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SERVICE DATE - DECEMBER 17, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 31363 (Sub-No. 3)¹

UNION RAILROAD COMPANY AND BESSEMER AND LAKE.
ERIE RAILROAD COMPANY—ARBITRATION REVIEW—
UNITED STEEL WORKERS OF AMERICA

Decided: December 16, 1998

The United Steel Workers of America (USWA) has appealed the decision of Arbitrator Helen M. Witt entered on October 21, 1997, which imposed an implementing agreement under which the Union Railroad Company (URR) and the Bessemer and Lake Erie Railroad Company (B&LE) (jointly, the Carriers) plan to consolidate functions currently performed by each Carrier's accounting department. We decline review of the arbitration decision.

BACKGROUND

In Blackstone Capital Partners, L.P., Blackstone Transportation Partners L.P. and USX Corporation—Exemption from 49 U.S.C. 10746, 11321 and 11343, Finance Docket No. 31363 (ICC served Dec. 23, 1988) (Blackstone), the Interstate Commerce Commission (ICC) exempted from the prior approval requirements now contained in 49 U.S.C. 11323 the transfer of control of URR, B&LE and five other rail carriers and one water carrier from USX Corporation (USX) to Transtar, Inc. (Transtar), a noncarrier holding company.² The transaction was subjected to the employee protective conditions in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock). 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, subject to limited review by the Board.

URR, B&LE, and the other rail carrier subsidiaries of Transtar had maintained separate accounting departments in different locations. The clerical employees for each carrier performed

¹ Embraces Union Railroad Company and Bessemer and Lake Erie Railroad Company—Petition, STB Finance Docket No. 31363 (Sub-No. 2).

² The other railroads are: Birmingham Southern Railroad Company (BS); Duluth, Missabe, and Iron Range Railway Company (DM&IR); Elgin, Joliet and Eastern Railway Company (EJ&E); The Lake Terminal Railroad Company (LT); and the McKeesport Connecting Railroad Company (MKC). The water carrier is the Warrior & Gulf Navigation Company.

work solely for their own employer, under separate collective bargaining agreements. URR's accounting department employees are represented by USWA, while B&LE's accounting department employees are represented by the Transportation Communications International Union (TCU).³ Apparently, URR employees worked side-by-side with B&LE employees in the same facility in Monroeville, PA. According to the Carriers, Transtar formulated a plan to consolidate the accounting and clerical functions of all of its carrier subsidiaries into its Monroeville, PA facility to be managed by B&LE. The Carriers stated that the plan was part of the process for realizing benefits from Transtar's common control over its carrier subsidiaries.⁴

On September 3, 1996, URR and B&LE notified the USWA and TCU by letter that they wanted to coordinate work of their accounting departments, citing Article I, section 4 of the New York Dock conditions imposed in Blackstone. The letter indicated that the work performed by nine URR employees would be transferred to B&LE, and that B&LE would increase its staff by nine new clerical positions. The letter further stated that employees adversely affected by the coordination would be accorded benefits under New York Dock.

On October 9, 1996, USWA advised the Carriers that it would not participate in negotiations under the New York Dock conditions to transfer URR work, contending that the coordination should be governed by the Railway Labor Act, 45 U.S.C. 156 (RLA). USWA maintained that its collective bargaining agreement with URR precluded URR from assigning its clerical work to B&LE employees. USWA further asserted that it was not a party to any other agreement that would authorize URR's actions, such as the Washington Job Protection Agreement of 1936 (WJPA). Instead, the USWA informed the URR that it considered the Carriers' New York Dock notice as a notice of intended change in agreements under section 6 of the RLA and that it would negotiate over those changes.

On October 26, 1996, URR and B&LE informed USWA that they were submitting the dispute to arbitration under Article I, section 4 of New York Dock. URR also submitted a proposed implementing agreement, under which the nine URR employees would be transferred to the B&LE. The proposed agreement further provided that the nine former URR employees would be represented by the TCU and would be covered by the B&LE-TCU collective bargaining agreement for accounting employees.

In a letter dated November 1, 1996, the USWA informed the URR that it considered the Carriers' invocation of the New York Dock arbitration procedures to be a unilateral and constructive termination of conferences under section 6 of the RLA. USWA also advised URR that it would not participate in the selection of an arbitrator to hear the dispute under the New York

³ TCU is not participating in this proceeding.

⁴ Apparently, implementing agreements have been negotiated with employee representatives of the other rail subsidiaries of Transtar, including B&LE.

Dock conditions. On November 4, 1996, the URR requested that the National Mediation Board (NMB) appoint a neutral referee to arbitrate the dispute. On November 19, 1996, USWA informed the NMB that it would not participate in the selection of a neutral referee. The NMB appointed Arbitrator Witt to sit as the neutral referee.

On November 18, 1996, URR filed an action before the United States District Court for the Western District of Pennsylvania (District Court), seeking a declaratory order and injunction contending that USWA's section 6 notice was premature. USWA counterclaimed that the provisions of the RLA govern the dispute rather than New York Dock, and that the arbitration would violate its rights under the RLA. As discussed later in this decision, the court subsequently rejected this position.

The issue of our jurisdiction over this dispute was also raised in a petition for declaratory order that was filed on November 20, 1996, by the Carriers in STB Finance Docket 31363 (Sub-No. 2), Union Railroad Company and Bessemer and Lake Erie Railroad Company—Petition (Union R. Petition). The Carriers requested that the Board determine that it has exclusive jurisdiction to resolve any dispute arising from implementing the proposed coordination. On December 13, 1996, USWA replied, contending that the Board did not have jurisdiction over the dispute. The Carriers filed a rebuttal on January 3, 1997. Action on the Carriers' petition was deferred because the dispute had been submitted to arbitration.

A hearing was held before Arbitrator Witt on April 29, 1997, at Pittsburgh, PA. Despite USWA's objections, it participated in the arbitral proceeding. The arbitrator issued her award on October 21, 1997, in which she imposed an implementing agreement for the coordination of the Carriers' accounting departments.

The arbitrator noted that, under the proposed agreement submitted by the Carriers, individual employees who left their employment with URR would follow their work to become employees of B&LE. Current members of the craft or class of URR employees would be offered employment by B&LE, which they would be free to accept or refuse. The arbitrator indicated that those employees who accept employment would be covered by an agreement produced by the arbitration, but those employees who reject employment with B&LE would forfeit protection and could be furloughed. She noted that USWA had declined to submit a proposed implementing agreement. Therefore, she had to decide what modifications were needed, if any, to the Carriers' proposed implementing agreement to fairly protect the URR employees.

The arbitrator modified Paragraph 1 of the implementing agreement to clarify the rights of URR clerical employees who decline to accept newly established B&LE positions. She also changed the timing for implementing the transaction. The arbitrator amended Paragraph 9 to provide that the implementing agreement would become effective upon 30 days' notice to the USWA, rather than the 5 days' notice which the proposed agreement provided for. Apparently, the Carriers accepted the arbitrator's modifications.

On November 10, 1997, USWA filed an appeal of the arbitrator's decision and the Carriers replied on December 22, 1997.

DISCUSSION AND CONCLUSIONS

Jurisdiction.

USWA initially questions whether the Board has jurisdiction to decide the dispute. As we noted, the jurisdiction issue had been raised in URR's petition for declaratory order in Union R. Petition. There, USWA, noting that the issue was also being considered by the District Court, requested that arbitration be held in abeyance until the court determined whether the dispute should be resolved under New York Dock. The arbitrator declined the request. In its appeal, USWA continues to assert that the dispute is subject to the procedures in the RLA and that the Board lacks jurisdiction to determine whether the URR's contractual obligations and RLA obligations have been preempted by 49 U.S.C. 11326.

Shortly after USWA filed its appeal of the arbitration decision, the District Court issued its decision and ruled that the Board, rather than the court, has exclusive jurisdiction to determine whether the New York Dock process was properly invoked to resolve the dispute.⁵ In support, the court cited Railway Labor Executives' Ass'n. v. Southern Pacific Transp. Co., 7 F.3d 902, 906 (9th Cir. 1993); Brotherhood Ry. Carmen, Div. of Transp. Comm. Int'l Union v. CSX Transp. Inc., 855 F.2d 745, 748-49 (11th Cir. 1988), cert. denied, 489 U.S. 1016 (1989); and CSX Transp. Inc. v. United Transp. Union, 86 F.3d 346 (4th Cir. 1996), which upheld the Board's exclusive authority to resolve labor disputes when implementing a Board-approved transaction.

These decisions, in turn, relied on precedent which established that the Board's approval of a transaction automatically removes its implementation from the procedures of the RLA, and that the Board or arbitrators acting under authority delegated under New York Dock may exempt a transaction from the provisions of the RLA and may override collective bargaining agreements when necessary to realize public benefits of an approved transaction. Where modification of a collective bargaining agreement has been necessary, it has been approved under either section 11321(a) [formerly section 11341(a)], or section 11326 [formerly section 11347]. Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991) (Dispatchers); Railway Labor Executives' Ass'n v. ICC, 987 F.2d 806 (D.C. Cir. 1993) (RLEA); American Train Dispatchers Ass'n. v. ICC, 26 F.3d 806 (D.C. Cir. 1994) (ATDA); and United Transp. Union v. STB, 114 F.3d 1425 (D.C. Cir. 1997) (UTU-STB). In RLEA, 987 F.2d at 814-15, the court indicated that agreements may be changed if necessary to effect a public benefit that would not be available if the agreement were left in place, but not merely to transfer wealth from employees to their employer.

⁵ Union Railroad Company v. United Steelworkers of America, Civil Action No. 96-2905 (W.D. Pa. Nov. 24, 1997) (Union RR v. USWA).

The District Court in Union RR v. USWA further noted that, since USWA's jurisdictional claim was raised after the arbitration process had begun, the union's claim could be characterized as an impermissible collateral attack on the arbitration process. The District Court also rejected USWA's assertion that it did not sign the WJPA, stating that the carrier's rights are statutory in nature and owe nothing to the WJPA.

USWA did not appeal the District Court's decision or raise any objections to the court's decision here. The court's decision confirms our jurisdiction to resolve this dispute under New York Dock and also upholds the arbitrator's authority to impose an implementing agreement under the New York Dock procedures.

Another jurisdictional issue raised by USWA both here and in Union R. Petition is the union's assertion that the Board is unable to issue a decision in these proceedings because we are "unconstitutionally composed." USWA states that the Board's members obtained their authority pursuant to 49 U.S.C. 701(b)(4) which was enacted in the ICC Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which provides:

On the effective date of this section, the members of the Interstate Commerce Commission serving unexpired terms on the date of the enactment of the ICC Termination Act of 1995 shall be members of the Board, to serve for a period of time equal to the remainder of the term for which they were originally appointed to the Interstate Commerce Commission.

USWA asserts that Congress violated the Appointments Clause in U.S. Const., Art II §2,⁶ because, by terminating the ICC and creating the Board, and then appointing three of the ICC's members to be members of the Board, it infringed on the President's right to appoint principal officers as members of the Board.

In support, USWA cites two decisions involving the abolishment of the Federal Home Loan Bank Board (FHLBB) and the Federal Savings and Loan Insurance Corporation and the creation of the Office of Thrift Supervision (OTS), a new agency. The FHLBB had three members. Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989), the newly formed OTS was to have only one Director which was to be appointed by the President with the advice and consent of the Senate. 12 U.S.C. 1462a(c)(1). However, the statute also included a "transitional provision" in 12 U.S.C. 1462a(c)(5) which designated the chairman of the FHLBB as the first director of the OTS. Two courts found that, by

⁶ Article II, §2 provides: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

enacting the “transitional provision” in section 1462a(c)(5), Congress had appointed the Director of OTS and thus unconstitutionally infringed on the President’s right to appoint officers. Franklin Sav. Ass’n v. Director of Office of Thrift Supervision, 740 F. Supp. 1535 (D. Kan. 1990), and Olympic Federal Sav. And Loan Ass’n. v. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C. 1990) (Olympic), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir 1990).

We do not agree with USWA that the statute which created the Board has the unconstitutional impediments that were present when OTS was created. In Olympic, 732 F. Supp. at 1186, the court noted that:

Had OTS been placed under the supervision of a three-person board, this court believes that the . . . three former FHLBB members would not have required re-confirmation. However, when Congress decided that only one of the three FHLBB members would have his responsibilities transferred and, moreover, decided specifically which one of the three would become the new Director, it went beyond simply changing the duties of an office and appointed a person to a new post.

When Congress abolished the ICC and transferred the members of the ICC to become members of the Board, it transferred the positions of the members of the ICC to the Board, 49 U.S.C. 701(b)(4). But, Congress did not transfer “particular” members of the ICC to the Board, as was done when the OTS was established under FIRREA. Thus, establishment of the Board is consistent with the court’s discussion in Olympic and is not a violation of the appointments clause.

USWA argues that the STB is without jurisdiction to override its collective bargaining agreement under 49 U.S.C. 11341(a) [and now section 11321(a)], because 11341(a) does not apply because the ICC used 49 U.S.C. 10505 [now 10502] to exempt the underlying control transaction from the prior approval requirements of sections 11321 and 11343. USWA cites in support of its argument Railroad Consolidation Procedures—Trackage Rights Exemption, 1 I.C.C.2d 270 (1985) (Rail Procedures), and RLEA, *supra*.

We disagree. In Rail Procedures, the ICC indicated that its authority to approve a transaction under section 11341(a), so that the transaction is exempt from the antitrust laws and from all other laws as necessary, does not reach transactions under section 10505. However, subsequently in Rio Grande Industries, et al.—Trackage Rights—Burlington Northern R.R. Lines, ICC Finance Docket No. 31730 (ICC served Mar. 12, 1991), the ICC clarified its position. Therein, the ICC stated that, even under the reasoning of Rail Procedures, the exemption authority in section 10505 would not remove transactions exempted from section 11343 from the reach of section 11341(a) with regard to labor protection matters. This is so, the ICC held, because the Commission, and the Board today, are expressly barred by the terms of the exemption provision from using the exemption powers to derogate from the labor protection to which employees are entitled under the relevant statutory section by which the transaction would be approved. The courts

have been in accord with this position.⁷ In United Transportation Union v. Norfolk and Western Ry Co., 822 F.2d 1114, 1115 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988), the court saw no basis for distinguishing between approved and exempted transactions for purposes of the applicability of section 11341(a). There, the court explained that the Commission “merely substitutes one form of Commission oversight for another” when it imposes labor protective conditions pursuant to an exemption. See also Brotherhood of Locomotive Engineers v. Boston and Maine Corp., 788 F.2d 794 (1st Cir. 1986), cert. denied, 421 U.S. 975 (1987). Moreover, 49 U.S.C. 11326, like its predecessor, section 11347 of the Interstate Commerce Act, provides an independent source of authority for the Board and its arbitrators to modify labor agreements as necessary to permit the implementation of an authorized transaction. RLEA at 813-14. See Delaware and Hudson Railway Co.--Lease and Trackage Rights--Springfield Terminal Company, Finance Docket No. 30965 (Sub Nos. 1 and 2) (STB served Sept. 25, 1998); CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No 28905 (Sub-No. 22); and Norfolk Southern Corporation--Control--Norfolk and Western Railway Company and Southern Railway Company (Arbitration Review), Finance Docket No. 29430 (Sub No. 20) (STB served Sept. 25, 1998).

Review of the Arbitration Decision.

Under 49 CFR 1115.8, the standard for review of arbitration decisions is provided in 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 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 otherwise significant issues of general importance regarding the interpretation of our labor conditions.” 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 it is outside the scope of authority granted by the conditions. Id. at 736.

USWA asks us to consider whether the arbitrator exceeded her authority when she imposed an implementing agreement and whether the award failed to preserve the rights of affected employees.

We find no reason to disturb the arbitrator's award under the Lace Curtain standards. There is no issue of first impression; and any issues that are likely to recur have already been thoroughly

⁷ The noted exception is the court decision in RLEA. However, on remand of that case, the ICC emphasized that it continued to adhere to its longstanding position that “section 11341 applies to authorizations by exemption as well as to approvals.” Delaware & Hudson Ry.--Lease and Trackage Rights--Springfield Terminal Ry., ICC Finance Docket No. 30965 (Sub-Nos. 1&2) (ICC served Apr. 21, 1993), slip op. at 2 n.4. No further review was sought.

resolved by us and the courts. USWA has not shown egregious error or any other grounds requiring review of the arbitration award here. See Employees of Butte Anaconda & Pac. Ry. v. United States, 938 F.2d 1009 (9th Cir. 1991), at 1012; United Transp. Union v. ICC, 43 F.3d 697 (D.C. Cir. 1995), at 699; CSX Transp. Inc. v. Surface Transp. Bd., 75 F.3d 696 (D.C. Cir. 1996), at 700; United Transportation Union v. Surface Transp. Bd., 114 F.3d 1242 (D.C. Cir. 1997), at 1245. And, to the extent USWA is seeking to raise an issue of representation, such issues can be resolved only by the NMB.

Because the Lace Curtain standards for review have not been met here, we decline review of the arbitration decision.

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

It is ordered:

1. To the extent USWA's appeal challenges the Board's jurisdiction to address the issues in this proceeding, it is denied.
2. We decline to review the award that is the subject of USWA's appeal.
3. The proceedings are discontinued.
4. This decision is effective 30 days after its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary