

ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760 (Sub-No. 42)

214030

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY,
AND MISSOURI PACIFIC RAILROAD COMPANY
-CONTROL AND MERGER-SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

PETITION FOR RECONSIDERATION

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MAR 20 2006

SURFACE
TRANSPORTATION BOARD

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Due Date: March 20, 2006

PREFACE AND
SUMMARY OF ARGUMENT

This petition is directed to the Board's February 28, 2006 action denying review for a divided 2-to-1 New York Dock (NYD) arbitration panel decision issued January 6, 2005, stemming from the UP/SP merger. The review is sought by a non-union former SP terminal superintendent, who was displaced from Tucson, AZ, to Houston, TX. The causal connection between the displacement and merger-related transaction is not in dispute. The UP employee was ruled not entitled to NYD certification due to (1) delay amounting to laches, and (2) terminal superintendent not qualifying as subordinate official or employee within the meaning of 49 U.S.C. 11236, and NYD employee conditions.

1. The Board in its Decision has misapprehended the arbitration process and the arbitration decision.
(Pages 3 thru 6),
2. Arbitration is prejudicial to non-agreement employees, such that the Board Should Hear the case De Novo; the Lace Curtain standard is inapplicable.
(Pages 6 thru 11).
3. The arbitral decision errs in dismissal for laches. The laches defense is not favored by the Board, and is not a factual issue for arbitration. The employee submitted his claim within the 6-year NYD period. The carrier is not prejudiced, and any issue of calculating compensation or benefits was not in issue and can be raised later.
(Pages 12 thru 16).
4. The Arbitral decision erred in finding the employee's status to be a factual issue to be decided by arbitration. The agency has specifically found persons below the level of division superintendent to be subordinate officials within the meaning of the Railway Labor Act. There is a definite relationship between the RLA and 49 U.S.C. §11326. Terminal superintendents are subject to union organization, and entitled to NYD.
(Pages 16 thru 21).

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Preliminary Statement

John E. Grother (Grother or petitioner), petitions the Board for reconsideration of the Decision dated February 27, 2006 (served February 28) (Decision), which denied his petition for review of the decision of an Arbitration Committee. This request for reconsideration is based upon material error. 49 CFR 1115.3(b)(2).

Petitioner was employed by Southern Pacific Transportation Company (SP) as a Terminal Superintendent at Tucson, AZ, when the UP/SP merger was consummated September 11, 1996. However, the merger was not implemented at Tucson, AZ until April 13, 1997. UP on April 16, 1997 selected petitioner as Senior Manager Terminal Operations (SRMTO) at Tucson, which was the same job he already

held, and is UP's title for Terminal Superintendent.^{1/} On June 26, 1997, petitioner was displaced to Houston, TX, effective July 1, 1997, to a lower-rated position of Manager of Intermodal Operations.^{2/}

Grother's request for New York Dock (NYD) employee protective conditions was denied by the arbitral award. The matter of merger-related "causality" for his displacement is not an issue. The dispute involves "laches" and "jurisdiction" ("employee status").

Upon reconsideration, the STB should find petitioner to be entitled to NYD employee protection, and take such other or further action as may be required, including modified procedure or remand.

I. THE DECISION ERRS IN ITS MISAPPREHENSION OF THE ARBITRATION PROCESS AND THE ARBITRATION DECISION.

The Decision errs in its understanding of the arbitration process. The STB decision fails to give the date of the arbitration decision, or the name of the so-called "arbitrator"; the Decision does not give the date for the UP/SP merger implementation at Tucson, AZ, or the correct date for the filing by Grother of his formal claim for certification with UP; the Decision states (in its first paragraph) that the arbitration "award" denied

^{1/} UP Opening Statement, at pp. 2, 30. (Supp. Pet., 2/22/05, Appendix 8, at 2, 30).

^{2/} The Decision asserts UP stated Grother's transfer and demotion were based on "his performance." (Decision 2). The UP letter reads differently, and says "demotion was based on performance standards." See: UP Ex. 5. (Supp. Pet., 2/22/05, Appendix 2, Appendix 8, Ex. 5). The term "performance standards" does not detract from the individual, but may refer to revised standards owing to merger implementation. The UP term "performance standards" appears to have been carefully chosen. (Supp. Pet., 2/22/05, Appendix 7 at 23-27).

Grother's claim for benefits under the NYD conditions imposed in the UP-SP merger, without apparent recognition that neither compensation nor benefits were placed in arbitration; the STB Decision, throughout its text, incorrectly gives the undated arbitral award as being issued by a single and nameless "arbitrator." (Decision 2, 3, 4, 5, 6, 7, 8). Important missing or misstatements of the arbitral process are:

1. As indicated in the preliminary statement, supra 2-3, although consummated September 11, 1996, the UP/SP merger was implemented at Tucson, AZ on April 13, 1997. Grother's title was changed on April 16, 1997, from Terminal Superintendent, a position held with SP at Tucson, to Senior Manager Terminal Operations (SRMTO) with UP at Tucson. Shortly thereafter, on June 26, 1997, he was advised to either quit or take a transfer to Houston, TX, effective July 1, 1997, as Manager of Intermodal Operations, with a substantial reduction in compensation and benefits. (Supp. Pet., 2/22/05, Appendix 1, 5-6; Appendix 3, V.S. Grother (Causality)).

2. Grother submitted a formal request to UP for NYD certification on May 12, 2003.^{3/}

3. Contrary to the STB's decision, the arbitration decision was not issued by a single arbitrator. A three-member arbitration

^{3/} The STB initially and incorrectly gave the date as May 17, 2003. (Decision 1). The STB decision incorrectly asserts Grother termed his May 12, 2003 letter as "Official Notice" (Decision 1), or a "New York Dock Arbitration Dispute." (Decision 5). Grother's letter speaks for itself. It is improper for the STB to incorrectly quote Grother, and to do so in a negative manner. The May 12, 2003 letter was a request to be certified for NYD protective benefits, and was treated as such by UP. (Supp. Pet., 2/22/05, Appendix 2; Appendix 8, Ex. 5).

committee was established,^{4/} with Lynette A. Ross as the neutral member appointed by the National Mediation Board (NMB).^{5/} The Committee issued its decision, by a divided 2-to-1 vote, on January 6, 2005.^{6/} There is no single "arbitrator" award or decision in the proceeding, other than certain preliminary rulings concerning procedures. The STB's February 28, 2006 decision errs in not providing the date and entity issuing the arbitral decision.^{7/}

4. The STB Decision errs in its understanding of the matters subject to arbitration. The arbitration agreement consists of two phases, the first being whether NYD is applicable to Grother, such that he may be entitled to some compensation or some benefits; if the committee finds NYD applicable to Grother, the partisan parties would then attempt to agree on the measure of such compensation or such benefits, if any, due Grother. If the partisan parties are unable to agree, a further hearing (phase two) is provided to determine the measure of compensation or benefits. The failure of the STB to consider the issue actually to be decided in

^{4/} Curiously, the STB's earlier decisions served April 21, 2004, recognized that an arbitration committee had been established. The three-member arbitration committee is a feature of New York Dock, Article I, §11. 360 I.C.C. at 87-88.

^{5/} This appears to be the neutral's first NYD appointment. (Supp. Pet., 2/22/05, 8 n.3).

^{6/} The January 6, 2005 date for the arbitral decision was confirmed without objection. See: STB Decision n.1 (served Jan. 13, 2005).

^{7/} Grother earlier noted the caption for the arbitral decision incorrectly listed the panel members. (Supp. Pet., 2/22/05, 2). The NYD employee arbitral decisions are not published, and are not generally available. Accordingly, identification of the decision, date, and committee or neutral members, is essential.

phase one--applicability of NYD to Grother--and not the measure of compensation or benefits--is a critical failure of the STB's decision. This error is of special importance in dealing with the claim of "laches," as set forth, infra 11-15. The matter of "laches" is really a non-issue, as compensation and benefits were not then before the arbitration committee, and not ripe for decision.

The arbitration agreement, consisting of four pages, is Appendix 1 hereto.^{8/} The STB's decision has misapprehended the "claim" determined January 6, 2005 by the arbitration committee. To be sure, in finding Grother ineligible for protection under the NYD conditions, the arbitral decision necessarily cut-off any inquiry into compensation or benefits, but the arbitral committee was confined to eligibility which, therefor, should have restricted any inquiry into laches.

5. Grother has many objections to the arbitration decision. These objections, included in his February 22, 2005 petition for review, merit further examination in the reconsideration process.

II. GROTHER DOES CHALLENGE ARBITRATION;
NYD DOES NOT REQUIRE THAT A PERSON
SUBMIT TO ARBITRATION; ARBITRATION IS
PREJUDICIAL TO NON-AGREEMENT PERSONNEL.

The STB's Decision states that Grother "appears" to challenge the arbitration requirement altogether, and the Board answers that such a challenge would be inconsistent with seeking NYD protection, since in the STB's view, arbitration is a well-established

^{8/} The arbitration agreement is included in both the Grother and UP pre-hearing submissions. (Supp. Pet., 2/22/05, Appendix 5, Ex. E-16; Appendix 8, Ex. 19).

quid pro quo for NYD conditions. (Decision 9). The Board adds that NYD procedures are not less fair to him as a non-agreement employee, and NYD expressly provides the same level of protective benefits regardless of union status. (Ibid.).^{9/}

1. Challenge to Arbitration. Grother does challenge the arbitration requirement, and made this challenge clear throughout the proceeding. This was done in his opening pre-hearing submission to the arbitration committee, on post-hearing brief, and in his petition for review. (Supp. Pet., 2/22/05, 22-23, 40-42; Appendix 3, 7-8; Appendix 5, Ex. E-7, 4-5, App. 2; Ex. E-15, 1, 2-3; Appendix 7, 8-10).

2. Grother a Non-Agreement Employee. Grother during his employment with SP and UP has never been a member of a labor organization, or represented by a labor organization. His entitlement to employee protection from the ravages of the UP/SP merger comes directly from Congress by means of the statute, 49 U.S.C. 11326.

3. Participation. It is not inconsistent for Grother to challenge assignment of his claim to arbitration, and at the same time participate in the arbitration. Moreover, there is no quid pro quo between NYD conditions and arbitration. The STB's predecessor frequently decided claims under NYD or its predecessor conditions,^{10/} without first remitting the parties to arbitration,

^{9/} The STB's decision incorrectly states NYD provides unrepresented and union employees with the "same level" of protection. (Decision 9 & n.10). The word "substantially" is missing, and permits of some variation, which is confirmed by the STB's own references. (UP Response, 4/8/05, App. Exhs. at 149). 360 I.C.C. at 90.

^{10/} Such as New Orleans, Burlington, or Oklahoma conditions, which has similar arbitration provisions.

particularly where important questions were involved. Some examples are: Leavens v. Burlington Northern, 348 I.C.C. 962 (1977); Great Northern Pac.-Merger-Great Northern Ry., 6 I.C.C.2d 919 (1990); Great Northern Pac.-Merger-Great Northern Ry., 8 I.C.C.2d 229 (1991); American Train Dispatchers Ass'n v. ICC, 578 F.2d 412 (D.C. Cir. 1978).^{11/}

3. STB Jurisdiction Only Recently Established. The jurisdiction of the agency to review arbitration awards was not established until 1987. CSX Corp.-Control-Chessie and Seaboard C.L.I., 6 I.C.C.2d 715, 752-53 n.31 (1990). Previously, the agency believed it did not have jurisdiction to do so. Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 66-67 (1981). Accordingly, the agency frequently responded to NYD issues without requiring arbitration. Of course, there is a difference between arbitration of implementing agreements under NYD Art. I, §4, usually conducted by a single referee, and arbitration of protective conditions under Art. I, §11, usually conducted by a three-member committee. 360 I.C.C. at 84-90.

It is clear that although it might have been technically possible in 2003 for Grother to have filed a complaint against UP directly with the STB, such would have been futile in mid-2003 in the context of recent practice of the Board to first require arbitration, now that the STB has jurisdiction to review arbitration decisions. See: American Train Dispatchers Ass'n v. ICC, 949 F.2d 413 (D.C. Cir. 1991), and 54 F.3d 842 (D.C. Cir. 1995).

^{11/} See also: F.D. No. 32549 (Sub-No. 19), Burlington Northern, Inc. and Burlington Northern Railroad Company-Control and Merger-Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company (served Dec. 20, 1995).

Grother preserved his request for direct agency consideration, also incorporated in his petition for review, suggesting modified procedure, if necessary. (Supp. Pet., 2/22/05, 43).

4. Arbitration Prejudicial-Substantive. Grother is prejudiced by arbitration under Lace Curtain standards. Contrary to the STB's Decision (Decision 2, 9), Grother did not seek review of the arbitral decision under Lace Curtain. The Grother petition for review acknowledged Lace Curtain, but stated immediately after citation, that the STB does not owe deference to the arbitration decision with respect to matters such as laches or jurisdiction. (Supp. Pet., 2/22/05, 19).^{12/} Grother flatly challenged the compulsory arbitration of his NYD claim under a narrow Lace Curtain review standard. (Supp. Pet., 2/22/05, 22).

The STB is to review arbitral decision more extensively than the so-called Steelworkers Trilogy.^{13/} The STB's review embraces the "searching scrutiny" of Wallace.^{14/} The agency has stated Lace Curtain is a "sliding scale" of deference. An arbitrator's interpretation of Board regulations and views regarding transportation policy are subject to more searching review, than are judgments about matters of evidence and causation. These "searching scru-

^{12/} By "laches and jurisdiction," Grother was referring to the two subtitles, laches and employee status. (Supp. Pet., 2/22/05, 19-22). The term "jurisdiction" was also used by UP for "employee status," as noted in the arbitral decision at 9, 15-16. (Supp. Pet., 2/22/05, Appendix 1, 9, 15-16).

^{13/} United Steelworkers v. American Mfg. Co., 363 U.S.. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

^{14/} Wallace v. Civil Aeronautics Board, 755 F.2d 861, 864-65 (11th Cir. 1985).

tiny" and "sliding scale" review standards were summed up in Railway Labor Executives' Ass'n v. U.S., 987 F.2d 806, 812 (D.C. Cir. 1993). However, the "searching scrutiny" and "sliding scale" for arbitration review is not as complete as direct agency review, and review under Administrative Procedure Act standards. To be sure, the elimination of causality as an issue removes much of petitioner's anxiety; however, laches and jurisdiction (employee status) should not be (as here) subject to the egregious whim of a very inexperienced neutral arbitration member.

The standard for review of "laches" and "jurisdiction" is not "egregious error" or "irrational," although both are present here, but a more searching de novo review by the STB.

5. Arbitration Prejudicial-Procedure. The prejudice of arbitration also extends to procedure. The procedures of labor arbitration are not conducive for the determination of policy issues of high importance for non-agreement employees. Here, UP did not distribute a single witness statement in advance of the hearing. In contrast, Grother filed 6 verified statements from himself and 3 other witnesses. UP's extensive pre-hearing submission (all argument--no witness statements) was prepared by an individual in UP's labor relations planning^{15/} who was not directly involved with non-agreement personnel matters.^{16/}

^{15/}UP's representative initially identified himself in the submissions as General Director of Labor Relations. However, his actual title was General Director-Employee Relations Planning. (Supp. Pet., 2/22/05, Appendix 6, GH-28, 1; Appendix 7, Tr. 169; Appendix 8, 1).

^{16/} Agreement employees deal with UP's Labor Relations Department with respect to wages, rules, or working conditions; non-agreement personnel, such as Grother, process these matters through UP's Human Resources Department. (Supp. Pet., 2/22/05, Appendix

(continued.....)

The procedure of having a "hearing" primarily for argument-- rather than for evidence--is the method for dispute resolution by the National Railroad Adjustment Board (NRAB), and is a procedure followed in the usual NYD arbitration between a carrier and employee organizations. However, prior development of evidence and conferencing is required under the Railway Labor Act (RLA) by 45 U.S.C. 152, Second, Six, with advance submissions to the NRAB. 29 CFR 301. The STB has not promulgated rules for NYD arbitration as it has for arbitration of rate disputes. This is clear from the STB's April 21 and June 10, 2004 decisions in this proceeding.

The provision in NYD that the NMB shall appoint the neutral member of the arbitration committee is not satisfactory for non-agreement personnel, and is prejudicial. The NMB is overwhelmingly concerned with disputes between carriers and labor organizations, and only rarely, as here, is asked to appoint a neutral in a non-agreement case, particularly where only one individual is involved. The NMB is not equipped to make an informed appointment. This is abundantly clear here, from any impartial examination of the arbitral award, with obvious deficiencies that need not be recounted.^{17/}

.....continued)

5, Ex. E-5; Appendix 7, Tr. 184-85).

^{17/} The arbitration decision borders on the incompetent, with separate findings for the "Neutral/Referee," for the "Majority," and for the "Committee." (Supp. Pet., 2/22/05, 11-13),

III. THE DECISION ERRS IN ASSERTING LACHES IS A FACTUAL ISSUE WITHIN THE PURVIEW OF THE ARBITRATOR; THE DECISION ERRS IN UPHOLDING DISMISSAL OF THE CASE ON TIMELINESS.

The STB ruled that Grother's claim is barred by laches, even though the claim, formal or informal, was submitted within NYD's six-year period. The STB asserted "laches" is a factual issue within the purview of the arbitrator, and that the arbitral decision reviewed the factual record and arguments, and followed relevant arbitral precedent. (Decision, 5). The STB added that the arbitrator applied the standard upheld by the STB in GTW, attached hereto as Appendix 2. (Decision 4, 6).^{18/} Elsewhere, the STB's decision states that Lace Curtain should govern laches review. (Decision 6).

The STB asserts that petitioner asks the agency to reevaluate the evidence and reconsider the factual findings, but that petitioner has not shown that the decision is irrational, or presented any other justification for reviewing and overturning the arbitral decision under the Lace Curtain standards. (Decision 6).

1. The Board does not owe Deference on Laches. The matter of laches is an equitable defense, and is a conclusion. Laches is not a factual matter within the oft-quoted language from Lace Curtain that the agency will not review "issues of causation, calculation of benefits, or the resolution of factual questions." There is no

^{18/} Finance Docket No. 28676 (Sub-No. 2), Grand Trunk Western Railroad Company--Merger--Detroit, Toledo Shore Line Railroad Company--Arbitration Review, decided Feb. 12, 1996, corrected Mar. 14, 1996 (served Feb. 26 and Mar. 19, 1996). The GTW decision was not mentioned, cited, or offered by any party in the arbitration proceeding. It was not mentioned in the arbitral decision. It cannot be retrieved from the STB's website.

time limit for filing NYD claims, other than the NYD 6-year protective period. The questions of laches is for the STB to decide although, of course, the STB might delegate fact-finding to an ALJ or other entity, but subject to de novo agency review. An adverse ruling on laches is equivalent to dismissal without passing upon the merits--and is a drastic remedy.

The only citation advanced where the STB or its predecessor upheld an arbitral dismissal for laches is the GTW case, which involved laches for part of certain claims, that exceeded 7 years, and clearly is inapposite here as it involved inability to determine off-sets, an issue deferred. The STB's decision, in a footnote, cites several arbitral awards which dismissed claims for laches, but these were not appealed to the agency, and involved disputes between carriers and employee organizations. (Decision 6 n.7).^{19/}

2. General Board Policy Discourages the Laches Defense. The general policy of the STB, and its predecessor ICC, is to take a dim view toward the laches defense. Petitioner went into the agency's overall treatment of laches in his petition for review, Repetition should be unnecessary. (Supp. Pet., 2/22/05, 27-29).

^{19/} The STB decision refers to the TCU/UP (Rehmus, 1992) award (Decision 5), which had been mentioned twice in the arbitral decision (Supp. Pet., 2/22/05, Appendix 1, 28, 29). Although this UP award was not included or mentioned by UP (or Grother) in the arbitral proceedings, it was courteously furnished by UP in its post-decisional response to Grother's appeal. (UP Response, 4/8/05, Exh. Appendix, following Ex. 51). The TCU/UP (Rehmus, 1992) found laches for a 6-year delay due to insurmountable problems in calculating off-sets to compensation. Such a situation is not present here, inasmuch as any UP off-set claim for Grother moving expenses is a deferred issue under the arbitration agreement, and UP did not encounter any difficulty in presenting its off-set calculations.

