

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.<sup>1</sup>

II. BACKGROUND AND SUMMARY OF THE FACTS

Prior to 1987, the UP maintained a small communications department office staffed by five communications specialists at Omaha. By an August 25, 1987 notice issued under the auspices of the amended February 7, 1965 Job Stabilization Agreement, the Carrier informed the Organization of its intent to transfer wire chief work from three field offices to the Omaha communications

<sup>1</sup> 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.

office. In compliance with Article III of the amended February 7, 1965 Job Stabilization Agreement, the parties entered into an Implementing Agreement, on November 18, 1987, to govern the transfer of communications work from the three outlying points to Omaha.

Under the terms of the Implementing Agreement, the Carrier abolished not only the wire chief positions at the three field offices but also the five communications specialist positions in Omaha. The Carrier simultaneously established 23 new system network specialist positions and one assistant manager job at Omaha.<sup>2</sup> In addition, the parties agreed that six MP non-Agreement employees would be given an opportunity to transfer to Omaha and claim newly established System Network Specialist positions.<sup>3</sup> Two of the MP employees already held UP seniority. The four remaining MP employees were accorded a January 15, 1988 UP seniority date on Master Roster 250 in Seniority Zone 200. In essence, these four MP employees were treated as new hires.

Although the parties executed the November 18, 1987 Implementing Agreement under the umbrella of Article III of the amended February 7, 1965 Agreement, the parties remained deadlocked over whether or not the Carrier was engaging in a New York Dock transaction. Letter of Understanding No. 4 appended to

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<sup>2</sup> All the newly established positions were subject to Rule 1(g) of the UP Schedule Clerical Agreement granting the Carrier the right to select the employee to fill the position.

<sup>3</sup> Evidently, the parties did not expect all wire chiefs to move from the three field offices to Omaha.

the November 18, 1987 Implementing Agreement memorialized the dispute as follows:

This has reference to Implementing Agreement S-72.

There still exists a disagreement with respect to NYDC [New York Dock Conditions] as it relates to the UP Managers and Wire Chiefs in the field as well as Communication Specialists in Omaha, Nebraska. The Carrier has, without prejudice, agreed to provide the NYDC to the field Managers and Wire Chiefs, providing such employes transfer to Omaha under Implementing Agreement S-72. However, Carrier will not provide such benefits to those field personnel who elect not to transfer to Omaha, or other affected employes.

The entire matter of employe benefits under NYDC in consolidations such as this Implementing Agreement was addressed in a recent arbitration hearing with your Organization. Referee LaRocco, who served as Chairman, stated in the hearing that an award would be forth coming in the very near future that should resolve this dispute. Therefore, in regard to all of the above, this letter now confirms to your Organization that NYDC benefits and claims that may be filed with respect to this Implementing Agreement are waived until such time as an award has been executed. Further, execution of this Implementing Agreement does not infer in any manner that your Organization has waived its rights to file claims for NYDC to any employes affected by this Implementing Agreement. [Brackets added for clarification.]

The dispute referred to in Letter of Understanding No. 4 was resolved by an Award issued by an Arbitration Committee sitting with this Arbitrator on December 18, 1987. Subsequent to the Committee's decision, the Carrier accorded New York Dock benefits to the clerical employes who had occupied wire chief positions at the three outlying points regardless of whether or not they had transferred to new System Network Specialist positions at Omaha. The crux of this dispute is whether or not the 1987 decision of the New York Dock Arbitration Committee compelled the Carrier to extend New York Dock protective status to the

incumbents of the five Omaha communications specialist positions abolished as a result of the consolidation of wire chief work.

In its December 18, 1987 decision which dealt with the consolidation of MP and UP crew dispatching functions into a centralized crew management center in Omaha, the Arbitration Committee held that the definition of a transaction in Section 1(a) of the New York Dock Conditions included all coordinations as defined by Section 2(a) of the 1936 Washington Job Protection Agreement (WJPA). The Committee observed that any "...manipulation of inter-Carrier operations, facilities or services which is a coordination under the WJPA is absolutely and automatically a transaction under the New York Dock Conditions."

The Committee further related:

In this case, the Carriers intend to establish a single CMS to administer all crew calling and timekeeping functions across the entire merged system. At the onset, we note that the Carrier does not presently maintain a CMS at Omaha. Thus, the proposed activity involves not merely the transfer of work but also the establishment of a new CMS office. 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.

In summary, the Committee decided that the Carrier had constructed a new single, integrated office where clerical employees would indiscriminately perform crew dispatching work previously accomplished, as separate operations, on the MP and

UP. While the Committee concluded that the crew dispatching consolidation constituted a New York Dock transaction, the Committee wrote the following caveat:

The Committee emphasizes that its holding on the issues herein is narrow. We cannot foresee all the possible operational changes that the Carrier might accomplish in the future. These matters should be handled on a case by case basis. As in the past, some intra-railroad actions, divorced from a concurrent or later New York Dock transaction, would fall solely within the ambit of the amended February 7, 1965 Agreement. Suffice to say, the proposed consolidation herein cannot be divided into a New York Dock transaction and an operational change under the February 7, 1965 Agreement.

The five Omaha communications specialists whose jobs were abolished coincident with the consolidation of wire chief work during January, 1988 initiated duplicate claims for New York Dock protective benefits on January 22, 1989 and February 3, 1989.

### III. THE POSITIONS OF THE PARTIES

#### A. The Organization's Position

The Carrier transferred not only MP employees but also some MP wire chief work to the UP Communications Department office in Omaha. According to the Organization, most wire chief work on the MP is accomplished by an outside entity. However, at the arbitration hearing, the Organization presented a March 22, 1990 statement from four of the involved employees stating that subsequent to the consolidation, the Omaha office "...inherited all communication problems on the Missouri Pacific..." Attached to the March 22, 1990 statement was the turnover report for March 23, 1990 showing that a few MP communication problems are handled at the Omaha office. The integration of MP wire chief work with

similar communications functions previously performed on the UP at Omaha and outlying UP points was a New York Dock transaction. The prior Arbitration Committee, on December 18, 1987, ruled that the unification of work into a single, systemwide office constitutes a transaction. The December 18, 1987 Award is res judicata in this case. Moreover, since the Carrier acknowledged that the thirteen employees at the outlying points had been affected by a New York Dock transaction, the Carrier can hardly withhold New York Dock benefits from the five incumbents at Omaha inasmuch as they were affected by the same consolidation as the other employees. The Arbitration Committee, which addressed the crew dispatching dispute, admonished the Carrier that it could not divide up a transaction to try to bring a portion of the consolidation solely within the ambit of the February 7, 1965 Agreement.

In addition, the Carrier's transfer and consolidation of wire chief functions constituted a WJPA coordination because it was the product of a joint action by two or more railroads. The Carrier abolished all the communications specialists positions at Omaha so all affected employees, including the MP workers, could be appointed to any of the twenty-four new jobs. Thus, the former Omaha-UP communications specialists could be performing MP work or the work that they formerly performed could now be accomplished by a former MP employee. Prior to the commingling of MP employees and MP wire chief work at the centralized Omaha facility, the UP employees could not perform any MP wire chief work.

The Carrier correctly points out that the wire chief work consolidation did not involve the dovetailing of seniority rosters but only because it was unnecessary to merge seniority. Two employees had UP seniority dates and thus, were already on the applicable roster while the other four MP employees were non-agreement personnel treated as new UP employees.

Contrary to the Carrier's argument, the five employees were adversely affected since they regularly received overtime opportunities before, but not subsequent to, the January, 1988 consolidation.

B. The Carrier's Position

The Carrier characterizes the transfer of work into Omaha as an intra-Carrier operational and organizational change exclusively subject to the provisions of the amended February 7, 1965 Job Stabilization Agreement. The work flowed from outlying UP points into Omaha. The New York Dock Conditions do not apply even if, after the consolidation, the Omaha Communications Department performs sporadic or isolated MP communication functions. In Peterson v. UP, NYD § 11 Arb. (Stallworth; 2/5/89), the Committee found that since one Carrier could use the software of its merger partner without obtaining the ICC's authorization, the joint activity was not a Section 1(a) New York Dock transaction.

There are several facts which distinguish this case from the crew dispatching dispute decided on December 18, 1987 by the prior Section 11 Arbitration Committee. First, the November 18, 1987 Implementing Agreement provided for the abolition of the

five Omaha positions simply to effectuate a "Sadie Hawkins Day." The incumbents of the communications specialist positions were unaffected by the non-Agreement MP employees coming to Omaha since they were junior employees (new hires). Second, to execute the transfer of wire chief work, the parties did not put together seniority rosters on separate railroads. Third, the UP did not coordinate or unify functions from two different railroads. The Organization argues that some MP work was shifted to the UP's centralized office yet it admits an outside contractor performs MP wire chief work. When the Carrier consolidated crew dispatching functions, it created a new office. In this case, the Carrier already maintained a communications facility at Omaha. Fourth, and most importantly, the subject matter of the instant consolidation was the transfer of work from UP field communications offices into an existing UP Omaha office. The transfer of work was not a merger-related action and thus, not a New York Dock transaction.

Lastly, the Organization has failed to satisfy its burden of identifying a transaction that adversely affected the five communication specialists and demonstrating a causal connection between a transaction and some detriment to their employment. MP v. ATDA; NYD § 11 Arb. (Zumas; 7/31/81). The five clerical employees occupied communication jobs at Omaha prior to the consolidation and they filled equivalent positions, with only a title change, after the consolidation.

#### IV. DISCUSSION

While there are some facts in this case which superficially seem to distinguish this consolidation from the crew dispatching transaction, this Committee concludes that the critical facts of this case are parallel to the material facts in the dispute resolved by the December 18, 1987 Arbitration Award.

The Organization proffered evidence at the arbitration hearing that a modicum of MP wire chief work is being performed in the Omaha office. The evidence does not disclose if the Omaha Communications Department began handling MP work at the time of the consolidation. It is true that the MP non-Agreement employees did not bring their work with them to Omaha but some MP wire chief work is present in the consolidated Omaha Communications Department office. Utilizing the Omaha Communications Department to perform even a small amount of MP wire chief work constitutes a coordination under the Washington Job Protection Agreement for the reasons that the prior Arbitration Committee more fully set forth in its December 18, 1987 Arbitration Award. In essence, two railroads pooled their resources. In addition, the presence of some MP wire chief work in the Omaha office means the office has begun to take on attributes of a centralized facility.

The Carrier emphasizes that since it did not establish a new communications office at Omaha, the transfer of work was solely intra-Carrier. The Organization's evidence, as previously discussed, belies the Carrier's position but, more notably, the November 18, 1987 Implementing Agreement contains terms strongly

suggesting that the Carrier actually established a new communications office at Omaha.

The Peterson decision rendered on February 5, 1989 is inapplicable to this case. In Peterson, the Arbitration Committee found that the consolidation of UP Customer Service functions into a centralized UP facility at St. Louis was solely an intra-Carrier coordination of work. Unlike this case, the St. Louis coordination involved neither the movement of MP employees to the UP nor did UP customer service representatives perform any MP customer service functions following the consolidation.

Finally, while this Committee is rendering an affirmative answer to the Question at Issue, we reiterate the proviso first articulated by the prior Arbitration Committee in its December 18, 1987 Award. Each dispute over whether a Carrier activity is a transfer of work covered by the February 7, 1965 Job Stabilization Agreement or the New York Dock Conditions must be resolved on a case by case basis. Our holding is restricted to the unique and peculiar circumstances in this consolidation. Nothing in our decision should be construed to create an absolute presumption that employees situated at the receiving location of a work transfer which is a New York Dock transaction are immediately affected by the transaction. We do not express any opinion as to whether or not the Organization has satisfied its burden of going forward set forth in Section 11(e) of the New York Dock Conditions. More specifically, we are not deciding if the five incumbents of the abolished Omaha positions were adversely affected by the transaction. The Organization, within

this record, has not traced any employment adversities back to the transaction. Thus, the Committee narrowly holds that, as a result of the consolidation of wire chief work in Omaha, the incumbents of the abolished positions were entitled to New York Dock protective status as of the date their positions were abolished.

**AWARD AND ORDER**

The Answer to the Question at Issue is Yes, provided this Committee does not make any finding that the identified clerical employees are entitled to displacement or dismissal allowances.

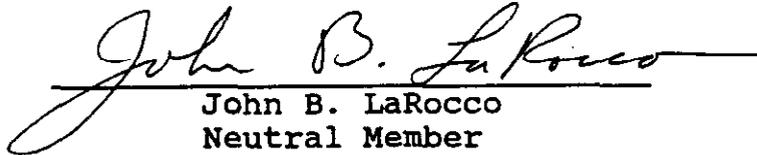
DATED: June 26, 1990



J. L. Gobel  
Employees' Member



L. A. Lambert  
Carrier Member



John B. LaRocco  
Neutral Member