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FD-32760 (SUB 40)

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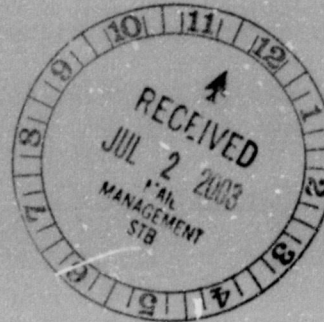
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June 29, 2003

**VIA UNITED STATES POSTAL SERVICE
EXPRESS MAIL**

Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

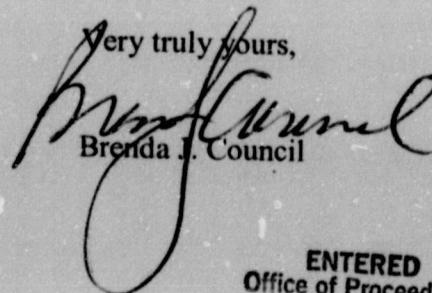


Re: UNION PACIFIC CORPORATION, UNION PACIFIC
RAILROAD COMPANY, AND MISSOURI PACIFIC
RAILROAD COMPANY -- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN
PACIFIC TRANSPORTATION COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP.,
AND THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY, Finance Docket No. 32760 Sub-Nos. 40
and 41

Dear Sir or Madame:

Enclosed please find the originals and 10 copies each of Union Pacific Railroad
Company's Reply in Opposition to Petition for Review of an Arbitration Award for filing
in the above-referenced Finance Docket Sub-Nos.

Very truly yours,


Brenda J. Council

cc: Charles R. Rightnowar

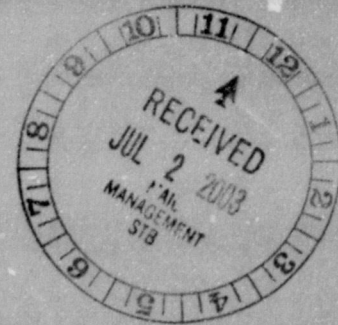
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208262

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 32760 (Sub-No. 40)

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 GRANDS WESTERN RAILROAD COMPANY

(Arbitration Review)

UNION PACIFIC RAILROAD COMPANY'S REPLY IN OPPOSITION TO
PETITION FOR REVIEW OF AN ARBITRATION AWARD

ENTERED
Office of Proceedings

JUL 2 2003

Part of
Public Record

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Attorneys for Union Pacific
Railroad Company

**UNION PACIFIC RAILROAD COMPANY'S REPLY IN OPPOSITION TO
PETITION FOR REVIEW OF AN ARBITRATION AWARD**

I.

INTRODUCTION

The Union Pacific Railroad – Central Region General Committee of Adjustment of the Brotherhood of Locomotive Engineers (hereinafter “BLE”) has petitioned for review of Award No. 1 and the Opinion and Award issued by Arbitrator John B. LaRocco on May 19, 2003 (hereinafter “Award No. 1”), in an arbitration conducted pursuant to Article 1, Section 11 of the employee protective conditions set forth in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979), *aff'd New York Dock Railway v. United States*, 609 F. 2d 83 (2nd Cir. 1979) (hereinafter “*New York Dock*”). The arbitration involved the claim of Engineer M. O. Coats (hereinafter “Claimant”) for relocation benefits under an implementing agreement negotiated by Union Pacific Railroad Company (hereinafter “Union Pacific”) and the BLE subsequent to the Surface Transportation Board’s (hereinafter “STB”) approval of the application of Union Pacific to control and merge with the Southern Pacific Transportation Company and its subsidiaries. *Union Pacific Corp. – Control and Merger – Southern Pacific Transportation Co.*, STB Finance Docket No. 32760 (served August 12, 1996). The BLE asserted that Claimant was entitled to the “in lieu of” relocation allowance provided in the Kansas City Hub Merger Implementing Agreement because he provided documents showing that he had changed his residence from Jefferson City, Missouri, to Kansas City, Missouri.

Arbitrator LaRocco found that eligibility for the “in lieu of” relocation allowance required Claimant to move from to Kansas City and then manifest the present intent to

maintain a permanent residence at Kansas City for a minimum, seniority permitting, of two years. Appendix A at p. 13.¹ He then found that Claimant did not actually relocate from Jefferson City to Kansas City. *Id.* Accordingly, Arbitrator LaRocco concluded that Claimant did not qualify for the "in lieu of" relocation allowance. *Id.* at p. 12-13.

The BLE asserts that Arbitrator LaRocco erred in finding that Claimant did not qualify for the "in lieu of" relocation allowance provided in the Kansas City Hub Merger Implementing Agreement. Petition at 4. The BLE also asserts that Award No. 1 should be overturned under the standards set forth in *Chicago & North Western Transp. Co. – Abandonment*, 3 I.C.C. 2d 729 (1987) (hereinafter "*Lace Curtain*"), *aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C.*, 862 F. 2d 330 (D.C. Cir. 1988), because "the award is irrational or fails to draw its essence from the clear and precise provisions of the negotiated agreement or it exceeds the authority reposed in arbitrators by those conditions." Petition at 5.

Union Pacific hereby opposes the Petition. First, the Petition is untimely. The STB's regulations require that petitions to review an arbitration award be filed within 20 days of a final arbitration decision. 49 CFR § 1115.8. The Petition was filed with the STB on June 10, 2003. As we show below, the Petition had to be filed on or before June 9, 2003, in order to be timely.

Second, the BLE's challenge to Award No. 1 does not merit review. Review of arbitration awards is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [the] labor protective conditions." *Lace Curtain*, 3 I.C.C. 2d at 736. Review is not available on "issues of causation, the

¹ All references herein to "Appendix" are to the Appendices attached to the BLE's petition for review, which are incorporated herein by reference.

calculation of benefits, or the resolution of factual disputes.” *CSX Corp. – Control – Chessie System, Inc.*, 4 I.C.C. 2d 641, 642 (1988); *see also, Fox Valley & Western Ltd. – Exemption Acquisition & Operations*, 1993 ICC LEXIS 228, *5 (served Nov. 16, 1993); *Lace Curtain*, 3 I.C.C. 2d at 736. The STB 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 & Western 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. As will be shown below, Arbitrator LaRocco did not err, much less err egregiously, in finding that Claimant did not relocate from Jefferson City to Kansas City and, accordingly, did not qualify for the “in lieu of” relocation allowance provided in the Kansas City Hub Merger Implementing Agreement. Likewise, Award No. 1 irrefutably draws its essence from the clear and unambiguous provisions of the Kansas City Hub Merger Implementing Agreement regarding relocation benefits. Therefore, the Petition must be denied.

II.

STATEMENT OF FACTS

Claimant is a former St. Louis South Western Railway engineer whose residence and home terminal was Jefferson City. Appendix A at p. 3. Side Letter No. 7 and other provisions of the Kansas City Hub Merger Implementing Agreement provide that Claimant could voluntarily relocate to Kansas City and become eligible for the “in lieu of” relocation benefits set forth in Article VII(B). *Id.* Article VII(B) of the Kansas City Hub Merger Implementing Agreement provides, in pertinent part, that:

Engineers required to relocate under this Agreement will be governed by the relocation provisions of New York Dock. In

lieu of New York Dock provisions, an employee required to relocate may elect one of the following options:

* * *

2. Homeowners may elect to receive an "in lieu of" allowance in the amount of \$20,000 upon providing proof of actual relocation.

* * *

6. Engineers receiving an "in lieu of" relocation allowance pursuant to this Implementing Agreement will be required to remain at the new location, seniority permitting, for a period of two (2) years.

Appendix C, Exhibit D at p. 23-24.

Side Letter No. 14 of the Kansas City Hub Merger Implementing Agreement provided that an employee who sold his or her home prior to the actual implementation of the merger would be treated as a "homeowner" for relocation benefit purposes if: (1) the employee meets the requisite test of having been "required to relocate" upon actual implementation of the merger implementing agreement; (2) the sale of the residence occurred at the same location where the employee was working immediately prior to implementation; and (3) the sale of the residence occurred after the date of the merger implementing agreement. Appendix B, Exhibit A at p. 9.

Claimant submitted an application for the "in lieu of" relocation allowance dated March 31, 2000, on which he checked Options 2 and 3, and stated that he was relocating from Jefferson City to Kansas City. Appendix B, Exhibit A. Option 2 and 3 read as follows:

Option 2: I am a homeowner and accept a \$20,000 allowance in lieu of New York Dock relocation benefits.

If I have accepted Option 1 or 2, I understand that I must submit "proof of actual relocation" in order to receive the "in lieu of" allowance.

Option 3: I am a homeowner and having sold my home, accept a 10,000 allowance in addition to the \$20,000 allowance I shall receive under Option 2, for a total of a \$30,000 allowance.

Id. By submitting the application, Claimant expressly agreed to remain in Kansas City for a period of two (2) years, seniority permitting. *Id.*

Along with his application, Claimant submitted a copy of a lease agreement dated April 5, 2000, for an apartment located at 16008 E. 28th Terrace in Independence, Missouri, which is located within the Kansas City metropolitan area. Appendix B, Exhibit A at p. 11. Claimant also submitted documentation showing his eligibility for the benefits under Option 3. The documentation showed that Claimant sold his home on Indian Meadow Road in Jefferson City on or about August 14, 1998, which was after the date of the Kansas City Hub Merger Implementing Agreement. Appendix B, Exhibit A at p. 3, 6-7. When Claimant submitted his application for the "in lieu of" relocation allowance, he resided on County Road 490 in New Bloomfield, Missouri, which is located approximately 11 miles from Jefferson City. On the basis of the material submitted by Claimant, Union Pacific paid Claimant an "in lieu of" relocation allowance on April 17, 2000, in the net amount of \$20,700. See Appendix B, Exhibit B.

During an audit conducted after Claimant received the "in lieu of" relocation payment, Union Pacific discovered that Claimant had not relocated to Kansas City but, instead, had relocated back to the Jefferson City area. Appendix at p. 2. By letter date June 2, 2000, Union Pacific demanded that Claimant repay the "in lieu of" relocation allowance because he failed to relocate in accordance with the terms under which he was granted the relocation allowance. Appendix B, Exhibit D. Union Pacific also advised Claimant that his payments for reverse held-away benefits would cease immediately.

Union Pacific received a letter from Claimant dated June 12, 2000, wherein he admitted that he had not actually relocated from Jefferson City to Kansas City. Appendix B, Exhibit C. Instead, Claimant stated that it was his "intent to totally relocate to Kansas City in the future." *Id.* at 2. Notwithstanding this admission, Claimant asserted that Union Pacific's demand for repayment of the "in lieu of" relocation allowance was "unwarranted." *Id.*

Union Pacific responded to Claimant by letter dated June 2, 2000 [sic]. Appendix B, Exhibit D. Union Pacific advised Claimant that the records establishing that he had not relocated to Kansas City included the fact that his home phone number remained in the 573 area code, which is the area code for the Jefferson City area, not Kansas City or Independence. *Id.* Union Pacific further advised Claimant that, notwithstanding his rental of an apartment in the Kansas City area, it had been demonstrated that he intended the New Bloomfield address as his principal place of residence. *Id.*

In a letter to Union Pacific dated June 17, 2000, Claimant repeated that is was his "intent to fully relocate to Kansas City in the future." Appendix R, Exhibit E. He stated that Union Pacific had not given him a proper chance to demonstrate where he "intended to live." *Id.* Claimant denied that he was commuting between New Bloomfield and Kansas City. *Id.* Claimant also suggested that the fact that his telephone number was within the Jefferson City area code was irrelevant to a determination of his residence because it was a cellular telephone. *Id.*

Union Pacific responded to Claimant by letter dated June 30, 2000. Appendix B, Exhibit F. Union Pacific noted that the Jefferson City are telephone number

referenced in its letter of June 14, 2000, is listed in its records as Claimant's home phone number and appeared on the letterhead of a letter from Claimant dated April 5, 2000, which showed his address as 3017 County Road 490, New Bloomfield, Missouri. *Id.* Union Pacific also noted that the relocation provisions of the Kansas City Hub Merger Implementing Agreement does not provide for payment to employees "intending" to relocate, but only to those who actually relocate their residence. *Id.* at p. 2.

Claimant wrote to Union Pacific on July 19, 2000, on letterhead bearing both his New Bloomfield address and his Independence address. Appendix B, Exhibit G. Claimant stated in the letter that the issue of his telephone number was irrelevant because his primary telephone number was different from the one referenced in Union Pacific's letter of June 14, 2000. *Id.* He provided a copy of a bill for utility service at the Independence address. Claimant asserted that Union Pacific could not prohibit him from maintaining an address in Jefferson City and stated that:

As stated I previous correspondence to your office, I still represent Engineers on this property and maintain numerous files regarding this representation as well as an office and office equipment at 3017 County Road 490 New Bloomfield, MO. 65603. I receive correspondence, not only from your office but also the BLE and various BLE Representatives around the country at this address. Being able to maintain this office **until such time as I can complete my move to the Kansas City area** makes my job as BLE Representative much easier. That is why I am grateful that your office continues to send correspondence regarding these Union matters to said address. **Until such time as I can complete my move to Kansas City** (which you are making unduly difficult) I will continue to send and receive said BLE and Labor Relations correspondence from said address.

Id. (Emphasis added).

Union Pacific responded to Claimant by letter dated August 3, 2000, stating that that while the *New York Dock* conditions do not prohibit him from having two addresses,

the Kansas City address is clearly not his primary residence. Appendix B, Exhibit H. Instead, Union Pacific noted that the fact that all correspondence regarding this issue was sent to and originated from the New Bloomfield address evidenced the fact that New Bloomfield was his principal place of residence. *Id.*

Thereafter, the BLE intervened on Claimant's behalf and engaged in an exchange of correspondence with Union Pacific regarding the issue of Claimant's entitlement to the "in lieu of" relocation allowance as well as the issue of whether or not the claim was properly the subject of arbitration under *New York Dock*. See Appendix B. Exhibits J-Y.

The claim of Claimant for the "in lieu of" relocation allowance was ultimately submitted to arbitration before a *New York Dock* arbitration committee. The hearing on the claim was held February 6, 2003. Appendix A at p. 1. At the hearing, Union Pacific and the BLE stipulated that Arbitrator LaRocco act as the neutral and sole member of the *New York Dock* arbitration committee. *Id.*

Arbitrator LaRocco issued an Opinion and Award on May 19, 2003, denying Claimant's claim for the "in lieu of" relocation allowance. Appendix A. He based his decision on his findings that eligibility for the "in lieu of" relocation allowance required Claimant to move from Jefferson City to Kansas City and that Claimant never moved from Jefferson City to Kansas City. *Id.* at 13. Dissatisfied with Arbitrator LaRocco's findings and decision, the BLE filed the petition for review.

III.

ARGUMENT

A. THE PETITION MUST BE DENIED BECAUSE IT WAS NOT TIMELY FILED.

The STB's regulations provide that documents must be received for filing at the STB's office in Washington, D.C., within the time limits set for filing. 49 C.F.R. § 1104.6. Petitions to review an arbitration award are required to be filed within 20 days of a final arbitration decision. 49 CFR § 1115.8. The timeliness of a filing is determined by the date of receipt at the Board, and not the date of deposit in the mail unless, however, a document is mailed by United States express mail, postmarked at least one day prior to the due date. 49 C.F.R. § 1104.6. In that case, the document will be accepted as timely filed even if it is received at the STB's office after the time limit set for filing. *Id.*

Award No. 2 was issued on May 19, 2003. Applying the method of computing time set forth in 49 CFR § 1104.7, the Petition was required to be filed on June 9, 2003. The Petition was not filed with the STB until June 10, 2003. There is no record of a grant of an extension of time to file the Petition. Consequently, the Petition is untimely unless it was mailed to the STB by United States express mail, postmarked at least one day prior to June 9, 2003.

While there is nothing in the Petition indicating the manner in which the BLE served the STB, it does reflect the manner in which the parties were served. The Certificate of Service states that the BLE served Union Pacific and Arbitrator LaRocco by mailing copies of the Petition via "first class [mail], postage prepaid," on June 6, 2003. Petition at 9. The STB's regulations provide that service on the parties should be by the same method and class of service used in serving the STB. 49 C.F.R. § 1104.12

(a). In view of the fact the parties were not served via United States express mail, it can be inferred that the STB was not served via United States express mail.

Since the Petition was not filed until June 10, 2003, and the facts show that the Petition was not mailed to the STB by United States express mail, postmarked at least one day prior to the due date, the Petition is untimely and must be denied.

B. AWARD NO. 1 DRAWS ITS ESSENCE FROM THE CLEAR AND UNAMBIGUOUS PROVISIONS OF THE KANSAS CITY HUB MERGER IMPLEMENTING AGREEMENT

The issue presented to Arbitrator LaRocco for resolution was whether or not Claimant qualified to receive the "in lieu of" relocation allowance provided in Article VII(B)2. of the Kansas City Hub Merger Implementing Agreement. The clear and unambiguous language of Article VII(B) dictates that an employee actually relocate to the new work location in order to receive the "in lieu of" relocation allowance. Thus, the question to be answered by Arbitrator LaRocco in order to resolve the issue presented was whether or not Claimant actually relocated to Kansas City.

In determining whether or not Claimant actually relocated to Kansas City, Arbitrator LaRocco applied the standard set forth in *Special Board of Adjustment: Allied Services Division, Transportation-Communication International Union and Union Pacific Railroad Company* (Suntrup, 2000). Under that standard, the employee must actually move from the old work location to the new work location and then manifest the present intent to maintain his principal and permanent place of residence at the new work location in order to conclusively effect a relocation from an employee's old work location to the employee's new work location.

