

SERVICE DATE - JULY 15, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 28905 (Sub-No. 27)

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.
AND
SEABOARD COAST LINE INDUSTRIES, INC., *ET AL.*
(Arbitration Review)

Decided: July 1, 1997

We deny the petition of the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) (jointly, the Unions) for a supplemental order concerning the ICC's decision served December 7, 1995.

BACKGROUND

CSXT Transportation, Inc. (CSXT) was created through various transactions that were approved by the ICC subject to the standard *New York Dock* labor protection conditions.² Under *New York Dock*, labor changes related to approved transactions are effected through implementing agreements negotiated before the changes occur. If the parties cannot agree, the issues are resolved by arbitration, with possible appeal to the Board under its deferential *Lace Curtain* standard of review.³ The Board (or arbitrators acting under *New York Dock*) may, with limited exceptions not

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326 and 11327. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

² The ICC adopted these conditions in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), to implement its mandate to provide such protection under former 49 U.S.C. 11347, which has been recodified as 49 U.S.C. 11326.

³ 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), popularly known as the "*Lace Curtain*" case. 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," which is to say, error that may have far reaching consequences for a substantial number of employees subject to the conditions or that may interfere with our ability to oversee implementation of the 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) 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 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.]

(continued...)

relevant here, override provisions of collective bargaining agreements (CBAs) that prevent realization of the public benefits of approved transactions.⁴ Affected employees receive comprehensive displacement and dismissal benefits for up to 6 years.

This proceeding arose because of CSXT's efforts to make operational changes related to a series of ICC-approved transactions that helped to create the carrier as it is today. Briefly, CSXT proposed to coordinate train operations and make related labor changes over a portion of its system by creating a new operating district, the "Eastern B&O Consolidated District" (Eastern District), and merging seniority rosters in that new district. All engineers and trainmen working in the new Eastern District were to be placed under CSXT's CBAs with UTU and BLE covering the former Baltimore & Ohio Railroad Company lines. There was to be a net loss of five positions. On January 10, 1994, CSXT served a notice on UTU and BLE of its intention to implement the labor changes under *New York Dock*.

The Unions refused to participate in the negotiation of an implementing agreement. The Unions argued, *inter alia*, that the labor changes may not be compelled under *New York Dock* because they would violate existing CBAs.⁵ Unable to negotiate, CSXT invoked arbitration under *New York Dock*. The parties selected Robert M. O'Brien as the arbitrator. Arbitrator O'Brien issued his award on April 24, 1995.

The arbitrator ruled that he had jurisdiction to arbitrate an implementing award under *New York Dock*. The arbitrator held that CSXT could implement the labor changes, unless the ICC were to find that they would unlawfully override "rights, privileges, or benefits" of CBAs that must be preserved under Article I, section 2 of *New York Dock*. The arbitrator reserved that issue for the ICC itself to decide in light of the District of Columbia Circuit Court of Appeals' remand of this issue in *RLEA*, *supra* n.4. Both sides appealed the arbitrator's award.

In its December 7, 1995 decision, the ICC affirmed the arbitrator's authority to implement labor changes related to the consolidation. The ICC rejected the Unions' argument that the changes could not be implemented under *New York Dock* because they involved CBA "rights, privileges, or benefits" that must be preserved under that decision. The ICC reaffirmed its authority to modify CBA terms when such changes are necessary to permit the carrier to realize the public benefits of an approved transaction. The ICC upheld the arbitrator's finding that public benefits would arise out of the positive effect of the workforce consolidation on operational efficiency. Subsequently, the ICC's decision was affirmed in *United Transportation Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997).

By petition filed October 17, 1996, the Unions request that we enter a "supplemental order" under current 49 U.S.C. 11327 requiring CSXT to submit quarterly reports as to: (1) the public transportation benefits "assertedly realized" by the transaction; and (2) the manner in which those

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The ICC reviewed issues of law and policy, including issues involving interpretation of the statute or its labor conditions, under the more expansive standard of review appropriate for a regulatory agency charged with administration of a regulatory statute and its conditions thereunder. *See Wallace v. CAB*, 755 F.2d 861, 864-65 (11th Cir. 1985); *Pan American World Airways Inc. v. CAB*, 683 F.2d 554, 562 (D.C. Cir. 1982).

⁴ Where modification is necessary, we may act under either former sections 11347 or 11341(a), where these former provisions apply, or under the successors to these provisions. *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C. Cir. 1993) (*RLEA*); *Norfolk & Western v. American Train Dispatchers*, 499 U.S. 117 (1991); and *American Train Dispatchers Association v. I.C.C.*, 26 F.3d 1157 (D.C. Cir. 1994) (*ATDA*).

⁵ The Unions also argued that (1) CSXT improperly based the changes on a succession of Commission decisions rather than on a specified individual decision and (2) the changes cannot be based on any of the transactions approved in the succession of decisions because those decisions are too old. These issues are not involved in this decision.

benefits have been used.⁶ On November 6, 1996, CSXT replied in opposition to the Unions' petition for a supplemental order.

On December 31, 1996, the Unions filed a motion to file a reply to CSXT's reply and tendered a separately filed reply. CSXT filed a reply in opposition to the Unions' motion on January 8, 1997.⁷

DISCUSSION AND CONCLUSIONS

The Unions' petition for a supplemental order is more properly construed as a petition to reopen this administratively final matter. We may reopen and revise such decisions based on material error, changed circumstances or new evidence. The Unions urge us to begin a separate proceeding to reexamine the issue of whether the public benefits of the transaction are actually being realized; they argue that the benefits found by the arbitrator were "presumed" and based on unsupported assumptions. In essence, they are arguing that the ICC committed material error by adopting the arbitrator's finding that there would be public benefits from the proposed consolidation of seniority districts.

We disagree. As noted by the ICC in its December 7, 1995 decision at 12-13, and affirmed by the court (slip op. at 11-12), the efficiency benefits of the consolidation were supported and quantified in the record before the arbitrator. Thus, the efficiency benefits were neither presumed nor based on unsupported assumptions. The Unions have failed to justify reopening of this administratively final and judicially affirmed matter.

The Unions also argue that we must reconsider the issue of whether the efficiency benefits of the transaction (assuming *arguendo* that they exist) will likely be passed through to the public. But the ICC's final decision thoroughly explained why the efficiency gains would benefit the general public as well as the railroad (slip op. at 13):

Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that cost decreases are reflected in rate decreases. Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.

The Unions have not attempted, however, to explain why they believe the ICC's decision was erroneous as regards efficiency gains. Once again the question of efficiency gains was expressly addressed by the court reviewing the ICC's decision and the ICC's conclusions were affirmed. Thus, their petition must be denied.

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

⁶ On April 12, 1996, the Unions filed an earlier petition for a "supplemental order" asking us to remedy alleged defects in CSXT's implementation of the labor changes in the new Eastern District. On October 23, 1996, the Unions filed a notice of withdrawal of that petition.

⁷ We will not consider the Unions' reply to CSXT's reply. Under 49 CFR 1104.13(c), replies to replies are prohibited. This prohibition may be waived upon a showing of good cause, but the Unions have not shown good cause here because they have not explained why the additional argument could not have been submitted in their original petition. Moreover, the Unions' reply merely offers further argument in support of its petition that we impose a reporting requirement on CSXT.

It is ordered:

1. The Unions' petition for a supplemental order is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary