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SERVICE DATE - SEPTEMBER 24, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33942 (Sub-No. 1)

USX CORPORATION—CONTROL EXEMPTION—TRANSTAR, INC.

(Arbitration Review)

Decided: September 19, 2002

Tracks, Traffic, and Management Services, Inc. (TTMS or petitioner) has appealed an arbitration award entered by a panel chaired by neutral member John C. Fletcher, addressing a dispute between TTMS and the Transportation•Communications International Union (TCU or respondent). We will not review the award.

BACKGROUND

In USX Corporation—Control Exemption—Transtar, Inc., STB Finance Docket No. 33942 (STB served Nov. 30, 2000), we exempted from the prior approval requirements of 49 U.S.C. 11323-25 the acquisition by USX Corporation (USX) of control of Transtar, Inc. (Transtar) and five rail carriers controlled by Transtar. The exemption authority was subject to the standard labor protective conditions in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

As part of the transaction, the administrative and support functions for carriers controlled by Transtar were transferred from the Bessemer and Lake Erie Railroad Company (BLE), which had performed all of these functions for Transtar's carriers, to TTMS, a noncarrier subsidiary of Transtar. On December 22, 2000, TTMS, BLE, and TCU signed an implementing agreement transferring clerical employees from BLE to TTMS and realigning clerical positions on BLE. The agreement allowed BLE employees who were performing the transferred work the choice of either following their work to TTMS or remaining with BLE. Pay rates for TTMS clerical positions were set at the same or higher rates than pay rates for the comparable BLE positions. In addition, the implementing agreement also required BLE, on written request, to furnish test period average (TPA) data, computed in accordance

with Article I, section 5 of the New York Dock conditions, to employees who would be affected by the transaction.¹

When bidding on positions closed, on January 11, 2001, every affected employee had obtained a position: 83 with TTMS and 29 with BLE. All but one of the affected employees used their prior rights in the bidding process, and all but four obtained their first choice of positions.

The transaction was consummated at the close of business on March 23, 2001. On the next business day, the BLE employees who had elected to follow their work to TTMS became TTMS employees. The transferred employees reported to work in the same building and, consistent with the implementing agreement, performed similar work at identical (or sometimes higher) rates of pay.

The dispute at issue here arose when several affected clerical employees who had transferred from BLE to TTMS obtained their TPA data and then filed claims for New York Dock displacement allowances with TTMS and BLE. The claimants sought displacement allowances for selected months in which their actual earnings fell short of their average monthly earnings calculated by the TPA formula.

TTMS rejected these claims, asserting that, because the claimants were performing similar work at the same (or higher) rates of pay, they had not been “placed in a worse position” as a result of the Transtar transaction and were not eligible for displacement allowances under the New York Dock conditions. TCU, representing the employees, responded that the implementing agreement committed TTMS to treating all of the employees who had transferred to TTMS as “displaced employees” within the meaning of New York Dock, thereby entitling them to displacement allowances when their monthly compensation fell below their TPAs.

Unable to resolve the dispute, TTMC and TCU agreed to invoke arbitration pursuant to Article I, section 11 of the New York Dock conditions and selected John C. Fletcher as neutral member. The parties filed and exchanged written submissions in advance of the arbitration hearing, which was held on January 29, 2002.

Arbitration. At the arbitration hearing, TCU asserted that, when the parties negotiated the implementing agreement, they agreed to recognize that any employee whose position was abolished as a result of the transaction was to be considered a “displaced employee” entitled to New York Dock

¹ Under Article I, section 5 of the New York Dock conditions, a TPA is determined by dividing by 12 the total compensation received by the employee and the total time for which he was paid for the 12-month period immediately preceding the date of the displacement. The TPA produces a monthly average compensation and average monthly time for which the employee was paid.

benefits. TCU claimed that this understanding was implicit in the requirement in Article VII² of the implementing agreement that “affected” employees be given TPA data on request. To support this assertion, TCU submitted copies of correspondence between the parties and excerpts from notes of TCU officials that detailed the discussions held by the parties while negotiating the implementing agreement. On the grounds that it was already acknowledged in the implementing agreement that all employees were adversely affected and considered as displaced employees, TCU asserted that TTMS was required to compensate each transferring employee when his monthly compensation fell below his TPA.

Conversely, TTMS claimed that Article VII was not intended to automatically certify employees for New York Dock benefits. TTMS argued that Article VII required the employees to show not only that they were entitled to receive a monthly displacement allowance pursuant to their TPA data, but more significantly that they were adversely affected by the transaction. It argued that the claimants were not adversely affected because they worked under the same or better compensation packages, were subject to the same labor agreement terms, and were performing the same clerical work that they performed as BLE employees.

Further, while acknowledging that the claimants’ actual earnings occasionally fell below their TPAs, TTMS claimed that the lower earnings were not caused by the Transtar reorganization or the transfer of functions to TTMS. According to TTMS, the claimants’ earnings occasionally fell below

² That Article reads as follows:

Article VII—Filing Claims for Protective Benefits:

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; (3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company, TPAs will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which the claim was made.

their TPAs because TPA comparisons are based on monthly earnings and some calendar months (e.g., February) are shorter than the “average” month. TTMS asserted that, all other things being equal, an employee who is paid at an hourly or daily rate necessarily will earn less than his average monthly compensation in months with fewer than the average number of workdays. TTMS stated that this is the result of simple arithmetic and does not show that an employee actually has been adversely affected by a transaction.³

The Arbitrator agreed with TCU that employees’ positions had been abolished as a result of the transaction and held that employees were presumed to be displaced employees in any month in which their compensation fell below their TPA. He determined that, when negotiating the implementing agreement, the negotiators had intended that any employee whose position was abolished by the Transtar transaction was to be considered “affected” by that transaction, noting that TCU had insisted that all employees be given TPAs, and that the carriers agreed to provide TPAs upon request.

Addressing TTMS’s argument that employees must be adversely affected to be considered displaced under New York Dock, the Arbitrator determined that the implementing agreement provided that the only way a claimant could determine whether he is adversely affected by the transaction would be by comparing his actual monthly salary to his TPA. The Arbitrator found that the language in the implementing agreement indicated that the parties anticipated that at least some of the transferring employees would be displaced and thus be entitled to occasional displacement allowances.

The Arbitrator rejected TTMS’s assertions that employees receiving displacement allowances in “short months” would be receiving a windfall. He noted that the TPAs are based on average monthly compensation, not on hourly rates of pay, and that occasionally receiving extra pay during short months would not result in a windfall.

³ According to TTMS, nearly all TTMS employees worked a Monday-through-Friday schedule, with the average month having 21.75 workdays (261 workdays per year divided by 12 months per year = 21.75 workdays per month). TTMS noted that the standard work calendar varies between 20 and 23 workdays in a month; that short months, and long months, occur for all employees, whether or not they are affected by a Board-authorized transaction; and that about half of the months in a given year have fewer than the average (21.75) number of workdays. It notes that the year 2001 had 5 months with 21 or fewer workdays. As a result, all employees working a Monday-through-Friday work schedule were likely to experience 5 months in 2001 when their earnings were below their monthly averages for the year.

Appeal. TTMS filed its appeal of the arbitration award on April 9, 2002. TCU filed a reply on May 6, 2002. On May 28, 2002, TTMS filed a reply to TCU's reply.⁴ We will grant a petition for leave to intervene that was filed on June 3, 2002, by the National Railway Labor Conference (NRLC or intervenor), and accept the brief it filed in support of TTMS. TCU filed a response to NRLC's brief on July 23, 2002.⁵

In its appeal, TTMS claims that the Arbitrator misconstrued Article I, section 5 of New York Dock by concluding that an employee who transfers to a position performing the same work, at the same location, and under the same (or higher) compensation and benefits package and labor agreement, qualifies as a "displaced employee" if his actual monthly earnings occasionally fall below his TPA. Petitioner reiterates that all railroad employees experience monthly earnings fluctuations resulting from short-months and other non-transaction-related factors such as weather and employment levels, and that comparing an employee's actual monthly earnings with TPA data will therefore always result in occasional shortfalls.

Moreover, petitioner argues that the Arbitrator erred by assuming that "worse position" can be determined by comparing the employee's actual earnings with his TPA. TTMS asserts that, under New York Dock, TPA data may only be used for computing a displacement allowance and cannot be used to determine whether an adverse effect was caused by the transaction in the first place. Thus, TTMS argues that its agreement to furnish TPA data to affected employees on demand did not mean that the employees would automatically qualify as displaced employees entitled to receive displacement allowances without evidence of causation.

Finally, TTMS is concerned that for the next 5 years the Arbitrator's decision could require it to pay displacement allowances to employees who were not placed in a worse position by the transaction, but were instead affected by post-transaction events. It notes that one employee who is claiming a displacement allowance was in fact placed in a worse position when his position was eliminated several months after he was transferred to TTMS.

NRLC asserts that the Arbitrator incorrectly interpreted the New York Dock conditions by finding that a dip in monthly earnings by itself automatically qualifies an employee for New York Dock

⁴ TTMS also filed a petition for leave to file a reply, contending that TCU's reply relied on assertions that were not considered in the arbitration proceeding. TCU has not objected, and we will accept the reply.

⁵ TCU also filed a petition to accept its late-filed reply to NRLC's brief. On August 5, 2002, TTMS responded to TCU's Petition. We will also accept these supplemental filings in the interest of a complete record.

benefits for 6 years. The intervenor argues that entitlement to New York Dock displacement allowances requires a showing that a decline in an employee's income was caused by a covered transaction, and that a decline in income alone would not entitle an employee to a displacement allowance. Like TTMS, NRLC maintains that providing TPAs on request does not imply "precertification." While noting that carriers and unions have agreed in some transactions to precertify that certain employees would be considered adversely affected by a transaction, NRLC asserts that the parties did not agree to precertify employees in this transaction. Finally, intervenor takes no position on the current dispute as to whether the Arbitrator intended to adopt a general rule negating the requirement that a claimant demonstrate that an adverse effect was caused by the approved transaction, as TTMS assumes, or rather merely determined that the contract terms in this particular case obviated the need for a showing of causation, as TCU argues. But NRLC expresses concern that, if broadly construed, the Arbitrator's decision could unduly burden carriers by requiring payments to employees who are not actually worse off due to a transaction.

TCU responds that the Arbitrator's decision does not present a recurring or significant issue warranting interpretation of the New York Dock conditions. Rather, respondent asserts that the Arbitrator needed only to decide whether including Article VII in the implementing agreement constituted an agreement that the TPAs would be used to determine if employees were placed in a worse position. The union claims that the Arbitrator properly resolved this issue through interpreting the implementing agreement and its negotiating history, rather than interpreting the New York Dock conditions.

DISCUSSION AND CONCLUSIONS

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) (Lace Curtain), *aff'd sub nom. International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988). 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." 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 it is outside the scope of authority granted by the conditions.

We find no reason to disturb the Arbitrator's decision here under the Lace Curtain standards. The Arbitrator's decision does not involve the general applicability of the New York Dock conditions, nor, contrary to the railroad parties' contentions, does it involve an interpretation of those conditions. Rather, the Arbitrator simply interpreted the parties' implementing agreement carrying out the conditions.

Examining the language of the implementing agreement and other indicia of intent, the Arbitrator determined that the parties themselves intended to precertify affected employees so as to eliminate the need to show causation in this case, and that the carrier's arguments did not accurately reflect the bargain that it made with TCU.⁶ We do not find that the Arbitrator's decision in this regard was egregious error, or that petitioner has demonstrated any other basis under our Lace Curtain standards that would warrant our review.⁷

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

It is ordered:

1. TTMS's petition for leave to file a reply is granted.
2. NRLC's petition for leave to intervene is granted.
3. TCU's petition to late-file its response to NRLC's filing is granted.
4. TTMS's request for our review of this matter is denied.
5. This decision is effective October 24, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

⁶ Thus, the Arbitrator's decision should not be broadly construed, nor read in any way as departing from the general principle that to receive benefits under the New York Dock conditions, an employee must demonstrate that he or she was adversely affected by a Board authorized consolidation.

⁷ We note that the Arbitrator's decision does not address claims by individual employees for displacement allowances. As a result, we do not address concerns raised by the parties about whether the decision would affect an employee allegedly impacted by post-transaction events.