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Before the
SURFACE TRANSPORTATION BOARD

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

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

(Arbitration Review)

MOTION TO STRIKE

ENTERED
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Due Date: April 28, 2005

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Preliminary Statement

John E. Grother (petitioner or Grother), files this motion to strike portions of the "Response" by Union Pacific Railroad Company (UP), filed April 8, 2005. UP's Response (Resp., 4/8/05) was directed to Grother's Supplement to Petition For Review, filed February 22, 2005. (Supp. Pet., 2/22/05). This proceeding involves Grother's challenge to the decision of a three-member arbitration panel, Grother dissenting, issued January 6, 2005.^{1/}

The Board's rules ordinarily do not permit a reply-to-a-reply. 49 CFR 1104.13(c). However, motions to strike are appropriate where, as here, a pleading goes beyond a legitimate reply, so

^{1/} UP's "response" was not authorized. The Board's March 5, 2005 decision permitted UP to file a "reply" in accordance with the Board's March 5, 2005 decision, and as permitted by the agency's rules. 49 CFR 1104.13(a). However, UP's "response," with text of 29 pages and lengthy appendices, goes beyond a "reply."

as to contain redundant, irrelevant, immaterial, impertinent, or scandalous matter. 49 CFR 1104.8. The UP's response (reply) contains much irrelevant, immaterial, and impertinent matter, and is confusing as well. Accordingly, Grother submits this Motion to Strike. Of course, this Motion to Strike is not directed to error per se, and failure to strike certain UP material does not imply the validity or accuracy of any UP statements.

UP's response is accompanied by an Appendix of Exhibits, consisting of 311 pages (all of which are taken from selected UP exhibits, or portions thereof, from the arbitration, except for 34 pages of hearing transcript). The Appendix of Exhibits lacks an index or table of contents, and thus is difficult to follow.^{2/} The Appendix is woefully incomplete; for example, curiously absent from UP's Appendix is UP's denial of Grother's claim, issued July 18, 2003. (Supp. Pet., 2/22/05, App. 2).

UP's "response" is to a large extent based on a new and novel theory. UP now argues that Grother brought his formal New York Dock (NYD) claim as an afterthought, following an asserted 6-year effort by Grother to secure relief for alleged discrimination afforded under Texas/federal age and veteran legislation. (Resp., 4/8/05, 1-2, 5-6, 6, 17-18, 28). UP is grasping at straws. Grother's discrimination claims which, incidentally, were not advanced until December 15, 2002 (Veteran), and March 12, 2003 (Age), are not part of this proceeding. The Arbitration Panel's January 6, 2005 decision, at pp. 15-23, in reciting UP's conten-

^{2/} UP states that the various exhibits in its Appendix are also contained in the Grother appendices to Supp. Pet. for Review. (Resp., 4/8/05, 3 n.1).

tions, makes no mention of any Grother claims of discrimination as a basis for initiating a formal NYD proceeding. (Supp. Pet., 2/22/05, App. 1, 15-23). The Arbitration Panel, at pp. 23-33, is silent on discrimination in its Discussion and Findings, other than to infer that Grother implied he was treated in a discriminatory manner in a July 15, 1997 letter to UP CEO Davis. However, the actual context of the communication was "UP Values System" and "issues of discrimination," and in no way was directed to any federal/state claim of discrimination. (Supp. Pet., 2/22/05, App. 1, 27; App. 4, Ex. E-2 {E10, 1}).^{3/}

The type of "discrimination" projected by some SP personnel at the time of merger implementation may have related to fears that UP personnel would be given preference over their SP counterparts in staffing matters. The harmful effect of culture conflict in railroad mergers had been documented in the case of the Penn-Central merger. See: Daughen, Joseph P. and Binzen, Peter: The Wreck of the Penn Central, Ch. 5, "The Red and the Green," pp. 90-128 (Little Brown, 1971).^{4/}

In addition to UP's mistaken view that this arbitration review is centered upon discrimination claims, UP's response misstates the actual arbitration decision under review, the material facts, and the transaction involved. In short, UP is attempting to have the Board adopt an entirely different set of

^{3/} Grother at the time of the merger implementation at Tucson (April 13, 1997), was under age 55, with no claim of age discrimination relevant.

^{4/} Grother was told when informed by Mr. Packard's superior he would no longer be at Tucson, that UP wanted its own managers on the Sunset Route. (Supp. Pet., 2/22/05, App. 3, V.S. Grother (causality) 3).

facts, and would void UP's responsibility for UP's commitments to certain positions it agreed upon in signing the arbitration decision, and in making it effective. UP is fully responsible, as an unconditional signatory to the Arbitration decision, to the findings of the Arbitration Decision.^{5/}

MATTERS TO BE STRICKEN

I. UP's RESPONSE-INTRODUCTION. (Resp., 4/8/05, 1-2).

UP's introduction, at pp. 1-2, consisting of three paragraphs, contains objectionable matter. First paragraph, the acronym "SMT0" is not accurate, and should read "SRMTO."^{6/} Grother was not transferred to "Manager Terminal Operations" at Houston, but rather to Manager of Intermodal Operations (MIO). (Supp. Pet., 2/22/05, 5). The sentence, "Grother...as a result of his job performance..." is without evidentiary support, erroneous, and irrelevant/material. The sentence, "Over the next six years... discriminatory" is without evidentiary support, erroneous, and irrelevant/immaterial.

The major reason for striking SMT0 and Manager Terminal Operations is because the terms are impertinent (inapplicable) as to Grother;^{7/} the two sentences each deal with causality--an

^{5/} The Neutral/Referee circulated a draft of the proposed panel decision. UP could have proposed revisions, or issued a separate expression. The Decision has no force or effect without the concurrence of at least two of the panel members. (Supp. Pet., 2/22/05, App. 5, E-16; App. 8, Ex. 19). Indeed, UP did suggest one revision, which was accepted by the Neutral/Referee. See: Reply to Motion for Ext. of Time, 3/4/05, Atta.).

^{6/} The same SMT0 error is found throughout UP's response. (Resp., 5, 8, 16, 18, 20, 21, 23, 24, 25).

^{7/} Indeed, the Arbitration Committee used the term SRMTO, and the term Manager of Intermodal Operations throughout the January 6, 2005 decision. (Supp. Pet., 2/22/05, App. 1, p. 4, et seq.).

issue where both Grother and UP have certain burdens of proof--but which was not the subject of findings or analysis by the Arbitration Decision, and thus not capable of effective review by the Board. (Supp. Pet., 2/22/05, App. 1, 26, 32). Indeed, UP in its post-hearing brief suggested the arbitration panel look only to the employee (job classification) issue, and that there is no need to decide causality or laches issues. (Supp. Pet., 2/22/05, App. 11, 15).

Second paragraph, first and third sentences should be stricken, as immaterial/irrelevant and impertinent--they deal with the "causality" issue for Grother's adverse effect--a matter not before the Board.

Third paragraph, second sentence, "On December 21, 2004, Arbitrator Lynette Ross issued an Award...." should be stricken as irrelevant/immaterial, as well as impertinent.^{8/} The Neutral/Referee of the Arbitration panel, on December 21, 2004, issued a draft Opinion and Award. However, both UP and Grother suggested revision, such that the draft was irrelevant/immaterial. (Reply to Motion to Ext. Time, 3/4/05, *atta.*). A final arbitration panel opinion and award (not Arbitrator Ross Award) was issued January 6, 2005. (Pet. for Rev., 1/10/05, *atta.* 34); Decision, 1/13/05, 1 n.1).

Third paragraph, fourth sentence, "In addition, ..prejudice to UP." should be stricken as impertinent (inapplicable) as UP submitted no evidence on laches which would indicate any prejudice

^{8/} An identical UP statement concerning the draft December 21, 2004 Award is sought to be stricken, infra, at p. 8.

to UP.⁹/

II. UP STATEMENT OF FACTS. (Resp., 4/8/05, 2-9).

A. The UP-SP Merger. (Resp., 4/8/05, 2-3). Second sentence, "One such merger occurred on August 6, 1996,..." should be stricken as impertinent (inapplicable), as the merger occurred on September 11, 1996. (Supp. Pet., 2/22/05, App. 1, 4).

B. Grother's Employment as a Manager at Carrier. (Resp., 4/8/05, 3-4). Second paragraph, "Grother continued to have the same managerial job duties and responsibilities...including his continued status as the top carrier official for the Tucson terminal." should be stricken as impertinent (inapplicable). The sentence is unsupported by the evidence or record, certainly for the period April 16-June 26, 1997. (Supp. Pet., 2/22/05, App. 3, V.S. Grother (Job classification), 2-5).

C. Transfer of Switching Operations. (Resp., 4/8/05, 4). The entire paragraph should be stricken as immaterial/irrelevant, as it is solely related to "causality"--not under review.

D. Grother's Transfer and Demotion. (Resp., 4/8/05, 5). The entire paragraph is should be stricken, for the same reason as (C).

E. Grother's Claims of Discriminatory Demotion. (Resp., 4/8/05, 5-6). The entire two paragraphs should be stricken, for discrimination was not an issue raised in the arbitration or discussed in the panel's decision, and is irrelevant/immaterial.

⁹/ The only UP laches "evidence" was presented by its witness Packard, when recalled at the hearing, and his evidence was exculpatory to Grother. (Supp. Pet., 2/22/05, 11; App. 7, 37).

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

(Resp., 4/8/05, 6-7). First paragraph, first two sentences should be stricken as impertinent (inapplicable), inasmuch as Grother's formal NYD filing on May 12, 2003 was within the NYD six-year period beginning July 1, 1997. The final sentence should be stricken as impertinent (inapplicable) inasmuch as Grother did not submit a request for appointment of an arbitrator, but sought an arbitration committee. (Supp. Pet., 2/22/05, App. 8, Ex. 3, 1).

Final paragraph, final sentence, "A hearing was held before the Arbitrator...." should be stricken as impertinent (inapplicable), inasmuch as the hearing was held before the arbitration committee as noted by the first five words of the text of the Opinion and Award. (Supp. Pet., 2/22/05, App. 1, 1).

G. Arbitrator Ross' Award. (Resp., 4/8/05, 7-9). First paragraph, first sentence should be stricken, as erroneous and impertinent (inapplicable), for the same reason given for the same statement made elsewhere in this Motion to Strike, supra, at p.6. A draft arbitration panel decision was circulated December 21, 2004, but the final and effective decision was not adopted or issued until January 6, 2005. (Decision, 1/13/05, 1 n.1).

Second paragraph, fourth sentence, beginning with "The Arbitrator also found"...through end of paragraph on p. 8," should be stricken as simply not contained in the Arbitration panel's decision as findings, particularly at the referenced pages. Indeed, petitioner finds no reference to Form 15121 anywhere in the final Opinion and Award, among other so-called "findings.".

Final paragraph, second sentence, should be stricken as impertinent (inapplicable), as there was no "Arbitrator's review

of the evidence on causation." Indeed, UP elsewhere acknowledges the Arbitrator (Arbitration Committee) did not analyze the issue of causation. (Resp., 4/8/05, 28).

III. ARGUMENT. (Resp., 4/8/05, 9-29). Petitioner deems it unnecessary and perhaps improper to strike portions of "Argument" inasmuch as the reader is on guard so as to question, and to beware the partisan advocate; especially since argument is not evidence. Of course, there are many erroneous statements of facts contained in UP's so-called Argument. Petitioner notes that UP's entire submission and presentation in the arbitration proceeding was "argument," from its General Director-Employee Relations Planning, a position within the Labor Relations Department,^{10/} with the single exception of one UP witness (from many possible UP witnesses); and the single UP witness declined to distribute testimony in advance of the hearing. (Supp. Pet., 2/28/05, App. 6, GH28, 1).

It should be kept in mind, in considering UP's argument concerning laches, that much of the UP's laches argument related to UP's asserted inability to determine the facts surrounding causality; yet, causality is no longer an issue. Moreover, any issue concerning sums due Grother if found to be an employee or subordinate official, and thus eligible for protective conditions,

^{10/}The Arbitration panel decision recites that UP's representative served and carried the title of UP's General Director of Labor Relations. (Supp. Pet., 2/22/05, App. 1, 16). Despite his claim to the title (Sup. Pet., 2/22/05, App. 8, 1), the individual is "General Director-Employee Relations Planning." (Supp. Pet., 2/22/05, App. 6, GH28, 1).

has been stipulated for resolution in phase two, and thus not before the Board. (Supp. Pet., 2/22/05, App. 5, Ex. E-16).

CONCLUSION

The Board should strike UP's response, filed April 8, 2005, to the extent set forth herein. The Board should review the final arbitration decision, issued January 6, 2005, which presents recurring and significant matters of general importance under NYD for unrepresented subordinate officials and employees; and the Board should grant Grother's appeal, and afford the relief requested in his petition for review as supplemented.

Respectfully submitted,


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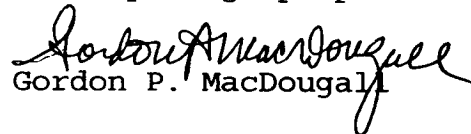
April 28, 2005

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall