BEFORE AN
ARBITRATION COMMITTEE ESTABLISHED
UNDER ARTICLE I, SECTION 11 OF THE
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

PARTIES	TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION	AWARD NO. ASD 2
TO	AND	CASE NO. ASD 2
DISPUTE	UNION PACIFIC RAILROAD COMPANY	

ORGANIZATION'S QUESTIONS AT ISSUE:

1. Did the Carrier violate Article I - Election of Benefits of NYD-217 when it refused to provide Mr. P. J. Morrison his test period average as a result of a transaction that occurred on or about February 3, 1997?

2. If the answer to Question 1 is in the affirmative, shall the Carrier now be required to furnish Mr. Morrison with his test period average and to pay him a displacement and/or dismissal allowance beginning February 3, 1997 and continuing for the duration of his protective period?

CARRIER'S QUESTIONS AT ISSUE:

1. Was the Claimant, Mr. P. J. Morrison, a 'displaced employee' subject to a test period average as requested based on an alleged transaction occurring on February 3, 1997?

2. Was the merger of the UP and SP a transaction which was the proximate cause of an affect on the Claimant which triggers the application of NYDC protection?

HISTORY OF DISPUTE:

By Decision served August 12, 1996 in Finance Docket No. 32760 the Surface Transportation Board (STB) approved the merger of the Union Pacific Corporation and its subsidiaries (UP) with Southern Pacific Rail Corporation and its subsidiaries (SP) and control of UP over SP. The authority granted was made subject to the labor protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District Terminal, 360 ICC 60 (1979)(New York Dock Conditions). Pursuant to Article I, Section 4 of the New York Dock Conditions the Carrier served notice upon the Organization of its intention to rearrange and consolidate the clerical forces of UP and SP pursuant to the STB's order. Further pursuant to Article I, Section 4 the parties negotiated an implementing agreement effective December 18, 1996 (NYD-217) applicable to the rearrangement and consolidation of clerical forces which was the subject of the Carrier's notice.

On June 2, 1997 the Organization filed a claim with the Carrier for a test period average (TPA) alleging that Claimant had been affected in a chain of displacements. The Carrier denied the claim. The Organization appealed the denial. However, the dispute was not resolved.

Eventually, the Organization invoked the arbitration procedures of Article IV of NYD-217. This Board heard the dispute in Washington, DC on October 29, 1998. The parties made written submission and presented oral argument to the Board. The parties

agreed to extend the time provided in Article IV within which the Arbitrator must render a decision in this case.

FINDINGS:

The Board finds that the parties have complied with all procedural requirements to bring the questions in this case and the underlying dispute before this Board for adjudication. The Board also finds it has jurisdiction to decide the questions and the dispute. The Board further finds that all parties to the case were given due notice of the hearing before the Board.

At all times material to the dispute in this case Claimant held the position of Clerk/ Steno at the SP Locomotive Plant in Denver, Colorado. Claimant currently holds that position.

On October 1, 1995, approximately one year before the UP/SP merger, the Chief Clerk at the same location was moved to the SP's Lincoln Street building in Denver where she performed secretarial duties for various SP Mechanical Department officials located in that building. The Chief Clerk's position at the SP Locomotive Plant was not abolished, bulletined or filled.

However, after October 1, 1995 Claimant performed not only the duties of his assigned position but also those of the departed Chief Clerk for which he was compensated at the Chief Clerk's rate of pay. Additionally, Claimant began to work

substantial overtime due to the necessity to perform the duties of his own position and those of the Chief Clerk.

As a result of the UP/SP merger the positions of the SP Mechanical Department officials at the Lincoln Street building were transferred elsewhere on the merged system. The secretarial duties of the Chief Clerk were eliminated at that location.

On or about February 3, 1997 the Chief Clerk was transferred back to the SP Locomotive plant in Denver where she resumed all duties as Chief Clerk. As a result, Claimant ceased performing the Chief Clerk's duties and ceased receiving the rate of the Chief Clerk's position. Additionally, Claimant no longer performed overtime.

The Organization's position in this case is that the Carrier is obligated to provide Claimant with his TPA and pay him a displacement allowance as provided in the New York Dock Conditions because he was directly affected by a transaction that occurred solely as a result of the UP/SP merger. As such, the Organization urges, he is entitled to an election of benefits in accordance with Article I of the NYD-217 agreement as well as Article I, Section 2 of the New York Dock Conditions.

Specifically, the Organization maintains that as a result of the UP/SP merger the Mechanical Department officials were relocated from the SP's Lincoln Street building in Denver to points elsewhere on the merged system. Consequently, the Chief Clerk who had performed secretarial services for those officials no longer had work at that location. She went back to the SP Locomotive Plant and resumed her duties as Chief Clerk at that location. Thereafter, Claimant no longer performed the Chief Clerk's work and thus no

longer received the higher rate of pay of that position. Moreover, Claimant no longer worked the overtime previously required because he performed the duties of his position and those of the Chief Clerk who had relocated to the Lincoln Street building.

