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January 6, 2005

Vernon A. Williams
Secretary
Surface Transp. Board
Washington DC 20423

Re: F.D. No. 32760 (Sub-No. 42)
UP/SP Merger-Arbitration Review

Dear Mr. Williams:

I enclose 34-page Opinion and Award of the arbitration committee, dated December 21, 2004, for use in conjunction with the request for extension of time within which to appeal the decision, filed January 3, 2005. I call attention to the statement in the attached Opinion and Award that it incorporates, by reference, other materials which are more voluminous, and which must await docketing of the appeal. See: pp. 9-10, and n.5.

Finally, I call attention to p. 34, indicating two signatures of January 4 and 6, 2005.

Very truly yours,

Gordon P. MacDougall

Atty. for John E. Grother

cc: W.E. Loomis-UPRR

IN THE MATTER OF THE ARBITRATION

BETWEEN

JOHN E. GROTHER
("Grother" or "Claimant")

AND

UNION PACIFIC RAILROAD COMPANY
("Union Pacific," "UP," or "Carrier")

Pursuant to Article IV of the New York Dock Conditions Imposed by the Surface Transportation Board in Finance Docket No. 32760.

CLAIM OF
John E. Grother
(Whether Claimant is a displaced employee under the New York Dock conditions; whether Claimant was adversely affected by the merger; whether claim should be barred by the doctrine of laches).

OPINION AND AWARD

Before: Arbitration Committee

Members:

William E. Loomis General Director, Employee Relations Planning	Carrier Member
Gordon P. MacDougall, Esq.	Grother Member
Lynette A. Ross	Neutral/Referee Member
Appointment of Neutral Member	January 21, 2004

I. INTRODUCTION

The hearing before this Arbitration Committee was held on October 12, 2004 at the offices of the National Mediation Board, 1301 K Street, N.W., Suite 250-E, Washington, DC, commencing at 10:00 a.m. before the undersigned Arbitrator who was designated as the Neutral/Referee Member of the Arbitration Committee by the National Mediation Board, pursuant to the above-captioned New York Dock Protective Conditions, 360 ICC 60, 84-90 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

Pursuant to the Memorandum of Agreement Between John E. Grother and Union Pacific Railroad, signed on June 18, 2004 by Gordon P. MacDougall, for John E. Grother, and William E. Loomis, on behalf of the Union Pacific Railroad Company, on September 14, 2004, the partisan members served written submissions, one upon the other, simultaneously, with copies to the Neutral/Referee Member. During the hearing before the Arbitration Committee, the parties were afforded full opportunity to "present witnesses, statements of fact, supporting evidence, data and argument"[1] in support of their respective positions. A 222-page stenographic transcript of this hearing was made. The partisan members of the Committee each filed post-hearing briefs on November 22, 2004, whereupon the record was declared closed. The partisan members stipulated at the hearing as to the Neutral/Referee Member's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

II. STATEMENT OF THE ISSUES

The issues as framed by the Grother Member of the Arbitration Committee are:

"A. Applicability of New York Dock Employee conditions.

1. Whether employee was adversely affected as a result of the STB-approved merger, and has the burden to prove the causal connection between the merger and the adverse affect (sic).

2. Whether the involved employee was an 'employee' within the meaning of 49 U.S.C. 11326 and NYD at the time of first adverse affect (sic).

3. Whether employee's request for compensation/benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches.

B. Measure of Compensation/Benefits (Deferred Issue)."[2]

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[1] See paragraph D, page 2, of the above-referenced Memorandum of Agreement ("MOA," or "MA-5D") signed on June 18, 2004 by the partisan members. (Grother Ex. E-16, Union Pacific Ex. 19).

[2] Pursuant to paragraph E, page 2 of the MOA, the Committee's jurisdiction was limited to "questions concerning the interpretation, application, or enforcement of New York Dock conditions to Grother and Union Pacific." According to paragraph E, "The matter of the measure of compensation and/or benefits due Grother, if any, will be deferred until, and only considered after, the Committee first finds that New York Dock is applicable to Grother, and that he may be entitled to some compensation and some benefits." Thus, under the MOA, the Committee will

The issues as framed by the Carrier Member of the Arbitration Committee are:

"(1) Was John E. Grother, at the time of his reduction in salary, a 'displaced employee' subject to the protection of the New York Dock conditions?

(2) Is John E. Grother's claim for a displacement allowance pursuant to New York Dock barred under the doctrine of Laches?"

III. RELEVANT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

NEW YORK DOCK CONDITIONS
Finance Docket No. 28250
APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly Sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

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

(b) "Displaced 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.

* * *

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

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first consider the question of whether the Claimant was covered and, if so, entitled to any benefits pursuant to the New York Dock conditions. If the Committee should deem the Claimant eligible for benefits under the New York Dock conditions, the partisan members thereafter shall confer in an attempt to reach agreement on the measure of compensation or benefits due the Claimant.

11. (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.

* * *

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

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.

IV. FACTUAL BACKGROUND

According to the Verified Statement-Causality submitted by Claimant John E. Grother with the Grother Member's September 17, 2004 pre-hearing submission, on May 12, 2003, while holding the position of Manager of Intermodal Operations at Houston, TX, the Claimant sent a letter to James V. Dolan, Union Pacific's Vice President of Law, seeking compensation of $107,370.00 in New York Dock benefits as a "displaced employee." In the Claimant's view, his "displacement" to Houston was a direct result of the September 11, 1996 merger between the Union Pacific and Southern Pacific railroads. In that Verified Statement-Causality, the Claimant asserted, "I have held this position since July 1, 1997, when I was displaced as Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. I suffered a reduction in pay and benefits by my displacement and transfer from Tucson to Houston."

The Carrier has consistently maintained, and as will be further discussed below, that the Claimant's transfer should not be viewed as a "displacement" for purpose of entitlement under

the New York Dock conditions. Rather, it has been the Carrier's position that at the time of the merger, the Claimant held an "official" position, and thus was not eligible for any benefits or displacement allowance under the New York Dock conditions. In any event, the demotion was for performance reasons, and was not a direct result of the merger. However, from the record before this Arbitration Committee, the Carrier does not appear to disagree that a result of the transfer from Tucson to Houston was a reduction in Claimant's salary, from approximately $6,200.00 to $4,928.00 per month.

Claimant's Verified Statement-Causality states that the Claimant began his railroad career on June 1, 1969 as a non-agreement employee on the former Southern Pacific Rail Corporation (SP) and, since that date, and for nearly 35 years now, has continued to work in a non-agreement capacity. On or about September 16, 1995, approximately one year before the merger of the SP and UP railroads, the Claimant was transferred from the non-agreement position he held at the SP's headquarters in San Francisco, CA, to a position of Terminal Superintendent at the SP's offices at Tucson, AZ. According to the record, at the time of the merger implementation, the Claimant held the above position at Tucson.

As the facts of record in this case further indicate, on August 6, 1996, the Surface Transportation Board (STB), in Finance Docket No. 32760, approved the common control and merger of the rail carriers controlled by both the Union Pacific and the Southern Pacific railroads, and the merger was finalized on September 11, 1996. In its Decision setting forth its approval of the merger, the STB ruled that the New York Dock conditions would apply to the rail employees of the merger applicants.

According to the record, approximately seven months after the effective date of the merger, on April 16, 1997, the Claimant's job title at Tucson, AZ was changed from the SP title of Terminal Superintendent to the UP title of Senior Manager Terminal Operations (SRMTO).

As stated above, at the time of the Claimant's subsequent transfer to Houston, TX, his salary at Tucson was approximately $6,200.00 per month. It is essentially undisputed in the record that, about two months after his title had been changed to SRMTO, the Claimant was informed that the Carrier had decided to relocate him to a position of Manager of Intermodal Operations at Houston, at a salary of approximately $4,928.00 per month. That "demotion," as the Carrier so states, or "displacement," as the Claimant would have it, to Houston, at a lower salary than that which he had been earning at Tucson, is the basis for the instant dispute before this Arbitration Committee.

According to the Claimant, as explained in his Verified Statement-Causality, there is an undeniable nexus between the UP/SP merger implementation and his "displacement" from his SRMTO position at Tucson, to the lower paying position of Manager of Intermodal Operations at Houston. A significant portion of this record is comprised of the Claimant's accounts of the Carrier's post-merger switching operations at Tucson, following a decision by the UP to discontinue its terminal switching operations at Phoenix, AZ.

Throughout his correspondence in this matter, the Claimant has emphasized that the Carrier's yard consolidation "experiment" at Tucson was a failure well known throughout the industry, and was neither his fault nor the fault of any other employee working at Tucson at that time. In his correspondence following his filing for the instant New York Dock arbitration, the Claimant has stressed that he was not involved in formulating the new terminal switching plans at Tucson, but that other "non-agreement" employees made those strategic-type decisions, and that notwithstanding his title of SRMTO, he merely carried out, in a subordinate fashion, the high-level decisions of his superiors.

Thus, asserted the Claimant in his Verified Statement-Job Classification, the non-agreement position he held on the effective date of merger was not "managerial in nature," as stated below:

> "This verified statement is to present facts in support of my contention that at all times since September 11, 1996 (consummation of the UP/SP merger), and between April 16, 1997 and my displacement on July 1, 1997, I have been an employee, within the meaning of the Railway Labor Act (RLA), which I understand defines a subordinate official as an employee, and I am an employee under appropriate New York Dock conditions. I do not consider myself to have been an 'official.'" [3]

It is not disputed in the record that, as stated above, on May 12, 2003 the Claimant wrote a 46-page letter, including 100 pages of attachments, to the Carrier's Vice President of Law, James Dolan, notifying Dolan that he was in the process of obtaining legal counsel to represent him in an arbitration pursuant to the New York Dock conditions, with specific regard to, in Claimant's words, "Grother's merger transaction related demotion effective July 1, 1997, which has classified Grother as a New York Dock 'displaced employee.'" (Union Pacific Ex. 2; Grother Ex. E-2).

According to the record, before receiving any response from the Carrier, on June 16, 2003, the Claimant sent a "30-day notice" to the National Mediation Board requesting arbitration of his demand for New York Dock benefits as a result of his "demotion and reduction in wages of $1,272 per month and other fringe benefits effective 7/1/97." According to that notice, the Claimant's request for arbitration resulted from what the Claimant regarded as "UPRR's failure to respond to the certified letter to Mr. Dolan." (Union Pacific Ex. 3; Grother Ex. E-3).

By letter dated July 7, 2003, Roland Watkins, the NMB's Director of Arbitration Services, responded to the Claimant's above letter and explained that he was sending a copy of

the Claimant's June 16, 2003 letter to the UP's Vice President of Law, Dolan, for review and comment, and requested a Carrier response by July 21, 2003. (Union Pacific Ex. 4). The record indicates that Dolan forwarded the Claimant's May 12, 2003 letter to Marilyn Ahart, the UP's Director of Protection Management. In her July 18, 2003 letter to the Claimant, with a copy to NMB Director Watkins (Union Pacific Ex. 5; Grother Ex. E-4), Ahart, in her second paragraph, stated:

> "I have reviewed your claim and have determined that you do not meet the required criteria to qualify as a displaced employee under the provisions of New York Dock. In order to be certified for coverage, an employee must prove that any adverse affect (sic) was as a direct result of the merger transaction. As you stated in your letter, when the merger was implemented, you remained on a management level position. All records indicate your subsequent demotion was based on performance standards, not as a result of the merger."

Ahart further explained that "to be considered for coverage an individual must satisfy the term of 'employee' as it is defined in the Railway Labor Act and by New York Dock cases." Relying on the on-property arbitral precedent set by a 1987 award rendered by Referee Seidenberg on the issue of "employee,"[4] Ahart essentially emphasized that in light of the management position the Claimant held on the merger implementation date, the Claimant could not "meet the definition of employee under the Railway Labor Act and New York Dock cases." Ahart quoted the determinative language of the Seidenberg Award, as follows:

> "A review of the history of labor protection conditions compels us to hold that the term 'employee' was not intended to be applied in a generic sense, i.e., all persons employed by the railroad, but rather the term as it has been hammered out on the anvil of railroad labor legislation, rulings of the ICC, court decisions, arbitral awards, to mean only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as **being other than administrative, managerial, professional, or supervisory in nature."** (emphasis supplied).

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[3] See page 1 of Verified Statement of John E. Grother (Job Classification), dated September 14, 2004.
[4] See Union Pacific Ex. 26, New York Dock Arbitration Award, B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v. Union Pacific Railroad Company, et al. (Seidenberg; 12/18/87)

Director Ahart's July 18, 2003 letter furthermore included a third reason for denying the Claimant's request for protective benefits under the New York Dock conditions, one involving procedure. Invoking the equitable doctrine of laches, Ahart stated that, although the New York Dock conditions do not prescribe specific time limits for the filing of employee claims, here the Claimant waited an unreasonable length of time before filing his claim giving rise to the instant arbitration. Applying the weight of "considerable arbitral authority" on the laches issue to the facts of this case, Ahart asserted that notwithstanding her two substantive reasons for denying the claim ("causality" and "jurisdiction"), from the procedural standpoint of filing untimeliness, the claim was fatally flawed.

The chronology of events, and correspondence relevant thereto, which then transpired between the July 18, 2003 date of Director Ahart's written claim declination to the June 18, 2004 date on which the partisan members of this Arbitration Committee formalized the procedures for the hearing of this matter in arbitration, as set forth in the Memorandum of Agreement (MOA), referred-to above, are referenced and discussed in the pre-hearing submissions prepared by the Carrier and the Grother Member, and are included herein by reference.[5] The Neutral/Referee Member has carefully reviewed the facts, relevant documentation and correspondence, as well as the legal and arbitral precedent, relied upon by the Claimant and the Carrier, comprising this extensive record, prior to preparing this Opinion and Award.

V. THE POSITION OF THE PARTIES

A. The Grother Member

As stated above, from the standpoint of procedure, the Claimant's arguments, and exhibits furnished in support thereof, are incorporated herein by reference. To summarize, the

Claimant contends that: (1) "the entire arbitration process, with its purported limited agency and judicia (sic) review [is] prejudicial, particularly where, as here a non-agreement railroad employee is involved," (2) the procedures set forth in the June 18, 2004 MOA governing the procedures for furnishing pre-hearing submissions did not allow Claimant to submit a pre-hearing reply on the issue of causality, and thereby respond to the Carrier's defense in that regard, and were in contrary to the "New York Dock scheme." In that regard, the Grother Member emphasized that, nevertheless, by identifying the UP/SP merger as the transaction that gave rise to his displacement to Houston, TX, and his uncontroverted loss of earnings, the Claimant fully satisfied his burden of proof, under Article I, Section 11(e), quoted above.

