34500 SERVICE DATE - APRIL 21, 2004
EB

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 42)

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: April 19, 2004

John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP) who is not represented by a labor organization, has filed a petition asking the Board to establish the procedures to be used in an arbitration proceeding to consider claims against UP for benefits under the New York Dock conditions.[1] The petition will be denied.

BACKGROUND

In approving the acquisition and control of the Southern Pacific Rail Corporation (SP) and its rail carrier subsidiaries by the Union Pacific Corporation and its rail carrier subsidiaries, the Board imposed the New York Dock conditions for the protection of affected employees.[2] Petitioner, who was employed at SP's yard at Tucson, AZ, claims that he is entitled to a displacement allowance under those conditions because he was adversely affected by problems that arose when UP attempted to consolidate switching between its Phoenix and Tucson yards in May of 1997. Petitioner filed his claim with UP under Article IV of the New York Dock conditions, which accords employees who are not represented by a labor organization the same level of protection as accorded to represented employees. In a letter dated June 16, 2003, petitioner asked the National Mediation Board (NMB) to select a neutral for an arbitration committee to consider his claim. In a letter dated January 21, 2004, the NMB designated Ms.

---

[1] New York Dock Ry.–Control–Brooklyn Eastern Dist. 360 I.C.C. 60 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

[2] Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 452-53, 553 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

Lynette A. Ross as the neutral arbitrator to handle the dispute.[3] NMB's letter indicated that the arbitrator "is responsible for scheduling and other appropriate procedural determination concerning the arbitration process."[4]

The petition indicates that the parties, while agreeing to most of the terms for the proposed arbitration, have been unable to agree on the extent and presentation of a written record and the place for an oral hearing. Petitioner proposes that the record be developed in a three-step process similar to the Board's arbitration procedures in 49 CFR 1108.8, whereby the complaining party proceeds first with a written statement, the defendant proceeds next, and the complainant has an opportunity to reply. Petitioner also asks that the hearing be held in Washington, DC. UP proposes that the parties submit single and simultaneous written submissions, followed by an oral hearing in Chicago, IL.

In his petition, Mr. Grother asserts that the procedures proposed by UP would not produce an adequate record for the Board to review. He argues that simultaneous submissions, with no opportunity for written responses, would not enable the parties to address fully the issue of causality, if UP were to contend that petitioner was not adversely affected by the transaction. Petitioner states further that the hearing should be held in Washington, DC, where the parties and the arbitrator would have access to unpublished material of the NMB and the Board.

In its response in opposition to the petition, UP asserts that the petition is premature because it raises routine procedural issues that, if they cannot be agreed upon by the parties, should be resolved by the neutral member of the arbitration committee. Citing 49 CFR 1108.2(b), UP states further that the Board's three-step arbitration procedures referred to by petitioner are designed for disputes involving the payment of money or involving rates and practices related to rail transportation or service subject to Board jurisdiction, and not for a New York Dock arbitration proceeding. UP requests that the Board dismiss the petition for lack of jurisdiction at this time, and remand the procedural issues to the arbitration committee for resolution.

DISCUSSION AND CONCLUSIONS

---

[3] The other members of the panel are Mr. Grother and Mr. W. E. Loomis, representing UP.

[4] Petitioner supplemented the record on March 5, 2004, forwarding a letter from Ms. Ross. Petitioner also submitted a comment/letter on March 12, 2004, expressing disagreement with UP's characterization of Mr. Grother as a management employee.

Under the deferential Lace Curtain standards of review,[5] the Board may review final decisions issued by arbitrators under the New York Dock labor protection conditions. The Board may also consider interlocutory appeals from an arbitrator's decision prior to a final arbitration decision in extraordinary circumstances. Union Pacific/MKT Merger–UTU Implementing Agreement, Finance Docket No. 30800 (Sub-No. 28) (ICC served Aug. 8, 1989).

Here, however, the Board has not been asked to review an arbitrator's decision. Rather, the petition seeks to have the Board become involved in a preliminary phase of this arbitration proceeding customarily handled by the arbitrator, i.e., scheduling and making procedural determinations concerning the arbitration process. These functions are properly encompassed within the arbitrator's authority to resolve disputes under the New York Dock labor protection conditions. Because the arbitrator controls the arbitration, she should be the person who determines where and how those proceedings should be conducted. Petitioner should attempt to reach an agreement with UP on the matters it has raised, and, if no agreement can be reached, seek resolution by the neutral arbitrator. Accordingly, the petition 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. The petition is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

---

[5] Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Broth. Of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under the Lace Curtain standards, 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.