

SERVICE DATE - SEPTEMBER 3, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32435 (Sub-No. 1)

THE BAY LINE RAILROAD, L.L.C.--ACQUISITION AND
OPERATION EXEMPTION--RAIL LINES OF ATLANTA & ST. ANDREWS
BAY RAILROAD COMPANY

(ARBITRATION REVIEW)

Decided: August 25, 1997

This proceeding involves an appeal by Atlanta & St. Andrews Bay Railroad (ASAB) of an arbitration board's decision finding that 12 former railroad maintenance of way employees are entitled to lump sum separation allowances under the labor protective conditions the Interstate Commerce Commission (ICC) imposed in *The Bay Line Railroad, L.L.C.--Acquisition and Operation Exemption--Rail Lines of Atlanta & St. Andrews Bay Railroad Company*, ICC Finance Docket No. 32435 (ICC served Mar. 31, 1995) (*ICC Decision*). We will decline to accept the appeal for review.

BACKGROUND

On December 27, 1993, The Bay Line Railroad, L.L.C. (Bay Line) filed a notice of exemption under 49 CFR Subpart 1150 - Exempt Transactions Under 49 U.S.C. 10901 in order to acquire from ASAB approximately 88 miles of main line trackage between Panama City, FL, and Dothan, AL, together with substantially all of ASAB's other railroad operating assets. The acquisition was consummated on January 1, 1994,¹ at which time Bay Line became a carrier.

In anticipation of the transaction, in December 1993, ASAB negotiated a severance package with four unions representing its employees.² As a result of the negotiations, on December 29, 1993, three unions signed an agreement accepting the severance package. The Brotherhood of Maintenance of Way Employees (BMWE) did not accept the package, the terms of which were as follows:

- (1) a lump sum separation allowance for ASAB employees denied employment with Bay Line or its contractor, consisting of either the employee's hourly rate multiplied by 2,080, or the employee's last 12 months' earnings, neither to exceed \$40,000;
- (2) an employment allowance for those accepting employment with Bay Line or its contractor, consisting of a lump sum equal to the employee's hourly rate multiplied by 1,040, not to exceed \$20,000; or
- (3) an involuntary termination allowance for employees who accepted employment with Bay Line or its contractor but who are terminated within 24 months of starting, consisting of a lump sum of \$20,000 reduced by one-twenty fourth of \$20,000 (\$833.33) for each month of employment prior to termination.

ASAB informed its BMWE member employees that maintenance-of-way employment would be offered through an independent contractor, Barnes Railroad Services (Barnes). Benefits for employees applying for positions with Bay Line also would be made available to employees

¹ The parties previously have been advised that, as the notice did not become effective until January 3, 1994, they consummated the transaction 2 days before they should have.

² For a detailed discussion of negotiations, see *ICC Decision, supra*, at pp. 6-10.

applying for jobs with Barnes. On December 28, 1993, all of ASAB's BMW member employees (17 persons) filed applications with Barnes. On December 30-31, 1993, Barnes offered employment to 13 applicants, only 1 of whom accepted the offer. The remaining 4 applicants were not offered jobs.

Shortly after consummation of the transaction, on January 14, 1994, BMW petitioned the ICC to revoke the exemption. The union's primary basis for seeking revocation was that the transaction was one covered by (former) 49 U.S.C. 11343 (now superseded by 49 U.S.C. 11323) and thus was not subject to the class exemption applicable to acquisitions and operations otherwise controlled by (former) 49 U.S.C. 10901 (now superseded by a revised 49 U.S.C. 10901).³ As interpreted in longstanding precedent, section 10901 applied to the acquisition of active rail lines by noncarriers, while section 11343 governed acquisitions of active rail lines by carriers. The provisions of section 11343, *et seq.*, required the imposition of labor protective conditions on grants of acquisition authority. The imposition of labor protective conditions was discretionary under section 10901. The ICC did not ordinarily impose labor protection under the latter section. A finding that section 11343 applied to the transaction would have resulted in the imposition of labor protective conditions established in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), had ASAB and Bay Line subsequently sought and been granted approval or an exemption under section 11343.

In *ICC Decision*, the ICC disagreed with BMW and determined that the subject transaction was within the purview of section 10901 rather than section 11343. The ICC, however, went on to find that the transaction at issue was characterized by exceptional circumstances that justified the discretionary imposition of labor protective conditions.⁴ The ICC therefore imposed, as protective conditions, the benefits package described above. The effect of the decision was to extend to BMW member employees the same benefits that, by agreement, ASAB had extended to employees who were members of three other unions.

Thereafter, ASAB paid separation allowances to the four BMW member employees who had been denied employment with Barnes at the beginning of 1994. ASAB also paid an employment allowance to the one BMW member employee who had accepted a position with Barnes. However, the 12 persons who are claimants here did not receive any benefits. Their post *ICC Decision* dealings with Barnes and ASAB were as follows.

In April 1995, the 12 BMW members who had declined Barnes' December 1993 offer of employment wrote letters to Barnes reapplying for jobs. Barnes did not respond to the letters. Then, on May 5, 1995, each of the 12 members submitted a claim to ASAB for benefits under section 1 of the conditions imposed in *ICC Decision*. On September 8, 1995, ASAB denied the claims on the grounds that the employees had refused offers of employment at the beginning of 1994.

Thereafter, on November 8, 1995, ASAB and BMW signed an agreement to submit this matter to a three-member arbitration board. On November 5, 1996, the neutral member, Fred Blackwell (herein, "the Arbitrator"), with the BMW member concurring and the ASAB member dissenting, issued a Decision and Award granting the 12 claimants lump sum separation allowances under section 1 of the labor protective conditions. In the decision, the Arbitrator found that claimants' failure to accept the jobs offered them on December 30-31, 1993, did not disqualify them from benefits under the conditions because the benefits did not become effective until March 31, 1995, when the ICC issued its decision. The Arbitrator found that it would not be rational to conclude that the ICC, with full knowledge of the employment offer, intended to award severance benefits that would be barred. The Arbitrator also found that claimants' employment requests of April 1995, coupled with the September 1995 notice from ASAB that their claims had been denied,

³ Subsequent references to the statutory sections will be to the former sections, unless otherwise specified.

⁴ For a discussion of this test, its basis, and application, see *New England Central Railroad, Inc.--Acquisition and Operation Exemption--Lines Between East Alburgh, VT, and New London, CT*, Finance Docket No. 32432 (ICC served Dec. 30, 1994, at pp. 26-30) (*New England Central*).

was an exchange of correspondence that constituted denial of employment within the meaning of the protective conditions.

On November 25, 1996, ASAB filed this petition for review of the Arbitrator's decision. BMWÉ replied on December 16, 1996.⁵

DISCUSSION AND CONCLUSIONS

At the outset, the parties dispute whether the award is reviewable under the deferential *Lace Curtain* standard of review. We find that issue dispositive here.⁶

ASAB contends that the case is one of first impression involving significant issues of general importance. The railroad asserts that this is only the second case (*New England Central* being the first) in which discretionary labor protection has been imposed on a line sale transaction under section 10901. And, petitioner adds, unlike the situation in the first case, here the sale had been consummated well before the decision imposing conditions was issued.

BMWÉ replies that there are no recurring issues or issues of general importance here, and that ASAB's arguments, in fact, underscore the uniqueness of this proceeding. The union notes that, whereas, under former section 10901(c), the agency had discretion to approve the transaction with labor protective conditions, under revised section 10901(c) the Board is now precluded from imposing such conditions. Thus, the union argues, there is no compelling need for elaboration of the law of discretionary labor protective conditions now that the Board is forbidden to impose them.

The standard of review for arbitration decisions is set forth in *Chicago & North Western Tptn. Co.--Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*), *aff'd sub nom. International Broth. of Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988). Under the *Lace Curtain* standard, (1) we do not review "issues of causation, the calculation of benefits, or the resolution of other factual questions," and (2) our review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." *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.* (ICC served Oct. 4, 1990) slip op. at 16-17, *remanded on other grounds in Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C. Cir. 1993), the *Lace Curtain* standard was further explained 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.]

In view of the governing standards, we will decline to accept this case for review. We find merit in BMWÉ's argument that this proceeding does not involve recurring or otherwise significant issues of general importance.

First, the labor protective conditions at issue here are unique. There is nothing to suggest

⁵ BMWÉ believes the petition may have been filed late. However, as required by our rules at 49 CFR 1115.8, the petition was filed with the Board within 20 days of the Arbitrator's November 5, 1996 issuance of his decision.

⁶ Other issues addressed by the parties are: (1) whether the Arbitrator erroneously based his decision on an interpretation of the decision in *Delaware and Hudson Ry. Co.--Lease and Trackage Rights Exemption--Springfield Terminal Ry. Co.*, 4 I.C.C.2d 322 (1988); (2) whether there has been a relevant "denial of employment" here; and (3) whether the Arbitrator's findings ignore the realities of the transaction and would undo its economic benefits. However, because we are disposing of this matter on the basis of *Lace Curtain*, we need not and will not discuss these other issues further.

that the same or similar conditions would come before this agency again. Second, under revised section 10901(c), the agency no longer has discretionary authority to impose labor protective conditions when it approves noncarrier acquisitions of active rail lines. In *ICC Decision*, the ICC considered the record under former section 10901 and found that there were “exceptional circumstances” warranting imposition of labor protective conditions. Given the change in the statute, the situation is not likely to recur. In addition, the decision does not have a broad impact; nor is it likely to have any continuing significance. Accordingly, we conclude that ASAB’s appeal does not meet the requirements for review under the narrow scope of review we apply to decisions of arbitrators under our labor conditions, and we decline to review the arbitration decision.

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

It is ordered:

1. ASAB’s request that its appeal of the arbitral decision be heard is denied, and this proceeding is discontinued.
2. This decision is effective on October 3, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary