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SERVICE DATE - DECEMBER 4, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33311

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

PETITION FOR EMERGENCY CEASE AND DESIST ORDER

Decided: November 19, 1997

We are denying the petition of the United Transportation Union (UTU) for an emergency cease and desist order because the issue raised therein must first be considered in arbitration under the labor protection conditions of New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 IO.C.C. 60 (1979) (New York Dock).

BACKGROUND

In a decision served May 1, 1997, we approved an application by Kansas City Southern Industries, Inc. (KCSI), KCS Transportation Company (KCSTC), The Kansas City Southern Railway Company (KCSR), Gateway Western Railway Company (GWWR), and Gateway Eastern Railway Company (GWER) for authority under 49 U.S.C. 11323-25 for KCSI to acquire control of GWWR and GWER (jointly, Gateway). Approval of the transaction was made subject to the employee protection conditions described in New York Dock.

On September 23, 1997, UTU filed a petition seeking an emergency cease and desist order to prevent the parties from implementing the transaction. UTU claims that KCSR transferred certain work to GWWR that had been performed by employees represented by UTU within the Kansas City, MO terminal, without providing notice or negotiating an implementing agreement as required by New York Dock.

In support of its petition, UTU submitted a verified statement from Robert G. Martin, general chairperson of UTU's General Committee of Adjustment, which represents conductors, brakemen and yardmen employed by KCSR. Mr. Martin indicates that UTU and KCSR are parties to a collective bargaining agreement that requires that all yard work at KCSR's Kansas City facilities be performed by yardmen represented by UTU. According to Mr. Martin, until August 1997, KCSR employees were assigned to do yard work associated with the GST Steel (GST) plant and the Armourdale Yard in Kansas City. A yard foreman, a yard helper, and a relief crew were assigned to these locations. Mr. Martin indicates that in August 1997 this work was transferred

from KCSR to GWWR and that GWWR employees are doing the work formerly performed by KCSR employees.

Mr. Martin states that, after learning of the transfer of work to GWWR, he protested to Hugh I. Salmons, KCSR Vice President-Employee Relations. Mr. Martin contended that Article 1, Section 4 of the New York Dock protective conditions had to be satisfied before any transaction affecting KCSR yardmen was effectuated. He requested that the KCSR rescind the transfer of work to GWWR and return matters to the status quo.

Mr. Salmons advised Mr. Martin that GWWR began performing switching within the Armourdale Yard and serving adjacent industries, including GST, under a lease agreement dated April 30, 1997, and by a supplemental agreement.¹ Mr. Salmons stated further that the lease arrangement was unrelated to and was unaffected by the control transaction in STB Finance Docket No. 33311 and, thus, was not subject to the New York Dock conditions.

UTU contends that the transfer of work to GWWR was implemented after the decision approving the transaction in this case was issued and thus should be included in the control proceeding. As UTU notes, Article 1, Section 4 of New York Dock forbids any change in operations until after an agreement is reached or rendered by arbitration. UTU alleges that KCSR has failed to comply with this requirement because the railroad prematurely implemented these coordinations with GWWR. The UTU requests that a cease and desist order be issued requiring KCSR and GWWR to return to the status quo and to refrain from further coordinations until an implementing agreement is in place.

KCSR replies that the lease agreement with GWWR to perform switching service in Armourdale Yard and adjacent industries, including GST, is not related to the control transaction. KCSR Senior Assistant Vice President Tom Nelson asserts that KCSR and GWWR began discussing a lease arrangement for the Armourdale Yard in 1994, shortly after GWWR entered into a lease with Kansas City Terminal Railway Company (KCT), to operate KCT's switching yard and various industrial tracks and to provide switching service to KCT customers in Kansas City.² According to Mr. Nelson, an agreement was reached with GWWR on April 30, 1996, and was in place when the application was filed in the control transaction. He indicates that GWWR

¹ In conflict, the verified statement of Tom J. Nelson, a KCSR Senior Assistant Vice President, which is noted below, indicates that the lease agreement was dated April 30, 1996, and supplemented on July 25, 1997. A copy of the lease agreement was not submitted into the record.

² GWWR's lease of KCT tracks was authorized in The Atchison, Topeka And Santa Fe Railway Company and Gateway Western Railway Company—Lease Exemption—Kansas City Terminal Railway Company, Finance Docket No. 32238 (ICC served Feb. 24, 1994) (GWWR-KCT).

commenced operations under the lease in August 1997, and now switches cars for KCSR, using GWWR yard crews and switch engines. Employees who performed this work have apparently been reassigned to other tasks. Mr. Nelson states further that the negotiations for the lease agreement were conducted separately and would have continued even if KCSR and GWWR had not come under common control.

KCSR further states that the lease with GWWR was noted in the control application and in the operating plan submitted with the application as being outside the scope of the control transaction. In addition, KCSR notes that our May 1 decision referred to the lease arrangement as a separate transaction. The application also indicated that the parties expected to implement the lease arrangement whether or not the sought control authority would be granted.³

DISCUSSION AND CONCLUSIONS

We will not issue the cease and desist order sought by UTU because, in our view, UTU is seeking a determination of whether the employees it represents were adversely affected by the control transaction, which would require negotiation of an implementing agreement before the transfer of work from KCSR to GWWR employees, as opposed to the lease transaction which would not, and thus were entitled to benefits under New York Dock. This is a matter that must be resolved in the first instance by arbitration..

Article I, section 11 of New York Dock provides is pertinent part:

11. Arbitration of disputes.—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

In Walsh v. ICC, 723 F.2d 570 (7th Cir. 1983), the court upheld the agency's refusal to hear a dispute prior to arbitration, holding that arbitration was mandatory despite use of the phrase "may be referred" in the above quoted portion of Article I, section 11. The issue raised in UTU's petition concerns whether the employees who were affected by the lease transaction are entitled to labor protection under the control transaction. This involves the application of New York Dock

³ See Exhibit 15 to Application in STB Finance Docket No. 33311, pages 104-105 and 109.

provisions and thus must be submitted for arbitration. See Fox Valley & Western Ltd.—Exemption Acquisition and Operation—Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation and The Ahnapee & Western Railway Company, Finance Docket No. 32035 (ICC served Nov. 16, 1993). Deferral of such matters to the arbitration process provided by our labor conditions has been consistently approved by the courts. See Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1578 (DC Cir. 1987); United Transp. Union v. ICC, 905 F.2d 463, 470 (DC Cir. 1990); and American Train Dispatchers Ass’n v. ICC, 949 F.2d 413, 414 (DC Cir. 1991).

We will address the issue raised by UTU only if we accept an appeal from a decision of an arbitrator. See 49 CFR 1115.8.

Employees and their representatives have 20 days from the date of service of this decision to take the issue raised by UTU to arbitration.

For this reason, UTU’s petition is dismissed without prejudice.

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

It is ordered:

1. UTU’s petition for an emergency cease and desist order is dismissed without prejudice.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary