In the Matter of Arbitration Between B.J. Maeser, T. P. Murphy, E.M. Sengheiser and K.W. Shupp and Union Pacific Railroad Co., Missouri Pacific Railroad Co. Pursuant to New York Dock Conditions Imposed by the Interstate Commerce Commission in Finance Docket No. 30,000	:	AWARD AND DECISION
Arbitrator	:	Jacob Seidenberg, Esquire
Hearing	:	August 19-20, 1987 St. Louis, Missouri
Appearances	:	Claimants Bill T. Walker, Esquire Jonathan McKee, Esquire Frank Baxendale, Esquire all of Law Firm of Bill T. Walker & Associates Carriers Richard A. Judes, Esquire, Counsel Richard A. Meredith, Esquire, General Director of Labor Relations
Post Hearings Briefs - Received	:	October 20, 1987
" " Reply Briefs - Received	:	November 2, 1987
Issues	:	(1) Are Claimants "employees" within the meaning of New York Dock Conditions? (2) Are the Claimants entitled to either a dismissal or displacement or severance allowance under New York Dock Conditions? (3) Did the Claimants receive the proper vacation allowances they were entitled to receive for year 1984?

(4) Did the Union Pacific RR interrupt the Claimants business or employment relationship with the Missouri Pacific RR?

Background: This dispute arises as a result of the merger effected between the Union Pacific RR, the Western Pacific RR and the Missouri Pacific which, upon ICC approval, became effective on December 22, 1982. The Carriers' petition for approval of the merger was filed with the ICC on September 15, 1980 and resulted in two years of hearings. The ICC imposed New York Dock Labor Protection Conditions as part of its approval.

The gravamen of the dispute arises from the decision of the merged Carriers to consolidate the existing Marketing Departments into one department of the UP located in Omaha, Nebraska. The Union Pacific extended an offer to the Claimants to become part of the merged Department at their existing MP salaries, but the offers were not accepted for the reasons hereinafter stated.

The Claimants were individuals who had long periods of employment with the Missouri Pacific and had been employed in Marketing and Sales Department in St. Louis, Missouri.

The specific jobs, salaries and length of service of the Claimants when their employment ceased were:

B.J. Maeser - General Manager - Marketing Commodities $75,000 employed from 1951.

T.P. Murphy - Administrative Assistant to General Manager - Marketing Commodities - $39,720 - 1950

E.M. Sengheiser - Director of Marketing, Chemicals and Petroleum Products, $61,000 from 1957.
K.W. Shupp - Supervisor- Files, Mail and Supplies - $38,760 - 1941.

The record discloses that Claimant Maeser executed on July 15, 1983 a Separation Allowance Memorandum wherein he stated that, in lieu of accepting proffered employment with the Union Pacific RR in Omaha which would require a change in residence, he elected to resign from the Missouri Pacific RR and accept a lump sum severance of $35,000. The Claimant wrote at the bottom of his Separation Memorandum:

> "I hereby reserve my right to seek such benefits to which I am legally entitled." (Carrier Ex. #43)

A similar Separation Allowance was executed on July 15, 1983 by Claimant Shupp (Carrier Ex. #10). On June 17, 1983 Claimant Murphy (Carrier Ex. #26) and Claimant Sengheiser (Carrier Ex. #22) executed the same Separation Allowances.

On February 10, 1983, Claimant Shupp wrote Missouri Pacific Assistant Vice President Colvin that, in addition not to electing to transfer to Omaha, and instead electing to take his severance pay, he was also electing to take his UPRR and railroad retirement pension (Carrier Ex. #9).

The antecedent for the aforesaid Claimants' actions was a January 27, 1983 Memorandum from then Vice President of Traffic, G.A. Craig, to all non-agreement employees in the Sales and Marketing Department who had been offered a position in Omaha, stating they also had the option of rece retirement allowance, if

they elected to resign their employment and not transfer to Omaha. The Severance Allowance was based on length of service with the Missouri Pacific with a cap of $35,000. The Craig Memorandum stated, inter alia, that the offer was not available to any employee who was offered a position in St. Louis and that the employee's decision to accept or reject the offer of severance pay in lieu of transfer to Omaha, had to be made before 5:00 PM, February 14, 1983 (Carrier Ex. #1).

After the merger was legally effected in December 1982, the Carrier distributed certain memoranda and a booklet (Claimants' Ex. #4) which purportedly set forth the benefits available to non-agreement employees of the merged railroad, which were the UP benefits.

As stated early in 1983, the Carrier offered employment to the Claimants in Omaha at their present salaries in the merged Marketing Department. The Claimants refused the offer to transfer and took severance allowances after tending their resignations. After the Claimants took their separation allowances, left the employment of the Carrier they then filed a law suit in the Missouri State Courts in 1985 for an alleged interrupted business relationship. The Carrier moved in 1986 to have the suit removed to the federal court for the Eastern District of Missouri. Subsequently the Carrier filed a motion to compel arbitration of this dispute pursuant to the provisions of the New York Dock Conditions. On October 23, 1986 the parties executed a stipulation to arbitrate. The parties selected the Undersi the Arbitrator from a

list furnished them by the National Mediation Board. At the arbitration hearing held on August 19-20, 1987 the parties presented their respective positions, by witnesses and in writing.

The arbitration hearing resulted in a 505 page transcript, 61 Claimants Exhibits and 6 Carrier Exhibits, plus extensive post hearing and reply briefs.

The relevant Statutes, Decisions, Awards and Rulings are the following

New York Dock Conditions which state in part:

"Article I

1. Definitions - (a) 'Transaction' means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) 'Displaced employee' means an employee of the railroad who, as a result of the transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position ...

....

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employee, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction ...

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during the protective period be paid a monthly displacement allowance...

6. Dismissal allowanc · · · (a) A dismissed employee shall be paid a monthly allowance, from the date he is deprived of : and continuing during his prot

"7. Separation allowance - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided for in this appendix) accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

...

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have been entitled under this appendix, this appendix will apply to such employee.

...

Article IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions."

Railway Labor Act (45 U.S.C. Chapter 8) in Section 151, Fifth states in part:

"Fifth. The term 'employee' as used herein includes every person in the service of the carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission ..."

Section 11347 (49 U.S.C.) states in part:

"When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce commission shall require the carrier to provide a fair arrangement at least as protective of the interest pf employees who are affected by the transaction ..."

Rail Passenger Service Act (45 U.S.C. 565) states in part:

Section 565

...

(f) 'railroad employee' def

"...

As used in this subsection, the term 'railroad employee' means (1) an active full time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company and (3) the dependents of any employee to in clause (1) and (2) of this sentence."

Milwaukee Railroad Restructuring Act (Title 45, Chapter 18) states in part: "Section 902(4)

... the term 'employee'

(A) includes any employee of the Milwaukee Railroad who worked on a line of each railroad the sale of which became effective on October 1, 1979 but

(B) does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of board of directors or any other person performing such functions."

Rock Island Railroad Transition and Employee Assistance Act (Title 45, Chapter, 19) states in part in Section 1002:

"(4) 'employee' includes any employee of the Rock Island Railroad as of August 1, 1979, but does not include any individual serving as president, vice president, secretary, treasurer, comptroller, counsel, member of the board of directors, or any other person performing such functions."

The 1980 Staggers Act P.L. 96-448 contains the same definition of "employees" as set forth in the Milwaukee and Rock Island Statutes.

The detailed respective positions are:

Claimants

B.P. Maeser

The Claimant maintains he is an employee of the Carrier within the meaning of the ICC imposed New York Dock Conditions. He asserts that he became a "displa[illegible]yee as a result of the

offered job in Omaha as Director of Pricing Services for the reasons subsequently set forth. The Claimant asserts that the language and the rulings of the ICC regarding "employee" and "subordinate official" or the language of the Railway Labor Act purporting to define "employee" or the language of the Rail Passenger Service Act defining "railroad employee" are not relevant, because these statutes, the orders and rulings issued thereunder were for the purpose of making clear what was the area of collective bargaining. These statutes sought to delineate the parties who could properly negotiate collective bargaining agreements.

The Claimant states those considerations which compelled the Congress, the ICC and the National Mediation Board to ensure that labor unions and carriers in the railroad industry would be able to freely, and without limitation, negotiate for wages and terms and conditions of employment, are not the same considerations which motivated the Congress to enact legislation to ensure that employees should not be adversely affected by merger or consolidations of two or more railroads. The Congress that enacted the Railway Labor Act was a Congress with different concerns than the Congress that enacted 49 USC 11347 mandating that the ICC provide for arrangements that would ensure the affected employees would not be in a worse employment position for at least four years or less, as a result of a railroad merger or consolidation.

The Claimant stresses the purpose of this arbitration proceeding is to effectuate the Congressional will and intent as stated in the aforesaid Section 1 [illegible] The Claimant stresses that

a long line of ICC decisions reveal a consistent Agency policy to carry out the Congressional intent. The Claimant insists that Section 151 of tbe Railway Labor Act was not intended to provide a generic definition of an employee in the railroad industry. Its purpose was to limit that class of employees subject to unionization, including subordinate officials, as so declared eligible by the Commission. The Claimant maintains that Congress, neither in 1926 nor 1934 was enacting guidance as to who were to be "employees" under New York Dock.

The Claimant asserts that the industry use of the term "employee" relates to the administration and effect of the Railway Labor Act. It is significant, however, that industry discussions of protective conditions concerning adverse effects of mergers frequently use specific language to embrace consideration of "all employees."

The Claimant states that when the cited Court cases are analyzed, it appears the Fifth Circuit held in the McDow case that the District court should not have decided whether a former vice president of the railroad was an "employee" for the benefits of protective conditions. The District Court had held that a study of the legislative history ofthe ICC Act left no doubt that the term "employee" did not include a vice president and general manager of the railroad. In the Edwards case the Fourth Circuit Court held that a stockholder and Chief Engineer of a small family owned railroad was not an employee for purposes of protective benefits. The Claimant stresses that the si language of the Court's

decision was that the protective conditions were not intended to cover those employees who were in a position to protect themselves from the adverse effects of the merger. The Claimant states this concept was endorsed in the Newborne case when the Sixth Circuit held that a former supervisor was not an "employee" because he possessed transferable skills and was able to take care of himself, and in fact did.

The Claimant notes the ICC in its Burlington Northern Decision (348 ICC 962) stated that it was deferring to those familiar with labor law (arbitrators) with respect to the complexities of protective conditions disputes. The Claimant contends this is the reason that one should not look either to the ICC or the Courts for authoritative decisions on this issue. The Claimant notes that the ICC in the Bell case made it clear that its authority to classify employees under the Railway Labor Act does not extend to classifying employees for the purpose of employee protection coverage.

The Claimant maintains that the ICC has applied a narrow meaning to its organic legislation in determining its jurisdiction to decide when employees are covered by protective conditions of New York Dock. The Claimant adds that despite Section 11347 has its roots in the 1936 Washington Job Protection Agreement, the legislation must be viewed in light of general welfare and not within the narrow interest of railroad carriers and labor unions. The Claimant stresses that there is no language in the relevant legislation that would indicate the co l intent was to deny

the Claimants the benefits of New York Dock Conditions. He further stresses that it is to ignore reality to contend that it was the intent of Congress to deny the Claimants the benefit of New York Dock, and to maintain that only subordinate officials and other employees eligible for unionzation, will be adversely affected by a merger.

The Claimant notes that on those specific occassions when the Congress has definitely addressed the question as to those employees who should be covered by protective conditions, i.e., the Milwaukee Railroad Restructuring Act (1979); Rock Island Railroad Transition and Employee Assistance Act (1980) and Staggers Rail Act (1980), it made all employees eligible for the protective conditions below the rank of top corporate officers. The Claimant states this Congressional action is consistent with the philosophy that protection should be afforded those who have little or no control over the merger developments which precipitated their need for protection.

The Claimant stresses the definition of displaced or dismissed employees set forth in New York Dock applies to all the Claimants in this proceeding due to the circumstances of their departures from the Carrier's service.

The Claimant states that if they are employees under New York Dock, then, by virtue of Article IV they are entitled to substantially the same level of protection even if they are not dismissed or displaced employees. The Claimant adds Article IV of New York Dock

is not ambiguous. It notes that the Carrier negotiated an Implementing Agreement with the Brotherhood of Railway and Airline Clerks and the Claiamnts are entitled, as a minimum, to receive those benefits.

The Claimant asserts that New York Dock establishes minimum conditions and employees are entitled to negotiate more favorable conditions than those in New York Dock, and Article IV clearly states that non-agreement employees are to be treated substantially the same as agreement employees. The Claimant stresses the argument that under Dock, relief is limited to those employees who are dismissed or displaced as contemplated by Article I, Section 1(b) and (c), ignores Article IV. The Claimant further notes that Article I, Section 4 that provides for negotiation or settlement by arbitration of disputes involving displacement or dismissal of employees or re-arrangement of forces.

The Claimant states there is no merit to the Carrier's position that it would be impossible to administer agreements that afforded non-agreement employees the same level of protection that union members obtained through negotiations. The Claimant asserts that the work "substantially" provides a practical standard for administering the level of benefits. The several union implementing agreements have or should have a thread of commonality reflecting a carrier policy of fairness to all. It was the intent of Congress that non-agreement employees should be the beneficiaries of the same policy. The Claimant asserts there is no valid reason why all railroad employees should not enjo[illegible] level of job protec-

tion on ICC sustained mergers.

The Claimant states that the interpretation of Article IV that would require non-agreement employees to be dismissed or displaced as defined in New York Dock would deny the Claimants the higher level of protection accorded senior clerks under the BRAC Implementing Agreement No. 1. The Claimant adds that if the Claimants are entitled to the same benefits, they are entitled to higher severance pay.

With respect to the facts why Claiamnt did not accept the transfer to Omaha, he testified that he was the victim of a vendetta launched against him by Vice President Colvin. Although he had come up through the ranks, starting as a messenger in 1951 to become General Manager-Marketing-Pricing in 1979, and had been rewarded with numerous promotions, raises and substantial bonuses, his 32 years of faithful service was cast aside at the time of the merger because Mr. Colvin wanted to punish him for previously disciplining M.L. Holland, his close friend.

The Claimant testified he was a displaced employee when Mr. Colvin stated there was no place for him in the Business Groups of the merged Department, despite his 32 years of experience in all facets of marketing-pricing traffic work, as well as conducting negotiations for rates with important MP customers.

Claimant Maeser testified that he was demoted by virtue of the Omaha job offer. He stated he would be forced in Omaha to work for individuals who had formerly worked for him. He added that his opportunities to earn further prom lary increases and bo-

nuses were virtually dead since his present salary would place him at the midpoint of the offered Director's job.

The Claimant stated that the proffered job in Omaha was such an indignity and blow to his pride that Mr. Colvin knew that he would not accept it and thus Colvin achieved his goal of getting rid of him. The Claimant stated he talked to Vice President Ostrow about the job being offered him and he asked whether there was anything that could be done about it. Mr. Ostrow stated he would see what could be done but the Claimant never heard from him. Mr. Ostrow told the Claimant to discuss the matter with Mr. Barger who was coordinating merger activities. The latter repeatedly told the Claimant he would take the matter up with UP Vice President Craig, but it was not until April 14, 1983 that he was told that VP Craig said nothing could be done for the Claimant. The Claimant stated he made several attempts to ascertain when the Carrier wanted him to leave, although initially he had been told it wanted him to "turn out the lights" in St. Louis. Finally Mr. Barger told him his services would be terminated on July 15, 1983, but on June 22, 1983, he received an abrupt telephone call from Mr. Barger ordering him "to pack his things and go." A security officer appeared at his office to ensure that he promptly left that day. The Claimant denied the Carrier's allegations that he intended to take any computer printouts of carrier customers when he left.

The Claimant summarized the specific reasons for not accepting the Omaha job. In the first place his proposed job was downgraded because it carried 1308 Ha while his Missouri Paci-

that he was also an employee within the coverage of New York Dock Conditions, and he was also a dismissed or displaced employee thereunder and entitled to the afforded protection. Sengheiser further stated that as an employee under New York Dock, he was entitled to the same level of protection afforded the union employees by their negotiated implementing agreement, even if he were not a dismissed or displaced employee under New York Dock.

The Claiamnt states that he was an employee rather than official of the Carrier because he did not have the authority to hire or fire; he could not discipline, promote or demote, or formulate Company policy. His authority was confined only to making recommendations, and he had no way of knowing what weight was accorded his recommendations. The Claimant added his authority to make marketing contracts was limited to acting within expressed guidelines. He noted that he was at least seven reporting levels below the ultimate decision making level.

The Claimant stresses that since he did not hold an executive level position he therefore was an employee within the purview of New York Dock protective conditions.

The Claimant concedes that he occupied a non-union position, but that does not go to the core issue as to whether he was in a position to take care of himself under the merger. The Claimant asserted that he had no transferable skills and therefore was an employee properly entitled to receive the protection of New York Dock.

The Claimant states he beca[illegible]aced or dismissed em-

ployee when the Carrier refused to negotiate with him or give him any assurances with regard to the offered Omaha job. The Claimant asserted that the security of the offered Omaha job was illusary in that he was being transferred to Omaha for the purpose of training a UP successor after which he would be discharged or demoted as had happened to other MOP employees such as Messrs. Coale, Mc Laughlin and Looney.

The Claimant explained that the position offered him was the largest revenue producing commodity group in Omaha, and the other six commodity groups were held by UP personnel. This situation made him apprehensive and he believed that as soon as he imparted his knowledge to a UP manager, he would be replaced. He stated he was concerned that once he moved to Omaha and took the position, he would lose his rights to severance pay and other benefits. This was the reason he sought some assurance from the Carrier that he would not be terminated or demoted as soon as he trained a UP employee in his job. The Claimant states the Carrier's refusal to negotiate on the items he raised, was proof positive that the Carrier's offer was illusory and not made in good faith. This conclusion is buttressed by the fact that all the other Group Product Managers were receiving salaries in excess of his.

The Claimant further states that under Article IV of New York Dock, even if it is found that he was not a displaced or dismissed employee under Dock, he was entitled to receive substantially the same level of protection that the Carrier had negotiated with BRAC. At the very least, the Claimant m e is entitled to sever-

ance pay at 17½ months service, and as a dismisseed employee he is entitled to receive all the benefits for protected employees.

T.P. Murphy

The Claimant asserted he was an employee entitled to the protective benefits of New York Dock despite his job title as assistant to the General Manager, Marketing Commodities, when his employment terminated in June 1983.

The Claimant adopted all the reasons set forth in the analysis made in Claimant Maeser's Submission as to why he was a New York Dock covered employee. The Claimant asserts that he has not carried out the duties described in his Job Description, such as: coordinating the administrative subsections of the Marketing Department; assisting the General Manager, Marketing, by providing him with statistical data, reports and special projects; protecting the Carrier's interests at various committees; assisting the Assistant Vice President - Marketing, by preparing background information to aid the AVP when he called on major shippers.

The Claimant testified, on the contrary, that his actual duties for the past ten years were to perform personal acts and favors for Carrier officials. The Claimant stated he did personal favors for several AVP's such as depositing their payroll checks, chauffering these officials and members of their families to airports and other locations on non Carrier functions. The Claimant took care of the automobiles of these officials and assisted in performing certain repair duties at their homes.

The Claimant maintained his [illegible]re menial and not the

sort of duties that a high ranking official performs in the course of his executing his formal job duties. The Claimant states he did not supervise any employees; he could not fire or hire anyone, and he certainly was not a policy making official.

The Claimant stresses his work record since his termination reveals he was not able to protect himself from the adverse consequences of the merger. His post merger jobs were as a baggage handler for a small airline and at present to deliver daily newspapers. The Claimant states to hold that only union employees are entitled to the protection of New York Dock Conditions is to ignore reality.

The Claimant asserts he was a dismissed employee because he was never offered a job in Omaha. He notes that when the January 27, 1983 list of invitees to the Omaha orientation meeting was distributed, he was not on that list. The Claimant states this list was prepared before he officially informed the Carrier that he was unable to transfer to Omaha. The Carrier was aware he could not transfer to Omaha because of his wife's health.

The Claimant maintains that he was not offered a job in St. Louis as Assistant Manager Rate Quotation, because this position was a token position. Since this job was for a short term if the Claimant had accepted, it would have meant he had to forfeit his Severance Allowance. The Claimant asserted he was not in a financial position to terminate his employment without the severance payment. For this reason the Claimant stated he sought to obtain an assurance from the Carrier that when the temporary job in St. Louis ceased, he would still be eligible to receive the Severance Allowance. The Claimant adds that the Carrier's letter of April 28,

1983 was not an unequivocal assurance that the Claimant would receive the guarantee he requested. In any event, the letter from Mr. Barger was not such a high carrier official who could give him the guarantee he needed. The Claimant stated that under the circumstances, he was forced to take the severance allowance rather than run the risk of receiving nothing at a later date when the temporary St. Louis job ended.

The Claimant states that since the Carrier had no intention to transfer him to Omaha, he was forced into a no-win position when his job was abolished. He was beyond question a dismissed employee under New York Dock.

The Claimant advances the same arguments previously set forth by the other Claimants to show that the Claimant is an employee under New York Dock, even though not a dismissed or displaced employee, and was entitled to the same level of protection afforded labor union members. The Claimant also presented the same arguments that the other Claimants did to demonstrate that Congress intended non-agreement employees to enjoy the same protective condition benefits that union members did from their implementing agreements.

The Claimant notes that other MOP employees, after the transfer, were given jobs in St. Louis and received full protective benefits. The Claimant asserts he only wanted to be treated the same way as these employees were, especially in light of his more than thirty years of devoted service to the Carrier.

W.K. Shupp

Claimant Shupp. Supervisor Mail and Supplies con-

tends that he was an employee of the Carrier within the meaning and intent of the New York Dock, for all the reasons advanced by the other Claimants. He was not only an employee but he was a dismissed employee because he was never offered a position in Omaha. He asserts proof that he was not to be transferred to Omaha can be gleamed from the fact that he was not invited to attend the Omaha meeting in January 1983 to get acquainted with this new community and he was not offered a specific job in Omaha. The Claimant added that there was no specific job in the UP organization that was comparable to his position in St. Louis. He stated his supervisors could not tell him what kind of job he would have in Omaha except to state that it would be in the file room. However he was never able to evaluate what kind of position he would occupy.

The Claimant states the testimony of the MOP officers reveals that they did not know specifically whether he was offered a job in Omaha. He maintained, in short, the Carrier overlooked him in the crunch and the pressures of the reorganization.

The Claimant testified that the only UP job in Omaha somewhat comparable to his, was held by John Lenahan and it paid several thousand dollars less than his MOP job.

The Claimant maintains that because he could not get a satisfactory explanation as to what kind of job to which he might be transferred, he had no recourse but to sign the separation allowance agreement, for otherwise he might be left without either a job or the separation allowance. He had no choice but to protect himself because he was a dismissed

The Claimant asserts his MOP job was that of a head clerk in the Mail Room with no duties of an official of the Carrier. He had no policy making functions and could not hire or fire anyone. He was an employee and a dismissed employee under New York Dock.

The Claimant also advances the same Article IV arguments set forth herein by the other Claimants.

Carrier's Position

With respect to issues of whether the Claimants were employees under the New York Dock Conditions and to the ancillary issue as to whether they were displaced or dismissed employees thereunder, the Carrier states both issues must be answered in the negative.

The Carrier states that the Claimants both by virtue of their rank in the Company and because of their status of non union employees, they were officials rather than employees of the Carrier. The Carrier stresses the Claimants occupied positions of such rank and responsibility that they must be considered as having held official positions, and therefore they were not employees within the meaning of New York Dock Conditions, and consequently not entitled to the benefits of New York Dock.

The Carrier notes that Claimant Maeser was the General Manager for Marketing Commodities charged with the responsibility of maximizing MOP revenues through effective marketing and pricing procedures. He received a salary of $75,000 annually plus large bonsues. He reported to the Assistant Vice President of Marketing, and in turn directly supervised f[illegible]ing Directors, an Administrative Assistant [illegible] reporting

to him 41 non-union and 24 union employees. The Carrier states Claimant Maeser supervised an annual payroll of $2,400,00 and the 1981 gross revenues of his Department were $1.7 billion.

The Carrier asserts it is clear that Claimant Maeser was a high ranking official and not an employee who was subject to unionization, and therefore outside the scope of New York Dock Conditions.

With respect to Claimant Sengheiser, he was a Director of Marketing-Chemicals and Petroleum Products, charged with developing marketing and pricing strategems for maximizing revenues for his assigned commodities. He directly supervised four Marketing Managers and indirectly supervised six non-union and 8 union employees. He supervised an annual payroll of $556,600 and the value of the 1980 gross revenues of the commodities he handled was $377,000,000.

The Carrier states Claimant Sengheiser received an annual salary of $61,000. He held an important high ranking official position and was not subject to unionization and therefore he could not be considered an employee entitled to New York Dock benefits.

With respect to Claimant Murphy, the Carrier asserts that his job as Administrative Assistant to the General Manager-Marketing Commodities, required him to maintain the efficient operations of the Marketing Department by coordinating the administrative activities of the subsections of the Department, and to give assistance to both Assistant Vice President and General Manager in preparation of calls to major shippers, and [illegible]h background information

on rate proposals and pending legislation.

Claimant Murphy was paid $39,720 annually. The Carrier asserts that, while Claimant attempted at the arbitration hearing to downgrade the importance of his position and convey there was little to his job other than personal service duties for various officials, the Carrier stated this testimony should be disregarded and credence be given to Vice President Colvin's testimony that Claimant Murphy performed somewhat limited external duties for Carrier officials when their official duties required them to be at least 50% of their time away from their offices.

Mr. Colvin testified that Claimant Murphy performed the duties described in his official Job Description and these duties were components of an important job. The Carrier stated that the Administrative Assistant position qualifications required years of training on clerical and supervisory assignments to gain the experience to execute the duties of the job effectively. The Carrier states the Claimant was an official and not an employee of the Carrier.

With respect to Claimant Shupp, the Carrier states that his position of Supervisor of Files, Mail and Supplies of the traffic Department required him to provide administrative support for this Department, by maintaining adequate clerical staff and services by maintaining current freight tariff files, furnishing and distribution mail between the Department, the general offices, shippers and government agencies. He had to maintain services and information to MP personnel. The Carri[illegible]. Shupp supervised 13

persons with an annual payroll of $287,000. His annual salary at the time of his resignation was $38,760.

The Carrier states that Claimant had an important official position which was outside the scope of unionization. Carrier officers such as Vice President Colvin and Assistant Director of Labor Relations Naro regarded the job as an important official post and part of management.

The Carrier states that all four Claimants held official positions and were not employees as the term was used in New York Dock. It further states that the Claimants do not meet the requirements of Article IV since they were not employees of the Carrier not represented by a labor organization. Since they were not employees, they derived no rights under Article IV of the New York Dock. This Article asserts that non agreement "employees" who are dismissed or displaced will receive substantially the same dismissal, displacement, and separation allowances to which agreement employees are entitled. Article IV makes it clear that its provisions apply only to non agreement "employees." Since the Claimants are not employees they derive no rights from Article IV.

The Carrier further contends, arguendo, that even if any of the Claimants were "employees" under New York Dock, they still would not be entitled to any of the benefits thereunder, because none of them was either a dismissed or displaced employee.

The Carrier stresses that each Claimant was not dismissed or displaced because they were offered a position in Omaha in the consolidated Marketing Department [illegible] reduction in salary or

other basic compensation. It adds that if the Claimants had accepted these offered positions, they could not claim to be dismissed or displaced employees. The Carrier states that the Claimants suggest that by rejecting the Carrier's job offers, they became dismissed or displaced employees.

The Carrier adds that a review of the testimony of each Claimant reveals that they were not dismissed or displaced employees.

The Carrier notes that Claimant Maeser turned down the job because of its alleged lowered responsibilities which he regarded as an indignity to him. It adds that Claimant Maeser spurned the offered job despite he would suffer no reduction in salary, only because he did not like the job. The Carrier maintains that under New York Dock he cannot be a dismissed or displaced employee because he resigned his employment due to his personal feelings about the proffered job. He was not adversely affected when he suffered no financial loss. He was upset because he was not made one of the nine Group Managers in the consolidated Department.

With respect to Claimant Sengheiser, he admitted that Vice President Colvin offered him a position as a Group Market Manager at the same salary, but he rejected the offer because the Carrier would not acceed to the several conditions he attached to his conditional acceptance, the primary one being a six month trial period and the option of receiving severance pay at the end of this period, and then a two year contract at the end of the trial period to maintain his present job an The Carrier asserts

that the Claimant made it clear in writing that if the Carrier did not accept all his conditions, it could then treat his letter of conditions as a notification of his election to resign and accept severance pay. The Carrier states it refused to agree to the conditions laid down by the Claimant in order for him to transfer to Omaha, thereupon, the Claimant resigned and took his severance pay. This act did not make him a dismissed or displaced employee within the meaning of New York Dock.

The Carrier asserts that it offered Claimant Murphy two rather than one job. It notes Claimant Murphy admitted he received Vice President Craig's January 1983 letter offering him a comparable job in Omaha at his present salary, albeit the job was unspecified. The Carrier adds that although it met its obligation to Claimant Murphy by its Omaha job offer, it went further and offered him a job in St Louis but Mr. Murphy rejected this job offer unless the Carrier would guarantee him employment until he was 55 years old, four years away, or allow him the $35,000 severance pay if this St. Louis job ceased. The Carrier stated that its coordinating official, Mr. Barger wrote Claimant Murphy stating that he would be allowed severance pay if his St. Louis job was terminated and no comparable jobs were offered him. However, Mr. Murphy did not regard Mr. Barger's letter as giving the kind of assurance he needed, despite the fact that a copy of Mr. Barger's letter was sent to two ranking Carrier officers, Vice President Ostrow and Mr. Colvin. After receiving Mr. Barger's offer Claimant Murphy then modified his demand, [illegible]ould take the St. Louis

job if the Carrier would guarantee that it would last until February 1984, when the Claimant would be eligible for an early retirement. The Carrier asserted that when it rejected this last condition, Claimant Murphy resigned and took his severance pay.

The Carrier maintains that Claimant Murphy could not be considered a dismissed or displaced employee after having rejected two job offers of a salary equal to his then present job.

The Carrier concludes by contending Claimant Shupp was also offered a job at his present salary in Omaha. The Carrier admits the Claimant was not offered a specific job in Omaha, but was told by Marketing Vice President Ostrow that it would be in the Mail Room and similar to his St. Louis job. In his letter of resignation, Mr. Shupp admitted he had been offered a job in Omaha, but he had exercised his option to retire early and collect his severance pay.

The Carrier notes that at the Arbitration Hearing Claimant Shupp testified his wife was employed in St. Louis and would not have relocated to Omaha. The Carrier adds since Mr. Shupp was eligible for early retirement, he refused to transfer to Omaha, and took his severance pay and early retirement. After Mrs. Shupp was eligible to retire from her job, both Mr. & Mrs. Shupp retired to Oklahoma. These facts show that Claimant Shupp refused the Omaha job for personal reasons, and therefore could not be considered as a New York Dock displaced or dismissed employee.

Vacation Pay Claims

In addition to claims filed [illegible] our Claimants for dis-

placed or dismissed employee allowances, as well as additional severance allowances pursuant to the provisions of New York Dock, the Claimants maintained that the Carrier erred in computing their vacation allowances under the Union Pacific rather than the Missouri Pacific formula. The dispute devolved on how the 1984 aspect of the vacation pay should have been calculated.

There are five documents in the record bearing directly on this question.

Claimant's Exhibit #1 was a Question and Answer Sheet prepared on January 26, 1983, covering subject matters raised at a January 24, 1983 employee meeting pertaining to the Omaha move. The question raised was whether vacation rights on the Missouri Pacific would be "grandfathered?" The answer given was that a MP employee who had an accrued vacation greater than that provided by the UP vacation plan, would have his or her vacation frozen until he had sufficient service to qualify for more vacation under the UP plan. This Q&A memorandum was signed by Mr. Barger who was the Carrier coordinator of the move of MP employees from St. Louis to Omaha.

In a letter dated January 28, 1983 (Claimants' Ex. #2) from Chairman Kenefick of the MP Board, it stated, inter alia that MP employees would not receive less vacation than they were entitled to receive under the MP plan. In Claimants' Exhibit #3, MP Vice President Angst, wrote MP employees on February 9, 1983, that under the UP vacation plan, they would not provide less vacation than that provided for by the MP

In February 1983 the UP distributed a booklet to UP and MP employees explaining the UP Benefit Program (Claimants' Ex. #4). This booklet stated in part at page 0-3:

> "Vacation Rights at Termination
>
> If you are terminated for any reason, you will receive full pay for vacation time not taken in current year plus vested vacation accumulated for the following year. Vacation accrual is based on complete months of service."

On April 28, 1983, UP Vice President Jordan, Personnel, wrote to ranking officials of both Carriers that the following was the UP vacation policy for current MP employees (Claimants' Ex. #5).

> "Vacation time will be determined by years of continuous service as outlined in the Union Pacific Railroad Benefit Handbook. In no event, however, will current transferred Missouri Pacific ... employees receive less vacation than they were entitled to under their respective vacation schedules as of December 31, 1982."

Claimants' Position

The Claimants contend the Carrier erred when it paid them their accrued vacation in June and July 1983 under the UP formula. They received less vacation pay than they would have received under the MP formula.

The Claimants stress ranking officials stated in writing that MP employees would not receive less vacation than they were entitled to under the MP Plan. The January 26, 1983 Q&A Sheet stated that vacation rights under the MP were "grandfathered." Both Chairman of the Board Kenefick and VP Agnst asserted MP employees would enjoy a vacation that would not be less than they enjoyed under the MP plan as of December 31, 1982.

The Claimants contend there is no merit to the Carrier's position that the UP Benefit Booklet issued in February 1983 put the MP employees on notice that their vacation benefits were to be computed in accordance with the UP formula. The Claimants further contend that this Booklet cannot be held to have put the MP employees on notice that it constituted a repudiation of the representations made by ranking officials of both the MP and the UP. If any ambiguity exists, it should be construed against the Employer. It cites the Missouri State Court case of Hinkeldey vs Cities Service Oil Co. (1971) in support of this principle.

The Claimants also stress that UP Vice President Jordan's April 28th letter was circulated more than two months after the UP Booklet was issued.

Carrier's Position

The Carrier maintains that it correctly calculated the 1984 vacation pay for the Claimants after they resigned their positions. Of all the exhibits cited only Exhibit #4 (booklet) is relevant. This booklet clearly set forth the UP's completed months of service formula would be used to determine vacation accrual for calculating the amount of vacation pay due an employee at termination.

The Carrier states that since all employees received the booklet upon leaving its employ, its terms are binding on them under Missouri Law. The Carrier states the Claimants are in error in contending they were not properly put on notice that the booklet repudiated Management's p sentations. The Car-

rier states that if Claimants' Exhibits 1, 2, 3, and 5 are considered Management representations, the Claimants have failed to understand these Exhibits, because they did not address the issue in dispute. All that these Exhibits state is that no former MP employee would receive fewer weeks of vacation as a UP employee than he had received from the MP. However these Exhibits do not go to the issue of whether the old MP vacation accrual system or the UP's completed month method should be used to calculate vacation rights at termination of the employee.

The Carrier states all of the cited exhibits pertain to vacation rights that a former MP employee will receive as a UP employee. These exhibits do not address the matter of vacation pay at termination. This issue is addressed only in the Benefits Booklet, and in this Booklet the completed months of service formula is adopted.

The Carrier states the Claiamnts should have expected that the merger would have brought about a change in employee benefits. They should have carefully read the Benefits Booklet. The Carrier states that under Missouri law the Claimants were put on constructive notice of the booklet's contents even if they did not read it.

The Carrier sets forth its reasons why the Hinkeldey case is not in point and lends no support to the Claimants' position.

The Carrier states there is no valid basis to sustain the claims for additional vacation pay and they should be denied.

Interruption of Claimants' MP Business Relationship by UP Claim

Claimants' Position

The Claimants contend that the Up took certain intentional actions prior to the Merger that interrupted the MP employees existing business relations with the MP. The Claimants stated both in depositions by UP and MP officials, and in testimony adduced at the Arbitration proceeding, it showed the UP influence and caused the MP to reorganize and modify its activities so as to more closely reflect UP activities thus to disadvantage the Claimants.

The Claimants contend that the UP specifically compelled the MP to reorganize its Marketing and Sales Department so as to deny them ranking positions in the merged Marketing Department. The Claimants specifically alluded to the UP influence to have the MP adopt the Hay Job Evaluation System which was already in effect in the UP. The Claimants contend that the existence and use of the Hay System permitted the UP personnel to get the better jobs in the merged Department.

The Claimants stated that, although the former MP executives asserted the MP Marketing Department was reorganized and the Hay System was adopted allegedly to permit the MP to function more effectively in a deregulated economy, in effect, it was reorganized basically to reflect the UP organization even though the senior former MP officers stated they were interested in the organization of the Departments of the Southern Pacific and the Sante Fe railroads. The Claimants maintain that the evidence shows it was the UP organization that the MP follow laimants add that as

a result of using the UP format in the MP Marketing Department, several MP ranking jobs were eliminated and MP marketing officers were not able to fit into the UP existing organizational set up.

Claimant Maeser alluded to the deposition of President Kenefick of the Union Pacific admitting he had conversations with Mr. Flannery then President of the Missouri Pacific in November or early December 1982 prior to approval of the Merger.

The Claimants further state the MP adopted certain UP pricing measures such as the Tank Car Allowance, the Manhattan Project which was a sensitive UP internal traffic study. Vice President Angst's analysis of UP's "hot shot" marketing personnel compared them to MP personnel work in the same field. Claimant Maeser testified that joint actions were conducted despite an October 29, 1982 memorandum from MP Vice President-Law-Hermelly who notified all MP Department Heads that until the ICC approved the Merger the MP key employees should treat the MP and UP as independent railroads for business purposes.

Carrier's Position

The Carrier states there is no merit to the Claimants' allegations that the UP interfered with their business relationship with MP and so violated Missouri State tort law. In the first place the Carrier states if there was a state law theory of recovery, it was preempted by federal law such as New York Dock. The Carrier asserts that Section 10 of Article I of New York Dock sets forth a comprehensive uniform scheme of federal law limiting

the pre merger activities of carriers. The Carrier adds to allow state law to regulate this conduct would place a constitutionally impermissible burden on interstate commerce. It adds that the ICC was established to create a body of uniform federal law such as New York Dock in order to prevent differing state law requirements in interstate commerce.

The Carrier stresses that any state law which would work to change what carriers may or may not do prior to a merger must be considered pre-empted by federal law.

The Carrier states that even if the claims under state law were not pre-empted, the claims would have to be denied because the Claimants did not prove that the Carriers had engaged in tortious conduct under Missouri State law. It adds that among the necessary elements necessary to prove that the Carriers committed the tort, it is necessary to prove by substantial evidence, and not by conjecture or speculation, that the UP took measures with the intent to cause the MP to terminate the Claimants' employment. Since each Claimant refused to accept the job offered them in Omaha in the merged railroad, these Claimants cannot state what the UP did that caused them to lose their jobs. The Carrier stresses that the Claimants lost their jobs because they voluntarily terminated their employment with the Carrier.

The Carrier states that factually there was no basis for the state law claims. At the time of the Merger the railroad industry was in a state of change occassioned by deregulation. Vice President Colvin testified that MP d changes in its Marketing Department i tion more profitably

in a competitive market. Mr. Colvin added it was deregulation that brought about the reorganization of the Department and the introduction of the Hay System of Job Evaluation. These moves were not instigated by UP for the purpose of interfering with the Claimants' MP employment. The Carriers state these charges are nothing more than wild speculation and should be dismissed.

Damages

Each Claimant listed the following amount of damages due him. All the Claimants stated by virtue of having to retire from the Carrier prior to their normal retirement age, they were assessed a penalty for early retirement, and another penalty for not being a Carrier employee at the time of their retirement.

Claimant Maeser

$71,250.00 - all the benefits as a displaced employee under New York Dock or, alternatively, under Article IV thereof- additional severance pay

$4,807.75 - additional vacation benefits

$110,592.00 - pension penalty resulting from early retirement

$5,368,716.00 - interference with business relationship

$5,555,360.75

Claimant Sengheiser

$51,445.00 - all benefits due a displaced employee under New York Dock, or alternatively under Article IV additional severance pay

$66,690.05 - pension penalty resulting from early retiremen'

$4,071.30 - additio on benefits

$10,069,2:

$10,191.3€

Claimant Murphy

$21,270.00	- additional severance pay
$ 2,634.15	- additional vacation pay
$34,919.42	- pension penalties - early retirement
$5,600,000.00	- interference with business relationship
$5,658,823.57	

Claimant Shupp

$17,275.00	- all benefits due a dismissed employee under New York Dock, or alternatively under Article IV thereof additional severance pay
$2,732.23	- additional vacation pay
$2,800,000.00	- interference with business relationship
$2,820,007.00	

The individual Claimants request the Arbitrator to award them the above listed items of monetary damage.

The Carrier, on the other hand, requests the Arbitrator to deny each and every claim item because whatever losses the Claimants incurred or suffered was the result of their own mistakes by involuntarily quitting the employ of the Carrier.

Findings:

The core, but not the exclusive, dispute in this case arises out of the differing meanings that the parties ascribe to the word "employee." While the Carrier contends that this term is a work of art in industrial and labor relations and generally refers to rank and file employees susceptable to union organization, the Claimants, on the other hand, assert that term "employee" as used in merger labor protection conditions is not confined to the limited area of union management situations, but must be given a wider scope and meaning when applied to merger situations and, therefore, labor protection conditions embrace all persons employed by the merged carriers, who are adversely affected by the merger, except the very top corporate officers.

We find from our study of the record, and the history of merger protection conditions that there is a definite and close relationship in the railroad industry between union labor relations and the protective conditions prescribed by the Congress and the Interstate Commerce Commission for merger affected personel. A review of the history of labor protection conditions compels us to hold that the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term, as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as being other than admini managerial, profession-

al or supervisory in nature.

We find the Claimants are in error when they contend that the past rulings and activities of the ICC pursuant to the Railway Labor Act and the rulings of the National Mediation Board do not circumscribe the ambit of persons eligible to receive the benefits of labor protection conditions allegedly because these prior rulings were intended basically to determine those employees who were eligible to engage in collective bargaining, and they did not purport to determine who was eligible for, or covered by, the prescribed merger protective labor conditions.

We are unable to accept the Claimants' broad interpretation of "Employee" because we find that it overlooks or ignores the genesis of labor protection conditions in this industry, i.e., how it came about and what it was to cover.

Labor merger protective conditions as we know it stem back to 1936 when the carriers and all the functioning labor unions in the industry negotiated the Washington Job Protection Agreement. This was a product of collective bargaining and intended to cover only the membership of the signatory unions. There is no evidence that the WJPA was ever intended to apply to all railroad personnel. The antecedents of the WJPA resulted from the efforts of the railroad brotherhoods during the depression of the 1930's to get the Congress of the United States to enact a law that would freeze employment of its railroad membership. The Brotherhoods were successful in getting the U.S. Senate to consider the Wheeler-Crozier bill which did provide for a free [illegible] railroad employment. This

bill also provided it would not become operative if labor and management could negotiate an agreement with respect to dismissal compensation. At this juncture, because of the legislative leverage exercised by the railroad unions, the Carriers agreed to the 1936 WJPA which afforded protection to railroad employees affected by coordinations, which meant mergers, pooling or consolidation of railroad facilities. There can be no doubt that the railroad brotherhoods negotiated the WJPA for the benefit of their membership and not railroad personnel generally. The Brotherhoods were concerned that mergers would reduce employment, with the attendant loss of union members, and this was one, but not the only one, of the reasons why the Brotherhoods were the protagonists in all the efforts to secure merger protection for union members from the Congress and from the ICC.

However, even after the 1936 WJPA, the ICC expressed doubts whether it had the authority to impose protective conditions in mergers under its existing legislative charter. This matter was put to rest when the U.S. Supreme Court held in the Lowden Case in 1939 (308 U.S. 225) that the ICC could impose protective conditions in merger consolidations in order to carry out a National policy of railroad consolidations. Nevertheless, the Brotherhoods were not content to rest upon the Lowden decision and they pushed to get legislation to ensure that the ICC had the authority to act in these matters. The Unions' efforts in this matter resulted in Congress enacting the 1940 Transportation Act. This legislation amended the ICC Act in Section 5(2)(f) which provided

for mandatory protection for four years of ICC approved transactions. It must be stressed that it was the railroad brotherhoods who were the proponents for the enactment of Section 5(2)(f) for the benefit of their members.

The ICC moved forward in prescribing protective conditions in other than mergers when it imposed in 1944 labor protection in an abandonment matter (Oklahoma Conditions). Here the ICC departed somewhat from the provisions of the WJPA with respect to giving unions advance notice and the need to negotiate an implementing agreement.

In 1948 the railroad unions took issue with the ICC when the latter issued its New Orleans Conditions, maintaining that the four year period in Section 5(2)(f) was only a minimum and not a maximum period of protection. The U.S. Supreme Court in 339 U.S. 143 (1950) eventually sustained the Union's position. In all the proceedings, either before the ICC or the court, the railroad brotherhoods were the moving parties acting in behalf of their membership rather than for all persons employed in the industry.

It is noteworthy that in the later mergers involving the Burlington Northern and the Penn Central these carriers and the labor organizations representing their work force negotiated labor protection conditions even before the ICC approved the mergers, and the ICC then accepted and imposed these negotiated protective conditions as an integral part of their approval of these mergers. These Carriers negotiated these protective conditions as a quid pro quo for getting the Unions to abstain from objecting or pro-

testing the proposed mergers. These are the reasons why we cannot accept the Claimants' contention that there is no nexus between the collective bargaining relationship in this industry and the imposition of labor protection conditions in the industry. The labor protection conditions were basically brought about by railroad brotherhoods for its members and were not intended to be directed to or established for all personnel employed in the industry who might be adversely affected by the merger. There is no history to show that merger protection conditions prescribed by the ICC have as broad a scope as the Claimants contend, i.e., covered all employees in a generic sense. All the history of this subject militates against the position of the Claimants.

We turn now to the Claimants' reliance on the Congressional definition of "employee" as provided for in 1973 Regional Railroad Reorganization act and the 1979 Milwaukee Railroad Restructuring Act and the 1980 Rock Island Railroad Transition and Employee Assistance Act. The Claimants assert that the definition of "employee" in these Acts reveal a Congressional intent to extend protective benefits to all employees except the few top corporate officers.

We are initially constrained to note that the Congressional action in these three situations does not involve or represent merger situations between viable railroads. It rather represents Congressional action coping with emergencies created by bankruptcies and liquidations of major carriers that could wreck havoc on the affected georgraphical areas. Congress felt compelled to pass the

3RR Act to ensure railroad service would continue after the bankruptcy of the Penn Central and the six other northeast carriers. The creation of the Conrail System was an unprecedented act for the federal government to take and the Congress wanted to ensure that all persons employed by all these carriers that constituted Conrail would be treated equally with the federal funds involved. It must be noted that the employee protection benefits granted by the Regional Railroad Reorganization Act came form the treasury of the federal government as a part of a $2.5 billion grant and not from any carrier.

The Milwaukee Reorganization Act and the Rock Island Employee Assistance Act also represented extraordinary measures by the federal government to ensure that the citizens of that part of the country were not left without rail service and that the employees of those carriers received various forms of assistance in making an adjustment when these two carriers stopped operations, such as supplementary unemployment insurance, priority in railroad placement, etc. The Rock Island was actually in the process of being liquidated when Congress enacted these emergency measures. However, none of these situations represent the normal circumstances under which the ICC imposes labor protection conditions in the usual merger situation.

However, it is noteworthy that in the legislation for both these carriers, i.e., Rock Island and Milwaukee, when it came to providing specific employee protection provisions the legislation emphasized the role of employees represented by labor unions. For

example, the Milwaukee Act stated:

"Section 9(a):

> The Milwaukee Railroad and labor unions representing employees of such railroad may, not later than 20 days, enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad."

The Rock Island Act states:

"Section 106(a):

> No later than 5 days after the enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island RR and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board may enter into an agreement providing protection for employees of such railroad who may be adversely affected as a result of a reduction in service by such railroad."

We stress that these three cited situations do not represent the usual and normal merger occurrences and it is also noteworthy that Congress wanted the labor protection conditions negotiated by the cognizant labor unions on those properties representing their membership. The aforesaid legislation shows that employee protection even in non merger situations is an integral part of the collective bargaining process of railroad labor relations, and therefore the ICC definitions of employees and subordinate officials must be given great weight in merger protection matters, just as it is in determining what group of employees may engage in collective bargaining in railroads. "Employees" in labor protection condition is a word of art and is not intended to be given a general and all encompassing meaning as the Claimants contend.

We find, in the instant case, that the term "employees" as used in New York Dock excludes the Claimants from coverage because a review of their duties and responsibilities reveals that they occupied or held positions that are properly categorized as Managerial, Administrative or Supervisory personnel rather than rank and file employees who could properly be represented by a labor union.

We find that Claimant Maeser, who as the General Manager-Marketing-Commodities, with the responsibility of supervising the work of six Managers of several Commodity groups as well as supervising 65 rank and file employees, union and non union, and earning $75,000 annually plus substantial bonuses, is not and was not an "employee" as this term is applied either in general parlance of labor relations or labor protection conditions.

We will subsequently set forth why Mr. Maeser also is not an Article IV "non-agreement" employee.

In the same vein, we also find Claimant Sengheiser, a Marketing Director of Chemical and Petroleum Products, one of the several commodity groups in Marketing Division under General Manager Maeser, supervising 18 employees, directly and indirectly, and earning $61,000 annually, had duties and responsibilities that transcended those of an "employee" and thus was outside the purview of Article I of New York Dock. He was a Manager even though he did not have the direct authority to hire or discharge a member of his group. He could make recommendations in this area and his recommendations were persuasive.

We find that Claimant Murphy was assigned administrative duties which he filled in varying degrees. We are not at liberty to overlook the fact that if Mr. Murphy was only performing menial and messenger duties, he was not paid the salary of a menial or a messenger when he received $39,720. This is not the salary paid a menial or a messenger. His annual salary is consonant with the duties set forth in his Job Description. There is also testimony in the record to indicate that he performed duties for the Marketing Vice President and the Assistant Vice President that were not of a menial nature and were in keeping with an Administrative Assistant to a ranking executive. Our overall view of Claimant Murphy's job duties lead us to conclude that he was an administrative, and not a rank and file, employee and therefore not entitled to New York Dock protection.

We likewise find Claimant Shupp a supervisory employee and beyond the scope of New York Dock protection. He was the supervisor in overall charge of the Files, the Mail Room and Supplies, supervising approximately 14 employees. He received an annual salary of $38,760 and was entrusted with the duties of ensuring that the files were intact and the Mail Room operated efficiently under his supervision and adequate supplies were maintained. There can be no doubt that he was a bona fide supervisory employee not within the scope of Articles I and IV of New York Dock. As a supervisor, he was not a rank and file employee as that term was intended to apply to those individuals entitled to merger protection.

We have no doubt that there were individuals employed by the

MP who were disadvantaged or whose economic well being adversely affected by the merger of these two Carriers. However, that is not the criterion for labor protection. The rationale and history of these benefits are that they were to be extended only to rank and file employees because it was believed that railroad work was so specialized and limited that these employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. It was also believed that ranking personnel could more effectively cope with the rigors resulting from the consolidation of railroad facilities.

In the past 50 years history of the adjudication of labor protection disputes, there has been no court decision or arbitration award, with the exception of the Curley Award, that has held that an individual employed by a railroad, regardless of position, was entitled to labor protection because his job tenure or job status was disrupted or adversely affected by a merger. Protection has only been accorded to rank and file employees and not to those individuals holding positions which could be denominated as executive, professional, administrative or supervisory.

It is not unknown in our system of labor law to exclude certain working personnel from existing statutory benefits of a given law. Under the Fair Labor Standards Act, administrative, professional and supervisory personnel are excluded from the overtime provisions. The National Labor Relations act excludes supervisors from its coverage. Many Court cases have held that an employee who works without supervision or control of an employer, is an independent

contractor and not an employee. Our present day labor relations law recognizes that there are many persons working for a Company who are not "employees" of that Company for the purposes of receiving the benefits that a given law may bestow or grant "employees" of said Company. We repeat that the word or term "employee" is a word of art and is not used in its generic sense, in application of New York Dock Conditions.

In short we find that it was the Claimants' job duties and responsibilities that removed them from that class of persons who were entitled to receive the protection of New York Dock.

We now turn to the Claimants' reliance on Article IV of New York Dock to support their claims. We find the operative word in this Article is "employee." We find that this Article covers the situations of individuals who are engaged in tasks or jobs which are within the scope of a labor organization, but because of extrinsic factors, or the nature of their job make it inappropriate for the individual to be a member of a labor union, i.e., the secretary to the President of the Company, or employee in the industrial relations department. It is not the work per se that makes the individual a non agreement employee but rather the confidential or private nature of the job that makes it compromising for them to be individuals in good standing in the Union.

Another example of such a non agreement employee would be, on certain properties, a yardmaster or a supervisor in the mechanical shops. In cases where, on some part of the Carrier property these crafts or classes of employees are unionized, and on other

parts of the property they are not. Even where such employees are not in a union, they would be considered non agreement employees within Article IV who are entitled to, or eligible for, coverage by Article IV. It is recognized that the Yardmaster or Shop Supervisor performs work that is or could be within the scope of a union contract even though these individuals are not represented by a labor union, and so they are entitled to receive substantially the same benefits and level of protection accorded to members of labor organizations.

We do not find the Claimants in this case to be the non agreement type of employees mentioned in Article IV. The Claimants are not employees because the basic nature of their duties are either managerial, administrative or supervisory and they did not perform work which was susceptable to union organization or union coverage.

We find the weight of court and arbitral authority has held, with the exception of the Curley Award on this property, that individuals holding jobs of the nature and character as the Claimants, are not employees within the purport and meaning of both Article I and Article IV of New York Dock.

Arguendo, and most importantly, even if it could be contended that the Claimants were protected employees within the purview of New York Dock, the facts of record disclose that they were neither "dismissed" nor "displaced" employees. It is a distortion of the concept of an employee disadvantaged by a merger, to hold that when such an employee has been offered a relatively comparable job at the same salary in the merged company that this employee is a dis-

missed or displaced employee and thus adversely affected.

We find that when a legal merger has occurred, it is to be expected that there will be disruptions in the organizational life of the affected personnel. It is not possible "to make an omelet without breaking the eggs." It is unrealistic to expect two major carriers could be integrated and each employee would have the same position he or she formerly held in the old company.

For example, Claimant Maeser cannot properly contend he was a displaced employee when the Carrier offered him a job at his MP salary but with somewhat different responsibilities. To be "adversely affected" under New York Dock, the criterion is financial and not emotional loss. Even if Mr. Maeser's feelings and pride were hurt by the new job, these personal feelings do not transmute him into a displaced person within the meaning of New York Dock.

We find that Claimant Sengheiser could not properly attach conditions to the Carrier's job offer at his same salary, and then maintain he did not receive a job offer in the merged Carrier because the Carrier would not acceed to his conditions, and such a failure resulted in his becoming a displaced or dismissed employee. While Claimant might have been apprehensive about accepting the Omaha job offer, he cannot maintain that he did not receive a job offer that paid him his former salary with substantially the same job responsibilities. Under New York Dock, even if he had been dismissed after transferring to Omaha, he would still have been protected if he could prove a causal nexus between his later dismissal and the merger. However, he was not at liberty to reject

a comparable job offer on the potential basis that he might be subsequently terminated after he had effected a transfer to Omaha. These apprehensions, real or illusory, did not make Claimant Sengheiser a dismissed or displaced employee under New York Dock.

We find with respect to Claimant Murphy that the Carrier made him a bona fide offer in an effort to accommodate him in light of his compelling and poignant personal situation, but he refused to accept the Carrier's offer for a st. Louis job and kept pressing the Carrier for additional concessions to the point where the Carrier refused to concede. We find the Carrier made a bona fide offer to let the Claimant remain in St. Louis in a temporary position and still preserve his right to a severance allowance when this temporary job ceased. The Claimant rejected this offer, and thus he cannot contend with merit that he was dismissed or displaced because he doubted the alleged authority of the Carrier official who made him the offer, especially since that Carrier official was the official charged with coordinating all the transfers from St. Louis to Omaha. The Claimant was not entitled to demand the Carrier guarantee him a St. Louis job until he was eligible for an early retirement, and still insist the Carrier did not offer him a job and so converted him into a dismissed or displaced employee.

We find the record does not support Claimant Shupp's contentions, i.e., he was not offered a job in Omaha. While the Carrier admits it did not designate a specific job for Mr. Shupp, it told him that he would receive his regular salary and have a job in his area of competence, namely a job in the File and Mail room. The

fact that he was not offered a specific job, but given assurance of economic security, did not make Supervisor Shupp a dismissed or displaced employee within New York Dock. It could be expected in a massive transfer of this nature that the Carrier will not be able to delineate every specific job to which an employee would be transferred.

In short, we find the Carrier made bona fide job offers to the four Claiamnts which they rejected for various reasons. We find this was not permissable and their actions did not convert their status into that of dismissed or displaced employees. On the record before us, we have no recourse but to find that the Claimants rejected the Carrier's job offers and instead elected to resign their positions and take the proffered severance allowances. Such a course of action removed them from New York Dock.

Interruption of Claimants' Business Relationship

We find no credible evidence to support the Claimants' charges that the Union Pacific engaged in a deliberate course of conduct to have the Missouri Pacific interfer with or terminate their employment.

We find that MP engaged in certain acts in order to be able to cope with the conditions in the industry brought about by deregulation. We find that MP's reorganization of its Marketing Department and instituting a Job Evanulation System as the Hay System, was not a wilful plot contrived to hurt or disadvantage the Claimants. The actions of the MP to reorganize its Marketing department in order to cope with the ces of deregulation and

the discussions conducted with the UP to prepare for the merger, were actions that were carried on under a color of right permitted by the Interstate Commerce Commission. We find no probative evidence to show that the actions complained of by the Claimants were the result of a UP conspiracy to interrupt their employment relationship with the MP. There is no evidence that the UP actions were even conducted with an awareness of the Claimants, or with any design to harm them. The fact that the UP offered all four Claimants jobs at their former salaries is proof that the UP did not seek or attempt to interrupt the Claimants' business relationship with the MP.

Vacations

We find the Claimants' position with respect to the contested vacation allowances more persuasive than the position advanced by the Carriers.

We find the evidence introduced by the Claimants with regard to the memoranda and notices issued by MP and UP officials clearly conveyed to the Claimants and other MP personnel that their MP vested vacation rights would be "grandfathered" and they would not lose any of their vacation rights which they had earned while they were in the employ of MP.

We find that the UP Booklet on Benefits (Claimant Ex. #4) did not put the Claimants on actual notice that the other material issued by UP and MP officials were modified by this Booklet. We find that the four line reference to termination of employment affecting vacations in a 73 page bo circulation and distri-

bution of which was questioned by some of the Claimants, was not such a notice that could overcome the broad and comprehensive memoranda and letters that in fact were given the Claimants by responsible Carrier officials.

We find that the Claimants could properly rely upon the specific notices addressed to them about the MP vested vacation rights they would possess as a result of the merger, rather than an obscure paragraph in a detailed booklet. The overt evidence of record could easily lead the Claimants to conclude that they would not be deprived of their MP vacation rights as a result of the merger.

In summary with respect to the several claims filed by the Claimants, we find the following:

(1) Because of the managerial, administrative and supervisory responsibilities exercised by the Claimants in their respective positions, we find that the Claimants were not "employees" within the meaning and intent of Article I and Article IV of the New York Dock Conditions;

(2) Because the Claimants were offered substantially comparable positions of responsibility at their MP salaries, which offers they rejected for questionable reasons, and instead elected to resign their MP employment and collect their severance allowances, we find that the Claimants were not dismissed or displaced employees within the meaning and intent of

Article I of the New York Dock Conditions;

(3) We find no merit to, and hereby deny, the claims that the Union Pacific tortiously interrupted with the Claimants' business relationship with the Missouri Pacific;

(4) We find that the Carriers erred in computing the Claimants' accrued 1984 MP vacation allowances, and they are hereby directed to compute these allowances pursuant to the MP vacation formula.

Award: Claims disposed of in accordance with the aforesaid Findings.

Jacob Seidenberg

(Jacob Seidenberg, Arbitrator

December 17, 1987