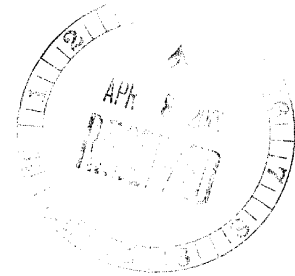


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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760, SUB-FILE 42



IN THE MATTER OF ARBITRATION BETWEEN UNION PACIFIC RAILROAD
COMPANY AND JOHN E. GROTHER,
NEW YORK DOCK ARBITRATION

(Arbitration Review)

CARRIER'S RESPONSE TO PETITIONER'S APPEAL

This case arises out of the 1997 transfer and demotion of John E. Grother, a manager of the Union Pacific Railroad Company ("UP"). At the time of his transfer, Grother worked as the Senior Manager Terminal Operations ("SMTO") at UP's Tucson, Arizona, terminal. As SMTO, Grother was, in his own words, the "senior officer of the Tucson District," and "the guy in charge of the territory." He was responsible for all aspects of running the Tucson terminal. In July 1997, Grother was transferred to the UP's terminal in Houston, Texas, as a result of his job performance, and was demoted to the position of Manager Terminal Operations. Over the next six years, Grother complained through UP's Human Resources and EEO departments that his demotion was the result of age and veteran status discriminatory. During this time, Grother repeatedly acknowledged his management status as the senior carrier officer over the Tucson terminal, and described the events of July 1997 as a "discriminatory demotion."

Six years later, when his complaints of discrimination had failed to yield the desired result, Grother changed his story. In 2003, Grother wrote to UP demanding displacement benefits under New York Dock Ry. - Control - Brooklyn E. Dist., 360 I.C.C. 60, aff'd sub nom.

New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979) (“New York Dock”).

Suddenly, the events of July 1997 were not a discriminatory transfer and demotion, but rather a merger-related displacement. Suddenly, he was not the top official over the Tucson terminal, but rather an employee relegated to performing the tasks of an “order taker” and whose primary function was to substitute for vacationing trainmasters.

Pursuant to New York Dock, the parties arbitrated Grother’s claims. On December 21, 2004, Arbitrator Lynette Ross issued an Award making several factual findings that led her to deny Grother’s claim for New York Dock displacement benefits. First, the Arbitrator credited the evidence submitted by UP and the statements made by Grother between 1997 and 2003 about his job duties, over the subsequent position taken by Grother as part of his efforts to secure New York Dock benefits. Thus, the Arbitrator concluded that Grother was not an “employee” eligible for New York Dock benefits. In addition, the Arbitrator credited evidence submitted by UP that Grother’s claim was barred by laches, because he had failed to submit his New York Dock claim for almost six years, resulting in prejudice to UP. As discussed below, such factual and credibility determinations are precisely the types of rulings that this Board does not review under its Lace Curtain decision, Chicago & N.W. Transp. Co. - Abandonment, 3 I.C.C.2d 729, 735 (1987), aff’d sub nom. International Bhd. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988). Accordingly, the Board should decline to review Arbitrator Ross’ decision denying Grother’s New York Dock claim.

FACTS

A. The UP-SP Merger

UP is a common carrier by rail operating in the western United States, which has grown through mergers with other railroads. One such merger occurred on August 6, 1996, when this

Board approved the merger of the rail carriers controlled by Union Pacific Corporation and the rail carriers controlled by Southern Pacific Transportation Company. Union Pac. Corp. – Control and Merger – Southern Pac. Transp. Co., 1 STB 233 (1996). In approving the UP-SP Merger, the Board imposed the New York Dock protective conditions.

B. Grother's Employment as a Manager at Carrier

For 28 years preceding the UP-SP Merger, Grother had worked as a non-union manager of SP, having served in a variety of management positions, including Assistant Trainmaster, Trainmaster, Terminal Superintendent, Assistant to the Vice President, Assistant Division Superintendent, General Manager, Manager Joint Facilities, and Senior Manager Budgets. App., 44, 54, 91.¹ At the time of the merger, Grother was the Terminal Superintendent at SP's Tucson, Arizona, terminal. App., 46. In this position, Grother was the senior carrier officer over the Tucson District, responsible for the operation of the terminal, safety, hiring recommendations, and disciplinary hearings and recommendations. App., 290-293. He directly supervised several managers, and had numerous union employees who worked under his command. Id. He received a salary and benefit commensurate with other management personnel. Id.

On January 1, 1997, Ken Packard became supervisor over the region that included Tucson, and began supervising Grother. App., 290. Initially, Packard decided to leave existing management in place. Id. As such, Grother's position remained unchanged, although his title was changed effective April 16, 1997, from the SP title of Terminal Superintendent to the UP title of SMTO over the Tucson District. Grother continued to have the same managerial job

¹ For convenience, UP submits the Exhibits cited in this brief in a separate appendix. All documents contained in UP's Appendix are contained in Appendices 1 through 11 to Grother's Supplement to Petitioner for Review.

duties and responsibilities over the Tucson District, including his continued status as the top carrier official for the Tucson terminal. App., 46, 67, 256-290.

C. Transfer of Switching Operations

In 1997, the carrier decided to move certain switching operations from the SP terminal in Phoenix to the SP terminal in Tucson. App., 290-291. Grother claims that this change was related to the UP-SP Merger. The record, however, belies that contention. Although the movement of switching work occurred following the UP-SP Merger, it occurred at a time when the former SP was still being managed as a separate property from the UP. App., 291-292. Thus, the transfer of switching operations from Phoenix to Tucson did not involve a merger of UP and SP facilities or operations. Instead, it simply involved the transfer of an SP operation from one SP facility to another SP facility, an action that could have been taken regardless of the UP-SP Merger. Id.

In fact, when the movement of switching operations took place, the carrier had not even begun to negotiate implementing agreements with any unionized personnel in Arizona. Of course, Article 1, § 4(b) of New York Dock required the carrier to negotiate or arbitrate implementing agreements with the unions representing its employees before it could begin making merger-related changes to its operations. These negotiations did not even begin in the relevant area until late 1997, when UP began negotiating implementing agreements with the train, engine, and yard crafts for the area that included Phoenix and Tucson. App., 156-235. These agreements were not finalized until 1999, two years after Grother had been transferred to Texas Id. Given these facts, the movement of work between the SP facility in Phoenix and the SP facility in Tucson could not have been related to the UP-SP Merger.

D. Grother's Transfer and Demotion

After several months observing Grother's job performance, and due to several problems in Tucson, Packard made the decision to remove Grother from the Tucson SMTO position. Packard testified that this decision was made because of significant operational difficulties in Tucson that caused him to believe that Grother did not possess the high level of skills necessary to be the official in charge in Tucson under existing, difficult circumstances. App., 291. Rather than terminate Grother, UP transferred him to the lower level position of Manager Terminal Operations in Houston, Texas. Supplement to Petition for Review ("Petitioner's Brief"), at 5. This position had less responsibility than Grother's SMTO job, and his salary was adjusted accordingly. At the time of his transfer, UP paid Grother management relocation benefits that exceeded those available to persons covered by New York Dock. App., 239-240A.

E. Grother's Claims of Discriminatory Demotion

Over the next six years, Grother sent letters to UP's CEO, Human Resources Department, EEO Group, and Ombudsman accusing UP of treating him unfairly and discriminating against him. App., 92-95, 101-103, 117, 119-125, 255-281. Specifically, Grother accused UP of demoting him for reasons including his age and veteran status, and claimed that he had been made the scapegoat for the problems that occurred when switching operations were moved from the SP Phoenix terminal to the SP Tucson terminal. App., 50, 53, 57, 85, 97. Most importantly for purposes of the present case, Grother described his SMTO job as placing him "in command" of the Tucson District, where he was the "senior officer," a job that included leadership of both the Tucson and Nogales yards.

On December 15, 2002, Grother filed a formal letter with UP's ombudsman claiming that he had been demoted in July 1997 because of his age and veteran status. App., 255-269. On

March 10, 2003, UP's ombudsman advised Grother that he had reviewed the decision to transfer him and found it to be appropriate. App., 125.

F. Grother's Belated Claim for New York Dock Benefits

On May 12, 2003, after six years spent seeking compensation and redress for alleged unfair treatment and discrimination, Grother suddenly changed course. App., 41-86. For the first time, Grother claimed that his demotion had been related to the UP-SP Merger and that he was therefore eligible for displacement benefits under New York Dock. On July 18, 2003, UP denied Grother's claim, finding that he did not qualify as a displaced employee under New York Dock. UP's denial was based on three independent grounds: (1) Grother's demotion and transfer was not the result of the UP-SP Merger, but rather based on Packard's analysis of Grother's job performance and abilities; (2) Grother was a manager and therefore not an "employee" eligible for benefits under New York Dock; and (3) Grother's claim was barred by laches given his delay of 6 years in pursuing displacement benefits. App., 127-128. Grother then submitted a request with the National Mediation Board ("NMB") for the appointment of an arbitrator under Article IV of New York Dock. App., 126.

Over the next several months, Grother registered numerous complaints concerning the arbitration process, beginning with the process for selecting a neutral. The parties eventually requested that the NMB select an arbitrator, and, on January 21, 2004, the NMB appointed Lynette Ross as arbitrator. App., 133-145.

Following Arbitrator Ross' appointment, a dispute arose concerning the arbitration process itself, including the timing and order of the parties' written submissions. Grother filed a petition with this Board requesting that it establish procedures for the arbitration. In particular, Grother disagreed with the filing of simultaneous briefs (a procedure typically done in New York

Dock arbitration cases). On April 21, 2004, the Board denied Grother's request, ruling that such procedural determinations were within the discretion of the arbitrator. App., 146-155.

Following the Board's decision, the parties entered into a Memorandum of Agreement establishing the procedures that would govern the hearing, including the submission of briefs and presentation of evidence.² App., 152-155. A hearing was held before the Arbitrator on October 12, 2004, which included live testimony. App., 1.

G. Arbitrator Ross' Award

On December 21, 2004, Arbitrator Ross issued her Award denying Grother's claim for displacement benefits under New York Dock. Arbitrator Ross' Award addressed three questions presented by the parties: (1) whether Grother's claim was barred by the doctrine of laches; (2) whether Grother was an "employee" within the meaning of New York Dock; and (3) whether a causal nexus existed between Grother's transfer and the UP-SP Merger. Each of these questions was resolved in UP's favor. App., 2.

First, Arbitrator Ross ruled that Grother's claim was barred by laches. Arbitrator Ross found that Grother had not filed a claim for New York Dock benefits until 70 months after his demotion and transfer. App., 26. In so finding, Arbitrator Ross rejected Grother's assertion that a July 1997 letter he had sent to UP's CEO asserted a claim under New York Dock, instead concluding that the letter was intended to seek assistance in obtaining a management job in Tucson. App., 27. The Arbitrator also found that Grother's six-year delay prejudiced UP by limiting its ability to: (1) mitigate its liability; and (2) "construct a vigorous defense with still-

² After the Memorandum of Agreement was signed by Grother and UP, a dispute arose concerning the testimony of a witness for UP. Specifically, Grother argued that UP could not present a witness without first submitting a verified statement outlining his testimony. The Arbitrator rejected Grother's argument, noting that either party could call witnesses to testify at the hearing. App., 241-246.

available documentation and personnel.” App., 28-30. Specifically, Arbitrator Ross found that, because of Grother’s delay, UP had: (a) been unable to offer him an alternative, higher paid position so that he would have earned any guaranteed minimum; (b) paid Grother non-New York Dock relocation benefits that it would not have been required to pay had he been certified as eligible for labor protection; (c) been unable to produce a so-called 15121 Form that could have substantiated its reasons for transferring and demoting Grother; and (d) lost computer entries regarding the reason for Grother’s transfer due to conversions of its computer systems had taken place between 1997 and 2003. App., 28-30. Finally, the Arbitrator concluded that Grother offered no credible evidence to justify his six-year delay in seeking benefits under New York Dock. Relying on well-established precedent, the Arbitrator concluded that Grother’s claim was therefore barred by the doctrine of laches. Id.

Second, the Arbitrator found that Grother was not an employee or subordinate official under the Railway Labor Act (“RLA”), and that he was therefore ineligible for benefits under New York Dock. Arbitrator Ross based this finding on her review of Grother’s job duties and responsibilities, including the testimony of Packard, as well as Grother’s “own description of the characteristics and responsibilities of the SMTO position he held at the time of his transfer,” which included Grother’s statement that he was the “senior officer” in Tucson. Arbitrator Ross discredited Grother’s post-claim efforts to downgrade the importance of his position to the level of “order taker,” specifically finding that “[s]uch belated assessments of [Petitioner’s] responsibilities at Tucson at the time of the transfer is less than credible and hardly constitutes persuasive evidence that [Petitioner] was an employee or subordinate official at the time of July 1, 1997 transfer.” Thus, relying on her resolution of these credibility issues, as well as

well-established arbitral precedent, the Arbitrator concluded that Grother was not an employee or subordinate official eligible for New York Dock benefits. App., 30-32.

Finally, the Arbitrator stated that she was not required to determine the issue of causation because of her findings on the issue of laches and employment status. Nonetheless, based on the Arbitrator's review of the evidence on the issue of causation, Arbitrator Ross answered the question of "whether employee was adversely affected as a result of the STB-approved merger" in the negative. App., 32-34.³ Grother now appeals these findings, which are reviewed under the Board's Lace Curtain standard.

ARGUMENT

A. The Board Should Decline Review of the Ross Award Under its Lace Curtain Standard

As discussed above, the Ross Award made three crucial *factual* determinations:

(1) Grother's claim was barred by the doctrine of laches; (2) Grother was ineligible for labor protection benefits because he was neither an employee nor a subordinate official within the meaning of the RLA and New York Dock; and (3) Grother was not adversely affected by the UP-SP merger. App., 33. Each decision was based on the Arbitrator's review and consideration of the testimony and evidence submitted by UP and Grother. Each of these factual determinations is precisely the type of decision that the Board does not review under Lace Curtain.

In Lace Curtain, the Board established its jurisdiction to review arbitration decisions arising under New York Dock. 3 I.C.C.2d at 735. Under its Lace Curtain standard, the Board limits review of arbitration decisions to "recurring or otherwise significant issues of general

³ The Arbitrator also addressed several procedural issues raised by Grother. Upon review of the evidence in the record, including all of the correspondence between the parties, Arbitrator Ross concluded that both parties were afforded their due process rights, and neither party was placed at an advantage or disadvantage by the procedures used to govern the arbitration. App., 33.

importance regarding the interpretation of our labor protective conditions.” Id. Most notably for purposes of the present case, 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.” Id. “Egregious error” has been defined by the Board as “irrational,” “wholly baseless and completely without reason,” or “actually and indisputably without foundation in reason and fact.” American Train Dispatchers Ass’n v. CSX Transp., Inc., 9 I.C.C.2d 1127, 1130-31 (1993), quoting Loveless v. Eastern Airlines, Inc., 681 F.2d 1272, 1275-76 (11th Cir. 1982). The Lace Curtain standard has been codified in the Board’s regulations. 49 C.F.R. § 1115.8.

Since 1987, both the Board and the courts have interpreted Lace Curtain as employing a “sliding scale of deference.” CSX Corp. - Control, 4 I.C.C.2d 641, 648 (1988); Railway Labor Executives’ Ass’n v. United States, 987 F.2d 806, 812 (D.C. Cir. 1993). Under this standard, “an arbitrator’s judgments about matters of evidence and causation are treated with deference. An arbitrator’s interpretations of [Board] regulations and views regarding transportation policy are subject to more searching review.” Id. Under Lace Curtain, factual matters are “committed to arbitral judgment.” Brotherhood of Maint. of Way Employees v. I.C.C., 920 F.2d 40, 45 (D.C. Cir. 1990).

The three issues decided by Arbitrator Ross (laches, employment status, and causation) are precisely the types of factual determinations that Lace Curtain places outside the scope of the Board’s review. Thus, in Grand T.W.R.R. Co. - Merger - Detroit & Toledo Shore Line R.R. Co. (Arbitration Review), Finance Docket No. 28676 (Sub-No. 2) (Feb. 26, 1996) (reported at 1996 WL 77881), an arbitrator had rejected a New York Dock claim based on laches. The Board held that the arbitrator’s factual findings – the same factual findings made by Arbitrator Ross herein – that the employee had engaged in unreasonable delay in forwarding his claim, and that the

employee's delay was prejudicial to the carrier, were unreviewable under Lace Curtain. Similarly, an arbitrator's decision that a New York Dock claimant was not an "employee" eligible for labor protection was held to be outside the scope of review in Rowett v. Missouri Pac. R.R. Co., Finance Docket No. 30853 (July 17, 1987) (reported at 1987 WL 98980, at * 3); see also American Train Dispatchers Ass'n v. CSX Transp., Inc., Finance Docket No. 28905 (Sub-No. 24) (June 20, 1990) (reported at 1990 WL 288269, at *2) (same). Finally, the D.C. Circuit held that questions of causation are explicitly outside the scope of Lace Curtain review in Brotherhood of Maint. of Way Employees, 920 F.2d at 45.

Tacitly recognizing that Arbitrator Ross' decision will survive Lace Curtain review, Grother challenges the entire arbitration process used by the Board under New York Dock, including the delegation of such disputes to arbitration and use of Lace Curtain review. Grother's arguments are easily rejected, given the courts' unanimous approval of the Board's use of arbitration to resolve labor protection disputes, its assertion of its jurisdiction to review such arbitral awards, and its Lace Curtain standards of review. In Brotherhood of Maint. of Way Employees, the D.C. Circuit specifically held that:

This court already has approved the arrangement by which the ICC defers questions arising under employee protective conditions to arbitration and strictly limits its review of the resulting arbitral decisions. Essentially, the Commission is authorized to use arbitration for dispute resolution without duplicating the work of its arbitrators on appeal. That is precisely what the Commission did in this case, and we can find no reason to disturb its judgment.

920 F.2d at 45. Other cases approving the Board's use of arbitration under New York Dock include International Bhd. of Elec. Workers v. I.C.C., 862 F.2d 330, 335-38 (D.C. Cir. 1988); Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 811-12 (D.C. Cir. 1993);

United Transp. Union v. I.C.C., 43 F.3d 697, 700 (D.C. Cir. 1995); and Swonger v. Surface Transp. Bd., 265 F.3d 1135, 1140 (10th Cir. 2001).

Grother's suggestion that Union Pac. R.R. Co. v. Surface Transp. Bd., 358 F.3d 31 (D.C. Cir. 2004), requires a different result is incorrect. The issue in Union Pacific was the standard of review that should be applied by a court when the Board declines to review an arbitration award under Lace Curtain. The court did not resolve the issue, instead holding that the Board had acted arbitrary and capricious in its application of Lace Curtain. The court most certainly did not overrule its prior approval of the Board's right to delegate New York Dock disputes to arbitrators, or its cases approving the Board's review of such awards under Lace Curtain.⁴

In addition to challenging the use of arbitration itself, Grother complains about the procedure used by Arbitrator Ross in this case. Petitioner's Brief, at 40-43. Specifically, Grother complains that the submission of simultaneous briefs and the failure to conference the dispute on-property deprived him of due process. As discussed above, these very issues have already been raised and addressed by the Board. As the Board specifically held, procedural issues, such as scheduling, are functions "properly encompassed within the arbitrator's authority to resolve disputes under the New York Dock labor protection conditions. App., 146-155. Because the arbitrator controls the arbitration, she should be the person who determines where and how those proceedings should be conducted."⁵ Grother should not be permitted to renew arguments that the Board has already rejected.

⁴ In fact, the panel decision in Union Pacific could not overrule the D.C. Circuit's earlier cases approving the Board's delegation of decision making to arbitrators and its use of Lace Curtain review. Such a ruling could only be made en banc. Brewster v. Commissioner, 607 F.2d 1369, 1373-74 (D.C. Cir. 1979) (panels are bound to follow circuit precedents until en banc court or Supreme Court overrules those precedents).

⁵ Grother's procedural arguments on page 42 of his Brief suggest that UP did not present any evidence to the Arbitrator, and that the Arbitrator simply assumed the truth of UP's statements. Grother's argument is incorrect. As

In the end, while Grother may disagree with the procedures used under New York Dock and the Board's limited role in reviewing factual determinations of the type made by Arbitrator Ross, such procedures and review have been upheld by the courts and used countless times by carriers, unions, and employees in resolving New York Dock disputes. Grother's invitation to scrap this system simply because he lost this arbitration should be rejected.

B. Arbitrator Ross' Finding that Grother's New York Dock Claim Was Barred by the Doctrine of Laches Survives Lace Curtain Review

As discussed above, Arbitrator Ross' first ground for rejecting Grother's claim was based on the doctrine of laches. Specifically, Arbitrator Ross found that Grother did not file a claim for benefits under New York Dock until almost six years after his demotion,⁶ and that the delay was unreasonable and prejudicial to UP. App., 26-30. Specifically, Arbitrator Ross found that Grother waited until the very end of the six-year period of benefit entitlement under New York Dock (which is normally paid out on a monthly basis), and then "blindsided" UP with a claim for the cumulative amount of those benefits, thus preventing UP from "taking any measures toward resolving the matter outright, reducing the liability, or alternatively, constructing a vigorous defense with still-available documentation and personnel." App., 30. Arbitrator Ross further found that Grother's excuse for failing to file a timely claim for New York Dock benefits – fear of retaliation – was "not backed by any credible proof." App., 29.

discussed in more detail below, the record demonstrates that Arbitrator Ross weighed the evidence put before her by the parties and made her own credibility determinations. The fact that Arbitrator Ross did not believe some of Grother's factual assertions is not a valid submission of error; in fact, under Lace Curtain, it is the precise kind of claim that the Board does not consider.

⁶ At the hearing, Grother attempted to argue that his July 15, 1997, letter to then-UP President Jerry Davis constituted a claim for benefits under New York Dock. After reviewing the letter and hearing Grother testify regarding his intent in sending the letter, the Arbitrator rejected Grother's argument. App., 26-27. Grother's appeal abandons this argument.

While there is no time limit to file a New York Dock claim, the doctrine of laches will bar a claim that is not filed within a reasonable time period that results in some prejudice to the carrier. Arbitrators have repeatedly applied laches to block stale New York Dock claims, and those decisions have been approved by the Board. For example, in United Transp. Union v. Union Pac. R.R. Co. (1993, LaRocco, Arb.),⁷ Arbitrator LaRocco held that a 3½ year delay in filing a New York Dock claim barred a claim under laches. As Arbitrator Ross found in the present case, Arbitrator LaRocco ruled that the carrier was prejudiced by the delay because it was “no longer in possession of documentary evidence which, in its view, would show the real reason why claimants were [dismissed].” Id. at 5. Similarly, a 33-month delay was held to bar a New York Dock claim in Transportation-Communications Int’l Union v. Union Pac. R.R. Co., (1990, LaRocco, Arb.). Again, as Arbitrator Ross found in the present case, the arbitrator held that the carrier was prejudiced because it could not “retroactively act to minimize the amount of claimant’s displacement allowance.” Id. at 7. For example, the carrier could have placed him in a position where his salary would have been equal to (or at least closer to) his monthly displacement allowance. The arbitrator further noted that as in the present case, the carrier was prejudiced by its payment of certain non-New York Dock displacement benefits to claimant based on its belief that he was not seeking New York Dock benefits. Id.

Other cases in which the Board and/or Arbitrators have applied the doctrine of laches to bar New York Dock claims include Grand T.W.R.R. Co. - Merger - Detroit & Toledo Shore Line R.R. Co. (Arbitration Review), Finance Docket No. 28676 (Sub-No. 2) (Feb. 26, 1996) (reported at 1996 WL 77881) (refusing to review arbitrator’s decision to dismiss an employee’s New York

⁷ UP is filing herewith an appendix of cases containing the arbitration decisions cited herein

Dock claim because it was filed almost seven years after the alleged displacement);

Transportation-Communications Int'l Union v. Union Pac. R.R. Co., (1992, Rehmus, Arb.) (“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”);

International Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forger & Helpers v. Southern Ry. Co., (1990, Muessig, Arb.) (3½-year delay unreasonable; laches bars claim).

The same evidence of prejudice found sufficient in these awards to invoke laches was presented to and relied upon by Arbitrator Ross in the instant case. Specifically, during Grother’s six year delay, UP lost documents explaining the reason for Grother’s demotion and transfer. App., 62, 88, 101. UP could not find documentation generated in 1997 explaining the reasons for Grother’s demotion, including a copy of the 15121 Form that formally explained the reasons for his demotion. Id. Nor could UP locate any entries in its computer system explaining the reason for the demotion due to changes in the system between 1997 and 2003. App., 61, 88, 101-102. Instead, the on-line system simply referenced that Grother had been “demoted for disciplinary reasons.” Id.

Ironically, although Grother tries to deny that UP was prejudiced by his delay, he attempted to rely on the absence of the 15121 Form and any computer entries explaining the reasons for the demotion to bolster his claim. App., 62. Indeed, Grother repeatedly pointed to the absence and loss of these records as evidence on the issue of causation. Specifically, Grother argues that UP essentially “invented” poor performance as a reason for his 1997 demotion to hide the actual reason. App., 58 (“Grother advised in April, 2003 that 2001 PDR has been ‘lost.’”); at 60 (claiming that “someone had placed on the secret-to-Grother online personnel record system that Grother had been demoted on July 1, 1997 for ‘disciplinary reasons’”); at 60-61 (UP’s

inability to produce documents he requested in 2002, some 5 years after his demotion, and the constant “dead-ends” in his attempt to obtain information “further corroborates why Grother has developed a realistic fear of trusting some in UPRR management”); at 62 (fact that UP was unable to provide him with 15121 Form justifies Grother’s fear in filing a timely New York Dock claim and is evidence that UP had fabricated a reason for terminating his employment). Grother’s submission to Arbitrator Ross continued this argument. App., 29 (“[i]n my opinion the alleged ‘performance standard’ basis for my displacement is an after-the-fact rationalization”). Grother’s repeated arguments that UP’s positions in this arbitration lack documentary support fatally undermines his effort to show that UP was not prejudiced by his six-year delay in forwarding his New York Dock claim.

Grother makes similar arguments in his Brief to this Board in attacking the testimony of his supervisor, Ken Packard. Packard testified as a witness for UP regarding the duties and responsibilities of Grother as SMTO at the time of his transfer. Grother’s Brief argues that the Arbitrator committed egregious error by crediting Packard’s testimony because he was “unclear” as to Grother’s exact duties and responsibilities as SMTO in 1997, and could only speak to “the best of his knowledge.” Petitioner’s Brief, at 38-39. This is precisely the type of prejudice that the doctrine of laches is intended to address.

In addition to the prejudice suffered by UP in the presentation of its case, Arbitrator Ross also concluded that UP was prejudiced in the assessment of any potential liability. Specifically, the Arbitrator found that UP had lost its ability to minimize the amount of Grother’s claimed displacement allowance, and had even paid certain relocation benefits to Grother to which he would not otherwise have been entitled had he been awarded benefits under New York Dock. App., 239-240A. Thus, this case precisely parallels the facts presented to Arbitrator LaRocco in

Transportation-Communications Int'l Union v. Union Pac. R.R. Co., (1990, LaRocco, Arb.), where the exact same harm to the carrier – the inability to minimize its damages and the payment of non-New York Dock benefits – was held to bar the claimant's New York Dock claim after a 33 month delay. The same result was reached in Transportation-Communications Int'l Union v. Union Pac. R.R. Co., (1992, Rehmus, Arb.). Given the evidence and the arbitral and Board precedent, it is impossible to say that Arbitrator Ross' decision that UP was prejudiced by Grother's six-year delay was egregious error.

Nor is there any basis to contend that Arbitrator Ross' rejection of Grother's excuses for waiting 6 years to pursue his New York Dock claim constituted egregious error. In essence, Grother argued that the Arbitrator should excuse his six-year delay based on his alleged fear that he would have been terminated had he filed a New York Dock claim. The Arbitrator found no credible evidence to support Grother's speculation, the type of credibility determination that is exclusively the province of the Arbitrator, and that is more than adequately supported by the record. App., 28-30.

For instance, Grother claims that he was told in June 1997 that UP would make his life difficult if he filed a lawsuit, and that he could still be demoted if he did not happily accept his demotion. App., 58-59. However, the very next month, on July 15, 1997, Grother sent a letter to UP's CEO complaining about his demotion and accusing UP of discrimination. App., 92-95. From that time through 2003, Grother wrote to senior level managers, HR officials, and others within UP accusing UP of discriminating against him because of his age and veteran status. App., 60-66, 101-103, 117, 119-125, 255-281. Grother filed charges of discrimination with a Texas state agency and accused senior UP managers of harassing and intimidating him, using ethical slurs, creating secret documents and files, and engaging a concerted effort to blame him

for others' mistakes. *Id.* Had Grother truly been afraid of retaliation by UP, he would never have taken the action he did. Arbitrator Ross' credibility determination in rejecting Grother's claim of fear of retaliation certainly cannot be called egregious error.

Based on all of the foregoing, and given the Lace Curtain standard of review that has been applied by the Board, codified in Board regulation, and approved by the courts, Arbitrator Ross' conclusion that Grother's claim is barred by the doctrine of laches should not be set aside. The Board should therefore decline to review Arbitrator Ross' Award.

C. Arbitrator Ross's Finding that Grother was Not an Employee or Subordinate Official Eligible for New York Dock Benefits Survives Lace Curtain Review

In her Award, Arbitrator Ross concluded that "the record before us is replete with evidence that . . . at the time of [Grother's] transfer from Tucson, AZ to Houston, TX, [Grother] was neither an employee nor subordinate official for purposes of entitlement to displacement allowance under Article IV of New York Dock." App., 30-31. Specifically, Arbitrator Ross credited Ken Packard's description of Grother's job duties as SMTO, noting that Packard's description was consistent with the way in which Grother described his job before he decided to pursue a New York Dock claim, *i.e.*, that Grother was a member of the management team and the "senior officer" in Tucson. On the other hand, Arbitrator Ross found that Grother's efforts to downplay his job responsibilities during the handling of his New York Dock proceedings were not credible. *Id.* Again, these credibility determinations are exclusively within the province of the Arbitrator and not subject to review under Lace Curtain.

It is now well-settled that the term "employee" as used in New York Dock is limited to persons meeting the definition of "employee" in 45 U.S.C. §151, Fifth, *i.e.*, rank-and-file employees and subordinate officials subject to unionization under the RLA. Bond & Topolsky v.

Union Pac. R.R. Co. (1985, Stallworth, Arb.); Benham v. Delaware & Hudson Ry. Co. (1986, O'Brien, Arb.); Maeser, Murphy, Sengheiser, & Shupp v. Union Pac. R.R. Co. (1987, Seidenberg, Arb.).⁸ Officials whose duties are professional, administrative, supervisory, or managerial, on the other hand, are neither employees nor subordinate officials under the RLA and thus are ineligible for New York Dock benefits. Id. On this issue, Grother had the burden of proof at the arbitration hearing. Thomas v. Union Pac. R.R. Co., (1988, Stallworth, Arb.).

One of the leading arbitration decisions on this issue is Maeser. In that decision, Arbitrator Seidenberg reviewed the history of labor protection back to the Washington Job Protection Agreement of 1936 and concluded that the term "employee," as used in New York Dock, was intended to mean "only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as other than being administrative, managerial, professional, or supervisory in nature." Maeser, at 38-39. This determination, Arbitrator Seidenberg ruled, must be based on an evaluation of the duties and responsibilities of the claimant, including his/her supervision of others, role in hiring and firing, salary and benefits, and overall job responsibilities. Other factors to be considered are whether the claimant possesses skills, such as managerial skills, that could be transferred to other industries, and whether the position held by the claimant has ever been unionized or subject to attempts at unionization.

Maeser's factual approach has been uniformly followed by arbitrators for nearly 20 years. E.g., Adams, Dominick, & Williamson v. Delaware & Hudson Ry. Co. (1987, O'Brien)

⁸ Such arbitration awards issued by a neutral under New York Dock constitute orders of the Board. UTU v. Norfolk & W. Ry. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987); Employees of Butte, Anaconda & Pac. Ry. Co. v. United States, 938 F.2d 1009, 1013 (9th Cir. 1991) (an arbitration award issued pursuant to labor protective conditions prescribed by the Commission is an "order" of the ICC).

(distinction between employee/subordinate official and official is a factual question that must be resolved by examining the nature and job duties of claimant's position); Benham v. Delaware & Hudson Ry. Co. (1986, O'Brien) (relevant factors include level and amount of supervisory authority, whether claimant's position was subject to unionization, whether claimant possessed skills which were readily transferable, salary and benefits, degree of supervisory and policy making responsibility); Dixon v. Union Pac. R.R. Co. (1998, Stallworth) (examining same factors), and has been upheld by the Board and the courts. Rowett v. Missouri Pac. R.R. Co., Finance Docket No. 30853 (July 17, 1987) (reported at 1987 WL 98980) (affirming analysis of question of whether claimant was an "employee" based on arbitrator's assessment of his job duties); Newbourne v. Grand T.W.R.R. Co., 758 F.2d 193, 195-96 (6th Cir. 1985).

Applying this well-established precedent, Arbitrator Ross found that Grother's duties and responsibilities were "consonant with those of a management-level employee above the rank of what the Railway Labor Act intended to be a 'subordinate official.'" App., 32. This finding is clearly supported by the record. There is no dispute that, at the time of Grother's demotion, he was the SMTO in Tucson, Arizona, the top transportation position in the entire terminal. App., 46, 290. The job description for the SMTO lists the basic purpose of the position as ensuring that the "quality of the transportation product at the terminal meets or exceeds the standards set by the business objectives and customer expectations," and lists the primary responsibilities of the position as:

- Developing, implementing, and executing the safety process
- Directing the execution of the transportation plan for the terminal to ensure that all quality of service objectives are met or exceeded
- Operating the terminal at or below annual transportation budget

- Ensuring terminal failure prevention activities are executed to achieve cost of quality business objectives
- Coordinating terminal activities with HDC [i.e., Harriman Dispatcher Center], NCSC [i.e., National Customer Service Center], adjoining Service Unit to meet business objectives
- Managing terminal work force level to ensure transportation needs are met and within budget
- Managing the efficient use of locomotives and fuel to ensure that freight car cycles are effectively managed while in the terminals
- Leading and developing both managers and agreement employees to the extent that their individual performance and employee involvement activities determine successful accomplishment of company business objectives
- Responding to emergency situations or service interruptions

App., 115-116.

In addition to this job description, the Arbitrator heard from Packard, Grother's supervisor at the time of his demotion, who testified that Grother was responsible for: (1) terminal operations; (2) safety; (3) budgeting; (4) the transportation product at Tucson; (5) making hiring recommendations; and (6) conducting disciplinary hearings and making disciplinary recommendations. App., 290-293. In addition, Packard testified that the written job description accurately described Grother's SMTO position as it existed in 1997 at the time of his demotion. *Id.* Consistent with Packard's testimony, Grother had also maintained that this job description accurately reflected his job duties at the time of his transfer – at least until he retained counsel and proceeded with his New York Dock claims. Specifically, in his May 12, 2003 letter to the UP ombudsman, Grother stated "Exhibits 33A-33B [the job description for the SMTO position in Tucson, App., 115-116] is another position that Grother was not even selected to be interviewed; despite Grother's 22 months, on the exact job as incumbent." App., 72.

The evidence also established that Grother directly supervised several managers, and indirectly supervised numerous union employees, was responsible for overseeing the terminal's budget, and ran the operations of a terminal that processed numerous cars per day. App., 290-293. Grother made recommendations on hiring candidates for employment, and in the event of a disciplinary investigation (hearing) involving an employee at the Tucson terminal, Grother was responsible for reviewing the on-property investigation, and recommending the appropriate level of discipline, including dismissal where appropriate. App., 292-293.

Arbitrator Ross also concluded that UP's evidence of Grother's job duties was consistent with his own statements regarding the importance of his position at Tucson at the time of his demotion. In describing his position before he began pursuing New York Dock benefits, Grother stated that he was "in command" of the terminal at Tucson and described himself as the "local manager" and "senior officer" at that location. App., 46, 50. He stated that he was "selected by UPRR to be its senior officer for the Tucson district, including Tucson and Nogales yards." App., 46. According to Grother, this selection came after 28 years as a manager with SP, during which time he had been selected for "many promotions, [and] had eleven (11) 'grooming moves,' including 'assignment 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.'" App., 45. In a May 13, 2003 letter, Grother stated:

[I] 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, [I] was selected by SPTCO VP 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.

App., 46. In that same letter, Grother claims that he spent 22 months before his demotion in the “#1 position at Tucson.” App., 72, 248-249. Arbitrator Ross specifically chose to credit these descriptions of Grother’s job duties over his downgraded portrayal of his job after Grother began pursuing New York Dock benefits.⁹

Arbitrators have consistently concluded that claimants with far less managerial authority and responsibility are *not* employees eligible for New York Dock benefits. For example, in Benham v. Delaware & Hudson Ry. Co. (1986, O’Brien), a marketing manager who performed primarily clerical duties sought New York Dock benefits following his displacement. The claimant did not supervise any employees, did not have a role in hiring or firing, earned less than many unionized employees, and had limited supervisory and policy-making responsibilities. However, the arbitrator still concluded that he was an official because his position was never represented by a union, nor had any union sought to organize his position; his skills were easily transferable; he received fringe benefits either not granted to rank-and-file employees; and, upon his transfer, he was provided a relocation benefit provided only to management.

Similarly, in Maeser, Arbitrator Seidenberg concluded that four claimants were not employees eligible for labor protection. Like Grother, the claimants supervised employees, were paid on a salary basis commensurate with their work, made hiring and disciplinary

⁹ Given these findings, Grother’s argument that Arbitrator Ross erred in ruling that his SMTO job was not subject to unionization cannot be sustained under Lace Curtain. First, UP notes that, given that Grother was its top official over the Tucson terminal, the argument that he was subject to unionization is quite odd, as it would leave the UP with no railroad officials for the entire facility. Moreover, in Atchison, Topeka & Santa Fe Ry. Co., 12 NMB 95, 111 (1985), the National Mediation Board identified numerous factors that determine whether individuals are RLA “employees” eligible for unionization, such as authority or responsibility as to the employment or discharge of employees, the authority to resolve grievances, and the authority and method used to direct the manner of work done by subordinates, the employment relationship of the individual with the carrier, his method of payment, his participation in benefits available to subordinate officials and employees, his voice in the inner council of management, the extent to which he participates in the formulation of general policy, and the extent of his authority to bind his principal in dealing with outside parties. Arbitrator Ross’ factual findings regarding Grother’s duties,

recommendations, oversaw a particular operation (for example, the mailroom), and held positions that no union had sought to organize. Arbitrator Ross' decision that Grother was not an employee eligible for labor protection is completely consistent with this precedent. See also Adams, Dominick & Williamson v. Delaware & Hudson Ry. Co. (1987, O'Brien) (holding that sales managers who did not supervise employees, earned less than many union employees, had no authority to set or negotiate rates, and were at bottom of sales organization chart were nonetheless officials; their position was never represented by a union nor did a union ever seek to represent them; they exercised independent judgment and initiative in performing their sales duties; their skills were transferable; and they received certain fringe benefits provided only to management).

The evidence credited by Arbitrator Ross clearly aligns Grother with those individuals who have been found by other arbitrators to be officials not entitled to New York Dock benefits. Moreover, like the evidence in the arbitration decisions cited above, the evidence before Arbitrator Ross established that Grother's SMTO job was never covered by a collective bargaining agreement at either SP or UP. App., 305. And, like the claimant in Benham, it is undisputed that Grother was provided a relocation benefit provided only to managers and that he received other benefits provided only to other managers. App., 110, 239-240A. Finally, although Arbitrator Ross did not address the issue, her finding is similarly supported by the transferability of Grother's management skills (including his receipt of an MBA degree) to other industries. App., 256.

which are unassailable under Lace Curtain, fatally undermine any argument that Grother was subject to unionization under these standards.

Grother's primary argument on the employee issue is his contention that any position below the level of Division Superintendent is, by definition, not that of an official. Supplement to Petition for Review, at 29-30. Grother cites no recent Board or arbitration decisions to support this argument, instead relying on the ICC's 1946 decision in 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, 266 I.C.C. 85 (1946) ("Ex Parte No. 72"), which was reaffirmed at 268 I.C.C. 55 (1947).¹⁰ Specifically, Grother argues that the Board stated in the Ex Parte No. 72 proceedings that railroad employees below the grade of Division Superintendent are subordinate officials, and that Grother was two grades below that level.

Grother's argument is completely inconsistent with all of the arbitration decisions cited above. In each of these cases, an analysis of the job duties of the particular claimant was made, rather than a simple look at the rank and job title of the claimant. The claimants in these cases all held jobs that would be lower than the position of Division Superintendent.

Not only has Grother's argument – under which his status as an employee would be determined solely based on his rank and job title – been rejected implicitly by the decisions cited above, it has also been rejected explicitly by the Board and arbitrators alike. As an initial matter, the Ex Parte No. 72 proceedings make clear that "rank and title are not controlling." 268 I.C.C. at 57. Rather, the determination of whether an individual is a subordinate official or official must be decided based on a factual review of the duties and responsibilities of the individual in question. Id. In keeping with this command, the ICC, in Bell v. Western Maryland Ry. Co., 366 I.C.C. 64, 68 (1981), specifically held that the Ex Parte No. 72 proceedings **cannot** be relied

¹⁰ Ex Parte No. 72 was adopted in 1924 as required by Section 300 of the Transportation Act of 1920, and defines several positions as "subordinate officials." Neither Terminal Superintendent (the SP term) nor SMTD (the UP term) are defined as "subordinate officials" in Ex Parte No. 72.

upon to determine a claimant's employee status in a labor protection proceeding. In Bell, an employee claimed that the ICC erred in finding that he was a "management level employee" who was not entitled to receive labor protection. As Grother does here, the claimant cited Ex Parte No. 72 as determinative of whether he was a "subordinate official." The ICC rejected this argument. Instead, the ICC decided that the proper mechanism to determine whether the claimant was an employee entitled to labor protection was arbitration. See also Atlantic Richfield Co. & Anaconda Co. – Control – Butte, Anaconda & Pac. R.R. Co. & Tooele Valley R.R. Co. – Arbitration Review, Finance Docket No. 28490 (Sub-No. 1) (Feb. 17, 1988) (reported at 1988 WL 225892) (reaffirming Bell and noting that arbitration allows disputes to be resolved by those most familiar with complexities of labor law and the peculiarities of disputes involving railroad employees).

Consistent with Bell and the above-quoted language in Ex Parte No. 72, arbitrators have repeatedly recognized that an individual's rank and job title do not determine whether a claimant is an employee or an official. "Rather, it is the nature and job content of his/her position that is determinative." Benham v. Delaware & Hudson Ry. Co. (1986, O'Brien), citing Edwards v. Southern Ry. Co., 376 F. 2d. 665 (4th Cir. 1967) ("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"); Isabell & Transportation and Communications Int'l Union v Union Pac. R.R. Co. (1998, Stallworth) (relying on ICC's recognition in Ex Parte No. 72 that "rank and title are not controlling" in analyzing job duties to determine whether employee is an official or subordinate official).

A similar attempt by a claimant to rely solely on job title and rank was rejected in Thomas & Bhd. of Locomotive Eng'rs v. Union Pac. R.R. Co. (1988, Stallworth). Thomas

involved a claim for New York Dock benefits by a dismissed Manager (trainee) Labor Relations. The claimant argued that his position ranked two levels below that of department head, and thus he should be classified as an employee or subordinate official. The Arbitrator disagreed, concluding that the determination of whether claimant was an employee must be made by looking to the nature of claimant's job and his job duties.¹¹

Grother's arguments are precisely those already rejected by the Board and New York Dock arbitrators alike. Grother asks the Board to turn 20+ years of judicial, Board, and arbitral precedent on its heads and determine his employment status based solely on his rank – whether he is above or below the rank of Division Superintendent – regardless of his job duties and responsibilities. Based on the above precedent, such an argument must fail. Arbitrator Ross did exactly what the decisions of this Board and of other New York Dock arbitrators called for her to do. She analyzed Grother's job duties and made credibility determinations regarding what his exact duties were, crediting Packard's testimony, as well as Grother's contemporaneous statements, on the subject. These findings cannot be disturbed under Lace Curtain.

D. Arbitrator Ross' Determination that Grother's Displacement was Not Caused by the UP-SP Merger was Not Egregious Error

The final issue discussed in Arbitrator Ross' Award is causation, i.e., whether Grother had proven that there was a causal nexus between his transfer and the UP-SP Merger. On this

¹¹ Similarly, both the Board and Arbitrators have repeatedly rejected Grother's argument that a person's status as a "manager" is irrelevant to the determination of whether he or she is an employee eligible for labor protection. American Train Dispatchers Ass'n v. CSX Transp., Inc., Finance Docket No. 28905 (Sub-No. 24) (June 20, 1990) (reported at 1990 WL 288269) (acknowledging that employment status issue is whether employee is labor or management); Rio Grande Indus., Inc.-Control - Southern Pac. Transp. Co. (Arbitration Review), Finance Docket No. 32000 (Sub-No. 12) (Sept. 17, 2002) (reported at 2002 WL 31087372), rev'd on other grounds sub nom. Union Pac. R.R. Co. v. Surface Transp. Bd., 358 F.3d 31 (D.C. Cir. 2004) (refusing to review arbitrator's conclusion that claimants did not perform managerial functions and thus were employees, not managers, who were entitled to New York Dock benefits under Lace Curtain standard); Bond & Topolsky v. Union Pac. R.R. Co. (1985, Stallworth, Arb.); Benham v. Delaware & Hudson Ry. Co. (1986, O'Brien, Arb.); Maeser, Murphy, Sengheiser & Shupp v.

issue, Grother faced a true uphill battle. As discussed above, Grother spent years arguing that the cause of his transfer and demotion was his age and veterans status. Given these repeated arguments, Grother's belated claim that he was the victim of a merger-related displacement rings hollow.

However, based on her conclusion that Grother's claim was barred by the doctrine of laches and the fact that he was not an employee eligible for benefits under New York Dock, Arbitrator Ross did not analyze the issue of causation in her Award. She did, however, answer the question of whether Grother was adversely affected by the UP-SP Merger in the negative. This finding is not subject to review under Lace Curtain. 3 I.C.C.2d at 735 ("[w]e continue to believe that mandatory arbitration is appropriate for the final resolution of causation issues . . ."); Brotherhood of Maint. of Way Employees, 920 F.2d at 45 (questions of causation are explicitly placed outside the scope of ICC review).

Although Arbitrator Ross found the issue of causation against him, Grother claims that, by signing the Award, UP has conceded the issue in his favor. Quite frankly, this argument is too absurd to merit more than a brief response. At no point did UP ever concede the issue of causation in favor of Grother, and Grother directs the Board's attention to no place where he claims such a concession was made. Moreover, while it is true that the Arbitrator stated that the issue of causation was immaterial given her holdings on the laches and employee issues, she ultimately decided the causation issue in UP's favor. Thus, even if the Board could review and reverse Arbitrator Ross' rulings on the laches and employee issues, the typical next step would be to remand the matter to that Arbitrator for a determination of causation. Here, however,

Union Pac. R.R. Co. (1987, Seidenberg, Arb.); Transportation Communications Int'l Union v. BNSF (2004, Suntrup, Arb.)

Arbitrator Ross has already stated that she decided the issue in UP's favor and, as such, UP respectfully suggests remand would serve no purpose.

CONCLUSION

The Board has repeatedly reaffirmed the Lace Curtain standard under which it reviews New York Dock arbitration awards. The courts have likewise approved Lace Curtain. Under this governing standard, Grother's appeal cannot stand, as Grother is contesting factual determinations made by the Arbitrator and outside the scope of the Board's review. For this reason, Union Pacific Railroad Company respectfully requests that the Board decline to review the Arbitration Award at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served, via United States mail, first class postage prepaid, this 8th day of April 2005 on:

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