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In the Matter of Arbitration Between:

Transportation-Communications International Union -- BRAC

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.

Case No. 8

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Before Arbitration Committee Members:

James J. Shannon	Carrier Member
Richard D. Meredith	Carrier Member
William R. Miller	Employee Organization Member
Gary McCall	Employee Organization Member
Lamont E. Stallworth Labor Arbitrator	Neutral Member
Hearing Held:	Chicago, Illinois November 8, 1989

ISSUES IN DISPUTE:

The Parties have submitted the following issues to the Committee:

1. Is I&CS Department Employee J.D. Oehme entitled to New York Dock benefits as the result of being affected by a New York Dock transaction?

2. If Question No. 1 is answered affirmatively what is the level of New York Dock benefits to which the Claimant is entitled?

BACKGROUND:

Like Case Nos. 6 and 7, this dispute centers around the entitlement to New York Dock benefits of a former non-agreement employee in the Carrier's Information and Communications (I&CS) Department in Omaha. Like the Claimants in those cases the Claimant here was affected by the same company-wide force reduction addressed by the Arbitration Committee in P.J. Kelley and Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees v. Union Pacific Railroad Company, (Neutral Member, Stallworth, 1987), hereinafter referred to as Kelley, which is described in greater detail below. The case of the Claimant here differs in certain respects from the other two cases addressed by this Committee today, the significance of which shall also be addressed below.

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. This protection, known as the New York Dock Conditions, offers certain benefits and guarantees to employees who are affected by merger-related transactions. Article IV of that document states,

> 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.

On May 1, 1986, the Carrier announced a company-wide force reduction. On this date, the Carrier offered non-agreement employees, i.e. employees not covered by a collective bargaining agreement, certain benefits under a voluntary force reduction program. In the same announcement, the Carrier also described the terms of an involuntary force reduction program, which it said it would put into effect if it did not obtain enough volunteers for the voluntary program. The terms of this second program were not as generous as those of the voluntary program.

In June, 1987, in another case before an Arbitration Committee between the same Parties the Committee decided that the force reduction announced May 1, 1986, was related to the merger, at least as it affected the claimant, P. J. Kelley, who worked in the Accounting Department. Therefore, the Committee determined that Kelley was eligible for benefits under the New York Dock Conditions, which are more generous than the benefits and protection offered by the Carrier under either of its force reduction programs.

The instant dispute centers around the Claimant J.D. Oehme, who was employed as one of four EDP Supervisors within the Data Center Organization which is one of the five sub-departments in the Information and Communication Systems (I&CS) Department, which in turn is one of twelve departments into which the Carrier's

functions and workforce are divided. The Claimant was based in Omaha, Nebraska. According to the Organization, the computer services for the Union Pacific were historically based in Omaha, while the computer services for the Missouri Pacific Railroad were based in St. Louis, Missouri.

The Carrier consolidated at least some of the work of the two departments. Two of these efforts towards consolidation are relatively close in time to the events in dispute here, as evidenced by Implementing Agreements between the Carrier and the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees (BRAC), dated March 19, 1986 and April 16, 1986. (TCU Exhibits B and C).

On May 1, 1986, the Company announced the terms of its Voluntary Force Reduction Program. The program information stated that if the Carrier did not receive a sufficient number of volunteers, it would institute a subsequent involuntary force reduction, with lesser benefits. (TCU Exhibit D). On May 9, 1986, Carrier's I&CS Vice President G.S. Sine issued a memorandum to non-agreement employees in his department, in conjunction with the force reduction program, which described the organizational structure of the department before and after the force reduction. The memo stated, in part,

> The absence or presence of a position title does not necessarily mean that the incumbent will not have a job, on the one hand, or is guaranteed a job, on the other.
> (Carrier Exhibit K).

The memo also stated that the changes in the organizational structure were being given to the employees in order to help them in their consideration of the Carrier's proposal regarding the voluntary force reduction program.

The May 9, 1986 memorandum included information showing that the Carrier intended to eliminate one of the four EDP Supervisor positions in Omaha, the position held by Claimant Oehme, through the force reduction. The memo also showed that the Carrier intended to eliminate one of six EDP Supervisor positions in the I&CS Department in St. Louis. (TCU Exhibit G, p. 4).

The Claimant decided not to participate in the voluntary force reduction program, unlike the Claimants in Case Nos. 6 and 7. On July 31, 1986, the Carrier notified the Claimant that his employment in a non-agreement position would end on August 31, 1986. (Carrier Exhibit L). The Carrier offered and the Claimant accepted an opportunity to participate in the Involuntary Force Reduction Program, by which he returned to the clerical ranks and accepted a lump sum "buy-down" allowance of $10,500.

According to the Carrier, 677 non-agreement employees company-wide decided to take the voluntary force reduction option, with the Carrier accepting 573 of their applications and rejecting 104. Within the I&CS Department, 74 applications were received, 56 were approved, and 18 were rejected. Of the 56 approved applications, 38 involved positions in St. Louis and 18 in Omaha. (Carrier's Submission, Case No. 8, p. 20).

On July 10, 1987, Claimant Oehme filed a formal claim letter asserting his entitlement to New York Dock benefits. The Claimant stated that he was filing his claim "in view of the recent P.J. Kelley arbitration case." In his claim, he contended that the involuntary separation program was a result of the merger, and he was entitled to test period earnings. (Carrier's Exhibit O).

The Carrier denied the claim on the following grounds: (1) the claim had not been filed in a timely manner; (2) the Claimant had not identified the non-agreement job he had held; (3) the Claimant had not identified the transaction; (4) and the Kelley award was not applicable because it was based on the particulars of a different situation. The timeliness dispute was resolved, so that the Carrier now is asserting only that the Claimant did not identify a merger-related transaction, and that the force reduction program was not a merger-related transaction as it affected the I&CS Department. (Carriers Exhibit Nos. T and V). The Carrier never raised the issue of whether the Claimant is an "employee" entitled to coverage under the New York Dock Conditions.

The Organization rejected the Carrier's rejection, and the claims proceeded to this forum for resolution.

THE ORGANIZATION'S POSITION

The Organization's argument in this case is very similar to its argument in Case Nos. 6 and 7. According to the Organization, the force reduction was concurrent with and in anticipation of New

York Dock transactions and therefore the Claimant is entitled to New York Dock protection.

In support of this position the Organization relies upon much of the same evidence that it relied upon to support Case Nos. 6 and 7. For example, the Organization points to the Carrier's May 9, 1986 bulletin notice, which was issued in conjunction with the force reduction, and which stated that one out of four EDP supervisors in Omaha Data Center Operations & Services was to be abolished. The Organization argues that this notice should be considered in conjunction with an earlier one, issued February 19, 1985, which shows the Carrier's plans for staffing the I&CS Department before and after consolidation. According to the Organization, these two memos, read together, indicate that the Carrier attempted to use the force reduction to achieve employment reduction concurrent with and in anticipation of New York Dock transactions in the I&CS Department.

The actual transactions which the Carrier admits occurred in 1986, as evidenced by several Implementing Agreements, combined with the anticipated transactions affecting the I&CS Department was the causal nexus leading to the abolishment of Claimants' positions, the Organization asserts. According to the Organization, the Carrier has been involved in an active program of consolidating the I&CS Department in Omaha and St. Louis from 1986 and perhaps before, to the present. The Organization contends that the dwindling number of positions in the department is irrefutable evidence of this trend.

In further support of its argument, the Organization also relies upon letters received by three non-agreement employees in late 1987 and early 1988 regarding the elimination of their positions in the I&CS Department. According to the Organization, these documents indicate that the Carrier was engaging in consolidations of the Omaha and St. Louis I&CS Departments even after the Claimants here were reduced to agreement positions.

The Organization argues further that the nature of the work performed by the Claimants, i.e. computer work, makes it extremely easy for the Carrier to manipulate, transfer and consolidate job functions with other positions, even positions in distant locations. The new head of the department resides in St. Louis, the Organization notes, but supervises the Omaha operations as well, thereby demonstrating that the consolidation of the department was taking place at the very highest levels.

The Organization also argues that the Carrier's organizational charts over the period from 1986 to 1988 plainly show that a consolidation has occurred. According to the Organization, this merging, consolidation of the computer work and the transfer of supervision is precisely the type of transactions intended to be covered by the New York Dock Conditions.

The Organization also relies upon Article I, Section 10 of the New York Dock Conditions which states that the Carrier must pay benefits if it rearranges or adjusts 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." The Organization argues that this is just what has occurred in this case.

According to the Organization, the Carrier's abolishment of Claimant's non-agreement position and his reduction to an agreement position was nothing more than "an elaborate, contrived shell game." The Organization contends that as early as 1985 the Carrier was planning consolidations of the two I&CS Departments. Some of these consolidations were made pursuant to Implementing Agreements, the Organization urges, but many were effectuated simply by transferring employees and supervisors from Omaha to St. Louis or vice versa. Other consolidations, the Organization argues, were effectuated by virtue of the reorganization of the I&CS Department, as indicated in the organizational charts. Therefore, the Organization requests that the Committee answer Question 1 in the affirmative, and award New York Dock benefits to the Claimant.

THE CARRIER'S POSITION

Like the Organization, the Carrier makes many of the same arguments in this case as it did in Case Nos. 6 and 7, except for the argument concerning whether the Claimant is an "employee' as that term is used in the New York Dock Conditions. The Carrier acknowledges that it has consolidated some of the functions of the I&CS Department as a result of the merger. However, the post-merger effects on the I&CS Department have been very minimal, in comparison to the effects on other departments, notably the Finance and Accounting Departments involved in the Kelley case, according

to the Carrier. (See list of Implementing Agreements regarding I&CS Department, Carrier's Submission, pp. 7-9). Furthermore, during the same period that the merged system was undergoing several transactions, the effects of deregulation and a rapidly changing technology caused very significant reductions in forces for the Carrier in particular, and for the railroad industry as a whole, the Carrier asserts.

According to the Carrier's records presented at the hearing, the largest force reduction program it has implemented to date has been the May 1, 1986 company-wide program which is at issue in this dispute. The Carrier argues that this force reduction was not a merger-related transaction, and therefore the Claimant is not entitled to New York Dock protection.

The Carrier notes that in the Kelley decision the Committee held that there can be factors other than a merger which cause an adverse action suffered by an employee. Here, the force reduction was a result of a decision made at the highest levels of the Carrier to reduce the non-agreement workforce by 15% across the board, the Carrier asserts, simply in an effort to cut overall costs.

The Carrier also argues that the Kelley case is distinguishable from the instant case because here the Organization has not established a sufficient relationship between the merger and the force reduction as it affected the Claimant to establish that the loss of his positions was merger-related. According to the Carrier, there must be a causal nexus between the actual

merger and the Carrier action at issue. The Claimant in the instant case has not demonstrated such a nexus, the Carrier argues. Furthermore, the fact that a position was abolished in some proximate geographic area and time frame as a transaction does not demonstrate that an employee has been affected by that transaction, the Carrier argues.

In Kelley the Committee found that there had been a substantial intermingling of work and employees in the Accounting Department, signalling a consolidation. According to the Carrier, there has been no substantial intermingling here. Therefore, the Carrier urges that this case is more like Peterson v. Union Pacific Railroad, (Neutral Member, Stallworth, 1988), another post-Kelley case in which the Committee found that there had been no consolidation of work or employees in Mr. Peterson's department, and therefore he was not entitled to New York Dock benefits, even though he lost his position through the same company-wide force reduction as Mr. Kelley.

OPINION

This is a case involving a claim that the Claimant lost his non-agreement position due to the merger which created the Union Pacific Railroad in its present form. The Claimant contends that he lost his job through the same involuntary force reduction which affected Mr. P.J. Kelley, in Kelley, supra, and which the Arbitration Committee in that case held was a merger-related transaction, at least as it applied to Mr. Kelley.

The Parties have presented the following issues to the Arbitration Committee,

1. Is I&CS Department Employee J.D. Oehme entitled to New York Dock benefits as the result of being affected by a New York Dock transaction?

2. If Question No. 1 is answered affirmatively what is the level of New York Dock benefits to which the Claimant is entitled?

The Committee has considered the evidence and arguments put forth by the Parties and concludes that the records evidence does not establish that the Claimant lost his position as an EDP Supervisor as a result of a merger-related transaction. The Committee's findings, conclusions and rationale are set forth below.

Standards for Defining a Transaction

The core issue in this case is whether the Carrier's action which caused the Claimant's displacement was a "transaction" as that word is used by the New York Dock Conditions, or whether it was an action taken in anticipation of a transaction, to deprive the Claimant of New York Dock benefits. In either case, the Claimant would be entitled to benefits.

Both in Kelley and in Peterson, which addressed the same force reduction as in the instant case, the Committees concurred with the Carrier when it asserted that every action subsequent to a merger which has adverse effects on employees is not necessarily merger-related. There must be a causal nexus between the actual merger and the Carrier action at issue, for New York Dock benefits to apply. New York Dock II -- Missouri Pacific Railroad Company and

American Train Dispatchers Association, ICC Finance Docket No. 27773 (Zumas, Neutral Member, 1981).

In Peterson the Committee adopted a definition of "transaction" from the definition of a "coordination" used in the Washington Jobs Protection Agreement (WJPA):

> 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 was the definition relied upon by the Committee in Transportation-Communications International Union (BRAC) v. Missouri Pacific Railroad Company and Union Pacific Railroad Company (Neutral Member, LaRocco, 1987).

In Kelley the Committee ruled that the force reduction, as it was applied in the Accounting and Finance Department, was a merger-related transaction. In that case the Committee noted that it was,

> sensitive to the fact that at some point following a merger, merger-related transactions end and the New York Dock conditions are no longer relevant. However, in the instant case the Organization has offered strong evidence that the merger and consolidation were not completed at the time the Claimant was demoted, and that his displacement resulted from the merger.
>
> (Kelley, p. 22).

In contrast, in Peterson, the Committee, considering the same force reduction as it applied to the Claimant's position in the customer service department, compared the circumstances to Kelley and concluded,

> 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.
>
> (Peterson, p. 19).

Therefore, the Committee concluded that there was not sufficient evidence that the force reduction, as it had been applied to Peterson's department, had a sufficient causal nexus to the merger to constitute a transaction in that case.

From the differing results in these two cases it is clear that the same company-wide force reduction may be viewed as merger-related or not, depending upon the circumstances in which it is applied. The Committee is sensitive to the Carrier's right to reduce its workforce to cut expenses, at a time when the railroad industry is undergoing significant changes, due to deregulation, technological changes and other economic factors, as the Carrier in this case has detailed in its submission. Furthermore, such a reduction may occur at the same time that the Carrier is completing a consolidation or merger, as the Carrier has argued in this case. On the other hand, the Carrier may not use these legitimate reasons to mask an action which is indeed related to a merger.

It is difficult in many cases to determine the precise nature of an action like the force reduction in this case, or to determine whether there was a proximate cause between the merger and the Carrier action at issue. The Committee in this case, like the Committee in Peterson, is guided in part by the "but for" standard adopted by Arbitrator LaRocco in the decision mentioned above, i.e.

"but for the merger, would the Carrier have taken the action at issue and would the Claimant have been affected by it?"

In analyzing these problems, the Committee has also considered the burden of proof. The New York Dock Conditions require that the Claimant "identify the transaction and specify the pertinent facts of that transaction relied upon." The Carrier then has the burden "to prove that factors other than a transaction affected the employee." (Article I, Section 11(e)). In order to "identify" the transaction in a case like this the claimant must do more than simply point to a specific Carrier action. Here the claimant must "identify" the action as a New York Dock transaction by establishing the causal nexus to a merger. This is more complicated and places a greater burden on the claimant than in a case where the issue is whether a transaction, recognized by the ICC as such, has actually affected an individual claimant in the manner charged. In the latter case, most of the burden rests upon the Carrier.

In Peterson the Committee ruled that the fact that the Carrier did not seek ICC approval for the force reduction and the Organization did not pursue this issue did not mean that the force reduction was not a transaction. Furthermore, even if the force reduction itself was not technically a transaction, the New York Dock Conditions also prevent a Carrier from instituting an adverse action affecting an employee, in anticipation of a transaction, to deprive employees of their New York Dock benefits. Therefore,

formal recognition of an action by the ICC as a transaction is not necessary to trigger New York Dock protection.

However, the fact that the ICC has not approved or disapproved the force reduction as a transaction means that the Organization must clearly show either that it was a transaction in some sense, or that it was taken in anticipation of a New York Dock transaction, in order to deprive employees of their benefits. As stated above, this puts a somewhat heavier burden on the Claimant to establish his case.

The Force Reduction As It Applied To The Claimant

This Committee concludes that under the circumstances of this case the force reduction was not merger-related as it applied to the Claimant. In reaching this conclusion, the Committee has determined that the situation here is more like that of Peterson than Kelley, for the following reasons.

As in Kelley, the Organization here relies upon certain "implementing agreements" with employees in the I&CS Department who were covered by collective bargaining agreements. These implementing agreements set out the methods for consolidating jobs and work as a result of the merger, and establish the rights of agreement employees directly affected by these consolidations. In general these agreements do not cover non-agreement personnel.

The Organization here relies upon two of these implementing agreements, dated within several months prior to the non-agreement force reduction at issue here, and involving the I&CS Department's

consolidation of certain work and positions between Omaha and St. Louis. In Kelley the Organization successfully argued that even though these agreements technically covered only union employees, they also demonstrated that the entire departments were being merged and therefore served as credible evidence that the positions of non-agreement personnel also were being affected by the merger/consolidation. The Committee found not credible the Carrier's implication that it was transferring or eliminating substantial numbers of agreement positions for merger-related reasons at the same time it was moving non-agreement personnel in the same department for non-merger-related reasons.

The Organization relies upon a similar rationale in this case. The Carrier acknowledges that some consolidation has gone on in the I&CS Department, as evidenced by the implementing agreements. The Carrier argues here, however, that the two implementing agreements relied upon by the Organization (TCU Exhibits B and C), and the other agreements in this department, show that there has been very little overall consolidation of work and positions in the I&CS Department, especially as compared with the Accounting Department involved in the Kelley case. The Carrier's argument suggests that under these circumstances it is not reasonable to infer that the Claimant was displaced for merger-related reasons.

Another aspect of this issue is the Organization's reliance upon changing organizational charts and various plans for consolidation. For example, the Organization relies heavily upon a February, 1985 memorandum (TCU Exhibit H), which it contends

demonstrates that the Carrier had a long-term goal of consolidating the Union Pacific and Missouri Pacific I&CS Departments long before it put the force reduction into effect. This evidence corresponds to evidence in Kelley of the Carrier's long-term goals for merging the Accounting Departments.

However, the Carrier in this case argued without contradiction before this Committee that the consolidation plans as outlined in the February, 1985 memorandum were never put into effect. According to the Carrier, it decided to scrap that plan because it feared putting all of its data operations in one location. Therefore, the large-scale consolidation which seems to be predicted in this document never occurred.

The third major component of the Organization's evidence involves three letters written by the Carrier to non-agreement personnel referring to eliminations of their positions. (TCU Exhibits I, J, and K). The Organization relies upon these as admissions by the Carrier that the I&CS Department has been consolidated, and that this consolidation has continued even after the Claimant lost his non-agreement position.

