**SPECIAL BOARD OF ARBITRATION**

**PURSUANT TO ARTICLE I, SECTION 11
OF NEW YORK DOCK CONDITIONS
IMPOSED BY THE SURFACE TRANSPORTATION BOARD (STB) IN
FINANCE DOCKET No. 32760**

**IN THE MATTER OF ARBITRATION BETWEEN**

**PARTIES TO DISPUTE** Ross F. Povirk and the Transportation and Communications International Union - ASD

and

Union Pacific Railroad Company
Southern Pacific Railroad Company

**STATEMENT OF CLAIM:**

The Organization submitted that this Arbitration Board, constituted pursuant to Article I, Section 11 of the New York Dock Conditions is asked to resolve the following issues:

1. Did Mr. Ross Povirk lose his non-agreement position of Regional Account Manager because of a merger-related transaction?

2. If the answer to Question (1) is in the affirmative, then is Mr. Povirk an employee as defined by the New York Dock Conditions?

3. If yes, to what level of benefits is he entitled to under the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Povirk's case and in regard to procedure:

1. Was R.F. Povirk, at the time of the discontinuation of his management position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

The Carrier submits the following statement of issue with respect to Mr. Povirk's case and in regard to the merits:

1. If any of the Claimants were employees under the New York Dock Conditions, was the elimination of their jobs due to a transaction subject to the New York Dock benefits?

2. Does R.F. Povirk's failure to bump onto a clerical position with his clerical seniority, entitle Mr. Povirk to New York Dock protection benefits?

**BACKGROUND:** This dispute concerns the Grievant, Mr. Ross R. Povirk's separation from his employment with the Carrier effective November 30, 1996. Mr. Povirk worked as a Regional Account Manager in Belle Vernon, Pennsylvania, at the time of his termination and was a non-agreement employee. Mr. Povirk held a clerk seniority roster date of December 12, 1983. Mr. Povirk's initial hire date was September 16, 1969; however, he was furloughed from July 16, 1982 until December 12, 1883 and his service date was therefore changed to December 12, 1983.

On August 6, 1996 the Surface Transportation Board through Finance Docket No. 32760, Decision No. 44, approved with certain conditions the merger and common control of the rail carriers controlled by the Union Pacific Railroad (Union Pacific Railroad and the Missouri Pacific Railroad) and the Southern Pacific Rail

Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation and the Denver and Rio Grande Railroad Company). As a condition of approval, the Surface Transportation Board imposed the New York Dock Conditions on the merger which are protective conditions to benefit employees as defined by the agreement. (TCU Exhibit No. A).

Subsequent to this merger, on November 1, 1996, Mr. Povirk was verbally notified that he was not selected for a position in the recently merged UP/SP Rail systems. Shortly thereafter, Mr. Povirk received a severance packet and letter dated November 8, 1996. The Organization notes that the November 8, 1996, severance letter makes specific reference to the "Union Pacific/Southern Pacific Severance Program Marketing and Sales", and that the letter expressly stated:

> As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of the Southern Pacific Railroad Company and the Union Pacific Railroad. I understand that you have been advised that your employment will terminate as part of the reduction in force. The effective date of your termination will be November 30, 1996. I'm writing to discuss the financial arrangements related to your separation from employment.

On December 18, 1996, the Parties reached agreement on certain benefits negotiated for agreement-covered employees known as the Implementing Agreement No. NYD-217. Subsequent to this agreement, the Union Pacific Railway abolished twenty-one (21) Marketing and Sales Agreement positions. According to the Organization, this

transaction was connected to the above-referenced transaction wherein non-agreement positions such as the one held by Mr. Povirk were abolished in the Marketing and Sales Department, including Mr. Povirk's position.

Following the termination of Mr. Povirk's non-agreement position effective November 30, 1996, the Organization informed the Carrier, specifically Mr. Bruce Feld, Senior Manager for Labor Relations, in a letter dated January 7, 1997, that the Organization considered Mr. Povirk to be in a "dismissed status" under the terms of the New York Dock Conditions. (TCU Exhibit No. E). The Organization asserts that in its January 7, 1997, letter it also informed the Carrier that Mr. Povirk held seniority as a Union member but did not possess enough seniority to displace the remaining agreement-covered employees on the roster. In addition, the Organization's January 7, 1997, letter identified additional agreement-covered positions in the Marketing and Sales Department abolished under the notice served in accordance with the Implementing Agreement NYD-217, reached, as stated earlier, on December 18, 1996.

According to the Organization, the January 7, 1997, letter identified the transaction that entitles Mr. Povirk to the New York Dock Conditions benefits and stated that Mr. Povirk was an "employee" under the terms of Article IV of the New York Dock Conditions because his position was no more than a subordinate salesman. Accordingly, the Organization filed a claim on Mr.

Povirk's behalf in its January 7, 1997 letter requesting a "dismissal allowance" of $3,400.00 per month and a continuation of Mr. Povirk's fringe benefits. At the time Mr. Povirk's job was discontinued, Mr. Povirk's annual salary was $40,800.00.

In the early part of 1997, the Parties exchanged correspondence regarding their respective positions on this issue and their ongoing disagreement over the interpretation and application of the New York Dock Conditions. (Carrier Exhibit No. B-2). The Carrier took the position in its January 27, 1997, response that the Organization lacked standing to represent Mr. Povirk over a change in his status during a period when the employee is working outside the scope of the Organization's representative jurisdiction, as stated in the Railway Labor Act. (TCU Exhibit No. G).

The Carrier also asserted that Mr. Povirk's claim involved an interpretation of the New York Dock Article III definition of "employee", as interpreted in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987, and that Mr. Povirk's position did not fit the standard interpretation of the term "employee" under the New York Dock Conditions. The Carrier argued that Mr. Povirk's former position was not subject to unionization and was best described as administrative, managerial, professional or supervisory in nature. (TCU Exhibit No. G). The Parties continued to exchange correspondence regarding their respective positions on this issue

and their ongoing disagreement over the interpretation and application of the New York Dock Conditions through March and April of 1997.

The Parties were unable to resolve their differences on this issue. Pursuant to the decision of the Interstate Commerce Commission in Finance Docket No. 32760, the Parties agreed to submit the matter to special arbitration for resolution by this Committee. It is within this factual context that the instant dispute arises.

**POSITION OF THE ORGANIZATION:**

The Organization contends that when the Carrier terminated Mr. Povirk's non-agreement position of Regional Account Manager for Belle Vernon, Pennsylvania but did not offer him a position on the newly merged UP/SP system, that it is clear that Mr. Povirk became a "dismissed employee" under the New York Dock Conditions. The Organization asserts that as a "dismissed employee" Mr. Povirk is entitled to receive for the protection period of six (6) years no less than the equivalent of one-twelfth of the compensation received by him in the last twelve (12) months of employment in which he earned compensation prior to the date he was first deprived of employment. The Organization also argues that Mr. Povirk is entitled under New York Dock Conditions to receive during his protection period benefits that were attached to his previous employment such as free transportation, hospitalization, pensions, reliefs under the same conditions.

The Organization submits that the following provisions of the New York Dock Conditions are applicable to the instant grievance:

**ARTICLE I**

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

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(b) "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 or loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

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(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of Section 7(b) of the Washington Job Protection Agreement of May 1936.

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6. ***Dismissal Allowances*** - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of

employment and continuing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent wage increases.

****

8. ***Fringe benefits*** - No employee of the railroad who is affected by a transaction shall be deprived, during his protective period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

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10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving en employee of benefits to which he otherwise would have become 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.

The Organization argues that there is no dispute that Mr. Povirk was indeed affected by a "transaction" as defined above in the New York Dock Conditions. The Organization asserts that Article I, Section 11(e) specifically requires that it is the employee's obligation to identify the transaction and relate explicit and pertinent facts of the transaction on which the employee relies to support his or her case. The Organization submits that it is then the Carrier's burden to prove that factors other than the transaction affected the employee.

In the instant grievance, the Organization argues that it did in fact identify the transaction and specific facts in regard thereto as required by Article I, Section 11(e). The Organization points out such facts in particular include where the Carrier admits in its letter and package to Mr. Povirk that he is being terminated as a result of the consolidation of the Southern Pacific Transportation Company and the Union Pacific Railroad. It is the Organization's position that it has proven the "causal nexus" between the merger and the termination action taken against Mr. Povirk by the Carrier. The Organization asserts that the burden then must shift to the Carrier to prove other than a transaction affected the employee and that the Carrier failed in its burden.

The Organization also notes that Carrier erroneously quoted and paraphrased Article III of the New York Dock Conditions, as it admits in its April 15, 1997 letter. (TCU Exhibit No. I). The Organization assumes that the intended language by the Carrier was

in fact from Article IV and proceeds with its argument and position statement based on that assumption.

The Organization contends that the single dispute with the Carrier concerns Mr. Povirk meeting the definition of the term "employee" under the New York Dock provisions. While the Organization recognizes the case the Carrier relies on and the result offered in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), the Organization also notes that there are two important differences in that case as compared to the instant dispute. The Organization states that in denying New York Dock benefits to the claimants in the above-referenced case, Arbitrator Seidenberg found that the non-agreement employees affected had managerial, administrative and supervisory responsibilities and that the employees were offered comparable positions and salaries but declined them.

The Organization argues that in the instant case Mr. Povirk was not offered a position on the merged UP/SP system nor did he have managerial, administrative and supervisory responsibilities assigned to his position. The Organization notes that the Carrier failed to deny these facts.

The Organization also challenges the Carrier's position that Mr. Povirk's position is not subject to unionization. The Organization argues that just as Mr. Povirk's prior non-agreement Chief Clerk position was unionized in 1979, Mr. Povirk's former non-agreement position of Regional Account Manager is also subject to unionization.

Notwithstanding the Carrier's position, the Organization submits and denies that an employee's non-agreement position must be subject to unionization to be considered an "employee" under the provisions of the New York Dock Conditions. The Organization relies on the recent decision by Arbitrator Christine D. Ver Ploeg, In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), in which the arbitrator considered the level and amount of supervising authority and degree of policy making in the position to determine whether a non-agreement position was labor related or imbued with management responsibilities. (TCU Exhibit No. I). See also, In the Matter of Arbitration Between James Benham v. Delaware and Hudson R. Co., Arb. O'Brien, 1986). As the Organization notes, Arbitrator Ver Ploeg held that the claimant's job responsibilities as a Quality Control Manager did not rise to the level of a management position, but rather was clearly more of a labor position and that the claimant was therefore entitled to the appropriate benefits under the terms of the New York Dock Conditions.

The Organization further asserts that the words of the Interstate Commerce Commission are instructive on this point:

> ... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding,

> therefore, must of necessity be decided upon the record.*** (supra, I.C.C. at 92). (Employees' Submission at page 15).

The Organization argues that in the instant claim the record evidence clearly establishes that Mr. Povirk's position of Regional Account Manager was more of a labor position than that of a managerial position. The Organization notes that Mr. Povirk had no authority to hire, fire, supervise, or evaluate any other employees and had no authority to order changes in company policy. The Organization maintains that Mr. Povirk was no more than a salesman selling transportation to the Carrier's customers and that Mr. Povirk had his position eliminated as a result of the merger of Union Pacific and Southern Pacific Railroads.

The Organization relies on the decision in The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) for the proposition that the claim must be sustained because the Organization established that the claimant lost his job as a result of a merger-related transaction. Similarly, in the instant case, the Organization argues that the claim should be sustained on the same grounds.

The Organization also notes that the Carrier refuses to acknowledge that Mr. Povirk is entitled to dismissal allowance and has not furnished the same to the Grievant. In addition, the Organization asserts that Mr. Povirk's average earnings over the twelve months proceeding his dismissal is $3,400.00

Based on the foregoing, the Organization asserts that the instant claim should be sustained in favor of Mr. Povirk and that he is entitled to full benefits as an "employee" as defined by the New York Dock Conditions. The Organization requests that the Arbitrator answer the question posed by the statement of the issue as framed by the Organization in the affirmative and render a decision that Mr. Povirk is entitled to substantially the same level of protection and benefits afforded to members of labor organizations.

**POSITION OF THE CARRIER:**

The Carrier first presents its procedural arguments. According to the Carrier, the instant dispute should be dismissed because Mr. Povirk was not an "employee" as contemplated by the New York Dock Conditions at the time his management position as Regional Account Manager was discontinued by the Carrier. The Carrier points out that the substantive merits of this case are only relevant if in fact it is determined by the Committee that Mr. Povirk is found to be an "employee" entitled to New York Dock Conditions benefits. The Carrier submits that the instant case should be decided on that procedural issue first and decided in favor of the Carrier.

In addressing the procedural issue of whether Mr. Povirk is an "employee" entitled to New York Dock Conditions benefits, the Carrier first notes that railroad employee protection originated

from the Depression era, when railroad consolidations were taking place and the government sought assurances that no railroad jobs would be lost. The Carrier asserts that it is necessary to consider for whom the legislated railroad protections were intended.

The Carrier asserts that starting with the Emergency Railroad Transportation Act of 1933, and then from the Washington Job Protection Agreement, through the Interstate Commerce Commission's involvement and the Transportation Act of 1940, railway employee protection was addressed. The Carrier notes that from 1940 to 1997, railway employee protection evolved into many forms or reiterations until the creation of the present day New York Dock Conditions.

The Carrier contends that when the Surface Transportation Board approved the merger of the Southern Pacific and Union Pacific Railroads, it did so by also imposing the New York Dock Conditions. It is the Carrier's position that at the crux of the instant dispute is whether Mr. Povirk, as well as other affected employees, can meet the definition of "employee" under the New York Dock Conditions and therefore receive New York Dock protections and benefits. The Carrier maintains that Mr. Povirk does not meet the New York Dock definition of "employee" and is therefore ineligible for such mandated New York Dock benefits.

The Carrier asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York

Dock protection. Specifically, that provision of the Railway Labor Act provides:

> Fifth. The term "employee" as used herein includes every person in the service of a 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 pursuant to the Authority which is conferred upon it to enter orders amending or interpreting such existing offers: **Provided, however,** that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employees organizations be regarded as any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

The Carrier argues that it is clear from the provision referenced above that the scope of unionization and the definition of the term "employee" includes only rank and file employees and subordinate officials but not officials or management employees. The Carrier asserts that the Railway Labor Act definition of "employee" is also used in New York Dock Condition cases. The Carrier relies on the Committee's decision in Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1) and asserts that the term "employee" means an agreement employee or one subject to unionization. The Carrier submits that the committee

found that when the ICC employed the phrase "employees of the railroad who are not represented by a labor organization" it was extending protection only to those employees and subordinate officials who are both subject to and entitled to union representation but are not represented. In accordance with Bond and Topolosky and Union Pacific Railroad (1985) (Carrier Exhibit No. D-3.1), the Carrier contends that this definition of employee is the industry definition and the definition used in the New York Dock cases. See also, In the Matter of Florida E.C. Ry., No. 4827-J, D.S. Fla. (January 5, 1960) (the term "employees" encompasses persons (including subordinate officials) covered by, or subject to, collective bargaining agreements under the Railway Labor Act but not officers, department heads, nor those in the next echelon, such as assistants and staff members to the department heads).

The Carrier argues that the ICC has never taken a broad view of the term "employee" and that New York Dock protections were not intended for management at a level above subordinate officials. See, Huggins, Rudloff, Kloess, and Moore and Norfolk and western Railway Co., (1985) (Carrier's Exhibit D-5). Rather, the Carrier asserts that claimants such as Mr. Povirk retain their rights to classified service while holding a management position and have the opportunity to exercise their union seniority when their management positions are eliminated, but are not due protection for their management positions under New York Dock Conditions. Id.

The Carrier notes that examining the job functions and responsibilities of the employee is required to determine whether an employee is an "employee" who is eligible for New York Dock Conditions benefits. In cases relied upon the Carrier, several factors to consider when reviewing job functions include both the level of responsibility held by the employee and whether an employee's job skills are transferable outside of the railway industry. See, e.g. Bond and Topolsky, supra; Newbourne v. Grand Trunk Western Railroad Co., 758 F.2nd 193 (1985); and Benham and Delaware and Hudson Railway Co., (1986) (Carrier's Exhibit Nos. D-6 and D-7).

The Carrier also relies on the decision in The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. Et al (Arb. Seidenberg, 1987), wherein it was stated:

> 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 administrative, managerial, professional, or supervisory in nature.
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> **********
>
> The rational and history of these benefits are that they were to be only extended 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.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

In the instant case, the Carrier argues that a review of Mr. Povirk's non-rank and file managerial position of Regional Account Manager indicates that he was a ranked personnel whose management and sales skills could be transferred outside of the railway industry. Specifically, the Carrier notes that Mr. Povirk's position of Manager of Regional Sales/Regional Account Manager is classified for Affirmative Action purposes as an Official/Manager under the Affirmative Action guidelines. (Carrier Exhibit F-1).

The Carrier submits that Mr. Povirk's position was substantially similar to the position held by the claimants in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) wherein claimants as District Sales Managers were found ineligible for New York Dock benefits because they were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.

2. Not under daily supervision.

3. Given an automobile allowance for personal use.

4. In possession of skills that were easily transferable.

The Carrier points out that the Committee in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987)(Carrier Exhibit No. D-9) recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer. The Carrier asserts that a similar result should be found in the instant case as Mr. Povirk's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Povirk was not under daily supervision, and, most significantly, Mr. Povirk possessed managerial and sales skills which are easily transferable to almost any other industry or service. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44). In addition, the Carrier maintains that Mr. Povirk, along with the other claimants, was offered a severance package that was not offered to agreement employees. (See Carrier Exhibit Nos. A-4, B-4 and C-4).

The Carrier contends that the burden of proving that Mr. Povirk is an "employee" entitled to New York Dock protections rests with the Organization and that the Organization has failed to meet their burden. See, Gerald Thomas & BLE and UPRR (1988)(Carrier's Exhibit No. D-4). The Carrier specifically notes that the Organization failed to prove that Mr. Povirk was a subordinate employee as listed by the ICC in Ex Parte 72 (February 5, 1924). See, Huggins, Rudloff, Kloess, and Moore and Norfolk and Western Railway Co., (1985) (Carrier's Exhibit D-5) and Carrier's Exhibit D-10 (ICC job title position indices).

The Carrier further contends that with regard to In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), that case is distinguishable from the instant claim as are the other cases cited by the Organization. The Carrier asserts that in the Nekich decision the claimant's position was Quality Coordinator who served as a liaison between management and classified employees. Accordingly, Arbitrator Ver Ploeg held that the claimant in Nekich was not an administrative, managerial, professional or supervisory employee. The Carrier also notes that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Povirk's transferable managerial and sales skills. For a similar case to Nekich, see also Hoffman and Burlington Northern Sante Fe, cited supra. (wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee).

With regard to The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) the Carrier argues that the parties in that case stipulated that the claimant was an "employee" for New York Dock Condition purposes. Because the arbitrator did not even need to reach the issue of whether the claimant in P.J. Kelley was indeed an "employee" for New York Dock Conditions, the Carrier avers that it is not applicable to the

instant case. (Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

The Carrier submits that any analysis of what is meant by a "position not subject to unionization" must be done on a *de facto* basis, with an examination of the position based on the facts at hand. The Carrier notes that this is especially important given that only the National Mediation Board has the jurisdiction to determine whether a position should be a member of a class or craft under the Railway Labor Act. The Carrier asserts that in outlining the definition of an employee eligible for New York Dock benefits, it is clear that Mr. Povirk's position fails to meet the accepted requirements because:

> 1. His position was not unionized nor subject to unionization.
>
> 2. His duties could be described as being administrative, managerial, professional or supervisory in nature.
>
> 3. His position was not exclusive to the railroad industry and his skills were transferable.

Based on these procedural arguments, the Carrier asserts that the instant claim should be dismissed.

With regard to the substantive issues, the Carrier argues that the elimination of Mr. Povirk's position was not due to a "transaction" under New York Dock Conditions. The Carrier submits that under Article I of the New York Dock Conditions, "transaction" is defined as "any action taken pursuant to authorizations of this

Commission on which these provisions have been imposed." The Carrier maintains that no evidence has been presented to demonstrate that these non-agreement positions could not have been abolished without ICC approval.

The Carrier additionally argues that the New York Dock Conditions define a "displaced employee" as "an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions". Furthermore, the Carrier states that a "dismissed employee" is defined under New York Dock Conditions as:

> 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 or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

Moreover, the Carrier contends that in light of the award In the Matter of Arbitration Between Union Pacific Railroad Company and Brotherhood of Railway Signalman, (Arb. Dana Eischen, 1994), it is it is well-established that the Organization must demonstrate a causal nexus between the merger and the alleged transaction. The Carrier refutes the Organization's assertion that it has established a "causal nexus" between the termination action against Mr. Povirk and the ICC's merger authorization. Rather, the Carrier asserts that the Organization did not prove that Mr. Povirk's position was eliminated as a result of a New York Dock transaction and that the Organization failed to show that Mr. Povirk was placed in a worse position due to a New York Dock transaction.

The Carrier notes that the Organization relies almost solely on the severance package letter from Vice President of Human Resources Barbara V. Schaefer to Mr. Povirk wherein she states:

> As you know, the Company is reducing the size of its non-agreement work force due to the consolidation of Southern Pacific Transportation Company and Union Pacific Railroad. I understand that you have been advised that your employment will be terminated as a part of this reduction in force.

The Carrier asserts that this letter from the Carrier's department of Human Resources was not approved by the Carrier's Labor Relations department and accordingly Labor Relations should not be held by what the Human Resources department independently distributed. As support for its position, the Carrier relies on the award in Transportation Communications International Union and CSX Transportation, Inc., (Arb. Seidenberg, 1995), wherein the arbitrator stated:

> The Committee notes the Organization's reliance on Director Patterson's letter...What is more significant is that Mr. Patterson was not a Carrier's officer who was vested with the authority to determine policy as to which employees were entitled to receive New York Dock benefits.

The Carrier maintains that the Organization failed to identify the transaction and specify those facts which are pertinent to that of the transaction being asserted. See, e.g., Transportation-Communications International Union – BRAC and Union Pacific Railroad, Case Nos. 6, 7, & 8. The Carrier also argues, as stated

previously on different grounds, that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) does not apply as an example of a New York Dock transaction because, unlike the instant grievance, there was sufficient evidence that an intermingling of work, employees, operations and functions had occurred in that case. (Carrier's Exhibit No. D-15).

The Carrier finally asserts that Mr. Povirk had a duty to mitigate his damages by bumping into a position in his former clerical craft position and failed to do so. The Carrier submits that Mr. Povirk attempted to bump into a position that was abolished several years prior to his management position being eliminated, and that when he was not able to obtain the abolished position, Mr. Povirk thereafter declared himself as a "displaced employee" under New York Dock conditions. The Carrier notes that Mr. Povirk did not attempt to find a different clerical position to fill although positions were made available to him. See, e.g. Carrier Exhibit No. E-3. According to the Carrier, with Mr. Povirk's clerical seniority date of 12/12/83, Mr. Povirk was eligible for approximately 700 positions.

The Carrier contends that it is well-established that an employee is required to exercise his seniority at the highest level possible and that Mr. Povirk deliberately chose not to do so. See, In the Matter of Arbitration Between Union Pacific Railroad Company

v. United Transportation Union (C&T), (1994) and International Association of Machinists and Aerospace Workers and CSX Transportation, (1995) (Carrier Exhibits D-18 and D-19, respectively).

Based on the foregoing, the Carrier respectfully requests that the Committee dismiss this claim on procedural grounds because:

> The term "employees" as used in Article IV of the New York Dock Conditions is a term of art which includes rank and file employees and subordinate officials, but excludes employees who are not subject to unionization or have positions that are managerial, supervisory, administrative or professional, such as the positions held by the Claimants herein: Manager Contract Administration, Regional Sales Manager and Senior Tax Representative.

(Carrier's Submission at page 31). The Carrier also requests that, in the alternative, the instant claim be denied because the elimination of Mr. Povirk's position was not due to a transaction as defined by New York Dock Conditions.

**OPINION:**

The Committee has carefully considered the facts, evidence and arguments presented by the Parties and concludes that under the provisions of the New York Dock Conditions, Mr. Povirk is not an "employee" as envisioned by the New York Dock Conditions. Therefore, Mr. Povirk is not entitled to New York Dock benefits and protections. Under a close examination of the record, the New York Dock Conditions and the related Implementing Agreement, it is the

Committee's opinion that the instant grievance must be denied on procedural grounds. Accordingly, the Committee must dismiss the Organization's claim as stated above and deny the instant claim in its entirety. The Committee's findings, conclusions and reasoning are set forth below.

The Committee is first required to address the threshold procedural issue of whether Mr. Povirk is an "employee" as envisioned by the express terms of the New York Dock Conditions, and in light of recent interpretations of the New York Dock Conditions, through reliable case law, and the facts presented in the instant dispute.

The term "employee" for New York Dock Conditions consideration is defined in the Railway Labor Act as provided by the Carrier. The Carrier specifically asserts that Section 1, Fifth of the Railway Labor Act defines who is considered an "employee" subject to New York Dock protection:

> Fifth. The term "employee" as used herein includes every person in the service of a 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 pursuant to the Authority which is conferred upon it to enter orders amending or interpreting such existing offers: **Provided, however,** that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees

> may be organized by their voluntary action, nor shall the jurisdiction or powers of such employees organizations be regarded as any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(Carrier's Submission at page 14).

The Committee also recognizes the statement by the Interstate Commerce Commission as provided by the Organization:

> ... in the final analysis rank and title are not controlling in defining the work of subordinate officials, and we are unable to conclude that there is any fixed outstanding factor which will always control without exception. We do not believe that as a practical matter it is feasible to make a definite line of demarcation between work of subordinate officials.**** Each proceeding, *therefore, must of necessity be decided upon* the record.*** Supra I.C.C. at 92.

(Employees' Submission at page 15).

In the instant dispute, the record provides evidence as to Mr. Povirk's position as Regional Account Manager and raises the issue of whether this position is more labor-related than managerial. The Committee notes that Mr. Povirk's position duties were primarily those of an independent salesman. The record demonstrates that Mr. Povirk's position involved:

> 1. Considerable contact with customers of the Carrier

2. Responsibility for all commodities in the region except for automotive and intermodal

3. Full authority and latitude in dealing with his customers, except for pricing and servicing customers

4. Collaborating with the operating side of the railroad to create pricing and service commitments

5. Accountability for a $24.3 million dollar revenue plan

6. Development of any business opportunities he deemed profitable

These job characteristics for the position held by Mr. Povirk were supplied by the Carrier and were not disputed by the Organization.

The Committee notes that Mr. Povirk's managerial sales position was substantially similar to the position held by the claimants in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier Exhibit No. D-9) wherein claimants as District Sales Managers were found ineligible for New York Dock benefits because they were:

1. Beyond the scope of any collective bargaining agreement on the property and not subject nor entitled to union representation.

2. Not under daily supervision.

3. Given an automobile allowance for personal use.

4. In possession of skills that were easily transferable.

The Committee agrees with the Carrier that in Adams, Dominick & Williamson and Delaware & Hudson Railway Co., (1987) (Carrier

Exhibit No. D-9) that Committee recognized that the transferability of sales skills and the position of sales representative were not unique to the railway industry, like those of a conductor or locomotive engineer. The Undersigned Committee concludes that a similar result should be found in the instant case as Mr. Povirk's position was not covered by any collective bargaining agreement, nor was it subject to unionization, that Mr. Povirk was not under daily supervision, and, most significantly, Mr. Povirk possessed managerial and sales skills which are easily transferable to almost any other industry or service. (See also, Surface Transportation Board, Finance Docket No. 32760, Decision No. 44).

Notably, the record evidence demonstrates that Mr. Povirk was not under daily supervision. As the Carrier asserted in its April 15, 1997 letter to the Organization:

> The Carrier wishes to make clear that the "Subject to unionization" criteria, which you refer to in your letter, is not the sole criteria upon which it relies in determining that these employees are not subject to coverage by New York Dock. These employees occupy positions which clearly were not contemplated by the extraordinary job protection couched in the New York Dock conditions. Each of these employees had a level of responsibility and duties, as well as salary, which was above that of a clerical employee. More fundamentally, each of these employees had a position that offered skills which are clearly more transferable than that of a railroad clerk.

(Carrier's Exhibit No. A-2).

The Committee is in agreement with the Carrier on this point. Notably, the most significant factor of all is that Mr. Povirk possessed managerial and sales skills that arguably are transferable to almost any other industry or service. (See e.g., Surface Transportation Board, Finance Docket No. 32760, Decision No. 44)(Carrier Exhibit No. D-1, page 175).

The Organization asserts that the case of The Matter of Arbitration Between P.J. Kelly, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees and the Union Pacific Railroad Company, (Arb. L. Stallworth, 1987) applies to the instant case. However, as the Carrier correctly asserts, the parties in P.J. Kelley stipulated that the claimant was an "employee" for New York Dock Condition purposes. In that case, the parties specifically agreed:

> The Carrier has agreed to stipulate, for purposes of this claim only, that the Claimant is an "employee", as that term is used in New York Dock Conditions. This stipulation regarding the Claimant's status as an employee does not extend to several other similarly situated employees who are not directly involved in this case.

(Carrier's Submission at page 24).

It is clear that, unlike the instant grievance, in the case of P.J. Kelley the Committee did not have to resolve the threshold issue of whether the claimant was indeed an "employee" for New York Dock Conditions. Accordingly, the Committee does not find that particular case relied upon the Organization to be controlling.

(Carrier Exhibit No. D-15; see also, Gerald Thomas, cited supra, Carrier Exhibit No. D-4).

Similarly, the Committee notes that the case of In the Matter of Arbitration Between James V. Nekich v. Burlington Northern Santa Fe Railroad (Arb. Ver Ploeg, December 6, 1996), is also distinguishable from the instant grievance. The Committee observes that in the Nekich case the claimant's position was that of a quality coordinator, a position that required the employee to serve as a liaison between management and classified employees. In that case, Arbitrator Ver Ploeg found that the claimant therefore was not an administrative, managerial, professional or supervisory employee.

The Carrier asserts that in the Nekich case the claimant's job duties were more railroad industry exclusive as compared to Mr. Povirk's transferable managerial and sales job skills. See also, Hoffman and Burlington Northern Sante Fe, cited supra. (Carrier Exhibit No. D-12)(wherein the position at issue was a railroad-oriented "maintenance" role rather than managerial employee). The Committee must agree. Mr. Povirk's Regional Account Manager position was an independent sales position that afforded contact with customers and input on pricing, a company car with insurance and no daily supervision. As such, Mr. Povirk's position is more dissimilar to the position in Nekich and more akin to the position in the Adams award, cited supra.

At this juncture the Committee finds it useful to reiterate the observations of Arbitrator Seidenberg, who was confronted with a similar issue in the case of The Matter of Arbitration Between B.J. Maeser et. al and Union Pacific RR Co. et al, (Arb. Seidenberg, 1987), wherein he noted:

> 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 administrative, managerial, professional, or supervisory in nature.
>
> **********
>
> The rational and history of these benefits are that they were to be only extended 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.

(Carrier Exhibit D-8, pp. 39, 42, and 47).

The Committee is mindful of the purpose behind the protective conditions set forth in the New York Dock Conditions and the Great Depression era genesis of legislative history which created railway

employee job protection. However, the Committee must also note that New York Dock Conditions benefits were designed to protect a certain type of employee, simply put, those employees who would find it most difficult to secure a position outside of the railway industry.

Furthermore, it is the Committee's opinion that New York Dock Conditions protection cannot be construed as a guarantee of continuing job benefits after an ICC sanctioned transaction for every railway employee. Rather, these special benefits must be reserved as the legislative history intended, i.e., to aid and protect those rank and file employees and subordinate officials who to their detriment are economically affected by the merger of railway systems. In the instant case, the Committee concludes that the position of Regional Account Manager is clearly not a rank and file position, or even a subordinate official position. As such, the Committee must conclude that Mr. Povirk is not an "employee" as envisioned by the New York Dock Conditions and is not eligible for New York Dock benefits.

Having decided in favor of the Carrier on the threshold procedural issue of whether Mr. Povirk's position falls within the definition of "employee" under New York Dock Conditions, the Committee need not reach the substantive merits presented by the instant claim.

**AWARD**

The Committee, after careful consideration of the instant dispute identified above, concludes that the claim must be dismissed as the Claimant, Mr. Povirk, is not an "employee" under New York Dock Conditions.

Adopted at Chicago, Illinois on the 16th day of July, 1998

Lamont E. Stallworth, Ph.D.
Neutral Member

Labor Member

Carrier Member

Labor Member

Carrier Member

LES:CHG