3. The Laches Findings. The deferral of Grother's claim for the calculation of compensation and benefits to a second phase, pursuant to the arbitration agreement (Appendix 1 hereto), renders the "laches" findings premature and de minimis. Since "causality" is not an issue, the only "laches" question is whether UP was fatally prejudiced on the jurisdictional issue, i.e., employee status. There is no finding in the arbitral decision that UP was prejudiced by Grother's formal NYD filing on May 12, 2003, within 6 years from his displacement on July 1, 1997. The arbitral decision says that UP would be harmed by the 2003 filing but, contrary to the STB decision (Decision 5), the arbitral decision did not find that UP was "blindsided" by Grother's request for NYD conditions. (Decision 5).^{20/}

Of course, even where there are time limits for filing claims, or where there are statutes of limitation for filing court actions, there is naturally some loss of memory, witnesses, etc. over the passage of time subsequent to an act.

The laches discussion in the arbitral decision is UP's hypothetical argument. Indeed, the STB's conclusion did not rest upon "evidence," but claimed to be based upon the "factual record and argument." (Decision 5). UP did not present a single witness on laches. The sole UP witness, Ken C. Packard, was presented on the issues of causality and job classification. (Supp. Pet., 2/22/05, Appendix 6, GH-25, 3). He was recalled later on the

^{20/} The arbitral decision said UP's "position," that it was "essentially blindsided," is well founded. However, this is not a fact. (Supp. Pet., 2/22/05, Appendix 1, 29). Indeed, UP did not offer any evidence on laches, other than the recall of its witness, who was helpful to Grother on this score.

"laches" issue, with respect to the contents of a lost or misplaced UP Form 15121, and testified as to its contents, which were favorable to Grother; however, the Form 15121 record was sought on the matter of causality, no longer in issue.^{21/}

Grother submitted verified statements, and testified extensively on laches. This material with record references is set forth in Grother's post hearing brief and in his petition for review. In short, UP's defense on the ground of laches, and the arbitral decision's discussion on laches, are basically subjective fabrication. (Supp. Pet., 2/22/05, 14-16, 23-29; Appendix 7, 35-37).^{22/}

4. Compensation & Benefits-Deferred Issue. The arbitral awards which have found laches usually have done so because complexities and variation of compensation for unionized employees, particularly those in train and engine service, may be difficult to estimate with the passage of time and the disappearance of records. Of course, Grother being a salaried employee, it is unlikely there would be any serious computation problems.

UP in its laches presentation raised the matter of an offset for relocation payments alleged made to Grother at the time of his transfer from Tucson to Houston. Grother answered that the

^{21/} The STB's decision's reference to Grother's concern about the "memory" of UP's witness (Decision 5) is not due to lapse of time, but is more owing to the rigors of litigation. In any event, Grother's departure from Tucson was not due to disciplinary factors.

^{22/} UP in its post-hearing brief urged the arbitration committee go no further than the "employee" issue, and said there is no need to decide the causality and laches issues. (Supp. Pet., 2/22/05, Appendix 11, 15).

matter of compensation off-sets can be raised in the phase two of the arbitration. (Supp. Pet., 2/22/05, 42-44; Appendix 6, GH-28, 14-15).

IV. THE DECISION ERRS IN ASSERTING ELIGIBILITY FOR NYD PROTECTION IS A FACTUAL QUESTION TO BE DETERMINED BY ARBITRATION SUBJECT TO SUBJECT TO LACE CURTAIN REVIEW BY THE AGENCY.

The arbitral decision determined that Grother was not an "employee" or "subordinate official" so as to qualify for NYD coverage. (Decision 6). The STB ruled that whether a "particular" employee is eligible for coverage under NYD is a factual matter, to which the Board owes deference to the arbitral decision absent egregious error. (Decision 6).^{23/}

The STB went on to say that arbitral precedent defines "employee" as meaning only those who are subject to unionization, or who perform duties other than administrative, managerial, professional or supervisory in nature (emphasis add.). (Decision 6).^{24/}

The STB decision added that under arbitral precedent, NYD benefits were to be accorded only to rank and file employees,

^{23/} Two of the three citations were prior to the agency's acquisition of the power to review arbitration decisions. The agency's third (most recent) citation was upset by the Court of Appeals, on other grounds, but with the with arbitration issue expressly unresolved.

^{24/} Of the precedents cited (Decision 6-7, n.8), the principal one is the last named (Seidenberg, 1987), the only reference given by UP in its formal decision-letter (July 18, 2003), denying Grother's request for NYD certification. (Supp. Pet., 2/22/05, Appendix 1, 8; Appendix 2; Appendix 3, Ex. E-4; Appendix 9, Ex. 26). UP's member of the arbitration committee at the hearing considered Seidenberg "the dean of railroad arbitrators-- the number one man.." (Supp. Pet., 2/22/05, Appendix 7, Tr. 146-47).

and claimed this approach has been followed in court rulings. (emphasis add.). (Decision 6-7).^{25/} The Decision stated that whether an employee is an official or subordinate official must be determined on a case-by-case basis, and that the agency has never held its employee classifications decisions, which the agency makes under the RLA, to be dispositive in determining a specific employee's eligibility for employee protection. (Decision 8).

Finally, as a factual matter, the STB relied upon the arbitral reference to Grother's statement describing himself as a manager and "senior officer," and the description by UP's witness describing SRMTO responsibilities at Tucson, for the arbitral decision to find Grother's duties were those of a "manager" and not those of an "employee."

1. Employee Status is Jurisdictional-Not Arbitrable.

The Board errs in finding employee status a factual matter to be determined by arbitration. Employee protection for non-agreement personnel comes from the statute, 49 U.S.C. 11326. UP correctly considers the issue "Jurisdictional," as noted in the arbitral decision, at 9, 15-16. (Supp. Pet., 2/22/05. Appendix 1, 9, 16). Although the Board may delegate certain evidentiary functions, the matter of jurisdiction/employee status is a de novo question for the Board.

The RLA requires the Board to determine eligibility for union representation on the railroads. 45 U.S.C. 151, Fifth. Employees and subordinate officials are eligible for organization, whereas

^{25/}Newborne v. Grand Trunk Western R. Co., 758 F.2d 193 (6th Cir. 1985); Edwards v. Southern Railway Company, 376 F.2d 665 (4th Cir. 1967).

officials are not. The Board cannot delegate its responsibilities to determine union eligibility under the RLA to arbitration.

Thus, the STB's decision on employee status is not a factual matter to be determined by arbitration with limited Lace Curtain review. The Board must make its own determination.

2. Relationship with Railway Labor Act. UP and Grother both recognized that "employee" for NYD eligibility turns upon whether the job classification is "subordinate official" or "employee" on the one hand, or "official" on the other hand. In short, both UP and Grother urged that 45 U.S.C. 151, fifth, and 49 U.S.C. 11326 must be in harmony. Unfortunately for UP's position in this Grother matter, UP overlooked the major ICC decisions finding that operating personnel below the level of Division Superintendent, which includes Terminal Superintendent, are generally to be classified as "subordinate officials," and thus subject to union organization. For UP's analysis, see: Supp. Pet., 2/22/05, Appendix 8, 9-15, Ex. 20-23; Appendix 10, UH-47; Appendix 11, 4-8; UP Response, 4/8/05, 18-19. For Grother's analysis, see: Supp. Pet., 2/22/05, 21-22, 29-38; Appendix 3, 15-27; Appendix 5, Ex. 22, Ex. 23; Appendix 7, 27-35.

The STB errs in finding "no merit" to the ICC's decisions on employee classification. (Decision 8). The agency specifically found that railroad employees below the grade of Division Superintendent, in a UP case, are subordinate officials or employees. Regulations Concerning Employees Under Ry. Labor Act, 289 I.C.C. 19, 24 (1953):^{26/}

^{26/} The STB decision says the ICC issued classification decisions under Ex Parte No. 72 and 72 (Sub-No. 1) between 1924 and 1953.

(Continued....)

Generally speaking, railroad employees below the grade of division superintendent are considered to be subordinate officials or employees, as the case may be.

The above citation was subsequent to Regulations Concerning Employees Under Ry. Labor Act, 268 I.C.C. 55, 57 (1947), and removed the caveat so inappropriately relied upon by the STB in its decision. (Decision 8).^{27/}

The STB decision's assertion that NYD conditions were to be accorded only to rank-and-file employees (Decision 7), is flatly wrong. UP in its initial presentation showed that the legislative history is directly to the contrary, and that it was the intent of Congress to cover employee "in addition to the rank and file employees." (Supp. Pet., 2/22/05, Appendix 8, 10).

The STB decision errs in finding the former ICC decisions on classification deal with individual situations on a case-by-case basis. (Decision 8). The classification cases are based upon groups. There have been new occupations in the railroad industry, particularly in accounting and office work, and the classification of these tasks may not have always been brought into controversy. However, the railroad operating job classifications have incurred

.....continued)

(Decision 8). However, UP showed the ICC received its classification duties and commenced issuing decisions in March 1920. (Supp. Pet., 2/22/05, Appendix 8, Ex. 21). There are references to decisions subsequent to 1953, e.g., Ex Parte No. 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials to be Included within the Term "Employee" Under the Railway Labor Act, 310 I.C.C. 845 (1960). There may be other citations. The drastic decline in employment levels, and in labor organizing efforts, may explain the reduction in classification disputes.

^{27/}The ICC's 1981 decision in Bell v. Western Maryland Railway Company, 366 I.C.C. 64 (1981), referred to the 1953 decision. 366 I.C.C. at 65 n.2.

unchanged when his SRMTO title was substituted for Terminal Superintendent.

3. Grother was Terminal Superintendent. Grother's position of Terminal Superintendent was two (and perhaps three) levels below Division Superintendent. (Supp. Pet., 2/22/05, Appendix 3, V.S. Grother (Job Classification), 2-3; Appendix 7, Tr. 19-21).

Grother's title was changed to UP's SRMTO when the merger was implemented at Tucson, but this was the same job and position he already held with SP. (Supp. Pet., 2/22/05, Appendix 8, 2, 30).

Since Grother's position was Terminal Superintendent under SP, with the identical job with UP as SRMTO after April 16, 1997, he was properly a "subordinate official" and subject to unionization under RLA. Grother therefore qualifies for NYD coverage, under the Seidenberg and other arbitral decisions (including UP's July 18, 2003 letter denying NYD coverage), irrespective of any so-called managerial duties, for the possibility of unionization, and managerial criteria, are in the disjunctive. (Supp. Pet., 2/22/05, Appendix 2; Appendix 9, Ex. 26, 38-39).^{28/}

4. Packard Description of SRMTO Duties. The STB decision recites arbitral findings of Grother statements that he considered himself a manager and "senior officer," with a list of Grother's duties as a UP SRMTO, as described by UP's witness Packard, to conclude that Grother's duties were "managerial," and thus not

^{28/} There is a difference between the STB's decision that Grother's position be subject to unionization, (Decision 3, final para.), and the STB's finding that the arbitral decision would require that Grother's position actually be covered by a union contract. (Decision 3, first full para.).

conclude that Grother's duties were "managerial," and thus not those of an "employee." The STB errs in using "manager" versus "employee" as the test, as it comes from the Labor Management Relations Act (LRMA), not the RLA, and has been distinguished by the U.S. supreme Court. (Supp. Pet., 2/22/05, 35-37, Appendix 3, 23-27, Appendix 7, 34-35). The term subordinate official includes managers and officers.

The testimony of Ken Packard as to SRMTO duties was challenged by Grother as not being in effect during early and mid-1997. Mr. Packard came to Tucson in early 1997, but was not sure the UP job duties were in effect in 1997. (Supp. Pet., 2/22/05, Appendix 3, V.S. Grother (Job Classification); Appendix 6, GH-28, 2-6); Appendix 7, Tr. 27-37, 65, 88-89).

CONCLUSION

The Board should review the January 6, 2005 arbitration and grant the appeal from the arbitration decision. The STB should issue a decision in petitioner's favor, finding the NYD conditions applicable to him, and take such other or further action as may be required, including modified procedure or remand.

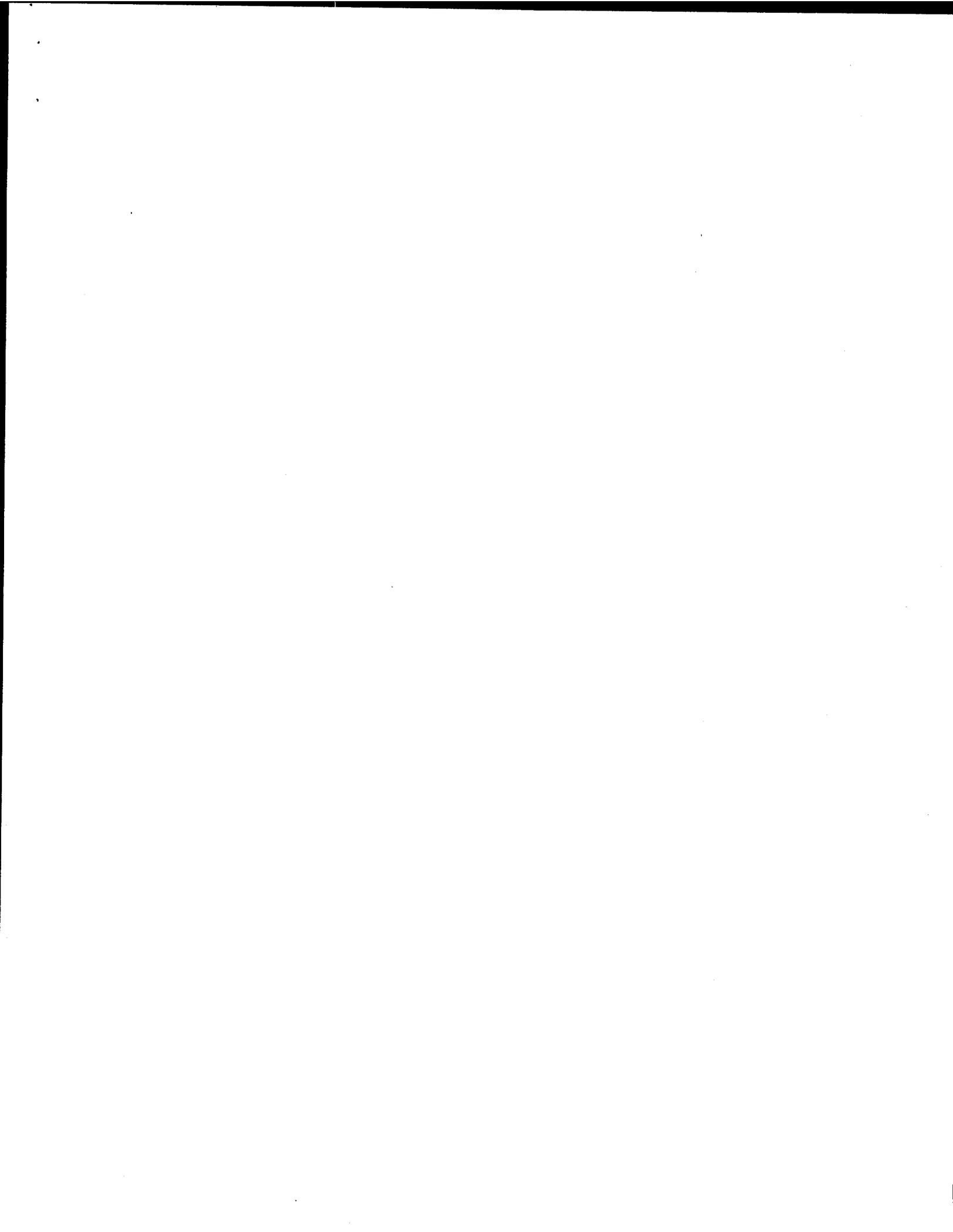
Oral argument is requested.

Respectfully submitted,


GORDON P. MacDOUGAL
1025 Connecticut Ave., N.W.
Washington DC 20036

March 20, 2006

Attorney for John E. Grother



MEMORANDUM OF AGREEMENT

BETWEEN

JOHN E. GROTHER

AND

UNION PACIFIC RAILROAD COMPANY

WHEREAS, John E. Grother (Grother) and Union Pacific Railroad Company (Union Pacific) are in dispute as to the interpretation, application, or enforcement of the so-called New York Dock protective conditions prescribed by the Surface Transportation Board (STB) in its Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (August 6, 1996); a neutral/referee having been designated January 21, 2004 by the National Mediation Board; and a decision having been issued April 21, as clarified June 10, 2004, by the STB in its Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review), and a telephone conference held June 7, 2004, among the parties and the neutral/referee, and without prejudice to the differing positions of the parties, but for the purpose of establishing procedures to permit the arbitration to proceed in light of the views of the neutral/referee,

IT IS AGREED:

A. There shall be established an arbitration committee (committee), which shall consist of three members. The member representing Grother shall be John E. Grother. The member representing Union Pacific shall be William E. Loomis. The neutral member and chairperson shall be Lynette A. Ross. Either Grother or Union Pacific may change its member of the committee by advance written notice to the other members of the committee.

B. The compensation and expenses of the Grother member shall be borne by John E. Grother. The compensation and expenses of the Union Pacific member shall be borne by Union Pacific Railroad Company. The compensation and expenses of the neutral member shall be borne equally by Grother and Union Pacific.

C. The committee shall hold its initial hearing at Washington, D.C. on October 12, 2004. The time and place for subsequent hearings, if any, shall be determined by the committee.

D. The partisan members of the committee shall serve written submissions, one upon the other, simultaneously, with copy to the neutral/chairperson, by sending via a second day delivery service on September 14, 2004. At the hearing, the parties may be heard in person, or by counsel, and they may present witnesses, statements of fact, supporting evidence, data and argument. The committee shall have the authority to require the production of such additional evidence, either oral or written, as it may desire from either party. The parties, at their discretion, may present post-hearing briefs within 20 days following the close of the hearing.

E. The committee shall have jurisdiction only to decide questions concerning the interpretation, application, or enforce-

ment of New York Dock conditions to Grother and Union Pacific. The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation and some benefits.

F. Within 45 days after the conclusion of the initial hearing and close of that record, which determines the applicability of New York Dock to Grother, the committee shall render a written decision, which shall become effective when signed by two members. If the decision finds that New York Dock is applicable to Grother, and that he may be due some compensation or some benefits, the partisan members will then attempt to agree on the measure of such compensation or benefits. If the partisan members are unable to agree on such compensation or benefits, the committee will, upon a request submitted by Grother or Union Pacific within 60 days from the effective date of the first decision, hold a subsequent hearing to determine the measure of compensation or benefits due. The schedule and procedures for advance submissions for any subsequent hearing(s) shall be by agreement of the partisan parties or, failing agreement, by the committee. Within 45 days after the subsequent hearing is concluded and the record is closed, the committee shall render a decision, setting forth the measure of compensation or benefits due Grother, which shall become effective when signed by two members.

G. Each member of the committee shall have one vote, and two members of the committee shall be competent to adopt a decision or make such other rulings and decisions as may be necessary to carry

out the functions of the committee. If an initial decision is in favor of Grother, it shall declare the applicability of New York Dock to him for the STB authorization(s) and, if a further decision is issued, it shall specify a remedy and direct the carrier to comply therewith on or before the date named in the decision.

H. The committee shall continue in existence until its decision(s) have become effective, after which it shall cease to exist, except for interpretation of its decision(s).

I. The time limits provided herein may be extended, or shortened, by mutual agreement of the parties.

Signed this 18th day of June, 2004.

FOR: JOHN E. GROTHER

Garburt MacDougal

FOR: UNION PACIFIC RAILROAD
COMPANY

[Signature]

EB

SERVICE DATE

SURFACE TRANSPORTATION BOARD

FEB 26 1996

DECISION

Finance Docket No. 28676 (Sub-No. 2)

GRAND TRUNK WESTERN RAILROAD COMPANY--MERGER--
DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY--ARBITRATION REVIEW

Decided: February 12, 1996

On April 3, 1995, the United Transportation Union (UTU or the Union) petitioned the former Interstate Commerce Commission (ICC or Commission) to review and set aside an arbitration award issued March 14, 1995, interpreting a labor protective agreement (the Agreement). GTW filed a reply on April 24, 1995. The Surface Transportation Board (Board) has been given jurisdiction over this matter.¹ In considering the petition, we will apply the Lace Curtain review standards.² Based on our review, we affirm the arbitral decision.

BACKGROUND

The terms of the Agreement were imposed in Grand Trunk Western Railroad--Control--Detroit, Toledo and Ironton Railroad Company, et al., 360 I.C.C. 498 (1979) (the 1979 Decision).³ The Agreement was one of the conditions imposed on the Commission's approval of the acquisition by the Grand Trunk Western Railroad Company (GTW) of the Detroit, Toledo and Ironton Railroad Company (DTI) and the Detroit and Toledo Shore Line Railroad (DTSL).

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the ICC and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the Act, and citations are to former sections of the statute, unless otherwise indicated.

² Chicago and North W. Transp. Co.--Abandonment, 3 I.C.C.2d 729, 735 (1987), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Review of arbitral decisions has been limited "to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Generally, the agency will not reverse an arbitrator's decision unless the decision fails to draw its essence from the conditions imposed, the arbitrator's action was outside the scope of authority granted by those conditions, or there is egregious error. Lace Curtain, 3 I.C.C.2d at 735. We do not review arbitrators' decisions on issues of causation, calculation of benefits, or resolution of other factual questions. Lace Curtain, 3 I.C.C.2d at 736.

³ The decision was embraced in Norfolk & W. Ry. Co.--Control--Detroit, T. & I. R. Co., 360 I.C.C. 498 (1979).

Finance Docket No. 28676 (Sub-No. 2)

In anticipation of the acquisition, GTW negotiated protective agreements with most of its employees, including the Agreement with the Railroad Yardmasters of America (RYA),⁴ signed September 4, 1979. The Agreement was identical in all respects to those reached with all of the other labor organizations. The Commission found in the 1979 Decision that the various protective agreements met the minimum requirements of 49 U.S.C. 11347, which requires that we impose conditions on merger transactions to protect the interests of affected employees.

The arbitration award that UTU seeks to overturn was issued by an arbitral board convened pursuant to Section 11 of New York Dock⁵ with Barry Simon as the neutral member.⁶ UTU filed claims on behalf of three GTW "yardmasters," a craft of rail employees. The first claim was filed by G.A. Wohlfeil, who held a yardmaster position until June 24, 1980. When his position was abolished, he exercised his seniority to take a lower-paying position as a switchman. The second was filed by J.A. Vandendries, a yardmaster whose position was also abolished on June 24, 1980. He exercised his seniority to become a clerk, and subsequently, was appointed a trainmaster. The third claimant, L.E. Miller, kept a yardmaster position, with a reduced salary.

The arbitral board sustained Wohlfeil's and Vandendries' claims in part and to the extent that they were timely, but dismissed Miller's. In so ruling, it held that the claimants were required to exercise their seniority to take positions in subordinate crafts to protect their rights under the Agreement. It thus permitted the carrier to charge the earnings of the subordinate position against the payments to which the employees would otherwise have been entitled. (Wohlfeil and Vandendries had argued that they were entitled to be paid yardmaster salaries, without any deduction for the salaries they were paid as a switchman and clerk respectively.) The arbitral board also held that the carrier could reduce the number of jobs on the railroad, even though the Agreement is an "attrition agreement." Finally, the arbitral board held that the laches defense barred any recovery of damages accruing before December 1992.

The Union argues that the three yardmasters were not required to exercise their seniority to take positions in other crafts. It also argues that the railroad was prohibited from eliminating Wohlfeil's and Vandendries' yardmaster positions until they voluntarily left, retired or died. Finally, the Union maintains that the laches defense is not available.

In reply, the carrier argues that UTU's appeal should be dismissed because it involves no recurring or otherwise significant issues of general importance in the interpretation of labor conditions, and thus does not fall within the scope of those warranting our review. Alternatively, GTW argues that the

⁴ RYA subsequently became a part of the United Transportation Union and is now known as the United Transportation Union - Yardmaster Department. For simplicity, the term "Union" shall refer to RYA both before and after becoming a part of UTU.

⁵ New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

⁶ Both the labor and rail parties selected one board member each. Those two members agreed to select Barry Simon as the Chairman and neutral member.

appeal must be denied because the arbitral board properly construed the Agreement.

DISCUSSION AND CONCLUSIONS

Lace Curtain Review. We will accept review because this appeal raises a significant issue of how provisions of an implementing agreement are to be interpreted in light of the New York Dock conditions on which the Agreement is based. This issue transcends questions of causation, calculation of benefits, or resolution of other factual questions.

The Agreement and New York Dock. The heart of the disagreement between the railroad and the Union concerns the effect of the Agreement on the provisions of New York Dock. The railroad argues that New York Dock applies unless it is specifically modified by the Agreement, while the Union argues that the Agreement displaces New York Dock entirely.

The arbitral board correctly agreed with the carrier. It explained that "Section I of the 1979 Agreement is clear in that it provides that all of New York Dock applies, unless the Agreement has modified any portion of those Conditions." It noted that "[a]n abridged reading of Section 1 shows that '[t]he terms and conditions imposed in New York Dock . . . shall be applied . . . , except as those terms are modified herein.'"

The Union notes that the Agreement references certain provisions of New York Dock [Section 5(a) (second paragraph) and Section 5(c), for example], but not others [such as Section 5(a)]. Because the Agreement referenced only those specific provisions, the Union argues that no other provisions were intended to be included. But, as the arbitral board noted, Section 1 of the Agreement expressly applies the provisions of New York Dock except as they are specifically modified. Under Article I, Section 5(b) of New York Dock, an employee must accept work within a subordinate craft if the employee is displaced from his or her primary craft. Thus, Wohlfeil's and Vandendries' guarantees should be reduced each month by the amount they earned as a switchman and clerk, respectively.

We also find the arbitral board's interpretation of the term "attrition agreement" to be correct. It determined that an "attrition agreement" does not prohibit a carrier from reducing the number of jobs in any class or craft. The UTU had argued that the carrier could only eliminate jobs through attrition, i.e., when the incumbent retired, died or left the railroad of his own violation. As the arbitral board noted, however, the ICC's decision in Great Northern Pacific & Burlington Lines, Inc. -- Merger -- Great Northern Railway -- In the Matter of William A. Rilling, 8 I.C.C.2d 229, 238 (1991)⁷ explained that:

to [accept labor's position] that no discharge without cause is possible is to say that the merger conditions amounted to a "job freeze" in which employers would have to retain employees even though no work was available. The courts have consistently held that a job freeze was not contemplated by Congress or the Commission when the imposition of labor protective conditions was established as a requirement for a merger's

⁷ Aff'd Rilling v. Burlington N. R.R. Co., 31 F.3d 856 (9th Cir. 1994).

Finance Docket No. 28676 (Sub-No. 2)

approval. See RLEA v. United States, 339 U.S. 142, 153 (1950).

The arbitral board correctly found that, although the Agreement (like the attrition conditions in Great Northern) extended the duration of labor protection beyond the 6-year maximum of New York Dock, it did not create a job freeze. Accord, Norfolk and Western R. Co. v. Nemitz, 404 U.S. 37, 42 (1971) (Nemitz) (purpose of labor protective conditions is to provide compensation, not freeze jobs). The Agreement contained no language restricting the carrier's right to eliminate jobs, but merely provided for compensation when that occurred.

Laches. The carrier successfully argued before the arbitral board that the claims of Vandendries and Miller should be disallowed, at least in part, because they had allegedly delayed too long (almost 7 years) in presenting their claims. The Unions had argued that the carrier waived that defense in a prior arbitration involving claims by other yardmasters⁸ arising out of the GTW acquisition of the DTI and DTSL. But the arbitral board reasonably interpreted the carrier's waiver in that earlier case only to apply to claims pending at the time of that prior arbitration, which the claims at issue here were not.

The Unions argue that because neither the Agreement nor New York Dock makes specific provision for a laches defense, the railroad may not use it. It claims that resort to laches would somehow contravene Nemitz, Reiter v. Cooper, 507 U.S. 258 (1993), and the Constitution. We disagree.

Nemitz is not on point. There, the Supreme Court invalidated an implementing agreement between labor and the carrier that reduced the level of labor protection that had previously been imposed by the ICC for a particular merger transaction. The court ruled that the agreement undermined the right of an individual employee, Nemitz, to the minimum level of protection provided for in the statute.

In this case, there has been no implementing agreement that has compromised statutorily guaranteed labor protection rights of individual employees. Rather, an arbitral panel has merely exercised its delegated authority to determine whether particular claims under the existing agreement are so stale that they should be barred. The arbitral panel is charged with determining whether particular claims are valid, a task that can be made more difficult or impossible by delays of the magnitude encountered here. As the carrier notes, it may not be possible under the circumstances to calculate appropriate offsets such as voluntary absences and to determine whether the claimant exercised his seniority rights to the fullest extent possible. In the absence of any particular statutory deadlines for filing, or of any agency rule concerning the subject, we think that it is appropriate for the arbitral board to make determinations concerning timeliness, as necessary to protect the integrity of the arbitral process.

⁸ United Transportation Union (Yardmasters) and Grand Trunk Western Railroad Company Arbitration Pursuant to Section 11, New York Dock Protective Provisions imposed by the Interstate Commerce Commission in Finance Docket No. 28676 (Sub-No. 1), John C. Fletcher, Chairman and Neutral Member, May 24, 1993 (Fletcher Board and Fletcher Award). There GTW said: "the Carrier is not arguing laches, because of a desire to put the issue to rest and hopefully, dispose of the claims that have been made by the yardmasters." Quoted in Simon Award, at 25.

Finance Docket No. 28676 (Sub-No. 2)

The Union's constitutional argument rests on an analogy between this case and Reiter, where the Supreme Court held that shippers could not avoid paying the rates published in ICC tariffs by invoking common law claims and defenses, including estoppel. The Union argues that, similarly, the carrier may not escape its obligations under section 11347 here by invoking the common law defense of laches.

Reiter does not stand for the broad proposition claimed. Reiter and related cases deal with the strict obligation to pay the filed tariff rate under the "filed rate" doctrine. Those cases do not purport to preclude the use of equitable principles in all ICC cases or in related arbitral decisions. No court, agency or arbitral precedent supports the broad interpretation of Reiter claimed by UTU here. The carrier cites ICC and arbitral precedents to establish that not only may claims be barred by laches, but also that shorter time periods than the ones at issue here have been found sufficient to bar claims. In Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad -- Merger (Arbitration Review), 5 I.C.C.2d 234 (1989) (Norfolk and Western), the agency held that "[a] delay of 11 months in appealing the award would warrant dismissal based on laches." Id., at 237.⁹

Moreover, there are numerous precedents affirming the use by federal agencies of equitable principles. United States v. Northern Pac. Ry., 288 U.S. 490, 494 (1933) (laches, emphasizing the importance of timeliness to orderly administrative procedure); National Insulation Transp. Comm. v. ICC, 683 F.2d 533, 540-541 (D.C. Cir. 1982) (ICC has broad equitable discretion in fashioning rate refund remedies); Southern Ry. v. United States, 412 F. Supp. 1122, 1151 (D.D.C. 1976) (agency should look to equity of restitution in determining whether to award refund for unlawful rate); Moss v. CAB, 521 F.2d 298, 308-309 (D.C. Cir. 1975) (same). We conclude that the fact that the laches defense is not specifically enumerated in the Act or the Agreement does not preclude GTW from invoking it here.

Application of laches to these facts was reasonable. The three claims at issue were filed in 1993. Wohlfeil's claim involved an injury that arose only 6 months before the claim was filed, and the arbitral board held that this claim was timely. But the basis for the other two claims arose in 1986, more than 7 years before the two yardmasters filed their claims. It is not persuasive to say, as the Union argued, that the claimants had not unreasonably delayed in asserting their rights because they were not certain of their rights until the Fletcher Board found on May 24, 1993, that the Agreement applied to the yardmasters.¹⁰ As the arbitral board noted, some yardmasters did protect their rights by promptly filing claims under the Agreement. It held that it was incumbent on Vandendries and Miller to do likewise. We do not find this conclusion to be egregious error under the Lace Curtain standards and we uphold the Board.

In sum, we find the arbitral board's decision to be a correct application of the law to the facts of this case and that

⁹ Although the Union claims that laches has not been recognized as a defense in arbitrations under the Railway Labor Act, it has provided no citations in support of that contention.

¹⁰ GTW asked the arbitral board to set aside the decision of the Fletcher Board. It correctly declined to do so, noting that review of arbitral decisions is properly reserved to this agency.

Finance Docket No. 28676 (Sub-No. 2)

its decision does not draw its essence from the conditions imposed. The arbitral board has not exceeded its authority; nor has it committed egregious error. Thus, we are affirming the arbitral decision and denying the appeal.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. We affirm the arbitral decision and deny UTU'S appeal.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

SERVICE DATE

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

MAR 19 1996

Finance Docket No. 28676 (Sub-No. 2)

GRAND TRUNK WESTERN RAILROAD COMPANY--MERGER--
DETROIT AND TOLEDO SHORE LINE
RAILROAD COMPANY--ARBITRATION REVIEW

March 14, 1996

NOTICE TO THE PARTIES:

The decision served in this proceeding on February 26, 1996, contained an error in the first line of page 6 of the decision. Please delete that line and insert in lieu thereof, "...its decision draws its essence from the conditions...".

Vernon A. Williams
Secretary

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

A handwritten signature in cursive script, appearing to read "Gordon P. MacDougall", written over a horizontal line.

GORDON P. MacDOUGALL

Dated at
Washington DC
March 20, 2006