Concerning the substantive issues before this Committee, the Grother Member has presented many detailed arguments which, while carefully considered by the Committee, will be addressed in summary form. The Claimant strenuously argues that the Carrier's affirmative defense that the transfer was for reasons involving the Claimant's job performance as a non-agreement manager, as opposed to as an employee or subordinate official affected by the merger implementation, simply was not substantially proved in the record. Primarily relying on the argument, as set forth in his Verified Statement-Causality, that the "failed switching experiment at Tucson," an outgrowth of the merger implementation, in fact, triggered his "displacement," the Claimant strongly asserts that, with respect to the issue of causality, the Claimant entirely met his burden of proving the nexus between the merger implementation and his displacement to Houston.

With respect to the second issue of whether the Committee should find that the Claimant was an "employee" eligible for coverage under the New York Dock conditions at the time of the merger implementation, the Grother Member asserted that the Claimant credibly and

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[5] See Union Pacific Exhibits 5 through 20; and Grother Exhibits E-4, and E-6 through E-17.

convincingly established throughout the record that notwithstanding his title of Senior Manager Terminal Operations (SRMTO), his actual duties and responsibilities were non-managerial in nature, and were much more consistent with the duties typically performed by an "employee" or "subordinate official," as those terms are comprehended by the Railway Labor Act and arbitration cases arising under New York Dock, as well as under the National Labor Relations Act.

According to the Claimant, the Carrier's sole reliance on its cited awards of arbitration panels in support of its position that the Claimant held an "official" position at the time of the merger, as opposed to looking toward broader authority, is incorrect, and that while such awards may be "helpful," they should not be regarded "governing" because they stemmed from disputes involving railroad employees who had been represented by labor organizations. Given the Claimant's status as a non-agreement employee not represented by any organization, the arbitral precedent should not weigh heavily on this Committee, the Grother Member asserts.

The Claimant thus strongly contends, therefore, as extensively set forth in his pre-hearing submission and relevant exhibits, that the SRMTO position he held at the time of the merger implementation and his subsequent transfer, "was below the level of the Service Union Superintendent (Division Superintendent); indeed he was two levels below the Division Superintendent." According to the Claimant, this is significant because, based on his interpretation of various rulings of the Interstate Commerce Commission (ICC), cited on pages 16 and 17 of the Grother Member's pre-hearing submission, in the Claimant's view the ICC has "generally" held that "persons below the level of Division Superintendent are subordinate officials or employees." Employing that logic, Grother should be deemed as similarly covered.

It is the Claimant's expressed opinion that, at the time of the merger, the characteristics of the SRMTO position he held at Tucson were, in fact, consistent with that of an "employee"

or "subordinate official," as opposed to an "official" of the Carrier and, more importantly, coincided with the "job evaluation factors used by the National Mediation Board," as set forth in its Representation Manual, or what the Claimant referred to as a "9-point test to determine 'subordinate employee.'" [6] Based on the Claimant's analysis of his job, as set forth in his Verified Statement-Job Classification, the Grother Member forcefully argued on page 19 of the submission that:

> "The V.S.[7] Grother (Job Classification) shows that Employee did not have authority to hire, discharge, or discipline anyone, or to recommend the same. V. S. Grother, 4-3 (Job Classification). He had no effective supervisory authority, but was an 'order taker.' (ibid. 4). He had no authority to authorize or grant overtime. (ibid. 4). He was without power to transfer or establish assignments. (ibid. 4). He did not create policy; rather he followed policy. (ibid. 4). Employee lacked authority to commit funds, and had a de minimus expense account which was seldom used. (ibid. 5); his authority was circumscribed by many written policies and directives. (ibid. 3-4). Employee was at the 8th level in the UP organizational hierarchy. (ibid. 6). Most of Employee's time was not actually spent on SRMTO duties, but was spent doing work one level below, at the MYO position. (ibid. 6 & Atta. 2). Finally, Employee based upon the work performed, was on the same 'band' level with other subordinate officials who were subject to unionization. (ibid. 7)."

Therefore, based on the above summary of the Claimant's duties and responsibilities, the Grother Member strongly argued that the Claimant obviously cannot have been regarded as having worked as an "official" under "NMB rules." Moreover, the Claimant asserted in his Verified Statement-Job Classification that he had "considered himself subject to unionization," the Grother Member pointed out. According to the submission prepared on the Claimant's behalf, having analyzed various court rulings addressing eligibility issues under 49 U.S.C. §11326, in light of the job attributes of the Claimant's SRMTO position held at the time of the

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[6] According to Claimant's reference to §9.211 of the Representation Manual, an "official" is defined as follows: (1) the authority to dismiss and/or discipline employees or to effectively recommend the same; (2) the authority to supervise; (3) the ability to authorize and grant overtime; (4) the authority to transfer and/or establish assignments; (5) the authority to create carrier policy; (6) the authority to commit carrier funds; (7) whether the authority exercised is circumscribed by operating and policy manuals; (8) the placement of the individual in the

merger implementation, there simply is no doubt that the Claimant was not a managerial employee ineligible for protection, i.e., displacement allowance, contained in the New York Dock conditions. Thus, the decisions rendered by the ICC and various circuit courts, as well as two arbitration awards[8] cited by the Grother Member on pages 19 through 23 of the Grother pre-hearing submission lend strong support to a finding by this Committee that, at the time of the merger implementation, the Claimant was, in fact, an employee within the meaning of 49 U.S.C. 11326 and thus eligible for the New York Dock benefits requested herein.

In response to the third issue raised by the Carrier, that the instant claim should be barred from consideration by this Committee as a result of laches, the Claimant contends that because there are no stated time limits for instituting claims under the New York Dock conditions, this Committee must not dismiss the claim as untimely, and that the Carrier's position that the claim is barred under the doctrine of laches "border(s) on the frivolous." The Claimant further submits that on July 15, 1997, just two weeks after the Claimant had been downgraded from SRMTO at Tucson to the position of Manager of Intermodal Operations at Houston, he, in fact, furnished the Carrier a "written notice concerning his displacement, which was acknowledged September 4, 1997."

Concerning such "notice," the record establishes that on July 15, 1997, again, just two weeks after the effective date of Claimant's transfer to Houston, the Claimant sent a letter to the Union Pacific's President and C.E.O., J. E. Davis, requesting "some type of MTO position (if not the senior MTO) in the Arizona area and without the 21% wage reduction."[9] Thus, given

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organizational hierarchy of the carrier; and (9) any other relevant factors regarding the individual's duties and responsibilities.

[7] V.S.=Verified Statement.

[8] See Thomas M. Curley, et al. v. Missouri Pacific Railroad Company (Brown; 1987); and Southern Pacific Empowered Employees v. Southern Pacific Transp. Co. (Fredenberger; 2000).

[9] Based on the record, the Committee reasons that MTO would stand for "Manager Terminal Operations," given the SRMTO position repeatedly referred-to above. The Claimant's letter to C.E.O. Davis is found at Union Pacific

the letter he had sent to Davis, just two weeks after the effective date of his transfer, in defense of the Carrier's procedural charge as to laches, the Claimant has consistently maintained that, "UP was well aware of Employee's claim, even though the dispute was not labeled NYD." The Claimant further asserted that, "...other claims arose out of Employee's displacement, under other federal provisions, and UP conceded it was aware of these related claims." (See p. 36, Claimant's post-hearing brief; and Exh. GH-28 [Reply Verified Statement of John E. Grother], p. 13).

