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BRENDA J. COUNCIL
brenda.council@kutakrock.com

December 14, 1999

**VIA FEDEX**

Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 - Sub No. 35
In the Matter of: 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 Railroad Company, SPCSL Corp. and The Denver and Rio Grande Railroad Company

Dear Sir/Madam:

Enclosed please find ten (10) copies of Union Pacific's opposition to the request by Kathleen Sullivan for a further extension of time to file a petition to review the New York Dock arbitration award issued by John LaRocco on September 17, 1999. The original of Union Pacific's opposition was filed with the Board and served upon Ms. Sullivan via facsimile transmission on December 6, 1999.

If you should have any questions or require additional information, please call me.

Very truly yours,

Brenda J. Council

Brenda J. Council

lat

Enclosures

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BRENDA J. COUNCIL
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December 6, 1999



**VIA FACSIMILE**

Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 - Sub No. 35
In the Matter of: 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 Railroad Company. SPCSL Corp. and The Denver and Rio Grande Railroad Company

Dear Sir/Madam:

This refers to the letter from Kathleen Sullivan dated December 3, 1999, which I received via facsimile this morning. Ms. Sullivan is requesting a further extension of time to file a petition to review the New York Dock arbitration award issued by John LaRocco on September 17, 1999. By decision dated October 21, 1999, the Board granted Ms. Sullivan's request for a 60-day extension of the deadline for filing a petition for review. Ms. Sullivan is now requesting an additional 30-day extension of the filing deadline.

For the reasons set forth in Union Pacific's opposition to Ms. Sullivan's initial request for an extension of time, Union Pacific hereby opposes the request set forth in Ms. Sullivan's letter of December 3, 1999. A true and correct copy of Union Pacific's opposition to the request for extension of time filed by Ms. Sullivan on October 7, 1999, is attached hereto and incorporated herein.

In addition to the fact that the granting of the requested extension would serve no other purpose than prolong the inevitable – denial of a petition for review – Ms. Sullivan has had more than ample time to perfect her appeal. The person whose assistance Ms. Sullivan sought is not unfamiliar with this case. Quite to the contrary, Robert Huntington co-authored Ms. Sullivan's submission in the New York Dock arbitration proceeding. Thus, Mr. Huntington's unavailability during the last two weeks should not excuse Ms. Sullivan from filing her petition for review within the time period she requested.

Finally, granting Ms. Sullivan's request will not draw this matter any closer to a conclusion. Rather, we foresee further requests for extensions of time, particularly in view of the fact that Ms. Sullivan is not requesting the extension to finalize her appeal. Instead, Ms. Sullivan is requesting the extension to "determine if this is something Mr. Huntington can proceed on and, if not, to find someone else who can help me."

It is time to finally resolve this matter. Therefore, Ms. Sullivan's request for an additional 30 day extension of the deadline for filing her petition for review of Arbitrator LaRocco's award should be denied.

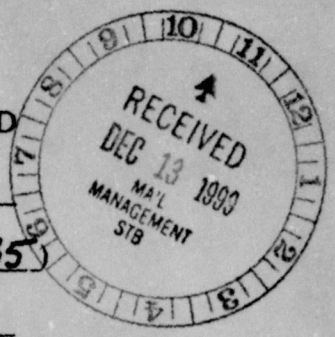
Very truly yours,

Brenda J. Council

cc: Kathleen Sullivan

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD




FINANCE DOCKET NO. 32760 (Sub-No. 35)

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)

# UNION PACIFIC RAILROAD COMPANY'S OPPOSITION TO PETITIONER'S REQUEST FOR EXTENSION OF TIME TO APPEAL ARBITRATION AWARD

Brenda J. Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000

Attorney for Union Pacific Railroad Company

UNION PACIFIC RAILROAD COMPANY'S
OPPOSITION TO PETITIONER'S REQUEST FOR EXTENSION OF TIME TO
APPEAL ARBITRATION AWARD

Union Pacific Railroad Company ("Union Pacific") hereby opposes the Request for Extension of Time to Appeal the New York Dock Arbitration Award of John LaRocco filed by Kathleen Sullivan ("Petitioner") on October 7, 1999. The Petitioner expressly waived her right to pursue a claim for New York Dock protective benefits and, therefore, her request for an extension of time to appeal the arbitration award should be denied.

I.

INTRODUCTION

This matter involves Petitioner's claim for New York Dock protective benefits in connection with the elimination of her position with the Southern Pacific Transportation Company ("Southern Pacific") on November 30, 1995. Petitioner asserts that her position was eliminated in anticipation of the merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company), which was approved by the Surface Transportation Board ("Board"). Union Pacific Corp. – Control and Merger – Southern Pacific Transportation Co., STB Finance Docket No. 32760 No. 44 (served August 12, 1996).

In June 1995, the Southern Pacific's Board of Directors approved plans to reduce future operating costs and increase productivity by eliminating 582 positions. On or about October 11, 1995, Petitioner was advised that her position was being abolished pursuant to the Board of

Directors' cost reduction plan. Petitioner was offered and accepted the Southern Pacific Non-Agreement Severance Benefit Plan, which provided for a lump-sum severance payment ($8,123.08). In consideration of the severance payment, Petitioner released Southern Pacific from any and all claims and causes of action arising from her employment or her separation from employment. Petitioner expressly waived and released Southern Pacific from any and all claims of any kind arising from or under federal, state or municipal laws pertaining to job protection. A true and correct copy of Petitioner's application for Severance Benefits and Release is attached hereto as Exhibit A.

Nearly two years after her position was eliminated and more than eighteen months after she accepted the severance package, Petitioner wrote to Union Pacific claiming to be entitled to New York Dock protective benefits. Union Pacific responded with a denial of the assertions in Petitioner's letter. After Union Pacific's second denial of the existence of any claim by Petitioner, she requested a list of arbitrators. While expressly reserving its argument that Petitioner waived and relinquished her claim for New York Dock benefits when she accepted the severance package, Union Pacific agreed to submit this matter to arbitration before Neutral John B. LaRocco.

This matter was heard on February 23, 1999. Arbitrator LaRocco issued a decision on May 21, 1999, denying petitioner's claim for New York Dock benefits. Arbitrator LaRocco found that the release executed by the Petitioner in connection with her acceptance of the severance package was binding and constituted an enforceable waiver of any New York Dock benefits to which she may have been entitled.

At the Petitioner's request, the Arbitration Committee met in executive session on September 7, 1999. Following the executive session, Arbitrator LaRocco concluded that his decision of May 21, 1999, would be the final decision of the Arbitration Committee. It is Arbitrator LaRocco's final decision, rendered September 17, 1999, Petitioner seeks to appeal. A true and correct copy of LaRocco's Arbitration Award is attached hereto as Exhibit B.

II.

ARGUMENT

A. Petitioner Waived Her Right to Appeal LaRocco's Arbitration Award

Petitioner executed an application for severance benefits and release after her position was abolished on November 30, 1995. The release specifically provided that Petitioner waived any claim for "job protection" benefits. As Arbitrator LaRocco correctly found, the waiver of Petitioner's job protection entitlements is "broad and unequivocal." Exhibit B, p. 18. Inasmuch as Petitioner has no right to claim any New York Dock benefits, there is no purpose to be served by a review of Arbitrator LaRocco's award. Thus, Petitioner's request for an extension of time to petition for review of the LaRocco Arbitration Award should be denied.

B. Petitioner Presents No Issue Warranting Review

The standard of review for arbitration awards is very limited. Chicago & N.W. Transp. Co. – Abandonment ("Lace Curtain"), 3 I.C.C. 2d 729, 735-36 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C., 862 F. 2d 330, 335-38 (D.C. Cir. 1988).[1] Under the Lace Curtain standard, the Board's review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." Id. at 736. Even when the Board determines that such issues are

presented, the scope of its review is very narrow. Interstate, 1989 ICC LEXIS 174, at *9-11 ("'If we determine that there is a significant issue that warrants our review we will employ an extremely limited standard of review according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award.'") (quoting, CSX Corp. – Control – Chessie System, Inc., 4 I.C.C. 2d 641, 649 (1988)). The Board does not review "issues on causation, the calculation of benefits, or the resolution of factual disputes." Id.; See, also, Fox Valley & Western Ltd. – Exemption Acquisition & Operation, 1993 ICC LEXIS 228, *5 (served Nov. 16, 1993); Lace Curtain, 3 I.C.C. 2d at 736. The Board will vacate an award "only when 'there is egregious error, the award fails to draw its essence from [the labor conditions], or the arbitrator exceeds the specific contract limits on his authority.'" Norfolk & W. Ry. Co. – Merger, Finance Docket No. 21510 (Sub-No. 5) at 3-4 (served May 25, 1995) (quoting, Lace Curtain at 735); Fox Valley & Western, infra, at *5.

Petitioner's request for an extension of time to file a petition for review of Arbitrator LaRocco's award does not raise any recurring or significant issues of general importance regarding the interpretation of the New York Dock conditions. Rather, Petitioner merely disagrees with Arbitrator LaRocco's factual findings on the validity of her release and the enforceability of her waiver of New York Dock protective benefits. It is well established that a New York Dock arbitration award will not be reviewed or overturned simply because a party is dissatisfied with the arbitrator's factual findings, as in this case. The Petitioner can not make a showing that Arbitrator LaRocco committed egregious error. Accordingly, the Petitioner's

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[1] The Board's (formerly the Interstate Commerce Commission's) standard of review has been repeatedly upheld by the courts. See, UTU v. ICC, 43 F. 3d 697 (D.C. Cir. 1995); BMWE v. ICC, 920 F. 2d 40,44 (D.C. Cir. 1990).

request for an extension of time to file a petition for review should be denied because the petition for review would be denied.

III.

CONCLUSION

For the foregoing reasons, the Petitioner's Request for Extension of Time to Appeal Arbitration Award should be denied.

Respectfully submitted,

By _____

Brenda J. Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000

**CERTIFICATE OF SERVICE**

I hereby certify that copies of Union Pacific's Opposition to Petitioner's Request for Extension of Time to Appeal Arbitration Award was served this 26th day of October, 1999, by first-class mail, postage prepaid, upon the following:

Kathleen Sullivan
1110 Bayswater Avenue, #302
Burlingame, Ca 94010

_____
Brenda J. Council

K. V. Sullivan

JAH

FEB 21 1996

# Southern Pacific Lines

Southern Pacific Building • One Market Plaza • San Francisco, California 94105

John R. Richards
Managing Director-Human Resources
Distribution Services
(415) 541-2710 FAX: (415) 541-2897



February 16, 1996

Ms. Kitty V. Sullivan
1110 Bayswater #302
Burlingame, CA 94010

Dear Kitty,

Enclosed you will find an executed counterpart of your Southern Pacific Lines Application for Severance Benefits and General Release. As you will note, the gross sum of $8,123.08 less applicable payroll tax deductions will be paid in a lump sum on March 20, 1996. As we discussed, I will try to secure payment to you in advance of this date.

Should you have any further questions, feel free to contact me at (415) 541-2710.

Sincerely,

ORIGINAL SIGNED

John R. Richards

bc: T. A. Hohn - w/copy of Application for Severance Benefits & Release attached.
M. J. Errico - w/copy of Application for Severance Benefits & Release attached.
Please progress lump sum payment as soon as possible. Check should be mailed to Ms. Sullivan at the above address.

EXHIBIT A

Sullivan, K. V.

**Application for Severance Benefits and Release**
**Under the Southern Pacific Lines Non-Agreement**
**Severance Benefit Plan**

---

1. In consideration of the separation allowance that I will receive, and of the additional provisions contained herein, I release and discharge Southern Pacific Transportation Company, its affiliated corporations, their predecessors, successors and assigns, and these companies; directors, officers, employees, stockholders, agents, servants, attorneys, and their successors and assigns (hereinafter referred to individually and collectively as the "Company"), past and present, from any and all liabilities, causes of action, claims, actions, or rights, known or unknown, arising from my employment or from my separation from employment with the Company, which I, my heirs or assigns, might otherwise claim or assert. I also hereby relinquish all of my employment rights and privileges with the Company and all companies affiliated with it, including, but not limited to, any and all seniority and employment rights in any scheduled employee craft or class which I may have accumulated under any applicable collective bargaining agreement.

2. Without limiting the generality of the foregoing, I specifically waive and release the Company from any and all claims of <u>any</u> kind which I could have or might have arising from or under federal, state, or municipal laws pertaining to age, sex, race, religion, veteran status, job protection, national origin, and handicap or other discrimination of any type, or under the Federal Employers Liability Act.

3. I knowingly waive the requirement of California Civil Code Section 1542, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in its favor at the time of executing the Release, which, if known by him, must have materially affected his settlement with the debtor."

Notwithstanding the provisions of Section 1542 and of any other laws of similar scope and effect, and for the purpose of implementing a full and complete release of claims, I expressly acknowledge that this Application and Release is intended to include in its effect, without limitation, all claims which I do not know or suspect to exist in my favor at the time of execution of this release.

4. I acknowledge that the only representations, promises or inducements that have been made to me to secure my signature on this document and the only consideration I will receive for signing this Release are as appear in this document. I understand that this Release is to have a broad effect and is intended to settle all claims or disputes, without limitation of any kind or nature, source or basis, whether known or unknown, relating to my employment with the Company and my separation from employment. I hereby covenant not to file a lawsuit to assert any such claims. In the event that after the date I sign this Application, Resignation and Release I file a lawsuit, or cause a lawsuit to be filed on my behalf, relating to the matters release hereunder, I agree to immediately return any payments provided by the Company to me pursuant to this Program and to reimburse the Company for any costs and attorneys fees incurred by the Company in defending any such lawsuit.

5. I expressly waive any rights or claims under the Federal Age Discrimination in Employment Act and Older Workers Benefit Protection Act in connection with my termination from employment with the Company. I have been advised to consult with an attorney, and affirm that I have had at least twenty-one (21) days in which to consider releasing age discrimination claims under the aforementioned statues. I am likewise aware of my right to revoke the waiver of age discrimination claims within seven (7) days after signing this Release.

6. If any portion or aspect of any promise, covenant, or understanding in the Release is or shall be invalid or unenforceable by operation of law, such unenforceability shall not in any way limit or otherwise affect the validity and enforceability of any other promise, covenant, or understanding, or any aspect thereof, in this Release which would otherwise be valid and enforceable by itself.

7. I hereby acknowledge that my separation allowance is subject to deductions for any applicable federal and state taxes, and lawful garnishments, if any.

8. On March 20, 1996 the Company will pay to me the gross sum of $8,123.08, less applicable deductions. In the event that I revoke the waiver of claims reference in paragraph 5 within seven (7) days after I execute this Release, I will immediately return to the Company the full amount of any sum I have heretofore received under this Plan. Any such revocation of claims under paragraph 5 shall not affect my release of all other claims hereunder, all of which are irrevocable upon execution of this Release.

9. I acknowledge that my giving of this Release is voluntary, that no coercion or undue influence has been exerted to obtain this Release, that I have had sufficient time to consider execution of this Release, and that I have received and reviewed a copy of this Release prior to executing it. I further agree that this Release shall not be subsequently revoked, rescinded, or withdrawn, and I acknowledge that the Company has no duty or obligation to hire me in the future and I covenant not to apply for employment with the Company in the future.

I have carefully read and understood all of the foregoing, and agree to all of the provisions contained in this Release. I acknowledge voluntarily executing this Release with fully knowledge of the rights I may be waiving.

Dated: 2-13-96

Kathleen V. Sullivan

Kathleen V. Sullivan

546-60-1501

(SOCIAL SECURITY NUMBER)

1110 Bayswater #302

Burlingame, CA 94010

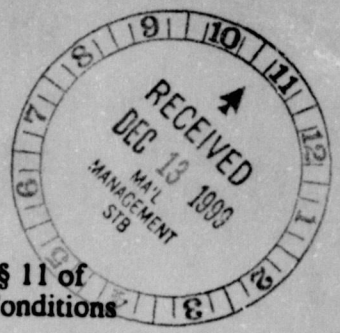
HOME ADDRESS
(STREET OR P.O. BOX)

CITY AND STATE ZIP CODE

SOUTHERN PACIFIC TRANSPORTATION CO.

Dated: 13 February 1996

John R Burkard




ARBITRATION COMMITTEE

| | | |
|---|---|---|
| In the Matter of the Arbitration between: | ) | Pursuant to Article 1, § 11 of the New York Dock Conditions |
| KATHLEEN V. SULLIVAN, | ) | |
| Claimant, | ) | Finance Docket No. 32760 |
| and | ) | |
| UNION PACIFIC RAILROAD COMPANY, | ) | **OPINION AND AWARD** |
| Carrier. | ) | |

Hearing Date: February 23, 1999
Hearing Location: Sacramento, California
Date of Award: September 17, 1999

MEMBERS OF THE COMMITTEE

Employee Member: Kathleen V. Sullivan
Carrier Member: Richard Meredith
Neutral Member: John B. LaRocco

EMPLOYEE'S STATEMENT OF THE CLAIM

Employee K. V. Sullivan's employment was terminated in anticipation of a transaction (Finance Docket No. 32760) and she was induced under stress to accept a separation allowance by fraudulent representations by the company, that she was not covered by the Protective Provisions of New York Dock and mistakenly relied on the company's misrepresentations when signing a severance agreement.

CARRIER'S STATEMENTS OF THE ISSUE

PROCEDURAL

(1) Does K. V. Sullivan, after accepting a lump-sum payment and signing the Southern Pacific Lines Application for Severance Benefits and General Release, have any right to any claim against the Carrier, including one for New York Dock benefits?

(2) Was K. V. Sullivan, at the time of the discontinuation of her non-agreement position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

MERITS

(3) If K. V. Sullivan did not relinquish her claim against the Carrier and, furthermore, was an employee under the New York Dock Conditions, was the elimination of her job due to a transaction or anticipation of a transaction subject to New York Dock benefits?

[Sullivan-UP.NYD]

## OPINION OF THE COMMITTEE

### I. INTRODUCTION

On August 6, 1996, the Surface Transportation Board (STB) approved the application of the Union Pacific Railroad Company (UP or Carrier) to control and merge with the Southern Pacific Transportation Company (SPT) and its related rail entities. [Finance Docket No. 32760.] To protect employees affected by the acquisition and merger, the STB imposed on the UP, the surviving Carrier, the employee protective conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") pursuant to the relevant enabling statute. *49 U.S.C. §§ 11343 and 11347.*

Prior to the February 23, 1999 hearing, both parties filed submissions with this New York Dock § 11 Arbitration Committee (Committee). The parties supplemented their submissions with extensive oral arguments on February 23, 1999, and the matter was deemed submitted to the Committee at the conclusion of the hearing. At the neutral member's request, the parties waived the 45-day time limit for issuing this decision as set forth in Article I, § 11(c) of the New York Dock Conditions.

### II. OVERVIEW OF THE DISPUTE

In an arbitration where Claimant seeks New York Dock protective benefits, Claimant shoulders the burden of identifying a transaction and specifying the pertinent facts regarding the transaction on which Claimant relies in accord with Article I, § 11(e) of the New York Dock Conditions. Claimant, herein, identified the UP's acquisition of the SPT as the transaction. Whether

Claimant has specified pertinent facts connecting an employment adversity to the transaction is one of the issues in dispute. However, there are two preliminary issues.

As will be more fully explained later in this Opinion, Claimant was an exempt employee at the time the SPT severed her employment. Shortly after her termination, Claimant accepted a lump sum separation payment and signed a release under the SPT's non-agreement severance benefit plan. The release and Claimant's status as an exempt employee pose two procedural issues.

The threshold issue is whether Claimant is bound by the release which she signed on February 13, 1996.[1]

The second preliminary issue is whether Claimant was an employee eligible for protection under the New York Dock Conditions.

On the merits, the issue is whether there was a causal nexus between Claimant's termination and the UP's acquisition of the SPT.

## III. PERTINENT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

Article IV of the New York Dock Conditions provide:

> 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.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

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[1] As we will discuss later herein, the UP contends that this Committee lacks jurisdiction to decide this issue.

Article I(c) of the New York Dock Conditions defines a dismissed employee as:

> "Dismissed employee" means 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.

Finally, this arbitration is conducted under the auspices of Article I, §§ 11(a), 11(c) and 11(e), which read:

> 11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee - and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.
>
> * * *
>
> (c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed
>
> * * *

> (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Claimant relies on Article I, § 10 of the New York Dock Conditions which provides:

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

## IV. JURISDICTION

At the onset, the Carrier contends that this Committee lacks jurisdiction to adjudicate the first threshold issue because the controversy does not involve interpreting the New York Dock Conditions.[2] Instead, the Carrier argues that the issue turns on applying common law principles concerning misrepresentation and duress.

Alternatively, the Carrier argues that should this Committee rescind the document which Claimant signed on February 13, 1996, the Committee should order Claimant to repay the separation allowance she received (with applicable interest) as a condition precedent to her receipt of any New York Dock protective benefits.

Claimant submits that this Committee has jurisdiction over the first issue primarily because the alleged fraud revolves around alleged misrepresentations made by SPT officials about Claimant's eligibility for New York Dock benefits. Claimant further argues that the validity of any waiver set

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[2] Claimant acknowledges that she signed the release. However, she now argues that she is not bound by the release because: (1) the SPT committed fraud (inducing her to sign the release); (2) she signed it under duress; or, (3) she signed it under a mistake of law.

forth in the release must be interpreted within the context of the UP's and SPT's alleged motive to minimize the UP's liability for New York Dock protective benefits.[3]

Based on the broad language of Article I, § 11(a), this Committee finds that it has jurisdiction to determine whether the terms of the release bind Claimant because the release, if enforceable, constitutes a waiver of her entitlement, if any, to New York Dock benefits. The first sentence of Article I, § 11(a) states that any controversy ". . . with respect to the interpretation, application or enforcement . . ." of the New York Dock Conditions is within the jurisdiction of an arbitration committee. [Emphasis added.] Put simply, whether the New York Dock Conditions apply to Claimant turns on the validity of the release. Stated differently, the term "application," in § 11(a), vests this Committee with authority to determine if Claimant expressly waived such benefits. It is true, as the Carrier points out, that an analysis of whether the New York Dock Conditions apply to Claimant involves a consideration of the common law principles concerning intentional misrepresentation, duress and mistake. Nevertheless, Claimant persuasively argues that the alleged fraud, duress and mistake are inextricably tied to alleged representations regarding her entitlement to New York Dock protective benefits.

## V. BACKGROUND AND SUMMARY OF THE FACTS

From August 1963 until December 1983, Claimant worked as a Bill Clerk and a Stenographer for the former Western Pacific Railroad.[4] During this time, Claimant was in the class

[3] The motive to which Claimant alludes was an ostensible conspiracy between the SPT and UP to take steps in advance of the merger to minimize the latter's liability exposure for employee protective benefits after the consummation of the acquisition and merger. If the document that Claimant signed is rescinded, Claimant implicitly recognizes that there might be a set off of the separation allowance she received against any protective pay that she would receive under the New York Dock Conditions.

[4] Claimant's tenure at the Western Pacific was briefly interrupted between June 1970 and October 1971.

and craft of employees represented by the former Brotherhood of Railway, Airline and Steamship Clerks [now Transportation•Communications International Union (Union)]. Ironically, Claimant's employment with the Western Pacific ended when the UP acquired the Western Pacific as approved by the Interstate Commerce Commission. Claimant accepted severance benefits under the New York Dock Conditions presumably pursuant to an implementing agreement negotiated between the UP and the Union.

The SPT hired Claimant on June 27, 1984. She first worked as a Legal Secretary, a position not represented by any labor organization. Sometime later (the record is not entirely clear as to when), Claimant assumed the position of Administrative Assistant in Marketing Services. In this position, which was not covered by any collective bargaining agreement, Claimant reported to the Director of Marketing Systems Support. Claimant earned an annual salary of $38,400.

Claimant and the Carrier differ about the content of Claimant's Administrative Assistant position. Claimant related that her primary duties consisted of clerical and secretarial tasks. Claimant stated that she performed tasks such as typing, mail distribution, photocopying and ordering supplies. She recounted, for example, that she would not generate data for a spreadsheet but simply enter data that she was given. On the other hand, the Carrier asserted (and supported its position with a job description) that Claimant's Administrative Assistant position encompassed some clerical duties but also some technical and administrative duties. The Carrier claimed that an Administrative Assistant develops and modifies correspondence, is involved with special projects and does high level, technical, computerized data applications and manipulations. The Carrier

acknowledged that Claimant's position encompasses some secretarial duties but the main duties were, according to the Carrier, at a higher echelon than a clerk.

In August 1993, May 1994 and, June 1994, Claimant sent letters to various superiors imploring them to keep her employed because, as of June 1994, she was just 13 months shy of attaining 30 years of railroad service for purposes of railroad retirement.[5]

On August 3, 1995, the UP and SPT announced their intent to merge. The applicable rail properties filed their application with the STB on November 30, 1995. The STB approved the application on August 6, 1996.

Beginning in 1991, the SPT was continually reducing forces. The number of jobs on the railroad decreased from 23,000 in 1991 to 18,000 in 1994. In June 1995, the SPT decided that it needed to eliminate another 582 positions.

According to a confidential internal SPT memorandum, SPT officials set a deadline of December 1, 1995 for eliminating Claimant's position and nine other jobs in her department.[6] The memorandum indicated that another Administrative Assistant, Maria McVeigh, would absorb the duties presently performed by Claimant.[7] According to a statement of one of the Carrier officials involved in deciding which positions to abolish, the reduction in force in Claimant's department was the result of an ongoing cost containment program.

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[5] These three pieces of correspondence show that Claimant understood that the SPT was continually engaged in downsizing (the SPT termed it "right sizing") its workforce.

[6] Evidently, eight of the 10 incumbents of the positions slated for abolishment had seniority to bump back to a class and/or craft represented by a labor organization. As stated earlier, Claimant did not hold any such seniority.

[7] Claimant alleged that Maria McVeigh asserted that she could not possibly perform the additional workload by herself.

On October 11, 1995, the SPT notified Claimant in writing, that her Administrative Assistant position would be eliminated effective November 30, 1995. The notice indicated that the position abolishment was precipitated because the SPT was losing money. According to Claimant, her supervisor merely told her that he was "sorry."

Claimant related that in mid-November 1995, she inquired of the SPT's Vice President of Human Resources (HR) whether her job was eliminated due to the impending merger and what her chances were for employment elsewhere in the SPT. According to Claimant, the HR Vice President replied that Claimant's job was eliminated as part of a downsizing program due to financial difficulties and was not eliminated as a consequence of the yet to be approved merger. The HR Vice President assured Claimant that she would attempt to find her other employment within the SPT. Claimant, the HR Vice President and the Tax Department sought to obtain the SPT's approval to establish a Legal Secretary position in the Tax Department for which Claimant was ably suited.

The SPT abolished Claimant's position on November 30, 1995. The SPT offered Claimant a severance package under its non-agreement severance benefit plan. Initially, Claimant balked at accepting any severance pay because she was awaiting word on whether the SPT would permit the establishment of the position in the Tax Department. Unfortunately, Claimant learned, in January 1996, that the Legal Secretary position in the Tax Department was not approved.

According to his written statement, Norm W. Shlinger, Claimant's former supervisor, attended a town hall meeting sometime in Winter 1995 - 1996. He returned from the meeting to tell Claimant that an SPT Executive (Tom Mathews) informed the attendees that he did not expect non-agreement personnel to be able to obtain benefits under the New York Dock Conditions. During the

same time period, the HR Vice President directly told Claimant that other exempt employees would be receiving the same severance package as Claimant.

As a result, Claimant signed the application for severance benefits and release under the Southern Pacific's non-agreement severance benefit plan on February 13, 1996. An SPT official executed the document on February 16, 1996. The Release reads:

**Application For Severance Benefits and Release Under the Southern Pacific Lines Non-Agreement Severance Benefit Plan**

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1. In consideration of the separation allowance that I will receive, and of the additional provisions contained herein, I release and discharge Southern Pacific Transportation Company, its affiliated corporations, their predecessors, successors and assigns, and these companies; directors, officers, employees stockholders, agents, servants, attorneys, and their successors and assigns (hereinafter referred to individually and collectively as the "Company"), past and present, from any and all liabilities, causes of action, claims, actions, or rights, known or unknown, arising from my employment or from my separation from employment with the Company, which I, my heirs or assigns, might otherwise claim or assert. I also hereby relinquish all of my employment rights and privileges with the Company and all companies affiliated with it, including, but not limited to, any and all seniority and employment rights in any scheduled employee craft or class which I may have accumulated under any applicable collective bargaining agreement.

2. Without limiting the generality of the foregoing, I specifically waive and release the Company from any and all claims of <u>any</u> kind which I could have or might have arising from or under federal, state, or municipal laws pertaining to age, sex, race, religion, veteran status, job protection, national origin, and handicap or other discrimination of any type, or under the Federal Employers Liability Act.

3. I knowingly waive the requirement of California Civil Code § 1542, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in its favor at the time of executing the Release, which, if known by him, must have materially affected his settlement with the debtor."

Notwithstanding the provisions of Section 1542 and of any other laws of similar scope and effect, and for the purpose of implementing a full and complete release of claims, I expressly acknowledge that this Application and Release is intended to include in its effect, without limitation, all claims which I do not know or suspect to exist in my favor at the time of execution of this release.

4. I acknowledge that the only representations, promises or inducements that have been made to me to secure my signature on this document and the only consideration I will receive for signing this Release are as appear in this document. I understand that this Release is to have a broad effect and is intended to settle all claims or disputes, without limitation of any kind or nature, source or basis, whether known or unknown, relating to my employment with the Company and my separation from employment. I hereby covenant not to file a lawsuit to assert any such claims. In the event that after the date I sign this Application, Resignation and Release I file a lawsuit, or cause a lawsuit to be filed on my behalf, relating to the matters release hereunder, I agree to immediately return any payments provided by the Company to me pursuant to this Program and to reimburse the Company for any costs and attorneys fees incurred by the Company in defending any such lawsuit.

5. I expressly waive any rights or claims under the Federal Age Discrimination in Employment Act and Older Workers Benefit Protection Act in connection with my termination from employment

with the Company. I have been advised to consult with an attorney, and affirm that I have had at least twenty-one (21) days in which to consider releasing age discrimination claims under the aforementioned statues [sic]. I am likewise aware of my right to revoke the waiver of age discrimination claims within seven (7) days after signing this Release.

6. If any portion or aspect of any promise, covenant, or understanding in the Release is or shall be invalid or unenforceable by operation of law, such unenforceability shall not in any way limit or otherwise affect the validity and enforceability of any other promise, covenant, or understanding, or any aspect thereof, in this Release which would otherwise be valid and enforceable by itself.

7. I hereby acknowledge that my separation allowance is subject to deductions for any applicable federal and state taxes, and lawful garnishments, if any.

8. On March 20, 1996 the Company will pay to me the gross sum of $8,123.08, less applicable deductions. In the event that I revoke the waiver of claims reference in paragraph 5 within seven (7) days after I execute this Release, I will immediately return to the Company the full amount of any sum I have heretofore received under this Plan. Any such revocation of claims under paragraph 5 shall not affect my release of all other claims hereunder, all of which are irrevocable upon execution of this Release.

9. I acknowledge that my giving of this Release is voluntary, that no coercion or undue influence has been exerted to obtain this Release, that I have had sufficient time to consider execution of this Release, and that I have received and reviewed a copy of this Release prior to executing it. I further agree that this Release shall not be subsequently revoked, rescinded, or withdrawn, and I acknowledge that the Company has no duty or obligation to hire me in the

> future and I covenant not to apply for employment with the Company in the future.
>
> I have carefully read and understood all of the foregoing, and agree to all of the provisions contained in this Release. I acknowledge voluntarily executing this Release with fully [sic] knowledge of the rights I may be waiving. [Emphasis in text.]

As the document specifies, in exchange for releasing the Carrier from all claims, either known or unknown, Claimant received a lump sum payment amounting to $8,123.08.

Claimant asserted that she felt pressured to sign the severance and release document because she desperately needed money. Claimant explained that she had accumulated a large debt.[8] Claimant also signed the document under the belief that she and other similarly situated non-agreement employees would not be entitled to New York Dock protective benefits.

