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SERVICE DATE - AUGUST 16, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 38)

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: August 11, 2000

The General Chairman of the Brotherhood of Locomotive Engineers, St. Louis Southwestern General Committee (BLE-SSW) has filed a petition for review<sup>1</sup> of an arbitration award (the Award) entered by an Arbitration Panel (Panel) chaired by neutral member Eckehard Muessig. We decline to review the Award.

BACKGROUND

In 1996, we approved the acquisition and control of the Southern Pacific Rail Corporation and its rail carriers by the Union Pacific Corporation and its rail carriers, including the Union Pacific Railroad Company (UP or the Carrier),<sup>2</sup> subject to our standard New York Dock conditions for the protection of employees.<sup>3</sup> Under New York Dock, changes affecting rail employees and related to approved transactions must be implemented by agreements negotiated before the changes occur. If the parties cannot reach agreement or disagree on the interpretation of an implementing agreement, the issues are resolved by arbitration, subject to appeal to the

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<sup>1</sup> Appeals of arbitration decisions are permitted under 49 CFR 1115.8.

<sup>2</sup> Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

<sup>3</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).

Board under our deferential Lace Curtain standard of review.<sup>4</sup> Once the scope of the necessary changes is determined by negotiation or arbitration, employees adversely affected by them are entitled to receive comprehensive displacement and dismissal benefits for up to 6 years.

In accordance with New York Dock, the Brotherhood of Locomotive Engineers (BLE) and UP entered into implementing agreements concerning the coordination of BLE engineers in various hubs established by UP. The Carrier relied on the BLE General Chairmen to resolve implementation issues among themselves, subject only to broad guidelines to protect the railroad's legal position and operational ability. When the BLE General Chairmen were unable to resolve certain seniority issues among themselves, these issues were taken to arbitration. The Carrier participated in the arbitration along with the BLE General Chairmen.

The various issues upon which the BLE General Chairmen could not agree were submitted to the Panel in the form of seven separate cases. The case at hand was docketed as "Case No. 1." The six other cases are not at issue in this appeal.<sup>5</sup>

The controversy at issue here arose between the General Chairman of BLE-SSW and the General Chairman of the BLE, Union Pacific Railroad — Eastern District (BLE-UPED), and involves the Expanded Salina Hub Agreement (the Agreement).<sup>6</sup> A dispute arose as to (1) the cut-off date for determining which employees who were in training to become engineers were entitled to placement on two "prior rights" rosters established under the Agreement<sup>7</sup> and (2) the number of "pool turns" on these rosters.<sup>8</sup>

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<sup>4</sup> Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. IBEW v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

<sup>5</sup> An appeal was also filed in Case No. 7, which is addressed in a separate decision served today in 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), STB Finance Docket No. 32760 (Sub-No. 37) (STB served August 16, 2000).

<sup>6</sup> The Agreement and its side letters are reproduced in part in BLE Exhibit 1 of Appendix D of BLE-SSW's petition for review.

<sup>7</sup> Prior rights generally refer to seniority rights based on pre-merger status vis-a-vis other employees on a division that once constituted another separate carrier.

<sup>8</sup> While neither party defines "pool turn," it appears to be an operational measure that influences the size of the rosters.

On February 8, 2000, the Panel entered its decision disposing of all seven cases. The Panel condensed the five questions submitted by BLE-SSW in Case No. 1 into two questions. Only the first of these two questions is relevant here.<sup>9</sup> It was posed and answered as follows:

Question No. 1: “In the Salina Hub (phase II) are all employees who were in engineer training on the day of implementation May (1999) prior righted to engineer positions or are only those employees who were in engineer training on July 16, 1998 entitled to prior rights?” [Award, at 3.]

Answer: “... those engineers in training on July 16, 1998 are granted prior rights and those in training after July 16, 1998 are not granted prior rights.” [Award, at 6.] [Emphasis in original.]

On March 7, 2000, BLE-SSW filed its petition for review of the Panel’s findings in Case No. 1, and replies were filed on March 22, 2000, by BLE-UPED, and, on March 27, 2000, by UP.

#### PRELIMINARY ISSUE

In its reply, BLE-UPED asserts that we should not consider BLE-SSW’s petition because BLE-UPED is “the duly designated and authorized collective bargaining representative for the Brotherhood of Locomotive Engineers for the craft of Locomotive Engineers working in the Expanded Salina Hub Agreement.” The Carrier also questions BLE-SSW’s standing to appeal.

We will not reject BLE-SSW’s petition for lack of standing to appeal. This agency does not have the authority to resolve “representation” issues of the sort raised here, which underlie the standing argument.

#### DISCUSSION AND CONCLUSIONS

BLE-SSW has raised two issues in its petition: (1) what is the proper cutoff date for determining which employees who were in training to become engineers on that date were entitled to placement on two “prior rights” rosters established under the Expanded Salina Hub Agreement; and (2) whether the Panel failed to resolve all of the issues put before it. Under Lace Curtain, we generally defer to arbitrators’ decisions in the absence of egregious error, and limit our review to “recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions.” Lace Curtain at 736. We normally will not overturn an

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<sup>9</sup> The second question, as noted, involved the correct number of prior-righted pool turns for former SSW engineers in the Herington-Kansas City pool and the Herington-Pratt pool. The Panel adopted the data shown in the Carrier’s records. BLE-SSW’s petition does not challenge the Panel’s conclusion relating to the number of pool turns.

arbitral award unless 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 the arbitrators by those conditions.” Delaware and Hudson Railway-Lease and Trackage Rights Exemption-Springfield Terminal Railway, ICC Finance Docket No. 30965 (Sub-No. 1) (ICC served Oct. 4, 1990), at 16-17, remanded on other grounds sub nom. Railway Labor Executives’ Ass’n v. United States, 987 F.2d 806 (D.C. Cir 1993). Typically, the Board defers to the arbitrators’ determination on seniority matters. See Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company — Merger, Etc., Finance Docket No. 21510 (Sub-No. 5) (STB served Dec. 22, 1998), at 6.

### Prior Rights for Engineers in Training

The Carrier and BLE-UPED argue that the prior rights cutoff date for engineers in training is July 16, 1998, the date on which the Agreement was signed. BLE-SSW argues that the cutoff date is May 1, 1999, the date of actual implementation announced by the Carrier.<sup>10</sup> In its award, as noted, the Panel agreed with the Carrier and BLE-UPED.

As the Panel noted, the rights of engineers in training were addressed in a July 16, 1998 side agreement, Side Letter No. 18, which provides in pertinent part as follows:<sup>11</sup>

As discussed, there are currently a group of engineers in training for Dalhart/Pratt. Under the SSW Agreement and seniority provisions, some of these trainees bid the training vacancies from Herington with the hope that they could hold seniority in the Salina Hub after implementation of the merger. It was agreed that these trainees would stand to be canvassed for establishment of seniority in the Salina Hub if the roster sizing numbers are such that there are roster slots for them. If not, there is no requirement that they be added to the Salina Hub roster.

BLE-SSW has not shown that the Panel committed egregious error in finding that the effective date of the Agreement for the purpose of determining eligibility for prior rights was the July 16, 1998 signature date of both the Agreement and Side Letter No. 18. The Panel reasonably concluded that the implementing agreement itself does not specifically address the

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<sup>10</sup> By letter dated March 29, 1999, reproduced in BLE-SSW’s Exhibit 8 of Appendix D of its petition for review, the Carrier served notice on the General Chairmen of “its intent to implement this Agreement on May 1, 1999.”

<sup>11</sup> Side Letter No. 18 is reproduced on p. 46 of Appendix D of BLE-SSW’s petition for review.

status of those persons who were in training to become engineers.<sup>12</sup> The Panel then looked to Side Letter No. 18 and concluded that it requires adoption of the signature date, rather than an uncertain implementation date, as the effective date. Side Letter No. 18 indicates that the parties were referring to a known group of employees who were in training at the time, not employees who would enter training in the future. Although Side Letter No. 18 does not refer to a specific date, the Panel reasonably concluded that, by referring to engineers “currently” in training, the parties only intended to include as “prior righted” those engineers in training on July 16, 1998.

The Panel also cited examples of other hub agreements where the parties intended to adopt cut-off dates that were, unlike the May 1, 1999 date espoused by BLE-SSW, known at the time of signing. While, as noted by BLE-SSW, these other hub agreements do not directly apply to Case No. 1, the Panel was not unreasonable in presuming that the parties’ intention would have been consistent with the practice in these other hub agreements in this respect.<sup>13</sup> Under BLE-SSW’s interpretation of the agreement, employees would have been faced with having to vote on an implementation agreement without knowing exactly how they would be affected by the agreement.

BLE-SSW also argues (Petition, at 14-15) that the Panel failed to consider the reference to the “date of implementation” in Article II.F. of the Agreement, which provides in pertinent part as follows:

F. Any engineer working in the territories described in Article I. on the date of implementation of this Agreement, but currently reduced from the engineers working list, shall also be given a place on the roster and prior rights . . . .

The Panel did not commit egregious error in finding that the prior rights for engineers in training were governed by the specific language of Side Letter No. 18. BLE-SSW’s argument about Article II.F are incorrect. The first sentence of Article II.F. refers to engineers, working on the date of implementation, not to employees in training to become an engineer. The latter are specifically covered by Side Letter No. 18. Further, if the parties had intended that the first

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<sup>12</sup> In fact, the Agreement (Article II.F) does give “engineers in training on the effective date of this Agreement” the right to “participate in the formulation of the [new Salina Hub Merger] roster.” Article X is entitled “Effective Date” and states: “This Agreement implements the merger of the Union Pacific and the SSW railroad operations in the area covered by Notice date June 4, 1998. Signed at Omaha, Nebraska, this 16th day of July, 1998.” Thus, the Agreement itself, even without Side Letter 18, appears to support the panel’s determination that July 16, 1998 is the effective date for determining the rights of trainees.

<sup>13</sup> Moreover, the Panel did not rely solely on this extrinsic evidence, but merely found that this evidence supported the interpretation of the Agreement that the panel had inferred from the language of Side Letter 18.

sentence of Article II.F. settle the issue of workers in training, there would have been no need for Side Letter No. 18. Similarly, if the parties had intended that the effective date of the Agreement (for purposes of determining prior rights) was to be the implementation date, the first sentence of Article II.F., which expressly grants prior rights to engineers that were reduced from the working force on the signature date but working on the implementation date, would have been unnecessary.<sup>14</sup>

#### Issues Addressed by the Panel

As noted above, the Panel condensed the five questions submitted by BLE-SSW in Case No. 1 to two questions.<sup>15</sup> Arguing that the Panel was obliged to answer all five questions that it posed (Petition, at 10), BLE-SSW criticizes the Panel for allegedly answering only questions 2 and 5.

We find no error in the Panel's asserted failure to address BLE-SSW Question 1 specifically. The issue before the Panel was not to identify the implementation date. Rather, it

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<sup>14</sup> The fact that Article II.F. refers to "the implementation date" when discussing "engineers working in the territories," but the "effective date" when discussing "engineers in training" further supports the Panel's determination.

<sup>15</sup> The five questions that BLE-SSW posed to the Panel are as follows:

1. What is the correct implementation date for the Expanded Salina Hub?
2. In the Expanded Salina Hub Agreement, are all engineers who were in training on the date of implementation (May 1, 1999) entitled to prior rights in the Salina Hub, Zone 1 and/or Zone 2 as per the agreement?
3. What is the correct date for Zone 1 engineers being placed at the bottom of prior right Zone 2 engineers and the correct date for Zone 2 engineers being placed at the bottom of prior right Zone 1 engineers?
4. What is the correct number of prior right pool turns for the former SSW Engineers in the Herington to Kansas City freight pool as per the provision of Article 1.B.2. and Attachment "B" of the Expanded Salina Hub Agreement?
5. What is the correct number or prior right pool turns for the former SSW Engineers in the Herington to Pratt pool as per the provisions of Article 1.B.3. and Attachment "B" of the expanded Salina Hub Agreement?

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See BLE-SSW's submission to the Panel, reproduced in Appendix D of its petition.

was to identify the proper cut-off date for granting prior rights to engineers in training – the signature date or the implementation date (whenever that latter date may have been). The Panel addressed this issue in the first of its rephrased questions, which, as BLE-SSW concedes, provides the answer to its Question 2. After the Panel found that the signature date governed, a further finding as to the implementation date would have been irrelevant to the issue before it.

Nor has BLE-SSW demonstrated that the Panel erred in its omission of a separate answer for BLE-SSW Question 3. The Panel in effect held that the date sought in BLE-SSW Question 3 was provided in the Panel's answer to its rephrased Question 1, where the Panel held that the signature date of July 16, 1998, was the cutoff date for determining prior rights. While the Panel's answer to its rephrased Question 1 did not refer specifically to the two zones ("Zone 1" and "Zone 2") mentioned in BLE-SSW Question 3, BLE-SSW has not explained why it needed a more specific answer to Question 3.

Finally, we do not find error in the Award's omission of a separate answer for BLE-SSW Questions 4 and 5. BLE-SSW's petition does not even attempt to explain why the Award's answer to its second rephrased question does not adequately address these questions. Indeed, the petition does not address the issue of pool turns at all.

For the foregoing reasons, we decline to review BLE-SSW's petition.

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

It is ordered:

1. The petition for review of the Award will not be heard.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams  
Secretary