ARBITRATION COMMITTEE

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO, Organization,	Pursuant to Article I, Section 11 of the New York Dock Conditions and Implementing Agreement No. 11
and	
MISSOURI PACIFIC RAILROAD COMPANY, Carrier.	ICC Finance Docket No. 30000

Hearing Date: June 13, 1986
Hearing Location: St. Louis, Missouri
Date of Award: September 3, 1986

MEMBERS OF THE COMMITTEE

Employes' Member: F. T. Lynch
Carrier Member: D. D. Matter
Neutral Member: John B. LaRocco

CARRIER'S QUESTIONS AT ISSUE

1. Was Implementing Agreement No. 11 - Union Pacific Railroad Company/Missouri Pacific Railroad Company and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes date effective July 1, 1983 violated when Clerks A. Whitney, S. Townsend, and W. C. LeNoir, all employes of the Purchasing and Materials Department, Roster No. 8, were not offered an opportunity to secure any of the eleven (11) positions bulletined July 1, 1983 which were established at Omaha, Nebraska in accordance with the provisions of Implementing Agreement No. 11, Article II?

2. If the answer to Question No. 1 is in the affirmative, shall the Carrier now allow such employes a displacement onto any position which was transferred from Missouri Pacific Railroad Company to Union Pacific Railroad Company pursuant to Implementing Agreement No. 11 which was not filled by the incumbent and dovetail such employes' MP Roster No. 8 seniority date into UP Master Roster 250, Zone 200 listing?

3. Additionally, if the answer to Question No. 1 is in the affirmative, shall the above named Claimants be paid at the rate of pay of any of the eleven positions bulletined on July 1, 1983 which were not filled by the previous incumbent of the positions and which should have been offered to the Claimants under the provisions of Implementing Agreement No. 11 beginning the effective date of the assignments, September 1, 1983 and continuing until the provisions of the Implementing Agreement are complied with?

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS
and
MISSOURI PACIFIC RAILROAD COMPANY

ORGANIZATION'S QUESTIONS AT ISSUE

1. Was Implementing Agreement No. 11 - Union Pacific Railroad Company/Missouri Pacific Railroad Company and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes date effective July 1, 1983 violated when Clerks A. Whitney, S. Townsend, and W. C. LeNoir, all employes of the Purchasing and Materials Department, Roster No. 8, were not offered an opportunity to secure any of the eleven (11) positions bulletined July 1, 1983 which were established at Omaha, Nebraska in accordance with the provisions of Implementing Agreement No. 11, Article II?

2. If the answer to Question No. 1 is in the affirmative, shall the above named Claimants be paid at the rate of pay of any of the eleven positions bulletined on July 1, 1983 which were not filled by the previous incumbent of the position and which should have been offered to the Claimants under the provisions of Implementing Agreement No. 11 beginning the effective date of the assignments, September 1, 1983 and continuing until the provisions of the Implementing Agreement are complied with?

OPINION OF THE COMMITTEE

I. INTRODUCTION

By an order dated September 24, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (Carrier) and the Western Pacific Railroad (WP). [ICC Finance Docket No. 30000.] To compensate and protect employees adversely 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 Carrier, the UP and WP pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

In accord with Section 4 of the New York Dock Conditions, the Carrier and the UP notified the Organization (on April 4, 1983) that they intended to transfer approximately eleven fully covered and partially exempt clerical positions in the Purchasing and Materials Department from the Carrier's St. Louis Headquarters Building to the UP Headquarters in Omaha, Nebraska.[1] The parties successfully negotiated Implementing Agreement No. 11, dated June 22, 1983, to govern the impending transfer of positions. This dispute centers on whether or not the Carrier properly applied Implementing Agreement No. 11 when

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[1]All sections pertinent to this case are found in Article I of the New York Dock Conditions. Thus, the Arbitrator will only cite the particular section number.

it filled the eleven positions established at Omaha on September 1, 1983.

The Carrier and the Organization submitted the dispute to final and binding arbitration under Section 11 of the New York Dock Conditions. At the Neutral Member's request, the parties waived the Section 11(c) forty-five day limitation period for issuing this decision.

II. BACKGROUND AND SUMMARY OF THE FACTS

Article II, Section 1 of Implementing Agreement No. 11, created four preference tiers for filling the positions transferred from St. Louis to Omaha. Article II, Section 1 reads:

> "The incumbents of the positions transferred will be afforded the first opportunity to transfer to Omaha with their respective positions. The incumbents must make such election within ten (10) days from date of the notice under Article I above. Thereafter, any position transferred, which is not filled by its current incumbent, will be offered in seniority order to the remaining Purchasing & Materials Department employes at St. Louis on Roster #8---MANAGER PURCHASES & MANAGER MATERIALS, subject to the seniority, fitness and ability rules of the UP/BRAC Agreement. Any remaining positions will be offered in reverse seniority order to an equal number of MP employes on Seniority Roster No. 8 and such junior employes must elect one of the options under Section 3 within five (5) days of offer.
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> "Positions not filled after affording other employes on Roster 8 the opportunity to transfer to Omaha, shall be filled by bulletining such positions to employes in Zone 200 - General Office, Headquarters Building, Omaha."

Article II, Section 3 lists four options, from which an employee was required to select if the worker was offered an Omaha position, as follows:

"(1) Exercise seniority on their home Carrier.

"(2) Accept the offer and transfer to Omaha.

"(3) Resign from all service and accept a lump sum computed as follows:

"(a) Protected employes electing UP February 7, 1965 protective benefits may elect a separation allowance as follows:

"i. with 3 years but less than 5 years service an amount of $12,047.26.

"ii. with 5 or more years of service an amount of $23,750.36.

"(b) MP protectes employes with 15 or more years service -- computed in accordance with Section 9 of the Washington Job Protection Agreement of May 9, 1936.

"(4) To be furloughed with a suspension of protective benefits during the furlough."

On or about July 1, 1983, the incumbent of each St. Louis position was properly given a right of first refusal to follow his position to Omaha. Next, the Carrier posted bulletins advertising the Omaha positions. The three Claimants, who held seniority on Roster No. 8 but were not actively employed in the Purchasing and Materials Department, did not bid on the available positions. The remaining positions were awarded to UP clerical workers on September 1, 1983.

On October 28, 1983, the Organization initiated the instant claim alleging that the Carrier breached Article II, Section 1 of Implementing Agreement No. 11. According to the original claim, the three Claimants never received notification that all remaining vacancies would be filled in reverse seniority order.

During implementation of the Purchasing Department consolidation, Claimants lacked sufficient seniority to occupy a regular position on Roster No. 8. Claimants Townsend and Whitney

were working positions on other seniority rosters and Claimant LeNoir was accepting temporary work on a sporadic basis.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Although the Carrier offered the appropriate Omaha position to the incumbent of each transferred position, the Organization argues that the Carrier failed to specifically offer any remaining positions to junior employees in reverse seniority order. The language in Article II, Section 1 is explicit. It precisely states that any "...remaining positions will be offered in reverse seniority order to an equal number of MP employees on Seniority Roster No. 8..." [Emphasis added.] Before accepting bids from UP workers, the Carrier was required to offer any unfilled Omaha positions to employees listed on Seniority Roster No. 8 starting at the bottom of the list. Article II, Section 1 applied to every worker listed on Roster No. 8. If the parties had intended to limit the mandatory offer to actively employed workers, the drafters of Implementing Agreement No. 11 would not have used the terms "seniority roster" and "reverse seniority order." Those terms manifest the parties' intent to include all workers holding District No. 8 seniority. Each of the steps for filling the transferred positions encompassed a broader group of workers. The first step allowed incumbents to retain their positions. The second step permitted Purchasing and Materials Department employees (at St. Louis) to transfer to Omaha. By step three, the pool of employees who might fill the remaining position expanded to all employees on Seniority Roster No. 8 regardless of their employment status in July and August, 1983.

Even though the Carrier posted bulletins (advertising the remaining Omaha positions) at St. Louis, the Carrier failed to comply with Article II, Section 1. Claimants were not forced to tender any bids. Instead, since the Carrier was unable to fill all positions with incumbents and St. Louis Purchasing Department workers, the Carrier should have extended an offer to each District No. 8 junior employee in reverse seniority order. The Carrier concedes that it did not approach Claimants and offer them the remaining Omaha positions. Claimants were directly affected by the merger transaction because they were permanently deprived of a right to be recalled to eleven positions once the work was removed from Seniority Roster No. 8. Because Claimants were expressly covered by Implementing Agreement No. 11, the parties recognized that Claimants might be adversely affected by the consolidation of work.

Therefore, the Organization urges the Committee to order the Carrier to pay Claimants the rate of pay of any position filled by a UP worker beginning on September 1, 1983 until the Carrier complies with Article II, Section 1 of Implementing Agreement No. 11.

B. The Carrier's Position

Claimants were unaffected by the consolidation since they were furloughed from Roster No. 8 when the Carrier implemented the transfer. Claimants' employment status remained unchanged. Thus, the Carrier concludes that Claimants were neither dismissed nor displaced employees within the meaning of the New York Dock Conditions.

Since Claimants were not involved in the transfer of positions to Omaha, Claimants are required to identify another merger related transaction and to show a nexus between the transaction and some adverse employment effect. Claimants have failed to designate a transaction or to demonstrate the causal nexus.

The Carrier's primary argument is that the parties intended, in Implementing Agreement No. 11, to include only those workers actively employed on Roster No. 8 who were affected by the transaction. The Preamble to Implementing Agreement No. 11 alluded to Section 4 of the New York Dock Conditions which requires the Carrier and the Organization to negotiate an implementing agreement covering "all employees involved." Thus, the Preamble reference to Section 4 demonstrates that Implementing Agreement No. 11 was limited to employees discretely touched by the consolidation. Unlike Implementing Agreement No. 1, when drafting Implementing Agreement No. 11, the parties deliberately refrained from dovetailing the seniority of all individuals on Roster No. 8 into a UP seniority list. The language differences between Implementing Agreement No. 1 and Implementing Agreement No. 11 reveal the parties' intent to include only actively employed Purchasing and Materials Department workers within the latter contract.

If Claimants are entitled to exercise one of the Article II, Section 3 options, they could bump other clerical workers even though Claimants endured no change in their employment status. Such displacement would not only be inequitable but would also contravene rules in the Schedule Agreement. The

succession of displacements would expand the group of workers who would be entitled to benefits far beyond the scope of consolidating eleven Purchasing and Materials Department positions. For similar reasons, vesting Claimants with the right to elect a separation allowance would be a windfall to the unaffected Claimants and force the Carrier to expend additional sums to hire new employees.

Finally, the Carrier contends that it strictly followed the Article II, Section 1 procedure for filling the transferred positions. After giving incumbents of the transferred positions the first opportunity to follow their jobs, the Carrier posted advertisements on bulletin boards at the St. Louis Purchasing and Materials Department Office. The bulletins constituted an "offer" to Claimants and all other workers, in seniority order, to fill the remaining transferred positions. Inasmuch as Claimants decided not to volunteer for any of the Omaha positions, Claimants are estopped from later complaining that the Carrier failed to offer them the positions. Claimants' silence reasonably led the Carrier to conclude that Claimants lacked any interest in transferring to Omaha.

The Carrier respectfully asks the Committee to issue a negative response to the issues in dispute.

IV. DISCUSSION

In Implementing Agreement No. 11, the parties clearly created a four tiered hierarchy to determine which workers would occupy the Purchasing and Materials Department positions transferred from St. Louis to Omaha. Without doubt, the Carrier properly administered the first and second preference levels.

Incumbents were accorded a right of first refusal to follow their jobs. Next, the Carrier bulletined the remaining transferred positions to all remaining workers in the St. Louis Purchasing and Materials Department who held seniority on Roster No. 8. However, there is a dearth of factual evidence proving that the Carrier offered the number of still unfilled positions "... in reverse seniority order to an equal number of MP employes on Seniority Roster No. 8..." Rather, the record discloses that since junior workers did not tender bids during step two, the Carrier presumptuously skipped the third preference tier and filled the remaining jobs with UP workers.

The posting of job bulletins at St. Louis cannot be construed as a specific offer of Omaha employment to junior workers listed on Roster No. 8. The bulletins were mainly aimed at those workers, other than incumbents of the transferred positions, actually employed in the Purchasing and Materials Department. There is no probative evidence that Claimants were aware of the bulletins or that they should be charged with constructive knowledge of the posted advertisements. In addition, posting a job bulletin hardly constitutes an offer. In traditional labor relations parlance, a bulletin solicits employee bids which the Carrier either accepts or rejects according to rules in the applicable agreement. Thus, a job advertisement merely informs workers of an available vacancy and it is the employee, through his bid, who tenders the "offer" to fill the position. In this instance, Claimants were not under any obligation to respond to the Carrier's bulletins.

Instead, Claimants' rights and obligations arose under the third step described in Article II, Section 1. Until the second step was fully completed, the Carrier would be unable to ascertain how many, if any, of the transferred positions were unfilled. Then, the Carrier should have matched each remaining Omaha position to an individual, junior worker, in inverse seniority order, on Roster No. 8. At the third level, the Carrier was mandated to offer (as opposed to merely soliciting bids) the remaining jobs to junior workers which triggered the workers' duty to select one of the Article II, Section 3 options. The Carrier failed to comply with the third preference level since it never specifically extended an offer of Omaha employment to Claimants.

