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In the Matter of Arbitration Between:)
)
Union Pacific Employee)
E. A. Peterson)
)
and)
)
Union Pacific Railroad Company.)
)
Pursuant to Article I, Section 11)
of the New York Dock Conditions)
Imposed by the Interstate Commerce)
Commission in Finance Docket No.)
30,000)

Before Arbitration Committee
Members:

Lynn A. Lambert Senior Director Labor Relations	Carrier Member
Robert V. Broom Attorney	Employee Representative Member
Lamont E. Stallworth Labor Arbitrator	Neutral Member

Hearing Held	Chicago, Illinois December 19, 1988
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ISSUE IN DISPUTE:

The Parties have submitted the following issue to the Committee:

1. Did Elmer A. Peterson lose his general clerk position effective April 1, 1987 because of a merger related transaction?

BACKGROUND:

This dispute involves a claim by an individual employee that he was displaced because of a merger, and therefore is entitled to certain protective benefits. In September, 1982 the Interstate Commerce Commission (I.C.C.) approved the merger and

consolidation of the Missouri Pacific Railroad Company (MP), the Western Pacific Railroad Company (WP) and the Union Pacific Railroad Company (UP). As a condition of that merger the I.C.C. imposed a set of labor protective conditions upon the railroads involved to afford some protection to the employees affected by the merger. Known as the New York Dock Conditions, this Agreement offers certain benefits and guarantees to employees who are affected by merger-related transactions.

The Claimant involved in this dispute worked under the Carrier's collective bargaining agreement with the Transportation Communications Union (TCU). Generally when the Carrier has undertaken merger-related transactions the parties have bargained implementing agreements.

Many organizational and operational changes followed the merger. The Carrier acknowledges that one of these changes was the adoption system-wide of the Transportation Control System (TCS) Computer System to control train operation. (Carrier Submission, p. 4). This software system had been used by the Missouri Pacific before the merger.

The Parties stipulated that the Council Bluffs, Iowa Yard Office at issue here began using the new computer system on December 1, 1985. According to the stipulation the Yard Office Operation Control Center controls the following railroad functions: call train, car scheduling, make train, departure, work order and arrival. (Joint Stipulation, p. 1).

Another function of yard offices is to act as a Customer Service Center. The Customer Service Center is commonly referred to in the railroad industry as the agency office, the parties have stipulated, and performs the following work and functions: demurrage, switching, trailer/container clerk, bill of lading clerk, bill clerks, and I/O clerks. (Joint Stipulation, p. 2).

After the merger the Carrier began combining some of the small agency offices into the larger terminals. By the end of 1985 over 80 small agencies had been combined into larger terminals, resulting in approximately 30 Customer Service Centers. According to the Carrier, the transfer of work and employees in this consolidation was not intermingled between the UP and the MP. (Carrier's Submission, p. 5).

The Carrier asserts that in the latter part of 1985, it decided to centralize all of the Customer Service Centers. According to the Carrier it decided upon St. Louis as the ultimate site for this consolidation because only half of the former Missouri Pacific Headquarters building there was being utilized. (Carrier Submission, p. 5).

The Carrier asserts that when the consolidation plans were submitted to the TCU, it made immediate demands for a total UP/MP system-wide merger agreement, as well as a new combined collective bargaining agreement. The Carrier rejected these demands, offering instead New York Dock benefits for the employees at St. Louis only.

The Carrier and the Union could not agree on a compromise, and the Carrier asserts that for this reason it established separate alternative arrangements in St. Louis, resulting in a UP Customer Service Center on one floor and an MP Customer Service Center on another floor. According to the Carrier, it negotiated separate implementing agreements for the UP and MP employees, to transfer the work and employees from the remaining agencies to the St. Louis Office. (Carrier's Submission, p. 5-6). The Carrier also contended at the hearing on this matter that the UP and MP employees continued to work under separate collective bargaining agreements and on separate seniority lists, after the move to St. Louis.

The Parties stipulated that effective in February, 1987 Union Pacific Railroad transferred work and positions in the customer service center from Council Bluffs, Iowa to St. Louis, Missouri. The implementing agreement covering this transfer permitted employees to exercise their seniority to remain in the Council Bluffs area. When the position of J.D. Dorman was abolished, he exercised his seniority to bump the Claimant out of his general clerk position. The Claimant then bumped another employee, and assumed his position of Supervisory Yard Officer Operator. (Carrier Submission, p. 7; Joint Stipulation, p. 1).

As a result of his displacement the Claimant submitted forms claiming New York Dock protection. The Carrier denied his requests, stating that the job transfer was covered by the February 7, 1965 Job Stabilization Agreement, and was not a New

York Dock transaction. The Claimant elected not to have the TCU Organization as a party to this arbitration action.

The Parties have stipulated further that the effective date of the Claimant's displacement was April 1, 1987. They have stipulated further appropriate test period earnings, if the Committee determines that New York Dock benefits are appropriate. There is approximately a \$350 per month difference in earnings between the Claimant's former job and the job he assumed after his displacement. (Joint Stipulation, p. 2).

THE INDIVIDUAL'S POSITION

The Claimant argues that he is entitled to New York Dock protection because of a merger related transaction. The Claimant contends that there is no dispute that he was placed in a worse position because of his displacement. Thus, according to the Claimant, the issue in this case is the same as in the Kelley case decided in June, 1987: whether the Carrier's action which allegedly caused the displacement is a "transaction" as that term is used by the New York Dock Conditions. The Claimant also contends that he need only identify the transaction and the Carrier bears the burden of proving that something other than a merger-related transaction caused the displacement.

According to the Claimant, the issue is whether the consolidation of the customer service centers in St. Louis was sufficiently related to the merger to entitle Peterson to New York Dock protections. In support of his position the Claimant

argues first that the purposes of the CSC consolidation are the same purposes set forth in the summary of the merger and the merger application. The Claimant also cites support for his view that the term "transaction" is not limited to those issue which were expressly covered in the merger application and order.

In support of his claim that the consolidation was merger-related, the Claimant points to two reasons given by the Carrier for the consolidation i. e. the proximity of the new department to 1) the consolidated accounting department and 2) TCS computer program support. According to the Claimant, these factors demonstrate that there is clear and convincing evidence of connection between the merger, the consolidation of the customer service functions, and his displacement. The Claimant also suggests that the Committee employ a "proximate cause" standard that would hold that "but for" the merger, the Claimant's department would not have been consolidated and he would not have been displaced.

The Claimant argues that the nexus between these events is direct and simple. According to the Claimant, St. Louis was chosen as the appropriate location for the new office only because of the merger and merger related actions. The Claimant contends that because the Kelley case held that the consolidation of the accounting department was merger-related, the consolidation of the customer service department at the same site in order to be close to the accounting department demonstrates sufficient causal nexus to the merger. The Claimant also contends

that the need to be close to TCS program support is merger-related, because the TCS system was originally used only by the Missouri Pacific before the merger.

Like the Carrier, the Claimant relies upon a New York Dock arbitration decision involving the same merger, with John B. LaRocco as the neutral member. That opinion held that the term "transaction" in the New York Dock Conditions is used in the same way as the term "coordination" under the Washington Jobs Protection Agreement. The definition of coordination in that Agreement relied upon by the Claimant is, in relevant part,

joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities, or any of the operations or services previously performed by them through such separate facilities." (Emphasis added).

The Claimant urges that any action of the Carrier's which fits this broad definition is a transaction, and that the consolidation at issue here clearly meets this definition.

The Claimant also contends that the fact that the two carriers' employees work on different floors at the St. Louis location does not mean that this is not a merger-related transaction. According to the Claimant, denying him benefits on this basis would be to allow a New York Dock transaction to be fragmented, simply in order to reduce the number of employees entitled to benefits. The Claimant argues that the LaRocco decision holds that the Carriers may not, at their discretion, carve a coordination into multiple parts.

The Claimant contends that his position is further supported by the fact that the Carrier has given notice that it now intends to consolidate the two carriers' customer service departments into one department. The Claimant argues that it is inconsistent for the Carrier to acknowledge that the final consolidation is a New York Dock transaction, but the intermediate steps leading up to the final consolidation are not transactions. For all of the above reasons the Claimant contends that his claim should be granted.

THE CARRIER'S POSITION

The Carrier contends that the Claimant is not entitled to New York Dock benefits because of the transfer of work from Council Bluffs, Iowa to St. Louis. According to the Carrier the Committee should consider all aspects of this case, because an award to the Claimant would grant benefits to the Claimant beyond what the Organization was able to obtain through the collective bargaining agreement or before the I.C.C.

The Carrier contends that the transfer of work and positions which led to the Claimant's displacement in this case was not a transaction as defined by the I.C.C., but rather a contractual right of the Union Pacific as provided in its agreement with the TCU dated February 7, 1965. For an event to qualify as merger-related, the Carrier argues, it must be taken pursuant to an authorization of the I.C.C.; an action like the one at issue here, which was not taken pursuant to I.C.C. authorization cannot

be a merger-related transaction. The Carrier also relies on an arbitration opinion which holds that every action initiated by the Carrier subsequent to a merger cannot be considered "pursuant to the merger."

According to the Carrier, the factors used in the LaRocco decision and relied upon by the Claimant distinguish the two cases and demonstrate that the action at issue here is not a transaction. Here there is no intermixing of work between the two railroads' centers. The Missouri Pacific Center is handling only MP business, and the same is true for the Union Pacific. Furthermore, the Carrier points out that there has been no consolidating of seniority rosters between the two groups.

The Carrier also contends that the implementation of the TCS computer system is not a merger-related transaction. According to the Carrier the railroad could have obtained the same computer software program independent of any merger. The Carrier argues that it was totally free, before and after the merger, to implement whatever computer software program it chose, and to modify, or "enrich" it as well.

The Carrier also argues that the location of the computer center itself is not a critical factor. According to the Carrier the computer hardware could have been located anywhere on the system.

In addition, the Carrier contends that the error in train handling referred to by the Claimant in the earlier stages of this claim is not a New York Dock transaction. Even if there

were merit to the claim that this mistake constituted a transfer of work, the Carrier alleges that it should have been addressed as a scope rule violation under the collective bargaining agreement rather than a New York Dock transaction.

In response to the Claimant's question regarding why the Carrier regards the full proposed consolidation as a New York Dock transaction, but not when the two railroads' employees were on separate floors, the Carrier states that there was no mingling of work or seniority rosters. The Carrier further stated that when it moves employees from one collective bargaining agreement to another it concedes it owes New York Dock benefits.

According to the Carrier, it has always had the right, under the February 7, 1965 Agreement, to transfer work, employees and positions from one location to another. The transfer at issue here simply fell under this general authority, the Carrier argues, rather than any New York Dock protection.

OPINION OF THE COMMITTEE

This is a case involving the Claimant's rights to New York Dock benefits due to the transfer of jobs from his department to a consolidated customer service department in St. Louis. The issue as presented by the Parties is,

1. Did Elmer A. Peterson lose his general clerk position effective April 1, 1987 because of a merger related transaction?

The Committee has considered the evidence and arguments put forth by the Parties and concludes that the Claimant did not lose his

general clerk position because of a merger related transaction. The Committee's findings, conclusions and rationale are set forth below.

The Definition of a Transaction

The critical issue in this case is whether the Carrier's action which caused the Claimant's displacement is a "transaction" as that term is defined by the New York Dock Conditions. The Conditions define a transaction as:

any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

The actual definition referred to above is rather circular: it states, in effect, that a New York Dock transaction is an action pursuant to I.C.C. authorizations on which the New York Dock Conditions have been imposed.

The Carrier has argued that there has been no I.C.C. approval of the changes at issue here, and therefore the changes do not constitute a New York Dock transaction. The Committee does not concur with this view entirely. The Committee concludes that there need not be I.C.C. approval of the specific event claimed as a New York Dock transaction in order for it to qualify as such. Under the language of the New York Dock a transaction need only be an action pursuant to I.C.C. authorizations to which the New York Dock Conditions have been attached. Under these circumstances the lack of I.C.C. approval of the event at issue does not mean that a transaction has not occurred.

The fact that the Carrier did not give notice of the proposed consolidation of the customer service centers which is required for New York Dock transactions is not controlling. Nor is the Carrier's assertion that, with regard to the issue at bar, the merging railroads never have needed I.C.C. authorization to institute an action under the February 7, 1965 Agreement. The issue of what is a transaction cannot be determined only by the Carrier's action in recognizing the event as a transaction, especially because in many cases it makes more sense for the Carrier not to recognize an event as a New York Dock transaction.

Also inconclusive is the fact that the Organization representing the Claimant did not file claims asserting that the job transfers were a merger-related transaction. The Claimant has provided evidence that the Organization did take this position at one time, and it is not clear from the evidence in this case why the Organization did not pursue the position any further. At any rate the Organization's position is not binding on the Claimant.

The Committee does concur with the Carrier that every action initiated subsequent to a merger cannot be considered a transaction. The Carrier also has correctly asserted that there must be a causal nexus between a merger-related transaction and an adverse effect on the Claimant. Furthermore, this Committee adopts the standard that there must be a causal or proximate cause between the actual merger and the Carrier action at issue. New York Dock II -- Missouri Pacific Railroad Company and American Train Dispatchers Association, ICC Finance Docket No.

27773 (Zumas, Neutral Member, 1981). The Claimant has suggested that in analyzing proximate cause we adopt a "but for" standard, i.e. but for the merger, would the Carrier have taken the action at issue?

The Claimant also urges that the Committee adopt the view that the term "transaction" as used in the New York Dock Conditions means the same as "coordination" under the older Washington Jobs Protection Agreement (WJPA). Coordination is there defined as,

joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

This is the definition adopted by the Committee in Transportation-Communications International Union (BRAC) v. Missouri Pacific Railroad Company and Union Pacific Railroad Company (Neutral, LaRocco, 1987), which is relied upon heavily by both Parties in this case. Therefore the Committee will adopt a similar standard in this case, which gives a somewhat broader interpretation to the term transaction than that suggested by the Carrier.

Thus, the issue here is whether the transfer of work and positions was a joint action by two or more railroads whereby they consolidated their railroad facilities, operations or services. In analyzing this the Committee has looked at whether, but for the merger, the Carrier would have transferred the work

and positions from Council Bluffs to St. Louis, resulting in the Claimant's displacement.

Did a Transaction Occur?

In analyzing whether a transaction occurred, the Committee concludes that there is no real dispute over whether the transfer of the general clerk positions to St. Louis caused the Claimant's displacement. At least in this forum the Claimant has dropped his charge that he was displaced in part because a UP train was being handled by MP employees. In his submission the Claimant did not mention this issue, nor attempt to show that there was a causal nexus between his displacement and the misassignment or transfer of work related to this train. Therefore the Committee does not regard this as an issue any longer in this case. The only transaction alleged by the Claimant at this point was the transfer of work and positions from Council Bluffs.

Nor does the Committee understand the Claimant to be arguing that the use of the TCS computer system in itself was a New York Dock transaction. The Carrier is correct in asserting that in general, the adoption of a specific computer software program is not in and of itself a transaction. As the Carrier points out, the Carrier generally is free to adopt whatever computer program, before and after the merger, it finds to be most useful. Carriers readily adopt other carriers' programs and even in the case here where one railroad adopted the system of another railroad involved in the same merger, the mere adoption of the

other railroad's software system does not constitute the type of joint merging of operations necessary to constitute a transaction.

Nor does the fact that the computer hardware was housed in the same building with the transferred customer service employees necessarily indicate that their transfer was a transaction. As the Carrier pointed out, the hardware could have been located anywhere on the system, and still have been used by the employees in St. Louis.

However, the real gravamen of the Claimant's case is that the St. Louis office was chosen as the site of the consolidated customer service department because the TCS computer program support and the accounting office were located there. As the Claimant has pointed out, the Carrier stated that part of the reason for moving the customer service centers to St. Louis was the proximity to "programming staff" (Claimant's Exhibit 5b), rather than the hardware. However, as the Committee already has ruled, the Carrier was free to adopt the TCS computer program, without regarding the adoption as a New York Dock transaction. Therefore moving employees partly in order to be close to computer programming staff does not make the move a merger-related transaction, even though the computer system was adopted by the merged railroad from one of the merging railroads.

Most importantly, neither of the factors pointed out by the Claimant transform the transfer of the agencies to St. Louis into a transaction, for the simple reason that no real merging of two

railroad's operations occurred. The Claimant has proposed the following definition for a transaction:

joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

Although both UP and MP customer service employees were moved to the same building in St. Louis at about the same time, each railroad's customer service department occupied a separate floor. Each railroad's department continued to serve only its customers. Most importantly, the UP employees continued to work under a separate collective bargaining agreement from the MP employees, and under separate seniority rosters. Furthermore, the transfer of work and employees was accomplished under separate implementing agreements.

Given these circumstances, there has been no real consolidation of the two railroads' customer service departments. There has been no joint action, no merging or pooling of two railroads' operations. It is true that both departments are housed in the same building in St. Louis. However, the Claimant did not demonstrate that there was any intermingling of work or employees among the two departments. The situation is little different from one in which the employees are housed in two separate buildings in the same city.

A permanent intermingling of work and employees was the primary factor relied upon by Neutral Member LaRocco to determine

that a transaction had occurred, in the case relied upon by both Parties. There he found,

Crew calling and timekeeping work will be flowing into Omaha from both UP and MP points. As a direct consequence of the proposed consolidation, MP CMS work will be permanently intermixed with UP crew dispatching work at the newly established Omaha office. The Omaha office will not merely supplant the Salt Lake City center. Rather, the consolidation is structured so that UP and MP crew calling work will become indistinguishable and interchangeable at a new, central location. In essence, the advent of the new office will convert previously separate CMS work into a fungible systemwide crew dispatching and timekeeping function.

This intermingling of work, employees, operations and functions was the linchpin for the Committee's finding in that case that a transaction had occurred. The Committee also relied heavily upon the fact that the seniority roster had been merged. The Committee in the instant case finds that an application of these same standards leads to the conclusion that there has not been a transaction. There is no intermingling of work or seniority rosters.

The Claimant in the instant case points to another part of the LaRocco decision as supporting its position. The Committee in that case also held that,

The ICC did not contemplate that a consolidation involving one or more of the merged railroads could be split into fragments to avoid application of the New York Dock Conditions.

The Committee in this case concurs with this analysis, but finds that it does not apply to this case. In the LaRocco case the Carrier had urged that part of the transfer of work, that involving the UP employees, was simply an intra-UP transfer that

did not fall under the New York Dock Conditions. The Committee held that because the work of both railroads had been intermingled, and became indistinguishable, the Carrier could not withhold New York Dock protection from the UP group.

In the instant case there has been no intermingling of work at this time. Furthermore, the Carrier acknowledges that it will consider the proposed intermingling of work and employees as a New York Dock transaction. Therefore this case differs dramatically from the LaRocco decision.

The Committee concludes that the Carrier in the instant case probably did intend to consolidate both railroads' customer service agencies into one department before it transferred the work from Council Bluffs. This is certainly suggested by Exhibit 5(b), dated June, 1986. However, intent alone is not enough, when an actual merger or consolidation does not occur. Although the Carrier is still contemplating a complete consolidation of the two departments, at the time this claim was filed, and at the time the arbitration hearing was held, there was still no intermingling of work.

The Claimant has argued that the move was merger-related because part of the reason for moving the work there was to be close to the Accounting Department. Another Committee has found that the consolidation of the Accounting Department in St. Louis was a merger-related transaction. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employes and Union Pacific Railroad Company (P.J. Kelley

Grievance), (Stallworth, Neutral Member, 1987). However, the circumstances of this case are different, because there is no evidence here that any consolidation of the UP and MP customer service operations has occurred yet, whereas in the Kelley case substantial intermingling of work and employees had occurred. The Claimant cannot establish a transaction here indirectly, by finding a tenuous connection to another event at the same location which has been ruled to be a transaction.

The Claimant has suggested that the Committee employ a "but for" analysis in order to determine whether the merger was the cause of the Claimant's displacement, i.e. but for the merger, would the Claimant have been displaced? Without an actual consolidation of the operations of the two railroads, however, the Committee cannot conclude that "but for" the merger, the transfer of the position at Council Bluffs would not have occurred. It was legitimate for the Carrier to simply consolidate all the customer service agencies on one railroad, as an ordinary efficiency measure, and the Claimant has not provided specific evidence that this action was motivated by the merger.

This might be a different case if there were evidence that the Carrier intentionally split up the consolidation into two steps here in order to avoid giving New York Dock protections to the employees at the outset. A deliberate attempt to circumvent the benefits mandated by the I.C.C. on the Carrier's part is improper. But there is not sufficient evidence for the Committee to draw that conclusion in this case. Rather the evidence


suggests that a failure between the Carrier and the Organization to negotiate agreements implementing the change was the reason the complete consolidation was not accomplished when the employees and work were originally transferred to St. Louis.

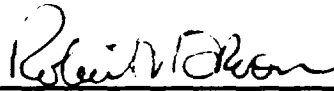
Because no real consolidation occurred at the time the Claimant filed his claim, there was no merger-related transaction in the move of work and positions from Council Bluffs to St. Louis. Therefore this Committee has no authority to award benefits to the Claimant.

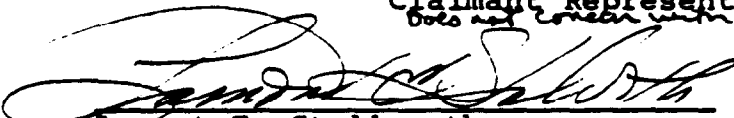
AWARD

The Claimant did not lose his general clerk position as the result of a merger-related transaction. Therefore the claim is denied.

Dissenting:


Lynn A. Lambert
Carrier Member


Robert V. Broom
Claimant Representative Member
Does not concur with arbitration decision and hereby dissents


Lamont E. Stallworth,
Neutral Member

Dated this 5th day of February 1989.

City of Chicago.
County of Cook.
State of Illinois.