

In the Matter of Arbitration between

Transportation-Communications
International Union

-and-

Union Pacific Railroad Company

OPINION
AND
AWARD

New York Dock
Conditions

B.A.Sounier claim

The parties' pre-hearing submissions in this matter were received on or before December 8, 1992. Hearing was held in San Diego, CA on December 8, 1992. Attending in addition to the undersigned board members were Brian P. Whitacre, Vice General Chairman, TCU; and Dean D. Matter, Senior Director Labor Relations, Non-Ops, UP. Carrier's Exhibit P was received on December 12, 1992, and thereafter the record was closed.

ISSUE

Is B. A. Sounier entitled to the protective benefits of the New York Dock Conditions as the result of her displacement in January, 1986?

BACKGROUND OF THE DISPUTE

In 1982 the ICC approved the merger of the Union Pacific, the Missouri Pacific, and the Western Pacific Railroads. Employees affected by the resultant transactions were afforded labor protective benefits including those of the New York Dock Conditions (NYDC).

Mr. James Beth, an accounting supervisor, was required as a result of one of these transactions to exercise his bargaining unit seniority to bump into a clerical position. In so doing, on January 14, 1986, he displaced the claimant here, Ms. Barbara

Sounier, a represented clerical employee. Some 19 months after this, as the result of an arbitration award rendered on July 29, 1987, Mr. Beth was found entitled to NYDC protective conditions. Since she was an individual affected by a NYD-covered chain of displacements, Sounier filed for these same NYD protections on March 31, 1992, which were then denied by the Carrier.

POSITIONS OF THE PARTIES

The Organization's position is that Mr. Beth's exercise of seniority to Ms. Sounier's clerical position was the direct result of a merger transaction. Accordingly, Sounier's displacement was likewise the result of a merger transaction and she became entitled to NYD protective benefits.

The Carrier challenges this claim largely on the basis that the Organization waited over six years to assert it. The Organization's delay in bringing the claim harmed the Carrier in that it had no way to act retroactively to minimize the displacement allowances that might be due the claimant. Hence it is unfair to it to process the claim at this late date and it should be barred by the equitable doctrine of laches.

To this argument the Organization responds that Carrier management misled Sounier by concealing her NYDC entitlement from her. It did this by its deliberate policy of denying that a supervisory employee--in this case, Beth--was entitled to NYDC benefits, thus forcing him and others to win their claims in a prolonged dispute culminating in arbitration. The Organization contends and the Carrier acknowledges that the NYD Conditions do

not contain an express time limit for filing a claim. Further, the Organization contends that the elements necessary to sustain an assertion of laches do not exist in this situation. It cites other arbitration awards where the affirmative defense of laches has not been sustained for one reason or another. The Carrier cites other awards where it has. This disagreement and dispute is now brought by the parties to arbitration.

DISCUSSION

Laches is an equitable doctrine that may be invoked in situations where failure to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party, may bar the exercise of the right. Each situation where the defense of laches is raised must be reviewed alone, there being no general rule on how long a time is unreasonable.

In this case, one can begin with the observation that NYD protections are afforded to employees affected by a transaction, but for only six years thereafter. Sounier was originally displaced on January 14, 1986, and her claim for protection was not filed until 74 1/2 months thereafter, or over six years later.

I do not think this is the operative period of delay here, however. While Sounier might have filed a claim immediately upon her displacement, this would have presumed a level of sophistication and advice not generally available to employees. Here the Carrier was contesting the right of Beth and other similarly displaced supervisors to NYD protections. The award of Arbitrator

Seidenberg granting them such protection was not signed until July 29, 1987 (Car.Ex.P). I conclude that only then were the Organization and Sounier put on notice that she was an employee who was entitled to be similarly protected.

But even then 56 months, or nearly five years, elapsed before this claim was filed. There is no explanation in the record for this delay. There is a rather long line of awards in the railroad industry holding that failure to process a claim within two or three years of the time it arises constitutes abandonment of the claim (Car.Exs.H,I,J,K,L). This claim was made far later.

Successful invocation of the doctrine of laches also requires, beyond delay itself, that potential or actual harm to the respondent would arise in the event the claim were to be sustained. Here, while it would still be possible to calculate Claimant's test period average earnings, NYDC permits protective benefits to be offset by refusal of the protected employee to work overtime. Without a claim, the Carrier does not keep records of overtime refusals and hence would be unable after six years to mitigate its liability for displacement allowances. This potential loss represents detriment to the Carrier were this claim to be sustained at this late date. Finally, the record does not show that Claimant always sought the highest-paying available position that her qualifications and seniority permitted during her protective period, which also may be an offset. This too represents increased liability to the Carrier, one that cannot now be averted.

On this record, I find that a nearly six-year unexplained

delay in filing this claim, the delay creating possible increased financial liability to the Carrier that cannot now be avoided or offset, fatally prejudices it.

AWARD

The claim of B. A. Sounier for protective benefits under the New York Dock Conditions as a result of her displacement in January, 1986, is denied.



J.L. Gobel
Int'l. Vice President
Transportation-Communications
International Union



A.T. Olin
Assistant Director
Labor Relations, Non-Ops
Union Pacific Railroad Co.


Charles M. Rehms, Referee

Dated: December 30 1992