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SERVICE DATE – LATE RELEASE JULY 27, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 44)

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)

Decided: July 27, 2005

The Brotherhood of Locomotive Engineers and Trainmen (BLET) has appealed the April 14, 2005 decision of the arbitrator finding lack of jurisdiction under the Board's New York Dock employee protective conditions<sup>1</sup> to review certain actions by the Union Pacific Railroad Company (UP or the carrier) affecting engineers at Dexter, MO. In a separate pleading, BLET also has sought a stay of the carrier's actions pending a ruling on the merits by an arbitration panel. We are granting BLET's appeal of the arbitrator's decision, but we are denying BLET's request for a stay.

BLET also filed a separate motion to exceed the 30-page limit of 49 CFR 1115.2(d). The motion will be granted. However, all exhibits containing social security numbers or telephone numbers will be removed from the public docket and will be kept under seal. BLET may file a redacted version of these exhibits.

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<sup>1</sup> See New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

## BACKGROUND

At issue in this arbitration review proceeding is the carrier's attempt to reassign certain employees at Dexter, MO. While it is not apparent that the issue was specifically before the arbitrator, BLET also seeks to keep UP from terminating the "reverse" or away-from-home lodging arrangement and benefits that the employees have been receiving, which has enabled them to maintain their existing places of residence while working out of their new home terminals. Briefly, BLET claims that the carrier's actions are contrary to an October 18, 1999 Memorandum of Understanding interpreting Side Letter No. 11 of the St. Louis Hub Merger Implementing Agreement. Arguing that the carrier's actions are related to the merger in Finance Docket No. 32760<sup>2</sup> and are thus subject to the jurisdiction of the Board and its New York Dock conditions, BLET invoked arbitration under Article I, § 11 of the New York Dock conditions.<sup>3</sup>

On April 14, 2005, an arbitrator, Dr. James R. McDonnell, issued a short decision (the McDonnell Award) declining to reach the merits of the dispute. He found that the controversy is not subject to arbitration under New York Dock because the aforementioned Side Letter No. 11 lacks "a clear and direct connection to the Merger Implementing Agreement." On May 3, 2005, BLET filed an appeal of the arbitrator's decision declining to review the dispute under New York Dock.

In addition to its timely filed appeal, on May 11, 2005, BLET filed a petition asking the Board not only to stay the decision of the arbitrator declining to review the dispute but also to enjoin UP's actions to revoke the reverse lodging arrangement and other benefits for engineers at Dexter. BLET views the McDonnell Award as holding that a side letter to a merger implementing agreement is not part of the agreement and therefore does not come under New York Dock. BLET argues that such a broad ruling clearly is wrong and that, in any case, Side Letter No. 11 specifically references the St. Louis Hub Implementing Agreement and, therefore, is part of that agreement. BLET contends that the McDonnell Award, unless stayed, will vitiate or call into question every side letter or understanding implementing a merger agreement.

In its stay request, BLET contends that, while not specifically argued in its underlying appeal of the arbitration decision, the issue of whether UP could terminate the reverse lodging arrangement for engineers at Dexter was included in its claim for arbitration. BLET adds that the reverse lodging arrangement is an important fringe benefit that must be preserved under 49 U.S.C. 11326. BLET expresses its belief that the loss of this benefit will result in a massive relocation of engineers from the Dexter area, with financial and psychological costs to those engineers and their families.

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<sup>2</sup> Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996).

<sup>3</sup> New York Dock, 360 I.C.C. at 87.

On May 17, 2005, UP filed a reply in opposition to both aspects of BLET's request for stay. Citing the current list of issues BLET placed before the arbitrator as set forth in the arbitration decision, UP contends that the matter before the arbitrator arose from a 2003 claim by BLET that UP had failed to comply with the terms of the October 18, 1999 Memorandum of Understanding by forcing certain St. Louis and Salem-based engineers to accept assignments in Dexter. UP argues that the dispute involves routine assignment, seniority, and bumping questions, and that the arbitrator was correct that the matter did not fall under New York Dock.

UP contends that its right under Side Letter No. 11 to terminate the reverse lodging arrangement (by giving notice on or after April 1, 2005) was never placed before the arbitrator. According to UP, now that it has given the notice, BLET is attempting to use its pending appeal of the McDonnell Award and attendant petition for stay as a means to preserve the reverse lodging arrangement, even though the issue was never before the arbitrator. UP contends that BLET's motion should be denied for the following reasons: (1) it is improper because a stay of Arbitrator McDonnell's Award does not provide BLET with the remedy it seeks; (2) it is untimely given that 49 CFR 1115.5 required BLET to file its motion for stay 10 days before UP took up the actions at issue, not one day after UP took up those actions; (3) it is moot, because UP has already implemented the changes at issue; (4) BLET has no chance of success on the merits; and (5) the harm to UP of issuing a stay greatly outweighs the harm to BLET of denying a stay.

On May 18, 2005, UP filed a motion to substitute an attached statement of Arthur Terry Olin for the statement of Mr. Olin that was attached to UP's reply filed on May 17, 2005. The two statements are identical, except that the second contains Mr. Olin's original signature. The motion will be granted because BLET will not be prejudiced.

On May 23, 2005, UP filed a reply in opposition to BLET's appeal, discussing further the major points on the merits that UP argued in its reply to BLET's stay request. UP also filed a separate motion on May 24, 2005, to exceed the 30-page limit of 49 CFR 1115.2(d). The motion will be granted.

On June 2, 2005, BLET filed a motion to admit a reply to UP's reply and tendered a separate reply emphasizing its arguments that the dispute falls under the New York Dock conditions. On June 6, 2005, UP filed a reply in opposition to BLET's motion. We will deny BLET's motion. Under 49 CFR 1104.13(c), replies to replies are not permitted, and BLET has failed to show good cause for departing from our rule in this instance.

## DISCUSSION AND CONCLUSIONS

Under New York Dock, labor changes related to approved transactions are to be implemented by agreements negotiated before the changes occur. If the parties cannot agree on the nature or extent of the changes, the issues are to be resolved by arbitration, subject to appeal to the Board under the deferential “Lace Curtain” standard of review adopted at 49 CFR 1115.8. See Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987), aff’d sub nom. IBEW v. ICC, 826 F.2d 330 (D.C. Cir. 1988) (“Lace Curtain”). Under the Lace Curtain standard, the Board does not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error. Id. at 735-36. In Delaware and Hudson Railway Company — Lease and Trackage Rights Exemption — Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al., slip op. at 16-17 (ICC served Oct. 4, 1990) (Springfield Terminal), remanded on other grounds in Railway Labor Executives’ Ass’n v. United States, 987 F.2d 806 (D.C. Cir. 1993), our predecessor agency, the Interstate Commerce Commission (ICC), elaborated on the Lace Curtain standard as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

Applying this standard of review, we will grant BLET’s appeal of the arbitrator’s decision finding lack of jurisdiction under New York Dock. Because we are deciding the appeal here, BLET’s request for stay of the arbitrator’s decision is moot. We will deny BLET’s request that we enjoin the employment actions that UP has already initiated.

Arbitrator’s Decision. The arbitrator’s decision offers little explanation for his conclusion that he lacks jurisdiction under New York Dock. Other than to say that the side letter “stands for what it is; a side letter,” the arbitrator provides no explanation and no reason for his conclusion that Side Letter No. 11 “does not find its genesis in the Merger Implementing Agreement.” Arbitration Decision at 3. He cites no precedent of any type. The side letter specifically states that it “refers to the Merger Implementing Agreement for the St. Louis Hub” and that its purpose is to “more specifically define the rights and responsibilities” of certain engineers under that agreement. Given that the side letter specifically references the implementing agreement, this lack of explanation is by itself sufficient reason to review and vacate his decision.

The absence of any discussion in the arbitrator’s decision is troubling, because under New York Dock, parties to agreements implementing mergers may pursue arbitration of issues arising over the interpretation and application of the implementing agreements. New York Dock

arbitrators routinely accept such arbitration, and their decisions have been reviewed by the Board and the ICC.<sup>4</sup> If a side letter or agreement interprets or enlarges upon an implementing agreement, as Side Letter No. 11 appears to do here, issues arising under the side letter are presumably as much a part of the implementation of the merger as the original implementing agreement, especially if there is no evidence to the contrary.<sup>5</sup> The same principle would logically seem to apply for subsequent agreements, such as the memorandum of understanding here, interpreting side letters.

In its reply to the stay request and to the appeal, UP attempts to support the arbitrator's disclaimer of New York Dock jurisdiction by pointing to its argument before the arbitrator proposing a narrow interpretation of the types of disputes that arbitrators may hear under New York Dock. Recalling its position before the arbitrator, the carrier states (stay reply, at 3):

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<sup>4</sup> See, e.g., Brotherhood of Maintenance of Way Employees v. ICC, 920 F.2d 40, 45 (1990) (when an arbitrator did interpret an implementing agreement); Burlington Northern, Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, STB Finance Docket No. 32549 (Sub-No. 23), slip op. at 2 (STB served Sept. 25, 2002) (noting that disputes about interpretation of implementing agreements are resolved by arbitration, subject to appeal to the Board).

The following are examples of proceedings where the Board deferred to arbitrators' interpretations of implementing agreements or side letters thereto: Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 37) (STB served Aug. 16, 2000); Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 38) (STB served Aug. 16, 2000) (UP/SP Muessig Award); and Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-Nos. 40 and 41) (STB served Oct. 10, 2003).

See also the cases cited by BLET in Petition for Review, Exh. B at 6-9.

<sup>5</sup> Tacitly applying this principle in UP/SP Muessig Award, the Board upheld a decision where a New York Dock arbitration panel used a side letter to define the rights of employees under an implementing agreement because the original implementing agreement did not specifically address the issue, thereby treating the side letter as an extension of the original agreement.

As UP noted, Article I, § 11 of New York Dock only allowed arbitrators appointed thereunder to resolve disputes “with respect to the interpretation, application or enforcement” of New York Dock. BLET’s claims, however, raised no issue regarding the New York Dock conditions or benefits, but instead raised routine assignment, seniority, and bumping questions.

UP points out that side letters may address both New York Dock and non-New York Dock employee benefits. The carrier argues that the matters placed before the arbitrator here, however, were not New York Dock matters because they did not involve “interpretation, application or enforcement” of the New York Dock conditions. Referring to the specific issues that BLET posed to the arbitrator, the carrier argues that none of them involves “conditions or benefits,” and that the October 18, 1999 Memorandum of Understanding does not address any of the benefits provided by the New York Dock conditions, but, rather, addresses simply the question of which engineers must fill assignments at Dexter. And in support, UP notes that BLET has filed a number of claims under Section 3 of the Railway Labor Act on behalf of engineers allegedly affected by the carrier’s actions involving the assignment of engineers at Dexter.

UP’s attempted explanation is not sufficient to cure the defects in the arbitrator’s decision, which must stand on its own. While a document identifying itself as a “Side Letter” to a merger implementing agreement could include issues that are not related to mergers, the arbitrator identifies nothing in either Side Letter No. 11 or the October 18, 1999 Memorandum of Understanding that indicates that these agreements, including the portions relevant to the specific disputes, do not flow from the agency’s merger approval. In contrast, Side Letter No. 11 specifically cites the merger implementing agreement to which it relates, and the arbitrator fails to address that reference. Thus, the arbitrator’s decision is deficient because it does not explain how he reached his decision in light of the plain language of the side letter and precedent.

It is not enough for the carrier to argue to us, in an attempt to prop up the arbitrator’s decision, that the October 18, 1999 Memorandum of Understanding addressed simply the question of which engineers must fill assignments at Dexter. UP is correct that implementing agreements and side letters sometimes include non-New York Dock matters. Indeed, when matters in implementing arrangements have on their face (because of their subject matter) been ineligible for arbitration under New York Dock, the Board has so found. See Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 22) (STB served June 26, 1997) (Board reversed a New York Dock arbitrator’s inclusion of a health benefits change in an implementing arrangement, holding that the change was an improper modification of “rights, privileges and benefits” that are protected under Article I, § 2 of New York Dock). On this record, however, we cannot determine whether the selection of engineers to fill assignments at Dexter was on its

face unrelated to the merger and thus an improper subject for New York Dock arbitration. The arbitrator had a duty to state his conclusion and to explain his rationale for it.

As noted, disputes arising from implementing agreements are routinely resolved by New York Dock arbitrators. The arbitrator's decision is void of any discussion addressing the apparent intent of the documents at issue to deal with issues that are related to the merger—the very type of issues that arbitrators must resolve under New York Dock. We conclude, therefore, that the award must be overturned because it is “irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions,” under Springfield Terminal, supra.

Stay of Action Pending Arbitration. To the extent that our decision vacating the arbitrator's decision does not moot BLET's request for a stay or other preliminary relief, we deny the request for stay. It is not the Board's policy to intervene in matters subject to Article I, § 11 of the New York Dock conditions, before they have been considered by an arbitrator. Kansas City Southern Industries, Inc., KCS Transportation Company, and the Kansas City Southern Railway Company – Control – Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served Dec. 4, 1997). Here, we note in particular that the listing of issues presented to the arbitrator for determination does not appear to contain any challenge, or even any reference, to UP's clearly stated right in Side Letter No. 11 to terminate the reverse lodging arrangement. While UP's action in terminating the reverse lodging arrangement may be made the subject of a future New York Dock dispute resolution process, BLET has failed to show that such a dispute was properly before Arbitrator McDonnell. Thus, BLET must await in this instance the arbitration of the issue of the reverse lodging benefits before it may pursue relief before this agency.

In any event, such extraordinary relief would not be justified under the standards for evaluating requests for stay or other injunctive-type relief, which are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. Hilton v. Braunkill, 481 U.S. 770, 776 (1987); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, “it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy.” Cuomo v. United States Nuclear Regulatory Comm., 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay normally carry the burden of persuasion on all of the elements required for such extraordinary relief, Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974), although “[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” Cityfed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995).

On the record before us, BLET has not shown that it is likely to prevail on the merits. A future arbitrator might have a different and more robust record than is before us, but that

arbitrator would have to address the Side Letter No. 11 that established UP's right to terminate the reverse lodging arrangement, and the October 18, 1999 Memorandum of Understanding that on its face does not appear to address reverse lodging, and the letter from the union supporting the position that UP did not give up its right to terminate the reverse lodging arrangement beginning in April 2005. See Declaration of Arthur Terry Olin, attached letter from Local Chairman David W. Grimes, dated September 17, 2003.

The balance of harms do not clearly tip in favor of one party or the other given BLET's concern about potential harm associated with having to relocate and UP's concern that it might not have the ability to recoup funds lost from having to pay lodging benefits during the stay period if it were to prevail on the merits. Additionally, there is no overriding public interest consideration warranting a stay. Thus, the movant has not met its burden of making the required showings.

Finally we note that, under our regulations at 49 CFR 1115.5, BLET's request for stay was due 10 days prior to the implementation date of the contested action. In April, BLET was notified of UP's intent to terminate the reverse lodging benefits by May 4, 2005. The carrier delayed actual commencement of termination of those benefits until May 10, 2005. Regardless of which date is used to calculate the due date for BLET's stay request, that request was untimely.

If the timeliness of the filing were the only legal issue impeding a stay, we would consider the stay a more viable remedy to prevent potential financial and psychological disruption to the employees during this and further litigation. As discussed, however, there are other legal issues.

Although we do not impose a stay here, we are very concerned about the effect on employees and their families of any UP actions that could be undone by further arbitration. Issues like UP's right to terminate the reverse lodging arrangement and to reassign certain employees whose home terminal is Dexter, MO, to other home terminals, have not yet been addressed in arbitration pursuant to § 11 of New York Dock. It is in everyone's interest that UP minimize any negative impacts on affected employees to the extent possible until the New York Dock processes have concluded.

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

It is ordered:

1. BLET's appeal of the arbitrator's decision is granted, and that decision is vacated.
2. BLET's request for stay of the carrier's employment actions is denied.

3. BLET's motion to exceed the 30-page limit of 49 CFR 1115.2(d) is granted, but all exhibits containing social security numbers or telephone numbers will be removed from the public docket and kept under seal.

4. UP's motion to exceed the 30-page limit of 49 CFR 1115.2(d) is granted.

5. UP's motion to substitute the witness statement of Arthur Terry Olin is granted.

6. BLET's motion for leave to file a reply to a reply is denied.

7. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary