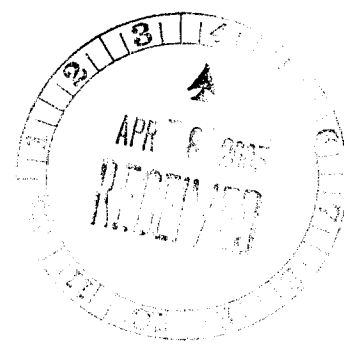


213724

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. GROTH, JR.,
NEW YORK DOCK ARBITRATION

(Arbitration Review)

APPENDIX OF CASES TO
CARRIER'S RESPONSE TO PETITIONER'S APPEAL

Respectfully submitted,

THOMPSON COBURN LLP

By Rodney A. Harrison by cch

Clifford A. Godiner
Rodney A. Harrison
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000

Attorneys for Carrier

TABLE OF CONTENTS

UP EX. 24	<u>Bond & Topolosky v. Union Pacific R.R. Co.</u> (1985, Stallworth, Arb.)
UP Ex. 25	<u>Benham v. Delaware & Hudson Ry. Co.</u> (1986, O'Brien, Arb.)
UP Ex. 26	<u>Maeser, Murphy, Sengheiser & Shupp v. Union Pacific R.R. Co.</u> (1987, Seidenberg, Arb.)
UP Ex. 27	<u>Adams, Dominick & Williamson v. Delaware & Hudson Ry. Co.</u> (1987, O'Brien, Arb.)
UP Ex. 28	<u>Thomas & Brotherhood of Locomotive Eng. v. Union Pacific RR. Co.</u> (1988, Stallworth, Arb.)
UP Ex. 31	<u>Dixon & Transportation & Communications Int'l Union v. Union Pacific R.R. Co.</u> (1998, Stallworth, Arb.)
UP Ex. 32	<u>Isabell & Transportation & Communications Int'l Union v. Union Pacific R.R. Co.</u> (1998, Stallworth, Arb.)
UP Ex. 36	<u>United Transportation Union v. Union Pacific R.R. Co.</u> (1993, LaRocco, Arb.)
UP Ex. 37	<u>Southern Ry. Co. v. Int'l Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers</u> (1990, Muessig, Arb.)
UP Ex. 38	<u>Transportation-Communications Int'l Union v. Union Pacific R.R. Co.</u> (1990, LaRocco, Arb.)
UP Ex. 51	<u>Transportation Communications Int'l Union v. Burlington Northern Santa Fe Ry. Co. v. Burlington Northern Santa Fe Ry. Co.</u> (2004, Suntrup, Arb.)
	<u>Transportation Communications Int'l Union v. Union Pacific R.R. Co.</u> (1992, Rehms, Arb.)

UP EXHIBIT

24

IN THE MATTER OF ARBITRATION BETWEEN

DANA R. BOND

AND

UNION PACIFIC RAILROAD COMPANY

AND

MICHAEL J. TOPOLOSKY

AND

UNION PACIFIC RAILROAD COMPANY

Pursuant to Article IV of the New York
Dock Conditions Imposed by the Interstate
Commerce Commission in Finance Docket No.
30,000.

Before Arbitration Committee

Members: R D. Meredith
Senior Director
Labor Relations

Carrier Member

Robert V. Broom, Esq.
Representing Michael J. Topolosky, Jr.

Claimant Member

Thomas R. Wolff, Esq.
Representing Dana R. Bond

Claimant Member

Lamont E. Stallworth
Arbitrator

Neutral Member

Appointment of Neutral Arbitrator

January 31, 1985

Hearing Held

Omaha, Nebraska
April 19, 1985

Post Hearing Carrier Memorandum Received

June 14, 1985

Post Hearing Claimant Memorandum Received

June 18, 1985 and
June 21, 1985.

THE ISSUE

The Parties submitted the following issues:

1. Was D. R. Bond, at the time of his termination from the service of Union Pacific Railroad Company, an "employee" subject to the protection of the New York Dock conditions?

2. Was M. J. Topolosky, at the time of his termination from the service

of Union Pacific Railroad Company, an "employee" subject to the protection of the New York Dock conditions?

The Parties agreed that if it were determined that either of the Claimants were employees subject to the protection of New York Dock conditions that their entitlements would be determined in a subsequent arbitral proceeding.

In addition, the question of whether Mr. Bond and/or Mr. Topolosky were adversely affected by a transaction within the meaning of the New York Dock conditions and the question of whether they are entitled to any compensation are not at issue before this Arbitration Committee.

RELEVANT NEW YORK DOCK CONDITION PROVISIONS

ARTICLE IV

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

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

STATEMENT OF FACT

THE MERGER

On September 15, 1980, three western railroads filed applications with the Interstate Commerce Commission (ICC) seeking authorization to create a major new rail network to link shipping, industries and communities in a 21-state area spanning the western two-thirds of the nation. In their joint applications, Union Pacific (UP), Missouri Pacific (MP) and Western Pacific (WP) said the new system would create a financially strong, highly competitive rail system which would provide efficient and reliable transportation service.

During the ICC proceedings on the UP/MP/WP applications, P. A. Jordan, then Vice President-Labor Relations and Personnel for UP, submitted a verified statement and gave testimony covering the following: to explain the methods and procedures used in the Labor Impact Exhibits, to offer a general description of the labor effects of the proposed consolidation and to discuss the labor protection

which will be afforded employees affected by the consolidations. (Carriers Exhibit "A" & "B") (Mr. Jordan died March 26, 1984).

After two years of hearings and testimony, the ICC, on September 13, 1982, voted to approve the consolidation of the UP, MP and WP Railroads. This decision was only a vote and the written, formal decision was to be issued later.

The formal decision, Finance Docket 30, 000, was issued on October 20, 1982 (Carrier's Exhibit "C").

In addition, the ICC held that the "New York Dock" conditions would apply in this case. The Commission held:

We find that the protection of New York Dock is appropriate for the protection of applicants employees affected by this proceeding without any modification. The New York Dock conditions are significantly more protective of labor interests than any previously imposed set of employee protective conditions, and they satisfy the statutory requirement of 49 U.S.C. 11347. *New York Dock Railway v. U. S.*, 609 F. 2d 83 (2d Cir. 1979). We have consistently rejected modifications similar to those proposed here in prior consolidation proceedings. We continue to reject them for the reasons set forth in those cases. We find no unusual circumstances in this proceeding requiring imposition of conditions in excess of the statutory minimum (pages 620-621)

The ICC summarized the New York Dock conditions as follows:

In New York Dock, 350 I.C.C. 60, we described the minimum protection to be afforded those employees affected by a consolidation, absent a voluntarily negotiated agreement. The protections of New York Dock include a mandated 90-day notice of employment actions; negotiated implementation of employment changes resulting from a consolidation with compulsory arbitration disputes; compensation of dismissed employees and differential compensation of displaced employees, at the rate of their last year of employment, for six years after impact (or for their period of employment if less than six years); reimbursement of moving expenses; and protection against loss from the same of a home.

Three competitor railroads, the Southern Pacific, Santa Fe and Kansas City Southern, sought to block the merger. On December 9, 1982, the United States Court of Appeals for the District of Columbia rejected the pleas of these three railroads and refused to block Union Pacific Corporation's acquisition of Missouri Pacific Corporation and Western Pacific Railroad. In addition, the Court did allow the three protesting railroads 10 days to seek a stay from the United States Supreme Court. The protestants did appeal but Chief Justice W. E. Burger rejected their request for a stay. The merger

was then completed on December 22, 1982.

Claimants' Employment Records
D. R. Bond

Mr. Bond began his service with the Carrier on August 1, 1973. On September 7, 1983, Mr. Bond's service with the Carrier was terminated. (The question of the reason for Mr. Bond's termination is not at issue in this arbitration).

The following listing details Mr. Bond's employment record with the Carrier:

<u>DATE</u>	<u>POSITION</u>
8/1/73	Director-Cost and Economic Analysis
9/1/74	Director-Credit and Collection
9/1/75	Assistant Controller-Accounting Operations

Thus, at the time of his termination, Mr. Bond was Carrier's Assistant Controller-Accounting Operations. The principal accountabilities of that assignment are summarized as follows: (1) to direct Accounting Operations in a manner which ensures accurate and timely reporting to management and appropriate regulatory bodies; (2) to prepare budgets and forecasts exclusive of revenue and operating expenses; (3) to protect railroad assets through a program of operation and financial audits (4) to maintain general Railroad accounts; (5) to properly account for all property and equipment; (6) to operate the payroll programs of the Railroad Company; (7) to supervise and review all tax information, accounts and returns in the Carrier's interest; (8) to establish and maintain an effective Banking Operations section; and (9) to supervise subordinates by providing an environment for maximum efficiency, individual growth and motivation.

In addition, the dimensions of that assignment may be summarized as follows: direct reports- 1 director and 3 managers (one of three managers reporting to the Assistant Controller-Accounting Operations was the Manager-Personnel Accounting, Mr. Topolosky's position); indirect reports- 12 managers, 57 non-agreement employees and 199 agreement employees, total budget (including payroll) -- \$5.5 million; payroll and related expenses - \$5.2 million; operating

expenses - \$900 million; other income and expenses - \$26 million; taxes - \$60 million; and, total assets- \$2300 million. (See Position Description of Assistant Controller-Accounting Operations Carrier's Exhibit "E").

The following listing details Mr. Bond's compensation record with the Carrier:

<u>DATE</u>	<u>COMPENSATION</u>
1973	\$30,000 (salary)
1974	\$33,000 (salary)
1975	\$38,000 (salary)
	\$ 5,000 (bonus)
1976	\$41,000 (salary)
	\$10,000 (bonus)
1977	\$45,575 (salary)
	\$12,000 (bonus)
1978	\$51,048 (salary)
	\$18,000 (bonus)
1979	\$57,000 (salary)
	\$22,000 (bonus)
1980	\$62,700 (salary)
	\$30,000 (bonus)
1981	\$69,600 (salary)
	\$30,000 (bonus)
1982	\$77,256 (salary)
	\$20,000 (bonus)

The Assistant Controller-Accounting Operations position was one of only four direct reports to the Controller and was responsible for all accounting operations. In addition, Mr. Bond's position at the time of his termination ranked 63rd in the Carrier's Salary Administration System out of a total of approximately 22,750 employees.

M. J. Topolosky

Mr. Topolosky began his service with the Carrier on January 1, 1974. On September 15, 1983, Mr. Topolosky's service with the Carrier was terminated. (The question of the reason for Mr. Topolosky's termination is not at issue in this arbitration).

The following listing details Mr. Topolosky's employment record with the Carrier.

<u>DATE</u>	<u>POSITION</u>
1/1/74	Manpower Planning Systems Supervisor

6/1/74
9/1/75
3/1/78
9/1/78
10/27/78
2/1/80

Manager Manpower Planning Systems
Manager Industrial Engineering Systems
Manager Industrial Engineering Installation
Manager Accounting Control Systems
Director Accounting Control Systems
Manager Personnel Accounting

Thus, at the time of his termination, Mr. Topolosky was Carrier's Manager Personnel Accounting. The principal accountabilities of that assignment may be summarized as follows: (1) ensure all personnel are paid and ensure the corresponding accounting distribution is received on a timely basis; (2) improve efficiencies for reporting time, preparing payrolls and administering benefits; (3) monitor withholding and disbursements other than payroll to ensure compliance with stipulated provisions and to ensure maximizing of cash flow opportunities; (4) verify the integrity of payroll data by establishing and maintaining centralized internal contracts; (5) maintain an efficient Personnel Accounting organization; and, (6) ensure employee records are maintained and communicated in an accurate and timely manner.

In addition, the dimensions of that assignment may be summarized as follows: direct reports- 2 managers; indirect reports- 6 non-agreement employees and 31 agreement employees; payrolls- 29,000 employees and \$577.8 MM annual salaries; and, employee records- \$170.1 MM annual amounts withheld and \$114.7 MM annual amounts paid by Company (See Position description of Manager Personnel Accounting Carrier's Exhibit "V").

The following listing details Mr. Topolosky's compensation record with the Carrier:

<u>DATE</u>	<u>COMPENSATION</u>
1/1/74	\$19,500
1/1/75	\$21,440
1/1/76	\$23,376
1/1/77	\$25,944
1/1/78	\$28,020
9/1/78	\$31,220
10/1/79	\$35,760
10/1/80	\$39,336
10/1/81	\$43,656
10/1/82	\$48,240

UNION PACIFIC EXHIBIT 24
PAGE 6 OF 19

Thus, at the time of his termination the Manager Personnel Accounting was

one of the only three managers reporting to the Assistant Controller-Accounting Operations and was responsible for ensuring all personnel were paid.

On January 23, 1985 the Claimants' attorneys and the Carrier representative jointly requested the National Mediation Board to appoint a referee to serve as the neutral member of the instant New York Dock Arbitration Committee

(Carriers Exhibit "HH"). On January 31, 1985 the Parties were notified that Professor Lamont E. Stallworth had been nominated by the NMB to serve as the referee, (Carrier Exhibit "II"). The Parties agreed to hear the claims of Messrs. Bond and Topolosky in one arbitral proceeding. It is within this factual context that the instant dispute arises.

CLAIMANTS' POSITION

The Claimants maintains that common sense; appropriate use of the English language; applicable principles of law and numerous other factors clearly establish that the Claimants were employees of the Carrier at the time they were terminated. The Claimants point out that the American Heritage dictionary defines "employee" as:

"a person who works for another in return for financial or other compensation".

According to the Claimants it is a well established legal principle that:

"Words are to be given their natural, received, popular, every-day, approved and recognized meaning...where there is not reason for a contrary construction, where a different meaning is not apparent or obvious, or definitely indicated, or required by the context". (See 73 Am Jur 2nd, page 205-206). (Also Uniform Statutory Construction Act, Section 2.)

Also according to the Claimants they clearly match the dictionary every day meaning or the word "employee" The Claimants were individuals who worked for the Carrier in return for financial compensation. The question then becomes whether another meaning was clearly intended.

Claimants further maintain that there is clear legal basis for the "every day" definition of "employee" being applied to the case at hand. For example, the Rail Passenger Service Act, 42 USC Sec. 565 (f) defines an employee in pertinent part, as: "an active full-time employee, including any such employee during a period of furlough or while on leave of absence by a railroad or terminal

company".

The Claimants also maintain that they were "employees" for purposes of New York Dock conditions at the time of their termination, as defined in 49 U.S.C. 1245.3. The Claimants point out that Congress provided a system to classify the number of employees in various categories each year by the railroad and that classification system was and is available to limit the application of New York Dock and any order issued by the Interstate Commerce Commission 49 U.S.C. 1245.7. The Claimants further point out that this system was not utilized in any way in Finance Order 30,000. Finance Order 30,000 was issued for the Carriers merger consolidation with Western Pacific and Missouri Pacific Railroads.

The Claimants assert that the Carrier has attempted to argue its position in reliance on a number of cases that are not only distinguishable, but in most instances predate New York Dock and the Railroad Revitalization and Regulatory Reform Act of 1976. See, e.g. Zinger v. Blanchett, 549 F2d 901; Edwards v. Southern Railroad, 376 F 2d. 665 C. A. 4, 1967); Norfolk & Western Railroad Co. and the New York & Chicago & St. Louis Railroad Co.

The Claimants also assert that nothing in the history of the railroads or the Interstate Commerce Commission restricts the word "employee". The Claimants point out that on at least one occasion the IOC held that subordinate officials including general conductors, foremen, supervisors and inspectors were "employees" See, e. g. In the Matter of Riggs 266 IOC 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 IOC 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 IOC 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 IOC after obtaining IOC approval for the merger/consolidation.

The Claimants also argue that the closest definition restricting employees' protection since New York Dock is found in Western Railroad Agreement 364 I.C.C. 782, where reference is made to the Staggers Rail Act of 1980: " Employed" does not include any individual serving as president, vice president, secretary , treasurer, comptroller, counsel, or a member of the board of directors, or any person performing similar functions". Accordingly, the Claimants conclude that they are employees subject to protection of New York Dock conditions.

CARRIER POSITION

The Carrier maintains that the term "employees" as used in Article IV of the New York Dock conditions is a term of art which includes rank and file employees and subordinate officials but excludes officials such as the Claimants.

The Carrier further maintains that the Ex Parte 72 decisions of the Interstate Commerce Commission, the cited Courts of Appeals cases and the cited arbitration award all support the Carrier's position that officials are not entitled to IOC-imposed labor protection.

The Carrier also maintains that the Claimants, Mr. Bond, as the Assistant Controller-Accounting Operations and Mr. Topolosky, as the Manager Personnel Accounting, did not satisfy the definition of "employee "; they were officials and therefore, are not covered by the New York Dock conditions. According to the Carrier the instant claims are without merit and should be denied.

OPINION

The Parties submitted the following issues to the Arbitration Committee:

1. Was D. R. Bond, at the time of his termination from the service of Union Pacific Railroad Company, an 'employee' subject to the protection of the New York Dock conditions?
2. Was M. J. Topolosky, at the time of his termination from the service of Union Pacific Railroad Company, an 'employee' subject to the protection of the New York Dock conditions?

The Arbitration Committee (hereinafter called the Committee) has carefully examined and considered the rather extensive record in this matter. The

Committee concludes as follows:

1. D. R. Bond at the time of his termination from service of the Carrier was not an "employee" subject to the protection of the New York Dock conditions.
2. M. J. Topolosky at the time of his termination from service of the Carrier was not an "employee" subject to the protection of the New York Dock conditions.

The findings, reasoning and conclusions of the Committee are set forth below.

There is no factual dispute in this matter concerning the positions which the Claimants held at the time of their respective terminations from service. There is also no dispute concerning the actual functions and responsibilities the Claimants performed as set forth in their job descriptions. In addition, there is no dispute that the Claimants were not represented by a labor organization at the time of their terminations from service. Consequently, this dispute is strictly a matter of interpretation and application of New York Dock conditions.

It is generally accepted that in interpretation disputes the burden of proof rests with the Claimants. In this particular case it is the burden of the Claimants to prove that the word "employee" as set forth in New York Dock was intended to encompass their positions. In support of its position the Claimant advance five (5) arguments: (1) that they are "employees" as defined in the dictionary; (2) that New York Dock does not define or limit the word employee; (3) that the Carrier did not attempt to exclude their positions in the proceedings before the ICC; (4) that Carrier's Vice President of Labor Relations represented before the ICC that...

would be afforded New York Dock or equivalent protection if the IOC were to impose such conditions; and (5) the IOC approved Carrier's merger/consolidation and imposed New York Dock conditions without restrictions and without modification. Under the circumstances the Committee does not find these arguments to be persuasive.

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

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

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

In the Committee's view one must consider the normal or industry definition of the meaning of "employee". The Committee notes that neither New York Dock nor its legislative history assist in defining this word for the purposes of New York Dock conditions. However, Section 1, Fifth of the Railway Labor Act sets forth those individuals in the railroad industry who are both subject to and entitled to union representation. Section 1, Fifth states as follows:

Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other

than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

In the Committee's opinion Section 1, Fifth offers guidance as to the scope of unionization and the term "employee" as including rank and file employees and subordinate officials. It is worth noting that the frames of Section 1, Fifth used the term "subordinate official" but excluded the term "official" of the carrier. On this point, the Carrier contends that when the IOC used the phrase "employees of the railroad who are not represented by a labor organization" it was extending the protection of New York Dock conditions only to those employees and subordinate officials who are both subject to and entitled to union representation but who are not represented. In the Committee's view a review of the industry use of the term "employee" supports this contention. See, e. g. Harry Lustgarten Principles of Railroad and Airline Labor Law (Omaha: Rail Publications) pp. 29-32 and Ernest Dale and Robert L. Raimon :Management Unionism and Public Policy on the Railroads and Airlines" (Industrial and Labor Relations Review, Vol. II, No. 4, July, 1985).

Under the Transportation Act of 1920; paragraph 5 of Section 300 the term subordinate official is defined:

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

The term subordinate official is further defined in the IOC order known as "Ex Parte 72". Here, the IOC 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 IOC 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 IOC has had numerous Ex

Parte 72 proceedings. An examination of these determinations, indicate that no position equivalent to Assistant Controller-Accounting Operations or Manager Personnel Accounting was found to come within the definition of employee/subordinate official (Carrier Exhibit "VVV").

The Committee is further persuaded that the term "employee" or non-agreement (not represented) employee is given further industry meaning by virtue of the most recent union organizing campaign conducted by BRAC in the late 1970's. BRAC sought to organize some 1300 positions of the Carrier within its craft and class which included rank and file employees and subordinate officials. BRAC did not attempt to represent the positions of Assistant Controller-Accounting Operations and Manager Personnel Accounting. This undisputed fact is not controlling; however it does support the Carrier's position that positions held by Claimants were not considered to be employees 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 employees 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 protections involved is similar. See, e. g. Oklahoma conditions; New Orleans conditions and the Southern-Central of Georgia conditions. It should also be noted that

Consideration by Congress of employee protective measures was in terms of aiding railroad 'labor' ('workers, ' those 'who toil, ' and those belonging to unions). (See, e.g. discussion by George H. Harrison in Hearings Before Senate Committee on Interstate Commerce on the Transportation Act of 1940, 76th Cong., 1st Sess, at 34 (1939) and debate at 84 Cong. Rec. 9881-7 (1939). Therefore the Committee is of the opinion that these decisions are relevant.

McDow v. Louisiana Southern Railway Company supra is noteworthy on two bases: (1) it supports the contention that the "ordinary every day usage of the term "employee" as used in the railroad industry must be accepted and (2) that high level management such as a vice president are not protected. In McDow the plaintiff was a former vice president of the Company. He sought a court decision as to whether he was an "employee". The district court, in finding for the Company, stated:

Reasons: This case turns on the definition of the word 'employee' Nowhere in the Interstate Commerce Act is employee defined. Consequently, its meaning in ordinary every day usage must be accepted, unless the legislative history of Section 5(2) (f) of the Act would indicate otherwise. A study of the legislative history of that section leaves no doubt that the term 'employee' as used therein does not include the vice-president and general manager of a railroad. Hearings before Committee on Interstate and foreign Commerce on H. R. 2531 and 4862, 76th Congress, 1st Sess. (1930) at pages 193, 216, 1291, 1296, 1720, 1721, 1722; 84th Cong. Rec. 9881-7 (1939). Nor does the every day meaning of the word 'employee' include the vice-president and general manager of a railroad.

Similarly in Edwards v. Southern Railway Company, supra the plaintiff was a stockholder, chief engineer and son of the controlling stockholder. He was not a union member and was not covered by any collective bargaining agreement. He sought protection under the Oklahoma conditions which had been imposed by the IOC.

The Court held Edwards was not entitled to protection since he was not an "employee". Specifically, the Court held:

Neither the Interstate, Commerce Commission nor the Oklahoma conditions imposed by the IOC provide a definition of "employee". We believe, however, that 'employee' as used in the present context by Congress and the IOC surely does not include the principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of consolidation. Edwards occupied in the small family-owned

railroad an important managerial position and, moreover, stood in a unique personal relationship to the controlling interests. We believe our decision that he is not entitled to the benefit of the protective order is supported by the legislative history of Section 5(2) (f) of the Interstate Commerce Act and by other relevant railroad law.

The court further reasoned that:

Edwards carried sufficient responsibilities, especially considered against the background of immediate family relationship, to remove him from the category of subordinate official. In *Beeler v. Chicago R. I. & P. Ry.*, 169 F. 2d 557 (10th Cir. 1948), cert denied, 335 U.S. 903, 69 S. Ct. 407, 93 L. Ed. 437 (1949), the Tenth Circuit held that an agent yardmaster was an official—as distinguished from a 'subordinate official'—and therefore not an 'employee' within the Railway Labor Act definition.

Our decision that Edwards is not an 'employee' is in accord with the principles laid down in the IOC 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 IOC, 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 IOC job protection provisions has ruled that 'employees' encompass persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act but not, inter alia, officers, or department heads, and those in the next echelon, such as assistants and staff members to the department heads. In the Matter of Florida E. C. Ry., No. 4827-J, S. D. Fla., (January 5, 1960.)

The courts definition of "employee" as excluding "officers and department heads and those in the next echelon such as assistants and staff members to the "Department heads" is applicable to the Claimants. Mr. Bond was responsible for all accounting operations and Mr. Topolosky was responsible for all personnel accounting.

In another case, Zinger v. Blanchette, supra involving a professional employee for a carrier (i.e. railroad attorney), it was contended that the ICC was required to protect "all affected railroad employees" and that he was an "employee". The Court first found there was nothing which prohibited Zinger's early retirement. The Court next commented on whether Zinger was an "employee":

Since he has failed to prove any breach of the protective agreement, we need not decide whether the plaintiff would be considered an 'employee' within the terms of the statute of the ICC order. We doubt that he would on the record here because of the lack of evidence to establish the meaning which the railroads and the ICC placed upon the word in their negotiations. Our research and that of counsel has not uncovered any authoritative court decision or ruling of the ICC in which a person in Mr. Zinger capacity has been considered an 'employee' under 5(2) (f) of the Interstate Commerce Act....

In the Committee's opinion the Claimants held positions with the Carrier which were equal to Mr. Zinger's position. In fact, a review of Mr. Bond's and Mr. Topolosky's position descriptions reveals their positions were superior to Mr. Zinger's in responsibility and decision-making authority (Carrier Exhibits "E" and "V").

In a recent case a court of appeals case held that a supervisor who was a part of management of the railroad was not an "employee" for purposes of protective labor conditions. (Revised Interstate Commerce Act, 49 U.S.C.A. 11347.) Newborne v. Grand Trunk Western Railroad Company 758 F.2d 193 (C.A. 6, April 4, 1985). In finding that the claimant was a part of management at the time of his termination, the court set forth seven(7) factors in determining why the claimant was not protected by New York Dock and the Emergency Railroad Transportation Act of 1933.

These factors are set forth below:

UNION PACIFIC EXHIBIT 24
PAGE 14 OF 10

(1) appellant was a supervisor, (2) his salary was \$43,200 a year, (3) he clearly would not have been eligible to be part of the railroad bargaining unit representing "employees", (4) the record strongly suggests that plaintiff's skills were transferable; (5) he did acquire a new job shortly after being terminated by Grand Trunk Western as an administrative vice-president at a salary of \$45,000 a year; (6) he was one of only 17 executives with his former employer who were protected under a Salary Continuation Plan; and, finally, (7) Newbourn, under the Continuation Plan, continued to receive his previous salary for six months after his dismissal.

The Court further set forth the weight given to these factors:

Facts 1, 2, and 3 numbered above are not dispositive of this appeal. When, however, facts 4, 5, 6 and 7 are added, they appear to tip the balance in favor of affirmance of the District Court's judgment.

The facts in Newbourn are distinguishable from the instant case. However, the Committee notes that the court in Newbourn did distinguish the claimant as being a part of management at the time of his termination. This distinction apparently in the Court's view brought the claimant outside of the definition of employee. The claimants in the instant case were undoubtedly managerial employees.

The question of whether officials are protected has also arisen in at least one arbitral proceeding. Award No. 51 of the Arbitration Committee, ICC F. D. No. 23011. In that decision, Referee David R. Douglass held that:

The record in this case shows that the claimant was not employed in any craft or class covered by the bargaining unit during the period from February 1, 1964, until September 20, 1966. During said period of time the claimant was an official of this carrier and, as such, had voluntarily placed himself in a position beyond the coverage of the protective features as prescribed by the ICC in Finance Docket 23011. The claimant was not an employee, within the contemplation of the protective features, at the time of the merger or at the time yardmaster positions were abolished.

The Committee is of the opinion that the Claimant's were officials at the time of their termination from service and therefore are not protected by New York Dock condition.

Lastly, the Claimants contend that representation and assurances made by the Carrier's Vice President of Labor Relations before the IOC indicate that, among other things, all non-agreement employees would be afforded the same or equivalent protection as provided in New York Dock conditions. The Committee is persuaded that the Vice President was using the term "non-agreement employe" in a fashion not intending to extend the term to encompass officials or principle managers. Therefore, the Committee is of the opinion that any representations and assurances made before the IOC which did not expressly include the Claimants positions were not intended to apply to the Claimants. This assertion goes to the heart of this dispute i.e. whether the Claimants are employes or subordinate officials. The Committee has concluded that the Claimants are neither employes or subordinate officials under New York Dock condition. ~~The Committee further concluded that the usual industry~~ definition of employe was intended to be used in New York Dock cases.

CONCLUSION

For the foregoing reasons, the Committee concludes that the Claimants were not "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

Thomas R. Wolff "dissent"

Thomas R. Wolff
Claimant Member

Lamont E. Stallworth

Lamont E. Stallworth
Neutral Member

City of Chicago

County of Cook

State of Illinois

Signed this 25 th day of September, 1985

UP EXHIBIT

25

ARBITRATION ESTABLISHED UNDER ARTICLE I, SECTION 11 (a)
OF THE NEW YORK DOCK CONDITIONS

* * * * *

In the matter of arbitration between: *

James M. Benham *

-and- *

Delaware and Hudson Railway Company *

* * * * *

ARBITRATION COMMITTEE

Robert M. O'Brien - Neutral Member
Douglas J. Broda - James M. Benham's Member
Daniel J. Kozak - Carrier Member

APPEARANCES

For James M. Benham - Douglas J. Broda - Attorney
McClung, Peters and Simon

For Delaware and Hudson Railway Company:

Daniel J. Kozak - Staff Officer - Labor Relations

BACKGROUND

The facts evidence that in 1984, Guilford Transportation Industries (hereinafter referred to as Guilford) acquired the Delaware and Hudson Railway Company (hereinafter referred to as the Carrier. In Finance Docket No. 29772, the Interstate Commerce Commission (hereinafter referred to as the ICC) imposed the labor protective conditions set forth in NEW YORK DOCK RY.- CONTROL-BROOKLYN EASTERN DISTRICT, 360 ICC 60 (1979) (hereinafter referred to as the New York Dock Conditions) on this acquisition. It should be noted that the Carrier had previously assumed control of the Boston and

Maine Corporation, headquartered in North Billerica, Mass. and the Maine Central Railway Company, headquartered in Portland, Maine. James M. Benham (hereinafter referred to as the Claimant) has submitted the instant claim pursuant to ICC Finance Docket No. 29772.

The evidence reveals that the Claimant entered the Carrier's service on January 14, 1969. He held a clerical position and was represented by the Brotherhood of Railway, Airline and Steamship Clerks (hereinafter referred to as BRAC) until January 14, 1980, when he was promoted to Data Research Analyst in the Sales and Marketing Department. This position was not represented by any labor organization on this property. On November 17, 1982, the Claimant was promoted to the position of Manager, Pricing and Marketing-Intermodal. Mr. Benham held this position until he resigned from the Carrier's service in 1984. This position was also a non-bargaining unit position on this property.

According to the Carrier, in his capacity as Manager, Pricing and Marketing-Intermodal, Mr. Benham was responsible for conducting market analyses and developing marketing and pricing strategies regarding intermodal service. The Carrier contends that Mr. Benham was required to exercise independent thinking and judgment in this position as well as individual initiative. However, Mr. Benham, through his attorney, claims that the Carrier has greatly exaggerated his duties and responsibilities. The Claimant insists that he in no way set or contributed to Company policy. Rather, he merely plugged

raw data into a formula determined by the Carrier to arrive at a price for transactions or shipping. The Claimant explained that while his job title made it appear that he held a managerial position, in actuality his duties were primarily clerical in nature.

On June 15, 1984, Mr. Benham was advised that he was being transferred from Albany, N.Y. to Guilford's corporate headquarters located in North Billerica, Mass., effective July 2, 1984. The Claimant's transfer was part of a corporate and department restructuring brought about by Guilford's acquisition of the Delaware and Hudson Railway Company, the Boston and Maine Corporation and the Maine Central Railway Company. Save for regional sales functions, Guilford consolidated all of its Marketing Department activity in North Billerica. The Claimant was one of nineteen (19) individuals employed by the respective Marketing Departments of both the Carrier and the Maine Central Railroad who were transferred to North Billerica. Fifteen (15) of these employees did, in fact, transfer whereas four (4) elected to resign from their positions with the Carrier.

Mr. Benham elected to transfer to North Billerica and was afforded relocation expenses in accordance with the Carrier's Corporation Relocation Policy. However, Mr. Benham did not find the working conditions at North Billerica favorable and by early August, 1984, he decided to resign from the Carrier's service. On August 6, 1984, he tendered his resignation to Mr. T.C. Perry, Vice President - Marketing & Sales. Mr. Perry agreed to retain the Claimant on the

payroll through October 1, 1984. His resignation was accepted by the Carrier on August 13, 1984. In mid-August, 1984, Mr. Benham obtained employment with Distribution Unlimited, Inc. as a sales manager. Approximately four (4) months later, he was promoted to the position of Assistant Vice President - Sales and Administration for this same company.

Approximately one (1) year after his resignation, James Benham retained the services of Attorney Homer E. Peters of the law firm of McClung, Peters, Simon and Arensberg. On September 10, 1985, Mr. Peters wrote to Mr. B. E. Rice, Vice-President - Human Resources for Guilford, on behalf of the Claimant. In that letter, Mr. Peters requested a separation allowance for Mr. Benham pursuant to Section 7 of the New York Dock Conditions. The Carrier advised Mr. Peters that, in its opinion, Mr. Benham had been an official of the Delaware and Hudson Railway Company and, as such, was not entitled to the protective benefits set forth in the New York Dock Conditions. Mr. Peters requested that the claim of Mr. Benham be submitted to arbitration.

On March 6, 1986, the undersigned Robert M. O'Brien was advised that he had been mutually selected to serve as the Neutral Member of the Arbitration Committee being established under Article I, Section 11, of the New York Dock Conditions to adjudicate Mr. Benham's claim. The aforementioned Arbitration Committee (hereinafter referred to as the Committee) met on May 2, 1986, to hear the claim of James Benham. Mr. Benham appeared at that hearing, represented by

counsel, and proffered extensive evidence in support of his claim for a separation allowance. The Carrier also submitted voluminous evidence to support its position that as an official, Mr. Benham was not entitled to labor protection benefits. In addition, both parties were given the opportunity to submit Reply Submissions to the Committee. The respective Reply Submissions were received by the Committee on or about July 1, 1984. Based on the entirety of the extensive record before us, this Committee renders the following decision.

CLAIMANT'S POSITION

Mr. Benham contends that he was an "employee" of the Carrier at the time he was relieved of employment on July 2, 1984, notwithstanding Guilford's argument that he was an "official," not an "employee." The Claimant insists that he had no supervisory authority or policy making responsibility whatsoever; he had no authority to hire or fire; he could not expend funds; he supervised no employees; and he merely set rates from a formula approved by the Carrier. In Mr. Benham's opinion, his duties as Manager, Pricing and Marketing-Intermodal were more clerical than managerial.

The Claimant further avers that the Railway Labor Act definition of an "employee" should be rejected by this Committee since labor protective statutes such as the Transportation Act of 1940 and its progeny, New York Dock, have absolutely no relation to the Railway Labor Act. The Claimant maintains that other Federal statutes have given the

term "employee" a much broader definition. According to the Claimant, the legislative history relating to the Transportation Act of 1940 clearly demonstrates that Congress intended labor protective agreements to encompass all those individuals in its employ, not merely those who are subject to union representation as claimed by the Carrier. For all these reasons, the Claimant insists that he was an employee of the Carrier when his employment terminated and therefore was entitled to the labor protective benefits mandated by the New York Dock Conditions.

Mr. Benham further asserts that the Carrier never gave him advance (i.e. 90 day) notice of his transfer to North Billerica as required by the New York Dock Conditions. Rather, it caused him to believe that he had no choice but to relocate to North Billerica or lose his job. The Carrier therefore violated Section 4 of the New York Dock Conditions, in Mr. Benham's opinion.

Mr. Benham stresses that he was entitled to a separation allowance in accordance with Section 7 of the New York Dock Conditions. He also contends that he was entitled to the protective conditions prescribed by the BRAC Master Implementing Agreement dated October 17, 1984, inasmuch as he was an employee of the Carrier who was not represented by a labor organization. Even outside the New York Dock Conditions and the BRAC Master Implementing Agreement, the Claimant submits that he was entitled to redress under 49 U.S.C 11347 inasmuch as he was placed in a much "worse position" as a

result of his forced transfer to North Billerica in July, 1984.

Based on all the foregoing, the Claimant argues that, under the New York Dock Conditions; the Washington Job Protection Agreement; and the BRAC Master Implementing Agreement, he is entitled to one year's salary less the \$4500.00 voluntarily paid him by the Carrier when he resigned.

CARRIER'S POSITION

The Carrier interposes three principal arguments to Mr. Benham's claim for a separation allowance. Initially, the Carrier contends that Mr. Benham is not entitled to a separation allowance pursuant to Section 7 of the New York Dock Conditions since he was not an "employee" as that term is customarily used in the railroad industry and applied in the New York Dock Conditions. The Carrier insists that the degree of responsibility and the level of independent judgment required of the Claimant in his capacity as Manager, Pricing and Marketing - Intermodal made him an "official," not an "employee." Yet, according to the Carrier, the ICC always intended labor protective benefits to be afforded only to "employees" of a railroad, and not to its "officials."

Even assuming, strictly arguendo, that the Claimant was protected under the New York Dock Conditions, nevertheless, he was still not entitled to a separation allowance, in the Carrier's opinion, since he was not a "dismissed employee" as that term is defined in Section 1 (c) of the New York Dock

Conditions: The Carrier stresses that Mr. Benham was not a "dismissed employee" since he voluntarily resigned his employment.

Finally, the Carrier avers that inasmuch as Mr. Benham was an official, he was beyond the scope of the BRAC Master Implementing Agreement. Consequently, the protective conditions set forth in that Agreement were inapplicable to him. For all these reasons, the Carrier respectfully requests this Committee to deny the Claimant's request for a separation allowance.

FINDINGS AND OPINION

While the underlying question before this Committee is whether the Claimant is entitled to any of the protective benefits mandated by the New York Dock Conditions, there are actually three (3) issues which must be resolved, namely whether Mr. Benham was an "employee" or an "official" of the Carrier; if so, was he a "dismissed employee" as that term is defined in Section 1 (c) of the New York Dock Conditions; and finally, was the Claimant entitled to the protective conditions provided by the BRAC Master Implementing Agreement dated October 17, 1984 ? Each of these issues shall be addressed individually in this Opinion.

WAS JAMES M. BENHAM AN "EMPLOYEE" OR AN "OFFICIAL" ?

This determination is crucial since if, in fact, the Claimant was an official of the Carrier when he left its service in August, 1984, then he is not entitled to the protective conditions provided by the New York Dock

Conditions. Conversely, were he found to be an employee of the Carrier, then Article IV of the New York Dock Conditions would govern his claim for a separation allowance.

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

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

An individual's rank and job title have not been considered controlling elements when determining whether an individual claiming protective benefits is an employee or an official. Rather, it is the nature and job content of his/her

position that is determinative. However, one's salary has been deemed a relevant consideration. This Committee wishes to state that, in our view, the degree of supervisory and policy making responsibility required of a position being evaluated must also be weighed.

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

"... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between the work of subordinate officials and that of officials....Each proceeding therefore, must of necessity be decided upon the record."

Though the precise question before the ICC in the above referenced proceeding was whether a subordinate official of a railroad was an employee under the Railway Labor Act, nevertheless the reasoning of the ICC is equally applicable to disputes such as the one at hand. In our judgment, the entire record must be examined to ascertain whether Mr. Benham was an employee or an official of the Carrier when he tendered his resignation in August, 1984.

After thoroughly examining the plethora of evidence and arguments advanced by both the Claimant and the Carrier what is clear to this Committee is that the Claimant possessed attributes of both an employee and those of an official when he held the position of Manager, Pricing and Marketing -

Intermodal . For example, it appears that he did not supervise any employees; he had no authority to either hire or fire employees; his salary was less than that earned by many unionized rank and file employees on the property; and Mr. Benham's supervisory and policy making responsibilities were limited. According to the Claimant, he merely applied rates based on a predetermined formula calculated by management. Were our analysis to end here, this Committee would be inclined to agree with the Claimant that he was an employee, not an official as claimed by the Carrier.

However, the facts also evidence that Mr. Benham's position as Manager, Pricing and Marketing - Intermodal, was never represented by a labor organization on the Delaware and Hudson Railway Company. Nor, evidently, did any labor organization ever attempt to represent this position.

Moreover, the Claimant obviously enjoyed skills which were easily transferable. Mr. Benham declared in his Affidavit to this Committee that he obtained employment with Distribution Unlimited, Inc. as a sales manager in the middle of August, 1984. It is significant that Mr. Benham obtained gainful employment approximately two (2) weeks after he tendered his resignation to the Carrier.

It is also noteworthy, in the opinion of this Committee, that in his capacity as Manager, Pricing and Marketing - Intermodal, Mr. Benham was entitled to numerous fringe benefits which were not granted rank and file employees, or if they were, were less beneficial than those afforded him.

Moreover, when Mr. Benham transferred to North Billerica, he was given the relocation expenses that other officials of the Carrier received. Mr. Benham was also retained on the payroll for two (2) months after he tendered his resignation which is not a benefit afforded rank and file employees.

After weighing and evaluating all of the foregoing considerations, this Committee is compelled to conclude that James Benham was not an "employee" of the Carrier and therefore was not entitled to the protective benefits prescribed by the New York Dock Conditions.

WAS JAMES M. BENHAM A "DISMISSED EMPLOYEE?"

Even were Mr. Benham deemed to be an employee, not an official, of the Carrier at the time of his resignation, he still would not be entitled to the protective benefits of the New York Dock Conditions, in the opinion of this Committee, since he simply was not a "dismissed employee" as that term is defined in Article I, Section 1 (c), of the New York Dock Conditions. Article I, Section 1 (c), defines a dismissed employee as one who is "... deprived of employment with the railroad because of the abolition of his position...." However, it is obvious that Mr. Benham was not deprived of his employment with the Delaware and Hudson Railway Company. The Claimant's position as Manager, Pricing and Marketing - Intermodal was not abolished by the Carrier. Rather, he voluntarily resigned this position when he found the working conditions at North Billerica not to his liking.

It is clear to this Committee that the separation allowance provided by Article I, Section 7, of the New York Dock Conditions was not available to Mr. Benham since he was not a dismissed employee. By its very terms, Article I, Section 7, provides a separation allowance only to dismissed employees. Moreover, there is no claim before this Committee that Mr. Benham was coerced into resigning his position with the Carrier. It was entirely a voluntary decision on his part for the reasons expressed in his August 6, 1984, letter of resignation which reasons he reiterated in the Affidavit he submitted to this Committee.

Inasmuch as James Benham was not a "dismissed employee" as that term is defined in Article I, Section 1 (c), of the New York Dock Conditions, he would not be entitled to a separation allowance even were he considered an employee of the Carrier at the time of his resignation.

WAS JAMES M. BENHAM ENTITLED TO THE PROTECTION PROVIDED BY THE BRAC 1984 MASTER IMPLEMENTING AGREEMENT ?

It is the considered opinion of this Committee that as an official of the Carrier, the Claimant was not entitled to any of the protective benefits provided by the BRAC Master Implementing Agreement. The provisions of that Agreement were obviously not extended to officials of the Carrier. Furthermore, it must be noted that the BRAC Agreement was executed on October 17, 1984, two (2) months after Mr. Benham tendered his resignation to the Carrier. Even were that Agreement retroactive as he claims, nevertheless Mr. Benham would not be entitled to its protective benefits since his

position as Manager, Pricing and Marketing - Intermodal, never fell within the scope of the BRAC collective bargaining agreements. The Claimant's position was not encompassed within BRAC's jurisdiction even though Mr. Benham retained his BRAC seniority while serving as an official of the Carrier. In our judgment, Mr. Benham was simply not a protected employee working under the scope of the BRAC Agreement and was therefore not entitled to the protective conditions which BRAC secured for its members by the October 17, 1984, Master Implementing Agreement.

AWARD

James M. Benham was not entitled to a separation allowance under the New York Dock Conditions nor was he entitled to the protective benefits provided by the 1984 BRAC Master Implementing Agreement. Accordingly, his claim must be denied.

Robert M. O'Brien
Robert M. O'Brien, Neutral Member
Dated: 11/29/86

Douglas J. Broda, Claimant's Member
Dated:

Daniel J. Kozak 12/2/86
Daniel J. Kozak, Carrier Member
Dated:

UP EXHIBIT

26

In the Matter of Arbitration :
Between :
B.J. Maeser, T. P. Murphy, E.M. :
Sengheiser and K.W. Shupp :
and :
Union Pacific Railroad Co., :
Missouri Pacific Railroad Co. Pur- :
suant to New York Dock Conditions :
Imposed by the Interstate Commerce :
Commission in Finance Docket No. :
30,000 :

AWARD AND DECISION

.. .. .

Arbitrator : Jacob Seidenberg, Esquire
Hearing : August 19-20, 1987 St. Louis,
Missouri
Appearances : Claimants
Bill T. Walker, Esquire
Jonathan McKee, Esquire
Frank Baxendale, Esquire
all of Law Firm of Bill
T. Walker & Associates
Carriers
Richard A. Judes, Esquire,
Counsel
Richard A. Meredith, Esquire,
General Director of Labor
Relations
Post Hearings Briefs - Received : October 20, 1987
" " Reply Briefs - Received: November 2, 1987
Issues : (1) Are Claimants "employees"
within the meaning of
New York Dock Conditions?
(2) Are the Claimants entitl-
ed to either a dismissal
or displacement or sever-
ance allowance under New
York Dock Conditions?
(3) Did the Claimants receive
the proper vacation allow-
ances they were entitled
to receive for year 1984?

- (4) Did the Union Pacific RR interrupt the Claimants business or employment relationship with the Missouri Pacific RR?

Background: This dispute arises as a result of the merger effected between the Union Pacific RR, the Western Pacific RR and the Missouri Pacific which, upon ICC approval, became effective on December 22, 1982. The Carriers' petition for approval of the merger was filed with the ICC on September 15, 1980 and resulted in two years of hearings. The ICC imposed New York Dock Labor Protection Conditions as part of its approval.

The gravamen of the dispute arises from the decision of the merged Carriers to consolidate the existing Marketing Departments into one department of the UP located in Omaha, Nebraska. The Union Pacific extended an offer to the Claimants to become part of the merged Department at their existing MP salaries, but the offers were not accepted for the reasons hereinafter stated.

The Claimants were individuals who had long periods of employment with the Missouri Pacific and had been employed in Marketing and Sales Department in St. Louis, Missouri.

The specific jobs, salaries and length of service of the Claimants when their employment ceased were:

B.J. Maeser - General Manager - Marketing Commodities
\$75,000 employed from 1951.

T.P. Murphy - Administrative Assistant to General Manager - Marketing Commodities - \$39,720 -
1950

E.M. Sengheiser - Director of Marketing, Chemicals and
Petroleum Products, \$61,000 from 1957.

K.W. Shupp - Supervisor- Files, Mail and Supplies -
\$38,760 - 1941.

The record discloses that Claimant Maeser executed on July 15, 1983 a Separation Allowance Memorandum wherein he stated that, in lieu of accepting proffered employment with the Union Pacific RR in Omaha which would require a change in residence, he elected to resign from the Missouri Pacific RR and accept a lump sum severance of \$35,000. The Claimant wrote at the bottom of his Separation Memorandum:

"I hereby reserve my right to seek such benefits
to which I am legally entitled." (Carrier Ex. #43)

A similar Separation Allowance was executed on July 15, 1983 by Claimant Shupp (Carrier Ex. #10). On June 17, 1983 Claimant Murphy (Carrier Ex. #26) and Claimant Sengheiser (Carrier Ex. #22) executed the same Separation Allowances.

On February 10, 1983, Claimant Shupp wrote Missouri Pacific Assistant Vice President Colvin that, in addition not to electing to transfer to Omaha, and instead electing to take his severance pay, he was also electing to take his UPRR and railroad retirement pension (Carrier Ex. #9).

The antecedent for the aforesaid Claimants' actions was a January 27, 1983 Memorandum from then Vice President of Traffic, G.A. Craig, to all non-agreement employees in the Sales and Marketing Department who had been offered a position in Omaha, stating they also had the option of receiving a retirement allowance, if

they elected to resign their employment and not transfer to Omaha. The Severance Allowance was based on length of service with the Missouri Pacific with a cap of \$35,000. The Craig Memorandum stated, inter alia, that the offer was not available to any employee who was offered a position in St. Louis and that the employee's decision to accept or reject the offer of severance pay in lieu of transfer to Omaha, had to be made before 5:00 PM, February 14, 1983 (Carrier Ex. #1).

After the merger was legally effected in December 1982, the Carrier distributed certain memoranda and a booklet (Claimants' Ex. #4) which purportedly set forth the benefits available to non-agreement employees of the merged railroad, which were the UP benefits.

As stated early in 1983, the Carrier offered employment to the Claimants in Omaha at their present salaries in the merged Marketing Department. The Claimants refused the offer to transfer and took severance allowances after tending their resignations. After the Claimants took their separation allowances, left the employment of the Carrier they then filed a law suit in the Missouri State Courts in 1985 for an alleged interrupted business relationship. The Carrier moved in 1986 to have the suit removed to the federal court for the Eastern District of Missouri. Subsequently the Carrier filed a motion to compel arbitration of this dispute pursuant to the provisions of the New York Dock Conditions. On October 23, 1986 the parties executed a stipulation to arbitrate. The parties selected the Undersigned to be the Arbitrator from a

list furnished them by the National Mediation Board. At the arbitration hearing held on August 19-20, 1987 the parties presented their respective positions, by witnesses and in writing.

The arbitration hearing resulted in a 505 page transcript, 61 Claimants Exhibits and 6 Carrier Exhibits, plus extensive post hearing and reply briefs.

The relevant Statutes, Decisions, Awards and Rulings are the following

New York Dock Conditions which state in part:

"Article I

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

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

(c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position ...

....

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employee, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction ...

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during the protective period be paid a monthly displacement allowance...

6. Dismissal allowances - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period ...

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

...

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have been entitled under this appendix, this appendix will apply to such employee.

...

Article IV

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

Railway Labor Act (45 U.S.C. Chapter 8) in Section 151, Fifth states in part:

"Fifth. The term 'employee' as used herein includes every person in the service of the carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission ..."

Section 11347 (49 U.S.C.) states in part:

"When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction ..."

Rail Passenger Service Act (45 U.S.C. 565) states in part:

Section 565

...

(f) 'railroad employee' defined

"...

As used in this subsection, the term 'railroad employee' means (1) an active full time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company and (3) the dependents of any employee to in clause (1) and (2) of this sentence."

Milwaukee Railroad Restructuring Act (Title 45, Chapter 18) states in part: "Section 902(4)

... the term 'employee'

- (A) includes any employee of the Milwaukee Railroad who worked on a line of each railroad the sale of which became effective on October 1, 1979 but
- (B) does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of board of directors or any other person performing such functions."

Rock Island Railroad Transition and Employee Assistance Act (Title 45, Chapter, 19) states in part in Section 1002:

"(4) 'employee' includes any employee of the Rock Island Railroad as of August 1, 1979, but does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions."

The 1980 Staggers Act P.L. 96-448 contains the same definition of "employees" as set forth in the Milwaukee and Rock Island Statutes.

The detailed respective positions are:

Claimants

B.P. Maeser

The Claimant maintains he is an employee of the Carrier within the meaning of the ICC imposed New York Dock Conditions. He asserts that he became a "displaced" employee as a result of the

offered job in Omaha as Director of Pricing Services for the reasons subsequently set forth. The Claimant asserts that the language and the rulings of the ICC regarding "employee" and "subordinate official" or the language of the Railway Labor Act purporting to define "employee" or the language of the Rail Passenger Service Act defining "railroad employee" are not relevant, because these statutes, the orders and rulings issued thereunder were for the purpose of making clear what was the area of collective bargaining. These statutes sought to delineate the parties who could properly negotiate collective bargaining agreements.

The Claimant states those considerations which compelled the Congress, the ICC and the National Mediation Board to ensure that labor unions and carriers in the railroad industry would be able to freely, and without limitation, negotiate for wages and terms and conditions of employment, are not the same considerations which motivated the Congress to enact legislation to ensure that employees should not be adversely affected by merger or consolidations of two or more railroads. The Congress that enacted the Railway Labor Act was a Congress with different concerns than the Congress that enacted 49 USC 11347 mandating that the ICC provide for arrangements that would ensure the affected employees would not be in a worse employment position for at least four years or less, as a result of a railroad merger or consolidation.

The Claimant stresses the purpose of this arbitration proceeding is to effectuate the Congressional will and intent as stated in the aforesaid Section 11347. The Claimant stresses that

a long line of ICC decisions reveal a consistent Agency policy to carry out the Congressional intent. The Claimant insists that Section 151 of the Railway Labor Act was not intended to provide a generic definition of an employee in the railroad industry. Its purpose was to limit that class of employees subject to unionization, including subordinate officials, as so declared eligible by the Commission. The Claimant maintains that Congress, neither in 1926 nor 1934 was enacting guidance as to who were to be "employees" under New York Dock.

The Claimant asserts that the industry use of the term "employee" relates to the administration and effect of the Railway Labor Act. It is significant, however, that industry discussions of protective conditions concerning adverse effects of mergers frequently use specific language to embrace consideration of "all employees."

The Claimant states that when the cited Court cases are analyzed, it appears the Fifth Circuit held in the McDow case that the District court should not have decided whether a former vice president of the railroad was an "employee" for the benefits of protective conditions. The District Court had held that a study of the legislative history of the ICC Act left no doubt that the term "employee" did not include a vice president and general manager of the railroad. In the Edwards case the Fourth Circuit Court held that a stockholder and Chief Engineer of a small family owned railroad was not an employee for purposes of protective benefits. The Claimant stresses that the significant language of the Court's

decision was that the protective conditions were not intended to cover those employees who were in a position to protect themselves from the adverse effects of the merger. The Claimant states this concept was endorsed in the Newborne case when the Sixth Circuit held that a former supervisor was not an "employee" because he possessed transferable skills and was able to take care of himself, and in fact did.

The Claimant notes the ICC in its Burlington Northern Decision (348 ICC 962) stated that it was deferring to those familiar with labor law (arbitrators) with respect to the complexities of protective conditions disputes. The Claimant contends this is the reason that one should not look either to the ICC or the Courts for authoritative decisions on this issue. The Claimant notes that ~~the ICC in the Bell case made it clear that its authority to classify employees under the Railway Labor Act does not extend to~~ classifying employees for the purpose of employee protection coverage.

The Claimant maintains that the ICC has applied a narrow meaning to its organic legislation in determining its jurisdiction to decide when employees are covered by protective conditions of New York Dock. The Claimant adds that despite Section 11347 has its roots in the 1936 Washington Job Protection Agreement, the legislation must be viewed in light of general welfare and not within the narrow interest of railroad carriers and labor unions. The Claimant stresses that there is no language in the relevant legislation that would indicate the congressional intent was to deny

the Claimants the benefits of New York Dock Conditions. He further stresses that it is to ignore reality to contend that it was the intent of Congress to deny the Claimants the benefit of New York Dock, and to maintain that only subordinate officials and other employees eligible for unionization, will be adversely affected by a merger.

The Claimant notes that on those specific occasions when the Congress has definitely addressed the question as to those employees who should be covered by protective conditions, i.e., the Milwaukee Railroad Restructuring Act (1979); Rock Island Railroad Transition and Employee Assistance Act (1980) and Staggers Rail Act (1980), it made all employees eligible for the protective conditions below the rank of top corporate officers. The Claimant states this Congressional action is consistent with the philosophy that protection should be afforded those who have little or no control over the merger developments which precipitated their need for protection.

The Claimant stresses the definition of displaced or dismissed employees set forth in New York Dock applies to all the Claimants in this proceeding due to the circumstances of their departures from the Carrier's service.

The Claimant states that if they are employees under New York Dock, then, by virtue of Article IV they are entitled to substantially the same level of protection even if they are not dismissed or displaced employees. The Claimant adds Article IV of New York Dock

is not ambiguous. It notes that the Carrier negotiated an Implementing Agreement with the Brotherhood of Railway and Airline Clerks and the Claimants are entitled, as a minimum, to receive those benefits.

The Claimant asserts that New York Dock establishes minimum conditions and employees are entitled to negotiate more favorable conditions than those in New York Dock, and Article IV clearly states that non-agreement employees are to be treated substantially the same as agreement employees. The Claimant stresses the argument that under Dock, relief is limited to those employees who are dismissed or displaced as contemplated by Article I, Section 1(b) and (c), ignores Article IV. The Claimant further notes that Article I, Section 4 that provides for negotiation or settlement by ~~arbitration of disputes involving displacement or dismissal of employees or re-arrangement of forces.~~

The Claimant states there is no merit to the Carrier's position that it would be impossible to administer agreements that afforded non-agreement employees the same level of protection that union members obtained through negotiations. The Claimant asserts that the work "substantially" provides a practical standard for administering the level of benefits. The several union implementing agreements have or should have a thread of commonality reflecting a carrier policy of fairness to all. It was the intent of Congress that non-agreement employees should be the beneficiaries of the same policy. The Claimant asserts there is no valid reason why all railroad employees should not enjoy the same level of job protec-

tion on ICC sustained mergers.

The Claimant states that the interpretation of Article IV that would require non-agreement employees to be dismissed or displaced as defined in New York Dock would deny the Claimants the higher level of protection accorded senior clerks under the BRAC Implementing Agreement No. 1. The Claimant adds that if the Claimants are entitled to the same benefits, they are entitled to higher severance pay.

With respect to the facts why Claimant did not accept the transfer to Omaha, he testified that he was the victim of a vendetta launched against him by Vice President Colvin. Although he had come up through the ranks, starting as a messenger in 1951 to become General Manager-Marketing-Pricing in 1979, and had been rewarded with numerous promotions, raises and substantial bonuses, his 32 years of faithful service was cast aside at the time of the merger because Mr. Colvin wanted to punish him for previously disciplining M.L. Holland, his close friend.

The Claimant testified he was a displaced employee when Mr. Colvin stated there was no place for him in the Business Groups of the merged Department, despite his 32 years of experience in all facets of marketing-pricing traffic work, as well as conducting negotiations for rates with important MP customers.

Claimant Maeser testified that he was demoted by virtue of the Omaha job offer. He stated he would be forced in Omaha to work for individuals who had formerly worked for him. He added that his opportunities to earn further promotions, salary increases and bo-

nuses were virtually dead since his present salary would place him at the midpoint of the offered Director's job.

The Claimant stated that the proffered job in Omaha was such an indignity and blow to his pride that Mr. Colvin knew that he would not accept it and thus Colvin achieved his goal of getting rid of him. The Claimant stated he talked to Vice President Ostrow about the job being offered him and he asked whether there was anything that could be done about it. Mr. Ostrow stated he would see what could be done but the Claimant never heard from him. Mr. Ostrow told the Claimant to discuss the matter with Mr. Barger who was coordinating merger activities. The latter repeatedly told the Claimant he would take the matter up with UP Vice President Craig, but it was not until April 14, 1983 that he was told that VP Craig said nothing could be done for the Claimant. The Claimant stated he made several attempts to ascertain when the Carrier wanted him to leave, although initially he had been told it wanted him to "turn out the lights" in St. Louis. Finally Mr. Barger told him his services would be terminated on July 15, 1983, but on June 22, 1983, he received an abrupt telephone call from Mr. Barger ordering him "to pack his things and go." A security officer appeared at his office to ensure that he promptly left that day. The Claimant denied the Carrier's allegations that he intended to take any computer printouts of carrier customers when he left.

The Claimant summarized the specific reasons for not accepting the Omaha job. In the first place his proposed job was downgraded because it carried 1308 Hays points while his Missouri Paci-

fic job carried 1560 points. He was being shunted outside of the Marketing Group and would have had to work for people whom he had formerly supervised. The UP incumbent of the job offered to him was to be promoted to Manager, but this individual would be two levels below what the Claimant already was. On an overall basis the Claimant maintained he was not going to be utilized in the marketing area where he had demonstrated competence and ability for many years and was being reduced to service functions where he would be serving individuals who had formerly worked for him. The Claimant added the testimonial letters he received from customers were ample proof there was no merit to the Carrier's allegations that he was not able to get along with customers. The Claimants stated he was being put down by the proffered job offer in Omaha and publically humiliated. He was also placed in a worse position because his opportunities to obtain bonuses and future wage increases were appreciably diminished.

The Grievant stated that under all these facts and circumstances of his situation, he was clearly a displaced or dismissed employee who was placed in a worse position as a direct result of the merger.

The specific monetary aspects of Mr. Maeser's claim will be set forth in the Section dealing with damages.

E.M. Sengheiser

Claimant Sengheiser presented the same analysis of the New York Dock Conditions, the Congressional legislation, and the relevant rulings thereunder that Claimant Maeser advanced, to show

that he was also an employee within the coverage of New York Dock Conditions, and he was also a dismissed or displaced employee thereunder and entitled to the afforded protection. Sengheiser further stated that as an employee under New York Dock, he was entitled to the same level of protection afforded the union employees by their negotiated implementing agreement, even if he were not a dismissed or displaced employee under New York Dock.

The Claimant states that he was an employee rather than official of the Carrier because he did not have the authority to hire or fire; he could not discipline, promote or demote, or formulate Company policy. His authority was confined only to making recommendations, and he had no way of knowing what weight was accorded his recommendations. The Claimant added his authority to make marketing contracts was limited to acting within expressed guidelines. He noted that he was at least seven reporting levels below the ultimate decision making level.

The Claimant stresses that since he did not hold an executive level position he therefore was an employee within the purview of New York Dock protective conditions.

The Claimant concedes that he occupied a non-union position, but that does not go to the core issue as to whether he was in a position to take care of himself under the merger. The Claimant asserted that he had no transferable skills and therefore was an employee properly entitled to receive the protection of New York Dock.

The Claimant states he became a displaced or dismissed em-

ployee when the Carrier refused to negotiate with him or give him any assurances with regard to the offered Omaha job. The Claimant asserted that the security of the offered Omaha job was illusory in that he was being transferred to Omaha for the purpose of training a UP-successor after which he would be discharged or demoted as had happened to other MOP employees such as Messrs. Coale, Mc Laughlin and Looney.

The Claimant explained that the position offered him was the largest revenue producing commodity group in Omaha, and the other six commodity groups were held by UP personnel. This situation made him apprehensive and he believed that as soon as he imparted his knowledge to a UP manager, he would be replaced. He stated he was concerned that once he moved to Omaha and took the position, he would lose his rights to severance pay and other benefits. This was the reason he sought some assurance from the Carrier that he would not be terminated or demoted as soon as he trained a UP employee in his job. The Claimant states the Carrier's refusal to negotiate on the items he raised, was proof positive that the Carrier's offer was illusory and not made in good faith. This conclusion is buttressed by the fact that all the other Group Product Managers were receiving salaries in excess of his.

The Claimant further states that under Article IV of New York Dock, even if it is found that he was not a displaced or dismissed employee under Dock, he was entitled to receive substantially the same level of protection that the Carrier had negotiated with BRAC. At the very least, the Claimant maintains he is entitled to sever-

ance pay at 17½ months service, and as a dismissed employee he is entitled to receive all the benefits for protected employees.

T.P. Murphy

The Claimant asserted he was an employee entitled to the protective benefits of New York Dock despite his job title as assistant to the General Manager, Marketing Commodities, when his employment terminated in June 1983.

The Claimant adopted all the reasons set forth in the analysis made in Claimant Maeser's Submission as to why he was a New York Dock covered employee. The Claimant asserts that he has not carried out the duties described in his Job Description, such as coordinating the administrative subsections of the Marketing Department; assisting the General Manager, Marketing, by providing him with statistical data, reports and special projects; protecting the Carrier's interests at various committees; assisting the Assistant Vice President - Marketing, by preparing background information to aid the AVP when he called on major shippers.

The Claimant testified, on the contrary, that his actual duties for the past ten years were to perform personal acts and favors for Carrier officials. The Claimant stated he did personal favors for several AVP's such as depositing their payroll checks, chauffeuring these officials and members of their families to airports and other locations on non Carrier functions. The Claimant took care of the automobiles of these officials and assisted in performing certain repair duties at their homes.

The Claimant maintained his duties were menial and not the

sort of duties that a high ranking official performs in the course of his executing his formal job duties. The Claimant states he did not supervise any employees; he could not fire or hire anyone, and he certainly was not a policy making official. .

The Claimant stresses his work record since his termination reveals he was not able to protect himself from the adverse consequences of the merger. His post merger jobs were as a baggage handler for a small airline and at present to deliver daily newspapers. The Claimant states to hold that only union employees are entitled to the protection of New York Dock Conditions is to ignore reality.

The Claimant asserts he was a dismissed employee because he was never offered a job in Omaha. He notes that when the January 27, 1983 list of invitees to the Omaha orientation meeting was distributed, he was not on that list. The Claimant states this list was prepared before he officially informed the Carrier that he was unable to transfer to Omaha. The Carrier was aware he could not transfer to Omaha because of his wife's health.

The Claimant maintains that he was not offered a job in St. Louis as Assistant Manager Rate Quotation, because this position was a token position. Since this job was for a short term if the Claimant had accepted, it would have meant he had to forfeit his Severance Allowance. The Claimant asserted he was not in a financial position to terminate his employment without the severance payment. For this reason the Claimant stated he sought to obtain an assurance from the Carrier that when the temporary job in St. Louis ceased, he would still be eligible to receive the Severance Allowance. The Claimant adds that Mr. Barger's letter of April 28,

1983 was not an unequivocal assurance that the Claimant would receive the guarantee he requested. In any event, the letter from Mr. Barger was not such a high carrier official who could give him the guarantee he needed. The Claimant stated that under the circumstances, he was forced to take the severance allowance rather than run the risk of receiving nothing at a later date when the temporary St. Louis job ended.

The Claimant states that since the Carrier had no intention to transfer him to Omaha, he was forced into a no-win position when his job was abolished. He was beyond question a dismissed employee under New York Dock.

The Claimant advances the same arguments previously set forth by the other Claimants to show that the Claimant is an employee under New York Dock, even though not a dismissed or displaced employee, and was entitled to the same level of protection afforded labor union members. The Claimant also presented the same arguments that the other Claimants did to demonstrate that Congress intended non-agreement employees to enjoy the same protective condition benefits that union members did from their implementing agreements.

The Claimant notes that other MOP employees, after the transfer, were given jobs in St. Louis and received full protective benefits. The Claimant asserts he only wanted to be treated the same way as these employees were, especially in light of his more than thirty years of devoted service to the Carrier.

W.K. Shupp

Claimant Shupp, Supervisor of Files, Mail and Supplies con-

tends that he was an employee of the Carrier within the meaning and intent of the New York Dock, for all the reasons advanced by the other Claimants. He was not only an employee but he was a dismissed employee because he was never offered a position in Omaha. He asserts proof that he was not to be transferred to Omaha can be 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 bonuses. He reported to the Assistant Vice President of Marketing, and in turn directly supervised five Marketing Directors, an Administrative Assistant and a Secretary, as well as indirectly reporting

to him 41 non-union and 24 union employees. The Carrier states Claimant Maeser supervised an annual payroll of \$2,400,00 and the 1981 gross revenues of his Department were \$1.7 billion.

The Carrier asserts it is clear that Claimant Maeser was a high ranking official and not an employee who was subject to unionization, and therefore outside the scope of New York Dock Conditions.

With respect to Claimant Sengheiser, he was a Director of Marketing-Chemicals and Petroleum Products, charged with developing marketing and pricing strategems for maximizing revenues for his assigned commodities. He directly supervised four Marketing Managers and indirectly supervised six non-union and 8 union employees. He supervised an annual payroll of \$556,600 and the value of the 1980 gross revenues of the commodities he handled was \$377,000,000.

The Carrier states Claimant Sengheiser received an annual salary of \$61,000. He held an important high ranking official position and was not subject to unionization and therefore he could not be considered an employee entitled to New York Dock benefits.

With respect to Claimant Murphy, the Carrier asserts that his job as Administrative Assistant to the General Manager-Marketing Commodities, required him to maintain the efficient operations of the Marketing Department by coordinating the administrative activities of the subsections of the Department, and to give assistance to both Assistant Vice President and General Manager in preparation of calls to major shippers, and also furnish background information

on rate proposals and pending legislation.

Claimant Murphy was paid \$39,720 annually. The Carrier asserts that, while Claimant attempted at the arbitration hearing to downgrade the importance of his position and convey there was little to his job other than personal service duties for various officials, the Carrier stated this testimony should be disregarded and credence be given to Vice President Colvin's testimony that Claimant Murphy performed somewhat limited external duties for Carrier officials when their official duties required them to be at least 50% of their time away from their offices.

Mr. Colvin testified that Claimant Murphy performed the duties described in his official Job Description and these duties were components of an important job. The Carrier stated that the Administrative Assistant position qualifications required years of training on clerical and supervisory assignments to gain the experience to execute the duties of the job effectively. The Carrier states the Claimant was an official and not an employee of the Carrier.

With respect to Claimant Shupp, the Carrier states that his position of Supervisor of Files, Mail and Supplies of the traffic Department required him to provide administrative support for this Department, by maintaining adequate clerical staff and services by maintaining current freight tariff files, furnishing and distribution mail between the Department, the general offices, shippers and government agencies. He had to maintain services and information to MP personnel. The Carrier adds Mr. Shupp supervised 13

persons with an annual payroll of \$287,000. His annual salary at the time of his resignation was \$38,760.

The Carrier states that Claimant had an important official position which was outside the scope of unionization. Carrier officers such as Vice President Colvin and Assistant Director of Labor Relations Naro regarded the job as an important official post and part of management.

The Carrier states that all four Claimants held official positions and were not employees as the term was used in New York Dock. It further states that the Claimants do not meet the requirements of Article IV since they were not employees of the Carrier not represented by a labor organization. Since they were not employees, they derived no rights under Article IV of the New York Dock. This Article asserts that non agreement "employees" who are dismissed or displaced will receive substantially the same dismissal, displacement, and separation allowances to which agreement employees are entitled. Article IV makes it clear that its provisions apply only to non agreement "employees." Since the Claimants are not employees they derive no rights from Article IV.

The Carrier further contends, arguendo, that even if any of the Claimants were "employees" under New York Dock, they still would not be entitled to any of the benefits thereunder, because none of them was either a dismissed or displaced employee.

The Carrier stresses that each Claimant was not dismissed or displaced because they were offered a position in Omaha in the consolidated Marketing Department with no reduction in salary or

other basic compensation. It adds that if the Claimants had accepted these offered positions, they could not claim to be dismissed or displaced employees. The Carrier states that the Claimants suggest that by rejecting the Carrier's job offers, they became dismissed or displaced employees.

The Carrier adds that a review of the testimony of each Claimant reveals that they were not dismissed or displaced employees.

The Carrier notes that Claimant Maeser turned down the job because of its alleged lowered responsibilities which he regarded as an indignity to him. It adds that Claimant Maeser spurned the offered job despite he would suffer no reduction in salary, only because he did not like the job. The Carrier maintains that under New York Dock he cannot be a dismissed or displaced employee because he resigned his employment due to his personal feelings about the proffered job. He was not adversely affected when he suffered no financial loss. He was upset because he was not made one of the nine Group Managers in the consolidated Department.

With respect to Claimant Sengheiser, he admitted that Vice President Colvin offered him a position as a Group Market Manager at the same salary, but he rejected the offer because the Carrier would not accede to the several conditions he attached to his conditional acceptance, the primary one being a six month trial period and the option of receiving severance pay at the end of this period, and then a two year contract at the end of the trial period to maintain his present job and salary. The Carrier asserts

that the Claimant made it clear in writing that if the Carrier did not accept all his conditions, it could then treat his letter of conditions as a notification of his election to resign and accept severance pay. The Carrier states it refused to agree to the conditions laid down by the Claimant in order for him to transfer to Omaha, thereupon, the Claimant resigned and took his severance pay. This act did not make him a dismissed or displaced employee within the meaning of New York Dock.

The Carrier asserts that it offered Claimant Murphy two rather than one job. It notes Claimant Murphy admitted he received Vice President Craig's January 1983 letter offering him a comparable job in Omaha at his present salary, albeit the job was unspecified. The Carrier adds that although it met its obligation to Claimant Murphy by its Omaha job offer, it went further and offered him a job in St. Louis but Mr. Murphy rejected this job offer unless the Carrier would guarantee him employment until he was 55 years old, four years away, or allow him the \$35,000 severance pay if this St. Louis job ceased. The Carrier stated that its coordinating official, Mr. Barger wrote Claimant Murphy stating that he would be allowed severance pay if his St. Louis job was terminated and no comparable jobs were offered him. However, Mr. Murphy did not regard Mr. Barger's letter as giving the kind of assurance he needed, despite the fact that a copy of Mr. Barger's letter was sent to two ranking Carrier officers, Vice President Ostrow and Mr. Colvin. After receiving Mr. Barger's offer Claimant Murphy then modified his demand, i.e., he would take the St. Louis

job if the Carrier would guarantee that it would last until February 1984, when the Claimant would be eligible for an early retirement. The Carrier asserted that when it rejected this last condition, Claimant Murphy resigned and took his severance pay.

The Carrier maintains that Claimant Murphy could not be considered a dismissed or displaced employee after having rejected two job offers of a salary equal to his then present job.

The Carrier concludes by contending Claimant Shupp was also offered a job at his present salary in Omaha. The Carrier admits the Claimant was not offered a specific job in Omaha, but was told by Marketing Vice President Ostrow that it would be in the Mail Room and similar to his St. Louis job. In his letter of resignation, Mr. Shupp admitted he had been offered a job in Omaha, but he had exercised his option to retire early and collect his severance pay.

The Carrier notes that at the Arbitration Hearing Claimant Shupp testified his wife was employed in St. Louis and would not have relocated to Omaha. The Carrier adds since Mr. Shupp was eligible for early retirement, he refused to transfer to Omaha, and took his severance pay and early retirement. After Mrs. Shupp was eligible to retire from her job, both Mr. & Mrs. Shupp retired to Oklahoma. These facts show that Claimant Shupp refused the Omaha job for personal reasons, and therefore could not be considered as a New York Dock displaced or dismissed employee.

Vacation Pay Claims

In addition to claims filed by the four Claimants for dis-

placed or dismissed employee allowances, as well as additional severance allowances pursuant to the provisions of New York Dock, the Claimants maintained that the Carrier erred in computing their vacation allowances under the Union Pacific rather than the Missouri Pacific formula. The dispute devolved on how the 1984 aspect of the vacation pay should have been calculated.

There are five documents in the record bearing directly on this question.

Claimant's Exhibit #1 was a Question and Answer Sheet prepared on January 26, 1983, covering subject matters raised at a January 24, 1983 employee meeting pertaining to the Omaha move. The question raised was whether vacation rights on the Missouri Pacific would be "grandfathered?" The answer given was that a MP employee who had an accrued vacation greater than that provided by the UP vacation plan, would have his or her vacation frozen until he had sufficient service to qualify for more vacation under the UP plan. This Q&A memorandum was signed by Mr. Barger who was the Carrier coordinator of the move of MP employees from St. Louis to Omaha.

In a letter dated January 28, 1983 (Claimants' Ex. #2) from Chairman Kenefick of the MP Board, it stated, inter alia that MP employees would not receive less vacation than they were entitled to receive under the MP plan. In Claimants' Exhibit #3, MP Vice President Angst, wrote MP employees on February 9, 1983, that under the UP vacation plan, they would not provide less vacation than that provided for by the MP plan.

In February 1983 the UP distributed a booklet to UP and MP employees explaining the UP Benefit Program (Claimants' Ex. #4). This booklet stated in part at page 0-3:

"Vacation Rights at Termination

- If you are terminated for any reason, you will receive full pay for vacation time not taken in current year plus vested vacation accumulated for the following year. Vacation accrual is based on complete months of service."

On April 28, 1983, UP Vice President Jordan, Personnel, wrote to ranking officials of both Carriers that the following was the UP vacation policy for current MP employees (Claimants' Ex. #5).

"Vacation time will be determined by years of continuous service as outlined in the Union Pacific Railroad Benefit Handbook. In no event, however, will current transferred Missouri Pacific ... employees receive less vacation than they were entitled to under their respective vacation schedules as of December 31, 1982."

Claimants' Position

The Claimants contend the Carrier erred when it paid them their accrued vacation in June and July 1983 under the UP formula. They received less vacation pay than they would have received under the MP formula.

The Claimants stress ranking officials stated in writing that MP employees would not receive less vacation than they were entitled to under the MP Plan. The January 26, 1983 Q&A Sheet stated that vacation rights under the MP were "grandfathered." Both Chairman of the Board Kenefick and VP Agnst asserted MP employees would enjoy a vacation that would not be less than they enjoyed under the MP plan as of December 31, 1982.

The Claimants contend there is no merit to the Carrier's position that the UP Benefit Booklet issued in February 1983 put the MP employees on notice that their vacation benefits were to be computed in accordance with the UP formula. The Claimants further contend that this Booklet cannot be held to have put the MP employees on notice that it constituted a repudiation of the representations made by ranking officials of both the MP and the UP. If any ambiguity exists, it should be construed against the Employer. It cites the Missouri State Court case of Hinkeldey vs Cities Service Oil Co. (1971) in support of this principle.

The Claimants also stress that UP Vice President Jordan's April 28th letter was circulated more than two months after the UP Booklet was issued.

Carrier's Position

The Carrier maintains that it correctly calculated the 1984 vacation pay for the Claimants after they resigned their positions. Of all the exhibits cited only Exhibit #4 (booklet) is relevant. This booklet clearly set forth the UP's completed months of service formula would be used to determine vacation accrual for calculating the amount of vacation pay due an employee at termination.

The Carrier states that since all employees received the booklet upon leaving its employ, its terms are binding on them under Missouri Law. The Carrier states the Claimants are in error in contending they were not properly put on notice that the booklet repudiated Management's prior representations. The Car-

rier states that if Claimants' Exhibits 1, 2, 3, and 5 are considered Management representations, the Claimants have failed to understand these Exhibits, because they did not address the issue in dispute. All that these Exhibits state is that no former MP employee would receive fewer weeks of vacation as a UP employee than he had received from the MP. However these Exhibits do not go to the issue of whether the old MP vacation accrual system or the UP's completed month method should be used to calculate vacation rights at termination of the employee.

The Carrier states all of the cited exhibits pertain to vacation rights that a former MP employee will receive as a UP employee. These exhibits do not address the matter of vacation pay at termination. This issue is addressed only in the Benefits Booklet, and in this Booklet the completed months of service formula is adopted.

The Carrier states the Claimants should have expected that the merger would have brought about a change in employee benefits. They should have carefully read the Benefits Booklet. The Carrier states that under Missouri law the Claimants were put on constructive notice of the booklet's contents even if they did not read it.

The Carrier sets forth its reasons why the Hinkeldey case is not in point and lends no support to the Claimants' position.

The Carrier states there is no valid basis to sustain the claims for additional vacation pay and they should be denied.

Interruption of Claimants' MP Business Relationship by UP Claim

Claimants' Position

The Claimants contend that the UP took certain intentional actions prior to the Merger that interrupted the MP employees existing business relations with the MP. The Claimants stated both in depositions by UP and MP officials, and in testimony adduced at the Arbitration proceeding, it showed the UP influence and caused the MP to reorganize and modify its activities so as to more closely reflect UP activities thus to disadvantage the Claimants.

The Claimants contend that the UP specifically compelled the MP to reorganize its Marketing and Sales Department so as to deny them ranking positions in the merged Marketing Department. The Claimants specifically alluded to the UP influence to have the MP adopt the Hay Job Evaluation System which was already in effect in the UP. The Claimants contend that the existence and use of the Hay System permitted the UP personnel to get the better jobs in the merged Department.

The Claimants stated that, although the former MP executives asserted the MP Marketing Department was reorganized and the Hay System was adopted allegedly to permit the MP to function more effectively in a deregulated economy, in effect, it was reorganized basically to reflect the UP organization even though the senior former MP officers stated they were interested in the organization of the Departments of the Southern Pacific and the Santa Fe railroads. The Claimants maintain that the evidence shows it was the UP organization that the MP followed. The Claimants add that as

a result of using the UP format in the MP Marketing Department, several MP ranking jobs were eliminated and MP marketing officers were not able to fit into the UP existing organizational set up.

Claimant Maeser alluded to the deposition of President Kenefick of the Union Pacific admitting he had conversations with Mr. Flannery then President of the Missouri Pacific in November or early December 1982 prior to approval of the Merger.

The Claimants further state the MP adopted certain UP pricing measures such as the Tank Car Allowance, the Manhattan Project which was a sensitive UP internal traffic study. Vice President Angst's analysis of UP's "hot shot" marketing personnel compared them to MP personnel work in the same field. Claimant Maeser testified that joint actions were conducted despite an October 29, 1982 memorandum from MP Vice President Law-Hermelly who notified all MP Department Heads that until the ICC approved the Merger the MP key employees should treat the MP and UP as independent railroads for business purposes.

Carrier's Position

The Carrier states there is no merit to the Claimants' allegations that the UP interfered with their business relationship with MP and so violated Missouri State tort law. In the first place the Carrier states if there was a state law theory of recovery, it was preempted by federal law such as New York Dock. The Carrier asserts that Section 10 of Article I of New York Dock sets forth a comprehensive uniform scheme of federal law limiting

the pre merger activities of carriers. The Carrier adds to allow state law to regulate this conduct would place a constitutionally impermissible burden on interstate commerce. It adds that the ICC was established to create a body of uniform federal law such as New York Dock in order to prevent differing state law requirements in interstate commerce.

The Carrier stresses that any state law which would work to change what carriers may or may not do prior to a merger must be considered pre-empted by federal law.

The Carrier states that even if the claims under state law were not pre-empted, the claims would have to be denied because the Claimants did not prove that the Carriers had engaged in tortious conduct under Missouri State law. It adds that among the necessary elements necessary to prove that the Carriers committed the tort, it is necessary to prove by substantial evidence, and not by conjecture or speculation, that the UP took measures with the intent to cause the MP to terminate the Claimants' employment. Since each Claimant refused to accept the job offered them in Omaha in the merged railroad, these Claimants cannot state what the UP did that caused them to lose their jobs. The Carrier stresses that the Claimants lost their jobs because they voluntarily terminated their employment with the Carrier.

The Carrier states that factually there was no basis for the state law claims. At the time of the Merger the railroad industry was in a state of change occasioned by deregulation. Vice President Colvin testified that MP instituted changes in its Marketing Department in order to be able to function more profitably

in a competitive market. Mr. Colvin added it was deregulation that brought about the reorganization of the Department and the introduction of the Hay System of Job Evaluation. These moves were not instigated by UP for the purpose of interfering with the Claimants' MP employment. The Carriers state these charges are nothing more than wild speculation and should be dismissed.

Damages

Each Claimant listed the following amount of damages due him. All the Claimants stated by virtue of having to retire from the Carrier prior to their normal retirement age, they were assessed a penalty for early retirement, and another penalty for not being a Carrier employee at the time of their retirement.

Claimant Maeser

\$71,250.00 - all the benefits as a displaced employee under New York Dock or, alternatively, under Article IV thereof- additional severance pay

\$4,807.75 - additional vacation benefits

\$110,592.00 - pension penalty resulting from early retirement

\$5,368,716.00 - interference with business relationship

\$5,555,360.75

Claimant Sengheiser

\$51,445.00 - all benefits due a displaced employee under New York Dock, or alternatively under Article IV additional severance pay

\$66,690.05 - pension penalty resulting from early retirement

\$4,071.30 - additional vacation benefits

\$10,069,239.00 - interference with business relationship

\$10,191,364.35

Claimant Murphy

\$21,270.00 - additional severance pay
\$ 2,634.15 - additional vacation pay
\$34,919.42 - pension penalties - early retirement
\$5,600,000.00 - interference with business relationship
\$5,658,823.57

Claimant Shupp

\$17,275.00 - all benefits due a dismissed employee
under New York Dock, or alternatively
under Article IV thereof additional
severance pay
\$2,732.23 - additional vacation pay
\$2,800,000.00 - interference with business relationship
\$2,820,007.00

The individual Claimants request the Arbitrator to award them the above listed items of monetary damage.

The Carrier, on the other hand, requests the Arbitrator to deny each and every claim item because whatever losses the Claimants incurred or suffered was the result of their own mistakes by involuntarily quitting the employ of the Carrier.

Findings:

The core, but not the exclusive, dispute in this case arises out of the differing meanings that the parties ascribe to the word "employee." While the Carrier contends that this term is a work of art in industrial and labor relations and generally refers to rank and file employees susceptible to union organization, the Claimants, on the other hand, assert that term "employee" as used in merger labor protection conditions is not confined to the limited area of union management situations, but must be given a wider scope and meaning when applied to merger situations and, therefore, labor protection conditions embrace all persons employed by the merged carriers, who are adversely affected by the merger, except the very top corporate officers.

We find from our study of the record, and the history of merger protection conditions that there is a definite and close relationship in the railroad industry between union labor relations and the protective conditions prescribed by the Congress and the Interstate Commerce Commission for merger affected personnel. [A review of the history of labor protection conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term, as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other than administrative, managerial, profession-

al or supervisory in nature.]

We find the Claimants are in error when they contend that the past rulings and activities of the ICC pursuant to the Railway Labor Act and the rulings of the National Mediation Board do not circumscribe the ambit of persons eligible to receive the benefits of labor protection conditions allegedly because these prior rulings were intended basically to determine those employees who were eligible to engage in collective bargaining, and they did not purport to determine who was eligible for, or covered by, the prescribed merger protective labor conditions.

We are unable to accept the Claimants' broad interpretation of "Employee" because we find that it overlooks or ignores the genesis of labor protection conditions in this industry, i.e., how it came about and what it was to cover.

Labor merger protective conditions as we know it stem back to 1936 when the carriers and all the functioning labor unions in the industry negotiated the Washington Job Protection Agreement. This was a product of collective bargaining and intended to cover only the membership of the signatory unions. There is no evidence that the WJPA was ever intended to apply to all railroad personnel. The antecedents of the WJPA resulted from the efforts of the railroad brotherhoods during the depression of the 1930's to get the Congress of the United States to enact a law that would freeze employment of its railroad membership. The Brotherhoods were successful in getting the U.S. Senate to consider the Wheeler-Crozier bill which did provide for a freeze in railroad employment. This

bill also provided it would not become operative if labor and management could negotiate an agreement with respect to dismissal compensation. At this juncture, because of the legislative leverage exercised by the railroad unions, the Carriers agreed to the 1936 WJPA which afforded protection to railroad employees affected by coordinations, which meant mergers, pooling or consolidation of railroad facilities. There can be no doubt that the railroad brotherhoods negotiated the WJPA for the benefit of their membership and not railroad personnel generally. The Brotherhoods were concerned that mergers would reduce employment, with the attendant loss of union members, and this was one, but not the only one, of the reasons why the Brotherhoods were the protagonists in all the efforts to secure merger protection for union members from the Congress and from the ICC.

However, even after the 1936 WJPA, the ICC expressed doubts whether it had the authority to impose protective conditions in mergers under its existing legislative charter. This matter was put to rest when the U.S. Supreme Court held in the Lowden Case in 1939 (308 U.S. 225) that the ICC could impose protective conditions in merger consolidations in order to carry out a National policy of railroad consolidations. Nevertheless, the Brotherhoods were not content to rest upon the Lowden decision and they pushed to get legislation to ensure that the ICC had the authority to act in these matters. The Unions' efforts in this matter resulted in Congress enacting the 1940 Transportation Act. This legislation amended the ICC Act in Section 5(2)(f) which provided

for mandatory protection for four years of ICC approved transactions. It must be stressed that it was the railroad brotherhoods who were the proponents for the enactment of Section 5(2)(f) for the benefit of their members.

The ICC moved forward in prescribing protective conditions in other than mergers when it imposed in 1944 labor protection in an abandonment matter (Oklahoma Conditions). Here the ICC departed somewhat from the provisions of the WJPA with respect to giving unions advance notice and the need to negotiate an implementing agreement.

In 1948 the railroad unions took issue with the ICC when the latter issued its New Orleans Conditions, maintaining that the four year period in Section 5(2)(f) was only a minimum and not a maximum period of protection. The U.S. Supreme Court in 339 U.S. 143 (1950) eventually sustained the Union's position. In all the proceedings, either before the ICC or the court, the railroad brotherhoods were the moving parties acting in behalf of their membership rather than for all persons employed in the industry.

It is noteworthy that in the later mergers involving the Burlington Northern and the Penn Central these carriers and the labor organizations representing their work force negotiated labor protection conditions even before the ICC approved the mergers, and the ICC then accepted and imposed these negotiated protective conditions as an integral part of their approval of these mergers. These Carriers negotiated these protective conditions as a quid pro quo for getting the Unions to abstain from objecting or pro-

for mandatory protection for four years of ICC approved transactions. It must be stressed that it was the railroad brotherhoods who were the proponents for the enactment of Section 5(2)(f) for the benefit of their members.

The ICC moved forward in prescribing protective conditions in other than mergers when it imposed in 1944 labor protection in an abandonment matter (Oklahoma Conditions). Here the ICC departed somewhat from the provisions of the WJPA with respect to giving unions advance notice and the need to negotiate an implementing agreement.

In 1948 the railroad unions took issue with the ICC when the latter issued its New Orleans Conditions, maintaining that the four year period in Section 5(2)(f) was only a minimum and not a maximum period of protection. The U.S. Supreme Court in 339 U.S. 143 (1950) eventually sustained the Union's position. In all the proceedings, either before the ICC or the court, the railroad brotherhoods were the moving parties acting in behalf of their membership rather than for all persons employed in the industry.

It is noteworthy that in the later mergers involving the Burlington Northern and the Penn Central these carriers and the labor organizations representing their work force negotiated labor protection conditions even before the ICC approved the mergers, and the ICC then accepted and imposed these negotiated protective conditions as an integral part of their approval of these mergers. These Carriers negotiated these protective conditions as a quid pro quo for getting the Unions to abstain from objecting or pro-

testing the proposed mergers. These are the reasons why we cannot accept the Claimants' contention that there is no nexus between the collective bargaining relationship in this industry and the imposition of labor protection conditions in the industry. The labor protection conditions were basically brought about by railroad brotherhoods for its members and were not intended to be directed to or established for all personnel employed in the industry who might be adversely affected by the merger. There is no history to show that merger protection conditions prescribed by the ICC have as broad a scope as the Claimants contend, i.e., covered all employees in a generic sense. All the history of this subject militates against the position of the Claimants.

We turn now to the Claimants' reliance on the Congressional definition of "employee" as provided for in 1973 Regional Railroad Reorganization act and the 1979 Milwaukee Railroad Restructuring Act and the 1980 Rock Island Railroad Transition and Employee Assistance Act. The Claimants assert that the definition of "employee" in these Acts reveal a Congressional intent to extend protective benefits to all employees except the few top corporate officers.

We are initially constrained to note that the Congressional action in these three situations does not involve or represent merger situations between viable railroads. It rather represents Congressional action coping with emergencies created by bankruptcies and liquidations of major carriers that could wreck havoc on the affected geographical areas. Congress felt compelled to pass the

3RR Act to ensure railroad service would continue after the bankruptcy of the Penn Central and the six other northeast carriers. The creation of the Conrail System was an unprecedented act for the federal government to take and the Congress wanted to ensure that all persons employed by all these carriers that constituted Conrail would be treated equally with the federal funds involved. It must be noted that the employee protection benefits granted by the Regional Railroad Reorganization Act came from the treasury of the federal government as a part of a \$2.5-billion grant and not from any carrier.

The Milwaukee Reorganization Act and the Rock Island Employee Assistance Act also represented extraordinary measures by the federal government to ensure that the citizens of that part of the country were not left without rail service and that the employees of those carriers received various forms of assistance in making an adjustment when these two carriers stopped operations, such as supplementary unemployment insurance, priority in railroad placement, etc. The Rock Island was actually in the process of being liquidated when Congress enacted these emergency measures. However, none of these situations represent the normal circumstances under which the ICC imposes labor protection conditions in the usual merger situation.

However, it is noteworthy that in the legislation for both these carriers, i.e., Rock Island and Milwaukee, when it came to providing specific employee protection provisions the legislation emphasized the role of employees represented by labor unions. For

example, the Milwaukee Act stated:

"Section 9(a):

The Milwaukee Railroad and labor unions representing employees of such railroad may, not later than 20 days, enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad."

The Rock Island Act states:

"Section 106(a):

No later than 5 days after the enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island RR and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board may enter into an agreement providing protection for employees of such railroad who may be adversely affected as a result of a reduction in service by such railroad."

We stress that these three cited situations do not represent the usual and normal merger occurrences and it is also noteworthy that Congress wanted the labor protection conditions negotiated by the cognizant labor unions on those properties representing their membership. The aforesaid legislation shows that employee protection even in non merger situations is an integral part of the collective bargaining process of railroad labor relations, and therefore the ICC definitions of employees and subordinate officials must be given great weight in merger protection matters, just as it is in determining what group of employees may engage in collective bargaining in railroads. "Employees" in labor protection condition is a word of art and is not intended to be given a general and all encompassing meaning as the Claimants contend.

We find, in the instant case, that the term "employees" as used in New York Dock excludes the Claimants from coverage because a review of their duties and responsibilities reveals that they occupied or held positions that are properly categorized as Managerial, Administrative or Supervisory personnel rather than rank and file employees who could properly be represented by a labor union.

We find that Claimant Maeser, who as the General Manager-Marketing-Commodities, with the responsibility of supervising the work of six Managers of several Commodity groups as well as supervising 65 rank and file employees, union and non union, and earning \$75,000 annually plus substantial bonuses, is not and was not an "employee" as this term is applied either in general parlance of labor relations or labor protection conditions.

We will subsequently set forth why Mr. Maeser also is not an Article IV "non-agreement" employee.

In the same vein, we also find Claimant Sengheiser, a Marketing Director of Chemical and Petroleum Products, one of the several commodity groups in Marketing Division under General Manager Maeser, supervising 18 employees, directly and indirectly, and earning \$61,000 annually, had duties and responsibilities that transcended those of an "employee" and thus was outside the purview of Article I of New York Dock. He was a Manager even though he did not have the direct authority to hire or discharge a member of his group. He could make recommendations in this area and his recommendations were persuasive.

We find that Claimant Murphy was assigned administrative duties which he filled in varying degrees. We are not at liberty to overlook the fact that if Mr. Murphy was only performing menial and messenger duties, he was not paid the salary of a menial or a messenger when he received \$39,720. This is not the salary paid a menial or a messenger. His annual salary is consonant with the duties set forth in his Job Description. There is also testimony in the record to indicate that he performed duties for the Marketing Vice President and the Assistant Vice President that were not of a menial nature and were in keeping with an Administrative Assistant to a ranking executive. Our overall view of Claimant Murphy's job duties lead us to conclude that he was an administrative, and not a rank and file, employee and therefore not entitled to New York Dock protection.

We likewise find Claimant Shupp a supervisory employee and beyond the scope of New York Dock protection. He was the supervisor in overall charge of the Files, the Mail Room and Supplies, supervising approximately 14 employees. He received an annual salary of \$38,760 and was entrusted with the duties of ensuring that the files were intact and the Mail Room operated efficiently under his supervision and adequate supplies were maintained. There can be no doubt that he was a bona fide supervisory employee not within the scope of Articles I and IV of New York Dock. As a supervisor, he was not a rank and file employee as that term was intended to apply to those individuals entitled to merger protection.

[We have no doubt that there were individuals employed by the

MP who were disadvantageded or whose economic well being adversely affected by the merger of these two Carriers. However, that is not the criterion for labor protection.] The rationale and history of these benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

In the past 50 years history of the adjudication of labor protection disputes, there has been no court decision or arbitration award, with the exception of the Curley Award, that has held that an individual employed by a railroad, regardless of position, was entitled to labor protection because his job tenure or job status was disrupted or adversely affected by a merger. Protection has only been accorded to rank and file employees and not to those individuals holding positions which could be denominated as executive, professional, administrative or supervisory.

It is not unknown in our system of labor law to exclude certain working personnel from existing statutory benefits of a given law. Under the Fair Labor Standards Act, administrative, professional and supervisory personnel are excluded from the overtime provisions. The National Labor Relations act excludes supervisors from its coverage. Many Court cases have held that an employee who works without supervision or control of an employer, is an independent

contractor and not an employee. Our present day labor relations law recognizes that there are many persons working for a Company who are not "employees" of that Company for the purposes of receiving the benefits that a given law may bestow or grant "employees" of said Company. We repeat that the word or term "employee" is a word of art and is not used in its generic sense, in application of New York Dock Conditions.

In short we find that it was the Claimants' job duties and responsibilities that removed them from that class of persons who were entitled to receive the protection of New York Dock.

We now turn to the Claimants' reliance on Article IV of New York Dock to support their claims. We find the operative word in this Article is "employee." We find that this Article covers the situations of individuals who are engaged in tasks or jobs which are within the scope of a labor organization, but because of extrinsic factors, or the nature of their job make it inappropriate for the individual to be a member of a labor union, i.e., the secretary to the President of the Company, or employee in the industrial relations department. It is not the work per se that makes the individual a non agreement employee but rather the confidential or private nature of the job that makes it compromising for them to be individuals in good standing in the Union.

Another example of such a non agreement employee would be, on certain properties, a yardmaster or a supervisor in the mechanical shops. In cases where, on some part of the Carrier property these crafts or classes of employees are unionized, and on other

parts of the property they are not. Even where such employees are not in a union, they would be considered non agreement employees within Article IV who are entitled to, or eligible for, coverage by Article IV. It is recognized that the Yardmaster or Shop Supervisor performs work that is or could be within the scope of a union contract even though these individuals are not represented by a labor union, and so they are entitled to receive substantially the same benefits and level of protection accorded to members of labor organizations.

We do not find the Claimants in this case to be the non agreement type of employees mentioned in Article IV. The Claimants are not employees because the basic nature of their duties are either managerial, administrative or supervisory and they did not perform work which was susceptible to union organization or union coverage.

We find the weight of court and arbitral authority has held, with the exception of the Curley Award on this property, that individuals holding jobs of the nature and character as the Claimants, are not employees within the purport and meaning of both Article I and Article IV of New York Dock.

Arguendo, and most importantly, even if it could be contended that the Claimants were protected employees within the purview of New York Dock, the facts of record disclose that they were neither "dismissed" nor "displaced" employees. [It is a distortion of the concept of an employee disadvantaged by a merger, to hold that when such an employee has been offered a relatively comparable job at the same salary in the merged company, that this employee is a dis-

missed or displaced employee and thus adversely affected.]

We find that when a legal merger has occurred, it is to be expected that there will be disruptions in the organizational life of the affected personnel. It is not possible "to make an omelet without breaking the eggs." It is unrealistic to expect two major carriers could be integrated and each employee would have the same position he or she formerly held in the old company.

For example, Claimant Maeser cannot properly contend he was a displaced employee when the Carrier offered him a job at his MP salary but with somewhat different responsibilities. To be "adversely affected" under New York Dock, the criterion is financial and not emotional loss. Even if Mr. Maeser's feelings and pride were hurt by the new job, these personal feelings do not transmute him into a displaced person within the meaning of New York Dock.

We find that Claimant Sengheiser could not properly attach conditions to the Carrier's job offer at his same salary, and then maintain he did not receive a job offer in the merged Carrier because the Carrier would not accede to his conditions, and such a failure resulted in his becoming a displaced or dismissed employee. While Claimant might have been apprehensive about accepting the Omaha job offer, he cannot maintain that he did not receive a job offer that paid him his former salary with substantially the same job responsibilities. Under New York Dock, even if he had been dismissed after transferring to Omaha, he would still have been protected if he could prove a causal nexus between his later dismissal and the merger. However, he was not at liberty to reject

a comparable job offer on the potential basis that he might be subsequently terminated after he had effected a transfer to Omaha. These apprehensions, real or illusory, did not make Claimant Sengheiser a dismissed or displaced employee under New York Dock.

We find with respect to Claimant Murphy that the Carrier made him a bona fide offer in an effort to accommodate him in light of his compelling and poignant personal situation, but he refused to accept the Carrier's offer for a St. Louis job and kept pressing the Carrier for additional concessions to the point where the Carrier refused to concede. We find the Carrier made a bona fide offer to let the Claimant remain in St. Louis in a temporary position and still preserve his right to a severance allowance when this temporary job ceased. The Claimant rejected this offer, and thus he cannot contend with merit that he was dismissed or displaced because he doubted the alleged authority of the Carrier official who made him the offer, especially since that Carrier official was the official charged with coordinating all the transfers from St. Louis to Omaha. The Claimant was not entitled to demand the Carrier guarantee him a St. Louis job until he was eligible for an early retirement, and still insist the Carrier did not offer him a job and so converted him into a dismissed or displaced employee.

We find the record does not support Claimant Shupp's contentions, i.e., he was not offered a job in Omaha. While the Carrier admits it did not designate a specific job for Mr. Shupp, it told him that he would receive his regular salary and have a job in his area of competence, namely a job in the File and Mail room. The

fact that he was not offered a specific job, but given assurance of economic security, did not make Supervisor Shupp a dismissed or displaced employee within New York Dock. It could be expected in a massive transfer of this nature that the Carrier will not be able to delineate every specific job to which an employee would be transferred.

In short, we find the Carrier made bona fide job offers to the four Claimants which they rejected for various reasons. We find this was not permissible and their actions did not convert their status into that of dismissed or displaced employees. On the record before us, we have no recourse but to find that the Claimants rejected the Carrier's job offers and instead elected to resign their positions and take the proffered severance allowances. Such a course of action removed them from New York Dock.

Interruption of Claimants' Business Relationship

We find no credible evidence to support the Claimants' charges that the Union Pacific engaged in a deliberate course of conduct to have the Missouri Pacific interfere with or terminate their employment.

We find that MP engaged in certain acts in order to be able to cope with the conditions in the industry brought about by deregulation. We find that MP's reorganization of its Marketing Department and instituting a Job Evaluation System as the Hay System, was not a wilful plot contrived to hurt or disadvantage the Claimants. The actions of the MP to reorganize its Marketing department in order to cope with the consequences of deregulation and

the discussions conducted with the UP to prepare for the merger, were actions that were carried on under a color of right permitted by the Interstate Commerce Commission. We find no probative evidence to show that the actions complained of by the Claimants were the result of a UP conspiracy to interrupt their employment relationship with the MP. There is no evidence that the UP actions were even conducted with an awareness of the Claimants, or with any design to harm them. The fact that the UP offered all four Claimants jobs at their former salaries is proof that the UP did not seek or attempt to interrupt the Claimants' business relationship with the MP.

Vacations

We find the Claimants' position with respect to the contested vacation allowances more persuasive than the position advanced by the Carriers.

We find the evidence introduced by the Claimants with regard to the memoranda and notices issued by MP and UP officials clearly conveyed to the Claimants and other MP personnel that their MP vested vacation rights would be "grandfathered" and they would not lose any of their vacation rights which they had earned while they were in the employ of MP.

We find that the UP Booklet on Benefits (Claimant Ex. #4) did not put the Claimants on actual notice that the other material issued by UP and MP officials were modified by this Booklet. We find that the four line reference to termination of employment affecting vacations in a 73 page booklet, the circulation and distri-

bution of which was questioned by some of the Claimants, was not such a notice that could overcome the broad and comprehensive memoranda and letters that in fact were given the claimants by responsible Carrier officials.

We find that the Claimants could properly rely upon the specific notices addressed to them about the MP vested vacation rights they would possess as a result of the merger, rather than an obscure paragraph in a detailed booklet. The overt evidence of record could easily lead the Claimants to conclude that they would not be deprived of their MP vacation rights as a result of the merger.

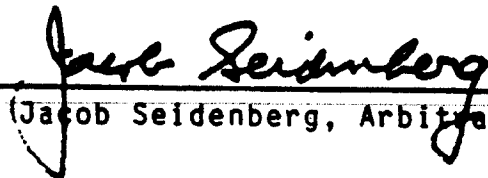
In summary with respect to the several claims filed by the Claimants, we find the following:

- (1) Because of the managerial, administrative and supervisory responsibilities exercised by the Claimants in their respective positions, we find that the Claimants were not "employees" within the meaning and intent of Article I and Article IV of the New York Dock Conditions;
- (2) Because the Claimants were offered substantially comparable positions of responsibility at their MP salaries, which offers they rejected for questionable reasons, and instead elected to resign their MP employment and collect their severance allowances, we find that the Claimants were not dismissed or displaced employees within the meaning and intent of

Article I of the New York Dock Conditions;

- (3) We find no merit to, and hereby deny, the claims that the Union Pacific tortiously interrupted with the Claimants' business relationship with the Missouri Pacific;
- (4) We find that the Carriers erred in computing the Claimants' accrued 1984 MP vacation allowances, and they are hereby directed to compute these allowances pursuant to the MP vacation formula.

Award: Claims disposed of in accordance with the aforesaid Findings.



(Jacob Seidenberg, Arbitrator)

December 17, 1987

UP EXHIBIT

27

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.

UNION PACIFIC EXHIBIT 27
PAGE 2 OF 11

As District Sales Managers, the Claimants' primary responsibility was to secure new freight business and to service and maintain communications with existing customers of the Carrier. They did not not supervise and employees nor did they establish policy for the Delaware and Hudson. The Claimants asserted that they had no authority to set, negotiate or change freight rates with customers. Rather, all rates were established by the Marketing and Sales Department located in North Billerica, Massachusetts.

The facts further evidence that on March 3, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter referred to as the BMWE) struck the Maine Central. Shortly thereafter, the BMWE extended its picketing to the Boston & Maine and to the Delaware and Hudson. The strike lasted until May 16, 1986. According to the Carrier, this strike and its attendant picketing caused all three Guilford railroads to suffer massive losses in traffic and revenue. Consequently, Guilford petitioned the United States District Court for the District of Maine for permission to abolish 725 agreement positions on the three Guilford railroads. It should be noted that the U. S. District Court for the District of Maine had jurisdiction over a lawsuit which had been filed on behalf of Guilford agreement employees.

On July 21, 1986, the U. S. District Court granted Guilford permission to abolish 725 agreement positions. But it also ordered Guilford to simultaneously abolish 93 management positions. On July 23, 1986, Guilford abolished these positions, including the 93 managerent positions.

According to the Carrier, the Claimants' positions were abolished pursuant to the Court's July 21, 1986 Order. The Claimants ~~were~~ offered positions in the Marketing Department at North Billerica, Mass., but they declined to transfer. It should be noted that Mr. Dominick secured employment as a salesman in November, 1986; and Mr. Adams obtained employment as a sales administrator on October 6, 1986. Neither Claimant is working in the railroad industry. As of the date of the arbitration hearing, Mr. Williamson had not obtained employment.

On August 25, 1986, Attorney Homer E. Peters submitted claims on behalf of Messrs. Adams, Dominick and Williamson for a separation or severance allowance under the New York Dock Conditions. Those claims were denied by the Delaware and Hudson since, in its view, the three Claimants had served as "officials," not as "employees." The parties agreed to consolidate the three claims into a single arbitration proceeding since the issues raised by the claims were identical. The parties mutually selected the undersigned Robert M. O'Brien to serve as the Neutral Member of the Arbitration Committee that was established pursuant to Article I, Section 11, of the New York Dock Conditions.

The Arbitration Committee (hereinafter referred to as the Committee) met on February 19, 1987, to hear the claims submitted by Messrs. Adams, Dominick and Williamson. Both parties submitted extensive evidence and arguments in support of their respective positions at the February 19, 1987,

hearing. They also filed Reply Submissions following the hearing. Based on the entirety of the extensive record presented by the parties, this Committee renders the following decision on the claims now before us.

CLAIMANTS' POSITION

It is the Claimants' contention that they were employees of the Delaware & Hudson when their employment was terminated in July, 1986. They emphatically denied that they were managerial employees as the Carrier claimed. They stress that their skills were not readily transferable as evidenced by their difficulty in obtaining employment; that they did not exercise independent judgment; that their salaries were less than the wages earned by many BRAC represented employees; and that they had no authority to negotiate rates or to issue rebates to customers. The Claimants also maintain that they had no supervisory authority over any employees. Moreover, their District Sales Manager positions were on the bottom of the organization chart for Guilford's Marketing and Sales Department.

It is the Claimants' position that they are "dismissed employees" as that term is used in the New York Dock Conditions and that they are therefore entitled to a "dismissal allowance" under Article I, Section 6, of the New York Dock Conditions. The Claimants maintain that they are also entitled to protection under Article I, Section 4, of the New York Dock Conditions since they were "[E]mployees of the railroad who are not represented by a labor

organization...." According to the Claimants, they are therefore entitled to a "separation allowance" under the Master Implementing Agreement which the Delaware and Hudson negotiated with BRAC on October 17, 1984.

Based on all the foregoing, the Claimants contend that they are entitled to one year's salary pursuant to the provisions of the Washington Job Protection Agreement which Agreement is incorporated by reference into the New York Dock Conditions less the wages earned by Messrs. Adams and Dominick during the year following their termination.

POSITION OF THE DELAWARE AND HUDSON RAILWAY

It is the position of the Delaware and Hudson that the Claimants are not entitled to a dismissal or a separation allowance since they were not employees as that term is normally used in the railroad industry and applied under the New York Dock Conditions. Rather, for a considerable period of time, the Claimants had been employed as officials in its Marketing and Sales Department. However, according to the Carrier, the Interstate Commerce Commission intended labor protective benefits to be afforded only to employees of a railroad, not to its officials.

The Carrier stresses that the Claimants' positions were beyond the scope of any collective bargaining agreement on its property. Indeed, the Carrier submits that no labor organization has ever attempted to represent its District Sales Managers. These positions were therefore neither subject to nor entitled to union representation, according to

the Carrier. Consequently, the Claimants were neither employees nor subordinate officials and are therefore not entitled to protective benefits under the New York Dock Conditions, in the Carrier's opinion.

It is also the Carrier's position that even assuming that the Claimants are covered under the terms and conditions of the New York Dock Conditions, they are still not entitled to protective benefits since they have failed to establish that they were deprived of employment as a result of a "transaction" as defined in Section 1(a) of the New York Dock Conditions. It is the Carrier's contention that the Claimants' positions were abolished as a result of a Federal District Court Order following the 1986 BMW strike, not because of any "transaction."

For all the foregoing reasons, the Carrier urges this Committee to deny the Claimants' requests for a dismissal or a separation allowance.

FINDINGS AND OPINION

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

are not entitled to benefits under the New York Dock Conditions.

The question before this Committee is not one of first impression. Indeed, the Neutral Member of this Committee addressed a similar issue on this property involving one James M. Benham who had been employed by the Carrier as Manager, Pricing and Marketing - Intermodal. As observed in the Benham Award, the Interstate Commerce Commission has never formulated a precise definition of either "employee" or "official." However, as a result of ICC administrative rulings; judicial decisions; and arbitration awards under the New York Dock Conditions, criteria have evolved to assist tribunals in resolving the question of "employee" vs. "official." These standards, which are explained on pages 9 and 10 of the Benham Award, are equally applicable to this proceeding, in our judgment, and shall therefore be incorporated by reference herein.

Quite frequently, the distinction between an "employee" and an "official" is not all that clear. In the final analysis, this is a factual question that must be resolved by carefully examining the nature and the job duties of an individual(s) who is claiming the protective benefits provided by the New York Dock Conditions. It is obvious to this Committee that the Claimants' District Sales Manager positions possessed characteristics of both an "employee" and an "official." For instance, like most rank and file employees, the Claimants did not supervise any employees. In fact, there were no subordinates responsible to them. Also,

the Claimants' respective salaries were less than the wages earned by some BRAC represented employees on the Delaware and Hudson. Moreover, the Claimants had no authority to either set or negotiate rates with customers. Evidently, this was the sole responsibility of Guilford's Marketing and Sales Department.

Additionally, the Claimants insist that they did not formulate sales policy for the Delaware and Hudson. They also claim that they had less independence than the Carrier suggests and that their itinerary was routinely reviewed by their supervisor, James Bean, Vice-President of Sales, who frequently changed it. The Claimants also deem it noteworthy that their positions were on the very bottom of the organization chart for the Guilford Marketing and Sales Department.

Clearly, the foregoing job duties and responsibilities of the Claimants were more akin to those of an employee than to those of an official. Yet, the position of District Sales Manager also possessed many of the attributes of an official of the Carrier. For example, District Sales Managers on this property have never been represented by a labor organization nor has any labor organization ever attempted to represent them. That the Claimants retained their seniority on the BRAC roster(s) clearly did not bring their positions under the BRAC agreements with the Delaware and Hudson, in the judgment of this Committee.

It must also be observed that unlike rank and file employees, the Claimants worked out of their respective residences and were not under the daily supervision of any management representative. Moreover, like other Carrier officials, the Claimants received an automobile allowance for using their personal vehicles while discharging their sales duties. Despite the Claimants' insistence to the contrary, the Carrier has convinced this Committee that the Claimants were required to exercise independent judgment and initiative in their capacity as District Sales Managers.

This Committee further wishes to observe that although the Claimants did not immediately secure employment following elimination of their positions in July, 1986 (Mr. Williamson has still not obtained employment), nevertheless their skills as salesmen were certainly more transferable than the skills of most railroad employees. Obviously, the position of sales representative is not unique to the railroad industry unlike that of a conductor or an engineer, for example. Moreover, the Claimants were entitled to a number of fringe benefits which were not available to rank and file employees on this property; or, if they were, were less beneficial than the perquisites available to the Claimants.

After carefully weighing all of the foregoing job duties and responsibilities of District Sales Managers on this property, it is the considered opinion of this Committee that Messrs. Adams, Dominick and Williamson were not "employees" as that term is commonly understood in the railroad industry and under the New York Dock Conditions. Rather, in our view,

the Claimants were Carrier "officials." Consequently, they were not entitled to the protective benefits provided by the New York Dock Conditions following their terminations in July, 1986, despite their many years of exemplary service on behalf of the Delaware and Hudson Railway. In the light of this determination, this Committee finds it unnecessary to address the additional issues raised by the parties during the arbitration proceeding.

AWARD

John F. Adams, Joseph Dominick and James Williamson were not "employees" of the Delaware and Hudson Railway Company but were Carrier "officials." Accordingly, they were not entitled to a separation allowance or a dismissal allowance under the New York Dock Conditions. The claims they submitted on August 25, 1986, are therefore denied.

Robert M. O'Brien

Robert M. O'Brien - Neutral Member
Dated: 10/22/87

Homer E. Peters under protest

Homer E. Peters - Claimants' Member
Dated:

Daniel J. Kozak

Daniel J. Kozak - Carrier Member
Dated: 11/27/87

UP EXHIBIT

28

In the Matter of Arbitration Between
Gerald Thomas

and

Brotherhood of Locomotive Engineers

and

Union Pacific Railroad Company

Pursuant to Article IV of the New York
Dock Conditions Imposed by the Inter-
state Commerce Commission in Finance
Docket No. 30,000

Before Arbitration Committee

Members:

Wayne E. Naro
Director of Labor Relations

Carrier Member

John E. Cook
Director of Labor Relations

Carrier Member

J.L. Dayton
Vice President

Employee Organization
Member

Prof. Lamont E. Stallworth
Labor Arbitrator

Neutral Member

Appointment of Neutral Arbitrator

November 4, 1987

Hearing Held

Salt Lake City, Utah
February 17, 1988

ISSUES IN DISPUTE:

The Parties submitted the following issues to the
Arbitration Committee:

1. Should the claim be denied because it was filed in an untimely manner?
2. Was G. Thomas, at the time of his removal from a non-agreement position, an "employee" subject to the protection of the New York Dock conditions?

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?

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.

STATEMENT OF FACTS:

In this dispute the Claimant charges that he is entitled to benefits under the New York Dock conditions because of the elimination of his position as Manager Labor Relations (Trainee). The Carrier contests the claim, alleging that it was not filed in a timely manner, that the Claimant is not an employee covered by the New York Dock conditions, and that he did not lose his position because of a merger-related transaction.

According to the Organization, the genesis of this claim lies in the merger among the Union Pacific Railroad Company (UP), the Missouri Pacific Railroad Company (MP), and the Western Pacific Railroad Company (WP). The three railroads first applied to the Interstate Commerce Commission (I.C.C.) for approval of the merger on September 15, 1980. On September 13, 1982, the I.C.C. voted to approve the merger, under the name Union Pacific Railroad (UP). Several other railroads attempted unsuccessfully to block the merger, and it became final on December 22, 1982. (Carrier's Submission, p. 3-5).

In its opinion approving the merger the I.C.C. also held that the New York Dock conditions would apply to the merger, to offer some protection to the thousands of employees who would be affected by the merger. (Carrier's Submission, p. 3). In this case the Organization contends and the Carrier contests that the Claimant is covered by these conditions.

The Claimant began working for the Carrier as a clerk in October, 1977. Through September, 1980, he held positions as a Management Trainee, a Brakeman, and a Fireman/Engineer, each for a relatively short period of time. From 1980 through June, 1985 he held the post of Division Personnel Officer in Portland, Oregon. (Organization Submission, pp. 3-4; Carrier Submission, p. 7).

In July, 1985, the Claimant obtained the position of Manager (trainee) of Labor Relations, also in Portland. According to the Carrier's official "generic" description of the position, the Claimant's duties as a Manager of Labor Relations included:

- 1) To develop and implement systems, methods and procedures for efficient administration of labor contracts;
- 2) To assist in resolving local level grievances and time claims;
- 3) To guide line officers and supervisors in appropriate discipline administration; and
- 4) To initiate and direct studies of obsolete work rules and procedures in order to provide the Assistant and Regional Directors with suggested revisions.

(Carrier's Exhibit C, p. 3).

The job description also states that the position reports to the

Assistant Director of Labor Relations. (Carrier's Exhibit C, p. 1). The Organization does not dispute that these were the duties assigned to the position, but in effect contests how much authority for these duties the Claimant had assumed as a trainee.

The Carrier sent a letter on June 9, 1986, informing the Claimant that his employment in a non-agreement position would terminate on August 30, 1986. (Carrier Exhibit D). On June 25, 1986, the Claimant informed the Carrier that he intended to participate in its Involuntary Force Reduction Program (IFRP) and return to his former position as a fireman in a bargaining unit represented by the United Transportation Union. (Carrier's Exhibit E). The Claimant did not accept the lump sum payment provided for by the IFRP and did not sign the release form given to participants in the program. On September 2, 1986, he returned to his former position as a locomotive engineer, based in Pocatello, Idaho. (Carrier's Submission, p. 8).

According to the Carrier, its first notice of a claim was an undated letter from the Claimant received by the Carrier on July 21, 1987, applying for protective benefits under the New York Dock Agreement. (Carrier's Exhibit F, p. 1). Another letter from the Claimant dated July 18, 1987, specifically linked the Claimant's job loss to the Carrier's restructuring of the three railroads as a result of the merger. (Carrier's Exhibit F, pp. 2-3).

The Carrier denied the claim on the basis that the Claimant had not filed it in a timely manner. The Carrier also contended

that the Claimant had not been affected by a merger-related transaction. (Carrier's Exhibit G, letter of August 13, 1987). Later the Carrier also denied the claim on the basis that the Claimant was an officer and not an "employee" of the Carrier, as that term is used in the New York Dock Agreement. (Carrier's Exhibit J).

The Parties could not resolve the claim and agreed to arbitrate it, with the undersigned acting as the Neutral Member of the Arbitration Committee. The hearing was held at the Carrier's Salt Lake City, Utah offices on February 17, 1988.

In their submissions the Parties also raised several other contested issues, which were also addressed at the hearing. The Organization raises the issue of certain testimony provided by the Union Pacific's then Vice President of Labor Relations and Personnel, Philip A. Jordan, before the I.C.C. when it was considering the merger. The Organization suggests that this testimony supports its position that the Carrier foresaw that the principal employees to be affected by the merger would be non-agreement personnel, and furthermore, that the Carrier intended the New York Dock conditions to apply to these employees. (Organization Submission, pp. 1-2). The Carrier disputed these contentions at the hearing. The Carrier also provided in its submission a chronology of the Company's reorganization, as it affected the Claimant's position. According to the Carrier, the reorganizations that affected the Claimant's job had nothing to do with the merger, but rather were related to the Carrier's

general desire for a more streamlined and efficient labor relations/personnel function. Any merger-related transactions affecting labor relations or personnel were completed long before the actions affecting the Claimant's position, according to the Carrier.

(Carrier's Submission, pp. 5-6).

The Organization disputes this interpretation of the facts, and asserts that the changes described by the Carrier were directly related to its original merger. The Parties could not resolve these disputes and they are part of the claim before this Committee. It is within this factual context that the instant dispute arises.

EMPLOYEE ORGANIZATION'S POSITION

The Organization's position is that the Claimant was affected by a merger-related transaction when he lost his non-assignment position. Furthermore, the Organization argues that the Claimant is an employee intended to be covered by the New York Dock conditions.

The Organization contends that the Claimant is a "subordinate official," entitled to protective benefits. According to the Organization, the Claimant's job was an entry-level position, subordinate to two Assistant Directors and a Director of Labor Relations. The Organization points out that the job carries approximately 478 job evaluation points, less than other jobs in which the Claimants have been held to be "

subordinate officials," subject to New York Dock protection. (Organization Submission, pp. 2-3).

At the hearing the Organization argued that the Claimant was never allowed to exercise independent management authority. The Organization contends that this factor distinguishes the instant case from the arbitration decisions relied upon by the Carrier.

In support of its position, the Organization also relies upon the Carrier's alleged promises to protect employees affected by the merger, contained in its representations before the I.C.C. before the merger was approved. According to the Organization, the Carrier specifically stated through its representative Mr. Jordan that the principal employees to be affected would be non-agreement employees, and the Carrier specifically agreed to the adoption of the New York Dock conditions to protect affected employees. Therefore, the Organization contends, the Carrier intended that the New York Dock conditions apply to non-agreement employees affected by the merger. (Organization Submission, pp. 11-12).

The Organization also points out a sequence of events involving the reorganization of the Personnel and Labor Relations Departments, which it contends resulted in the termination of the Claimant's non-agreement position. The Organization argues that these reorganizations were made as a result of the general merger which created the new Union Pacific Railroad. (Organization Submission, p. 11).

The Organization also contends that the Carrier erred when it denied the claim on the basis that it was not filed in a timely manner. According to the Organization, there is no time limit governing the filing of a claim which seeks the protective benefits of the New York Dock Agreement. There is a section requiring the filing of a claim for losses from home removal, one of the benefits sought by this Claimant, which requires filing within a year of the date the employee is required to move. According to the Organization, the Claimant met this deadline. (Organization Submission, pp. 14-15).

Therefore the Organization argues that the claim may not be denied on the basis of timeliness. In addition, the Organization contends that the Claimant was an employee protected by the New York Dock conditions and that he was affected by a merger-related transaction.

CARRIER'S POSITION:

The Carrier contends that the claim should be denied first on procedural grounds, i.e. because it was not filed timely and because the Claimant is not an employee intended to be covered by the Agreement. Secondly, the Carrier argues that the claim should be denied on its merits, because the Claimant was not affected by a merger-related transaction.

In support of its position on the procedural issues, the Carrier acknowledges that there are no precise time limits in the New York Dock conditions. However, according to the Carrier, there is an inherent obligation to file a claim in a timely

manner, and the Claimant violated that obligation. The Carrier cites a number of arbitration opinions allegedly supporting its position. (Carrier Submission, pp. 12-15).

The Carrier contends that the most important issue in the case is whether the Claimant is an employee, as that term is used in the New York Dock conditions. According to the Carrier, he is not, because he occupied a position as an "official," rather than an "employee" or "subordinate official."

The Carrier contends that the term "employee" includes only those employees and subordinate officials who are both subject to and entitled to union representation, but who are not represented. (Carrier Submission, p. 18). The Carrier further argues that the Claimant does not fall into this category, for a number of reasons. The Carrier presents a very detailed history of the word "employee" as it has been used in a variety of labor relations laws in the railroad industry.

According to the Carrier, a review of the "Ex Parte 72" decisions by which the I.C.C. determines who is a subordinate official, do not reveal any position comparable to the Claimants in which the employee was found to be a subordinate official. (Carrier Submission, p. 24). The Carrier also relies upon arbitration decisions which it contends demonstrate that the Claimant should be viewed as an official, rather than a subordinate official. The Carrier also relies upon decisions which have determined that an official is not entitled to the New York Dock protections. (Carrier Submission, pp. 25-41).

The Carrier also argues that the Claimant did not lose his position because of a merger-related transaction. According to the Carrier, all merger-related transactions were completed before the Claimant lost his position. Furthermore, the Carrier contends that the loss of the Claimant's position resulted from other organizational changes within the railroad which were simply designed to improve its overall efficiency and operation. For example, the Carrier notes that the Portland, Oregon office never conducted labor relations for the Western Pacific or Missouri Pacific Railroads. Therefore, the closing of that office was not a result of the Union Pacific's merger with these other two railroads, but rather a simple organizational change to improve the efficiency of the Carrier. (Carrier Submission, pp. 41-43).

The Carrier also points out that since it did not need the authorization of the I.C.C. in order to effect the change which caused the Claimant to lose his job, then it could not have been a merger-related transaction. According to the Carrier, it had the right to merge its labor relations offices before the merger without I.C.C. approval, and therefore it retained this right after the merger. (Carrier Submission, pp. 44-45).

The Carrier also argues that the loss of the Claimant's position through the Involuntary Force Reduction Program does not make it a merger-related transaction either. Lastly, the Carrier contends that if the Committee were to rule in the Claimant's favor, he is not entitled to non-agreement fringe benefits,

because this would be compensation at a level above that of agreement employees, and the New York Dock conditions mandate only comparable benefits. (Carrier Submission, pp. 49-50).

For all of the foregoing reasons, the Carrier contends that the claim should be denied, on both procedural and substantive grounds.

OPINION:

This case involves a claim to benefits under the New York Dock Agreement, which protects certain employees such as those affected by the merger of the Western Pacific, Missouri Pacific and Union Pacific Railroads. The principal issue in the dispute is whether the Claimant, a Manager (trainee) Labor Relations is an employee intended to be covered by the Agreement. The Organization contends that he is, and the Carrier disputes this interpretation of the Agreement.

The Parties submitted the following issues to the Arbitration Committee:

1. Should the claim be denied because it was filed in an untimely manner?
2. Was G. Thomas, at the time of his removal from a non-agreement position, an "employee" subject to the protection of the New York Dock conditions?
3. Did G. Thomas lose his non-agreement position of Manager Labor Relations because of a merger-related transaction?
4. If so, to what level of benefits is G. Thomas entitled

The Arbitration Committee (Committee) has carefully considered the evidence, documents and arguments presented by each side and concludes that the claim should not be denied because it was

filed in an untimely manner. However, the committee further concludes that the Claimant was not an employee entitled to protection under the New York Dock conditions, at the time he lost his non-agreement position. Therefore there is no need to address the third and fourth issues. The Committee's findings, conclusions and reasoning are set forth below.

Timeliness Issue

The Carrier presents a threshold issue challenging the timeliness of the Claimant's filing of his claim. According to the undisputed evidence presented by the Carrier, the first notice it received of the claim was an undated letter received by it on July 21, 1987, about ten and one half months after the effective date of the Claimant's job loss on August 30, 1986. The Carrier contends that this filing is beyond the reasonable limits and the claim should be denied on these grounds alone.

The Carrier acknowledges that the New York Dock conditions establish no precise time limit for the filing of claims. Nevertheless, the Carrier contends that inherent in the Agreement is an obligation to file claims within a reasonable time limit, which the Claimant exceeded in this case.

The Committee concurs with the Carrier's principle, but not its result. A filing party does have the responsibility to file his claim within a reasonable time after the occurrence giving rise to the claim. If he does not do so, the claim may be dismissed under the principle of laches. However, in this case

the Committee concludes that the delay does not rise to the level where laches bars the claim, for the following reasons.

First, the single case relied upon by the Carrier which barred a claim on the basis of laches involved a two-year delay, as opposed to the ten months at issue here. (NRAB Second Division Award No. 22971). The other cases relied upon by the Carrier actually permitted the claims to go forward under the New York Dock Agreement, even though they involved delays longer than the claim at issue here. United Transportation Union and San Diego & Arizona Eastern Railway Company, (1984, Vernon, Arb.); Certain Designated Claimants and Union Pacific Railroad Company (1987, Seidenberg, Arb.).

Although the Carrier attempts to distinguish these cases, the Committee is not convinced by the distinctions offered by the Carrier. For example, the Carrier argues that the Claimant, as a Manager in the Labor Relations Department, should have known of the obligation to file a claim in a reasonable and timely manner, unlike the unsophisticated mechanics who were claimants in the case decided by Arbitrator Seidenberg. However, the Organization presented evidence that the Claimant did not become aware of his rights under the Agreement until months after the loss of his job, and suggests that the Carrier breached its obligation to inform him of his rights. In view of the Organization's arguments, the Committee is not persuaded by the Carrier's distinction.

Second, even if the Claimant should have known of his rights under the Agreement and should have filed more quickly, the Carrier has not demonstrated that it was injured by the delay. This is an important factor in determining when to apply the doctrine of laches to bar a claim.

Third, one of the major benefits sought by the Claimant is a loss from removal from his home. The New York Dock conditions mandate a one-year time limit from the date the employee is required to move for the filing of claims for these benefits. There is no dispute that the Claimant filed within this limit. Furthermore, this section provides some evidence concerning what the Parties considered a reasonable time limit for filing claims in general.

Therefore, the Committee concludes that the claim should not be barred on the grounds that it was not filed in a timely manner. Considering the circumstances surrounding the filing of the claim, the date on which it was filed did not unfairly prejudice the Carrier.

The Status of the Claimant as a Covered Employee

The second procedural issue raised by the Carrier, and the one most critical to the resolution of this dispute, is the question of whether the Claimant is an employee entitled to the benefits of the New York Dock conditions. The Committee concludes that he is not, for the reasons outlined below.

The Organization bases its claim on Article IV of the New

York Dock conditions, which contains the following relevant provision,

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

There is no dispute that the Claimant was not represented by a labor organization at the time he lost his job. Rather the dispute in this case centers on whether he was an "employee" entitled to benefits under this provision.

Clearly, the Claimant, at the time he lost his job, was an "employee" in the most simple sense, under any dictionary definition and under standard industrial relations parlance. As a Manager (trainee) Labor Relations he rendered service to the Carrier and received compensation for it.

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

The Organization of course bears the burden of establishing this claim, since it is the Party which filed the claim. Thus, the Organization also bears the burden of establishing this crucial aspect of the claim, i.e. that the Claimant is an employee entitled to New York Dock benefits, under the language cited above.

Neither the New York Dock Agreement nor its legislative history define the meaning of the term "employee." However, Section 1, Fifth, of the Railway Labor Act defines those who are considered "employees" under the Act:

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 order of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by order hereafter entered by the Commission.... (Emphasis added, TITLE I, Section 1, Fifth).

This definition of employee determines who is subject to and entitled to union representation. This Committee concludes that the New York Dock conditions adopted this same definition, and that the section relied upon by the Claimant includes only those employees and subordinate officials who are subject and entitled to union representation, but, for some reason, are not represented.

This is the predominant view in the industry,¹ and indeed, the Organization, in its submission, apparently accepts this interpretation. In its submission the Organization cites not only the Railway Labor Act language defining "employee," which is cited above, but also language from an arbitration opinion rendered by the Undersigned Neutral Member which concurred in the Carrier's position that,

¹. See, e.g. Harry Lustgarten, Principles of Railroad and Airline Labor Law (Omaha: Rail Publications, pp. 29-32); 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.

the term "employees" as used in Article IV of the New York Dock conditions is a term of art which includes rank and file employees and subordinate officials but excludes officials....

(Organization Submission, p. 10; Bond and Topolosky v. Union Pacific Railroad, Stallworth, Arb., 1985).

The Organization does not argue for a broader interpretation of the term "employee" in the New York Dock conditions. Rather, it argues that the Claimant was a "subordinate official," at the time he lost his job.

The Organization also concurs with the Carrier about the definition of a "subordinate official." Both cite language from the Transportation Act of 1920, which states,

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

(Section 300, paragraph 5 of the Transportation Act of 1920).

The I.C.C. primarily has defined the term "subordinate official" through a series of opinions issued under the general order known as "Ex Parte 72." That order does not refer to the Claimant's position in its detailed listing of "subordinate officials." (Carrier Exhibit R). Nor has the Organization demonstrated any later proceedings under "Ex Parte 72" which designate this position as that of a "subordinate official." (Carrier's Exhibit PP). In addition the Organization has not identified a position designated as a "subordinate official" that is substantially similar to the one held by the Claimant.

Furthermore, in examining the duties of subordinate officials as sketchily outlined in Ex Parte 72 and in the later proceedings, the Committee concludes that none of the positions identified as "subordinate officials" involve duties and authority similar to the Claimant's. Although some of those holding subordinate official jobs are first-line supervisors, the Claimant's job involved making, enforcing and interpreting rules and regulations to guide these supervisors. And while he may not have had complete authority to formulate and enforce policy, his role in doing so sets him apart dramatically from the subordinate officials, whose duties involve either routinely obeying such guidelines, or other technical and clerical duties. (Compare Carrier's Exhibit C, Claimant's duties, with Carrier Exhibits R and PP).

The Organization also suggests that the Claimant should be considered a "subordinate official" because he reports to an Assistant Director and a Regional Director. In making this argument it appears that the Organization is relying upon a federal district court decision in which the judge held,

"employees" encompasses persons "(including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act" but not, inter alia, "officers" or "department heads and those in the next echelon, such as assistants and staff members to the department heads."

(In the Matter of Florida E.C. Ry., No. 4827-J, S.D.Fla. 1960).

According to the Organization, the Claimant, occupying a 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 Employees v. Union Pacific Railroad Company, (Stallworth, Arb., 1987)). According to the Organization, the Claimant in Kelley had a higher job rating than the Claimant in the instant dispute, but was still considered a "subordinate official." Because both cases involved the Union Pacific merger and the extent of New York Dock conditions to employees holding similar jobs, the Organization apparently contends that the Claimant in this case should be regarded in the same fashion as the Kelley Claimant. However, in fact, the Carrier in the Kelley case waived the issue of whether the Claimant was an employee under the terms of the New York Dock conditions, in order to reach the substantive issue of whether he was affected by a merger-related transaction. There was no finding by the Undersigned that the Claimant was in fact a subordinate official. Furthermore, the waiver of that issue applied only to the resolution of that dispute, and the Organization may not use it

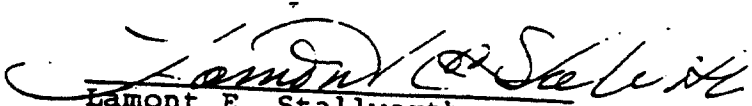
to prove that the Claimant here was a subordinate official of the Carrier as well.

Having determined that the Claimant was not a subordinate official, there is no need for the Committee to address whether an official is covered by the terms of the New York Dock conditions. This point has been well settled in earlier opinions, both through lawsuits and arbitrations. See Bond & Topolosky, supra, pp. 12-16. Furthermore, the Organization accepted this position in its submission, when it acknowledges that the Claimant must be a subordinate official in order to be covered.

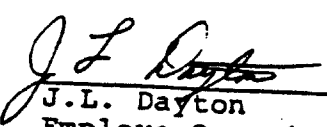
Furthermore, because the Committee has determined that the Claimant is not an "employee" as that term is used in the New York Dock Agreement, there is no need to proceed to the merits of his claim. Thus, there is no need to examine whether his job loss occurred as a result of a merger-related transaction.

AWARD

The claim is denied. The Organization has failed to prove that the Claimant was an employee entitled to protection under the New York Dock Agreement.


Lamont E. Stallworth
Neutral Member

Wayne E. Naro
Carrier Member


J.L. Dayton
Employee Organization
Member

Signed this 5~~4~~ day of April, 1988.

City of Chicago
County of Cook
State of Illinois

UP EXHIBIT

31

Special Board of Arbitration
Award No.

Case No. 2

Page No. 1

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).

The Carrier took the position in its March 7, 1997 response that Mr. Dixon'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. Dixon's former position as Manager-Contract Administration 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. F, G and H). In the Carrier's letter dated April 15, 1997, the Carrier responded to the Organization as follows:

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).

UNION PACIFIC EXHIBIT 31
PAGE 6 OF 34

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 and 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. Dixon's non-agreement position of Manager-Contract Administration, located in Denver, Colorado but did not offer him a position on the newly merged UP/SP system, that Mr. Dixon clearly became a "displaced employee" under the New York Dock Conditions. The Organization asserts that as a "displaced employee" Mr. Dixon 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 claim:

ARTICLE I

1. Definitions

- (a) "Transaction" means any action taken pursuant to authorization of this Commission on which these provisions have been imposed.

Special Board of Arbitration
Award No.

Case No. 2
Page No. 8

(b) "Dismissed employee" means an employee of the railroad who, as a result of a transaction, is deprived of employment with the railroad because of the abolition of his position or loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

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

6. **Dismissal Allowances** - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent wage increases.

8. **Fringe benefits** - No employee of the railroad who is affected by a transaction shall be deprived, during his protective period, of benefits attached to his previous employment, such as free transportation, hospitalization,

pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

ARTICLE IV

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

The Organization argues that there is no dispute that Mr. Dixon 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 claim, the Organization argues that it did in fact identify the transaction and specific facts 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. Dixon 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. Dixon by the Carrier. The Organization asserts that the burden shifts to the Carrier to prove something other than a merger transaction affected Mr. Dixon. 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. G). 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. Dixon 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. Dixon's abolished position was not subject to unionization. The Organization argues that several Marketing and Sales non-agreement positions have been unionized in 1979, and as indicated on TCU Exhibit No. C, other similar Marketing and Sales positions have been unionized for many years. The Organization contends that Mr. Dixon's prior non-agreement position as Manager-Contract Administration is also subject to unionization.

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 dispute the record evidence clearly establishes that Mr. Dixon's position of Manager-Contract Administration was "one" more of labor than a managerial position. The Organization notes that Mr. Dixon 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. Dixon was in fact a liaison between management and the Carrier's shippers and no more than a file clerk who handled and filed contracts or tariffs. The Organization contends that Mr. Dixon's "file clerk" position was 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 grievance should be sustained on the same grounds.

The Organization also notes that the Carrier refuses to acknowledge that Mr. Dixon is entitled to a displacement allowance and has not furnished the same to Mr. Dixon. In addition, the Organization asserts that Mr. Dixon's earnings over the twelve months preceding his displacement was \$3,215.00 per month, with his average hours totaling 176 hours.

Based on the foregoing, the Organization asserts that the instant claim should be sustained in favor of Mr. Dixon and that he is entitled to full benefits as an "employee" as defined by the New York Dock Conditions. The Organization requests that the Committee answer the question posed by the statement of the issue as framed by the Organization in the affirmative and render a decision that Mr. Dixon 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. Dixon 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 Committee that Mr. Dixon is found to be an "employee" entitled to New York Dock Conditions benefits. The Carrier submits that the instant dispute should be decided on that procedural issue first and resolved in favor of the Carrier.

In addressing the procedural issue of whether Mr. Dixon 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. Dixon as well as other affected employees, can meet the definition of "employee" under the New York Dock Conditions and therefore receive New York Dock protections and benefits. The Carrier maintains that Mr. Dixon does not meet the New York Dock definition of "employee" and is therefore ineligible for such mandated New York Dock benefits.

The Carrier asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection. Specifically, that provision of the Railway Labor Act provides:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the Authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employees organizations be regarded as any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine 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; Newbourn v. Grand Trunk Western Railroad Co., 758 F.2nd 193 (1985); and Benham and Delaware and Hudson Railway Co., (1986) (Carrier's Exhibit Nos. D-6 and D-7).

The Carrier also relies on the decision in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), wherein it was stated:

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

The rational and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their

jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

In the instant case, the Carrier argues that a review of Mr. 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

3. Given an automobile allowance for personal use.
4. In possession of skills that were easily transferable.

The Carrier points out that the committee in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer. The Carrier asserts that a similar result should be found in the instant case as Mr. Dixon's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Dixon was not under daily supervision, and, most significantly, Mr. Dixon possessed managerial skills that are easily transferable to almost any other industry or service. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175). In addition, the Carrier maintains that Mr. Dixon, along with the other claimants, was offered a severance package that was not offered to agreement employees. (See, Carrier Exhibit Nos. A-4, B-4 and C-4).

The Carrier contends that the burden of proving that Mr. Dixon is an "employee" entitled to New York Dock protections rests with the Organization and that the Organization has failed to meet their burden. See, Gerald Thomas & BLE and UPRR (1988) (Carrier's Exhibit No. D-4). The Carrier specifically notes that the Organization failed to prove that Mr. Dixon was a subordinate employee as listed

by the ICC in Ex Parte 72 (February 5, 1924). See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5) and Carrier's Exhibit D-10 (ICC job title position indices).

The Carrier further contends that with regard to In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), that case is distinguishable from the instant claim as are the other cases cited by the Organization. The Carrier asserts that in the Nekich decision the claimant's position was Quality Coordinator who served as a liaison between management and classified employees. Accordingly, Arbitrator Ver Ploeg held that the claimant in Nekich was not an administrative, managerial, professional or supervisory employee. The Carrier also notes that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Dixon's transferable managerial contract administration job skills. For a similar case to Nekich, see also Hoffman and Burlington Northern Santa Fe, cited supra, (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee).

With regard to The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) the Carrier argues that the parties in that case stipulated that the claimant was an

"employee" for New York Dock Condition purposes. Because the committee did not even need to reach the issue of whether the claimant in P.J. Kelley was indeed an "employee" for New York Dock Conditions, the Carrier avers that it is not applicable to the instant case. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

The Carrier submits that any analysis of what is meant by a "position not subject to unionization" must be done on a de facto basis, with an examination of the position based on the facts at hand. The Carrier notes that this is especially important given that only the National Mediation Board has the jurisdiction to determine whether a position should be a member of a class or craft under the Railway Labor Act. The Carrier asserts that in outlining the definition of an employee eligible for New York Dock benefits, it is clear that Mr. Dixon's position fails to meet the accepted requirements because:

1. His position was not unionized nor subject to unionization.
2. His duties could be described as being administrative, managerial, professional or supervisory in nature.
3. His position was not exclusive to the railroad industry and his skills were transferable.

Based on these procedural arguments, the Carrier asserts that the instant claim should be dismissed.

With regard to the substantive issues, the Carrier argues that the elimination of Mr. Dixon's position was not due to a

"transaction" under New York Dock Conditions. The Carrier submits that under Article I of the New York Dock Conditions, "transaction" is defined as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." The Carrier maintains that no evidence has been presented to demonstrate that these non-agreement positions could not have been abolished without ICC approval.

The Carrier additionally argues that the New York Dock Conditions define a "displaced employee" as "an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions". Furthermore, the Carrier states that a "dismissed employee" is defined under New York Dock Conditions as:

An employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

Moreover, the Carrier contends that in light of the award In the Matter of Arbitration Between Union Pacific Railroad Company and Brotherhood of Railway Signalman, (Arb. Dana Eischen, 1994) (Carrier Exhibit D-20), it is well-established that the Organization must demonstrate a causal nexus between the merger and the alleged transaction. The Carrier refutes the Organization's assertion that it has established a "causal nexus" between the termination action against Mr. Dixon and the ICC's merger

authorization. Rather, the Carrier asserts that the Organization did not prove that Mr. Dixon's position was eliminated as a result of a New York Dock transaction and that the Organization failed to show that Mr. Dixon was placed in a worse position due to a New York Dock transaction.

The Carrier notes that the Organization relies almost solely on the severance package letter from Vice President of Human Resources Barbara V. Schaefer to Mr. Dixon wherein she states:

As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of Southern Pacific Transportation Company and Union Pacific Railroad. I understand that you have been advised that your employment will be terminated as a part of this reduction in force.

(Carrier Exhibit No. B-4). The Carrier asserts that this letter from the Carrier's department of Human Resources was not approved by the Carrier's Labor Relations department and accordingly Labor Relations should not be held by what the Human Resources department independently distributed. As support for its position, the Carrier relies on the award in Transportation Communications International Union and CSX Transportation, Inc., (Arb. Seidenberg, 1995) (Carrier Exhibit D-14) wherein the arbitrator stated:

The Committee notes the Organization's reliance on Director Patterson's letter...What is more significant is that Mr. Patterson was not a Carrier's officer who was vested with the authority to determine policy as to which employees were entitled to receive New York Dock benefits.

The Carrier maintains that the Organization failed to identify the transaction and specify those facts which are pertinent to that of the transaction being asserted. Se, e.g., Transportation-Communications International Union - BRAC and Union Pacific Railroad, Case Nos. 6, 7, & 8 (Carrier Exhibits Nos. D-16 and 17). The Carrier also argues, as stated previously on different grounds, that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) does not apply as an example of a New York Dock transaction because, unlike the instant grievance, there was sufficient evidence that an intermingling of work, employees, operations and functions had occurred in that case. (Carrier's Exhibit No. D-15).

Based on the foregoing, the Carrier respectfully requests that the Committee dismiss this claim on procedural grounds because:

The term "employees" as used in Article IV of the New York Dock Conditions is a term of art which includes rank and file employees and subordinate officials, but excludes employees who are not subject to unionization or have positions that are managerial, supervisory, administrative or professional, such as the positions held by the Claimants herein: Manager Contract Administration, Regional Sales Manager and Senior Tax Representative.

(Carrier's Submission at page 31). The Carrier also requests that, in the alternative, the instant claim be denied because the elimination of Mr. Dixon's position was not due to a transaction as defined by New York Dock Conditions.

OPINION:

The Committee has carefully considered the facts, evidence and arguments presented by the Parties and concludes that under the provisions of the New York Dock Conditions, Mr. Dixon is not an "employee" as envisioned by the New York Dock Conditions. Therefore, Mr. Dixon is not entitled to New York Dock benefits and protections. Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the Committee's opinion that the instant grievance must be denied on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirety. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Dixon is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier. The Carrier specifically asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection:

Fifth. The term "employee" as used herein includes every person in the service of a

carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the Authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employees organizations be regarded as any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(Carrier's Submission at page 14).

The Committee also recognizes the statement by the Interstate Commerce Commission as provided by the Organization:

... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, therefore, must of necessity be decided upon the record.*** (supra I.C.C. at 92).

(Employees' Submission at page 15).

In the instant dispute, the record provides evidence as to Mr. Dixon's position as Manager-Contract Administration and raises the issue of whether this position is more labor-related than managerial. The Committee notes that Mr. Dixon's position required him to supervise four (4) other employees, and work independently by making decisions without consulting his manager. The record demonstrates that Mr. Dixon's position involved:

1. Responsible for the contract and tariff work of twenty-three (23) managers
2. Supervise two (2) pricing representatives and two (2) senior pricing representatives
3. Coordinate and progress contracts
4. Oversee and progress pricing compliance issues
5. Coordinate and progress selective increases
6. Administration of contracts, contract rates and tariff publications
7. Manage price quotation function

(Carrier Exhibit No. A-3).

Mr. Dixon's job characteristics noted above were supplied by the Carrier and were not disputed by the Organization.

The Committee considers the award in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) to be instructive in the instant case. In Adams, the claimants were District Sales Managers and ultimately held to be ineligible for New York Dock benefits because they were not considered "employee(s)" under New York Dock Conditions as their positions were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. - Not under daily supervision.
3. Given an automobile allowance for personal use.
4. In possession of skills that were easily transferable.

The Committee notes the point made by the Carrier that in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer.

The Undersigned Committee is of the opinion that a similar result as the one reached in Adams must be reached in the instant case. The record demonstrates that Mr. Dixon's Manager-Contract Administration position was not covered by any collective bargaining agreement, nor was it apparently subject to unionization. The Organization offered the unsupported argument that Mr. Dixon's position could be subject to unionization but did not credibly explain under what circumstances. In addition, the record evidence demonstrates that Mr. Dixon supervised other employees and he himself was not under daily supervision. As the Carrier asserted in its April 15, 1997 letter to the Organization:

The Carrier wishes to make clear that the "Subject to unionization" criteria, which you refer to in your letter, is not the sole criteria upon which it relies in determining that these employees are not subject to

coverage by New York Dock. These employees occupy positions which clearly were not contemplated by the extraordinary job protection couched in the New York Dock conditions. Each of these employees had a level of responsibility and duties, as well as salary, which was above that of a clerical employee. More fundamentally, each of these employees had a position that offered skills which are clearly more transferable than that of a railroad clerk.

(Carrier's Exhibit No. A-2). The Committee is in agreement with the Carrier on this point. Notably, the most significant factor of all is that Mr. Dixon possessed managerial skills that arguably are transferable to almost any other industry or service. (See e.g., Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175).

The Organization asserts that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) applies to the instant case. However, as the Carrier correctly asserts, the parties in P.J. Kelley stipulated that the claimant was an "employee" for New York Dock Condition purposes. In that case, the parties specifically agreed:

The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several other similarly situated employees who are not directly involved in this case.

(Carrier's Submission at page 24).

It is clear that, unlike the instant grievance, in the case of P.J. Kelley that Committee did not have to resolve the threshold issue of whether the claimant was indeed an "employee" for New York Dock Conditions. Accordingly, the Committee does not find that particular case relied upon the Organization to be controlling in the instant dispute. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

Similarly, the Committee notes that the case of In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), is also distinguishable from the instant grievance. The Committee observes that in the Nekich case the claimant's position was that of a quality coordinator, a position that required the employee to serve as a liaison between management and classified employees. In that case, Arbitrator Ver Ploeg found the claimant therefore was not an administrative, managerial, professional or supervisory employee.

The Carrier asserts that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Dixon's transferable managerial job skills. See also, Hoffman and Burlington Northern Santa Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee). The Committee must agree. Mr. Dixon's Manager-Contract Administration position was an independent oversight position that required supervision of other employees, contact with shippers, pricing compliance and

increases oversight, and the ability to make decisions without consulting his manager. As such, Mr. Dixon's position is more dissimilar to the position in Nekich and more akin to the position in the Adams award, cited supra.

At this juncture the Committee finds it useful to reiterate the observations of Arbitrator Seidenberg, who was confronted with a similar issue in the case of The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. et al. (Arb. Seidenberg, 1987), wherein he noted:

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

The 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.

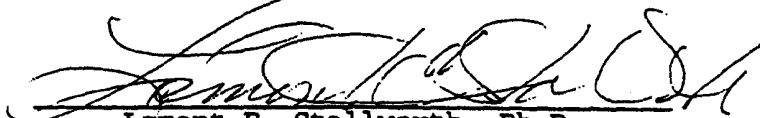
Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended, i.e., 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.

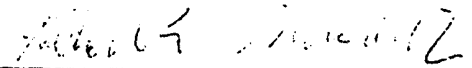
Adopted at Chicago, Illinois on the 16th day of July, 1998.


Lamont E. Stallworth, Ph.D.
Neutral Member


Labor Member


Carrier Member

Labor Member


Carrier Member

LES:CHG

UP EXHIBIT

32

Special Board of Arbitration
Award No.

Case No. 137
Page No. 1

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 B.W. Isabell and the Transportation
TO and Communications International Union - ASD
DISPUTE

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?

UNION PACIFIC EXHIBIT 32
PAGE 1 OF 33

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.

Special Board of Arbitration
Award No.

Case No. X³
Page No. 4

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).

UNION PACIFIC EXHIBIT 32
PAGE 4 OF 33

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,

Special Board of Arbitration
Award No.

Case No. 43
Page No. 8

however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of Section 7(b) of the Washington Job Protection Agreement of May 1936.

6. **Dismissal Allowances** - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent wage increases.

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

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee

of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

ARTICLE IV

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

The Organization argues that there is no dispute that Mr. Isabell was indeed affected by a "transaction" as defined above in the New York Dock Conditions. The Organization asserts that Article I, Section 11(e) specifically requires that it is the employee's obligation to identify the transaction and relate explicit and pertinent facts of the transaction on which the employee relies to support his or her case. The Organization submits that it is then the Carrier's burden to prove that factors other than the transaction affected the employee.

In the instant grievance, the Organization argues that it did in fact identify the transaction and specific facts in regard thereto as required by Article I, Section 11(e). The Organization points out that such facts particularly include the Carrier's admission in its severance letter and package to Mr. Isabell that he is being terminated as a result of the consolidation of the Southern Pacific Transportation Company and the Union Pacific Railroad. It is the Organization's position that it has proven the

"causal nexus" between the merger and the termination action taken against Mr. Isabell by the Carrier. The Organization asserts that the burden shifts to the Carrier to prove something other than a merger transaction affected Mr. Isabell. The Organization argues that the Carrier wholly failed to carry this burden of proof.

The Organization also notes that the Carrier erroneously quoted and paraphrased Article III of the New York Dock Conditions, as it admits in its April 15, 1997 letter. (TCU Exhibit No. F). The Organization assumes that the intended language by the Carrier was in fact taken from Article IV and proceeds with its argument and position statement based on that assumption.

The Organization contends that the Carrier relies heavily upon the text of a comment by Arbitrator Seidenberg in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), and that the Parties are in dispute over the definition of the term "employee" under the New York Dock provisions. While the Organization recognizes the result offered in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), the Organization also notes that there are two important differences in that case as compared to the instant dispute. The Organization states that in denying New York Dock benefits to the claimants in the above-referenced case, Arbitrator Seidenberg found that the non-agreement employees affected had managerial, administrative and supervisory responsibilities and that the employees were offered comparable positions and salaries but declined them.

Special Board of Arbitration
Award No.

Case No. 3
Page No. 11

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.

Special Board of Arbitration
Award No.

Case No. X³
Page No. 12

(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.

UNION PACIFIC EXHIBIT 32
PAGE 12 OF 33

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.

Special Board of Arbitration
Award No.

Case No. X³
Page No. 15

The Carrier contends that when the Surface Transportation Board approved the merger of the Southern Pacific and Union Pacific Railroads, it did so by also imposing the New York Dock Conditions. It is the Carrier's position that at the crux of the instant dispute is whether Mr. Isabell, as well as other affected employees, can meet the definition of "employee" under the New York Dock Conditions and therefore receive New York Dock protections and benefits. The Carrier maintains that Mr. Isabell does not meet the New York Dock definition of "employee" and is therefore ineligible for such mandated New York Dock benefits.

The Carrier asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection. Specifically, that provision of the Railway Labor Act provides:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the Authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employees organizations be regarded as any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical

Special Board of Arbitration
Award No.

Case No. X3
Page No. 16

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; Newbourn v. Grand Trunk Western Railroad Co., 758 F.2nd 193 (1985); and Benham and Delaware and Hudson Railway Co., (1986) (Carrier's Exhibit Nos. D-6 and D-7).

The Carrier also relies on the decision in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et

al. (Arb. Seidenberg, 1987), wherein it was stated:

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

The rational and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

In the instant case, the Carrier argues that a review of Mr. Isabell's non-rank and file managerial position indicates that he was a ranked personnel whose professional accounting skills could be transferred outside of the railway industry. Specifically, the Carrier notes that Mr. Isabell's position of Senior Tax Representative is placed in the Professional category for Affirmative Action computations. The Carrier submits that the Senior Tax Representative involved plan development, analyzing tax bills and giving recommendations regarding the handling of tax

matters and auditing. The Carrier points out that while the Organization initially claimed that Mr. Isabell was subject to the collective bargaining agreement on the property, the Organization did not reargue that claim when the appeal was denied. The Carrier maintains that the scope of the rule agreement indicates that Mr. Isabell's position was neither clerical, nor listed as a position under the agreement as is the case for the other affected claimants (Mr. Dixon and Mr. Povirk). See, Carrier's Exhibit C-6).

The Carrier submits that Mr. Isabell's position required knowledge of IRS regulations, capital gains tax, corporate income tax and property valuation. The Carrier notes that Mr. Isabell also possessed a Bachelor's Degree in Business Administration. The Carrier therefore asserts that Mr. Isabell's skills are clearly transferable and highly marketable in the job workplace outside of the railway industry. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44)(Carrier Exhibit No. D-1, page 175). In addition, the Carrier maintains that Mr. Isabell, along with the other claimants, was offered a severance package that was not offered to agreement employees. (See, Carrier Exhibit Nos. A-4, B-4 and C-4).

The Carrier contends that the burden of proving that Mr. Isabell is an "employee" entitled to New York Dock protections rests with the Organization and that the Organization has failed to meet their burden. See, Gerald Thomas & BLE and UPRR (1988) (Carrier's Exhibit No. D-4). The Carrier specifically notes

that the Organization failed to prove that Mr. Isabell was a subordinate employee as listed by the ICC in Ex Parte 72 (February 5, 1924). See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5) and Carrier's Exhibit D-10 (ICC job title position indices).

The Carrier further contends that with regard to In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), that case is distinguishable from the instant grievance as are the other cases cited by the Organization. The Carrier asserts that in the Nekich decision the claimant's position was Quality Coordinator who served as a liaison between management and classified employees. Accordingly, Arbitrator Ver Ploeg held that the claimant in Nekich was not an administrative, managerial, professional or supervisory employee. The Carrier also notes that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Isabell's transferable accounting job skills. For a similar case to Nekich, see also Hoffman and Burlington Northern Santa Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee).

With regard to The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) the Carrier argues

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.

Special Board of Arbitration
Award No.

Case No. 13
Page No. 23

Moreover, the Carrier contends that in light of the award in In the Matter of Arbitration Between Union Pacific Railroad Company and Brotherhood of Railway Signalman, (Arb. Dana Eischen, 1994) (Carrier Exhibit D-20), it is well-established that the Organization must demonstrate a causal nexus between the merger and the alleged transaction. The Carrier refutes the Organization's assertion that it has established a "causal nexus" between the termination action against Mr. Isabell and the ICC's merger authorization. Rather, the Carrier asserts that the Organization did not prove that Mr. Isabell's position was eliminated as a result of a New York Dock transaction and that the Organization failed to show that Mr. Isabell was placed in a worse position due to a New York Dock transaction.

The Carrier notes that the Organization relies almost solely on the severance package letter from Vice President of Human Resources Barbara V. Schaefer to Mr. Isabell wherein she states:

As you know, the Company is reducing the size of its nonagreement work force due to the consolidation of Southern Pacific Transportation Company and Union Pacific Railroad. I understand that you have been advised that your employment will be terminated as a part of this reduction in force.

(Carrier Exhibit No. B-4). The Carrier asserts that this letter from the Carrier's department of Human Resources was not approved by the Carrier's Labor Relations department and accordingly Labor Relations should not be held by what the Human Resources department

independently distributed. As support for its position, the Carrier relies on the award in Transportation Communications International Union and CSX Transportation, Inc., (Arb. Seidenberg, 1995) (Carrier Exhibit D-14) wherein the arbitrator stated:

The Committee notes the Organization's reliance on Director Patterson's letter... What is more significant is that Mr. Patterson was not a Carrier's officer who was vested with the authority to determine policy as to which employees were entitled to receive New York Dock benefits.

The Carrier maintains that the Organization failed to identify the transaction and specify those facts which are pertinent to that of the transaction being asserted. Se, e.g., Transportation-Communications International Union - BRAC and Union Pacific Railroad, Case Nos. 6, 7, & 8 (Carrier Exhibits Nos. D-16 and 17). The Carrier also argues, as stated previously on different grounds, that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) does not apply as an example of a New York Dock transaction because, unlike the instant grievance, there was sufficient evidence that an intermingling of work, employees, operations and functions had occurred in that case. (Carrier's Exhibit No. D-15).

Based on the foregoing, the Carrier respectfully requests that the Committee dismiss this dispute on procedural grounds because:

The term "employees" as used in Article IV of the New York Dock Conditions is a term of art which includes rank and file employees and subordinate officials, but excludes employees who are not subject to unionization or have positions that are managerial, supervisory, administrative or professional, such as the positions held by the Claimants herein: Manager Contract Administration, Regional Sales Manager and Senior Tax Representative.

(Carrier's Submission at page 31). The Carrier also requests that, in the alternative, the instant claim be denied because the elimination of Mr. Isabell's position was not due to a transaction as defined by New York Dock Conditions.

OPINION

The Committee has carefully considered the facts, evidence and arguments presented by the Parties and concludes that under the provisions of the New York Dock Conditions, Mr. Isabell is not an "employee" as envisioned by the New York Dock Conditions. Therefore, Mr. Isabell is not entitled to New York Dock benefits and protections. Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the Committee's opinion that the instant claim must be dismissed on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirety. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Isabell is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier. The Carrier specifically asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the Authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employees organizations be regarded as any way limited or defined by the provisions of this chapter or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, preparation of coal, the handling (other than movement by

rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(Carrier's Submission at page 14).

The Committee also recognizes the statement by the Interstate Commerce Commission as provided by the Organization:

... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, therefore, must of necessity be decided upon the record.*** (supra I.C.C. at 92).

(Employees' Submission at page 15).

In the instant dispute, the record provides evidence that Mr. Isabell's position required knowledge of IRS regulations, capital gains tax, corporate income tax and property valuation. Mr. Isabell also possessed a Bachelor's Degree in Business Administration. A review of Mr. Isabell's job duties raises the issue of whether his position of Manager-Senior Tax Representative is more labor-related than managerial. The Carrier states that the principle responsibilities for the position of Senior Tax Representative, the non-agreement position which Mr. Isabell held until January 31, 1997, can be summarized as follows:

1. Develop a plan for tax reduction
2. Prepare tax returns and exemptions

3. Investigate special improvement districts
4. Analyze tax bills and advise appropriate handling
5. Audit tax bills for errors

(Carrier Exhibit No. C-1). Based on the record evidence, the Committee concludes that Mr. Isabell's position duties were primarily those of an accountant specializing in tax matters rather than a rank and file employee. The Committee must therefore agree with the Carrier that Mr. Isabell's skills are clearly transferable and highly marketable in the job workplace outside of the railway industry.

The Committee finds the award in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) to be instructive in the instant case. In Adams, the claimants were District Sales Managers and ultimately held to be ineligible for New York Dock benefits because they were not considered "employee(s)" under New York Dock Conditions as their positions were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.
2. Not under daily supervision.
3. [The Claimants were] Given an automobile allowance for personal use.
4. [The Claimants were also] In possession of skills that were easily transferable.

The Committee notes the point made by the Carrier that in Adams, Dominick & Williamson and Delaware & Hudson Railway Co.,

(1987) (Carrier Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer.

The Undersigned Committee is of the opinion that a similar result as the one reached in Adams must be reached in the instant case. The record demonstrates that Mr. Isabell's position of Manager - Senior Tax Representative was not covered by any collective bargaining agreement, nor was it apparently subject to unionization. The Organization offered the unsupported argument that Mr. Isabell's Senior Tax Representative position could be subject to unionization but did not credibly explain under what circumstances. In addition, the record evidence demonstrates that Mr. Isabell was not under daily supervision. The Carrier asserts, and the Committee agrees, that most significant of all is that Mr. Isabell possessed accounting and tax management skills that arguably are transferable to almost any other industry or service. (See e.g., Surface Transportation Board, Finance Docket No. 32760, Decision No. 44) (Carrier Exhibit No. D-1, page 175).

The Organization argues that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) applies to the instant case. However, as the Carrier correctly asserts, the parties in P.J. Kelley stipulated that the claimant

was an "employee" for New York Dock Condition purposes. In that case, the parties specifically agreed:

The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several other similarly-situated employees who are not directly involved in this case.

(Carrier's Submission at page 24).

It is clear that, unlike the instant claim, in the case of P.J. Kelley that Committee did not have to resolve the threshold issue of whether the claimant was indeed an "employee" for New York Dock Conditions purposes. Accordingly, the Committee does not find that particular case relied upon the Organization to be controlling. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

Similarly, the Committee notes that the case of In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), is also distinguishable from the instant claim. The Committee observes that in the Nekich case the claimant's position was Quality Coordinator, a position that required the employee to serve as a liaison between management and classified employees. Arbitrator Ver Ploeg found the claimant was not an administrative, managerial, professional or supervisory employee.

The Carrier asserts that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Isabell's transferable accounting job skills. See also, Hoffman and Burlington Northern Sante Fe, cited supra. (Carrier Exhibit No. D-12) (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee). The Committee must agree. Mr. Isabell's accounting and tax representation work was primarily an accounting position with tax-related issues, and Mr. Isabell apparently did not require daily supervision. As such, Mr. Isabell's position is more dissimilar to the position in Nekich and more akin to the position in the Adams award, cited supra.

The Committee finds it useful to reiterate at this juncture the observations of Arbitrator Seidenberg, confronted with a similar issue in the case of The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. et al. (Arb. Seidenberg, 1987), wherein he noted:

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

The rational and history of these benefits are that they were to be only extended to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

The Committee is mindful of the purpose behind the protective conditions set forth in the New York Dock Conditions and the Great Depression era genesis of legislative history which created railway employee job protection. However, the Committee must also note that New York Dock Conditions benefits were designed to protect a certain type of employee, simply put, those employees who would find it most difficult to secure a position outside of the railway industry.

Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended; i.e., to aid and protect those rank and file employees and subordinate officials who to their detriment are economically affected by the merger of railway systems. In the instant case, Mr. Isabell's Manager - Senior Tax Representative position is clearly not a rank and file position, or even a subordinate official position. As such, the

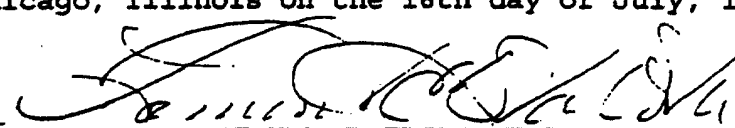
Committee must conclude that Mr. Isabell is not an "employee" as envisioned by the New York Dock Conditions and is not eligible for New York Dock benefits.

Having decided in favor of the Carrier on the threshold procedural issue of whether Mr. Isabell falls within the definition of "employee" under New York Dock Conditions, the Committee need not reach the substantive merits presented by the instant grievance.

AWARD

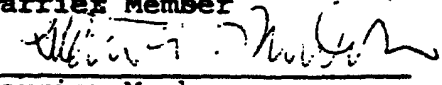
The Committee, after careful consideration of the instant dispute identified above, finds that the instant claim must be denied as the Claimant, Mr. Isabell, is not an "employee" under New York Dock Conditions.

Adopted at Chicago, Illinois on the 16th day of July, 1998


Lamont E. Stallworth, Ph.D.
Neutral Member


Labor Member

Labor Member


Carrier Member

Carrier Member

UP EXHIBIT

36

ARBITRATION COMMITTEE

Feb NYD 91

In the Matter of the	)	Pursuant to Article 1,
Arbitration between:	)	Section 11 of the
	)	New York Dock Conditions
UNITED TRANSPORTATION UNION	)	
	)	
Organization,	)	I.C.C. Finance Docket No. 30000
	)	
and	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Carrier.	)	
		OPINION AND AWARD

Hearing Date: July 1, 1993
Hearing Location: Sacramento, California
Date of Award: August 27, 1993

MEMBERS OF THE COMMITTEE

Employees' Member: J. L. Easley
Carrier Member: L. A. Lambert
Neutral Member: John B. LaRocco

QUESTION AT ISSUE

Is the Organization barred under the Doctrine of Laches from arbitrating claims for moving allowances made by trainmen R.L. Shankel, R.E. Porter, and L. Chapman, for losses sustained from home removal on July 24, 1987 (under New York Dock Labor Protection Conditions)?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad Company (UP), the Missouri Pacific Railroad Company (MP) and the Western Pacific Railroad Company (WP). [I.C.C. Finance Docket No. 30,000.] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343 and 11347.

At the neutral member's request, the parties waived the Section 11(c) time limit for issuing this decision.¹

II. BACKGROUND AND SUMMARY OF THE FACTS

The issue herein involves claims made by three different claimants who previously resided at Oroville, California. For purposes of the Question at Issue, the claims have been consolidated.

A. Claimant Chapman

Sometime in early 1987, Claimant Chapman filed for a dismissal allowance as a consequence of having been cutoff the Oroville, California extra board on September 4, 1985. Subsequently, Claimant Chapman went to work at Portola, California. In September 1988, Claimant Chapman filed a claim for losses associated with his change in residence, and more specifically, on the sale of his Oroville home.

UNION PACIFIC EXHIBIT 36
PAGE 2 OF 7

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.

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

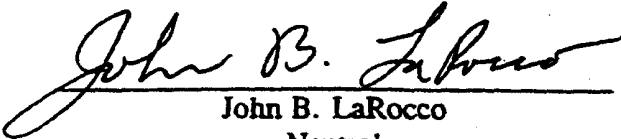
under the New York Dock Conditions inasmuch as they initiated claims for home removal losses.

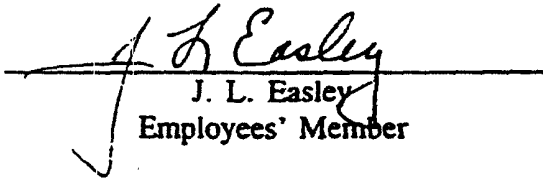
In summary, the doctrine of laches permanently bars these claims.

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

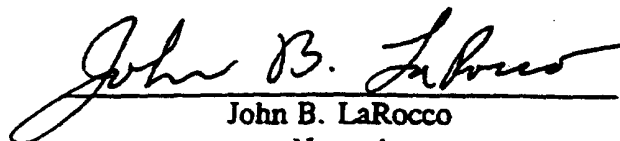
under the New York Dock Conditions inasmuch as they initiated claims for home removal losses.

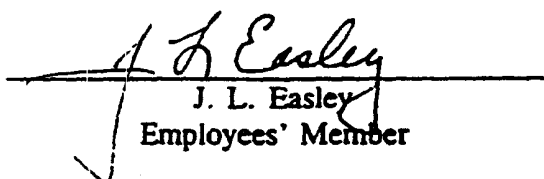
In summary, the doctrine of laches permanently bars these claims.

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

UP EXHIBIT

37

----- X
In the Matter of Arbitration

Between

Southern Railway Company

And

International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers
and Helpers
----- X

FINDINGS AND AWARD

QUESTION AT ISSUE:

Are D. L. Haver and G. L. Galbreath entitled to a
"dismissal allowance" under the New York Dock
protective conditions as the result of their
furlough on September 6, 1985?

BACKGROUND: The two Claimants in the case before the Board occupied Boilermaker positions in the Carrier's Atlanta Diesel Shop. On September 5, 1985 they were furloughed. This is the action which triggered the claim now to be resolved.

Prior to their furlough, the Norfolk Southern Corporation had obtained approval on March 19, 1982 to take control of the Norfolk and Western and the Southern Railways. The approval order included the requirement that New York Dock Conditions apply.

In accordance with the normal procedure, the Parties executed an Implementing Agreement on January 25, 1982. This document provided the particulars of the coordination of certain work and the conditions set forth in New York Dock.

The two claims were submitted to the Carrier by letter dated September 12, 1988. Following an exchange of correspondence, it became clear that the main basis for the claims was the contention that certain repair work of Atlanta based locomotives, as well as modification of some locomotive toilet systems, had been done in the Carrier's Roanoke Shop rather than the Atlanta Shop. The Claimants contended that this deprived them of work and resulted in their furlough. Because the parties could not agree on a resolution of the claims, it was properly progressed to this Arbitration Committee.

FINDINGS: The Board has carefully reviewed and considered the submissions of the parties, the record developed on the property as well as the various holdings on which the parties have relied. The Carrier, as a threshold matter, contends that these claims were not filed in a timely manner. The Claimants waited about three years after the occurrence of the events upon which their claims are based before they were submitted to the Carrier. Certainly, the doctrine of Laches has been recognized in this industry as well as by other arbitral precedent to bar claims filed beyond a reasonable time period. The theory underlying the Laches doctrine is that the failure to litigate a claim presently by deferring action until some unspecific but distant time in the future result in bias or prejudice the party against whom the claim ultimately filed. The purpose of Laches is to bar the submission of

stale claims. Clearly, in employee protective matters, it is critical that claims be filed without delay. In the cases at hand, and while we have fully considered the General Chairman's aggressive and skilled comments before us, the Claimants' failure to act in a timely manner precludes consideration of the issue at hand.

It is to the benefit of both parties to initiate and process claims in an expeditious manner. Often times there is a period of uncertainty with respect to the movement of work between shops following mergers: and, at times, this results in gradual, incremental changes. As a consequence, it may well be difficult to clearly identify the specific time at which the claimed adverse effect became apparent. In other words, there may be a gradual erosion of work which is not readily apparent or easily identified. However, such was not the case here. The Claimants were furloughed on September 6, 1985. As of this date, they state they were placed in a "worse position". One of the Claimants signed his claim on July 20, 1988. The other Claimant signed on August 15, 1988. They gave no reason for waiting almost three years from the time that they claimed to have been put in a "worse position" until their claims were filed. In the circumstances that we find here, such a delay was unreasonable. Therefore, the Board finds that the claims are barred.

AWARD

As specified in the Findings.

G. C. Edwards
G. C. Edward
Carrier Member

E. Mueserig
Eckehard Mueserig
Neutral Member

Alan M. Scheer
Alan M. Scheer
Organization Member

Dated: February 13, 1990

UP EXHIBIT

38

ARBITRATION COMMITTEE

In the Matter of the	)	
Arbitration Between:	)	
	)	
TRANSPORTATION-COMMUNICATIONS	)	Pursuant to Article 1,
INTERNATIONAL UNION,	)	Section 11 of the New
	)	York Dock Conditions
Organization,	)	
	)	I.C.C. Finance Docket
and	)	No. 30,000
	)	
UNION PACIFIC RAILROAD	)	Case No. 3
COMPANY,	)	Award No. 3
	)	
Carrier.	)	

Hearing Date: March 27, 1990
Hearing Location: Sacramento, California
Date of Award: June 26, 1990

MEMBERS OF THE COMMITTEE

Employees' Member: J. L. Gobel
Carrier Member: L. A. Lambert
Neutral Member: John B. LaRocco

QUESTION AT ISSUE

Is clerical employe R. Tefft entitled to New York Dock protection as a result of a displacement in 1986?

Carrier File No. 891734
Organization File No. R-15-1334-172

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad Company (UP), the Missouri Pacific Railroad Company (MP) and the Western Pacific Railroad Company (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the UP, MP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

This Committee is duly constituted by a letter agreement dated January 25, 1990. At the Neutral Member's request, the parties waived the Section 11(c) time limit for issuing this decision.¹

II. BACKGROUND AND SUMMARY OF THE FACTS

On May 14, 1986, the Carrier notified the Organization, pursuant to Section 4 of the New York Dock Conditions, of the Carrier's intent to consolidate MP crew dispatching functions, timekeeping tasks and administrative support work performed at Kansas City with similar functions performed by UP clerical employees at Omaha. The parties signed Implement Agreement No.

¹ All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will cite only the particular section number in this Opinion.

29 governing the transaction on July 16, 1986. Attachment A to Implementing Agreement No. 29 listed the clerical positions to be abolished at Omaha upon execution of the transaction. Among the jobs slated for abolishment was Clerk T. M. Beals' Crew Dispatcher position. When the transaction occurred in November, 1986, Clerk Beals exercised his seniority to a Work Order Clerk position occupied by Clerk J. C. Zybert. Clerk Zybert exercised his seniority to displace Claimant from his Property Analyst position on November 14, 1986 and Claimant, in turn, displaced junior clerical employee S. E. Moore on November 18, 1986. The Carrier did not provide Claimant with a calculation of his test period average earnings under the New York Dock Conditions. Claimant, who had a monthly protected rate of \$2,326.51 under the amended February 7, 1965 Job Stabilization Agreement, did not file for New York Dock benefits. Claimant opted for New York Dock protective benefits when he transferred to St. Louis on January 26, 1988 under a subsequent implementing agreement.

In the meantime, during 1987, the Organization progressed a claim on behalf of Clerk Brewer to a New York Dock Section 11 Arbitration Committee sitting with this Referee. On March 1, 1988, the Committee held that an employee affected by a chain of displacements traceable to the abolition of a position due to a New York Dock transaction must be accorded protective status under the New York Dock Conditions.

On August 24, 1989, the Organization filed the instant claim seeking New York Dock protection for Claimant retroactive to his November 14, 1986 displacement.

The sole issue in this case is whether Claimant timely initiated a claim for New York Dock protective benefits arising out of the November, 1986 transaction.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The doctrine of laches is inapplicable to this case since Claimant did not unreasonably delay the filing his claim and, even he had, any dilatoriness on Claimant's part did not prejudice the Carrier.

On this property, a New York Dock Arbitration Committee has ruled that an elapsed time of four years between the date of adverse affect and the initiation of a grievance did not bar a claim. TCU v. UP; NYD § 11 Arb. (Stallworth, 11/26/88). Indeed, there is a landmark decision that laches does not extinguish a claim filed under the Oregon Short Line Conditions because employees, even by their procrastination, cannot waive their rights grounded in federal law. UTU v. SPT; OSL § 4 Arb. (Fredenberger, 9/26/86).²

When Claimant was displaced in November, 1986, the Carrier applied the novel, but incorrect theory that only the immediate incumbent of a job abolished as the result of a transaction was entitled to New York Dock protection. The Carrier's faulty interpretation of the New York Dock Conditions was rejected in the Brewer case. The Brewer decision triggered Claimant's

Like the Oregon Short Line Conditions, a federal statute mandated the ICC to promulgate the New York Dock Conditions.

realization that he had been entitled to New York Dock protective benefits as of November, 1986. Claimant timely filed this claim after the Brewer decision.

Lastly, the Carrier cannot invoke the equitable doctrine of laches because it comes to this Committee with unclean hands. The Carrier deliberately misled Claimant into believing that he was not eligible for New York Dock protective status and further failed to provide Claimant with his test period average earnings in November, 1986. The Carrier, not Claimant, is responsible for any delay in the filing of this claim. Moreover, the Carrier has not suffered any prejudice even if the claim was not instituted in a timely fashion inasmuch as Claimant's requested remedy covers only the thirteen months between the November, 1986 transaction and the January, 1988 transaction.

B. The Carrier's Position

The doctrine of laches can bar a protection claim. RED v. C&WI; Appdx. C-1 Arb. (Dolnick, 1/25/73). In this case, Claimant did not file a claim for New York Dock benefits until thirty-three months after his displacement from the Property Analyst position. During this time, the Carrier accorded Claimant his protected rate under the February 7, 1965 Job Stabilization Agreement. Claimant accepted those benefits without any complaint. While the Carrier emphatically denies that it told Claimant that he was not entitled to New York Dock protection, the mere fact that the Carrier did not provide him with test period average earnings would not prevent Claimant from grieving inasmuch as Clerk Brewer timely filed a claim for New York Dock

benefits. Also, even if Claimant was awaiting the outcome of the Brewer case, he never explained why he delayed filing this claim for an additional eighteen months after the Arbitration Committee issued the Brewer decision.

The delay prejudiced the Carrier. If it had known that Claimant wanted to elect New York Dock protection, it could have compelled him to perform extra work to earn additional compensation to equal his monthly New York Dock displacement allowance. An employee cannot retroactively claim New York Dock benefits at any time. Under the Organization's theory, an employee could go back six years, annul his job stabilization agreement protection and then claim New York Dock benefits depriving the Carrier of any opportunity to maximize the employee's earnings.

IV. DISCUSSION

The New York Dock Conditions do not contain an express time limitation for filing claims for displacement and dismissal allowances. BRS v. B&O; NYD § 11 Arb. (Peterson, 2/28/87). BRC v. BN; NYD § 11 Arb. (Marx, 8/30/84). However, an employee's unreasonable delay in progressing a claim for protective benefits which operates to prejudice the Carrier, is barred under the doctrine of laches. CR v. IBEW; NYD § 11 Arb. (Seltzer, 12/16/85). RED and C&WI; Appdx C-1 Arb. (Dolnick, 1/25/73). The Neutral Member of this Committee, in BRAC v. N&W; 4/7/65 Agreement Arb. (LaRocco, 7/1/86), defined the doctrine of laches and justified its application to protective claims as follows:

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

In RED v. C&WI, Arbitrator Dolnick declined to apply laches to a claim which was delayed for fifteen months following the carrier's initial denial because the petitioning party engaged in alternate, affirmative steps to attempt to resolve the claim. Thus, the carrier was on continuing notice that the claim was alive. However, Arbitrator Dolnick clearly confirmed that laches was a defense available to the carrier. He simply found that the carrier was not prejudiced by the delay. The UTU v. SPT case decided by Referee Fredenberger only intimated that laches may not be an appropriate defense in a dispute brought under Section 4 of the Oregon Short Line Conditions. This claim does not fall within the compulsory interest arbitration provisions of Section 4 of the New York Dock Conditions. This is an ordinary Section 11 grievance, and thus, laches may be applicable.

Claimant procrastinated by sitting on his rights for an unreasonable period of time. He pursued no alternate efforts to procure New York Dock protective status leading the Carrier to conclude that Claimant wished to retain protection under the amended February 7, 1965 Job Stabilization Agreement. Claimant waited thirty-three months before filing a claim for New York

Dock protection. Unlike the case decided by Referee Dolnick, Claimant evinced no early intent that he was pursuing a claim under the New York Dock Conditions. On the contrary, Claimant not only enjoyed protection under the Job Stabilization Agreement but he also attained New York Dock protective status from a subsequent transaction long before filing the instant claim. Even if Claimant was waiting for the outcome of the Brewer case, he still failed to initiate a claim for an additional eighteen months. Claimant never justified this delay.

Claimant's delay in bringing this claim prejudiced the Carrier because it cannot retroactively act to minimize the amount of Claimant's displacement allowances. Furthermore, the Carrier detrimentally relied on Claimant's apparent manifestation that he desired continued Job Stabilization Agreement protection. Although the Organization asserted that the Carrier deceived Claimant into thinking that he was not entitled to New York Dock protection, the Organization has not brought forward any evidence to support its bare assertion. The record is void of any evidence showing the Carrier surreptitiously concealed Claimant's potential right to New York Dock protective status.

Finally, in TCU v. UP, NYD § 11 Arb. (Stallworth, 11/26/88), the Arbitration Committee rejected the Carrier's attempt to impose a strict ninety day filing period, following an initial displacement, for an employee to file for New York Dock benefits. Nonetheless, the Arbitration Committee observed that laches may be a valid defense. It simply declined to impose a standard filing period, since, as we discussed above, Section 11 of the

TCU and UP
NYD § 11 Arb.
Award No. 3

Page 8

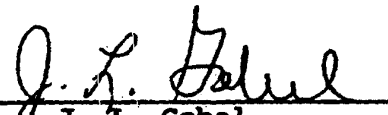
New York Dock Conditions contains no fixed timed limit for initiating a claim.

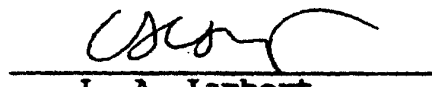
This claim is stale. Due to Claimant's unreasonable delay which prejudiced the Carrier, this claim is barred by laches.

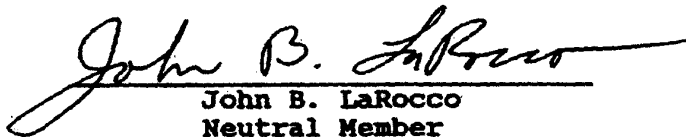
AWARD AND ORDER

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

UP EXHIBIT

51

In the Matter of Arbitration

Transportation Communications
International Union

vs

Burlington Northern Santa Fe
Railway Company

)
)
) **Arbitration Proceedings**
) **New York Dock (L.) (11)**
) **ICC Finance Docket 32549**
) **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

¹The 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 Worth, 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 lynchpin 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 of 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 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.

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 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

²Given 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

³Employees' 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 corrected by the Claimant. See Employees' Exhibit A @ p. 22 of 106.

⁴Employees' 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

⁵Carrier'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 of 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

⁶Carrier's Exhibit B @ p. 8 of 52.

⁷There 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 of 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

⁸Carrier'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.

⁹One 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

¹⁰Carrier'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

¹¹Employees' Exhibit E @ p. 4 and Employees' Submission @ p. 21 seq.

¹²Nekich 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 quality coordinator position to qualify as a manager.

¹³This 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

¹⁴Carrier's Exhibit B @ p. 21 of 52.

¹⁵Carrier'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

¹⁶We 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.

¹⁷See *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

¹⁸See 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

¹⁹Certainly 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.

²⁰Throughout 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

²¹All 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.

²²The 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.

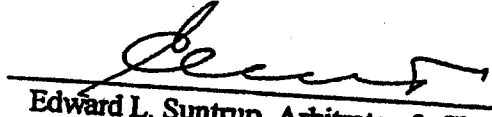
Was the Claimant subject to potential covered status? At one time auditors had been represented by this Organization on this property. That is not disputed in the record. But the basis of the union's argument with respect to the Claimant is that he also was eligible for representation since his position 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".

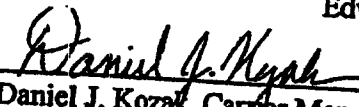
A final issue dealing with whether the Claimant received benefits not granted to the rank-and-file, after being affected by a transaction is, in view of the foregoing, moot. There was no transaction in the instant case because the Claimant was not an employee covered by NYD under Article IV.

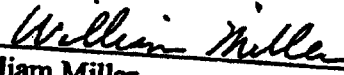
In view of the full record before him the arbitrator rules that the Claimant to this case is not an employee under Article IV of NYD. Subsequently he was not a displaced employee when his position of "project manager" was abolished in October of 2001, and there was no transaction associated with the 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

TCU v. UNION
PACIFIC
(1992, REHMUS)

In the Matter of Arbitration between

Transportation-Communications
International Union

-and-

Union Pacific Railroad Company

OPINION
AND
AWARD

New York Dock
Conditions

B.A.Sounier claim

The parties' pre-hearing submissions in this matter were received on or before December 8, 1992. Hearing was held in San Diego, CA on December 8, 1992. Attending in addition to the undersigned board members were Brian P. Whitacre, Vice General Chairman, TCU; and Dean D. Matter, Senior Director Labor Relations, Non-Ops, UP. Carrier's Exhibit P was received on December 12, 1992, and thereafter the record was closed.

ISSUE

Is B. A. Sounier entitled to the protective benefits of the New York Dock Conditions as the result of her displacement in January, 1986?

BACKGROUND OF THE DISPUTE

In 1982 the ICC approved the merger of the Union Pacific, the Missouri Pacific, and the Western Pacific Railroads. Employees affected by the resultant transactions were afforded labor protective benefits including those of the New York Dock Conditions (NYDC).

Mr. James Beth, an accounting supervisor, was required as a result of one of these transactions to exercise his bargaining unit seniority to bump into a clerical position. In so doing, on January 14, 1986, he displaced the claimant here, Ms. Barbara

Sounier, a represented clerical employee. Some 19 months after this, as the result of an arbitration award rendered on July 29, 1987, Mr. Beth was found entitled to NYDC protective conditions. Since she was an individual affected by a NYD-covered chain of displacements, Sounier filed for these same NYD protections on March 31, 1992, which were then denied by the Carrier.

POSITIONS OF THE PARTIES

The Organization's position is that Mr. Beth's exercise of seniority to Ms. Sounier's clerical position was the direct result of a merger transaction. Accordingly, Sounier's displacement was likewise the result of a merger transaction and she became entitled to NYD protective benefits.

The Carrier challenges this claim largely on the basis that the Organization waited over six years to assert it. The Organization's delay in bringing the claim harmed the Carrier in that it had no way to act retroactively to minimize the displacement allowances that might be due the claimant. Hence it is unfair to it to process the claim at this late date and it should be barred by the equitable doctrine of laches.

To this argument the Organization responds that Carrier management misled Sounier by concealing her NYDC entitlement from her. It did this by its deliberate policy of denying that a supervisory employee--in this case, Beth--was entitled to NYDC benefits, thus forcing him and others to win their claims in a prolonged dispute culminating in arbitration. The Organization contends and the Carrier acknowledges that the NYD Conditions do

not contain an express time limit for filing a claim. Further, the Organization contends that the elements necessary to sustain an assertion of laches do not exist in this situation. It cites other arbitration awards where the affirmative defense of laches has not been sustained for one reason or another. The Carrier cites other awards where it has. This disagreement and dispute is now brought by the parties to arbitration.

DISCUSSION

Laches is an equitable doctrine that may be invoked in situations where failure to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party, may bar the exercise of the right. Each situation where the defense of laches is raised must be reviewed alone, there being no general rule on how long a time is unreasonable.

In this case, one can begin with the observation that NYD protections are afforded to employees affected by a transaction, but for only six years thereafter. Sounier was originally displaced on January 14, 1986, and her claim for protection was not filed until 74 1/2 months thereafter, or over six years later.

I do not think this is the operative period of delay here, however. While Sounier might have filed a claim immediately upon her displacement, this would have presumed a level of sophistication and advice not generally available to employees. Here the Carrier was contesting the right of Beth and other similarly displaced supervisors to NYD protections. The award of Arbitrator

Seidenberg granting them such protection was not signed until July 29, 1987 (Car.Ex.P). I conclude that only then were the Organization and Sounier put on notice that she was an employee who was entitled to be similarly protected.

But even then 56 months, or nearly five years, elapsed before this claim was filed. There is no explanation in the record for this delay. There is a rather long line of awards in the railroad industry holding that failure to process a claim within two or three years of the time it arises constitutes abandonment of the claim (Car.Exs.H,I,J,K,L). This claim was made far later.

Successful invocation of the doctrine of laches also requires, beyond delay itself, that potential or actual harm to the respondent would arise in the event the claim were to be sustained. Here, while it would still be possible to calculate Claimant's test period average earnings, NYDC permits protective benefits to be offset by refusal of the protected employee to work overtime. Without a claim, the Carrier does not keep records of overtime refusals and hence would be unable after six years to mitigate its liability for displacement allowances. This potential loss represents detriment to the Carrier were this claim to be sustained at this late date. Finally, the record does not show that Claimant always sought the highest-paying available position that her qualifications and seniority permitted during her protective period, which also may be an offset. This too represents increased liability to the Carrier, one that cannot now be averted.

On this record, I find that a nearly six-year unexplained

delay in filing this claim, the delay creating possible increased financial liability to the Carrier that cannot now be avoided or offset, fatally prejudices it.

AWARD

The claim of B. A. Sounier for protective benefits under the New York Dock Conditions as a result of her displacement in January, 1986, is denied.



J.L. Gobel
Int'l. Vice President
Transportation-Communications
International Union



A.T. Olin
Assistant Director
Labor Relations, Non-Ops
Union Pacific Railroad Co.


Charles M. Rehms, Referee

Dated: December 30, 1992