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FD-32760 (SUB 41)

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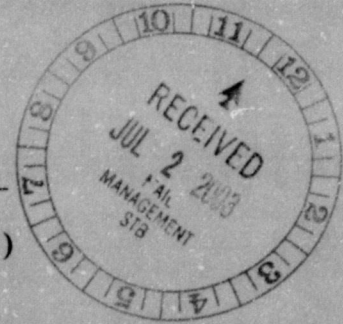
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub-No. 41)



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

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# **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. 2 and the Opinion and Award issued by Arbitrator John B. LaRocco on May 19, 2003 (hereinafter “Award No. 2”), 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 (2<sup>nd</sup> Cir. 1979) (hereinafter “*New York Dock*”). The arbitration involved the claim of Engineer C. W. Kerr (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 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 Jefferson City 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. 10.<sup>1</sup> He then found that Claimant did not actually relocate from Jefferson City to Kansas City. *Id.* Accordingly, Arbitrator LaRocco found 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. 2 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. 2 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*

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<sup>1</sup> All references herein to "Appendix" are to the Appendices attached to the Petition, which are incorporated herein by reference.

*Curtain*, 3 I.C.C. 2d at 736. Review is not available on "issues of causation, the calculation of benefits, or the resolution of factual disputes." *CSX Corp. - Control - Chessie System, Inc.*, 4 I.C.C. 2d 641, 649 (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 Implementing Agreement. Likewise, Award No. 2 irrefutably draws its essence from the clear and precise 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 Union Pacific 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 Implementing Agreement provided 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 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.

Claimant submitted an application for the "in lieu of" relocation allowance dated December 30, 1999, on which he checked Option 2 and stated that he was relocating from Jefferson City to Kansas City. Appendix B, Exhibit A. Option 2 reads 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.

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

By letter dated January 5, 2000, Union Pacific denied Claimant's application for the "in lieu of" relocation allowance because his permanent address, as reflected in Union Pacific's records, had not been changed from Jefferson City and he had not submitted sufficient evidence of his relocation to Kansas City. Appendix B, Exhibit B. Shortly thereafter, Claimant advised Union Pacific that his address had been changed

from Jefferson City and he submitted a copy of a lease agreement dated January 10, 2000, for an apartment located at 7900 N. Anita, Kansas City, Missouri. Appendix B, Exhibit C. On the basis of the material submitted by Claimant, Union Pacific paid Claimant an "in lieu of" relocation allowance on February 11, 2000, in the net amount of \$13,134.80. See Appendix B, Exhibit D.

During an audit conduct in May 2000, Union Pacific discovered that Claimant had changed his address of record back to his residence in Jefferson City. Appendix B at p. 3. 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.

On June 8, 2000, Union Pacific received a letter from Claimant wherein he admitted that his address of record had been changed back to his Jefferson City address. Appendix B, Exhibit E. Nevertheless, he asserted that he resided at the Kansas City address reflected in the lease agreement he previously submitted and, therefore, he had complied with the terms and conditions of the Kansas City Hub Merger Implementing Agreement. *Id.* Claimant refused to execute an agreement to repay the "in lieu of" relocation allowance, but he did offer to have his paycheck directly deposited in response to the fact that it was being mailed to his Jefferson City address. *Id.*

By letter dated June 13, 2000, Union Pacific advised Claimant that changing his address of record back to the Kansas City address and having his paycheck directly deposited was of no consequence if he had not, in fact, relocated his residence to Kansas City in accordance with the terms and conditions of the Kansas City Hub Merger Implementing Agreement. Appendix B, Exhibit F. Union Pacific further advised

Claimant that the rental of an apartment in Kansas City and commuting to his home in Jefferson City did not constitute relocation under the terms and conditions of the Kansas City Hub Merger Implementing Agreement. *Id.*

On June 28, 2000, Union Pacific received a letter from Claimant wherein he maintained that he had established a residence in Kansas City in accordance with the terms and conditions of the Kansas City Hub Merger Implementing Agreement. Appendix B, Exhibit G. Claimant denied that he commuted from Kansas City to Jefferson City and asserted that Union Pacific Crew Management System had a telephone number with a Kansas City area code where he could be reached to report for duty. *Id.*

Union Pacific responded to Claimant by letter dated June 30, 2000. Appendix B, Exhibit H. Union Pacific noted that while Claimant had changed his address of record back to Kansas City, he had done so on June 10, 2000, after receiving the letter of June 2, 2000, demanding repayment of the "in lieu of" relocation allowance. *Id.* Union Pacific also noted that Claimant's home terminal phone number remained at Jefferson City while his away from home terminal was at Kansas City. *Id.* Union Pacific advised Claimant that he was being returned to home terminal of Jefferson City for this pool. *Id.*

The hearing on Claimant's claim for the "in lieu of" relocation allowance 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. Arbitrator LaRocco 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 did not actually relocate from Jefferson City to Kansas City. *Id.* at p. 10. Dissatisfied with Arbitrator LaRocco's findings and decision, the BLE filed the petition for review of Award No. 2.

### 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. 2 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 10. 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 simple 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 admissions by Claimant evidencing the fact that he did not actually relocate to Kansas City. In his letter of June 8, 2000, Claimant admitted that his address of record had been changed back to his Jefferson City address after he received the "in lieu of" relocation allowance. Appendix B, Exhibit E. This admission is of particular significance in view of the fact that Claimant changed his address back to Kansas City only after Union Pacific advised of the results of the audit conducted in May 2000. Arbitrator LaRocco aptly noted that while Claimant belatedly attempted to change his address back to Kansas City, his true intent to maintain his residence in Jefferson City had already been evidenced when he changed his address back to Jefferson City. Appendix A at p. 9.

Claimant also admitted that he received his paycheck and other materials from Union Pacific at his Jefferson City address instead of the apartment he leased in Kansas City. Appendix B, Exhibit E. Arbitrator LaRocco surely did not commit error in concluding that the place where an employee receives compensation for his labor is a strong indicator of where the employee resides.

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. 2.

#### IV.

#### CONCLUSION

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

Dated this 29<sup>th</sup> day of June 2003.

Respectfully submitted,

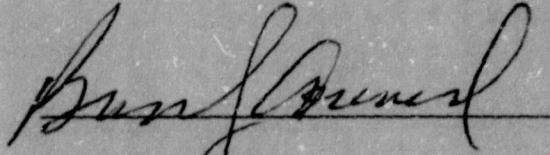
By 

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### **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 29<sup>th</sup> 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