Moreover, the Claimant has emphasized throughout this proceeding that the Carrier's ability to defend itself has at no time been compromised by the Claimant's delayed filing of a claim requesting benefits under the New York Dock conditions. For example, the Carrier official to whom the Claimant reported at Tucson, Service Unit Superintendent, Ken Packard, was still employed by the Carrier when the Claimant sent his May 12, 2003 letter to the UP's Vice President of Law, James V. Dolan. Thus, at that time, Packard arguably still possessed detailed knowledge of the factors leading to the Claimant's "displacement," the Claimant stressed. Indeed, relying on certain testimony provided by Packard, who appeared at the hearing as a Carrier Witness, the Claimant's displacement was not motivated by disciplinary concerns. Therefore, argues the Claimant, if his transfer to Houston was not for disciplinary reasons (as a "lost" personnel form, identified as "UP 15121" supposedly at one time had indicated), the only reason for the transfer was merger-related, again, as a result of the "failed switching experiment at Tucson." Indeed, relying on the Verified Statement of Conductor Tom Moore (Ex. GH-27, p. 3), the Claimant submits that, as Moore so stated under oath:

> "...The failure of this merger yard consolidation program was not the fault of Grother or for that manner any of the non-agreement employees in Tucson as they gave it their all. The people in Omaha who orchestrated this plan without major

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Ex. 2, pp. 64-66; or Grother Ex. E-2, Exh. 10). Davis's one-page response, dated September 14, 1997, is found at Union Pacific Ex. 2, p. 68; or Grother Ex. E-2, Exh. 11).

repairs to trackage or increased staffing of personal (sic) in Tucson yard are the ones who caused this plan to fail!"

Finally, notwithstanding the reasons set forth above in defense of the Carrier's challenge regarding the timeliness of his claim, the Claimant gave as an additional reason, a fear "retaliatory discharge," that would purportedly have caused him to suffer a loss of health benefits for him and his wife, given the fact that in July 1997 he had not attained a "medical benefit eligibility age of 55." As justification for his "fear," the Claimant cited a situation involving a non-agreement employee named Fransconi (See Grother Ex. E-2, Exh. 35). The Claimant further charged that at time of his transfer to Houston, both Packard and his new "supervisor," Don Fryar, "cautioned" him to take the demotion, and not pursue any "lawsuits," because the Carrier would otherwise make it "unbearable" for him (See pp. 1-2 of Grother's Verified Statement-Laches).

Accordingly, in view of the above, and based on the comprehensive arguments and evidence as set forth in detail in the entire record before this Arbitration Committee, the Claimant urges that the Committee find: (1) Claimant was adversely affected as a result of the Carrier's implementation of the STB-approved merger with the Southern Pacific Rail Corporation; (2) Claimant was an employee within the meaning of 49 U.S.C. 11326 and New York Dock at the time of adverse effect; and (3) the instant claim should not be barred by laches given the Carrier's knowledge of a claim dating back to July 15, 1997 and in view of the fact that the Claimant's "delay" in perfecting a specific claim under the New York Dock conditions was not prejudicial to the Carrier.

B. The Carrier Member

It its post-hearing brief, the Carrier addressed the three issues for resolution by this Committee, in the order in which they were discussed at the arbitration hearing. As the hearing

record so indicates, the questions involving (1) causality (merger); (2) jurisdiction (employee status); and (3) procedure (laches), were confronted in that order.

In its post-hearing brief, the Carrier initially commented that the Claimant's submission of his New York Dock claim to the UP's Law Department instead of to the Labor Relations Department was procedurally wrong. However, the Neutral/Referee Member notes that such error was deemed by the Carrier to be more of a procedural "misstep" than fatal error.

Specifically, the Carrier emphasized that with respect to its procedures for handling claims arising under protective conditions such as New York Dock, the Carrier's Labor Relations Department, and not its Law Department has customarily handled all claims, disputes and issues related to employee protection. Thus, states the Carrier, the Claimant's apparent view that the Law Department was the proper forum for adjudicating his May 12, 2003 claim under New York Dock was incorrect from the standpoint of procedure. However, from the record before us it is clear that the Carrier's key procedural argument rests on the laches doctrine, given the Claimant's 70-month delay in submitting his claim for relief under the New York Dock conditions.

Furthermore, in response to an additional procedural matter raised by the Grother Member, with regard to the Carrier Member's standing on this Arbitration Committee, the Carrier sharply contends that, as the Carrier's General Director of Labor Relations, the Carrier Member's assignment to this Committee was consistent with his customary responsibilities in Labor Relations which, as developed in the record, includes participating as a Carrier advocate in labor claim matters progressed to arbitration. In a related vein, on page 13 of its post-hearing brief, the Carrier stressed that "this arbitration case has been handled in the usual and customary manner." Specifically, the Carrier Member asserted that the parties' simultaneous exchange of *ex parte* submissions, followed by hearing and rebuttal briefs limited to reinforcement of prior

argument, but no new evidence or new argument, was consistent with the railroad arbitration procedures set forth in the Railway Labor Act as opposed to a "three-step" process of exchanging submissions advocated by the Claimant purportedly under STB procedural guidelines.

Returning to the three issues precisely before this Board, the Chair notes that like the Claimant, the Carrier, in its pre-hearing submission, testimony at the arbitration hearing, and post-hearing brief, has presented to this Committee detailed arguments and evidence in what it argues is overwhelming support for its position that the Committee should deny the instant claim for reasons of both procedure (laches) and substance (jurisdiction and causality).

The Carrier submits that the Claimant's assertions that his demotion from the position of Senior Manager Terminal Operations (SRMTO) to Manager Intermodal Operations at Houston, TX was solely merger related was not proved by him, irrespective of whether the Claimant was, in fact, an "employee" or "subordinate official" at the time, which the Carrier has consistently denied. Relying on the testimony at arbitration of the Claimant's then supervisor, Service Unit Superintendent Ken Packard, on page 2 of its post-hearing brief, the Carrier emphasized:

> "...Mr. Grother had not been demoted because of the issue with Phoenix. He stated 'the service issues and everything, they were insurmountable no matter who was in charge.' He testified the real reason for the demotion was Mr. Grother's lack of performance on the job. In his words, 'John wasn't up to the charge...' During cross examination by Mr. MacDougall, Mr. Packard reiterated that Mr. Grother's demotion did not occur as a result of the movement of Phoenix switching into Tucson."

Furthermore, the Carrier asserted that inasmuch as the switching experiment took place on the former territory of the Southern Pacific Rail Corporation, the Carrier's decision to move the switching from Phoenix to Tucson could have been made by the SP prior to the merger, and thus, was not a "merger dependent" operational change, as the Claimant has essentially contended. Moreover, for reasons stated in detail in its pre-hearing and post-hearing

submissions, the Carrier asserted that certain information contained in the Labor Impact Exhibit filed by the merger applicants did not support the Claimant's opinion that that his demotion was a direct result of the merger in light of the situations at both Phoenix and Tucson. In sum, the Carrier stressed that a comprehensive review of the entire record of this case by the Committee should support a determination that the Claimant, even if he were an employee or subordinate official, did not sustain his burden of proof as regards the causality issue.

Regarding the second issue of whether the Claimant's status at the time of the September 11, 1996 merger implementation was that of an "employee" for purpose of eligibility for a displacement allowance under the New York Dock conditions, given the clear facts in this case, the Claimant did not hold a position of employee or "subordinate official." The Carrier emphasizes that the historical meaning of the terms employee and subordinate official have been derived from federal legislation applicable to the railroad industry involving labor protection coverage issues such as this, and as further clarified by numerous awards rendered by arbitration committees convened on this Carrier's property as well as on other railroads. The "the real test for coverage under the New York Dock conditions is whether a person is considered to be an official," the Carrier states. (See Carrier's post-hearing brief, p. 4). According to the Carrier:

> "Only those persons who are covered by a collective bargaining agreement, or those non-agreement persons determined to be subordinate officials, are employees under the RLA. In each of the NYD awards cited by UP, the arbitration committee's decision hinged on whether a non-agreement person was an official."

The Carrier has argued throughout this matter that, based on the duties and responsibilities traditionally associated with the SRMTO position held by the Claimant at the time of the transaction implementation, it would be highly erroneous for this Committee to ultimately find in favor of the Claimant with respect to its determination on the "employee"

(jurisdictional) issue. Indeed, the Carrier reminds the Committee that "use of the term 'employee' in New York Dock is tied to the use of the term 'employee' in the RLA." Indeed, in Carrier Exhibit 51, a 25-page recent award rendered by Referee Suntrup, the Carrier emphasizes that an employee holding the non-agreement title of "project manager," was found to not have met the definition of a "displaced employee" under Article IV of New York Dock.[10] Thus, the Carrier reasons that the position of Senior Manager Terminal Operations (SRMTO), held by the Claimant the time of his demotion, should be regarded as an official position because it never has been covered by a collective bargaining agreement on either the Southern Pacific or Union Pacific railroads, and furthermore is a position that has never been deemed eligible for unionization on either railroad.

The Carrier furthermore urges the Committee to consider the Claimant's request for coverage under the New York Dock conditions in light of whether the Claimant meets the test of coverage with respect to whether the position he had occupied at the time of the merger transaction was that of an "official," as opposed to an "employee," or "subordinate official." According to the Carrier, specific language contained in the Railway Labor Act excludes officials from the definition of employees covered by the Act. The Carrier additionally argues that this Committee should be cognizant of the holdings made by the ICC in its Ex Parte No. 72 decisions. Therein, according to the Carrier, the ICC has consistently held that employees occupying the position of "trainmaster" have been viewed as holding "official" positions. Here, the Claimant held a higher level position of SRMTO, whose key function was to supervise trainmasters, or their equivalent the UP's MYO's, as will be further discussed below.

The Carrier points out that on page 2 of the Claimant's Verified Statement-Job Classification, the Claimant substantiated his place in the Carrier's managerial hierarchy at

[10] See Trans. Comm. International Union vs. Burlington Northern Santa Fe Railway Company (Suntrup; 7/14/04).

Tucson by admitting that beginning on September 16, 1995 (one year prior to the merger), his title at Tucson was that of Terminal Superintendent and, in that capacity, three trainmasters had reported to him. Moreover, according to the testimony of Carrier Witness Packard, when the title of Trainmaster at Tucson (former SP territory) was subsequently changed to the UP's title of Manager Yard Operations (MYO), the MYOs, in turn, still reported to the Claimant, whose title had also been similarly changed from the SP title of Terminal Superintendent to the UP title of Senior Manager Terminal Operations (SRMTO). Thus, given the facts of record, as admitted to by the Claimant, and as corroborated by the credible testimony of Carrier Witness Packard, the Claimant's position was unquestionably managerial, or official, given his supervisory responsibilities over the MYOs, formerly "trainmasters." Thus, the Carrier stresses that the Claimant's position that he was merely a "titular head of the terminal" who provided "trainmaster relief" is inconsistent with the actual record in this case, and should be rejected by the Committee.

The Carrier additionally maintains that the record clearly establishes that prior to his demotion to Houston, as the SRMTO at Tucson, the Claimant "was neither being paid, nor expected to perform the duties of the lower rated MYO position." Even if he voluntarily performed such duties, such as "trainmaster relief," such duties would still be consistent with those of a class of employee (used in the general sense) excluded from the category of "subordinate official" pursuant to the Railway Labor Act, and as determined by the ICC Ex Parte No. 72 decisions, which again, set the bar below the level of trainmaster. In sum, therefore, consistent with the relevant arbitral precedent established through the numerous awards of previous New York Dock arbitration committees that have considered this very

issue[11] this Committee should so similarly find that the Claimant in this case was neither an employee nor subordinate official for purpose of New York Dock coverage or eligibility given the SRMTO managerial position he held at Tucson.

Turning to the third issue involving the Carrier's contention that this claim is procedurally barred from this Arbitration Committee's consideration under the equitable doctrine of laches, the Carrier member emphasized at arbitration that the Claimant's argument that his July 15, 1997 letter to President and C.E.O. Davis somehow preserved his procedural right to advance a specific claim under the New York Dock conditions some 70 months later, on May 12, 2003, should be rejected in its entirety. Indeed, the Carrier points to the Claimant's own Reply Verified Statement-Laches, Exhibit GH-28, p. 13, in which the Claimant "admitted" he did not "label" his original letter (to C.E.O. Davis) as a dispute arising under New York Dock.

The Carrier argues that the Claimant's apparent belief that time limits do not apply to the initial submission of claims under the New York Dock conditions is completely without foundation, and it emphasizes that the lack of a specified time limit does not militate against his extraordinary delay in the filing of his claim. Citing numerous awards of prior arbitration committees that have indeed dismissed similar claims because the employees involved in those disputes were found to have waited an unreasonable length of time before initiating their New

[11] See B. J. Maeser, T. P. Murphy, E. M. Sengheiser and K. W. Shupp v.. Union Pacific Railroad Company, et al. (Seidenberg; 12/18/87); John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Company (O'Brien; 10/22/87); Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (Stallworth; 4/5/88); James V. Nekich v. Burlington Northern Santa Fe Railroad (VerPloeg; 12/6/96); Ross F. Povirk and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth; 7/16/98); G. L. Dixon and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company; (Stallworth; 7/16/98); and B. W. Isabell and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company; (Stallworth; 7/16/98).

York Dock claims, and such delays were to prejudiced the Carrier,[12] the Carrier urges that this Committee make a similar determination here, given the nearly six year delay that preceded the Claimant's filing of his specific claim under New York Dock.

In response to the Claimant's argument that his delay in filing was justified by a legitimate fear of "some sort of" retaliation by the Carrier, the Carrier states that (1) the Claimant's "belief" that the Carrier would have discharged him for filing such a claim, before attaining the age of 55, resulting in his loss of certain medical benefits, was completely speculative and totally unfounded; (2) certain executives, whom the Claimant had identified in his Carrier correspondence as having knowledge of his dispute, had, in fact, left the company between 1997 and 2003; and (3) many of the documents and records relating to 1997, for example personnel form 15121, referred-to above, were no longer available, again, given the substantial passage of time from the date of the demotion to the date of his claim filing.

Last, the Carrier opines that the Claimant's "long delay" in submitting a claim under the New York Dock conditions furthermore worked to his advantage by virtue of the non-agreement compensation and relocation benefits paid to him for his relocation from Tucson to Houston. Thus, the Carrier asserts that in the event this Committee should find that the Claimant was covered by New York Dock, the Carrier should, in turn, be permitted to recover the salary and moving expenses paid to the Claimant as part of his non-agreement benefit package[13] that would have exceeded the moving expense benefits normally paid to employees covered under the New York Dock conditions.

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[12] United Transportation Union v. Union Pacific Railroad Company (LaRocco; 8/27/93); Southern Railway Company v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Muessig; 2/13/90); and Transportation-Communications International Union v. Union Pacific Railroad Company (LaRocco; 6/26/90).

[13] According to the Carrier, in addition to moving expenses received, the Claimant received $10,857.50 in salary and expenses related to the relocation to which he would not have been entitled had he been similarly compensated under New York Dock (Union Pacific Exhibit 43).

Therefore, based on the above and for all the reasons set forth by the Carrier, both orally an in writing, prior to and during the arbitration hearing, and thereafter in its post-hearing brief, the Carrier requests that the Committee find that: (1) the Claimant's claim was time barred under the equitable doctrine of laches; and (2) at the time of his demotion, the Claimant was not a "displaced employee" subject to the jurisdiction of New York Dock, and hence, his demotion was not "merger-related."

VI. DISCUSSION AND FINDINGS

As set forth in detail above, the instant case before this Arbitration Committee involves a claim by non-agreement Claimant, John E. Grother, for a displacement allowance under the New York Dock conditions, imposed by the STB on August 6, 1996, in Finance Docket No. 32760, the merger application filed by petitioner railroads, Union Pacific Railroad Company and Southern Pacific Rail Corporation. It is essentially not disputed that, on the September 11, 1996 merger implementation date, the Claimant held a non-agreement position of Senior Manager Terminal Operations (SRMTO) at Tucson, AZ. Subsequent to the date of merger, on July 1, 1997, the Claimant was transferred to a lower paying position of Manager of Intermodal Operations at Houston, TX. Despite the fact that the Carrier viewed that transfer as a demotion, the Claimant received relocation benefits and other compensation as a result of the move.

The Claimant strongly contends that, at the time of his relocation to Houston, which he subsequently regarded as a "displacement," as opposed to a "demotion," the Claimant did not hold an "official" position, as the Carrier has argued. Furthermore, the Claimant asserts that he consequently was entitled to a displacement allowance under the New York Dock conditions given the fact that his transfer was involuntary and he was placed in a worse position with respect to his earnings. In the Claimant's view, he has amply carried his burden of proving that

the Carrier's action as regards his transfer to Houston was solely attributed to the Carrier's implementation of the UP/SP merger on the former SP territory.

With respect to the issue of the nearly six year delay in filing the instant claim asserting an entitlement to benefits under the New York Dock conditions, the Claimant has consistently argued that, for the reasons discussed above, this Committee should not regard the delay as fatally detrimental to his claim from the standpoint of procedure. Therefore, the Arbitration Committee should adjudicate this claim solely on its merits, the Claimant emphasized.

Conversely, the Carrier contends that procedurally, the Claimant's six-year delay is excessive, and citing the prior awards on that point, urges the Committee to dismiss the claim outright under the laches doctrine. According to the Carrier, the Claimant simply waited too long, and such delay was prejudicial to its ability to defend itself against the significant liability claimed.

With respect to the substantive issues of jurisdiction and causality, the Carrier asserts that the claim should be denied, and as noted above, has supplied numerous awards of previous arbitration committees in support of its contention that the Claimant's position of SRMTO met the test of an official position as opposed to that of an employee or subordinate official. Thus, because the New York Dock conditions do not apply to the Claimant, the reason for his transfer technically is irrelevant to the dispute.

The Committee has undertaken a painstaking review of the evidence, documentation and arguments extensively set forth by the partisan members with respect to the issues of procedure, jurisdiction and causality. As a result of that review, the Neutral/Referee Member finds that the Carrier has met its burden of proving that the instant claim should be dismissed under the equitable doctrine of laches.

The Claimant's nearly six-year delay in perfecting a claim for benefits under Article IV of the New York Dock conditions was grossly excessive, given the facts of record before this Committee. Furthermore, upon due study of the record, the Neutral/Referee Member finds that the explanations proffered by the Claimant in his attempt at justifying the substantial delay were not supported by probative evidence and simply do not mitigate the 70-month delay. Moreover, because of the extent of the liability which the Claimant calculated as having accrued beginning on July 1, 1997, and continuing for the six years thereafter, as previous awards have held, by the time the Carrier had received such claim its ability to defend it or somehow stem the accruing liability was seriously diminished.

The Neutral/Referee Member notes that given the existence of substantial relevant arbitral precedent on both the procedural and substantive issues before this Committee, with particular emphasis on the laches issue before us at this point in the discussion, the majority's determination as to the laches question must reflect its review of that precedent, with the resulting finding not inconsistent therewith.

Second, as regards the jurisdictional issue of whether the Claimant was an "employee" or "subordinate official" at the time of his transfer, without retreating from the threshold procedural determination as to laches, the Neutral/Referee Member finds that, based on the evidence of record and the relevant precedent identified by the Carrier, the Claimant, at the time of his transfer, was not an employee or subordinate official under the New York Dock conditions. See the Carrier's extensive discussion of the history of the term "employee" under New York Dock, railroad labor legislation, and the awards of numerous New York Dock arbitration committees on pages 8-20 of its pre-hearing submission.

Third, with respect to the issue of causality, given the majority's finding that the claim is barred by laches and its merits determination as to coverage, the issue of causality or nexus is

essentially moot. This is so because of the majority's findings that the Claimant had no standing under Sections 1.(b) and (c) of New York Dock given the SRMTO position he held at the time of the transfer. Hence, the Committee need not evaluate whether the Claimant met the burden of proof specified in Section 11. (e), that is, "to identify the transaction and specify the pertinent facts of that transaction relied upon." Indeed, any question as to what prompted the transfer, or demotion, in light of the Claimant's non-coverage under New York Dock is simply not relevant to the outcome of this dispute, and consequently, the Carrier would not be required "to prove that factors other than a transaction affected the employee."

Now giving more detail to the threshold procedural issue of laches, it is clear from a careful review of the record that the Claimant did not perfect any claim under Article IV of New York Dock until his May 12, 2003 (46-page) letter to James V. Dolan, the Union Pacific's Vice President of Law. In that letter, as opposed to the one he had sent 70 months earlier, on July 15, 1997, to President and C.E.O. Davis, the Claimant clearly asserted, both in a bold-type heading and in the opening paragraph of the letter, that the intent of his letter was to notify the Carrier of a "New York Dock Arbitration Dispute." Furthermore, the Claimant stated and that he was seeking benefits as a "displaced employee" under New York Dock as a result of a merger-related transaction. (Union Pacific Ex. 2; Grother Ex. E-2).

In light of the above, the majority cannot agree that, under the facts present in this dispute, the Claimant's submission of the 1997 letter in any manner whatsoever constituted his timely notification of a New York Dock dispute with the Carrier. Furthermore, following the Committee's careful review of the specific statements made in that July 15, 1997 letter, the majority holds there is nothing contained therein that would in some way preserve the Claimant's right to submit a New York Dock claim some 70 months later.

In a similar vein, the Claimant's argument that the absence of any time limit for filing a claim under Article IV of the New York Dock conditions, especially given the fact that he was not represented in this proceeding by any labor organization, presumably preserved his right to file a claim at a much later date, is not supported by any credible proof. Again, and from a slightly different angle, the majority notes that the Claimant's 1997 letter to C.E.O. Davis essentially is an expression of his concern about his "downgrade" from his management position of SRMTO at Tucson, to the lower level position of Manager of Intermodal Operations at Houston. Furthermore, in that same letter, the Claimant implied he was treated in a discriminatory manner, and asserted that he was not aware of any personal performance issues that would have justified such a transfer. Davis' response was essentially that there were many factors contributing to the problems at Tucson and that one of the strategies toward correcting those problems was a change in management staffing, which Davis acknowledged is sometimes difficult to comprehend. The Committee further notes that its jurisdiction is confined to the issues set forth in Section II, Statement of the Issues, above.

Moreover, the Neutral/Referee Member notes that in the Claimant's July 15, 1997 letter, the Claimant furthermore wrote to President Davis about his dissatisfaction with his demotion and essentially attempted to enlist his help in obtaining a comparable management position in Arizona, as opposed to Houston. Therein the Claimant expressed "the hope that I could possibly retain some type of MTO position (if not the senior MTO) in the Arizona area and without the 21% wage reduction..." Clearly, based on the specificity of that request for a comparable management-type position, and preferably at a senior level, the focus of that letter was to enlist Davis's aid in securing a management position to which he was accustomed to working as opposed to any obtaining benefits as an employee or subordinate official under the New York Dock conditions.

Thus, the majority concludes that until its receipt of the May 12, 2003 claim specifying a request for accrued benefits under New York Dock, the Carrier had no knowledge of any pending claim from the Claimant seeking some measure of compensation under the New York Dock conditions. The Neutral/Referee Member accordingly finds merit to the Carrier's argument that when it rece: ed the Claimant's request for over $107,300.00 in New York Dock benefits over the course of the previous 70 months, it essentially was "hit from behind," and thus unfairly placed in a position in which it could neither mitigate nor stem the liability.

Indeed, in an on-property case involving a similar delay in filing a claim under the New York Dock conditions, Referee Rehmus found that "a nearly six-year unexplained delay in filing this claim...creat(ed) possible increased financial liability to the Carrier that cannot now be avoided or offset, (and) fatally prejudices it." See Transportation-Communications International Union v. Union Pacific Railroad Company (Rehmus; 12/30/92). That award is particularly applicable here, where the record is devoid of any probative evidence justifying the Claimant's nearly six-year delay in filing a claim under New York Dock.

Moreover, further arbitral support for the majority's determination that the Claimant's extraordinary delay permanently bars this claim, under the equitable doctrine of laches, is found in the following awards cited by the Carrier: United Transportation Union v. Union Pacific Railroad (LaRocco; 8/27/93); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Southern Railway Company (Muessig; 2/23/90); Transportation-Communications International Union v. Union Pacific Railroad Company (LaRocco; 6/26/90); and Certain Designated Claimants v. Union Pacific Railroad Company (Seidenberg; 5/18/87). Referee Muessig stated in his February 13, 1990 award that a nearly three year delay in filing for New York Dock protective benefits was unreasonable, as follows:

"Certainly the doctrine of Laches has been recognized in this industry as well as by other arbitral precedent to bar claims filed beyond a reasonable time period. The theory underlying the Laches doctrine is that the failure to litigate a claim presently by deferring action until some unspecific but distant time in the future result in bias or prejudice the party against whom the claim is ultimately filed. The purpose of Laches is to bar the submission of stale claims. Clearly, in employee protective matters, it is critical that claims be filed without delay. In the cases at hand, and while we have fully considered the General Chairman's aggressive and skilled comments before us, the Claimants' failure to act in a timely manner precludes consideration of the issue at hand."

Here, the majority finds that, upon its careful review of the record, the Claimant's excuses for his delay in submitting his claim in a timely manner were not backed by any credible proof. From the majority's review of the record, there simply is no real evidence to support the Claimant's contentions that a timely filing of his claim would have subjected himself to "retaliatory discharge," loss of health benefits to him or his wife, or other punitive actions. Such serious allegations must be backed by credible proof, the Neutral/Referee Member emphasizes, especially in a situation such as this, where the delay was far in excess of the delays involved in the on-property arbitration cases cited above, with the exception of the 1992 Rehmus award, which, again, dismissed an on-property claim for protective benefits under New York Dock when that claim was submitted nearly six years after the date of the merger involved in that case.

The Claimant's six-year delay in filing his claim parenthetically coincided with the maximum period of benefit entitlement under New York Dock, the majority of this Committee notes. Thus, the Carrier's position that it was essentially blindsided by the Claimant's six-year cumulative request for $107,370.00 in New York Dock benefits is well founded, and such tactic runs contrary to a management goal of achieving "stable and predictable railroad labor-management relations," as Referee LaRocco pointed out in his June 26, 1990 award, cited above. In sum, the majority finds that the Claimant's delay was not satisfactorily justified by

the evidence of record, and such delay did prevent the Carrier from taking any measures toward resolving the matter outright, reducing the liability, or alternatively, constructing a vigorous defense with still-available documentation and personnel. The Carrier's position as to the manner in which it was prejudiced by the Claimant's protracted claim filing is succinctly set forth on page 10 of its post-hearing brief:

> "...Had Mr. Grother identified his 'dispute' as one involving New York Dock, the parties could have scheduled a conference and discussed the facts. Either party could have referred this dispute to arbitration if it had not been settled within 20 days after the dispute arose. Has (sic) that happened, this matter would have been settled at least five years ago, when the players and the papers involved were still available. By not labeling his dispute as one involving New York Dock until nearly six year after his demotion, Mr. Grother seriously disadvantaged UP's ability to defend itself."

Last, even if this Committee were to regard the Carrier's "laying behind the log" metaphor to be a bit hyperbolic, the majority nonetheless is convinced of the correctness of the Carrier's argument that the loss or dissipation of records, fading memories, and personnel turnover over the period of time covering the nearly six-year delay were inevitable workplace realities that had a chilling effect on the Carrier's ability to appropriately defend itself against the sizeable claim submitted by this Claimant. Thus, for all of the reasons set forth above, the Neutral/Referee Member holds that the Carrier met its burden of proving, by substantial evidence, that the instant claim should be barred from consideration on the merits under the equitable doctrine of laches.

The majority's determination as regards the procedural threshold issue of laches is dispositive of this case, as stated earlier. However, without retreat from the foregoing, and in the event the majority had reached an alternative finding, we nonetheless conclude that the record before us is replete with evidence that, with respect to the question of coverage, at the time of the Claimant's transfer from Tucson, AZ, to Houston, TX, the Claimant was neither an employee

nor subordinate official for the purpose of entitlement to a displacement allowance under Article IV of New York Dock. In that regard, the Neutral/Referee Member relies particularly upon the Claimant's own description of the characteristics and responsibilities of the SRMTO position he held at the time of his transfer, and the description of the Claimant's duties as SRMTO as set forth by the Carrier on page 21 of it pre-hearing submission, and as emphasized by Carrier Witness Packard during the arbitration hearing.

In the second sentence of the first paragraph of his May 12, 2003 claim for benefits under New York Dock, the Claimant clearly considered himself as a manager, and moreover, as someone who had been selected for many promotions. Indeed, based on that document, it is clear to the majority of this Committee that the Claimant regarded himself as a member of SP's management team, stressing that, when selected for the position of Terminal Superintendent (later, SRMTO), he had essentially been given the responsibilities of "senior officer" at Tucson. The Neutral/Referee Member further finds that, as the facts of record indeed have made plain, at the time he actively began to pursue his claim for protective benefits under New York Dock, his portrayal of himself was "downgraded" to that of a mere "order taker" at Tucson, whose primary function was to provide "vacation relief." Such a belated assessment of his responsibilities at Tucson at the time of the transfer is less than credible and hardly constitutes persuasive evidence that the Claimant was an employee or subordinate official at the time of his July 1, 1997 transfer to Houston, the majority stresses.

