ethington, the Union Pacific Ombudsman, during this same period of time.....in order to present a complete record that correspondence is attached as Union Pacific Exhibit 42."

Response: The UP Ex. 42 is not a "complete record" of correspondence with the Ombudsman, but is only a highly selective portion of the Ombudsman's letters to me. UP Ex. 42 consists of only three letters, all issued in late 2003, after this arbitration was invoked. None of my correspondence to the Ombudsman is included in UP Ex. 42.

5. Page 20, final para., last complete sentence, "At the time of Mr. Grother's self-described "demotion" on July 1, 1997 he was Senior Manager Terminal Operations (SMTO) at Tucson, Arizona."

Response: My actual self-described terminology is Merger Transaction Related Demotion, and is set forth at the outset of my May 12, 2003 letter to Mr. James V. Dolan, invoking arbitration or a settlement process. (Emp. Ex. E-2, 1, para. 1; UP Ex. 2, p. 1).

6. Pages 20-21. "A Senior Manager Terminal Operations is the top transportation (operating) position in the terminal. In other words, the SMTO is the boss of the terminal."

Response: Mr. Loomis has not correctly described the UP operating positions, whether "top" or "boss." The top position at UP terminals is regularly a Director Terminal Operations (DTO) or higher. At Tucson, El Paso, San Antonio and Settegast (Houston), the DTO is the top. At Avondale (New Orleans), the Director Transportation Services (DTS) is the top terminal position, based

on the UP COED data base. The SMTO works for the DTO, DTS or Superintendent Transportation Services (STS), dependent on how the Service Unit (Division) is organized. My duties as SMTO (SRMTO) are set forth in my V.S. (Job Classification, pp. 2-5). I was not the "top" man, or the "boss" of the Tucson terminal.

7. Page 21, 1st para. & 9 items. "The job description for that position lists the basic purpose of the position is to "ensure the quality of the transportation product of the terminal meets or exceeds the standards set by the business objectives and customer expectations." The primary responsibilities of the position are: (list 9 items),

Response: The above job description, except for the safety process sentence, is taken from the August 1999 job application description. (Emp. Ex. E-2 {33B}; UP Ex. 2, p. 108). This was not in effect in April 1997. I was not given a 1997 job description. Indeed, Mr. Loomis asserts that following the merger, my job did not change. (UP Sub., p. 2, final para.). In the hectic days of the breakdown in operations following the merger, many of the UP personnel processes were not in place, including a new job description for myself. For the "real world" on UP in early 1997, see my V.S. (Causality) and V.S. (Job Classification).

8. Page 21, final para. "In Mr. Grother's own words, he was "in command" of the terminal at Tucson."

Response: This is a misquote. (UP Ex. 2, p.42; Emp. Ex. E-2, p.42). The reference to "compared to others who were in command roles," does not imply that Grother was "in command" at Tucson. It is the "others" who were in command.

9. Page 21, final para. "He was the boss of a terminal where approximately 85 employees covered by collective bargaining agreements worked under his command. Mr. Grother was responsible for approximately 13 yard assignments and 4 road jobs (locals)."

Response: The DTO position was the "boss" of the terminal. In the absence of a DTO, which was the situation at Tucson in early 1997, Superintendent Packard (STS) and Assistant Superintendent McDowell (DTS) were in charge ("boss"). They performed the "boss" role over the 85 employees and yard assignments. See my V.S. (Job Classification).

10. Pages 21-22. "The terminal he commanded had an annual budget of approximately $2.5 million per year and processed approximately 700 cars per day."

Response: As for my "commanded," see my response to No. 8. I had no knowledge of any budget for Tucson, $2.5 million, or $10 million. The UP budget for Tucson was not made known to me or to the other 3 MYOs. We were told the budget was in the process of being finalized. Therefore, as an example, all overtime had to be authorized by either McDowell or Packard. Overtime was the province of McDowell or Packard, as was the use of additional switch engines.

11. Page 22. First para, last sentence. " Approximately four subordinate officers (MTOS) and MYOS) reported to Mr. Grother, and he reported directly to the service unit superintendent."

Response: The term "approximately" is incorrect. The three non-agreement operating personnel in 1997, all MYOs, are named. (Emp. Ex. E-2 {E9}; V.S. Grother (Job Classification), Atta. 1; UP Ex. 2, p. 63). My relationships with these MYOs are set forth in my V.S. (Job Classification), pp. 2-5), which was in a relief role. The three MYOs were not my "subordinate officers." They reported directly to Packard and McDowell. I reported

to both McDowell (preponderance) and to Packard, and to personnel at headquarters who issued instructions. At no time did Packard state or act as if Packard were my direct supervisor.

12. Page 22, first para., 1st and 3rd sentences. "As Senior Manager of Terminal Operations, either he, or one of his subordinate officers, would make hire decisions on candidates for employment who were being interviewed by the Human Resources Department....."In short, a Senior Manager of Terminal Operations has the authority to hire and fire."

Response: For my "subordinate officers," see response to No. 11. As for hiring and firing, at no time did I or any of the MYOs make hiring decisions between September 1996 and June 1997. Moreover, the merged companies were in a hiring freeze, as it was assumed the UP hub system would require fewer employees. I never had the authority to fire anyone. Packard had the authority to hire and to fire. See also my V.S. (Job Classification), at pp. 4-5.

13. Page 22. 2nd para., 2nd sentence. "In the event of a disciplinary investigation (hearing) involving an employee at the Tucson terminal, the Senior Manager of Terminal Operations would review the transcript and recommend the appropriate level of discipline, including dismissal where appropriate, to the service unit superintendent."

Response: As SRMTO, I never reviewed a transcript, or recommended discipline to Packard. Moreover, one of the UP processes, which was being introduced at Tucson in early 1997, was the UP UPGRADE discipline system, which was used by Superintendent Packard to determine the appropriate level of discipline based on repeat offenses and other standards. The UPGRADE system did not require any input from a low level non-agreement employee, as it provided a matrix to determine discipline.

14. Page 22, first line, and footnote 4. ".....approximately 700 cars per day. The term "approximately" is used repetitively in this section because the timing of Mr. Grother's claim places Union Pacific in a position of estimating what was in effect at Tucson more than six years ago."

Response: My sample indicates an average of 618 cars at the beginning of the day. See my V.S. (Causality), 2-3 & Atta. 2. I have repeatedly offered the data (consisting of 20 boxes) to UP, but without any request for examination, concerning my sample, which in any event approximates the UP's 700-car estimate.

15. Pages 23-24. "Terminal Superintendents (A Southern Pacific title) or Senior Managers of Terminal Operations (A Union Pacific title) have never been covered by collective bargaining agreement on either Southern Pacific or Union Pacific. Mr. Grother acknowledges this in his July 28, 2003 letter to Marilyn Ahart (Union Pacific Exhibit 8) when he says after retirement he plans to "Re-activate the Unionization of managers starting with UPRR."

Response: My letter did not acknowledge whether or not certain personnel had ever been covered by a CBA on either SP or UP, and I do not have complete information on this score. My use of the phrase "reactivate the unionization of managers" did not have specific reference to any particular craft or class of employees. My July 28, 2003 letter to Ms. Ahart was intended for settlement purposes, as suggested in the opening sentence. (UP Ex. 8, p.1).

16. Page 25, final 2 paragraphs. "This Board should evaluate Mr. Grother's skills to determine if they are transferable. The best source of that information is Mr. Grother's own assessment of his skills. In his May 12, 2003, letter to Mr. Dolan, Mr. Grother touts his own eduction, training and skills, as follows:(UP Ex. 2, p. 6)(citation omitted). Clearly, Mr. Grother's level of education, training and skills is readily transferable to industries other than the railroad. Union Pacific asserts this is another reason why Mr. Grother should be considered to be an official and, thus, not covered by New York Dock.))

Response: The referenced quotation from my May 12, 2003 letter to Mr. Dolan, did not address any skills I may have for employment outside the railroad industry. At my age in 1997 (then 51, now 58 years), I am not considered suitable for comparable employment in another industry. Moreover, UP has found my skills not transferable to other railroad work at UP, even on a lateral level. Despite numerous job applications, partially shown (UP Ex. 2, pp. 103-108; Emp. Ex. E-2{E31 thru E33B}), I have not progressed beyond one telephone interview. The best source of transferability is my actual experience in attempting job transfer. See also my V.S. (Job Classification), pp. 5-6. Finally, the statement "Union Pacific asserts this is another reason why Mr. Grother should be considered an official..." is without foundation, for whatever UP person considers me an "official," either at Tucson or Houston, is not identified. There is, of course, a distinction between "officer" and "official."

17. Pages 26-27. "A great deal of Mr. Grother's May 12, 2003 letter is devoted to his portrayal of himself as the victim not of the merger, but of what he considers to have been an ill-advised and not very well thought out plan implemented by his superiors."

Response: Contrary to the above statement, the UP/SP merger with the subsequent action taken in April, 1997, was the cause of my adverse effect on July 1, 1997. The reduction of work at Phoenix, and the dramatic increase in freight traffic for Tucson, were part of the merger plan, or "re-plan" experiment, as filed with the Surface Transportation Board. This plan was implemented by persons superior to me, but its basis is in the UP/SP merger. See my V.S. (Causality).

18. Page 27, 2nd para., 2nd sentence. "Note carefully, however, Mr. Grother never clearly explains the link between the "consolidation experiment" and his demotion."

Response: Contrary to the above statement, I demonstrated the causal nexus. See my V.S. (Causality), and Emp. Ex. E-2, p.3, para.3; p. 5, para.3; p. 6, para.4; p. 7, para.2; p. 10, para.2 & 4; p. 11, final para.; p. 12, para.2 & final para.; p. 14, para.2. The consolidation of Phoenix traffic into Tucson had never been tried prior to the UP/SP merger attempt. The June 1997 service failure described by UP President Davis would not have occurred, and his immediate action of displacing me and ending the merger experiment, would not have taken place, apart from the merger. (Emp. Ex. E-2{11}; UP Ex. 2, p. 68). Moreover, I am advised the burden is on UP to prove that factors other than the merger related transaction affected the employee.

19. Page 27, 3rd para., 1st sentence; page 31, 1st para. "Union Pacific asserts Mr. Grother was removed from his position in Tucson because of his job performance and not because of the merger..... Union Pacific states the reason Mr. Grother was transferred to a position of less responsibility, and his salary adjusted accordingly, was because of his superiors' assessment of his overall job performance. During the Spring and early summer of 1997, Mr. Grother was observed by managers who had not previously had the opportunity to observe his performance. The reason for Mr. Grother's demotion was that after a few months of such observation, his new bosses concluded he was not the person to be "in command" at Tucson.[i)]

Response: The terms "Union Pacific asserts," and "Union Pacific states," in the above first two sentences are anonymous, unless it is the opinion of the author, Mr. Loomis. My appeal to UP President Davis stated, "I had no indication of personal unsatisfactory performance beforehand, although there was talk that the Phoenix replan was not working as others had designed." (Emp. Ex. E-2{10}; UP Ex. E-2, pp. 64-67). President Davis did not deny my

statement concerning unsatisfactory performance. Instead, Davis corroborated the direct nexus of my displacement with the June service failure created by the Phoenix replan. (Emp. Ex. E-2{11}; UP Ex. 2, p. 68). On UP, it is the direct supervisor's accountability to document overall performance with an interim Performance Development Review and Developmental Action Plan, yet no one at UP did these documents in my situation.

The balance of the above statement (taken from p. 31, first para.) relate to my superiors at Tucson, managers visiting Tucson, and "new bosses." My superiors at Tucson were McDowell and Packard. Neither of these superiors orally or in writing advised me of 1997 unsatisfactory personal performance.

The purported observations by managers who had not previously observed my performance is another anonymous statement which comes to me first through Mr. Loomis in his submission. None of the managers who visited Tucson told me orally or in writing that I was an unsatisfactory performer. Indeed, I was selected as SRMTO on April 16, 1997 by Packard.

The term "new bosses" does not provide identification. Apparently the submission writer (Mr. Loomis) is referring to UP personnel, rather than SP personnel. The statement that these "new bosses" did not want me "in command," may be simply the submission writer's opinion. I was not in command at Tucson; rather, Messrs. McDowell and Packard were in command at Tucson.

20. Page 27, 3rd para., 2nd sentence. "Union Pacific does not believe the "consolidation experiment" is even merger related."

Response: The basis for "Union Pacific" is anonymous, but the statement that the merger had not been implemented for operations at Tucson in the Spring of 1997 (and description at pp. 27-29) appears based upon the writer's experience in negotiating merger implementing agreements with organized operating crafts. Contrary to the UP submission writer, UP managers were in charge at Tucson in early 1997, and merger-related plans were being carried out. See my V.S. (Causality), and Emp. Sub. pp. 8-14. To be sure organized operating employees may continue under their pre-merger agreements until implementing agreements are placed into effect, but this does not mean that non-agreement employee changes must await changes in agreement employee working conditions.

21. Page 29, 2nd para.; 3rd para. first 2 sentences. "In this instant case involving Mr. Grother, the transaction is the UP-SP merger. Events which could have taken place even if the merger had not occurred do not trigger protection, even if the result is an employee being placed in a worse position.....Separate and apart from the timing of the merger, the "experiment" to consolidate switching formerly done at Phoenix into Tucson could have been done by SP prior to the merger. It was not merger dependent."

Response; While the UP/SP merger is a transaction, so is the action taken pursuant to the merger resulting in Grother being placed in a worse position on July 1, 1997, also a "transaction." (Emp. Ex. E-2, p. 1; UP Sub. p. 26). At no time prior to the UP/SP merger would SP have attempted to consolidate all switching from Phoenix to Tucson's 1% grade yard. Of considerable importance is the fact that the UP/SP merger gave UP the right to make immediate operational decisions to benefit the UP system, but which would not have been made by SP, standing alone, as such decisions would have been economically adverse to a separate SP system. Moreover,

it was the UP traffic diverted to Tucson, along with other revisions in traffic, which permitted changes in the operation of SP facilities. These changes would not have been made without the merger.

22. Page 30, last para. "UP states that if Mr. Grother had been removed from his job as part of a merger related reduction or consolidation of officials, there would have been no need to appoint a replacement."

Response: The identity of "UP states" is unknown, but is presumed the writer of UP's submission. The fact is that UP advised in its merger application to the STB there would be many changes in non-agreement (not official) positions at Tucson, with jobs transferred from other locations to Tucson, and jobs transferred from Tucson to other locations. There are obviously many reasons for job transfers, which may embrace replacements of the very jobs being transferred. (Emp. Ex. E-19).

23. Page 31, 3rd para., 1st sentence. "A manager who suffers a decrease in salary because of reassignment based on job performance can not be considered as having been placed in a worse position because of the merger."

Response: The reasoning lacks logic. A merger, with shifts in traffic and in operations, can create different requirements for "job performance." In short, in a reorganization, stemming from a merger, the nature of the job might change, with a change in required "performance standards," and with different criteria for evaluation of "job performance." See my V.S. (Causality), pp. 1, 4-5. Thus, merger-related job performance can be a cause for displacement to a worse position. In any event, I was not charged with poor "job performance." Ms. Ahart's July 18, 2003 letter denying coverage of NYD conditions mentioned "perfor-

mance standards," not "job performance." (Emp. Ex. E-4; UP Ex. 5, p.1).

24. Pages 31-33. "Mr Grother will argue that "but for" the UP-SP merger, the situation which led to his demotion would never have occurred.....In summary, it really does not make a difference whether this arbitration committee determines the reason put forth by Mr. Grother (the consolidation "experiment") or the reason put for(th)(sic) by Union Pacific (poor job performance) was the cause of his demotion. Either event could have taken place prior to the merger. Therefore, Mr. Grother's reassignment and reduction of salary did not come as a result of the merger."

Response: See my responses to 19, 21, concerning merger-related operational changes. Of course, as a non-agreement person, I am always subject to reassignment or discharge, but such does not avoid the fact that the reassignment or discharge is merger related. Under the theory (apparently Loomis) advanced above, a non-agreement employee, always subject to reassignment or discharge, would never qualify for NYD, which would be absurd. Finally, I note this is the first occasion in this submission where "Union Pacific" (unidentified person) has claimed, in writing, that my July 1997 displacement was due to "poor job performance." There is no record support for such claim, apart from hearsay January 14, 2003 by the Ombudsman, which subsequently was modified on November 10, 2003. (Emp. Ex. E-2, p. 26; UP Ex. 2, p. 26; Emp. Sub. V.S. (Causality, Atta. 3)).

Statement of Facts
(Laches)

25. Page 33, 3rd para. "Mr. Grother's demotion was effective July 1, 1997. His first notified Union Pacific of his position that a dispute existed under New York Dock by letter dated May 12, 2003."

Response: My first written notification that a dispute exists was on July 15, 1997, not May 12, 2003. See my VS (Laches), at p. 2; Emp. Ex. E-2{E10}). This was acknowledged September 4, 1997. (Emp. Ex. E-2{E11}). To be sure, my dispute was not labeled NYD, but the label is unimportant. UP was well aware a dispute existed over my claim. Moreover, other claims arose out of my displacement, under other federal provisions, well before May 12, 2003.

26. Page 33, 3rd para., 4th sentence thru page 36, para. 2, 1st sentence. "Union Pacific's position is Mr. Grother slept on his rights, to the detriment of Union Pacific in being able to defend itself...because some of the alleged "villains" in his claim have left the Company. In addition, records pertaining to the switching "experiment" no longer exist and the personal recollection of people still with the railroad have grown dim....-His reasons are sprinkled throughout his May 12, 2003 letter to Mr. Dolan."

Response: Union Pacific is quite able to defend itself. Messrs. McDowell and Packard, the latter being Service Unit Superintendent, are still with the Company, and Packard is an announced witness. (UP Sub. p. 41). The records involving the switching experiment have been preserved and are available, per my response No. 14.

27. Pages 36-38. "The numbered paragraphs which follow list Mr. Grother's reasons for delay (as summarized by Union Pacific)."

Response: The UP submission grossly misstates my written statement, and much of UP's "summary" is also speculation. The reader is directed to my own written statement. (Emp. Ex. E-2; Emp. Sub. V.S. (Laches)).

28. Page 38, final para., thru page 41, first para. "One of the reasons Mr. Grother cites...is loss of his medical insurance.....Mr. Grother's fear that he might lose COBRA coverage could not have arisen..."

Response: UP does not dispute my fears concerning medical coverage, but merely asserts I would not be as adversely affected as I understand my coverage would have been. I stand by my reasoning. I did not say I would retire at age 55, but only that after that age I could "more safely file for arbitration inasmuch as I would be eligible to pay a reduced amount for medical insurance for my wife. Without such minimal assurance, not guaranteed by UP policy, one would pay astronomical COBRA insurance payments for 18 months, and then placed in a high -risk pool. These high risk insurance pools would cost up to ten times more than my severely reduced UP pension, if taken at age 55.

29. Page 41, 2d para. "However, a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997 is still employed with Union Pacific. That person is Ken Packard, who was the Tucson Service Uni(t)(sic) superintendent, and Mr. Grother's immediate supervisor."

Response: My immediate supervisor, to whom I reported, was H.L. McDowell. See my V.S. (Job Classification), pp. 2-3.

Statement of facts
(Relocation Expenses)

30. Pages 42-43, final para. "If this Board determines Mr. Grother was covered by New York Dock at the time of his salary reduction and relocation, then Union Pacific should be able to recover the excess compensation and reimbursement paid to Mr. Grother when it comes time to consider the "measure of compensation and/or benefits due Grother..." phase of this case."

Response: I disagree with the UP's statement of costs of relocation, claimed at pp. 42-43, or whether any off-set to my NYD benefits is proper. Moreover, this Committee should

not at this time make any findings as to whether UP's claim should be sustained, or whether any off-set should be allowed. Indeed, it is believed improper for any mention of the subject at this time in light of the procedural agreement covering this arbitration. (Emp. Ex. E-16, para. E&F.).

VERIFICATION

STATE OF TEXAS)
COUNTY OF HARRIS)

Under the penalties of perjury, I hereby affirm the foregoing reply verified statement is true and correct as stated.

JOHN E. GROTHER

Dated at
Houston, TX
October 9, 2004

GH-29

Washington DC
October 12, 2004

Ms. Lynette A. Ross
Mr. William E. Loomis

Re: Union Pacific/Grother-NYD Arbitration

To the Committee members:

In accordance with our Memorandum of Agreement, paragraph A, signed June 18, 2004, this is to change the member representing John E. Grother, from myself, to Gordon P. MacDougall.

JOHN E. GROTHER

cc: Gordon P. MacDougall

APPENDIX 10

0444

Sent via fax to Messrs. MacDougall and Loomis
Sent via U. S. Priority Mail to Messrs. Grother, MacDougal and Loomis

REC'D
SEP 30 2004
Labor Relations

Lynette A. Ross
Arbitrator

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September 28, 2004

Mr. John E. Grother
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Mr. Gordon P. MacDougall, Esq.
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St., Stop 0710
Room 332
Omaha, NE 68179-0710

Re: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm the telephone conference conducted on this date, among the Committee members in this case, with Mr. MacDougall representing Member Grother. The purpose of the conference was to discuss Mr. Grother's procedural request of September 21, 2004, communicated to the Carrier and Neutral Members through his Representative.

Specifically, the Grother Member submits that Pargaraph D of the June 18, 2004 Memorandum of Agreement, governing the upcoming arbitration hearing, requires the Carrier Member to tender a "verified statement under oath" to the Grother Member prior to the hearing, and as a pre-condition of any live testimony by its witness, Mr. Ken Packard. The Grother member requests receipt of Mr. Packard's statement on or before October 1, 2004, and essentially asks the Neutral Member to direct the Carrier Member to furnish the statement or else Mr. Packard shall be precluded from appearing at the October 12, 2004 hearing. By letter dated September 24, 2004, the Carrier Member submitted his response, disagreeing with the September 21, 2004 request.

During our telephone conference, Mr. MacDougall, as Representative of Mr. Grother, and Carrier Member Loomis amplified the positions set forth in their above-referenced letters. Mr. Loomis related that, as an individual directly familiar with Mr.

Grother's circumstances at the time of the event which gave rise to his claim, Mr. Packard is expected to provide his views on the causality issue and convey his understanding of Mr. Grother's duties as SMTO in Tuscon. Mr. Grother will have an opportunity to respond to Mr. Packard's statements at the hearing.

After giving careful consideration to the parties' positions in light of Paragraph D, referenced above, the Neutral Member finds that Paragraph D allows the Carrier Member to present Mr. Packard as a Carrier witness without the pre-condition of submitting a "verified statement". Therefore, the Grother Member's procedural request is denied.

Mr. Grother is reminded that, as a Member of the Committee, notwithstanding the fact that to this point he has provided two witness "verified statements", under Paragraph D he retains an equal right to present witnesses without tendering any written statements, in advance, to the other Committee Members. Furthermore, as Paragraph D clearly sets forth, at the conclusion of the hearing, both parties may present post-hearing briefs within 20 days of the close of the hearing.

Very truly yours,

Lynette A Ross

Lynette A. Ross

September 24, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

Dear Ms. Ross:

This refers to Mr. Gordon P. MacDougall's letter of September 21, 2004. In that letter, Mr. MacDougall asks for the following:

> *"It is my request that the committee direct the carrier member to serve the written statement of Mr. Ken C. Packard, in its entirety, to be verified under oath, on or before October 1, 2004, or else the individual be precluded from appearing at the October 12 hearing."*

Union Pacific opposes Mr. MacDougall's request for the following reason:

The Memorandum of Agreement between John E. Grother and Union Pacific Railroad Company dated June 18, 2004, provides for the following in Paragraph D:

> *"At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statement of fact, supporting evidence, data and argument."* (emphasis added)

The Memorandum of Agreement has no requirement for a written statement. The Memorandum of Agreement does not link the requirement for a written submission with the opportunity to present witnesses - the requirement and the opportunity occur at different times (pre-hearing and at the hearing). The Memorandum of Agreement clearly provides "the parties ... may present witnesses" without restriction. On this basis alone, Mr. MacDougall's request must be denied.

In addition, Union Pacific opposes Mr. MacDougall's request for the following reasons:

(1) Mr. MacDougall's preference for "verified statements" over live testimony stands centuries of Anglo-American jurisprudence on its head. Live testimony, where the fact-finder may judge a witness's credibility, is always preferable to "verified statements." This is especially true in this case where the "verified statements" are clearly self-serving or Grother-serving. Mr. Packard, Mr. Grother's immediate supervisor on the Tucson Service Unit (not, as Mr. MacDougall wrongfully says, "asserted immediate supervisor") should be allowed to testify without the requirement of a written statement.

UNION PACIFIC EXHIBIT __
PAGE 3OF 6

William E. Loomis
General Director

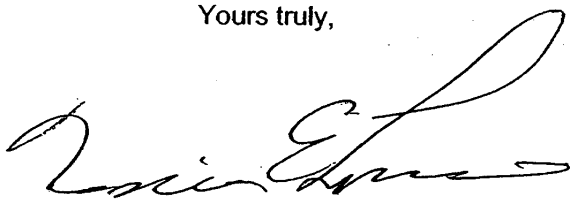
UNION PACIFIC RAILROAD
1400 Douglas St., Stop 0710, Omaha, NE 68179-0710

(2) Mr. MacDougall implies that witness testimony from Mr. Packard will somehow surprise Mr. Grother. Nothing could be farther from the truth. Union Pacific advised Mr. Grother in its submission that Mr. Packard would be a witness at the hearing. In fact, Union Pacific specifically advised Mr. Grother in its submission that Mr. Packard was "a person familiar with the circumstances involving Mr. Grother at Tucson in mid-1997." Mr. MacDougall cannot claim surprise.

(3) Finally, Mr. MacDougall furnishes no support for his request other than his opinion. In the first paragraph of his letter, he says, "I deem it highly unfair..." In the third paragraph, he says, "I consider this tactic..." "I deem" and I consider" cannot serve as justification for Mr. MacDougall's request.

Based on all the foregoing, there can be no doubt Mr. MacDougall's request is without merit and must be denied. The Surface Transportation Board saw no merit in his repeated protestations and neither should this Committee. Paragraph D clearly gives Union Pacific the right to present witnesses at the hearing without any preconditions such as written statements.

Yours truly,



W. E. Loomis
General Director
Labor Relations

CC: John E. Grother
Gordon P. MacDougall

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE, N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

September 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Re: Grother/Union Pacific-NYD

Dear Ms. Ross:

This is in response to the carrier's submission, received September 14, 2004, with particular reference to the statement, at p. 41, that Mr. Ken Packard will be present as a witness at the hearing scheduled for October 12. Thus, the carrier's case--on the critical issue of causality--has not been presented by any advance written submission of facts or statements from knowledgeable personnel; rather, it has been deferred, and is now projected to be through "live" testimony from Mr. Packard, former Service Unit Superintendent (Division Superintendent). I deem it highly unfair, prejudicial, and serves to deny a fair hearing to the employee, for the carrier's case to be presented in this manner--the employee first learning of the only known opposition statement orally at the hearing, without advance opportunity to check facts or to gather further information, and in an environment (Washington DC) far removed from Tucson AZ. I expressed a premonition the carrier might advance what it has now seeks to achieve procedurally, per my letter of May 28, 2004. (Employee Ex. E-15).

I attempted to reach W.E. Loomis yesterday, having finished my initial review of the carrier's written submission over the weekend, to first raise my concerns with him. However, I am advised he is on vacation until September 28. In accordance with his wishes expressed on his answering tape, I am sending a copy of this letter to Mr. Richard D. Meredith, by overnight express.

I consider this tactic of deleting a critical element for a written submission, with substitution by a "live" hearing submission, to be contrary to the Memorandum of Agreement (MOA) governing procedures for this arbitration. (Employee Ex. E-16; UP Ex. 19). Paragraph D provides that the partisan parties shall serve written submissions. To be sure, there is a safety valve for witnesses should such become necessary, but the written submission and witness provisions must be read together and in harmony with each other; here, the "live" and unannounced testimony is to be from the employee's asserted immediate supervisor, and such oral submission on an important matter would be contrary to the agreement for written submissions in advance of the hearing.

UH-45

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

September 29, 2004

W.E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St.-Stop 0710
Omaha NE 68179

REC'D
OCT 05 2004
Labor Relations

VIA FAX/US MAIL

Re: Union Pacific/Grother

Dear Mr. Loomis:

Your facsimile of yesterday came to my attention today. You seek copies of published opinions, referring to Grother's submission, at p. 3, n.1, "However, slip opinions will be furnished to committee members upon request."

At this time, such would be quite an undertaking, coming some two weeks after the partisan parties exchanged their submissions, and less than two weeks before hearing. Grother's intent was to supply these published opinions, which are available on the bookshelves of many public libraries, in the event members of the committee so desire. Please note the use of the plural "members."

Grother's offer was premised upon the geographical location of the neutral member. Grother will undertake the task of providing two sets if one is requested by the neutral member. The other would be forwarded to yourself as desired.

However, the Union Pacific law department, at Omaha, is believed to have more than a complete set of the very opinions cited in the Employee's submission. I spoke today with one of the several attorneys I deal with in that department. I am advised their library resources are available to you; indeed, I rather suspect the law department would prefer you secure your legal materials from UP in Omaha, rather than from Grother's attorney. Accordingly, Grother is unwilling to go to the expense of reproducing these materials merely at the request of one (UP) committee member.

I am sorry, but I must decline your request at this time.

Very truly yours,

Gordon A. MacDougall

Attorney for John E. Grother

UNION PACIFIC EXHIBIT __
PAGE 1 OF 3

cc: L.A. Ross
J.E. Grother

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

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September 29, 2004

W.E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1400 Douglas St.-Stop 0710
Omaha NE 68179

VIA FAX/US MAIL

Re: Union Pacific/Grother

Dear Mr. Loomis:

Your facsimile of yesterday came to my attention today. You seek copies of published opinions, referring to Grother's submission, at p. 3, n.1, "However, slip opinions will be furnished to committee members upon request."

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I am sorry, but I must decline your request at this time.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: L.A. Ross
J.E. Grother

UNION PACIFIC EXHIBIT __
PAGE 2 OF 3

September 28 2004

VIA FAX AND U.S. MAIL

Gordon P. MacDougall
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Dear Mr. MacDougall:

RE: John E. Grother New York Dock arbitration

On page 3 of Mr. Grother's submission, dated September 14, 2004 (corrected copy 9/17/04), the last sentence in footnote 1 states:

> "However, slip opinions will be furnished to committee members upon request."

This letter is a request that such slip opinions be furnished to me in sufficient time for review prior to the hearing date.

Thank you.

Sincerely,

W. E. Loomis

CC: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

UNION PACIFIC EXHIBIT __
PAGE 3 OF 3

William E. Loomis
General Director

UNION PACIFIC RAILROAD
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ph. (402) 544-5446 fx. (402) 233-2499
beloomis@up.com

04/46

LAW OFFICES
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AREA CODE 202
223-9736

October 6, 2004

Lynette A. Ross (502) 859-9004 VIA FAX & US MAIL
William E. Loomis (402) 501-0120

Re: Union Pacific/Grother

I have arranged to have our Tuesday, October 12 hearing to be covered by a reporter.

This is at the expense of Employee, inasmuch as I am advised the carrier does not wish to participate in this expense.

The reporting service is: Beta at 910-17th Street, NW. Tel: (202) 638-2400.

I am advised the transcript is usually available within 10 days.

The reporter is authorized to administer oaths, should such be desired. My suggestion is that each of the partisan parties bring a set of their submissions for use of the reporter.

I am available for any of your thoughts concerning this matter by telephone anytime tomorrow.

Very truly yours,

Gordon P. MacDougall

UNION PACIFIC EXHIBIT __
PAGE 1 OF 1

EX PARTE NO. 72 (SUB-NO. 1)[1]

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

ROADMASTERS (ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, FRANK A. THOMPSON, TRUSTEE)

Submitted June 18, 1946. Decided July 19, 1946

On oral argument, findings in prior reports, 263 I. C. C. 607 and 264 I. C. C. 239, that the orders of the Commission now in effect, defining the work of employees or subordinate officials of common carriers by railroads, include the work of roadmasters of respondent in the title proceeding and the work of roadmasters and supervisors, such as general roadmasters, roadmasters, assistant roadmasters, and general foremen; supervisors of bridges and buildings such as supervisors, assistant supervisors, and general foremen; supervisors of water supply; supervisors and inspectors of signals such as supervisors, assistant supervisors, and general foremen; and supervisors of telegraph lines of the respondent in the embraced proceeding, affirmed.

Additional appearances, *Martin F. O'Donoghue* for original petitioner in the title proceeding.

Willard H. McEwen for an association of railway labor executives, intervener.

J. Carter Fort, *Thomas L. Preston*, and *J. M. Souby* for an association of railroads, intervener.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

BY THE COMMISSION:

In the prior report in the title proceeding, 263 I. C. C. 607, division 3 found that the orders of the Commission now in effect, defining the work of employees or subordinate officials of common carriers by rail-

[1] This report also embraces Ex Parte No. 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials To Be Included Within the Term "Employee" Under the Railway Labor Act—Roadmasters and Supervisors such as General Roadmasters, Roadmasters, Assistant Roadmasters, and General Foremen, Supervisors of Bridges and Buildings such as Supervisors, Assistant Supervisors, and General Foremen, Supervisors of Water Supply, Supervisors and Inspectors of Signals such as Supervisors, Assistant Supervisors, and General Foremen, and Supervisors of Telegraph Lines of the Union Pacific Railroad Company.

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employees or subordinate officials to include the work of certain classes then being considered. For example, in *Regulations Concerning Employees Under Ry. Labor Act*, 218 I. C. C. 141, division 3 found that the work defined as that of an employee or subordinate official in the existing orders included the work of signal foremen of the Union Pacific Railroad Company, northwestern district. Prior to the present proceedings no such orders had been issued to include the work of supervisors of telegraph lines, general track foremen, general foremen of bridges and buildings, and general signal foremen, and accordingly, division 3 in the prior report in the embraced proceeding herein entered an order dated December 27, 1945, amending the existing orders to include the work performed by the supervisors of telegraph lines, general track foremen, general foremen of bridges and buildings, and general signal foremen of the Union Pacific system.

The respondent in the title proceeding employs about 37 roadmasters, each of whom supervises the maintenance of as much as 200 miles of track. This respondent has no roadmasters with the title of division roadmasters or with assigned duties which cover an operating division of railroad. Each roadmaster has office space and maintains office files and records. He has supervision of the foremen of regular track gangs, extra gangs, rail and welding gangs, fence gangs, and crossing watchmen, aggregating between 40 and 200 men, including foremen. Within limitations the roadmaster may hire or dismiss employees under his jurisdiction. Disciplinary letters, however, are signed by the division superintendent. The roadmaster is given a monthly allowance which is spent according to his judgment for labor and materials to maintain the track in his territory. Rails and crossties, however, are budgeted. He is subject to call at all hours, but ordinarily fixes his hours of work and vacation periods for himself and for those under his charge. He is paid a fixed monthly wage, and approves for pay-roll purposes the time records of those under him. He signs bulletins and advertisements for vacancies in his territory on maintenance work, and makes the assignments when the vacancies are filled. It is his duty to check the track gages, safety of tools, frogs, cross-overs, locks, and all working equipment. He is responsible for, and has charge of, any work train that is doing maintenance-of-way work on tracks assigned to him. When two or more jobs are to be done, the roadmaster decides which work is to be performed first. He negotiates contracts as to leasing of parts of the right-of-way, cutting of right-of-way fences for private crossing, drainage, and similar matters. So far as inspection and performance of work are concerned, the roadmaster for the most part relies upon his own judgment. He reports, however, to the division engineer. Before rail-

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road labor was given vacations with pay, roadmasters were granted a vacation yearly and were allowed sick leave with pay, a privilege usually granted only to officials. Since vacation with pay has been granted to railway employees generally, the schedules of vacations for foremen and trackmen are prepared by the roadmasters and approved by a representative of the maintenance-of-way union, and occasionally also by the division engineer. A copy of the schedule is then sent to the accounting department of the company for inclusion in the pay roll and audits.

In the embraced proceeding the respondent employs 9 general roadmasters located in various cities on its lines. The general roadmaster's jurisdiction extends, generally speaking, over an operating division, except for 2 of them located on the respondent's Idaho division. The duties of a general roadmaster and a division roadmaster on respondent's lines are the same. The general roadmaster has about 800 men under his supervision, and he covers an average territory of 1,139 miles of main track and sidings. His duties include supervision of track construction, drainage projects, bank restoration, and installation of ballast or new rails as well as supervision of repairs and maintenance, right-of-way fences, upkeep of the property, except buildings and major structures, and coordination of the work performed by roadmasters assigned to various districts. He is in charge of the particular section of railroad to which he is assigned and is responsible for track maintenance and largely for construction. He determines, among other things, whether new rails should be laid, drainage put in, or new ballast installed, and he performs routine work such as inspecting roadbed and crossings. The general roadmaster generally has a program of major items of construction or improvement which he considers necessary, resulting from his familiarity with the portion of track under his care. This program is submitted by him, however, to the division engineer, and in turn is submitted to the superintendent, the general manager, maintenance engineer, and finally to the executive officers, for ultimate decision as to whether or not sufficient funds are available to cover the projects. The general roadmaster does not have discretionary power to determine how much money shall be spent each month on his division. He can only recommend that certain expenditures be made. If his recommendation is approved he is so advised by the division engineer, to whom he reports, and he then proceeds to carry out the projects. At the time of the hearing in May 1945 he worked from 290 to 300 hours a month during the cold season and about 350 hours monthly during the warm season. When serious storms occur his hours of duty are increased. His salary is on a monthly basis.

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Under each general roadmaster there are, on an average, seven district roadmasters who are in charge of, and responsible for, particular districts. Each district roadmaster initiates the recommendations for such things as new rails and ballast, as he has the responsibility for a particular segment of track on a division. His jurisdiction extends over about 179 miles of track and 200 employees. These latter employees perform normal maintenance work, but there also may be as many as 200 to 300 other employees working in heavy construction, such as laying rails and ballast. The district roadmaster has the duty of seeing that material is supplied to various projects and that manpower is available. Other duties entail looking after the welfare of employees under him, such as housing and transportation; keeping informed as to the track structure, right-of-way fences, loading of livestock, and the cleaning of cars; seeing that weeds and brush around buildings or other structures are cut to prevent fires; and making certain that fire regulations are enforced, especially in timber territory where he has to employ fire patrols and see that they perform their assignments. The district roadmaster must also be efficient in spotting and repairing rough or weak track, and must know of conditions which may impair the speed of trains or restrict their capacity or motive power. Whatever recommendations the district roadmaster makes, however, are passed on to the general roadmaster who determines the advisability and importance of the project recommended. The district roadmaster's salary is on a monthly basis, and the number of hours which he works a month corresponds, on an average, with that of the general roadmaster.

There are employed by this respondent 13 general track foremen, who, until 1944, were called assistant roadmasters, and whose duties are the same as those formerly exercised by the assistant roadmasters. The general track foreman has from 100 to 300 men under his supervision, depending upon the extent of construction or maintenance work which he is directing. He is in charge of individual projects, such as relaying rails or ballast jobs, and extended yard improvements, and is subject to assignment to any place on respondent's lines. He is primarily a road man and spends most of his time on the outside as distinguished from office work. The general track foreman reports to the roadmaster in his own particular district. His salary is on a monthly basis, and the number of hours he works each month averages generally less than that of the general roadmaster or district roadmaster.

Fifteen supervisors are employed by this respondent in the bridge and building department, and are assigned to various divisions. Each supervisor has from 80 to 160 employees under his supervision,

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PAGE 5 OF 20

or the so-called "B-type" car (bus inspection car) usually furnished officials. Many of them in performing their duties labor manually, and much of the time they wear overalls when so engaged. They usually handle their own business correspondence and make their reports without secretarial or stenographic help. They do not as a rule have private offices as is customary with officials. Some of them have expense accounts for such items as lodging, meals, et cetera, but they are more restricted in their expenditures than are the officials, and account more strictly for those expenses than do the officials.

If the prior findings are affirmed the respondents in both proceedings fear that outside interests eventually will take over the management of the railroads and create a serious threat to the maintenance of discipline and efficiency of the employees under consideration, and that the latter's loyalty to the company will be impaired if they become unionized. Whether or not these employees join labor unions is not dependent upon our findings herein. In any event these are matters which are not cognizable by us in the determination of the issues presented. Our duties under the Railway Labor Act are clear, and questions of public policy have no place in our deliberations here. If the employees under consideration were full-fledged officials their advice would be sought by, and they would confer with, other officials in company matters such as policy management. According to the records the services and advice of these employees are subordinate to those individuals who have heretofore been regarded as officials. Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials.

The petitioners have brought nothing to our attention which would warrant a reversal of the prior findings. As a result of the oral argument and on reconsideration of the records, we affirm the prior findings.

ALLDREDGE, *Commissioner*, concurring in part:

I concur in the findings except that in my opinion the general roadmasters of the Union Pacific Railroad Company fall within the classification of officials.

MILLER, *Commissioner*, dissenting:

From my review of the prior decisions in these and other similar proceedings, I now feel that we have gone beyond the intent of the Railway Labor Act, in many instances, in holding that certain persons are subordinate officials rather than officials of particular railroads. I believe that this has resulted chiefly from our prior classification orders

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wherein we have attempted to state by the use of title of positions who are and who are not employees or subordinate officials. Because of this method of classification, it seems that in many of our decisions involving this question we have accorded too much weight to titles and given too little consideration to the work performed by, and the duties and responsibilities imposed upon, the persons holding the positions. Titles, of course, should be given consideration but they should not be accorded controlling weight. In the final analysis the status of a person should be determined from the evidence respecting the nature of his work, duties, and responsibilities.

Moreover, it is my view that the existing classification orders define as subordinate officials various persons holding high-grade positions, such as here involved, who should be excluded. In other words, these orders now reach up and embrace many persons who, in my opinion, are part of railroad management. They should be amended and the ceiling lowered.

I also believe that many of our decisions in these matters have unduly stressed certain facts which are of little or no importance. For example, we have accorded too much weight to the fact that the actions taken by the person, whose status was in question, with respect to the dismissal and disciplining of employees under his supervision were subject to the review or approval by someone in higher authority. In my opinion, such fact should have little or no weight in deciding the issue. We well know that many of the actions taken by officials of railroads are subject to the approval of their superiors in position.

From my further consideration of the records in the instant proceedings, I am of the opinion that the work, duties, and responsibilities of the various persons involved in these proceedings, and holding the several positions defined in the report, mark them as officials of these respondents and a part of their respective managements. I therefore dissent from the opposite conclusion reached by the majority.

I am authorized to state that COMMISSIONER PORTER joins in this dissent.

COMMISSIONER ROGERS dissents.

COMMISSIONERS AITCHISON and LEE did not participate in the disposition of these proceedings.

UNION PACIFIC EXHIBIT __
PAGE 10 OF 20

EX PARTE 72 (SUB-NO. 1)

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

ROADMASTERS AND SUPERVISORS, SUCH AS GENERAL ROADMASTERS, ROADMASTERS, ASSISTANT ROADMASTERS, AND GENERAL FOREMEN; SUPERVISORS OF BRIDGES AND BUILDINGS, SUCH AS SUPERVISORS, ASSISTANT SUPERVISORS, AND GENERAL FOREMEN; SUPERVISORS OF WATER SUPPLY; SUPERVISORS AND INSPECTORS OF SIGNALS, SUCH AS SUPERVISORS, ASSISTANT SUPERVISORS, AND GENERAL FOREMEN; AND SUPERVISORS OF TELEGRAPH LINES OF THE UNION PACIFIC RAILROAD COMPANY

Submitted January 8, 1947. Decided February 3, 1947

On reargument, findings in prior report, 266 I. C. C. 85, defining as subordinate officials, under the provisions of the Railway Labor Act, the work of certain classes of employees of respondent Union Pacific Railroad Company, affirmed.

Additional appearance, *Clarence M. Mulholland*, for Railway Labor Executives Association, intervener.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In our report of July 19, 1946, 266 I. C. C. 85, on oral argument, we affirmed the findings of division 3 in its report of December 27, 1945, 264 I. C. C. 239, that our orders now in effect, defining and classifying the work of subordinate officials, include the work of respondent's[1] roadmasters and supervisors, such as general roadmasters, roadmasters, assistant roadmasters, and general foremen; supervisors of bridges and buildings, such as supervisors, assistant supervisors, and general foremen; supervisors of water supply; supervisors and inspectors of signals, such as supervisors, assistant supervisors, and general foremen; and supervisors of telegraph lines.

Upon further consideration of the record and upon petition of the respondent for reargument and reconsideration and concurring petition of the Association of American Railroads, intervener, we reopened the proceeding for reargument, which we have heard. The petitioners give various reasons in support of their prayer for reopening. It is deemed necessary here to consider only the contentions

[1] Respondent is Union Pacific Railroad Company.

that (*a*) the issues are not controlled by our order of February 5, 1924, wherein we prescribed regulations designating the classes of employees to be included within the term "subordinate official"; (*b*) in determining who are subordinate officials or employees "for the purpose of collective bargaining," the purpose and intent of the Railway Labor Act require that public policy and public interest shall be considered; and (*c*) we have erred in laying disproportionate emphasis on trivial matters to the subordination of our findings as to matters of substance and importance.

In the two afore-mentioned prior reports, there are discussed in much detail the duties and responsibilities of the various groups of employees under consideration, and we will not repeat that discussion.

Dealing first with the contention that the issues in this proceeding are not controlled by our order of February 5, 1924, in our report of July 19, 1946, we stated that—

> By order dated February 5, 1924, we prescribed regulations designating the classes of employees to be included within the term "subordinate official." Among those so named were roadmasters, with rank and title not higher than division roadmasters, track supervisors, maintenance inspectors, supervisors of bridges and buildings with rank and title below that of superintendent of bridges and buildings, supervisors of water supply, and supervisors and inspectors of signals with rank and title below that of assistant signal engineer. It was further stated in the order that the definitions included therein embraced all of the classes of employees whose claims to recognition as subordinate officials were presented at the hearing, and that the list of subordinate officials might be enlarged or restricted after due notice and hearing if and when occasion demanded. In numerous proceedings thereafter we amended or interpreted our existing orders defining the work of certain classes then being considered.

We have no thought that this order of February 5, 1924, may not be changed as circumstances warrant. By the terms of the Railway Labor Act (fifth paragraph of section 1, as quoted in the prior reports), we have the authority to amend or interpret our orders entered under the provisions of that act. Thus, determination of the instant issues properly may be influenced by the order of February 5, 1924, because the record before us does not warrant any other conclusion than that these classes of employees under consideration are subordinate officials. Having found that roadmasters with rank and title not higher than that of division roadmaster, track supervisors, maintenance inspectors, supervisors of bridges and buildings with rank and title below that of superintendent of bridges and buildings, supervisors of water supply, and supervisors and inspectors of signals with rank and title below that of assistant signal engineer are subordinate officials, that classification, which has been in effect for many years, should remain undisturbed until we have a record which requires a change to be made. In our opinion the present record is not sufficient for that purpose.

UNION PACIFIC EXHIBIT __
PAGE 12 OF 20

As indicated, the petitioners contend that the purpose and intent of the Railway Labor Act require that public policy and the public interest should be considered when we define the work of subordinate officials or employees. The petitioners are fearful of their continued loyalty to the company, if these various groups of employees have their work defined as that of subordinate officials. As pointed out in our report of July 19, 1946, whether or not these employees join labor unions is not dependent upon our findings herein. Our duties under the Railway Labor Act are clear, and questions of public policy or the public interest have no place in our deliberations under the issues presented. In passing, it may be noted that there is nothing of record to warrant the petitioners' fears in this particular.

With respect to the contention that we have erred in laying disproportionate emphasis on trivial matters and have subordinated our findings as to matters of substance and importance, as we said in our report of July 19, 1946, the Railway Labor Act does not contain a definition of a subordinate official, and we have not attempted to set a rigid standard by which, in all instances, the duties and responsibilities of subordinate officials and officials may be distinguished at a glance. It is true that in our order of February 5, 1924, some limitation was placed on some of the classes therein embraced. In the final analysis, however, rank and title are not controlling any more than are wages and salaries, or hours of labor performed. However, rank and title tend to disclose the responsibilities of a position, and help in defining the work of subordinate officials or employees. In our prior report, we said that—

> Generally speaking railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials.

In our prior report we also said that—

> We do not believe that as a practical matter it is feasible to make a definite line of demarcation between the work of subordinate officials and that of officials. Frequently, it is comparatively simple to find that the work of certain employees is that of subordinate officials. There are other instances, however, the so-called border-line cases, the present proceedings being good illustration, where the determination of the question is more difficult. Each proceeding, therefore, of necessity must be decided upon the record before us, and all pertinent facts considered, even though of themselves some may be deemed trivial.

On reargument and reconsideration of the record, we affirm the prior findings.

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PAGE 13 OF 20

MILLER, *Commissioner*, dissenting:

My views respecting this proceeding are set forth in my dissenting expression in the prior report. The findings made in that report and here affirmed should be reversed and the original petition dismissed.

In addition, however, I am constrained to make the following remarks: It appears that the chief object of the respondent carrier in here seeking a finding that the persons involved and holding the positions defined in the report, are its officials, is to prevent them from joining labor unions. As pointed out in the report, whether or not these persons join such unions does not depend upon our findings. My views in this matter have been reached from considerations, independent of, and apart from, such matters as those noted above. However, assuming that respondent's real purpose, in seeking to have the persons involved classified as its officials, is to prevent them from joining labor unions, I venture to suggest that the one thing most likely to deter them from doing so is for respondent to make their compensation, rules, and working conditions so attractive that there would be no incentive for their joining unions.

COMMISSIONERS LEE and ROGERS dissent.

COMMISSIONER BARNARD, being necessarily absent, did not participate in the disposition of this proceeding.

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Ex Parte No. 72 (Sub-No. 1)

IN THE MATTER OF REGULATIONS CONCERNING THE CLASS OF EMPLOYEES AND SUBORDINATE OFFICIALS TO BE INCLUDED WITHIN THE TERM "EMPLOYEE" UNDER THE RAILWAY LABOR ACT

Railroad Maintenance of Way Supervisors Chicago, Rock Island & Pacific Railroad Company

Submitted December 17, 1952. Decided May 26, 1953

Orders of the Commission now in effect defining the work of employees or subordinate officials of common carriers by railroad, found to include the work of respondent's roadmasters, master carpenters, signal supervisors, and supervisor of lines and equipment.

Beecher Rintoul for petitioner.

Bruce Dwinell and *W. F. Peter* for respondent.

Richard R. Lyman, Clarence M. Mulholland, Edward J. Hickey, Jr., and *J. P. Tahney* for interveners.

Report of the Commission

By the Commission:

Exceptions to the report proposed by the examiner were filed by the respondent, and certain interveners replied. We have heard the parties in argument. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Upon petition of Beecher Rintoul, general chairman, Association of Railroad Maintenance of Way Supervisors, we entered upon a hearing to determine whether our orders now in effect defining and classifying employees and subordinate officials of common carriers by railroad should be amended or interpreted to include the work performed by persons employed as railroad maintenance of way supervisors by the Chicago, Rock Island and Pacific Railroad Company. The Brotherhood of Maintenance of Way Employees, Brotherhood of Railroad Signalmen of America, the Railway Employees' Department of the American Federation of Labor, and the American Railway Supervisors Association, Inc., intervened. At the hearing it developed that the only work for which determination was sought was that performed by respondent's roadmasters, master carpenters, signal supervisors, and supervisor of lines and equipment.

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Section 1 (fifth) of the Railway Labor Act, as amended, provides, in part, as follows:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders.

By an order of February 5, 1924, we prescribed regulations as to the classes of employees to be included within the term "subordinate officials." Among those so designated were:

> Foremen, supervisors, and roadmasters. This class shall include roadmasters with rank and title not higher than division roadmaster, track supervisors, maintenance inspectors, supervisors of bridges and buildings, with rank and title below that of superintendent of bridges and buildings, supervising carpenters with rank below that of superintendent, supervisors of water supply, supervisors and inspectors of signals with rank and title below that of assistant signal engineer, and foremen or supervisors of machinists, boilermakers, blacksmiths, sheet metal workers, electricians, car men, and their helpers and apprentices, with rank and title beneath that of general foreman.

On December 27, 1945, in *Regulations Concerning Employees Under Ry. Labor Act*, 264 I. C. C. 239, division 3 found that our orders defining work as that of employees or subordinate officials of common carriers by railroad, should be amended to include the work of supervisors of telegraph lines, and an appropriate order was entered.

As of May 1951, as well as in January 1952, when the hearing was held, the respondent had in its employ 51 roadmasters. There is but 1 roadmaster employed on the short Chicago, Ill., division, but from 4 to 7 are assigned to each of the other 9 of respondent's divisions. Each roadmaster is responsible for the proper maintenance of approximately 150 miles of track and roadway, and for the distribution of labor and material within his territory. The roadmasters report to the division superintendent, and none is designated "division roadmaster." Office space assigned to roadmasters is adequate for their needs. They keep their own records of rail that is laid and of ties and material used, and write out their own reports, as clerical assistance is not assigned to them. However at stations where there is stenographic help, it is available to the roadmaster.

Roadmasters have authority over section, maintenance, and extra gang foremen and men, with an average of 11 foremen and 51 men under the supervision of each. They have authority to hire men and take them out of service pending investigation, but only the division superintendent may discharge employees. Foremen generally hire the men subject to the immediate approval of the roadmaster and the

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ultimate approval of the division superintendent. When working within the territory of a particular roadmaster, roadway machine operators, helpers, and heavy-work equipment operators are under his jurisdiction. He has control also of all work trains while at work in his territory, including the train and maintenance crews. The duties of the roadmaster include making frequent inspection of all main-line track and switches under his supervision, and less frequently of other tracks, to determine whether they are being maintained properly and that surface, alinement, and gage of tracks are proper. These inspections are made from the rear end of a passenger train, by walking over the track, or by using a personally operated track motorcar.

It is the roadmaster's responsibility to decide what improvements are required to remedy any unsatisfactory conditions. While usually he does none of the actual work, he frequently demonstrates to section foremen and workers how properly to drive a spike or place a plate. From these inspections he makes an estimate of the money required for the labor and material necesary for the succeeding month's maintenance and submits his estimate to the division superintendent, who may modify it before passing it on to higher authority. A budget for the system as a whole is set up at Chicago, Ill., for the ensuing month, with allocations to each division superintendent, who in turn allocates funds to his respective roadmaster territories. Each roadmaster then has the responsibility of wisely expending such funds. During a normal month the roadmaster of the largest territory, on the Des Moines, Iowa, division, receives an allowance of $36,600 for labor and material. For the month of May 1951, the average labor allowance per roadmaster was $14,583, the largest allowance, $32,967.28, being for the Chicago division, and the smallest, $4,351, for the Cedar Rapids, Iowa, division.

Roadmasters deal directly with highway authorities, adjoining land owners, and municipal authorities in the first instance, and correct conditions of which complaint is made or report them to the division superintendent. They have no assigned hours of work, being subject to call at any time the work demands, whether it be nights, Sundays, or holidays, and generally work more hours a month than the employees under them. They are paid fixed monthly salaries, and along with master carpenters, signal supervisors, and the supervisor of lines and equipment, have the same vacation privileges as do the officers of the carrier. The roadmaster alone approves the payroll data sent to the accounting department by each foreman in a maintenance, section, or extra gang.

The respondent has 9 master carpenters, 1 for each operating division, except the Chicago division. These employees report to the division engineer, with whom they are jointly responsible on their

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respective divisions for the condition of all bridges, viaducts, trestles and culverts, signal bridges, retaining walls and tunnels, buildings, platforms, turntables, fuel stations, stockyards, cinder pits, mail cranes, scales in connection with the scale department, water and oil tanks, water and oil pumping plants, and fire protection. A master carpenter has jurisdiction over 2 to 4 bridge and building foremen and gangs varying in size from 13 to 29 men, 1 water-service foreman and gang of not more than 5 men, and 1 paint foreman and gang of 2 to 4 men. Master carpenters have the same authority as roadmasters respecting disciplinary matters. They operate under monthly allowances made in the same manner as those of the roadmasters, except that master carpenters submit their monthly estimates of material and labor needs to the division engineer, and these in turn are submitted to the division superintendent. All master carpenters are located at division headquarters, where adequate office space and stenographic help are available, but they prepare all their reports in longhand, and maintain certain records. Much of their time is spent on the roadway, and while they have no prescribed hours, they usually work more hours per month than the men under them. Master carpenters receive monthly compensation at a fixed rate.

There is 1 signal supervisor for each of the 10 divisions of the respondent's railroad. They report jointly to the division superintendent and the signal engineer with respect to matters of operation, and report solely to the signal engineer on engineering standards and the types of material to be used in constructing, maintaining, and repairing signal equipment. The territories of the signal supervisors range in size from the Chicago division with approximately 130 miles of track to 473 miles of territory on the Southern division. The amount of signaling involved varies, that of the Chicago division requiring the services of 31 signal maintainers and assistant signal maintainers, while only 9 maintainers and assistants are employed on the Southern division. Signal supervisors have authority to take employees out of service pending investigation, but they may be discharged only by higher authority.

With respect to office facilities and stenographic help, the situation as to the signal supervisors is the same as that of the master carpenters. They likewise keep their own files and prepare their reports in longhand. They operate under monthly allowances determined in the same way as those for roadmasters and master carpenters, except that signal supervisors submit their estimates jointly to the division superintendent and the signal engineer. They make frequent inspections of their territory, promptly investigate accidents attributed to defective signal equipment to determine what action is necessary to prevent recurrence, and make recommendations for changes in signal

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systems and locations. They instruct the men as to the proper performance of their duties and conduct such examinations as are required by the signal engineer. Signal supervisors are paid monthly salaries. They determine their own hours of labor per day, but normally work more hours in a month than the hourly paid employees under them, and much of their time is spent out of their offices. They are on call 24 hours a day throughout the year.

The respondent's 1 supervisor of lines and equipment has jurisdiction over the entire system of 8,000 miles, and reports directly to the superintendent of communications, a system officer. He has complete charge over pole and wire line construction, reconstruction, and maintenance, and has supervisory authority over gang foremen, linemen, groundmen, section linemen, and telephone and telegraph equipment installers. He may not commence new construction unless the project has been agreed upon by higher authority. He is responsible for the proper estimates for the general day-to-day maintenance, and for poles, wires, insulation, new construction, and reconstruction. He is required to see that the time rolls and reports of foremen and section linemen are correctly prepared and forwarded to the office of the superintendent of communications, and that all work equipment is properly used and maintained. He is authorized to hire or to remove from service pending investigation, but not to discharge employees. He shares office space with others, keeps records and files pertaining to his work, and prepares his own reports. Most of his labor is performed away from his office. He works no assigned hours and, except in emergencies, performs his duties during daylight hours. He is paid a monthly salary. The present supervisor of lines and equipment holds seniority rights with the respondent as a section lineman.

The respondent's position is that roadmasters, master carpenters, signal supervisors, and the supervisor of lines and equipment are not subordinate officials, but are responsible officers, and are treated as such rather than as employees. For example, the respondents had in effect for 35 years prior to enactment of the Railroad Retirement Act a pension system applicable to all officers and employees, which included the groups here considered. Following the enactment of that act, the respondent continued a supplemental pension plan and, in addition, instituted in May 1950 a health insurance plan, for officers only, including the same groups. While the limitations upon the authority of these groups are emphasized by the petitioner, the respondent calls attention to their broad powers and responsibilities, and to the fact that all officers are subject to certain restraints and limitations. The substantial sums of money which roadmasters are called upon to disburse are shown to illustrate the extent of their

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responsibility. The respondent refers also to certain of its rules defining the duties and responsibilities of these groups as published in booklet form, entitled Rock Island Rules and Regulations for Maintenance of Way and Structures, effective April 1, 1951, introduced in evidence. The first statement in the publication provides that: "The rules, regulations, and instructions contained herein govern Maintenance of Way and Structures Employees of the Chicago, Rock Island and Pacific Railroad Company." The second paragraph of this statement is as follows:

> Rules governing practice and work details of Maintenance will be issued in the form of Standard Practice Circulars, a complete set of which will be furnished to all officers and employees concerned therewith. Where Standard Practice Books, or circulars, differ from General Instructions as covered in these rules, the Standard Practice authority will govern.

Many of the rules are directed specifically to roadmasters, master carpenters, signal supervisors, and the supervisor of lines and equipment. Although, as argued, the rules do not disclose the recognition accorded the men in these groups as officers, they nevertheless constitute the respondent's determination of their status. It does not follow that an employee is an official of a carrier because he may have weighty responsibilities in connection with his work. Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be. *Regulations Concerning Employees Under Ry. Labor Act*, 266 I. C. C. 85.

The roadmasters, master carpenters, signal supervisors, and the supervisor of lines and equipment are indisputably in the service of the respondent, subject to its continuing authority to supervise and direct the manner of rendition of their services, and each class is below the grade of division superintendent.

We find that the orders of the Commission now in effect defining and classifying the work of employees or subordinate officials of common carriers by railroad, include the work of the respondent's roadmasters and others herein considered. No order is necessary.

CHAIRMAN ALLDREDGE concurs in the conclusions of the report except as to roadmasters. He does not regard the latter group as coming within the classification of employees and subordinate officials.

COMMISSIONERS JOHNSON, MITCHELL, and KNUDSON dissent.

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UP-48

Surface Transportation Board (S.T.B.)

**1 HASKELL H. BELL
v.
WESTERN MARYLAND RAILWAY COMPANY

Decided December 30, 1981

The Commission has only limited jurisdiction to entertain complaints concerning violation of employee protective conditions when it has prescribed arbitration as a means of resolving disputes.

FINANCE DOCKET NO. 23178 (SUB-NO. 2)
*64 Charles A. Spitulnik for petitioner.
Joseph B. Geyer and Peter J. Shudtz for Western Maryland Railway Company, respondent.
DECISION

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

BY THE COMMISSION:

INTRODUCTION

On June 6, 1979, Haskell H. Bell, an employee of the Western Maryland Railway Company (WM), filed a complaint alleging that WM violated employee protection conditions imposed in Chesapeake & O. Ry. Co.--Control--Western Maryland Ry. Co., 328 I.C.C. 684 (1967) (WM Control). Mr. Bell contends that WM's actions caused him to lose his job and suffer a loss of compensation.

On August 18, 1980, the Commission, Review Board Number 5, dismissed Mr. Bell's complaint. The board found that because he was a management-level employee at the time the grounds for the complaint arose, he was apparently not subject to the Commission's protection. In addition, the board concluded that there was insufficient evidence to show that the alleged injury resulted directly from the control exercised by the Chesapeake & Ohio Railway Company (C&O) over the WM.

In a letter petition filed October 6, 1980, Mr. Bell appealed the board's decision. On November 18, 1980, WM filed a petition for an extension of time to file a reply to Bell's appeal and the reply. On March 5, 1981, and April 3, 1981, Mr. Bell filed a petition for leave to file a supplemental pleading along with the pleading. On April 24, 1981, WM filed a petition for an extension of time to file

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a reply to Mr. Bell's supplemental pleading and its reply.

*65 Since no objection was raised to any of the late-filed and supplemental pleadings they will be incorporated as part of the record.

POSITIONS OF THE PARTIES

Mr. Bell submits that the board erred in failing to find that he was an 'employee' within the meaning of 49 U.S.C. 11347, depriving him of the opportunity to present a claim of adverse affect and attendant damages to an arbitrator as permitted by the employee protective conditions. He contends that a Commission determination of his employee status is necessary before he can go to arbitration.

Mr. Bell argues that while the term 'employee' is not expressly defined in the Interstate Commerce Act, its definition in the Railway Labor Act, 45 U.S.C. 151 et seq., compels the conclusion that he is covered by the employee protective conditions. [FN1] Mr. Bell points to the series of Commission decisions in Ex Parte No. 72 (Sub-No. 1), Regulations Concerning Employees Under Ry. Labor Act. [FN2]

WM argues that proper interpretation of the Commission's decisions would not include petitioner within the group of protected employees. WM asserts that the statutory intent is to provide protection to union employees rather than management. It states that in WM Control, no party sought expansion of the labor protective conditions to any class of management personnel. WM believes that petitioner is attempting to expand the scope of the Commission's labor protection to a class of management personnel not previously covered.

**2 WM contends that any expansion of the established employee classifications may be accomplished only after notice and hearing in a rulemaking proceeding under Ex Parte No. 72 (Sub-No. 1). WM further argues that there is no basis for submitting petitioner's claim to arbitration since the protective conditions in WM Control only apply to union employees.

DISCUSSION AND CONCLUSIONS

The sole issue presented for our consideration in this proceeding is whether petitioner is an employee protected by the conditions imposed in WM Control. There are two ways to examine this issue. First, we can *66 examine our previous definitions of 'employee' and determine whether Mr. Bell fits into any of these existing classifications. Second, if petitioner does not fit into any of the existing definitions of 'employee,' we must decide whether it is appropriate to make ad hoc determination of his status.

Petitioner has pointed to a line of cases, noted above, in which we classified types of railroad employment as that of employees or of subordinate officials. These cases arose out of the obligation to classify employees imposed by the Railway Labor Act. This act governs the right of railroad employees to engage in

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collective bargaining and provides a mechanism for the prompt settlement of disputes. We are required to classify employees under this act for purposes related to employee representation, collective bargaining and jurisdiction of the National Mediation Board. Our power to classify employees under this act is limited, and does not extend to the classification of employees for the purpose of employee protection. See Hudson & M. R. Co. Employees--Railway Labor Act, 245 I.C.C. 415, 417 (1941); National Mediation Board, The Railway Labor Act at Fifty, (1976). Accordingly, none of the decisions in Ex Parte No. 72 (Sub-No. 1) relied upon by petitioner can be used to support a positive determination of his 'employee' status in this proceeding.

Similarly, our decisions under the Interstate Commerce Act do not resolve the question of petitioner's employee status. WM points to decisions where we have declined to order employee protection for supervisory, professional and executive personnel. E.g., Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 330 I.C.C. 780 (1967). In contrast with the issue before us here, these decisions represent our findings concerning the imposition of conditions in specific proceedings and provide guidelines for the carrier and its employees to use in negotiating implementing agreements.

The language in the decisions referred to does not provide a basis for classifying petitioner. There is no description of the criteria we should use to distinguish an executive or a professional from a laborer. Such distinctions are not always self-evident. The general terms that we find appropriate in imposing conditions are inadequate to use as a means of determining petitioner's employee status. Despite petitioner's allegations to the contrary, we have never specified the classes of employees covered by the protective conditions. We have consistently declined to precisely define 'employee' on the ground that once the protective conditions have been imposed, the matter is for interpretation by the courts. See New Orleans & Northeastern R. Co.--Control, 282 I.C.C. 819 (1953).

****3** Petitioner's argument that arbitration is unavailable unless we issue a decision on his employee status is novel and compels us to examine ***67** whether we can make such a determination. Once protective conditions have been imposed, our power of review is limited and possibly we may not retain jurisdiction to make the findings petitioner seeks.

In WM Control we imposed conditions protecting WM employees who might be adversely affected. Affected employees were afforded the benefit of the so-called New Orleans conditions as modified in the fringe benefit and arbitration provisions. [FN3] The conditions provided that all disputes requiring interpretation, application or enforcement of the provisions were to be resolved in accordance with the arbitration procedures set forth.

We recognize that Federal policy favors arbitration of labor disputes. Douglas Aircraft Co. v. N.L.R.B., 609 F. 2d 352 (9th Cir. 1979) and Lodges 700, 743, 1946, Intern. Ass'n. of Machinists and Aerospace Workers, AFL-CIO v. N.L.R.B., 525 F. 2d 237 (2d Cir. 1975). Arbitration is regarded as quasi-judicial, and by imposing arbitration we are establishing a procedure for settling differences in lieu of a Commission proceeding. Except where subsequent agreements between employees and a carrier may reduce the aggregate compensation guaranteed by the protective conditions, individuals having disputes regarding loss of compensation or

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employment are required to seek relief through arbitration. See Norfolk & Western R.R. v. Nemitz, 404 U.S. 37 (1971) and Leavens v. Burlington Northern, 348 I.C.C. 962 (1977).

We believe that this is an arbitrable dispute, and consequently we may not take any action in the matter. Mr. Bell's complaint against WM turns initially on the question of whether he was an employee. Since the conditions limit protection to employees of WM, the dispute requires interpretation of the term 'employee' and application of the term to the facts presented by Bell. This brings the dispute within the categories for which arbitration is the proper remedy.

Where we have specifically prescribed arbitration as the remedy for employee complaints, we no longer have authority to become involved in disputes between a railroad and individual parties arising out of the protective conditions. Pennsylvania R. Co.--Lease, 330 I.C.C. 503, 506-7 (1966). Recourse to the Commission is unnecessary, since any party in a dispute over protective conditions has an absolute right, binding on the other, to refer the dispute to arbitration. New Orleans & Northeastern R.R. v. Bozeman, 312 F. 2d 264, 266-8 (1963). Even the fact that Bell was not a union employee at the time the dispute arose does not affect this right to seek arbitration. Pennsylvania R. Co.--Merger--New York Central R. Co., 327 I.C.C. 475, 544 (1966) and Great Northern Pac.--Merger--Great Northern, 331 I.C.C. 228, 278 (1966).

****4 *68** Because the question of whether Mr. Bell's position was labor or management is a proper matter to be resolved at arbitration, and is therefore outside the scope of our jurisdiction, we will not consider the complaint.

Petitioner raises the contention that the board's findings on the issues of his employment status and the nexus between his complaint and the control transaction will prejudice his ability to seek relief under arbitration. The board's decision was based on a sparse factual background and was consequently not determinative on these issues. In light of our decision to uphold the board's decision to dismiss this complaint, a reversal of the board's findings is unwarranted.

It is ordered:

1. The complaint is dismissed.

2. This decision is effective on the date of service.

1 The Railway Labor Act defines the term 'employee' as follows: The term 'employee' as used herein includes every person in the service of a carrier subject to its continuing authority to supervise and direct the manners and rendition of his service, who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred on it to enter orders amending or interpreting such existing orders * * *

2 See unprinted decision of February 5, 1924, and decisions printed at 263 I.C.C. 607 (1945); 264 I.C.C. 239 (1945); 268 I.C.C. 55 (1947); 289 I.C.C. 19 (1955); and 328 I.C.C. 684 (1967).

3 Originally imposed in New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952).

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I.C.C.

366 I.C.C. 64, 1981 WL 22679 (I.C.C.)

END OF DOCUMENT

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NMD-14

ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN

THOMAS M. CURLEY, CHARLES D. ERNST, KENNETH GROH,
MARTIN HOLLAND, TERRY MARTIN, WARREN RICHTER,
ROBERT SANFORD, and BILL TRAUTMAN, Claimants

vs.

MISSOURI PACIFIC RAILROAD COMPANY, Carrier

Pursuant to Article IV of the New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000.

ARBITRATOR: DAVID H. BROWN, selected by the Parties

APPEARANCES: For the Carrier -

RICHARD E. JAUDES, ESQ.
Peper, Martin, Jensen, Maichel & Hetlage
720 Olive Street, 24th Floor
St. Louis, MO 63101

For the Claimants -

PAUL C. HETTERMAN, ESQ.
Gray & Ritter
1015 Locust Street, Suite 900
St. Louis, MO 63101

THE ISSUES

ISSUE NO. 1 Did Claimants waive their right to arbitration?

ISSUE NO. 2 Are Claimants "employees" within the meaning of New York Dock Conditions?

ISSUE NO. 3 If Claimants are employees within the meaning of New York Dock, are they "dismissed employees" under the terms of New York Dock?

ISSUE NO. 4 If Claimants are employees under New York Dock, although neither "dismissed employees" nor "displaced employees" as defined therein, are they nevertheless entitled to substantially the same levels of protection as were afforded to members of a labor organization through implementing agreements negotiated pursuant to the provisions of New York Dock such as Implementing Agreement No. 1 effective June 1, 1983?

ISSUE NO. 5 Are Claimants entitled to additional vacation benefits?

ISSUE NO. 1 (Re-stated)

DID THE CLAIMANTS WAIVE THEIR RIGHT TO ARBITRATION?

THE EVIDENCE

Litigation of the instant dispute commenced on April 16, 1984, when Claimants filed suit against Carrier in the Missouri Circuit Court for the City of St. Louis. Carrier filed a timely motion for removal of the case to the United States District Court for the Eastern District of Missouri, requesting that such court assume jurisdiction of the matter because the claim was based on alleged violations of New York Dock Condiditons. Carrier also filed an answer in which it argued that the case should be barred because Claimants had failed to exhaust their administrative remedy of arbitration.

Claimants vigorously resisted Carrier's efforts to remove the case to the United States District Court, arguing that their claim was based upon "a simple action for breach of contract".

On November 1, 1984, United States District Judge Steven Limbaugh ruled that Carrier's removal of the lawsuit was proper, holding that the instant claims are based on protective conditions imposed by the Interstate Commerce Commission under Finance Docket 30,000.

In the course of time, fairly extensive discovery proceedings were had, and Carrier filed a Motion for Summary Judgment based upon its claim that the redress of the involved grievances can only be had through arbitration. On November 21, 1984, Judge Limbaugh stayed the lawsuit pending arbitration, and on January 29, 1985, the parties entered into an Arbitration Procedure Agreement. The parties thereafter selected the undersigned as sole arbitrator of the dispute. Oral hearings before the undersigned were held in St. Louis on May 14, 1986, and February 12, 1987, and final briefs were submitted by both parties on April 6, 1987.

Article I, Section 11. Arbitration of disputes.--(a) of New York Dock protective conditions provides in pertinent part as follows:

> "In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix . . . within 20 days after the dispute arises, it may be referred by either party to an arbitration committee..."

POSITION OF THE CARRIER

Carrier argues that the arbitration remedy as just set out is compulsory and exclusive, citing Walsh v. United States, 723 F.2d 570 (7th Cir. 1983) and Swartz v. Norfolk & Western Railway Co., 589 F.Supp 743 (E.D. Mo. 1984). Language is quoted from the latter decision which, after referring to Eighth Circuit decisions involving similar

arbitration clauses to the "may" clause found in New York Dock Conditions, states as follows: "The chosen construction has been that the purpose of the 'may' language is to give the aggrieved party a choice--arbitration or abandonment of the claim."

Carrier relies heavily on the case of Reid Burton Construction, Inc. v. Carpenter's District Council of Southern Colorado, 614 F.2d 698 (10th Cir. 1980). Special references are made to the fact that Claimants "engaged in extensive pre-trial discovery" and persisted in pursuing their litigation in federal court after notice that the correct remedy is in arbitration.

POSITION OF THE CLAIMANTS

Claimants maintain that the filing of a breach of contract suit in state court could not waive any federal right. Claimants point out that at the time their suit was filed "no law, either federal or state, prohibited such action." They point out that Judge Limbaugh held, on November 1, 1984, that the action arose out of a railroad consolidation pursuant to the Interstate Commerce Act and therefore the federal court had original jurisdiction, that on November 8 Carrier filed its Motion for Summary Judgment based on the mandatory arbitration proceedings required under New York Dock and that on November 21, 1984, the parties entered into a consent order by which the lawsuit was stayed pending arbitration.

Claimants stressed the point that at the time they filed their lawsuit in the state court there was no federal law in the Eight Circuit establishing the mandatory nature of arbitration in cases such

as theirs and that it was not until July 17, 1984, that Judge Limbaugh handed down his decision in the Swartz case cited above.

Finally, Claimants emphasize the fact that prior to the entering of the consent order Carrier had at no time sought arbitration on its own behalf.

ANALYSIS AND OPINION

We concur with Carrier's view that arbitration of this dispute is mandatory. However, we find no basis for holding that Claimants have waived their right to arbitrate the dispute.

The Reid Burton case cited above involved facts which are not remotely analogous to those before us. From the record before us there is no reason to question the good faith of Claimants in seeking to litigate the matter in state court at the time such action was taken. Indeed the law was not settled at the time. Contrary to the factual situation which obtained in Reid Burton, we see no evidence that Claimants, at any time, were less than forthright with Court and Carrier.

Counsel for Carrier complains that Claimants improperly took advantage of discovery procedures available in federal court but not available in arbitration, contending that such conduct should be held to constitute a waiver of the right to pursue arbitration. In connection with this argument counsel cites the Reid case. The court in Reid offers no rationale in support of its comment but does cite a case on the point which leads to two other cases. The case cited is Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2nd Cir. 1968). In such

case the appellant had sought a stay pending arbitration some two years after the suit was filed. The court held that mere delay in seeking a stay would not constitute waiver in the absence of a showing of prejudice to a party, citing Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2nd 978 (2nd Cir. 1942). Kulukundis involved arbitration under a contract to arbitrate pursuant to the United States Arbitration Act, Title 9, U.S.C., legislation which encouraged arbitration in the maritime and commercial field.

Under the Act the arbitrators were "commercial men" whom we doubt were capable of overseeing discovery procedures in aid of the arbitral process. The abuse of such procedures was not involved in Kulukundis. The court did state that it might consider it improper for a plaintiff "to avail himself of provisional (court) remedies not available in aid of the arbitration" and then, after a long delay, seek a stay of court proceedings in order to pursue arbitration of the dispute.

The other case cited in Carcich is Graig Shipping Co. v. Midland Overseas Shipping Corp., 259 F.Supp 929 (S.D.N.Y. 1966), in which the court denied a motion to stay the proceedings pending arbitration after the plaintiff had brought suit in two federal courts and conducted substantial discovery procedures.

Our examination of these and other cases reveals no case where a court has held that a plaintiff had waived arbitration at the expense of a trial on the merits in any forum.

We further find no case where a court has held that arbitration was waived under circumstances akin to those under review herein.

Furthermore, relative to the use or abuse of judicial discovery procedures, we are of the opinion that an arbitrator under New York Dock has inherent power to authorize discovery in aid of arbitration. Certainly there is nothing in the record which would justify the denial of Claimants' right to arbitration under Section 11.

DECISION

We hold that the dispute before us is arbitrable.

ISSUE NO. 2 (Re-stated)

ARE THE CLAIMANTS "EMPLOYEES" WITHIN THE MEANING OF NEW YORK DOCK CONDITIONS?

THE EVIDENCE

Martin Leonard Holland, at the time his employment with MoPac was terminated on June 17, 1983, held the position of Director of Marketing, Lumber, Forest Products and Paper, drawing a salary of $57,600.00 per year.

At the time of the severance of his employment relationship with the carrier, Mr. Holland was five levels on the organizational chart below MoPac President R. G. Flannery. Mr. Holland reported to General Manager Marketing--Commodities B. J. Maeser, who reported to Assistant Vice President Marketing J. R. Colvin, who reported to Vice President--Marketing J. M. Ostrow, who reported to Senior Vice President--Marketing G. A. Craig, who reported to President Flannery.

Mr. Holland had commenced his employment with MoPac in 1962, beginning as a mail clerk and working in a total of 27 different jobs during his railroad career. In his position as a director of

marketing, Mr. Holland had three people who reported to him directly and ten reporting to him indirectly, including a secretary who worked for the entire group. The principal function of the group was to "make rate adjustments that hopefully would get us some business that produced a profit".

Unlike some of his superiors, Mr. Holland received no special benefits such as bonuses, country club memberships, company automobile or use of a company plane or business car. Nevertheless, Mr. Holland was said to be "totally responsible for marketing and revenues associated with lumber, forest products, paper and consumer goods" amounting to over $184 million per annum. His written job description included the following: (1) directing the operation of the annual Lumber, Forest Products, Paper and Consumer Goods Commodity Module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on a course of action essential to the achievement of revenue and profitability of objectivities; and (3) establishing priorities and measuring the result of the productivity of subordinates.

Upon his leaving the carrier, Mr. Holland commenced working for an insurance agency owned by his family. Mr. Holland testified that in his new employment he received none of the fringe benefits which he received with the railroad, and that he is making substantially less money.

However, before he left the carrier, Mr. Holland was offered a job in Omaha comparable with the one which he had in St. Louis. He refused

such offer because of family considerations and was then offered a better job in Omaha, paying $80 thousand per year with the prospect of an annual bonus amounting to $20 thousand. Again he opted for personal considerations and refused the offer. Mr. Holland's expertise is, and his experience has been, in the establishment of freight rates. In his last position with the railroad he had no authority to hire or fire employees but could recommend disciplinary action.

Charles Ernst, at the time of his leaving the employment of Carrier, was Director of Marketing Coal, Ores, Aggregates and Metals, being paid a salary of $55,080 per year. Mr. Ernst began his employment with MoPac in 1955 as a messenger. Ten years later he was promoted to his first supervisory position. As of the date of the hearing herein Mr. Ernst was fifty-five years of age.

In his position as a director of marketing with MoPac Mr. Ernst was at the same organizational level as Mr. Holland and in the same chain of command. And although his salary was slightly less than Mr. Holland's, he supervised eighteen people and was said to be responsible for nearly 600 million in revenue per year.

Like Mr. Holland, his chief responsibility was working out rates with respect to the commodities under his jurisdiction. Responsibilities covered in his job description included the following: (1) directing the operation of the coal and coke, ores, aggregates, and metals commodities module and its development of profitable marketing and pricing strategies; (2) exercising judgmental decisions on courses of action essential to the achievement of revenues and profitability

objectivities; and (3) establishing priorities and measuring results of the productivity of subordinates.

Mr. Ernst's group of nineteen people shared one full-time secretary and another employee who worked as a secretary for the group part of her time. His fringe benefits and "perks" were identical with those of Mr. Holland. He had no authority to hire or fire employees.

Mr. Ernst was offered a position in Omaha as Market Manager, Energy, with salary and benefits commensurate with those received in St. Louis. He declined the employment and elected to take a job as director of maintenance with his church, with a pay cut in excess of 50% and benefits not comparable with those which he received while in the employment of MoPac.

Thomas Curley, at the time he left the service of Carrier, was serving as Director of Marketing Services at a salary of $61,000 per year. Mr. Curley was at the same organizational level as Messrs. Holland and Ernst; however, he was in a different chain of command. Mr. Curley commenced work for MoPac in 1949 as a messenger/mail clerk. In 1960, he became Chief Clerk, occupying his first supervisory position. He was assigned revenue accountability for approximately $199 million in revenue per annum. Among his responsibilities as detailed in his job description were the following: (1) supervising 84 employees, 10 reporting directly and 74 indirectly; (2) staying abreast of swiftly changing activities brought on by increased competition as a result of deregulation; (3) analyzing and making decisions concerning

competitive forces; and (4) analyzing and making decisions concerning the restrictions on anti-trust immunity.

Mr. Curley testified that his time "was taken up mostly by handling rate bureau mergers, rate bureau agreements, bureau allocations deregulations, and things of that sort." His office accommodations, secretarial help, benefit, perks and authority were comparable to those afforded Holland and Ernst.

Mr. Ernst was offered a position in Omaha comparable to that which he occupied in St. Louis. However, he had four children at home with two of them in school. Rather than dislocate his family under such circumstances he, being just fifty-five years of age, elected to take early retirement which he did, effective July 15, 1983. He swore that it was not his intention to take early retirement until he was faced with the sole option of moving his family to Omaha.

Kenneth Groh was Manager, Marketing Lumber and Forest Products at a salary of $50,760 per annum when he left the service of Carrier on June 13, 1983. Mr. Groh's direct supervisor was Martin Holland. He confirmed Mr. Holland's testimony as to responsibilities, office facilities and help, benefits etc.

Mr. Groh commenced work for the carrier on July 24, 1943, as a messenger. He advanced to a supervisory position in 1960. As Manager of Marketing, Lumber and Forest Products, he had five people under his supervision. He was assigned responsibility relative to $88 million in revenue. This was a part of the $184 million placed in Mr. Holland's area of responsibility.

Mr. Groh had no authority to hire or fire anyone. For some time prior to the announcement of merger plans he had expressed a tentative plan to retire at age 60. He declined transfer to a comparable job in Omaha. At the time he had a son in college who was living at home and there were other family considerations which made a move to Omaha undesirable. Mr. Groh did retire and remains in such status.

Terry Martin was Assistant Manager of Market Development for Chemicals and Petroleum Products at the time he left the employment of MoPac. Carrier offers no argument relative to the status of Messrs. Richter, Sanford and Trautman.

POSITION OF THE CARRIER

The position of the carrier may be summarized as follows:

Claimants Martin Holland, Charles Ernest, Thomas Curley, Kenneth Groh and Terry Martin are not employees within the meaning of New York Dock because they were MoPac officials as opposed to rank and file employees or subordinate officials. While the Interstate Commerce Commission (I.C.C.) has not undertaken a definition of the term "employee" as it is used in Dock, nevertheless an examination of relevant statues, railroad history, and case law establishes that such term includes rank and file employees and subordinate officials but excludes officials such as the five named claimants. It is the carrier's position that the Commission, when it used the phrase "employees of the railroad who are not represented by a labor organization", was only extending the protection of New York Dock to

those employees and subordinate officials who are entitled to union representation but who are not represented, the work of such employees and subordinate officials having been defined by the I.C.C. pursuant to Section 1, Fifth, of the Railway Labor Act. Previous to the enactment of such Act the Commission had also defined "subordinate official" under the mandate of Congress in its enactment of the Transportation Act of 1920.

The Commission, when it used the phrase "employees of the railroad who are not represented by a labor organization" in Article IV of New York Dock Conditions, was using the term "employee" in the accepted Railroad Industry manner--to include only those rank and file employees and subordinate officials who are subject to and entitled to unionization but were not unionized. Carrier's position is supported by the following court decisions:

McDow v. Louisiana Southern Ry. Co., 219 F.2d 650 (5th Cir. 1955)

Edwards v. Southern Ry. Co., 219 F.2d 650 (5th Cir. 1955)

Zinger v. Blanchett, 549 F.2d 901 (3rd Cir. 1977)

Carrier further relies on the following arbitration awards:

Brotherhood of Railway Trainman v. Southern Pacific Co., (David R. Douglas, Arbitrator) decided April 1, 1968.

In the Matter of Arbitration between Dana R. Bond and Michael J. Topolosky and Union Pacific Railroad Co. (Lamonte Stallworth, Arbitrator) decided September 25, 1985

In the Matter of Arbitration between Gerald J. Huggins, Lindell B. Rudloff, Ervin J. Kloess and Eugene F. Moore and Norfolk and Western Railway Co. (Robert O. Harris, Arbitrator) decided November 26, 1985.

POSITION OF THE UNION

Claimants argue that both the case law and prior administrative and arbitral decisions establish a fact-sensitive standard which demands a case-by-case analysis. When such standard is applied and a case-by-case analysis made herein, the facts will fully justify a finding that each of the claimants was an employee of Carrier within the meaning of the New York Dock Conditions imposed by the I.C.C.

ANALYSIS AND OPINION

In its ordinary sense, the word "employee" simply means a person who works for another person or entity for compensation in wages or salary. In its broadest sense, the term applies to the chief executive officer of the corporate entity. The resolution of the particular issue now under consideration turns on a determination of the sense in which the term was employed in the New York Dock Conditions imposed by the Commission pursuant to legislation now codified as 49 United States Code, Section 11347, which reads in pertinent part as follows:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

The referenced section 11344 is entitled "Consolidation, merger*, and acquisition of control: general procedure and conditions of approval", and Section 11345 is entitled "Consolidation, merger, and acquisition of control: rail carrier procedure". No definition of "employee(s)" is found in sections 11344, 11345, 11347 or elsewhere in Chapter 113, Title 49, United States Code.

Section 405 of the Rail Passenger Service Act (45 U.S.C. 565) (Amtrak Act) contains the following language which we deem relevant:

> § 565. Protective arrangements for employees
>
> (a) Duty of railroads; discontinuance of intercity rail passenger service. A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by discontinuances of intercity rail passenger service whether occurring before, on, or after January 1, 1975.
>
> * * * *
>
> (b) Substantive requirements for protection. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise;
>
> * * * *
>
> (3) the protection of such individual employees against a worsening of their positions with respect to their employment.
>
> * * * *
>
> (f) "railroad employee" defined.
>
> * * * *
>
> As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or

*For the sake of convenience we sometimes use this term in lieu of one or more of the three.

terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

We conclude that the definition of the term "railroad employee" pertains only to subsection (f) and therefore that it gives us no meaningful insight into the intent of Congress. No other definition of employee is set out in the Amtrak Act.

For those of us involved in railroad labor relations the homing beacon is generally the Railway Labor Act, 45 U.S.C. Chapter 8. Paragraph Fifth of Section 151 defines "employee" for the purposes of the Act, as follows:

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Our instinctive reliance on the Railway Labor Act is especially apparent in the arguments made herein on behalf of Carrier and in two of the three arbitral awards relied on by Carrier. We now consider all three of such awards.

Award No. 51 of Arbitration Committee, ICC F. D. NO. 23011, (David R. Douglass, Referee) predates New York Dock and contains insufficient explanation of its holding to provide meaningful precedent relative to the instant dispute.

Bond and Topolsky v. Union Pacific Railroad Company (hereinafter Bond) held that the U.P. Assistant Controller--Accounting Operations and its Manager.Personnel Accounting were not "employees" subject to New York Dock at the time of their termination from service. We examine langage from the award which justifies its holding.

> In the Committee's opinion Section 1, Fifth offers guidance as to the scope of the unionization and the term "employee" as including rank and file employees and subordinate officials. It is worth noting that the framers of Section 1, Fifth used the term "subordinate official" but excluded the term "official" of the carrier. On this point, the Carrier contends that when the ICC used the phrase "employees of the railroad who are not represented by a labor organization" it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term "employee" supports this contention. See, e. g. Harry Lustgarten Principles of Railroad and Airline Labor Law (Omaha: Rail Publications) pp. 29-32 and Ernest Dale and Robert L. Raimon: Management Unionism and Public Policy on the Railroads and Airlines" (Industrial and Labor Relations Review, Vol. II, No. 4, July, 1985).

It should be remembered that in the Railway Labor Act the Congress did not in any way or manner address the subject of what protective conditions for employees would be appropriate to redress the adversity which would be imposed on some employees through the merger or consolidation of the operations of two or more rail carriers. Dictionaries present words in their multiple meanings. And so it is that Congress in its legislation uses a single word in multiple senses,

usually defining, in each piece of legislation, the word as it is to be understood therein. When no definition is given, it is generally taken to mean that the word is to be interpreted in its general sense. We think it significant that in searching many dictionaries we have discovered only one which offers more than one simple definition of the word "employee".

Railroads have played a most vital role in the development of the resources of our nation. Because of their importances to our economic growth and national defense they were granted subsidies and made subject to regulation. The same two factors have motivated Congress over a period of many years to pass legislation designed to promote harmony between railroad management and labor, thus avoiding crippling work stoppages and industrial strife. The goal was substantially achieved in 1926 with the adoption of the Railway Labor Act. The two forces of industry, labor and management, were harnessed.

For the purpose of this discourse we need give attention to only two of the stated purposes of the Railway Labor Act as found in its Section 151a: "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter". Only these two subsections (and the definition quoted above) mention "employees".

It is apparent that the intent of the Railway Labor Act was to draw a line of demarcation between management and labor so as to give full recognition to the right of employees to bargain collectively with their employer, while recognizing the right of proprietorship of the employer carrier to the extent necessary to preserve its fundamental right to manage its workforce. Such latter right cannot be maintained unless the managerial cadre is big enough to insure that the paramount interest of the proprietor will not be entrusted to people with divided loyalties.

The considerations bearing on the drawing of this line of demarcation are quite different from those relevant to the issue of which employees of a carrier should be protected from adverse effects on their employment status brought about by consolidation, merger, and/or acquisition of control of rail interests. The Congress that wrote the Railway Labor Act was a different Congress addressing totally different concerns from those addressed by the Congress which passed that legislation codified as 49 United States Code, Section 11347; and it should be kept in mind that the essence of our charge is to give effect to the will and intent of Congress in Section 11347, particularly as relayed to us by the Interstate Commerce Commission. This conviction is re-enforced by a diligent study of all I.C.C. decisions having any relevancy to the issue. Such decisions span a long period of time and reflect a consistent policy, of a Commission of changing membership, to faithfully carry out the will of Congress without legislative mutation.

We strongly disagree with the conclusion of the arbitral committee in Bond quoted above. Such paragraph is the basis of the committee's decision. Let us examine the language:

> "In the Committee's opinion Section 1 Fifth offers guidance as to the scope of unionization and the term 'employee' as including rank and file employees and subordinate officials."

Section 1 Fifth (codified in U.S.C.A. as Section 151, Fifth) of the Railway Labor Act was not intended to provide a generic definition of an employee in the railroad business or otherwise. Its purpose was simply to limit the class of employees subject to unionization, including, however, specifically such subordinate officials as should be declared eligible by definition of the Interstate Commerce Commission. It simply cannot be said that in either 1926 or 1934 or at any time since, Congress, in framing the Railway Labor Act, has attempted to "offer guidance" on the issue as to who are "employees" under New York Dock.

> "It is worth noting that the framers of Section 1, Fifth used the term 'subordinate official' but excluded the term 'official' of the carrier."

We do not deem the stated fact to be noteworthy. Had the framers provided for the unionization of officials then the Railway Labor Act would have been stillborn.

From this foundation of speciousness the committee proceeds:

> "On this point, the Carrier contends that when the ICC used the phrase 'employees of the railroad who are not represented by a labor organization' it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term 'employee' supports this contention."

At this point the arbitral committee cites the writings of Harry Lustgarten and Dale and Raimon cited above. We have searched the cited works in vain for support of the stated thesis. Industry use of the term "employee" relates in the main to the administration and effect of the Railway Labor Act. However, it is significant that industry discussions of protective conditions for redress of adverse effects of merger frequently use specific language to embrace consideration of "all employees". (Emphasis ours)

The reference to Harry Lustgarten's Principles of Railroad and Airline Labor Law cites pages 29 through 32. On such pages a single topic is discussed: "Employees Subject to Union Organization and Representation." The syllabus reads as follows:

> "As a result of the definition of the word 'employee' in Section 1, Fifth, union organization and representation rights include not only ordinary employees but also extends to 'subordinate officials'. The Interstate Commerce Commission, which is authorized to make the determination of what employees are included in these classifications, has been rather indefinite but has tended to draw a line between 'subordinate officials' and officers rather high into the supervisory levels."

Nowhere on the referenced pages does Mr. Lustgarten address the subject of the definition of "employees" as the term relates to employee protection.

Management Unionization and Public Policy on the Railroads and the Airlines by Ernest Dale and Robert L. Raimon is not remotely concerned with the definition of "employees" under New York Dock or other provisions for employee protection. The principal theses of the article are the voracious appetite of the National Mediation Board for expansion of the definition of subordinate officials, the continuing

tendency of the Interstate Commerce Commission to satisfy the Board's hunger, and the plight of the carriers in dealing with the trend. The cited commentary provides no help in the resolution of the instant dispute.

We now turn to the court decisions cited in the Bond opinion. McDow v. Louisiana Southern Railway Co., 219 F2d 650 (1955), decided by the Fifth Circuit Court of Appeals, held that the question of whether a former vice-president of the Louisiana Southern Railway Company was an "employee" entitled to employment protections afforded by I.C.C.-imposed employee protective conditions, should not have been decided by the district court, which had concluded that "a study of the legislative history of (Section 5 (2) of the Interstate Commerce Act) leaves no doubt that the term 'employee' as used therein does not include the vice president and general manager of a railroad." No specific reference is made relative to the legislative hearings. A specific reference to such hearings is made in the Huggins opinion hereafter discussed.

Edwards v. Southern Railway Co., 376 F2nd 665 (1967) involved the Oklahoma conditions for employee protection. Edwards was a stockholder, and an employee (Chief Engineer), of a small family-owned railroad of which his father was the chairman and chief executive officer. The Fourth Circuit Court of Appeals held that he was not an employee covered by the Oklahoma conditions. The most significant language in the opinion, we think, is the following:

> "We believe, however, that 'employees' as used in the present context by Congress and the I.C.C. surely does not include the

principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidation." (emphasis supplied)

In this language, we believe, the court exposed what should be, at least, the justification for protective conditions: to protect railroad employees whose position with the company is such that it will not empower them to protect themselves. And we believe that such purpose should far transcend the issue of union membership. The Railway Labor Act is a stranger to this consideration.

This understanding of the purpose of employee protective conditions was endorsed to a degree in the case of Newbourne v. Grand Trunk Western Railroad Co., 758 F2nd 193 (1985) in which the Court of Appeals for the Sixth Circuit held that Newbourne, a former supervisor on the DT & I who reported directly to a vice-president, was not an employee under Section 11347. The court enumerated seven factors used by the district court in its arrival at the same conclusion. The judges were impressed by the fact that Newbourne possessed skills which were "transferable", citing the fact that during 21 of the 30 years of his career he had been employed outside of the railroad industry. Thus the court felt that Newbourne could "take care of himself". While we appreciate the court making a distinction between employees who can take care of themselves and those who cannot, we think that resort to "transferable skills" should not be required of a career railroad man, even one with only nine years of service. The elusive nature of such insurance is demonstrated by the fact that within two years after his

termination, Newbourne, who earned $43,220 with the railroad, was earning approximately $9,000 per year.

Zinger v. Blanchette, 549 F2nd 901 (1977) is not helpful because it provides no definitive ruling on the issue of whether or not Mr. Zinger was an employee eligible for protection, the case being decided on other grounds.

Strong reliance on federal court decisions in the Bond award is subject to serious question. Surely the Congress as well as the Supreme Court has made it plain that it is in the arbitral forum that these disputes should be resolved. It would therefore appear that knowledgeable railroad arbitrators should be able to adjudicate the disputes independent of putative precedential constraints of random fallout resulting from the straying by the disputants into the judicial arena. Yet, to be sure, some court decisions may be educational in providing us with ratiocination helpful in getting to the heart of the matter. The same applies to I.C.C. decisions.

Most instructive, we believe, is the following language of the Interstate Commerce Commission in its decision in Leavens v. Northern Burlington, 348 I.C.C. Reports 962, 975:

> "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized. However, there would have been no conditions had there been no merger. The conditions were adopted to protect affected employees from harm that would be caused by the merger. Our review should be limited to those matters that either result from the merger or which claim violation of a specific condition that was intended to protect against a specific merger-related harm. Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we required for adversely affected employees.

"However, in dealing with these protective conditions, the Commission is faced with a special problem--defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is provided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. (Emphasis ours) This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations. Burlington Truck Lines v. U.S. 371 U.S. 156 (1962); Overnite Transp. Co.--Pur.--Rutherford Freight Lines."

The significance of the quoted language is quite obvious. Of singular interest and instructional benefit is the Commission's declaration that matters such as those before us are deferred to the jurisdiction of arbitrators in order that those "most familiar with the complexities of labor law and the peculiar problems associated with the railroad employees (may) determine disputes arising out of (protective) conditions." Obviously, those not familiar with the complexities of labor law and the peculiar problems associated with railroad employees are without that expert competence which the Interstate Commerce Commission itself disclaims. In our extensive study of I.C.C. opinions we are greatly impressed with the Commission's profound understanding of its charter and the careful restraint it has exercised in its avoidance of infringement on the province of Congress, courts, and arbitral forums, which it has referred to as "quasi- judicial." Thus, in Leavens, the Commission affirms its resolve not to "contravene" the national policy as to labor relations: that is, not to make decisions on matters which are within the realm of arbitral jurisdiction.

It is for this reason that we should not expect I.C.C. decisions to provide precedent for the resolution of the issues before us. And indeed the search for authoritative precedent in I.C.C. decisions is no more proper than looking to the courts to decide the issue for us. It is ironic that the pivotal consideration in the decision of the arbitral board in Huggins, et al v. Norfolk and Western Railway Co. (1985) is the case of Haskell H. Bell v. Western Maryland Railway Co., 366 I.C.C. Reports 64..

Mr. Bell, an employee of Western Maryland Railway Company, lost his job after the Chessie swallowed the WM. He filed a complaint with the I.C.C. alleging that the C&O had violated provisions of the so-called New Orleans conditions imposed by the Commission in WM Control. The matter was routinely referred to the Commission's Review Board Number 5. After hearing, the review board found that "because he was a management-level employee at the time the grounds for the complaint arose, he was apparently not subject to the Commission's protection." The board's decision was appealed to the Commission, and the Commission's decision is illuminative of several of the issues directly involved herein. Basically, Mr. Bell presented two arguments in support of his complaint. We shall discuss such arguments in reverse order to that followed in the I.C.C. opinion. We describe the arguments in the language of the Commission:

> "Mr. Bell argues that while the term "employee" is not expressly defined in the Interstate Commerce Act, its definition in the Railway Labor Act, 45 U.S.C. 151 et seq., compels the conclusion that he is covered by the employee protective conditions. Mr. Bell points to the series of Commission decisions in Ex Parte No.

72 (Sub-No. 1), Regulations Concerning Employees Under Ry. Labor Act."

While in its opinion the Commission does not reveal Mr. Bell's title or describe his duties and responsibilities, it is quite obvious that Bell and his attorneys believed that his position would fit the job description of one of the classes of subordinate officials which the Commission had declared eligible for union representation in one of its Ex Parte 72 decisions. This is most interesting, since in recent cases the carriers have usually taken the position that eligibility for coverage under New York Dock should be limited to employees (including subordinate officials) as defined by the Commission (in Ex Parte 72 proceedings) pursuant to the mandate found in the Railway Labor Act. And in Bell, the Western Maryland based its defense upon argument that Mr. Bell was improperly seeking to expand the group of protected employees and that such expansion could be accomplished "only after notice and hearing in a rule-making proceeding under Ex Parte No. 72 (Sub-No. 1)".

The Commission addressed this issue in succinct language which should serve to dispel the notion that definition of the term "employee" for the purposes of the Railway Labor Act is either controlling or significantly meaningful as relates to the determination of the meaning of the term under Section 11347. The Bell opinion states, page 66,

> "Our power to classify employees under (Railway Labor Act) is limited, and does not extend to the classification of employees for the purpose of employee protection. See Hudson & M. R. Co. Employees--Railway Labor Act, 245 I.C.C. 415, 417 (1941); National Mediation Board, The Railway Labor Act at Fifty, (1976).

> Accordingly, none of the decisions in Ex Parte No. 72 (Sub-No. 1) relied upon by petitioner can be used to support a positive determination of his 'employee' status in this proceeding."

Again we advert to the Huggins--N&W arbitration award relied on by carrier, drawing attention to language found on page 17 of the opinion. It is stated: "The I.C.C. has never taken a broad view of the term 'employee'." The award goes on to state,: "But the I.C.C. clearly differentiated between 'labor' and 'management' in (Bell)." The decision refers to language from the review board's decision, using such language as authority in its determination of the issue of whether or not Bell was an employee covered by the New Orleans conditions. However, it is clear that the Commission in no way affirmed any language of the inferior board touching on the merits of the case. Having explained that its Ex Parte 72 decisions were strictly for purposes related to employee representation, collective bargaining and jurisdiction of the National Mediation Board and not intended for purposes of employee protection and having disavowed its intent, competence and jurisdiction to resolve issues such as that before us, the Commission made the following observations: "We believe that this is an arbitral decision, and consequently we may not take any action in the matter....Because the question of whether Mr. Bell's position was labor or management is a proper matter to be resolved at arbitration, and is therefore outside the scope of our jurisdiction, we will not consider the complaint."

The Interstate Commerce has clearly ruled, therefore, that it has no jurisdiction to decide whether or not the claimants in cases such as

that before us are employees covered by the protective conditions of New York Dock. It is patently not appropriate to determine their status on the basis of illusory definitions envisioned in I.C.C. decisions.

As aforenoted, the Interstate Commerce Commission has scrupulously observed the constraints of its organic legislation, recognizing that its duty is to enforce the will of the Congress. It behooves us to do exactly the same, for in spite of the fact that Section 11347 has its roots in the Washington Job Protection Agreement, the legislation must necessarily be viewed in light of the general welfare and not within the narrow interest of railroad owners and labor unions. We find no arcane language in Section 11347 or in New York Dock. Neither do we attach significance to legislative history exposing the presence of partisans at the creation. The following is abstracted from the opinion in Huggins et al v. Union Pacific:

> "(I)n 1936 the carriers and the representatives of the organized employees entered into an agreement which has become known as the Washington Job Protection Agreement. That agreement is the direct linear predecessor of the New York Dock II conditions under which Claimants seek protection. However, notwithstanding that Agreement, an attempt was made to get further legislation from Congress, which would allow greater flexibility on the part of the ICC in allowing consolidations and mergers. The hearings which formed the basis for the subsequent legislation included testimony by George M. Harrison, the President of the Clerks Union, recommending that there be 'fair and reasonable protection for the rights and interests of the workers that may be adversely affected' by any merger. In response to a question regarding the possibility of protection for management itself, since they might also be affected, Mr. Harrison noted:
>
> > Most of our supervisory and management staff members have been promoted from the ranks. They retain their rights to the classified service while they are so occupied, and, should they discontinue a position of one of those persons,

> they would then slide back or go back, I should say, to the classified service. (Report of the Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Congress, 1st Session, at page 245 (1939).
>
> In other words, union labor was suggesting to Congress that management at a level above subordinate officials was not in need of the type of job protection that was suggested by Section 5 (2) (f) of the Interstate Commerce Act, as amended (49 U.S.C. 11347).
>
> There was the additional implication that the Washington Job Protection Agreement was intended to cover management at a level above subordinate officials since such management officials would most probably have the ability to bump down to lower level jobs if need be."

We again stress that the federal legislation which brings us together in this case was by no means a mere ratification of the Washington Job Protection agreement. An old adage is as follows: "Whose bread I eat, his song I sing." To be sure, President Harrison was singing the song of the Clerks' union when he gave the quoted testimony. And indeed it would be in the interest of the Clerks' union if the protective conditions were restricted to union members. Mention is made of the fact that management officials could "bump down" in order to avail themselves of protection. But if someone is forced to bump down because of a merger, has he not thereby been adversely affected by such merger?

In the final analysis our lengthy research has not revealed, in either legislation affecting railroads and their employees, or in decisions of the Interstate Commerce Commission, any language which would indicate that it was the intent of Congress to deny to claimants the benefit of New York Dock protective conditions. In 21 years as a railroad arbitrator the undersigned has been privileged to observe the

effects of numerous mergers. To contend that only subordinate officials and other employees eligible for unionization will suffer adverse effects from a merger is to ignore reality.

On three, and only three, occasions, the Congress of the United States has definitively addressed the question of what employees should be covered by protective conditions imposed for the purpose of minimizing the adverse effects resulting from reduction of jobs in the railroad industry. Actually, Congress has found it easier to simply exclude certain classes of employees while affording broad coverage for the remainder. Let us examine the legislation.

On November 4, 1979, Congress passed the Milwaukee Railroad Restructuring Act (now Title 45, Chapter 18, Sections 901 et seq). Section 908 made provision for negotiations between the Milwaukee Road and labor organizations representing the employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad (conditions quite similar to those resulting from mergers, control or consoildations). Section 907 made provision for preferential hiring for <u>all</u> employees separated or furloughed from the Milwaukee (other than for cause) prior to April 1, 1984, and Section 909 provided for <u>supplementary</u> unemployment insurance for <u>all</u> employees affected by reduction in service. (all underlining supplied) And Section 902 (4) states:

"..the term 'employee' -

"(A) includes any employee of the Milwaukee Railroad who worked on a line of such railroad the sale of which became effective on October 1, 1979; but

"(B) does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions;"

Pursuant to Section 908, negotiations between the Milwaukee and the labor representatives of its employees took place. The result was adoption of New York Dock Protective Conditions in an instrument identified as Appendix B. Most significantly, Milwaukee management then made the terms of Appendix B applicable to all non-agreement employees except those excluded by Section 902 (4)(A).

On May 30, 1980, the Congress passed the Rock Island Railroad Transition and Employee Assistance Act (now Title 45, Chapter 19, Sections 1001 et seq).

Section 1001 cited a need for adequate protection provisions to insure uninterrupted continuation of services over Rock Island lines and avoid serious repercussions on the economies of the states served by the railroad. Section 1002 included the following among its "Definitions":

"(4) 'employee' includes any employee of the Rock Island Railroad as of August 1, 1979, but does not include any individual serving as president, vice-president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions;"

Section 1005 imposed on the Secretary of Transportation and "the representatives of the various classess and crafts of employees" (not "labor organizations" as in the Milwaukee conditions) responsibility for negotiating protective conditions, with proviso that if they were

unable to reach agreement, the Secretary would unilaterally prescribe such conditions.

On October 14, 1980, the Staggers Rail Act of 1980, Public Lae 96-448 was enacted. Section 219(g) states:

> "The Interstate Commerce Commission shall require rail carrier members of a rate bureau to provide the employees of such rate bureau who are affected by the amendmentsmade by this section with fair arrangements no less protective of the interests of such employees than those established pursuant to Section 11347 of Title 49, United State Code. For purposes of this subsection, the term 'employees' does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions."

From the foregoing it is evident that each time the Congress has made provision for protective conditions for employees adversely affected by circumstances or events other than mergers, Congress has extended eligibility to all employees below the rank of vice president. The drawing of this line of demarcation is consistent with the philosophy that the protection is due only to those employees who have had little if any control over developments which precipitated the need for protection. It will be remembered that this thinking was advanced by the U. S. Circuit Court of Appeals in Edwards v. Southern Railway, supra.

This doctrine is also consistent with the definition of "employee" found in the unabridged Webster's Third New International Dictionary (G. & C. Merriam Co.), reading as follows: "One employed by another, usually in a position below the executive level and usually for wages". (Emphasis supplied)

SUMMARY OF RATIONALE

We summarize the reasons for our holding on this issue:

1. We believe that while all of the congressional legislation reflects an intent to cover a broad range of employees with protection against the adverse effect of mergers, none of such legislation indicates an intent to exclude from protection employees at the level of these claimants. None of the claimants had the power to affect the merger of MP-UP-WP nor the influence to cushion its impact. Claimants were not really executives of MoPac, and in spite of the large sums of income for which they were nominally responsible, we would venture to say that none of their names was ever mentioned in the company's annual report to its stockholders.

2. The use of the definition "employee" found in the Railway Labor Act is insupportable. Such act has no relevancy insofar as the scope of employee protective conditions is concerned. The fact that the Interstate Commerce Commission Act authorizes the NMB to appoint arbitrators is likewise not relevant to the issue before us.

3. The court cases and arbitral awards relied on by the carrier have been carefully considered. We are unable to recognize them as authoritative precedent.

4. We believe our decision is consistent with the authority delegated us by the Interstate Commerce Commission and with the Commission's consistent adherence to what it perceives to be the intent of Congress.

DECISION

We hold that each of the claimants was an employee of MoPac within the meaning of New York Dock conditions.

ISSUE NO. 3 (Re-stated)

IF THE CLAIMANTS ARE EMPLOYEES WITHIN THE MEANING OF NEW YORK DOCK, ARE THEY "DISMISSED EMPLOYEES" UNDER THE TERMS OF NEW YORK DOCK?

ANALYSIS AND OPINION

Since each of the claimants was offered a position in Omaha comparable to that which he occupied in St. Louis, none of the claimants is a dismissed employee under the definition set forth in New York Dock conditions.

DECISION

The claimants are not "dismissed employees" under the terms of New York Dock.

ISSUE NO. 4 (Re-stated)

IF CLAIMANTS ARE EMPLOYEES UNDER NEW YORK DOCK, ALTHOUGH NEITHER "DISMISSED EMPLOYEES" NOR "DISPLACED EMPLOYEES" AS DEFINED THEREIN, ARE THEY NEVERTHELESS ENTITLED TO SUBSTANTIALLY THE SAME LEVELS OF PROTECTION AS WERE AFFORDED TO MEMBERS OF A LABOR ORGANIZATION THROUGH IMPLEMENTING AGREEMENTS NEGOTIATED PURSUANT TO THE PROVISIONS OF NEW YORK DOCK SUCH AS IMPLEMENTING AGREEMENT NO. 1 EFFECTIVE JUNE 1, 1983?

BACKGROUND

This issue involves the interpretation of Article IV of New York Dock conditions which reads in pertinent part as follows:

> "Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions."

This would not appear to be an ambiguous provision. The aura of ambiguity is generated by arguments encouraged by arbitral awards which have held that a considerable number of railroad employees are simply not employees.

We have already concluded that claimants were indeed employees of MoPac subject to the protective conditions of New York Dock.

Pursuant to the provisions of New York Dock, the BRAC and carrier entered into Implementing Agreement No. 1 effective June 1, 1983. Upon termination, each of the claimants sought to take advantage of one of the provisions of such agreement. The issue is whether or not such agreement inured to the benefit of the claimants.

POSITION OF THE CARRIER

In support of its argument that claimants are not eligible for any of the benefits accruing to employees under Implementing Agreement No. 1, counsel for Carrier cites a recent arbitration award authored by Neutral Robert M. O'Brien and being styled Benham & Delaware & Hudson Ry. Co. It is the further position of the carrier that the position of the claimants is contrary to public policy. The adoption of such position, it is urged, would pose a serious threat to industrial peace in the railroad industry and create an administrative nightmare.

Carrier argues that the claimants cannot receive the benefits contained in Implementing Agreement No. 1 because they are neither "dismissed employees" nor "displaced employees" under New York Dock. It is argued that New York Dock is designed to "guarantee only minimal protection" to eligible employees. The company further cites

Burlington Northern-St.L. & S.F. Ry. Co.-Control, 360 I.C.C. Reports 788, as authority that "there is no requirement that all employees be treated substantially the same in the event of a merger or control".

Finally, counsel argues that Option 3 in Implementing Agreement No. 1 is not derived from New York Dock but from the February 7, 1965, National Agreement, an agreement having no application to non-agreement employees.

POSITION OF THE UNION

Claimants contest each of the points made by Carrier, pointing out that New York Dock simply establishes minimum protective benefits, that employees are entitled to negotiate more favorable conditions than those in Dock, and that the language of Article IV plainly says that non-agreement employees are to be treated substantially the same as agreement employees.

ANALYSIS AND OPINION

The crux of the holding in Benham is an affirmance of the arbitral awards rejected by us in our discussion under Issue No. 2. For the reasons set forth in such discussion we likewise reject Benham as authentic precedent.

Carrier's position that relief under Dock is limited to employees who are dismissed or displaced as contemplated by Dock Article I, Sections 1.(b) and 1.(c) ignores Article IV. It ignores the fact that the skeletal provisions of Dock constitute simply the minimum protections for employees adversely affected by a merger. It also ignores the effect of Article 1, Section 4, of Dock providing for

negotiation or settlement by arbitration of matter relating to displacement or dismissal of any employees, or re-arrangement of forces.

Adverting to the BN-Frisco-Control decision, we consider Carrier's argument that such holding is authority that "there is no requirement that all employees be treated substantially the same in the event of a merger". As background to consideration of BN-Frisco we quote the following language from the Interstate Commerce Commission in a prior case cited in BN-Frisco. The case is Norfolk & W. Ry. Co. and New York, C. & St.L. R. Co. Merger, 324 I.C.C. Reports 1, 50, and the relevant language reads as follows:

> "Employee conditions.-As previously stated herein and in appendix A, various agreements have been reached between employee representatives and the Norfolk & Western for the protection of employees adversely affected by these transactions. Our authorizations herein will, by reference, be made subject to such agreements. For the benefit of employees not covered by such agreements, the hearing examiner recommended the imposition of protective conditions similar to those imposed in Oklahoma Ry. Co. Trustees Abandonment, 257 I.C.C. 177. However, it has been our experience in proceedings of this nature that more adequate protection is afforded by the conditions prescribed in Southern Ry. Co.-Control-Central of Georgia Ry. Co., 317 I.C.C. 557, as supplemented and clarified in 317 I.C.C. 729 and 320 I.C.C. 377. Therefore, the conditions prescribed in the latter case will be imposed by reference in our order for the protection of railway employees not covered by the agreements and adversely affected by the transactions."

Appendix A referred to in the foregoing quotation recited that prior to the I.C.C.'s decision the N & W had entered into an agreement with 19 of the principal labor organizations.

The relevant language from BN-Frisco-Control is as follows:

> "Employee protection.-Since we have decided to approve the merger, we must consider the interest of, and provide protection

for, carrier employees. We must determine first, what level of protection should be provided, and second, which employees should be protected.

"This merger will provide a long-term benefit to employees of BN and Frisco by increasing the number of positions on the merged system. The applicants acknowledge that there will be short-term dislocations on their system. We must protect employees from these dislocations. Three alternative protective conditions which we might impose are: the standard protective conditions; these minimum standards, with the amendments requested by RLEA (set out in appendix K); or the protection which BN and Frisco have negotiated with three other labor unions.

"In the past we have imposed differing levels of employee protection for employees who reached an agreement for protection and those who did not. We believe that this proceeding is also an appropriate place to bifurcate the levels of employee protection. Those parties who have negotiated agreements will be provided with that level of protection. Those who have not will be accorded the statutory standard....

"In this case there is no basis for us to exercise our discretion and require a greater degree of employee protection than the statutory minimum....

"The New York Dock conditions are significantly more protective of railroad labor than any previously imposed single set of employee protective conditions. The New York Dock conditions satisfy the employee protection mandated by the statute. They will be imposed for the protection of employees who do not enter into a protective agreement with BN and Frisco prior to consummation of the merger.

"We next turn to the agreements which were negotiated with the Brotherhood of Railroad Signalmen (BRS), Sheet Metal Workers International Association (SMWIA), International Association of Machinists and Aerospace Workers (IAMAW), and Brotherhood of Locomotive Engineers (BLE). These agreements are more protective than the New York Dock conditions and protect not only employees of BN and Frisco but also their wholly owned subsidiaries. The protective period is the same as in New York Dock or in the alternative, the period equal to length of service at the date of merger, with the protective period starting on the date of merger but no benefits to accrue until the employee is affected due to the merger. The displacement allowance is subject to a 6-year minimum.

"For BLE the displacement allowance is a monthly allowance computed by dividing earnings from the last 12 months by the

number of calendar days in the 12 months and multiplying that daily rate by the number of calendar days in the current month. These rates are to be adjusted for general wage increases, and reduced by any changes in laws or agreements which limit availability for work. Dismissal allowances are to be computed in the same manner. However, they are reduced by outside earnings, unemployment compensation, opportunities for available comparable work, and any period the employee would have been furloughed due to emergency conditions.

"The BRS, SMWIA, and IAMAW agreements also compute wages on the basis of the prior 12 months, unless the employee has worked for less than 12 months.

"The employee has the option of electing separation pay 30 days after furlough instead of 7 days provided in New York Dock.

"There are other modifications to the New York Dock conditions which we have reviewed and found to be fair and equitable to the employees and at least as protective as arrangements required by 49 U.S.C. 11347.

"After analyzing these agreements, we are convinced that the interest of carrier employees covered thereby will be adequately and fairly protected by the terms of the agreements, and we find that the agreements do not render the proposed transaction inconsistent with the public interest. When we adopt a labor agreement, we impose it as a condition to our approval of the transaction. We emphasize that these protective agreements shall apply only to those organizations which enter into such agreements with BN and Frisco prior to consummation of the merger...."

Section 11347 makes specific provision for the negotiation by a carrier and its unions of contracts for employee protection independent of I.C.C. control, subject, however, to the legislative mandate that the negotiated protective conditions shall not be below the level of New York Dock. It is noteworthy that the contracts negotiated by the four unions prior to the BN-Frisco merger were "more protective than the New York Dock conditions." For such reason, the agreements were virtually certain to be approved by the Commission, as they were. While the Commission invited other unions to negotiate similar

agreements with the carrier, it made it clear that those not doing so prior to merger would be "accorded the statutory standard", ie. New York Dock.

This bifurcation of the levels of employee protection does not impair the claimants' rights under Article IV. What it does is provide the reason for the use of the language "under these terms and conditions" in Article IV. The addition of "under these terms and conditions" denies to non-agreement employees consideration for protective conditions substantially similar to those negotiated by the unions prior to merger, yet entitles such non-agreement employees to substantially the same level of protection as is negotiated or imposed by arbitration under New York Dock.

If the intent of Article IV was simply to qualify non-agreement personnel of whatever stripe for protection under the strict terms of New York Dock there is no logic supporting protection at substantially the same level of benefits. The language which was employed comes into focus only when we consider the variances in implementing agreements which may be negotiated or imposed for the governance of conditions affecting members of the various bargaining units. Because of the variables involved it makes perfect sense to provide employees outside the bargaining units only substantially (not exactly) the same benefits.

Carrier introduced expert testimony to the effect that affording non-agreement employees such as claimants substantially the same level of protection as that given union members through negotiated accords or

arbitral fiats would be impossible to administer and produce a chaotic situation. We see no such problem, for the word "substantially" imposes a standard of practicality sufficient to quell the chaos feared by management. Common sense dictates that New York Dock implementing agreements affecting union members will (or should) have an identifiable thread of commonality reflecting a consistent carrier policy of fairness to all. It was the intent of Congress, we believe, to make non-agreement employees beneficiaries of that same policy. As surely as the difference in union crafts poses no insurmountable barrier to negotiating fair agreements for all such crafts, so it should be with non-union people who share the adversity brought about by merger.

The law frequently is satisfied with simply substantial compliance with its requirements. Indeed, arbitral law recognizes such principle along with that of equal justice under law. There is no good reason for not providing all classes of railroad employees substantially the same level of job protection when mergers are sanctioned by the I.C.C. Such, we believe, is and has been the will and intent of Congress.

What is the meaning of the language "the same levels as are afforded...under these terms and conditions"?

Counsel for Carrier argues that the underlined words limit protections afforded non-agreement employees to the bare-bones benefits extended to "displaced" and "dismissed" employees, in New York Dock provided such non-agreement employees qualify as being "displaced" or "dismissed" as defined in Dock. Obviously, such construction would

deny to employees like claimants the higher level of protection that was provided to senior clerks in the BRAC Implementing Agreement No. 1. If claimants are entitled to the same benefits they are entitled to collect significantly higher severance pay while refusing an assignment in Omaha. Implementing Agreement No. 1 contains the following language:

> "Employees offered the positions at Omaha must exercise one of the following options within 10 days:
>
> * * * *
>
> (3) Resign from all service and accept a lump sum computed as follows:
>
> * * * *
>
> "b) MP protected employees with 15 or more years service -- computed in accordance with Section 9 of the Washington Job Protection Agreement of May 9, 1936."

Most significantly, substantially the same language is found in Mediation Agreement, Case No. A-7128, dated February 7, 1965, with BRAC, U.P., M.P. and W.P. signatories thereto. We quote:

> "In the case of any transfers or rearrangements of forces for which an implementing agreement has been made, any protected employee who has 15 or more years of employment relationship with the carrier and who is requested by the carrier pursuant to said implementing agreement to transfer to a new point of employment requiring him to move his residence shall be given an election, which must be exercised within seven calendar days from the date of request, to make such transfer or to resign and accept a lump sum separation allowance in accordance with the following provisions:
>
> * * * *
>
> "If the employee elects to resign in lieu of making the requested transfer as aforesaid he shall do so as of the date the transfer would have been made and shall be given (in lieu of all other benefits and protections to which he may have been entitled under the Protective Agreement and Washington Agreement) a lump

sum separation allowance which shall be computed in accordance with the schedule set forth in Section 9 of the Washington Agreement; provided, however, that force reductions permitted to be made under this Agreement shall be in addition to the number of employees who resign to accept the separation allowance herein provided."

We hold that protections "under these terms and conditions contemplates protections provided in implementing agreements negotiated or imposed pursuant to New York Dock Conditions.

Stated another way, implementing agreements negotiated under mandate of New York Dock become an integral part of Dock, that is, a part of its "terms and conditions" mentioned in Article IV.

However, we cannot justify extending such protections to non-agreement employees where, as is here the case, the carrier's obligation long pre-dated the consolidation which created the need for protection.

In essence the quoted language from Implementing Agreement No. 1 was not born of New York Dock.

We think it most unlikely that this language would have appeared in the BRAC Implementing Agreement absent the existence of the 1965 Agreement. The fact that it was recited in the implementing agreement does not bring it within the purview of Article IV.

DECISION

For the foregoing reasons we hold that Claimants are entitled to substantially the same level of protection as that provided clerks under Implementing Agreement No. 1, but cannot exercise Option No. 3 under such agreement because it is merely a recitation of a right

available to clerks under the February 7, 1965 Mediation Agreement and independent of New York Dock.

ISSUE NO. 5 (Re-stated)

ARE CLAIMANTS ENTITLED TO ADDITIONAL VACATION BENEFITS?

THE EVIDENCE

The facts are not in dispute. Upon termination of their service with MoPac in June and July of 1983, each of the claimants was paid accrued vacation benefits under the UP formula. The benefits were less than they would have been under the MoPac formula.

However, in January of 1983, two different high UP officials assured MoPac employees that their MoPac vacation benefits would be "grandfathered" and under no circumstances would their MoPac benefits be reduced. In addition, Carrier circulated a Question and Answer sheet to the same effect. Then, in February, 1983, UP published a booklet outlining employee benefits. Included was the UP method of computing vacation time accrual.

Counsel for each side cite the case of Hinkeldey v. Cities Service Oil Co., 470 S.W.2d 494 (Mo. 1971). Counsel for Carrier cites the case as authority that notice of contract modification constitutes an offer, acceptance of which is found in continued employment. Claimants' counsel cites Hinkeldey for its holding that where an employer makes two different representations to employees, ambiguity must be construed against the employer. We are not at all sure that under the facts of record Claimants were properly charged with notice that the employee handbook contained a repudiation of the three prior representations

made by management. At the least, there is ambiguity which should be resolved in Claimants' favor.

DECISION

We hold that Claimants are entitled to benefits as thrice promised by carrier officers about six months before the benefits were claimed; that is, to computation of vacation pay in conformity with the old MoPac method.

Rendered May 11, 1987.

David H. Brown

DAVID H. BROWN, Arbitrator

Section F. The provisions of Section E, paragraphs 1 through 3 of this article, also will apply to regular assigned conductors or conductors assigned to extra boards who are taken therefrom and used under the provisions of Section A of this Article.

ARTICLE 54

LEAVES OF ABSENCE

Section A. Committeemen will be granted leave of absence and transportation without unnecessary delay.

Section B. A trainman selected for training under the Southern Pacific Transportation Company's Training and Development Program, promoted to an official position in the Company's service, or exclusively employed by the United Transportation Union, will retain his seniority rights.

Section C. 1. In the discretion of the Superintendent other leaves of absence may be granted for not more than 30 days, with an extension of 30 days, except is cases of sickness or disability. A trainman who has been five years in the Company's service will be granted leave of absence for one (1) year and will retain his seniority rights if the requirements of the service will permit and if he does not accept position on another railroad. Request and approval for leave of absence under this section must be in writing.

2. Thirty day leave of absence, as referred to in paragraph 1, will extend from the effective date in one month to and including the corresponding date in the next subsequent month.

3. Trainmen who are absen because of sickness or injury will be on an automatic leave of absence until they are able to return to service.

4. A trainman who is elected or appointed an official of the Federal or State Government will be granted leave of absence for the duration of the term of office or appointment.

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other matters decided the provisions in Section 15(f) for protection of employes adversely affected as a result of the discontinuance of any existing runs or the establishment of new runs resulting from application of this rule.

(e) Interdivisional, interseniority district, intradivisional or intraseniority district service and/or agreements in effect on September 1, 1971, are not affected hereby.

(f) Every employe adversely affected either directly or indirectly as a result of the application of this rule shall receive the protection afforded by Sections 6, 7, 8, and 9 of the Washington Job Protection Agreement of May 1936, except that for the purposes of this Rule Section 7(a) of said agreement is amended to read 100% (less earnings in outside employment) instead of 60% and extended to provide period of payment equivalent to length of service not to exceed 5 years and to provide further that allowances in Sections 6 and 7 be increased by subsequent general wage increases.

Any employe required to change residence shall be subject to the benefits contained in Sections 10 and 11 of the Washington Job Protection Agreement and in addition to such benefits shall receive a transfer allowance of $400.00 and five working days instead of the "two working days" provided by Section 10(a) of Washington Job Protection Agreement. Under this Section, change of residence shall not be considered "required" if the reporting point to which the employe is changed is not more than 30 miles from his former reporting point.

If any protective benefits greater than those provided in this Article are available under existing agreements, such greater benefits shall apply subject to the terms and obligations of both the Company and employe under such agreements, in lieu of the benefits provided in this Rule.

Holding Official Positions

SECTION 16. An engineer with seniority rights on any district, accepting an official position in the service of the Company, or being exclusively employed by the Brotherhood of Locomotive Engineers, retains in either case his seniority rights; upon application, as provided for in Section 12, this Article, he will have the privilege to displace any engineer his junior.

Leave of Absence

SECTION 17. An engineer having been in the service of the Company as an engineer for five (5) years may be granted leave of absence for one (1) year and retain his seniority rights, provided he does not accept a position on any other railroad.

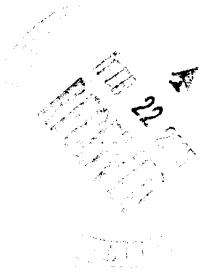
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APPENDIX 11

IN THE MATTER OF ARBITRATION BETWEEN)
)
)
JOHN E. GROTHER)
)
and)
)
)
UNION PACIFIC RAILROAD COMPANY)
)
Pursuant to Article IV of the New York Dock Conditions Imposed by the Surface Transportation Board in Finance Docket N0. 32760)

UNION PACIFIC'S POST-HEARING BRIEF



* * * * * * * * * * * * *

During the hearing, Neutral Member Ross summarized the three issues in this case as whether Mr. Grother's demotion was as a result of the merger (causality), whether Mr. Grother was an employee under New York Dock (employee), and whether Mr. Grother waited too long to pursue his case under New York Dock (Laches). She stated that post-hearing briefs should be limited to amplification or rebuttal of arguments already made, and could not contain new argument. The order in which Union Pacific presents amplification and rebuttal on each of the three issues in this document follows the order in which they were presented during the hearing, and does not indicate UP's order of importance.

Causality:

In Mr. Grother's May 12, 2003, letter he clearly and repetitively sets forth his belief that his demotion was merger related because it came as a result of the movement into Tucson of switching formerly performed at Phoenix.[1] Based on the testimony of Witness Packard, Mr. Grother's belief as to causality is not true. Mr. Packard testified Mr. Grother had not been demoted because of the issue with Phoenix. He stated "the service issues and everything, they were insurmountable no matter who was in charge." He testified the real reason for the demotion was Mr. Grother's lack of performance on the job:. In his words, "John wasn't up to the charge." (74:4-12) [2] During cross-examination by Mr. MacDougall, Mr. Packard reiterated that Mr. Grother's demotion did not occur as a result of the movement of Phoenix switching into Tucson (96:8-10).

Union Pacific's later decision to return the switching to Phoenix was made for the reason set forth by Mr. Packard (101: 8-16). Because that decision was made on the same day Mr. Grother was informed of his demotion (101:17-20), Mr. Grother wrongfully concluded his demotion was related to the Phoenix experiment. .

In its written submission and during the hearing, Union Pacific argued that the movement of switching from Phoenix to Tucson could have been made by Southern Pacific prior to the merger and thus was not dependent upon the merger. Grother apparently disagrees.[3] In his reply verified statement, item #21, Mr. Grother states:

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[1] Mr. Grother's May 12, 2003 letter is Exhibit 2 in both Grother's and Union Pacific' written submission.

[2] Citations in parentheses refer to the transcript of the hearing. (74: 4-12) refers to page 74, lines 4 through 12 in the transcript.

[3] "Grother", as used herein, refers collectively to the opposite party in this arbitration, while "Mr. Grother" refers specifically to John E. Grother

> "Of considerable importance is the fact that the UP/SP merger gave UP the right to make immediate operational decisions to benefit the UP system, but which would not have been made by SP, standing alone, as such decisions would have been economically adverse to a separate SP system."[4]

That statement is illogical. If there were an economic benefit to flow to UP as the result of moving Phoenix switching into Tucson, that same benefit would have flowed to SP prior to the merger. To the extent the move made economic sense, then it would make the same economic sense to either carrier. Notice also that Mr. Grother says "would not have been made," not "could not have been made" by SP standing alone.

In his verified statement relating to causality, Mr. Grother contends the movement of switching from Phoenix into Tucson was part of the merger implementing plan.[5] In Item #17 of his reply verified statement (Exhibit GH28), Mr. Grother states:

> "The reduction of work at Phoenix, and the dramatic increase in freight traffic for Tucson, were part of the merger plan, or "re-plan" experiment, as filed with the Surface Transportation Board."

The Labor Impact Exhibit filed by UP/SP prior to the merger does not support that contention.[6] During the hearing, Union Pacific pointed out that the Labor Impact Exhibit shows a reduction of one engineer and one trainman at Phoenix in year two following the merger.[7] When questioned about this during the hearing, Mr. Grother was unable to explain how moving most of

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[4] Grother Exhibit GH28 - page 10

[5] Grother Verified Statement (Causality) - bottom of page 1, top of page 2

[6] The Labor Impact Exhibit is Exhibit 20 in Grother's submission

[7] Page 6 (labeled "412" at the bottom) and Page 13 (labeled "420" at the bottom) of Grother Exhibit 20

the switching out of Phoenix could have been part of the first year merger implementing plan when the Labor Impact Exhibit filed by UP/SP shows a reduction of only one engineer and one trainman at Phoenix, and then not until the second year (118:13 - 122:5). The facts indicate the movement of switching from Phoenix to Tucson was not part of the merger plan.

An argument might possibly be made that Union Pacific could/should have done a better job in handling Mr. Grother's demotion. For example, Mr. Packard testified when he counseled Mr. Grother, he only gave him verbal, not written, advice of the elements of his performance which were inadequate and needed to be improved. However, to find fault with UP's handling of Mr. Grother's demotion does not transform the underlying reason for the demotion from job performance into being merger related.

Employee:

In its submission, Union Pacific detailed the history of the term "employee" in federal legislation governing railroad labor. UP also presented several previous arbitration awards which dealt with the issue of whether an individual not represented by a labor organization is an "employee" under New York Dock. A reading of those awards reveals the real test for coverage under the New York Dock conditions is whether a person is considered to be an official. Officials are not considered to be employees under the RLA, and thus are not considered to be employees under New York Dock. Only those persons who are covered by a collective bargaining agreement, or those non-agreement persons determined to be subordinate officials, are employees under the RLA. In each of the NYD awards cited by UP, the arbitration committee's decision hinged on whether a non-agreement person was an official. Subsequent to the October 12 hearing in this case,

UP has received a copy of a recent award dealing with the same issue, which is attached as Union Pacific Exhibit 51 .[8] That issue is a key point in this case. During the hearing, Union Pacific reviewed those prior arbitration awards (133:10 - 152:16). Those awards stand for the proposition that only individuals who are considered employees for purposes of the Railway Labor Act (RLA) are considered employees for purposes of the New York Dock conditions. That relationship did not develop as the result of an ICC/STB pronouncement (143: 5 - 13). Instead, it arose because many New York Dock arbitration committees have examined the history of the term "employee" under the labor protective conditions and concluded use of the term "employee" in New York Dock is tied to use of the term "employee" in the RLA.

Grother also appears to accept the premise that to be considered an "employee" under New York Dock conditions, a person must also be considered an employee for purposes of the Railway Labor Act. See Mr. Grother's verified statement (job classification):[9]

> "This verified statement is to present facts in support of my contention that at all times since September 11, 1996 (consummation of the UP/SP merger), and between April 16, 1997 and my displacement on July 1, 1997, I have been an employee, within the meaning of the Railway Labor Act (RLA), which I understand defines a subordinate official as an employee, and I am an employee under appropriate New York Dock conditions."

Grother, however, improperly does not place much weight on the precedential value of the previous arbitration awards. During the hearing, UP pointed out the locations in Grother's submission where he says just that. (129:22 - 131:21). Pages 16-27 of Grother's submission contain

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[8] New York Dock Arbitration Award - Transportation-Communications International Union (F. L. McAlexander) v. Burlington Northern Santa Fe Railway Company (2004, Suntrup)

[9] Page 1, third paragraph, first sentence

other sources upon which he would have this arbitration committee rely as precedent in determining whether Mr. Grother is an "official" or a "subordinate official:"

> "Employee places primary reliance upon statutory interpretations made by the courts, and interpretations by federal agencies, particularly the former ICC, in dealing with the definition under 45 U.S.C. 151, Fifth."[10]

Union Pacific commented in depth during the hearing on these other sources cited by Grother (153: 4 - 167: 4) The arguments presented by UP explain why Grother's sources do not constitute proper precedent this committee needs to follow.

If this committee chooses to follow the precedent established by the previous NYD arbitration awards, it must then determine whether the position held by Mr. Grother at the time of his demotion was subject to unionization under the RLA. The position held by Mr. Grother has never been unionized on either Southern Pacific or Union Pacific. (175: 4-12)

In the Ex Parte No. 72 decisions rendered by the ICC, there is recognition that trainmasters are "looked upon as officials."

> "However, assistant superintendents, train masters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials."[11]

Mr. Grother states that prior to the merger, as Terminal Superintendent at Tucson, he supervised trainmasters.

> "At that time, SP had three trainmasters (terminal trainmasters) assigned to the Tucson terminal, who reported to me."[12]

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[10] Grother submission, page 15

[11] Union Pacific Exhibit UH47 - page 9

[12] Grother's verified statement on job classification - page 2

Witness Packard testified those trainmasters became Managers of Yard Operations under the terminology of UP titles.(65: 19-21) Mr. Grother concurs with that, because he states ". . . the titles of the three former SP trainmasters were changed to Manager Yard Operations... "[13] Mr. Packard also testified that when he was pressed to select his management team for the Tucson Service Unit, he left the incumbents in their jobs.(65: 18 - 66: 6) After Mr. Packard selected his management team at Tucson, the former SP trainmasters, now known as MYOs, still reported to Mr. Grother. Thus. as senior manager of terminal operations, Mr. Grother was clearly above the level of a trainmaster, because MYOs reported to him. If the ICC recognizes a trainmaster as an official, then it stands to reason that the person to whom that trainmaster reports to is also an official.

During the hearing, UP pointed out the amazing change in Mr. Grother's view of his position within UP that took place in the sixteen months which elapsed between his May 12, 2003, letter and his September 14, 2004 verified statement (job classification). (168: 3 - 174: 3) In May of 2003, Mr. Grother wrote about his May-June 1997 position:

> "THEREFORE, ONLY TWO MONTHS BEFORE GROTHER'S SEVERE DEMOTION, GROTHER WAS SELECTED BY UPRR TO BE ITS SENIOR OFFICER FOR THE TUCSON DISTRICT, INCLUDING TUCSON AND NOGALES YARDS."[14]

In September, 2004, Mr. Grother wrote that during that May-June 1997 period he was not actually the senior officer in the Tucson District, but was doing the work of an MYO:

> "The MYO, SYO, and YIC are all within UP's Band B of UP job classification structure. Other jobs included in the Band B 'family' are train dispatchers and border trainmasters. (Atta. 5).

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[13] Grother's verified statement on job classification - page 2

[14] Union Pacific Exhibit 2 - page 6

> "Although my job classification (SRMTO) was nominally in Band C, my actual duties assigned by UP were comparable to, indeed identical with, those for MYO in Band B. It is clear to me that work in Band B is susceptible to agreement, and thus would be covered by RLA., and the positions are performed by an employee or subordinate official, as the case may be."[15]

UP disagrees vehemently with Mr. Grother's view of his position in the UP organization. The duties of a Senior Manager Terminal Operations were detailed in UP's submission as well as in Ex. 33-B of Exhibit E-2 of Grother's submission. Mr. Grother was neither being paid, nor expected, to perform the duties of the lower rated MYO position. If he were, in fact, doing that, perhaps it explains some of the reasons why his supervisor was not satisfied with his job performance. Further, even if he filled his tours of duty with MYO work, UP contends that still does not take him out of the category of official for purposes of the Railway Labor Act. Therefore, following the precedent established by the previous NYD arbitration awards cited earlier, since Mr. Grother was not in the category of employee under the RLA he was not an employee for purposes of New York Dock.

Laches:

During the hearing, Union Pacific explained how the long lapse of time between Mr. Grother's demotion and his allegation of being covered under New York Dock adversely affected UP's ability to defend itself. Little more needs to be said on that point, except for one aspect. That aspect is Mr. Grother's contention UP was aware New York Dock was involved well in advance of his May 12, 2003 letter.

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[15] Grother's verified statement on job classification - page 7

"Response: My first written notification that a dispute exists was on July 15, 1997, not May 12, 2003. See my VS (Laches), at p. 2; Emp. Ex. E-2{E10}). This was acknowledged September 4, 1997. (Emp. Ex. E-2{E11}). To be sure, my dispute was not labeled NYD, but the label is unimportant. UP was well aware a dispute existed over my claim. Moreover, other claims arose out of my displacement, under other federal provisions, well before May 12, 2003."[16]

Break that response down into its elements. First, Mr. Grother says UP was aware a dispute existed because of his July 15, 1997 letter to UP President Jerry Davis.[17] All that Mr. Davis would have been aware of was that he had an unhappy manager, who had been demoted and transferred. Davis might have suspected the letter involved an allegation of discrimination because of the wording "I am writing to you in an attempt to reconcile how the 'UP values system' and the issue of discrimination related to my sudden downgrade." But, there is nothing in the letter which would indicate Mr. Grother believed he was covered under the provisions of New York Dock! Mr. Grother recognizes this when he said "To be sure, my dispute was not labeled NYD..."

In his reply verified statement, Mr. Grother chastised Union Pacific because it had not included all of the correspondence between himself and UP's ombudsman, Butch Ethington.[18] Mr. Grother accused UP of including only a "highly selective portion" of the correspondence. Subsequent to the hearing in this case, Mr. Ethington was asked to furnish copies of any additional correspondence between himself and Mr. Grother he may have in his files. That correspondence is

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[16] Grother's reply verified statement (Exhibit GH28), page 13, item 25

[17] Union Pacific Exhibit 2 - pages 64-66

[18] Grother Exhibit GH47, page 2, Item 4 - referring to Union Pacific Exhibit 42

attached as Union Pacific Exhibit 52.[19] This committee should note there is no mention of New York Dock contained in any of Mr. Grother's letters in Exhibit 52, including one dated November 8, 2004, which is subsequent to the October 12 hearing.

Second, Mr. Grother says "the label is unimportant." The label is important. Had Mr. Grother identified his "dispute" as one involving New York Dock, the parties could have scheduled a conference and discussed the facts. Either party could have referred the dispute to arbitration if it had not been settled within 20 days after the dispute arose.[20] Has that happened,, this matter would have been settled at least five years ago, when the players and the papers involved were still available. By not labeling his dispute as one involving New York Dock until nearly six years after his demotion, Mr. Grother seriously disadvantaged UP's ability to defend itself.

Third, Mr. Grother says "other claims arose out of my displacement, under other federal provisions, well before May 12, 2003". But, those claims under other federal provisions did nothing to make UP aware of the alleged New York Dock link. UP submits it was only after those claims based on other federal provisions did not yield the result Mr. Grother expected, it was only then that he decided to pursue the New York Dock path.

General Comments:

One aspect of this case which requires comment is Grother's apparent view of the arbitration process itself. Grother challenged Union Pacific's presentation at several points during the handling of this case, not with respect to accuracy but with respect to qualification of the person to make the

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[19] Mr. Ethington advises some earlier correspondence he received from Mr. Grother is no longer in his office files and may be in storage at an off-site location.

[20] Union Pacific Exhibit 1, page 5 (Article I, Section 11 of New York Dock)

argument or the manner in which it was presented. For example, the following statement appears on page 5 of Grother's pre-hearing submission:

> "3. Sometime in late August or September, 2003, UP's representative in the dispute was transferred from the Protective section of the Law Department, to the Planning section of the Labor Relations Department, and assigned to William E. Loomis, an individual with a background on the former SP, and who was familiar with Employee when both were SP employees. The 'Planning Section' of the UP's Labor Relations department is something other than having direct responsibility for specific operating department employment disputes, as indicated by the UP's announcement in The Pocket List of Railroad Officials. (Ex. E-5)."

First of all, part of that statement is not correct. There is no section of the Law Department. which handles disputes arising under labor protective conditions. UP also contests the accuracy of Grother's statement that "UP's Labor Relations department is something other than having direct responsibility for specific operating department employment disputes. . ." With regard to employment issues such as hiring, that may be true, but all labor arbitration for both operating and non-operating personnel on UP, whether arising under the collective bargaining agreements, or under protective conditions such as New York Dock, is handled by the Labor Relations Department.

Other apparent attempts to challenge Mr. Loomis' ability, or perhaps credibility, to speak on matters relating to this case appear in Mr. Grother's reply verified statement. Examples include: Item 1:

> "1. Page 1, final para., 'Union Pacific is represented by its General Director of Labor Relations, W. E. Loomis.'
>
> Response: It is my understanding that the title of Mr. Loomis is 'General Director - Employee Relations Planning.' (Emp. Ex. E-5, p. 3),"[21]

[21] Grother's reply verified statement (Exhibit GH28), page one, item one

Item 19: (only a portion of the response is shown)

> "Response: The terms 'Union Pacific asserts,' and 'Union Pacific states,' in the above first two sentences are anonymous, unless it is the opinion of the author, Mr. Loomis. - - -"[22]

These challenges continued throughout the hearing. Mr. MacDougall made several comments about UP's member of the arbitration committee, Mr. Loomis, not being able to offer testimony on this or that point. Examples include (178: 18-21); (181: 11 - 182:13). At one point during the hearing, Mr. MacDougall, clearly indicated he does not challenge Mr. Loomis's ability to be Union Pacific's member of this arbitration committee (183: 9-18). Note, however, the conflict with Mr. MacDougall's earlier comment on this point when he refuses to respond, saying "We'll argue that on brief." (179: 16-19)

By specifying arbitration as the process for resolving disputes arising under the New York Dock conditions, the STB(ICC) indicated its belief that arbitration, rather than the courts, is better suited to resolve such matters. There are significant differences between the two processes. For example, the strict rules of evidence which apply in court are typically not applicable in railroad labor arbitration. In court, an attorney develops the record by means of witness and expert testimony. In railroad labor arbitration, the partisan members of the arbitration committee/board, in this case Mr. MacDougall and Mr. Loomis, present their side's position by a written submission, presentation of documents relevant to the case, verbal argument during the hearing and, in some cases, testimony from witnesses. The partisan members of the arbitration committee are free to challenge the accuracy or relevance of any statement, argument or document presented. When all of this has been

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[22] Grother's reply verified statement (Exhibit GH28), page 8, item 18

accomplished, the record is closed and the body of information which has been developed comprises the facts and the analysis of the protective conditions the neutral uses to reach a decision. The job of the neutral is to determine which of the facts, and which analysis, are most applicable to the specific circumstances of the case at hand.

Union Pacific submits this arbitration case has been handled in the usual and customary manner, and there is no validity in Mr. MacDougall's attempt to convince the neutral member otherwise. UP anticipates this committee will hear much more on this issue in Grother's post-hearing brief.

The other aspect of this case which requires comment is Grother's apparent desire, throughout the handling of this case, to gain a position of advantage by having the last word. The first manifestation of this was Grother's desire to have a three-step process for the filing of pre-hearing submissions. Under Grother's proposal, Grother would send a written submission to UP, following which UP would send its written submission to Grother. Finally, Grother, but not UP, would be entitled to submit a rebuttal submission prior to the hearing. When UP refused to agree to that process for the handling of submissions, Grother petitioned the Surface Transportation Board seeking a determination that the three-step process was appropriate for the handling of written submissions in this case. The reason stated for desiring this process was ". . .to develop a full written record for STB review at minimum expense to employee."[23] In its opposition to Grother's STB petition, UP pointed out that Grother's focus on a written record indicated "... the mistaken view that arbitration under Article I, Section 11 of the New York Dock conditions is merely a perfunctory step on a path toward an ultimate review of the arbitration record by the STB. Given the STB's 'Lace

[23] Union Pacific Exhibit 15 - page 15 - center of page under "ARGUMENT"

Curtain' standard for review of arbitration decisions, he is ill advised to so cavalierly look past the determinations of the arbitration committee."[24] Grother's effort concerning the submissions failed when Ms. Ross, to whom STB had remanded the issue, determined the usual and customary practice of simultaneous exchange of submissions would be used.

At the hearing, Grother introduced a reply verified statement and was anxious for a response from Union Pacific. Since that was the first time UP had seen the reply verified statement, it did not have an opportunity to review the document during the hearing. When UP indicated it would not respond to Grother's reply verified statement during the hearing, Mr. MacDougall objected (22:11-20). UP presumes Grother sought to obtain UP's rebuttal to the reply verified statement during the hearing, so he could have the last word on that matter in his post-hearing brief.

This committee should note Grother did not make a comprehensive argument on causality during the hearing. Grother's argument on the issue of causality consisted of a verbatim reading of Grother's reply verified statement (Grother Exhibit GH28). Mr. MacDougall read the numbered points and Mr. Grother read the answers. That reply verified statement actually covers all three issues, causality, employee and Laches and "responds to asserted factual matters advanced by Loomis in his submission."[25]

This committee should also note that Grother did not make any argument at the hearing concerning the issue of employee. Mr. MacDougall's comments were:

> "But we have nothing to say to that. As you say, it's argument and we can answer the argument on brief." (178: 16-18)

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[24] See Union Pacific Exhibit 15 - page 5

[25] Grother Exhibit GH28 - page one - second paragraph

Why did Grother not offer any argument during the hearing? UP submits that decision was a conscious effort by Grother not to lay his argument on the table, because that would allow UP to make a rebuttal in its post-hearing brief. By holding back on its argument, Grother feels he has achieved what he sought throughout this case, i.e., the ability to speak the last word.

By opting to save his arguments for his post-hearing brief, Grother has held his cards close to his vest. However, Grother needs to be mindful of Neutral Member Ross' comment that post-hearing briefs be limited to amplification and rebuttal, and that she would not accept new arguments in such briefs. In her words, the parties will have to "trust her to tell the difference."

Summary:

This arbitration committee needs to look no further than UP's argument on "employee" to deny Mr. Grother's claim for benefits under the New York Dock conditions. The only reason for differentiating his claim from the series of previous NYD awards UP has presented would be a finding that Mr. Grother was not an "official." However, the arguments presented by UP clearly demonstrate Grother was an "official." This committee should determine Mr. Grother was an official, therefore he was not an employee under New York Dock and therefore is not entitled to any benefit under those conditions. Having made that determination, there is no need to decide the "causality" and "Laches" issues.

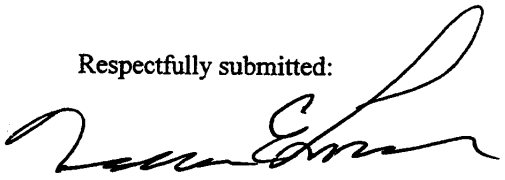
That is not to say UP lacks confidence in its arguments on causality and Laches. Grother's link between his demotion and the merger is merely speculation and suspicion on his part. The extreme lapse of time between Grother's demotion and his initial contention of New York Dock

coverage resulted in UP being forced to defend itself without documents and personnel necessary to fully develop the facts on the issue of causality.

Union Pacific's argument on all three issues in this case, causality, employee and Laches, taken together, constitute an overwhelming justification for this committee to deny Mr. Grother's claim in its entirety. UP respectfully requests this committee to answer the questions/issues presented by the parties as follows:

> Union Pacific's first question - "Was John E. Grother, at the time of his reduction in salary, a 'displaced employee' subject to the protection of the New York Dock conditions?' - **NO**
>
> Union Pacific's second question - "Is John E. Grother's claim for a displacement allowance pursuant to New York Dock barred under the doctrine of Laches?" - **YES**
>
> Grother's first issue - "Whether employee was adversely affected as a result of the STB-approved merger, and has the burden to prove the causal connection between the merger and the adverse affect." - **HE WAS NOT ADVERSELY AFFECTED AS THE RESULT OF THE MERGER**
>
> Grother's second issue - "Whether the involved employee was an 'employee' within the meaning of 49 U.S.C. 11326 and NYD at time of first adverse affect." **HE WAS NOT**
>
> Grother's third issue - "Whether employee's request for compensation/benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches." **HIS REQUEST IS BARRED BY THE DOCTRINE OF LACHES**

Respectfully submitted:



William E. Loomis
November 22, 2004
Omaha, Nebraska

In the Matter of Arbitration

Transportation Communications International Union	)	
	)	**Arbitration Proceedings**
vs	)	**New York Dock (I.)(11)**
	)	**ICC Finance Docket 32549**
Burlington Northern Santa Fe Railway Company	)	**Claimant: Fred L. McAlexander**

Introduction

In August of 1995 the former Interstate Commerce Commission (ICC)[1] approved the merger between the Burlington Northern Railroad Company (BN) and the Atchison, Topeka and Santa Fe Railway Company (SF) in ICC Finance Docket No. 32549. With that approval the ICC imposed New York Dock (NYD) conditions on the new merged Carrier.

The parties subsequently signed an implementing agreement under I. (4.) of NYD which is called on this property the Master Implementing Agreement (MIA). According to a claim for benefits filed by Fred L. McAlexander on November 30, 2001, he elected to receive NYD benefits as an employee covered under Article VII of the MIA. As of November 1, 2001 the Claimant had been an exempt employee who subsequently exercised his seniority as a former TCU covered clerk. Mr. McAlexander bumped to a covered position after his management job was abolished in Topeka, Kansas in October of 2001. Bumping to a covered position was one of the Claimant's options when his exempt position

[1]The former Interstate Commerce Commission (ICC) has since been replaced by the Surface Transportation Board (STB). This has no particular bearing on the outcome of the instant case but it should be mentioned for the record.

was abolished at Topeka. The Claimant was offered a severance package by the company after his position was abolished. He refused this offer and chose to bump back to the ranks of clerks. Upon doing so the Claimant then presumed that he was covered by NYD.

The Claimant's exempt position was eliminated by what the Carrier states was a business-driven reorganization of its auditing functions in 2001 wherein some of the auditing work done at the Carrier's Topeka, Kansas facility off the former SF was shifted to its Fort Forth, Texas facility off the former BN. Subsequently the Carrier moved all of the work of its revenue and financial audits' division from Topeka to Fort Worth.

Issue(s) Before the Arbitrator

The parties present the arbitrator with a number of issues to rule on in this case. First, the arbitrator must rule on whether the Claimant was covered by Article IV of NYD. If he is then the union asks for a ruling a fortiori on whether the Claimant fell under the definition of a "displaced employee", as defined by NYD I. (1.)(b.), and whether he suffered an adverse effect directly related to a transaction as defined by NYD I. (1.)(a.) & (11.)(e). The lynch-pin of this case, however, centers on an interpretation of Article IV of NYD.

NYD Provisions

The following provisions of NYD are referenced by the parties in arguing this case.

Article I

1. Definitions

(a) "Transaction" means any action taken pursuant to authorization of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee...who, as a result of a transaction has been placed in a worse position with respect to his compensation and rules governing his working conditions.

.....

(d) "Protective period" means the period of time during which a displaced...employee is to be provided protection hereunder and extends from the date on which an employee is displaced...to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced...than the period during which such employee in the employ of the railroad prior to the date of his displacement... For purposes of this appendix, an employee's length of service shall be determined in accordance with the provision of Section 7(b) of the Washington Job Protection Agreement of May 1936.

4. (a.) Each railroad contemplating a change or changes in its operations, services, facilities, or equipment as a result of a transaction which may cause the dismissal or displacement ot any employees, or rearrangement of forces, shall give at least ninety (90) days' notice of such intended change or changes by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes...

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

.....

5. (a.) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rule and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during this protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he is displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services

immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increase) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that eh is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b.) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c.) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11.

.....

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee. The claiming employee shall prevail on this issue if it is established that the transaction had an effect upon the employee even if other factors also may have affected the employee.

Article IV

Employees of the railroad who are not represented by an labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In his claim dated November 30, 2001 the Claimant cites Article VII of the MIA. In addition to that, the arbitrator will also cite here Article I of the MIA, for the record.

Master Implementing Agreement (MIA) of December 19, 1995

Article I

When the Company contemplates a technological or operational change, including merger-related transactions, the Company will serve appropriate notices as may be required under the proper protective agreement (Blue Book or Gold Book). When a contemplated changes involves a inter-railroad related transaction, a notice will be served on the General Chairman on the railroad where the work is being transferred from with a copy to the General Chairman on the railroad to where the work is going. An implementing agreement covering the contemplated change will not be necessary prior to the Company effecting a change on which notice has been given.

Article VII

(a) Protected employees under the Orange Book, White Book, Blue Book or Gold Book will be considered as having elected to retain such protection unless they make written election to be covered by the New York Dock Conditions, which election must be made within thirty (30) days of being affected.

Background

Fred M. McAlexander is a long-term employee who has worked for the BNSF and for one of its predecessor railroads which is the SF. According to information of record he hired in as a Clerk in 1966 and worked until 1997 as a covered employee under the labor agreements negotiated between TCU and this employer as the latter underwent various

corporate changes, result of of its mergers with other railroads.[2] The Claimant worked in the revenue department for about a decade, and then bid on a rate clerk position and worked in the latter capacity for some 20 years. During this time the Claimant was subsequently promoted to the position of a rate supervisor which was still a covered position. In 1997 Mr. McAlexander then made a career move which became the sine qua non for the instant case. He took himself out from under the protection of his union contract and accepted a non-covered position as a auditor in the revenue and financial audits' division of the Carrier's corporate audit services' department. About a year after this, in 1998, he received, according to the union, a raise that he had been promised when he had accepted the exempt position. But arguably Mr. McAlexander received at that time more than a raise. He also received a promotion in accordance with what this Carrier calls its developmental progression scheme for management trainees and staff auditors which will be discussed later in this Award. After October of 1998 the Claimant's exempt title was now: "project manager". According to the union, which is a matter to be examined closely in this case, the October, 1998 changes in title and pay grade that the Claimant received were not accompanied by any change in duties nor any additional responsibilities. In other words, according to the union, the Claimant was given the title of manager, which has never been disputed, but he was never required to act like one when he was a "project manager". This is why he should fall under the umbrella of NYD coverage. A ruling in this case will center on whether the union is right, or not, in this

[2]Given the time frame the union also underwent a metamorphosis and the Claimant was undoubtedly first covered by BRAC's labor agreements which was TCU's predecessor.

contention.

To reiterate the facts, in further detail, behind this NYD arbitration: on November 30, 2001 Fred L. McAlexander turned in a request, in accordance with the 30 day time-limit outlined in Article VII of the MIA, to be covered by NYD conditions as a result of being allegedly "...affected..", as he put it, by a transaction under NYD. He had bumped into a clerical position on November 1, 2001 in Seniority District No. 101 on the Carrier's property.[3] In response to Mr. McAlexander's claim for NYD benefits supervision wrote to him as follows:

> "Our records do reflect that you were in a direct chain of displacements due to the abolishment of position 6155... Our records indicate that you were in exempt status until November 1, 2001. If there is a New York Dock transaction in which you were affected, please advise...".[4]

Along this same line of reasoning, and some two months later, Carrier's supervision again advised the Claimant that his request for NYD benefits was being denied because the company's records reflected that he had only been affected by "...the involuntary reductions made in the exempt ranks during October..." of 2001 and that this did not represent a transaction in accordance with New York Dock conditions. These responses for denying Mr. McAlexander's request for NYD benefits did not satisfy the Claimant. Subsequently, they did not satisfy the Claimant's union representative, and as such they would not have, in and of themselves, satisfied the instant arbitrator. The question is not whether the Claimant was

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[3]Employees' Exhibit A @ p. 2 of 106. This request for coverage was later amended in view of a technical error on the original request which was correcterd by the Claimant. See Employees' Exhibit A @ p. 22 of 106.

[4]Employees' Exhibit A @ p. 21 @ 106.

an exempt employee when his position was abolished, since exempt employees, depending on what they actually do while on the job, might be covered by NYD conditions if their positions are abolished, but the question is whether the Claimant was an exempt employee who was performing management duties when his position was abolished.

So it is not surprising that in August of 2002 the General Chairman of the Organization in Topeka appealed Mr. McAlexander's claim for NYD benefits with request that he be granted NYD coverage. The General Chairman's very detailed, closely reasoned and lengthy appeal of August of 2002 was rejected by the Carrier. Thereafter the parties continued to address their differences during 2003 on whether Mr. McAlexander was eligible for NYD benefits or not. Absent settlement of the matter the instant case was brought to arbitration under NYD I (11.).

Discussion

Argument by the union is that while the Claimant was not represented by a labor organization at the time of the abolishment of his position on October 31, 2001 he was, nevertheless, a displaced employee involved in a transaction in accordance with the provisions of NYD. He ought, therefore, according to the union, have been given "...substantially the same levels of protection as are afforded to members of labor organizations...", to paraphrase Article IV of NYD, in pertinent part.

The union argues that the abolishment of the Claimant's position, as well as the abolishment of other positions in the ranks of exempt employees in October of 2001 in the Carrier's Topeka revenue and financial audits' division, was not the result of economic or

other operational factors. According to the union these actions by the Carrier were merger related. The union argues that the Claimant's loss of his position in Topeka in October of 2001 was the result of a transaction . There was a nexus between the merger of the BNSF and the abolishment of the Claimant's job. The union argues that the instant case is comparable in principle to an earlier one in 1987 involving this union and the UP wherein the arbitrator concluded that a consolidation move by that railroad, which resulted in the abolishment of an employee's position and his demotion, were merger related. In that case a position was eliminated but the work was not. This leads the union representative to conclude that this is what happened at the Topeka accounting division in 2001 and 2002. According to the union, "...an examination of the (accounting) division prior to and after the abolishment of (the Claimant's) position will show that Claimant's position was not actually eliminated but, rather, assigned to employees on the other side of the merged railroad to whom relocation expenses need not be paid...".[5] The brunt of the union's transaction related argument is that after the consolidation of the corporate audits' department did take place, or was taking place, then the Claimant's position was abolished in Topeka and the work of his whole former division was moved from Topeka to Fort Worth. According to the union, there was no diminution of work of the type that the Claimant did. It was just all done now in Fort Worth by different exempt employees. Thus the Claimant was clearly put in a worse position as a result of this transfer of work from one location to another which required the Claimant to exercise seniority and return to the clerical ranks. According to the union: "the Claimant's

[5]Carrier's Exhibit B @ p. 6 of 52.

position as a "project manager" was not eliminated due to economic and operational factors as the Carrier alleges. In fact, it was not eliminated at all. Rather, it was abolished at Topeka, Kansas, transferred across former property lines, and reestablished at Fort Worth, Texas in a consolidation of the department. The Claimant was not given the opportunity to transfer with his work. The abolishment ot his position at Topeka was the result of a merger related transaction. The Claimant is clearly a 'displaced employee' as contemplated by NYD...", according to the union.[6]

Turning then to the status of the Claimant as an employee eligible to receive NYD benefits under Article IV of NYD the union cites arbitral precedent to the effect that other than unionized employees are eligible to receive these benefits in the event of a transaction, and if they are put in a worse position, so long as they perform duties "...that generally are described as being other than administrative, managerial, professional or supervisory, in nature...".[7]

After a review of arbitral case materials involving the interpretation of Article IV of NYD the union argues that this leads to the conclusion that a "framework" can be derived as a tool for analyzing specific cases. This "framework" includes the following factors which

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[6]Carrier's Exhibit B @ p. 8 of 52.

[7]There is considerable NYD I (11.) arbitral precedent dealing with the meaning of the phrase: "...employees of the railroad who are not represented by a labor organization..." and the union representative has cited some well reasoned Awards. The only issue here is whether the Claimant was performing managerial or supervisory duties when his exempt position was abolished. If he did the instant arbitrator is not persuaded that precedent that states that he ought not be covered is not correct. There is a certain analogy between the interpretation of Article IV if NYD and Section 2 (11) of the NLRA albeit the latter deals with unit determination matters. Both one and the other focus on the issue of eligibility.

are cited here in somewhat abbreviated form.

> Does the individual: (1) exercise managerial, administrative or supervisory duties at a certain level? (2) exercise policy making at a certain level? (3) work under supervision him/herself? (4) have skills indigenous to the rail industry; (5) receive benefits not granted to the rank and file after being affected by a transaction; and (6) have access to representation by a labor union without being actually represented by a union?[8]

Using this framework the union argues that the Claimant to this case did not pass muster as an "official" of the BNSF in October of 2001 when his position in the division of revenue and financial audits was abolished. The union states that it was not able to get a copy of a job description for the "project manager" position held by the Claimant when his job was abolished,[9] but it ventures that such description cannot be much different from that of an auditor. The union opines that auditors are just "...moved up for pay purposes..." and then called "project managers".

The union then addresses the formal credentials of the Claimant and states that he has no college degree, has never taken an accounting course in college, is not a CPA, and has no MBA. The Claimant is an "...old time rate clerk...". His skills are not transferrable to any other industry. Until he accepted the job in the revenue and financial audits' division the

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[8]Carrier's Exhibit B @ p. 15 of 52. Also Organization's Brief @ p. 18. In reviewing the arguments by the union the arbitrator has relied heavily on the very detailed original claim of August 9, 2002 which contained many of the arguments repeated in the Submission. This August 9, 2002 document is found in Employees' Exhibit A @ pp.1-19 of 106 & in Carrier's Exhibit B @ pp.1-19 of 52. When citing one Exhibit with respect to this letter the other is implied by reference for the sake of brevity.

[9]One reason for this is, according to the union representative, because "...it is possible that project manager positions are seldom if ever posted...". On this point it can be observed that posting of jobs is closely associated with seniority driven bidding rights common to union contracts. Jobs subject to bidding must be posted otherwise the system would not work. Nothing requires an employer to post certain kinds of job openings unless there is an issue related to external law that might be applicable (discrimination, etc.).

union states that the Claimant had never heard of generally accepted auditing standards and has no information on generally accepted accounting principles. Prior to working for the division the Claimant had no auditing experience at all. But he did bring something with him to the division: he brought a "...wealth of specialized knowledge about freight rates in the railroad industry...". The work the Claimant did was specialized: he did compliance audits aimed "...specifically at looking for missed freight rates...". His job as program manager was to meet with the department head for direction and then "...deal directly with the employees who performed the nuts and bolts work of the department. After his analysis was complete he would develop recommendations for improvements...". The Claimant had no authority to supervise, evaluate, hire or fire other employees...he worked under "...the daily direction of three high level managers...".[10] According to the union, the Claimant served as a "...liaison between the nuts and bolts employees in the departments he audited, their department heads, and his own supervisors. He had no authority to order changes in policy to implement the methods he identified for improving performance. If the department heads and his own supervisors did not both sign off on his recommendations they were not implemented...". According to the union, the Claimant did not choose the audits he performed. Once he was assigned an audit, he met briefly "...with the department head for direction and then deal(t) directly with the employees who performed the nuts and bolts work of the department...". His manager reviewed his work and made changes "...to documents that were going outside

[10]Carrier's Exhibit B @ p. 17 of 52.

of the department...". [11]

The union argues that the position held by the Claimant to this case in October of 2001 was remarkably similar to that of an exempt employee by the name of James V. Nekich who had filed a claim for NYD benefits on this property at another location when his whole department was eliminated after the BNSF merger. When Nekich's request for NYD benefits was denied, he then prevailed in a NYD I (11.) arbitration proceeding.[12]

Further, in times past the position that the Claimant held had been subject to labor representation. At one time the union had represented a "...whole roster of internal auditors...".[13]

Because the Claimant was put in a worse position when he had to exercise his seniority back to the ranks of the clerks the remedy requested by the union is the difference between the earnings that the Claimant received as a "project manager" prior to the abolishment of his position in October of 2001, and the earnings he started to receive when he bumped to a way billing position.

According to the Carrier the reduction in positions in the audit department in Topeka

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[11]Employees' Exhibit E @ p. 4 and Employees' Submission @ p. 21 seq.

[12]Nekich held the position of quality coordinator off the BN when his whole department was eliminated after the BNSF merger. Nekich was not represented by a labor organization in that case. He had originally hired in as a dispatcher represented by the ATTD/BLE and then took the exempt position of quality coordinator in 1994. In that case the arbitrator was not persuaded that Nekich had sufficient duties in his qualify coordinator position to qualify as a manager.

[13]This statement is premised on the assumption that an auditor is synonymous to that of a project manager which is an assumption used by the union representative arguing this case throughout the record. There is no evidence, nor even an assertion, in the record that project managers in the auditing department had ever been represented by a union at any point.

was "...simply a reduction in exempt headcount..." As a result the Claimant was given the option to take a severance package, or to exercise seniority as a covered employee. He chose to do the latter.

As a" project manager" at the Topeka revenue and financial audits' division the Claimant was, according to the Carrier, "...in wage band 29...", and exempts in this wage band are not covered by NYD. The Carrier admits that non-union employees could potentially be covered by NYD. But they are also non-managerial employees. On the other hand, the Claimant as a project manager "...was in charge of auditors while on assignment. It was his responsibility to plan the project to be audited. He would prepare and issue the engagement letter; prepare the planning memo defining the scope of the audit; develop and complete (the) audit program; and develop and issue a report of the audit." The scope of the Claimant's duties were considered to be "...administrative, managerial, professional or supervisory in nature...", according to the Carrier.[14]

The Carrier argues that the "development progression" for auditors working for the corporate audit services' department shows that a "project manager I", which is what the Claimant was when his job at Topeka was abolished, as having the following duties:

> "Responsible for all audit processes on individual audit projects, including planning, execution, supervision of staff, customer relations and reporting".[15]

The Carrier takes umbrage with the designation of the Claimant as simply an "old line rate

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[14]Carrier's Exhibit B @ p. 21 of 52.

[15]Carrier's Exhibit E, cited in Ibid. @ p. 22 of 52.

clerk". The Carrier states that this is an attempt to belittle the Claimant's knowledge and skills. The Claimant was able to do the work of a "project manager". He was promoted to that position after having served as an auditor for the division. And he fulfilled the duties of a "project manager" intelligently and competently. In defense of the Claimant the Carrier states that many managers at the Carrier started their careers as schedule employees and worked their way the corporate ladder.

The Carrier also argues that the Claimant does have auditing skills that are transferable to other industries and if he would have opted for severance pay, which he did not, he could have found a place for his skills at other employers.

Lastly, the Carrier admits that auditors in the past on the SF side had been unionized. But the internal audit department was abolished in 1982 in a reorganization along with all of the positions in that department. The latter was then transferred to the holding company of the former SF railroad. Thereafter the auditing functions on the SF were reorganized. But as a "project manager" the Claimant was not eligible for unionization at the new merged entity which is the BNSF because he was a manager.

Findings

Prior to proceeding with framing a ruling in this case, given the volume of materials presented to the arbitrator, and the diversity and minutiae of arguments found in the record, a number of points need to be sorted out.

First of all, the original claim that was filed on November 30, 2001 by the Claimant was filed under Article VII of the parties' MIA. The claim was filed properly in accordance

with the pertinent time-lines outlined in that Agreement. However, whether the Claimant is eligible for benefits outlined in the MIA is contingent on whether he is an employee covered by Article IV of NYD. The issue of eligibility cannot be resolved by resort to the MIA itself.

Secondly, whether a transaction took place under Article I of NYD is also contingent upon whether the Claimant is covered by Article IV of NYD. It is not possible to logically separate, in this type of case, the issue of whether this Claimant is a displaced employee, and whether a transaction took place, when Mr. McAlexander's position was abolished in October of 2001. All conclusions about the Claimant's alleged displaced status under Article I (b.) of NYD, and a transaction, is contingent on the evidence relating to the Claimant's status under Article IV of NYD. This observation is made because one of the parties to this case attempts to establish that a transaction took place, and then having done so, they argue that the Claimant was a covered employee subject to a nexus between the transaction and his covered status. The logic of such an approach amounts to putting the cart before the horse. As noted earlier, however, the lynch-pin of this case centers on the proper interpretation of Article IV of NYD as it applies to the record before the arbitrator.

This is not a case of first impression albeit the meaning of the language of Article IV of NYD has caused considerable consternation over the years because of its failure to make a clear demarcation between coverage of non-managerial and managerial personnel working for railroads. Clearly non-managerial personnel who are covered by a union contract are eligible for NYD benefits, given evidence of a nexus between their being put in a worse

position and a transaction. So are those employees, in accordance with precedent, at least, who are eligible to be unionized under the RLA but for some reason have not been organized and so on. This is one of the arguments used by the union in this case. The union believes the Claimant is eligible to be unionized, albeit the Carrier does not. The arbitrator will deal with that issue shortly. There is more than sufficient arbitral and legal precedent to warrant conclusion that what the literature of management theory would designate as "managers" would not be protected employees under NYD. But the language of Article IV of NYD poses a challenge, at least as it has been interpreted in some instances, because it supposedly also coopts under NYD coverage those employees who are less than full fledged managers, yet non-unionized. The courts have attempted to clarify what this means but without much success by referring to such individuals as "...subordinate officials..."[16] or by stating that "...rank and title are not controlling in defining the work of (such) subordinate officials..."[17]. The latter line of legal fuzzy thinking is particularly disconcerting since the title of "manager" in the real world of work is almost always associated with managerial duties such

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[16]We avoid the use of the term "official", subordinate or otherwise, in framing this Award for the simple reason that it is never used in the management literature to designate managers. An "official" is a term to describe someone who holds a position normally in a political arena, appointed or elected, who may or may not even have definable management responsibilities (i.e. legislators, etc.). It is unclear why the courts, at any level, would introduce this term into a discussion of managerial decision-making in the railroad industry, or in any other industry, for that matter. There have been instances where even the supreme court has been known to make important rulings on the locus and characteristics of managerial decision-making without one reference to the large literature of management science, with its empirical underpinnings, that has a direct bearing on the case in point.See "NLRB v Yeshiva University & Unionization in Higher Education" Industrial Relations Law Journal, Vol. 4:287-307 (1981)(Suntrup). Having said all that the arbitrator is aware that there is a convention in this industry of sometimes referring to managers as "officials" and there is no intention here of trying to will away that cultural trait of the industry. But the term, "manager" is also used. We use only this term here in framing the instant Award.

[17]See Edwards v Southern Railway Company (U.S. Court of Appeals, 4th Cir., 376 F. 2d. 665).

as overseeing the work of others, independent decision-making, and authority over subordinates. Such latter observation is supported by both common sense and a library full of literature on management science.

Given the language of Article IV it is clear that instances could arise whereby a non-unionized employee who is put in a worse position by the actions of a merged railroad could be covered by NYD. Management science would generally refer to these employees simply as support staff: some with more, and some with less, responsibilities. But support staff, nonetheless. The union here cites an Award involving an employee off the BN whose position was abolished. The title of the position was quality coordinator. This is the case involving employee Nekich. This is an important case for our purposes here because it took place on the BNSF, it took place rather recently, and it is a good example of how non-unionized, support staff personnel can fall under the protections of NYD. After Nekich's exempt position was abolished he did the same thing that McAlexander did, and exercised seniority and bumped back to his craft. That employee exercised seniority back to the ranks of covered dispatchers. After a review of the evidence the arbitrator concluded, in that case that Nekich was not a manager in view of the "...level of responsibility that is inherent in (the) position (of quality coordinator that he held)...", and that the "...level and amount of supervisory authority..." exercised by employee Nekich did not rise to the level of a manager. The arbitrator also found it pertinent that the position of quality coordinator implied that this employee served as a "...liaison between scheduled and management employees to identify and facilitate ways in which to improve the Carrier's overall levels of

performance...". Since Nekich had no supervisory authority over other employees the arbitrator concluded that his exempt position fell within the purview of an employee, and not a manager, under NYD.[18] The union comes back to this case often in its arguments here before the arbitrator because it finds strong parallels between what happened to that quality coordinator when his position was abolished in 1995 on the BNSF, and what happened to the Claimant to this case whose position as project manager was abolished in 2001. Whether there is a parallel is a matter of evidence since each case involving the application of Article IV of NYD must be taken, obviously, on its own merits.

Was the Claimant to this case a manager? Or did his position involve work which was insufficiently managerial in nature that it would not be improper to classify him as an exempt, non-managerial support staff employee which is what the arbitrator did in the case of Nekich?

First of all, the Claimant to this case consistently refers to his position in October of 2001 as that of a manager. He never says anything other in all available correspondence between he and the Carrier. Common sense; common usage in the work place; and the literature of management science, despite certain legal thinking to the contrary, all tell us that if someone says he/she is a manager then they probably are. But there may be rare cases when this might not be the case. Thus we will not accept here the conclusion that McAlexander is a manager because he says he is albeit such evidence certainly pushes the arbitrator in a certain

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[18]See James V. Nekich vs Burlington Northern Santa Fe Railroad, NYD I (11.) Arbitration Award (December 6, 1996)(Ver Ploeg, Arbitrator). Employees' Exhibit A @ pp. 56 seq.

direction as a starter.

Arbitral precedent dealing with Article VII shows that prior arbitrators have gone beyond the mere presence of a title in framing rulings about an exempt employee's eligibility for NYD benefits. So this arbitrator will do the same.[19]

Did the Claimant to this case perform managerial duties?

The union argues that he did not. According to the union the Claimant was just a "...liaison..." person between the employees in the departments he audited, their department heads and his own supervisors. The union says he had no authority to order changes in policy to implement methods used for improving performance. He needed his supervisors to sign off on recommendations in order to get them implemented. He did not evaluate, hire or fire other employees.

Whether this is an accurate appraisal of what the Claimant did can best be evaluated by looking at the job description of the duties of a "project manager"[20] or a reasonable facsimile thereof. Does this exist? Yes it does. Does it exist in the same form as a bulletined job normally associated with covered employees? It appears not. Is the Carrier required to post the position of "project manager"? There is nothing in the record to show that this is so. Why? Because the position of "project manager" is but one step in the developmental

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[19]Certainly the experts in figuring out who is and who is not a manager are hearing officers dealing with unit determination cases since the NLRA and most state labor laws exclude managers from coverage in the event of an organizing drive. So hearing officers have to figure out who is eligible to vote in a representation election, etc.

[20]Throughout this Award we refer to the Claimant's position as that of a "project manager". We will continue to do so albeit this is short-hand for "project manager I".

progression of employees chosen by the Carrier in its exempt, managerial track. In the auditing division the Carrier had an internal system of seven grades of auditors designated by what it calls salary bands; primary duties; education requirements; professional certification; experience requirements, and promotion criteria.[21] The seven grades (and salary bands) go from grade 26 through 32. The Claimant's position of "project manager" is in the middle of those seven grades. Under him are management trainees/staff auditors, auditors and auditors II. Above him are project manager IIs, program managers and audit managers. What are the primary responsibilities of a "project manager". The developmental progression document states the following:

> "Responsibility for all audit processes on individual audit projects, including planning, execution, supervision of staff, customer relations and reporting."

How does someone who holds the position of "project manager" get promoted? The developmental progression document explains that. It says that a "project manager" must:

> "lead at least 6-8 audits, along with other lesser projects simultaneously. 1-2 special projects. Lead development of plan and analysis of significant risks associated with 3-4 of the projects. Presented audit work and associated findings to customer up to AVP."

The developmental progression document is a de facto job description of the duties of a "project manager". It is just in a different form than a bulletin. Given the information on this document it is simply incorrect to conclude that the Claimant was no more than a liaison type support staff employee. A "project manager" has considerable responsibility and is responsible for "...all audit processes on individual projects...", "...including...supervision of

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[21]All of this information is found in Carrier's Exhibit E.

staff...", and he is in charge of presenting audit findings "...up to AVP...". Does the Claimant report to other managers? Yes, he does. Do other managers oversee his work? Yes, they do. Does this make him less a manager. No. The most rudimentary knowledge of managerial decision-making in a large scale organization such as the BNSF tells us that all managers report to someone until you get to the top and even then, in a publicly held corporation, which is what this Carrier is, there is the Board of Directors. And there are stockholders as legal, if not factual, overseers. Further, a review of the primary responsibilities of the three managers higher up on the chart than the Claimant shows that about the only thing they do that he does not do is participate in an annual audit plan. This apparently is what the union is referring to when it argues that the Claimant is not a manager since he does not participate in the making of policy. On this latter point it can simply be said that, proportionately, most managers in large scale organization probably do not participate in policy making. They implement policy. But this does not make them less a manager. They simply supervise others who assist them in implementing policy. This appears to describe what the Claimant to this case did, in accordance with his job description, as it exists.

The union argues that the Claimant did not get involved in the recruitment, hiring, evaluation and disciplining of employees. Albeit these are functions done by many managers, they are not sine qua non perquisites for managerial status for the simple reason that American industry has scores of managers who do not do these things. So does, it appears, this Carrier for it is far from clear on its face if audit project managers II, program managers, and audit managers in the Carrier's revenue and financial audits division do these things

either. Are we to conclude that they also are not managers?

The union states that the Claimant is an "...old time rate clerk..." and he had none of the formal credentials required of a "project manager". If one reviews the educational and professional certification requirements of the Carrier's developmental progression scheme it shows that the position the Claimant held will "...generally (have) a four year college degree in accounting...", or comparable degree and be willing to work toward professional certification such as a CPA and so on. Obviously the Claimant to this case was able to do the job of a "project manager" without these credentials and there is no information in the record, as noted earlier, that he did not excel in his job. About the only thing that can be said for this argument by the union is that if the Carrier can find an individual with sufficient experience and intelligence and ability to do a management job it has the right to waive formal educational requirements just as professorships in great universities in poetry, music and the fine arts are sometimes filled by individuals with minimal education but with creative genius.[22]

The union argues that the Claimant only had skills indigenous to this industry with implication that if he would have accepted a severance package he would not have been able to have found a job somewhere else because he did not have transferable skills. This does not seem to be any more correct that the proposition that he was simply an old line rate clerk.

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[22]The union provides information on a "auditor" bulletin from Fort Worth which also requires considerable formal education, etc. The Claimant to this case must simply have bypassed all of that while at Topeka when he was first hired as an exempt auditor in May of 1997. It is unclear from the record if he went through all three audit positions from May of 1997 until October of 1998 when he was promoted to project manager or if he hired in as auditor II.

Was the Claimant subject to potential covered status? At one time auditors had been represented by this Organization on this property. That is not disputed in the record. But the basis of the union's argument with respect to the Claimant is that he also was eligible for representation since his position as a "project manager" was synonymous with that of an "auditor". The foregoing discussion dealing with the responsibility of a "project manager" suggests that auditors are not synonymous with "project managers".

A final issue dealing with whether the Claimant received benefits not granted to the rank-and-file, after being affected by a transaction is, in view of the foregoing, moot. There was no transaction in the instant case because the Claimant was not an employee covered by NYD under Article IV.

In view of the full record before him the arbitrator rules that the Claimant to this case is not an employee under Article IV of NYD. Subsequently he was not a displaced employee when his position of "project manager" was abolished in October of 2001, and there was no transaction associated with the abolishment of that position. The Carrier was not in violation of Article VII of the parties' MIA when it denied the Claimant's claim for NYD benefits.

Award

The ruling is in accordance with the Findings.

Edward L. Suntrup, Arbitrator & Chair

Daniel J. Kozak, Carrier Member
Assistant Vice President
Labor Relations, BNSF

William Miller
Director of Industrial Relations
Transportation Communications Union

Dated: 7-14-04

November 12, 2004

Mr. John Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Dear Mr. Grother:

I received your letter dated November 8, 2004 regarding your claims against Union Pacific.

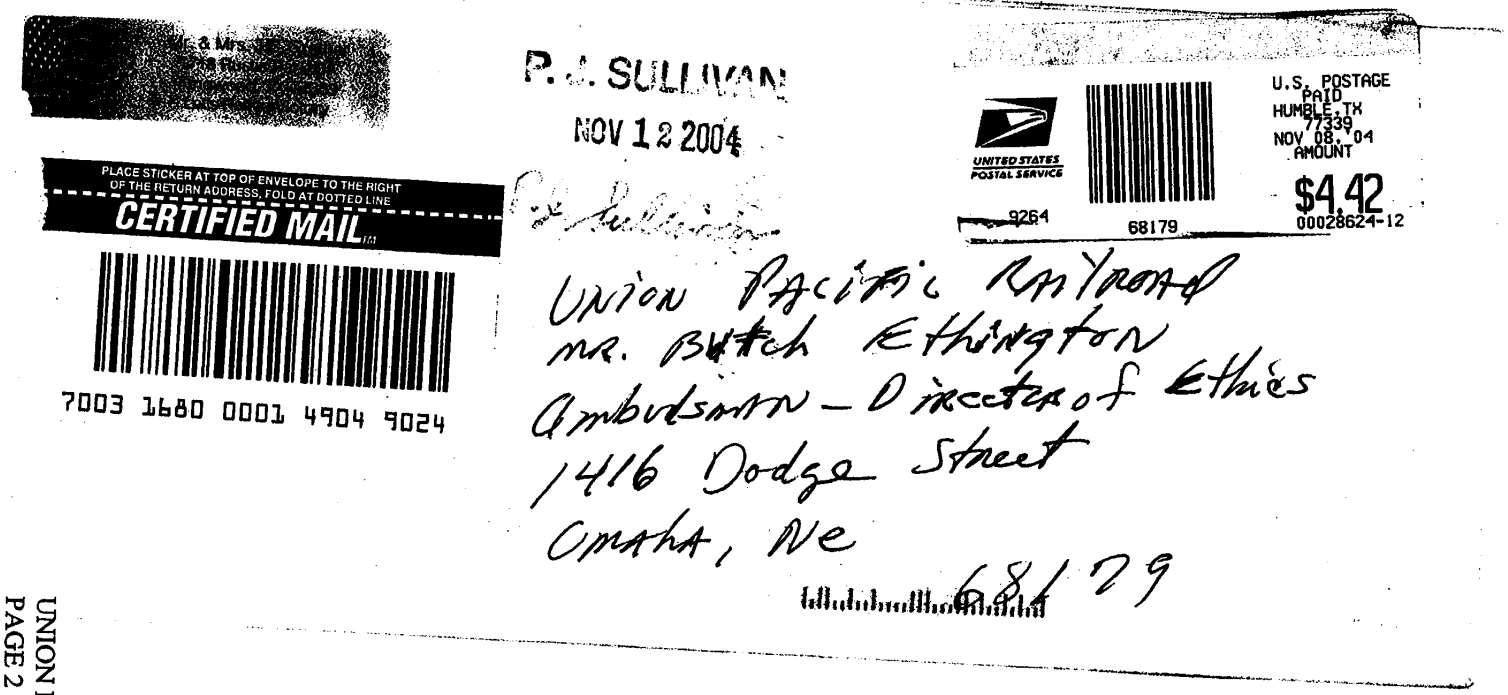
Since you have current actions pending against the railroad (for EEO and New York Dock issues), I believe that those are the proper forums through which to resolve your claim(s).

I am sure the arbitrator or hearing officers, by considering all of the evidence, will render a fair and impartial judgement.

Sincerely,

Butch Ethington
Ombudsman & Director of Ethics
Union Pacific

UNION PACIFIC EXHIBIT 52
PAGE 1 OF 34


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AMBUDSMAN - DIRECTOR of ETHICS
1416 DODGE STREET
OMAHA, NE
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Via Certified Mail-7003 1680 0001 4904 9024

Mr. Butch Ethington
Ombudsman-Director of Ethics
1416 Dodge Street
Omaha, Ne 68179

November 8, 2004

Dear Mr. Ethington,

Subject: New Evidence that I was treated unethically in 1997

Reference my previous correspondence to you regarding 1997 Unethical Practices, attached Exh.'s 1 and 3 are sworn Arbitration testimony by my alleged 1997 supervisor Kenneth C. Packard which clearly state that:

1. "...**the service issues and everything, they were insurmountable, no matter who was in charge"** (Pres. Davis's letter referred to service failure). (If no one could do yard consolidation, why severe reduction in wages?)

2. Regarding the 1997 required justification to warrant a wage reduction (Exh. 2), Packard Exh. 3 concerning writing anything on Form 15121: "No, I'm not familiar with the form at all"

(Therefore, my alleged supervisor did not provide any 1997 justification as required and my wages should not have been reduced without justification!)

In view of: 1) New UP **sworn evidence, 2)** Exh. 2 Policy of UP that usually a persons wages were not reduced in 1997, 3) that when wages were reduced special justification by the supervisor was required and Packard states no knowledge of writing such justification, and 4) that my similarly situated Houston MIO peers (Harry Stark and Joe Crow) displaced from Operations to the same job in the same City were not reduced in wages per UP payroll records; are you now willing to reconsider my request for **Fair Treatment,** which is publicly published Policy of UP to be a ***fundamental right* of ALL Union Pacific Employees** and allow the prior requested reimbursement of rightfully earned wage level after 28 years of dedicated service in 1997? Please advise.

Sincerely,

John Grother

Attachments-Exh's 1-3

John Grother

Exh. 1

Now, the issues that went on at Tucson, the service issues and everything, they were insurmountable no matter who was in charge. It was a tough time for the Union Pacific railroad.

MS. ROSS: Thank you.

MR. [redacted] First of all I'm going to take that damn thing off because it catches on my arm every time I move. I'm going to make an assumption, Lynette, just making sure you understand my presentation. I'm going to make an assumption that you have read the submissions and studied the exhibits and I'm not going to go through them *ad*

EXH. 2

DEMOTION POLICY 1997 Rev. 3/1/96

Demotion justification	If an employee is transferred to a lower job grade due to his/her inability to perform the duties of the prior position, the SRG and job grade of the new (lower) position will apply on the effective date of the transfer.
What about salary changes?	In most cases, the employee's present salary level is retained. However, if you believe a salary adjustment is warranted, provide Operating HR with your justification and we will try to obtain Railroad HR sign-off on the 15121.
What if it isn't a demotion?	If an employee is transferred to a lower grade for reasons other than performance, use "other" on the 15121 with reasons noted in the "comments" section of the form.

Exh. 3

[redacted]

Q That's this comment here?

A Right.

MR. MacDOUGALL: Did you write on this one? Did you write anything on this one, the 151-21?

MR. PACKARD: No, I'm not familiar with the form at all.

[redacted]

Q I believe you testified earlier you came back from Denver to Tucson with Tom Murphy and at that time this process was in motion?

A The arrangements for his transfer were in motion.

MR. MacDOUGALL: When was this, a day or two before the end of June? Murphy and you spoke to him? If you recall.

MR. PACKARD: June-July.

MR. MacDOUGALL: That's pretty close.

MR. PACKARD: I'm not exactly sure

November 10, 2003

Mr. John Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Dear Mr. Grother:

I received your letter via regular mail dated November 2, 2003 regarding your accepting a lesser salary and position in 1997. You were given a choice at that time according to Mr. Ken Packard, Superintendent. There was no unethical practice. The choices and decisions made during that merger period were difficult for many people. The fact that you were one of the managers who were given difficult choices is unfortunate, but not unethical.

I will not rehash the personnel evaluations and decisions made by management and you so long ago. Mr. Jerry Davis responded to your petition in September of 1997.

Sincerely,

Butch Ethington
Ombudsman and Director of Ethics

VIA CERTIFIED LETTER

December 15, 2002

Union Pacific Railroad-Ombudsman
Attn: Mr. Butch Ethington (Confidential)
1416 Dodge Street
Omaha, NE 68179

Rcvd 12/30/02 cee

Mr. Ethington,

This refers to our discrimination discussion today and Union Pacific Railroad ("UPRR") President and Chief Operating Officer Ike Evans letter dated August 5, 2002 (Exh.1), and the Building America Brochure enclosed therewith (i.e. "Building America is about how we act with each other"). Specifically, I am convinced that I have "**not been treated** appropriately within the **values** and **attributes** inherent in Union Pacific's reputation". My fellow managers have not afforded me respect, **FAIRNESS (A FUNDAMENTAL UPRR EMPLOYEE RIGHT)**, or ethical behavior. Below, I shall indicate a few of the facts which I have recently (starting 7/31/02) been allowed to know so far, about my two salary rate grade ("SRG") demotion on July 1, 1997 from Senior MTO at Tucson, Arizona to MIO at Houston, Texas-a whopping $1,272 per month.

The purpose of this letter is to request **COMPENSATION & FAIRNESS:**

1) Compensation reimbursement - see Attachment 2 for details,
2) Deletion of unknown-to-me demotion "disciplinary reasons" from my on-line, people-soft, hard copy personal record, and any other records,
3) Immediate appropriate raise to salary Band C (Attch 2 details the math)- $ 7,528/month effective 1/1/03 & $ 7,791 effective 7/1/03, OR present wages of Mr.Thomas Parr (my replacement in July 1997 @ Tucson, Az.)
4) Give 2002-$2,500 bonus, like other MIO'S with same PDR's in Houston.
4) Consideration for future promotion, and 2003 Bonus like other MIO's.

BACKGROUND

I was an Ex-Southern Pacific Transportation Company ("SPTCo") Manager with "Outstanding" Performance Ratings spanning a career of 28 years in various Operating, Marketing and Joint Facility positions in 1997. I had been consistently promoted as indicated by Exh. 2 (Personal Record) and received numerous types of special recognition, compensation and assignments; including being appointed by SPTCo President Mohan to be

the SPTCo's lead negotiator for a $450 Million Peninsula right-of-way sale to the State and Counties in the San Francisco Bay area. (Exh.'s 3-6).

I was highly regarded by most of my peers as a person who could get the job done through the creation of process management based on my Air Force fail-safe (redundant system) training, formal education (including an MBA), and in-depth process training at SPTCo. In fact, I was specially selected by SPTCo VPO Lacy to be their sole "Coordinator, Productivity Improvement Program", which included multiple Terminal and Blocking studies with implementation timelines / detailed implementation processes, which were followed by the respective Service Units, after each evaluation.

LOGIC TEST NUMBER ONE:
BASED ON THE ABOVE RECOGNITION, DUTIES AND PROMOTIONS BY SPTCo, IS IT LOGICAL THAT A MANAGER OF SUCH DEPTH AND LONGEVITY WOULD DESERVE A 21% CUT IN PAY AND DEMOTION, AFTER A TWO-MONTH MERGER RELATED YARD CONSOLIDATION EXPERIMENT FAILED?

After a cross training assignments as General Manager Amtrak/Transit Systems, and Joint Facilities (where SPTCo managers negotiated with UPRR managers), I returned to the Operating Department of SPTCo as Terminal Superintendent (SrMTO) Tucson, Arizona effective 9/16/95 with a salary of $6,200 a month. After a thorough Jan-Mar 1997 review of my strong personal record and "Outstanding" performance, I was verbally selected by Union Pacific Railroad ("UPRR") to be Senior Manager Terminal Operations ("SMTO") by UPRR. After eighteen (18) months as the incumbent, as corroborated by my personnel record, I was OFFICIALLY designated by the UPRR as SMTO effective April 16, 1997, which was ONLY 2.5 months before my discriminatory demotion on July 1, 1997!

During the Arizona UP-SP Merger implementation rollout in early 1997, UPRR VPO Arthur Shoener performed his initial review of UPRR operations and interviewed several persons regarding how the operations could be consolidated or modified, which was "desirable to realize, UP-SP merger benefits". VPO Shoener reached the merger-related decision to close the phoenix flat switching operation and move "**ALL** flat switching" to Tucson, despite the 1% Tucson switching grade and lack of other resources,

including track capacity for that volume, an on-going twelve hour maintenance of way (M of W) curfew on both sides of Tucson, and there was no flat switching lead on the Eastend (which in 1997 required that all "tailing switch movements of any size" obtain Dispatcher authority before entering the Main Track to switch).

As in most mergers, UPRR managers were not interested in the opinions of ex-SPTCo managers. I did provide a documented list of the resources and blocking that would be required, **BEFORE ATTEMPTING TO CONSOLIDATE ALL PHOENIX WITH TUCSON SWITCHING.** That list was ignored by the 1997 UPRR corporate culture. Said culture required that the merger transaction experiment take place promptly as ordered by the hasty VPO decision without benefit of even a capacity-model study in advance.

According to the existing documentation, I expressed extreme concern regarding the fact Tucson was surrounded on both sides by twelve-hour maintenance-of way (M of W) curfews, which prohibited the operation of trains, in any direction, between the hours of 0700-1900 M-F. In simple language, the trampled playing field was cut in half (by the lack of operational time account M of W curfews and the other teams size was doubled (by consolidating ALL Phoenix flat car switching at Tucson), which was a recipe for disaster, none of which was within my decision or control!).

Under present UPRR operations, UPRR attempts to take great care with curfews and even detours trains and other activities are performed to ensure that the Terminal will survive. That was not the case in 1997, as ALL were "piling on the beleaguered ex-SPTCo management at Tucson" (to extend the metaphor of the "trampled playing field").

The merger transaction experiment was started effective May 14, 1997, which was about twenty (20) months after I had been successfully performing as "Outstanding", on my Tucson assignment. Senior UPRR management quickly realized that the two (2) M of W curfews, lack of capacity, lack of personnel, 1% grade issue, track conditions, and other Tucson resource deficiencies had created a failure, just as others and I had predicted. In desperation, capacity, process and "bullying switching experts" were flown in to show the ex-SPTCo managers how to railroad.

Experts were quickly brought to reality and had to publicly admit that it could not be done with **ALL** the Phoenix traffic coming to Tucson, including Westbound, insufficient trackage and 12' M of W curfews in both directions. During the week of June 17, 1997, confidential meetings were held to determine who would be the scapegoat, and a little over one-month into this merger consolidation experiment, my demotion and 21% pay cut decision was made by senior management. I was orally advised June 26, 1997 to be gone July 1, 1997, as UPRR wanted its own people in Tucson!

The decision to demote me was made with complete disregard for the truth; because, the **FACTS SPEAK FOR THEMSELVES!** Shoener was the genesis of this merger consolidation decision, as testified to by many witnesses. Therefore, why punish the local manager, who just happened to be in the wrong place at the wrong time?

As indicated by the web site of the BLE Union (Exh. 7), the problems at Tucson continued for several months, after my demotion, which does not match statements made in President Jerry Davis's response to my appeal (Exh. 8- see APPEAL to Davis), concerning this discriminatory demotion.

LOGIC TEST NUMBER TWO:
WHY WOULD I WRITE THE THEN PRESIDENT OF UPRR ON JULY 15, 1997 A LETTER REQUESTING A DIFFERENT JOB, WITH THE SAME $6,200/ MO. COMPENSATION, IF I HAD BEEN ADVISED THAT I HAD BEEN DEMOTED FOR DISCIPLINARY REASONS IN JUNE? THE FACTS SPEAK FOR THEMSELVES!

President Davis's letter stated on September 4, 1997 in part. (Exh. 9):
"In **JUNE,** the service levels to our customers, both external and internal, deteriorated to the point where immediate action had to be taken." and "We believe that a change in management was necessary for improvement to occur." The conflicts in Davis's letter included; but, were not limited to:

a. Service difficulties in Tucson were still roaring in September 1997 when Mr. Davis responded to me September 4, 1997 (see Exh 7 Union Web Site).
b. b. The issues keeping Tucson Terminal barely fluid in September were: 1) the 12-hour per day M of W curfews on both sides had ended,

2) THE "JUNE PROBLEM" AT TUCSON ENDED (THE MERGER CONSOLIDATION EXPERIMENT WAS ENDED JUNE 26, 1997!)

LOGIC TEST NUMBER THREE:
IF I HAD ACTUALLY BEEN DEMOTED FOR A PROPERLY DOCUMENTED AND REPORTED DISCIPLINARY REASON ON JULY 1, 1997, WHY WAS THIS ALLEGED "FACTUAL DEMOTION REASON " NOT SIMPLY STATED IN UPRR PRESIDENT DAVIS'S SEPTEMBER 4, 1997 RESPONSE TO MY APPEAL? (SEE EXH. 9)

The author of Mr. Davis's letter had so little regard (i.e. respect for employees) for my discriminatory demotion, that the response took almost two months, did not use the Quality Process to determine the root cause of the June 1997 service failure and did not even bother to address or answer my specific questions about my financial denigration for life.

President Davis's letter **CORROBORATES** that the ONE cause of my demotion was the **JUNE SERVICE FAILURE**, which was directly related to the late May 1997 merger decision to consolidate yards, without doing a capacity study in advance or going through an in-depth simulation study of issues prior to the attempted consolidation implementation merger experiment, including the postponement of the two (2) strangling M of W curfews. The late May 1997 **TOTAL** switching consolidation experiment was the result of UPRR managers, inexperienced with the territory; seeking a "quick cost cut", who would not listen to reason or perform due diligence.

I have access to the 1997 UPRR capacity study which documented, after the experiment began, that consolidation of such volume ***COULD NOT BE DONE***; especially, with Phoenix also sending ALL Mill-Run Eastbound and Westbound traffic to Tucson and M of W curfews surrounding it.

It was an impossible task! Even many prior-to-the-merger UPRR managers were also in agreement (before the yard merger consolidation experiment), that failure was the only possible outcome.

As **CORROBORATION** of the 1997 UPRR Corporate Culture, which created my arbitrary demotion, the Wall Street Journal on August 25, 1999 indicated, in part, the 1997 ***ATTITUDES AND BEHAVIOR OF***

UPRR (Exh. 10):

a. "When something happened," **YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY"**.

(When the merger experiment of consolidating switching terminals was ordered by VPO Shoener and failed in less than two months, I was shot!)

b. "Their culture was dysfunctional and characterized by noncommunication"

c. "Troubled...1997-98..." "freight service had collapsed, stranding Midwestern crops, snarling west coast ports and delaying shipments of goods from chemicals to paper" (The whole UPRR system was fouled).

d. "But many people blame Union Pacific management. They say Union Pacific **TRIED TO CUT COSTS DURING THE INTEGRATION, NOT HIRING PEOPLE AND CRAMMING CARS INTO FEWER YARDS"**

(Above is exactly what happened at Tucson during the merger yard **CONSOLIDATION EXPERIMENT OF MOVING ALL PHOENIX SWITCHING INTO TUCSON, WITHOUT BENEFIT OF CAPACITY, PROCESS, PROPER RESOURCE STUDY!**

e. "Meanwhile, Mr. Davidson reinforces his push for greater flexibility by showing he is willing to try anything"

(Above are great; but why ruin the Grother's lives?)

In much the same way as Enron's Vice President of Corporate Development, Ms. Sherron Watkins, believed she had a duty to advise senior management of an impending failure, I advised that this merger experiment was doomed. Not only were my warnings ignored; but also, when the experiment failed, I was discriminatorily demoted and advised to accept a 21% cut in salary at Houston, Texas, in a different sub-department, or "Hit the Street"!

In 1997, after 28 years of dedicated service, eleven "grooming moves", mainly as an Operating department manager working 12 hour plus days/nights/weekends/holidays/derailments/injuries/accidents/hazardous material releases/incidents and so forth, "I felt the 33,000 miles of Building America tm"

Based on the 1997 UPRR Corporate Culture and after the June 1997 merger switching consolidation experiment failure, senior UPRR managers undertook an aggressive program of removing, demoting, denigrating (until resigned) ex-SPTCo managers until **all ex-SPTCo Operating Officers who were at Tucson when the merger was announced were gone, for perceived discriminatory reasons.**

Masseurs. John E. Grother, H. Lawson McDowell, David L. Hampton, Paul A. Lobello, Ray Szarek and Bob Strefelder were "removed " by various means and Ex-Rock Island UPRR Service Unit Superintendent Ken C. Packard was "demoted" (BUT, **WITH NO REDUCTION IN WAGES!).** Ex-SPTCo manager Dan S. Payawall tragically died during the stress-filled twelve (12) hour plus days of this June 1997 yard consolidation transaction experiment, when his pancreatic cancer came out of remission.

THE QUESTION AT ISSUE:

Is Grother to be made whole for the lost compensation and fringe benefits which resulted from the two SRG discriminatory demotion July 1, 1997 based on UPRR's Policy that every employee has a **fundamental right to fairness and free of discrimination?**

Since the UP-SP Merger, I have been concerned for several years why I was unable to be promoted or even be transferred after years of C-NET attempts and it now appears that the reason has come forth!

On July 31, 2002, I was advised in part the following (Exh.11): "The online record indicates **DISCIPLINARY ACTION**" as the reason for your July 1, 1997 demotion!

You can imagine ***MY SHOCK AND CONCERN*** to find out that I have been deceived and a separate, online system exists, which has been providing information to prospective UPRR hiring managers. These prospective internal hiring managers, of course, would look no further than "demoted for disciplinary reasons", before discarding all my C-NET applications. In combination with the word "demoted" on my Official PR, my reputation has been and continues to be badly tarnished, and the damage is almost irreparable.

I have never been told anything about my "disciplinary action" (why not? – Was a "disciplinary reason created as a cover-up for discrimination?).

President Davis's letter of September 4, 1997 does not mention anything about discipline, only that service had deteriorated in June 1997 (during VPO Shoener's merger yard consolidation experiment). I had no idea there were negative remarks on some "secret-to-me", online record.

I requested a hard copy of what I was told was my "entire Personal Record" twice, to work on my UPRR resume, and there was not one word therein about "disciplinary action in 1997", or any other time. Ms. Linda S. Jensen (Exh 12) wrote, "There are no entries of discipline".

Moreover, I asked the Local HR manager Buttrill if she had knowledge of anything negative on my record, which would explain why I was demoted and she replied March 6, 2002 "The only thing I have access to is the "database information", which associates this title change with the move from Tucson to Houston"(Exh. 13a and 13b).

THE ABOVE RESPONSE COULD LEAD ONE TO BELIEVE THAT THE REASON FOR MY DEMOTION (I.E. DISCIPLINARY REASON), MAY HAVE BEEN PUT IN THE ONLINE DATABASE "BETWEEN" MARCH 6, 2002 (BUTTRILL'S STATED RESEARCH DATE) AND JULY 31, 2002 (BREWSTER'S RESEARCH RESULTS).
COULD THAT BE POSSIBLE?

WHAT OTHER EXPLANATION IS POSSIBLE FOR THE DIFFERENT RESULTS FOUND BY TWO SEPARATE HR MANAGERS?

Also, on March 7, 2002, the Local HR manager Buttrill states:

"My suggestion was to review your Personal Record. A hard copy PR 'generally' has more information than is documented in the computer" and "If neither of these suggestions produce the information ...(PR review or Former Supervisor feedback)... I don't know where you would find it." Apparently, Ms. Buttrill was not aware that the compensation section of the HR Department would have on file the 1997 Demotion Policy.

IN DIRECT OPPOSITE TO THE ABOVE ADVICE, MY HARD COPY PR INDICATED NOTHING ABOUT THE "SECRET REASON" FOR MY DEMOTION. THE "DISCIPLINARY REASON" WAS FOUND IN THE "ON-LINE SYSTEM" ON 7/31/02, AFTER MS. BUTRILL STATES SHE CHECKED "DATABASE INFORMATION" ON OR BEFORE 3/6/02 AND FOUND NO REASON FOR MY DEMOTION – WHY NOT?

The local HR manager Buttrill suggested my Tucson supervisor could advise me why I was demoted 2-SRG's. I sent four Lotus Notes, two AOL e-mails, and Certified Letter to Mr. Ken C. Packard. He has **not responded yet!**

WHAT WOULD LOGIC INFER ABOUT PACKARD'S NON-RESPONSE? (See Exh. 14a-14b unanswered requests to Packard).

Local HR manager Buttrill also suggested that I contact the EEO Group and provided their Phone number for some unknown reason July 9, 2002? At that time, I was unaware of ALL the discriminatory acts which had taken place; especially, the July 31, 2002 information that disciplinary reasons had been placed on a secret online file which affected my promotability.

Ms. Lisa Brewster was helpful and provided Exh.15 (1997 POLICY), which indicates, in part: "***IN MOST CASES THE EMPLOYEES PRESENT SALARY LEVEL IS RETAINED***". WHY WAS MINE NOT RETAINED?

I have been unable to obtain Page 2, Form 15121 data from 1997, which allegedly indicates the heinous "comments" justification provided to reduce $1,272 per month. It seems incredulous to me that such a huge pay reduction could be taken from one's fellow employee without some hard copy evidence being maintained forever, or at least some type of CD-ROM,

microfiche or other accessible file created. Surely, Mssrs. Packard and Murphy can remember what heinous activity I did, which was undisclosed to me in 1997 (or thereafter) and discriminatorily placed in the online system, creating a "secret to me discipline record", which would end my career!

Perhaps, the above managers could be asked to re-create the discipline charges for ALL to see, understand the underlying evidence, and rebut?

Would it be FAIR to know why I could not ever get promoted again (i.e. account an on-line system "disciplinary demotion" notation for all UPRR hiring Managers to review) and why I have lost over $100,000 through March, 2003 and stand to lose another estimated $200-300,000 in retirement (including Tucson Real Estate losses), assuming that my wife and I live 20 years into retirement (see Attachment 2).

My extensive research of other persons demoted or "demonstrating a significant change in job title" (which have the logical appearance of a demotion-i.e. Vice president to General Manager, etc.), indicates that I am the only person I can find during the System-wide 1997 service failures, who was forced to take a 21% cut in pay, **OR QUIT!** A partial list of managers who retained **all their wages** through the severe service disruptions during 1997 is shown on Exhibits 16 and 17 (i.e. comparative and/or statistical disparate treatment proofs indicating discrimination).

Even those prior-to-the-Merger UPRR managers who made the local Houston Newspaper related to spectacular service failures (i.e. Mssrs Charles Malone and Greg "Bubba" Garrison) ***HAD NO PAY CUTS; DESPITE THOUSANDS OF DELAYED CARS, LAW SUITS AND HUGE CUSTOMER SETTLEMENTS AGAINST UPRR (EXH. 18).***

LOGIC TEST NUMBER FOUR:

IS IT LOGICAL THAT I DID SOMETHING SO HEINOUS AFFECTING CUSTOMER SERVICE, THAT I DESERVED A WHOOPING 21% PAY CUT, WHEN ALL AROUND THE UPRR SYSTEM THERE WERE NUMEROUS, INCREDULOUS SERVICE FAILURES, WITHOUT DEMOTION PAY REDUCTIONS?

(I.E. UNJUSTIFIED EXCLUSIONARY EFFECT?)

WHY WAS I SINGLED OUT FOR A SEVEN-YEAR SALARY PUNISHMENT, FOR JUST BEING IN TUCSON, WHEN SOMEONE MADE A DECISION, WITHOUT THE QUALITY PROCESS?

The System-wide service delays in 1997 are well documented (Exh's 19-25); yet, in ALL the managers demoted, I fail to find any (at this writing), who were reduced in pay during 1997, out of hundreds interviewed.

One specific ***CORROBORATION*** of 1997 differences in the application of the official UPRR demotion policy, which is **EXACTLY ON POINT** and demonstrates clearly that others, similarly situated, were treated better is:

MESSRS. HARRY L. STARK AND JOE D. CROW WERE BOTH EX-SPTCo OPERATING OFFICERS, JUST LIKE MYSELF AND THEY WERE ALSO DEMOTED FROM HIGHER PAYING POSITIONS AND PLACED IN THE SAME INTERMODAL DEPARTMENT, IN THE SAME CITY (HOUSTON), ON THE SAME JOB (MIO), A FEW MONTHS BEFORE MYSELF; BUT, THEY DID NOT HAVE THEIR HIGHER OPERATING DEPARTMENT PAY REDUCED, WHICH IS CLEARLY DISCRIMINATORY AND APPLYING POLICY IN A NON-STANDARD MANNER TO SIMILARLY SITUATED EMPLOYEES. (I.E. INFERENTIAL DISPARATE TREATMENT)

Discriminatory intent can be inferred from the fact that similarly situated persons are treated differently in a similar employment situation.

Based on hundreds of interviews, the issue of a manager being reduced in compensation as a result of demotion was virtually unheard of in 1997. That concept was so strong; that, HR personnel issued Exh. 26A "Summary of plan Changes" effective January 1, 1999 concerning ex-SPTCo Pension Plan Rights which stated " ***IN NO CASE WILL YOUR BENEFIT UNDER THE AMENDED PLAN BE LESS THAN THE PLAN BENEFIT YOU EARNED THROUGH December 31, 1998."***

The above statement does not appear to be true in my case, as my highest pay to date is the 36 consecutive months between July 1994- June 1997, which will not be allowed in the calculation of my UPRR pension, as no monies before 1998 are included for ex-SPTCo managers. I shall be financially impaired for the rest of my life! The above quoted HR statement could only be made; if, it were believed by HR personnel ***that no one demoted would lose their wage base; which, is not true in my discriminatorily demoted case.***

Regarding any delay in submitting this request for compensation and personal record correction. I have already experienced the following partial list of facts; which I had to be exposed to before composing this request:

1. Not aware of the on-line **SECRET** reports until Jul 31, 2002, at which time I was Lotus Note advised (Exh. 11) only that an unknown-to-me online system stated "Demoted, disciplinary reasons". From that SURPRISE date until now, information has been requested and many dead-ends have been encountered in trying to obtain the facts (Exh. 26B through 26E). The latest dead-end is the comments section of ALL form 15121's in 1997 have been shredded after retaining only page one data.

2. After just requesting my "Official Personal Record" in November 2001 to determine why I was "not promotable", I was instructed to submit to two "random drug tests" in a row (Feb 2 and May 2, 2002). These tests were only separated by that much time because I was on a previously scheduled April vacation. Such close timing between "random tests" seems statistically implausible, after 33 years of dedicated service without a single random drug test. These have the appearance to me of being retaliation, harassment and continuing discrimination, for simply just requesting my Personal Record!

3. Although my PDR was identical with my two peer MIO's at Settegast and Englewood (both in Houston), they both received a $2,500 bonus February 2002, for their 2001 performance (which was identical to mine), indicating a continuing pattern of discrimination.

4. Advised by my new Houston Supervisor, Mr. Don F. Fryar on Saturday, August 2, 1997 while driving Settegast to Englewood Ramp, in part:

"YOU CAN NOT WORK AROUND HERE DURING ANY TYPE OF LAWSUIT, AS THEY WOULD MAKE LIFE UNBEARABLE FOR YOU." (NO WITNESSES OF COURSE BUT INTIMIDATING, HARASSING AND DISCRIMINATORY THREAT).

5. Even the local HR representative Buttrill was so "disturbed" by my dead-end search for facts about my discriminary demotion, that she referred me 7/09/02 to the EEO group for some unknown EEO reason (Exh. 13b).

6. Requested training on the Budget and other Computer Drive functions needed to be understood before being considered for promotion to Senior MIO or SeniorMTO at Englewood or anywhere on the System. Fryar failed to provide the training requested and appeal to Fryar's boss ended with a continuation of Grother on the night shift and less chance of promotion!

I AM TRYING TO RECONCILE THE ABOVE PARTIAL LIST OF DISCRIMINATORY STATEMENTS, ACTIONS AND BEHAVIORS, WHICH HAVE OCCURRED, WITH THE BELOW PUBLICLY PUBLISHED POLICIES OF UPRR.

THE PUBLICLY PUBLISHED POLICIES OF UPRR:

1. UPRR web site – General Public – Diversity (Exh. 27)

"Policy and Practice"

" A DISCRIMINATION FREE WORKPLACE AND FAIR TREATMENT ARE FUNDAMENTAL RIGHTS OF ALL UNION PACIFIC EMPLOYEES".

I HAVE BEEN DENIED THIS FUNDAMENTAL RIGHT!

To partially illustrate, it **is not fair to enter undisclosed data into an online system, which is used by internal managers who hire and not make that same information available to the affected employee for rebuttal. It is not fair to enter data in a discipline system without telling the employee about said entry. It is not fair to take away my monthly income when hundreds of other managers were involved in locations with more**

severe service failures in 1997. It is not fair to treat similarly employed persons with different policies, concerning demotion and so forth.

2. UPRR web site-General Public-Diversity (Exh. 28)

"Equal opportunities are afforded to ALL employees"

" ...employment without regard to....status as a Vietnam-era Veteran..."

"This policy applies to all terms and conditions of employment, including, but not limited to, ... demotion, ... transfer, ...compensation..."

(AS HAS BEEN FOREVER NOTED IN MY PERSONAL RECORD AND MY INTERNAL RESUME, I SERVED AND RETIRED WITH AN HONORABLE DISCHARGE FROM THE USAF RESERVE, AFTER SERVICE DURING 1969-71 ON ACTIVE DUTY AND THEREAFTER AS AN ACTIVE RESERVIST, INCLUDING USAFR RETIREMENT.

3. UPRR Website-Executive-Business Conduct Guidelines (Exh. 29)

"Simply stated, ***OUR POLICY REQUIRES EVERY UNION PACIFIC RAILROAD COMPANY EMPLOYEE TO PRACTICE HONEST, INTEGRITY, AND FORTHRIGHTNESS IN EVERY ASPECT OF DEALING WITH EMPLOYEES, ..."***

(I WAS NOT TOLD THAT I WAS DEMOTED FOR DISCIPLINE, ADVISED OF ANY DISCIPLINE PROBLEM, GIVEN AN OPPORTUNITY TO CONFRONT MY ACCUSERS, DEFEND MYSELF IN ANY MANNER, OR BE PLACED ON A DEVELOPMENTAL ACTION PLAN TO CORRECT ANY PERFORMANCE ISSUES).

4. THE 2002 POLICY FOR VISION AND VALUES (Exh. 30)

"We put all issues on the table and attempt to resolve them through a constructive debate a challenge", which should include resolving this compensation issue without fear of reprisal. The 2002 Policy also states:

" ... do not kill the messenger bearing bad news". This already happened to me in 1997, when I simply warned my UPRR Tucson supervisor, that the merger switching consolidation experiment of moving ALL Phoenix switching into Tucson could not be done.

5. THE 1997 VISION AND VALUES (Exh. 31– DESKTOP DISPLAYED)

The 1997 VALUE DESKTOP STAND was prominently displayed on my desk in early 1997. The 1997 Values included, in part, the following and other values shown on Exhibit 31, WHICH I GOT TO STARE AT, WHILE I WAS BEING DISCRIMINATORILY DEMOTED:

"TREAT OTHERS LIKE YOU WANT TO BE TREATED"

(Those who cut my wages 21% would have NOT WANTED THAT TO HAPPEN TO THEM AND SUCH REDUCTIONS DID NOT OCCUR TO OTHER MANAGERS WHOSE TERRITORIES WERE INVOLVED IN SEVERE SERVICE FAILURES WITH HUGE SETTLEMENTS, LAWSUITS AND GRID-LOCKED SERVICE OVER MANY MONTHS!)

"TRY NEW IDEAS...ENCOURAGE CHANGE"

(I WAS FINANCIALLY RUINED AFTER VPO SHOENER HAD AN UNRESEARCHED MERGER IDEA TO CONSOLIDATE ALL YARD SWITCHING FROM PHOENIX TO TUCSON'S 1% GRADE).

"TRUST IS ESSENTIAL"

(THE ABOVE VALUES AND OTHERS WERE NOT HONORED AS PUBLISHED IN 1997. CAN ONE NOW OBTAIN FAIRNESS IN 2002?)

6. BUSINESS CONDUCT POLICY OF UPRR AS STATED BY 'UP ONLINE' JUNE 21, 2002 (Exh. 32) – IN PART:

"IN THE CONDUCT OF BUSINESS, EACH EMPLOYEE MUST ADHERE TO HIGH ETHICAL **STANDARDS**. ***THESE INCLUDE HONESTY (I.E. TRUTHFUL DEALING WITH EVERYONE, INCLUDING ...FELLOW EMPLOYEES) AND FAIRNESS (I.E.***

TREATING ANOTHER IN THE SAME MANNER AS YOU WOULD EXPECT TO BE TREATED."

(WOULD MESSRS. PACKARD AND MURPHY WANT THEIR WAGES REDUCED 21% IN 1997 AND STILL NOT BE BACK TO THEIR 1995 LEVEL OF COMPENSATION UNTIL 2004 OR LATER?)

7. LOTUS NOTE February 4, 2002 to ALL employees from President and COO Ike J. Evans (**can** this be used to evaluate my Attch 2 request?):

"Internally, all of us must heighten our efforts to '***WALK THE TALK'.*** TO ME, ***THIS MEANS MATCHING THE EVERYDAY BEHAVIOR WITH THE VISION AND VALUES OF THE COMPANY. THIS IS A PREREQUISITE TO US ADVANCING INTO THE HIGHEST RANKS OF U.S. BUSINESS."***

8. UPRR reminder card received with reduced paycheck October 22, 1999:

"ALL EMPLOYEES WILL BE TREATED FAIRLY AND WITH RESPECT" (Exh. 33).

9. President Evans's LOTUS NOTE June 2002 to ALL employees concerning UPRR reputation states:

"WE WANT TO ***ENHANCE THE REPUTATION OF UNION PACIFIC AND THE MEN AND WOMEN, LIKE YOU, WHO WORK HARD EVERY DAY TO MAKE US ONE OF THE BEST COMPANIES IN THE WORLD".***

(I HAVE NOW WORKED VERY HARD FOR 33+ YEARS, ESPECIALLY AS A 12-HOUR DAY- PLUS OPERATING OFFICER; BUT MY REPUTATION HAS BEEN RUINED BY THE TUCSON DEMOTION PIGEONHOLING REMARKS PLACED IN THE ONLINE SYSTEM. MY SEVERE CUT IN WAGES WAS EXTREMELY UNFAIR AS: OTHER EX-SPTCo OPERATING MANAGERS WERE DEMOTED TO POSITIONS IN INTERMODAL AT THE SAME CITY (HOUSTON), THE SAME JOB AND THEY WERE NOT CUT IN WAGES; AND

PRIOR-TO-THE-MERGER UPRR MANAGERS, WHO WERE LOCATED AT SERVICE FAILURE LOCATIONS WHICH RESULTED IN LAWSUITS AND CUSTOMER CLAIM SETTLEMENTS WERE NOT REDUCED IN COMPENSATION WHEN DEMOTED/TRANSFERRED!

MY PERSONAL 1997 ACTIONS DID NOT RESULT IN ANY LAWSUITS OR CUSTOMER SETTLEMENTS PER MY DOCUMENTATION!

10. COMPARISON BETWEEN THE "UNKNOWN DISCIPLINE DEMOTION" EVOKED ON MYSELF BY UPRR IN 1997, FOR JUST BEING IN THE WRONG PLACE WITH DISCIPLINE ISSUED TO OTHERS IN "COMMAND ROLES", INCLUDING MILITARY COMMANDERS WHO WERE "IN COMMAND" WHEN ***LOSS OF LIVES OCCURRED BY ACCIDENTS; BUT, THESE "MANAGERS" HAVE NOT BEEN FINANCIALLY AFFECTED FOR LIFE, LIKE ME:***

A. Exh. 34 is result of high profile NEWSPAPER case of USS Greenville COMDR. Scott Waddle who was "in command" when his submarine surfaced and NINE (9) JAPANESE SAILORS WERE KILLED. THE NAVY SAID WADDLE WILL RECEIVE HIS PENSION AND FULL RETIREMENT PAY.

B. Exh. 35 concerns Colonel Larry New, who was Commander at Nellis AFB 57th Operations Group when ***TWELVE (12) AIRMEN WERE KILLED.*** After a temporary sideline to a staff position account MEDIA ***SCRUTINY, HE HAS NOW BEEN SELECTED AS A GENERAL.*** NO LOSS OF PAY OR RETIREMENT BENEFITS OCCURRED.

C. Exh. 36, Mr. Steve Clark, prior Attorney General of Arkansas and Candidate for Governor of Arkansas in 1990 was found guilty of using the State's credit card (felony conviction). In June 2000, he was given ***A SECOND CHANCE BY TEXAS BOARD OF LAW EXAMINERS, WHO ALLOWED HIM TO TAKE THE TEXAS BAR EXAM BECAUSE " WE BELIEVE IN REHABILITATION IN TEXAS AND YOU LOOK LIKE YOU'VE HAD ENOUGH"***

11. Exh. 37 is urging employees, as a paycheck insert received 4/26/02:

"IT'S TIME AMERICA HEARD YOUR STORY"
I HAVE VERY BRIEFLY AND PAINFULLY TOLD MY STORY. I DO NOT WANT TO TELL IT AGAIN; THEREFORE, I LOOK FORWARD TO A FAIR RESPONSE FROM UPRR.

12. LOTUS NOTE 8/8/02 FROM PRESIDENT & COO IKE EVANS TO ALL EMPLOYEES:

"***FOR OVER 140 YEARS, THE MEN AND WOMEN AT UNION PACIFIC HAVE PROVEN THAT THEY CAN BE TRUSTED TO DO WHAT'S RIGHT"***

13. **PARTIAL LIST OF FAIRNESS QUESTIONS FOR THE REVIEWERS OF THIS COMPENSATION REQUEST TO CONSIDER:**

- What was the Operating Department's and or UPRR's record in 1997 of applying my same discipline or punishment to others, who had been alleged to have violated the same rule, standard or conduct?

- Why was I given NO NOTICE OF INADEQUATE WORK or performance standard, including the possible consequences of failure to comply or opportunity to respond? Why no PDR or counseling sheet of any type issued to me before leaving or to my demoted duty station?

- Why was there no disciplinary issue raised on ANY KNOWN TO ME performance appraisals and no previous disciplinary actions?

- Why have I never been made aware of any investigation, documentation of poor performance, or given a defined time period and guidelines in which to correct an alleged deficiency?

- Did UPRR conduct a thorough investigation, including adequate, impartial investigation of the multiplicity of factors affecting performance at Tucson Terminal (root cause analysis) before making a decision about taking an alleged "disciplinary action"?

- What evidence supports the alleged disciplinary reason, including allowing myself an opportunity to respond to the charges? Was the investigation of the alleged infraction FAIR and OBJECTIVE?

- Was truly substantial proof of misconduct or performance discrepancy gathered, not flimsy or slight, to form the alleged basis for taking disciplinary action (i.e. who are the witnesses and why was I not afforded an opportunity to confront the witnesses against me)?

- Have similarly situated employees (similar records and alleged infractions) received the same discipline (i.e. two SRG reductions)?

- What was the Operating Department and / or UPRR's record in 1997, or anytime, for taking "similar disciplinary action" for this type of infraction?

- Were ALL EMPLOYEES held accountable for the performance standards established for their positions?

- Was the discipline assessed reasonably related to the seriousness of the issue? Was it reasonably related to my personal record (i.e. length of service-28 years and overall performance)? Does a minor infraction merit harsh discipline for a lifetime?

Whomever the decision makers are concerning my Attachment 2 compensation request, please consider my "fairness MANTRA":

"HOW WOULD YOU WANT TO BE TREATED AS THE RESULT OF BEING IN THE WRONG PLACE, AT THE WRONG TIME, WHEN A TWO-MONTH MERGER YARD CONSOLIDATION EXPERIMENT WAS ORDERED WITHOUT CAPACITY, RESOURCE AND PROCESS STUDIES? WOULD YOU WANT A 21% CUT IN WAGE, SEVERELY REDUCED RETIREMENT AND A RUINED CAREER?

LOGIC TEST NUMBER FIVE:
IF I WERE PROPERLY ADVISED IN 1997 THAT I HAD BEEN DEMOTED FOR SOME ALLEGED HEINOUS REASON WHICH WOULD BE SHOWN ON MY RECORD AS "DEMOTED FOR

DISCIPLINARY REASON", WHY WOULD I HAVE THE GALL TO BE REQUESTING "TOTAL FAIRNESS IN COMPENSATION TODAY", AS I STILL DO NOT EVEN KNOW WHAT COMMENTS ARE HIDDEN IN THE "15121 COMMENTS SECTION", AS IT HAS BEEN STATED FORM 15121 DOES NOT APPEAR TO BE RETRIEVABLE (Exh. 26C).

14. On November 14, 2002, Exh. 39 was sent to you, and you returned a voice mail November 21, 2002 that the issue of determining why I was demoted in 1997 and reduced two SRG's had been referred to Mr. Brad King (first discipline endorser for 1997). You have now advised the Mr. King and Mr. John Holm (spelling?) have no recollection of my financial ruin Form and Mr. Packard states it was a confusing time and something should have been sent to me or provided to me in the form of a PDR. At this writing, I am concerned that Ms. Nancy Quinn will "somehow find" some long lost file that "should have been sent to you" or some other pretextual documentation that was NOT MADE AVAILABLE IN 1997. It is my belief that a thorough investigation of "unbiased witnesses" will rebut any pretextual allegations offered at this late date, especially after the comments section document, Page 2 of Form 15121 (that provided the "alleged heinous reason(s)" for a 2 SRG discriminatory demotion), has now been shredded.

15. Exh. 40 indicates another "lack of response issue" wherein the Pension Department has not been able to answer my questions regarding the lifetime of financial denigration that was accomplished by my July 1997 discriminatory demotion. Since SPTCo managers do not start calculating Pension Benefits until January 1, 1998 per the PLAN, my UPRR Pension will be undercompensated during the remainder of my life due to my discriminatory demotion effective July 1, 1997.

Despite the above partial list of actions and statements, I am grateful to be a member of the UPRR Team which is "Building America" tm, and I continue to believe in being a Team Player (Exh. 38).

NONETHELESS, IN ACCORDANCE WITH UPRR POLICY, PLEASE CONSIDER THIS LETTER AS:

1) OFFICIAL NOTICE that I am of the belief that discriminatory and unfair actions have taken place against me based on my **VIETNAM ERA**



VETERAN status. One reason is referred to herein (i.e. denied an equal opportunity for promotion consideration by secret-to-me online data stating I was demoted for "disciplinary reasons", ***WHICH WAS AVAILABLE TO MANAGERS WHO HIRE OR PROMOTE),*** and other actions and statements which may be further detailed, if time and circumstances permit or require.

This is also OFFICIAL NOTICE that I have received Ethnic Slurs from my present supervisor, Mr. Don F. Fryar, complete with intimidating threats should said slurs be reported. The latest Ethnic Slur against persons of German descent, which included witnesses, was September 18, 2002 at 0945. Fryar asked me twice "ARE YOU A NAZI?" I did not respond. Witnesses were Quality Terminal Services (QTS) contractor personnel, Manager Roy Daily and Leadman Jason Tingle. Since UPRR signs the QTS invoices for lifts and so forth, I am uncertain if the above will be afraid to truthfully answer separate questioning as Fryar can usually intimidate QTS (I.e. Fryar obtained a job for son Jeff at Englewood as QTS Foreman for a few months ending late November 2002, when Jeff was hired by the UPRR).



2) A request for Compensation Reimbursement payment as shown on Attachment 2 (see page 4 of 6, line "Amount of Compensation Requested").

3) Request implementation of ALL "**COMPENSATION AND FAIRNESS" ISSUES STATED ON PAGE 1 HEREOF.**

I had intended this letter (which has been a work in progress for a considerable time, based on constant dead-ends and newly forthcoming data) for Ms. Kathleen Vance; but, your efforts to determine the truth regarding who discriminatorily placed discipline on my record, reach a conclusion based on the facts, consider compensation for this UNFAIRNESS, ETC., ARE REFRESHING.

IN COORDINATION WITH MS. VANCE AND/OR OTHER HR EXPERTS, PLEASE ADVISE WHAT CAN BE DONE ON OR BEFORE FEBRUARY 1, 2003 TO CORRECT THIS LIFETIME EMOTIONAL AND FINANCIAL DENIGRATION, WHICH RESULTED FROM THE ABOVE LIST OF UNFAIR AND

DISCRIMINATORY ACTIONS (AS ONLY BRIEFLY AND PARTIALLY OUTLINED ABOVE).

Should anyone have any questions, I can be reached 1730-0530 Monday-Friday at 713-678-5303 after I return from disability for Pituitary Tumor Surgery or between 1400-1700 CT at 281-359-5667.

Enclosures:
Exh 1-40
Attach 2

Sincerely,

JOHN GROTHER

Subj:	**CAPACITY ANALYSIS AT TUCSON 1997-2003**
Date:	1/6/03 11:23:29 AM Central Standard Time
From:	Johnace51
To:	ButchEthington@UP.com

Mr. Ethington,

Concerning the issue of my performance at Tucson circa 1997:

1. Would the Capacity Model Department consider either review their 1997 notes on the inability of Tucson to switch ALL East and West Traffic from Phoenix, Pichacho and LAPXM at Tucson on its 1% grade without the present E/E lead extension; or, use 2002 data with ALL E/W TRAFFIC coming to Tucson for flat switching, including any Pichacho setouts which were not authorized by Management in 1997?

I believe this would indicate clearly what an impossible task was experimented with; especially, with two M of W curfews in effect on either side of Tucson.

2. What specifically was so heinous about my PERSONAL JUNE 1997 PERFORMANCE compared to my "exact MIO peers" at Houston who had no salary reductions; and, the newsworthy failed service areas, where the U.P. paid huge customer settlements and Lawsuits and yet the pre-merger Managers of U.P. experienced no wage reductions?

PLEASE ADVISE HOW THIS FAIRNESS ISSUES CAN BE RESOLVED?

JOHN GROTHEER

MR Ethington,
In case you DIDN'T GET these AOL emails.
Thank you
JEG

, 2003 America Online: Johnace51

Subj: CORROBORATION OF 1997 PERFORMANCE
Date: 1/4/03 8:29:48 AM Central Standard Time
From: Johnace51
To: ButchEthington@UP.com

MR. ETHINGTON,

1) REGARDING A LIST OF UNBIASED PERSONS WHO SHOULD BE ABLE TO CORROBORATE MY PERFORMANCE IN LATE MAY-JUNE 1997 ACCOUNT THEY WERE ALSO EYE WITNESSES TO THE SWITCHING NIGHTMARE ON A 1% GRADE, THE FOLLOWING PARTIAL LIST IS SUBMITTED:

(YOU MAY NEED TO ASSIST THEIR MEMORIES BY ADVISING THEM THAT THIS WAS THE MERGER RELATED YARD CONSOLIDATION EXPERIMENT TO MOVE ALL THE FLAT SWITCHING FROM PHOENIX TO TUCSON WHILE WE HAD 12 HOUR M OF W CURFEWS IN EFFECT ON BOTH SIDES OF TUCSON, NO AUTHORITY TO AUGMENT ADDITIONAL PERSONNEL, AND NO SWITCHING LEAD EXTENSION ON E/E.)

DAVID L. HAMPTON: EX-OPERATIONS MANAGER FOR SPTCO & U.P., NOW EAST END CONDUCTOR TO EL PASO.
WAS MTO IN MAY-JUNE 1997.

R.L. "BOB" STREFELDER: EX-ROAD FOREMAN OF ENGINES & SELECTED AS MOP FOR U.P.. AWARE CONGESTION & PERSONNEL ISSUES CREATED BY CONSOLIDATION OF YRDS.

RAY SZAREK: EX-RF FOR SPTCO & MOP FOR U.P.
NOW TUCSON ENGR; BUT, MANAGER DURING 1997 PROBLEMS WITH MANPOWER AND CONGESTION.

PAUL A. LOBELLO: EX-OPERATIONS MTO FOR SPTCO & U.P.;
NOW WITH KCS IN ARK. OR LOUISIANA. MTO IN 1997.

LEE R. HOLSINGER: EX-SPTCO OPS & MECH MGR.
WAS CONDUCTOR IN 1997

TOM F. MOORE: UTU REP IN 1997

JIM CRITCHLEY: UTU REP IN 1997

KEN KROEGER: BLE DIV 28 REP IN 1997

ANY MEMBER OF THE 1997 SAFETY COMMITTEE.

2) REGARDING U.P.'S WEBSITE UNDER "GENERAL PUBLIC", DIVERSITY, "AFFIRMING DIVERSITY", U.P. STATES UNDER POLICY AND PRACTICES:

UNION PACIFIC EXHIBIT 52
PAGE 31 OF 34

"A DISCRIMINATION-FREE WORKPLACE AND FAIR TREATMENT ARE FUNDAMENTAL RIGHTS OF ALL UNION PACIFIC EMPLOYEES"

IT IS MY HOPE THAT AFTER INTERVIEWING SOME OF THE PERSONS ABOVE, THE GROSS LACK OF FAIR TREATMENT AND LACK OF BUSINESS ETHICS (I.E. FAIRNESS) WHICH WAS PERPETRATED AGAINST ME WILL BE CLEAR AND WE CAN RESOLVE THIS ISSUE QUICKLY OF UNFAIRNESS.

SIMPLY BASED ON THE FACTS WHICH ARE NOW KNOWN, IT IS CLEAR THAT SOMETHING VERY UNUSUAL OCCURRED AND NO ONE WANTS TO STEP FORWARD A CLAIM A PART IN THIS UNFAIRNESS. THEREFORE, IT MUST BE CLEAR ALREADY THAT AN INJUSTICE HAS BEEN DONE BY THE 1997 COMPANY'S CULTURE AND THE ORGANIZATION NOW NEEDS TO DO THE RIGHT THING FOR THE EMPLOYEE.

JOHN GROTHER

Saturday, January 04, 2003 America Online: Johnace51

VIA LETTER FOR DELIVERY ASSURANCE

Subj:	FOLLOW-ON QUESTIONS
Date:	1/3/03 4:24:15 PM Central Standard Time
From:	Johnace51
To:	ButchEthington@UP.com

GROTHER

MR. ETHINGTON,

AFTER OUR CONVERSATION 1/3/02 @ 1400, I WAS REVIEWING WHAT YOU HAD SAID, AS RELATED BY MR. PACKARD WHEREIN HE STATED:

"WE LOOKED AT A LOT OF DIFFERENT PEOPLE AND OTHER PEOPLE PERFORMED BETTER"

(AS A RESULT OF THIS ANALYSIS, I WAS DEMOTED $1,272/MONTH WHEN UP'S 1997 VISION AND VALUES STATEMENT SAID "TREAT OTHERS LIKE YOU WANT TO BE TREATED" AND OTHERS WERE BEING DEMOTED AND TRANSFERRED WITHOUT ANY CUT IN WAGES, INCLUDING MY TWO PEERS AT ENGLEWOOD RAMP?).

1. ABOVE PACKARD STATEMENT IS NOT CONSISTENT WITH MYSELF BEING SELECTED BY PACKARD FOR SRMTO LESS THAN TWO MONTHS BEFORE THE DECISION TO SEVERELY DEMOTE ME WAS REACHED.

IT IS ALSO NOT CONSISTENT WITH MR. PACKARD LEAVING ME A VOICE MAIL A FEW WEEKS BEFORE THE DEMOTION STATING WE WERE DOING A GREAT JOB GIVEN THE CONSOLIDATION EXPERIMENT AND THE CURFEWS ON BOTH SIDES OF TUCSON AT THAT TIME.

2. ASSUMING THAT ONE'S PERFORMANCE WAS ACTUALLY LESS THAN SOMEONE ELSE'S, IS THAT A REASON TO REDUCE YOUR SALARY BY TWO SRG'S OR $1,272?

MY REPLACEMENT RECEIVED A SIGNING BONUS TO $6,338 PER MONTH?

3. IF 2 ABOVE IS CORRECT, WHY WERE THE WAGES OF OTHER MANAGERS NOT REDUCED DURING THE 1997 SERVICE FAILURES, ACROSS THE SYSTEM, WHEN THOSE MANAGERS WERE DEMOTED AND TRANSFERRED BECAUSE OTHER PEOPLE SELECTED FOR THEIR JOBS, MAY HAVE BEEN PERCEIVED AS "ABLE TO PERFORM BETTER"?

LASTLY, DID ROYCE HARDIN EVER DETERMINE WHY HE DID NOT HAVE AN OPPORTUNITY TO RESPOND TO FOUR OF MY 5 CONFIRMED JOB REQUESTS?

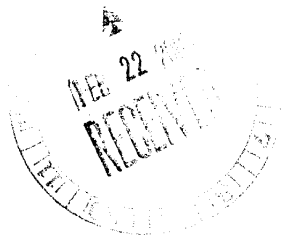
ALSO, WHY DID I RECEIVE A "FORM RESPONSE" FOR THE MYO POSITION AT TUCSON INDICATING THAT A MORE QUALIFIED PERSON HAD BEEN SELECTED (ESTIMATED AT 29 YEARS OLD WITH AUTO FACILITY EXPERIENCE) , WHEN I HAI WORKED A JOB TWO LEVELS OF DIFFICULTY (SRMTO) ABOVE THAT FOR 22 MONTHS AT TUCSON?

IN ADDITION, I HAD PERFORMED AS THE SOLE ASSISTANT DIVISION SUPERINTENDENT FOR THE SPTCO ON THE LARGEST DIVISION IN THE USA, FROM YUMA TO FRESNO AND ST. LUIS OBISPO FOR EIGHTEEN MONTHS.

HOW COULD I NOT BE QUALIFIED TO BE AN MYO AT TUCSON?

PLEASE ADVISE.

JRG



IN THE MATTER OF ARBITRATION BETWEEN

JOHN E. GROTHER

and

UNION PACIFIC RAILROAD COMPANY

Pursuant to Article IV of the New York Dock Conditions Imposed by the Surface Transportation Board in Finance Docket N0. 32760

UNION PACIFIC'S 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.2nd 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

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[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 dos 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 an 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 employe in both the dictionary sense and the legal sense. The critical question is whether an employe, such as the Claimants or even the President of a Carrier are "employes" 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.

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"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 employes 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 "employe" supports this contention.

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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."

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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."

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"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."

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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."

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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."

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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)"

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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 a 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

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[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

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[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)

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> "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 that 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)

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> "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)

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"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

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[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]

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[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

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[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]

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[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

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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**)
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> "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)."

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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."

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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 ..zer, 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 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

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[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.
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> #2 (page 16) UPPR 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'."

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[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 Francisconi[21]. 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

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[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 in 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.

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[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	$ 2,456.00
	$ 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?

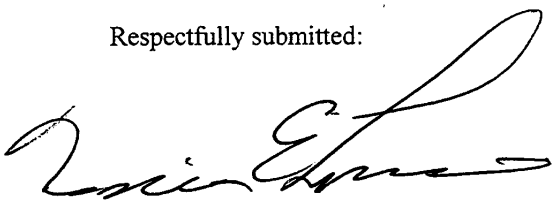
in the **negative**

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:



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 II

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 ARBIRATION 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. GROTHER 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 GROTHER'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 GROTHER HAD BEEN MAKING SINCE SEPTEMBER 1995.

GROTHER'S STANDARD OF PERFORMANCE HAD NEVER BEEN BELOW "OUTSTANDING" AT ANY TIME AND GROTHER WAS NOT FORCIBLY TRANSFERRED IN 1997 TO A JOB MORE SUITABLE WITH HIS ABILITY, AS HE KNEW LITTLE ABOUT THE INTERMODAL DEPARTMENT. THE MANAGER'S AND EMPLOYEES WHO WERE AT TUCSON IN MAY-JUNE 1997 ARE WILLING TO PROVIDE CORROBORATION THAT GROTHER DID EVERYTHING WITHIN HIS AUTHORITY TO MAKE SHOENER'S YARD CONSOLIDATION MERGER EXPERIMENT WORK; BUT, YOU CAN NOT SWITCH UP TO ALMOST DOUBLE THE VOLUME OF CARS IN A YARD WITH A RESTRICTED FLAT SWITCHING CAPACITY.

THEREFORE; BUT FOR SHOENER'S INITIAL ROLLOUT MERGER YARD CONSOLIDATION EXPERIMENT, GROTHER WOULD NOT HAVE BEEN DEMOTED 7/1/97.

UPRR TOOK OVER THE SPTCO IN A ROLLOUT MANNER AND TUCSON WAS PART OF THE LAST PORTION TO CUTOVER, AS FURTHER CORROBORATED BY BLE'S EXHIBIT 8.

PRIOR TO HIS SUDDEN DEMOTION BY UPRR, GROTHER HAD BEEN SELECTED FOR MANY PROMOTIONS, HAD ELEVEN (11) "GROOMING MOVES" AT THE REQUEST OF THE SPTCO, RECEIVED SPECIAL AWARDS, SPECIAL ASSIGNMENTS, SPECIAL PROJECTS BY SPTCO MANAGEMENT FOR MANY YEARS, INCLUDING AN ASSIGNMENT BY SPTCO PRESIDENT MIKE MOHAN TO REPRESENT SPTCO AS LEAD NEGOTIATOR FOR THE PROPOSED SALE OF THE PENINSULA COMMUTE SERVICE TO THE PUBLIC ENTITIES NEAR SAN FRANCISCO (EXH. 3), WHICH WAS A $450 MILLION TRANSACTION. (EX'S. 4-6 INDICATE PARTIAL RECOGNITION, INCLUDING FACT THAT GROTHER WAS ON THE UP/SP COMMON POINT MERGER TEAM (GROTHER WAS ONE OF THE 38 PERSONS WHO WERE SELECTED).

IS IT LOGICAL THAT A MANAGER OF SUCH DEPTH AND LONGEVITY WOULD DESERVE A 21% DEMOTION, AFTER A 1.5

MONTH MERGER RELATED YARD EXPERIMENT FAILED, WHICH WAS ORDERED IN MAY 1997 BY UPRR VP SHOENER?

GROTHER WAS HIGHLY REGARDED AS A PERSON WHO COULD GET THE JOB DONE THROUGH THE CREATION OF PROCESS MANAGEMENT BASED ON HIS AIR FORCE FAIL-SAFE TRAINING, FORMAL EDUCATION (INCLUDING AN MBA,) AND IN-DEPTH PROCESS TRAINING AT SPTCO. IN FACT, GROTHER WAS SELECTED BY SPTCO VPO BILL LACY TO BE THEIR SOLE "COORDINATOR, PRODUCTIVITY IMPROVEMENT PROGRAM", INCLUDING MULTIPLE TERMINAL AND BLOCKING STRATEGY STUDIES, WITH IMPLEMENTATION TIMELINES AND DETAILED PROCESSES, WHICH WERE FOLLOWED BY THE SERVICE UNITS.

REGARDING TUCSON, GROTHER WAS SELECTED TO BE SPTCO TERMINAL SUPERINTENDENT (SENIOR MANAGER TERMINAL OPERATIONS OR SRMTO IN UPRR TERMINOLOGY) OF THE TUCSON DISTRICT FROM NOGALES-THRU TUCSON TO PIACACHO – INCLUDING ALL YARDS EFFECTIVE SEPTEMBER 16, 1995 AT A MONTHLY SALARY OF $6,200. BASED ON GROTHER'S STRONG PERSONAL RECORD AND EXCELLENT PERFORMANCE, GROTHER WAS SELECTED AS UPRR'S CHOICE TO BE SRMTO APRIL 16, 1997. GROTHER'S SELECTION WAS SO STRONG THAT UPRR DID NOT REQUIRE THE PERSONNEL REVIEW SELECTION PROCESS CONDUCTED BY UPRR TO DETERMINE WHO WOULD KEEP THEIR EX-SPTCO POSITIONS WHICH WERE CONDUCTED IN JANUARY 1997 (EXH. 9). THEREFORE, ONLY TWO MONTHS BEFORE GROTHER'S SEVERE DEMOTION, GROTHER WAS SELECTED BY UPRR TO BE ITS SENIOR OFFICER FOR THE TUCSON DISTRICT, INCLUDING TUCSON AND NOGALES YARDS.

CORROBORATION OF NEXUS BETWEEN VPO SHOENER'S DECISION TO CONSOLIDATE SWITCHING AND DEMOTION :

NOTWITHSTANDING THAT THE UP-SPTCO MERGER WAS EFFECTIVE SEPTEMBER 11, 1996, THE IMPLEMENTATION WAS ROLLED OUT IN TERMINAL CONTROL SYSTEM (TCS) REGIONS. TUCSON WAS IN THE LAST REGION TO BE CUTOVER TO TCS

(EXH. 8). THE FIRST TCS CUTOVER WAS NOT COMPLETED UNTIL MAY 2, 1997 (1.5 MONTHS BEFORE DECISION MADE TO DEMOTE GROTHER) REGARDING THE FORMER D&RGW PORTION OF THE SPTCO. CLEARLY, THE MERGER IMPLEMENTATION WAS SLOW AND PAINFUL! AS PART OF THE INITIAL MERGER IMPLEMENTATION ROLL-OUT, UPRR VPO ARTHUR SHOENER PERFORMED HIS AN INITIAL IN-DEPTH REVIEW OF UPRR ARIZONA OPERATIONS IN EARLY 1997 TO DETERMINE WHAT WAS "DESIRABLE TO REALIZE MERGER BENEFITS". VPO SHOENER REACHED THE MERGER TRANSACTION RELATED DECISION TO CLOSE THE PHOENIX FLAT SWITCHING OPERATION AND MOVE "ALL FLAT SWITCHING" TO TUCSON, DESPITE THE 1% GRADE AND LACK OF OTHER RESOURCES, INCLUDING TRACK CAPACITY FOR THAT VOLUME AND TWO ON-GOING MAINTENANCE OF WAY (M OF W) CURFEW'S STOPPING TUCSON OPERATIONS, IN EACH DIRECTION FROM 0700-1900 MONDAY THOROUGH FRIDAY. GROTHER'S ATTORNEY CONFIDENTIAL JOURNAL INDICATES THAT BOTH M OF W CURFEWS STARTED TUESDAY, MAY 6, 1997, AFTER GETTING THE M OF W EQUIPMENT ORGANIZED ON MONDAY, MAY 5, 1997.

ONE **CORROBORATION OF THE NEXUS TO THE UP-SP MERGER TRANSACTION** IS SHOENER'S DIRECT ORDER (BASED ON HIS MERGER TRANSACTION TRIP TO REVIEW EX-SPTCO TERRITORY) TO SEVERAL UPRR MANAGERS; INCLUDING, BUT NOT LIMITED TO DTO H. LAWSON MCDOWELL AND SERVICE UNIT SUPERINTENDENT KEN C. PACKARD) THAT ALL PHOENIX FLAT SWITCHING WOULD BE CONSOLIDATED AT TUCSON.

THE OMAHA WORLD-HERALD STATED AUGUST 19, 2000 THAT:

"U.P. CORPORATION WILL ELIMINATE ANOTHER 1,600 JOBS IN THE NEXT 16 MONTHS AS IT **MOPS UP THE LAST DETAILS OF ITS 1996 MERGER WITH THE S.P." "DURING THE FIVE YEAR MERGER TRANSITION PERIOD, WHICH CONTINUES FOR ANOTHER YEAR, U.P. HAS *CONSOLIDATED OR DISPERSED OF REDUNDANT TRAIN FACILITIES AND ABANDONED RAILINES".***

THE ABOVE ARTICLE WAS WRITTEN IN AUGUST 2000 OVER THREE (3) YEARS SINCE THE MERGER TRANSACTION YARD ***CONSOLIDATION EXPERIMENT WAS ORDERED BY UPRR VP SHOENER DISPERSING ALL PHOENIX FLAT SWITCHING TO TUCSON FROM PHOENIX.*** SINCE UPRR WAS STILL MOPPING UP THE DETAILS OF THE MERGER EXPERIMENTS IN 2000, THE **NEXUS IS CLEAR,** THAT A MAY 1997 YARD CONSOLIDATION SWITCHING EXPERIMENT THAT WAS ORDERED AS PART OF THE MERGER IMPLEMENTATION "SAVINGS PROCESS", ACROSS THE NEWLY MERGED UPRR SYSTEM, COULD NOT BE DEFINED AS ANYTHING OTHER THAN A MERGER TRANSACTION NEXUS.

PROGRESSIVE RAILROADING ARTICLE JANUARY 2003 UNDERSCORES THE CORROBORATION OR **NEXUS** AS IT PORTRAYS THE LENGTH OF DELAY RELATED TO THE UPRR ROLL-OUT STRATEGY:

"ALTHOUGH IT TOOK UNION PACIFIC **SEVERAL YEARS** TO GET ITS POST-MERGER ACT TOGETHER-BY IMPROVING SERVICE,... CUTTING COSTS-MANAGEMENT IS COUNTING ON THE REVAMPED FRANCHISE (**THE DIRECT RESULT OF MERGER TRANSACTION EXPERIMENTS INCLUDING YARD CONSOLIDATION EXPERIMENTS**)...TO ACT AS TOP-LINE SPRINGBOARDS" (PARENTHESIS INSERT ADDED) (SEE EXH. 50).

AS IN MOST MERGERS, UPRR MANAGERS WERE NOT INTERESTED IN THE OPINIONS OF EX-SPTCO MANAGERS. GROTHER DID PROVIDE A DOCUMENTED LIST OF THE RESOURCES AND BLOCKING THAT WOULD BE REQUIRED **BEFORE ATTEMPTING TO CONSOLIDATE.** THAT LIST WAS IGNORED BY THE 1997 UPRR CORPORATE CULTURE, WHICH REQUIRED THE MERGER TRANSACTION EXPERIMENT TAKE PLACE PROMPTLY AS ORDERED BY THE HASTY VPO DECISION.

ACCORDING TO WITNESSES AND DOCUMENTATION, GROTHER EXPRESSED CONCERN REGARDING THE FACT TUCSON WAS SURROUNDED ON BOTH SIDES BY MAINTENANCE-OF-WAY (M OF W) CURFEWS WHICH PROHIBITED THE OPERATION OF

TRAINS, IN ANY DIRECTION, BETWEEN THE HOURS OF 0700-1900 M-F. IN FOOTBALL PARLANCE, THE TRAMPLED PLAYING FIELD WAS CUT IN HALF (BY THE LACK OF OPERATIONAL TIME ACCOUNT CURFEW AND THE OTHER TEAMS SIZE WAS DOUBLED (BY CONSOLIDATING PHOENIX FLAT CAR SWITCHING INTO TUCSON), WHICH WAS A SURE RECIPE FOR DISASTER, WHICH WAS NOT GROTHER'S DECISION OR CONTROL!

UNDER PRESENT UPRR OPERATIONS, UPRR TAKES GREAT CARE WITH M OF W CURFEWS AND EVEN DETOURS TRAINS AND OTHER ACTIVITIES TO ENSURE THAT THE TERMINAL WILL SURVIVE. GROTHER OVERHEARD MANY CONFERENCE CALL STATEMENTS BY REGIONAL VP STEVE BARKLEY REGARDING THE CURFEWS ON EITHER SIDE OF SAN ANTONIO TO DENNIS THOLEN AND OTHERS CONCLUDING JULY 21, 2000 THAT "WE CAN NOT LET HIM (GARY DAVIDSON) FAIL FROM THESE CURFEWS". TRAINS WERE DETOURED AND OTHER SEVERE MEASURES WERE TAKEN TO SAVE GARY DAVIDSON (A PRIOR TO THE UP-SPTCO MERGER MANAGER OF UPRR). ANYONE WHO WAS IN ATTENDANCE ON BARKLEY'S JULY 2000 CONFERENCES COULD CORROBORATE THE FACT THAT M OF W CURFEW'S WILL ADVERSELY AFFECT A TERMINAL'S PERFORMANCE AND THAT IS NOT THE TIME FOR MERGER RELATED YARD CONSOLIDATION EXPERIMENTATION. UNFORTUNATELY, THAT WAS JUST THE CASE IN 1997, AS ALL WERE "PILING ON THE BELEAGUERED EX-SPTCO MANAGEMENT AT TUCSON", TO EXTEND THE METAPHOR OF THE "TRAMPLED PLAYING FIELD".

THE MERGER TRANSACTION EXPERIMENT WAS STARTED EFFECTIVE MAY 14, 1997 WHICH WAS ABOUT TWENTY (20) MONTHS AFTER GROTHER HAD PERFORMED EXCELLENTLY AS THE INCUMBENT ON GROTHER'S TUCSON TERRITORY ASSIGNMENT. SENIOR UPRR MANAGEMENT QUICKLY REALIZED THAT THE TWO (2) M OF W CURFEWS, LACK OF CAPACITY, LACK OF PERSONNEL, 1% GRADE ISSUE, TRACK CONDITIONS, AND OTHER TUCSON RESOURCE DEFICIENCIES HAD CREATED A FAILURE, JUST AS GROTHER PREDICTED. IN DESPERATION, CAPACITY STUDY, PROCESS AND "BULLYING SWITCHING

EXPERTS" WERE FLOWN IN TO SHOW THE EX-SPTCO MANAGERS "HOW TO RAILROAD". THEY WERE QUICKLY BROUGHT TO REALITY AND HAD TO PUBLICLY ADMIT THAT IT COULD NOT BE DONE. DURING THE WEEK OF JUNE 16, 1997, CONFIDENTIAL MEETINGS WERE HELD TO DETERMINE WHO WOULD BE THE SCAPEGOAT AND A LITTLE OVER ONE-MONTH INTO THE MERGER TRANSACTION EXPERIMENT, THE GROTHER DEMOTION AND 21% PAY CUT DECISION WAS MADE BEHIND DOORS, IN TUCSON, BY SENIOR UPRR MANAGEMENT.

THE DECISION TO DEMOTE GROTHER WAS MADE WITH COMPLETE DISREGARD FOR THE FACTS. SHOENER WAS THE GENESIS OF THIS MERGER TRANSACTION DECISION, AS TESTIFIED TO BY MANY WITNESSES. THEREFORE, WHY PUNISH THE LOCAL MANAGER, WHO JUST HAPPENED TO BE THERE?

AS INDICATED BY THE WEB SITE OF THE BLE UNION, EXH. 8, THE CONTINUING UPRR ROLLOUT PROBLEMS AT TUCSON CONTINUED FOR SEVERAL MONTHS AFTER THE DEMOTION OF GROTHER, WHICH DOES NOT MATCH STATEMENTS MADE IN PRESIDENT JERRY DAVIS'S RESPONSE TO GROTHER'S APPEAL (EXH. 10), CONCERNING GROTHER'S SEVERE DEMOTION.

PRESIDENT DAVIS STATED ON SEPTEMBER 4, 1997 IN PART:

"IN **JUNE** THE SERVICE LEVELS TO OUR CUSTOMERS, BOTH EXTERNAL AND INTERNAL, DETERIORATED TO THE POINT IMMEDIATE ACTION HAD TO BE TAKEN. WE BELIEVE THAT A CHANGE IN MANAGEMENT WAS NECESSARY FOR IMPROVEMENT TO OCCUR." (EXH.11).

IN FACT, THE DIFFICULTIES AT TUCSON WERE STILL OCCURRING IN SEPTEMBER, 1997, WHEN UPRR PRESIDENT DAVIS FINALLY RESPONDED TO GROTHER (EXH. 8). THE ONLY THINGS, WHICH KEPT, TUCSON TERMINAL BARELY FLUID IN SEPTEMBER 1997 WERE THAT:

1) THE M OF W CURFEWS ON BOTH SIDES HAD ENDED, AND

2) **THE "JUNE SERVICE LEVEL PROBLEM" AT TUCSON WAS THE MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT HAD BEEN SUDDENLY ENDED JUNE 26, 1997, JUST AFTER GROTHER WAS ORDERED TO TAKE A 21% PAY CUT TO HOUSTON INTERMODAL, OR HIT THE STREET!**

UPRR PRESIDENT DAVIS DID NOT STATE THAT MY DEMOTION WAS FOR "PERSONAL PERFORMANCE ISSUES OR ANY TYPE OF DISCIPLINARY REASON". DAVIS STATED IT WAS SIMPLY RELATED TO THE "JUNE SERVICE FAILURE", WHICH WAS THE DIRECT RESULT OF NEARLY DOUBLING THE VOLUME, WITH NO INCREASE IN RESOURCES AND A 12 HOUR PER DAY M OF W CURFEW ON BOTH SIDES OF TUCSON. (DOCUMENTATION OF ABOVE AVAILABLE TO PRESENT)

PRESIDENT DAVIS HAD SO LITTLE REGARD FOR THE DISPLACED DEMOTION OF GROTHER THAT DAVIS:

- TOOK ALMOST TWO MONTHS TO RESPOND,

- DID NOT USE THE QUALITY PROCESS TO DETERMINE THE ROOT CAUSE OF THE JUNE 1997 SERVICE FAILURE,

- DID NOT EVEN BOTHER TO ADDRESS GROTHER'S SPECIFIC INQUIRY ABOUT GROTHER'S FINANCIAL REQUEST TO AVOID FINANCIAL AND EMOTIONAL DENIGRATION FOR LIFE, AND

- DID NOT HAVE ANYONE INVESTIGATE GROTHER'S STATEMENT REGARDING "HOW...**THE ISSUES OF DISCRIMINATION RELATE TO MY SUDDEN DOWNGRADE"**

PRESIDENT DAVIS'S LETTER IS STRONG ***CORROBORATION*** THAT THE **NEXUS** OF GROTHER'S DEMOTION WAS THE JUNE SERVICE FAILURE, WHICH HAS A DIRECT NEXUS TO THE LATE MAY MERGER RELATED DECISION BY VPO SHOENER TO CONSOLIDATE TERMINALS WITHOUT DOING A CAPACITY

STUDY IN ADVANCE OR GOING THROUGH A PROPER SIMULATION STUDY OF ISSUES PRIOR TO THE ATTEMPTED YARD CONSOLIDATION IMPLEMENTATION, INCLUDING THE POSTPONEMENT OF THE TWO (2) STRANGLING M OF W CURFEWS.

FURTHERMORE, THE RECORDS DO NOT INDICATE THAT THERE HAD EVER BEEN AN ATTEMPT TO CONSOLIDATE **ALL** FLAT SWITCHING FROM PHOENIX TO TUCSON BEFORE THE 1997 UP-SP MERGER TRANSACTION NEXUS; NOR, HAS THERE BEEN ONE SINCE OF ANYTHING NEAR THE SAME VOLUME MAGNITUDE. THE LATE MAY, 1997 SWITCHING CONSOLIDATION EXPERIMENT HAD A DIRECT NEXUS OR TIMING WITH THE MERGER ROLLOUT RELATED TO THE UPRR SYSTEM IMPLEMENTATION, WHEN MANAGERS INEXPERIENCED WITH THE TERRITORY SOUGHT A QUICK "MERGER RETURN", AND WOULD NOT LISTEN.

GROTHER HAD ACCESS TO THE 1997 UPRR CAPACITY STUDY WHICH DOCUMENTED, THAT CONSOLIDATION OF THAT VOLUME COULD NOT BE DONE; ESPECIALLY, WITH PHOENIX ALSO SENDING ALL MILL-RUN WESTBOUND TRAFFIC TO TUCSON AND WEST COLTON WAS ALSO BLOCKING THE LAPXM'S SO POORLY THAT THEY HAD TO BE OPERATED INTO TUCSON BECAUSE THEY HAD TO BE PROPERLY RE-BLOCKED (EXH. 12 IS CORROBORATION).

THIS MERGER RELATED YARD CONSOLIDATION EXPERIMENT WAS AN IMPOSSIBLE TASK. MANY PRIOR-TO-MERGER UPRR MANAGERS WERE ALSO IN AGREEMENT, BEFORE THE MERGER CONSOLIDATION EXPERIMENT, THAT FAILURE WAS THE ONLY POSSIBLE OUTCOME, AS SWITCHING CAPACITY WAS LACKING.

CONDITIONS IN 1997 WHICH CORROBORATE THE MERGER TRANSACTION NEXUS FOR GROTHER DEMOTION :

AS ***CORROBORATION*** OF THE 1997 UPRR CORPORATE CULTURE, WHICH SEVERELY DEMOTED GROTHER, THE WALL STREET JOURNAL ON AUGUST 25, 1999 INDICATED, IN PART (EXH 13):

1. "WHEN SOMETHING HAPPENED, " **YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY**" (ABOVE PROVES NEXUS TO GROTHER'S DEMOTION. AFTER THE UPRR MERGER WAS APPROVED, ROLLOUT FIELD VISITS WERE TAKEN AND THE MERGER TRANSACTION EXPERIMENT OF CONSOLIDATING THE PHOENIX AND TUCSON FLAT SWITCHING TERMINALS WAS ORDERED THEREAFTER BY VPO SHOENER).

2. "THEIR CULTURE WAS DYSFUNCTIONAL AND CHARACTERIZED BY NONCOMMUNICATION"

3. "TROUBLED ... 1997-98 ..." "FREIGHT SERVICE HAD COLLAPSED, STRANDING MIDWESTERN CROPS, SNARLING WEST COAST PORTS AND DELAYING SHIPMENTS OF GOODS FROM CHEMICALS TO PAPER"
(THE WHOLE UPRR SYSTEM WAS FOULED).

4. "BUT MANY PEOPLE BLAME UNION PACIFIC MANAGEMENT. THEY SAY UNION PACIFIC **TRIED TO CUT COSTS DURING THE INTEGRATION, NOT HIRING PEOPLE AND CRAMMING CARS INTO FEWER YARDS**"
(ABOVE IS EXACTLY WHAT HAPPENED AT TUCSON DURING THE MERGER TRANSACTION YARD ***CONSOLIDATION EXPERIMENT OF MOVING PHOENIX SWITCHING INTO TUCSON, WITHOUT BENEFIT OF CAPACITY, PROCESS, PROPER RESOURCE STUDY!***

5. "MEANWHILE, MR. DAVIDSON REINFORCES HIS PUSH FOR GREATER FLEXIBILITY BY SHOWING **HE IS WILLING TO TRY ANYTHING".**
(ABOVE IS GREAT; BUT, WHY RUIN THE GROTHER'S LIVES?)

WHEN A MERGER RELATED TRANSACTION SWITCHING EXPERIMENT WAS ATTEMPTED WITHOUT BENEFIT OF: AN ADVANCE CAPACITY STUDY, INSUFFICIENT SIMULATION OF VOLUME IMPACT, NO PROPER IN-DEPTH DISCUSSIONS WITH LOCAL MANAGEMENT, NO POSTPONEMENT OF M OF W CURFEWS ON BOTH SIDES OF TUCSON YARD, LACK OF RESPECT

FOR THE DIFFICULTIES OF FLAT SWITCHING ON TUCSON'S ONE PERCENT (1%) GRADE AND NO ATTEMPT TO PROVIDE THE RESOURCES REQUESTED TO MAKE THE GOAL WORK; ANY YARD CONSOLIDATION EXPERIMENT WOULD FAIL.

IN MUCH THE SAME WAY AS ENRON'S VICE PRESIDENT OF CORPORATE DEVELOPMENT, MS. SHERRON WATKINS, BELIEVED SHE HAD A DUTY TO ADVISE SENIOR MANAGEMENT OF AN IMPENDING FAILURE, GROTHER ADVISED THAT THIS MERGER TRANSACTION EXPERIMENT WAS DOOMED. NOT ONLY WERE HIS WARNINGS IGNORED; BUT, WHEN THE EXPERIMENT FAILED, GROTHER WAS VICARIOUSLY DISPLACED AND ADVISED TO ACCEPT A 21% IN SALARY AT HOUSTON TEXAS, IN A DIFFERENT DEPARTMENT, OR "HIT THE STREET"!

AFTER 28 YEARS OF DEDICATED SERVICE, MAINLY AS AN OPERATING DEPARTMENT MANAGER WORKING 12+ HOUR DAYS/NIGHTS/WEEKENDS/HOLIDAYS/DERAILMENTS/INJURIES/ HAZARDOUS MATERIAL RELEASES/INCIDENTS AND SO FORTH, GROTHER FEELS 'THE 33,000 MILES OF BUILDING AMERICA"tm.

NONETHELESS, GROTHER AS AN EX-SPTCO MANAGER, WAS "OUTSIDE THE UPRR OLD BOY NETWORK" OF LONG-TERM ALLEGIANCES. IN ADDITION, BASED ON THE 1997 UPPR CORPORATE CULTURE AND THE MERGER TRANSACTION SWITCHING CONSOLIDATION FAILURE, SENIOR UPRR MANAGERS UNDERTOOK AN AGGRESSIVE PROGRAM OF REMOVING, DEMOTING, DENIGRATING (UNTIL RESIGNED) EX-SPTCO MANAGERS UNTIL ***ALL SPTCO MANAGERS WHO WERE AT TUCSON WHEN THE MERGER WAS ANNOUNCED ARE GONE!***

MSSERS. JOHN E. GROTHER, DAVID L. HAMPTON, PAUL A. LOBELLO, RAY SZAREK AND ROBERT STREFELDER WERE EITHER "ASKED TO" OR DID RESIGN AS MANAGERS AND EX-ROCK ISLAND SERVICE UNIT MGR. KEN C. PACKARD WAS LATER DEMOTED; BUT, ***WITH NO REDUCTION IN WAGES!*** EX-SPTCO MANAGER DAN S. PAYAWALL TRAGICALLY DIED DURING THE STRESS-FILLED TWELVE (12) HOUR PLUS DAYS OF

THE CONSOLIDATION TRANSACTION EXPERIMENT, WHEN HIS PANCREATIC CANCER CAME OUT OF REMISSION, "AFTER DAILY STRESSFUL CONFRONTATIONS WITH THE UPRR SWITCHING EXPERTS", AND DIED DURING SAID YARD EXPERIMENT.

GROTHER KNOWS WHAT HE WAS TOLD BY MASSEURS. KEN C. PACKARD AND THOMAS F. MURPHY ON JUNE 26, 1997 AS THE REASON FOR GROTHER BEING DEMOTED, WAGES CUT, ETC:

"**WE WANT OUR OWN PEOPLE IN TUCSON",** (PACKARD)

"**UNION PACIFIC WANTS ITS OWN MANAGERS ON THE SUNSET ROUTE"** (MURPHY)

THE ABOVE UPRR MANAGERS DID NOT SAY ONE WORD ABOUT POOR PERSONAL PERFORMANCE IN 1997; NOR, IS THERE ANY DOCUMENTATION KNOWN TO GROTHER, THAT INDICATES A "POOR PERSONAL PERFORMANCE ISSUE". GROTHER WAS NEVER PROVIDED AN ORAL OR WRITTEN WARNING OF PERSONAL PERFORMANCE ISSUES OR PLACED ON A PERSONAL DEVELOPMENT PROGRAM. GROTHER WAS NEVER ASKED TO SIGN ANY DOCUMENT, WHICH STATED THAT GROTHER'S PERFORMANCE WAS THE REASON FOR THE 1997 DEMOTION.

THE POOR PERFORMANCE STATEMENTS HEREIN; REGARDING GROTHER ARE "DEFAMATION", WHICH CAN BE PROVEN TO BE 100% FALSE. IT IS A PRETEXT (A COVER UP), IN PART, FOR PREJUDICE AGAINST FORMER MANAGERS OF SPTCO.

PARTIAL LIST OF REASONS FOR THE DELAY IN THE PRESENTATION OF THIS DISPUTE (INCLUDES THREATS OF RETALIATION, ACTIONS BY UPRR WHICH CREATED A PATTERN OF MISTRUST AND FEAR OF UPRR PUBLIC STATEMENTS, WHICH ALLEGE ONE TYPE OF CORPORATE BEHAVIOR AND ANOTHER TYPE OF BEHAVIOR OCCURS, WHICH WOULD FURTHER INTIMIDATE ANY EMPLOYEE INTO A FEAR TO TAKE ARBITRATION ACTION :

1. THE UPRR CORPORATE CULTURE IN 1997 WAS DYSFUNCTIONAL, ABUSIVE AND "GUNSLINGER" PER MR. R.F. DAVIDSON" ACCORDING TO EXHIBIT 13 FROM THE WALL STREET JOURNAL (WSJ) ARTICLE REFERRING TO 1997-98. THEREFORE, GROTHER SURELY WOULD HAVE BEEN IMMEDIATELY DISMISSED HAD GROTHER DARED TO TRANSMIT ANOTHER, STRONGER APPEAL THAN GROTHER'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS (EXH. 10), OR ATTEMPT ANY TYPE LEGAL ACTION. AS ANYONE EVEN "NEAR WHERE SOMETHING HAPPENED", WAS ELIMINATED.

MR. R.F. DAVIDSON IS QUOTED IN EXHIBIT 13:

"SOMETIMES YOU MAKE THE DECISION AND THEN ANALYZE THE PROBLEM"

(ABOVE AND BELOW ARE HOW GROTHER WAS DEMOTED & FINANCIALLY/EMOTIONALLY DENIGRATED FOR LIFE!)

UPRR VP JOHN REBENSDORF IS QUOTED (EXH. 13) BY WSJ DESCRIBING 1997-98 AS THE DAYS OF LEADING BY FEAR:

" WHEN SOMETHING HAPPENED, YOU PULLED OUT YOUR GUN AND SHOT THE GUY IN CHARGE OF THE TERRITORY"

BUT FOR UPRR'S ABOVE 1997 CORPORATE CULTURE BEING THE CREDO USED TO JUDGE THE FAILED MERGER YARD CONSOLIDATION EXPERIMENT OF PLACING ALL PHOENIX SWITCHING INTO TUCSON, GROTHER WOULD NOT HAVE BECOME A DISPLACED EMPLOYEE.

WHEN VPO SHOENER'S MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT FAILED BETWEEN LATE MAY AND JUNE 1997, GROTHER WAS TRANSFERRED AND DEMOTED (DISPLACED) JULY 1, 1997 AND FINANCIALLY DENIGRATED FOR LIFE.

2. IN THE SEPTEMBER 1997 RESPONSE TO GROTHER'S APPEAL,

PRESIDENT DAVIS DISPLAYED SUCH A TOTAL LACK OF REGARD FOR THE ISSUES OF FAIRNESS, DISCRIMINATION, PROCESS MANAGEMENT TO DETERMINE THE ROOT CAUSE OF THE TUCSON 1997 JUNE SERVICE FAILURE AND THE FINANCIAL DENIGRATION OF GROTHER, THAT ANY FURTHER APPEAL TO FAIRNESS IN 1997 WAS TOO HIGH OF AN "INDIVIDUAL RISK".

3. IN 1997, THE UPRR VISION AND VALUES DESKTOP PLACARD WAS DISPLAYED PROMINENTLY ON GROTHER'S DESK STATING ALLEGED PROPER BEHAVIOR FOR UPRR (EXH. 2): (BELOW ARE FEW 1997 UPRR PUBLICLY PUBLISHED VALUES)

   " TREAT OTHERS LIKE YOU WANT TO BE TREATED",

   " TRY NEW IDEAS...ENCOURAGE CHANGE"

   " TRUST IS ESSENTIAL"

   IN THE MEANTIME, GROTHER WAS BEING DEMOTED 21%, OR $1,272 / MONTH AND BEING TRANSFERRED & DENIGRATED. SHOENER HAD THE ABOVE "NEW IDEA" AND GROTHER WAS FINANCIALLY AND EMOTIONALLY DENIGRATED FOR LIFE

THE DIFFERENCE BETWEEN UPRR REALITY AND WHAT UPRR PUBLICLY STATED AS ITS 1997 VISIONS AND VALUES IS A STARK AND DEVASTATING CONTRAST; ESPECIALLY, FOR EX-SPTCO MANAGERS! TO ILLUSTRATE FURTHER THE UNDERLYING "TRUST DISCONNECTS IN 1997 AND THEREAFTER", SEE MOST OF THE PARAGRAPHS BELOW.

4. IN APRIL-MAY 1997 WHEN GROTHER, IN WRITING, ADVISED SENIOR MANAGEMENT THAT THE MERGER CONSOLIDATION EXPERIMENT FAILURE WAS CERTAIN, BASED ON THE LACK OF RESOURCES AT TUCSON, GROTHER WAS IGNORED AND THEN PUNISHED WITH A TWO SALARY RATE GRADE DEMOTION IN 2 MONTHS, FOR JUST BEING THERE. GOES TO PATTERN OF MISTRUST AND FEAR OF UPRR RETALIATION.

5. GROTHER HAS ORALLY AND IN WRITING REQUESTED PERFORMANCE DEVELOPMENT REVIEWS (PDR'S) FROM SUPERVISORS DATING BACK TO 1997. AT THIS WRITING, ONLY YEAR 2000 HAS BEEN RECEIVED (SEE EX'S 13A-C). GROTHER ADVISED IN APRIL 2003 THAT 2001 PDR HAS BEEN "LOST".

MORE IMPORTANTLY, GROTHER NEVER RECEIVED ANY ORAL OR WRITTEN WARNING (PROGRESSIVE OR OTHERWISE) OF PERSONAL POOR PERFORMANCE AT TUCSON IN 1997. THERE WAS NO UPRR DEVELOPMENT ACTION PLAN. NO DISCUSSIONS OF POOR PERFORMANCE. GROTHER WAS NEVER ASKED TO SIGN ANY DOCUMENT, WHICH STATED THAT GROTHER HAD BEEN A POOR PERFORMER. NO PROGRESSIVE DISCIPLINE.

THERE WAS ONLY A FOUR (4) WORKDAY NOTICE TO TAKE THE $1,272 CUT IN WAGES IN HOUSTON OR "HIT THE STREET" ON JUNE 26, 1997.

6. UPRR DEMOTION POLICY IN 1997 STATED THAT:

"IN *MOST CASES*, THE EMPLOYEE'S PRESENT SALARY LEVEL IS RETAINED" (SEE EXH. 14).

IN CONTRAST TO THE ABOVE PUBLISHED POLICY, GROTHER'S SALARY WAS DRASTICALLY REDUCED; WHICH CORROBORATES THAT HE EXPERIENCED PREJUDICE AS AN EX-SPTCO MANAGER, FOR A MERGER EXPERIMENT FAILURE.

7. NEW HOUSTON SUPERVISOR, MR. DON F. FRYAR, STATED ON SATURDAY, AUGUST 2, 1997; IN PART:

" YOU CAN NOT WORK AROUND HERE DURING ANY TYPE OF LAWSUIT, AS THEY (UPRR) WOULD MAKE LIFE UNBEARABLE FOR YOU" (NO WITNESSES OF COURSE; BUT, INTIMIDATING, HARASSING AND A THREAT OF SEVERE RETALIATION.)

FRYAR RETIRED FEBRUARY 1, 2003; THEREFORE FRYAR'S ORDERS TO NOT PUSH BACK AGAINST UNFAIR TREATMENT, HOPEFULLY; NO LONGER HAVE ANY STANDING.

THIS WAS GROTHER'S SECOND WARNING OF IMMEDIATE RETALIATION, SHOULD GROTHER COMPLAIN OR SEEK ARBITRATION. MR. KEN C. PACKARD (PRIOR BOSS), HAD ADVISED GROTHER ON JUNE 26, 1997 (DAY OF DEMOTION NOTIFICATION) THAT:

"YOU KNOW, THEY CAN FURTHER DEMOTE YOU. YOU ARE NOT GETTING ANY YOUNGER". "YOU BETTER TAKE DEMOTION AND BE HAPPY"

8. GROTHER FOUND OUT ONLY AFTER THEY TOOK BUYOUTS OR RETIRED, THAT THE FOLLOWING TWO EX-SPTCO MANAGERS HAD BEEN DEMOTED FROM THE OPERATING DEPARTMENT (WHERE THEY MANAGED TRAIN OPERATIONS LIKE GROTHER), WERE TRANSFERRED TO INTERMODAL ON THE SAME JOB AND IN THE SAME PLACE AS GROTHER JUST BEFORE GROTHER AND YET THEIR WAGES WERE NOT REDUCED, OR THEIR SUBSEQUENT PENSIONS AFFECTED:

   MASSEURS HARRY L. STARK AND JOE D. CROW

GROTHER HAD BEEN TREATED DIFFERENTLY AS THE ABOVE SIMILARLY SITUATED PERSONS AT UPRR IN 1997. ONE REASON FOR BEING TREATED DIFFERENTLY WAS THAT THOSE UPRR MANAGERS IN DIRECT CHARGE OF THE 1997 TUCSON DEMOTION DECISION OF GROTHER, MASSEURS KEN C. PACKARD AND THOMAS F. MURPHY MADE IT CLEAR (SEE MIDDLE OF PAGE 15 ABOVE), THAT EX-SPTCO MANAGERS WERE NOT WELCOME IN THE MERGED UP-SPTCO COMPANY.

IN ADDITION, PRIOR TO THE MERGER MANAGERS OF UPRR WERE ALSO TREATED CONSIDERABLY DIFFERENT REGARDING THE EXTREMELY ADVERSE SERVICE FAILURES IN 1997. SHOWN

ON EXHIBIT 15 ARE THOSE PRIOR-TO-THE- MERGER UPRR MANAGERS WHO MADE THE LOCAL HOUSTON NEWSPAPER BECAUSE OF SPECTACULAR SERVICE FAILURES (I.E. MASSEURS CHARLES MALONE, AND GREG "BUBBA" GARRISON).

THESE TWO SAMPLES OF PRIOR TO THE MERGER MANAGERS OF UPRR SUFFERED NO PERSONAL REDUCTION IN PAY DESPITE THOUSANDS OF DELAYED CARS, HUGE LAWSUITS AND LARGE CUSTOMER SETTLEMENTS AGAINST UPRR ACCORDING TO THE HOUSTON NEWSPAPERS (EXH. 16). SURELY, THEY WERE ALSO PERCEIVED TO HAVE "PERFORMANCE PROBLEMS" OR PERFORMANCE WHICH WAS THAT WHICH WAS NOT WANTED; YET, THEIR WAGES AND PENSION WERE NOT DENIGRATED FOR LIFE-**WHY NOT? IN COMPARISON, GROTHER'S 1997 PERFORMANCE RESULTED IN NO LAWSUITS, CUSTOMER SETTLEMENTS OR STB THREATS TO TAKE TRACKAGE!**

THE SYSTEM-WIDE UP-SP MERGER CUSTOMER DELAY AND SERVICE FAILURE ISSUES ARE WELL DOCUMENTED (EX'S 17-22).

9. TO FURTHER ILLUSTRATE PACKARD AND MURPHY'S POSSIBLE PREJUDICE AGAINST EX-SPTCO MANAGERS, GROTHER JUST FOUND OUT **JULY 31, 2002,** FOR THE FIRST TIME AFTER CONSIDERABLE INQUIRIES AND EFFORT, THAT "SOMEONE" HAD PLACED ON THE SECRET-TO-GROTHER ONLINE PERSONAL RECORD SYSTEM THAT GROTHER HAD BEEN DEMOTED ON JULY 1, 1997 FOR "DISCIPLINARY REASONS" (SEE EXHIBIT 23).

   EXHIBITS 23, 24 AND 26 PROVIDE PART OF THE CORROBORATE FOR DELAY THAT GROTHER INCURRED OR THE NEED TO KEEP REQUESTING INFORMATION OVER SEVERAL MONTHS AND FROM SEVERAL PEOPLE, JUST TO OBTAIN THE NEW, "BACK-STABBED INSIGHT" INTO THE SECRET UPRR ONLINE SYSTEM, WHICH ALSO FURTHER CORROBORATES WHY GROTHER HAS DEVELOPED A REALISTIC FEAR OF TRUSTING SOME IN UPRR MANAGEMENT.

AT FIRST, GROTHER ATTEMPTED WORKING WITH THE LOCAL HR PERSON, LINDA BUTTRILL TO OBTAIN INFORMATION ON THE 1997 DEMOTION POLICY OF UPRR AND WHY GROTHER WAS NON-PROMOTABLE, INCLUDING OBTAINING GROTHER'S PERSONAL RECORD. ALL THESE REQUESTS ENDED IN DEADENDS, UNLESS OTHERS WERE INVOLVED AT A LATER DATE TO PROVIDE THE "REAL INFORMATION AND ANSWERS"

10. TO FURTHER CORROBORATE GROTHER'S CONCERN ABOUT THE "DISINGENUOUS ISSUE OR FEAR OF SOME IN THE UPRR SYSTEM". THE CONSTANT DEADENDS AND PATTERNS OF MISINFORMATION ARE WHY NO ONE IN THEIR RIGHT MIND WOULD REQUEST AN ARBITRATION CASE EARLIER THAN 55:

A. ON JANUARY 3, 2003 THE UPRR OMBUDSMEN, MR. BUTCH ETHINGTON ORALLY ADVISED GROTHER THAT:

"I CAN NOT GET ANYONE TO COME FORWARD AND ADMIT THAT THEY PLACED THE STATEMENT THAT YOU WERE DEMOTED FOR DISCIPLINARY REASONS ON YOUR ONLINE RECORD. IT IS A MYSTERY".

THE ABOVE UPRR DEAD-END, THAT NO ONE CAN FIND THE PERPETRATOR WHO RUINED ONE'S CAREER, IS THE RESPONSE GIVEN TO GROTHER WHEN GROTHER WROTE TO THE UPRR OMBUDSMEN SEEKING **FAIR TREATMENT,** WHICH IS PUBLICLY STATED ON THE UPRR WEBSITE TO BE:

" **A FUNDAMENTAL RIGHT OF ALL UPRR EMPLOYEES"**.

THE ABOVE UPRR FEEDBACK CONTINUES THE PATTERN OF STONE-WALLING AND FEAR INSTILLATION BECAUSE:

- IN ALL UPRR DATA SYSTEM KNOWN TO GROTHER, THE UPRR COMPUTER EXPERTS HAVE DEVELOPED A MEANS TO BACK TRACK ELECTRONICALLY AND DETERMINE WHO MADE THE COMPUTER ENTRY; YET, UPRR NOW STATES

THEY CAN NOT DETERMINE THE PERSON WHO ENTERED THAT CAREER KILLING ENTRY ON THE ONLINE PR SYSTEM

- THE OMBUDSMEN ALSO STATED THAT PAGE 2 OF THE FORM 15121 USED TO DEMOTE GROTHER IN 1997 **HAS BEEN SHREDDED** AND CAN NOT BE RETRIEVED IN ANY WAY AS ONLY PAGE 1 HAS BEEN INPUT INTO THE SUCCEEDING SYSTEM. PAGE 2 OF THE FORM 15121, PER EXHIBIT 14, MAY HAVE ALLEGEDLY CONTAINED THE MANDATORY JUSTIFICATION, WHICH IS REQUIRED TO WARRANT SUCH A HUGE DOWNWARD SALARY ADJUSTMENT. FOR ALL GROTHER CAN FIND OUT, PAGE 2 MAY HAVE BEEN BLANK AND NO WAGE REDUCTION JUSTIFICATION WAS STATED! EVERYONE WAS JUST SIMPLY "IN A HURRY IN 1997" AND GROTHER'S DEMOTION WAS RUBBER-STAMPED THRU!

- THE POSITION OF OMBUDSMEN HAS THE SELF-STATED PURPOSE OF "... MAKING SURE THE COMPANY'S CULTURE AND ORGANIZATION ARE DOING THE RIGHT THING FOR THE EMPLOYEES" (EXH. 25). GROTHER IS OF THE OPINE THAT, TO DATE, ALTHOUGH THE OMBUDSMEN HAS APPARENTLY MADE A DECISION, THE FACTS OF FAIR TREATMENT ABOUT SHOENER'S DECISION HEREIN HAVE BEEN IGNORED, AS THEY SPEAK FOR THEMSELVES.

  OF COURSE, UPRR MAY BE IN A SHORT TERM DOWNWARD FINANCIAL CYCLE BECAUSE OF THE WAR AND BUSINESS CYCLE; BUT THAT IS NO REASON TO THROW THE "FUNDAMENTAL RIGHT TO FAIR TREATMENT FOR ***ALL EMPLOYEES"***, OUT THE WINDOW.

B. IN 2001, GROTHER REQUESTED A COPY OF HIS PERSONAL RECORD (PR). AFTER EXPERIENCING SOME POSSIBLE MISINFORMATION FROM HR REPRESENTATIVE LINDA BUTTRILL THAT THE ONLY WAY TO LOOK AT YOUR PR WAS IN THE OFFICE, IN FRONT OF A SUPERVISOR (EXH. 26A), GROTHER FINALLY RECEIVED COPIES OF TWO SETS, WHICH

HAD ALL THE INFORMATION, INCLUDING RECORDS OF PROCESS TRAINING WHILE WITH SPTCO (EX'S 26B &26C).

IN WHAT APPEARS TO BE RETALIATION FOR JUST REQUESTING GROTHER'S PERSONAL RECORDS IN DECEMBER 2001 (OR AN INCREDULOUS COINCIDENCE), GROTHER WAS ORDERED TO SUBMIT TO TWO ALLEGED FRA RANDOM DRUG AND ALCOHOL TESTS ALMOST BACK-TO-BACK! AFTER 33 YEARS WITHOUT A FRA RANDOM TEST, GROTHER WAS ORDERED TO SUBMIT ON SATURDAY A.M. FEBRUARY 2, 2002. THEN, BECAUSE HE HAD A SCHEDULED VACATION IN APRIL, THE NEXT "RANDOM FRA TEST" GOT DELAYED UNTIL MAY 2, 2002 (EX'S 27A-27B). BOTH TESTS WERE NEGATIVE; BUT, THE STATISTICAL RARENESS OF TWO FRA RANDOM TESTS, NEARLY BACK-TO-BACK APPEARS DESIGNED TO INSTILL FEAR AND "MORE APPRECIATION FOR RETALIATION".

C. IN 2002, GROTHER FINALLY IS ABLE TO OBTAIN A COPY OF THE 1997 DEMOTION POLICY (EXH. 14) FROM THE COMPENSATION DEPARTMENT, AFTER BEING ADVISED BY THE HR REPRESENTATIVE (LINDA BUTTRILL-EXH. 24), THAT SHE BASICALLY COULD NOT ASSIST GROTHER WITH THIS.

GROTHER WAS ALSO ORALLY ADVISED BY LOCAL HR REPRESENTATIVE, LINDA BUTTRILL, "WHY DO YOU WANT TO KNOW WHAT UPRR'S 1997 DEMOTION POLICY WAS, **YOU CAN NOT DO A DARN THING ABOUT WHAT HAPPENED TO YOU!" ALSO, AND IN WRITING "...I DOUBT THAT A REBUTTAL WOULD BE OF MUCH USE AT THIS TIME" (EXH. 26A).**

AS GROTHER BEGAN TO ASK MORE QUESTIONS OF MS. LISA BREWSTER (THE COMPENSATION DEPARTMENT) REGARDING WHO HAD THE ABILITY TO ENTER AND OBTAIN DATA REGARDING THE SECRET-TO-GROTHER ONLINE SYSTEM, BREWSTER'S FINAL E-MAIL (UPRR LOTUS NOTE) USED THE "UPRR SECRECY ICON". THE SENDER MUST SPECIFICALLY SELECT THIS SECRECY ICON FOR USE. IT ALLOWS THE SENDER TO TRANSMIT AN E-MAIL ***WHICH CAN NOT BE***

COPIED OR FORWARDED TO ANOTHER PARTY.

EX'S 29A-29C INDICATE GROTHER'S EFFORTS TO PRESENT BREWSTER'S RESPONSE "IN RED" SO ALL CAN SEE THE VAGUE AND VEILED RESPONSE, FOR A REVIEW.

WHAT WAS BREWSTER TRYING TO HIDE?

IT IS GROTHER'S OPINE THAT BREWSTER DID NOT WANT IT KNOWN TO "OTHERS" WHO HAD E-MAIL, THAT A SECRET-TO-UPRR- EMPLOYEE SYSTEM EXISTED, WHICH CAN BE USED TO DESTROY ONE'S CAREER (GROTHER) WITH FALSE DATA ENTERED (DEMOTED FOR DISCIPLINARY REASONS), THAT WAS AVAILABLE TO DECISION MAKERS, WHO CAN MAKE PROMOTION DECISIONS FROM ONLINE SYSTEM.

IN A COMPANY THAT PUBLICLY STATES THAT FAIR TREATMENT IS A "FUNDAMENTAL RIGHT", THE ABOVE EGREGIOUS LACK OF BUSINESS ETHICS CONCERNING THE ENTRY OF FALSE DATA AND APPEARING TO HIDE THE FACTS, UNDERSCORES ANOTHER REASON **INDIVIDUALS FEAR TO FILE A NEW YORK DOCK ARBITRATION DISPUTE.**

D. BREWSTER ALSO INDICATED THAT I SHOULD SEEK A DETAILED EXPLANATION FROM MR. KEN C. PACKARD, THE TUCSON SUPERVISOR OF GROTHER, REGARDING WHY THE SALARY DECREASE TOOK PLACE. BREWSTER'S EXH. 48 STATED HER INABILITY TO GO ANY FURTHER. BREWSTER'S ADVICE WAS A TYPICAL CATCH-22 RESPONSE, GIVEN THE FACT THAT GROTHER HAD ATTEMPTED TO GET A RESPONSE FROM PACKARD SIX TIMES, INCLUDING THREE UPRR COMPANY E-MAILS, TWO AOL E-MAILS AND EXH. 49 CERTIFIED LETTER TO PACKARD'S BUSINESS ADDRESS. PACKARD DID NOT HAVE THE "RESPECT FOR EMPLOYEES" TO ANSWER ANY OF THE ABOVE INQUIRIES.

WHAT IS PACKARD HIDING, THAT HE WILL NOT RESPOND, TO THE PERSON PACKARD FINANCIALLY DESTROYED?

E. GROTHER AND ALL OTHER SERVICE UNIT PHONES (TO OTHER WITNESSES) RECEIVED AN ALL POINTS VOICE MAIL MESSAGE MONDAY, JUNE 16, 1997 FROM PACKARD WHICH GROTHER TAPED AND FORWARDED IN GROTHER'S JULY 15, 1997 APPEAL LETTER TO PRESIDENT DAVIS WHICH STATED:

" ... THAT CONSIDERING THE RESOURCES THAT WE HAD AVAILABLE, THE ENTIRE SERVICE UNIT WAS DOING AN OUTSTANDING JOB..."

GROTHER WAS DEMOTED LESS THAN TWO WEEKS AFTER THE ABOVE SUPPORTING REMARKS – WHAT TYPE OF DISINGENUOUS BEHAVIOR DOES THIS REFLECT?

F. CONCERNING THE ALLEGED SHREDDING OF THE JUSTIFICATION USED TO DEMOTE GROTHER 2 SRG'S, AND THE UNKNOWN DATA ENTRY PERSON, WHO PLACED "DEMOTED FOR DISCIPLINARY REASONS" ON THE SECRET-TO-GROTHER ONLINE SYSTEM USED TO SELECT PERSONS FOR PROMOTION, BOTH ARE EXAMPLES OF A "CALLOUS DISREGARD" FOR THE PERSONAL RECORDS OF EMPLOYEES WHICH CREATES MISTRUST AND FEAR OF RETALIATION. EXH. 52 INDICATES A LETTER FROM BLE REPRESENTATIVE SVOB TO SUPERINTENDENT ROYCE HARDIN AT TUCSON WHICH COMPLAINS OF UPRR DISCARDING SENSITIVE PR DATA IN THE TRASH DUMPSTER, WHERE UNAUTHORIZED PERSONS COULD OBTAIN DISCIPLINE AND INTIMATE DETAILS OF INVESTIGATIONS (INCLUDING DRUG AND ALCOHOL VIOLATION). SVOB STATES "...THEY WERE DISPOSED OF IN A MANNER WHICH MADE THEM ACCESSIBLE TO **OTHER EMPLOYEES**, TRESPASSERS, OR THIEVES FOR WHATEVER ILLICIT OR **NEFARIOUS** PURPOSE MIGHT BE DEVISED (E.G. EXTORTION, BLACKMAIL, IDENTITY THEFT).

GROTHER'S CRITICAL DATA WAS ALSO "GARBAGE DUMPED" (SHREDDED) AND "**OTHER EMPLOYEES**" ACTUALLY DID PERFORM A **NEFARIOUS** PURPOSE (SECRET ENTRY ON THE

SECRET ONLINE SYSTEM), WHICH ENDED GROTHER'S ABILITY TO BE PROMOTED. UPRR'S LACK OF FAIRNESS IN THE CONTROL OF CRITICAL RECORDS AND THE ABILITY OF **OTHERS** TO USE THE SECRET-TO-GROTHER ONLINE SYSTEM FOR RETALIATION CORROBORATES ANOTHER REASON TO NOT CONSIDER ARBITRATION, AN EARLIER AGE THAN 55.

11. INITIALLY, ON DECEMBER 28, 2002 THE OMBUDSMEN STATED THAT PACKARD HAD STATED 1997 WAS A "VERY CONFUSING TIME" AND PACKARD "COULD NOT REMEMBER WHAT HAPPENED". THEN AFTER A LITTLE "SPINNING TIME BY PACKARD", ON JANUARY 14, 2003, THE OMBUDSMEN ORALLY ADVISED THAT HE WOULD NOT BE ABLE TO FURTHER PROCESS GROTHER'S REQUEST FOR COMPENSATION FAIRNESS; IN PART, BECAUSE HE HAD RECEIVED FEEDBACK FROM PACKARD AND MURPHY, THE PERSON'S WHO SEVERELY DISPLACED GROTHER THAT GROTHER'S 1997 DEMOTION WAS RELATED TO "POOR PERFORMANCE" AS:

"WE LOOKED AT A LOT OF PEOPLE AND GROTHER DID NOT PERFORM AS WELL AS THEM".

FINALLY, ON 3/10/03 OMBUDSMAN ETHINGTON ADVISED IN WRITING THAT GROTHER'S 7/1/97 DEMOTION REASON WAS:

"THE EXPLANATION WAS GIVEN THAT YOUR PERFORMANCE WAS NOT WHAT WAS NEEDED". (EXHIBIT 55)

(SOUNDS LIKE A MERGER RELATED DECISION TO ME AS WITNESSES AND DOCUMENTATION ARE AVAILABLE TO TESTIFY THAT THE YARD CONSOLIDATION EXPERIMENT CAUSED TUCSON TO HAVE A JUNE 1997 SERVICE FAILURE)

HOW IS THE ABOVE UPRR EXPLANATION APPROPRIATE JUSTIFICATION TO TAKE AWAY TWO SRG'S OR $1,272/MO., WHICH GROTHER HAD WORKED 28 YEARS TO OBTAIN?

THE ABOVE IS NOT LOGICAL FOR SEVERAL REASONS; INCLUDING, BUT NOT LIMITED TO:

A. PACKARD HAD SELECTED GROTHER AS THE SENIOR MTO (SRMTO) AT TUCSON EFFECTIVE APRIL 16, 1997 AFTER HAVING THE OPPORTUNITY TO OBSERVE GROTHER'S PERSONAL PERFORMANCE FOR 3.5 MONTHS AND REVIEW GROTHER'S OUTSTANDING RECORD.

   HOW COULD GROTHER'S PERSONAL PERFORMANCE DETERIORATE SO MUCH IN TWO (2) MONTHS; ESPECIALLY, WITH GROTHER'S BACKGROUND AS A SOLID, OUTSTANDING PERFORMER FOR 28 YEARS?

   THE ONLY LOGICAL REASON FOR THE "JUNE SERVICE FAILURE" IS THE SHOENER MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT STARTING MAY 16, 1997 AND PEAKING MID-JUNE (SLIGHTLY OVER ONE MONTH), IN A MERGER EXPERIMENT FAILURE, WHICH WAS NOTHING GROTHER HAD DECIDED.

B. IN GROTHER'S JULY 15, 1997 LETTER TO UPRR PRESIDENT DAVIS, GROTHER STATED: " I HAD NO INDICATION OF PERSONAL UNSATISFACTORY PERFORMANCE BEFOREHAND..." ABOVE STATEMENT WAS NOT DISPUTED BY PRESIDENT DAVIS, AS DAVIS REFERS TO A **JUNE** SERVICE FAILURE. THE STATEMENT BY PACKARD TO THE OMBUDSMEN THAT SAID FAILURE WAS THE RESULT OF POOR PERSONAL PERFORMANCE OF GROTHER IS **DEFAMATION OF CHARACTER, AS IT WAS SIMPLY A MERGER YARD CONSOLIDATION EXPERIMENT THAT FAILED DUE TO LACK OF CAPACITY/CURFEWS AND NOT DUE TO ANY DECISION OR FAULT OF GROTHER.**

C. UPRR HAS BEEN REQUESTED, AS PART OF GROTHER'S FAIRNESS LETTER REQUEST FOLLOW-ON, TO VERIFY THE FOLLOWING ISSUES, WHICH WILL CONCLUSIVELY

CORROBORATE THAT, THE "PERSONAL PERFORMANCE" OF GROTHER WAS NOT THE ACTUAL REASON FOR GROTHER'S 1997 DEMOTION. UPRR CAN AND SHOULD PROVIDE THIS **FAIRNESS** DATA. AS OF THIS WRITING, UPRR HAS NOT PRODUCED THE FOLLOWING EXH. 53 VERIFICATIONS REQUESTED BY GROTHER, WHICH WOULD CLEARLY DEMONSTRATE THAT TUCSON TERMINAL WAS ORDERED IN 1997 TO PERFORM AN IMPOSSIBLE MERGER RELATED TASK AND FAILED:

- PRODUCE OR REPRODUCE THE 1997 TUCSON YARD CAPACITY MODEL WHICH CONCLUSIVELY STATED THAT ALL EAST AND WEST TRAFFIC TO & FROM PHOENIX AND PICACHO SETOUT TRAFFIC COULD NOT BE SWITCHED AT TUCSON BECAUSE OF EXCESSIVE VOLUME FOR 1997 YARD CONDITIONS (I.E. NO E/E SWITCHING LEAD, BAD TRACKS). (IF UNAVAILABLE, USE 2002 DATA WHICH MUST INCLUDE **ALL THE E/W TRAFFIC, INB/OUTBOUND FOR PHOENIX.**

SHOULD THE LATEST UPRR CAPACITY STUDY INDICATE THAT IT IS SUDDENLY POSSIBLE TO CONSOLIDATE **THE ENTIRE EAST AND WEST TRAFFIC DESTINED TO & FROM PHOENIX AT TUCSON, WHY NOT DOING IT?**

THERE ARE GOOD REASONS THAT THIS MERGER RELATED YARD CONSOLIDATION EXPERIMENT WAS NOT DONE BEFORE MID-MAY 1997; NOR, HAS **ALL EAST AND WEST TRAFFIC TO AND FROM PHOENIX BEEN ATTEMPTED AGAIN, WITH SWITCHING CONSOLIDATED AT TUCSON.** THE FACTS AND NEXUS SPEAK FOR THEMSELVES!

- THE ENGINEERING DEPARTMENT SHOULD BE ASKED TO CONFIRM THAT TUCSON HAD M OF W CURFEWS ON BOTH SIDES OF TUCSON DURING THE PERIOD MAY 16 – JUNE 26, 1997, WHICH WOULD NOT ALLOW TRAINS TO ARRIVE OR DEPART TUCSON BETWEEN THE HOURS OF 0700-1900 M-F.

- **ALL THE MANAGERS AND UNION OFFICIALS WHO**

WERE AT TUCSON DURING SHOENER'S EXPERIMENT SHOULD BE INTERVIEWED TO DETERMINE IF IT WAS GROTHER'S "POOR PERSONAL PERFORMANCE" OR THE EFFECT OF THE PHOENIX MERGER EXPERIMENT. THESE PERSONS WOULD INCLUDE MASSEURS BOB STREFELDER, RAY SZAREK, DAVID HAMPTON, TOM F. MOORE (UTU), KEN KROEGER (BLE), H. L. MCDOWELL, AND ANY MEMBER OF THE 1997 SAFETY COMMITTEE.

- THE UPRR MANAGERS WHO DEMOTED GROTHER, MASSEURS KEN C. PACKARD AND THOMAS F. MURPHY ARE STILL EMPLOYED BY UPRR. IT WOULD APPEAR HIGHLY APPROPRIATE THAT THESE TWO MANAGERS SHOULD BE ASKED TO "RECREATE THE DETAILED PERSONAL PERFORMANCE FAILURE ISSUES OF GROTHER".

WHAT DID GROTHER DO THAT WAS SO HEINOUS TO DESERVE SUCH A WHOOPING $1,272/MO WAGE CUT?

- WHAT WERE GROTHER'S HEINOUS POOR PERSONAL PERFORMANCE FAILURES THAT RESULTED IN GROTHER BEING CUT TWO SALARY RATE GRADES OR ONE BAND IN CURRENT UPRR SALARY PARLANCE? SURELY, ANY PERSONAL PERFORMANCE THAT WAS SO HEINOUS, SHOULD BE EASY TO RECALL IN DETAIL? WHAT IS THE "EVIDENCE", WHICH WAS AND HAS NEVER BEEN SHOWN OR DISCUSSED WITH GROTHER ABOUT HIS "PERSONAL PERFORMANCE"? SUCH A HEINOUS ACT, RESULTING IN A $1,272 MONTH PAY CUT, MUST BE MEMORABLE, AS OTHER "SERVICE FAILURE MANAGERS" WERE NOT CUT IN PAY!

  IN DIRECT CONTRAST, IT APPEARS CRYSTAL CLEAR THAT OTHER UPRR MANAGERS IN THE INFAMOUS 1997 SYSTEM-WIDE SERVICE FAILURES HAD MERGER RELATED SERVICE PROBLEMS; YET, NONE OF THE PRIOR TO THE MERGER UPRR MANAGERS WERE REDUCED IN PAY OR PENSION! UPRR COMPENSATION RECORDS MAINTAINED TO SATISFY THE IRS SHOULD READILY CORROBORATE NO OTHER SERVICE FAILURE WAGE REDUCTIONS.

THEREFORE, THERE HAS BEEN NO DISSIPATION OF EVIDENCE AS ON-THE-GROUND WITNESSES OF GROTHER'S MAY-JUNE 1997 "PERSONAL PERFORMANCE" ARE THERE AND THE WAGE CUT COMPARISONS ARE READILY AVAILABLE. IN ADDITION, STABLE AND PREDICTABLE LABOR MANAGEMENT RELATIONS HAVE NOT BEEN AFFECTED BY DISPLACING AN EX-SPTCO MANAGER.

- CORROBORATION THAT WEST COLTON WAS ALSO CREATING RE-SWITCHING FOR TUCSON DURING MAY-JUNE, 1997 SHOULD ALSO BE CONFIRMED. BASED ON ONE SAMPLE DOCUMENT DATED JUNE 10, 1997 (EXH. 12), THE LAPXM PER THE SERVICE PLAN WAS TO OPERATE DIRECTLY TO PHOENIX. HOWEVER, INVARIABLY TUCSON WOULD RECEIVE A MESSAGE ON NEARLY A DAILY BASIS STATING THAT THE ENTIRE TRAIN HAD TO YARDED AT TUCSON AND RESWITCHED STEM TO STERN AS WEST COLTON HAD MILL OR MINE-RUN THE TRAIN WITH PHOENIX AND TUCSON TRAFFIC MIXED. THIS PROBLEM WAS KNOWABLE ONLY AFTER GOING BY THE SCANNER. **WEST COLTON WAS ALSO DUMPING ON TUCSON!**

  MOREOVER, THE REVERSE WAS ALSO TRUE, AS PHOENIX WAS SENDING ALL WEST TRAFFIC TO TUCSON ALSO INSTEAD OF OPERATING A PXLAM AS AGREED.

- ASK REGIONAL VP STEVE BARKLEY TO CORROBORATE THE SERVICE EFFECTS OF PLACING AN M OF W TWELVE (12') HOUR DAYLIGHT CURFEW ON BOTH SIDES OF A TERMINAL LIKE SAN ANTONIO OR TUCSON. WHAT IS DONE NOW TO PROTECT SUCH TERMINALS?

  ASK BARKLEY IF SUCH A DOUBLE CURFEW WOULD BE A GOOD TIME TO ATTEMPT DOUBLING THE VOLUME OF TRAFFIC COMING INTO SAID TERMINAL.

- ASK THE QUALITY DEPARTMENT IF THEY CAN DETERMINE WHO WAS FLOWN TO TUCSON AROUND THE

- FIRST WEEK OF JUNE 1997 AND LEFT IN DISMAY STATING SOMETHING LIKE - IT IS IMPOSSIBLE TO DO WHAT UPRR HAS ASKED TUCSON TO DO. HOW CAN YOU PLAN WITH 12' CURFEWS ON BOTH SIDES, NEARLY DOUBLE THE VOLUME AND NO INCREASE IN PERSONNEL OR TRACKAGE? HE THOUGHT IT BEST TO LEAVE ASAP BEFORE "SOMEONE" DECIDED TO HOLD HIM ACCOUNTABLE FOR A TRAIN DISPATCHING SCENARIO WHICH CAUSED RANDOM AND BUNCHED ARRIVALS OF BOTH THE EASTBOUND AND WESTBOUND TRAIN FLEETS DURING DARKNESS AS MAIN TRACK OPERATIONS WERE CLOSED BY M OF W CURFEWS ON BOTH SIDES OF TUCSON STARTING MAY 1997.
(I THINK HIS FIRST NAME WAS DAVE-I THINK. SOME HAVE SUGGESTED IT MAY HAVE BEEN DAVID WHALEN OR DAN WHITE; BUT UPRR EXPENSE ACCOUNTS SHOULD SELECT.

10. BASED ON HUNDREDS OF DISCUSSIONS BY GROTHER, THE CONCEPT OF A MANAGER BEING REDUCED IN COMPENSATION AS A RESULT OF DEMOTION WAS UNHEARD OF AT UPRR IN 1997. THAT BELIEF WAS SO STRONG; THAT, HR PERSONNEL ISSUED EXH. 30, "SUMMARY OF PLAN CHANGES: EFFECTIVE JANUARY 1, 1998 CONCERNING EX-SPTCO PENSION PLAN RIGHTS WHICH STATED:

"***IN NO CASE*** WILL YOUR BENEFIT UNDER THE **AMENDED** PLAN BE LESS THAN THE PLAN BENEFIT YOU EARNED THROUGH DECEMBER 31, 1998"

THE ABOVE DOES NOT APPEAR TO BE TRUE IN GROTHER'S CASE, AS GROTHER'S HIGHER PAY BETWEEN 1995-1997 WILL NOT BE ALLOWED IN THE CALCULATION OF HIS UPRR PENSION. THE GROTHER'S WILL BE FINANCIALLY HARMED FOREVER! GROTHER WAS MAKING $6,200 MONTH IN SEPTEMBER 1995 AND HIS WAGES **MAY** NOT RETURN TO THAT LEVEL UNTIL 2005, OR LATER. THAT IS AN ESTIMATED **EIGHT YEAR PUNISHMENT** JUST TO EARN THE SAME AMOUNT AND A LIFETIME OF PENSION / RAILROAD RETIREMENT LOSSES, "FOR JUST BEING IN TUCSON", WHEN SOMEONE ELSE MADE AN INITIAL MERGER

RELATED DECISION WITHOUT USING THE "QUALITY PROCESS" AND GROTHER WAS SEVERELY SCAPEGOATED?

12. PARAGRAPH 9 ABOVE CONCERNS AN ENTRY THAT WAS MADE ON THE ONLINE PERSONNEL SYSTEM WHICH WAS SECRET-TO-GROTHER; YET, KNOWN AND USED BY MANAGERS OF UPRR WHO MADE DECISIONS ON GROTHER'S ABILITY TO BE CONSIDERED FOR PROMOTION 1997-2003

THIS ONLINE ENTRY WAS PARTIALLY ACCOUNTABLE FOR GROTHER NOT BEING PROMOTED OR EVEN SELECTED FOR A LATERAL TRANSFER FOR THE LAST 5.5 YEARS AS THOSE WHO PROMOTE HAD EITHER ACCESS TO THIS SECRET ONLINE SYSTEM FROM THEIR OWN AUTHORITY OR THROUGH HR AND OTHER UPRR REPRESENTATIVES. THIS ONLINE SYSTEM HAS BEEN USED BEHIND GROTHER'S BACK TO DESTROY GROTHER'S CAREER AND NOW THE OMBUDSMEN SIMPLY STATES "NO ONE WANTS TO COME FORWARD FOR ENTERING THIS DEMOTED FOR DISCIPLINARY REASONS ON YOUR ONLINE PERSONAL RECORD".

AS CORROBORATION, EXHIBIT 31 INDICATES A PARTIAL LIST OF UPRR POSITIONS APPLIED FOR AND THE UPRR LACK OF RESPONSE OR RETALIATION REGARDING MY RESUME. IN SUMMARY, GROTHER APPLIED FOR SIX POSITIONS BACK TO ARIZONA IN 1999-2000 AND GROTHER ONLY RECEIVED ONE RESPONSE WHICH BASICALLY STATED TO GROTHER THAT BASED ON ALL APPLICANTS, YOUR EXPERIENCE, EDUCATION, TRAINING, ARE NOT ACCEPTABLE. THIS COMPUTER GENERATED RESPONSE WAS RECEIVED **REGARDLESS OF THE FACT THAT GROTHER HAD PERFORMED 22 MONTHS AT THE SAME LOCATION (TUCSON) IN THE # 1 POSITION AT TUCSON ITSELF OR TWO SALARY RATE GRADES ABOVE THE POSITION WHICH HAD GROTHER APPLIED FOR (EX'S. 32A-32B). EXHIBITS 33A – 33B IS ANOTHER POSITION THAT GROTHER WAS NOT EVEN SELECTED TO BE INTERVIEWED; DESPITE, GROTHER'S 22 MONTHS, ON THAT EXACT JOB AS INCUMBENT.**

WHY DID UPRR'S ROYCE HARDIN'S COMPUTER GENERATED, "TRY AGAIN LATER RESPONSE" IMPLY THAT GROTHER WAS NOT QUALIFIED FOR A POSITION THAT HE HAD BEEN THE SUPERVISOR OF FOR 22 MONTHS? (GOES TO PATTERNS OF MISTRUST AND RETALIATION).

13. IN 1997, THE UPRR MANAGERS WHO ARBITRARILY DEMOTED GROTHER KNEW THAT GROTHER HAD A VERY SICK WIFE WITH SYSTEMIC LUPUS AND **GROTHER COULD NOT RISK THE LOSS OF MEDICAL INSURANCE FOR HIS WIFE, AS THAT WOULD CERTAINLY RESULT IN HER DEATH!**

A. THERE WAS A CRITICAL QUESTION IF INSURANCE WOULD BE MADE AVAILABLE UNDER COBRA IN 1997. TO ILLUSTRATE ANOTHER CORROBORATION OF "CREATING FEAR OF RETALIATION". IN FRANCISCONI V. UNION PACIFIC RAILROAD, CASE NO. 20000 408-CA, VPO SHOENER APPARENTLY DENIED FRANCISCONI'S SICK WIFE COBRA COVERAGE IN 1997 (EXH. 35). SUCH A **DENIAL OF COBRA** WOULD HAVE BEEN VERY DESTRUCTIVE TO GROTHER'S WIFE, IF NOT LIFE THREATENING. THEREFORE, THE RISKS WERE TOO HIGH WITH THAT TYPE OF 1997 CORPORATE CULTURE RETALIATION "ALLOWED" AND "ACCEPTED".

IF AN INDIVIDUAL HAD TO MAKE MEDICAL INSURANCE PAYMENTS, EVEN IN 1997, THE COST WOULD HAVE BEEN STAGGERING. AARP SOURCES INDICATE THE "FAMILY MONTHLY PREMIUM" MAY HAVE BEEN OVER $600 A MONTH AND POSSIBLY MORE FOR A SEVERE PRE-EXISTING CONDITION, ASSUMING IT WOULD BE POSSIBLE TO EVEN OBTAIN INSURANCE FOR ONE'S PRE-EXISTING CONDITIONS. EXHIBITS 36B-36E ARE A FEW EXAMPLES OF HOW HARD IT IS FOR MRS. GROTHER TO OBTAIN ANY TYPE OF INSURANCE, INCLUDING THE NEW LONG TERM CARE UPRR HAS RECENTLY OFFERED THOROUGH ANOTHER COMPANY (CMA).

B. IT IS NOTEWORTHY THAT COBRA APPEARS TO ONLY PROVIDE COVERAGE FOR EIGHTEEN (18) MONTHS. IF

DISMISSED IN 1997 FOR FILING AN ARBITRATION, LAWSUIT OR SIMPLY REQUESTING ANOTHER APPEAL, THAT WOULD MEAN THAT WHEN THE COBRA COVERAGE RAN OUT, GROTHER WOULD HAVE BEEN 52 YEARS OLD AT THAT TIME AND **WITHOUT** MEDICAL INSURANCE FOR HIS WIFE - AN ILL LUPUS PATIENT, UNLESS FOUND EMPLOYMENT ELSEWHERE.

ALL READERS - CONSIDER THIS PLEASE:
ALL OF US ARE ONLY ONE JOB AWAY FROM A HEALTH INSURANCE DISASTER.

AN ESTIMATED INSURANCE BILL OF $600 PLUS PER MONTH WOULD BE A HEFTY BILL FOR GROTHER; ESPECIALLY, IF TERMINATED IN 1997 FOR ANY NUMBER OF POSSIBLE "SPIN DOCTOR ACCUSATIONS". IMAGINE LIVING ON GROTHER'S UPRR PENSION, ESTIMATED AT LESS THAN $400 PER MONTH IN 1997, AS GROTHER WAS, AND IS "TOO YOUNG" FOR RAILROAD RETIREMENT BENEFITS. THAT WOULD HAVE BEEN GROTHER'S "FAIRNESS REWARD" FOR 28 YEARS OF DEDICATED AND LOYAL RAILROAD SERVICE TO SPTCO AND TEN MONTHS WITH UPRR.

WOULD ANYONE IN THEIR RIGHT MIND DARE TO FILE FOR AN UNCERTAIN ARBITRATION PROCESS, UNDER THE ABOVE FINANCIAL CONDITIONS?

IT IS GROTHER'S UNDERSTANDING THAT NOW THAT GROTHER HAS REACHED FIFTY-FIVE (55) THAT GROTHER IS CATEGORIZED AS AN OFFICIAL "RETIREE" BY THE UPRR PENSION PROGRAM (I.E. ELIGIBLE; BUT NOT REQUIRED, TO FILE FOR GROTHER'S UPRR PENSION). AS A "RETIREE", GROTHER IS NOW ALLEGEDLY ELIGIBLE TO OBTAIN MEDICAL INSURANCE FROM THE UPRR, ASSUMING THAT GROTHER FILED FOR HIS SEVERELY AGE AND DEMOTION REDUCED UPRR PENSION AND PAID THE COST OF SUCH MEDICAL INSURANCE COVERAGE. WITHOUT SAID MED. INSURANCE, GROTHER HAS BEEN PARALYZED WITH NO FUNDS.

IN SUMMARY, BEFORE REACHING AGE 55, GROTHER WAS NOT ELIGIBLE FOR THIS SUBSIDIZED UPRR MEDICAL

INSURANCE COVERAGE AND COULD NOT RISK SEEKING RECOVERY OF GROTHER'S COMPENSATION AND FRINGE BENEFITS TAKEN AWAY AS A DISPLACED EMPLOYEE. EVEN AT AGE 55, ONE GIVES UP A WHOOPING 50% OF ONE'S UPRR RETIREMENT, IF THEY START RETIREMENT AT AGE 55!

MOREOVER, IT TOOK GROTHER SEVERAL YEARS TO OBTAIN EVIDENCE OF WRONGFUL UPRR BUSINESS ETHICS, UNFAIRNESS, INTIMIDATION AND RETALIATION BY CERTAIN UPRR MANAGERS, INCLUDING AN APPEAL "TO FAIR TREATMENT", WHICH IS ALLEGED AS THE FUNDAMENTAL RIGHT OF *ALL UPRR* EMPLOYEES. ALL THE ABOVE EFFORTS HAVE LED TO NO APPROPRIATE RESPONSE FROM UPRR, CONCERNING COMPENSATION FOR BEING A DISPLACED EMPLOYEE. LAST UPRR ANSWER WAS 3/10/03 ON FAIRNESS!

MUCH OF THE DELAY PRESENTING THIS DISPUTE COULD HAVE BEEN REDUCED. IF SELECT UPRR REPRESENTATIVES HAD BEEN FORTHCOMING AND LESS RETALIATORY IN THEIR ACTIONS AND RESPONSES AS REQUIRED BY UPRR BUSINESS ETHICS.

14. IN 2001, UPRR OFFERED A VOLUNTARY EARLY RETIREMENT PROGRAM TO UPRR NON-AGREEMENT (MANAGER) PERSONNEL, AT WHICH TIME GROTHER WAS 54 YEARS OLD. ONE OF THE WARNINGS IN THE UPRR'S VERP VHS TAPE WAS THAT IF YOU ARE NOT 55 YEARS OLD, DO NOT ACCEPT THIS OFFER, UNLESS INDEPENDENTLY WEALTHY, OR COULD ACCEPT A SUBSTANTIAL DROP IN YOUR PENSION. THIS IS CORROBORATION THAT AGE 55 IS THE POINT WHERE UPRR PENSION BENEFITS PROVIDE "BARE BONES BENEFITS".

SAID 2001 VERP ALSO CLEARLY DISPLAYED JUST HOW BADLY GROTHER'S UPRR PENSION HAD BEEN DAMAGED BY THE 1997 DEMOTION. WHEN COMPARED TO ANOTHER MANAGER WITH COMPARABLE AGE AND USING GROTHER'S OLD 1997 EARNING LEVEL (ESCALATED BY AVERAGE OF .035% PER ANNUM FOR INCREASES), GROTHER'S DISMAL

VERP PACKAGE WAS GREATLY REDUCED IN COMPARISON. THE OMBUDSMEN (271-2113) ADVISED FEBRUARY 2, 2001 THAT THE VERP HAD SUCH A "RETIREMENT REDUCTION", IN GROTHER'S CASE, BECAUSE IT WAS ONLY BASED ON ONE'S LAST THREE YEARS OF PAY (1998-2000) IF YOU WERE A EX-SPTCO OFFICER WHICH ELIMINATED GROTHER'S HIGHER EARNINGS IN 1996-1997. THE VERP ALSO RESULTED IN QUESTIONS WHICH EXPOSED THE FACT THAT THE "PENSION PLAN OF UPRR FOR EX-SPTCO PERSONNEL" DOES NOT ALLOW WAGES BEFORE JANUARY 1, 1998 TO BE INCLUDED IN THE "FAE" PENSION CALCULATIONS OF UPRR, CREATING GROTHER A SUBSTANTIAL PENSION REDUCTION.

GROTHER IS STILL AWAITING A RESPONSE FROM THE PENSION DEPARTMENT TO COMPUTE RETIREMENT DAMAGE. EXHIBIT 46 INDICATES AN AUGUST 25, 2002 REQUEST.

15. TO THE LAYMAN, BINDING ARBITRATION BY THE NATIONAL MEDIATION BOARD APPEARS TO BE EXTREMELY DIFFICULT FOR AN INDIVIDUAL, WHO IS NOT REPRESENTED BY A UNION. IN ADDITION, ARTICLES HAVE BEEN WRITTEN WHICH INDICATE THAT SOME ARBITORS MAY FEEL PRESSURED TO RENDER DECISIONS THAT WILL NOT ALIENATE COMPANIES WHO MAY HIRE THEM AGAIN, AS OPPOSED TO THE SOLE EMPLOYEE WHO HAS NO FUTURE BUSINESS TO OFFER. BELOW ARE SPECIFIC EXAMPLES OF HOW AN INDIVIDUAL WOULD BECOME CONCERNED ABOUT THE POSSIBILITY OF RECOVERY FROM ARBITRATION WITH THE RISKS STATED IN PUBLICLY PUBLISHED DOCUMENTATION. GIVEN ONE'S CAREER HAS ALREADY BEEN ENDED AND CRITICAL MEDICAL INSURANCE FURTHER AT RISK, HOW COULD ONE REASONABLY FILE FOR ARBITRATION BEFORE ALL KNOWN FACTS (AVAILABLE, AS MANY ARE NOT MADE READILY AVAILABLE) FACTS WERE OBTAINED FROM SOME RECALCITRANT PERSONS AND THE INSURANCE ISSUE IS PROTECTED AT AGE 55 ("RETIREE"). BELOW ARE A FEW SAMPLES OF ARTICLES WHICH CREATE EXTREME FEAR IN REQUESTING ARBITRATION AS AN INDIVIDUAL.

A. RAILWAY AGE ARTICLE DATED JULY 18, 1999 ON NEW YORK DOCK/STB AGREEMENT WHICH DISCUSSES "CRAM-DOWN" REGARDING AN ALLEGED BIAS BY "RAIL REGULATORS" (I.E. SURFACE TRANSPORTATION BOARD), WHICH AFFECTED ARBITOR DECISIONS (EXH. 37):

"MYRON (BROTHERHOOD OF M OF W) INSISTS RAIL REGULATORS SO OFTEN OVERTURNED ARBITRATED DECISIONS FAVORABLE TO EMPLOYEES DURING THE 1980'S THAT **ARBITORS BECAME CONDITIONED TO GRANTING RAILROADS UNDUE PREFERENCE."**

B. EXH. 38 INDICATES AN ARTICLE FROM AARP WHICH QUOTES PAUL PALEFSKY, A LAWYER IN SAN FRANCISCO FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION STATING:

" ...ARBITORS MAY FEEL PRESSURED TO RENDER DECISIONS THAT WILL PLEASE (OR AT LEAST WON'T ALIENATE) COMPANIES THAT MAY HIRE THEM AGAIN."

C. SEVERAL ATTORNEYS HAVE STATED THAT AN INDIVIDUAL FILING ARBITRATION IS AT A DISADVANTAGE, AS YOU HAVE "NO REPEAT BUSINESS TO OFFER AN ARBITOR" AND ARBITORS NEED TO MAKE A LIVING TOO. SUCH STATEMENTS DO NOT INSPIRE AN INDIVIDUAL CLAIMANT TO COME FORWARD.

16. GROTHER WAS PERPLEXED BY HIS SEVERE 1997 PAY REDUCTION THAT WAS RELATED TO GROTHER'S SEVERE DEMOTION BECAUSE A PRIOR TO MERGER MGR. WITH UPRR WAS "DEMOTED AND TRANSFERRED FROM OMAHA SAFETY DEPARTMENT" TO TUCSON ON/ABOUT FEBRUARY 15, 1997 (FOUR MONTHS BEFORE GROTHER'S DEMOTION DECISION). HE BRAGGED THAT HE HAD CONNECTIONS AT UPRR HQ. AND HIS HIGHER PAY FROM HIS OMAHA SAFETY JOB WOULD NOT BE REDUCED; DESPITE HIS DEMOTION. HIS NAME WAS THEODORE F. INGRAM AND GROTHER IS SURE THAT HIS PRESENT WAGE HAS CONTINUED TO ESCALATE MUCH HIGHER THAN GROTHER'S, AS GROTHER IS STILL TRYING TO GET BACK TO GROTHER'S 1995 LEVEL OF PAY! WHY WAS

GROTHER TREATED DIFFERENTLY THAN INGRAM, WHO HAD BEEN DEMOTED AND TRANSFERRED? ALL THE ABOVE INCONSISTENT WAGE REDUCTION TREATMENTS CREATE FEAR OF RETALIATION AND MORE DISCRIMINATION.

17. UPRR PROVIDED AN INSERT WITH GROTHER'S DIMINISHED CHECK WHICH WAS RECEIVED MARCH 1, 2001 WHICH ADVISED GROTHER "IF YOU RETIRE AND TAKE A CASH DISTRIBUTION FROM YOUR 401(K) PLAN, YOU'LL PAY INCOME TAX ON THE TAXABLE PORTION OF THE DISTRIBUTION - PLUS A 10% FEDERAL TAX PENALTY, **IF YOU ARE UNDER AGE 55 WHEN YOU SEPARATE FROM THE COMPANY".**

THIS AGAIN GOES TO THE ISSUE OF BEING UNABLE TO TAKE ANY REALISTIC ARBITRATION ACTION BECAUSE ONE WOULD BE WIPED OUT FINANCIALLY, AS A MANAGEMENT INDIVIDUAL, UNTIL AGE 55 IS REACHED.

THIS APPEARS TO ALSO MEAN THAT SHOULD ONE HAVE BEEN TERMINATED (BEFORE AGE 55), AS RETALIATION FOR FILING ARBITRATION OR EVEN A FURTHER APPEAL TO SENIOR MANAGEMENT AND TAKE A CASH DISTRIBUTION FROM ONE'S 401(K) TO PAY FOR MEDICAL INSURANCE AS YOUR "EARLY UPRR PENSION" IS ESTIMATED AT LESS THAN $400 PER MONTH IN 1997, THE RESULT WOULD BE FURTHER FINANCIAL PUNISHMENT IN PERPETUITY. MEDICAL INSURANCE AND LIVING EXPENSE WITHDRAWALS WOULD ELIMINATE ONE'S DEMINIMUS LIFETIME SAVINGS. GROTHER COULD NOT AFFORD TO LOSE A SUBSTANTIAL PORTION OF GROTHER'S SAVINGS PLAN ON "UNNECESSARY TAXATION".

OF COURSE, ONE WOULD TRY TO OBTAIN REPLACEMENT EMPLOYMENT. HOWEVER, THE SPECIALIZED SKILLS OF RAILROADING (ESPECIALLY AS AN OPERATING OFFICER) ARE NOT HIGHLY MARKETABLE. AGE IS ALSO A FACTOR. AGE FIFTY-ONE AND UP IS A "HARD SELL" WITH ONLY MARKET SPECIFIC RAILROAD MANAGEMENT SKILLS.

18. IT IS WELL ESTABLISHED THAT PSYCHOLOGICAL AND PHILOSOPHICAL CLASHES OCCUR AS AN AFTERMATH OF MERGERS. PER MITCHELL LEE MARKS, PHD, "...WORKERS THAT REMAIN WILL BECOME ... SCARED..." (EXH. 47) THUS BEING "SCARED"; ESPECIALLY GIVEN BEING DEMOTED TWO SALARY RATE GRADES WITHIN THREE MONTHS OF THE MERGER TRANSACTION VP'S ARRIVAL (FOR NO FAULT OR DECISION OF YOUR OWN), DOES CREATE FEAR TO FURTHER APPEAL, ARBITRATE OR SEEK OTHER LITIGATION.

19. GIVEN THAT GROTHER IS HARASSED AND THREATENED ALMOST WEEKLY WITH LOSING HIS JOB OF 34 YEARS FOR ANYTHING FROM "FAILURES OF THE UPRR REPORTING SYSTEMS (I.E. SOMEONE ENTERED THE WRONG DEPARTURE DELAY CODE") TO OTHER ISSUES TOTALLY OUT OF GROTHER'S CONTROL, HOW COULD GROTHER DARE TO FILE ARBITRATION BEFORE AT LEAST AGE 55?

20. THE INVOLUNTARY SEVERANCE PROGRAMS AT UPRR FOR NON-AGREEMENT (MANAGERS) HAVE CONTINUED A PATTERN OF BEING CONTINUOUSLY REDUCED SINCE THE MERGER. INITIALLY, THOSE WITH OVER TWENTY YEARS OF SERVICE (LIKE GROTHER) HAD BEEN OFFERED EIGHTEEN (18) MONTHS OF SEVERANCE PAY PER MY RECORDS. ON DECEMBER 28, 2000, GROTHER HAD JUST TURNED 53 YEARS OF AGE AND UPRR ANNOUNCED THAT SEVERANCE PAY WAS REDUCED TO TWELVE (12) MONTHS FOR THOSE OVER TWENTY YEARS OF SERVICE. THEREFORE, SHOULD ONE APPEAL, FILE ARBITRATION OR TAKE ANY OTHER ACTION, ONE COULD READILY BE IDENTIFIED FOR "INVOLUNTARY SEVERANCE", DEPENDING ON "CONTROLLED CONDITIONS". UPRR HAS THE ABILITY TO INITIATE ANOTHER ROUND OF INVOLUNTARY BUYOUTS AT ANY TIME AND THOSE THAT FIGHT BACK WILL GO TO TOP OF "ELIMINATION LIST". WITHOUT AGE 55 MEDICAL INSURANCE, THERE IS NO FINANCIALLY REASONABLE WAY TO ARBITRATE.

TO ILLUSTRATE UPRR'S APPROPRIATE RIGHT AND CONTINUING EFFORTS TO REDUCE MANAGEMENT PERSONNEL, EXH. 51 IS A RECENT OMAHA WORLD-HERALD ARTICLE DATED JANUARY 14, 2003 INDICATING, IN PART:

"...THERE MAY BE MANY INSTANCES WHERE AFFECTED PEOPLE WON'T BE OF RETIREMENT AGE"

"...EMPLOYEES ARE NOT BEING OFFERED EARLY RETIREMENT" "

"...SEVERANCE PACKAGES WERE BASED ON YEARS OF SERVICE BUT DECLINED TO GIVE DETAILS"

"WHEN UPRR CUT JOBS IN 2001, EMPLOYEES WERE OFFERED A SEVERANCE PACKAGE AND A BUYOUT PROGRAM"

GROTHER HAD TO WAIT UNTIL HIS 55TH BIRTHDAY TO EVEN START ASKING FOR HIS PERSONAL RECORD, IN FEAR THAT THIS WOULD RESULT IN RETALIATION, WHICH IT APPARENTLY DID, IN THE FORM OF TWO URINALYSIS TESTS, NEARLY BACK TO BACK. ALSO, AS FURTHER RETALIATION, GROTHER'S SUPERVISOR FRYAR WOULD NOT TRAIN GROTHER ON THE BUDGET DUTIES NEEDED TO BECOME FRYAR'S REPLACEMENT, WHEN FRYAR RETIRED FEBRUARY 2003. THE SEARCH FOR RECORDS, 1997 DEMOTION POLICY, INTERVIEWS OF DEMOTION PAY CUTS, ETC., HAS BEEN VERY FRUSTRATING WITH NUMEROUS DEADENDS AND MISDIRECTION.

21. GROTHER HAD BEEN ADVISED THAT THE NATIONAL RAILROAD ADJUSTMENT BOARD WAS THE VENUE FOR **INDIVIDUAL ARBITRATION**; BUT, THAT WAS INCORRECT FOR EMPLOYEES NOT PROTECTED BY AN AGREEMENT (EXH. 54) RESEARCH CREATED ADDITIONAL DELAY IN THIS SUBMISSION. ALSO, FINDING LEGAL COUNSEL, TAKES TIME.

IN SUMMARY, THE UPRR HAS NOT BEEN ADVERSELY AFFECTED BECAUSE OF ANY DELAY IN SUBMITTING THIS DISPUTE. THE DELAY IN SUBMITTING THIS DISPUTE WAS CAUSED BY

DOCUMENTED FEAR OF RETALIATION, ACTIONS OF PREJUDICE AND DISCRIMINATION ACTUALLY PERPETRATED BY UPRR AGAINST GROTHER AND OTHERS WHO DARED TO LITIGATE (I.E. 1996 FRANSCONI CASE WHERE UPRR DELAYED COBRA HEALTH INSURANCE FOR LITIGANTS WIFE), DELAYS IN GATHERING EVIDENCE DUE TO UPRR REPRESENTATIVES EFFORTS TO CREATE DEAD-ENDS, MISDIRECTION, SHREDDING KEY DOCUMENTS, ALLEGED DISINGENUOUS BEHAVIOR. MOREOVER, THE PERSONS WHO DEMOTED GROTHER ARE STILL EMPLOYED BY UPRR AND SHOULD BE READILY ABLE TO DOCUMENT THE DETAILED "JUSTIFICATION" WHY GROTHER'S "PERSONAL PERFORMANCE" SUDDENLY BECAME "NOT WHAT WAS NEEDED" AFTER:

A) PERSONAL PERFORMANCE BEING OUTSTANDING FOR 28 YRS.
B) TWENTY (20) MONTHS AS THE INCUMBENT ON THE JOB,
C) JUST (2) MONTHS AFTER BEING SELECTED AS UPRR'S SENIOR MANAGER TERMINAL OPERATIONS (SRMTO) AT TUCSON AS THE RESULT OF REVIEWING GROTHER'S RECORD OVER SIX MONTHS AND GROTHER'S PERSONAL PERFORMANCE FROM JAN. THROUGH APRIL 1997 (3.5 MONTHS OF DAILY REVIEWS OR POSSIBLY MORE, DEPENDING ON PACKARD'S ARRIVAL).

WHY WAS GROTHER DEMOTED TWO SALARY RATE GRADES ($1,272 PER MONTH); WHEN, NO OTHER UPRR MANAGER IN 1997 WAS REDUCED IN PAY DURING THE SYSTEM WIDE SERVICE FAILURES?

IN COMPARISON, DESPITE GROTHER'S BELOW FINANCIAL DENIGRATION FOR LIFE AS A DISPLACED EMPLOYEE, GROTHER HAS PERFORMED IN A STABLE AND PREDICTABLE PATTERN SINCE JULY 1, 1997:

- FINANCIALLY (DEMOTED GRADE 19 TO 17, OR BAND C TO B) AND ADVERSELY AFFECTED AS A "DISPLACED EMPLOYEE". GROTHER HAS BEEN DEPRIVED OF OVER $107,000 THOROUGH 6/1/03.

- UPRR AND RAILROAD RETIREMENT HAVE BEEN REDUCED FOR A LIFETIME FOR BOTH GROTHER AND HIS WIFE.

- CONSISTENTLY BEEN REJECTED IN HIS EFFORTS TO SEEK PROMOTION, OR EVEN, A LATERAL TRANSFER! GROTHER HAS DOCUMENTED A FEW OF HIS NUMEROUS APPLICATIONS (EXH. 31) ON CNET AND THE RECENTLY "IMPROVED INTERNAL UPRR CNET SYSTEM", WHICH ALL RESULTED IN ONLY ONE PHONE INTERVIEW.

GROTHER'S TREATMENT BY UPRR COMPARED TO OTHERS WHO WERE IN COMMAND ROLES -"COMPARATIVE JUSTICE":

COMPARING THE "DEMOTION DISCIPLINE" EXECUTED ON GROTHER BY UPRR, FOR JUST BEING IN THE WRONG PLACE WHEN SHOENER MADE A MERGER CONSOLIDATION EXPERIMENT, WITH "DISCIPLINE" ISSUED TO OTHERS IN "COMMAND ROLES". EVEN RECENT MILITARY COMMANDERS WHO WERE "IN COMMAND" WHEN ***LOSS OF LIVES OCCURRED BY ACCIDENTS, HAVE NOT BEEN FINANCIALLY AFFECTED LIKE GROTHER'S PENSIONS. GROTHER WAS NOT INVOLVED IN ANY LOSS LIFE ISSUES, CUSTOMER SETTLEMENTS, LAWSUITS.***

1. EXH. 39 INDICATE THE RESULT OF THE HIGH PROFILE NEWS CASE OF USS GREENEVILLE CMDR. SCOTT WADDLE WHO WAS "IN COMMAND" WHEN HIS SUBMARINE SURFACED AND ***KILLED NINE (9) JAPANESE SAILORS. THE NAVY SAID WADDLE WILL RECEIVE HIS PENSION AND FULL RETIREMENT PAY!***

2. EXH. 40 CONCERNS THE FATE OF COLONEL LARRY D. NEW'S, WHO WAS COMMANDER AT NELLIS AFB 57TH OPERATIONS GROUP WHEN TWELVE (12) ***AIRMEN WERE KILLED.*** HE WAS TEMPORARILY SIDELINED IN A STAFF JOB ACCOUNT MEDIA

SCRUTINY; BUT HE RECEIVED ***NO LOSS OF PAY OR RETIREMENT BENEFITS.*** IN FACT, "GENERAL (SELECT) NEWS" WAS APPROVED AUGUST, 2001 TO BECOME A GENERAL AND HE ASSUMED COMMAND OF THE 325TH FIGHTER WING AT TYNDALL AFB, FL ON JULY 12, 2002, TRAINING ACTIVE DUTY JET PILOTS.

3. EXH. 41, MR. STEVE CLARK, PRIOR ATTORNEY GENERAL OF ARKANSAS AND CANDIDATE FOR GOVERNOR OF ARKANSAS IN 1990 WAS FOUND GUILTY OF USING THE STATE'S CREDIT CARD, A FELONY CONVICTION. IN JUNE 2000, HE WAS GIVEN ***A SECOND CHANCE*** BY THE TEXAS BOARD OF LAW EXAMINERS, WHO ALLOWED HIM TO TAKE THE TEXAS BAR EXAM BECAUSE "***WE BELIEVE IN REHABILITATION IN TEXAS AND YOU LOOK LIKE YOU'VE HAD ENOUGH"***

PARTIAL LIST OF MORE UPRR POLICIES WHICH SUPPORT COMPENSATING GROTHER AS A DISPLACED EMPLOYEE:

1. THE BUSINESS CONDUCT POLICY OF UPRR, AS NOTED ON UP ONLINE JUNE 28, 2002 (AGAIN EXH. 42) STATES, IN PART, "IN THE CONDUCT OF BUSINESS, EACH EMPLOYEE MUST ADHERE TO HIGH ETHICAL STANDARDS. THESE INCLUDE HONESTY (I.E. ***TRUTHFUL DEALING WITH EVERYONE, INCLUDING...FELLOW EMPLOYEES) AND FAIRNESS (I.E. TREATING ANOTHER IN THE SAME MANNER AS YOU WOULD EXPECT TO BE TREATED.)"***

2. GROTHER IS HOPEFUL THAT THE BELOW COMPANY WIDE PUBLISHED STATEMENT BY PRESIDENT AND COO IKE J. EVANS IN THE LOTUS NOTE TO ALL EMPLOYEES DATED FEBRUARY 4, 2002, WILL ALLOW A FAIR AND IMPARTIAL REVIEW OF THIS DISPUTE ISSUE:

" INTERNALLY, ALL OF US MUST HEIGHTEN OUR EFFORTS TO 'WALK THE TALK'. TO ME, ***THIS MEANS MATCHING THE EVERYDAY BEHAVIOR WITH THE VISION AND VALUES OF THE COMPANY. THIS IS A PREREQUISITE TO US ADVANCING INTO THE HIGHEST RANKS OF U.S. BUSINESS."***

FURTHERMORE, PRESIDENT IKE EVAN'S LOTUS NOTE JUNE 3, 2002 CONCERNING UPRR'S REPUTATION STATUS: "WE WANT TO ENHANCE THE REPUTATION OF THE UNION PACIFIC AND THE MEN AND WOMEN, LIKE YOU, WHO WORK HARD EVERY DAY TO MAKE US ONE OF THE BEST COMPANIES IN THE WORLD." GROTHER HAS WORKED HARD FOR 34 YEARS, (ESPECIALLY AS A 12 HOUR PLUS DAY OPERATING OFFICER) "BUILDING AMERICA" tm; BUT, HIS REPUTATION HAS BEEN RUINED BY THE TUCSON DEMOTION DISPLACEMENT. CAN THE REVIEWERS OF THIS DISPUTE AT LEAST RESTORE GROTHER'S COMPENSATION, AS GROTHER'S REPUTATION IS TARNISHED FOREVER?

3. EVEN IN TODAY'S 2003 UPRR CORPORATE CULTURE, IT IS STILL VERY DIFFICULT TO OBTAIN INFORMATION REGARDING WHY ONE HAS BEEN DISPLACED AND PIGEONHOLED. IT IS HOPED THAT THE "2002 UNION PACIFIC VALUES AND LEADERSHIP BEHAVIORS" (EXH 1), THE UPRR BALDRIDGE AWARD COMMITMENT, AND UPRR'S DESIRE TO ENHANCE ITS REPUTATION; ALL REVIEWED IN THEIR TOTALITY, WILL ALLOW UPRR TO FAIRLY ASSESS GROTHER'S LOSS AND PROVIDE REIMBURSEMENT TO "WALK-THE-TALK", AS DESCRIBED IN UPRR'S BUSINESS CONDUCT POLICY OR ETHICS AS SHOWN ON EXH. 42.

4. AS PART OF THE 2002 UPRR "BUILDING AMERICA" tm AD CAMPAIGN, THE GROTHERS RECEIVED A "IBM SIZED CARD" (EXH. 43) WITH GROTHER'S SEVERELY REDUCED PAYCHECK AT THEIR HOME STATING ON ONE SIDE

   "ITS TIME AMERICA HEARD YOUR STORY"

GROTHER WOULD PREFER TO SETTLE THIS MERGER RELATED TRANSACTION EXPERIMENT DEMOTION ISSUE WITHOUT BEING REQUIRED TO DETAIL THE GROTHER'S FINANCIAL AND EMOTIONAL DENIGRATION STORY TO THE NATIONAL MEDIATION BOARD NEUTRAL, AND SHOULD AN APPEAL BE NEEDED, TO THE SURFACE TRANSPORTATION BOARD.

WHOMEVER THE UPRR DECISION MAKERS ARE CONCERNING GROTHER'S ATTACHMENT 2 COMPENSATION DISPUTE CLAIM, PLEASE CONSIDER GROTHER'S FAIRNESS MANTRA:

HOW WOULD YOU WANT TO BE TREATED AS THE RESULT OF JUST BEING IN THE WRONG PLACE, AT THE WRONG TIME, WHEN A 1.5 MONTH MERGER TRANSACTION YARD CONSOLIDATION EXPERIMENT WAS ORDERED WITHOUT CAPACITY-RESOURCE PROCESS STUDIES AND M OF W CURFEWS ON EACH SIDE?

"WOULD YOU WANT A 21% OR $1,272 CUT IN WAGES, RETIREMENT AND A RUINED CAREER, FOR SOMEONE ELSE'S VICARIOUS MERGER EXPERIMENT DECISION?"(EXH. 42)?"

GROTHER HAS NOT LET THE ABOVE UNFAIRNESS AND TREATMENT AS A DISPLACED EMPLOYEE DESTROY HIS WILLINGNESS TO BE A "TEAM PLAYER". EXHIBIT 44 INDICATES GROTHER'S CONTINUING ABILITY AND WILLINGNESS TO ASSIST THE UPRR TO OBTAIN CRITICAL LEGISLATION.

MR. R.F. DAVIDSON IS QUOTED IN AN JULY 2, 2002 HOUSTON CHRONICLE ARTICLE DESCRIBING UPRR EXPENDITURES OF UNDER HALF A BILLION TO SETTLE THE 1997-8 MERGER RELATED SYSTEM-WIDE SERVICE FAILURE DEBACLES; INCLUDING CUSTOMER SETTLEMENTS AND LAWSUITS. IT WAS **DESCRIBED AS UPRR'S WORST PUBLIC DRUBBING, AND:**

"...THE PAIN FROM THE MERGER LASTED LONGER THAN ANYONE ANTICIPATED" (EXH. 45)

GROTHER'S FINANCIAL AND EMOTIONAL PAIN AS A DIRECT NEXUS TO A FAILED MERGER EXPERIMENT IS NOT OVER; AND, GROTHER'S PUBLIC AND PRIVATE DRUBBING CONTINUES!

IN SUMMARY, PURSUANT TO THE NEW YORK DOCK PROTECTIVE CONDITIONS, FINANCE DOCKET NO. 28250, APPENDIX III, ARTICLE IV, THIS IS OFFICIAL NOTICE THAT SHOULD THE PARTIES BE UNABLE TO SETTLE THIS DISPUTE

REGARDING GROTHER'S DISPLACED COMPENSATION AND FRINGE BENEFITS WITHIN THIRTY (30) DAYS, OR JUNE 16, 2003, SAID AVERAGE MONTHLY COMPENSATION AND FRINGE BENEFITS DISPUTE WILL BE REFERRED TO ARBITRATION.

ANY QUESTIONS, PLEASE CALL GROTHER AT 281-359-5667, AFTER 1500 CT, AS GROTHER IS STILL WORKING THE NIGHT SHIFT AFTER 34 YEARS OF LOYAL AND DEDICATED SERVICE.

SINCERELY,

JEG

ENCLOSURES:
ATTACHMENT TWO (pgs 1-4)
AND EXHIBITS 1-54

JOHN GROTHER

ATTACHMENT TWO – FINANCIAL LOSSES CREATED AS DIRECT RESULT OF GROTHER DEMOTION JULY 1, 1997 BECAUSE OF MERGER EXPERIMENT TO CONSOLIDATE

AVERAGE MONTHLY COMPENSATION LOSS:

MO. AVERAGE PAY FOR 12 MONTH PERIOD PRIOR 7/1/97 = $6,200

LESS: MO. PAY@ "TAKE IT OR LEAVE IT" HOUSTON JOB = $4,928

MONTHLY GROTHER LOSS IN COMPENSATION = $1,272

PERIOD OF TIME	PER MONTH	TIMES # OF MONTHS	HISTORICAL LOSS
7/1/97 – 6/30/98	$1, 272	12	$ 15, 264
7/1/98 – 6/30/99	1, 272	12	15,264
7/1/99 – 6/30/00	1,272	12	15,264
7/1/99 – 6/30/01	1,272	12	15,264
7/1/00 – 6/30/02	1,272	12	15,264
7/1/02 – 6/30/03	1,272	12	15,264

TOTAL DISPLACED EMPLOYEE BASE WAGE COMPENSATION LOSS THRU 6/30/03 $ 91,584.00

- THE ABOVE DATA ASSUMES NO SALARY INCREARES
- THEREFORE, IF ASSUME A 3.0% ANNUAL SALARY INCREASE
- APPLY SAID SALARY INCREASE TO THE ANNUAL/MONTHLY LOSS TIMES .030.
- (.030 x $15,264) = $458 X 6 YEARS = $ 2,748.00

BASE WAGE LOSS, PLUS EFFECT OF ASSUMED 3.0% ANNUAL SALARY INCREASES $ 94,332.00

(ABOVE SUB-TOTAL REPRESENTS SIX YEARS AS DISPLACED EMPLOYEE AND DOES NOT INCLUDE THE FRINGE BENEFITS NEXT UNDER).

THE ABOVE DOES ATTEMPT TO RECOGNIZE SOME NORMATIVE AMOUNT WHICH REPRESENTS THE GENERAL TYPE OF 3.0% SALARY INCREASES OVER THIS TIME FRAME. HAD I BEEN IN THE TUCSON OR OTHER "OPERATING DEPARTMENT JOB" (OPRNS), IT IS NOT UNCOMMON TO RECEIVE AN ANNUAL SALARY INCREASE OF 5-7% EACH YEAR AND GET A BONUS ON TOP OF THAT, WHICH THEN BECOMES A PART OF ONE'S FINAL RETIREMENT AND PENSION COMPENSATION CALCULATIONS.

I WAS ALSO DENIED THE ABILITY TO INCREASE MY SALARY SUBSTANTIALLY BECAUSE I REACHED THE SALARY CAP FOR MY DEMOTED SRG @ $61,140 WITHIN SIX MONTHS OF BEING ASSIGNED TO INTERMODAL. IN CONTRAST, MY PRIOR POSITION , THEN OCCUPIED BY **TOM S. PARR, WAS GIVEN AN IMMEDIATE INCREASE TO $6,328/MO.** EFFECTIVE 7/1/97. MOREOVER, PARR'S GRADE 19 SRG HAD A CAP OF $78,264; WHICH MEANS, MR. PARR WAS ABLE TO GET MORE INCREASES ON THE NEXT REVIEW; WHEREAS, MY SRG WAS CAPPED OUT, OR "AT THE TOP OF MY SALARY RANGE". IT WOULD BE VERY INTERESTING TO COMPARE THE PAY RAISES, BONUS'S, EXPENSE ACCOUNTS AND OTHER FRINGE BENEFITS (I.E PROMOTION OF PARR TO DTO @ WEST COLTON, RETIREMENT, ETC.) BETWEEN MIO GROTHER AND DTO PARR SINCE 7/1/97.

The requested amount of $107, 370 is greatly understated because:

- Wages/bonuses/expense accounts and other fringe benefits (starting 7/1/97) provided to my Tucson replacement, Mr. Thomas Parr, have and will greatly outpace my TO DATE AND pension earnings (See Parr's vs. Grother total compensation in the UPRR data bases)

- Includes no recognition of the emotional denigration and stress that both my wife and I have endured for almost six years. Includes assistance toward the restoration of my tarnished reputation, which is irreparable.

- Fact we will now need to move from Houston upon retirement.

- No compound interest or loss of use of money for 6 years is recognized.

NOTWITHSTANDING THE ABOVE, I AM WILLING TO ACCEPT THE $107, 370 (REDUCED BY APPROPRIATE TAXES) , TO RESOLVE UNFAIR TREATMENT FROM A MERGER YARD CONSOLIDATION EXPERIMENT ORDERED BY UPRR VPO.

ATTCH 2: PAGE 3 OF 4

LOSS OF FRINGE BENEFITS

DEPRIVED OF BENEFITS ATTACHED TO HIS PREVIOUS EMPLOMENT BY THE DEMOTION & TRANSFER TO HOUSTON

1. LOSS OF FREE TRANSPORTAION (I.E. COMPANY PROVIDED VEHICLE). AS A SPTCO. TERMINAL SUPERINTENDENT, ON DUTY AND ON CALL 24 HOURS PER DAY, THE SPTCO. APPROPRIATELY PROVIDED FREE TRANSPORTATION TO / FROM WORK AND TO ACCIDENTS, INCIDENTS, PERSONAL INJURIES ON A 24 / 7 / 365 DAYS PER YEAR BASIS. AFTER THE UP-SP MERGER, UPRR CONTINUED TO PROVIDE FREE TRANSPORTATION FOR "FIRST RESPONDERS" UNTIL 6/30/2000, WHEN MOST CARS WERE RECALLED (SOME STILL RECEIVE SOME TYPE OF VEHICLE REIMBURSEMENT; BUT, I HAVE NO ACCESS TO THAT INFORMATION TO DETERMINE ANY CONTINUING CLAIM:

(IF INFORMATION WERE MADE AVAILABLE ABOUT ANY CURRENT RE-IMBURSEMENT FOR THE BAND C, THEN THE BELOW LOSS SHOULD BE AMENDED ACCORDINGLY).

IN BOTH TUCSON AND HOUSTON, MY ONE WAY COMMUTE TO WORK WAS AND IS APPROXIMATELY 25 MILES ONE WAY. THEREFORE, TO COMPENSATE FOR MY PAST LOSS OF FREE TRANSPORTATION, I AM WILLING TO STIPULATE THAT THE "IRS RATE PER MILE" WILL BE PROVIDED AS "BACK COMPENSATION" BASED ON THE MINIMUM OF 50 MILES ROUNDTRIP PER DAY x 260 WORKING DAYS PER YEAR (I HAVE WORKED EVERY SATURDAY), LESS 25 VACATION DAYS OR 235 DAYS PER YEAR OF CAR USE:

PERIOD OF TIME	# OF DAYS	MILES PER DAY	IRS RATE	LOSS
7/1/97 – 6/30/98	235	50	$ .315	$ 3,701.25
7/1/98 - 6/30/99	235	50	$.325	$ 3,818.75
7/1//99 – 6/30/00	235	50	$.325	$ 3,818.75
LOSS OF FREE TRANSPORTATION COMPENSATION				$ 11,338.75

ATTCH 2 ; PAGE 4 OF 4

2. **LOSS OF MEDICAL FLEX CREDITS AS A FRINGE BENEFIT:**

FLEX CREDITS WERE BASED ON TOTAL COMPENSATION TO CALCULATE THE REDUCTION OF ONE'S MEDICAL COST. THEREFORE, AS YOUR COMPENSATION WENT DOWN, ONE WOULD HAVE FEWER FLEX CREDITS. BASED ON 1999 DATA, EACH FLEX CREDIT WAS ESTIMATED AT WORTH $26.61; THERFEFORE, A LOSS OF $573 IN FLEX CREDITS FOR A $ 15,264 REDUCTION IN ANNUAL WAGES:

YEAR	ANNUAL SALARY	FLEX CREDIT		EST CREDIT LOSS
1998	TO BE DETERMINED	TBD	*	550.00
1999	$ 62, 976	2, 367	**	573.62
2000	$ 62,184	TBD	*	575.00

ESTIMATED LOSS OF FLEX CREDIT USE TO OFSET MEDICAL COSTS , DENTAL & FLEXIBLE SPENDING = $ 1,698.62

- TO BE DETERMINED MEANS THAT ACTUAL VALUES NEED CORROBORATION FROM UPRR RECORDS, AS I HAVE MISPLACED THESE RECORDS; THEREFORE, AN ESTIMATED VALUE WAS UTILIZED FOR THIS INITIAL CALCULATION.
- FLEX CREDITS WERE DISCONTINUED IN 2001 AS "UNFAIR".

(** $62,976/2,367 CREDITS = $26.61 PER CREDIT OF VALUE. IF WAGES CUT $15,264/$26.61= 573.62 LOST FLEX CREDITS/YEAR.

EXCLUDING EXTREMELY ADVERSE AFFECT ON RETIREMENT BENEFIT CALCULATIONS, THE MINIMUM GRAND TOTAL WAGE AND FRINGE BENEFIT LOSS, WITHOUT INTEREST, FOR N.Y. DOCK DISPUTE THRU JUNE 30, 2003 IS = $ 107, 370

AMOUNT OF COMPENSATION REQUESTED = $ 107, 370

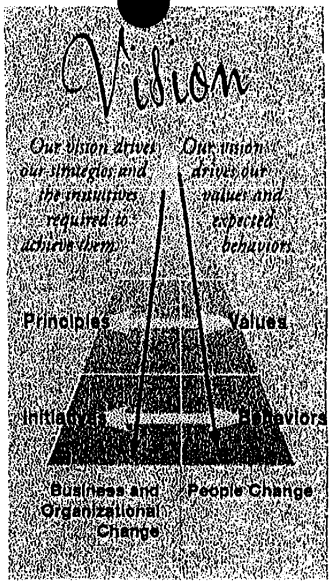
PLUS, MINIMUM PENSION LOSSES ARE ESTIMATED EXCEEDING TWO HUNDRED THOUSAND DOLLARS, SHOULD GROTHER'S LIVE TO BE 80 YEARS OLD! $ 200,000

MIN. EST. GRAND TOTAL OF ESTIMATED LOSS (EXCLUDING TUCSON REAL ESTATE LOSSES) $ 310,000

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

EXH. 1

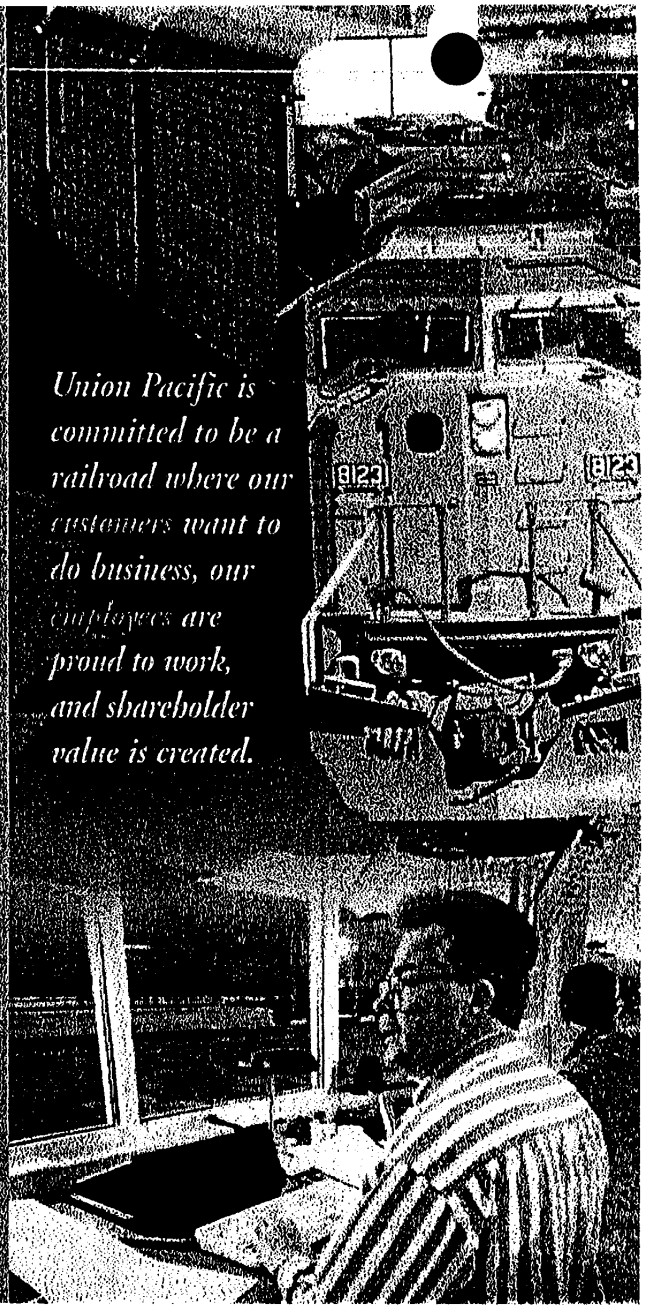
BUSINESS PRINCIPLES

- **Recognize employees as critical to success.**
  Our employees are a critical asset; without them, we would not be able to serve our customers.
- **Recognize customers as critical to success.**
  Our customers depend on us for consistent and reliable service; we depend on them for their continued business.
- **Sell what we can deliver.**
  Our ability to match our customer commitments with network capacity is a key to our future success as a Company.
- **Deliver what we sell.**
  Our decentralized operating structure and network design capability will allow us to better meet our delivery commitments.
- **Maximize return on each dollar invested.**
  We will consider our shareholders' perspective with every investment decision we make.
- **Performance excellence.**
  We will use our focus on quality as the foundation for improved responsiveness to our customers and employees.
- **Lead effectively at all levels and strive for excellence.**
  We will use communication, training and performance feedback to develop leadership at all levels of our organization.

TRANSFORMATION

VISION

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.



UNION PACIFIC EXHIBIT 2
PAGE 52 OF 146

VALUES AND VISIONS 1997

EXH. 2.

UNION PACIFIC VALUES

"We are dedicated to creating and maintaining a customer-focused environment where people can be the best they can be."

– LEADERSHIP TEAM

IT DEPENDS ON ME

- *My team's success depends on me*
- *My contribution counts*
- *We all lead by the example we set*
- *Treat others like you want to be treated*
- *Enjoy your work... it's OK to have fun*

KEEPING OUR COMMITMENTS

- *Make commitments that are clear and realistic*
- *Do what we say we're going to do*
- *Create a sense of urgency*

BETTER, SIMPLER, SAFER

- *Safety is my responsibility*
- *Try new ideas... encourage change*
- *Focus on process improvement and timely results*
- *Keep it simple*
- *Emphasize the critical few*

OPEN COMMUNICATIONS

- *Tell it like it is*
- *Be here now... listen and respond with respect*
- *Share ideas and encourage different points of view*
- *Understand the requirement... when in doubt ask*

WE ARE ALL PART OF THE UNION PACIFIC TEAM

- *Trust is essential*
- *Respect differences*
- *Recognize and reward the contributions of individuals and teams*
- *My success depends on my team's success*

We will deliver... *it depends on me.*™

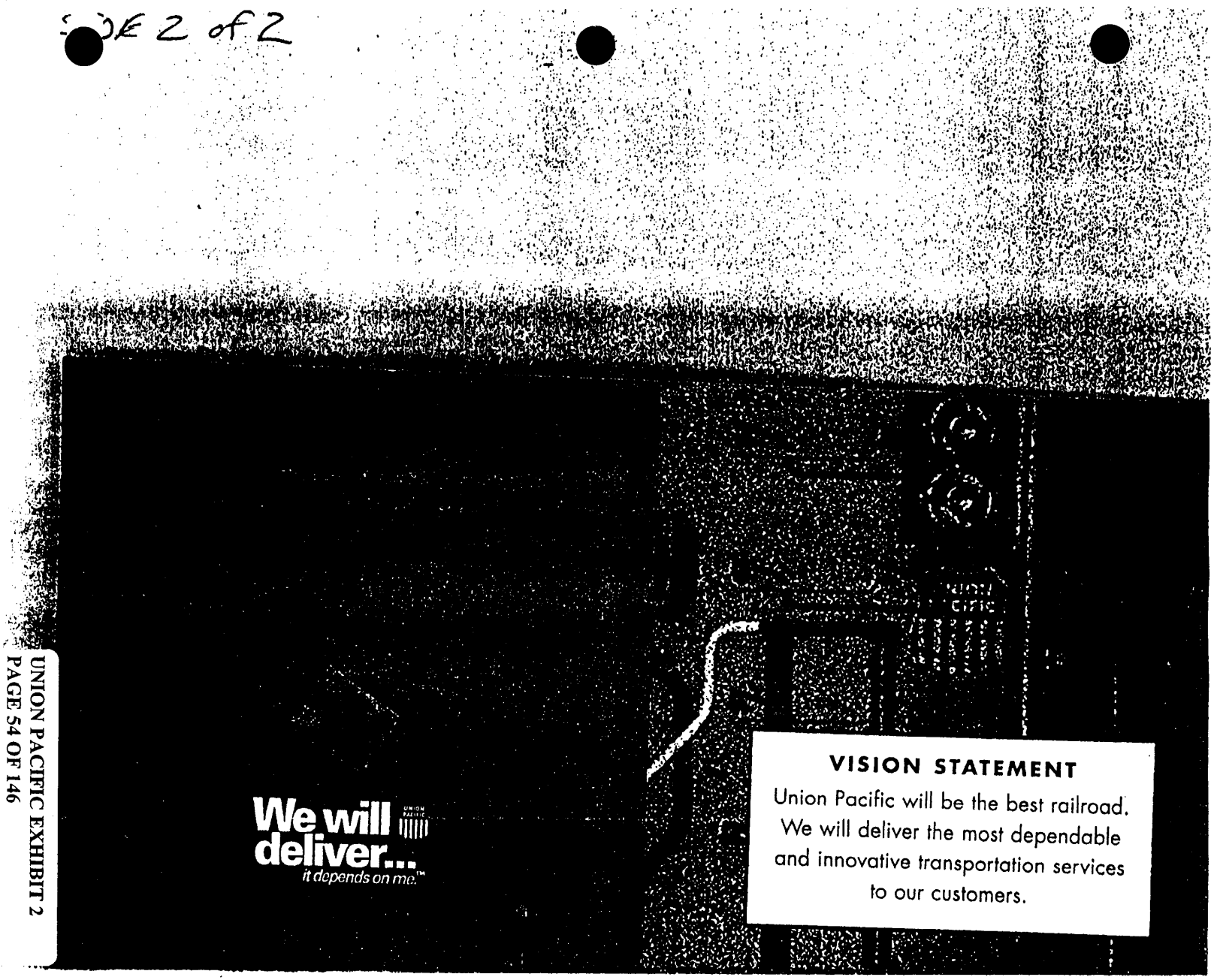
STOCK 1 of 2

FOR YOUR DRESS

AS A REMINDER

OF WHAT IS IMPORTANT

POLICY IN FEB, 1997


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.

Exh. 5

521-34/925

cc: mk

WPK

June 3, 1988

W.J.L. JUN 03 1988

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 Bachtold and myself will review the status of negotiations every quarter.

The Caltrans negotiating team will consist of Joe Browne, George Gray and O. J. Solander. If you or Mr. Grother are contacted by anyone from Caltrans, it is appropriate to schedule an initial meeting with them at our convenience, but not before you and our negotiating team meet with Mr. McNear and myself. Please advise if you are contacted by Caltrans.

D. M. MOHAN

cc: Mr. D. K. McNear
Mr. J. E. Grother
Mr. J. M. Smith
Mr. R. E. Mesick

R. W. McC.

JUN 3 1988

JUN 3 1988

110-1
December 23, 1986

Mr. J. E. Grother:

Please refer to your letter of December 4, file 1000-40-A, requesting authority to execute agreements involving passenger trains/transit matters.

You are hereby authorized to execute agreements which pertain to passenger trains/transit operation matters. This authority applies with the respect to the following companies only:

Southern Pacific Transportation Company
St. Louis Southwestern Railway Company
Dallas Terminal Railway and Union Depot Company
Northwestern Pacific Railroad Company
Visalia Electric Railroad Company

You may, when the proposal has been approved, execute agreements except bonds and deeds. As an exception to this authority, you may execute agreements covering grants of easements or licenses to public bodies for passenger trains/transit operation purposes, which have been properly approved, if terminable upon abandonment by the user of the easement or license granted.

W. J. Lacy

cc: Mr. E. L. Johnson

Ex H. 4.B.

218-64
March 8, 1988

PERSONAL

Messrs. H. D. Fisher
R. D. Bredenberg
L. G. Simpson
L. F. Furlow
M. D. Ongerth
G. L. Pollitt
L. L. Phipps
K. L. Miller
E. L. Hord
G. D. Barnett
J. E. Grother
G. L. Murdock
P. D. Lively
J. D. Daniels
D. K. Medley
J. W. Lynch
G. A. Greblo
G. R. Fetty
M. L. Wells
A. M. Henson
L. L. Jenkins
R. R. McClanahan
J. W. Clark

Referring to my letter June 22, 1987, establishing a Special Awards Program for non-agreement employees whose efforts have significantly improved operating performance, productivity, or profitability and who have directed their attention to areas of greatest importance to the organization:

It is my pleasure to announce the top five candidates chosen to receive the Special Awards of $2,500:

Mr. J. E. Grother, General Manager-AMTRAK, Amtrak Department
Mr. D. J. Maxey, Geotechnical Engineer, Engineering Department
Mr. J. D. Puffer, Manager Divisions Clerical Operations, Operating Department
Mr. K. R. Regalia, Special Project Manager, Operating Department
Mr. M. D. Wasina, General Foreman, Mechanical Department

W. J. Lacy

EXH. 5

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179-0323

March 11, 1996

To: UP / SP Common Point Team Members / JOHN GROTHER

On November 30, 1995, Union Pacific and Southern Pacific filed the application for merger. This filing was the culmination of an enormous collective effort that began in August. Each of you contributed to this effort through your work with the Common Point team (made up of 38 individuals from both the Union Pacific and Southern Pacific).

During the two primary crunch months in particular, from our team's kickoff meeting on August 17 through the information transfer meetings on October 18, the travel and hours put in by each sub-team and team member were extraordinary (and somewhat unprecedented). The boxes of files in the Washington depository and quality of the operating plan are clear testimony to the Common Point team's contribution. These efforts will also help springboard the follow-up planning efforts for actual merger implementation, placing the railroad way ahead of where we have been in prior merger situations at a comparable time.

Please accept our sincere appreciation and thanks for your work on this project. As a further token and remembrance of this effort, we present you with the UP-SP Common Point Team watch (and regret that the process of obtaining and distributing it has taken as long as this).

Sincerely,

Richard Gray

Buck Hord

Brad King

N. NO.		NEW OFFICERS EA NO.
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	B T Wilson From PRA 207 11/16/79 to 5/15/80 #9497
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J C Wirich From PRA 457 11/16/79 to 5/15/80 #9537
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	R G Negrete From PRA 207 11/16/79 to 5/15/80 #6440
5	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79 to 5/15/80	U C Barton From PRA 207 11/16/79 to 5/15/80 #0494
	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J W Wilshire From PRA 207 11/16/79 to 5/15/80 #9499
	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	L G Powell From PRA 207 11/16/79 to 5/15/80 #7162
	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	M R Stearman From PRA 607 11/16/79 to 5/15/80 #8426
	Actg Asst Rd Foreman of Engs-Houston New posn. 11/16/79-5/15/80	J C Malone From PRA 607 11/16/79 to 5/15/80 #5436
	Coordinator-Performance Improvement Program-San F New posn. 11/16/79	J E Grother 11/16/79 THRU → 8/16/81
		L F Epperson To PRA 11/19/79
	Actg Asst Rd Foreman of Engs-Houston Formerly held by L F Epperson	Temp. vacant 11/20/79

OPERATING

EXH. 7

PeopleSoft

Report ID: upc41000

Page No. 1
Run Date 12/04/2001
Run Time 07:12:04

EMPLOYEE JOB WORK HISTORY

Empl ID: 0050020
SSAN: 526663917
NAME: Grother,John E

Exp Rtn Dt:
Serv Unit:

START/DT	TYPE CHG	STAT	TITLE	LOCATION	UNION	DEPT.	CO	JOBCD
08/16/01	NA Lat Lev	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
07/31/01	NABaseBen	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
04/01/01	NA Ttl Chg	Act	Mgr Imdl O	Houston, Tx	N/A	Supt South	01	N75532
03/01/01	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/00	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/99	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
03/01/98	NA-Merit	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
07/01/97	NA Demote	Act	Mgr Imdl O	Houston, Tx	N/A	Trns So Rg	01	N75532
04/16/97	NA SP-UP	Act	Sr Mgr Ter	Tucson, Az	N/A	Trns Ws Rg	01	N72007
09/16/95	NA Pro Exc	Act	Terminal S	Tucson, Az	N/A	Sp History	70	N88884
09/01/95	NA-Promo	Act	Sr Mgr Bud	San Franci, Ca	N/A	Sp History	70	N88884
05/01/94	NA Ttl Chg	Act	Sr Mgr Bud	San Franci, Ca	N/A	Sp History	70	N88884
09/01/92	NA Ttl Chg	Act	Mgr Joint	San Franci, Ca	N/A	Sp History	70	N88884
11/01/89	NA-Merit	Act	Gen Mgr Am	San Franci, Ca	N/A	Sp History	70	N88884
01/01/88	NA Ttl Chg	Act	Gen Mgr Am	San Franci, Ca	N/A	Sp History	70	N88884
01/01/87	N/A Salary	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
12/01/86	N/A Salary	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/85	NA Ttl Chg	Act	Asst Div S	Los Angele, Ca	N/A	Sp History	70	N88884
05/01/85	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
[illegible]84	N/A Salary	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
[illegible]83	NA Ttl Chg	Act	Asst To Vp	San Franci, Ca	N/A	Sp History	70	N88884
06/01/82	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
05/01/81	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
07/01/80	N/A Salary	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
06/01/80	NA Ttl Chg	Act	Terminal S	Avondale, La	N/A	Sp History	70	N88884
11/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
09/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
03/01/79	N/A Salary	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
06/01/78	NA Ttl Chg	Act	Staff Asst	San Franci, Ca	N/A	Sp History	70	N88884
03/01/78	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
12/01/77	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
05/01/77	N/A Salary	Act	Service De	San Franci, Ca	N/A	Sp History	70	N88884
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
12/01/75	N/A Salary	Act	Planner	Los Angele, Ca	N/A	Sp History	70	N88884
06/01/75	NA Ttl Chg	Act	Planner	Los Angele, Ca	N/A	Sp History	70	N88884
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

CUTOVER IS ICS COMPUTER SYSTEM OF UPRR WHICH DID NOT ROLLOUT UNTIL OCTOBER 1, 1997.

This is G o o g l e's cache of http://members.aol.com/blewestern/4-97.htm.
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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

```
 OOOOOO  PPPPPPP  RRRRRR      JJ EEEEEE  GGGGGG
OOOOOOOO PPPPPPPP RRRRRRR     JJ EEEEEE GGGGGGGG
OO    OO PP    PP RR    RR     JJ EE     GG
OO    OO PPPPPPPP RRRRRRR     JJ EEEEEE GG  GGGG
OO    OO PPPPPPP  RRRRRRR JJ  JJ EEEEEE GG  GGGG
OO    OO PP       RR RR   JJ  JJ EE     GG    GG
OOOOOOOO PP       RR  RR  JJJJJJ EEEEEE GGGGGGGG
 OOOOOO  PP       RR   RR  JJJJ  EEEEEE  GGGGGG
```

FROM: OPRMXG --SPTSVM02 DATE AND TIME 01/28/97 12:48:01
TO: OPRPAL --SPTSVM02 LOBELLO, PAUL OPRDSP --SPTSVM02 PAYAWAL, DAN
OPRDLH --SPTSVM02 HAMPTON, D.
CC: OPRHLM --SPTSVM02 MCDOWELL, LAWSON OPRJEG --SPTSVM02 GROTHER, JOHN

FROM: MAI
SUBJECT: INTERVIEW SCHEDULE WITH SUPT WED 1-29-97 AT TUCSON
PLEASE ARRANGE TO MEET WITH THE SUPERINTENDENT ON WEDNESDAY 1-29-97 TO BE INTERVIEWED AT THE TIME INDICATED BELOW:

PAUL LOBELLO	-	7:30 AM
DAVE HAMPTON	-	8:30 AM
DAN PAYAWAL	-	3:30 PM

YOU DON'T NEED TO BRING ANYTHING TO THE INTERVIEW. THE INTERVIEW WILL LAST ABOUT 45 MINS.

THANKS!
END

JRG DETERMINED A KEEPER EARLIER AND NOT INTERVIEWED! FOR SRMTO

EXH. 10

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 000000  PPPPPPP  RRRRRR       JJ EEEEEE  GGGGGGG
00000000 PPPPPPPP RRRRRRR      JJ EEEEEE GGGGGGGG
00    00 PP    PP RR    RR     JJ EE      GG
00    00 PPPPPPPP RRRRRRR      JJ EEEEEE GG  GGGG
00    00 PPPPPPP  RRRRRRR JJ   JJ EEEEEE GG  GGGG
00    00 PP       RR RR   JJ   JJ EE      GG    GG
00000000 PP       RR  RR  JJJJJJ EEEEEE GGGGGGGG
 000000  PP       RR   RR  JJJJ  EEEEEE  GGGGGGG
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ROM: OPRJEG --SPTSVM02 DATE AND TIME 07/15/97 23:37:01
O: OPRJEG --SPTSVM02 GROTHER, JOHN

ROM: JOHN GROTHER, TERMINAL SUPERINTENDENT 629-2191/2120
UBJECT: LETTER TO DAVIS

R. J. E. DAVIS JULY 15, 1997
'RESIDENT AND CEO

EAR MR. DAVIS,

LETTER CONCERNS MY JULY 1, 1997 DOWNGRADE (ON FOUR DAYS NOTICE)
ROM SENIOR MANAGER TRAIN OPERATIONS AT TUCSON, AZ ($6,200/MO) TO
ANAGER INTERMODAL OPERATIONS AT HOUSTON, TX ($4,928/MO), A 21%
AGE REDUCTION AFTER 28 YEARS OF LOYAL AND DEDICATED SERVICE (SINCE
989, I RECEIVED ONE $60/MO RAISE IN SEP 1995 WHEN TRANSFERRED TO TUCSON).

T IS WITH HEAVY HEART THAT I AM WRITING YOU IN AN ATTEMPT TO RECONCILE
OW THE "UP VALUES SYSTEM" AND THE ISSUES OF DESCRIMINATION RELATE TO MY
UDDEN DOWNGRADE. I HAD NO INDICATION OF PERSONAL UNSATISFACTORY PERFORMANCE
EFOREHAND, 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
TANDING 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"

F COURSE I UNDERSTOOD THAT TUCSON WAS UNDER EXTREME PRESSURE DUE TO THE ARTIAL CLOSURE OF PHOENIX YARD; BUT, THE RESOURCES I REQUESTED TO KEEP UCSON CURRENT WERE NOT PROVIDED. TO ILLUSTRATE, TUCSON WAS IN THE POSITION IF NOT BEING ABLE TO ADD MORE SWITCH ENGINES OR CALL EXTRAS AS NEEDED UNTIL UNE 26, 1997, THE DAY THAT SIX AUGMENTORS WERE FINALLY ALLOWED ON THE TUCSON OARD AND THE DAY I WAS INFORMED OF MY DOWNGRADE (I HAD REQUESTED MORE WITCHMEN IN WRITING FOR OVER A YEAR BEFORE THESE AUGMENTORS WERE ALLOWED). N ADDITION, ON THIS SAME DAY, I WAS REQUESTED TO SIGN A NOTICE THAT ALLOWED UCSON TO MILL RUN TOGETHER CERTAIN TRAFFIC WHICH ELIMINATED SOME OF THE ULTIPLE HANDLING ON OUR 1% GRADE WITH A FOREMAN AND ONE SWITCHMAN. SEVERAL THER CHANGES HAVE BEEN ALLOWED SINCE MY DOWNGRADE WHICH HAD BEEN PREVIOUSLY EQUESTED INCLUDING BUT NOT LIMITED TO OPERATING THE LAPXM DIRECTLY TO PHX N LIEU OF SWITCHING AT TUCSON, ADDITIONAL PERSONNEL AT PHOENIX, PICACHO UCSON, BLOCKING CONSOLIDATIONS/CHANGES, IMPROVED COMMUNICATIONS IN HE 22ND STREET TOWER, ADDITIONAL LOCOMOTIVES IN SHUTTLE SERVICE BETWEEN UCSON AND PHOENIX, ADDITIONAL TRACKAGE TO MAKE BLOCKS/HOLD INTERMODAL QUIPMENT AND SO FORTH.

ONCERNING THE SPECIFIC CRITICISM THAT ONE YARDMASTER DID NOT START HIS OBS IN A PROMPT FASHION ON TWO DIFFERENT OCCASIONS, THAT ACT IS DIRECTLY ELATED TO YARDMASTER DISSIBIO'S EFFORTS TO PERSUADE HIS SENIOR MANAGER UDIENCE TO RESTORE AN ADDITIONAL YDM POSITION IN THE TOWER, WHILE KEEPING HE 36TH ST YARDMASTER POSITION. IN LIEU OF CONSIDERING DISSIBIO'S ACTIONS S REPRESENTATIVE OF THE TERMINAL, DISSIBIO SHOULD HAVE BEEN HELD ACCOUNTABLE Y THOSE WHO DIRECTLY OBSERVED HIS ACTIONS BASED ON PROGRESSIVE DISCIPLINE.

E CONTINUED TO RECEIVE SOME PROFS INFORMATION ON CONTINUING CHANGES TO THE PHOENIX REPLAN, SOME OF WHICH IS NOTED AS AN URGENT CHANGE ON THE SUBJECT LINE AND THEN SHOWN AS "DELIVERY PRIOITY: NORMAL AND DELIVERY REPORT

: BASIC" CONCERNING A MULTITUDE OF PHX REPLAN CHANGES (ATTCH WAS NOT URGENT).

IS NOTHING "NORMAL OR BASIC" ABOUT THE IMPACT OF THE PHOENIX REPLAN
MYSELF AND MY FAMILY; ESPECIALLY CONSIDERING THE PLAN WAS NOT MINE AND THE
SSENTIAL RESOURCES WERE NOT PROVIDED AS REQUESTED UNTIL MY DOWNGRADE.

FTER MUCH REFLECTION, I WRITE THIS LETTER IN THE HOPE THAT I COULD POSSIBLY
ETAIN SOME TYPE OF MTO POSITION (IF NOT THE SENIOR MTO) IN THE ARIZONA AREA
ND WITHOUT THE 21% 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.

URSE, 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"
)

```
          OOOOOO    PPPPPP   RRRRRR       JJ EE   EE  GGGGGGG
         OOOOOOOO PPPPPPPP RRRRRRR      JJ EEEEEE GGGGGGGG
         OO     OO PP     PP RR    RR      JJ EE      GG
         OO     OO PPPPPPPP RRRRRRR      JJ EEEEEE GG  GGGG
         OO     OO PPPPPPP  RRRRRRR JJ   JJ EEEEEE GG  GGGG
         OO     OO PP       RR RR   JJ   JJ EE      GG    GG
         OOOOOOOO PP       RR  RR  JJJJJJ EEEEEE GGGGGGGG
          OOOOOO  PP       RR   RR  JJJJ  EEEEEE  GGGGGGG
```

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)
ATE: 04-22-97 12:07:26 PM
UBJECT: TUCSON BEER BLOCK - LATC - LATUM

IKE, PLEASE UPDATE TAG TABLE AT LA TO PROVIDE A 281 (TUCSON) TAG FOR BEER
ESTINED TO TEMPE (27050)
HIS WILL SUPPORT A PURE PHOENIX HEAD END BLOCK FOR TUCSON TO SETOVER TO TUPXF
HEN CLOSE CONNECTION
EQUIRES. THE TEMPE TRAFFIC MOVES ON A LATER CONNECTION AND CAN BE SWITCHED
UT OF THE TUCSON SWITCH
[illegible] TO MAKE THAT CONNECTION CONSISTENTLY.

ELIVERY PRIORITY: NORMAL
ELIVERY REPORT: BASIC

)

9608 0 6 2223 07/15/97 U610 X8 N078 VB99801

1. THIS HAS BEEN CHANGED SINCE TO DIRECT LAPXM TO PHX.

2. ILLUSTRATES "PRIORITY AND URGENCY" FOR WHICH I WAS DOWNGRADED OTHERS PLANNED, I WAS SCAPEGOAT.

EXH. 11

UNION PACIFIC RAILROAD COMPANY

JERRY DAVIS
PRESIDENT AND
CHIEF OPERATING OFFICER

1416 DODGE STREET
ROOM 1230
OMAHA, NEBRASKA 68179-1230

September 4, 1997

Mr. John Grother
Manager-Intermodal Operations
Union Pacific Railroad Company
6800 Kirkpatrick Boulevard
Houston, TX 77026-3995

Dear John:

Thank you for your letter of July 15 concerning your transfer from Tucson to Houston. I appreciate your feedback and understand the difficulties you may be experiencing as a result of your reassignment.

Brad King, Vice President-Transportation, tells me that there were many factors contributing to the problems at Tucson. In June, the service levels to our customers, both external and internal, deteriorated to the point where immediate action had to be taken. We believe that a change in management was necessary for improvement to occur.

While it is not always easy, changes in staffing are sometimes necessary as we look at our work force and strive to handle all the business that comes our way. I'm sure you can understand that Union Pacific must continually fine tune our operations so that we can be more efficient and responsive to customer needs.

Again, thank you for your letter and your continued commitment to our company.

Sincerely,

Jerry Davis

EXHIBIT 12

FOR TUCSON MAY-JUNE 97 DURING PEAK OF YARD CONSOLIDATION PHX. INTO TUCSON (MERGER EXPERIMENT)

1) EVEN WEST COLTON WAS STILL RUNNING TRAINS INTO TUCSON (OUT OF CONTRO 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!!

QQKQQQ PP RR RR JJJJ EEEEEE QQQQQQQ

DM: DJBLAKE --NOTES DATE AND TIME 06/10/97 10:48:34
DM: DAVE J. BLAKESUP (DJBLAKE § NOTES)

: ROGER J. NOUREY § UP (RJNOUREY § NOTES) - Gave
OPRWZF § SPTSVM02 (OPRWZF § SPTSVM02),
JOHN E. READY § UP (JEREADY § NOTES),
ROBERT S. JONES (OPRRXJ § SPTSVM02),
HUGH J. ROGER § UP (HJROGER § NOTES) Gene Bryant
BILL R. WILKIE (OPUBRW § SPTSVM02) Tom W. Colton
: JIM P. KOSCIELNIAK (OPRJPK § SPTSVM02),
JOHN E. GROTHER (OPRJEG § SPTSVM02),
LAWSON MCDOWELL § UP (LMCDOWEL § NOTES), St Louis
KEN L. CARGILE § UP (KLCARGIL § NOTES),
GARY R. DAVIDSON § UP (GRDAVIDS § NOTES) - San Antonio
MICHAEL J. GORMAN § UP (MJGORMAN § NOTES),
KEN C. PACKARD § UP (KCPACKAR § NOTES) - Omaha
PAUL R. FLOWERS § UP (PRFLOWER § NOTES)
TE: 06-10-97 10:53:22 AM
BJECT: 1MLATU 09 BLOCKING

REVIEWED CONSIST ON 1MLATU 09 OUT OF GLANIS (AEI CORRECTED)

E BLOCKING ON THIS SCHEDULE OUT OF WEST COLTN (CORRECTED) IS AS FOLLOWS:

5 - 280 TUCSON (FROM LA)
2 - 270 PHOENIX(FROM LA) FOR SETOUT PICACHO FOR ATUPX
3 - 280 TUCSON (FROM WCLTN)
- 270 PHOENIX (FROM WCLTN) FOR SETOUT PICACHO FOR ATUPX
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
CEPTIONS:

CONSIST OUT OF WEST COLTON INDICATED 95% CORRECT BLOCKING. REVISED AEI NSIST INDICATES MILLRUN 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

EXH. 13

[redacted], 1999

ter Some Crippling Chaos,
ion Pacific Can See the Light
/ DANIEL MACHALABA
aff Reporter of THE WALL STREET JOURNAL

OUSTON – 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) miles per hour.

hat would have been an uncommon sight around this hub in the troubled eriod of 1997-98, when hardly anything moved fast enough to generate more ian 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 vo-thirds of the U.S. – had turned into a nightmare. Freight service had ollapsed, stranding Midwestern crops, snarling West Coast ports and elaying shipments of goods from chemicals to paper. A string of fatal ccidents had the Federal Railroad Administration blaming a "fundamental reakdown" in safety.

[redacted]of addressing the mess fell to Richard Davidson, Union Pacific's hairman and chief executive, who also was in charge during the railroad's reakdown. 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, evamped 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 of railroad companies.

"You're sort of a gunslinger," Mr. Davidson says. "Sometimes you make the decision and then analyze the problem." His managers use similar language to describe the old days of leading by fear. "When something happened, you pulled out your gun and shot the guy in charge of the territory," says John Rebensdorf, a vice president of the company's railroad subsidiary, Union Pacific Railroad Co. "Now, you find out why it happened and make sure it doesn't happen again."

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, r[redacted]culture, which seemed to discourage teamwork and communication. [redacted]ulture 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

[redacted]000 employees. He is setting up a unit to coordinate planning [redacted]the company's sales force and its operating managers, and boosting apital spending to make up for years of cutbacks.

ast September, Mr. Davidson met with 100 Union Pacific field officers in Kansas City, Mo., and urged them to undergo a personal transformation. Then e shared the results of a review by his senior managers that depicted him s cold, aloof, too demanding, resistant to innovation and reluctant to raise. "It's like an alcoholic," he says. "To get better, you have to admit our weakness."

Mr. Davidson is shifting authority from the Omaha headquarters to managers n the field. Central management was making many of the daily decisions such as when and how to run trains. "We're a detail business, but it was too much detail at the wrong level," says Brad King, a Union Pacific Railroad executive vice president. Some executives are now urging Mr. Davidson to vacate the railroad's command center in Omaha. Already, some dispatchers have been moved to Houston, Fort Worth, Texas, and Southern California to be closer to their territories.

Strike Teams and Loops

The devolution began to make itself felt after the railroad's breakup into three regions last summer. Jeff Verhaal, who heads the company's western region, sent out roving "strike teams" of repairmen to the California desert [redacted]dle 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

M[redacted]be not all of them. Mr. Davidson's personal style still draws criticism. [redacted]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
e trying to do will probably take five years," says Robert Bauman, a Union
cific director. But riding with Mr. Davidson on inspection trains through
l states, it's possible to find a number of places where the company
pears to be back on track.

nion Pacific Announces Plans to Repurchase Track, Save Lines (Aug. 25, 1998)

nion Pacific Is to Restructure Centralization of Management (Aug. 20, 1998)

ne last car on the inspection train is called the theater car. Its seats
ce backward, toward a large rear window through which Mr. Davidson and his
ecutives watch the track stretching out behind them. The boss discusses
ans to expand mainline tracks in Kansas and Nebraska to handle more
ains. He chides his chief engineer for a rough ride the night before. "I
d a nightmare that I was on a bucking bronco and was about to fall off the
rse," Mr. Davidson says.

t one point in Nebraska, he can hardly contain his glee when his train
ces 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."

nother time, though, Mr. Davidson appears glum when he sees that rainy
eather 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
om its worst crisis and one that has spurred a backlash against railroads.
ustomers angry about lost shipments and delayed freight have been heaping
lame on big rail mergers and clamoring for stiffer federal regulation.
lthough railroads still haul about 40% of the nation's freight traffic,
eflecting their lock on bulk shipments of coal and grain, their spotty
elivery record has sent many of the more lucrative consumer-goods shipments
o trucks. Trucks have boosted their share of the nation's freight bill to
0% from 77% in 1990.

Overhauling Union Pacific is a critical test for Mr. Davidson, the only pure
ailroader heading one of the major U.S. railroads. He started as a brakeman
n 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.
s 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."

What 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

ess has been made elsewhere, with the man and the railroad. Union acific executives say Mr. Davidson is more relaxed now that the trauma of ie service crisis is behind him and the company has sold off businesses he idn't care about. (The latest slated for disposal is trucking firm Overnite ransportation.) His personal life, too, has settled down. Twice divorced, Ir. Davidson last year married a woman who worked for Union Pacific in ommunity affairs for nearly 20 years.

le keeps his old workaholic ways, arriving at the office by 6 a.m., and says e doesn't have time for hobbies except raising cattle in his hometown of ulen, Kan., and working out. A former baggage car on his inspection train as been converted into an exercise room.

)n the business side, freight-car inventory, a measure of congestion, is 15% etter than at the worst of the crisis. Average train speeds -- a key neasure for timely delivery -- are up, which means that trains are less requently having their top speed of 70 mph dragged down by being stalled or orced to roll at a snail's pace through congested yards. The number of idings blocked by stalled trains is down, which is essential in the many laces where sidings provide two-way traffic for single tracks. Even in louston, the center of the service meltdown, the tracks are clear. A year go a long row of parked freight trains there was "like a big billboard aying, '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 ought 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

[redacted] Williams, manager of transportation services at Roseburg Forest [redacted] Co. in Roseburg, Ore. "You just can't count on them to deliver on [redacted]." 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" is giving way to a gentler approach; Union Pacific recently opened a spiffy new yard in California with such gradual slopes that cars glide to a stop.

He wants to use the Internet and make it easier to do business with railroads. When Union Pacific sent salespeople to the Los Angeles area, some potential customers didn't know anything about the company. "They think Union Pacific was a movie made in 1939," he says.

There's a lot at stake, says Dennis Duffy, executive vice president of [redacted]s of Union Pacific Railroad, and some say a potential Davidson [redacted]ssor. "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."

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part1_dec44353.24f82f9e_boundary--

---------- Headers ----------
Return-Path: <dennishoes@earthlink.net>
Received: from rly-za01.mx.aol.com (rly-za01.mail.aol.com [172.31.36.97]) by air-za03.mail.aol.com (v60.28) with ESMTP; Fri, 27 Aug 1999 15:27:30 -0400
Received: from snipe.prod.itd.earthlink.net (snipe.prod.itd.earthlink.net [207.217.120.62]) by rly-za01.mx.aol.com (v60.28) with ESMTP; Fri, 27 Aug 1999 15:27:02 -0400
Received: from earthlink.net (pool0362.cvx10-bradley.dialup.earthlink.net [209.178.183.107])
by snipe.prod.itd.earthlink.net (8.9.3/8.9.3) with ESMTP id MAA18955;
[redacted]7 Aug 1999 12:26:48 -0700 (PDT)
Message-ID: <37C6E638.D9004A71@earthlink.net>
Date: Fri, 27 Aug 1999 12:25:45 -0700

* QUALITY PROCESS NOT USED IN GROTHER'S DEMOTION !!

EXH. 13 A

Linda D. Buttrill
12/23/2002 11:53 AM = ONE MONTH FOR 1/6th OF DATA REQUESTED

To: John E. Grother MORE "DEAD-ENDS" = See 18C REQUEST
cc:

Subject: Re: PDR'S

John, this has really been a difficult time of the year - a mountain of reports due. But I have checked the data base and there is only one (1) PDR in the Southern Region system for you, that is January 2000 thru December 2000. I am sending it, via U.S.Mail, today. When the Intermodal group left the region, I no longer had access to their files. You might want to check with Fryar.

John E. Grother

John E. Grother
11/26/2002 01:19 AM

To: Linda D. Buttrill@UP
cc:

Subject: PDR'S

WOULD APPRECIATE COPIES OF MY PDR'S FOR THE LAST SIX (6) YEARS BEING MAILED TO MY HOME ADRRESS BELOW:

1718 RUSTIC PARK DRIVE
KINGWOOD, TX 77339

EXH. 13B

NO RESPONSE

USUAL DEADEND

John E. Grother
11/26/2002 01:14 AM

To: Don F. Fryar (DIRECT SUPERVISOR)
cc:

Subject: PDR'S

WOULD APPRECIATE COPIES OF MY PDR'S FOR PAST 5 YEARS BEING MAILED TO MY RESIDENCE WHILE I AM RECOVERING SUCH THAT I MAY REVIEW MY POSITIVES AND NEGATIVES.

Exh. 13C

Union Pacific Railroad
Attn: Ms. Linda Buttrill
24125 Aldine-Westfield Road
Spring, TX. 77373

December 30, 2002

NO RESPONSE TO DATE

MORE DEADEND

Dear Ms. Buttrill,

This refers to attached copy of request for six (6) years of PDR reports.

I appreciate the Performance Development Report (PDR) which you sent for the year 2000 and your advice to contact Mr. Fryar. I did contact Mr. Fryar with a written lotus request dated 11/26/02; however, he choose not to respond thus far and Mr. Fryar appears to be on 2002 vacation until the date of his retirement (Feb 1, 2003). Therefore, that suggestion is another dead-end.

Do you have anyway to obtain the missing PDR REPORTS from Premium Services for 2001 and 2002?

Moreover, do you have anyway to obtain the Service Unit PDR's for 1996 through 1999? I am especially interested in 1996-1997.

I have requested copies of these for each of the foregoing years; yet, Mr. Fryar choose not to provide them, just as Mr. Fryar has done this time.

Thanking you in advance for your cooperation. Please send the requested data to my home address.

John Grother JG

Attach: Grother lotus note 11/26/02
Buttrill lotus note 12/23/02

Exh. 14

DEMOTION POLICY 1997 Rev. 3/1/96

Demotion justification	If an employee is transferred to a lower job grade due to his/her inability to perform the duties of the prior position, the SRG and job grade of the new (lower) position will apply on the effective date of the transfer.
What about salary changes?	In most cases, the employee's present salary level is retained. However, if you believe a salary adjustment is warranted, provide Operating HR with your justification and we will try to obtain Railroad HR sign-off on the 15121.
What if it isn't a demotion?	If an employee is transferred to a lower grade for reasons other than performance, use "other" on the 15121 with reasons noted in the "comments" section of the form.

EXHIBIT 15

PARTIAL LIST OF PRIOR TO THE MERGER UNION PACIFIC MANAGERS WHOSE TITLES AND RESPONSIBILITIES WERE REDUCED IN 1996-1997; BUT , WITHOUT ANY KNOWN REDUCTION IN THEIR MONTHLY COMPENSATION

NAME	FROM JOB TO JOB
$ CHARLES O. MALONE	HOUSTON HUB GENERAL MANAGER TO OMAHA DISPATCH CENTER
$ GREGORY "BUBBA" GARRISON	HOUSTON SR DTO TO OMAHA STAFF
THEODORE F. INGRAM	HIGH LEVEL SAFETY STAFF POSITION - FIELD MTO AT TUCSON. (DEMOTED TWO + SALARY RATE GRADES; BUT, NO PAY CUT.
# RAY J. PERRY	HOUSTON SR DTO TO OMAHA STAFF

$ SEE EXHIBIT 16 FOR DESCRIPTION OF SEVERE SERVICE ISSUES IN HOUSTON & GULF COAST WHICH RESULTED IN NUMEROUS SETTLEMENTS WITH CUSTOMERS, LAWSUITS, AND SO FORTH; BUT, NO REDUCTION IN THE PAY FOR THE ABOVE MANAGERS.

(IN COMPARISON, GROTHER'S TERRITORY HAD NO SUCH LAWSUITS AND HUGE SETTLEMENTS WHEN GROTHER WAS REMOVED ACCOUNT "WE WANT UNION PACIFIC PEOPLE IN TUCSON")

"RE-ASSIGNED" IN 2001 FROM HOUSTON WITH NO CUT IN PAY.

EXH. 16

Union Pacific workers shun OT

Railroad making management changes to deal with backlogs

12/24/97

By CHARLES BOISSEAU
Houston Chronicle

Union Pacific Railroad reported Tuesday its freight delays worsened in the past week because it is shorthanded as more train crews are taking time off, presumably for the Christmas holidays.

Also, the Omaha, Neb.-based railroad said it reassigned its two top supervisors in the Houston area and will bring in a new manager with more authority to oversee its troubled Gulf Coast operations.

In its weekly filing to the U.S. Surface Transportation Board, the nation's largest railroad said that "over the last two weeks, UP ... experienced a deterioration in service in the Gulf Coast area."

As a result, the railroad's average train speed slipped last week to an average of 14.1 mph from 14.2 mph.

The slowdown forced the number of freight cars on the railroad's 36,000-mile system to swell by 3,616 cars to 336,863. That's 27,000 cars above the desired maximum and the highest since the week before Thanksgiving.

Since summer, Union Pacific has been struggling with an unprecedented traffic jam that began in the Houston area and has spread throughout much of its 36,000-mile system. To try to resolve the congestion, the STB imposed an emergency order until March 15 to allow competitors to operate more freely over Union Pacific's lines in the Houston area.

Union Pacific spokesman John Bromley said the deterioration is "almost entirely due to a shortage of train crews. This is concentrated in the Houston area and the Houston to New Orleans line."

"It's worse this time than it traditionally is," Bromley said.

He speculated that workers are "laying off" and not reporting for work because they've already put in such long hours and may feel they've made enough money.

"A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year," Bromley said.

Asked if the company still hopes to get operations running normally by Jan. 1 as it has promised federal regulators, Bromley said: "It's going to be pretty hard to do, with this crew shortage."

Union Pacific also mentioned in its filing with the Surface Transportation Board that service suffered as "personnel and shippers have been learning to operate new routes and use new tools" since the carrier switched over former Southern Pacific lines in the Houston area to Union Pacific's computer system.

> 'A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year.'
>
> **John Bromley, Union Pacific spokesman**

To help catch up in the Gulf Coast region, Union Pacific said it will continue to operate through Christmas, while most of the rest of its mainline operations will shut down late Christmas Eve through Christmas Day.

Texas Railroad Commission Chairman Charles Matthews said the worsening service "points out that until the STB ... revisits the UP-SP merger and begins to make some meaningful changes, in particular in the Houston and Gulf Coast area, this rail crisis is going to drag on longer than anybody expected."

He reiterated his support for a commission plan that would force Union Pacific to divest a substantial amount of track in the Houston area to increase competition.

Union Pacific also confirmed a number of personnel changes at its local offices, located in Spring.

Effective Jan. 1, Houston hub General Manager Charles Malone – the railroad's top local manager here as the traffic jam began and worsened this summer and fall – was reassigned to the carrier's Omaha, Neb., dispatch center.

Malone is being replaced by Ed Handley, an ex-safety project coordinator for the Federal Railroad Administration whom Union Pacific hired in October as an assistant general manager.

Union Pacific also said it will beef up local management here by creating a new job with more authority.

Steve Barkley – who manages Union Pacific's massive central dispatching center in a football-field-size bunker beneath Omaha – was given a new position in charge of the railroad's Southern and Central Region. His official title will be announced after approval by the railroad's board of directors, Bromley said. Barkley will relocate here after Jan. 1. Handley will report to Barkley.

Moreover, the carrier said it reassigned Greg Garrison, who had served as Union Pacific's No. 2 local manager as superintendent, transportation services. Replacing Garrison will be Ray Perry, who currently is in charge of the carrier's massive North Platte, Neb., terminal. Garrison was relocated to Omaha with an unknown title, Bromley said. Also, an existing superintendent here, Jeff Crandall, was promoted to general superintendent, transportation.

Union Pacific, by far the largest railroad in the Houston area, employs slightly more than 2,000 workers in Harris County.

Asked if the carrier was displeased with the jobs done by the displaced managers, Bromley said: "We're trying to strengthen the management down there and put the best people in the best slots."

EXH. 19

Union Pacific reports progress on slowdown

Train speeds improve slightly, filing states

DATED 1/14/98

By CHARLES BOISSEAU
Houston Chronicle

Union Pacific Railroad reported Tuesday it is making progress in recovering from a traffic slowdown during the holidays.

In a weekly filing with federal regulators, the carrier said average train speeds hit 14.6 mph in the week ended Jan. 9, up from 12.3 mph the previous week. The average was the fastest since Union Pacific began providing the data in mid-September, but still below the 17.9 mph average a year ago.

Because of the faster traffic, the Omaha, Neb.-based railroad was able to move about 7,000 cars from its system, leaving it with 333,193. Officials said 310,000 is the maximum cars Union Pacific's 36,000-mile system can support without delays like those that have plagued the railroad for months and provoked the ire of shippers and regulators.

"The numbers show we are making some improvements," Union Pacific spokesman John Bromley said. "Basically we're seeing a pretty fluid (railroad) with the exception of that one area where all this started."

Bromley referred to the Houston terminal — where the railroad's congestion problems began last summer — and the Houston-to-New Orleans corridor. In these areas, traffic "still is pretty congested," he said.

The railroad hopes for improvements here in early February when it starts operating trains in two directions over tracks running from Houston to Memphis, Tenn., and southern Missouri. One track will be used exclusively for northbound freight, another for southbound traffic.

The railroad's recovery efforts had faltered the last two weeks, as it reported many train workers chose to stay home for the holidays. But in its latest report to the Surface Transportation Board, the railroad said fewer trains are now delayed because of a lack of manpower.

Also on Tuesday, a Union Pacific freight train derailed at 3:25 a.m. igniting a fire on a busy corridor in east Fort Worth, damaging a trestle spanning the Trinity River. No injuries were reported in the derailment, which involved eight cars, with one carrying a load of salt and the others empty, Bromley said.

Union Pacific has been under fire since last summer because of traffic congestion and safety problems that have plagued its operations. The widespread delays have caused additional costs estimated in the hundreds of millions of dollars for scores of shippers.

Many customers and state regulators have blamed the problems on the merger with Southern Pacific Rail Corp., which made Union Pacific once again the nation's largest railroad and gave it a commanding share of the Houston and Gulf Coast market — Texas' busiest rail corridor.

Because of the service problems, the federal Surface Transportation Board has issued an emergency order until March 15 that, among other things, requires Union Pacific to report on its progress each week.

For its part, Burlington Northern Santa Fe Railway Co. — the nation's second-largest carrier — said in its own quarterly progress report to the STB that Union Pacific's congestion has hampered its ability to serve the area.

Burlington Northern said because of the congestion it "has serious reservations about its ability long-term to fulfill the competitive role" the railroad and the agency had anticipated.

"BNSF's operational experiences to date, in light of the cost and unreliability of service over the trackage rights lines, raise serious questions as to whether BNSF will be able to provide rail customers viable long-term competitive service, particularly in South Texas and along the Gulf Coast," the carrier said.

The Fort Worth-based railroad was granted the right to operate over Union Pacific tracks as a condition of the UP-Southern Pacific merger.

Burlington Northern spokesman Jim Sabourin said Tuesday, "At this point we're not asking for anything specific (from the board). We are continuing to bring this to the board's attention.

"We are unable to take advantage or capitalize on the trackage rights because of the congestion," he said.

EXH. 2E
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 ballyhooed buyout of Southern Pacific Rail Corp.

By DANIEL MACHALABA
The Wall Street Journal

Its railroad safety record, marred by three fatal crashes in three months, is being characterized as a "fundamental breakdown" by federal regulators. Its route system west of the Mississippi River has slipped into near gridlock in many places, with thousands of freight cars backed up in the Houston area alone. Its chairman was forced to publicly apologize in August to its big customers.

So bad has service become that customers say Union Pacific Corp., the nation's largest railroad, can't account for millions of dollars of shipments for weeks at a time. Riviana Foods Corp., a Texas rice producer, tried to ship a freight car full of rice from Missouri to Tennessee in early August. A month later, the car was spotted on a track in Devil's Slide, Utah. The latest word is that it was somewhere in Texas. "I still don't know where it's at," says Terry Nickens, Riviana's distribution manager.

Is this any way to run a railroad?

Union Pacific's attempts to put together the biggest railroad merger in history is fast becoming one of the industry's biggest debacles. With high hopes last year, the company bought Southern Pacific Rail Corp. for $3.9 billion and promised to begin merging the systems this summer into a seamless link between the West Coast and the Midwest.

Instead, with amazing speed, the merger has unraveled in recent weeks into a series of service and safety quagmires. Analysts estimate the carrier has already lost about $125 million in revenue as customers diverted shipments. Hundreds of customers have threatened to take away business, and the Federal Railroad Administration could well impose stiff fines on the company for safety violations. The company concedes that its ser-

Please see RAIL Page 4

RAIL: Company hurt by self-professed arrogance

EXH 20 (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 railroading.

"They thought they could conquer the world," says William Withuhn, transportation curator at the Smithsonian Institution in Washington, D.C., and a widely recognized expert on railroads. "They were counting on having a great success. But they just didn't plan it right. It fell apart."

Union Pacific acknowledges that it has been caught by surprise — and humbled by the experience. Richard Davidson, its chief executive, said in an interview after a recent meeting with more than 200 angry chemical-company officials and other shippers in Houston: "I never imagined in my wildest dreams that I'd be down here apologizing for our service." Wednesday, a Union Pacific spokesman said, "There's no denying we have severe service problems, but we are making headway."

The carrier's executives concede that they overestimated their ability to combine giant rail systems operating hundreds of thousands of freight cars. Its own long record of success, unmatched through much of the late 1980s and early 1990s, might have bred overconfidence. "We are arrogant," Greg Garrison, Union Pacific's Houston superintendent, said last month. "We consider ourselves the best."

Union Pacific's woes raise troubling questions about how well railroads can transport goods in the nation's ever-growing economy. For more than a decade, the industry has been on an unprecedented merger binge that was supposed to give the remaining five powerful railroads a better chance at competing against trucks, which now earn nearly 80 percent of the nation's freight revenues. That improvement, in turn, was supposed to help reduce everything from highway congestion to air pollution to fuel consumption. Consumers would gain, too, because railroads can haul goods about 20 percent more cheaply than trucks can, with much of the saving to be passed on to the public.

But Union Pacific's problems suggest that the railroads are a long way from fulfilling this promise and that shippers might be discouraged from using them. Chemical companies on the Gulf Coast have been switching to trucks whenever possible because Union Pacific's delays have cost them an estimated $100 million in plant closings, lost revenues and extra expenses.

In Waverly, Ohio, Mill's Pride Inc., a maker of prefabricated kitchens that had turned to railroads to save money, says it has dropped Union Pacific and the railroad industry entirely.

"They give us excuses. They have derailments, floods, breakdowns, snow, just stuff you wouldn't think would happen," says Armando Sanchez, the distribution manager.

A Union Pacific spokesman says floods in Texas as well as hurricane-related damage in the Gulf Coast region compounded the problems. The company tried to persuade its labor unions to agree to new flexible work rules, but the unions didn't go along until last month. By then, the snarl had spread to Union Pacific's facilities in the Los Angeles/Long Beach harbor complex, where as many as 3,000 containerized shipments have been piling up for lack of freight cars. "I've never seen it this bad," says David McLean, director of global marketing for Circle International Inc. of San Francisco, which arranges freight transportation for major firms.

Through its buyouts, Union Pacific also encouraged an exodus of many Southern Pacific executives and managers, whom industry officials said were s[illegible] at keeping the weaker line [illegible]

→ FOR DEMOTION

EXH. 19

ESS

Dow Jones	NYSE	Amex	NASDAQ	Gold
+101.87	+6.64	+5.00	+25.34	-1.1
Close 7,826.61	Close 500.54	Close 672.85	Close 1,626.56	Close 303

Railroad vows to bring trees

ristmas: Union Pacific says it won't be a inch, despite transportation gridlock.

Art Wong
writer

NG BEACH – Not wanting e a Grinch, Union Pacific ad officials promised that te a "massive mess" snarling c on its tracks, deliveries of tmas trees to Southern Cali- a would not be delayed.

e won't let that happen," said n Pacific Vice President Rob- tarzel, speaking at a special ng held by the California c Utility Commission.

[redacted]etic Starzel testified [redacted]ad had implemented [redacted]dented plan that is ning to ease a two-month ck, but he said a complete n to normalcy isn't expected early next year.

t and steamship officials d, saying they are beginning improvements. They asked tors not to intervene, which worsen the situation. But er shippers complained that re continuing to see lengthy .

see it getting worse," said Lindsay of Lindsay Lumber amount, speaking on behalf local lumber industry. "The m is cars are taking six to weeks to get from Oregon to ngeles that used to take a week."

The delays have resulted in a shortage of lumber, which has driven up its cost by about 15 percent, he said.

Starzel said the congestion stems from serious mistakes made by Union Pacific this summer as it tried to merge with Southern Pacific railroad. It closed some Southern Pacific yards in Houston, not realizing how vital they were.

That began to back up trains in the Southwest and then throughout its system, which extends to Southern California. The problems grew because the two railroads don't have common computer systems. A greater-than-expected surge in holiday shipments overwhelmed Union Pacific, which has yet to negotiate new labor agreements that would allow it to use Union Pacific workers to help on its newly acquired Southern Pacific routes, such as those in Southern California.

The gridlock has left cargo piled up on the docks. About 16 ships have been diverted.

United Parcel Service diverted about $50 million worth of cargo. Union Pacific paid 7,000 truckers to haul stalled cargo from Southern California to Chicago.

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. said other railroads are their capacity. The compa is acquiring another 300 tives. It already has 8,200. hiring and training more w

"The recovery plan is working, but it takes time t back," Starzel said.



Robert Starzel, Union Pacific vice president, addresses bers of the Public Utilities Commission at a hearing on t road tieup Wednesday in Long Beach. John Hayes / Associa

ockholders sue Union Pacific over stock flop

atie Fairbank
ited Press

LAS – Shareholders are [redacted]Pacific over its stock's [redacted]aiming the nation's railroad knew long ago that rger with Southern Pacific f track.

ass-action lawsuit represent- nion Pacific shareholders ught stock between March 4 [redacted] across the Omaha, Neb.-based railroad of misrepresenting its safety record and failing to disclose problems involving last year's merger.

The lawsuit, filed here Tuesday, contends that even as the railroad touted the benefits of the $5.4 billion merger, top railroad officials knew that combining the two lines would be costly. It also claims that the optimistic announcements inflated stock prices.

"It's a fair statement to say there is no doubt that the directors and officers knew very well that those statements about the merger were false," Steven Schulman, a lawyer for the stockholders, said. Union Pacific spokesman John Bromley on Thursday would not comment.

Railroad executives month that fourth-qua would range from $7

quarter results could rang break even to substantial

Schulman said the t "stock-drop" case he has hard to win.

"It's not because it's not a case, but because the con fight hard," he said.

ific Jul 2,

Dow sues railroad over delays

UP denies union's claim that it's violating safety regulations

By JENALIA MORENO
Houston Chronicle 3/18/98

Union Pacific Railroad was sued Tuesday by one of its biggest customers and accused of violating safety regulations by a union leader – the same day it announced signs of congestion relief in the Gulf Coast and Laredo areas.

Dow Chemical Co., in a suit filed in state district court in Angleton, claims rail service delays have cost the company more than $25 million in the past nine months and that the railroad breached its contract by failing to provide reasonable service.

The chemical company said it has been forced to use trucks to move its products and raw materials.

The company's Freeport and Plaquemine, La., manufacturing facilities depend on Union Pacific for service because no other railroad provides service to those plants, Dow said.

Some of the company's 115 manufacturing plants worldwide have been forced to close down for days at a time because of service delays, said Anne Ainsworth, spokeswoman for the Midland, Mich.-based company.

"The service disruptions have affected numerous of our product lines with our key industry segments," Ainsworth said. "Our losses are continuing to mount."

Attorneys for the nation's largest railroad had not yet received the suit and a spokesman declined to comment. This is the second suit filed against Union Pacific over service delays. Entergy Corp. filed a similar suit several months ago.

Shippers from around the nation met in Houston last month to discuss rail service delays and attorneys instructed them on how they could recoup their transportation losses, estimated to be $2 billion nationally.

At that meeting, Dow's transportation manager, Harry Ignatowski, said he was

See UNION on Page 8C.

Tax hotline

Filing a tax return this year will be no easy matter for many people, especially when you consider the number of new laws on the books.

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 are some ways you can finance education using the tax laws?

If you need help with these or any other tax-related questions, call the Houston Chronicle's Tax Hotline on Thursday, at 713-220-8410. Tax experts will be on hand to answer your questions from 8:30 a.m. to 4:30 p.m.

Ex H 21

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 a manner. He said engineers complete a program to familiarize themselves with the tracks they are allowed to operate alone.

Directional running has signs of relieving congestion Houston ar according to day's report U.S. Su Transport Board.

That r stated that ton's rail were beco more fluid were 288 f cars in Engl Yard last and 401 leave in the Sett Yard.

The company is now planni construct a rail line less than a long along Liberty Road to co those two yards. Union Pacifi quired the Englewood Yard in in its merger with Southern Pa The company now must circun gate the city to move cars from yard to the other.

"Connecting those two tr would not only save hours, bu prove productivity between the yards," said Union Pacific sp man Mark Davis.

In its weekly report, Union P also announced it had reache agreement with the Mexican rai Transportacion Ferroviaria M cana and Texas Mexican Railw alleviate the rail traffic backl Laredo.

TFM and Texas Mexican, w are jointly owned by Kansas Southern Railway Co. and the M can transportation company T portación Maritima Mexic agreed to accept an additional cars daily from Union Pacific typically accepts 500 Union Pa cars en route to Mexico daily.

TFM also agreed to urge Mex agricultural officials to inspect in rail yards instead of on the La International Bridge when the are crossing into Mexico.

Union Pacific agreed to run tional locomotives through Laredo Monterrey.

Both railroads agreed to send empty northbound trains through less congested Brownsville cross

UNION PACIFIC EXHIBIT 2

DATE 05/05/16

20 B

LAW

DuPont Sues Norfolk Over Rail Delays

By DANIEL MACHALABA
Staff Reporter of THE WALL STREET JOURNAL

DuPont Co. sued Norfolk Southern Corp., seeking damages for rail-service breakdowns following Norfolk's operation of parts of the former Conrail.

The suit, filed Friday in U.S. District Court in Alexandria, Va., accuses Norfolk Southern of breaching its contract with DuPont to provide timely, uninterrupted and reliable service. The Wilmington, Del., chemicals manufacturer said the rail-service snafus caused DuPont to slow production lines, use more-expensive substitute transportation and acquire substitute materials at higher costs.

DuPont spokesman Clif Webb said the disruptions affected almost a dozen plants in the company's nylon, fluoroproducts and chemicals-solutions businesses, among others, and occurred from June 1, 1999, through the present. He said DuPont "incurred expenses and suffered losses amounting to millions of dollars."

The lawsuit comes after several years of increasing customer frustration with rail service following big railroad mergers and customers' inability to get Congress or federal regulators to promote more competition in the rail industry.

In 1997 and 1998, massive service failures followed Union Pacific Corp.'s takeover of Southern Pacific Rail Corp. Then, soon after they began operating their respective portions of Conrail on June 1, 1999, Norfolk Southern and CSX Corp. became mired in freight congestion, delivery delays and communication snafus. CSX isn't involved in the lawsuit filed by DuPont.

"Too frequently, rail customers have had to live with whatever service their railroad gives them," said Edward Emmett, president of the National Industrial Transportation League, which represents rail, truck and ocean freight customers. "If there's no relief to be found in the marketplace, I expect more shippers will turn to the courts."

Some analysts, however, don't expect a wave of similar lawsuits, because Norfolk Southern has sought to resolve such customer issues expeditiously. In addition, the magnitude of its service problems never approached the full gridlock experienced by Union Pacific customers.

The DuPont suit "likely represents more the exception than the rule," said Scott Flower, an analyst at Salomon Smith Barney Inc.

Norfolk Southern, based in Norfolk, Va., declined to comment on specifics of the DuPont suit. But Norfolk Southern spokesman Robert Fort said the company has "been working with all customers who have had service-related claims from last year, and we have made a good-faith effort to work with DuPont, but we have been unable to resolve these issues."

In its suit, DuPont said Norfolk Southern had represented that transit times along the former Conrail routes would be as good as or better than transit times before the Conrail acquisition. But DuPont said that Norfolk Southern's performance deteriorated immediately after June 1, 1999, with transit times for loaded and empty railcars as well as cycle times for DuPont's rail fleet increasing dramatically.

Among the Norfolk Southern service breakdowns it experienced, DuPont said in its suit, were "'lost cars,' blocked railsidings, 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

Board extends order on Union Pacific

By DAVID IVANOVICH
Houston Chronicle Washington Bureau

WASHINGTON – Federal regulators late Thursday extended an emergency order imposed on Union Pacific Railroad's operations, unpersuaded that the nation's largest railroad has overcome the operational woes that caused massive backups in Houston and much of the West.

But the federal Surface Transportation Board's order fell far short of the more radical steps proposed by the Texas Railroad Commission, which wanted Union Pacific to turn over control of some of its track in Houston.

The Surface Transportation Board announced Thursday night it would keep Union Pacific under emergency status until March 15, and give competitors Burlington Northern-Santa Fe and Texas Mexican Railway Co. the right to use Union Pacific's Houston lines in the area.

Previous emergency orders issued Oct. 31 had given only Texas Mexican the right to serve some of Union Pacific's customers along its Houston lines.

"While service is showing signs of improvement, the service recovery to date is not broad enough in scope. Given the improvement that is still needed, we have concluded that the emergency is not yet over," the board said.

The board also will require even more extensive reporting requirements on Union Pacific than it had in the past.

Union Pacific Chief Executive Dick Davidson, in a written statement, said the board had given all parties in the issue a fair hearing.

"We look forward to completing our service recovery as rapidly as possible in order to regain the confidence of our customers," Davidson said.

Some Union Pacific customers were surprised by the board's order, which went further than they had expected.

"I think this is probably as good as it's going to get from the board," said Maureen Healey, director of transportation services for the Washington-based Society of the Plastics Industry, a trade group which has been one of Union Pacific's biggest critics. "It's still going to take a lot of cooperating among the railroads, trying to get them to talk to one another and get the business taken care of."

Texas Railroad Commission Chairman Charles Matthews, who had asked the board to force Union Pacific to divest a portion of its rail lines in Houston as a way to promote rail competition in the area, blasted the decision.

"It appears to be very, very minor relief for the Houston area, which is disappointing," Matthews said. "It's Houston and the Gulf

See UNION on Page 4C.

Union

Continued from Page 1C.

Coast that are hurt the worst."

Matthews has pointed to a study conducted by Bernard Weinstein at the Center for Economic Development and Research at the University of North Texas, which estimated that the service problems have cost Texas businesses $762 million.

"They just still don't seem to get it," Matthews said. "It's amazing. No matter how many Texans go up there to testify, they just don't seem to pay any attention to us."

The board declared the initial rail emergency in response to massive rail congestion problems that began in Union Pacific's Houston operation and quickly spread throughout the West.

Union Pacific's Englewood Yard in northeast Houston was ground zero for the railroad's troubles. Company officials have said one of their biggest mistakes was to stop making up trains at the company's busy Strang Yard in La Porte and try to consolidate all shipments out of the massive Englewood operation.

Davidson had assured the board back in October that his railroad could resolve the traffic problems by shortly after Thanksgiving.

And on Wednesday, Davidson claimed victory over the traffic woes and told reporters his railroad would be running smoothly again by the end of the year.

Union Pacific's customers, many of whom have been forced to curtail production, lay off employees, even shut down plants because of an inability to obtain raw materials ship out products, had asked board to continue the order.

Robert Evans of the Nationa dustrial Transportation League dicted Union Pacific would nee other three months to resolve its fic problems.

Many critics blame Union Pa woes on the company's merger Southern Pacific Rail Corp. last a move that made Union Pacific biggest rail carrier in the nation, ploying 53,000 workers and con ling 36,000 miles of track. Union cific also is the nation's larg hauler of chemical products, muc which is produced along the (Coast.

Davidson said company offic have thrown their budget for the y out the window, sparing no cost fix the operational troubles.

Industry analysts earlier this s mer were expecting Union Pac Railroad's parent company, Un Pacific Corp., to post a profit of ab $1.20 a share for the fourth quart Wall Street railroad analysts Dc Cummins and Tony Hatch now looking for a 40-cent-per-share lo

Union Pacific's stock, which w selling around 72 in early August, 1¾ Thursday to close at 62⅝ Thu day on the New York Stock E change.

Texas Mexican, which is 49 perce owned by Kansas City Southern Ra road Co., is currently moving abo half a dozen cars in the Houston ar each day. The company will be at to serve customers along Union F cific's line only until the emergen order is lifted.

Chronicle staffer Charles Boisse contributed to this report.

EXH 2

2

Union Pacific spending big to unclog rail lines

RAILROADS: The company is upgrading key segments on the Nebraska plains to ease its costly, merger-related congestion.

By JOE RUFF
The Associated Press

NORTH PLATTE, Neb. — Welding machines the size of semitrailer trucks straddle new Union Pacific rail lines in this vast expanse of Nebraska's western plains that is home to the busiest segment of the nation's largest railroad.

Nearly 500 workers in the summer heat grind ends of the rails smooth, cut new rail bed and lay concrete ties in a $366 million track expansion and maintenance project just east of North Platte.

About 40 percent of Union Pacific's trains hit this 108-mile stretch, carrying cargo as diverse as airplane wings, automobiles, frozen vegetables and coal, traveling from Los Angeles to Chicago, Wyoming to Texas.

The track work here and around Union Pacific's 36,000-mile network already is making progress at easing congestion that made the railroad an object of ridicule and the target of customer lawsuits last year. But much remains to be done to smooth out the stormy 1996 merger of Union Pacific and Southern Pacific.

The price tag for upgrading track and trains is running at least $200 million above the $1.4 billion Union Pacific had projected. The work now is expected to take two more years than the five years originally planned.

Still, things are going well enough that the railroad showed off some of its expansion on a recent media tour of its routes to Wyoming coal fields.

Like the rest of Union Pacific's 23-state system, travel slowed through this stretch last year because of congestion that cost the U.S. economy an estimated $4 billion in stalled production and more-expensive transportation.

Only now is traffic picking up, and railroad executives hope putting a third track down will speed service still more.

If all goes as planned, trains will go 70 mph instead of 60. Instead of 125 trains each day, more than 200 could roar through daily by year's end. When one track undergoes maintenance, the other two will run full speed.

But Union Pacific has a long way to go to please its customers, said Ed Rastatter, director of policy for the National Industrial Transportation League, which represents about 1,000 rail and truck users.

Most agree the crisis is over, but they're still not getting the service they expect, Rastatter said. Merger benefits were supposed to include faster transportation times, but unforeseen delays in service continue and train times are too slow, he said.

"Almost everybody thinks they have a long way to go to normal, let alone where they want to be with the benefits of the merger," he said.

The merger that created the biggest U.S. railroad quickly challenged the notion that bigger is better.

A surge in business surprised Union Pacific in 1997, even as it suffered from a rash of wrecks and difficulties merging with Southern Pacific's aging equipment.

Average train speeds 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 to store much of last year's harvest in hopes of improving market

UNION PACIFIC EXHIBIT 2
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Page 1 of 1

EX4 228

Page 2 of

The Orange County Register NATION/WORLD Saturday, Sept. 19, 1998

Union Pacific might be ordered to divest

The federal government Friday raised the possibility of forcing **Union Pacific** to divest some of its rail lines if service did not improve by the end of the year.

In a submission to the Surface Transportation Board, the Department of Transportation said it did not support allowing the railroad an indefinite amount of time to restore service to the levels seen before its 1996 merger with **Southern Pacific**.

The Department of Transportation noted some improvement in service, but expressed concern that Union Pacific's performance would deteriorate in the coming months as grain and other shipments increased.

A Transportation Board emergency order last year against Union Pacific that allowed other railroads to compete for customers on UP tracks expired Thursday.

Exh. 23A

John E. Grother
07/31/02 02:39 AM

To: Lisa Brewster@UP
cc:
Subject: Re: Letter dated July 25, 2002

MY DIRECT SUPERVISOR WAS MR. KEN C. PACKARD, WHO STILL APPEARS TO BE AN ACTIVE EMPLOYEE AS NOTED ON COED. DO YOU THINK HE KNOWS WHERE THE 15121 IS FILED?

WOULD MR. PACKARD HAVE BEEN THE PERSON ACCOUNTABLE FOR FILLING OUT THE 15121?

WHY WOULD MR. PACKARD STILL HAVE THE 15121? WOULD IT NOT BE ON MICROFICHE OR HARD COPY?

HE HAS NOT RESPONDED TO MY TWO LOTUS NOTES ABOUT THIS ISSUE; BUT, HE MAY RESPOND TO YOURS.

NOTWITHSTANDING THE PROBLEM THAT THE CONTACTS YOU ARE TRYING TO REACH ARE ON VACATION, WHICH IS EXASPERATING AT BEST, PERHAPS WE CAN FOCUS ON FOUR SIMPLE QUESTIONS:

1. IS THERE A 15121 ON SOME HR HARD COPY FILE OR MICROFICHE? THERE MUST BE A PROCESS? I don't know. Our systems have changed at least twofold.

I HAVE REQUESTED & RECIEVED MY PERSONAL RECORD TWICE & THERE IS NOT ONE IOTA OF INFORMATION THEREIN ABOUT THE 1997 DEMOTION, OR ANY "DISCIPLINE" OR RATIONAL RELATED THERETO.

2. WAS JUSTIFICATION FOR A WAGE REDUCTION REQUESTED AND APPROVED? Yes, in the online system it indicates an electronic approval from Brad King and Art Schoener.

WHAT WAS THE BASIS FOR SUCH A HORRIFIC WAGE REDUCTION ($ 1,272/MO) ; WHEN ALL AROUND THE COUNTRY IN 1997, UPRR WAS BEING SUED BY SHIPPERS FOR SERVICE FAILURES; BUT, NO LAW SUITS IN MY TERRITORY? The online record indicates disciplinary action.

3. MAY I OBTAIN A COPY OF THE 15121? If the old system and the archive is brought up, yes. I don't have any idea of what it looked like in 1997.

4. WAS PERFORMANCE STATED AS THE REASON FOR MY DEMOTION OR "OTHER"? As I indicated above, the only note I can see in the online system was the demotion was for disciplinary reasons.

IF "OTHER", WHAT REASONS ARE NOTED IN THE "COMMENTS" SECTION OF THE 15121? Since we don't have a copy of the actual 15121, I don't know.

FORGIVE ME FOR ROLLING ON; BUT, PART OF MY TRANSITION IS TO WORK 1730-0530; 5-6 DAYS A WEEK AND SOMETIMES I GET A LIL' CONCERNED WHEN I RE-VISIT THE "FAIRNESS" OF THIS 1997 EVENT.

HOWEVER, SINCE I WILL BE FINANCIALLY PENALIZED FOR THE REST OF MY ENTIRE LIFE, I FEEL I AM ENTITLED TO SOME REASONABLE EXPLANATION AS TO WHY I HAVE BEEN SINGLED OUT AS SCAPEGOAT OF THE DECADE.

THANKING YOU IN ADVANCE FOR YOUR UNDERSTANDING OF THIS PAINFUL DEMOTION ISSUE.

I

Ex H. 23B

To: John E. Grother@UP
cc:

Subject: Re: Letter dated July 25, 2002

Mr. Grother, I have not been able to find anyone who knows if the old system (15121) is archived anywhere. Therefore, I will not be able to do anything more on that front. I will forward you a copy of the form that is included in one of our more recent systems. That is all the luck I have had. The reference to disciplinary/performance is due to the policy statement in effect at that time, which I forwarded to you already.

Take care,
Lisa Brewster
John E. Grother

John E. Grother
08/01/02 09:19 PM

To: Lisa Brewster@UP
cc:
Subject: Re: Letter dated July 25, 2002

THANK YOU FOR THE TIME YOU HAVE DEDICATED TO THE FAIR REVIEW OF THIS ISSUE.

HOWEVER, I STILL WOULD APPRECIATE IT IF YOU WOULD REVIEW YOUR ANSWER IN RED TO #3 BELOW
WHERE YOU ANSWERED "YES" ; TO PROVIDING A COPY OF THE 15121 ("IF THE OLD SYSTEM AND ARCHIVE IS BROUGHT UP, YES") ; AND , PROVIDE ME WITH A COPY OF THAT 15121 DOCUMENT.

UPRR POLICY STATES EMPLOYEES SHALL BE TREATED WITH RESPECT AND FAIRNESS, "JUST LIKE YOU WOULD LIKE TO BE TREATED".

IF YOU CAN NOT ACTIVATE THE EQUIPMENT NECESSARY TO OBTAIN MY 15121, WHO, IS IN POSITION TO ACTIVATE SAID EQUIPMENT OR SYSTEM?

IN THE MEANTIME, IS IT POSSIBLE TO OBTAIN A COPY FROM THE "ON LINE RECORD" WHICH INDICATES DISCIPLINARY ACTION AND THE NAMES OF THE PARTIES WHO APPROVED THIS DEMOTION IN HARD COPY FORMAT TO MY HOME ADDRESS?

IN CONCLUSION, THEREFORE, I ONCE AGAIN AM REQUESTING THAT THE TRUTH FINALLY BE MADE AVAILABLE TO THE EMPLOYEE WOULD HAS BEEN SO ADVERSELY AFFECTED FOR THE REST OF THEIR LIFE.
Lisa Brewster

Lisa Brewster 07/31/2002 07:27

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 Ex H. 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 DEAD END

John, As I have indicated on several occasions to you, I do not have a copy of this policy you are requesting. If you want to continue to pursue the 'demotion' and 'reduction in pay' from your 1997 assignment; maybe you should speak with someone in the EEO group. You can reach them at 402-271-4435, or 1-866-877-3362.
John E. Grother

WHY? EEO ISSUE?

John E. Grother
07/02/2002 03:55 AM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

IT HAS BEEN OVER 100 DAYS SINCE I INITIALLY REQUESTED A COPY OF THE UNION PACIFIC 1997 DEMOTION POLICY AND THE IMPLEMENTING GUIDELINES, IF ANY.

ARE YOU NOW IN A POSITION TO PROVIDE SAID DOCUMENTS OR ADVISE ME TO WHOM I SHOULD BE ADDRESSING THIS REQUEST PLEASE?

---------- Forwarded by John E. Grother on 07/02/2002 03:52 AM ----------

John E. Grother
05/09/2002 04:51 AM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

AS REQUESTED BELOW ON 3/27/02:

ARE YOU NOW ABLE TO PROVIDE THE "OFF-THE-SHELF FILED 1997 DEMOTION POLICY" OF THE UNION PACIFIC RAILROAD?

ALSO, ARE THERE ANY IMPLEMENTING GUIDELINES OR PROCEDURES THAT WENT WITH THE POLICY, THAT ARE ALSO AVAILABLE?

---------- Forwarded by John E. Grother on 05/09/2002 04:47 AM ----------

John E. Grother
03/27/2002 10:28 PM

To: Linda D. Buttrill@UP
cc:

Subject: Re: REQUEST FOR MEETING

UP Online

Updated: Wed, Aug 09, 2000 02:28 PM CST

August 9, 2000

Ombudsmen Helps Make System Work for Employees

UP Online Main Page
SECTIONS:
Stock Report
Omaha News
St. Louis News
Want Ads
Employee Discounts
EMPLOYMENT INFO:
Oper Mgmt Opptys
CNET
UP Career Link
UP ONLINE FEEDBACK:
Send Ideas/Comments

Do you have a work-related problem that you haven't been able to solve at a local level by talking to your supervisor? Maybe it's time to call Union Pacific's Ombudsman, Butch Ethington.

The ombudsman's office, created almost a decade ago, is designed to assist employees with issues they feel need executive office involvement. Employees are encouraged to talk with their supervisors first about any issues or concerns they may have.

Ethington took over the ombudsman chores when Mike Phillips moved to a new position in Labor Relations in March. Ethington had been tapped to provide a list of potential candidates for the position before President Ike Evans eventually asked him if he'd take the job.

"I said I'd be willing to do anything to help this company," Ethington said. His background as the former director of internal auditing and as head of the company's business conduct committee made him a perfect choice, not to mention his background working on a B&B gang during the summers when he was in college. His last position as director of environmental and ethics compliance took him to the field for audits to ensure the company is complying with environmental regulations.

"Sometimes in large organizations, people can fall through the cracks because they can't get connected to the right channels. I'm interested in making sure the company's culture and organization are doing the right thing for the employees."

Ethington sees the ombudsman's office as a place for employees to turn when they can't find the answers. "I try to make the system work like it's suppose to," he said. "Sometimes in large organizations, people can fall through the cracks because they can't get connected to the right channels. I'm interested in making sure the company's culture and organization are doing the right thing for the employees."

On the other hand, Ethington said the ombudsman's office was never designed to over-ride authority.

EXH. 26A

DEADEND

"DO NOT WASTE MY TIME TYPE OF RESPONSES"

Linda D. Buttrill

Linda D. Buttrill
03/10/2002 05:46 PM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hello John . Yest you can make notes of what is in your personal record. Since the files are maintained in Omaha, far removed from the managers/supervisors that actually made 1997 decisions, I doubt that a rebuttal would be of much use at this time. However, if you are able to discuss with your supevisor at that time, they may be able to shed some light on the decision.

Linda D. Buttrill
03/07/2002 08:05 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

Hi John. My suggestion was to review your Personal Record. A hard copy 'generally' has more information than is documented in the computer. The procedure for doing that is to have your present manager request the record and sit with you during the review. Records cannot be copied or taken out of the presence of your supervisor. Secondly, whoever you worked for in Tucson at the time of the change should have knowledge of why that decision was made. If neither of these suggestions produce the information you're looking for, I don't know where you would find it.

NOT TRUE {See 26 26

Linda D. Buttrill
03/06/2002 09:28 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR MEETING

UNION PACIFIC EXHIBIT 2
PAGE 94 OF 146

I would be happy to meet with you; however, I have no information that details your move from Sr. MTO to MIO. The only thing I have access to is the database information which associates this title change with the move from Tucson to Houston.

I suggest that your time would be better spent by either reviewing your Personal Record (with your supervisor) or talking to the manager/supervisor who recommended this change.

Exh 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.

TURNED OUT THERE IS ANOTHER SECRET RECORD ONLINE

---------- Forwarded by Wayne E. Huddleston on 02/04/2002 03:07 PM ----------

Linda S. Jensen 02/04/2002 03:06 PM

To: Wayne E. Huddleston@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

---------- Forwarded by Linda S. Jensen on 02/04/2002 03:05 PM ----------

John E. Grother
02/04/2002 12:51 PM

To: Linda S. Jensen@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

HOW CAN I OBTAIN A COPY OF EVERTHING , INCLUDING WITHOUT LIMITATION BOTH POSTIVE AND NEGATIVE ISSUES, IN MY PERSONAL RECORD?

Linda S. Jensen

Linda S. Jensen 02/04/2002 09:13 AM

To: John E. Grother@UP
cc:

Subject: Re: REQUEST FOR COPY OF PERSONAL RECORD

The copy that was forwarded to you is the entire hard copy personal record that we have in Records

EXH. 26
C

Management.
I am forwarding a copy of your training history and exam history that is in Peoplesoft... There are no entries of discipline on your record in Peoplesoft...
John E. Grother

John E. Grother
02/03/2002 11:55 AM

To: Linda S. Jensen@UP
cc:

Subject: REQUEST FOR COPY OF PERSONAL RECORD

I APPRECIATE THE TWO DIFFERENT WAYS YOU USED TO PRINT THE WORK HISTORY. THAT WAS VERY CONSIDERATE OF YOU.

HOWEVER, I AM NOT CERTAIN THAT I HAVE MY ENTIRE PERSONAL RECORD.

SPECIFICALLY, I WOULD APPRECIATE A COPY OF ANY AND ALL POSITIVE (AWARDS, ACCOLADES,POSITIVE STATEMENTS, ETC.) AND NEGATIVE (DEMOTIONS, DISCIPLINE, LETTERS OF REPRIMAND, LETTERS OF UNSATISFACTORY PERFORMANCE, ETC) THAT ARE PRESENT IN MY PERSONAL RECORD.

I CAN BE REACHED AT 8-678-5303 SHOULD YOU HAVE ANY QUESTIONS.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

---------- Forwarded by John E. Grother on 02/03/2002 11:50 AM ----------

Wayne E. Huddleston
12/03/2001 03:37 PM

To: Linda S. Jensen@UP
cc: John E. Grother@UP

Subject: REQUEST FOR COPY OF PERSONAL RECORD

Linda, would you please send John a copy of his personal record.

---------- Forwarded by Wayne E. Huddleston on 12/03/2001 03:35 PM ----------

Mitzy A. Graybeal 12/03/2001 09:49 AM

To: Wayne E. Huddleston@UP
cc:

Subject: REQUEST FOR COPY OF PERSONAL RECORD

For your handling. Thanks.

---------- Forwarded by Mitzy A. Graybeal on 12/03/2001 09:48 AM ----------

William J. Behrendt
12/03/2001 09:33 AM

EXH 27A

FORM 20834
REV. 5/01

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

Affix Or Print Screening Results Here

RET IU# 011407 TAPE
DATE 02-02-02
TEST NO. 0339
SS #
526-66-3917
AS IU# 026055
SCREENING
G/210L TIME
0000 AUTO 12:37

EVIDENCE

TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name: John E. Grother (Print) (First, M.I., Last)

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 Lichtman 402-271-4800 ~~(800) 848-3784~~
DER Name / DER Phone Number

D: Reason for Test: ☑ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 02,02,02

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☑ BAT ☐ STT DEVICE: ☐ SALIVA ☑ BREATH* 15-Minute Wait: ☐ Yes ☑ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Additional Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

Eagle Ind. Examiners — Alcohol Technician's Company
4784 Hwy 346 South — Company Street Address
Michael A Van Arsdale — (PRINT) Alcohol Technician's Name (First, M.I., Last)
Ft. Worth TX 76179 817 560-8014 — Company City, State, Zip / Phone Number
Michael Van A — Signature of Alcohol Technician
2/2/02 — Date Month Day Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee — Date Month Day Year: / /

COPY 1 – ORIGINAL – FORWARD TO:
(YELLOW) University Services
Arsenal Business Center, Bldg. 4
5301 Tacony Street
Philadelphia, PA 19137

COPY 2 – EMPLOYEE RETAINS
(GREEN)

All Positive Confirmations:
(1) Call Manager Drug & Alcohol Testing Union Pacific Railroad at 1-800-877-0565 and leave a message that you have a Positive Test.
(2) FAX form to: 1-402-271-5796

Exh 27B

FORM 20834
REV. 5/01

UNION PACIFIC RAILROAD
Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

#76

Affix Or Print Screening Results TAPE

RBT IU# 014407
DATE 05-02-02
TEST NO. 0565
ID# 526-66-3917
AS IU# 026845
SCREENING
G/21AL TIME
.000 AUTO 17:42

Step 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last) John Grother

B: SSN or Employee ID No. 526-66-3917

C: Employer Name UNION PACIFIC RAILROAD Eagle wood
Street 5500 Wallisville Rd.
City, ST ZIP Houston TX. 77020

DER Name and Telephone No. ~~CHARLIE SHOGREN~~ John Lietzau ~~402-326-4~~ ~~(800) 840-3784~~ EVIDENCE
DER Name DER Phone Number

D: Reason for Test: ☑ Random ☐ Reasonable Cause ☐ Reasonable Susp ☐ Post-Accident ☐ Return to Duty ☐ Follow-up ☐ Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee — Date Month Day Year: 5 1 02

Affix Or Print Confirmation Results Here

Affix With Tamper Evident Tape

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the US Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: ☐ BAT ☐ STT DEVICE: ☐ SALIVA ☑ BREATH* 15-Minute Wait: ☐ Yes ☑ No

SCREENING TEST: *(For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)*

Test #	Testing Device Name	Device Serial # OR Lot # & Exp Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: *Results MUST be affixed to each copy of this form or printed directly onto the form.*

REMARKS:

Affix Or Print Additional Results (e.g. Calibration Check) Here

Affix With Tamper Evident Tape

Eagle Ind. Examiners — 4734 Hwy 377 S.
Alcohol Technician's Company — Company Street Address

Michael Van Accole — Ft Worth TX. 76126 (817) 560-8414
(PRINT) Alcohol Technician's Name (First, M.I., Last) — Company City, State, Zip — Phone Number

Michael Van Accole — 5 12 02
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 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 1-800-874-0565 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

ANSWER MADE UNPRINTABLE BY "ICON OF SECRECY." COULD NOT BE FORWARDED OR COPIED.

WHY RESPOND IN MANNER THAT COULD NOT BE PRINTED?

ated AT [8/28/2002 07:56 AM]

(See Attached)

Message stated:

MR. GROTHER - I AM LEAVING ON MATERNITY LEAVE IN FIVE DAYS. SO I APOLOGIZE FOR BEING SHORT WITH THIS E-MAIL. I HAVE INDICATED RESPONSES IN RED BELOW.

LISA BREWSTER"

ANSWER BLOCKED { } OR WRITTEN IN RED ON THE NEXT PAGE..

GKH. 29C

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:

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IF RESTRICTED INFORMATION, HOW IS ACCESS CONTROLLED?

PLEASE ADVISE.

THANKING YOU IN ADVANCE FOR YOUR COOPERATION.

EXH.
30

Pension Plan for Salaried Employees of
Union Pacific Corporation and Affiliates

Summary of Plan Changes
Effective January 1, 1999

The plan was amended to include several changes effective January 1, 1999. These changes may have little or no effect on your plan benefit. Alternatively, your benefit may grow at a slower rate in the future or not grow at all for a period of time. In some cases, your benefit may increase as a result of these changes. In no case will your benefit under the amended plan be less than the plan benefit you earned through December 31, 1998. The following summarizes the changes made to the plan.

Compensation

- The plan uses actual monthly base pay, plus overtime and certain paid incentives, to determine compensation. Beginning January 1, 1999, the plan will determine compensation using the base rate of pay in effect on the first day of each month, plus overtime and certain paid incentives.

- Pay from certain acquired companies (such as Chicago and North Western, Missouri Pacific, and Western Pacific) is currently included as plan compensation. Beginning January 1, 1999, the plan generally will not include any pay earned from an acquired company.

- Pay while in agreement service with a participating company is included as plan compensation if the agreement service is directly followed by five years of non-agreement employment. Beginning January 1, 1999, the plan will not include any pay for a period of agreement service (that is not covered by the plan).

- Compensation for part-time employees is adjusted by multiplying monthly pay by the following ratio: 190 divided by the hours worked during the month. Beginning January 1, 1999, the plan will determine compensation for part-time employees using actual monthly base pay, plus overtime and certain paid incentives, with no adjustment.

- For part-time employees, compensation during an unpaid absence is determined using the base pay rate in effect at the start of the absence if the employee returns to work after the absence, or if the absence is for a family or medical leave. Beginning January 1, 1999, no compensation will be credited during an unpaid absence for part-time employees.

EXHIBIT 31

C-NET JOBS APPLIED FOR AND UPRR RESPONSE (IF ANY)

JOB APPLIED FOR – DATE	CONFIRMATION REQUEST NUMBER	RESULTS/ REMARKS
1. Mgr. Terml Oprns (MTO)-Tucson (SRG 18) (Royce Hardin decision maker) Position was one SRG below what I had worked for 22 months	2879526663917 Applied 3/17/99	Resume was Recvd. C-Net said position filled 3/23/99
2. Mgr. Yard Oprns. (MYO)-Tucson (SRG 17) Position was two SRG's below what I had worked for 22 months.	2914526663917 Applied 4/6/99 (Royce Hardin decision maker)	Resume was Recvd. No other response
3. Sr. Mgr. Terml. Oprns. (SMTO)-Tucson (SRG 19) (Exh's 30A & 30B) (Royce Hardin) Position Exact SAME as I had performed for 22 mo. @ Tucson.	3047526663917 Applied 8/9/99	Resume was Recvd. No interview as "NOT Qualified"
4. Mgr. Intmdl Terml. Oprns (MITO)-Long Beach (Band C) (Gary Davidson decision maker) Position was Band C, at which level I had already performed. Position given to Marie Bedwell–est. age 38 & I was 53	3301526663917 Applied 12/23/99	Resume was Recvd. No interview as "NOT Qualified"
5. Sr. Mgr. Terml. Oprns (SMTO)-Phoenix (Band C) (Royce Hardin decision maker) Position same as I worked in Tucson for 22 mo., except Phoenix.	3293526663917 Applied 12/23/99	Resume was Recvd. No other response
6. Supt. Intmdl Oprns. (SIO)- Los Angeles (Band D) Position was a promotion of two Bands from Demoted Status.	3372526663917 Applied 1/28/00 (Greg Workman decision maker)	Resume was Recvd. No other response

7. Mgr. Terml. Oprns. Not Received No system response
(MTO)- Freeport, Tx Applied 6/6/00 (Dennis Tholen decision maker)
(Band C) (Charlie A. Bishop "personally lobbied my application", with no results, except "They don't want you. You are not young enough to handle an outside operating district"

8. Mgr. Terml. Oprns. 3648526663917 Resume was Recvd.
(MTO)-Tucson Applied 6/21/00 No other response
(Band C) (Royce Hardin decision maker)
(Position was one SRG below where I had performed for 22 months)
Position would have been a Promotion from my Demoted Status.

9. Mgr. Yard Oprns. 3725526663917 Resume was Recvd.
(MYO)-Tucson Applied 7/24/00 No other response
(Band B) (Royce Hardin decision maker)
(Position was one Band below that which I performed at Tucson for 22 months or two Salary Rate Grades). (Exh's 31A & 31B)
My selection would have been a lateral from my Demoted Status.

10. Mgr. Yard Oprns. Not received Received call from
(MYO)-Bloomington Applied 10/31/00 David Bader indicating
(Band B) Position was lateral transfer "unacceptability".
back to Train Operations.
(Unsure; but ,Dennis Tholen may have been actual decision maker)

11. Various Operating No calls – No feedback for about 2 years,
Positions on new C-NET (Since new system started)
System which is allegedly continuously
Searching for Operating Department Matches.

EXH. 31A

Page: 1 Document Name: untitled

Rs004R10

Thank You For Using the Union Pacific Job Posting System

JOHN, your resume has been received and is being considered along with other candidates who have applied for the OPER MGR YARD OPRNS (TUCSON) position in the ~~OPER~~ Department.

Your Confirmation Number is:
3725526663917

Number of lines in your Resume 199

>>> ENTER to Continue >>>

PF Keys

PF1-Help PF4-Close CNet

his POSITION is two SALARY RATE GRADES (SRG 17 vs. 19) below the SR. MTO POSITION WHICH I PERFORMED AT TUCSON FOR 22 MONTHS. {NOW BAND B vs. BAND C UNDER PRESENT SYSTEM}

I DID NOT RECEIVE A RESPONSE TO MY APPLICATION, FOR THIS "BELOW- LATERAL TRANSFER."

Date: 7/24/00 Time: 06:05:03 PM

EXH. 32B
SUBMITTED 7/24/99

Applications accepted from: 07/19/00 through 07/25/00

Profile ID Title

MGR 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 HARDIN Phone: 8-629-2120
Company: UPRR
Bus Group: OPER

Job Profile # 72017 - MGR YARD OPERATIONS

Basic Purpose of Position:

Execution of the daily transportation plan to achieve business objectives and customer satisfaction within the terminal confines.

Primary Accountabilities of the Position:

Manage the safety process for terminal TE&Y employees
Manage the terminal transportation plan to ensure that all quality of service business objectives are met or exceeded. Manage TE&Y expenses within assigned budgetary limits commensurate with volume of business
[redacted]nd manage Supervisor Yard Operations and agreement employees
[redacted]cution 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
RCSC (1 yr.) Working knowledge

Special Training, Skills, or Education:

Undergraduate Degree
Written/Oral communication skills
TQMS
ATCS
Computer skills (HOST/PC)
Dr[redacted]wareness

Desired Education Level: Bachelor Degree or equivalent

Travel Requirements: 0-25% travel may be required

S007R03 - JVN 3725 07/18/00

Exh. 33A

Page: 1 Document Name: untitled

Page 1 of 2 CNet Notice Rst4F1

09/22/99

Dear John:

Thank you for your application for the position of MGR TERMINAL OPERATIONS (TUCSON AZ).

I have reviewed all of the resumes for consideration and have assigned interviews to those individuals who possess a combination of experience, education, and skills which appropriately meet the requirements of this position. While I cannot extend an interview opportunity to you, your time and interest in applying for the position are appreciated. I encourage you to continue to seek developmental opportunities for which you are qualified within Union Pacific. } ?

Sincerely,

Delete Notice ( ) (Y/N)

PF3-Exit PF4-Close CNet PF Keys PF8-Next Page

ABOVE SHOULD HAVE BEEN THE FORM LETTER FOR "UNQUALIFIED" REGARDING ATTACHED POSITION WHICH MEANS THIS DOCUMENT SHOULD HAVE BEEN POSITION TITLED "SENIOR MGR. TERMINAL OPERATIONS; NOT MGR. TERMINAL OPERATIONS - TUCSON. THE POSITION OF SENIOR CLOSED 8/10/99 AND THIS WAS THE CLOSEOUT ONE MONTH LATER INDICATING POSITION WAS FILLED BY SOMEONE "MORE QUALIFIED" THAN MYSELF WHO HAD WORKED THE JOB"

Date: 1/28/00 Time: 03:41:33 PM

Confirmation #

Exh. 33B

3047/52663917

SR MGR TERM OPRNS (TUCSON AZ)

[redacted]ications accepted from: 08/04/99 through 08/10/99

File ID	Title	
07	SR MGR TERM OPRNS	Grade Level 1F

partment:	TRANS - FIELD OPERATIONS JVN 5047		
cation:	TUCSON AZ	Start Date:	ASAP
b Status:	Full Time	Vacancies:	1
ntact:	ROYCE HARDIN X	Phone:	8-629-2120
mpany:	UPRR		
s Group:	OPER		

Profile # 72007 - SR MGR TERM OPRNS

c Purpose of Position:

re the quality of the transportation product of the terminal meets
xceeds the standards set by the business objectives and customer
ctations.

ary Accountabilities of the Position: ✓

ure safe performance of all terminal T&Y employees through
eloping, implementing and executing the safety process
[redacted]e execution of the transportation plan for the terminals
[redacted]re that all quality of service objectives are met or exceeded
rate the terminal at or below annual transportation budget
ur[redacted] terminal failure prevention activities are executed to
ieve cost of quality business objectives
rdinate terminal activities with MGC, NCSC, adjoining Service
t to meet business objectives
age terminal work force level to ensure transportation needs are
and within budget
age the efficient use of locomotives and fuel to ensure that
ight car cycles are effectively managed while in the terminals
d and develop both managers and agreement employees to the
en[redacted] that their individual performance and employee involvement
ivities determine successful accomplishment of company business
ectives
pond to emergency situations or service interruptions

red Experience:

/MYD (2 yrs.) Working
(2 yrs.) Working
(2 yrs.) Working
(1 yr.) Working
tralized function (1 yr.) Working

[redacted]aining, Skills, or Education:

gement training program
dership seminars
ergraduate Degree✓

This policy allows an employee to give cash or gifts to a host or hostess who provides a gratuitous product or service, such as a meal or lodging, in lieu of a reasonable "expense . . . which the employee normally would have incurred." The In Lieu Policy explains: "The purchase of a gift for the hostess in appreciation of a gratuitous meal served to an employee while traveling on company business, at the home of a fellow employee or business associate, would represent an example of an appropriate 'in lieu of' expense." Each of Francisconi's expense claims, some of which involved stays with his father in Pocatello, Idaho, was approved by his supervisor.

¶3 In 1987, Francisconi was temporarily transferred to Omaha, Nebraska, to work as a safety representative for Arthur Shoener, a Union Pacific executive. During this time, Francisconi became intimate with another employee whom, he later learned, also had an intimate relationship with Mr. Shoener. Francisconi alleges that Mr. Shoener incurred some malevolence against him as a result of his relationship with the employee. In 1994, after this assignment, Union Pacific published a policy entitled "Union Pacific General Rules for Administering Discipline Effectively" (the UPGRADE Policy), and delivered a copy to Francisconi. Union Pacific then implemented the UPGRADE Policy. The UPGRADE Policy provides for a formal disciplinary process, including a formal hearing regarding an employee's conduct prior to termination.

¶4 On April 26, 1996, Francisconi was directed to attend a meeting in Omaha, Nebraska (the Omaha Meeting), without being told the purpose of the meeting. At the meeting, six Union Pacific officers and agents, including auditors, supervisors, and a railroad policeman, confronted Francisconi for four hours. Union Pacific accused Francisconi of abusing the In Lieu Policy, and presented some grounds and documents capable of being construed as evidence of abuse, such as altered receipts he had submitted. He was also accused of lying, theft, fraud, and abuse of his position. Further, Francisconi was told that Union Pacific was considering having him criminally prosecuted, which would lead to a search of his relatives' homes.

¶5 Although Francisconi did not believe he was at fault, he asked what he could do to keep his job. He was told, "Well, the first thing you can do to save your job is to fill out a statement." Francisconi wrote and signed, at Union Pacific's direction, a statement which included the following:

> I . . . freely and voluntarily admit to making in lieu of expense purchases not in accordance to the intent of the policy. I didn't include the itemized receipts for these purchases and I altered receipts to remove the itemized items listed on the receipts. I was aware that the items purchased were being given to my wife, my sister and my son and other people that my Dad chose to give them to. I also admit to including personal time with company time while I was in Pocatello on weekends and being reimbursed by the company for the time spent there for expenses. I was wrong in what I have done and am extremely sorry for misusing the expense account system.

Also during the meeting, the highest level of the UPGRADE Policy was mentioned as a possible way to resolve the matter.

¶6 After the meeting, Francisconi experienced extreme anxiety, lack of sleep, and an outbreak of hives. The assistant vice-president of Union Pacific, Mr. Campbell, telephoned Francisconi several times demanding his resignation and that he release Union Pacific from liability. Mr. Campbell, knowing that Francisconi's wife was experiencing health problems, threatened that Francisconi would not be insured from April 30, 1996, would not receive COBRA medical coverage, would not be paid for the month of May, and would be criminally prosecuted. Mr. Campbell did not retract these threats even after Francisconi explained that his wife was scheduled for surgery. Further, "[t]he health care benefits department of [Union Pacific] was directed by . . . the human resources director of the railroad operations department, which was headed by Mr. Shoener, not to offer COBRA coverage to" Francisconi's wife. These directions were initially followed, causing the surgery to be rescheduled until Francisconi's wife finally obtained COBRA coverage.

¶7 Union Pacific then terminated Francisconi for alleged willful disregard of the In Lieu Policy and for intent to deceive Union Pacific in his use thereof. He now appeals the district court's summary dismissal of his claims.

STANDARD OF REVIEW

EXH. 30A



(UPRR CONNECTED PROGRAM)

PO Box 946760
Maitland, FL 32794-6760

July 18, 2002

DOROTHY D GROTHER
1718 RUSTIC PARK DR
KINGWOOD TX 77339

Underwriting Co.: Continental Casualty Company
Application Number: 10170-1010
Account Name: CNA Group Benefits Long-Term Care Program

Dear DOROTHY GROTHER:

Thank you for your recent application for Long-Term Care Insurance.

We are sorry that we are unable to issue the insurance for which you have applied. Our decision is based on your history of response to questions 2.a., 2.e., 2.i., 3 and question 5 listed on your application. While we realize you may be disappointed, we want to assure you we made this decision only after careful consideration of your health history.

Occasionally, as in your case, a particular condition or combination of conditions will prevent us from issuing coverage. We hope that you understand that without such an underwriting review we would need to raise our premiums substantially, greatly limiting the availability of this product.

You may request reconsideration of this decision. All requests for reconsideration should be submitted in writing within 60 days of receipt of this letter by sending the reasons for your request and any documentation you may have to support your request. Please send this information to the Group Long Term Care Underwriting Department at the address listed above. Ordinarily, you will receive notification of the final determination within 60 days following receipt of your request. If special circumstances require an extension of time, you will be notified of such extension within 60 days.

Again, thank you for choosing CNA; we appreciate your interest in this plan. If you have any further questions, please let us know.

Sincerely,

Jody Ross

Administrator
Group Long-Term Care Plan from CNA

Enclosure(s)

UNION PACIFIC EXHIBIT 2
PAGE 110 OF 146

EXH. 30 B

AARP Life Insurance Program from NEW YORK LIFE

New York Life Insurance Company
AARP Operations
Customer Service
P.O. Box 30712
Tampa, FL 33630-3712

October 26, 2001

Mrs. Dorothy D Grother
1718 Rustic Park Dr
Humble, TX 77339

Dear Mrs. Dorothy D Grother:

Thank you for your request for insurance under the AARP Life Insurance Program from New York Life Insurance Company.

We regret to inform you that based on the health information you provided, we must decline your request for insurance.

We appreciate your interest in the AARP Life Insurance Program from New York Life. If you believe the information we have received from you is inaccurate, please write me and we will be happy to review this matter with you.

Sincerely,

Maria Echazabal

Maria Echazabal
Underwriting Associate
Customer Service

EXH. 30 E

North American Company
for Life and Health Insurance
Office: 20700 Ventura Boulevard, Suite 220 / Woodland Hills, CA 91364
Mailing Address: P.O. Box 4193 / Woodland Hills, CA 91365-4193
Telephone: (818) 716-0004 Fax: (818) 716-0006

DOROTHY D GROTHER
1718 RUSTIC PARK DRIVE
KINGWOOD TX 77339

OCTOBER 29, 2001

RE: LW00184094
DOROTHY D GROTHER

Thank you for applying to North American for your life insurance needs. We are not able to approve your application due to the reason stated below:

medical history and current medical findings

If you submitted money with your application in exchange for a Conditional Receipt, it will be promptly refunded. This notice and the refund void the Conditional Receipt and no coverage is provided under its terms.

If your policy was assigned to North American, we have returned the original paperwork to your agent. A letter of release has been sent to your existing Insurer.

We regret that we are not able to be of service to you at this time. If you have any questions, please contact your agent.

Underwriting Department
87 /3XH

Exh 36D

John Hancock Financial Services, Inc.

333 West Everett
Post Office Box 2986
Milwaukee, WI 53201-2986

John Hancock
FINANCIAL SERVICES

Susan Stinard
Senior Underwriter

February 8, 2002

Dorothy Grother
1718 Rustie Park Drive
Kingwood, TX 77339

Dear Ms. Grother:

Thank you for your application for Long Term Care insurance with this company. I am sorry to inform you that after careful consideration and a review of your medical history we cannot provide coverage for you.

Our decision was based on your medical history of an abnormal MRI of the brain. Additionally our decision was affected by your history of rheumatoid arthritis and systemic lupus erythematosus under treatment with multiple prescription medications as documented in your medical records provided by Dr.. Cavanar-Johnson.

If you have any questions regarding the medical history contained in this letter, please feel free to forward a copy of this letter to your primary care physician. If your physician feels this information is incorrect or inaccurately stated, we would be happy to re-evaluate your medical history based on a corrected statement from your physician.

Any conditional receipt coverage that you may have requested when you applied is no longer in effect. Any initial premium made in connection with this application will be refunded.

Thank you for considering John Hancock for your insurance needs and we appreciate the opportunity to review your application.

Sincerely,

Susan J. Stinard

Susan Stinard
Senior Underwriter

Reference#: 5037729

EXH 36E

GE Capital Assurance

Long Term Care Division
1650 Los Gamos Drive
San Rafael, Ca. 94903-1899
(415) 492-7000

November 1, 2001

Mr. Dorothy D. Grother
1718 Rustic Park Dr
Kingwood, TX 77335

RE: UDG4239360

Dear Mr. Dorothy D. Grother:

Per your request, we corresponded with Dr. Mary Cavnar Johnson on this date regarding the reasons for our decision on your long term care application.

We suggest that you contact your physician to discuss the information provided in our letter.

Sincerely,

Jennifer Rogers /JB

Jennifer Rogers
Senior Underwriting Specialist
LTC Underwriting Department

LTC4BAW #430

cc: Ms Diane L Dussault

EXHIBIT 39

UTU Message Board

Railway Age article on New York Dock/STB agreement revisions

From:
Date: 18 Jul 1999
Time: 20:26:28
Remote Name: 205.188.197.58

Comments

"Cram-down" casts a menacing cloud over upcoming negotiations RAILWAY AGE July 19, 1999 COMMENTARY By Frank N. Wilner

Just a few months ago, Union Pacific Chairman Dick Davidson was optimistic that railroads and their unions could negotiate an end to a bitter controversy known as "cram-down." Dream on. Last month Davidson's chief labor negotiator, John Marchant, told the Industrial Relations Research Association how essential cram-down is to carrier efficiency. Fellow panelist Linda Morgan, chairman of the Surface Transportation Board-the agency that gives a final thumbs up or down to cram-down proposals even decades after mergers are consummated-appeared to agree by distancing herself from a Clinton administration proposal to banish cram-down legislatively. Offering a blistering rebuke of the process, and of STB as its facilitator, was Brotherhood of Maintenance of Way official Joel Myron.

Cram-down is a shorthand term for the ability of merged railroads to override the Railway Labor Act and collective bargaining agreements to the extent-and this is a legal term-"necessary" to enable the unifying carriers to achieve intended efficiencies of the unification. There is no time limit on "necessary" transactions and it is not uncommon for contract overrides to be sought decades following a merger. Fourteen years after Missouri Pacific was merged into UP, UP successfully moved to override a local collective bargaining agreement to facilitate consolidation of work assignments and seniority rosters.

In exchange for overriding collective bargaining agreements, merged railroads pay damages to adversely affected workers-payments Morgan termed "substantial." When the two sides can't agree on the trade-off, arbitrators decide. Hence, the term cram-down.

Railroads are the only industry where Congress permits an override of private-sector contracts for the benefit of merging companies, their customers, and investors. But railroads also are the only industry where adversely affected employees' pre-transaction incomes and benefits are protected for up to six years. The process flows from the voluntarily negotiated Washington Job Protection Agreement of 1936 as embodied in a 1979 regulatory decision-blessed by the courts-called New York Dock, which relates to a merger involving New York Dock Railway.

Although New York Dock's Article I, Section 4 sets out procedures and a timetable by which separate collective bargaining agreements of unifying railroads are harmonized-selection and assignment of employees, transfer of work, and merging of seniority-Myron says it conflicts with Section 2 that mandates rules and working conditions may be changed only through Railway Labor Act bargaining procedures. The courts disagree, but Myron and the AFL-CIO Executive Council won't retreat. The matter has become so disruptive that the bi-partisan leadership of the House Transportation and Infrastructure Committee encouraged the sides to negotiate a settlement. Talks broke down.

Marchant takes issue with the term cram-down. "Employers can't just go out and change operations following a merger," he said. Railroads must give 90 days notice, make an attempt voluntarily to negotiate an implementing agreement under New York Dock guidelines, and submit to binding arbitration if an agreement cannot be reached. Myron insists rail regulators so often overturned arbitrated decisions favorable to employees during the 1980s that arbitrators became conditioned to granting railroads undue preference. Morgan says she's trying to "level the playing field" and "eliminate" expectation by either side of a "favorable" STB arbitration review.

If railroads and their unions had to bargain under the sometimes interminable procedures of the Railway Labor Act, said UP's Marchant, railroads would become further hobbled in competing with trucks.

When UP and the MP merged, he said, efficiency dictated that a 100-year-old locomotive repair facility at Omaha be closed and the work shifted to a five-year-old facility at Little Rock. New York Dock procedures provided the key to unlocking what Marchant called a rapid and equitable solution for selecting the new work force, determining seniority, and protecting the earnings of those adversely affected. Similarly, following the UP-Southern Pacific merger, six separate collective bargaining agreements threatened efficient operations at Salt Lake City. UP again turned to New York Dock procedures to choose a single surviving agreement. Short of arbitration, a peaceful resolution would have been impossible, said Marchant, because each vested interest wanted to "cherry-pick" terms most favorable.

"Carriers have huge investments in mergers and were we to resort to the Railway Labor Act for implementing agreements we'd have strikes that would devalue mergers and give unions an unconscionable amount of leverage," said Marchant. "We'd have to take out our checkbooks," he said, displaying his for effect.

The enemy, of course, is non-unionized truckers, but Serbs and ethnic Albanians may live together peacefully before rail management and labor settle contract-override differences. Under this menacing cloud, the two sides will begin in November industry-wide bargaining for a new wage-benefits-rules agreement. God save the railroad industry. xxxxx

---

Last changed: July 18, 1999

EXHIBIT 38

her way for employees to win

's workers rights

ION

) sign away their
e their employers
ination still have
heir cases may one
urt.
ne 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 employers have begun requiring workers to waive their right to jury trials—including potential class action suits—and submit job-related disputes to arbitration instead. Some companies insert such agreements into job application forms, and, workers' advocates say, job seekers have little choice but to sign on the dotted line.

Your Money

About 6 percent of all American workers are covered by workplace arbitration agreements, notes Robert Meade, senior vice president of the American Arbitration Association (AAA). Proponents of arbitration say it offers a quick, cost-effective alternative to litigation.

Keeping results fair

But when employers impose mandatory arbitration on workers as a condition of employment, the results can be "brutally unfair," claims Cliff Palefsky, a lawyer in San Francisco and co-founder of the National Employment Lawyers Association.

Compared to a lawsuit, Palefsky contends, arbitration gives plaintiffs less access to evidence in the employer's control, less chance of being awarded punitive damages and no opportunity to have the case heard in an open courtroom. Moreover, he charges, arbitrators may feel pressured to render decisions that will please (or at least won't alienate) companies that may hire them again.

AAA's Meade counters that reputable arbitrators operate by a code of ethics that requires them to disclose any conflicts of interest.

Besides, arbitration provides a venue for workers whose complaints those that could win big awards.

Baker, the former Waffle Ho cook, never tried to arbitrate his gr ance with his employer. Instead, filed a claim with the EEOC, alleg that in firing him, the company l violated the Americans with Disa ities Act.

Of about 80,000 claims filed with EEOC every year, only about 400 e up in court. Baker's case was amo the half of 1 percent that do.

The EEOC enters the case

As with other claims it pursues, t EEOC first tried to settle with W fle House out of court. When tho attempts failed, the EEOC su the company, seeking not only court order requiring Waffle Hou to stop discriminating, but an awa on Baker's behalf, including ba pay and compensatory and puniti damages.

An appeals court ruled the EE had no right to seek damages fo victim who had agreed not to take l claim to court. But in a 6-3 decisi the Supreme Court overturned t lower court's ruling, saying t EEOC was not bound by a contr to which it was not a party.

Writing for the majority, Just John Paul Stevens said the EEOC "the master of its own case."

Justice Clarence Thomas, who o headed the EEOC, wrote the d senting opinion. He claimed EEOC should not be allowed to ' on behalf of an employee that wh an employee has agreed not to do himself."

Know what you're signing

RECENT COURT decisions have given companies the green light to require workers to submit disputes to arbitration instead of litigation.

Be on the lookout for arbitration clauses in any documents you're asked to sign, and be sure you understand the consequences, advises Robert Meade of the American Arbitration Association.

"Weigh the pros and cons," he says. Weigh how much you want that particular job against how im-

Article from AARP MAGAZINE

EXH 39

Tuesday April 29, 2001

Nation HOUSTON CHRONICLE

Sub commander gets letter of reprimand

Associated Press

PEARL HARBOR, Hawaii — USS Greeneville 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 and boys aboard a Japanese fishing vessel.

Waddle also received a two-month cut in pay and salary, but his punishment was suspended. Waddle will keep full pay and retire in October.



Cmdr. Scott Waddle says he will retire in October.

"While [illegible] Navy [illegible] this was [illegible] one of the [illegible] cause [illegible] dent," Waddle [illegible] statement [illegible] civilian [illegible] collision.

The punishment was imposed by Adm. Thomas Fargo, who said Waddle showed "poor judgment and a lack of sense of responsibility" when he rapidly surfaced the Greeneville on Feb. 9 into the path of a commercial boat training 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 Navy and with dignity and respect, and I thank him for that," said Waddle, of Austin.

All other officers of the Greeneville also escaped court-martial. Those included the officer of the deck, Lt. j.g. 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 Kazuhiko 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

EXH. 4/0
PAGE 1 of 2

a brand NEW day

A.F. Times 8/5/02

Commander is back with a wing — and soon a star

By Bruce Rolfsen
TIMES STAFF WRITER

Two years after he was denied command of a fighter wing, Col. Larry D. New's career appears to be back on track.

New was handed the flag of command for the 325th Fighter Wing at Tyndall Air Force Base, Fla., on July 12. The wing trains the service's active-duty F-15C Eagle pilots and is taking on the same job for the F-22 Raptor.

New also is in line to pin on his brigadier general star this year.

His career hit difficulties after a 1998 helicopter accident at Nellis Air Force Base, Nev., that killed 12 airmen. New then was commander of Nellis' 57th Operations Group.

An Air Force accident-investigation board faulted New for not taking stronger actions to improve the safety of operations in the helicopter squadron. Also, family members of some of the lost airmen sought support from U.S. lawmakers to stop New's promotion.

The head of Air Combat Command in 2000 put a hold on New's wing-command posting. The air combat commander then was Gen. John Jumper,



ROBERT COOPER

Col. Larry New speaks at the July 12 change-of-command ceremony for the 325th Fighter Wing at Tyndall Air Force Base, Fla.

New told Air Force Times in a written statement, "My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence."

New's command represents the turnaround of a career that was in trouble since the deaths of the airmen in the crash.

Fatal accident

On Sept. 3, 1998, two HH-60G Pave Hawk helicopters assigned to the 66th Rescue Squadron collided during a night-training mission.

An accident-investigation board concluded that aircrew error was the immediate cause of the accident. But the board also found the rescue squadron suffered a wide range of woes, from a grueling overseas-deployment schedule to poor morale to an inexperienced cadre of pilots.

Investigators said New believed he had solved the 66th Rescue Squadron's problems when he relieved from their jobs a weak squadron commander and a first sergeant. But actually, the report concluded, New had treated just the symptoms.

'My number-one priority is to conduct the mission in a safe and effective manner while continuing Tyndall's legacy of excellence.'

New also didn't provide the new squadron commander and base safety officer a safety evaluation of the res squadron, called Operational

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 o 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 exceptiona performance, the continuing media scrutiny surrounding (him would impair his ability to effec tively command the 33rd FW."

Brighter fortunes

Instead of getting his wing com mand, New stayed in a desk job a the Pentagon with the Join Chiefs of Staff office. But hi fortunes got brighter in 2001 wher he was among the more than three dozen Air Force colonels nominat ed for brigadier general.

Family members of the crash victims challenged New's promo tion. But then-Air Force Secretary Whit Peters and Defense Secre tary William Cohen defended hi performance.

In August 2001, the Senate ap proved New's promotion and i the same month he became Ai

Exh. 40 —
page 2 of 2

of staff and who has approved New's latest assignment as commander of the 325th Fighter Wing.

"The previous decision to delay General (select) New's command opportunity was based on my judgment that his effectiveness in command would be impaired by an ongoing investigation," Jumper said in a statement to Air Force Times.

"This would not have been fair to General New or the airmen in his wing. With the investigation completed, the Air Force is right to take full advantage of General New's leadership and qualifications to command," he said.

ment, written by the Air Force Safety Center at New's request.

The new squadron commander had been in his job three weeks when the crash occurred.

Board president Col. Denver L. Pletcher concluded about New's performance, "... I believe the 57th OG commander failed to mitigate known safety hazards within the squadron that directly contributed to this accident."

After the accident and a staff assignment at the Pentagon, New in 2000 had been on track to become commander of an F-15 unit, the 33rd Fighter Wing at Eglin Air

would share with student fliers, he said, "What I try to impart on all airmen is that we are part of a cause that is much bigger than ourselves. Our calling in the military is most certainly challenging and has an inherent level of risk.

"... They are part of a force that takes great measures to provide our young men and women with the best equipment, training and support to ensure we accomplish the mission with the greatest emphasis on safety." □

Bruce Rolfsen can be reached at (703) 750-8647 or brolfse@atpco.com.

EXH. 41

SECOND CHANCE

Former Arkansas attorney general who lost his law license gains redemption in Texas

Associated Press

AUSTIN — Eleven years ago, at age 43, Steve Clark was attorney general of Arkansas and thinking about challenging the incumbent governor, Bill Clinton.

Ten years later, he was working at a Half Price Books in Austin, making $6.50 an hour while flunking the Texas bar exam. Even if he had passed, he might not have gotten a law license because of a felony conviction in Arkansas, according to Saturday's editions of the Austin American-Statesman.



Associated Press

Steve Clark, former Arkansas attorney general, is reflected in the glass frame of his recently acquired Texas law license.

Today, Clark is on the rebound. He passed the bar exam on the third try, got his Texas law license in June and started a general civil and mediation practice as a solo Austin practitioner.

"It's very wonderful to say to somebody, 'I'm a lawyer and mediator,'" Clark said. "It is redemption."

Under Arkansas rules, Clark can never get his law license back in that state because of his felony conviction.

Clark is the most prominent of a handful of former felons practicing law in Texas, where lawyers who lose a license because of a felony conviction can get it back. A 1997 survey by the American Bar Association indicated that few states permanently disbar lawyers.

Over the past five years, records show, four petitions for reinstatement involving felony convictions were approved. Texas has more than 66,000 lawyers.

Clark, then 31, in 1978 ran for attorney general, a position Clinton gave up to run for governor. Both men, who are

See CLARK on Page 17A.

HOUSTON CHRONICLE MARCH 12, 2001

Clark

Continued from Page 13A.

Democrats, won. By the end of the 1980s, Clinton was looking to run for president. Clark dreamed of becoming governor.

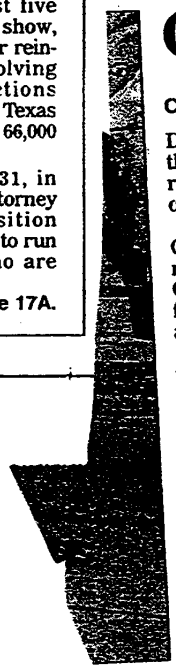
But in January 1990, just after Clark announced that he was running for governor, the Arkansas Gazette reported that Clark's office had spent $115,729 on travel and meal expenses in 1988.

That article triggered an official investigation, and Clark dropped his race for governor. He was found guilty of using his state credit card to pay for meals and travel for family and political contributors. He was fined $10,000 and ordered to pay restitution.

The Internal Revenue Service also said he owed $465,000 in back taxes, penalty and interest. He negotiated and paid $75,500.

Determined to get a law license, Clark met with the Texas Board of Law Examiners. They decided he was morally fit to be a lawyer.

He remembers what a board official told him: "We believe in rehabilitation in Texas, and you look like you've had enough."



hronicle

and

Exh. 42

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

UNION PACIFIC EXHIBIT 2
PAGE 122 OF 146

Healthy Hound's Tip of the Day

Chronic stress that lasts more than a month may increase your risk

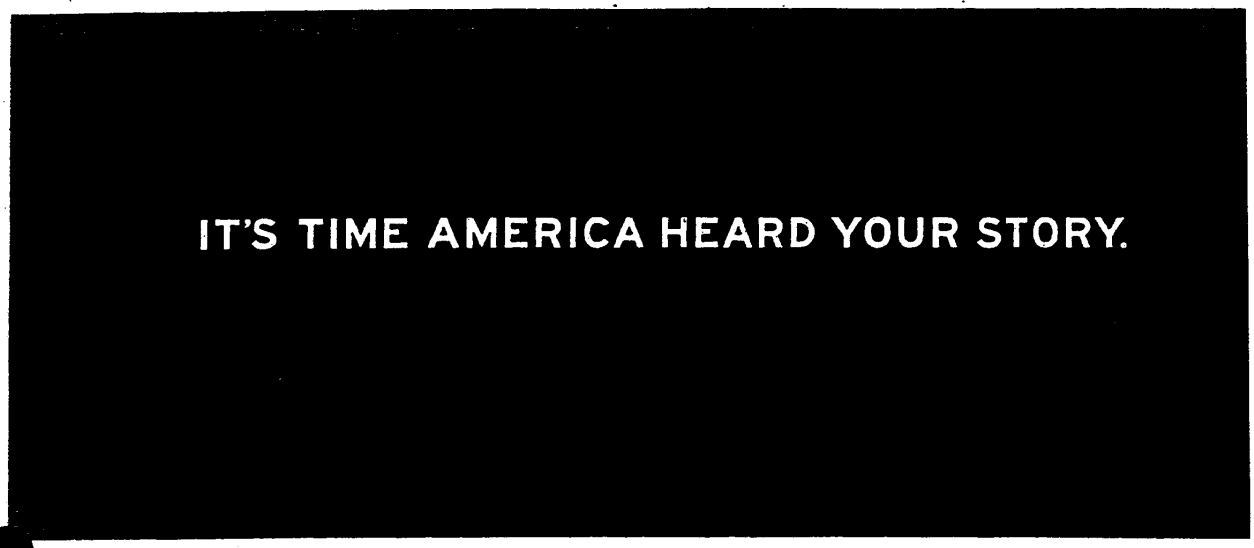
2 Exh.
43

WAS GROTHER "TREATED FAIRLY AND WITH RESPECT" WHEN DEMOTED IN 1997?



EXH. 43

RECEIVED WITH PAY CHECK APRIL 26, 2002



Union Pacific's new television campaign will reach across America, telling an important story. Yours. The story of the men and women of Union Pacific and the truly indispensable role you play in our nation's growth. To learn more about the campaign, visit www.uprr.com.

BUILDING AMERICA℠

UNION PACIFIC

EXH. 44

UNION PACIFIC CORPORATION

DICK DAVIDSON
CHAIRMAN

February 16, 2000

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339-2963

Dear Mr. Grother:

Last year I asked for your help in communicating to Congress the immense achievements of the railroad industry—and Union Pacific—in cutting rates, improving safety and increasing investment since being deregulated by the Staggers Rail Act in 1980.

The response was terrific. Over 2,800 letters, e-mails, faxes and phone calls were logged from Union Pacific employees and retirees to representatives in Washington, urging them to oppose any measure—such as H.R. 2784, S. 621 and S. 747—that would re-regulate the industry and send it back to the 1970's when government interference left railroads poorly managed and often bankrupt. Joining forces with other advocates, we were able to slow the momentum of some opportunistic shipper groups who wanted to see our industry stifled by government control.

However, we cannot afford to relax our efforts despite these successes. It will take continued vigilance to ensure that Congress stays on the right track and passes a reauthorization bill that is good for railroads and good for the country that depends on them.

Let me say in closing that I am proud to be a part of a company whose employees and retirees care so much about keeping it as strong and vital in this new century as it was in the last. Again, thank you for your hard work for Union Pacific and for your extra effort with this legislative challenge. As a team, we can ensure that railroaders—not government—continue to run railroads.

Sincerely,

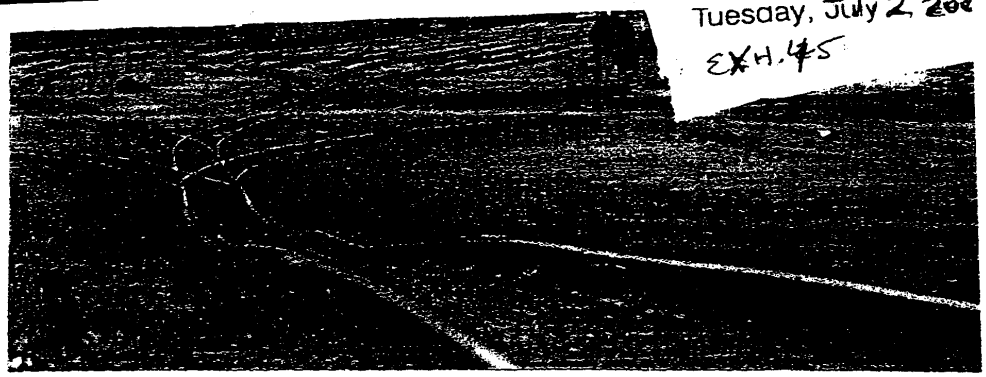
Dick

Dick Davidson

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PAGE 125 OF 146

Page 1 of 2

Tuesday, July 2, 200
EXH. 45



Photos by Melissa Phillip / Chronic

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 re turned the freight carrier to normal service to ave future crises.

Better rail service doesn't end gripes

Union Pacific back to normal; shippers crave competition

By BILL HENSEL JR.
Houston Chronicle

FIVE years ago, the troubled merger of Southern Pacific and Union Pacific nearly paralyzed rail traffic in Houston and points north.

Despite the near-meltdown in service in 1997 and into 1998, massive efforts by Union Pacific to improve service have brought the carrier back to normal.

Customer service is also better and the company is reporting record profits, spokesman John Bromley said. The company hauled in record net income of $222 million in the first quarter of 2002.

While shippers agree that customer service is considerably better than it was five years ago, that doesn't mean they all are happy.

The source of their ire is the lack of rail competition in the Houston area. It is an ever-present annoyance for shippers like Sam Slovack of Basell USA.

"We are not in a meltdown condition. Traffic is moving," Slovack said. "Is it moving at what we believe to be competitive rates? No. Do we see room for improvements in service levels? Absolutely. But if you have no competition, there is no drive nor desire to improve the product offering."

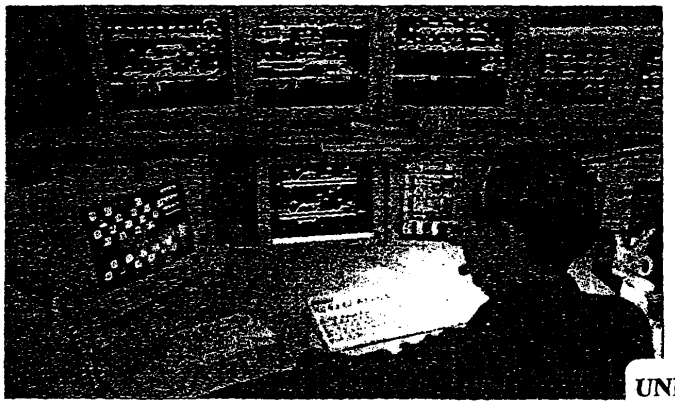
Shippers generally agree they would like to see more competition, said Diane Duff, head of the Alliance for Rail Competition, which represents a group of freight rail customers and industry trade associations in the ongoing debate over rail competition.

"I can generally state that my members are far happier with their rail service today than they were five years ago," Duff said. "But that wouldn't take too much. My experience has been that rail customers on the whole are thrilled when their stuff arrives with any regularity at all."

It's not a problem isolated to Houston. The number of mergers since 1980 has whittled th[illegible]

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.



Terminal train dispatcher Billy Duke keeps trains moving at the new dispatching office in Spring

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UP Page 2 of 2

ontinued from Page 1B.

espread calls to make changes to ore competitive rail service.

While the rail merger was only approved ith terms requiring Union Pacific to open p a few of its lines to competing carriers, ere was a strong push to open the sys- m far more during the crisis. There's still lenty of talk of the need for more opening, ut the chance of it happening has faded as rvice has improved.

Union Pacific dominates the local rail ipping business because it owns the great ajority of the lines, said Ed Emmett, esident of the National Industrial Trans- rtation League. The group represents big ippers before government regulatory encies.

That's a major concern for the chemical ants along the Ship Channel that depend trains to move their huge output over- nd.

"All modes of transportation supposedly ve been deregulated, but the very nature railroad is if you have a chemical plant, u are served by a railroad — and if you n't like that railroad, you can't call an- her one," said Emmett, a former member the Interstate Commerce Commission.

Most shippers just want the ability to ve another railroad physically serve their r' at least have the ability to get ottleneck rates," he said.

hat urge sparked the formation of a ven- e combining a group of large chemical akers with the Burlington Northern and nta Fe Railway Co. to build their own 13- le spur line.

The $80 million project, called San Jacinto il Ltd., would cut the cost of shipping in d out of the four plants in the Bayport ea: Atofina Petrochemicals, Basell, Equi- r Chemicals and Lyondell Chemical Co.

Since the petition asking to build the line s filed by San Jacinto and Burlington rthern last August, the Surface Transpor- ion Board originally was to have com- ted its investigation and review by Au- st. But it will take more time because agency is doing an environmental alysis, said Joe Dettmar, deputy director he board's office of proceedings.

We can't put out a final decision until environmental process is complete, and s pretty clear that it is not going to be mpleted" on time, Dettmar said.

While the huge traffic tie-up in 1997 at on Pacific's Englewood yard in Houston ld happen again, Emmett doesn't believe ill.

he 1997 breakdown wound up costing ilroad hundreds of millions of dollars. stomers, whose shipments were emanded reimbursement because shipments hurt their businesses.

he rail slowdown triggered lawsuits filed he likes of Phillips Petroleum and Air uide America Corp. The lawsuits con- led Union Pacific refused to acknow- e the extent of its service problems and "set out on a campaign to deceive Air Liquide and other shippers," the company's lawsuit charged.

Union Pacific denied those allegations. It has since settled that lawsuit and most of the others. Only one suit is still pending against the carrier from that period.

At the height of the problems, the average time a car spent at the Englewood Yard in Houston was as long as 50 hours, Union Pacific Chairman and Chief Executive Officer Dick Davidson said. Now it is a bit more than half that.

Union Pacific has taken advantage of its recent turnaround by launching a marketing campaign aimed at shoring up its image. The "branding" campaign marks the first such move in years for Union Pacific, which suffered one of its worst public drubbings as a result of the problems emanating from Houston after the merger.

Steve Barkley, a regional vice president with Union Pacific, was dispatched to Houston in 1998 to attack the problems the Southern Pacific merger caused.

One solution was simple — trains in Houston were being moved by dispatchers in Omaha and Fort Worth, Barkley said. The company dealt with that by creating a local dispatching office that was also designed to maximize cooperation with its biggest competitor, Burlington Northern.

The idea for the shared office to coordinate train movements was hatched during a Sunday afternoon meeting in 1998 involving top executives from both companies.

"This was groundbreaking," said Rod Richardson, superintendent of the coordinating center, which is in Spring and focuses on dispatching trains in the area from Brownsville to New Orleans. "It has worked a lot better than anyone could have imagined."

One advantage of the setup is that what they call "colorblind" dispatching. The system reduces conflict between the competing interests of the railways by setting priorities based on the kind of cargo rather than the train line.

Intermodal traffic, products carried on stack cars or trailer cars, have the highest priority, followed by chemicals, said Stan Bubela, joint director of the Spring dispatching center.

For example, say a Burlington Northern chemical train is about to leave the South Yard, headed west to Rosenberg. If a Union Pacific intermodal train is heading east into Houston on the same tracks, dispatchers would normally decide to keep the intermodal train coming and hold the chemical train back until the intermodal train is past.

If the trains are carrying similar cargo, the priority goes to the crew that worked the longest.

The staff of the center is also a mix, with 95 Union Pacific employees, 24 Burlington Northern employees and 31 who work on behalf of both companies. An employee of the TexMex Railway, a joint operation of Kansas City Southern and TMM, also is at the center.

Union Pacific also made use of the added track from the merger by creating lines where all the trains run in the same direction. The advantage of this is easy enough to see — it reduced the number of times a train had to pull off the track to let another pass by 41,000 times a year. But initially it slowed operations instead.

"We knew it was going to be a wonderful thing, but the changeover itself was very painful," Davidson said. "It took about two months to make the changes work effectively."

Average train speed had slowed to about 7 mph during the height of the slowdown, Davidson said. It is back up to about 15 or 16 mph or even higher today, he said.

"It never will be as fast along the Gulf Coast because you have so much business originating and terminating there," he said.

Union Pacific also has since integrated its operations with the old Southern Pacific system by installing a new computer system.

Davidson noted that Union Pacific has spent $150 million in the Houston area alone to implement changes and make good on promises of improved service. Much of the improvements were needed because Southern Pacific had not kept up with maintenance improvements, he said.

"Southern Pacific had been neglected because they really had been cash-strapped," he said.

Union Pacific also had to spend several hundred million dollars to settle lawsuits the slowdown triggered. Davidson did not reveal the settlement figure, only acknowledging it was under half a billion dollars.

In the case of Air Liquide, the company has relied on Union Pacific for years to ship products from its manufacturing plants to national distribution points. The company ships products such as liquid argon and carbon dioxide, supercooled gases that are subject to rapid evaporation, meaning reliable delivery and transit times are paramount.

Phillips Petroleum leveled similar allegations in its lawsuit — that slowdowns and delays cost the company millions because it could not serve its customers properly.

Attorney Ronald Krist, who represented Phillips in its suit against Union Pacific, said the company did a good job of promptly settling the case, but he declined to discuss the terms.

"Railroad law is heavily laden with rules and regulations that limit damages, but in this case it was resolved very reasonably for both sides," Krist said.

Union Pacific paid out another $34 million in 2000 when it agreed to settle a shareholder lawsuit. That suit, like the others, claimed the company made false and misleading statements about service and congestion following the merger.

Davidson said he never questioned that the problems would eventually be straightened out. But he acknowledged that the "pain" from the merger lasted longer than anyone anticipated.

"It has all paid off," Davidson said. "Our service is better than it was prior to the me an

EXH. 46

Union Pacific Railroad
Ms. Janice Arthur (Via Certified Mail)
Director-Pensions
1700 Farnam Street
10th Floor North
Omaha, Ne 68102

August 25, 2002

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 attachs 3 and 4, or verifiable data (with bonus), from the Union Pacific compensation system into the standard pension computation model.

Please advise the results of these "WHAT IF" scenarios, as I am concerned about "FAIRNESS". Thanking you in advance for your cooperation.

Attachments @ 4
1718 Rustic Park Drive, Kingwood Tx 77339

Sincerely,

Exh. 47

This is G o o g l e's cache of http://www.apa.org/monitor/jul98/merger.html.
G o o g l e's cache is the snapshot that we took of the page as we crawled the web.
The page may have changed since that time. Click here for the current page without highlighting.
To link to or bookmark this page, use the following url: http://www.google.com/search?q=cache:_DMCjB3avPgC:www.apa.org/monitor/jul98/merger.html+%22How+groups+merge:++the+effects+of+merger+integration+patterns%22&hl=en&ie=UTF-8

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These search terms have been highlighted: **how groups merge the effects of merger integration patterns**

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.

UNION PACIFIC EXHIBIT 2
PAGE 129 OF 146

In fact, up to 80 percent of corporate mergers and acquisitions fail to garner the expected financial gains, mainly because the deal-makers fail to anticipate the psychological and philosophical clashes that can undermine the alliance, industrial/organizational (I/O) psychologists say.

Yet new mergers are being announced almost daily. And the trend is becoming a big line of business for I/O psychologists who specialize in helping two or more companies join forces effectively. Some psychologists are using tenets of marital therapy to help companies maintain a workable union.

'It's not inevitable that [merged companies] will fail, if they pay attention to the right things—like immediately resolving their different ways of doing business,' says organizational psychologist Addie Perkins Williamson, PhD, of Stamford, Conn., who works with companies that enter mergers and acquisitions.

What goes wrong?

While top executives of two companies may decide that merging operations makes sense competitively, the human antipathy toward change often infects the work force and erodes the alliances, psychologists say. At the top level, executives may find they're unwilling to adopt their partners' way of doing business, as Northwest Airlines and KLM Royal Dutch Airlines found when they joined forces in 1993.

The two companies began deriding each other's cultures in the business press, took their differences to court and, earlier this year, disbanded the alliance, notes Marks. Such cultural clashes can occur even between merging companies from the same country, says Rich Michaels of Michaels McVinney, Inc., a Boston-based corporate education and development firm. (Michaels' firm uses many techniques grounded in psychological research and theory.)

A prime example, says Michaels, is GTE's 1997 purchase of BBN Corp., a technology firm that was in the forefront of developing the Internet. BBN is a research-oriented company made up of scientists and technology 'wizards,' he says. Many of those valuable employees resigned because they thought GTE would impose a new, much more businesslike atmosphere on their workplace, he notes.

'They weren't in fear of losing their jobs,' Michaels says. 'They were just worried about what this new culture was going to be like.'

Employee morale can plummet as soon as a merger or acquisition is announced, psychologists say. Workers almost immediately fear that they'll lose seniority or expected promotions. They lament the loss of control of their jobs. And at worst, they worry about losing their jobs as the new partners combine operations and shed redundancies.

Top talent may leave the company altogether, and workers that remain will become angry or scared, and thus unproductive, says Marks.

Morale appears to be most at risk among employees in the company being acquired, says Gary Mottola, PhD, senior market analyst with Peco Energy Co. in Philadelphia. Mottola was involved in a recent study on the effects of mergers and acquisitions on employees. He and his colleagues recruited 263 college students to participate in a role-playing experiment. Some participants role-played middle-level managers in two fictitious companies—'Acme Corp.,' a large manufacturing firm that was

acquiring 'Bolt Corp.'

The researchers found that employees of both the Bolt and Acme corporations felt more threatened and less committed to their 'jobs' the more they had to adapt to new policies, pay scales and technology systems.

Previous studies have shown a similar resistance or decline in morale among employees who fear their organizational culture will disappear in an acquisition, Mottola adds.

Making the alliance work

Psychologists use a variety of techniques to help newly aligned companies keep their best workers and maintain healthy morale. Williamson and her colleagues, Erika Hayes, PhD, of Tulane University and Cheryl Henderson, PhD, of Stamford, Conn., try to help companies develop realistic expectations about a merger, just as they would help romantic partners anticipate some of the struggles they'll encounter after they marry. They encourage companies, in the premerger (premarital) stage, to really learn about and understand each other and to make sure they each have the same expectations about the merger.

For example, they worked with a large American corporation that bought a foreign travel agency. At first, the corporation was only interested in enhancing its economies of scale and had no desire to learn about the travel agency's business strategy, Williamson says. But in merger talks, officials at the agency convinced the acquiring corporation to absorb the agency's successful business practices, and not just its personnel and equipment.

Unfortunately, few executives take this step before entering a merger agreement, Henderson notes. After the merger is under way, Williamson, Hayes and Henderson encourage companies to address and resolve problems before they escalate out of control. For example, executives should immediately tell key employees that they're needed, lest those workers resign for fear of being laid off, Hayes says.

Both Mottola and the co-author of the merger study, Samuel L. Gaertner, PhD, professor of psychology at the University of Delaware, suggest a common group identity model, which guides two parties from a 'them and us' to a 'we' mind set. Even simple steps, like forming a whole new company name instead of hanging on to the name of one of the partners, can create a stronger sense of unity.

Marks uses a variety of approaches to help companies make a smooth merger, particularly in the area of employee relations. For example, he's helped companies develop programs to minimize the stress that employees may feel in the midst of a merger. The programs are designed to help workers:

- Understand and manage the stress they're feeling over the merger.
- Consider new ways of thinking, rather than embracing the old way of doing business.
- Stay informed about the merger progress and the implications it has for their jobs.
- Find ways to get involved in building the newly formed entity so they have a stronger sense of control and investment in their jobs.

Marks says that more companies are recognizing the need to address work force issues immediately

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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UNION PACIFIC EXHIBIT 2

Exh. 48

UNION PACIFIC RAILROAD COMPANY

MAN RESOURCES
DEPARTMENT

1416 DODGE STREET
OMAHA, NEBRASKA 68179

August 16, 2002

John Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Dear Mr. Grother:

I am in receipt of your certified letter dated August 5, 2002. I can completely understand your frustration with the lack of detail that I have been able to find for you. Unfortunately, I do not have the knowledge of how things were handled systematically from a Human Resources standpoint in 1997. The systems that were used then have since merged with others which makes backtracking difficult.

Regarding the reasons behind your 'demotion', I would suggest that you speak directly with Mr. Ken Packard who you indicated was your supervisor at the time. If anyone can shed any detail on your situation, I would hope he could. I do know that Mr. Packard is still working with Union Pacific here in Omaha. As far as how the systems have recorded or detailed the situation, I don't believe more researching will necessarily give you what you are looking for, which is a detailed explanation as to why the demotion/salary decrease was given to you.

Again, I apologize for my lack of help in this matter. I hope that Mr. Packard will be able to give you what you are looking for.

Sincerely,

Lisa Brewster

Lisa Brewster

Exh. 49

VIA CERTIFIED MAIL

October 28, 2002

To: Mr. K.C. Packard
Director Transportation Services
1416 Dodge Street, CBSU #1
Omaha, Ne. 68179-0004

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 whooping 21% reduction in wages or $1,272 per month. When you and Mr. Murphy debriefed me separately in June 1997, no one stated why I was being demoted, except that Union Pacific Railroad (UPRR) wanted its own people in Tucson and UPRR wants Prior-UPRR persons running the Sunset Route. *

I realize that the Service Unit was unable to shift all the flat switching from Phoenix to Tucson, as that was a near doubling of volume, without any more trackage made available in May-June 1997. Moreover, even the UPRR capacity model personnel said, "this merger experiment will not work".

Also, you will painfully remember that we had Maintenance of Way (MofW) curfews on both sides of Tucson during that yard consolidation merger experiment. Tucson could only operate trains between 1900 and 0700, which is also the general time span when both the Eastbound and Westbound fleets of trains were converging on an overwhelmed Tucson.

We were not allowed any new hiring, augmenting or train blocking relief until one day after I was advised of my 1997 Demotion!

While all the above was going on, on my desk was sitting the Union Pacific Vision and Values "1997 Desktop Stand" which stated, in part, "our values" include: "***TREAT OTHERS AS YOU WOULD LIKE TO BE TREATED".***

Was anyone else reduced 21% or $1,271 per month, as a result of someone else's merger yard consolidation experiment?

What about all the thousands of cars delayed elsewhere (i.e. Houston, Gulf Coast, etc.). Was anyone at these locations and others cut two SRG's for those spectacular service failures, which lasted beyond 6-9 months?

Surely, you would agree, that no one in their right mind, would think losing 21% of their wages was "Fair Treatment"; especially when other, Prior-UPRR managers were not reduced in pay for long periods of horrendous service failures and lawsuits against UPRR?

I have a few basic questions, which I desperately need answered please:

Are you now able to advise me specifically, at this time, what I did at Tucson that was so HEINOUS, other than being an Ex-Southern Pacific manager, that I deserved being demoted two SRG's, which will require at least seven years from 1997 to just restore my September 1995 salary level?

Who made the decision to demote me and on what specific basis, evidence or charges?

Why was I not allowed to defend myself?

Why was I not allowed a "developmental action plan"?

Logic Tests:

If I had known in June-July 1997, that I was being demoted for alleged "disciplinary reasons", why would I have had the GALL to write then UPRR President Jerry Davis on July 15, 1997, asking for an appeal to save my wages, career and retirement?

More importantly, when President Davis responded after almost two months, why did his ghostwriter say nothing about me being demoted for alleged "disciplinary reasons"?

Finally, why was I never advised that "discipline reasons" had been placed on my record until July 31, 2002?

The reasons these questions are directed to you include; but, are not limited to:

1. I was advised by Linda Buttrill, of Houston HR, that these questions should be sent to my 1997 Tucson supervisor.

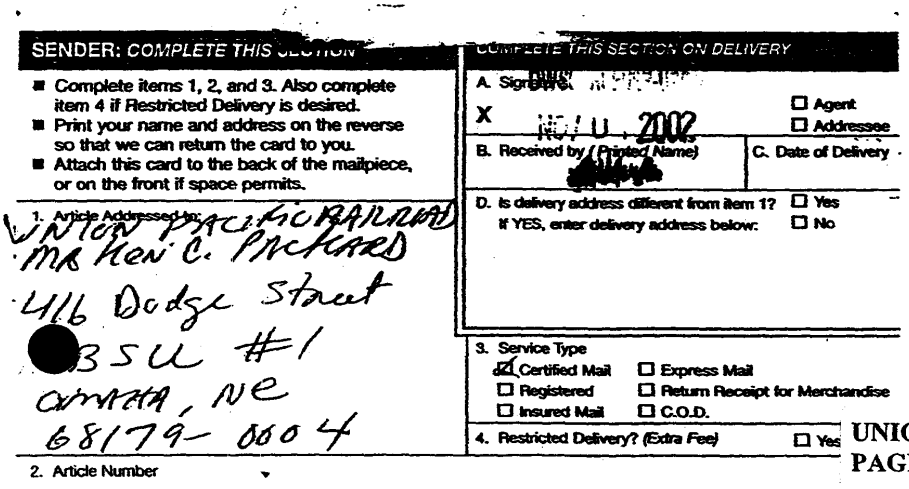
2. I was advised on July 31, 2002, that an on-line record exist with information in place regarding my 1997 demotion which states that it was a "disciplinary action" and I want to know NOW - "for what please".

It appears that over these last 5.5 years, every attempt I made to get promoted has been rejected, as I had this unknown-to-me "disciplinary action" entry in the on-line system which is a very quick way for hiring managers to reject someone for promotion consideration!

Please advise, such that I may clear my secret on-line record.

I can be reached at 678-5303 should you wish to discuss the above.

Thanking you in advance for your cooperation.


SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
UNION PACIFIC RAILROAD
MR Ron C. Packard
416 Dodge Street
1135 U #1
Omaha, NE
68179-0004

2. Article Number

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X NOV U 2002 ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

JG

John Grother

EXH. 50

SPECIAL CLASS I 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 Class 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 $260 million headquarters, which the railroad plans to occupy in August 2004.

The office tower symbolizes UP's 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 into North America's largest railroad.

The SP merger brought UP's network providing additional mainlines that don't all flow through Nebraska and opening more east-west channels and north-south lines into and out of Mexico and Canada.

Although it took UP several years to get its post-merger act together — by improving service, developing productivity and cutting costs — management is capitalizing on the revamped franchise and a renewed can-do spirit to act as top-line springboards.

"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



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 $2.46 billion in operating revenue.

75 IN 2005

Plus, UP's operating ratio of 78.1 during that span set a quarterly record, and its 78.7 ratio during 2002's first nine months improved 2.2 points compared with the same 2001 period, remaining south of 80.

Next up's a 75 ratio. "We'll get there in 2005," says Davidson.

To get closer to that destination, UP plans to take a bigger bite out of an estimated $28 billion transportation buying quarter west of the Mississippi River. Currently Burlington Northern Santa Fe and UP control 25 percent of the market's trucking lanes, the majority of that is

"I think we can get 1 to 2 percent a year — if we can get just one-half of a 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 off 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

EXH. 51

UP job cuts become reality

OMAHA, Neb. -- The president of Union Pacific Railroad (UP) warned employees in a recent e-mail that aggressive cost-cutting and job cuts were coming in the first quarter of 2003. One round of those cuts came Monday (January 13), when 53 employees in the information technology department lost jobs, according to a report by Grace Shim that appeared in the Omaha World-Herald.

President Ike Evans warned in a Thursday e-mail sent to employees that each department would have to cut costs.

"While the scope of these plans will vary by department, these cost reductions will be felt across all areas of the company, primarily in administrative functions," he said in the e-mail.

Union Pacific spokeswoman Kathryn Blackwell would not say how many employees lost jobs Monday but did say it was likely some of those affected were managers. Blackwell said the job cuts were immediate.

An Omaha employee of Union Pacific, who spoke on the condition of anonymity, said 53 workers in the information technology department in Omaha lost jobs Monday. The employee also said at least 26 workers in the crew management department in Omaha lost jobs last week.

Two crew management employees in Omaha, who also spoke on the condition that they not be named, said more job cuts are anticipated in the department.

Union Pacific Corp., the Omaha-based company whose largest unit is its railroad, had announced in December that it was drafting a plan to cut costs by as much as 20 percent.

Evans said in a recent e-mail to employees that 2002 was "a very good year," but cited these factors as the reason for cuts in 2003: higher employee wages, double-digit increases in health care benefits, higher fuel prices resulting from the threat of war in the Middle East and political strife in Venezuela, and soaring insurance costs since the Sept. 11 terrorist attacks.

"A continuing soft economy is a backdrop to all of these challenges," Evans said in the e-mail.

In the past, Evans said, the company met similar challenges through productivity improvements, price increases and careful budgeting, but the company is not earning its cost of capital, which is the basic return that investors and lenders expect from their investment in the company.

"We need to take a bolder step," he said of 2003.

UP's cuts come at a time of improved earnings for the company, which reported record revenues of $3.2 billion for the third quarter.

For the first nine months of 2002, the company reported net income of $963 million. During the first nine months of 2001, the company posted $691 million in net income.

UP will report its fourth-quarter 2002 results Jan. 22.

"Some have asked why we need to take these tough actions at a time when we are setting financial and operating records. The answer is simple: It is better to act from a position of strength while you have choices, rather than to wait until financial weakness forces even more severe actions," Evans wrote in the e-mail.

Union Pacific spokeswoman Blackwell said employees are not being offered early retirement. She said that severance packages were based on years of service but declined to give details.

One of the Union Pacific employees said managers who lose their jobs would get a maximum of one year's pay if they have 20 or more years' tenure. If a manager chose to revert to union membership, then the union member with the least seniority would lose his job, the employee said.

The employee said no department is being asked to cut more than 20 percent of its staff.

When Union Pacific cut jobs in 2001, employees were offered a severance package and a buyout program.

In this round of cuts, Blackwell said there may be many instances where affected people won't be of retirement age.

Blackwell said the company is targeting aspects of the business that don't add value. The company can do more things efficiently because of technology and does not need as many people, she said.

(The preceding report by Grace Shim appeared in the Omaha World-Herald Tuesday, Jan. 14, 2003.)

14. The 3rd and the 5th principles of the Code were violated in the Spring of 1998 at the UP Tucson Yard Office, in the course of some "spring cleaning." Information regarding discipline proceedings gathered by the Southern **Pacific** Transportation Company was discarded by **Union Pacific** carrier officials in a seemingly negligent manner--exposing that information to public display. The **Union Pacific Railroad**, by its careless disposal of discipline **records**, failed to take appropriate precautions to prevent the possible misuse of that data. (see photos enclosed)

15. Contrary to **Union Pacific's** unstated premise regarding the sanctity of **personal records** and data, this incident of improper disposal of **records** shows--not careful stewardship--but rather callous disregard for the **personal records** of employees and disregard for the privacy rights of those employees. The old discipline **records** which we found next to the dumpster near the Tucson Yard Office contained names, social security numbers, the intimate details of investigations (including drug and/or alcohol violations--old "Rule G" offenses), and carrier comments about the final disposition of those cases. These were **records** of current employees. The unsealed boxes of files were stacked next to the dumpster in plain sight for several days until the trash removal service hauled them away. It would seem that **records** of this nature should have been shredded or incinerated to prevent their accidental dissemination; yet they were disposed of in a manner which made them accessible to other employees, trespassers, or thieves for whatever illicit or nefarious purpose might be devised (e.g., extortion, blackmail, identity theft).

16. Engineer Howard has expressed concern that, given the UP's new policy on graffit of a sexual or racial nature found on company property (effective 05 Dec 01)--and the reporting requirements imposed by that policy--he may be unjustly categorized as a less than upstanding employee by the existence of the prank time claim.

17. We believe that the removal of this offensive record from Engineer

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These search terms have been highlighted: **personal records union pacific railroad**

BLE DIVISION 28

TUCSON, AZ.

11/27/2001 LAST UPDATED

From:

R.S. Svob, Jr., Chairman
Arizona State Legislative Board
Brotherhood of Locomotive Engineers
1534 E. Water St.
Tucson, AZ 85719-3344
520-327-5864 ph. / 520-320-9697 fax
520-557-6795 pg. / 520-247-4961 cell

UNION PACIFIC EXHIBIT 2

EXH. 53

Via CERTIFIED MAIL
Union Pacific Railroad
Human Relations Department
Attn: Ms. M. Uwakwe
1416 Dodge Street
Omaha, Ne 68179

January 28, 2003

Ms. M. Uwakwe,

Further the issues of **"FAIRNESS TO ALL EMPLOYEES" AND THE ACCOUNTABILITY OF MANAGERS FOR NOT FOLLOWING UNION PACIFIC RAILROAD'S (UPRR) PUBLICLY PUBLISHED "BUSINESS ETHICS", WHO DEMOTED ME 2 SRG'S DESPITE A 1997 DEMOTION POLICY THAT STATED "IN *MOST CASES, THE EMPLOYEE'S PRESENT SALARY LEVEL IS RETAINED" (EXH.1).***

Recommend that corroboration of total compensation fairness be obtained simply by requesting a few comparisons from the Compensation Dept.:

1. Compare what has been paid to Thomas Parr, my 1997 **mentor-assisted,** youthful replacement from 1997 to present in terms of monthly salary, bonus, expense accounts, annual increases, fringe benefits and retirement benefits to my pigeon-holed position.

   The difference is incredible, as I have been unfairly pigeon-holed in a dead-end job and probably will not even get back to my 1995 wage level of $6,200/month until 2005 of later (ten year penalty). If I had been allowed to keep my 1997 wage level, like others who were similarly situated, this huge differential in pay and retirement would not exist.

2. Compare what has been paid to Masseurs Charles O. Malone and Gregory "Bubba" Garrison since they were demoted and transferred in 1997 as a result of the "Railroad making changes to deal with backlogs" per Exhibit 2. THEIR DEMOTIONS WERE DUE TO **EXTREME SERVICE FAILURES, WHICH OCCURRED IRONICALLY IN THE SAME HOUSTON AREA THAT I WAS TRANSFERRED TO IN 1997, AS THE RESULT OF ALLEGED TUCSON SERVICE FAILURE; BUT, NO CUT IN WAGES FOR THOSE MANAGERS WHO WERE PRIOR TO THE MERGER UPRR MANAGERS!**

THEIR SERVICE FAILURE WAS AT LEAST FIFTY (50) TIMES GREATER THAN ANY "JUNE SERVICE FAILURE" WHICH OCCURRED AT TUCSON IN THE SUMMER OF 1997. THEIR "SERVICE FAILURE" RESULTED IN THE RAILROAD MAKING PERSONNEL CHANGES, JUST LIKE MY ALLEGED SERVICE FAILURE; YET NO ONE WAS CUT IN THEIR PAY! THE NEWSPAPER ARTICLE'S SUBTITLE REGARDING "RAILROAD MAKING MANAGEMENT CHANGES ..."; (EXH. 3) IS ALMOST EXACTLY WHAT PRESIDENT DAVIS SAID IN HIS SEPTEMBER 4, 1997 LETTER; BUT, THEY HAD NO PAY CUTS. THEIR SERVICE FAILURE HAD HUGE CUSTOMER SETTLEMENTS, EXTREME LAWSUITS AND ALMOST THE LOSS OF SOME MERGER TERRITORY TO OTHERS (STB ACTION) IN COMPARISON, I HAD NONE OF THE ABOVE!

You can see on Exhibit 2 that "Since summer (1997) UPRR has been struggling with an unprecedented traffic jam... has spread throughout much of its 36,000 mile system". Why was I the only one reduced in wages? The above system-wide service failures had demotions and transfers; but I was unfairly singled out to lose the wage level I had worked 28 plus years of loyal and dedicated service to obtain!

The last comparison, per my attorney-only 1997 Journal entry, Theodore (Ted) F. Ingram was demoted from a very high level in the UPRR Safety Department in Omaha to Tucson as an MTO on or about February 1997. This was approximately four (4) months before my demotion, after a failed merger yard consolidation experiment. Upon Ingram's arrival, Ingram stated that he had **"CONNECTIONS IN OMAHA"** and his very high Omaha monthly salary would be retained "as is", despite his lowered salary rate grades in Tucson. Why disparate treatment for similarly situated persons?

In comparison, I had "**no connections in Omaha"** as an Ex-SPTCO manager and I was financially denigrated for life!

DO ALL THE ABOVE APPEAR AS "FAIRNESS TO ALL EMPLOYEES" AND PROPER BUSINESS ETHICS TO HR?

Attaches: Exhibits 1-3

John Grother

Exh. 54

Arbitration
Frequently Asked Questions

1. **Q: What is the current daily pay rate for arbitrators working in the railroad industry?**
   A: $300.00 per day

2. **Q: Is there a separate roster for airline arbitrators?**
   A: The NMB has a single Roster of Arbitrators from which arbitrators can be selected for airline and railroad cases.

3. **Q: Can an individual railroad employee process a claim?**
   A: Yes, via the National Railroad Adjustment Board (NRAB) in Chicago.

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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ARBITRATION | DOCUMENTS & FORMS | FOIA | COMMENTS & SUGGESTIONS
RELATED WEB SITES

EXH 55

Butch Ethington
03/10/03 12:32 PM

To: John E. Grother@UP
cc: Mariette C. Uwakwe@UP
Subject: Re: REQUEST FOR 1997 POOR PERFORMANCE DETAILS

I spoke with Ken Packard, Dennis Tholen, and Tom Murphy about your demotion in 1997. The explanation was given that your performance was not what was needed. They made clear to me that the action was explained to you and you were given options. You chose to move and take a lower paying job. I am satisfied that the action was appropriate to the needs and practices at that time. The fact that others got treated differently is because they were in different jobs with different responsibilities and performance. You appealed to President Jerry Davis. Rene Orosco, the Ombudsman at that time, looked into your situation and responded appropriately at that time. He was closer to the situation, in time and information, than I am now. I believe that matter was settled, obviously not to your liking.

As for the reason for your lack of promotion in the interim, I believe the comment on the Form 15121 data base has nothing to do with that. Only by digging into the forms did that comment surface. I believe it has no bearing on your lack of interview success. I believe you should talk to the hiring managers about why you were not selected for various positions and get direct feedback.

You allege age and Viet Nam veteran status as a basis for discrimination in your treatment. That puts you case squarely in the hands of the EEO group.

Sincerely,
Butch Ethington
Ombudsman

John E. Grother

CORROBORATION OF "BEING DISPLACED".

John E. Grother
09/09/03 11:33 AM

To: Butch Ethington@UP
cc: Jill E. Augustyne@UP, Mariette C. Uwakwe@UP, Jill E. Thomsen@UP
Subject: Re: REQUEST FOR 1997 POOR PERFORMANCE DETAILS

See Next Two Pages for QUESTIONS CREATING ABOVE RESPONSE.

3/9/03

Mr. Ethington,

I need a clarification please, as I am servicing 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 Masseurs 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".

VIA CERTIFIED MAIL

June 16, 2003

National Mediation Board (NMB)
Attn: Mr. Roland Watkins
Washington, D.C. 20572

LAW DEPT.
JUN 20 2003
REC'D UPRR

Dear Mr. Roland Watkins,

I have been advised that your Office is the contact point for individuals applying for NMB Arbitration. Pursuant to the attached excerpt from the New York Dock (NYD) Article IV, and oral information from your Office, this letter is to request the assignment of an Arbitration Committee.

In accordance with Article IV, I have provided Union Pacific Railroad ("UPRR") a thirty (30) day notice (attached in part) to resolve this dispute ("Dispute"), concerning myself being defined as a Displaced Employee (Non-Agreement person). The issue involves UPRR's failed Merger Transaction related yard consolidation experiment to operate ALL the switching for Phoenix from Tucson, Arizona in late May 1997, which resulted in my demotion and reduction in wages of $1,272 per month and other fringe benefits effective 7/1/97. UPRR has not responded to my certified letter dated 5/12/03, attached in part, requesting Dispute resolution.

I am hereby requesting Neutral selection data, including biographies, for referees, who would be available for the states of Arizona, Texas, California and Washington D.C. please. I am uncertain if witnesses are able to testify; but, Tucson Arizona would be an appropriate site for an Arbitration, if ALL those employees present in 1997 are allowed to testify in person.

NMB-2 appears to apply to Mediation; so, not prepared. Please advise immediately what may additionally be required to activate the entire NMB Arbitration process, including any deposits or pre-payments required. I would appreciate a return call to discuss the entire NMB Arbitration Process to 281-359-5667 between 1300-1800 CT please (night worker).

By copy to UPRR, this is Official Notice to UPRR of my intent to refer said Dispute to an Arbitration Committee, as no UPRR response to attached certified letter.

Attachments:
NYD Conditions
Certified ltr. to UPRR

Sincerely,

JEG

John Grother

cc: UPRR 085-RM 830

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 ARBIRATION 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. GROTHER 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 GROTHER'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".

UNITED STATES POSTAL SERVICE

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:

Quick Search ◉ Extensive Search ○

Explanation of Quick and Extensive Searches

Item Number:

Submit

Inquire on multiple items.

Go to the Product Tracking System Home Page.

UNION PACIFIC EXHIBIT 3
PAGE 6 OF 6

JJM

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

)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 EXHIBIT 4
PAGE 1 OF 1

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. J. E. Grother
1718 Rustic Park Dr.
Kingwood TX 77339

Dear Mr. Grother:

This is in reference to your May 12, 2003 letter to Mr. James V. Dolan in which you requested to be certified for New York Dock protective benefits as a result of the merger between the Union Pacific and Southern Pacific Railroads. As this is a protection issue, it has been referred to my office for handling. All future New York Dock related correspondence between you and Union Pacific Railroad should also be directed to me.

I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger.

In addition, to be considered for coverage an individual must satisfy the term of "employee" as it is defined in the Railway Labor Act and by New York Dock cases. As Arbitrator Seidenberg wrote (in relevant part) in his 1987 case of The Matter of Arbitration Between B. J. Maeser et.al and Union Pacific RR Co. et al.:

> "A review of the history of labor protection conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature."** (emphasis added).

Clearly, the position you held at the time of the merger implementation was managerial in nature. Any individual assigned to such a position does not meet the definition of employee under the Railway Labor Act and New York Dock cases.

UNION PACIFIC EXHIBIT 5
PAGE 1OF 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,

Marilyn J. Ahart

cc: Mr. Roland Watkins
Mr. J. V. Dolan

UNION PACIFIC EXHIBIT 5
PAGE 2 OF 2

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

July 18, 2003

Mr. Roland Watkins
National Mediation Board
Washington DC 20572

Dear Mr. Watkins:

This is in reference to your July 7, 2003 letter to Mr. James V. Dolan regarding Mr. John Grother's request to have the National Mediation Board assign arbitration pursuant to Article IV, of the New York Dock labor protective conditions.

Attached is a copy of my response to Mr. Grother. As indicated in my letter, Union Pacific is confident his claim for New York Dock protective benefits has absolutely no merit. However, in accordance with Article IV of the New York Dock labor protective conditions, please assign a neutral member to this case.

Since my office handles New York Dock protective issues at Union Pacific Railroad, please address future correspondence related to this case to me at 1416 Dodge St., PNG06; Omaha, NE 68179.

Your assistance in this matter is greatly appreciated.

Sincerely,

Marilyn J. Ahart

cc: Mr. John Grother
Mr. J. V. Dolan

UNION PACIFIC EXHIBIT 6
PAGE 1 OF 1

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.

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
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 Baldridge 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 shorthanded as more train crews are taking time off, presumably for the Christmas holidays.

Also, the Omaha, Neb.-based railroad said it reassigned its top two supervisors in the Houston area and will bring in a new manager with more authority to oversee its troubled Gulf Coast operations.

In its weekly filing to the U.S. Surface Transportation Board, the nation's largest railroad said that "over the last two weeks, UP ... experienced a deterioration in service in the Gulf Coast area."

As a result, the railroad's average train speed slipped last week to an average of 14.1 mph from 14.2 mph.

The slowdown forced the number of freight cars on the railroad's 36,000-mile system to swell by 3,616 cars to 336,863. That's 27,000 cars above the desired maximum and the highest since the week before Thanksgiving.

Since summer, Union Pacific has been struggling with an unprecedented traffic jam that began in the Houston area and has spread throughout much of its 36,000-mile system. To try to resolve the congestion, the STB imposed an emergency order until March 15 to allow competitors to operate more freely over Union Pacific's lines in the Houston area.

Union Pacific spokesman John Bromley said the deterioration is "almost entirely due to a shortage of train crews. This is concentrated in the Houston area and the Houston to New Orleans line."

"It's worse this time than it traditionally is," Bromley said.

He speculated that workers are "laying off" and not reporting for work because they've already put in such long hours and may feel they've made enough money.

"A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year," Bromley said.

Asked if the company still hopes to get operations running normally by Jan. 1 as it has promised federal regulators, Bromley said: "It's going to be pretty hard to do, with this crew shortage."

Union Pacific also mentioned in its filing with the Surface Transportation Board that service suffered as "personnel and shippers have been learning to operate new routes and use new tools" since the carrier switched over former Southern Pacific lines in the Houston area to Union Pacific's computer system.

> 'A lot of our people have made a lot of money this year, so the financial incentive to work through the holidays isn't as strong this year.'
>
> John Bromley, Union Pacific spokesman

To help catch up in the Gulf Coast region, Union Pacific said it will continue to operate through Christmas, while most of the rest of its mainline operations will shut down late Christmas Eve through Christmas Day.

Texas Railroad Commission Chairman Charles Matthews said the worsening service "points out that until the STB ... revisits the UP-SP merger and begins to make some meaningful changes, in particular in the Houston and Gulf Coast area, this rail crisis is going to drag on longer than anybody expected."

He reiterated his support for a commission plan that would force Union Pacific to divest a substantial amount of track in the Houston area to increase competition.

Union Pacific also confirmed a number of personnel changes at its local offices, located in Spring.

Effective Jan. 1, Houston hub General Manager Charles Malone — the railroad's top local manager here as the traffic jam began and worsened this summer and fall — was reassigned to the carrier's Omaha, Neb., dispatch center.

Malone is being replaced by Ed Handley, an ex-safety project coordinator for the Federal Railroad Administration whom Union Pacific hired in October as an assistant general manager.

Union Pacific also said it will beef up local management here by creating a new job with more authority.

Steve Barkley — who manages Union Pacific's massive central dispatching center in a football-field-size bunker beneath Omaha — was given a new position in charge of the railroad's Southern and Central Region. His official title will be announced after approval by the railroad's board of directors, Bromley said. Barkley will relocate here after Jan. 1. Handley will report to Barkley.

Moreover, the carrier said it reassigned Greg Garrison, who had served as Union Pacific's No. 2 local manager as superintendent, transportation services. Replacing Garrison will be Ray Perry, who currently is in charge of the carrier's massive North Platte, Neb., terminal. Garrison was relocated to Omaha with an unknown title, Bromley said. Also, an existing superintendent here, Jeff Crandall, was promoted to general superintendent, transportation.

Union Pacific, by far the largest railroad in the Houston area, employs slightly more than 2,000 workers in Harris County.

Asked if the carrier was displeased with the jobs done by the displaced managers, Bromley said: "We're trying to strengthen the management down there and put the best people in the best slots."

EXH. 3

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
09/09/03 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,

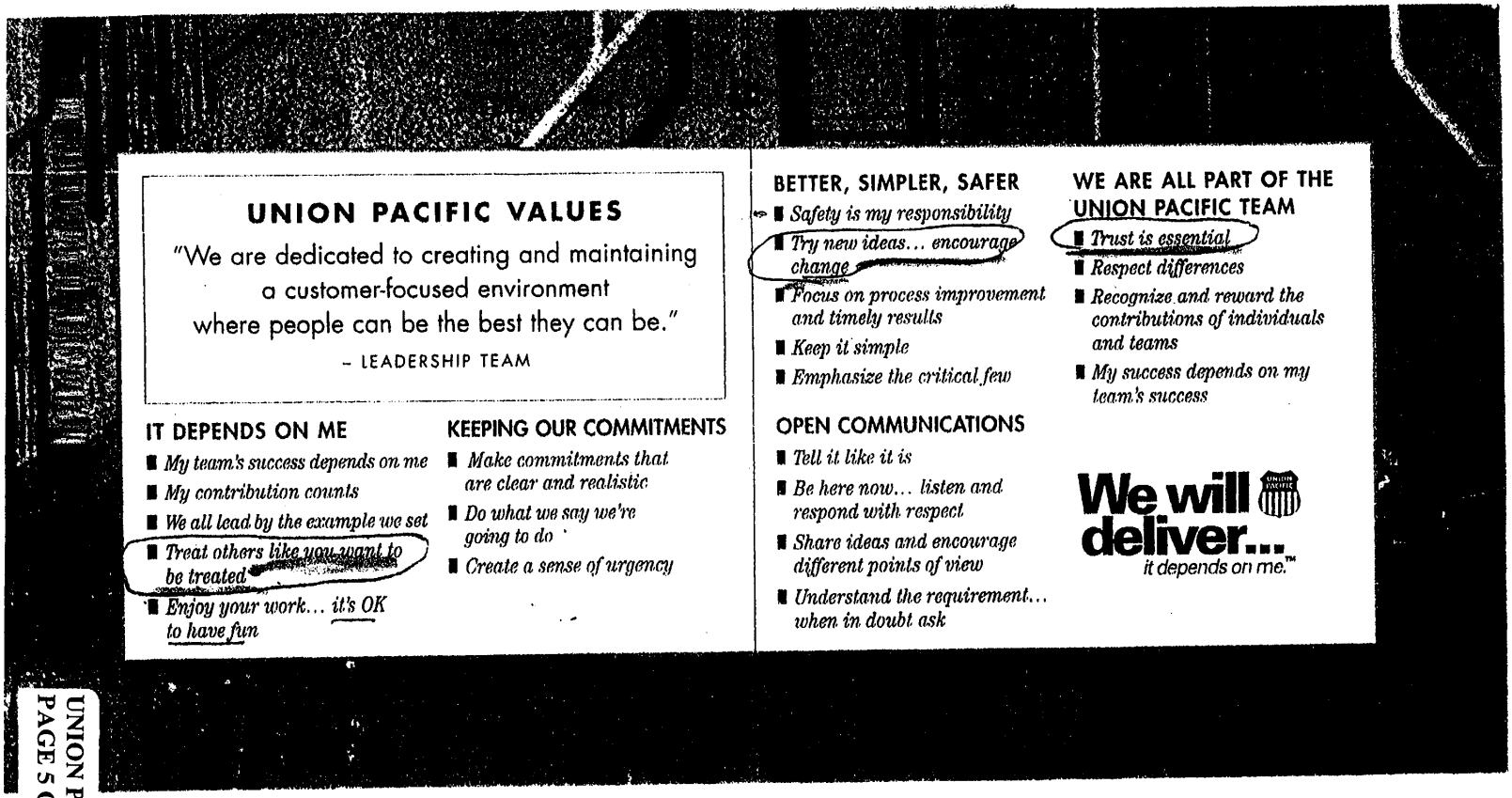
I need a clarification please, as I am sensing a Catch-22 situation.

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 Masseurs 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".

199 Values of Union Pacific



UNION PACIFIC VALUES

"We are dedicated to creating and maintaining a customer-focused environment where people can be the best they can be."

– LEADERSHIP TEAM

IT DEPENDS ON ME

- *My team's success depends on me*
- *My contribution counts*
- *We all lead by the example we set*
- *Treat others like you want to be treated*
- *Enjoy your work... it's OK to have fun*

KEEPING OUR COMMITMENTS

- *Make commitments that are clear and realistic*
- *Do what we say we're going to do*
- *Create a sense of urgency*

BETTER, SIMPLER, SAFER

- *Safety is my responsibility*
- *Try new ideas... encourage change*
- *Focus on process improvement and timely results*
- *Keep it simple*
- *Emphasize the critical few*

OPEN COMMUNICATIONS

- *Tell it like it is*
- *Be here now... listen and respond with respect*
- *Share ideas and encourage different points of view*
- *Understand the requirement... when in doubt ask*

WE ARE ALL PART OF THE UNION PACIFIC TEAM

- *Trust is essential*
- *Respect differences*
- *Recognize and reward the contributions of individuals and teams*
- *My success depends on my team's success*

We will deliver...
it depends on me.™

UNION PACIFIC EXHIBIT 8
PAGE 5 OF 5

9-11-03

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

August 11, 2003

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Re: New York Dock: Union Pacific Railroad Company
And John Grother

Dear Mr. Grother:

Reference is made to the exchange of correspondence requesting arbitration pursuant to Article IV, of New York Dock labor protective conditions involving a dispute between you and the Union Pacific Railroad Company.

In accordance with the request, I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records.

Sincerely.

Roland Watkins
Director, Arbitration Services

Copy to:

Ms. Marilyn J. Ahart
Director Protection Management
Union Pacific Railroad Company
1416 Dodge Street
PNG06
Omaha, NE 68179

UNION PACIFIC EXHIBIT 9
PAGE 1 OF 1

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 EXHIBIT 10
PAGE 1 OF 1

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

Marilyn J. Ahart
Director Protection Management
(402) 997-2014

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,

Marilyn J. Ahart

UNION PACIFIC EXHIBIT 11
PAGE 1 OF 1

JOB STATUS REPORT

TIME : 09/24/2003 13:13
NAME : UPRR LAB REL OMAHA
FAX# : 402-271-2463
TEL# : 402-271-2463

DATE,TIME	09/24 13:12
FAX NO./NAME	912023318343
DURATION	00:01:23
PAGE(S)	04
RESULT	OK
MODE	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 LOOMIS

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

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	09/26 09:46
FAX NO./NAME	912023318343
DURATION	00:00:53
PAGE(S)	03
RESULT	OK
MODE	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

UNION PACIFIC EXHIBIT 12
PAGE 6 OF 19

Number of Pages: Two (Not including this sheet)

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

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
gwood, TX 77339

Re: New York Dock Arbitration Request

r 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 suant to Article IV, of the New York Dock conditions.

We are sending a copy of your letter to Mr. James V. Dolan, Counsel the Union Pacific Railroad. By copy of this letter, we are hereby uesting Mr. Dolan to furnish this office with any comments he may care nake in regard to this matter by the close of business July 21, 2003. r comments may be submitted by facsimile.

Upon receipt of such comments you will be advised further.

erely,

nd Watkins
ctor, Arbitration Services

y to:

J. V. Dolan, Counsel
on Pacific Railroad

UNION PACIFIC EXHIBIT 12
PAGE 8 OF 19

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

A number of months ago, the National Mediation Board (Board) began experimenting with a new procedure for providing the parties with balanced panels in New York Dock cases. Since many of you may not have been involved with New York Dock cases recently, pleased be advised that the following procedures will apply governing the selection of a neutral to resolve disputes in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions:

- Upon receipt of a request from a party for a neutral, the Board will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals. Each party will be requested to provide a list of fifteen (15) preferred neutrals from that list. **This information is confidential and will be used only for the purpose of the selection of a neutral for that dispute.**

- The lists, along with other relevant information, will be considered by the Board in compiling a panel of seven (7) neutrals. The Board will then promptly provide the parties with such a panel. The parties will use the strike method to derive at a neutral and will immediately inform the Board of the selection.

These procedures will not prevent the parties from mutually deciding on a neutral, but will apply only when the parties are unable to agree on a neutral.

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499

September 30, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to John E. Grother's June 16, 2003 letter to you concerning neutral selection data in connection with his request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions, to resolve a dispute with Union Pacific Railroad. I have been assigned to handle this arbitration for Union Pacific. Mr. Grother's August 11, 2003 letter to you advised he has retained the services of Attorney Gordon P. MacDougall for the pending arbitration issue.

Your letter of August 11, 2003 to John E. Grother, with copy to Marilyn Ahart at Union Pacific, enclosed a panel of seven neutrals and requested the parties notify your office "...as soon as a selection has been made." This is to advise Ms. Ahart and I have had three telephone conversations with Mr. MacDougall for the purpose of selecting a neutral from your panel by means of alternate strikes. Mr. MacDougall is unwilling to use the alternate strike method to reduce the panel to a single neutral.

During our telephone conversation today, Mr. MacDougall said he has talked with you on this matter. He alleges you said the neutral selection process for New York Dock arbitration set forth in your April 28, 2000 memorandum is not applicable to cases stemming from Article IV of New York Dock, where the individual is not represented by a labor organization. Is that correct and, if so, what process is applicable?

Sincerely,

W. E. Loomis

cc: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

October 6, 2003

REC'D
OCT - 7 2003
Labor Relations

Mr. Roland Watkins
National Mediation Board
1301 K St., NW-#250E
Washington DC 20572

BY HAND

Re: NYD Claimant-John E. Grother

Dear Mr. Watkins:

I am in receipt of a letter from Mr. W.E. Loomis (UP-Employee Relations Planning), dated September 30, regarding selection of a neutral in the entitled matter. I have a somewhat different version of the events to date.

1. We have conducted three telephone discussions, 9/24, 9/26, and 9/30, during which a number of matters were discussed, such as likely issues, procedures, location, and possible terms for an arbitration agreement. I believe these discussions, for the most part, have been helpful. However, during the 9/26 discussion, Mr. Loomis referred to your August 11, 2002 letter, addressed to Mr. Grother:

> "I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records."

Mr. Loomis maintained that the alternate striking process is mandatory in selecting a neutral, in accordance with your April 28, 2000 memorandum, attached, which he forwarded to me following our telephone conference. I agreed, at his suggestion, to inquire whether this is your understanding of the two sentences quoted above from your August 11 letter to Mr. Grother--that selection means alternate striking.

2. I advised Mr. Loomis during our brief 9/30 conversation that my understanding is the April 28, 2000 memorandum is mandatory only as to the persons addressed, i.e., railroad carriers and rail labor organizations and, as such, alternate striking is not mandatory here, where the controversy does not involve a rail labor organization party.

3. Mr. Loomis asserts I am unwilling to use the alternate strike method to reduce the panel to a single neutral, but he does not mention my other suggestions, apparently in the belief the alternate strike scheme is binding. However, it is possible the discussions may prove more fruitful if the April 28, 2000 memorandum was not intended, or does not apply, to non-labor situations.

Very truly yours,

UNION PACIFIC EXHIBIT 12
PAGE 11 OF 19

Gordon P. MacDougall

Atty. for John E. Grother

cc: W.E. Loomis
Union Pacific RR Co.
1416 Dodge St.-Rm. 332
Omaha, NE 68179

(By overnight express)

John E. Grother
1718 Rustic Park Drive
Kingwood TX 77339

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572
(202) 692-5000

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

A number of months ago, the National Mediation Board (Board) began experimenting with a new procedure for providing the parties with balanced panels in New York Dock cases. Since many of you may not have been involved with New York Dock cases recently, pleased be advised that the following procedures will apply governing the selection of a neutral to resolve disputes in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions:

- Upon receipt of a request from a party for a neutral, the Board will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals. Each party will be requested to provide a list of fifteen (15) preferred neutrals from that list. **This information is confidential and will be used only for the purpose of the selection of a neutral for that dispute.**

- The lists, along with other relevant information, will be considered by the Board in compiling a panel of seven (7) neutrals. The Board will then promptly provide the parties with such a panel. The parties will use the strike method to derive at a neutral and will immediately inform the Board of the selection.

These procedures will not prevent the parties from mutually deciding on a neutral, but will apply only when the parties are unable to agree on a neutral.

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

CORRECTED COPY

October 6, 2003

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street, Room 322
Omaha, NE 68179

Dear Mr. Loomis:

I received your letter concerning a recent conversation with Mr. Gordon MacDougall, counsel for John Gother. I did not offer any opinion as to the applicability of New York Dock. As you and Mr. MacDougall are aware, I merely furnished a list pursuant to a request initiated by Mr. Gother. With this letter, I am requesting of you and Mr. MacDougall that any further inquiry on this matter must be in writing. I will not respond to any further phone calls on this matter.

Sincerely,

Roland Watkins
Director, Arbitration Services

cc: Gordon MacDougall

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

JOB STATUS REPORT

TIME : 10/14/2003 16:06
NAME : UPRR LAB REL OMAHA
FAX# : 402-271-2463
TEL# : 402-271-2463

DATE,TIME	10/14 16:06
FAX NO./NAME	912026925086
DURATION	00:00:30
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM



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

UNION PACIFIC EXHIBIT 12
PAGE 16 OF 19

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,

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

REC'D
JAN - 5 2004
Labor Relations

Mr. Roland Watkins
Director, Arbitration Services
National Mediation Board
Washington DC 20572

Re: New York Dock: Union Pacific Railroad Company
and John E. Grother

Dear Mr. Watkins:

This is in reference to the June 23, 2003 request by Mr. John E. Grother for arbitration pursuant to the New York Dock employee protective conditions, and the various exchange of correspondence subsequent thereto.

Mr. Grother, during all relevant periods, has been a non-agreement employee; and he was not associated with counsel until on or about August 11, 2003, when the undersigned was engaged. Previously, you had furnished Mr. Grother, and the carrier, with the names of individuals for consideration as the neutral member of an arbitration committee.

Unfortunately, the carrier has insisted upon a system of selecting a neutral by an alternate strike method, apparently recently prescribed or utilized in situations involving carriers and labor organizations. There have been no meaningful discussions since receipt of the carrier's October 15, 2003 letter to you.

The alternate strike method is deemed prejudicial to Mr. Grother, particularly in light of contemplated issues peculiar to this non-agreement employee, which appear to include matters of official vis-a-vis employee, in contrast with management vis-a-vis labor.

Accordingly, under the circumstances, this is to request that you select the neutral member of the arbitration committee. From Mr. Grother's standpoint, you may wish to consider a person heretofore either named or unnamed, or not on any previous list, and either with or without railroad industry experience, as may be appropriate.

Mr. Grother's preference for location of any hearing by the arbitration committee would be the Washington DC area.

Very truly yours,

Gordon P. MacDougall

cc: John E. Grother
William E. Loomis

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-5446
FAX (402) 233-2499

January 6, 2004

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to the December 31, 2003 letter from Gordon P. MacDougall, who is representing John E. Grother in his request for arbitration in accordance with Article IV of the New York Dock labor protective conditions.

Thus far, the Board's and Union Pacific's handling of this matter has been in strict compliance with your April 28, 2000 memorandum which sets forth the procedure to be followed when the Board is requested to furnish a neutral to resolve New York Dock disputes. The procedure broke down when Mr. MacDougall was unwilling to utilize the strike method to reduce the list of seven neutrals furnished with the Board's letter of August 11, 2003 to a single neutral. Without offering any explanation why, Mr. MacDougall now states, in his December 31, 2003 letter, that the alternate strike method is "... prejudicial to Mr. Grother...."

The Board will note Union Pacific's letter of October 15, 2003 contains its three strikes, thus reducing the list of neutrals to four. Union Pacific does not object to Mr. MacDougall's request for the Board to select the neutral member of the arbitration committee. In fact, this appears to be the only option left to move this matter forward. However, Union Pacific's position is the Board should comply with its own stated procedure by making that selection from among the four neutrals remaining on the list.

Sincerely,

W. E. Loomis

CC: John E, Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

NJB-317

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

WEL
JAN 26 2004

REC'D
JAN 26 2004
Labor Relations

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

> **This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of**

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins
Director, Arbitration Services

Copies to:

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Dated: February 20, 2004

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 TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES
FOR ARBITRATION UNDER NEW YORK
DOCK EMPLOYEE PROTECTIVE CONDITIONS

Preliminary Statement

John E. Grother (Grother, or employee), ancillary to review of a forthcoming arbitration award, and in aid of the arbitration prescribed by the Surface Transportation Board (STB), petitions the STB to establish certain procedures for implementing the non-agreement employee arbitration provisions of the New York Dock employee protective conditions, with respect to the current dispute between Grother and his employer (carrier), Union Pacific Railroad Company (UP). Specifically, employee desires (1) that the order of written arbitration submissions be first employee, then carrier, followed by an employee reply, and (2)

Washington DC be designated the site for hearing by the arbitration committee.

Background

Grother was employed by Southern Pacific Transportation Company (SPTC) as part of its yard force at Tucson, AZ, at the time of the STB's August 1996 approval of Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (Aug. 6, 1996)(UP/SP), wherein the STB imposed the so-called New York Dock (NYD)[1/] employee protective conditions for the benefit of affected SPTC employees. UP/SP, 1 S.T.B. at 452-53. He claims to have been first adversely affected in 1997, as a result of problems with the attempted consolidation of switching between the Phoenix Yard and the Tucson Yard.

Grother was not (and is not) represented by a labor organization. He invokes Article IV of the NYD conditions, as a non-agreement employee, 360 I.C.C. 60, 90:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

[1/] New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979).

At Grother's initiative, the National Mediation Board (NMB), on January 21, 2004, designated Lynette A. Ross, as the "neutral/referee member" for arbitration of the Grother/UP dispute under NYD. (Appendix 1).[2/] The NMB states its designation is "ministerial," and the NMB's action only provides a qualified arbitrator...in extending comity to the ICC's dispute resolution process. (Appendix 1, p. 2). The neutral/referee member has not been involved in discussions among the partisan members of the arbitration committee concerning any terms to govern the arbitration.

The partisan parties, while in agreement in principle for most of the terms to govern the proposed arbitration,[3/] have come to an impasse with respect the extent and presentation of a written record, and the place for hearing. UP suggests the record be developed by a single, but simultaneous, written submission by carrier and by employee, which would be similar to the ex parte rules in place at the National Railroad Adjustment Board, conducted at NRAB offices in Chicago, IL. 29 CFR 301. (Appendix 2). UP urges that the arbitration hearing be conducted in Chicago, IL. To the contrary, Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its

---

2/ The other two members of the committee are William E. Loomis (UP) for the carrier, and Grother for the employee.

3/ UP does not believe a written arbitration agreement is necessary prior to an arbitration committee hearing. UP apparently is of the view the parties can participate simply by appearing at a designated time and place. Nevertheless, the partisan parties have exchanged views as to the appropriate process.

written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFR 1108.8. Grother urges that the arbitration hearing be held in Washington, DC, where the NMB and STB are both located.

The issues involve the interpretation, applicability, and enforcement of the NYD employee protective conditions for the involved Grother and UP, and will likely center upon eligibility of Grother for employee protection, causality, asserted laches, and the measure of any compensation or other benefits.

ARGUMENT

I. THE ARBITRATION SHOULD BE DESIGNED TO TO DEVELOP A FULL WRITTEN RECORD FOR STB REVIEW AT MINIMUM EXPENSE TO EMPLOYEE.

A. UP Would Frustrate Effective STB Review. The general practice in NYD arbitration, particularly where an individual or small number of employees are involved, is not to have a transcript of the oral hearing. There is considerable expense involved with a transcript, particularly when expedition is required.[4/] The no transcript procedure is projected to be followed here. The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled.

4/ An arbitration decision ordinarily is to be issued within 45 days after the hearing is concluded and the record closed. NYD, Art. I, § 11(c).

The UP proposal for the simultaneous exchange of written submissions, to be followed by the oral hearing, would serve to transfer the usual written reply submission and argument, into "live" oral submissions, without a record of the evidence and argument for the STB to review. This would deprive the STB of effective review for the resultant arbitration award, and perhaps necessitate the conduct of additional submissions to the STB to supplement the record at the time of agency review.

The NYD arbitration process is part the STB's decisional mechanism, with an award being an "order" of the STB, which is carried out in lieu of direct STB action. American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 845-46 (D.C. Cir. 1995); International Broth. of Elec. Workers v. ICC, 862 F.2d 330, 335-39 (D.C. Cir. 1988); United Transp. Union v. Norfolk and Western R. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987).[5/]

2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8.[6/]

A. STB Consideration. The STB rejected simultaneous filings in establishing its three-step procedure. Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564, 576 (1997).

5/ The arbitration process is a delegation by the STB to the arbitrator of the STB's authority to implement employee conditions. Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 5 I.C.C.2d 234, 236 1989). Arbitration is essentially an extension of the STB's action. Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

6/ The STB's arbitration rules do not specifically apply to arbitration involving NYD conditions. In the same vein, NRAB arbitration does not extend to NYD conditions.

B. NYD Causality Procedure. The simultaneous submissions urged by UP would be particularly unfair here, where UP challenges Grother's claim to have been affected by the transaction--the matter of causality. The NYD conditions specify that the employee should first identify the transaction and specify the facts, followed by the carrier's evidence. NYD, Art. I, § 11(e), 360 I.C.C. at 88:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Thus, UP's simultaneous submission could not fully cover the matter of causality, but would allow UP to first present its case not in written form in advance of the oral hearing, but at the hearing itself, with Grother to respond extemporaneously at the hearing. Such tactics should be discouraged in the interest of a fair hearing, and in developing a complete and reviewable record. The STB's NYD conditions contemplate answering statements, not simultaneous statements.

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NARB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C. 153. Here, Grother, as an unrepresented employee, does not

possess the full range of representation. The single submission procedure of the NRAB would be inappropriate here.

D. Cost of Proceedings. Arbitration is not inexpensive. For a single individual, the sum may be significant. The three-stage written submissions will minimize the ultimate cost for resolving the issues. The UP proposal for one set of simultaneous submissions likely will result in prolix proceedings, and result in additional costs. Moreover, because of the novelty of some of the anticipated issues, and the impact of any award upon future proceedings, it is likely that one or more of the parties will seek review of the award by the STB. Here, the compensation claim is for approximately $108,000.

Although the cost of arbitration and resultant final agency action may not be avoided, American Train Dispatchers Ass'n v. ICC, 949 F.2d 413, 414 (D.C. Cir. 1991), the STB should aim to minimize the expense in this situation.

II. THE HEARING SHOULD BE HELD IN WASHINGTON DC, NOT CHICAGO IL.

The hearing location should be Washington, DC, where the facilities of the NMB and STB are situated, rather than Chicago, IL, where the NRAB has its headquarters. The expenses for Grother would be minimized by a Washington location. Moreover, access by the parties, and the arbitrator, to unpublished material at the NMB and STB would be readily available in Washington, DC.

Hearing at Chicago IL would be inappropriate. While UP may have access to facilities at Chicago, Grother and his counsel do

not. Moreover, the arbitration involved in this NYD case involves a comity arrangement between NMB and STB.

III. REFERRAL OF THE WRITTEN SUBMISSION PROCESS AND HEARING LOCATION TO THE ARBITRATOR WOULD BE INAPPROPRIATE.

The STB should not refer the matter of simultaneous or three-part written submissions, or the hearing location, to the arbitrator, as such would not be appropriate.[7/]

The matter of the written submissions, as indicated above, goes to the record available to the STB on review, particularly in the absence of a hearing transcript; and a multi-staged submission process is actually required by STB for NYD Art. I, §11(e). Thus, it is for the STB to determine the procedures for the submissions.

The hearing location likewise is for the STB. The arbitration committee is subject to the protective conditions mandated by the STB, such that the facilities maintained by in Washington DC should be available to the parties in an inexpensive manner.

CONCLUSION

The STB should determine that, in the absence of agreement, the involved NYD arbitration should be conducted by the three-stage written submission process, with hearing at Washington DC.

Respectfully submitted,

7/ The arbitrator should, of course, schedule the hearing date, and presumably will do so after consultation with the partisan parties of the arbitration committee.

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

William E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street-Rm. 332
OMAHA NE 68179

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Washington DC
February 20, 2004

GORDON P. MacDOUGALL

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

> **This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of**

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins
Director, Arbitration Services

Copies to:

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
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PART 301—RULES OF PROCEDURE

Sec.
301.1 General duties.
301.2 Classes of disputes.
301.3 Organization.
301.4 Jurisdiction.
301.5 Form of submission.
301.6 General.
301.7 Hearings.
301.8 Appearances.
301.9 Awards.

AUTHORITY: Sec. 3, 44 Stat. 578, as amended; 45 U.S.C. 153.

SOURCE: Circular 1, Oct. 10, 1934, unless otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151-162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes: but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) *First Division.* The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) *Second Division.* The Second Division will have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) *Third Division.* The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) *Fourth Division.* The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

§ 301.5 Form of submission.

(a) *Parties.* All parties to the dispute must be stated in each submission.

(b) *Statement of claim.* Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) *Statement of facts.* In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts," then each party shall show separately the facts as they respectively believe them to be.

(d) *Position of employees.* Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(f) *Signatures.* All submissions must be signed by the parties submitting the same.

(g) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of_____Division

Attest:_____

[Secretary]

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

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[2] New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1970), aff'd sub nom. New York Dock Ry. v. United States, 609 F. 2d 83 (2nd Cir. 1979).
[3] See Union Pacific Appendix 2 - Grother's June 16, 2003 letter to the NMB.
[4] See Union Pacific Appendix 3 - NMB's January 22, 2004 letter appointing Lynette A. Ross.

would impede the process, and should not be undertaken unless clearly justified."

FN2 reads: "49 CFR 1113.15 provides for interlocutory appeals from an administrative Law Judge (ALJ) only if: (a) the ALJ's ruling denies or terminates any person's participation; (b) the ruling grants a request for the inspection of documents not ordinarily available for public inspection; (c) the ruling overrules an objection based on privilege, the result of which is to require the presentation of testimony or documents; or (d) the ALJ finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party."[5]

This dispute involving Grother and Union Pacific does not fall within any of the limited exceptions above and presents no extraordinary circumstances. Procedural disputes such as the ones presented herein are routinely resolved by the neutral/referee member. These issues simply do not warrant the direct involvement of the STB.

II. Mr. Grother's Preferred Submission Process Has No Application to Arbitration Conducted Pursuant to Labor Protective Conditions

On pages 4 and 5 of his 2/20/2004 petition, Grother asks the STB to impose his preferred "three-step" process for filing written submissions.

". . . Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFRR 1108.8."[6]

Grother prefers this three-step process over the customary simultaneous exchange of written submissions to the arbitration committee prior to the hearing. He argues the simultaneous exchange would somehow frustrate effective STB

[5] See Union Pacific Appendix 4 - Interstate Commerce Commission Decision - Finance Docket No. 30800 (Sub-No. 28) - decided August 1, 1989.
[6] Grother's 2/20/2004 petition - pp. 4-5.

review. Grother argues "The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled."[7] He refers to the "considerable expense involved with a transcript" and argues that the three-step procedure for filing written submissions will produce a "reviewable record" while allowing the parties to avoid the cost of a transcript. Grother's argument reflects the mistaken view that arbitration under Article I, Section 11 of the New York Dock conditions is merely a perfunctory step on a path toward an ultimate review of the arbitration record by the STB. Given the STB's "Lace Curtain" standard for review of arbitration decisions, he is ill advised to so cavalierly look past the determinations of the arbitration committee.[8] If Grother was really concerned over building a complete written record, he would consider the cost of a transcript.

Further, if Grother was really concerned about building a complete record in writing, he would ask for a four-step procedure for filing written submissions under which both he and UP would have the opportunity to file a pre-hearing written rebuttal. Of course that would deprive him of the last word prior to the hearing.

III. Mr. Grother Misrepresents His Preferred Briefing Process As Having Application to Arbitration Under Labor Protective Conditions

On page 6 of his 2/20/2004 petition, Grother attempts to justify the use of a three-step process because that is the process used in STB arbitration.

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[7] Grother's 2/20/2004 petition - p. 5.

[8] How the submission process that has been effectively utilized in hundreds of New York Dock arbitrations somehow "would deprive the STB of effective review" is unclear to Union Pacific. Grother's 2/20/2004 petition - p.6.

"2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8."[9]

The problem with that argument is the arbitration committee to which Ms. Ross was appointed as neutral/referee member is arbitration pursuant to Article I, Section 11 of the New York Dock conditions, not STB arbitration. The STB arbitration procedures set forth in 49 CFR 1108 are "intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates or practices related to rail transportation or service subject to the statutory jurisdiction of the STB."[10] In footnote 6 on page 6 of his 2/20/2004, Grother concedes the "STB's arbitration rules do not specifically apply to arbitration involving NYD conditions." That is quite an understatement, because 49 CFR § 1108.2(b) precludes the use of the STB arbitration procedures for arbitration pursuant to the New York Dock labor protective conditions:

"Nor are they available for arbitration that is conducted pursuant to labor protective conditions."[11]

For the reason set forth above, Union Pacific believes the procedure for filing written submissions urged by Grother is not appropriate in a matter involving NYD arbitration. If the partisan members of the arbitration committee are unable to agree on this procedural matter, the proper forum for its resolution is through the assistance of the neutral/referee member of the committee, not the STB.

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[9] Grother's 2/20/2004 petition - p. 6.
[10] 49 CFR § 1108.2(b)
[11] 49 CFR § 1108.2(b)

IV. Location of the Hearing

There is also the matter of the location of the hearing. Grother lives and works in the vicinity of Houston, TX. Ms Ross lives in Lawrenceburg, KY and Union Pacific's headquarters is in Omaha, NE. The only connection between this dispute and Washington, D.C. is that is where Grother's attorney has his office.[12] Union Pacific favors a location which is neutral ground for the partisan members, and a location, like Chicago, which can be reached by a single direct airline flight from an airport near each of the arbitration committee member's base. Union Pacific's position is that the neutral member of the arbitration committee should determine the location of the hearing if the partisan members cannot agree. Surely, the STB does not want to get involved in routine procedural matters arising under arbitration pursuant to the NYD protective conditions, such as the location of the hearing.

V. There is no requirement in New York Dock for a pre-hearing agreement on procedural matters between the partisan members.

There is no requirement in the New York Dock protective conditions for the partisan members of an arbitration committee to reach agreement on the procedural details prior to the hearing. A careful reading of Article I, Section 11 of the NYD conditions (Arbitration of disputes) reveals no obligation for the partisan members to reach agreement on anything. Nevertheless, in this specific case, and based on the desire for a smooth flowing and efficient process, UP's

[12] The location of NMB and STB offices is, of course, irrelevant to this matter. Properly prepared parties will have no need for "unpublished material" in Washington, D.C. Grother's 2/20/2004 petition - p.8.

member of the arbitration committee, William Loomis, has discussed several aspects of the upcoming arbitration with Grother's attorney, Gordon P. MacDougall. These discussions have been in the form of telephone conversations and facsimile transmissions. Through this process, the partisan members have reached an understanding on several issues leaving only two issues outstanding. The neutral/referee member, Ms. Ross, has been contacted by the partisan members only twice, jointly via telephone, regarding the dates she proposed for the hearing and to advise that the partisan members were attempting to settle a couple of procedural issues. Instead of the seeming confusion which a reader of Grother's 2/20/2004 petition might infer, the discussions between MacDougall and Loomis thus far have been orderly and productive. The next step should be a discussion between the three members of the arbitration committee, and if the outstanding items cannot be settled by agreement, that task should fall to Ms. Ross as the neutral member, i.e. tie-breaking member, of the committee.

VI. The New York Dock arbitration process does not distinguish between employees represented by a labor organization and those who are not.

Grother obviously places some significance on the fact he is not represented by a labor organization and attempts to argue the arbitration process under New York Dock is different depending on whether an employees is, or is not, covered by a collective bargaining agreement. Union Pacific is unable to discern a distinction in the procedures for arbitration under New York Dock on this basis because there is none. As referenced on page 3 of Grother's

2/20/2004 petition, Article IV of the NYD protective conditions provides the remedy of arbitration to employees not represented by a labor organization just as it does to employees who are represented by a labor organization. This attempt on the part of Grother to distinguish this case from the usual and customary procedures used in other NYD arbitration has already caused considerable delay to the resolution of this dispute. Grother's letter to the NMB requesting arbitration was sent more than six years after the date of the event which he claims entitles him to a displacement allowance.[13] More than five months elapsed between NMB's August 11, 2003 letter, which furnished a panel of seven neutrals, and NMB's letter of January 21, 2004 appointing Ms. Ross as the neutral/referee member. See Union Pacific Appendix 5 for the part Grother's contention of different handling for employees not represented by a labor agreement played in that delay. Now, we have Grother's 2/20/2004 petition, which appears to be yet another action to delay the commencement of arbitration.

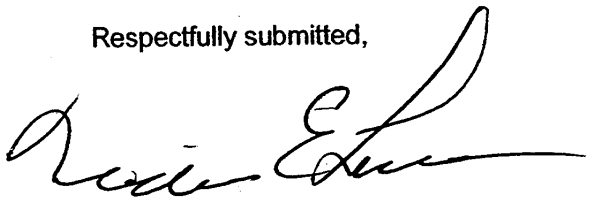
VII. Summary

Union Pacific requests STB to declare lack of jurisdiction in this matter at this time, and remand the procedural issues involving the filing of written submissions and the location of the hearing to the already established arbitration committee for prompt resolution.

---

[13] See Union Pacific Appendix 2. This is not to imply there was no on-property handling prior to Grother's letter of June 16, 2003 requesting assignment of an arbitration committee. There was communication between Grother and various employees of Union Pacific in the period between May, 1997 and May, 2003. However, the first statement of claim contending he is a displaced employee as a result of the Union Pacific/Southern Pacific merger transaction is Grother's letter dated May 12, 2003 to James V. Dolan.

Respectfully submitted,



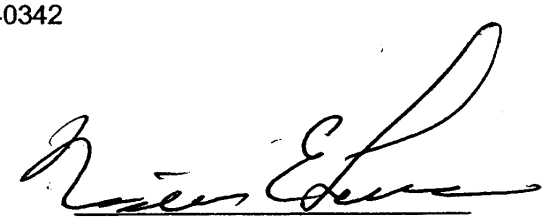
Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342



Omaha, NE
March 4, 2004

WILLIAM E. LOOMIS

UNION PACIC EXHIBIT 15
PAGE 10 OF 42

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER---
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Dated: February 20, 2004

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
---CONTROL AND MERGER--
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPSCL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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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.

itten 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, 335-36 (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 NARB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C. . 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

ot. 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 submissions.

The hearing location likewise is for the STB. The arbitration committee is subject to the protective conditions mandated by the STB, such that the facilities maintained by in Washington DC should be available to the parties in an inexpensive manner.

CONCLUSION

The STB should determine that, in the absence of agreement, the involved NYD arbitration should be conducted by the three-stage written submission process, with hearing at Washington DC.

Respectfully submitted,

7/ The arbitrator should, of course, schedule the hearing date, and presumably will do so after consultation with the partisan parties of the arbitration committee.

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

William E. Loomis, Gen. Dir.
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street-Rm. 332
OMAHA NE 68179

Lynette A. Ross
1220 Fairway Drive
Lawrenceburg KY 40342

Washington DC
February 20, 2004

GORDON P. MacDOUGALL

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

202) 692-5000

January 21, 2004

Ms. Lynette A. Ross
1220 Fairway Drive
Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the [illegible]utes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

> This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of

administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins
Director, Arbitration Services

Copies to:

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179

PART 301—RULES OF PROCEDURE

Sec.
301.1 General duties.
301.2 Classes of disputes.
301.3 Organization.
301.4 Jurisdiction.
301.5 Form of submission.
301.6 General.
301.7 Hearings.
301.8 Appearances.
301.9 Awards.

AUTHORITY: Sec. 3, 44 Stat. 578, as amended; 45 U.S.C. 153.

SOURCE: Circular 1, Oct. 10, 1934, unless otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151-162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) *First Division.* The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) *Second Division.* The Second Division will have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) *Third Division.* The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) *Fourth Division.* The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

§ 301.5 Form of submission.

(a) *Parties.* All parties to the dispute must be stated in each submission.

(b) *Statement of claim.* Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) *Statement of facts.* In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts," then each party shall show separately the facts as they respectively believe them to be.

(d) *Position of employees.* Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(f) *Signatures.* All submissions must be signed by the parties submitting the same.

(g) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of_____Division

Attest:_____

[Secretary]

UNION PACIFIC APPENDIX 2
SHEET 1 OF 1

VIA CERTIFIED MAIL

June 16, 2003

National Mediation Board (NMB)
Attn: Mr. Roland Watkins
Washington, D.C. 20572

LAW DEPT.
JUN 20 2003
REC'D UPRR

Dear Mr. Roland Watkins,

I have been advised that your Office is the contact point for individuals applying for NMB Arbitration. Pursuant to the attached excerpt from the New York Dock (NYD) Article IV, and oral information from your Office, this letter is to request the assignment of an Arbitration Committee.

In accordance with Article IV, I have provided Union Pacific Railroad ("UPRR") a thirty (30) day notice (attached in part) to resolve this dispute ("Dispute"), concerning myself being defined as a Displaced Employee (Non-Agreement person). The issue involves UPRR's failed Merger Transaction related yard consolidation experiment to operate ALL the switching for Phoenix from Tucson, Arizona in late May 1997, which resulted in my demotion and reduction in wages of $1,272 per month and other fringe benefits effective 7/1/97. UPRR has not responded to my certified letter dated 5/12/03, attached in part, requesting Dispute resolution.

I am hereby requesting Neutral selection data, including biographies, for referees, who would be available for the states of Arizona, Texas, California and Washington D.C. please. I am uncertain if witnesses are able to testify; but, Tucson Arizona would be an appropriate site for an Arbitration, if ALL those employees present in 1997 are allowed to testify in person.

NMB-2 appears to apply to Mediation; so, not prepared. Please advise immediately what may additionally be required to activate the entire NMB Arbitration process, including any deposits or pre-payments required. I would appreciate a return call to discuss the entire NMB Arbitration Process to 281-359-5667 between 1300-1800 CT please (night worker).

By copy to UPRR, this is Official Notice to UPRR of my intent to refer said Dispute to an Arbitration Committee, as no UPRR response to attached certified letter.

Attachments:
NYD Conditions
Certified ltr. to UPRR

Sincerely,

JEG

John Grother

cc: UPRR 085-RM 830

UNION PACIFIC EXHIBIT 15
PAGE 26 OF 42

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

WEL REC'D
JAN 26 2004 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:

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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.

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> 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.

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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 the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

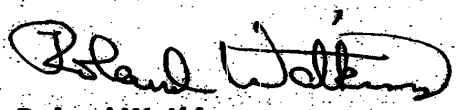
A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.



Roland Watkins
Director, Arbitration Services

Copies to:

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
1416 Dodge Street
Room 332
Omaha, NE 68179

Surface Transportation Board (S.T.B.)

*1 UNION PACIFIC/MKT MERGER--UTU IMPLEMENTING AGREEMENT ARBITRATION REVIEW

Decided: August 1, 1989

INTERSTATE COMMERCE COMMISSION DECISION
Finance Docket No. 30800 (Sub-No. 28)

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

On April 18, 1989, Union Pacific [FN1] filed a motion requesting the Commission to: (1) stay its "notice of appeal," filed March 2, 1989; and (2) direct the Arbitration Committee, notwithstanding the pendency of the appeal, to resume the arbitration process immediately and to move forward promptly to arrive at an implementing agreement. The United Transportation Union (UTU) replied. For the reasons discussed below, we will dismiss the appeal and deny the motion.

BACKGROUND

In Union Pacific Corp. et al.--Cont.--MO-KS-TX Co. et al., 4 I.C.C.2d 409 (1988), we approved the acquisition of control by Union Pacific Corporation (UPC), Union Pacific Railroad Company (UPRR), and Missouri Pacific Railroad Company (MPRR), of the Missouri-Kansas-Texas Railroad Company (MKT), the Oklahoma, Kansas and Texas Railroad Company (OKT), and the Galveston, Houston & Henderson Railroad Company (GHH). In doing so, we imposed the labor protective conditions set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). The decision is currently on review in RLEA v. ICC, No. 88-1391 (D.C.Cir., argued Apr. 28, 1989).

On June 1, 1988, Union Pacific served notice upon representatives of the UTU that it intended fully to integrate the personnel, facilities, and operations of MKT, the OKT, and the GHH into their MPRR counterparts. Negotiations failed to yield an agreement. On November 21, 1988, UTU formally requested arbitration to prescribe the terms of an implementing agreement. Proceedings before Arbitrators Richard Kasher and Robert Peterson were held in December 1988 and January 1989.

On February 14, 1989, the Arbitration Committee entered its Findings and Award (the arbitration decision). The arbitrators did not believe that the parties had availed themselves of a fair opportunity to negotiate a standard New York Dock implementing agreement. The arbitrators found that the reason an implementing agreement was not reached on a voluntary, collectively bargained basis was that both Union Pacific and the UTU were polarized on a number of issues the arbitrators believed were not proper subjects for a New York Dock implementing agreement. The arbitrators' intent in issuing the Findings and Award was to identify those issues that they believed should be removed from the bargaining table because they fell outside the scope of their understanding of an ordinary New York Dock implementing agreement. Arbitration decision, at 17. The arbitrators thus directed the parties to negotiate an implementing agreement addressing the remaining issues within 30 days from the date of the findings (id., at 18), and authorized the parties, in the event negotiations failed, to petition the arbitrators to impose an implementing agreement.

*2 On March 2, 1989, Union Pacific filed with this Commission a protective "notice of appeal" to the arbitration decision. Union Pacific argued that the arbitrators erred in removing certain issues from the bargaining table. These issues, in Union Pacific's view, were and are proper subjects for a New York Dock implementing agreement, and consequently may not be dismissed from the arbitration process. Union Pacific acknowledged, however, that we might wish to await the outcome of the further negotiations prescribed in the arbitration decision,

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subsequent decision by the Arbitration Committee, before establishing procedures for hearing and addressing the merits of Union Pacific's appeal.

On March 18, 1989, the Arbitration Committee announced that in the light of Union Pacific's protective appeal, it would not proceed with an arbitration hearing scheduled for March 20, 1989. By letter dated April 13, 1989, it stated its willingness to continue if both parties withdrew the matter from the Commission, with prejudice, and agreed to the principles of the February 14th ruling.

On March 20, 1989, UTU filed a pleading styled an "answer" to Union Pacific's notice of appeal and a "counterclaim for enforcement of award." UTU argued that the arbitration decision was not ripe for review, since it does not constitute an arbitrated implementing agreement. UTU also argued, alternatively, that if the arbitration agreement is ripe for review then the Commission should affirm it.

By decision served April 17, 1989, the Director of the Commission's Office of Proceedings issued a decision holding in abeyance Union Pacific's notice of appeal. The Director noted that subsequent negotiations ordered by the arbitrators or any ensuing arbitration might yield results satisfactory to both parties, thus mooting the issues raised in Union Pacific's pleading. The decision required the parties to file quarterly reports with this Commission so that we may be informed of the status of their ongoing negotiations and any subsequent arbitration.

Following this decision, Union Pacific filed a motion to stay its notice of appeal. Union Pacific is unwilling to withdraw its appeal because it does not wish to be precluded from challenging pertinent aspects of the February 14th findings and award. Union Pacific is concerned that the arbitrators' refusal to proceed is not only delaying the completion of an implementing agreement, it is also delaying indefinitely the consolidation of the operations of UPRR/MPRR and MKT, and the realization of the public interest benefits associated with that consolidation. Therefore, Union Pacific urges us to stay its appeal pending the completion of arbitration, and to enter an order directing the Arbitration Committee, notwithstanding the pendency of the appeal, to resume the arbitration process immediately and to move forward promptly to arrive at an implementing agreement. UTU responded to the motion, saying that if the Commission orders arbitration to go forward, it should make it clear that arbitration must proceed on the basis of the February 14th Findings and Award.

DISCUSSION AND CONCLUSIONS

*3 Union Pacific filed its request for review of the arbitrators' Findings and Award under 49 C.F.R. 1117.1, invoking our jurisdiction under the standards announced in Chicago and North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C.Cir.1988). There, we concluded that we would exercise jurisdiction to review decisions issued under the arbitration provisions of the labor protective conditions we have imposed under 49 U.S.C. 11347. We found that our jurisdiction resided in the statutory mandate to impose the conditions. Id. at 733.

Subsequent to Lace Curtain, we have defined our role in reviewing arbitration decisions on a case-by-case basis. See, e.g., Norfolk & W. Ry. Co. and New York, C & St. L.R. Co. Merger, 5 I.C.C.2d 234 (1989) (Norfolk). Cases to date have involved our review of a final award of an arbitrator. There is nothing in them to suggest that preliminary or interim findings by an arbitrator during the arbitration process will be reviewed before the arbitrator issues a final decision.

Following our decision in Norfolk, but subsequent to Union Pacific's filing of its petition on March 2, 1989, we adopted a rule codifying that an appeal of right is permitted to review arbitration decisions, and that the appeal must be filed within 20 days of a final arbitration decision. See Ex Parte No. 55 (Sub-No. 75), Deadline for Requesting Commission Review of Arbitration Decisions, served May 8, 1989 (54 Fed.Reg. 1984), May 9, 1989), codified at 49 CFR 1115.8. This accords with our general practice not to entertain interlocutory appeals except in 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

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we might hold its protective appeal in abeyance, pending the arbitrators' final decision.

...e arbitrators' February 14th Findings and Award is not a final decision of the arbitration committee. The arbitrators deliberately did not address the specifics of the items which they believed should be included in an implementing agreement. Rather, they stated their hope that with the removal of negotiating roadblocks, the parties would bargain realistically and in good faith to reach a valid implementing agreement consistent with the New York Dock conditions. This action does not justify interlocutory review of the February 14th decision. Indeed, it reflected the arbitrators' mediation role.

We are not ignoring the adverse effect of delay on consummation of the UPRR/MPRR-MKT consolidation. But, on balance, this concern does not outweigh our interest in the arbitration process being free of our interference through interlocutory review.

*4 Accordingly, we will deny Union Pacific's motion and dismiss its pending appeal of the February 14th decision without prejudice. This action should moot Union Pacific's request that we direct the arbitrators to proceed. It should also satisfy the arbitrators' legitimate concern about their role vis-a- vis this Commission. [FN3]

The decision of the Director of the Office of Proceedings, served April 17, 1989, is vacated. We expect that our dismissal of the appeal will remove any obstacle standing in the way of the Arbitration Committee in continuing with the negotiations, and that the arbitration process will resume promptly. Appeals to the arbitrators' final decision (as well as the February 14 decision as relevant) may be filed pursuant to 49 CFR 1115.8. [FN4]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

t is ordered:

1. Union Pacific's "notice of appeal," filed March 2, 1989, is dismissed, and its motion, filed April 19, 1989, is enied.

2. This decision is effective on August 8, 1989.

loreta R. McGee

ecretary

N1 "Union Pacific" refers, collectively, to Union Pacific Railroad Company, Missouri Pacific Railroad Company, id Missouri-Kansas-Texas Railroad Company.

N2 49 CFR 1113.15 provides for interlocutory appeals from an administrative Law Judge (ALJ) only if: (a) the LJ's ruling denies or terminates any person's participation; (b) the ruling grants a request for the inspection of ocuments not ordinarily available for public inspection; (c) the ruling overrules an objection based on privilege, e result of which is to require the presentation of testimony or documents; or (d) the ALJ finds that the ruling ay result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a rty.

While we do not have specific rules regarding interlocutory appeals from arbitrators, if we were to apply the ove criteria, the interlocutory appeal in this proceeding would not be justified.

3 We do not read the arbitrators April 13th letter as preventing any party from subsequently seeking review of

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[redacted]al decision, as influenced by the February 14th decision. Instead, we read their request that the parties [redacted]e February 14th decision as one that simply allows the process to continue under the framework and limitations of that decision.

FN4 It would be inappropriate for us broadly to rule, as UTU requests, that Union Pacific is bound by the February 14th decision. We have made clear that, for the purpose of the arbitration process it is so bound.

1989 WL 239106 (I.C.C.)

END OF DOCUMENT

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NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

August 11, 2003

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Re: New York Dock: Union Pacific Railroad Company
And John Grother

Dear Mr. Grother:

Reference is made to the exchange of correspondence requesting arbitration pursuant to Article IV, of New York Dock labor protective conditions involving a dispute between you and the Union Pacific Railroad Company.

In accordance with the request, I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records.

Sincerely.

Roland Watkins
Director, Arbitration Services

Copy to:

Ms. Marilyn J. Ahart
Director Protection Management
Union Pacific Railroad Company
1416 Dodge Street
PNG06
Omaha, NE 68179

UNION PACIFIC RAILROAD COMPANY

[redacted]OOMIS, 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.

[redacted]letter of August 11, 2003 to John E. Grother, with copy to Marilyn Ahart at Union [redacted], 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

[redacted] John E. Grother
[redacted]1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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,

Roland Watkins
Director, Arbitration Services

cc: Gordon MacDougall

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

October 6, 2003

REC'D
OCT - 7 2003
Labor Relations

Mr. Roland Watkins
National Mediation Board
1301 K St., NW-#250E
Washington DC 20572

BY HAND

Re: NYD Claimant-John E. Grother

Dear Mr. Watkins:

I am in receipt of a letter from Mr. W.E. Loomis (UP-Employee Relations Planning), dated September 30, regarding selection of a neutral in the entitled matter. I have a somewhat different version of the events to date.

1. We have conducted three telephone discussions, 9/24, 9/26, and 9/30, during which a number of matters were discussed, such as likely issues, procedures, location, and possible terms for an arbitration agreement. I believe these discussions, for the most part, have been helpful. However, during the 9/26 discussion, Mr. Loomis referred to your August 11, 2002 letter, addressed to Mr. Grother:

> "I am enclosing a panel of seven (7) neutrals. Please notify this office as soon as a selection has been made for our records."

Mr. Loomis maintained that the alternate striking process is mandatory in selecting a neutral, in accordance with your April 28, 2000 memorandum, attached, which he forwarded to me following our telephone conference. I agreed, at his suggestion, to inquire whether this is your understanding of the two sentences quoted above from your August 11 letter to Mr. Grother--that selection means alternate striking.

2. I advised Mr. Loomis during our brief 9/30 conversation that my understanding is the April 28, 2000 memorandum is mandatory only as to the persons addressed, i.e., railroad carriers and rail labor organizations and, as such, alternate striking is not mandatory here, where the controversy does not involve a rail labor organization party.

3. Mr. Loomis asserts I am unwilling to use the alternate strike method to reduce the panel to a single neutral, but he does not mention my other suggestions, apparently in the belief the alternate strike scheme is binding. However, it is possible the discussions may be more fruitful if the April 28, 2000 memorandum was not intended, and does not apply, to non-labor situations.

Very truly yours,

Gordon P. MacDougall

Atty. for John E. Grother

cc: W.E. Loomis
Union Pacific RR Co.
1416 Dodge St.-Rm. 332
Omaha, NE 68179

(By overnight express)

John E. Grother
1718 Rustic Park Drive
Kingwood TX 77339

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572
(202) 692-5000

REC'D
MAY 05 2000
Labor Relations

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

A number of months ago, the National Mediation Board (Board) began experimenting with a new procedure for providing the parties with balanced panels in New York Dock cases. [illegible] many of you may not have been involved with New York Dock cases recently, pleased be [illegible]ed that the following procedures will apply governing the selection of a neutral to resolve disputes in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions:

- Upon receipt of a request from a party for a neutral, the Board will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals. Each party will be requested to provide a list of fifteen (15) preferred neutrals from that list. **This information is confidential and will be used only for the purpose of the selection of a neutral for that dispute.**

- The lists, along with other relevant information, will be considered by the Board in compiling a panel of seven (7) neutrals. The Board will then promptly provide the parties with such a panel. The parties will use the strike method to derive at a neutral and will immediately inform the Board of the selection.

These procedures will not prevent the parties from mutually deciding on a neutral, but will apply only when the parties are unable to agree on a neutral.

UNION PACIFIC RAILROAD COMPANY

W. E. LOOMIS, GENERAL DIRECTOR
EMPLOYEE RELATIONS PLANNING
1416 DODGE STREET - ROOM 332
OMAHA, NE 68179
(402) 271-6446
FAX (402) 233-2499

October 15, 2003

Mr. Roland Watkins
National Mediation Board
Washington, DC 20572

Dear Mr. Watkins:

This refers to your letter of August 11, 2003 in connection with John E. Grother's request for arbitration, in accordance with Article IV of the New York Dock labor protection conditions. Enclosed with your letter was a list of seven (7) qualified neutrals. During telephone discussions with Mr. Grother's attorney, Gordon P. MacDougall, Union Pacific has attempted to reduce that list to a single neutral by means of the alternate strike method. Unfortunately, our efforts in this regard have not been successful. For your records, and only for the purpose of this case, had the alternate strike method been utilized, Union Pacific's three strikes would have been Barbara C. Deinhardt, Ira F. Jaffe and Robert M. O'Brien.

Sincerely,

W. E. Loomis

CC: John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE, N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9736

December 31, 2003

REC'D
JAN - 5 2004
Labor Relations

r. Roland Watkins
irector, Arbitration Services
ational Mediation Board
ashington DC 20572

e: New York Dock: Union Pacific Railroad Company
and John E. Grother

ear Mr. Watkins:

This is in reference to the June 23, 2003 request by Mr. John . Grother for arbitration pursuant to the New York Dock employee rotective conditions, and the various exchange of correspondence ubsequent thereto.

Mr. Grother, during all relevant periods, has been a non-greement employee; and he was not associated with counsel until n or about August 11, 2003, when the undersigned was engaged. reviously, you had furnished Mr. Grother, and the carrier, with mes of individuals for consideration as the neutral member arbitration committee.

Unfortunately, the carrier has insisted upon a system of electing a neutral by an alternate strike method, apparently ecently prescribed or utilized in situations involving carriers nd labor organizations. There have been no meaningful discussions ince receipt of the carrier's October 15, 2003 letter to you.

The alternate strike method is deemed prejudicial to Mr. rother, particularly in light of contemplated issues peculiar to his non-agreement employee, which appear to include matters of fficial vis-a-vis employee, in contrast with management vis-a-is labor.

Accordingly, under the circumstances, this is to request that ou select the neutral member of the arbitration committee. From r. Grother's standpoint, you may wish to consider a person eretofore either named or unnamed, or not on any previous list, nd either with or without railroad industry experience, as may be ppropriate.

Mr. Grother's preference for location of any hearing by the rbitration committee would be the Washington DC area.

Very truly yours,

Gordon P. MacDougall

c: John E. Grother
William E. Loomis

UNION PACIFIC RAILROAD COMPANY

[redacted]LOOMIS, GENERAL DIRECTOR
LOYEE 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 [redacted]e 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
[redacted]1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Suite 410
1025 Connecticut Ave. NW
Washington, DC 20036

REC'D
MAR 15 2004
Labor Relations

LAW OFFICES
GORDON P. MACDOUGALL
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9736

March 12, 2004



Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

Petitioner is in receipt of the opposition by Union Pacific Railroad Company (UP), filed March 5, 2004. The Board's rules do not permit a reply absent unusual circumstances, and petitioner will not answer the facts and arguments which it deems erroneous, at this time.

However, UP has characterized the identity of the petitioner, John E. Grother, as a "management employee" (UP Opp. 3), analogous to the term of art ("managerial employee") under the NLRA, in lieu of the RLA definitions for railroad and airline personnel (subordinate official/employee). Cf. 29 U.S.C. 152(f); 45 U.S.C. 151, fifth, 182. For a recent decision and summary of cases, see: LeMoyne Owen College v. NLRB (No. 03-1031, USCA-DC Cir., Feb. 10, 2004), 72 U.S. Law Week 1497-98 (2/24/04).

We wish the record to show that petitioner disagrees with UP's characterization of his identity, and that he is not a "management employee," now or previously.

Very truly yours,

Gordon P MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

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

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[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
1025 CONNECTICUT AVE., N. W.
WASHINGTON, D. C. 20036

TELEPHONE
AREA CODE 202
223-9738

April 23, 2004

REC'D
APR 29 2004
Labor Relations

Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

This is to request that the decision in the entitled proceeding, served April 21, 2004, be corrected in the following respects, at page 1, final paragraph, 2nd sentence, and 3rd sentence, with text to be stricken indicated by dash, and to be added by underline, as follows:

> Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance, among other benefits, under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner ~~filed his claim with UP~~ invoked arbitration under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization substantially the same level of protection as accorded to represented employees.

Although the decision correctly states petitioner seeks a displacement allowance, such is not the entire basis for his benefits. Moreover, petitioner did not file a "claim" with UP under New York Dock's Article IV, but invoked arbitration under that provision. Perhaps the use of "claim" as both a noun and verb may have caused the misleading sentences. The NYD conditions embrace more than displacement allowances, and also include matters such as fringe benefits, moving expenses, etc. 360 I.C.C. at 87-90. Finally, the word substantially should be added to the second sentence, so as to track the exact wording of Article IV, 360 I.C.C. at 90.

The paragraph as it presently stands does not correctly reflect the record filed with the Board, and does not correctly reflect the language of the NYD conditions.

Very truly yours,

UNION PACIFIC EXHIBIT 18
PAGE 1 OF 3

Gordon MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

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

MA-5D

MEMORANDUM OF AGREEMENT

BETWEEN

JOHN E. GROTHER

AND

UNION PACIFIC RAILROAD COMPANY

****

WHEREAS, John E. Grother (Grother) and Union Pacific Railroad Company (Union Pacific) are in dispute as to the interpretation, application, or enforcement of the so-called New York Dock protective conditions prescribed by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (August 6, 1996); a neutral/referee having been designated January 21, 2004 by the National Mediation Board; and a decision having been issued April 21, as clarified June 10, 2004, by the STB in its Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review), and a telephone conference held June 7, 2004, among the parties and the neutral/referee, and without prejudice to the differing positions of the parties, but for the purpose of establishing procedures to permit the arbitration to proceed in light of the views of the neutral/referee,

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-

UNION PACIFIC EXHIBIT 19
PAGE 2 OF 4

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

Gordon P. MacDougall

FOR: UNION PACIFIC RAILROAD COMPANY

UNION PACIFIC EXHIBIT 19
PAGE 4 OF 4

TRANSPORTATION ACT.

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.

Use of revolving fund.

Ante, p. 462.

(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.

Issue of indebtedness to United States.

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—

Meaning of terms.

(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;

"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.

UNION PACIFIC EXHIBIT 20
PAGE 1 OF 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 road-masters 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 officals.

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 tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

(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 261.

"(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 l(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 employe it means the date in said period when that employe 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 employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes 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 "employe" 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 "employe" subject to the protection of the New York Dock conditions?

The Parties agreed that if it were determined that either of the Claimants were employes 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 employes 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 employes 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 employe 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, 360 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:

DATE	POSITION
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 employes and 199 agreement employes, 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:

DATE	COMPENSATION
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 employes.

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.

DATE	POSITION
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 Indsutrial 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 employe records are maintained and communicated in an accurate and timely manner.

In addition, the dimensions of that assignment may be summarized as follo direct reports- 2 managers; indirect reports- 6 non-agreement employes and 31 agree ment employes; payrolls- 29,000 employes and $577.8 MM annual salaries; and, employ 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:

DATE	COMPENSATION
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

Thus, at the time of his termination the ManagerPersonnel 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 employes 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

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company".

The Claimants also maintain that they were "employe s" 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 "employe ". 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 employes' 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 employes subject to protection of New York Dock conditions.

CARRIER POSITION

The Carrier maintains that the term "employes" as used in Article IV of the New York Dock conditions is a term of art which includes rank and file employes 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 "employe "; 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 employe' 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 'employe' 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 "employe " 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 "employe " subject to the protection of the New York Dock conditions.

The findings, reasonsing 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 "employes" as defined in the dictionary; (2) that New York Dock does not define or limit the word employe ; (3) that the Carrier did not attempt to exclude their positions in the proceedings before the ICC; (4) that Carrier's Vice President of Labor Relations represented before the ICC that [illegible]

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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 employe in both the dictionary sense and the legal sense. The critical question is whether an employe , such as the Claimants or even the President of a Carrier are "employes" 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 "employe". 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 or 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 Committie's opinion Section 1, Fifth offers guidance as to the scope of unionization and the term "employe" as including rank and file employes 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 employes 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 "employe" 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; paragrpah 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 sub-ordinate 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 employes or subordinate official positions. It should be noted that BRAC attempted to organize Senior Anal: 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 employes 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 s 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 "employe" as used in the railraod 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 "employe". The district court, in finding for the Company, stated:

> Reasons: This case turns on the definition of the word 'employe' Nowhere in the Interstate Commerce Act is employe 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 'employe" 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 'employe' include the vice-president and general manager of a railraod.

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 ICC.

The Court held Edwards was not entitled to protection since he was not an "employe". Specifically, the Court held:

> Neither the Interstate, Commerce Commission nor the Oklahoma conditions imposed by the ICC provide a definition of "employee". We believe, however, that 'employee as used in the present context by Congress and the ICC 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 decison 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 employes" and that he was an "employe". The Court first found there was nothing which prohibited Zinger's early retirement. The Court next commented on whether Zinger was an "employe":

> Since he has failed to prove any breach of the protective agreement, we need not decide whether the plaintiff would be considered an 'employe' 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 'employe' 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:

(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) Newbourne, 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 Newbourne are distinguishable from the instant case. However, the Committee notes that the court in Newbourne 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 Februaryl, 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 ICC 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 ICC 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 "employes" 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

T. 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 refered 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

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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 offical 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.

Moroever, 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.

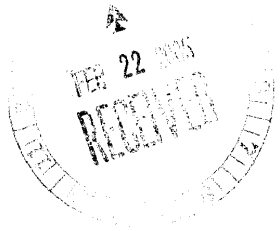
AWARD

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	:	AWARD AND DECISION
Union Pacific Railroad Co., Missouri-Pacific Railroad Co. Pursuant 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 entitled to either a dismissal or displacement or severance allowance under New York Dock Conditions? (3) Did the Claimants receive the proper vacation allowances they were entitled to receive for year 1984?

(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 pf 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 unionzation, will be adversely affected by a merger.

The Claimant notes that on those specific occassions 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 Claiamnts 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 Claiamnt 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 Claiamnt 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 illusary 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 dismisseed 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, chauffering 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 gleamed 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 bonsues. 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

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 acceed 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 O-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 Claiamnts 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 Sante 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 occassioned 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 susceptable 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 personel. 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 obstain 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 georgraphical 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 form 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 disadvantaged 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 susceptable 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 acceed 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 Claiamnts which they rejected for various reasons. We find this was not permissable 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 interfer 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 Evanulation 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

(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.

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 Employes (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 attendent 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 not 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 BMWE 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

UNION PACIFIC EXHIBIT 27
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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 Interstate 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	Employe 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.

EMPLOYE 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 positio°. 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 "employes" as used in Article IV of the New YUork Dock conditions is a term of art which includes rank and file employes 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 positions 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 Employes 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
Employe Organization
Member

Signed this 5th day of April, 1988.

City of Chicago
County of Cook
State of Illinois

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

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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 road 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 1995the 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 consitute 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 laison 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 Coordinatorrs.*** 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

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James V. Nekich, Grievant

ISSUE:

How do the terms of the New York Dock conditions apply to James Nekich?

BACKGROUND

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

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:

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

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.

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 chose 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 TO DISPUTE Ross F. Povirk and the Transportation and Communications International Union - ASD

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, 1883 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

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

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.

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 en 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 [illegible] months proceeding his dismissal is $3,400.00

UNION PACIFIC EXHIBIT 30
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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 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.

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; 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 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 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. 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 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. 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 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.
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>
> 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, 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

Carrier Member

Labor Member

Carrier Member

LES:CMG

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

G.L. Dixon 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. 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).

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 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.
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> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, 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 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.

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.
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> 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. 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 Sante 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.
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> 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

"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 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

> 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 anadministrative, 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 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. 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 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, 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

Carrier Member

Labor Member

Carrier Member

LES:CHG

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?

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.

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).

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,

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 en 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 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.

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 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. 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 Sante 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:

> 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 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 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 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 employes 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

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

Carrier Member

Labor Member

Carrier Member

LES:CHG

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 initialed 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

W.S. Hinckley
General Director Labor Relations

Agreed:

General Chairman UTU

Daniel E. Johnson

Vice President UTU

UNION PACIFIC EXHIBIT 33
PAGE 25 OF 28

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,

W S Hinckley

W.S. Hinckley
General Director Labor Relations

Agreed:

General Chairman UTU

Daniel E. Johnson
Vice President UTU

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

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/SPEL/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 implementaion 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 pended 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:

General Chairperson UTU UP

General Chairperson UTU SPWest

General Chairperson UTU SSW

General Chairperson UTU SP East Road

General Chairperson UTU SP East Yard

For the Carrier:

General Director Labor Relations

Assistant Vice President Southern Region

General Director Labor Relations

General Chairperson UTU-E

Vice-President UTU

Vice-President UTU

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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.

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.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

Agreed:

General Chairperson UTU - T&P

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 LetterNo.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

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. 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

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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. In 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 x 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

Agreed:

General Chairperson UTU - SSW

General Chairperson UTU - SPEL-T

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

Pool	Mileage
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.

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 :

General Chairperson UTU

General Chairperson UTU

General Chairperson UTU

General Chairperson UTU

For the Carrier:

General Director Labor Relations

General Director Labor Relations

Assistant Vice President
Southern Region

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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

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

NYD 97

ARBITRATION COMMITTEE

In the Matter of the Arbitration between:	)	Pursuant to Article 1, 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.

[1] Most sections pertinent to this case appear in Article I 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.

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[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

In the Matter of Arbitration Between Southern Railway Company And International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers	:	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 critica that claims be filed without delay. In the cases at hand, and while we have fully considered the General Chairman's agressive 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 a 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 become 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 me that they claimed to have been put in a "worse position" until th 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. Edward	Eckehard Muessig	Alan M. Scheer
Carrier Member	Neutral Member	Organization Member

Dated: February 13, 1990

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	)	
TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION,	)	Pursuant to Article 1, Section 11 of the New York Dock Conditions
Organization,	)	
and	)	I.C.C. Finance Docket No. 30,000
UNION PACIFIC RAILROAD COMPANY,	)	Case No. 3 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

[2] 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 riod 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 Arbitration Committee

Under

ICC Finance Docket No. 30,000 (New York Dock Employee Protective 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
Post 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 service 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 prescribed when it approved the consolidation of the Union Pacific Railroad, the Missouri Pacific Railroad and the Western Pacific Railroad, which merger was finally 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 Spetember 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 Weatman 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 in effect 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 Contrac 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 as 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 throughly 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 faced 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 occassions 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 committments 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 are not 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 concerntrate 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 occassioned 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 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 "tranaction" 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 unauthordox 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 [illegible], 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 regretable 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 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 realighment of machinist forces of the Stockton and Salt Lake City facilities wes 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 detrement, 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

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
- ○ Temporary
- ○ From UP Corp/Sub Unit -
- ○ From Agreement
- ○ Return from Suspension
- ○ Return from Leave of ABS
- ○ Return from Salary Continuation

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:		

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%

				MRV:	
Dept.		Part Time Hourly Rate:		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:	
Restrac Req #:		Explanation:	

DEPARTMENT APPROVER

Does NAPS need department approval:	○ YES ● NO
Department Approver:	

COMPENSATION

Control Number:	L093		
Class:		Location:	
Degree:		Rpt Unit:	
Grade:		Benefits Date:	01/15/98
Job ID:		PINs Date:	
ICC Number:		Payroll Acct.:	01/23/98 09:31:41 AM

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

Medical Date: 2/20/98 11:02:21 AM

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	)	OPINION AND AWARD
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Organization,	)	Pursuant to Article I, Section 11 of the New York Dock Conditions
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 Employe 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]

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[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 (~~without any Motor Track Inspector seniority~~ 45 CAC) 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~~) 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 ~~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
Employes' 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 Scheudle 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 * * *." (Underscoring 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 consolidtion 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.

Based on 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 . . ."

On 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 employe 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 employe do not turn on the protective provisions. Only adverse effect as a 'result' of a transaction qualifies an employe 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 employe'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 Chalie 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

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

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

PRS027 MSG 502 - MORE INFORMATION AVAILABLE -HIT ENTER-
YTD TIME SUMMARY - 23

SOC SEC NO ===> 526663917 EMPLOYEE NAME ===> GROTHER 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

ate: 9/8/04 Time: 10:23:52 AM

PRS027 MSG 504 - INQUIRY COMPLETED
YTD TIME SUMMARY - 23

SOC SEC NO ===> 526663917 EMPLOYEE NAME ===> GROTHER 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

ıte: 9/8/04 Time: 10:24:21 AM

PRS027 MSG 504 - INQUIRY COMPLETED
YTD TIME SUMMARY - 23

SOC SEC NO ===> 526663917 EMPLOYEE NAME ===> GROTHER J E
COMPANY CODE => 9X YEAR ==> 97 CLASS OF TIME ==> 001

YTD TIME SUMMARY ATTRIBUTES

:LS 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) @ 4928.01 19,712.04
2 month (Sept Nov) @ 4928.00 9,856.00
41 968.04

) ENTER NEXT TOPIC OR 98 - MAIN MENU, 99 - PRIMARY MENU

UP System

May	6,200
June	6,200
July	4928.01
Aug	4928.01
Sept	4928
Oct	4928.01
Nov	4928.00
Dec	4928.01
	41968.04

SP System

Jan	6206
Feb	6200
Mar	6200
Apr.	6200
	24,800

Total 41,968.04
24,800
66,768 04

UNION PACIFIC EXHIBIT 43
PAGE 3 OF 3

ate: 9/8/04 Time: 10:54:19 AM