The Carrier maintains that Claimant is not a displaced employee within the meaning of the New York Dock Conditions because he was never displaced from his Clerk/Steno position at the SP Locomotive Plant. The Organization, urges the Carrier, has failed in its burden of proof in this case to show a causal nexus between a transaction, in this case the UP/SP merger, and the diminution in Claimant's income after the Chief Clerk returned to the SP Locomotive Plant. Nor, the Carrier points out, has the Chief Clerk claimed to be a displaced employee under New York Dock which forces the conclusion that Claimant does not occupy such status. Finally, the Carrier argues, even if it is determined that Claimant is a displaced employee, there is no proof that the overtime he lost after the Chief Clerk's return to the SP Locomotive Plant qualifies for inclusion in his TPA.

Article I of NYD-217 provides in pertinent part that the New York Dock Conditions are incorporated and made a part of the agreement and are applicable to the transaction in this case, i.e., ". . . the general rearrangement and selection of forces in connection with the consolidation and rearrangement of functions throughout the UP and the SP . . . ." which was undertaken to effectuate the merger of UP and SP properties. Article I, Section 1(b) of the New York Dock Conditions defines a displaced employee as ". . . an employee of the railroad who, as a result of a transaction is placed in a worse

position with respect to his compensation and rules governing his working conditions." Such employee is entitled to a displacement allowance calculated in accordance with Article I, Section 5. Article I, Section 11(e) of the conditions provides:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

We believe the Organization has the stronger position in this dispute.

The fact that Claimant was not displaced from his Clerk/Steno position is irrelevant. The language of Article I, Section 1(b) of the New York Dock Conditions does not mean literally that an employee must be displaced from a position as a threshold condition to meeting the definition of a displaced employee. All that is required in order to meet the definition is that an employee experience a diminution of income or adverse working conditions as a result of a transaction. As so well put by an Article I, Section 11 Arbitration Committee in TCU and Norfolk Southern Corp., Apr. 19, 1989 (Roukis, Neutral Member) the word "position" in Section 1(b) ". . . connotes status, situation or posture rather than a specific job or assignment."

Nor can we agree that the Organization has failed to meet its burden of proof in this case.

As the Carrier recognized in its written submission "[T]he issue in this case is whether the Claimant . . . was an employee who was affected by the Union Pacific/Southern Pacific merger." NYD-217 and the notice under Article I, Section 4 of

the New York Dock Conditions which lead to that agreement specify that the rearrangement of clerical forces throughout the merged system, which was the subject matter of the notice and the agreement, was a transaction undertaken to effectuate the merger. The Organization maintains, without serious challenge from the Carrier, that the relocation of the Mechanical Department officials for whom the Chief Clerk performed secretarial services at the Lincoln Street building was part of the rearrangement of forces. The conclusion is inescapable that such removal was part of the transaction in this case. As a result the Chief Clerk no longer had secretarial duties to perform at the Lincoln Street building which caused her return to the SP Locomotive Plant which in turn caused Claimant to cease performing the Chief Clerk's work and receiving the higher rate of pay for that work as well as to lose the overtime Claimant had been working as a result of performing the functions of two positions.

On the basis of the foregoing we believe the Organization has established a causal nexus between the transaction and the diminution in compensation suffered by Claimant. It follows that Claimant meets the definition of a displaced employee under Article I, Section 1(b) of the New York Dock Conditions. It also follows that Claimant is eligible for a displacement allowance under Article I, Section 5 of the New York Dock Conditions. It follows further that Claimant is entitled to a TPA provided in Article I, Section 5 to determine whether Claimant is due a displacement allowance.

We also cannot agree with the Carrier's position that the overtime Claimant worked for the period the Chief Clerk was at the Lincoln Street building and which he

lost upon her return to the SP Locomotive Plant is not properly part of the TPA. The rule is that overtime which is regular, recurring or casual, but which is not generated by the transaction itself, is to be included in an employee's TPA calculated under Article I, Section 5. In this case the overtime was generated by the fact that the Chief Clerk left the SP Locomotive Plant to perform secretarial services for Mechanical Department officials located at the Lincoln Street building. That move was not as a result of the transaction. Accordingly, the overtime Claimant was required to work because he subsequently performed not only his duties but those of the Chief Clerk properly is includable in his TPA to be calculated under Article I, Section 5.

AWARD

All Questions at Issue are answered in the affirmative.

William E. Fredenberger, Jr.
Chairman and Neutral Member

D. D. Matter
Carrier Member

R. F. Davis
Employee Member

DATED: May 24, 1999