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SERVICE DATE - DECEMBER 15, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 29430 (Sub-No. 21)

NORFOLK SOUTHERN CORPORATION
— CONTROL—
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY

(Arbitration Review)

Decided: December 8, 1999

We are resolving interlocutory issues that have arisen in this appeal of an award of an arbitration panel.

BACKGROUND

The Transportation • Communications International Union (TCU) has filed an appeal of an arbitration panel's award holding that the Norfolk Southern Railway Company (NSR) is not required to pay displacement allowances to claimant employees after (1) their work was transferred to a new location as a result of the railroad consolidation that created NSR and (2) they exercised their seniority rights to take lower paying jobs at their current locations rather than follow their jobs to the new location.

By notice published in the Federal Register on the date of service of this decision, we are requesting comments on this appeal from interested parties and announcing that we would be issuing this decision. In this decision, we are resolving three preliminary issues: (1) whether the Brotherhood of Maintenance of Way Employees (BMWE) will be permitted to intervene; (2) if so, whether we must strike BMWE's evidence that practice on other railroads is inconsistent with the result of the award on the grounds that the evidence was not before the arbitrator; and (3) whether we must vacate the award based on BMWE's allegation that the neutral member of the panel, William E. Fredenberger, Jr., was convicted of tax evasion.

I. BMWE's Petition to Intervene

We will grant BMWE's petition to intervene and accept its statement in support of TCU's appeal. Although BMWE is not a party, it has a substantial interest in the outcome of this proceeding because it involves an issue of the extent of eligibility for labor protection benefits under our New York Dock conditions. This decision could provide an important precedent for future proceedings in which BMWE members may be directly affected.

BMW's intervention will not unduly disrupt resolution of, or unnecessarily broaden the issues involved in, this proceeding. BMW does raise an issue that was not raised before the arbitrator, i.e., whether the neutral member of the panel, William E. Fredenberger, Jr., was qualified to serve on it. That issue, however, is not factually or legally complex, and NSR has had an adequate opportunity to rebut BMW's position on that issue and any other evidence raised in BMW's statement.

II. BMW's Evidence Concerning Practice on Other Railroads

BMW proffers a statement from Ernest L. Torske, Vice President for BMW's Northwest Region, that the result of the award is inconsistent with practice concerning the allowance of New York Dock benefits on three other railroads. NSR argues that we should not consider this evidence on the grounds that it was not part of the record before the panel and lacks relevance to this appeal.

We will admit this evidence for the same reason that we are allowing BMW's intervention. The evidence is not factually or legally complex, and NSR has had an adequate opportunity to rebut it. The evidence is relevant because longstanding, industry-wide custom and practice in the application of the New York Dock conditions can bear on its interpretation, and allowing such information into the record is consistent with our seeking comments from the public as discussed in the notice we have served and published today. While Mr. Torske has woven policy and legal opinion into his statement, such opinion goes to its weight rather than its admissibility.

III. Qualification of Neutral Member of Panel

It is undisputed that, on April 7, 1999, before the Award was issued, neutral member Fredenberger pleaded guilty in the United States District Court for the Eastern District of Virginia to violation of the federal tax laws, and that a criminal judgment was entered against him on July 1, 1999. We will not vacate the panel's award solely because of the conviction of neutral member Fredenberger.

BMW reasons that (1) Fredenberger was acting as a federal employee employed by this Board when he was involved in the arbitration, (2) his conviction violated the duties imposed on public employees, and (3) such a violation requires that decisions made after the violation be considered void ab initio. We disagree. One dispositive flaw in BMW's argument is that, even if Fredenberger could be viewed as having acted as a federal employee,¹ his tax law violation had no

¹ In fact, Fredenberger was not acting as a federal employee when he was involved in the arbitration. Fredenberger was selected by NSR and TCU to hear the dispute, and his selection was not subject to review by any government agency. He was not employed by the Board. He was not an administrative law judge. His fee and expenses were paid by the parties, not by the government.

BMW argues that Fredenberger was a "special government employee" under 18 U.S.C.

(continued...)

connection whatsoever with the subject matter of the arbitration. Fredenberger's conviction for tax evasion involved his private financial affairs, not railway labor issues. BMWWE has not shown, or even argued, that Fredenberger's private tax violation created a bias against TCU pertaining to this arbitration. We are aware of no authority for the proposition that legal or ethical transgressions, even by public employees, invalidate decisions by the transgressing employees that have no relationship to the issues or subject matter involved in the transgressions.

Alternatively, we discount BMWWE's argument because the issue of Fredenberger's conviction was not raised before the panel. Under American legal jurisprudence, objections to a decisionmaker's legal capacity to render a decision must generally be made before the decision is rendered, especially if the grounds for objection are known beforehand. This rule promotes the orderly conduct of business by courts and agencies and deters parties from bringing capacity challenges that they would not have brought if the decision had gone the other way. Here, neither TCU nor BMWWE raised an issue of Fredenberger's qualifications before the panel issued its award. Indeed, TCU has not raised the issue at all, even in its appeal. Neither TCU nor BMWWE claims that it was unaware of Fredenberger's tax violation during the arbitration proceeding, and, in fact, there is evidence that the violation was known while the arbitration was in process.²

It is ordered:

1. BMWWE's petition to intervene is granted.

¹(...continued)

202(a) and that, as such, he was bound by the ethical rules imposed on such employees. Under 18 U.S.C. 202(a), however, a special government employee is "an officer or employee of the executive or legislative branch of the United States Government, or any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform . . . temporary duties" [Emphasis added.] We are aware of no authority for the proposition that private entities like NSR and TCU can "retain, designate, appoint, or employ" special government employees.

Nor did Fredenberger become a government employee simply because his award is reviewable by the Board. When an arbitrator's award is vacated, the Board does not return the award to the arbitrator for further action, but remands the award to the parties for action that is consistent with the Board's decision.

² There is evidence that BMWWE was aware of the violation before the decision was rendered. Attached as Exh. D to NSR's reply, filed on September 21, 1999, was a copy of a July 20, 1999 page from BMWWE's web site informing members of Fredenberger's conviction. If BMWWE was aware of the controversy while the arbitration was in progress, it is likely that other participants in the rail industry, such as TCU, were also aware of it.

2. NSR's request to strike the statement submitted by BMW witness Ernest L. Torske is denied.

3. BMW's motion to vacate the award is denied.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary