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SERVICE DATE - AUGUST 6, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 28676 (Sub-No. 4)

GRAND TRUNK WESTERN RAILROAD
—CONTROL—
DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY
AND
DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY
(Arbitration Review)

Decided: July 31, 1998

We are denying the appeal by the United Transportation Union (UTU) of the decision of the arbitration panel (the "Panel") entered on January 19, 1998 (Barry E. Simon, Neutral Member).

BACKGROUND

In 1979, our predecessor agency, the Interstate Commerce Commission (ICC), approved the acquisition of the Detroit, Toledo and Ironton Railroad Company and the Detroit & Toledo Shore Line Railroad Company (DTSL) by the Grand Trunk Western Railroad ("Grand Trunk" or "the Carrier").¹ To satisfy the statutory labor protection requirement, the ICC imposed an agreement that was negotiated between Grand Trunk and the unions representing the employees of the three carriers (the "1979 Agreement"). The 1979 Agreement grants enhanced income protections extending beyond those provided under our standard New York Dock formula.² The enhanced protections are called "attrition protections" because they cover eligible employees until they leave the workforce due to resignation, retirement, termination for cause, or death.³

On November 3, 1995, UTU presented the Carrier with letters from trainmen of the former DTSL asserting claims for attrition protection under the 1979 Agreement. Because the parties could

¹ See, Grand Trunk Western Railroad -- Control -- Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company, Finance Docket No. 28676 (Sub-No. 1) (ICC served Dec. 3, 1979).

² See, New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) (New York Dock).

³ The agreement providing the supplemental protections is reproduced in Tab B of Grand Trunk's reply filed on March 24, 1998.

not agree on these claims, the dispute was taken to arbitration. During arbitration, the Carrier argued that attrition protection does not apply. Grand Trunk claimed that, under the 1979 Agreement, the attrition protection is subject to a precedent condition that the parties negotiate a single, company-wide agreement governing crafts represented by UTU to replace the current separate agreements applying for former employees of each carrier. Grand Trunk says that this condition has not been satisfied. UTU responded that there was no such condition precedent and that the attrition protection applies without qualification.

The Panel agreed with the Carrier, holding that the attrition benefits do not apply because the parties have not negotiated a single, company-wide agreement governing the crafts represented by UTU.⁴ On February 27, 1998, UTU filed an appeal of the Panel's decision.⁵ Grand Trunk filed a reply to the appeal on March 4, 1998.

DISCUSSION AND CONCLUSIONS

The appeal does not meet our Lace Curtain standard of review.⁶

The 1979 Agreement adopted by the ICC is clear on its face in providing that the attrition protection is a supplemental protection that is subject to the condition precedent that the parties negotiate a single, company-wide agreement to replace the separate agreements that currently apply to the former employees of each carrier. In particular, section 1 of the 1979 Agreement adopted by the ICC provides that the New York Dock formula will apply except as the formula is specifically modified in that Agreement:⁷

The terms and conditions imposed in New York Dock Railway - Control - Brooklyn Eastern District, 354 I.C.C. 399, as modified by the Commission's Decision served

⁴ The Panel also resolved issues involving UTU's representational authority and whether certain claimants would be eligible for the attrition protection even if it were generally available. UTU has not appealed the Panel's decision as to these additional issues.

⁵ The document filed by UTU is called a "petition," but we sometimes refer to it as an "appeal" because, under 49 CFR 1115.8, parties are granted an "appeal of right" to arbitration decisions.

⁶ See Chicago & North Western Transp. Co. — Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain).

⁷ The ICC upheld this interpretation in Grand Trunk Western Railroad Company — Merger — Detroit and Toledo Shore Line Railroad Company — Arbitration Review, Finance Docket No. 28676 (Sub-No. 2) (STB served Feb. 26, 1996), aff'd mem., United Transportation Union v. Grand Trunk Western R.R., 114 F.3d 1190 (6th Cir. 1997).

in that proceeding on February 23, 1979, ("New York Dock") shall be applied for the protection of the interests of employees of GTW, Detroit, Toledo & Ironton Railroad Company (DT&I) and the Detroit and Toledo Shore Line Railroad Company (DTSL), except as those terms and conditions are modified herein. Copy of New York Dock attached and made part hereof.

In turn, section 11 of the 1979 Agreement makes it clear that the benefits supplementing New York Dock under that Agreement are subject to the condition precedent that a single agreement be negotiated:

This Agreement will be effective as to each labor organization upon the date of acquisition or the date upon which the labor organization and GTW come to agreement on a single working agreement for all the employees they represent on the GTW and the DT&I, whichever date is later and the employees shall be entitled only to the protective conditions provided in Finance Docket No. 28676 (Sub-No. 1F) until such date. It is understood that DTSL employees shall be subject to such single agreement only when and if the DTSL is acquired in its entirety [sic] by the GTW.

As found by the Panel, "[b]y providing that the enhanced (attrition) benefits are effective on the date of the acquisition or the date of a single working agreement, 'whichever date is later,' it is evident both conditions must be satisfied."⁸ In other words, according to sections 1 and 11 of the 1979 Agreement adopted by the ICC, the members of a labor organization may receive the supplemental attrition protection only when that organization and the Company negotiate a single, company-wide agreement. Until such an agreement is negotiated, the standard New York Dock protection applies.⁹ It is undisputed that a single, company-wide agreement governing the crafts represented by UTU has yet to be negotiated.

The parties' intent in negotiating sections 1 and 11 of the 1979 Agreement is not difficult to discern. A single working agreement would serve the Carrier's interest by simplifying labor bargaining and administration. From labor's point of view, however, a single agreement could upset established seniority. It is reasonable to believe that the Carrier offered labor the benefit of added protection as an incentive for labor to agree to change such patterns by accepting a single working agreement. If we were to adopt UTU's interpretation, the provision in the 1979 Agreement referring to a "single working agreement" would be nullified, and UTU would obtain the benefit of the added protection without having to give anything in return. If the parties had intended such a result, they would surely have provided simply that the attrition protection would take effect when the acquisition was consummated, without including the "whichever date is later" language.

⁸ Arbitration Decision, at 20.

⁹ The same conclusion was reached in an April 28, 1988 arbitration decision by Donald Kelley (Neutral Member), reproduced in Tab J of Grand Trunk's reply.

UTU has not shown that, under our Lace Curtain standard of review, the Panel's interpretation of the 1979 Agreement is "egregious error" or "fails to draw its essence from the imposed labor conditions." The Panel's decision is entirely consistent with the plain language and purpose of the 1979 Agreement, which refute UTU's contention that attrition protection applies whether or not a separate agreement has been negotiated. Moreover, we find no error in the Panel's conclusions (Arbitration Decision, at 19-20) that the Simon and Fletcher arbitration decisions can be distinguished¹⁰ and that the Eischen arbitration decision should not be followed.¹¹

UTU's statement (petition at 25) that section 11 of the 1979 agreement does not mention New York Dock is incorrect. In the above quoted language from section 11, "Finance Docket No. 28676 (Sub-No. 1F)" is the docket number of the ICC's initial decision (by an administrative law judge) approving the acquisition. In that decision, the administrative law judge imposed the standard New York Dock protection formula, which the entire Commission later supplemented in its final (December 3, 1979) decision approving the acquisition by adopting the 1979 Agreement.

Nor do we see the relevance of UTU's argument (page 24 of its appeal) that the Panel's decision creates two levels of protection, whereby (1) unionized employees would be entitled only to New York Dock protection until a separate agreement is negotiated while (2) non-unionized employees would be entitled to the attrition protection.¹² The decision states that the issue of

¹⁰ In the May 24, 1993 Fletcher arbitration decision, reproduced in Tab E of Grand Trunk's reply, the panel held that former Grand Trunk's unionized yardmasters were entitled to attrition protection because DT&I yardmasters were not organized when the acquisition of DT&I was consummated and thus could not be subjected to a requirement that a single agreement replace separate agreements. In the March 14, 1995 Simon arbitration decision, reproduced in Tab H of Grand Trunk's reply, the panel refused to disturb the Fletcher panel's holding in this respect. Neither decision disputed the Carrier's contention that single agreements were required for employees who were organized when the acquisition was consummated.

¹¹ The December 13, 1985 Eischen arbitration decision is reproduced in Tab O of Grand Trunk's reply. By failing to give effect to the "whichever date is later" language in section 11 of the 1979 Agreement, the Eischen panel held that the negotiation of a separate agreement was not a condition precedent to application of the attrition protection. For the reasons discussed above, the Eischen panel was incorrect in so holding, and we will not follow that decision. In his April 28, 1988 decision (see n.9, above), Arbitrator Donald Kelly refused to follow this holding of the Eischen panel for the same reasons. Moreover, as noted by the Panel in the instant proceeding, the Eischen decision involved a non-union employee.

¹² UTU's basis for asserting that non-unionized employees would be entitled to attrition protection even in the absence of a separate agreement is not explained. UTU's position may be based on the 1993 Fletcher arbitration decision, discussed in n.7, above.

whether the 1979 Agreement applies to non-unionized employees was not before the Panel.¹³ The Panel's holding as to unionized employees was not by itself egregious error and cannot be found to be egregious error merely because of what arbitrators may have found in other decisions concerning non-unionized employees.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The appeal is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹³ Arbitration Decision, at 18 n.3.