However, the Committee determines that only the third letter clearly indicates a Carrier admission of a consolidation in the I&CS Department. It states in relevant part,

> Mr. Schroeder was offered a position in the Consolidated I&CS Department, which carried a rate of pay and level of benefits equal to the pay and benefits he was receiving prior to consolidation.
>
> (TCU Exhibit K).

Although one of the other letters mentions a "reorganization," that term does not necessarily indicate a reorganization due to the merger. There are reasons for reorganization other than merger-related consolidation. The third letter does not mention either consolidation or reorganization.

From the evidence before it the Committee concludes that the Carrier consolidated only some of the functions and workforce of the I&CS Department. The Organization's evidence suggests that at some point the Carrier intended a more complete and widespread consolidation of the department. However, apparently because of its fear of having all its data operations in one location, with the attendant problems that could occur to the whole railroad in case of computer failure at that location, the Carrier decided to change its original plan.

It is clear that some consolidation has occurred in the I&CS Department. The Carrier admits as much. But there is no evidence here of the widespread consolidation which was evident in Kelley. Therefore, this case is more like the facts of Peterson, where the Carrier originally intended a more widespread consolidation, but had not put those plans into effect because of its failure to negotiate implementing agreements for its union employees.

The number of positions affected by the two implementing agreements relied upon by the Organization in this case is very small. There have been only two positions eliminated in the first agreement, and although eighteen were eliminated in Omaha under the second agreement, thirteen were created by that agreement in St.

Louis. This is not the kind of widespread consolidation, involving hundreds of employees, upon which Kelley was based.

Furthermore, there is no evidence that the Claimant's non-agreement position was related to the agreement positions which were affected by the consolidation. Similarly, there is no evidence that his position was related to Mr. Schroeder's, the employee whose letter from the Carrier did refer to a consolidation. Although the Organization has pointed out their respective locations on the organization chart, the Committee cannot conclude from this that because Mr. Schroeder was affected by a consolidation, the Claimant was affected as well by the same consolidation. If the consolidation were more widespread, this would not be a problem. However, because there was only partial consolidation in the I&CS Department, there must at least be evidence linking the Claimant's job to one of these partial consolidations, and this evidence has not been established before the Committee.

Under these circumstances, the Committee cannot conclude that the Carrier utilized the force reduction program to achieve employment reduction in the I&CS Department in anticipation of New York Dock transactions, as the Organization has argued. As in Peterson, there simply is not sufficient evidence of an intermingling of work, employees, operations and functions to conclude that the a merger-related consolidation has occurred with regard to the Claimant's job. Nor can the Committee conclude that

but for the merger, the Claimant would not have been affected by the involuntary force reduction at the time he was affected.

In reaching this decision, the Committee has considered the concern of the Organization expressed in Peterson that the Carrier may not split a consolidation into fragments to avoid application of the New York Dock Conditions. Therefore, even if there were no overall consolidation of the I&CS Department in this case the Claimant might be affected by the merger, as the Carrier admits certain agreement employees were affected, through a partial consolidation. However, there is no strong evidence which links the Claimant in this case to the partial consolidations which have occurred in his department. Therefore, the Committee cannot conclude that he has been affected by a merger-related transaction, or an action in anticipation of a merger-related transaction.

The Organization also has argued that because of the nature of computer work, the Carrier could easily transfer it from location to location. However, the Organization has not offered sufficient proof that that is what occurred in the instant case, at least as far as the work performed by the Claimant is concerned.

In Kelley there was strong evidence of a substantial intermingling of work and employees. Under those circumstances the Committee held that there was sufficient evidence that the force reduction, as it applied to Mr. Kelley in his non-agreement position, was being used as a New York Dock transaction. The same type of strong evidence does not exist in this case. Therefore the claim must be denied.

AWARD

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

James J. Shannon
Carrier Member

William R. Miller
Employee Organization Member

Lamont E. Stallworth
Neutral Member

Dated this 11th day of December, 1989.

City of Chicago
County of Cook
State of Illinois