

ARBITRATION COMMITTEE

In the Matter of the)
Arbitration Between:)
)
TRANSPORTATION-COMMUNICATIONS)
INTERNATIONAL UNION, (BRAC))
)
Organization,)
)
and)
)
MISSOURI PACIFIC RAILROAD)
COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)
)
Carriers.)
_____)

OPINION AND AWARD

Pursuant to Article I,
Section 11 of the
New York Dock Conditions

Case No. 2
Award No. 3

Hearing Date: November 11, 1987
Hearing Location: Sacramento, California
Date of Award: March 1, 1988

MEMBERS OF THE COMMITTEE

Employees' Member: F. T. Lynch
Carriers' Member: L. A. Lambert
Neutral Member: John B. LaRocco

QUESTIONS AT ISSUE

- (1) Was Implementing Agreement No. 21 - Union Pacific Railroad Company/Missouri Pacific Railroad Company and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees effective February 7, 1985, violated when the Carrier failed and refused to assign Clerk W. A. Peyton to the position of Joint Facility Auditor?
- (2) If the answer to Question (1) is in the affirmative, shall the above named claimant now be assigned to the position of Joint Facility Auditor and compensated in the amount of \$2,535.23 per month, commencing May 13, 1985, and continuing until assigned?

OPINION OF THE COMMITTEE

I. INTRODUCTION

In September, 1982, the Interstate Commerce Commission (ICC) approved the merger and consolidation of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (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.

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

On June 1, 1984, the Carriers served notice on the Organization of their intent to engage in a number of New York Dock transactions. Among the coordinations enumerated in the notice was the transfer and consolidation of joint facility auditing work from St. Louis, Missouri and Spring, Texas (MP points) to Omaha, Nebraska (a UP point). The Organization and Carriers entered into Implementing Agreement No. 21 on February 7,

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

1985 to govern the consolidation of UP and MP joint facility auditing functions.

The Carrier began to implement the transaction on or about April 29, 1985. The Carrier issued an April 29, 1985 notice, in compliance with Implementing Agreement No. 21, advising employees that it was establishing six fully exempt Semi-Senior Joint Facility Auditor positions at Omaha. The Carrier simultaneously abolished eight partially exempt MP Travelling Accountant positions at St. Louis and one partially exempt MP Special Accountant position at Spring, Texas, effective May 15, 1985.

Article II, Section 2(a) of Implementing Agreement No. 21, provided the method for selecting employees to fill the new Omaha positions. Article II, Section 2(a) reads:

"Notice covering the establishment of positions of Supervising JF Auditor and Semi-Senior JF Auditor will be advertised for a period of fifteen (15) days in MP Accounting Department Offices at St., Louis, Missouri, Spring, Texas, and on UP Master Roster 250. Selection of applicants for the positions will be made after expiration of notice in the following manner of preference:

- "i. First selection shall be made from employees currently assigned to MP Joint Facility Auditing positions at St. Louis, Missouri, and Spring, Texas, whose positions are scheduled to be abolished pursuant to Article III of this Agreement.
- "ii. Second selection shall be from MP applicants holding seniority on MP Accounting Department seniority District No. 1 at St. Louis.
- "iii. Third selection shall be made from UP employees on Master Seniority Roster 250.

"The provisions of Rule 1(d-1) shall apply in filling any remaining positions after application of

paragraphs i., ii. and iii. above as well as any subsequent vacancies."

In addition, Article II, Section 8 of Implementing Agreement No. 21 stated:

"Employees applying for and becoming assigned to new UP Joint Facility Auditing positions at Omaha may be required to undergo any necessary training commencing on or after date of assignment."

Pursuant to Implementing Agreement No. 21, the fully excepted positions established at Omaha were totally exempt from the rules of UP-BRAC Working Agreement except for the union shop provisions.

Claimant, who occupied an Evaluation Accountant position in the MP Property Accounting Department when the Carriers implemented the transaction, timely applied for one of the Semi-Senior JF Auditing positions being established at Omaha. On his May 1, 1985 application, Claimant emphasized his thirty-two years of experience with the MP including a short stint (from 1979 to 1981) as a Travelling Joint Facility Accountant in the MP Auditing Department. Also, Claimant had recently graduated from college with a degree in Psychology and a minor in Business Administration. Claimant fell within the second (ii) of the three preference groups listed in Article II, Section 2(a) of Implementing Agreement No. 21.

The first Article II, Section 2(a) preference tier was composed of the incumbents of the abolished positions at St. Louis and Spring. The Carrier received three applications from the first tier. It selected all three applicants to fill three of the

newly created Semi-Senior JF Auditor positions.² The record does not reflect how many employees in the second preference group (besides Claimant and one junior employee) applied for the remaining four Auditor jobs. After the personnel and accounting departments extensively interviewed Claimant, the Carrier rejected his application. The Carrier filled one of the Semi-Senior Joint Facility Auditor positions with the second tier applicant who held less seniority than Claimant. The Carrier did not select any other candidates from either the second or third preference groups.

Two of the four employees originally selected for the Semi-Senior JF Auditor positions were promoted to official or managerial positions. One of the promoted employees was a preference group one applicant and the other promoted employee was the single level two employee selected for a JF Auditor position. On the property, the Carrier alleged that it had abolished the remaining three JF Auditor positions. In its submission, the Carrier explained that it had overestimated the number of positions needed to perform the available work at Omaha.

On September 19, 1985, the Organization filed a claim charging that the Carrier had violated the terms of Implementing Agreement No. 21 when it failed to select Claimant for a new JF Auditor position. The Organization urges this Committee to award Claimant the position of Semi-Senior Joint Facility Auditor and

²Evidently, one of the three was assigned to the sole Semi-Senior Joint Facility Auditor job created at Spring, Texas.

to order the UP to pay Claimant \$2,535.23 per month from May 13, 1985 until the Carrier assigns him to the Semi-Senior JF Auditor job. The Organization did not disclose the source of its back pay figure. As a fully excepted position, the Joint Facility Auditor's salary was not fixed by contract.

III. POSITIONS OF THE PARTIES

A. The Organization's Position

Since Claimant was in Preference Group (ii), the Carrier should have assigned him to a Semi-Senior Joint Facility Auditor position ahead of junior employees within the same tier. The Carrier lacked the absolute right to select employees. Rule 1(d-1) of the UP-BRAC Agreement applied only after the Carrier had exhausted the three level hierarchy for selecting Semi-Senior JF Auditors. Put differently, Rule 1(d-1) was operative only after the Carrier fully complied with Article II, Section 2(a) of Implementing Agreement No. 21.

Claimant possessed more than the minimum qualifications for the job. His credentials were outstanding. During his long service tenure, Claimant performed work in fifteen different positions without ever being disqualified. Indeed, Claimant successfully performed MP Auditing Department work for two years (1979 to 1981). In addition, Claimant had recently attained a college degree manifesting his fitness and ability to hold a responsible position. Also, Article II, Section 8 of Implementing Agreement No. 21 contemplated that employees would be provided

with training to master the duties of Semi-Senior Joint Facility Auditor. The UP did not even attempt to train Claimant.

With regard to the Carrier's contention that Claimant actually applied for a subsequent vacancy, the Organization avers that Claimant, on May 1, 1985, was undoubtedly applying for one of the original JF Auditor positions being established pursuant to the notice issued just two days before his application. Moreover, Implementing Agreement No. 21 called for the Carrier to establish seven Semi-Senior JF Auditor jobs. (See Article II, Section 1 of Implementing Agreement No. 21.) Since the Implementing Agreement mandated the Carrier to create and fill all seven positions, Claimant should have received one of the new jobs. When initially filling the new auditing positions, the UP could not pick and choose from among applicants. As discussed above, the Carrier first had to pick candidates from the preference groups, in descending order, before it could exercise its unilateral right of selection under Rule 1(d-1). Under the literal language of Implementing Agreement No. 21, Claimant was an applicant for one of the original seven vacancies.

B. The Carrier's Position

At the onset, the UP contends that since both the abolished partially excepted Travelling Accountant positions and the newly established fully exempt Auditor jobs were "right of selection" positions, the Carrier was under no contractual obligation to assign any specific individual to the new Omaha positions. Because the newly established JF Auditor positions were governed

by Rule 1(d-1) of the UP-BRAC Agreement, the Carrier had the unfettered discretion to assign or remove an employee from such positions. When exercising its right of selection prerogative, the UP did not have to choose every applicant from the first preference tier before appointing workers in the second or third groups. At most, Implementing Agreement No. 21 only compelled the Carrier to consider applicants in preference level order but the agreement did not constrain the Carrier's absolute right to select candidates for each position. In essence, the Organization seeks to interfere with the Carrier's necessary prerogative for selecting the appropriate person for sensitive and highly responsible positions. Under the Organization's argument, the Carrier would have to hire a janitor for an Auditor position merely because he might hold seniority on MP Accounting Department Seniority Roster No. 1.

Nonetheless, the Semi-Senior Joint Facility Auditor positions were filled in accord with Implementing Agreement No. 21. The Carrier was not required to fill all of the Semi-Senior Joint Facility Auditor positions. In fact, the UP determined that it had created an excessive number of jobs.³ Since the work load did not warrant seven positions, the Carrier abolished three jobs before selecting employees to occupy the jobs. Inasmuch as the three remaining positions were abolished, Claimant was actually

³The Carrier explained that existing vacancies on three of the MP Travelling Accounting positions exemplified the lack of sufficient auditing work.

applying for a subsequent vacancy. The final clause of Article II, Section 2(a) of Implementing Agreement No. 21 expressly provides that Rule 1(d-1) of the UP-BRAC Agreement controls the selection of individuals to fill a subsequent vacancy. In sum, the Carrier could select whomever it desired for the vacancy which arose due to the promotion of one of the initially selected candidates.

Even if the Carrier was bound to select candidates from the three preference groups, Claimant lacked the requisite fitness and ability to adequately perform the duties of a Semi-Senior Joint Facility Auditor. After carefully considering Claimant's application, the UP reasonably determined that Claimant did not possess the qualifications for one of the newly established positions. Even though Claimant had previously occupied an MP Travelling Accountant position, the content of the new positions bore little resemblance to the job that Claimant worked in 1980. Moreover, Claimant's psychology degree did little to enhance his qualifications. When the parties wrote Implementing Agreement No. 21, they did not intend to force the Carrier to accept unqualified candidates for the JF Auditor positions. The Carrier retains the power to evaluate an employee's fitness and ability. NRAB Third Division Award No. 25871 (Gold). The Carrier was neither arbitrary nor capricious in judging Claimant unqualified.

With regard to the second question at issue, the Carrier asserts that Claimant has not lost any compensation since he has been fully employed and under pay since the 1985 transaction.

Furthermore, the Carrier emphasizes that this Committee lacks the authority to set a rate of pay for an excepted position.

IV. DISCUSSION

Even though this transaction involved the abolition and establishment of restricted positions, Implementing Agreement No. 21 limited the Carrier's right to appoint the initial occupants of the newly established JF Auditor positions at Omaha. The Carrier was required to select, in descending order, candidates from the three preference groups.⁴ If the Carrier had retained its absolute right of selection of individuals for the initial vacancies, it would have been unnecessary for the parties to write the last paragraph of Article II, Section 2(a). Also, it would have been superfluous for the parties to structure, in great detail, the three level hierarchy of applicants. The parties do not enter into solemnly negotiated agreements only to have their language rendered useless and meaningless.

The Carrier's argument concerning absolute right of selection might be meritorious within the third preference group [but not (i) or (ii)] because the parties adopted the word "employees", instead of "applicants," in group (iii). However, we

⁴The parties neglected to place the term "qualified" after the word "from" in the second and third preference groups. The requirement that an applicant must meet, at least, the minimum qualifications as a prerequisite to procuring a JF Auditor job might be reasonably inferred from Implementing Agreement No. 21 but we need not address this issue. As we state later in our Opinion, Claimant's qualifications are not relevant to the outcome of this case.

need not interpret this terminology distinction since Claimant was in the second group.

Although both Claimant and the fourth employee selected for one of the initial vacancies came from the second preference group, Implementing Agreement No. 21 did not grant Claimant any paramount right (to fill a new position) over any other individual in the second preference group. The Implementing Agreement is noticeably silent regarding the order of internal selection within the parameters of each preference group. So long as it assigned applicants from the first and second preference group, but not third tier workers or employees outside the three tiers, the Carrier could bypass Claimant regardless of his seniority. If the parties had decided to construct a formula for selecting from among candidates within a preference group, they could have easily incorporated a seniority provision into the Implementing Agreement. Furthermore, the concept of selection according to preference groups is, in and of itself, a selection process significantly different from the seniority principle.

After filling four of the seven newly created Semi-Senior Joint Facility Auditor positions, the Carrier decided not to fill the remaining jobs. While Implementing Agreement No. 21 clearly contemplated that the Carrier would establish seven positions, nothing in the Implementing Agreement prohibited the Carrier from abolishing the positions before the selection process was completed. If there was any obligation on the Carrier to fill all seven positions, such a requirement was illusory. An instant

after filling the remaining three JF Auditor positions, the Carrier could have simply removed the selected employees and abolished the positions pursuant to Rule 1(d-1) of the UP-BRAC Agreement. However, when filling the four initial JF Auditor positions, the Carrier did have to abide by the preference tiers. Since the Carrier filled all four jobs without going beyond the second preference level, it did not undermine Claimant's preferential application. Had the Carrier filled a fifth new position, it would have had to select Claimant or another applicant from the second preference group.

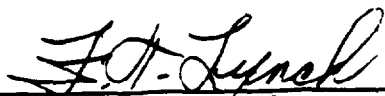
Shortly after assigning four new Semi-Senior Joint Facility Auditors at Omaha and Spring, the Carrier elevated two of the three incumbents to official positions. Under the final clause of Article II, Section 2(a), the Carrier could select the promoted employees' successors pursuant to Rule 1(d-1) of the UP-BRAC Agreement. Claimant lacked any preferential hiring right to a subsequent vacancy. The Committee cannot characterize the two later vacancies as initial positions since there was never more than four new Semi-Senior Joint Facility Auditor positions established at Omaha.

AWARD AND ORDER

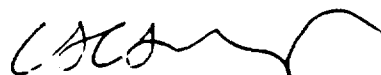
The Answer to the First Question at Issue is No.

The Second Question at Issue is moot.

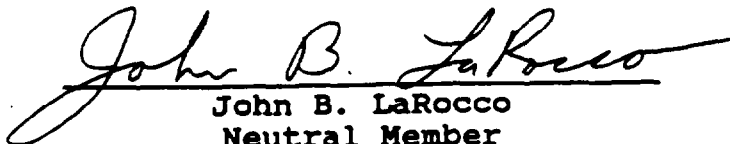
Dated: March 1, 1988



F. T. Lynch
Employees' Member



L. A. Lambert
Carriers' Member



John B. LaRocco
Neutral Member