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SERVICE DATE - MAY 4, 1999

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 21510 (Sub-No. 5)

NORFOLK AND WESTERN RAILWAY COMPANY AND NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY--MERGER, ETC.

Decided: April 29, 1999

By decision served December 22, 1998, we denied a petition filed by 11 former employees (petitioners)<sup>1</sup> of the former Akron, Canton and Youngstown Railroad Company (AC&Y) to reopen this proceeding on the grounds of material error, new evidence, and substantially changed circumstances. On January 11, 1999, the former employees filed a petition for reconsideration of the December 22 decision, alleging material error. On February 1, 1999, Norfolk Southern Railway Company (NS), successor by merger to Norfolk and Western Railway Company (NW), filed a reply. We will deny the petition.

BACKGROUND

In the December 22 decision, we denied the petitioners' petition to reopen the proceeding to review a Supplemental Opinion and [Arbitration] Award issued on January 2, 1996 (Supplemental Award),<sup>2</sup> which became a final and binding decision on January 22, 1996, under 49 CFR 1115.8.<sup>3</sup>

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<sup>1</sup> The petitioners are: Jerry Kunkle, John Roman, Lawrence C. Rose, Leo H. Tressell, Denver D. Walker, John Koehl, Allen Barbour, David W. Cornell, Charles F. Johnson, Glynn Knight, and Billy K. Knight.

<sup>2</sup> The dispute precipitating the arbitration arose from NW's sale of AC&Y to the Wheeling Acquisition Corporation, which included the petitioners' entire seniority district. Approximately 3 years after NW sold AC&Y, NW required petitioners to report to work to its Cleveland Nickel Plate District, where petitioners were given new hire seniority dates rather than petitioners' established seniority dates with AC&Y. The transfer was disputed and was submitted to arbitration. An arbitral decision was issued on July 9, 1993, which the former Interstate Commerce Commission (ICC) affirmed by decision served on May 25, 1995, subject to the negotiation of an implementing agreement. The parties were unable to reach a voluntary agreement and the matter was resubmitted to arbitration, which resulted in the Supplemental Award.

<sup>3</sup> In our prior decision we pointed out that petitioners apparently recognize that their appeal of right under 49 CFR 1115.8 is time barred.

We found that, although a jury's verdict<sup>4</sup> had found that the United Transportation Union (UTU) had breached its duty of fair representation to petitioners concerning matters in the Cleveland district and awarded them damages for that breach, we could not draw any inference that would warrant reopening of this arbitration review proceeding. Additionally, we stated that petitioners' dispute is not the type that is reviewable under the standards set forth in Chicago & North Western Tptn. Co. -- Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain).

In seeking reconsideration of our prior decision, petitioners argue that, because of the jury's verdict that UTU had breached its duty to them in some respects, we must draw an inference that the arbitration proceedings that resulted in the Supplemental Award were tainted, involved error, and were unfair or partial, and therefore that we must overturn the Supplemental Award. In support, petitioners point out that UTU's activities that were considered by the jury and UTU's participation in the arbitration proceedings, including its decision not to appeal the Supplemental Award to the Board, occurred during the same time period. Petitioners argue further that the matters addressed by the jury were contract grievances that involved the same employees' rights that were extinguished by the Supplemental Award. In reply, NS does not dispute petitioners' assertion that the contract grievances were extinguished by the Supplemental Award, but states that petitioners also directly represented themselves in the arbitration proceedings that resulted in the Supplemental Award and knowingly failed to follow the procedures set forth at 49 CFR 1115.8 to appeal the award. NS points out that the district court, in dismissing petitioners' claims against NW, noted petitioners' failure to appeal the Supplemental Award to the Board and found that the petitioners had not shown that the failure to exhaust this avenue of relief was excused. Petitioners have not explained why they did not timely file an appeal to the Supplemental Award.

#### DISCUSSION AND CONCLUSIONS

The circumstance that the matters considered in the court case occurred during the time UTU was representing petitioners in the arbitration proceeding does not create an inference that the arbitration proceeding was "tainted" or that the Supplemental Award was unfair to petitioners. We affirm our previous finding that petitioners have not demonstrated that the jury's verdict shows our review of the Supplemental Award involved error or that the verdict constitutes new evidence or substantially changed circumstances. The verdict does not warrant reopening of this proceeding or excuse petitioners' failure to file an appeal to the Supplemental Award on their own behalf. Petitioners initiated the supplemental proceedings and filed their own submissions, not relying on UTU to represent them. They could have raised their objections to the Supplemental Award in a timely petition for review under 49 CFR 1115.8, but did not.

Moreover, petitioners have not addressed how the Lace Curtain standard permits review of

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<sup>4</sup> The verdict was returned on May 7, 1998, in petitioners' lawsuit against NW and UTU in John Koehl, et al. v. Norfolk & Western Ry., et al., No. 1:95CV2309 (N.D. Ohio) (Koehl v. NW).

the Supplemental Award. We affirm our previous determination that Lace Curtain bars our review of that decision. We noted in our prior decision that, although the ICC did not agree with UTU's position that the seniority of petitioners could not be integrated into their new seniority district, the ICC's decision neither ordered nor precluded the result reached in the Supplemental Award. We pointed out that we traditionally defer to the judgments of arbitrators on seniority matters and our decisions in this regard have been upheld by the courts. The Supplemental Award is not inconsistent with the ICC's decision. Petitioners do not address these findings in their petition for reconsideration and we affirm them here. Accordingly, the petition for reconsideration 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 to reconsider our decision of December 22, 1998, is denied.
2. This decision is effective on June 3, 1999.

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

Vernon A. Williams  
Secretary