

ARBITRATION COMMITTEE

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

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

MEMBERS OF THE COMMITTEE

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

QUESTION AT ISSUE

Can the Carrier discontinue payment of New York Dock protection to clerical employees in the National Customer Service Center at St. Louis who voluntarily transfer out of the St. Louis area onto another clerical positions?

Carrier File No. 297-79
Organization File No. M-14-NYD

OPINION OF THE COMMITTEE

I. INTRODUCTION

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

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

II. BACKGROUND AND SUMMARY OF THE FACTS

At the time of the 1982 merger, both the UP and the MP maintained Customer Service Centers at St. Louis. In the latter part of 1985, the UP began transferring work performed at agencies and field customer service offices into a centralized UP Customer Service Center housed in the MP Headquarters Building at St. Louis. The MP Customer Service Center was located on a

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

different floor in the same building. To govern the transfer of clerical work, positions and employees into the UP St. Louis Customer Service Center, the parties negotiated several implementing agreements under the auspices of the February 7, 1965 Job Stabilization Agreement, as amended on May 16, 1980. The first such implementing agreement was signed on June 24, 1986. Attachment B of the June 24, 1986 Implementing Agreement provides:

This refers to our discussion concerning the provisions of agreement signed this date providing for among other things the establishment of thirty (30) positions in the UP Centralized Customer Service Center at St. Louis.

It is the position of the Organization that this change is a result of the UP/MP merger. It is the position of the Company that this is an organizational, operational and technological change being made under the provisions of the February 7, 1965 Agreement, as amended, and not merger related.

Without prejudice to the position of either party, it is agreed that an employee who is assigned to a position of CSC Clerk at St. Louis will be afforded an option to elect benefits under the UP February 7, 1965 Agreement, as amended, or the protective benefits for a six (6) year period, not to exceed the employee's years of service, in accordance with the terms, provisions and obligations of the New York Conditions prescribed by the ICC in Finance Docket No. 30,000. Such election must be made within thirty (30) days of the date the employee is assigned to a CSC Clerk position at St. Louis. An employee who fails to make an election shall retain existing protective benefits. If the employee elects the protection provided by the New York Dock Conditions, then at the expiration of such period the employee shall revert to and be covered by the preexisting employee protective agreement or arrangement, provided the employee still maintains an employment relationship at that time.

This letter of understanding will not hereafter be cited as a precedent.

Subsequent implementing agreements contain provisions substantially similar to the third paragraph in the above quoted Attachment B. For example, Article VI, Section 3 of the September 16, 1986 Implementing Agreement governing the transfer of work, positions and employees from Los Angeles to the UP Centralized Customer Service Center, states:

Without prejudice to either party's position and with the understanding that the provisions of this Section will not be cited as controlling in any other matter, Carrier is agreeable in affording an employee who voluntarily transfers on a position under this Agreement an option to elect the protective benefits for a six (6) year period, not to exceed the employee's years of service, in accordance with the terms, provisions and obligations of the New York Dock Conditions as prescribed by ICC Finance Docket No. 30000. Each employee who is assigned voluntarily to a position at St. Louis, MO, under this Agreement will be provided as promptly as possible an election form for this option which will include the New York Dock test period earnings and such employee must make an election within thirty (30) days from date of election form. An employee who fails to make an election shall retain existing protective benefits. If the employee elects the protection provided under the New York Dock Conditions, such employee will not be governed under the provisions of Sections 1 and 6 of this Article. However, at the expiration of New York Dock Conditions period the employee shall revert to and be covered by the preexisting employee protective agreement or arrangement, provided the employee still maintains an employment relationship at that time.

According to the Carrier, most of the CSC clerks opted to retain protection under the amended February 7, 1965 Job Stabilization Agreement. Some, however, chose New York Dock protective benefits.

Pursuant to notice dated October 5, 1988, issued in accord with Section 4 of the New York Dock Conditions, the Carrier informed the Organization of its intent to coordinate and

consolidate the UP and MP Customer Service Centers into a National Customer Service Center at St. Louis. Thereafter, the parties negotiated Implementing Agreement No. 44, executed on April 24, 1989, to cover the transaction.

This dispute arose when clerical employees, who had both voluntarily transferred to the St. Louis UP Customer Service Center (later the National Customer Service Center) pursuant to an implementing agreement containing a clause equivalent to Article VI, Section 3 of the September 16, 1986 Implementing Agreement and elected New York Dock benefits, voluntarily exercised their seniority to positions outside the Customer Service Center. The disagreement concerns whether or not these clerks carried New York Dock benefits with them after they left, of their own volition, the Customer Service Center.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Organization advances two primary arguments. First, the Carrier seeks from this Committee the addition of a condition not found in the negotiated Implementing Agreements allowing employees to elect between New York Dock and Job Stabilization protection. The Implementing Agreements specify only one condition that an employee must satisfy to select New York protection, that is, the employee must voluntarily transfer to St. Louis. The standard clauses in the Implementing Agreements, like Article VI, Section 6 of the September 16, 1986 Implementing Agreement, do not compel a clerical employee to remain at St.

Louis until the end of his New York Dock protective period. If the parties had intended to require an employee to remain at the Customer Service Center for the length of the employee's New York Dock protective period, they would have expressly written such a critical condition into the Implementing Agreements.

Second, once an employee elects New York Dock benefits, the provisions of the New York Dock Conditions control the duration of the employee's protective period. The phrase "...in accordance with the terms, provisions and obligations of the New York Dock Conditions...." found in the Implementing Agreements confirms that an employee's protective period is fixed by the New York Dock Conditions. Section 1(d) defines an employee's protective period as six years except when the employee has been employed with the Carrier for less than six years. Sections 5(c) and 6(d) of the New York Dock Conditions set forth the reasons which cause the cessation of displacement or dismissal allowances before the running of an employee's protective period. An employee can lose New York Dock protection only upon the occurrence of one of the events enumerated in Sections 5(c) or 6(d). UTU v. UP/WP/SN, NYD Arb. § 11 Arb. (Rehmus; 2/14/86). The Carrier has failed to cite any provision of the new York Dock Conditions authorizing it to terminate New York Dock benefits for employees who voluntarily left the Customer Service Center.

B. The Carrier's Position

Without prejudice to its position in future intra-UP work transfers, the UP extended the option of New York Dock protection to employees who voluntarily moved to St. Louis even though the

Carrier had not engaged in a New York Dock transaction. The purpose of the election of benefit clauses in the various implementing agreements was to entice the employees to voluntarily move from their UP point to the UP Customer Service Center. The option provided mutual benefits. Employees could elect potentially more lucrative protection than the benefits available under the February 7, 1965 Agreement while the Carrier realized productivity savings from having employees familiar with customer service functions working in the St. Louis Customer Service Center.

The parties did not intend for employees to gain permanent access to New York Dock coverage absent a New York Dock transaction by briefly staying in St. Louis. Such a result defeats the purpose of the election. This Committee should reasonably interpret the Implementing Agreements to avoid an absurd result. NRAB Third Division No. 15011 (Wolff). The Organization's misguided interpretation creates a loophole allowing employees to, in essence, revoke their voluntary moves to St. Louis while retaining New York Dock protective benefits.

With hindsight, the UP should have placed disclaimers in the Implementing Agreements providing for the cessation of New York Dock protection if an employee left St. Louis. However, this Committee can logically imply such a proviso to give effect to the spirit and intent of the election right.

Alternatively, the Carrier argues that the protective period for the involved employees ends when they leave the Customer Service Center because they were not affected by a New York Dock

transaction. They acquired New York Dock protection solely through the particular implementing agreement which mandated their presence in St. Louis. Since the UP was not obligated to grant employees New York Dock protection by the February 7, 1965 Job Stabilization Agreement, the Carrier may discontinue the New York Dock benefits when an employee voluntarily departed from the Customer Service Center.

IV. DISCUSSION

Vesting UP clerical employees who voluntarily transferred to the UP Customer Service Center under the various Job Stabilization Implementing Agreements had a twofold purpose. As the Carrier related, allowing employees to elect New York Dock benefits as a substitute for pre-existing protection probably induced some experienced employees to voluntarily transfer to St. Louis. However, the election of benefits clauses also avoided a protracted and complex dispute over whether the Carrier's movement of Agency and Customer Service functions from various points on the UP to the UP Customer Service Center at St. Louis was a New York Dock transaction (or made in anticipation of a transaction) or an operational and organizational change exclusively within the ambit of the amended February 7, 1965 Job Stabilization Agreement. Giving employees, at least those who voluntarily went to St. Louis, access to the New York Dock Conditions temporarily settled the controversy over whether the Carrier's actions were merger related. Since the election of benefits clauses were compromises forestalling a dispute over the

applicability of the New York Dock Conditions, it becomes difficult for this Committee to endorse the Carrier's argument, that the election of benefits clauses were solely designed to entice workers to move to and remain at St. Louis. The history of the election clauses tends to undermine the Carrier's position that, even if we assume the absence of a New York Dock transaction, the involved employees relinquished New York Dock protection when they moved out of the National Customer Service Center.

This Committee does not have to retroactively decide if the Carrier engaged in New York Dock transactions since, by contract and without prejudice to either party's position in the future, the movement of work into the UP Customer Service Center was treated as a change governed by the amended February 7, 1965 Job Stabilization Agreement. Regardless of whether or not transactions occurred, employees moving to St. Louis were vested with the contractual right to opt for New York Dock protective benefits.

More importantly, the election clauses in the Implementing Agreements incorporated the New York Dock Conditions in their entirety. The New York Dock Conditions specifically address when and how an employee's protective period can terminate before the employee's full protective period has elapsed. Section 5(c) of the New York Dock Conditions, which covers the cessation of a displacement allowance, states:

The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

Similarly, Section 6(d) of the New York Dock Conditions sets forth the events causing a discontinuance of a dismissal allowance short of the expiration of an employee's protective period as follows:

The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

A voluntary exercise of seniority out of the St. Louis Customer Service Center is not among the conditions listed in either 5(c) or 6(d).² This Committee is powerless to add items triggering a cessation of an employee's New York Dock protective status not found in the New York Dock Conditions. Once an employee elected New York Dock coverage, the protective period for the employee could only cease upon the occurrence of one of the events listed in Sections 5(c) or 6(d) of the New York Dock Conditions provided, of course, the employee complied with the only condition stated in the election of benefits clauses, that

² The Implementing Agreements incorporated much of the same language found in Section 6(d) of the New York Dock Conditions. For example, see Article IX, Section 2 of the September 16, 1986 Implementing Agreement.

is, the employee voluntarily transferred to a St. Louis Customer Service position under the applicable Implementing Agreement.

In addition, the final sentence of the election of benefits clauses in Attachment B to the June 24, 1986 Agreement and Section 3 of Article VI of the September 16, 1986 Implementing Agreement provides for an employee to revert to his pre-existing employee protection at the end of his New York Dock protective period, assuming the employee "...still maintains an employment relation..." at the expiration of the New York Dock protective period. This language evinces the negotiators' intent that the only condition attached to the employee's right of reversion would be the existence of an employment relationship as opposed to being employed at the Customer Service Center. The parties did not write that the reversion would occur earlier if an employee voluntarily exercises his seniority to a position other than one in the Customer Service Center.

The Carrier equitably implores this Committee to adjust the election clauses to imply a requirement that employees must remain in the St. Louis Customer Service Center or forfeit New York Dock protective benefits. To make such an implication, this Committee would have to not only add a condition to each election of benefits provision but also alter the final sentence of these clauses. Put simply, this Committee does not sit to dispense equity between the parties. We are relegated to interpreting and applying the New York Dock Conditions and Implementing Agreements negotiated under those conditions. However, there is some doubt that the Carrier has a strong equitable position in view of the

maxim "equity abhors a forfeiture." Prematurely terminating New York Dock protection is such a critical condition, as the Organization asserts, that the negotiators failure to expressly provide for a forfeiture of benefits for employees subsequently leaving the Customer Service Center means such a condition was deliberately excluded.

AWARD AND ORDER

The Answer to the Question at Issue is No.

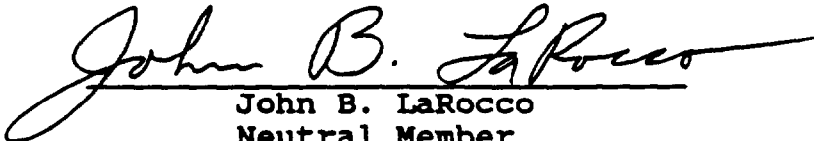
DATED: June 26, 1990



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John B. LaRocco
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