Thus, notwithstanding the laches bar to this claim, the majority concludes that the evidentiary record is completely lacking in any evidence to support the Claimant's contention that the SRMTO position he occupied was that of a subordinate official subject to unionization under the Railway Labor Act. Indeed, as stated above, on page 21 of its pre-hearing submission, the Carrier set forth the primary responsibilities of the SRMTO position, and Packard's own

recitation of the relevant duties of the SRMTO were not inconsistent with the Carrier's list. Indeed, according to Carrier Witness Packard, the Claimant was responsible for (1) terminal operations; (2) safety; (3) budgeting; (4) the "transportation product" at Tucson; (5) hiring recommendations; and (6) conducting disciplinary hearings and making disciplinary recommendations. (See transcript pp. 69-70; 84-86). The above duties and responsibilities are consonant with those of a management-level employee above the rank of what the Railway Labor Act intended to be a "subordinate official," the majority holds. As arbitral support for our findings here, see, in particular, Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (Stallworth; 4/5/88), which answered, in the negative, the question of whether a Manager of Labor Relations on this Carrier was an employee subject to the protection under New York Dock and thus entitled to protective benefits.

Based on the foregoing, even fewer comments are necessary with respect to the question of causality, given the majority's first finding as to the procedural bar of laches, and its second finding as regards "employee." Given the majority's ruling that, notwithstanding the procedural bar, the Claimant was not an employee, it is emphasized here that he moreover does not meet the definition of a "displaced employee," as defined in Section 1. (b), despite the Claimant's valiant efforts to convince a majority of this Committee that the duties he performed in actuality, fell within a class of employees deemed by the Railway Labor Act as eligible for unionization.

Therefore, in light of the facts of record, the Claimant was not entitled to protection under Article IV, above, and the question of whether his transfer stemmed purely from the merger transaction itself, or was attributed to other reasons, is immaterial, and the Committee need not determine whether the parties met their respective burdens of proof as regards the causality issue.

Last, the Neutral/Referee Member is aware that, both during the arbitration hearing and in the post-hearing briefs, the parties made reference to the issue of whether there was a

statutory duty, under the Railway Labor Act, to conference this matter before the Claimant's decision to invoke arbitration and, if so, whether that duty was appropriately fulfilled. Given the majority's findings, as set forth in detail above, it clearly is unnecessary for that issue to be addressed by this Committee, for the predominant reasons that: (1) such issue was not formally raised by the Carrier as a statutory bar to arbitration; and (2) such argument was not fully developed by either of the partisan members of this Committee either prior to or during the arbitration hearing.

Furthermore, the Neutral/Referee Member holds that upon careful review of the record and all of the correspondence which ultimately led to the holding of the instant arbitration hearing (and the procedures for conducting same), both parties were afforded their respective due process rights. In sum, neither party was placed at any advantage or disadvantage with respect to the procedures governing this arbitration.

Therefore, in response to the questions put before this Arbitration Committee by the Claimant, the majority answers as follows:

1. Whether employee was adversely affected as a result of the STB-approved merger. **Claimant was not adversely affected by the merger.**

2. Whether the involved employee was an "employee" within the meaning of 49 U.S.C. 11326 and NYD at the time of first adverse effect. **Claimant was not an employee within the meaning of 49 U.S.C. 11326 and the New York Dock conditions.**

3. Whether employee's request for compensation/benefits under NYD was so unreasonably delayed as to be barred by the doctrine of laches. **Claimant's request is barred by the doctrine of laches as a result of his nearly six-year delay in filing.**

In response to the questions placed before this Arbitration Committee by the Carrier, the majority responds as follows:

1. Was John E. Grother, at the time of his reduction in salary, a "displaced employee" subject to the protection of the New York Dock conditions? **No.**

2. Is John E. Grother's claim for a displacement allowance pursuant to New York Dock barred under the doctrine of Laches? Yes.

VII. AWARD

For the reasons set forth above and incorporated herein as if fully rewritten, the subject claim is hereby denied in its entirety.

Lynette A Ross

Lynette A. Ross
Neutral Member

I Dissent-John E. Grother

John E. Grother
Grother Member 1/6/2005

William E. Loomis 1/4/2005
Carrier Member

Dated: December 21, 2004

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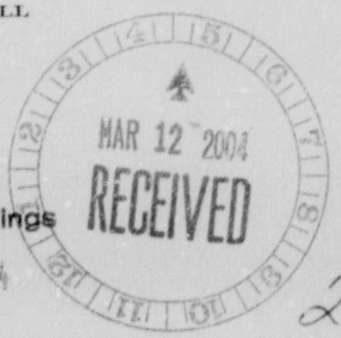

March 12, 2004

210289

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20423

Re: Finance Docket No. 32760 (Sub-No. 42), Union Pacific Corporation Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

Petitioner is in receipt of the opposition by Union Pacific Railroad Company (UP), filed March 5, 2004. The Board's rules do not permit a reply absent unusual circumstances, and petitioner will not answer the facts and arguments which it deems erroneous, at this time.

However, UP has characterized the identity of the petitioner, John E. Grother, as a "management employee" (UP Opp. 3), analogous to the term of art ("managerial employee") under the NLRA, in lieu of the RLA definitions for railroad and airline personnel (subordinate official/employee). Cf. 29 U.S.C. 152(f); 45 U.S.C. 151, fifth, 182. For a recent decision and summary of cases, see: LeMoyne Owen College v. NLRB (No. 03-1031, USCA-DC Cir., Feb. 10, 2004), 72 U.S. Law Week 1497-98 (2/24/04).

We wish the record to show that petitioner disagrees with UP's characterization of his identity; and that he is not a "management employee," now or previously.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

210236

ORIGINAL

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GORDON P. MACDOUGALL
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TELEPHONE
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223-9738

March 5, 2004

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
Washington DC 20036

Re: Finance Docket No. 32760, (Sub-No. 42), Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (Arbitration Review)

Dear Mr. Williams:

This is to supplement the petition, filed February 20, 2004, in the captioned proceeding, with the one-page letter from the Arbitrator, dated March 1, 2004.

Very truly yours,

Gordon P. MacDougall

Attorney for John E. Grother

cc: W.E. Loomis
L.A. Ross

MAR - 4 2004

Lynette A. Ross
Arbitrator

1220 Fairway Drive
Lawrenceburg, KY 40342-9706

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(502) 859-9004 (fax)
E-mail: lynetteross@hotmail.com

March 1, 2004

Mr. John E. Grother
1718 Rustic Park Drive
Kingwood, TX 77339

Gordon P. MacDougall
Representative for John E. Grother
Suite 410
1025 Connecticut Avenue, NW
Washington, DC 20036

Mr. W. E. Loomis
General Director
Employee Relations Planning
Union Pacific Railroad Company
1416 Dodge Street
Room 332
Omaha, NE 68179

Re: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Messrs. Grother, MacDougall, and Loomis:

This is to confirm my receipt of a copy of Mr. MacDougall's petition, dated February 20, 2004, before the Surface Transportation Board (STB), to establish arbitration procedures regarding the above-captioned case. I appreciate your efforts to keep me informed of the status of this case.

As we discussed during a recent telephone conference, once the procedural issues set forth in the petition are resolved, we will resume contact in order to schedule a mutually acceptable hearing date.

Very truly yours,

Lynette A Ross

Lynette A. Ross