STB FD 32760(SUB35) 12-06-99 D 196157

196157

KATHLEEN SULLIVAN
1110 Bayswater Avenue, #302
Burlingame, CA 94010
(650) 340-8249

December 3, 1999

Surface Transportation Board
1925 K Street, NW, Room 715
Washington, D.C. 20423

Re: Status of Appeal for Review of Arbitration Award Pursuant to Article 1, §10 of Finance Docket No. 32760 (Sub-No. 35), In the Matter of the Arbitration between: Kathleen V. Sullivan, Claimant, and Union Pacific Railroad Company, Carrier, due December 6, 1999.

The Surface Transportation Board was kind enough to grant me an extension to file an appeal until December 6, 1999. I had mailed all the working papers to Robert Huntington, the person who was going to help me who lives in Tacoma, Washington. I talked to him about two weeks ago and everything was on schedule. I left a couple of messages last week and he did not call me back. I was very anxious to talk with him because of the impeding deadline and tracked down his brother who lives nearby. He informed me that Mr. Huntington was hospitalized after Thanksgiving and was not able to take any calls. I have since tried to contact the family to gather more information but have been unsuccessful.

I called the Surface Transportation Board on Thursday and talked to someone in your Public Services Department. She said that I should contact the UP counsel, Brenda Council, to explain the situation and ask for their agreement for an extension. I did that but was told that Ms. Council would be out of the office until Monday, December 6, 1999. Her assistant Laurie said that she generally checks her voicemail daily and I left a message explaining the situation and with a request asking her to call me by Friday. Laurie also took the information down and said that she would try to get in touch with her. Because I did not hear from Ms. Council, I called Laurie back on Friday and asked if there was anyone else that could help me and she said no, that she is the only one that handles those types of cases.

I want to have my "day in court" but I cannot pull this together before December 6, 1999. Because of his hospitalization, my working papers being in Tacoma, Washington and the upcoming holidays, I am asking for a 30-day extension to determine if this is something Mr. Huntington can proceed on and, if not, to find someone else who can help me.

Respectfully,

Kathleen Sullivan

cc Brenda Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102-2186

STB FD 32760 (SUB 35) 10-13-99 D 195873

Title This Jacket

STB FD-32760(Sub-35) 10-13-99 D

ID-195873

19553

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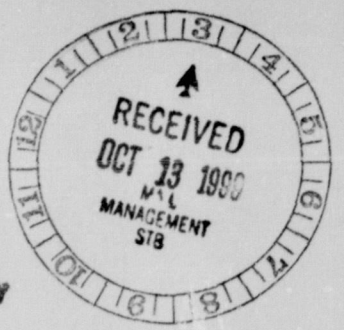

October 7, 1999

FD ~~28250~~
32760 Sub 35

VIA FAX
Original sent via US Mail

Surface Transportation Board
1925 K Street, NW, Room 715
Washington, D.C. 20423

Re: Request for an Extension to file an Appeal for Review of Arbitration Award Pursuant to Article 1, §10 of Finance Docket No. 28250, In the Matter of the Arbitration between: Kathleen V. Sullivan, Claimant, and Union Pacific Railroad Company, Carrier.

I would like to request an extension to file an appeal in the above-referenced Arbitration. The decisions were rendered on May 21, 1999 and a subsequent decision, after an executive session, rendered on September 17, 1999 by Arbitrator John La Rocco.

The Arbitration Committee met in executive session on September 7, 1999. In that session I was able to rebuttal all the points that I did not agree with in the Arbitrator's award issued on May 21, 1999. The Arbitrator after reviewing pertinent parts of the record and reconsidering the proposed decision, concluded that the proposed decision was correct and is now the final decision of the Committee. I do not agree with his decision and I feel I clearly proved my case.

I'm appealing under Article 1, § 10 of the New York Dock Conditions and other erroneous conclusions and misrepresentations of facts that I feel the Arbitrator's denial was based on.

During the executive session Mr. LaRocco said that he did not think it was good business to reverse decisions and out of 3,000 decisions rendered he had only reversed one. He also advised me that I could appeal to the Surface Transportation Board but I told him that I did not have the financial means to pursue this any further and basically put it behind me.

Subsequently, in the last few days, a friend with years of New York Dock experience has offered to help with the appeal. I called the STB on Monday, October 4, 1999 to inquire if there were time lines and I was told that I had until Thursday, October 7, 1999 to file. My friend was not available to help me this week so accordingly I am requesting an extension of 60 days to file an appeal.

Respectfully,

Kathleen Sullivan

cc: Mr. Richard Meredith
Manager, Labor Relations
Union Pacaific Railroad Company
1416 Dodge Street
Omaha, NE 68179

Title This Jacket

STB FD-32760(Sub.35) 10-8-99 D

ID-195828

195828

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October 7, 1999

FD-32760 Sub 35

D

VIA FAX
Original sent via US Mail

Surface Transportation Board
1925 K Street, NW, Room 715
Washington, D.C. 20423

Re: Request for an Extension to file an Appeal for Review of Arbitration Award Pursuant to Article 1, §10 of Finance Docket ~~No. 30250~~, In the Matter of the Arbitration between: Kathleen V. Sullivan, Claimant, and Union Pacific Railroad Company, Carrier.

I would like to request an extension to file an appeal in the above-referenced Arbitration. The decisions were rendered on May 21, 1999 and a subsequent decision, after an executive session, rendered on September 17, 1999 by Arbitrator John La Rocco.

The Arbitration Committee met in executive session on September 7, 1999. In that session I was able to rebuttal all the points that I did not agree with in the Arbitrator's award issued on May 21, 1999. The Arbitrator after reviewing pertinent parts of the record and reconsidering the proposed decision, concluded that the proposed decision was correct and is now the final decision of the Committee. I do not agree with his decision and I feel I clearly proved my case.

I'm appealing under Article 1, § 10 of the New York Dock Conditions and other erroneous conclusions and misrepresentations of facts that I feel the Arbitrator's denial was based on.

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Respectfully,

Kathleen Sullivan

cc: Mr. Richard Meredith
Manager, Labor Relations
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

19652

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

(Arbitration Review)

UNION PACIFIC RAILROAD COMPANY'S REPLY IN OPPOSITION TO THE APPEAL OF AN ARBITRATION AWARD

Brenda J. Council
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(402) 346-6000

Attorneys for Union Pacific Railroad Company

01-222236.01
01-236131.01

UNION PACIFIC RAILROAD COMPANY'S REPLY IN OPPOSITION TO THE APPEAL OF AN ARBITRATION AWARD

I. INTRODUCTION

Kathleen Sullivan ("Petitioner") has petitioned for review of the Opinion and Award issued by Arbitrator John B. LaRocco on September 17, 1999 ("Award"), in an arbitration under the New York Dock conditions. Petitioner claims an entitlement to New York Dock protective benefits in connection with the elimination of her position with the Southern Pacific Transportation Company ("Southern Pacific") on November 30, 1995. Petitioner asserts that she was an "employee" within the meaning of New York Dock and that her position was eliminated in anticipation of the merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company ("Union Pacific") and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific, St. Louis Southwestern Railway Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company), which was approved by the Surface Transportation Board ("Board"). Union Pacific Corp. – Control and Merger – Southern Pacific Transportation Co., STB Finance Docket No. 32760 No. 44 (served August 12, 1996). Petitioner further alleges that her execution of a separation agreement and release (collectively "release") related to the termination of her employment was procured through fraud and undue duress.

Arbitrator LaRocco found that there was insufficient evidence of fraud or undue duress in connection with Petitioner's execution of the release and, therefore, the release was binding and constituted an enforceable waiver of any New York Dock benefits to which she may be entitled. Since Arbitrator LaRocco found that Petitioner had waived any entitlement to New York Dock

benefits, he declined to decide the issues of whether Petitioner was covered under New York Dock or whether her job was abolished in anticipation of the Union Pacific-Southern Pacific merger.

Union Pacific hereby opposes Petitioner's petition for review ("Petition"). Union Pacific's opposition is supported by the Declaration of Andrea R. Gansen.

Petitioner's challenge to the Award 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." Chicago & N.W. Transp. Co. – Abandonment ("Lace Curtain"), 3 I.C.C. 2d 729, 736 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C., 862 F. 2d 330, 335-38 (D.C. Cir. 1988). Review is not available on "issues on 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 & Operation, 1993 ICC LEXIS 228, *5 (served Nov. 16, 1993); Lace Curtain, 3 I.C.C. 2d at 736. The Board will vacate an award "only when 'there is egregious error, the award fails to draw its essence from [the labor conditions], or the arbitrator exceeds the specific contract limits on his authority.'" Norfolk & W. Ry. Co. -- Merger, Finance Docket No. 21510 (Sub-No. 5) at 3-4 (served May 25, 1995) (quoting, Lace Curtain at 735); Fox Valley & Western, infra at *5.

It appears that Petitioner is presenting two issues for review: (1) whether Arbitrator LaRocco committed egregious error in finding that the release was binding and constituted a waiver of New York Dock benefits, and (2) whether he committed egregious error in declining to decide whether Petitioner was covered under New York Dock or if her position was abolished in anticipation of the Union Pacific-Southern Pacific merger. As we show below, Arbitrator

LaRocco did not err, much less err egregiously, in finding that Petitioner waived any entitlement to New York Dock benefits or in declining to decide the remaining procedural and substantive questions. Consequently, the Petition must be denied. . .

II.

STATEMENT OF FACTS

Petitioner began her employment with Southern Pacific on June 24, 1984. Prior to joining Southern Pacific, Petitioner was employed by the Western Pacific Railroad Company ("Western Pacific") until December 9, 1983, when her position was abolished and she accepted severance benefits under New York Dock in connection with the Western Pacific's merger with Union Pacific. Award at 6.

At all times material, Petitioner held the position of Administrative Assistant in Marketing Services, which reported to the Director of Marketing Systems Support. Petitioner's position encompassed technical and administrative duties as well as some clerical duties, for which she earned an annual salary of $38,400.[1]

Commencing in 1991, Southern Pacific undertook a cost containment program that resulted in substantial force changes and reductions. By 1994, Southern Pacific had eliminated a total of 5,386 positions. Award at 7.

In June 1995, the Southern Pacific's Board of Directors approved plans to reduce future operating costs and increase productivity by eliminating 582 positions. Petitioner's and nine other jobs in Marketing Services were slated for elimination by December 1, 1995. Award at 7. Petitioner was notified on October 11, 1995, that her Administrative Assistant position would be

[1] It is to be noted that Petitioner asserted that she had worked without a raise for seven years due to Southern Pacific's dire financial condition. Award at fn. 8.

eliminated effective November 30, 1995, because Southern Pacific was losing money. Award at 8.

On August 8, 1995, Southern Pacific's Board of Directors announced its approval of an agreement providing for the merger with Union Pacific. The Southern Pacific stockholders approved the merger in January 1996. Gansen Decl.¶ 13. The Board approved the merger, subject to the imposition of the New York Dock conditions, on August 12, 1996.

Petitioner's job was abolished on November 30, 1995. In connection therewith, she was offered a severance package under Southern Pacific's non-agreement severance plan. The severance plan provided for a lump sum payment of $8,123.08 in exchange for Petitioner's release of Southern Pacific "from any and all liabilities, causes of action, claims, actions or rights, known or unknown, arising from [her] employment or from [her] separation from employment with [Southern Pacific]." Gansen Decl., Ex. B. Petitioner expressly waived and released Southern Pacific "from any and all claims of any kind which [she] could have or might have arising from or under federal . . . laws pertaining to job protection . . ." Gansen Decl., Ex. B. Petitioner executed the release on February 13, 1996, and received the severance payment. Award at 9, 12.

Nearly two years after her position was abolished and more than eighteen months after she accepted the severance package, Petitioner wrote to Union Pacific claiming to be entitled to New York Dock protective benefits as a result of the abolishment of her position. Award at 12. Petitioner asserted that she was an "employee" within the meaning of New York Dock, and that her separation from employment with Southern Pacific was in anticipation of the merger with Union Pacific. Petitioner further alleged fraud and undue duress in connection with her execution of the release. Gansen Decl.¶ 2, Ex. A.

Union Pacific responded to Petitioner by letter dated October 2, 1997. Petitioner was advised that she failed to cite any circumstances that would give rise to a finding of duress that would countermand her acknowledgement that the execution of the release was voluntary and without any undue influence or coercion. Union Pacific also advised Petitioner that her job had not been abolished in anticipation of the merger but, instead, as part of the force changes and reductions that had been occurring at Southern Pacific for years prior to her acceptance of the severance package. Gansen Decl.¶ 4, Ex. D.

Petitioner reasserted her claim for New York Dock benefits in a letter to Union Pacific dated December 5, 1997. Petitioner took exception to the application of the release to benefits under New York Dock. She continued to maintain that her position was abolished in connection with a transaction under New York Dock. However, Petitioner did not identify the Union Pacific-Southern Pacific merger as the only transaction. Rather, Petitioner asserted, in the alternative, that her position was abolished as a direct result of the DRGW's purchase of the Southern Pacific. Petitioner advised of her intent to request the National Mediation Board to select an arbitrator under Article I, Section 11 of the New York Dock conditions unless Union Pacific agreed to conference her claim in an attempt to reach a compromise settlement. Gansen Decl.¶ 5, Ex. E.

Union Pacific informed Petitioner that it had no interest in engaging in a conference since she had waived any claim to New York Dock benefits under the terms of the release. Union Pacific further advised Petitioner that it would request enforcement of its rights under Paragraph 4 of the release to recover the severance payment and all costs incurred if she insisted on pursuing this matter to arbitration. Gansen Decl.¶ 6, Ex. F.

After an exchange of correspondence concerning Petitioner's request for a list of arbitrators, the parties agreed on John B. LaRocco as the neutral arbitrator. The hearing on Petitioner's claim was held on February 23, 1999.[2]

Arbitrator LaRocco issued an award on May 21, 1999, denying Petitioner's claim for New York Dock benefits. Arbitrator LaRocco found that there was insufficient evidence that Union Pacific committed fraud or that Petitioner signed the release under undue duress. Accordingly, he found that the release was binding and constituted an enforceable waiver of any New York Dock benefits to which she may have been entitled. In view of his finding on the effect of the release, Arbitrator declined to decide the issue of whether Petitioner was covered under the New York Dock conditions or whether her job was abolished in anticipation of the Union Pacific-Southern Pacific merger. Award at 20-21.

At Petitioner's request, an executive session was held via telephone conference on September 7, 1999. Gansen Decl.¶ 20. Following the executive session, Arbitrator LaRocco issued the Award, which was the same as the award issued on May 21, 1999. Dissatisfied with Arbitrator LaRocco's findings, Petitioner filed her petition for review.

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[2] Petitioner asserts that Union Pacific's agreement to submit Petitioner's claim to arbitration constitutes an acknowledgement of Petitioner's status as an "employee" within the meaning of New York Dock. Petitioner also suggests that Union Pacific's agreement to arbitrate nullifies the provisions of the release. There is absolutely no merit to Petitioner's assertions. First, Petitioner had a right to seek arbitration under Article I, Section 11 of New York Dock to resolve the dispute over whether or not she was eligible for benefits. Second, Union Pacific not only reserved its position that Petitioner's execution of the release constituted a waiver of New York Dock benefits, it advised Petitioner of its intent to enforce Paragraph 4 of the release if the matter was progressed to arbitration.

II.

ARGUMENT

A.
THE ARBITRATOR DID NOT ERR IN FINDING THAT PETITIONER WAIVED ANY CLAIM FOR NEW YORK DOCK BENEFITS

The threshold question in this case is whether Petitioner could even advance a claim for New York Dock benefits. It goes without question that employees can, and do, waive the application, if any, of the labor protective conditions under New York Dock to an employment action such as job abolishment. See, e.g., Int'l Bhd. of Electrical Workers and Burlington Northern Railroad Co., Arbitration Committee, Award No. 1 (LaRocco, 1983) Here, in consideration for the receipt of a severance payment, Petitioner executed a release containing an express waiver, and release of Southern Pacific from, any and all claims pertaining to job protection.

After carefully examining the evidence presented by the parties, Arbitrator LaRocco concluded that the New York Dock conditions did not apply to Petitioner. That conclusion rested on his finding that the waiver of job protection entitlements contained in the release executed by Petitioner was "broad and unequivocal." Award at 18. He then found the release to be valid and enforceable because there was insufficient evidence that Union Pacific committed fraud or that Petitioner was under undue duress when she executed the release.

Arbitrator LaRocco's findings on the validity and enforceability of the release are factual determinations. Such factual determinations do not warrant the Board's review under the Lace Curtain standard. Lace Curtain, infra at 736. Indeed, the Board 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 & W. Ry. Co. – Merger, Finance Docket No. 21510 (Sub-No. 5) at

3-4 (served May 25, 1995); Fox Valley & Western, infra, at *5. It is well established that a New York Dock arbitration award will not be reviewed or overturned simply because a party is dissatisfied with the arbitrator's factual findings. as in this case.

Contrary to Petitioner's contention, Arbitrator LaRocco did not err, much less commit reviewable egregious error, in considering the facts surrounding Petitioner's execution of the release. Quite to the contrary, Arbitrator LaRocco's findings were based on the evidence, or lack thereof, regarding Petitioner's claim that Southern Pacific or its officials intentionally misrepresented a material fact induced her to execute the release and that she executed the release under duress.

Petitioner challenges the validity and enforceability of the release on the ground that she was misled into believing that she was not covered by New York Dock. The only evidence presented by Petitioner were statements made by Southern Pacific officials in response to inquiries regarding her eligibility for New York Dock benefits. According to Petitioner, Southern Pacific's Vice President-Human Resources ("HR") told her that "as far as she knew [Petitioner] was not covered" by New York Dock. Petitioner's supervisor made a similar statement. Petition at 6. Petitioner did not make any showing that either the HR Vice President or her supervisor had a motive to deliberately mislead her. Award at 19. Rather, the evidence showed that the HR Vice President diligently sought to find Petitioner another position on Southern Pacific.

Arbitrator LaRocco correctly found that the statements made by the HR Vice President and Petitioner's supervisor, if not accurate, represented nothing more than their opinions or beliefs. Award at 19. Those opinions and beliefs were based on the facts, as they knew them at the time. Specifically, Petitioner was an Administrative Assistant, a position that was not

covered by a collective bargaining agreement. Petitioner's duties, as reflected in the job description for the position, were technical and administrative as well as some clerical. Award at 6. Since Administrative Assistants have previously been found to not be covered under New York Dock, the Southern Pacific official's belief that Petitioner was not covered was not the product of ill will. See, Maeser, Murphy, Sengheiser and Shupp, (Seidenberg Award, 1987). Thus, Arbitrator LaRocco's finding that there was insufficient evidence to support Petitioner's claim that Union Pacific deliberately misled her about her eligibility for New York Dock benefits is clearly not erroneous, egregiously or otherwise.

Petitioner also challenges the validity and enforceability of the release on the ground that she was under undue duress at the time of execution. The only evidence of duress presented to Arbitrator LaRocco was the product of Petitioner's own actions. She had accumulated a large debt. Award at 12. She had overextended herself financially with the purchase of a condo. Petition at 7. The pressure Petitioner may have felt as a result of these conditions is not the type of duress required to invalidate the release. It is evident from the facts that Arbitrator LaRocco did not err in finding that there was insufficient evidence that Petitioner was under undue duress when she executed the release.

Apparently recognizing that the evidence of duress presented to Arbitrator LaRocco was insufficient, Petitioner asserts, for the first time, in the petition for review that she was coerced into signing the release in its original form in order to obtain a temporary job as an independent contractor. Not only did Petitioner fail to assert this issue before Arbitrator LaRocco; it flatly contradicts the evidence she did present. Petitioner originally represented that she signed the release because she desperately needed the money and because she believed that she was not entitled to New York Dock benefits. Award at 12. Petitioner now asserts that the money was

secondary, and she signed the release in its original form because she was convinced that if she worked the temporary job she would ultimately secure a permanent position. Petition at 8. Further, Petitioner formerly alleged only that Mr. Saul told her she would have to sever her ties with Southern Pacific in order to assume the temporary position. She did not allege that Mr. Saul told her that she would have to sign the release without an addendum before she could assume the position. Gansen Decl.¶ 23. That Petitioner neglected to raise such a critical point before Arbitrator LaRocco defies logic. Surely, Arbitrator LaRocco cannot be found to have committed error by not addressing matters that were not before him.

Even if the issue of conditioning the temporary job on Petitioner's execution of the release without an addendum had been presented to Arbitrator LaRocco, it would not have altered the decision. The scenario described by Petitioner does not establish coercion. Rather, it shows that Petitioner made a conscious decision to waive any and all claims she might have had under New York Dock in hopes of ultimately securing a permanent position with Southern Pacific.

Finally, Petitioner avers that Arbitrator LaRocco should have rendered the release void due to a mistake of law. Petitioner asserts that she did not know that New York Dock fell under the umbrella of "job protection." Petition at 5. First, the release applied to any and all claims, "known or unknown." Gansen Decl., Ex. B. Second, if Petitioner did not know that "job protection" included New York Dock labor protective conditions, she certainly suspected that it might. In fact, she refrained from executing the release while she solicited the opinions of several Southern Pacific officials as to whether she was eligible for New York Dock benefits. Additionally, Petitioner consulted several attorneys before she signed the release, including one she knew to be handling New York Dock claims on behalf of another group of former Southern

Pacific employees. As Arbitrator LaRocco properly noted, Petitioner had a prior experience with New York Dock and if, as she maintained, her duties at Southern Pacific were identical to the duties she performed when she received New York Dock benefits in connection with the Union Pacific-Western Pacific merger, she should have known that she might be covered. Under these circumstances, the Board must defer to Arbitrator LaRocco's finding that Petitioner was not the victim of a mistake of law.

In sum, Petitioner has failed to show any basis for the Board to review Arbitrator LaRocco's findings with respect to the validity and enforceability of the release.

B.

THE ARBITRATOR DID NOT ERR IN DECLINING TO DECIDE WHETHER PETITIONER WAS COVERED BY NEW YORK DOCK AND WHETHER HER JOB WAS ABOLISHED IN ANTICIPATION OF A MERGER

Petitioner contends that Arbitrator LaRocco committed egregious error by declining to decide the issues of whether she was an "employee" under the New York Dock conditions and whether her job was abolished in anticipation of the Union Pacific-Southern Pacific merger. Petitioner's contention lacks a basis in fact and law.

The agreement establishing the arbitration committee provided that the Arbitrator LaRocco "shall not have the authority to go beyond the confines of the New York Dock provisions in reaching his decision." Gansen Decl., Ex. K. Under Article I, Section 11 (a) of the New York Dock conditions, the arbitrator has the authority "with respect to the interpretation, application or enforcement" of the conditions.

The issue before Arbitrator LaRocco in this case was not one involving the interpretation or enforcement of the New York Dock conditions. Instead, the threshold procedural issue was whether the New York Dock conditions applied to Petitioner in light of her execution of the release. Arbitrator LaRocco correctly determined that the New York Dock conditions did not

apply to Petitioner because she effectively waived any claim she might have had. As demonstrated above, that factual determination is not to be disturbed by the Board.

Once Arbitrator LaRocco made the determination that Petitioner waived any claim for New York Dock benefits, the remaining procedural issue, i.e., Petitioner's status as an "employee," and the merits of Petitioner's claim, i.e. whether there was a causal nexus between the abolishment of her job and the Union Pacific-Southern Pacific merger, were rendered moot. See, Int'l Bh'd of Electrical Workers, infra. Even if Arbitrator LaRocco had sustained Petitioner's position on the merits, she would not have been entitled to any monetary recovery by virtue of the release. Additionally, if Arbitrator LaRocco had rendered a decision on the moot issues, he would have exceeded the specific contract limits on his authority and the award would have failed to draw its essence from the New York Dock conditions since they were not applicable to Petitioner's claim. In that circumstance, the Board would have been compelled to vacate any such award.

Accordingly, Arbitrator LaRocco did not err in declining to render a decision on the remaining issues presented by Petitioner's claim.

C.
PETITIONER FAILED TO CARRY THE BURDEN OF ESTABLISHING HER CLAIM FOR NEW YORK DOCK BENEFITS

Even if Arbitrator LaRocco had invalidated the release. Petitioner failed to establish that she was eligible to receive New York Dock benefits. In order to be eligible for New York Dock benefits, Petitioner first had to establish that she was an "employee" as that term is defined under the conditions. While the burden was on Petitioner to present evidence to establish that she met the definition of "employee," Union Pacific presented substantial evidence showing that she was not an "employee" entitled to protection under New York Dock.

The most widely recognized test for determining whether an employee is eligible for New York Dock protection is whether he or she is covered by a collective bargaining agreement or subject to unionization. See, In the Matter of Florida E.C Ry., No. 4827-J. (D.S. Fla. 1960). The undisputed evidence is that Petitioner held a non-agreement position. Award at 6.

In determining whether an employee is subject to unionization, the focus of the examination is on the job functions and level of the employee's responsibilities. Here, the job description for Petitioner's position – Administrative Assistant – revealed that her duties were technical and administrative in nature. Award at 6. Petitioner could not be considered a subordinate official, particularly since the Administrative Assistant position is not listed in the ICC index of the various positions considered to be subordinate officials. Further, employees occupying an Administrative Assistant position have not been found to fall within the definition of "employee" under the New York Dock conditions. See, Newbourne v. Grand Trunk Western Railroad, 758 F.2d 193 (6th Cir. 1985); Maeser, Murphy, Sengheiser and Shupp.

Thus, Union Pacific submits that the weight of the evidence before Arbitrator LaRocco would dictate a finding that Petitioner was not subject to New York Dock protection. In that regard, Arbitrator LaRocco, while declining to decide the issue, noted that the question of Petitioner's status as a protected employee was a "very close" one. He went on to state that, under the circumstances, the HR Vice President may have been correct when she told Petitioner that she was not eligible for New York Dock benefits. Award at fn. 11.

Regardless of whether or not Petitioner was an "employee" under New York Dock, she would not be eligible for benefits. Article I, Section 11(e) of the New York Dock conditions provides that

> 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.

While Petitioner ultimately identified the Union Pacific-Southern Pacific merger as the transaction, she failed to present pertinent facts establishing a causal nexus between the abolishment of her job and that transaction.[3] Instead, Petitioner relied solely on the fact that she received notification of the elimination of her position after the announcement of Southern Pacific's Board of Directors' approval of an agreement of merger with Union Pacific. Petition at 4; Gansen Decl.¶ 13. Petitioner's reliance on the notification of the elimination of her position completely ignores the fact that the plan to eliminate 582 positions, including hers, was approved by Southern Pacific's Board of Directors two months prior to the announcement of the approval of the merger agreement.

While Petitioner failed to carry her burden of establishing the causal nexus, Union Pacific presented substantial evidence that Petitioner's job was abolished as part of Southern Pacific's historical cost reduction efforts, not the Union Pacific-Southern Pacific merger. In order to curb operating costs and achieve efficiencies, Southern Pacific began reducing forces in 1991. Award at 7. Southern Pacific reduced its forces by more than 5,000 between 1991 and 1994. Award at 7. In June 1995, Southern Pacific approved yet more plans aimed at reducing future costs and increasing productivity by eliminating 582 positions. Thus, it is indisputable that significant force reductions occurred, and were occurring, at Southern Pacific without regard to the merger.

Petitioner was intimately aware of Southern Pacific's grave financial condition, which drove its cost reduction measures. Petitioner lamented the fact that she had not had a pay raise in more than seven years. Award at fn. 8; Petition at 7.

In addition, Petitioner knew of the imminence of the abolishment of her position as early as 1993. Award at 7; Gansen Decl.¶ 22. She wrote letters imploring various Southern Pacific officials to take into account the period of time she needed to attain 30 years of railroad service when making the force reduction decisions. Award at 7; Gansen Decl.¶ 22, Ex. M, N and O.

By Petitioner's own admission, no Southern Pacific officials made any statement to her indicating that her position was being abolished as a result of the impending merger with Union Pacific. Quite to the contrary, Petitioner was told by various officials that her position was being abolished because of Southern Pacific's dire financial condition. Gansen Decl.¶ 15.

The overwhelming weight of the evidence presented to Arbitrator LaRocco established that Petitioner's job was not abolished in anticipation of the merger but, instead, because of Southern Pacific's ongoing cost containment program. Thus, if Arbitrator LaRocco had rendered a decision on the merits of Petitioner's claim, he would have been constrained to find that Petitioner had failed to prove her claim. Although Arbitrator LaRocco declined to formally decide the merits of Petitioner's claim because it was moot, he did advise Petitioner during the executive session that she had failed to demonstrate that her position was abolished in anticipation of the Union Pacific-Southern Pacific merger.

In sum, even in the absence of the release, Petitioner would not have been able to sustain her claim for New York Dock benefits.

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[3] Prior to the arbitration, Petitioner asserted, in the alternative, that her position was eliminated as a direct result of the DRGW's purchase of Southern Pacific. Gansen Decl., Ex. E.

IV.

CONCLUSION

For the foregoing reasons, the Petitioner's petition to review the Award should be denied.

Respectfully submitted,

By _____

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Omaha, Nebraska 68102
(402) 346-6000

CERTIFICATE OF SERVICE

I hereby certify that a copy of Union Pacific's Reply in Opposition to Petitioner's Appeal of an Arbitration Award was served this 24th day of January, 2000, by first-class mail, postage prepaid, upon the following:

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

Brenda J. Council

194562

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

(Arbitration Review)

DECLARATION OF ANDREA R. GANSEN

01-238872.01

DECLARATION OF ANDREA R. GANSEN

I, Andrea R. Gansen, pursuant to 28 U.S.C. Section 1746, declare the facts stated herein are known to me to be true, based on my personal knowledge or on information received in the ordinary course of the discharge of my employment responsibilities.

1. My name is Andrea R. Gansen. I have been employed by Union Pacific Railroad Company ("Union Pacific") since February 1, 1997. I am currently employed in Union Pacific's Labor Relations Department as Assistant Director—Labor Relations. My address is Room 330, 1416 Dodge Street, Omaha, Nebraska 68179. In my capacity as Assistant Director, I have responsibility for the arbitration of all non-agreement employee New York Dock claims.

2. By letter dated August 28, 1997, Ms. Kathleen Sullivan submitted a claim to the Southern Pacific for benefits under the New York Dock labor protective conditions. Ms. Sullivan alleged that she was an "employee" within the meaning of New York Dock, and that her separation from employment with the Southern Pacific was in anticipation of the merger with Union Pacific. Ms. Sullivan further alleged fraud and duress in connection with her execution of a separation agreement and release related to the termination of her employment. A true and correct copy of the letter dated August 28, 1997, is attached hereto as Exhibit A. A true and correct copy of the separation agreement and release executed by Ms. Sullivan on February 13, 1996, is attached hereto as Exhibit B.

3. By letter dated September 2, 1997, Ms. Judith Holm, then Vice President of Human Resources-Operations for the Southern Pacific, forwarded Ms. Sullivan's August 28, 1997, letter to Mr. Henry Carnaby, Union Pacific's General Attorney, for further handling. A true and correct copy of the letter dated September 2, 1997, is attached hereto as Exhibit C.

4. Mr. Carnaby responded to Ms. Sullivan by letter dated October 2, 1997. Mr. Carnaby noted that the release contained Ms. Sullivan's acknowledgment that her execution was voluntary and without any undue influence or coercion. He disputed her claim that the abolishment of her job was in anticipation of the Union Pacific-Southern Pacific. Rather, he advised her that her job had been abolished as part of force changes and reductions that had been occurring for many years prior to her acceptance of the voluntary separation. Finally, Mr. Carnaby advised Ms. Sullivan that Union Pacific would enforce its rights under the release to recover the severance payment she received and any costs and attorney's fees incurred by Union Pacific in defending any claim for New York Dock benefits. A true and correct copy of Mr. Carnaby's letter of October 2, 1997, is attached hereto as Exhibit D.

5. Ms. Sullivan replied to Mr. Carnaby by letter dated December 5, 1997. She took issue with the position advanced by Mr. Carnaby. In particular, she maintained that her position was abolished in connection with a transaction. However, she did not solely specify the Union Pacific-Southern Pacific merger as the transaction. Instead, she asserted, in the alternative, that her position was abolished as a direct result of the DRGW's purchase of the Southern Pacific. She stated that she would request the National Mediation Board ("NMB") to appoint an arbitrator under Article I,

Section 11 of New York Dock if Mr. Carnaby was not agreeable to conferencing her claim via telephone. A true and correct copy of Ms. Sullivan's letter of December 5, 1997 is attached hereto as Exhibit E.

6. Mr. Carnaby responded by letter dated January 16, 1998. Mr. Carnaby reiterated Union Pacific's position that she was not covered by New York Dock and, in any event, she had waived any claims against the company for job protection benefits with her execution of the release and acceptance of the severance payment. He further advised that she had not demonstrated that she was coerced into executing the release. A true and correct copy of Mr. Carnaby's letter dated January 16, 1998, is attached hereto as Exhibit F.

7. We did not hear from Ms. Sullivan again until April 3, 1998, at which time, she sent a letter requesting a list of arbitrators. A true and correct copy of Ms. Sullivan's letter dated April 3, 1998 is attached hereto as Exhibit G.

8. Since it appeared that Ms. Sullivan was determined to progress this matter to arbitration under New York Dock despite the fact that she had voluntarily executed the release, the matter was referred to me for further handling. I responded to Ms. Sullivan by letter dated June 22, 1998, wherein I advised her that the matter had been referred to Labor Relations for any further handling and that she should contact me in the future regarding the matter. I further advised that Union Pacific would not submit a list unless and until we discussed and reached agreement on the method of selecting an arbitrator. A true and correct copy of my letter dated June 22, 1998, is attached hereto as Exhibit H.

9. My letter of June 22, 1998, apparently crossed in the mail with a letter from Ms. Sullivan to Mr. Carnaby dated June 24, 1998, wherein she renewed her request to be provided with a list of arbitrators. I responded by letter dated July 6, 1998, advising her that she should contact me to discuss an agreement on the method of selecting an arbitrator. The letters dated June 24, 1998, and July 6, 1998, are attached hereto as Exhibits I and J, respectively.

10. After exchanging more correspondence on the selection of an arbitrator, Ms. Sullivan and I agreed on the selection of John LaRocco as the neutral arbitrator. It was also agreed that the hearing would be held on February 23, 1999. A true and correct copy of the letter dated September 3, 1998, containing our agreement on the selection of Mr. LaRocco is attached hereto as Exhibit K.

11. My execution of the letter dated September 3, 1998, did not constitute an acknowledgement of Ms. Sullivan's status as an "employee" within the meaning of New York Dock, nor did it nullify the provisions of the separation agreement and release she executed on February 13, 1996. The issue of whether Ms. Sullivan was an "employee" within the meaning of New York Dock is separate and distinct from the issue of whether she relinquished her employment status by virtue of her execution of the separation agreement and release. With respect to the first issue, the purpose of the arbitration is to resolve that question regardless of the claimant's employment status at the time the claim is initiated. As to the second issue, Union Pacific maintained throughout this process that the separation agreement and release were binding on Ms. Sullivan. In fact, Mr. Carnaby expressly advised Ms. Sullivan in his letter dated January 16, 1998, that if she insisted on pursuing her claim to arbitration, we would request enforcement of

our rights under Paragraph 4 of the agreement to recover the severance payment as well as our costs.

12. The arbitration hearing was held on February 23, 1999, in Sacramento, California. Prior to the hearing, both Ms. Sullivan and Union Pacific outlined their respective positions in written submissions to Mr. LaRocco.

13. Ms. Sullivan, who was assisted at the hearing by Robert Huntington, did not present a shred of credible evidence to support her claim that her job was abolished in anticipation of the Union Pacific-Southern Pacific merger. Instead, she relied solely on the timing of the announcement of the Southern Pacific Board of Directors' approval on August 3, 1995, of an agreement providing for the merger with Union Pacific and the notification she received on October 11, 1995, of the abolishment of her job. Ms. Sullivan completely ignores the fact that the plan to eliminate 582 positions was approved two months prior to the August 3 announcement, and the Southern Pacific stockholders did not approve the merger until more than three months after she was notified of the abolishment of her position.

14. It is also to be noted that in her December 5, 1997, letter to Mr. Carnaby, Ms. Sullivan asserts a transaction other than the Union Pacific-Southern Pacific merger as the basis for the abolishment of her position. She states, in the alternative, that her job was abolished "as a direct result of the DRGW's purchase of SP."

15. While Ms. Sullivan did not present any convincing evidence to support her claim that her job was abolished in anticipation of the merger, she did present evidence buttressing Union Pacific's contention that her position was abolished as part of the

Southern Pacific's historical cost reduction efforts. Specifically, she presented evidence that she was told by various Southern Pacific officials that her position was abolished because of the Southern Pacific's dire financial condition, not the merger with Union Pacific. The Southern Pacific's grave financial condition was confirmed by the evidence Ms. Sullivan presented that Southern Pacific had not given yearly or cost-of-living increases for eight and one-half years, and that she had worked without a raise for seven years.

16. With respect to her allegation of fraud and duress, Ms. Sullivan relied primarily on statements attributed to Southern Pacific officials. According to Ms. Sullivan, Ms. Holm's response to her question as to whether she was covered by New York Dock was that, as far as Ms. Holm knew, she was not covered. The belief that non-agreement employees, such as Ms. Sullivan, would not obtain New York Dock benefits was echoed by Ms. Sullivan's supervisor, Norm Schlinger.

17. In view of the substantial evidence presented by Union Pacific establishing that Ms. Sullivan was not an "employee" within the meaning of New York Dock because of the position she occupied (Administrative Assistant) and the duties she performed, and arbitral precedent, the statements made by Ms. Holm and Mr. Schlinger were correct. Thus, those statements were neither fraudulent nor coercive.

18. In addition to the fact that Ms. Sullivan did not present any persuasive evidence to support her fraud claim, she failed to present any compelling evidence of duress other than that resulting from her inability to manage her finances during the six years preceding the termination of her employment. Rather, Ms. Sullivan

acknowledged that she was allowed more than two months to contemplate her execution of the separation agreement and release, and during that time she consulted with several attorneys.

19. On May 21, 1999, Mr. LaRocco issued his Opinion and Award denying Ms. Sullivan's claim on the basis of his finding that the separation agreement and release were binding and an enforceable waiver of her claim for New York Dock benefits. Thereafter, Ms. Sullivan requested an executive session with Mr. LaRocco.

20. The executive session was held on September 7, 1999, via telephone conference because I was unable to be present in Mr. LaRocco's office with Ms. Sullivan. During the executive session, Ms. Sullivan expressed her concern over the manner in which Mr. Huntington represented her during the hearing. Mr. LaRocco assured her that Mr. Huntington's conduct had no bearing on his decision. Ms. Sullivan then expressed her objection to the language of the award regarding her efforts to obtain legal counsel prior to executing the separation agreement and release. She also objected to the language in the award that she should have known that she might be covered by New York Dock because of her experience with the Union Pacific-Western Pacific merger. She maintained that she had been misled into believing that she was not eligible for New York Dock benefits.

21. Contrary to the assertion in her appeal, Mr. LaRocco did not state that he wished that she had gone into more depth about her efforts to obtain legal assistance. Since I was not present, I am not aware of any "look" Mr. LaRocco may have given to

Ms. Sullivan. However, he did not otherwise indicate that this issue would have made a difference in his decision.

22. In response to Ms. Sullivan's repeated statements that nobody tried to help her, Mr. LaRocco cited the evidence presented by Union Pacific establishing Ms. Sullivan's knowledge of the imminence of the elimination of her position as early as 1993. Ms. Sullivan wrote letters on August 23, 1993, May 23, 1994, and June 24, 1994, in connection with reports that her position was slated for abolishment. In each of those letters, she requested that the amount of time she needed to remain employed in order to attain 30 years of railroad service be taken into consideration in making the workforce reduction decisions. Mr. LaRocco noted that the record disclosed that the Southern Pacific's response to her pleas was to either retain her or move her to another position. True and correct copies of the letters dated August 23, 1993, May 23, 1994, and June 24, 1994, are attached hereto as Exhibits M, N and O, respectively.

23. Ms. Sullivan did not assert that the offer of a temporary position as an independent contractor was conditioned upon her submission of a signed release without an addendum during the executive session. In fact, she raises this contention for the first time in her appeal and, quite frankly, contradicts the evidence she presented at the hearing. According to the evidence presented at the hearing, Ms. Sullivan was advised in late January 1996 that William Saul, then Assistant Vice President, Tax Department, had not received authority to fill a legal secretary position she had sought and, therefore, there was no reason for her to wait any longer to return the separation agreement and release. Ms. Sullivan executed the release on February 8, 1996, after adding an addendum. Ms. Sullivan stated that she received a call from Mr. Saul on

February 8, 1996, offering her the legal secretary position on a temporary basis as an independent contractor. The release with the addendum was returned to Ms. Sullivan on February 9, 1996. On or about that date, she called Mr. Saul and accepted the temporary, contract position. While Mr. Saul is alleged to have told her that Ms. Holm had advised that it was okay to bring her back as a contractor as long as she had severed her ties with the Southern Pacific, Ms. Sullivan did not allege that he said that meant signing the separation agreement and release without an addendum. Ms. Sullivan's accusations with respect to Mr. Saul's efforts to assist her in securing alternate employment is a classic example of the adage that "no good deed goes unpunished."

24. At the conclusion of the hearing, Mr. LaRocco advised that he doesn't reverse himself, but that he would take the additional evidence under consideration. He further explained to Ms. Sullivan that in the absence of the separation agreement and release she would probably have a good case for showing that she was covered by New York Dock, but that she had not demonstrated a causal nexus between the merger and the abolishment of her job, particularly in view of the Southern Pacific's history of downsizing.

25. Mr. LaRocco issued his final Opinion and Award on September 17, 1999, which was the same as the award issued on May 21, 1999. Ms. Sullivan has never signed the award indicating her dissent or concurrence. A true and correct copy of the award is attached hereto as Exhibit L.

26. The overwhelming weight of the evidence presented supports Mr. LaRocco's finding that the separation agreement and release are a binding, effective waiver of any claim by Ms. Sullivan for New York Dock benefits. Even if he had invalidated the release, Ms. Sullivan failed to carry her burden of establishing that she was an "employee" within the meaning of New York Dock or that her position was abolished in anticipation of the Union Pacific-Southern Pacific merger.

27. Accordingly, the LaRocco Opinion and Award should be upheld by denying Ms. Sullivan's appeal.

Dated this 22nd day of January, 2000.

Andrea R. Gansen

Exhibits to Declaration of

Andrea R. Gansen

1110 Bayswater, #302
Burlingame, CA 94010

August 28, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Judy Holm
Vice President, Human Resources
Union Pacific Railroad
One Market Plaza, Room 860
San Francisco, CA 94105

Dear Ms. Holm:

Re: My forced separation from Southern Pacific under duress and fraudulent representation

First comes the issue of duress. Duress being defined as 1) compulsion by threat or force; coercion. 2) constraint or coercion of a degree sufficient to void any legal agreement entered into or act performed under its influence

Now comes the issue of fraud. I have documentation of a town meeting where it was pronounced that non-covered employees were not covered by the provisions of New York Dock. This totally goes against Article IV of the New York Dock provisions which clearly state employees not represented by a labor organization shall be afforded substantially the same level of protection as afforded union members. I did not meet the criterion of independent decision making authority that would put me in the management category. Thus, I must be considered an employee as opposed to a manager This being the case, I am and was covered under provisions of Article IV of New York Dock.

We then move to the issue of Article 1, Section 10, New York Dock, where it is specifically stated, "Should a railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee."

It is of significant import the fact that my termination was rendered two months after the announcement of the pending Union Pacific purchase of Southern Pacific. In my opinion, this was done as the result of an agreement between the UP and SP for SP to put into effect a hiring freeze and to get rid of all the employees it could prior to acquisition.

It should also be noted no notice pursuant to the provisions of Article I, Section 4, New York Dock was ever provided me.

Therefore, it is my position that as a non-covered and non-management employee, I was deceived by management into believing I was not covered under the provisions of New York Dock and, therefore, coerced into a separation agreement, by virtue of fraud. That said agreement provided lessor benefits than I would have been entitled to under New York Dock.

After this misrepresentation and false statements made by management, as can be evidenced by the town meeting, I would have never signed the separation agreement presented to me.

As a result of [illegible]cts presented above, I am presenting a claim pursuant to and in accordance with the protective provisions of New York Dock. Further, I request a conference to discuss other facts pertaining to this case with hope we can resolve it prior to proceeding to arbitration.

Please advise, understanding I reserve all rights to representation should this case be pursued to arbitration. I do not think you will look forward to dealing with my representative, as in his career he has never lost a New York Dock case. On the other hand, I am willing to negotiate to settle this dispute so that it can forever remain confidential.

I can be re[illegible]ched at 650-340-8249. I look forward to hearing from you soon.

Sincerely,

Kathleen Sullivan

Kathleen Sullivan

cc: Mr. Bruce Feld -- via Certified Mail

B

Sullivan, K. V.

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

---

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

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

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

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

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

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

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

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

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

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

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

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

Dated: 2-13-96

Kathleen V. Sullivan

Kathleen V. Sullivan

546-60-1501

(SOCIAL SECURITY NUMBER)

1110 Bayswater #302

Burlingame, CA 94010

HOME ADDRESS
(STREET OR P.O. BOX)

CITY AND STATE ZIP CODE

SOUTHERN PACIFIC TRANSPORTATION CO.

Dated: 16 February 1996

John R Richards

C

UNION PACIFIC

JUDITH A. HOLM
VICE PRESIDENT SOUTHERN PACIFIC
HUMAN RESOURCES OPERATIONS

1997

ONE MARKET PLAZ
SAN FRANCISCO, CALIFORNIA 9410

September 2, 1997

Mr. Henry Carnaby
General Attorney
Union Pacific Railroad
1416 Dodge Street, Room 830
Omaha, NE 68179

Dear Mr. Carnaby:

Enclosed for your further handling is a letter received from Ms. Kathleen Sullivan.

Sincerely,

Enclosure

cc: Ms. Kathleen Sullivan
1110 Bayswater #302
Burlingame, CA 94010

D

FILE

UNION PACIFIC RAILROAD COMPANY

Law Department

1416 DODGE STREET
ROOM 830
OMAHA, NEBRASKA 68179-0001
FAX (402) 271-5610

October 2, 1997

Ms. Kathleen Sullivan
1110 Bayswater, No. 302
Burlingame, CA 94010

Re: Severance with Southern Pacific Transportation Company

Dear Ms. Sullivan:

Responding to your letter dated August 28, 1997, my review of the circumstances surrounding your severance from the Southern Pacific Transportation Company in February of 1996 does not support your accusations of duress or fraud.

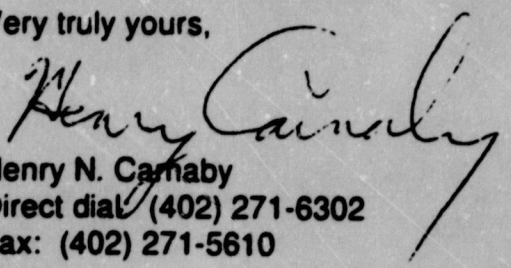
The Application for Severance Benefits and Release Under the Southern Pacific Lines' Non-Agreement Severance Benefit Plan fully and accurately discloses the circumstances surrounding your severance and includes your acknowledgment that your release was voluntary and without any undue influence or coercion. Your letter fails to cite any circumstances that could give rise to a finding of duress.

There also appears to be no coverage for your separation under the provisions of the New York Dock Railway decision. First, your separation was part of a reduction of force that had nothing to do with the Union Pacific purchase of Southern Pacific. Second, the abolishment of your position was not in anticipation of such a transaction. In fact, Southern Pacific had been undergoing force changes and reductions for many years prior to your having accepted a voluntary separation. Further, the solicitation of voluntary separations from non-agreement employees where work diminishes or disappears due to technological improvements, as was the situation in your case, does not constitute a New York Dock transaction.

In the event that you elect to pursue this claim, the Union Pacific will enforce its rights under Paragraph 4 of your Severance Agreement and seek

reimbursement for any costs and attorney fees incurred in defending against future claims.

Very truly yours,



Henry N. Carnaby
Direct dial: (402) 271-6302
Fax: (402) 271-5610

Kathleen Sullivan
1110 Bayswater #302
Burlingame, California 94010

December 5, 1997

Mr. Henry N. Canaby
Law Department
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179-0001

Dear Mr. Canaby:

In response to your letter of October 2, 1997, I have the following comments:

First there is no provision in any portion of my separation agreement which preempts the valid portions of the Interstate Commerce Act, particularly when I and many other non-represented employees relied, in good faith, on the fact we were specifically told by Company management we were not covered by the protective provisions of New York Dock.

In your letter of October 2, 1997, you seem to attempt to endeavor to intimidate me by relying on Paragraph 4 of my Separation Agreement. Moreover, the issue of misrepresentation of my, and other employees rights, under the provisions of New York Dock is not addressed in your letter.

Your attention is called to the fact that Paragraph 4 of this legally invalid separation agreement only addresses the issue of legal expenses in the event of a lawsuit. There is no mention of the expenses of pursuing a claim pursuant to New York Dock. Therefore, your reliance on Paragraph 4 as a defense of my pursuance of New York Dock claims has no merit as it relates to any liability on my part. In this regard I rely on Article 1, Section 4, Subsection (4) of New York Dock.

Further, Article 1, Section 11 of New York Dock clearly prescribes the procedures for arbitrating an unresolved dispute of this nature. I would prefer, <u>without prejudice to my position</u>, to conference this issue via telephone with you in an attempt to reach a compromise settlement. However, if you are not agreeable to such a conference, I will exercise my right under Article 1, Section 11 to request the National Mediation Board to appoint an arbitrator to resolve this dispute.

Also, keep in mind my position that I was coerced into signing the separation agreement by virtue of misrepresentation by management that I was not covered by the provisions of New York Dock, even though the reduction of my position was as a result of anticipation of the transaction of the UP's purchase of SP, or in the alternative, as a direct result of DRGW's purchase of SP; and that Article IV of New York Dock as well as Article I, Section 10 are also applicable to this dispute.

Please call me to set up a phone conference.

Respectfully,

Kathleen Sullivan

Kathleen Sullivan
650-340-8249

FILE

Law Department

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
ROOM 830
OMAHA, NEBRASKA 68179-0001
FAX (402) 271-5610

January 16, 1998

Ms. Kathleen Sullivan
1110 Bayswater, No. 302
Burlingame, CA 94010

Dear Ms. Sullivan:

Responding to your letter of December 5, 1997, the Union Pacific Railroad Company has no interest in conducting a telephone conference to discuss a compromise settlement since you have failed to state any claim that would require any further action. We have already addressed the fact that you were not covered by the protective provisions of New York Dock. I can appreciate the fact that you individually do not accept this conclusion but that does not mean that it is a misrepresentation. You have not demonstrated any facts that would suggest that you were coerced into signing the Separation Agreement with the Southern Pacific Transportation Company. Since under the terms of that agreement you have waived all of your rights against the Company, the burden is clearly upon you to plead and prove facts in avoidance of the agreement. We do not believe you have any chance of meeting this burden.

If you wish to persist in your claim, we will agree to meet solely for the purpose of attempting to pick an arbitrator to resolve your claim with regard to jurisdiction under New York Dock. If we are required to participate in arbitration, we will request and I am confident will be successful in having the arbitrator award us our costs under Paragraph 4 of your Separation Agreement. If this course is necessary, contact me to arrange the time and place of the conference.

Very truly yours,

Henry Carnaby

Henry N. Carnaby
Direct dial: (402) 271-6302
Fax: (402) 271-5610

G:\LAW\ADM\HNC\SULLIVAN.LT2

KATHLEEN SULLIVAN
1110 Bayswater #302
Burlingame, CA 94010
(650-340-8249)

April 3, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Henry N. Carnaby
1416 Dodge Street
Room 830
Omaha, Nebraska 68179-0001

Dear Mr. Carnaby:

Responding to your letter of January 16, 1998, since you have refused conference, please provide me with a list of the arbitrators you would be willing to use.

Respectfully,

Kathleen Sullivan

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

June 22, 1998

NYD Claim

Certified U. S. Mail - Return Receipt Requested

Ms. Kathleen Sullivan
1110 Bayswater #302
Burlingame, CA 94010

Dear Ms. Sullivan:

This is in response to your letter dated April 3, 1998, to Mr. Henry Carnaby. This matter has been moved to Labor Relations for further handling and any future correspondence should be designated in that manner.

In your April 3 letter, you requested that the Carrier submit a list of arbitrators that we would be willing to use for arbitration of this matter. I do not find anything in the record of this matter that indicates any agreement between the parties as to how an arbitrator will be selected. Until this is done, the Carrier will not submit a list. Furthermore, I feel it is necessary to reiterate Mr. Carnaby's statement that you carry the burden of proof in this case. The Carrier holds that:

1. You are not an "employee" under New York Dock.
2. You were not affected by a "transaction" under New York Dock.
3. You are covered by your Severance Agreement which you signed February 13, 1996, not New York Dock Conditions.

If you still seek to bring this matter to arbitration, please contact me as soon as possible to reach an agreement as to how an arbitrator will be selected.

Sincerely,

Andrea Gansen
Manager Labor Relations

KATHLEEN SULLIVAN
1110 Bayswater #302
Burlingame, CA 94010
(650) 340-8249

June 24, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Henry N. Carnaby
Law Department
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179-0001

Dear Mr. Carnaby:

I have not received a response to my letter of April 3, 1998. I have attached a copy for your convenience.

Please respond within the next 30 days or I will have to contact the National Mediation Board and have them appoint an arbitrator.

Sincerely,

Kathleen Sullivan

Kathleen Sullivan

KATHLEEN SULLIVAN
1110 Bayswater #302
Burlingame, CA 94010
(650-340-8249)

JUL 02 1998

April 3, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Henry N. Carnaby
1416 Dodge Street
Room 830
Omaha, Nebraska 68179-0001

Dear Mr. Carnaby:

Responding to your letter of January 16, 1998, since you have refused conference, please provide me with a list of the arbitrators you would be willing to use.

Respectfully,

Kathleen Sullivan

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery
Consult postmaster for fee.

3. Article Addressed to:
Henry N. Carnaby
Union Pacific RR
1416 Dodge St, #830
Omaha [illegible]

4a. Article Number
Z 354 618 950

4b. Service Type
☐ Registered ☐ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
APR 9 1998

5. Received By: (Print Name)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature: (Addressee or Agent)
X

PS Form 3811, December 1994 102595-97-B-0179 Domestic Return Receipt

Thank you for using Return Receipt Service.

Do not use this form for international mail. See reverse side for information.

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179

July 6, 1998

NYD Claim

Certified U. S. Mail - Return Receipt Requested

Ms. Kathleen Sullivan
1110 Bayswater #302
Burlingame, CA 94010

Dear Ms. Sullivan:

This is in response to your letter dated June 24, 1998, to Mr. Henry Carnaby. My letter to you, dated June 22, must have crossed your letter in the mail. To reiterate, this matter has been moved to Labor Relations for further handling and any future correspondence should be designated in that manner.

Please contact me as soon as possible to reach an agreement as to how an arbitrator will be selected. My number is (402) 271-6607.

Sincerely,

Andrea Gansen

Andrea Gansen
Manager Labor Relations

KATHLEEN SULLIVAN
1110 Bayswater #302
Burlingame, CA 94010
(650) 340-8249
(650) 348-1985 (fax)
email: Kittysulli@aol.com

September 3, 1998

VIA FAX – ORIGINAL SENT U.S. MAIL

Ms. Andrea Gansen
Manager Labor Relations
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

RE: Telephone conversation of today regarding scheduling for hearing of the dispute regarding New York Dock protective conditions.

Dear Ms. Gansen:

We agreed that we would convene the arbitration case for hearing on February 23, 1999 at 1:00 p.m. in the offices of John LaRocco located at 928 Second Street, Suite 300, Sacramento, California. It was also agreed that Mr. LaRocco would serve as the neutral member of the Arbitration Board and that his decision shall be final and binding on the parties.

As it stands currently, I will serve as the Employee Member of the Board and you will serve as the Carrier Member. Not withstanding, both parties reserve the right to change the designated Employee or Carrier Member of the Board prior to the hearing but shall give notice of such change to the other member ten days prior to commencement of the hearing.

The hearing shall be conducted pursuant to the pertinent provision of the New York Dock Protective Provisions and the arbitrator shall not have the authority to go beyond the confines of the New York Dock provisions in reaching his decision.

If this Agreement meets with your approval, please affix your signature in the space provided below forwarding a signed copy to me and John LaRocco.

FOR THE CARRIER

Andrea Gansen, Manager Labor Relations

FOR THE EMPLOYEE

Kathleen Sullivan, Claimant

Kathleen Sullivan

ARBITRATION COMMITTEE

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

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

MEMBERS OF THE COMMITTEE

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

EMPLOYEE'S STATEMENT OF THE CLAIM

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

CARRIER'S STATEMENTS OF THE ISSUE

PROCEDURAL

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

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

MERITS

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

[Sullivan-UP.NYD]

EXHIBIT B

OPINION OF THE COMMITTEE

I. INTRODUCTION

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

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

II. OVERVIEW OF THE DISPUTE

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

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

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

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

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

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

III. PERTINENT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

Article IV of the New York Dock Conditions provide:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

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

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

> "Dismissed employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

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

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

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

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

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

IV. JURISDICTION

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

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

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

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

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

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

V. BACKGROUND AND SUMMARY OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI THE POSITIONS OF THE PARTIES

A. Claimant's Position

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

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

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

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

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

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

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

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

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

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

B. The UP's Position

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

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

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

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

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

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

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

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

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

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

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

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

VII. DISCUSSION

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

AWARD AND ORDER

Claim denied.

Date: September 17, 1999

___I concur/___I dissent

Kathleen V. Sullivan
Employee Member

X I concur/___I dissent

Richard Meredith
Carrier Member

John B. LaRocco
Neutral Committee Member

August 23, 1993

PERSONAL & CONFIDENTIAL

Mr. J. L. Truitt:

I understand there may be numerous personnel cuts in the Distribution Services Department in the near future and I want to make you aware of the following:

I was hired at Southern Pacific as an exempt in June 1984 and therefore I have no union seniority. Previously I had been at Western Pacific Railroad for almost 20 years. I'm 50 years old and my sole support.

I have 23 more months to attain 30 years of Railroad Retirement service and it's very important that I accomplish this. In reviewing the attached information received from the Railroad Retirement Board, it appears that with 30 years service I will be able to receive full retirement benefits at age 62. If I am unable to attain 30 years service I will be required to wait until I'm 65 years and 10 months to get the same monthly benefit. At $1650 a month for 3 years and 10 months that amounts to about $75,000 that I wouldn't be eligible for.

Any consideration you can give to this would be greatly appreciated.

Kitty Sullivan

Kitty Sullivan

Attachment

cc: Mr. N. W. Schlinger
Mr. C. W. Douglas
Personal Record

May 23, 1994

PERSONAL & CONFIDENTIAL

Mr. Jim Obendorf:

I had informed Jim Truitt of the following but in case he didn't pass it on I would like you to be aware of my situation.

I was hired at Southern Pacific as an exempt in June 1984 and therefore have no union seniority. Previously I had been at Western Pacific Railroad for almost 20 years. I'm 51 years old and my sole support.

I have 14 more months to attain 30 years of Railroad Retirement service and it's very important that I accomplish this. In reviewing the attached information received from the Railroad Retirement Board, it appears that with 30 years service I will be able to receive full retirement benefits at age 62. If I am unable to attain 30 years service I will be required to wait until I'm 65 years and 10 months to get the same monthly benefit. At $1650 a month for 3 years and 10 months that amounts to about $75,000 that I wouldn't be eligible for.

I take pride in the fact that when I'm given an assignment I always do my very best in a conscientious, timely and efficient manner and I always get the job done. I'm flexible, capable and willing to take on any task. I consider myself a team player and I'm committed to making a difference in our group.

Any consideration you can give to this would be greatly appreciated.

Kitty Sullivan

Attachment

cc: Mr. N. W. Schlinger
Mr. J. R. Richards
Personal Record

June 24, 1994

PERSONAL & CONFIDENTIAL

Mr. Ron Byrd:

I gave this information to Jim Obendorf but in case he didn't pass it on I'd like you to be aware of my situation.

I was hired at Southern Pacific as an exempt in June 1984 and therefore have no union seniority. Previously I had been at Western Pacific Railroad for almost 20 years. I'm 51 years old and my sole support.

I have 13 more months to attain 30 years of Railroad Retirement service and it's very important that I accomplish this. In reviewing the attached information received from the Railroad Retirement Board, it appears that with 30 years service I will be able to receive full retirement benefits at age 62. If I am unable to attain 30 years service I will be required to wait until I'm 65 years and 10 months to get the same monthly benefit. At $1650 a month for 3 years and 10 months that amounts to about $75,000 that I wouldn't be eligible for.

I take pride in the fact that when I'm given an assignment I always do my very best in a conscientious, timely and efficient manner and I always get the job done. I'm flexible, capable and willing to take on any task. I consider myself a team player and I'm committed to making a difference in our group.

Any consideration you can give to this would be greatly appreciated.

Kitty Sullivan

Kitty Sullivan

Attachment

cc: Mr. N. W. Schlinger
Mr. J. R. Richards
Personal Record

H47 - 010160000 4 196410

KATHLEEN SULLIVAN
1110 Bayswater Avenue, #302
Burlingame, CA 94010
(650) 340-8249

January 4, 2000

Surface Transportation Board
1925 K Street, NW, Room 715
Washington, D.C. 20423

Re: Appeal for Review of Arbitration Award Pursuant to Article 1, §10 of Finance Docket No. 32760 (Sub-No. 35), In the Matter of the Arbitration between: Kathleen V. Sullivan, Claimant, and Union Pacific Railroad Company, Carrier

Enclosed are the original and 10 copies of my Appeal and a check for $150.00.

The person who was to help me with this became unavailable at the last minute. It was too late for me to retain an attorney to handle this so I did it myself. I know that the format is probably not what you are used to but I tried my best to make it readable.

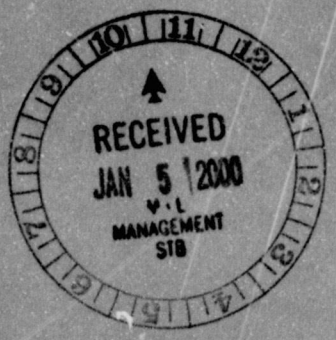
Thank you again for the two extensions you have allowed me. You have been more than fair.

Respectfully yours,

Kathleen Sullivan

Kathleen Sullivan

cc Brenda Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102-2186



BEFORE THE SURFACE TRANSPORTATION BOARD

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

STATEMENT OF CLAIM

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

PETITIONER'S POSITION

The following is taken from Petitioner's Submission to Arbitrator

"Petitioner was the victim of an overt action by the Carrier to convolute the provisions of Federal law by creating an environment under which plenary jurisdiction granted under the Interstate Commerce Act by either providing misinformation or no information to an employee regarding their legal rights, taking advantage of the fact that the legal resources available to a nonrepresented employee are extremely limited because few legal professionals in private practice have a thorough knowledge of the New York Dock Employee Protective Conditions.

New York Dock clearly provides in Article IV that nonrepresented employees shall receive substantially the same levels of protection as are afforded covered employees.

It has been consistently held that under New York Dock, the defining criteria of whether an employee is considered management or nonmanagement is solely determined on whether or not they have independent decision-making authority. Ms. Sullivan was not a management employee, but rather an employee performing tasks at the discretion of whomever was her immediate supervisor. In accordance with these facts, she was clearly covered under the protective provisions of New York Dock.

Now comes the status of Ms. Sullivan's employment status with the Carrier. If the Carrier takes the position that her severance agreement was binding, why would it then enter into

an agreement after first disavowing her employment connection to enter into an agreement to arbitrate this dispute? (Exhibit 1) Clearly the Carrier acknowledged Ms. Sullivan's employment relationship by agreeing to this arbitration without pursuing other legal avenues to avoid resolving this case before the forum under which these proceedings are now being conducted.

To the specific question of protective provisions, Ms. Sullivan now relies on New York Dock and its provisions as it pertains to Article 1, Section 10 of NYD in her case. Article IV of NYD clearly states the rights of noncovered employees but this does not insulate them from misrepresentation by management whereby virtue of their being blindly led to sign away their legal rights because of the lack of adequate availability of skilled legal professionals to pursue their interests. These people are left trapped in an environment which causes them to make mistaken decisions based upon their good faith reliance of management pronouncements.

This is not what the Interstate Commerce Commission intended when they imposed the New York Dock Protective Provisions. Taking the literal language of Article IV of those conditions, it must be concluded they were meant to be applied exactly in a manner that was encompassed in the language, i.e. "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." This language encompasses all provisions of New York Dock and does not permit carriers to dance around any provision of New York Dock on the basis an employee was exempt or noncovered.

Is there any provision of NYD which permits a carrier in anticipation of a transaction to carefully, through a scenario that includes duress, even fraud, by virtue of nondisclosure and mistake, to induce employees to sign separation agreements providing significantly less benefits than New York Dock? Was Ms. Sullivan ever provided a copy of the New York Dock Protective Provisions by the Carrier so she could examine her rights accordingly? The New

York Dock Provisions have been adopted in every merger since 1978. All the above questions, after examining the facts in the instant case must be answered in the negative.

So what do we have: As the facts of this case are examined, was there not a convoluted effort to deprive Ms. Sullivan her legal rights by taking advantage of her naivete? If so, this clearly constitutes mistake of law on the part of Ms. Sullivan as she was led to believe she would only be entitled to separation benefits offered to management personnel, and she was in fact a clerical employee with no independent managerial decision-making authority and therefore, covered by the provisions of New York Dock. This includes pension and medical benefits which Ms. Sullivan was deprived of.

CONCLUSION

What is confronted here is rather a defined effort to subvert plenary jurisdiction of the Surface Transportation Board in its imposition of New York Dock provisions in Surface Transportation Board Docket 32760. Without doubt, evidence adduced will warrant that Claimant Sullivan was placed in a posture believing she had no alternative but to sign a separation agreement in the face of Union Pacific's acquisition of Southern Pacific and that this action was carried out solely for the purpose of evading the liabilities that would incur after the acquisition was approved, with the carrier knowing full well New York Dock Protective Conditions would be imposed. This being the case and UP's acknowledgement of Ms. Sullivan's employment relationship by virtue of its signing the Arbitration Agreement can lead to only one conclusion, Ms. Sullivan is entitled to the New York Dock Protective Provisions imposed in Surface Transportation Board Finance Docket 32760."

ARGUMENT

REASONS WHY PETITIONER WAS AN EMPLOYEE UNDER NEW YORK DOCK

I basically did filing, photocopying, data entry, delivering mail and many go-fer type tasks. I had no one reporting to me and I had no independent decision-making authority. The UP in their submission attached a job description for a UP Administrative Assistant that was even close to what my position was. In Exhibit 5 of their Submission my position is listed as a Data Entry Support Function.

REASONS WHY PETITIONER WAS AN EMPLOYEE UNDER NEW YORK DOCK WHOSE POSITION WAS ABOLISHED IN ANTICIPATION OF THE MERGER

I do not know how long before the announcement of the merger due diligence was going on but I'm sure it was way before August 3, 1995, the date the merger was announced. The fact that I was given notice October 11, 1995, two months after the merger was announced would lead me to believe that my job abolishment was in anticipation of the merger. I have no right to discovery but the Arbitrator did.

REASONS WHY PETITIONER THINKS THE SEVERANCE AGREEMENT SHOULD HAVE BEEN RESCINDED

(highlighted parts are quotes from the Arbitrator's Award)

The following is my rebuttal at the Executive Session to the Arbitrator's Award:

Severance agreement urged to consult an attorney

Arbitrator did not think I pursued the issues of seeking legal counsel enough. In my submission I mentioned contacting attorneys but I did not mention by name or elaborate. During the Executive Session when I did go in depth, the Arbitrator said that he wished I had done that in my Submission and with the look he gave me I perceived that it would have made a difference.

I consulted Arthur Siegal on November 30, 1995 and paid him $200.00 for one hour of his time. He read the severance agreement, asked me if someone younger was doing my job and other typical discrimination type questions. I also discussed with him other issues that I thought

were pertinent. He said he wasn't sure he could do anything for me but for $1,000 he would write a letter. At that time, since he didn't seem very positive about anything and that amount of money seemed like a lot to just write a letter, I left.

After seeing Mr. Siegal, I contacted John Henning. He was handling a NYD case for the ISSC Department at SP. I faxed him my severance agreement. After reviewing the agreement, he told me that the SP had not yet adopted NYD. He also said that there wasn't anything in that agreement if I were to sign it that would preclude me from filing under New York Dock, eventually.

I also called Mark Rudy's office and Kay Lucas Wallace's office, both labor attorneys. They essentially asked me the same questions that Mr. Siegal did. They said that I was an at will employee and they couldn't do anything for me.

According to the statement in the severance agreement urging me to consult an attorney, I feel that I did fulfill my obligation to seek legal advice. I contacted qualified labor attorneys before signing my severance. I am the type of person that always gives maximum credibility to anything anyone in authority says to me whom I've appraoched and asked for advice or a questions. I thought I had done all I could do.

The only attorney who knew anything about NYD was John Henning, so I made the assumption that if I was covered and I did sign the agreement, that there wasn't going to be a problem if they did adopt NYD because of the advice I was given. Mr. Henning gave me inaccurate information but I believe Mr. Henning is someone that Mr. LaRocco would consider "competent" to give me advice on NYD.

By signing the severance I waived any claim for "job protection" benefits

I did not know that New York Dock fell under the umbrella of "job protection" benefits and also as I mentioned above the advice I received from a knowledgeable attorney.

HR Vice President lacked the intent to deliberately mislead her

During my last week at Southern Pacific I had a meeting with Judy Holm, Vice President-Human Resources. I asked her if I was covered under New York Dock and she said as far as she knew I was not covered. That confirmed what I had heard from my boss, Norm Schlinger. Norm had been at a Town Hall meeting in September (while I was on sick leave), where Tom Matthews was asked the question of whether or not nonagreement employees would be covered under New York Dock. Norm told me that Matthews said he had no expectations we would be covered.

I have since found out that since 1978 all railroad mergers have adopted New York Dock Protection. I find it strange that neither Ms. Holm or Mr. Matthews knew the answer to that in November 1995. I do not think that can be considered a "mistake" as the Arbitrator says. Shouldn't someone at SP have known that? Yes, I do feel that I was misled. Who else would I go to to ask that? Ms. Holm knew what I did, that I was working for a middle manager and basically doing clerk's work. I looked to the VP-Human Resources as the person with the authoritative answers. She had a responsibility in that position to give accurate information. The clerks had the union and the exempts and management had Human Resources. I think they did have that knowledge and that's why I think there was fraud. I definitely think the Arbitrator did not give weight to that and I think it was very important.

After years of being a conscientious and loyal employee, I felt that I received no help or guidance from anyone in the company. It seems once you are on that "list" of losing your job, my peers and managers treated me like I wasn't there or if they did talk to me, they ignored what was happening to me. Everyone had a fear of losing their job and somehow that doesn't lend them to be very helpful or supportive.

The Claimant had experience with NY Dock Protective Conditions.

Arbitrator relied upon the separation that I received from the Western Pacific Railroad in December 1983. I do not see how they can be compared, two entirely different situations. Should never have even been referred to in the Award.

Number one, I don't think that my previous employment with WP had anything to do with my employment at SP. When I was employed at WP, I was on a Rule 2 position which was covered by the union but was an appointed position. I had been on a Rule 2 position since 1968 and except for having a payroll deduction for my union dues, I had nothing to do with the union thereafter. I worked in the Management Services Department with all management personnel. At the time of the merger I was asked, "Do you want to go to Omaha," and I said "No." I received a check like everyone else in my department.

When I was hired at SP in 1984, they were in the process of a merger with the Santa Fe and were not hiring for any union positions. I came in as an exempt and basically worked with exempts and management my entire career at SP. I rarely had contact with any union personnel.

Employees who lose their jobs are placed in an economic vise

I had not had a raise in seven and a half years, since 1987. I had overextended myself in 1989 when I bought a condo anticipating an increase. Every year I went more and more into the hole and Southern Pacific in the background kept thanking us for sticking with them in these bad financial times. I did not leave because I was a few years away from attaining my 30 years for Railroad Retirement.

What the Arbitrator did not address and is an egregious error:

I first talked to Judy Holm in mid November, 1995 and she told me there might be a position for me in the company. It wasn't until my last day, November 30, that I was told it wasn't going to happen. The man I would be working for William Saul, Vice President-Tax told me on November 30, 1995 that the only reason they did not approve the position was that I

was just a headcount and they did not want to add another body. He also said that SP did not care if they had to pay more money by paying a temp. They were not creating a position for me, it was a position that had been authorized in August but after the merger was announced had been frozen.

Ms. Holm told me on the same day that Mr. Saul did not get approval because there was a Board meeting and they had decided to eliminate another 150 jobs in January 1996. I found out later that they decided to let attrition handle it. I was basically the last person who lost their job after the merger was announced.

A few days before Mr. Saul called me in February 1996 to offer me the temporary job, I had mailed in my signed severance with an addendum (Attachment 2)

I believe he called me because I sent in a signed severance agreement that was unacceptable to SP. Why wait 2-1/2 months after I left SP to offer me that job? After we talked about the job, I said that I would think about it and let him know. I called back the next day or day after and accepted. It was then that he said, "Well, I talked to Judy Holm and she said that I couldn't bring you back on board as long as you had ties to the SP." I asked if that meant signing my severance agreement without an addendum and he said yes. Was the timing just a coincidence? I don't think so. I felt pressured now that I had made the decision to take the job, that I had to sever all ties. I know that without that pressure I would not have signed it. I wanted that position because I was convinced that if I got back to SP on the temporary job, they would make it permanent. After all, in my mind that was the right and just thing to do. Looking back that was my main motivation; the money was secondary.

Also, I was paid through an employment agency because Mr. Saul did not want to be caught in a Railroad Retirement Board audit that showed he had hired back a former employee as a consultant and thus did not pay the necesssary employment taxes.

The Arbitrator did not take into account the fact that I was let go one day and rehired soon after as a temporary employee and that the primary purpose of doing that was to avoid the application of New York Dock Provisions and that was an egregious error of his Award.

After the Executive Session, the Arbitrator said that I would probably be considered an employee under New York Dock but I did not prove my case regarding the severance agreement and he did not think that I showed I lost my job in anticipation of the merger because SP had been downsizing for years.

Regardless of the severance agreement, the Arbitrator should have dealt with the actual facts that occurred and in that regard he did commit another **egregious** error. He did not consider some of the factual information properly.

Because he did not rescind the severance agreement that I signed, Mr. LaRocco stated he did not have to address the issues of whether or not I was an employee under NYD or whether I lost my position as a result of the merger.

At the Executive Session I did not bring that up because I just accepted his authority that he did not have to deal with my employee status if he found the severance agreement valid. I now believe that was part of his job to address those issues.

MISCELLANEOUS

When the Arbitrator was on the conference call with the UP and I was in his office, he said that he probably wasn't going to change anything in the Award, just maybe some wording. He also said he did not think it was good business to reverse decisions and that out of 3,000 decisions he has rendered, he has only reversed one. After we hung up with UP, he told me that I could appeal and at that time I did not have the financial means for an appeal and I said that I would not be filing one. When I received his Award after the Executive Session I noticed that he

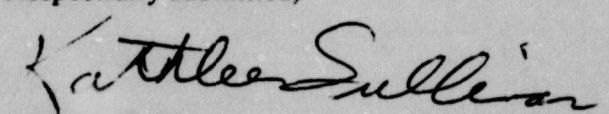
did not change any of the wording and I wonder if he would have had if I said I was going to appeal.

Why has this taken so long:

In November 1995 I contacted attorneys, February 1996 before taking the job with Mr. Saul I again contacted John Henning and asked his advice. In November 1996 after a conversation with an attorney in Sacrament, CA named James Gilwee, he urged me to file a complaint in the San Francisco Superior Court. He had an attorney friend of his in San Francisco draft in for me in Pro Per but because I could never find any attorney to take it on a contingency basis because of the severance agreement that I signed, so I vacated it. That takes us up to May 1997. After I did that, through numerous conversations with people, I found my way to Robert Huntington shortly thereafter. Right after I was in touch with him he had an auto accident, then a stroke all of which delayed things again. This has only been dragged out so long because of extenuating circumstances, I have not done this on purpose.

I am requesting an oral hearing in this matter if it is necessary to resolve the conflict of the conclusions reached by the Arbitrator and the evidence.

Respectfully submitted,

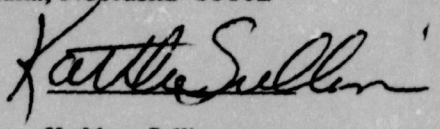


Kathleen Sullivan
1110 Bayswater Avenue, #302
Burlingame, CA 94010
(650) 340-8249

CERTIFICATE OF SERVICE

I hereby certify that copies of Kathleen Sullivan's Appeal was served this 4th day of January, 2000 by Federal Express, upon the following:

Brenda J. Council
Kutak Rock
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102



Kathleen Sullivan

EMPLOYEE'S EXHIBIT 1

EX. 1

KATHLEEN SULLIVAN
1110 Bayswater #302
Burlingame, CA 94010
(650) 340-8249
(650) 348-1985 (fax)
email: Kittysulli@aol.com

September 3, 1998

VIA FAX – ORIGINAL SENT U.S. MAIL

Ms. Andrea Gansen
Manager Labor Relations
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179

RE: Telephone conversation of today regarding scheduling for hearing of the dispute regarding New York Dock protective conditions.

Dear Ms. Gansen:

We agreed that we would convene the arbitration case for hearing on February 23, 1999 at 1:00 p.m. in the offices of John LaRocco located at 928 Second Street, Suite 300, Sacramento, California. It was also agreed that Mr. LaRocco would serve as the neutral member of the Arbitration Board and that his decision shall be final and binding on the parties.

As it stands currently, I will serve as the Employee Member of the Board and you will serve as the Carrier Member. Not withstanding, both parties reserve the right to change the designated Employee or Carrier Member of the Board prior to the hearing but shall give notice of such change to the other member ten days prior to commencement of the hearing.

The hearing shall be conducted pursuant to the pertinent provision of the New York Dock Protective Provisions and the arbitrator shall not have the authority to go beyond the confines of the New York Dock provisions in reaching his decision.

If this Agreement meets with your approval, please affix your signature in the space provided below forwarding a signed copy to me and John LaRocco.

FOR THE CARRIER

Andrea Gansen, Manager Labor Relations

FOR THE EMPLOYEE

Kathleen Sullivan, Claimant

Kathleen Sullivan

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

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

Dated: _____

Kathleen V Sullivan

Kathleen V. Sullivan

546-60-1501

(SOCIAL SECURITY NUMBER)

1110 Bayswater #302

HOME ADDRESS
(STREET OR P.O. BOX)

Burlingame CA 94010

CITY AND STATE ZIP CODE

SOUTHERN PACIFIC TRANSPORTATION CO.

Dated: _____ _____

provided that my severance package is no less than it would have been had it been calculated using the formula applicable toother similar Management personnel that lose their positions during the first year after the merger with Union Pacific becomes effective.

Ex. 2

ARBITRATOR'S AWARD

ARBITRATION COMMITTEE

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

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

MEMBERS OF THE COMMITTEE

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

EMPLOYEE'S STATEMENT OF THE CLAIM

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

CARRIER'S STATEMENTS OF THE ISSUE

PROCEDURAL

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

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

MERITS

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

[Sullivan-UP.NYD]

OPINION OF THE COMMITTEE

I. INTRODUCTION

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

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

II. OVERVIEW OF THE DISPUTE

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

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

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

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

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

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

III. PERTINENT PROVISIONS OF THE NEW YORK DOCK CONDITIONS

Article IV of the New York Dock Conditions provide:

> Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.
>
> In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

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

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

> "Dismissed employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

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

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

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

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

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

IV. JURISDICTION

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

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

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

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

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

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

V. BACKGROUND AND SUMMARY OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. THE POSITIONS OF THE PARTIES

A. Claimant's Position

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

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

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

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

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

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

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

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

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

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

B. The UP's Position

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

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

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

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

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

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

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

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

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

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

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

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

VII. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AWARD AND ORDER

Claim denied.

Date: September 17, 1999

___I concur/___I dissent

Kathleen V. Sullivan
Employee Member

___I concur/___I dissent

Richard Meredith
Carrier Member

John B. LaRocco
Neutral Committee Member