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SERVICE DATE - JULY 22, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42076

ALBANY & EASTERN RAILROAD COMPANY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY

Decided: July 17, 2003

BACKGROUND

The Albany & Eastern Railroad Company (AERC) has filed a complaint against The Burlington Northern and Santa Fe Railway Company (BNSF) under the Board's procedures in 49 CFR Part 1108,¹ seeking arbitration of a dispute under the Railroad Industry Agreement (RIA).² AERC's complaint seeks waiver of a paper barrier that is allegedly contained in an agreement by which AERC purchased 17.4 miles of BNSF's line between Lebanon and Foster, OR.³ AERC claims that the paper barrier precludes it from interchanging traffic that originates on AERC's line with the Union

¹ The procedures were adopted in Arbitration of Disputes Subject to Stat. Juris. of the STB, 2 S.T.B. 564 (1997) (Ex Parte No. 560).

² The RIA is an agreement between the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) that is intended to provide a framework for improving the ability of smaller (Class II and Class III) railroads and Class I railroads to work together to serve the public in the most efficient manner possible. AERC's complaint invokes the provision of the RIA that prescribes the procedures in 49 CFR Part 1108 for resolving disputes over so-called "paper barriers." In general, a paper barrier is a contractual restriction on interchange that is imposed on short-line carriers at the time of their creation. See Assn. of American Railroads et al.—Agreement—49 U.S.C. 10706, 3 S.T.B. 910, 911 (1998) (Agreement). AERC has attached a copy of the RIA to its complaint.

³ Albany & Eastern Railroad Company—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33567 (STB served May 21, 1998) (AERC Acquisition).

Pacific Railroad Company (UP) at Albany, OR, and that terminates at points served only by UP. BNSF has agreed to arbitration under the Board's procedures.

On February 13, 2003, the Board, by the Director of the Office of Proceedings, issued a notice providing that AERC and BNSF may proceed to arbitration. Prior to the issuance of the notice, John D. Fitzgerald, United Transportation Union-General Committee of Adjustment (Mr. Fitzgerald or UTU/GO-386), sought to intervene in the determination of whether arbitration should proceed. However, the notice rejected UTU/GO-386's intervention as being inappropriate. The notice explained that, in Ex Parte No. 560, 2 S.T.B. at 574, the Board had determined that the only disputes that could be brought for arbitration under 49 CFR 1108 were those that the individual parties to the dispute could otherwise settle privately without Board involvement, and that it would contravene the voluntary and informal nature of the arbitration process to permit outside parties to intervene in the resolution of the dispute. The notice also pointed out that in Ex Parte No. 560 the Board had specifically rejected a request that provision be made for intervention by uninvited third parties in individual arbitrations⁴ and that UTU/GO-386's argument thus constituted a collateral attack on that rule.

UTU/GO-386 appealed the notice, and AERC filed a reply.⁵ The appeal will be denied.

DISCUSSION AND CONCLUSIONS

In its appeal, UTU/GO-386 initially questions the authority of the Director of the Office of Proceedings to issue the notice, pointing out that there is no provision in the Board's rules that specifically delegates authority to the Director to do so. UTU/GO-386 again contends that it should be permitted to intervene so that its views would be considered when the Board determines whether the complaint should be referred to the arbitrator under 49 CFR 1108.7(g). It argues that it is in the public interest for the Board to have the views of as many interests as possible, when referring a dispute to arbitration. The union further claims that it is not seeking to have labor protection imposed; rather, it wants to represent the interests of BNSF employees who allegedly would be adversely affected if AERC diverts traffic from BNSF to UP.

⁴ See Ex Parte No. 560 at 574.

⁵ AERC has petitioned for leave to late-file its reply. AERC's counsel indicates that counsel for UTU/GO-386 does not object to the late filing. AERC's petition will be granted and AERC's reply will be accepted.

These assertions lack merit. AERC's complaint did not institute a formal Board proceeding in which UTU/GO-386 could intervene.⁶ The notice issued by the Director on the Board's behalf did not "determine" or "approve" whether arbitration would proceed and was not an action in a formal Board proceeding. Rather, because both parties had agreed to arbitration, the notice was a mere ministerial act facilitating the initiation of the arbitration process. To the extent there is a question about the Director's authority to take this ministerial action, the Board in this decision confirms the action taken. Furthermore, the Board's procedures do not provide for public participation when an arbitration proceeding is initiated or for intervention by an uninvited third party at any time. Thus, the Board finds no basis for UTU/GO-386's criticisms of the notice.

UTU/GO-386 also claims that AERC has not established the Board's jurisdiction over the dispute in its complaint seeking arbitration and that the Board should therefore dismiss the complaint. As AERC responds, however, 49 CFR 1108.3(b) provides that arbitration may include disputes arising in connection with jurisdictional transportation, including service being conducted pursuant to an exemption. Clearly, the transportation at issue here is jurisdictional, and the dispute involving interchange rights for new traffic is sufficiently connected to that transportation.

UTU/GO-386 expresses concern that the arbitral process here will be guided by the terms of the RIA rather than what it describes as the statutory criteria related to the transportation. But arbitration clearly will sometimes produce resolutions that are not identical to those that would have been reached in a Board adjudication, and yet arbitration is a well accepted means of dispute resolution. Proceeding under the RIA is appropriate as long as the application of its terms does not yield a result that is contrary to the Board's statute or rules.⁷ The Board has no basis on this record for finding that such a result could be reached here.

Moreover, the Board notes that the RIA grew out of the Board's proceeding in STB Ex Parte No. 575 and the resulting decision in Review of Rail Access and Competition Issues, 3 S.T.B. 92 (1998). In that proceeding, the Board heard concerns by short-line carriers and shippers about paper barriers and other obstacles that prevented those carriers from obtaining or fully using connections with competing carriers and noted that smaller railroads and larger railroads had been discussing those very concerns. Emphasizing that private sector solutions generally were preferable, the Board urged the parties to address and resolve those issues privately and to report back to the Board on their progress.

⁶ See Ex Parte No. 560, 2 S.T.B. at 567 ("a complaint filed under part 1108 will initiate an arbitration process, rather than a formal Board proceeding. . . .")

⁷ Because the traffic is new and the underlying transaction cannot be made subject to labor protective conditions, the Board fails to see how rail labor could suffer cognizable statutory harm by the removal of the paper barrier.

Id. at 100. These discussions resulted in the RIA, which provides, as previously noted, for the use of the Board's arbitration process to resolve certain disputes over paper barriers—disputes that could have been brought to the Board—that the parties could not first settle by negotiation.⁸ Thus, the Board finds that there is a sufficient nexus between the RIA and the Board's regulatory functions to allow use of the Board's arbitration process to resolve the paper barrier dispute presented here.

Intervention by third parties would contravene the central objective of the Board in adopting the arbitration rules, i.e., the prompt resolution of disputes between two parties. Similarly, requiring AERC to petition for reopening of AERC Acquisition would be inconsistent with the purpose of the arbitration rules. See Ex Parte No. 560, 2 S.T.B. at 565. In any event, UTU/GO-386 may file a complaint with the Board to address any perceived violation of the statute or the Board's rules. For these and the other reasons discussed above, UTU/GO-386's request to dismiss the complaint for arbitration will be denied.

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

It is ordered:

1. AERC's request to accept its late-filed reply is granted.
2. UTU/GO-386's appeal is denied.
3. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

⁸ The Board was asked by the AAR and the ASLRRRA to approve only the rate-related provisions of the RIA. But the Board in doing so declined Mr. Fitzgerald's request to disapprove certain non-rate related aspects of the agreement, including the use of arbitration. Agreement, 3 S.T.B. at 912.