

**IN THE MATTER OF THE ARBITRATION BETWEEN**

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**James V. Nekich**

**EMPLOYEE**

**and**

**Burlington Northern Santa Fe Railroad**

**EMPLOYER**

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**ARBITRATOR: Christine D. Ver Ploeg**

**DATE AND PLACE OF HEARING: September 12, 1996**  
**Offices of Leonard, Street and Deinard**  
**St. Paul, Minnesota**

**DATE OF CLOSE OF RECORD: November 5, 1996**

**DATE OF AWARD: December 6, 1996**

**ADVOCATES**

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**James V. Nekich, Grievant**

**ISSUE:**

**Is James Nekich covered by the terms of the New York Dock conditions?**

**DEC 09 1996**

## BACKGROUND

This case has been brought by James Nekich, who is employed by the Burlington Northern Santa Fe Railroad (hereinafter "Carrier"). The dispute which gives rise to this Arbitration stems from the Carrier's refusal to grant Mr. Nekich benefits provided pursuant to the New York Dock conditions. Mr. Nekich submits that this refusal violates the terms of those conditions; the Carrier submits that it does not.

The parties agree on most of the background facts pertinent to this arbitration. It is undisputed that in 1989 the Carrier hired Mr. Nekich as a Dispatcher, which was a unionized position. In 1991 he was promoted to the position of Assistant Chief Dispatcher, which was a supervisory but still unionized position. At approximately this same time Mr. Nekich applied for, and was approved for, consideration for participation in the "This Way Up" program.

In May of 1994 the Carrier promoted Mr. Nekich to a new created position, Quality Coordinator, in the newly created Quality Department. This moved Mr. Nekich from a union to a non-union position, and in January of 1995 he was advanced an additional pay grade due to his "superior" performance.

Meanwhile, in mid-1994 senior management of the then separate Burlington Northern and Santa Fe Pacific railroads decided to merge. Both railroads filed their application for this merger with the ICC in October of 1994, which the ICC approved in August of 1995. In its August 1995 decision the ICC conditioned approval of the merger on the Carrier's compliance with "the labor protective conditions set out in New York Dock Ry.--Control--Brooklyn Eastern Dist. 360 I.C.C. 60, 84-90 (1979), generally known as the New York Dock Conditions.

Article IV of the New York Dock Conditions reads:

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.

The apparent intent of the New York Dock Conditions, as determined in subsequent decisions interpreting its terms, has been to cushion the harsh impact of railroad mergers by providing special benefits to railroad employees who are, for some unique reason, not represented by a union. The apparent purpose of the protections has been to at least partially protect employees whose skills are narrowly specialized within the railroad industry. This rationale has been expressed as follows:

The rationale and history of the 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 those employees could not easily obtain work in outside industry if they lost their jobs as a result of the merger. In the Matter of Arbitration Between B. J. Macser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

Despite the literal language of the New York Dock Conditions--which could be read to mean that *all* railroad road employees not in a union are eligible for the same benefits as the unionized employees--subsequent decisions have established that:

...the term "employee" was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather...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 administrative, managerial, professional or supervisory in nature. In the Matter of Arbitration Between B. J. Macser et. al. and Union Pacific RR Co. et. al. (Seidenberg, 1987).

It is against this backdrop that in November of 1995 the Carrier wrote to Mr. Nekich advising him that it had eliminated the entire Quality Department, including his position of Quality Coordinator. In response, Mr. Nekich exercised his seniority to return to the position of Dispatcher, a union position. That did result in Mr. Nekich being required to re-locate to Texas, after living his entire life in Minnesota.

The issue currently in dispute is whether Mr. Nekich fell within the terms of the New York Dock Conditions, so that the Carrier was obliged to grant him the associated benefits under those Conditions. The Carrier submits that Mr. Nekich does not meet the New York Dock tests; Mr. Nekich submits that he does.

The parties were unable to resolve their differences concerning this matter in earlier discussions, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and the arbitrator met for a hearing on this matter on September 12, 1996. The parties submitted post-hearing briefs as well as additional submissions, the last of which the Arbitrator received on November 6, 1996.

#### RELEVANT CONTRACT LANGUAGE

Article IV of the New York Dock Conditions reads:

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.

## DISCUSSION AND DECISION

It is undisputed that the ICC's approval of the Carrier's merger in the fall of 1995 was subject to its complying with the New York Dock Conditions. It is also undisputed that the New York Dock Conditions provide certain benefits and guarantees to non-union employees who are affected by merger-related transactions in the railroad industry. The question this case raises is whether Mr. Nekich, an employee affected by the Carrier's merger, falls within the coverage of New York Dock so that he is entitled to its benefits. To answer this question it has been necessary to address the following underlying questions.

### 1. Who is covered by the New York Dock Conditions?

Although New York Dock could be read literally to extend benefits to *all* non-union employees, the reasoning and holdings of subsequent decisions interpreting its terms persuasively demonstrate that its coverage is not so unlimited. Rather, the key distinction appears to be whether an unrepresented railroad employee has occupied a "labor" or a "management" position. The former would qualify under the New York Dock Conditions while the latter would not.

Although the distinction between "labor" and "management" is self evident with respect to many positions, that is not always true. In such cases, such as this, "It has left to arbitration the exact line to be drawn between these categories." In the Matter of the Arbitration Between Gerald I. Huggins et al v Norfolk & Western Ry. Co. (1985, Harris).

Thus, this case requires determining whether Mr. Nekich's now eliminated position of Quality Coordinator was more clearly a labor or more clearly a management position. That finding will, in turn, determine his eligibility for coverage under New York Dock.

In determining whether the Quality Coordinator position was a labor or a management position, I have weighed most heavily the evidence concerning "the level of responsibility that is inherent in the position..." *Id.* This weighing process has included consideration of "the level and the amount of supervisory authority" held by Mr. Nekich, as well as his policy making responsibility. See In the Matter of the Arbitration Between James Benham v. Delaware and Hudson Ry. Co. (1986, O'Brien).

**2. Did Mr. Nekich's job responsibilities as Quality Coordinator constitute management responsibilities?**

In determining that Mr. Nekich's job responsibilities as Quality Coordinator were more clearly labor than management responsibilities, I have been most persuaded by the following evidence.

First, it is undisputed, and highly relevant, that Mr. Nekich had no authority to supervise, evaluate, hire or fire any other employees. Rather, he appears to have worked largely under the direction of a higher level manager, serving as a liaison between the scheduled and the management employees to identify and facilitate ways in which to improve the Carrier's overall levels of performance. Simply serving as a liaison to management, and to the Carrier's shippers, did not make Mr. Nekich a manager.

Second, not only did Mr. Nekich have no supervisory authority over other employees, he had no authority to order changes in policy to implement the methods he identified for improving quality. He was not even invited nor did he attend Division meetings.

All of this evidence suggests that Mr. Nekich's job responsibilities as a Quality Coordinator did not rise to the level of a management position.

**3. Does other evidence concerning Mr. Nekich's job responsibilities as a Quality Coordinator overcome or bolster the above finding?**

In reaching the above finding, I have not been persuaded by the following evidence:

a. *Mr. Nekich remained a dues paying member of the Union.* The evidence is undisputed that Mr. Nekich voluntarily remained a dues paying Union member, apparently in order to preserve his seniority status within the Union. However, the Carrier did not require Union membership as a condition of his employment as Quality Coordinator.

b. *A union organizer suggested organizing the Quality Coordinators.* This fact alone is not proof that the Quality Coordinator position was, in fact, a union-type position.

c. *Mr. Nekich wore jeans to work.* The evidence is undisputed that some management personnel also wore jeans to work.

d. *The Carrier did not pay for Mr. Nekich's closing costs upon his move to Texas.* The evidence establishes that closing costs were not part of the relocation package given to management personnel.

*e. Mr. Nekich claims that the Carrier's failure to inform him of or to pay him certain benefits has been retaliatory. There is no evidence to support this claim.*

#### AWARD

For the above reasons I find that Mr. Nekich's position as a Quality Coordinator was more clearly a labor than a management position. Thus, he fell within the coverage of the New York Dock Conditions and should be given the appropriate benefits under its terms. I will retain jurisdiction of this matter in the event that the parties cannot agree concerning the implementation of this award.

December 6, 1996

  
Christine D. Ver Ploeg