On the evidence presented, Arbitrator LaRocco correctly found that Claimant could not possibly have had the intent to establish a primary and permanent residence in

Kansas City because he never moved from Jefferson City to Kansas City. Appendix A at 13. Clearly, Arbitrator LaRocco's decision denying Claimant's claim for the "in lieu of" relocation allowance draws its essence from the clear and precise provisions of the Kansas City Hub Merger Implementing Agreement.

C. THE ARBITRATOR DID NOT ERR IN FINDING THAT THE CLAIMANT WAS NOT ENTITLED TO RECEIVE THE RELOCATION BENEFITS PROVIDED IN ARTICLE OF THE KANSAS CITY HUB IMPLEMENTING AGREEMENT

After carefully examining the evidence presented by the BLE and Union Pacific, Arbitrator LaRocco concluded that Claimant did not qualify to receive the "in lieu of" relocation allowance provided in the Kansas City Hub Merger Implementing Agreement. That conclusion rested on his findings that eligibility for the "in lieu of" relocation allowance required Claimant to move from Jefferson City to Kansas City and that Claimant did not actually relocate to Kansas City.

Arbitrator LaRocco's findings on the issue of whether Claimant qualified to receive the "in lieu of" relocation allowance are factual determinations. Such factual determinations do not warrant the STB's review under the *Lace Curtain* standard. *Lace Curtain, infra* at 736. Indeed, the STB accords extreme deference to an arbitrator's factual determinations and will not disturb them in the absence of "egregious error." *Id.* at 735; *see also, Norfolk & Western Ry. Co. – Merger, infra* at 3-4; *Fox Valley & Western, infra* at *5. 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.

Arbitrator LaRocco did not err, much less commit reviewable egregious error, in finding that Claimant did not qualify to receive the "in lieu of" relocation allowance

because he did not actually relocate to Kansas City. Quite to the contrary, Arbitrator LaRocco's finding was based on Claimant's admissions that he did not actually relocate to Kansas City. Claimant admitted in his letter of June 12, 2000, that he planned to move to Kansas City in the future. Appendix B, Exhibit C. Indeed, Claimant further admitted in that letter that he did not "complete this move." *Id.* at 2.

In his letter of July 19, 2000, Claimant stated that he kept his office at his New Bloomfield address "... until such time as [he] can complete [his] move to the Kansas City area" Appendix B, Exhibit G. This statement constituted another admission by Claimant of the fact that he did not actually relocate to Kansas City. Arbitrator LaRocco correctly noted that Claimant's maintenance of his office at New Bloomfield manifested an intent to maintain his residence at New Bloomfield. Appendix A at p. 13.

In addition to Claimant's admissions, there was other substantial evidence of the fact that Claimant did not relocate to Kansas City. Claimant's telephone number of record with Union Pacific coincided with the area code for Jefferson City. This fact confirmed his intent to maintain his residence in New Bloomfield.

While Claimant submitted a modicum of evidence of a relocation to Kansas City, the overwhelming weight of the evidence supported Arbitrator LaRocco's finding that Claimant did not relocate to Kansas City. Under these circumstances, the STB must defer to Arbitrator LaRocco's finding that Claimant did not relocate to Kansas City and, therefore, was not entitled to receive the "in lieu of" relocation allowance provided in the Kansas City Hub Merger Implementing Agreement.

In sum, the BLE has failed to present any basis for the STB to review, let alone overturn, Award No. 1.

IV.

CONCLUSION

For the foregoing reasons, the BLE's petition to review Award No. 1 should be denied.

Dated this 29th day of June 2003.

Respectfully submitted,

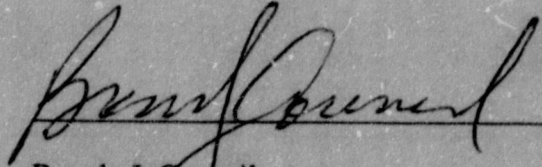
By 

Brenda J. Council
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ATTORNEYS FOR UNION
PACIFIC RAILROAD COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of Union Pacific's Reply in Opposition to Petition for Review of an Arbitration Award was served on the BLE this 29th day of June, 2003, by mailing the same via United States Postal Service express mail, postage prepaid, to Charles R. Rightnowar, 320 Brookes Drive, Suite 115, Hazelwood, MO 63402.



Brenda J. Council