The Carrier vigorously contends that Implementing Agreement No. 11 was intended to cover only workers who were actively employed on Roster No. 8. For two reasons, we disagree. First, the express language in Article II, Section 3 included "...employes on Seniority Roster No. 8." If the parties wanted to limit application of the third step, the parties could have utilizied alternative terminology. The Carrier has not adequately explained why the parties settled on the unambiguous language in Article II, Section 1 if the parties intended to restrict the provision to actively employed clerks. The plain meaning of the words in the Agreement is the best evidence of the parties' true intent. Second, forcing junior workers on Roster No. 8 to select one of the options was not unreasonable in light of the surrounding circumstances. Perhaps, at the time, the parties perceived that the consolidation might adversely affect

Claimants sometime after the transaction was implemented. Most importantly, although implementing contracts, such as Implementing Agreement No. 11, are negotiated pursuant to the criteria in Section 4 of the New York Dock Conditions, nothing in Section 4 prohibits the parties from formulating implementing agreements which protect more employees or provide for greater benefits than the minimum level of protection prescribed in the New York Dock Conditions. Often during the give and take of good faith bargaining, the parties may address subjects beyond the selection of forces and assignment of employees, as described in Section 4, to attain a satisfactory agreement without resorting to compulsory arbitration. In summary, it is not the function of this Committee to second guess the parties' rationale for including certain employees, even if they were unaffected by the transaction, within the protective scope of Implementing Agreement No. 11. This Committee may not alter the content of Implementing Agreement No. 11. Pursuant to Section 11 of the New York Dock Conditions, our jurisdiction is confined to interpreting and applying the agreement terms.

Since we have concluded that the Carrier breached Article II, Section 1, this Committee must fashion a remedy which, to the extent feasible, places Claimants in the position or status they would have achieved but for the Carrier's violation. Also, we are mindful of the pitfalls inherently associated with adjusting seniority rosters long after the transaction is completed. The proper remedy must compensate Claimants yet recognize the rights of other workers at St. Louis and Omaha.

With the benefit of hindsight analysis, Claimants today, might choose an option different from the one they would have selected in August, 1983. We must reconstruct the critical choices, with all the attendant uncertainties, which Claimants would have confronted in 1983.

To redress the Carrier's violation of Implementing Agreement No. 11 without unreasonably undermining established seniority rosters, we will provide each Claimant with two alternatives. Claimants shall be given an opportunity to bid on the transferred positions left unfilled after steps one and two. If Claimants elect to transfer to Omaha, they shall be compensated at the rate of pay of the particular Omaha positions less amounts earned subsequent to September 1, 1983. If Claimants forego the option to transfer to Omaha, then they are electing to maintain their current employment status.

In conclusion, the Committee affirmatively answers the questions at issue.

AWARD AND ORDER

This Committee renders the following Award:

1. On or before October 10, 1986, each Claimant may bid on the remaining positions transferred to Omaha. The Carrier shall award each position to the proper Claimant in accord with Article II, Section 1 of Implementing Agreement No. 11.

2. If Claimant(s) elects to be placed on an Omaha position, then he shall transfer to Omaha on or before November 1, 1986 and his seniority shall be dovetailed into the UP Master Roster 250, Zone 200 listing pursuant to Article V of Implementing Agreement No. 11.

3. If Claimant(s) exercises the alternative described in Part 1 above, the Carrier shall pay Claimant(s) the rate of pay of the particular Omaha position for the period commencing September 1, 1983 until Claimant(s) is placed in the Omaha position less amounts earned during that period. The Carrier shall tender such payment within thirty days after Claimant(s) assume the Omaha position.

4. If Claimant(s) elects the option in Part 1 above, Claimant(s) is entitled to the same relocation benefits accorded to other workers who transferred to Omaha as stated in Implementing Agreement No. 11 and the attached Letters of Understanding.

5. If Claimant(s) does not bid on a remaining Omaha position on or before October 10, 1986, then it will be presumed that Claimant(s) has elected not to transfer to Omaha and the Carrier has satisfied Claimant's rights under Implementing Agreement No. 11.

6. The Organization and Carrier may mutually agree to extend the time limits in this Award.

7. This Committee retains jurisdiction over this case should a dispute develop regarding the application of our remedy.

Dated: September 3, 1986

F. T. Lynch
Employes' Member

D. D. Matter
Carrier Member

John B. LaRocco
Neutral Member