For a short period during 1996, Claimant worked as an independent contractor through an employment agency for the SPT. On August 9, 1996, the HR Vice President notified Claimant that Claimant would not be re-employed by SPT.

Approximately one year later, on August 28, 1997, Claimant initiated the instant claim for New York Dock benefits. In the interim, Claimant stated that she had difficulty finding an attorney to represent her. She iterated that several attorneys declined to represent her because she had signed the severance and release document.

Thereafter, Claimant properly progressed her claim for New York Dock protective benefits to this Committee.

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[8] The debt began to accumulate in 1989 because, according to Claimant, she worked without a raise for seven years.

## VI. THE POSITIONS OF THE PARTIES

### A. Claimant's Position

Claimant charges that Carrier officials deliberately misled her about her eligibility for New York Dock protective benefits so that the SPT would both be a marketable entity (an attractive acquisition for the UP) and to reduce the UP's expenditure for protective benefits. In good faith, Claimant relied on the representations made by the executive at the 1996 Winter Town Hall meeting and by SPT's HR Vice President. Without being able to turn to a labor organization for help, Claimant rightly assumed that these people spoke the inviolate truth thus, she felt that she had no choice but to accept the non-agreement severance package. In addition, the SPT coerced her into signing the release in February 1996. The SPT placed Claimant in severe economic straits. Claimant tried to maintain a comfortable style of living without having a salary increase for many years. Then, the SPT callously terminated her. Without any income stream, Claimant had to accept the measly severance package just to survive. Claimant reached out for the severance pay like a drowning person grasping for a life preserver.

Claimant was helpless. She lacked any access to any unbiased expert. Had she known, for example, about Article IV of the New York Dock Conditions, she would not have accepted the non-agreement severance package. Aggravating its mistreatment of Claimant, the SPT further evaded its merger protective obligations by setting up the sham independent contracting relationship after Claimant was terminated.[9]

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[9] This relationship permitted the SPT to circumvent both railroad retirement and the New York Dock Conditions.

In sum, Claimant signed the release based on the SPT's intentional misrepresentations, under economic duress and without knowing the full extent of her rights under the New York Dock Conditions.

Claimant is an employee covered by the New York Dock Conditions. Although she held the seemingly lofty title of Administrative Assistant, Claimant regularly performed routine clerical and secretarial functions. She did not exercise any independent judgment or decision-making ability. Thus, she clearly cannot be construed as a management official exempt from the New York Dock Conditions.

The title, "Administrative Assistant," is not dispositive. Her real title should have been Secretary but, the SPT frequently changed the title of positions so that the incumbent could gain a pay raise. To determine if a person is subject to New York Dock Conditions, one must analyze the duties of a position rather than looking exclusively at the title given the position. Put simply, Claimant daily performed data entry, word processing, photocopying and mail distribution tasks just like a clerk or secretary.

In accord with Article IV of the New York Dock Conditions, Claimant was among the group of non-agreement covered employees who are covered by the New York Dock Conditions.

The SPT used downsizing as a pretext for the abolition of Claimant's job. The chronology of events conclusively demonstrates that the SPT abolished Claimant's position in anticipation of the impending UP-SPT merger and acquisition. The UP and SPT announced their intent to merge on August 3, 1995. Just two months later, on October 11, 1995, Claimant learned that her position would soon be eliminated. The timing is hardly coincidental. Obviously, the SPT was preparing for

the takeover by downsizing positions. Not surprisingly, in a rail merger, clerical functions are the first to be eliminated because it is unnecessary for the merged railroad to maintain often redundant and duplicative clerical positions. The SPT simply acted in advance. Section 10 of the New York Dock Conditions expressly provides that an employee adversely affected in anticipation of a transaction must be afforded New York Dock protective benefits.

In sum, the SPT and the UP have grossly mistreated Claimant. The SPT treated Claimant akin to leading a lamb to slaughter. The UP should be required to provide Claimant with New York Dock protective benefits.

B. The UP's Position

Claimant freely signed the non-agreement severance contract and, most notably, she accepted the lump sum payment from the SPT. Claimant failed to come forward with any evidence that the SPT committed fraud. Claimant had plenty of time to mull over whether to sign the release. The SPT abolished her job on November 30, 1995, but she did not sign the release until February 13, 1996. The SPT graciously afforded her enough time to consider the matter. Others in the SPT actively sought another position for Claimant. Economics made it infeasible for SPT to offer Claimant another position but that does not mean that SPT committed fraud or duress.

In paragraph 2 of the release, Claimant expressly waived all "job protection" claims, which implicitly encompasses New York Dock protective benefits. If Claimant did not fully understand the New York Dock Conditions, she was under a duty to check out the law. The fact that attorneys were reluctant to take her case demonstrates that she does not have a viable claim.

More importantly, Claimant knew about the New York Dock Conditions and how they operate in a merger. She was previously a beneficiary of protective benefits when the UP acquired the former Western Pacific Railroad. Therefore, she was fully aware of the terms of the New York Dock Conditions.

Finally, even if Claimant relied on the purported statements made by the HR Vice President and the SPT executive at the Town Hall meeting, these two individuals were expressing their opinion.[10] At most, they were mistaken. Therefore, any misrepresentation was wholly inadvertent. Moreover, Claimant's reliance on these statements is suspect not only because she was well versed about the New York Dock Conditions but also she could have sought expert help, including legal counsel, prior to signing the release.

Claimant does not satisfy the definition of an employee set forth in § 1, Fifth of the Railway Labor Act, 45 U.S.C. § 151, which is used to define an employee for purposes of the New York Dock Conditions. The Railway Labor Act defines an employee according to the potential scope of unionization. If the employees are subject to union representation, they are covered by New York Dock. Although a small number of employees not subject to unionization may have access to New York Dock benefits pursuant to Article IV therein, precedents clearly show that department heads and the next echelon, the staff serving department heads (Administrative Assistants), are not employees within the meaning of the New York Dock Conditions. *Newbourne v. Grand Truck Western Railroad*, 758 F.2d 193 (6th Cir. 1985).

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[10] The UP nevertheless argues that these statements were accurate inasmuch as Claimant is not an employee within the meaning of the New York Dock Conditions.

The New York Dock Conditions protect only those employees who have skills peculiar to the railroad industry, i.e., the employee's skills are not readily transferrable to jobs outside the railroad industry. *Benham v. Delaware and Hudson Railway*, NYD § 11 Arb. (O'Brien, 1986). Administrative Assistants are not covered by the New York Dock Conditions. *Maezer, Murphy, Sengheiser and Shupp v. Union Pacific and Missouri Pacific*, NYD § 11 Arb. (Seidenberg, 1987).

Claimant's job description shows that she prepared spreadsheets, budgets and performed other staff support functions that are technical and administrative in nature. Moreover, if, as Claimant asserts, she was actually performing secretarial duties, such skills are readily transferrable to many other industries.

In sum, Claimant is not an employee as that term is used in the New York Dock Conditions.

Claimant has failed to show a causal nexus between the abolition of her position and an STB approved transaction. The SPT did not need the STB's approval to abolish Claimant's job. Her duties were transferred to another SPT employee and not across rail property lines. Claimant's job was eliminated well before the STB approved the merger.

SPT eliminated Claimant's position due to cash flow difficulties rather than in anticipation of any transaction. SPT officials informed Claimant that the downsizing was necessary due to the severe financial problems confronting the SPT. Indeed, for many years, the SPT had been downsizing jobs from over 23,000 in 1991 to 18,000 in 1994. In June 1995, before any merger announcement, the SPT slated another 582 positions for abolition. Claimant, unfortunately, finally became a victim of an ongoing force reduction.

Therefore, the genesis of the elimination of Claimant's job was the SPT's dire financial situation. Since the elimination of her job was neither merger related nor accomplished in anticipation of the merger, Claimant is not entitled to New York Dock protective benefits.

VII. DISCUSSION

Paragraph 2 of the application for severance benefits and release under the Southern Pacific Lines' non-agreement severance benefit plan, which Claimant signed on February 13, 1996, specifically provides that Claimant waived any claim for "job protection" benefits. In paragraph 3, Claimant similarly waived her rights under California Civil Code § 1542. In essence, she forever relinquished any claims against the SPT even if, at the time she executed the document, she was not aware that she may have had a claim (such as, for New York Dock protective benefits).

Moreover, in paragraph 5, the release urged her to consult an attorney. Had Claimant sought legal counsel, she may have better understood her rights. The fault for not seeking counsel before she signed the release lies solely with Claimant.

The waiver of her job protection entitlements is broad and unequivocal. Thus, if the release is enforceable, the claim herein is barred.

Paragraph 4 of the release contains what is commonly called a zipper or integration clause. Stated differently, paragraph 4 bars us from examining extrinsic evidence (matters beyond the four corners of the document) to vary or alter the terms of the release. However, since Claimant is alleging duress and fraud, extrinsic evidence is permissible to show whether the release must be rescinded based on intentional misrepresentation or undue coercion.

Claimant has failed to muster sufficient evidence that the SPT or its officials intentionally misrepresented a material fact reasonably inducing Claimant to sign the release.

First, whether or not Claimant is an employee subject to the New York Dock Conditions is a very close question. As the arguments in this case demonstrate, reasonable persons and parties can offer differing views on whether Claimant was the kind of non-agreement employee contemplated by Article IV of the New York Dock Conditions.[11] Thus, when an SPT official responded to inquiries about whether non-agreement persons would be covered, the response is best characterized as an opinion or a belief rather than an outright factual assertion. Therefore, when the HR Vice President of Human Resources told Claimant she would not have access to the New York Dock Conditions, the SPT official was expressing her opinion. Expressing an opinion shows that the HR Vice President lacked the intent to deliberately mislead her. In addition, Claimant has not shown that the HR Vice President had a motive to deliberately mislead Claimant. On the contrary, the HR Vice President gave Claimant ample time to review the release and consider whether she should sign it. During this period, the HR Vice President valiantly tried to find Claimant another position on the SPT.

Second, the evidence does not show that Claimant justifiably relied on the representations made by SPT officials. Claimant had experience with New York Dock protective conditions. If, as she asserts, she was performing exactly the same sort of clerical duties that she had performed on the former Western Pacific, Claimant should have known that she might be covered by New York

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[11] This Arbitration Committee will not decide if Claimant is an employee within the meaning of the New York Dock Conditions because we are holding that the release is binding and enforceable. However, to reiterate, her status as a protected employee is a very close question. It may be that the HR Vice President was correct when she said that Claimant was not eligible for New York Dock benefits.

Dock Conditions and thus, she should have refrained from signing the release. Claimant is correct that few attorneys are adept at giving competent legal advice about rail employee protective conditions. Nevertheless, a thorough search would have uncovered a competent lawyer or a knowledgeable advisor.[12] It is apparent that Claimant did not make a diligent effort to seek counsel until long after she had signed the release.

Next, this Committee realizes that employees who lose their jobs are placed in an economic vise.[13] However, these employees are still obligated to rationally review their options. Under Claimant's theory of economic duress, every employee who lost his or her job would have an escape clause from any severance agreement on the grounds that they signed it under economic duress.

Finally, mistake of law is not generally recognized grounds for rescinding a contract. This Committee has already found that Claimant was not only urged to seek legal advice before signing the release but she was sufficiently aware of how the New York Dock Conditions operate so that she should have been alerted to the fact that, by signing the release, she was surrendering her entitlement to New York Dock benefits.

Therefore, there is insufficient evidence showing that the Carrier committed fraud or that Claimant was under undue duress when she executed the release. The release is binding. The waiver of her protective benefits is enforceable.

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[12] Claimant had competent representation in presenting her claim to this Committee. We do not find any reason why Claimant could not have located this expertise in 1995 and 1996.

[13] Claimant appears to have aggravated her poor economic situation by accumulating a large amount of debt during the six years prior to her termination.

Inasmuch as the Arbitration Committee has found that Claimant waived her entitlement, if any, to New York Dock protective benefits, this Committee need not decide if she was an employee within the meaning of those conditions or if the SPT abolished her position in anticipation of the impending merger and acquisition.

**AWARD AND ORDER**

Claim denied.

Date: September 17, 1999

___I concur/___I dissent

Kathleen V. Sullivan
Employee Member

X I concur/___I dissent

Richard Meredith
Carrier Member

John B. LaRocco
Neutral Committee Member

196167

B



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December 6, 1999

**VIA FACSIMILE**

Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 - Sub No. 35
In the Matter of: 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 Railroad Company, SPCSL Corp. and The Denver and Rio Grande Railroad Company

Dear Sir/Madam:

This refers to the letter from Kathleen Sullivan dated December 3, 1999, which I received via facsimile this morning. Ms. Sullivan is requesting a further extension of time to file a petition to review the New York Dock arbitration award issued by John LaRocco on September 17, 1999. By decision dated October 21, 1999, the Board granted Ms. Sullivan's request for a 60-day extension of the deadline for filing a petition for review. Ms. Sullivan is now requesting an additional 30-day extension of the filing deadline.

For the reasons set forth in Union Pacific's opposition to Ms. Sullivan's initial request for an extension of time, Union Pacific hereby opposes the request set forth in Ms. Sullivan's letter of December 3, 1999. A true and correct copy of Union Pacific's opposition to the request for extension of time filed by Ms. Sullivan on October 7, 1999, is attached hereto and incorporated herein.

In addition to the fact that the granting of the requested extension would serve no other purpose than prolong the inevitable – denial of a petition for review – Ms. Sullivan has had more than ample time to perfect her appeal. The person whose assistance Ms. Sullivan sought is not unfamiliar with this case. Quite to the contrary, Robert Huntington co-authored Ms. Sullivan's submission in the New York Dock arbitration proceeding. Thus, Mr. Huntington's unavailability during the last two weeks should not excuse Ms. Sullivan from filing her petition for review within the time period she requested.

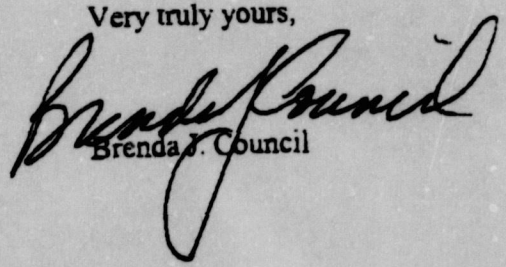
KUTAK ROCK LLP



Finally, granting Ms. Sullivan's request will not draw this matter any closer to a conclusion. Rather, we foresee further requests for extensions of time, particularly in view of the fact that Ms. Sullivan is not requesting the extension to finalize her appeal. Instead, Ms. Sullivan is requesting the extension to "determine if this is something Mr. Huntington can proceed on and, if not, to find someone else who can help me."

It is time to finally resolve this matter. Therefore, Ms. Sullivan's request for an additional 30-day extension of the deadline for filing her petition for review of Arbitrator LaRocco's award should be denied.

Very truly yours,



Brenda J. Council

cc: Kathleen Sullivan

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 32760 (Sub-No. 35)

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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)

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# UNION PACIFIC RAILROAD COMPANY'S OPPOSITION TO PETITIONER'S REQUEST FOR EXTENSION OF TIME TO APPEAL ARBITRATION AWARD

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Brenda J. Council
Kutak Rock
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(402) 346-6000

Attorney for Union Pacific Railroad Company

# UNION PACIFIC RAILROAD COMPANY'S OPPOSITION TO PETITIONER'S REQUEST FOR EXTENSION OF TIME TO APPEAL ARBITRATION AWARD

Union Pacific Railroad Company ("Union Pacific") hereby opposes the Request for Extension of Time to Appeal the New York Dock Arbitration Award of John LaRocco filed by Kathleen Sullivan ("Petitioner") on October 7, 1999. The Petitioner expressly waived her right to pursue a claim for New York Dock protective benefits and, therefore, her request for an extension of time to appeal the arbitration award should be denied.

## I.

## INTRODUCTION

This matter involves Petitioner's claim for New York Dock protective benefits in connection with the elimination of her position with the Southern Pacific Transportation Company ("Southern Pacific") on November 30, 1995. Petitioner asserts that her position was eliminated in anticipation of the merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company), which was approved by the Surface Transportation Board ("Board"). Union Pacific Corp. – Control and Merger – Southern Pacific Transportation Co., STB Finance Docket No. 32760 No. 44 (served August 12, 1996).

In June 1995, the Southern Pacific's Board of Directors approved plans to reduce future operating costs and increase productivity by eliminating 582 positions. On or about October 11, 1995, Petitioner was advised that her position was being abolished pursuant to the Board of

Directors' cost reduction plan. Petitioner was offered and accepted the Southern Pacific Non-Agreement Severance Benefit Plan, which provided for a lump-sum severance payment ($8,123.08). In consideration of the severance payment, Petitioner released Southern Pacific from any and all claims and causes of action arising from her employment or her separation from employment. Petitioner expressly waived and released Southern Pacific from any and all claims of any kind arising from or under federal, state or municipal laws pertaining to job protection. A true and correct copy of Petitioner's application for Severance Benefits and Release is attached hereto as Exhibit A.

Nearly two years after her position was eliminated and more than eighteen months after she accepted the severance package, Petitioner wrote to Union Pacific claiming to be entitled to New York Dock protective benefits. Union Pacific responded with a denial of the assertions in Petitioner's letter. After Union Pacific's second denial of the existence of any claim by Petitioner, she requested a list of arbitrators. While expressly reserving its argument that Petitioner waived and relinquished her claim for New York Dock benefits when she accepted the severance package, Union Pacific agreed to submit this matter to arbitration before Neutral John B. LaRocco.

This matter was heard on February 23, 1999. Arbitrator LaRocco issued a decision on May 21, 1999, denying petitioner's claim for New York Dock benefits. Arbitrator LaRocco found that the release executed by the Petitioner in connection with her acceptance of the severance package was binding and constituted an enforceable waiver of any New York Dock benefits to which she may have been entitled.

At the Petitioner's request, the Arbitration Committee met in executive session on September 7, 1999. Following the executive session, Arbitrator LaRocco concluded that his decision of May 21, 1999, would be the final decision of the Arbitration Committee. It is Arbitrator LaRocco's final decision, rendered September 17, 1999, Petitioner seeks to appeal. A true and correct copy of LaRocco's Arbitration Award is attached hereto as Exhibit B.

II.

ARGUMENT

A. Petitioner Waived Her Right to Appeal LaRocco's Arbitration Award

Petitioner executed an application for severance benefits and release after her position was abolished on November 30, 1995. The release specifically provided that Petitioner waived any claim for "job protection" benefits. As Arbitrator LaRocco correctly found, the waiver of Petitioner's job protection entitlements is "broad and unequivocal." Exhibit B, p. 18. Inasmuch as Petitioner has no right to claim any New York Dock benefits, there is no purpose to be served by a review of Arbitrator LaRocco's award. Thus, Petitioner's request for an extension of time to petition for review of the LaRocco Arbitration Award should be denied.

B. Petitioner Presents No Issue Warranting Review

The standard of review for arbitration awards is very limited. Chicago & N.W. Transp. Co. – Abandonment ("Lace Curtain"), 3 I.C.C. 2d 729, 735-36 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C., 862 F. 2d 330, 335-38 (D.C. Cir. 1988).[1] Under the Lace Curtain standard, the Board's review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." Id. at 736. Even when the Board determines that such issues are

presented, the scope of its review is very narrow. Interstate, 1989 ICC LEXIS 174, at *9-11 ("'If we determine that there is a significant issue that warrants our review we will employ an extremely limited standard of review according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award.'") (quoting, CSX Corp. – Control – Chessie System, Inc., 4 I.C.C. 2d 641, 649 (1988)). The Board does not review "issues on causation, the calculation of benefits, or the resolution of factual disputes." Id.; See, also, Fox Valley & Western Ltd. – Exemption Acquisition & Operation, 1993 ICC LEXIS 228, *5 (served Nov. 16, 1993); Lace Curtain, 3 I.C.C. 2d at 736. The Board will vacate an award "only when 'there is egregious error, the award fails to draw its essence from [the labor conditions], or the arbitrator exceeds the specific contract limits on his authority.'" Norfolk & W. Ry. Co. – Merger, Finance Docket No. 21510 (Sub-No. 5) at 3-4 (served May 25, 1995) (quoting, Lace Curtain at 735); Fox Valley & Western, infra, at *5.

Petitioner's request for an extension of time to file a petition for review of Arbitrator LaRocco's award does not raise any recurring or significant issues of general importance regarding the interpretation of the New York Dock conditions. Rather, Petitioner merely disagrees with Arbitrator LaRocco's factual findings on the validity of her release and the enforceability of her waiver of New York Dock protective benefits. It is well established that a New York Dock arbitration award will not be reviewed or overturned simply because a party is dissatisfied with the arbitrator's factual findings, as in this case. The Petitioner can not make a showing that Arbitrator LaRocco committed egregious error. Accordingly, the Petitioner's

[1] The Board's (formerly the Interstate Commerce Commission's) standard of review has been repeatedly upheld by the courts. See, UTU v. ICC, 43 F. 3d 697 (D.C. Cir. 1995); BMWE v. ICC, 920 F. 2d 40,44 (D.C. Cir. 1990).

request for an extension of time to file a petition for review should be denied because the petition for review would be denied.

III.

CONCLUSION

For the foregoing reasons, the Petitioner's Request for Extension of Time to Appeal Arbitration Award should be denied.

Respectfully submitted,

By _____
Brenda J. Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000

**CERTIFICATE OF SERVICE**

I hereby certify that copies of Union Pacific's Opposition to Petitioner's Request for Extension of Time to Appeal Arbitration Award was served this 26th day of October, 1999, by first-class mail, postage prepaid, upon the following:

Kathleen Sullivan
1110 Bayswater Avenue, #302
Burlingame, Ca 94010

_____
Brenda J. Council

K. V. Sullivan

LAH

FEB 21 1996

# Southern Pacific Lines

Southern Pacific Building • One Market Plaza • San Francisco, California 94105

John R. Richards
Managing Director-Human Resources
Distribution Services
(415) 541-2710 FAX: (415) 541-2897

February 16, 1996

Ms. Kitty V. Sullivan
1110 Bayswater #302
Burlingame, CA 94010

Dear Kitty,

Enclosed you will find an executed counterpart of your Southern Pacific Lines Application for Severance Benefits and General Release. As you will note, the gross sum of $8,123.08 less applicable payroll tax deductions will be paid in a lump sum on March 20, 1996. As we discussed, I will try to secure payment to you in advance of this date.

Should you have any further questions, feel free to contact me at (415) 541-2710.

Sincerely,

ORIGINAL SIGNED

John R. Richards

bc: T. A. Holm - w/copy of Application for Severance Benefits & Release attached.
M. J. Errico - w/copy of Application for Severance Benefits & Release attached.
Please progress lump sum payment as soon as possible. Check should be mailed to Ms. Sullivan at the above address.

EXHIBIT A

Sullivan, K. V.

**Application for Severance Benefits and Release Under the Southern Pacific Lines Non-Agreement Severance Benefit Plan**

1. In consideration of the separation allowance that I will receive, and of the additional provisions contained herein, I release and discharge Southern Pacific Transportation Company, its affiliated corporations, their predecessors, successors and assigns, and these companies; directors, officers, employees, stockholders, agents, servants, attorneys, and their successors and assigns (hereinafter referred to individually and collectively as the "Company"), past and present, from any and all liabilities, causes of action, claims, actions, or rights, known or unknown, arising from my employment or from my separation from employment with the Company, which I, my heirs or assigns, might otherwise claim or assert. I also hereby relinquish all of my employment rights and privileges with the Company and all companies affiliated with it, including, but not limited to, any and all seniority and employment rights in any scheduled employee craft or class which I may have accumulated under any applicable collective bargaining agreement.

2. Without limiting the generality of the foregoing, I specifically waive and release the Company from any and all claims of any kind which I could have or might have arising from or under federal, state, or municipal laws pertaining to age, sex, race, religion, veteran status, job protection, national origin, and handicap or other discrimination of any type, or under the Federal Employers Liability Act.

3. I knowingly waive the requirement of California Civil Code Section 1542, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in its favor at the time of executing the Release, which, if known by him, must have materially affected his settlement with the debtor."

Notwithstanding the provisions of Section 1542 and of any other laws of similar scope and effect, and for the purpose of implementing a full and complete release of claims, I expressly acknowledge that this Application and Release is intended to include in its effect, without limitation, all claims which I do not know or suspect to exist in my favor at the time of execution of this release.

4. I acknowledge that the only representations, promises or inducements that have been made to me to secure my signature on this document and the only consideration I will receive for signing this Release are as appear in this document. I understand that this Release is to have a broad effect and is intended to settle all claims or disputes, without limitation of any kind or nature, source or basis, whether known or unknown, relating to my employment with the Company and my separation from employment. I hereby covenant not to file a lawsuit to assert any such claims. In the event that after the date I sign this Application, Resignation and Release I file a lawsuit, or cause a lawsuit to be filed on my behalf, relating to the matters release hereunder, I agree to immediately return any payments provided by the Company to me pursuant to this Program and to reimburse the Company for any costs and attorneys fees incurred by the Company in defending any such lawsuit.

5. I expressly waive any rights or claims under the Federal Age Discrimination in Employment Act and Older Workers Benefit Protection Act in connection with my termination from employment with the Company. I have been advised to consult with an attorney, and affirm that I have had at least twenty-one (21) days in which to consider releasing age discrimination claims under the aforementioned statues. I am likewise aware of my right to revoke the waiver of age discrimination claims within seven (7) days after signing this Release.

6. If any portion or aspect of any promise, covenant, or understanding in the Release is or shall be invalid or unenforceable by operation of law, such unenforceability shall not in any way limit or otherwise affect the validity and enforceability of any other promise, covenant, or understanding, or any aspect thereof, in this Release which would otherwise be valid and enforceable by itself.

7. I hereby acknowledge that my separation allowance is subject to deductions for any applicable federal and state taxes, and lawful garnishments, if any.

8. On March 20, 1996 the Company will pay to me the gross sum of $8,123.08, less applicable deductions. In the event that I revoke the waiver of claims reference in paragraph 5 within seven (7) days after I execute this Release, I will immediately return to the Company the full amount of any sum I have heretofore received under this Plan. Any such revocation of claims under paragraph 5 shall not effect my release of all other claims hereunder, all of which are irrevocable upon execution of this Release.

9. I acknowledge that my giving of this Release is voluntary, that no coercion or undue influence has been exerted to obtain this Release, that I have had sufficient time to consider execution of this Release, and that I have received and reviewed a copy of this Release prior to executing it. I further agree that this Release shall not be subsequently revoked, rescinded, or withdrawn, and I acknowledge that the Company has no duty or obligation to hire me in the future and I covenant not to apply for employment with the Company in the future.

I have carefully read and understood all of the foregoing, and agree to all of the provisions contained in this Release. I acknowledge voluntarily executing this Release with fully knowledge of the rights I may be waiving.

Dated: 2-13-96

Kathleen V. Sullivan

Kathleen V. Sullivan

546-60-1501

(SOCIAL SECURITY NUMBER)

1110 Bayswater #302

Burlingame, CA 94010

HOME ADDRESS
(STREET OR P.O. BOX)

CITY AND STATE ZIP CODE

SOUTHERN PACIFIC TRANSPORTATION CO.

Dated: 16 February 1996

John R Richards

# ARBITRATION COMMITTEE

| | |
|---|---|
| In the Matter of the Arbitration between: | Pursuant to Article 1, § 11 of the New York Dock Conditions |
| KATHLEEN V. SULLIVAN. | |
| Claimant, | Finance Docket No. 32760 |
| and | |
| UNION PACIFIC RAILROAD COMPANY, | **OPINION AND AWARD** |
| Carrier. | |

Hearing Date: February 23, 1999
Hearing Location: Sacramento, California
Date of Award: September 17, 1999

## MEMBERS OF THE COMMITTEE

Employee Member: Kathleen V. Sullivan
Carrier Member: Richard Meredith
Neutral Member: John B. LaRocco

## EMPLOYEE'S STATEMENT OF THE CLAIM

Employee K. V. Sullivan's employment was terminated in anticipation of a transaction (Finance Docket No. 32760) and she was induced under stress to accept a separation allowance by fraudulent representations by the company, that she was not covered by the Protective Provisions of New York Dock and mistakenly relied on the company's misrepresentations when signing a severance agreement.

## CARRIER'S STATEMENTS OF THE ISSUE

### PROCEDURAL

(1) Does K. V. Sullivan, after accepting a lump-sum payment and signing the Southern Pacific Lines Application for Severance Benefits and General Release, have any right to any claim against the Carrier, including one for New York Dock benefits?

(2) Was K. V. Sullivan, at the time of the discontinuation of her non-agreement position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

### MERITS

(3) If K. V. Sullivan did not relinquish her claim against the Carrier and, furthermore, was an employee under the New York Dock Conditions, was the elimination of her job due to a transaction or anticipation of a transaction subject to New York Dock benefits?

## OPINION OF THE COMMITTEE

### I. INTRODUCTION

On August 6, 1996, the Surface Transportation Board (STB) approved the application of the Union Pacific Railroad Company (UP or Carrier) to control and merge with the Southern Pacific Transportation Company (SPT) and its related rail entities. [Finance Docket No. 32760.] To protect employees affected by the acquisition and merger, the STB imposed on the UP, the surviving Carrier, the employee protective conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") pursuant to the relevant enabling statute. *49 U.S.C. §§ 11343 and 11347.*

Prior to the February 23, 1999 hearing, both parties filed submissions with this New York Dock § 11 Arbitration Committee (Committee). The parties supplemented their submissions with extensive oral arguments on February 23, 1999, and the matter was deemed submitted to the Committee at the conclusion of the hearing. At the neutral member's request, the parties waived the 45-day time limit for issuing this decision as set forth in Article I, § 11(c) of the New York Dock Conditions.

### II. OVERVIEW OF THE DISPUTE

In an arbitration where Claimant seeks New York Dock protective benefits, Claimant shoulders the burden of identifying a transaction and specifying the pertinent facts regarding the transaction on which Claimant relies in accord with Article I, § 11(e) of the New York Dock Conditions. Claimant, herein, identified the UP's acquisition of the SPT as the transaction. Whether

Claimant has specified pertinent facts connecting an employment adversity to the transaction is one of the issues in dispute. However, there are two preliminary issues.

As will be more fully explained later in this Opinion, Claimant was an exempt employee at the time the SPT severed her employment. Shortly after her termination, Claimant accepted a lump sum separation payment and signed a release under the SPT's non-agreement severance benefit plan. The release and Claimant's status as an exempt employee pose two procedural issues.

The threshold issue is whether Claimant is bound by the release which she signed on February 13, 1996.[1]

The second preliminary issue is whether Claimant was an employee eligible for protection under the New York Dock Conditions.

On the merits, the issue is whether there was a causal nexus between Claimant's termination and the UP's acquisition of the SPT.

## III. PERTINENT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

Article IV of the New York Dock Conditions provide:

> 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.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

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[1] As we will discuss later herein, the UP contends that this Committee lacks jurisdiction to decide this issue.

Article I(c) of the New York Dock Conditions defines a dismissed employee as:

> "Dismissed employee" means 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.

Finally, this arbitration is conducted under the auspices of Article I, §§ 11(a), 11(c) and 11(e), which read:

> 11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee - and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.
>
> * * *
>
> (c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed
>
> * * *

> (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Claimant relies on Article I, § 10 of the New York Dock Conditions which provides:

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

## IV. JURISDICTION

At the onset, the Carrier contends that this Committee lacks jurisdiction to adjudicate the first threshold issue because the controversy does not involve interpreting the New York Dock Conditions.[2] Instead, the Carrier argues that the issue turns on applying common law principles concerning misrepresentation and duress.

Alternatively, the Carrier argues that should this Committee rescind the document which Claimant signed on February 13, 1996, the Committee should order Claimant to repay the separation allowance she received (with applicable interest) as a condition precedent to her receipt of any New York Dock protective benefits.

Claimant submits that this Committee has jurisdiction over the first issue primarily because the alleged fraud revolves around alleged misrepresentations made by SPT officials about Claimant's eligibility for New York Dock benefits. Claimant further argues that the validity of any waiver set

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[2] Claimant acknowledges that she signed the release. However, she now argues that she is not bound by the release because: (1) the SPT committed fraud (inducing her to sign the release); (2) she signed it under duress; or, (3) she signed it under a mistake of law.

forth in the release must be interpreted within the context of the UP's and SPT's alleged motive to minimize the UP's liability for New York Dock protective benefits.[3]

Based on the broad language of Article I, § 11(a), this Committee finds that it has jurisdiction to determine whether the terms of the release bind Claimant because the release, if enforceable, constitutes a waiver of her entitlement, if any, to New York Dock benefits. The first sentence of Article I, § 11(a) states that any controversy ". . . with respect to the interpretation, application or enforcement . . ." of the New York Dock Conditions is within the jurisdiction of an arbitration committee. [Emphasis added.] Put simply, whether the New York Dock Conditions apply to Claimant turns on the validity of the release. Stated differently, the term "application," in § 11(a), vests this Committee with authority to determine if Claimant expressly waived such benefits. It is true, as the Carrier points out, that an analysis of whether the New York Dock Conditions apply to Claimant involves a consideration of the common law principles concerning intentional misrepresentation, duress and mistake. Nevertheless, Claimant persuasively argues that the alleged fraud, duress and mistake are inextricably tied to alleged representations regarding her entitlement to New York Dock protective benefits.

## V. BACKGROUND AND SUMMARY OF THE FACTS

From August 1963 until December 1983, Claimant worked as a Bill Clerk and a Stenographer for the former Western Pacific Railroad.[4] During this time, Claimant was in the class

[3] The motive to which Claimant alludes was an ostensible conspiracy between the SPT and UP to take steps in advance of the merger to minimize the latter's liability exposure for employee protective benefits after the consummation of the acquisition and merger. If the document that Claimant signed is rescinded, Claimant implicitly recognizes that there might be a set off of the separation allowance she received against any protective pay that she would receive under the New York Dock Conditions.

[4] Claimant's tenure at the Western Pacific was briefly interrupted between June 1970 and October 1971.

and craft of employees represented by the former Brotherhood of Railway, Airline and Steamship Clerks [now Transportation-Communications International Union (Union)]. Ironically, Claimant's employment with the Western Pacific ended when the UP acquired the Western Pacific as approved by the Interstate Commerce Commission. Claimant accepted severance benefits under the New York Dock Conditions presumably pursuant to an implementing agreement negotiated between the UP and the Union.

The SPT hired Claimant on June 27, 1984. She first worked as a Legal Secretary, a position not represented by any labor organization. Sometime later (the record is not entirely clear as to when), Claimant assumed the position of Administrative Assistant in Marketing Services. In this position, which was not covered by any collective bargaining agreement, Claimant reported to the Director of Marketing Systems Support. Claimant earned an annual salary of $38,400.

Claimant and the Carrier differ about the content of Claimant's Administrative Assistant position. Claimant related that her primary duties consisted of clerical and secretarial tasks. Claimant stated that she performed tasks such as typing, mail distribution, photocopying and ordering supplies. She recounted, for example, that she would not generate data for a spreadsheet but simply enter data that she was given. On the other hand, the Carrier asserted (and supported its position with a job description) that Claimant's Administrative Assistant position encompassed some clerical duties but also some technical and administrative duties. The Carrier claimed that an Administrative Assistant develops and modifies correspondence, is involved with special projects and does high level, technical, computerized data applications and manipulations. The Carrier

acknowledged that Claimant's position encompasses some secretarial duties but the main duties were, according to the Carrier, at a higher echelon than a clerk.

In August 1993, May 1994 and, June 1994, Claimant sent letters to various superiors imploring them to keep her employed because, as of June 1994, she was just 13 months shy of attaining 30 years of railroad service for purposes of railroad retirement.[5]

On August 3, 1995, the UP and SPT announced their intent to merge. The applicable rail properties filed their application with the STB on November 30, 1995. The STB approved the application on August 6, 1996.

Beginning in 1991, the SPT was continually reducing forces. The number of jobs on the railroad decreased from 23,000 in 1991 to 18,000 in 1994. In June 1995, the SPT decided that it needed to eliminate another 582 positions.

According to a confidential internal SPT memorandum, SPT officials set a deadline of December 1, 1995 for eliminating Claimant's position and nine other jobs in her department.[6] The memorandum indicated that another Administrative Assistant, Maria McVeigh, would absorb the duties presently performed by Claimant.[7] According to a statement of one of the Carrier officials involved in deciding which positions to abolish, the reduction in force in Claimant's department was the result of an ongoing cost containment program.

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[5] These three pieces of correspondence show that Claimant understood that the SPT was continually engaged in downsizing (the SPT termed it "right sizing") its workforce.

[6] Evidently, eight of the 10 incumbents of the positions slated for abolishment had seniority to bump back to a class and/or craft represented by a labor organization. As stated earlier, Claimant did not hold any such seniority.

[7] Claimant alleged that Maria McVeigh asserted that she could not possibly perform the additional workload by herself.

On October 11, 1995, the SPT notified Claimant in writing, that her Administrative Assistant position would be eliminated effective November 30, 1995. The notice indicated that the position abolishment was precipitated because the SPT was losing money. According to Claimant, her supervisor merely told her that he was "sorry."

Claimant related that in mid-November 1995, she inquired of the SPT's Vice President of Human Resources (HR) whether her job was eliminated due to the impending merger and what her chances were for employment elsewhere in the SPT. According to Claimant, the HR Vice President replied that Claimant's job was eliminated as part of a downsizing program due to financial difficulties and was not eliminated as a consequence of the yet to be approved merger. The HR Vice President assured Claimant that she would attempt to find her other employment within the SPT. Claimant, the HR Vice President and the Tax Department sought to obtain the SPT's approval to establish a Legal Secretary position in the Tax Department for which Claimant was ably suited.

The SPT abolished Claimant's position on November 30, 1995. The SPT offered Claimant a severance package under its non-agreement severance benefit plan. Initially, Claimant balked at accepting any severance pay because she was awaiting word on whether the SPT would permit the establishment of the position in the Tax Department. Unfortunately, Claimant learned, in January 1996, that the Legal Secretary position in the Tax Department was not approved.

According to his written statement, Norm W. Shlinger, Claimant's former supervisor, attended a town hall meeting sometime in Winter 1995 - 1996. He returned from the meeting to tell Claimant that an SPT Executive (Tom Mathews) informed the attendees that he did not expect non-agreement personnel to be able to obtain benefits under the New York Dock Conditions. During the

same time period, the HR Vice President directly told Claimant that other exempt employees would be receiving the same severance package as Claimant.

As a result, Claimant signed the application for severance benefits and release under the Southern Pacific's non-agreement severance benefit plan on February 13, 1996. An SPT official executed the document on February 16, 1996. The Release reads:

**Application For Severance Benefits and Release Under the Southern Pacific Lines Non-Agreement Severance Benefit Plan**

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1. In consideration of the separation allowance that I will receive, and of the additional provisions contained herein, I release and discharge Southern Pacific Transportation Company, its affiliated corporations, their predecessors, successors and assigns, and these companies; directors, officers, employees stockholders, agents, servants, attorneys, and their successors and assigns (hereinafter referred to individually and collectively as the "Company"), past and present, from any and all liabilities, causes of action, claims, actions, or rights, known or unknown, arising from my employment or from my separation from employment with the Company, which I, my heirs or assigns, might otherwise claim or assert. I also hereby relinquish all of my employment rights and privileges with the Company and all companies affiliated with it, including, but not limited to, any and all seniority and employment rights in any scheduled employee craft or class which I may have accumulated under any applicable collective bargaining agreement.

2. Without limiting the generality of the foregoing, I specifically waive and release the Company from any and all claims of any kind which I could have or might have arising from or under federal, state, or municipal laws pertaining to age, sex, race, religion, veteran status, job protection, national origin, and handicap or other discrimination of any type, or under the Federal Employers Liability Act.

3. I knowingly waive the requirement of California Civil Code § 1542, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in its favor at the time of executing the Release, which, if known by him, must have materially affected his settlement with the debtor."

Notwithstanding the provisions of Section 1542 and of any other laws of similar scope and effect, and for the purpose of implementing a full and complete release of claims, I expressly acknowledge that this Application and Release is intended to include in its effect, without limitation, all claims which I do not know or suspect to exist in my favor at the time of execution of this release.

4. I acknowledge that the only representations, promises or inducements that have been made to me to secure my signature on this document and the only consideration I will receive for signing this Release are as appear in this document. I understand that this Release is to have a broad effect and is intended to settle all claims or disputes, without limitation of any kind or nature, source or basis, whether known or unknown, relating to my employment with the Company and my separation from employment. I hereby covenant not to file a lawsuit to assert any such claims. In the event that after the date I sign this Application, Resignation and Release I file a lawsuit, or cause a lawsuit to be filed on my behalf, relating to the matters release hereunder, I agree to immediately return any payments provided by the Company to me pursuant to this Program and to reimburse the Company for any costs and attorneys fees incurred by the Company in defending any such lawsuit.

5. I expressly waive any rights or claims under the Federal Age Discrimination in Employment Act and Older Workers Benefit Protection Act in connection with my termination from employment

with the Company. I have been advised to consult with an attorney, and affirm that I have had at least twenty-one (21) days in which to consider releasing age discrimination claims under the aforementioned statues [sic]. I am likewise aware of my right to revoke the waiver of age discrimination claims within seven (7) days after signing this Release.

6. If any portion or aspect of any promise, covenant, or understanding in the Release is or shall be invalid or unenforceable by operation of law, such unenforceability shall not in any way limit or otherwise affect the validity and enforceability of any other promise, covenant, or understanding, or any aspect thereof, in this Release which would otherwise be valid and enforceable by itself.

7. I hereby acknowledge that my separation allowance is subject to deductions for any applicable federal and state taxes, and lawful garnishments, if any.

8. On March 20, 1996 the Company will pay to me the gross sum of $8,123.08, less applicable deductions. In the event that I revoke the waiver of claims reference in paragraph 5 within seven (7) days after I execute this Release, I will immediately return to the Company the full amount of any sum I have heretofore received under this Plan. Any such revocation of claims under paragraph 5 shall not affect my release of all other claims hereunder, all of which are irrevocable upon execution of this Release.

9. I acknowledge that my giving of this Release is voluntary, that no coercion or undue influence has been exerted to obtain this Release, that I have had sufficient time to consider execution of this Release, and that I have received and reviewed a copy of this Release prior to executing it. I further agree that this Release shall not be subsequently revoked, rescinded, or withdrawn, and I acknowledge that the Company has no duty or obligation to hire me in the

> future and I covenant not to apply for employment with the Company in the future.
>
> I have carefully read and understood all of the foregoing, and agree to all of the provisions contained in this Release. I acknowledge voluntarily executing this Release with fully [sic] knowledge of the rights I may be waiving. [Emphasis in text.]

As the document specifies, in exchange for releasing the Carrier from all claims, either known or unknown, Claimant received a lump sum payment amounting to $8,123.08.

Claimant asserted that she felt pressured to sign the severance and release document because she desperately needed money. Claimant explained that she had accumulated a large debt.[8] Claimant also signed the document under the belief that she and other similarly situated non-agreement employees would not be entitled to New York Dock protective benefits.

For a short period during 1996, Claimant worked as an independent contractor through an employment agency for the SPT. On August 9, 1996, the HR Vice President notified Claimant that Claimant would not be re-employed by SPT.

Approximately one year later, on August 28, 1997, Claimant initiated the instant claim for New York Dock benefits. In the interim, Claimant stated that she had difficulty finding an attorney to represent her. She iterated that several attorneys declined to represent her because she had signed the severance and release document.

Thereafter, Claimant properly progressed her claim for New York Dock protective benefits to this Committee.

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[8] The debt began to accumulate in 1989 because, according to Claimant, she worked without a raise for seven years.

## VI. THE POSITIONS OF THE PARTIES

### A. Claimant's Position

Claimant charges that Carrier officials deliberately misled her about her eligibility for New York Dock protective benefits so that the SPT would both be a marketable entity (an attractive acquisition for the UP) and to reduce the UP's expenditure for protective benefits. In good faith, Claimant relied on the representations made by the executive at the 1996 Winter Town Hall meeting and by SPT's HR Vice President. Without being able to turn to a labor organization for help, Claimant rightly assumed that these people spoke the inviolate truth thus, she felt that she had no choice but to accept the non-agreement severance package. In addition, the SPT coerced her into signing the release in February 1996. The SPT placed Claimant in severe economic straits. Claimant tried to maintain a comfortable style of living without having a salary increase for many years. Then, the SPT callously terminated her. Without any income stream, Claimant had to accept the measly severance package just to survive. Claimant reached out for the severance pay like a drowning person grasping for a life preserver.

Claimant was helpless. She lacked any access to any unbiased expert. Had she known, for example, about Article IV of the New York Dock Conditions, she would not have accepted the non-agreement severance package. Aggravating its mistreatment of Claimant, the SPT further evaded its merger protective obligations by setting up the sham independent contracting relationship after Claimant was terminated.[9]

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[9] This relationship permitted the SPT to circumvent both railroad retirement and the New York Dock Conditions.

In sum, Claimant signed the release based on the SPT's intentional misrepresentations, under economic duress and without knowing the full extent of her rights under the New York Dock Conditions.

Claimant is an employee covered by the New York Dock Conditions. Although she held the seemingly lofty title of Administrative Assistant, Claimant regularly performed routine clerical and secretarial functions. She did not exercise any independent judgment or decision-making ability. Thus, she clearly cannot be construed as a management official exempt from the New York Dock Conditions.

The title, "Administrative Assistant," is not dispositive. Her real title should have been Secretary but, the SPT frequently changed the title of positions so that the incumbent could gain a pay raise. To determine if a person is subject to New York Dock Conditions, one must analyze the duties of a position rather than looking exclusively at the title given the position. Put simply, Claimant daily performed data entry, word processing, photocopying and mail distribution tasks just like a clerk or secretary.

In accord with Article IV of the New York Dock Conditions, Claimant was among the group of non-agreement covered employees who are covered by the New York Dock Conditions.

The SPT used downsizing as a pretext for the abolition of Claimant's job. The chronology of events conclusively demonstrates that the SPT abolished Claimant's position in anticipation of the impending UP-SPT merger and acquisition. The UP and SPT announced their intent to merge on August 3, 1995. Just two months later, on October 11, 1995, Claimant learned that her position would soon be eliminated. The timing is hardly coincidental. Obviously, the SPT was preparing for

the takeover by downsizing positions. Not surprisingly, in a rail merger, clerical functions are the first to be eliminated because it is unnecessary for the merged railroad to maintain often redundant and duplicative clerical positions. The SPT simply acted in advance. Section 10 of the New York Dock Conditions expressly provides that an employee adversely affected in anticipation of a transaction must be afforded New York Dock protective benefits.

In sum, the SPT and the UP have grossly mistreated Claimant. The SPT treated Claimant akin to leading a lamb to slaughter. The UP should be required to provide Claimant with New York Dock protective benefits.

B. The UP's Position

Claimant freely signed the non-agreement severance contract and, most notably, she accepted the lump sum payment from the SPT. Claimant failed to come forward with any evidence that the SPT committed fraud. Claimant had plenty of time to mull over whether to sign the release. The SPT abolished her job on November 30, 1995, but she did not sign the release until February 13, 1996. The SPT graciously afforded her enough time to consider the matter. Others in the SPT actively sought another position for Claimant. Economics made it infeasible for SPT to offer Claimant another position but that does not mean that SPT committed fraud or duress.

In paragraph 2 of the release, Claimant expressly waived all "job protection" claims, which implicitly encompasses New York Dock protective benefits. If Claimant did not fully understand the New York Dock Conditions, she was under a duty to check out the law. The fact that attorneys were reluctant to take her case demonstrates that she does not have a viable claim.

More importantly, Claimant knew about the New York Dock Conditions and how they operate in a merger. She was previously a beneficiary of protective benefits when the UP acquired the former Western Pacific Railroad. Therefore, she was fully aware of the terms of the New York Dock Conditions.

Finally, even if Claimant relied on the purported statements made by the HR Vice President and the SPT executive at the Town Hall meeting, these two individuals were expressing their opinion.[10] At most, they were mistaken. Therefore, any misrepresentation was wholly inadvertent. Moreover, Claimant's reliance on these statements is suspect not only because she was well versed about the New York Dock Conditions but also she could have sought expert help, including legal counsel, prior to signing the release.

Claimant does not satisfy the definition of an employee set forth in § 1, Fifth of the Railway Labor Act, 45 U.S.C. § 151, which is used to define an employee for purposes of the New York Dock Conditions. The Railway Labor Act defines an employee according to the potential scope of unionization. If the employees are subject to union representation, they are covered by New York Dock. Although a small number of employees not subject to unionization may have access to New York Dock benefits pursuant to Article IV therein, precedents clearly show that department heads and the next echelon, the staff serving department heads (Administrative Assistants), are not employees within the meaning of the New York Dock Conditions. *Newbourne v. Grand Truck Western Railroad*, 758 F.2d 193 (6th Cir. 1985).

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[10] The UP nevertheless argues that these statements were accurate inasmuch as Claimant is not an employee within the meaning of the New York Dock Conditions.

The New York Dock Conditions protect only those employees who have skills peculiar to the railroad industry, i.e., the employee's skills are not readily transferrable to jobs outside the railroad industry. *Benham v. Delaware and Hudson Railway*, NYD § 11 Arb. (O'Brien, 1986). Administrative Assistants are not covered by the New York Dock Conditions. *Maezer, Murphy, Senglaiser and Shupp v. Union Pacific and Missouri Pacific*, NYD § 11 Arb. (Seidenberg, 1987).

Claimant's job description shows that she prepared spreadsheets, budgets and performed other staff support functions that are technical and administrative in nature. Moreover, if, as Claimant asserts, she was actually performing secretarial duties, such skills are readily transferrable to many other industries.

In sum, Claimant is not an employee as that term is used in the New York Dock Conditions.

Claimant has failed to show a causal nexus between the abolition of her position and an STB approved transaction. The SPT did not need the STB's approval to abolish Claimant's job. Her duties were transferred to another SPT employee and not across rail property lines. Claimant's job was eliminated well before the STB approved the merger.

SPT eliminated Claimant's position due to cash flow difficulties rather than in anticipation of any transaction. SPT officials informed Claimant that the downsizing was necessary due to the severe financial problems confronting the SPT. Indeed, for many years, the SPT had been downsizing jobs from over 23,000 in 1991 to 18,000 in 1994. In June 1995, before any merger announcement, the SPT slated another 582 positions for abolition. Claimant, unfortunately, finally became a victim of an ongoing force reduction.

Therefore, the genesis of the elimination of Claimant's job was the SPT's dire financial situation. Since the elimination of her job was neither merger related nor accomplished in anticipation of the merger, Claimant is not entitled to New York Dock protective benefits.

VII. DISCUSSION

Paragraph 2 of the application for severance benefits and release under the Southern Pacific Lines' non-agreement severance benefit plan, which Claimant signed on February 13, 1996, specifically provides that Claimant waived any claim for "job protection" benefits. In paragraph 3, Claimant similarly waived her rights under California Civil Code § 1542. In essence, she forever relinquished any claims against the SPT even if, at the time she executed the document, she was not aware that she may have had a claim (such as, for New York Dock protective benefits).

Moreover, in paragraph 5, the release urged her to consult an attorney. Had Claimant sought legal counsel, she may have better understood her rights. The fault for not seeking counsel before she signed the release lies solely with Claimant.

The waiver of her job protection entitlements is broad and unequivocal. Thus, if the release is enforceable, the claim herein is barred.

Paragraph 4 of the release contains what is commonly called a zipper or integration clause. Stated differently, paragraph 4 bars us from examining extrinsic evidence (matters beyond the four corners of the document) to vary or alter the terms of the release. However, since Claimant is alleging duress and fraud, extrinsic evidence is permissible to show whether the release must be rescinded based on intentional misrepresentation or undue coercion.

Claimant has failed to muster sufficient evidence that the SPT or its officials intentionally misrepresented a material fact reasonably inducing Claimant to sign the release.

First, whether or not Claimant is an employee subject to the New York Dock Conditions is a very close question. As the arguments in this case demonstrate, reasonable persons and parties can offer differing views on whether Claimant was the kind of non-agreement employee contemplated by Article IV of the New York Dock Conditions.[11] Thus, when an SPT official responded to inquiries about whether non-agreement persons would be covered, the response is best characterized as an opinion or a belief rather than an outright factual assertion. Therefore, when the HR Vice President of Human Resources told Claimant she would not have access to the New York Dock Conditions, the SPT official was expressing her opinion. Expressing an opinion shows that the HR Vice President lacked the intent to deliberately mislead her. In addition, Claimant has not shown that the HR Vice President had a motive to deliberately mislead Claimant. On the contrary, the HR Vice President gave Claimant ample time to review the release and consider whether she should sign it. During this period, the HR Vice President valiantly tried to find Claimant another position on the SPT.

Second, the evidence does not show that Claimant justifiably relied on the representations made by SPT officials. Claimant had experience with New York Dock protective conditions. If, as she asserts, she was performing exactly the same sort of clerical duties that she had performed on the former Western Pacific, Claimant should have known that she might be covered by New York

---

[11] This Arbitration Committee will not decide if Claimant is an employee within the meaning of the New York Dock Conditions because we are holding that the release is binding and enforceable. However, to reiterate, her status as a protected employee is a very close question. It may be that the HR Vice President was correct when she said that Claimant was not eligible for New York Dock benefits.

Dock Conditions and thus, she should have refrained from signing the release. Claimant is correct that few attorneys are adept at giving competent legal advice about rail employee protective conditions. Nevertheless, a thorough search would have uncovered a competent lawyer or a knowledgeable advisor.[12] It is apparent that Claimant did not make a diligent effort to seek counsel until long after she had signed the release.

Next, this Committee realizes that employees who lose their jobs are placed in an economic vise.[13] However, these employees are still obligated to rationally review their options. Under Claimant's theory of economic duress, every employee who lost his or her job would have an escape clause from any severance agreement on the grounds that they signed it under economic duress.

Finally, mistake of law is not generally recognized grounds for rescinding a contract. This Committee has already found that Claimant was not only urged to seek legal advice before signing the release but she was sufficiently aware of how the New York Dock Conditions operate so that she should have been alerted to the fact that, by signing the release, she was surrendering her entitlement to New York Dock benefits.

Therefore, there is insufficient evidence showing that the Carrier committed fraud or that Claimant was under undue duress when she executed the release. The release is binding. The waiver of her protective benefits is enforceable.

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[12] Claimant had competent representation in presenting her claim to this Committee. We do not find any reason why Claimant could not have located this expertise in 1995 and 1996.

[13] Claimant appears to have aggravated her poor economic situation by accumulating a large amount of debt during the six years prior to her termination.

Inasmuch as the Arbitration Committee has found that Claimant waived her entitlement, if any, to New York Dock protective benefits, this Committee need not decide if she was an employee within the meaning of those conditions or if the SPT abolished her position in anticipation of the impending merger and acquisition.

**AWARD AND ORDER**

Claim denied.

Date: September 17, 1999

___I concur/___I dissent

Kathleen V. Sullivan
Employee Member

X I concur/___I dissent

Richard Meredith
Carrier Member

John B. LaRocco
Neutral Committee Member

STB FD 32760(SUB35) 10-27-99 B 195944

195944

KUTAK ROCK

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WASHINGTON



BRENDA J. COUNCIL
brenda.council@kutakrock.com

October 26, 1999

B

**VIA FEDEX**



Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 - Sub No. 35
In the Matter of: 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 Railroad Company, SPCSL Corp. and The Denver and Rio Grande Railroad Company

Dear Sir/Madam:

Enclosed please find the original and 11 copies of Union Pacific Railroad Company's Opposition To Petitioner's Request For Extension Of Time To Appeal Arbitration Award for filing in the above-referenced matter.

If you should have any questions or require further documentation, please do not hesitate to call me.

Very truly yours,

Brenda J. Council

lat

Enclosures

01-222251.01

195944





BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 35)

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)

# UNION PACIFIC RAILROAD COMPANY'S OPPOSITION TO PETITIONER'S REQUEST FOR EXTENSION OF TIME TO APPEAL ARBITRATION AWARD

Brenda J. Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000

Attorney for Union Pacific Railroad Company

UNION PACIFIC RAILROAD COMPANY'S
OPPOSITION TO PETITIONER'S REQUEST FOR EXTENSION OF TIME TO
APPEAL ARBITRATION AWARD

Union Pacific Railroad Company ("Union Pacific") hereby opposes the Request for Extension of Time to Appeal the New York Dock Arbitration Award of John LaRocco filed by Kathleen Sullivan ("Petitioner") on October 7, 1999. The Petitioner expressly waived her right to pursue a claim for New York Dock protective benefits and, therefore, her request for an extension of time to appeal the arbitration award should be denied.

I.

INTRODUCTION

This matter involves Petitioner's claim for New York Dock protective benefits in connection with the elimination of her position with the Southern Pacific Transportation Company ("Southern Pacific") on November 30, 1995. Petitioner asserts that her position was eliminated in anticipation of the merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company), which was approved by the Surface Transportation Board ("Board"). Union Pacific Corp. – Control and Merger – Southern Pacific Transportation Co., STB Finance Docket No. 32760 No. 44 (served August 12, 1996).

In June 1995, the Southern Pacific's Board of Directors approved plans to reduce future operating costs and increase productivity by eliminating 582 positions. On or about October 11, 1995, Petitioner was advised that her position was being abolished pursuant to the Board of

Directors' cost reduction plan. Petitioner was offered and accepted the Southern Pacific Non-Agreement Severance Benefit Plan, which provided for a lump-sum severance payment ($8,123.08). In consideration of the severance payment, Petitioner released Southern Pacific from any and all claims and causes of action arising from her employment or her separation from employment. Petitioner expressly waived and released Southern Pacific from any and all claims of any kind arising from or under federal, state or municipal laws pertaining to job protection. A true and correct copy of Petitioner's application for Severance Benefits and Release is attached hereto as Exhibit A.

Nearly two years after her position was eliminated and more than eighteen months after she accepted the severance package, Petitioner wrote to Union Pacific claiming to be entitled to New York Dock protective benefits. Union Pacific responded with a denial of the assertions in Petitioner's letter. After Union Pacific's second denial of the existence of any claim by Petitioner, she requested a list of arbitrators. While expressly reserving its argument that Petitioner waived and relinquished her claim for New York Dock benefits when she accepted the severance package, Union Pacific agreed to submit this matter to arbitration before Neutral John B. LaRocco.

This matter was heard on February 23, 1999. Arbitrator LaRocco issued a decision on May 21, 1999, denying petitioner's claim for New York Dock benefits. Arbitrator LaRocco found that the release executed by the Petitioner in connection with her acceptance of the severance package was binding and constituted an enforceable waiver of any New York Dock benefits to which she may have been entitled.

At the Petitioner's request, the Arbitration Committee met in executive session on September 7, 1999. Following the executive session, Arbitrator LaRocco concluded that his decision of May 21, 1999, would be the final decision of the Arbitration Committee. It is Arbitrator LaRocco's final decision, rendered September 17, 1999, Petitioner seeks to appeal. A true and correct copy of LaRocco's Arbitration Award is attached hereto as Exhibit B.

II.

ARGUMENT

A. Petitioner Waived Her Right to Appeal LaRocco's Arbitration Award

Petitioner executed an application for severance benefits and release after her position was abolished on November 30, 1995. The release specifically provided that Petitioner waived any claim for "job protection" benefits. As Arbitrator LaRocco correctly found, the waiver of Petitioner's job protection entitlements is "broad and unequivocal." Exhibit B, p. 18. Inasmuch as Petitioner has no right to claim any New York Dock benefits, there is no purpose to be served by a review of Arbitrator LaRocco's award. Thus, Petitioner's request for an extension of time to petition for review of the LaRocco Arbitration Award should be denied.

B. Petitioner Presents No Issue Warranting Review

The standard of review for arbitration awards is very limited. Chicago & N.W. Transp. Co. – Abandonment ("Lace Curtain"), 3 I.C.C. 2d 729, 735-36 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C., 862 F. 2d 330, 335-38 (D.C. Cir. 1988).[1] Under the Lace Curtain standard, the Board's review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." Id. at 736. Even when the Board determines that such issues are

presented, the scope of its review is very narrow. Interstate, 1989 ICC LEXIS 174, at *9-11 ("'If we determine that there is a significant issue that warrants our review we will employ an extremely limited standard of review according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award.'") (quoting, CSX Corp. – Control – Chessie System, Inc., 4 I.C.C. 2d 641, 649 (1988)). The Board does not review "issues on causation, the calculation of benefits, or the resolution of factual disputes." Id.; See, also, Fox Valley & Western Ltd. – Exemption Acquisition & Operation, 1993 ICC LEXIS 228, *5 (served Nov. 16, 1993); Lace Curtain, 3 I.C.C. 2d at 736. The Board will vacate an award "only when 'there is egregious error, the award fails to draw its essence from [the labor conditions], or the arbitrator exceeds the specific contract limits on his authority.'" Norfolk & W. Ry. Co. – Merger, Finance Docket No. 21510 (Sub-No. 5) at 3-4 (served May 25, 1995) (quoting, Lace Curtain at 735); Fox Valley & Western, infra, at *5.

Petitioner's request for an extension of time to file a petition for review of Arbitrator LaRocco's award does not raise any recurring or significant issues of general importance regarding the interpretation of the New York Dock conditions. Rather, Petitioner merely disagrees with Arbitrator LaRocco's factual findings on the validity of her release and the enforceability of her waiver of New York Dock protective benefits. It is well established that a New York Dock arbitration award will not be reviewed or overturned simply because a party is dissatisfied with the arbitrator's factual findings, as in this case. The Petitioner can not make a showing that Arbitrator LaRocco committed egregious error. Accordingly, the Petitioner's

[1] The Board's (formerly the Interstate Commerce Commission's) standard of review has been repeatedly upheld by the courts. See, UTU v. ICC, 43 F. 3d 697 (D.C. Cir. 1995); BMWE v. ICC, 920 F. 2d 40,44 (D.C. Cir. 1990).

request for an extension of time to file a petition for review should be denied because the petition for review would be denied.

III.

CONCLUSION

For the foregoing reasons, the Petitioner's Request for Extension of Time to Appeal Arbitration Award should be denied.

Respectfully submitted,

By _____

Brenda J. Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102
(402) 346-6000

**CERTIFICATE OF SERVICE**

I hereby certify that copies of Union Pacific's Opposition to Petitioner's Request for Extension of Time to Appeal Arbitration Award was served this 26th day of October, 1999, by first-class mail, postage prepaid, upon the following:

Kathleen Sullivan
1110 Bayswater Avenue, #302
Burlingame, Ca 94010

_____
Brenda J. Council

K. V. Sullivan

J.A.H.

FEB 21 1996

# Southern Pacific Lines

Southern Pacific Building • One Market Plaza • San Francisco, California 94105

John R. Richards
Managing Director-Human Resources
Distribution Services
(415) 541-2710 FAX: (415) 541-2897

February 16, 1996

Ms. Kitty V. Sullivan
1110 Bayswater #302
Burlingame, CA 94010

Dear Kitty,

Enclosed you will find an executed counterpart of your Southern Pacific Lines Application for Severance Benefits and General Release. As you will note, the gross sum of $8,123.08 less applicable payroll tax deductions will be paid in a lump sum on March 20, 1996. As we discussed, I will try to secure payment to you in advance of this date.

Should you have any further questions, feel free to contact me at (415) 541-2710.

Sincerely,

ORIGINAL SIGNED

John R. Richards

bc: T. A. Holm - w/copy of Application for Severance Benefits & Release attached.
M. J. Errico - w/copy of Application for Severance Benefits & Release attached.
Please progress lump sum payment as soon as possible. Check should be mailed to Ms. Sullivan at the above address.

EXHIBIT A

Sullivan, K. V.

**Application for Severance Benefits and Release**
**Under the Southern Pacific Lines Non-Agreement**
**Severance Benefit Plan**

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1. In consideration of the separation allowance that I will receive, and of the additional provisions contained herein, I release and discharge Southern Pacific Transportation Company, its affiliated corporations, their predecessors, successors and assigns, and these companies; directors, officers, employees, stockholders, agents, servants, attorneys, and their successors and assigns (hereinafter referred to individually and collectively as the "Company"), past and present, from any and all liabilities, causes of action, claims, actions, or rights, known or unknown, arising from my employment or from my separation from employment with the Company, which I, my heirs or assigns, might otherwise claim or assert. I also hereby relinquish all of my employment rights and privileges with the Company and all companies affiliated with it, including, but not limited to, any and all seniority and employment rights in any scheduled employee craft or class which I may have accumulated under any applicable collective bargaining agreement.

2. Without limiting the generality of the foregoing, I specifically waive and release the Company from any and all claims of any kind which I could have or might have arising from or under federal, state, or municipal laws pertaining to age, sex, race, religion, veteran status, job protection, national origin, and handicap or other discrimination of any type, or under the Federal Employers Liability Act.

3. I knowingly waive the requirement of California Civil Code Section 1542, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in its favor at the time of executing the Release, which, if known by him, must have materially affected his settlement with the debtor."

Notwithstanding the provisions of Section 1542 and of any other laws of similar scope and effect, and for the purpose of implementing a full and complete release of claims, I expressly acknowledge that this Application and Release is intended to include in its effect, without limitation, all claims which I do not know or suspect to exist in my favor at the time of execution of this release.

4. I acknowledge that the only representations, promises or inducements that have been made to me to secure my signature on this document and the only consideration I will receive for signing this Release are as appear in this document. I understand that this Release is to have a broad effect and is intended to settle all claims or disputes, without limitation of any kind or nature, source or basis, whether known or unknown, relating to my employment with the Company and my separation from employment. I hereby covenant not to file a lawsuit to assert any such claims. In the event that after the date I sign this Application, Resignation and Release I file a lawsuit, or cause a lawsuit to be filed on my behalf, relating to the matters release hereunder, I agree to immediately return any payments provided by the Company to me pursuant to this Program and to reimburse the Company for any costs and attorneys fees incurred by the Company in defending any such lawsuit.

5. I expressly waive any rights or claims under the Federal Age Discrimination in Employment Act and Older Workers Benefit Protection Act in connection with my termination from employment with the Company. I have been advised to consult with an attorney, and affirm that I have had at least twenty-one (21) days in which to consider releasing age discrimination claims under the aforementioned statues. I am likewise aware of my right to revoke the waiver of age discrimination claims within seven (7) days after signing this Release.

6. If any portion or aspect of any promise, covenant, or understanding in the Release is or shall be invalid or unenforceable by operation of law, such unenforceability shall not in any way limit or otherwise affect the validity and enforceability of any other promise, covenant, or understanding, or any aspect thereof, in this Release which would otherwise be valid and enforceable by itself.

7. I hereby acknowledge that my separation allowance is subject to deductions for any applicable federal and state taxes, and lawful garnishments, if any.

8. On March 20, 1996 the Company will pay to me the gross sum of $8,123.08, less applicable deductions. In the event that I revoke the waiver of claims reference in paragraph 5 within seven (7) days after I execute this Release, I will immediately return to the Company the full amount of any sum I have heretofore received under this Plan. Any such revocation of claims under paragraph 5 shall not affect my release of all other claims hereunder, all of which are irrevocable upon execution of this Release.

9. I acknowledge that my giving of this Release is voluntary, that no coercion or undue influence has been exerted to obtain this Release, that I have had sufficient time to consider execution of this Release, and that I have received and reviewed a copy of this Release prior to executing it. I further agree that this Release shall not be subsequently revoked, rescinded, or withdrawn, and I acknowledge that the Company has no duty or obligation to hire me in the future and I covenant not to apply for employment with the Company in the future.

I have carefully read and understood all of the foregoing, and agree to all of the provisions contained in this Release. I acknowledge voluntarily executing this Release with fully knowledge of the rights I may be waiving.

Dated: 2-13-96

Kathleen V. Sullivan

Kathleen V. Sullivan

546-60-1501

(SOCIAL SECURITY NUMBER)

1110 Bayswater #302

Burlingame, CA 94010

HOME ADDRESS
(STREET OR P.O. BOX)

CITY AND STATE ZIP CODE

SOUTHERN PACIFIC TRANSPORTATION CO.

Dated: 16 February 1996

John R Richards

ARBITRATION COMMITTEE

| | | |
|---|---|---|
| In the Matter of the Arbitration between: | ) | Pursuant to Article 1, § 11 of the New York Dock Conditions |
| KATHLEEN V. SULLIVAN, | ) | |
| Claimant, | ) | Finance Docket No. 32760 |
| and | ) | |
| UNION PACIFIC RAILROAD COMPANY, | ) | **OPINION AND AWARD** |
| Carrier. | ) | |

Hearing Date: February 23, 1999
Hearing Location: Sacramento, California
Date of Award: September 17, 1999

MEMBERS OF THE COMMITTEE

Employee Member: Kathleen V. Sullivan
Carrier Member: Richard Meredith
Neutral Member: John B. LaRocco

EMPLOYEE'S STATEMENT OF THE CLAIM

Employee K. V. Sullivan's employment was terminated in anticipation of a transaction (Finance Docket No. 32760) and she was induced under stress to accept a separation allowance by fraudulent representations by the company, that she was not covered by the Protective Provisions of New York Dock and mistakenly relied on the company's misrepresentations when signing a severance agreement.

CARRIER'S STATEMENTS OF THE ISSUE

PROCEDURAL

(1) Does K. V. Sullivan, after accepting a lump-sum payment and signing the Southern Pacific Lines Application for Severance Benefits and General Release, have any right to any claim against the Carrier, including one for New York Dock benefits?

(2) Was K. V. Sullivan, at the time of the discontinuation of her non-agreement position with the service of Southern Pacific Railroad Company, an "employee" subject to the protection of the New York Dock Conditions?

MERITS

(3) If K. V. Sullivan did not relinquish her claim against the Carrier and, furthermore, was an employee under the New York Dock Conditions, was the elimination of her job due to a transaction or anticipation of a transaction subject to New York Dock benefits?

[Sullivan-UP.NYD]

## OPINION OF THE COMMITTEE

### I. INTRODUCTION

On August 6, 1996, the Surface Transportation Board (STB) approved the application of the Union Pacific Railroad Company (UP or Carrier) to control and merge with the Southern Pacific Transportation Company (SPT) and its related rail entities. [Finance Docket No. 32760.] To protect employees affected by the acquisition and merger, the STB imposed on the UP, the surviving Carrier, the employee protective conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") pursuant to the relevant enabling statute. *49 U.S.C. §§ 11343 and 11347.*

Prior to the February 23, 1999 hearing, both parties filed submissions with this New York Dock § 11 Arbitration Committee (Committee). The parties supplemented their submissions with extensive oral arguments on February 23, 1999, and the matter was deemed submitted to the Committee at the conclusion of the hearing. At the neutral member's request, the parties waived the 45-day time limit for issuing this decision as set forth in Article I, § 11(c) of the New York Dock Conditions.

### II. OVERVIEW OF THE DISPUTE

In an arbitration where Claimant seeks New York Dock protective benefits, Claimant shoulders the burden of identifying a transaction and specifying the pertinent facts regarding the transaction on which Claimant relies in accord with Article I, § 11(e) of the New York Dock Conditions. Claimant, herein, identified the UP's acquisition of the SPT as the transaction. Whether

Claimant has specified pertinent facts connecting an employment adversity to the transaction is one of the issues in dispute. However, there are two preliminary issues.

As will be more fully explained later in this Opinion, Claimant was an exempt employee at the time the SPT severed her employment. Shortly after her termination, Claimant accepted a lump sum separation payment and signed a release under the SPT's non-agreement severance benefit plan. The release and Claimant's status as an exempt employee pose two procedural issues.

The threshold issue is whether Claimant is bound by the release which she signed on February 13, 1996.[1]

The second preliminary issue is whether Claimant was an employee eligible for protection under the New York Dock Conditions.

On the merits, the issue is whether there was a causal nexus between Claimant's termination and the UP's acquisition of the SPT.

## III. PERTINENT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

Article IV of the New York Dock Conditions provide:

> 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.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

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[1] As we will discuss later herein, the UP contends that this Committee lacks jurisdiction to decide this issue.

Article I(c) of the New York Dock Conditions defines a dismissed employee as:

> "Dismissed employee" means 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.

Finally, this arbitration is conducted under the auspices of Article I, §§ 11(a), 11(c) and 11(e), which read:

> 11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee - and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.
>
> * * *
>
> (c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed
>
> * * *

> (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Claimant relies on Article I, § 10 of the New York Dock Conditions which provides:

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

## IV. JURISDICTION

At the onset, the Carrier contends that this Committee lacks jurisdiction to adjudicate the first threshold issue because the controversy does not involve interpreting the New York Dock Conditions.[2] Instead, the Carrier argues that the issue turns on applying common law principles concerning misrepresentation and duress.

Alternatively, the Carrier argues that should this Committee rescind the document which Claimant signed on February 13, 1996, the Committee should order Claimant to repay the separation allowance she received (with applicable interest) as a condition precedent to her receipt of any New York Dock protective benefits.

Claimant submits that this Committee has jurisdiction over the first issue primarily because the alleged fraud revolves around alleged misrepresentations made by SPT officials about Claimant's eligibility for New York Dock benefits. Claimant further argues that the validity of any waiver set

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[2] Claimant acknowledges that she signed the release. However, she now argues that she is not bound by the release because: (1) the SPT committed fraud (inducing her to sign the release); (2) she signed it under duress; or, (3) she signed it under a mistake of law.

forth in the release must be interpreted within the context of the UP's and SPT's alleged motive to minimize the UP's liability for New York Dock protective benefits.[3]

Based on the broad language of Article I, § 11(a), this Committee finds that it has jurisdiction to determine whether the terms of the release bind Claimant because the release, if enforceable, constitutes a waiver of her entitlement, if any, to New York Dock benefits. The first sentence of Article I, § 11(a) states that any controversy ". . . with respect to the interpretation, application or enforcement . . ." of the New York Dock Conditions is within the jurisdiction of an arbitration committee. [Emphasis added.] Put simply, whether the New York Dock Conditions apply to Claimant turns on the validity of the release. Stated differently, the term "application," in § 11(a), vests this Committee with authority to determine if Claimant expressly waived such benefits. It is true, as the Carrier points out, that an analysis of whether the New York Dock Conditions apply to Claimant involves a consideration of the common law principles concerning intentional misrepresentation, duress and mistake. Nevertheless, Claimant persuasively argues that the alleged fraud, duress and mistake are inextricably tied to alleged representations regarding her entitlement to New York Dock protective benefits.

## V. BACKGROUND AND SUMMARY OF THE FACTS

From August 1963 until December 1983, Claimant worked as a Bill Clerk and a Stenographer for the former Western Pacific Railroad.[4] During this time, Claimant was in the class

[3] The motive to which Claimant alludes was an ostensible conspiracy between the SPT and UP to take steps in advance of the merger to minimize the latter's liability exposure for employee protective benefits after the consummation of the acquisition and merger. If the document that Claimant signed is rescinded, Claimant implicitly recognizes that there might be a set off of the separation allowance she received against any protective pay that she would receive under the New York Dock Conditions.

[4] Claimant's tenure at the Western Pacific was briefly interrupted between June 1970 and October 1971.

and craft of employees represented by the former Brotherhood of Railway, Airline and Steamship Clerks [now Transportation•Communications International Union (Union)]. Ironically, Claimant's employment with the Western Pacific ended when the UP acquired the Western Pacific as approved by the Interstate Commerce Commission. Claimant accepted severance benefits under the New York Dock Conditions presumably pursuant to an implementing agreement negotiated between the UP and the Union.

The SPT hired Claimant on June 27, 1984. She first worked as a Legal Secretary, a position not represented by any labor organization. Sometime later (the record is not entirely clear as to when), Claimant assumed the position of Administrative Assistant in Marketing Services. In this position, which was not covered by any collective bargaining agreement, Claimant reported to the Director of Marketing Systems Support. Claimant earned an annual salary of $38,400.

Claimant and the Carrier differ about the content of Claimant's Administrative Assistant position. Claimant related that her primary duties consisted of clerical and secretarial tasks. Claimant stated that she performed tasks such as typing, mail distribution, photocopying and ordering supplies. She recounted, for example, that she would not generate data for a spreadsheet but simply enter data that she was given. On the other hand, the Carrier asserted (and supported its position with a job description) that Claimant's Administrative Assistant position encompassed some clerical duties but also some technical and administrative duties. The Carrier claimed that an Administrative Assistant develops and modifies correspondence, is involved with special projects and does high level, technical, computerized data applications and manipulations. The Carrier

acknowledged that Claimant's position encompasses some secretarial duties but the main duties were, according to the Carrier, at a higher echelon than a clerk.

In August 1993, May 1994 and, June 1994, Claimant sent letters to various superiors imploring them to keep her employed because, as of June 1994, she was just 13 months shy of attaining 30 years of railroad service for purposes of railroad retirement.[5]

On August 3, 1995, the UP and SPT announced their intent to merge. The applicable rail properties filed their application with the STB on November 30, 1995. The STB approved the application on August 6, 1996.

Beginning in 1991, the SPT was continually reducing forces. The number of jobs on the railroad decreased from 23,000 in 1991 to 18,000 in 1994. In June 1995, the SPT decided that it needed to eliminate another 582 positions.

According to a confidential internal SPT memorandum, SPT officials set a deadline of December 1, 1995 for eliminating Claimant's position and nine other jobs in her department.[6] The memorandum indicated that another Administrative Assistant, Maria McVeigh, would absorb the duties presently performed by Claimant.[7] According to a statement of one of the Carrier officials involved in deciding which positions to abolish, the reduction in force in Claimant's department was the result of an ongoing cost containment program.

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[5] These three pieces of correspondence show that Claimant understood that the SPT was continually engaged in downsizing (the SPT termed it "right sizing") its workforce.

[6] Evidently, eight of the 10 incumbents of the positions slated for abolishment had seniority to bump back to a class and/or craft represented by a labor organization. As stated earlier, Claimant did not hold any such seniority.

[7] Claimant alleged that Maria McVeigh asserted that she could not possibly perform the additional workload by herself.

On October 11, 1995, the SPT notified Claimant in writing, that her Administrative Assistant position would be eliminated effective November 30, 1995. The notice indicated that the position abolishment was precipitated because the SPT was losing money. According to Claimant, her supervisor merely told her that he was "sorry."

Claimant related that in mid-November 1995, she inquired of the SPT's Vice President of Human Resources (HR) whether her job was eliminated due to the impending merger and what her chances were for employment elsewhere in the SPT. According to Claimant, the HR Vice President replied that Claimant's job was eliminated as part of a downsizing program due to financial difficulties and was not eliminated as a consequence of the yet to be approved merger. The HR Vice President assured Claimant that she would attempt to find her other employment within the SPT. Claimant, the HR Vice President and the Tax Department sought to obtain the SPT's approval to establish a Legal Secretary position in the Tax Department for which Claimant was ably suited.

The SPT abolished Claimant's position on November 30, 1995. The SPT offered Claimant a severance package under its non-agreement severance benefit plan. Initially, Claimant balked at accepting any severance pay because she was awaiting word on whether the SPT would permit the establishment of the position in the Tax Department. Unfortunately, Claimant learned, in January 1996, that the Legal Secretary position in the Tax Department was not approved.

According to his written statement, Norm W. Shlinger, Claimant's former supervisor, attended a town hall meeting sometime in Winter 1995 - 1996. He returned from the meeting to tell Claimant that an SPT Executive (Tom Mathews) informed the attendees that he did not expect non-agreement personnel to be able to obtain benefits under the New York Dock Conditions. During the

same time period, the HR Vice President directly told Claimant that other exempt employees would be receiving the same severance package as Claimant.

As a result, Claimant signed the application for severance benefits and release under the Southern Pacific's non-agreement severance benefit plan on February 13, 1996. An SPT official executed the document on February 16, 1996. The Release reads:

**Application For Severance Benefits and Release Under the Southern Pacific Lines Non-Agreement Severance Benefit Plan**

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1. In consideration of the separation allowance that I will receive, and of the additional provisions contained herein, I release and discharge Southern Pacific Transportation Company, its affiliated corporations, their predecessors, successors and assigns, and these companies; directors, officers, employees stockholders, agents, servants, attorneys, and their successors and assigns (hereinafter referred to individually and collectively as the "Company"), past and present, from any and all liabilities, causes of action, claims, actions, or rights, known or unknown, arising from my employment or from my separation from employment with the Company, which I, my heirs or assigns, might otherwise claim or assert. I also hereby relinquish all of my employment rights and privileges with the Company and all companies affiliated with it, including, but not limited to, any and all seniority and employment rights in any scheduled employee craft or class which I may have accumulated under any applicable collective bargaining agreement.

2. Without limiting the generality of the foregoing, I specifically waive and release the Company from any and all claims of any kind which I could have or might have arising from or under federal, state, or municipal laws pertaining to age, sex, race, religion, veteran status, job protection, national origin, and handicap or other discrimination of any type, or under the Federal Employers Liability Act.

3. I knowingly waive the requirement of California Civil Code § 1542, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in its favor at the time of executing the Release, which, if known by him, must have materially affected his settlement with the debtor."

Notwithstanding the provisions of Section 1542 and of any other laws of similar scope and effect, and for the purpose of implementing a full and complete release of claims, I expressly acknowledge that this Application and Release is intended to include in its effect, without limitation, all claims which I do not know or suspect to exist in my favor at the time of execution of this release.

4. I acknowledge that the only representations, promises or inducements that have been made to me to secure my signature on this document and the only consideration I will receive for signing this Release are as appear in this document. I understand that this Release is to have a broad effect and is intended to settle all claims or disputes, without limitation of any kind or nature, source or basis, whether known or unknown, relating to my employment with the Company and my separation from employment. I hereby covenant not to file a lawsuit to assert any such claims. In the event that after the date I sign this Application, Resignation and Release I file a lawsuit, or cause a lawsuit to be filed on my behalf, relating to the matters release hereunder, I agree to immediately return any payments provided by the Company to me pursuant to this Program and to reimburse the Company for any costs and attorneys fees incurred by the Company in defending any such lawsuit.

5. I expressly waive any rights or claims under the Federal Age Discrimination in Employment Act and Older Workers Benefit Protection Act in connection with my termination from employment

with the Company. I have been advised to consult with an attorney, and affirm that I have had at least twenty-one (21) days in which to consider releasing age discrimination claims under the aforementioned statues [sic]. I am likewise aware of my right to revoke the waiver of age discrimination claims within seven (7) days after signing this Release.

6. If any portion or aspect of any promise, covenant, or understanding in the Release is or shall be invalid or unenforceable by operation of law, such unenforceability shall not in any way limit or otherwise affect the validity and enforceability of any other promise, covenant, or understanding, or any aspect thereof, in this Release which would otherwise be valid and enforceable by itself.

7. I hereby acknowledge that my separation allowance is subject to deductions for any applicable federal and state taxes, and lawful garnishments, if any.

8. On March 20, 1996 the Company will pay to me the gross sum of $8,123.08, less applicable deductions. In the event that I revoke the waiver of claims reference in paragraph 5 within seven (7) days after I execute this Release, I will immediately return to the Company the full amount of any sum I have heretofore received under this Plan. Any such revocation of claims under paragraph 5 shall not affect my release of all other claims hereunder, all of which are irrevocable upon execution of this Release.

9. I acknowledge that my giving of this Release is voluntary, that no coercion or undue influence has been exerted to obtain this Release, that I have had sufficient time to consider execution of this Release, and that I have received and reviewed a copy of this Release prior to executing it. I further agree that this Release shall not be subsequently revoked, rescinded, or withdrawn, and I acknowledge that the Company has no duty or obligation to hire me in the

> future and I covenant not to apply for employment with the Company in the future.
>
> I have carefully read and understood all of the foregoing, and agree to all of the provisions contained in this Release. I acknowledge voluntarily executing this Release with fully [sic] knowledge of the rights I may be waiving. [Emphasis in text.]

As the document specifies, in exchange for releasing the Carrier from all claims, either known or unknown, Claimant received a lump sum payment amounting to $8,123.08.

Claimant asserted that she felt pressured to sign the severance and release document because she desperately needed money. Claimant explained that she had accumulated a large debt.[8] Claimant also signed the document under the belief that she and other similarly situated non-agreement employees would not be entitled to New York Dock protective benefits.

For a short period during 1996, Claimant worked as an independent contractor through an employment agency for the SPT. On August 9, 1996, the HR Vice President notified Claimant that Claimant would not be re-employed by SPT.

Approximately one year later, on August 28, 1997, Claimant initiated the instant claim for New York Dock benefits. In the interim, Claimant stated that she had difficulty finding an attorney to represent her. She iterated that several attorneys declined to represent her because she had signed the severance and release document.

Thereafter, Claimant properly progressed her claim for New York Dock protective benefits to this Committee.

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[8] The debt began to accumulate in 1989 because, according to Claimant, she worked without a raise for seven years.

## VI. THE POSITIONS OF THE PARTIES

### A. Claimant's Position

Claimant charges that Carrier officials deliberately misled her about her eligibility for New York Dock protective benefits so that the SPT would both be a marketable entity (an attractive acquisition for the UP) and to reduce the UP's expenditure for protective benefits. In good faith, Claimant relied on the representations made by the executive at the 1996 Winter Town Hall meeting and by SPT's HR Vice President. Without being able to turn to a labor organization for help, Claimant rightly assumed that these people spoke the inviolate truth thus, she felt that she had no choice but to accept the non-agreement severance package. In addition, the SPT coerced her into signing the release in February 1996. The SPT placed Claimant in severe economic straits. Claimant tried to maintain a comfortable style of living without having a salary increase for many years. Then, the SPT callously terminated her. Without any income stream, Claimant had to accept the measly severance package just to survive. Claimant reached out for the severance pay like a drowning person grasping for a life preserver.

Claimant was helpless. She lacked any access to any unbiased expert. Had she known, for example, about Article IV of the New York Dock Conditions, she would not have accepted the non-agreement severance package. Aggravating its mistreatment of Claimant, the SPT further evaded its merger protective obligations by setting up the sham independent contracting relationship after Claimant was terminated.[9]

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[9] This relationship permitted the SPT to circumvent both railroad retirement and the New York Dock Conditions.

In sum, Claimant signed the release based on the SPT's intentional misrepresentations, under economic duress and without knowing the full extent of her rights under the New York Dock Conditions.

Claimant is an employee covered by the New York Dock Conditions. Althougn she held the seemingly lofty title of Administrative Assistant, Claimant regularly performed routine clerical and secretarial functions. She did not exercise any independent judgment or decision-making ability. Thus, she clearly cannot be construed as a management official exempt from the New York Dock Conditions.

The title, "Administrative Assistant," is not dispositive. Her real title should have been Secretary but, the SPT frequently changed the title of positions so that the incumbent could gain a pay raise. To determine if a person is subject to New York Dock Conditions, one must analyze the duties of a position rather than looking exclusively at the title given the position. Put simply, Claimant daily performed data entry, word processing, photocopying and mail distribution tasks just like a clerk or secretary.

In accord with Article IV of the New York Dock Conditions, Claimant was among the group of non-agreement covered employees who are covered by the New York Dock Conditions.

The SPT used downsizing as a pretext for the abolition of Claimant's job. The chronology of events conclusively demonstrates that the SPT abolished Claimant's position in anticipation of the impending UP-SPT merger and acquisition. The UP and SPT announced their intent to merge on August 3, 1995. Just two months later, on October 11, 1995, Claimant learned that her position would soon be eliminated. The timing is hardly coincidental. Obviously, the SPT was preparing for

the takeover by downsizing positions. Not surprisingly, in a rail merger, clerical functions are the first to be eliminated because it is unnecessary for the merged railroad to maintain often redundant and duplicative clerical positions. The SPT simply acted in advance. Section 10 of the New York Dock Conditions expressly provides that an employee adversely affected in anticipation of a transaction must be afforded New York Dock protective benefits.

In sum, the SPT and the UP have grossly mistreated Claimant. The SPT treated Claimant akin to leading a lamb to slaughter. The UP should be required to provide Claimant with New York Dock protective benefits.

B. The UP's Position

Claimant freely signed the non-agreement severance contract and, most notably, she accepted the lump sum payment from the SPT. Claimant failed to come forward with any evidence that the SPT committed fraud. Claimant had plenty of time to mull over whether to sign the release. The SPT abolished her job on November 30, 1995, but she did not sign the release until February 13, 1996. The SPT graciously afforded her enough time to consider the matter. Others in the SPT actively sought another position for Claimant. Economics made it infeasible for SPT to offer Claimant another position but that does not mean that SPT committed fraud or duress.

In paragraph 2 of the release, Claimant expressly waived all "job protection" claims, which implicitly encompasses New York Dock protective benefits. If Claimant did not fully understand the New York Dock Conditions, she was under a duty to check out the law. The fact that attorneys were reluctant to take her case demonstrates that she does not have a viable claim.

More importantly, Claimant knew about the New York Dock Conditions and how they operate in a merger. She was previously a beneficiary of protective benefits when the UP acquired the former Western Pacific Railroad. Therefore, she was fully aware of the terms of the New York Dock Conditions.

Finally, even if Claimant relied on the purported statements made by the HR Vice President and the SPT executive at the Town Hall meeting, these two individuals were expressing their opinion.[10] At most, they were mistaken. Therefore, any misrepresentation was wholly inadvertent. Moreover, Claimant's reliance on these statements is suspect not only because she was well versed about the New York Dock Conditions but also she could have sought expert help, including legal counsel, prior to signing the release.

Claimant does not satisfy the definition of an employee set forth in § 1, Fifth of the Railway Labor Act, 45 U.S.C. § 151, which is used to define an employee for purposes of the New York Dock Conditions. The Railway Labor Act defines an employee according to the potential scope of unionization. If the employees are subject to union representation, they are covered by New York Dock. Although a small number of employees not subject to unionization may have access to New York Dock benefits pursuant to Article IV therein, precedents clearly show that department heads and the next echelon, the staff serving department heads (Administrative Assistants), are not employees within the meaning of the New York Dock Conditions. *Newbourne v. Grand Truck Western Railroad*, 758 F.2d 193 (6th Cir. 1985).

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[10] The UP nevertheless argues that these statements were accurate inasmuch as Claimant is not an employee within the meaning of the New York Dock Conditions.

The New York Dock Conditions protect only those employees who have skills peculiar to the railroad industry, i.e., the employee's skills are not readily transferrable to jobs outside the railroad industry. *Benham v. Delaware and Hudson Railway*, NYD § 11 Arb. (O'Brien, 1986). Administrative Assistants are not covered by the New York Dock Conditions. *Maezer, Murphy, Sengheiser and Shupp v. Union Pacific and Missouri Pacific*, NYD § 11 Arb. (Seidenberg, 1987).

Claimant's job description shows that she prepared spreadsheets, budgets and performed other staff support functions that are technical and administrative in nature. Moreover, if, as Claimant asserts, she was actually performing secretarial duties, such skills are readily transferrable to many other industries.

In sum, Claimant is not an employee as that term is used in the New York Dock Conditions.

Claimant has failed to show a causal nexus between the abolition of her position and an STB approved transaction. The SPT did not need the STB's approval to abolish Claimant's job. Her duties were transferred to another SPT employee and not across rail property lines. Claimant's job was eliminated well before the STB approved the merger.

SPT eliminated Claimant's position due to cash flow difficulties rather than in anticipation of any transaction. SPT officials informed Claimant that the downsizing was necessary due to the severe financial problems confronting the SPT. Indeed, for many years, the SPT had been downsizing jobs from over 23,000 in 1991 to 18,000 in 1994. In June 1995, before any merger announcement, the SPT slated another 582 positions for abolition. Claimant, unfortunately, finally became a victim of an ongoing force reduction.

Therefore, the genesis of the elimination of Claimant's job was the SPT's dire financial situation. Since the elimination of her job was neither merger related nor accomplished in anticipation of the merger, Claimant is not entitled to New York Dock protective benefits.

VII. DISCUSSION

Paragraph 2 of the application for severance benefits and release under the Southern Pacific Lines' non-agreement severance benefit plan, which Claimant signed on February 13, 1996, specifically provides that Claimant waived any claim for "job protection" benefits. In paragraph 3, Claimant similarly waived her rights under California Civil Code § 1542. In essence, she forever relinquished any claims against the SPT even if, at the time she executed the document, she was not aware that she may have had a claim (such as, for New York Dock protective benefits).

Moreover, in paragraph 5, the release urged her to consult an attorney. Had Claimant sought legal counsel, she may have better understood her rights. The fault for not seeking counsel before she signed the release lies solely with Claimant.

The waiver of her job protection entitlements is broad and unequivocal. Thus, if the release is enforceable, the claim herein is barred.

Paragraph 4 of the release contains what is commonly called a zipper or integration clause. Stated differently, paragraph 4 bars us from examining extrinsic evidence (matters beyond the four corners of the document) to vary or alter the terms of the release. However, since Claimant is alleging duress and fraud, extrinsic evidence is permissible to show whether the release must be rescinded based on intentional misrepresentation or undue coercion.

Claimant has failed to muster sufficient evidence that the SPT or its officials intentionally misrepresented a material fact reasonably inducing Claimant to sign the release.

First, whether or not Claimant is an employee subject to the New York Dock Conditions is a very close question. As the arguments in this case demonstrate, reasonable persons and parties can offer differing views on whether Claimant was the kind of non-agreement employee contemplated by Article IV of the New York Dock Conditions.[11] Thus, when an SPT official responded to inquiries about whether non-agreement persons would be covered, the response is best characterized as an opinion or a belief rather than an outright factual assertion. Therefore, when the HR Vice President of Human Resources told Claimant she would not have access to the New York Dock Conditions, the SPT official was expressing her opinion. Expressing an opinion shows that the HR Vice President lacked the intent to deliberately mislead her. In addition, Claimant has not shown that the HR Vice President had a motive to deliberately mislead Claimant. On the contrary, the HR Vice President gave Claimant ample time to review the release and consider whether she should sign it. During this period, the HR Vice President valiantly tried to find Claimant another position on the SPT.

Second, the evidence does not show that Claimant justifiably relied on the representations made by SPT officials. Claimant had experience with New York Dock protective conditions. If, as she asserts, she was performing exactly the same sort of clerical duties that she had performed on the former Western Pacific, Claimant should have known that she might be covered by New York

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[11] This Arbitration Committee will not decide if Claimant is an employee within the meaning of the New York Dock Conditions because we are holding that the release is binding and enforceable. However, to reiterate, her status as a protected employee is a very close question. It may be that the HR Vice President was correct when she said that Claimant was not eligible for New York Dock benefits.

Dock Conditions and thus, she should have refrained from signing the release. Claimant is correct that few attorneys are adept at giving competent legal advice about rail employee protective conditions. Nevertheless, a thorough search would have uncovered a competent lawyer or a knowledgeable advisor.[12] It is apparent that Claimant did not make a diligent effort to seek counsel until long after she had signed the release.

Next, this Committee realizes that employees who lose their jobs are placed in an economic vise.[13] However, these employees are still obligated to rationally review their options. Under Claimant's theory of economic duress, every employee who lost his or her job would have an escape clause from any severance agreement on the grounds that they signed it under economic duress.

Finally, mistake of law is not generally recognized grounds for rescinding a contract. This Committee has already found that Claimant was not only urged to seek legal advice before signing the release but she was sufficiently aware of how the New York Dock Conditions operate so that she should have been alerted to the fact that, by signing the release, she was surrendering her entitlement to New York Dock benefits.

Therefore, there is insufficient evidence showing that the Carrier committed fraud or that Claimant was under undue duress when she executed the release. The release is binding. The waiver of her protective benefits is enforceable.

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[12] **Claimant had competent representation in presenting her claim to this Committee. We do not find any reason why Claimant could not have located this expertise in 1995 and 1996.**

[13] **Claimant appears to have aggravated her poor economic situation by accumulating a large amount of debt during the six years prior to her termination.**

Inasmuch as the Arbitration Committee has found that Claimant waived her entitlement, if any, to New York Dock protective benefits, this Committee need not decide if she was an employee within the meaning of those conditions or if the SPT abolished her position in anticipation of the impending merger and acquisition.

**AWARD AND ORDER**

Claim denied.

Date: September 17, 1999

___I concur/___I dissent

Kathleen V. Sullivan
Employee Member

X I concur/___I dissent

Richard Meredith
Carrier Member

John B. LaRocco
Neutral Committee Member