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SERVICE DATE – FEBRUARY 28, 2006

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: February 27, 2006

John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP), has filed a petition seeking review of an arbitration award. The award denied Mr. Grother's claim for benefits under the New York Dock conditions¹ imposed when the Board approved the merger of the UP and the Southern Pacific Transportation Company (SP) in 1996.² We decline to review the award.

BACKGROUND

Mr. Grother states that he had been employed by the SP for 27 years prior to the UP-SP merger. At the time of the merger, Mr. Grother worked as SP's Terminal Superintendent at Tucson, AZ. On April 16, 1997, UP changed Mr. Grother's job title to Senior Manager Terminal Operations (SRMTO) with the same compensation and benefits. However, effective July 1, 1997, UP transferred Mr. Grother to Houston, TX, to be Manager of Intermodal Operations, with a substantial reduction in compensation.

On May 17, 2003, nearly 6 years after his transfer, Mr. Grother submitted a letter to UP's Counsel, James V. Dolan, giving "Official Notice" that he had been adversely affected when UP

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 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999) (UP-SP Merger).

assertedly implemented the merger by discontinuing switching operations at its Phoenix yard in May 1997, thus consolidating switching operations at Tucson. He claimed that he was entitled to displacement benefits under New York Dock totaling \$107,370 for compensation and benefits lost as a result of his merger-related demotion and transfer.

In a letter dated July 18, 2003, UP rejected Mr. Grother's claims for New York Dock benefits. The letter stated that Mr. Grother was not eligible to receive these benefits because he was a manager and not an "employee" under New York Dock. The letter also stated that Mr. Grother's transfer and demotion were not caused by the merger, but were based on his performance. The letter also noted that Mr. Grother waited an unreasonable length of time before filing his claim.

The dispute was then submitted to arbitration. Mr. Grother had initially objected to the procedures to be used in the arbitration and filed a petition asking that the Board establish the procedures. The Board denied Mr. Grother's petition in a decision served on April 21, 2004, finding that the arbitrator had the authority to establish the procedures used to conduct the arbitration proceeding.

The arbitration award. The award denied Mr. Grother's claim in its entirety. First, the award determined that the nearly 6-year delay by Mr. Grother in seeking New York Dock benefits was grossly excessive and that the explanations Mr. Grother offered to justify the delay were not supported by the evidence of record and did not mitigate the delay. Second, the decision determined that Mr. Grother was not an "employee" or subordinate official covered by New York Dock. Third, because of the first two findings, the arbitration decision determined that the causation issue was moot. Finally, because Mr. Grother had questioned the procedures used in the arbitration proceeding, the arbitration decision determined that both parties were afforded their respective due process rights and that the procedures used in the arbitration did not advantage or disadvantage either party.

Appeal. Mr. Grother seeks Board review of the arbitration decision under the Lace Curtain standards.³ He disputes the finding that his claim was barred by laches, asserting that there is no time limit in the New York Dock conditions for filing claims, and that his claims were filed within the 6-year protection period mandated by 49 U.S.C. 11326. He contends that he did not previously seek New York Dock benefits in several communications with UP, because he feared dismissal or other retaliation.⁴ He also argues that UP did not show that it was harmed by

³ See Chicago & North Western Tptn. Co.—Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

⁴ The record submitted by the parties contains copies of several letters Mr. Grother sent to UP officials, which predate the instant New York Dock claim and challenge the fairness of his
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the delay, as the railroad was able to present testimony from UP witness Ken Packard, who was Mr. Grother's immediate supervisor in Tucson.

Mr. Grother next asserts that the decision erred in finding that he was not an employee eligible for New York Dock benefits. He argues that he should have been considered a "subordinate official," stating that our predecessor, the Interstate Commerce Commission (ICC), had classified railroad employees similar to Mr. Grother as subordinate officials under the Railway Labor Act (RLA), 45 U.S.C. 151, et seq., in several decisions in Ex Parte No. 72 (Sub-No. 1), Regulations Concerning Employees Under the Ry. Labor Act, 232 I.C.C. 44 (1939); 266 I.C.C. 85 (1946); 268 I.C.C. 55 (1947); and 289 I.C.C. 19 (1953). He disagrees with the arbitrator's finding that he is not entitled to benefits because his work was that of a manager or that he was in a position that was not covered by a union contract.

Finally, Mr. Grother continues to object to the procedures used in the arbitration, contending that they were prejudicial to his interest as a "non-agreement, at will, employee." He claims that the arbitrator adopted procedures that were similar to those used by the National Railroad Adjustment Board for resolving disputes under the RLA. Under those procedures, the parties meet in a conference and submit evidence simultaneously. He believes that the arbitrator should have used the STB's procedures set forth in 49 CFR 1108.8. Those procedures generally use a 3-step process, with the complaining party opening and closing the evidentiary record.

UP response. UP responds that the issues addressed in the arbitration decision were factual determinations that are not subject to review under the Lace Curtain standards. UP asserts that, while there is no time limit for filing New York Dock claims, arbitrators have repeatedly applied the doctrine of laches to reject stale claims. UP argues that Mr. Grother's reliance on UP's inability to produce a 6-year old personnel form (that would have explained the reason for Mr. Grother's transfer and demotion), as well as his attacks on the testimony of UP witness Packard for being "unclear" as to Mr. Grother's exact duties in 1997, demonstrate the fact that Mr. Grother's lengthy delay in bringing this claim prejudiced UP's ability to defend itself. And UP notes that the arbitrator found no support for Mr. Grother's argument that he delayed because he feared retaliation by UP, and argues further that this excuse is inconsistent with Mr. Grother's repeated efforts to obtain compensation reimbursements from UP on the basis of UP's alleged unfairness towards him.

UP states further that, under arbitral precedents, the term "employee" in New York Dock means only those employees and subordinate officials who are subject to unionization, or who perform duties that generally are described as other than administrative, managerial, professional or supervisory in nature. UP points out that the arbitrator relied on substantial record evidence,

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transfer, request copies of documents from UP records, and/or seek compensatory reimbursement.

including Mr. Grother's own statement that he was the "senior officer" in Tucson, in determining that Mr. Grother's duties and responsibilities were consistent with those of a management-level employee above the rank of a subordinate official.

PRELIMINARY MATTERS

Both parties have filed motions to waive the 30-page limit at 49 CFR 1115.2(d), to permit them to submit copies of evidence and argument that each submitted in the arbitration proceeding. The motions will be granted.

On April 28, 2005, petitioner filed a motion to strike portions of UP's response, claiming that they involve irrelevant matters or relate to the causation issue, which was not addressed by the arbitration decision. UP responded on May 12, 2005. The motion to strike will be denied. Petitioner has not shown that he would be prejudiced in any way by the material he seeks to strike.

DISCUSSION AND CONCLUSIONS

Under Lace Curtain, we accord deference to arbitrators' decisions and will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Review of arbitral decisions has been limited to "recurring or other significant issues of general importance regarding the interpretation of our labor conditions." Lace Curtain, 3 I.C.C.2d at 736. We generally do not overturn an arbitral award, unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or that it exceeds the scope of the arbitrator's authority under those conditions. Applying these standards here, we find no basis for reviewing or overturning the arbitration decision in this proceeding.

Laches. We have recognized that arbitrators can dismiss claims for laches. In Grand Trunk Western Railroad Company–Merger–Detroit and Toledo Shore Line Railroad Company–Arbitration Review, Finance Docket No. 28676 (Sub-No. 2) (STB served Feb. 26, 1996) (GTW), we affirmed an arbitrator's decision that dismissed claims for New York Dock benefits because of an almost 7-year delay in filing the claims. We noted there that an arbitrator acting under delegated authority could bar stale claims when the delays could make it difficult to determine whether the claims were valid. We also stated that, "[i]n the absence of any particular statutory deadlines for filing, or of any agency rule concerning the subject, we think that it is appropriate for the arbitral board to make determinations concerning timeliness, as necessary to protect the integrity of the arbitral process." GTW at p.4. We have also affirmed arbitral decisions that found that claims were timely filed. See The Burlington Northern and Santa Fe Railway Company–Petition for Review of Arbitration Award, STB Finance Docket No. 32549 (Sub-No. 24) (STB served Sept. 25, 2002) (2½-year delay found not unreasonable by arbitrator under facts of case).

Whether Mr. Grother's claim is barred by laches is a factual issue that was within the purview of the arbitrator to resolve. Here, the arbitral decision reviewed the detailed factual record and argument submitted by the parties and followed relevant arbitral precedent in deciding that Mr. Grother's claim was barred by laches.

The arbitral decision determined that Mr. Grother did not perfect his claim under New York Dock until his letter of May 12, 2003, which notified UP that he was submitting a "New York Dock Arbitration Dispute,"⁵ and found that UP would be harmed by Mr. Grother's nearly 6-year delay in several ways. For example, the arbitral decision stated that UP was "blindsided" by Mr. Grother's cumulative request for 6-years' worth of benefits and was placed in an unfair position because it was too late for UP to take measures to resolve the matter outright or otherwise reduce its liability. The decision also noted that the loss or dissipation of records, fading memories and personnel turnover during the 6-year period were inevitable workplace realities that undercut UP's ability to defend itself against Mr. Grother's sizeable claim. Mr. Grother challenges the arbitral finding that the delay impaired UP's ability to defend itself, but Mr. Grother himself complains about the unclear memory of UP's witness regarding the situation at the time of Mr. Grother's transfer.

The decision also found that Mr. Grother's excuses for his delay in submitting his claim were not supported by credible proof, and that there was no evidence to support his assertions that, had he filed his claims in a timely manner, he would have been discharged, lost health benefits for him or his wife, or suffered other punitive actions.⁶ And the decision also rejected, as unsupported, Mr. Grother's assertion that either the absence of a time limit for filing a claim under New York Dock or his status as a non-union employee justified his lengthy delay in filing.

The arbitral decision found that the situation here is similar to that discussed in an arbitral decision in Transportation-Communications International Union v. Union Pacific Railroad Company (Rehmus, 1992), in which the arbitrator determined that a nearly 6-year delay in filing a claim fatally prejudiced the claim, because it created possible increased financial liability to the

⁵ Mr. Grother had argued that a letter that he had previously sent to UP's President Davis on July 15, 1997, gave UP notice of his claim for New York Dock benefits. The arbitral decision rejected Mr. Grother's assertion, pointing out that the 1997 letter did not seek New York Dock benefits, but rather sought help in obtaining a senior management position comparable to the one he had previously held. Mr. Grother no longer makes this argument here.

⁶ We note that this argument appears inconsistent with Mr. Grother's earlier efforts to obtain compensation from UP on alternative bases.

carrier that could not be avoided or offset. The arbitral decision also found support in other arbitration decisions that applied the doctrine of laches.⁷

In his appeal, petitioner asks us to reevaluate the evidence and reconsider the factual findings in the arbitral decision. However, the arbitrator applied the standard we upheld in GTW, and petitioner has not shown that the arbitral decision is irrational, nor has petitioner presented any other justification that would warrant reviewing and overturning the arbitral decision under the Lace Curtain standards. Thus, we will not disturb the arbitrator's determination.

Employee status. We have recognized that whether a particular employee is eligible for benefits under Board-imposed employee protective conditions is a factual matter that is determined by arbitration. Rio Grande Industries, Inc., SPTC Holding, Inc., and the Denver and Rio Grande Western Railroad Company—Control—Southern Pacific Transportation Company (Arbitration Review), STB Finance Docket No. 32000 (Sub-No. 12) (STB served Sept. 19, 2002), rev'd on other grounds, Union Pacific R.R. Co. v. STB, 358 F.3d 31 (D.C. Cir. 2004); Haskell H. Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 67 (1981) (Bell); L.A. Rowlett, Jr. v. Missouri Pacific Railroad Company, Finance Docket No. 30853 (ICC served Aug. 19, 1987). And we defer to the arbitrator's determination of the status of an employee, absent a showing of egregious error.

The arbitral decision determined that Mr. Grother was not an employee or subordinate official who was eligible for New York Dock benefits. The arbitral decision relied on precedent defining the term "employee" as used in the New York Dock conditions as meaning only those employees who are subject to unionization, or who perform duties that are considered as being other than administrative, managerial, professional or supervisory in nature.⁸ Under that

⁷ United Transportation Union v. Union Pacific Railroad Company (LaRocco, 1993) (more than 3-year unexplained delay barred claims); Southern Railway Company v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Muessig, 1990) (3-year unexplained delay in filing claim determined to be unreasonable); Transportation-Communications International Union v. Union Pacific Railroad Company (LaRocco, 1990) (33-month delay barred filing claim); Certain Designated Claimants v. Union Pacific Railroad Company (Seidenberg, 1987) (where carrier knew of New York Dock disputes, lapse in time for actually filing claims by 28 individual employees determined not to be so extended or protracted to warrant invoking the doctrine of laches).

⁸ Transportation Communications International Union v. Burlington Northern Santa Fe Railway Company (Suntrup, 2004) (Project Manager determined not to be "employee" eligible for New York Dock benefits); B.W. Isabell and the Transportation and Communications International Union v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth, 1998) (non-agreement Manager-Senior Tax Representative determined not to be "employee" eligible for New York Dock benefits); G.L. Dixon and the Transportation

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precedent, benefits under New York Dock were to be accorded only to rank and file employees, because railroad work was so specialized and limited that these employees could not easily obtain work in an outside industry if they lost their jobs as a result of a merger. The same approach has been followed in court rulings on whether an employee is eligible for employee protection benefits. See Newbourne v. Grand Trunk Western R. Co., 758 F.2d 193 (6th Cir. 1985) (management official determined not to be “employee” eligible for New York Dock benefits); Edwards v. Southern Railway Company, 376 F.2d 665 (4th Cir. 1967) (manager of small, family-owned railroad determined not to be “employee” eligible for labor protection benefits).

Under both arbitral and agency precedent, the status of an individual employee is determined by considering an individual claimant’s specific job functions and responsibilities, rather than job title. The arbitral decision here relied on Mr. Grother’s own description of his responsibilities at the time of his transfer, including his characterization of himself as a manager and “senior officer” in his letter claiming New York Dock benefits. The arbitrator also cited testimony by UP’s Witness Packard that described Mr. Grother’s specific duties and responsibilities as SRMTO at Tucson. According to that testimony, Mr. Grother was responsible for: (1) terminal operations; (2) safety; (3) budgeting; (4) the “transportation product” at Tucson; (5) hiring recommendations; and (6) conducting disciplinary hearings and making disciplinary recommendations. On the basis of that testimony, the arbitrator determined that Mr. Grother’s duties and responsibilities were those of a manager and not those of an “employee.” The arbitrator found Mr. Grother’s belated post-claim efforts to downgrade his position and responsibilities to be less than credible.

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Communications and International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth, 1998) (non-agreement Manager-Contracts & Administration determined not to be “employee” eligible for New York Dock benefits); Ross F. Povirk and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth, 1998) (Regional Account Manager determined not to be “employee” eligible for New York Dock benefits); James V. Nekich v. Burlington Northern Santa Fe Railroad (Ver Ploeg, 1996) (Quality Coordinator determined to be “employee” eligible for New York Dock benefits); John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Company (O’Brien, 1987) (Non-agreement District Sales Managers determined not to be “employees” eligible for New York Dock benefits); Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (Stallworth, 1988) (Manager of Labor Relations determined not to be “employee” eligible for New York Dock benefits); B.J. Maeser, T.P. Murphy, E.M. Sengheiser and K.W. Shupp v. Union Pacific Railroad Co., Missouri Pacific Railroad Co. (Seidenberg, 1987) (Marketing and Sales Department officials determined not to be “employees” eligible for New York Dock benefits).

While petitioner disagrees with the arbitral decision's findings as to his status, he has not shown that the arbitral decision was irrational or inconsistent with the factual record developed by the parties. Nor has he shown that the decision deviated from arbitral precedent, or that the arbitrator acted outside her authority under New York Dock. Thus, petitioner has failed to show in his appeal that we should review and overturn the arbitral determination that Mr. Grother was not an employee who was eligible for New York Dock benefits.

We also find no merit to Mr. Grother's assertion that his status should be determined under decisions by the ICC issued in Ex Parte No. 72 and Ex Parte No. 72 (Sub-No. 1) between 1924 and 1953 that classified types of railroad employment pursuant to the RLA, 45 U.S.C. 151 Fifth. Pursuant to those provisions, the ICC classified types or classes of employees as officials or subordinate officials for purposes related to employee representation, collective bargaining and the jurisdiction of the National Mediation Board. Nothing that the ICC did in the Ex Parte No. 72 or Ex Parte No. 72 (Sub-No. 1) proceedings, however, constrained the arbitrator's authority to act here. Indeed, in the decisions that petitioner cites, the ICC does not rely on the titles assigned to employees, or set an otherwise rigid standard, for determining whether employees are subordinate officials or officials. See 268 I.C.C. at 57. Rather those decisions make clear that whether employees are subordinate officials or officials must be determined on a case-by-case basis by considering the responsibilities of the employees at issue. Moreover, as Mr. Grother acknowledges, the agency has never held its Ex Parte No. 72 or Ex Parte No. 72 (Sub-No. 1) decisions to be dispositive in determining a specific employee's eligibility for employee protection conditions.⁹ Thus, petitioner has made no showing that would warrant reviewing and overturning the arbitral decision as to employee status.

Causality. Petitioner suggests that the issue of causality, while expressly not decided by the arbitrator, may nevertheless be before the Board because the arbitrator's ultimate conclusion appears to find that Mr. Grother was not adversely affected by the merger. However, in light of our decision not to disturb the arbitrator's dismissal of Mr. Grother's claim on the bases of laches and employee status, we agree with the arbitrator's finding that the causality issue is moot.

Procedures. Petitioner continues to object to the procedures used during the arbitration proceeding, but these objections lack merit. The parties submitted simultaneous pre-hearing written statements; attended a hearing to present witnesses, statements of fact, supporting evidence, data and argument; and submitted post-hearing briefs. Petitioner has not adequately explained why the procedures have denied him a fair process. We find no basis for upsetting the arbitrator's determination that both parties were afforded their respective due process rights, and that neither party was placed at any advantage or disadvantage respecting the procedures used in the arbitration proceeding.

⁹ See Supplement to Petition at 35, citing Bell, 366 I.C.C. at 66.

Moreover, the Board's arbitration rules and procedures at 49 CFR part 1108, which Mr. Grother prefers, specifically exclude from their applicability arbitration that is conducted pursuant to labor protective conditions. In any event, those rules also provide an arbitrator with discretion in establishing procedures for each arbitration proceeding, 49 CFR 1108.8, and they specifically provide that an arbitrator may alter the 3-step procedures sought by Mr. Grother. 49 CFR 1108.8(c).

Mr. Grother also appears to challenge the arbitration requirement altogether, suggesting that he should have been permitted to bring his claim directly to the Board. But arbitration is a well-established part of the quid pro quo that comprises the New York Dock conditions, under which Mr. Grother is seeking benefits. Thus, a challenge directly to the Board would be inconsistent with the relief he seeks. And Mr. Grother does not support his contention that New York Dock arbitration procedures are less fair to him as a non-agreement employee. As he acknowledges, New York Dock expressly provides the same level of protective benefits to both unrepresented and union employees.¹⁰

In sum, Mr. Grother has failed to show that the award should be reviewed and overturned under the Lace Curtain standards. The dispute does not involve recurring or other significant issues of general importance regarding the interpretation of our labor conditions. Rather, the arbitral decision renders factual determinations addressing a specific claim filed by one individual, and it resolves the issues raised by the parties in a manner consistent with established arbitral precedent. We find no egregious error in the arbitration decision here. Rather, the findings in the arbitration decision are based on a substantial factual record presented in the arbitration proceeding and on relevant precedent. Accordingly, Mr. Grother's petition for relief is denied.

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

It is ordered:

1. The motions for waiver of the page limit are granted.
2. Petitioner's motion to strike is denied.
3. The petition for review is denied.

¹⁰ See Appendix of Exhibits to Carrier's Response at 149.

4. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary