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SERVICE DATE – LATE RELEASE AUGUST 14, 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: August 14, 2006

By decision served on February 28, 2006, we declined to review an arbitrator's decision in response to a petition filed by John E. Grother (petitioner), an employee of the Union Pacific Railroad Company (UP). Petitioner had sought review of an arbitration award that denied his claim for benefits under the New York Dock conditions,¹ which were imposed when the Board approved the merger of the UP and the Southern Pacific Transportation Company (SP) in 1996.² On March 20, 2006, petitioner filed a petition seeking reconsideration, to which UP replied on April 6, 2006. We will deny the petition for reconsideration.

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).

BACKGROUND

At the time of the merger, Mr. Grother worked as SP's Terminal Superintendent at Tucson, AZ. Following approval of the merger, UP changed Mr. Grother's job title, on April 16, 1997, to Senior Manager Terminal Operations (SRMTO) with the same duties, 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 responsibilities and compensation.

On May 12, 2003, nearly 6 years after his transfer, Mr. Grother submitted a letter to UP asserting that he had been adversely affected when, in May 1997, UP implemented the merger by discontinuing switching operations at its Phoenix yard and consolidating switching operations at Tucson, and subsequently transferring Mr. Grother to Houston. 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.

UP rejected Mr. Grother's claims for New York Dock benefits, asserting that Mr. Grother was not eligible to receive these benefits because he was a senior official rather than an "employee" under New York Dock. UP stated further that Mr. Grother's transfer and demotion were not caused by the merger, but were based on performance, and that Mr. Grother waited an unreasonable length of time before filing his claim.

The dispute was then submitted to arbitration.³ The decision by arbitrator Lynette A. Ross denied Mr. Grother's claim in its entirety.⁴ First, the decision determined that the nearly 6-year delay by Mr. Grother in seeking New York Dock benefits was grossly excessive and was harmful to UP, and that the explanations he 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 decision determined that the causality issue was moot. Finally, because Mr. Grother had questioned the procedures used in the arbitration proceeding, the 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.

³ The 3-member arbitration committee consisted of Mr. Grother, William E. Loomis representing UP, and arbitrator Lynette A. Ross, who was appointed Neutral/Referee Member by the National Mediation Board.

⁴ We use the terms arbitral award and decision interchangeably. For ease of reference, we refer to the decision of the neutral member because, as a practical matter, the neutral member decides the dispute. Here, Ms. Ross prepared the arbitration decision, dated December 21, 2004; Mr. Loomis signed in agreement on January 4, 2005; and Mr. Grother signed in dissent on January 6, 2005.

Petitioner appealed the arbitration decision to the Board. He disputed 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 timely because they were filed within the 6-year period during which an employee's wages may be protected if an employee qualifies for New York Dock benefits under 49 U.S.C. 11326. He argued that he did not seek New York Dock benefits in prior communications because he feared retaliation and that UP did not show that it was harmed by the delay. Mr. Grother also disagreed with the finding that he was not an employee eligible for New York Dock benefits, but rather that he should have been considered a "subordinate official." As support, he argued 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). See 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 disagreed 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. Mr. Grother also objected to the procedures used in the arbitration, contending that they were prejudicial to his interest as a "non-agreement, at will, employee."

UP responded that the issues addressed in the arbitration decision were factual determinations that are not properly subject to review by the Board here. UP asserted 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 stated 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 pointed out that the arbitrator relied on substantial record evidence, 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.

We considered petitioner's appeal under the deferential Lace Curtain standards.⁵ We found that Mr. Grother did not show that the arbitral decision was irrational or inconsistent with the factual record developed by the parties or that it contained egregious error, and that Mr. Grother did not present any justification that would warrant reviewing and overturning the arbitral decision under the Lace Curtain standards. We found that the issues relating to laches and Mr. Grother's status as a New York Dock-covered employee were factual matters that were within the purview of the arbitrator to resolve, and that the arbitrator had applied established

⁵ 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) (IBEW v. ICC).

standards to the factual record and the arbitral decision, therefore, was not irrational. We also found 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.

Reconsideration Petition. In seeking reconsideration, petitioner again objects to the arbitration process, contending that arbitration is prejudicial to non-agreement employees and violates their statutory and due process rights. Petitioner maintains that the dispute should not have been submitted to arbitration and then reviewed by the Board under the Lace Curtain standards but should either have been considered directly by the Board in the first instance or reviewed de novo after arbitration. Petitioner also asserts that labor arbitrations are not conducive to determining disputes by non-agreement employees and are prejudicial to those employees.

Petitioner further contends that the Board erred in deferring to the arbitrator's determination that he was not an employee who is entitled to New York Dock benefits, arguing that such determination was not a factual issue. Petitioner asserts that employee protection for non-agreement personnel comes from 49 U.S.C. 11326, and that the Board itself is required to determine his status as a subordinate official or employee under the RLA. Petitioner continues to assert that his position as a Terminal Superintendent and SRMTO should be considered that of a "subordinate official" under the RLA and thus that he was entitled to New York Dock benefits as an "employee."

Finally, petitioner disagrees with the Board's determination that laches is a factual issue within the purview of the arbitrator. According to petitioner, the arbitrator's laches finding is premature and should not have been considered until the compensation phase of the arbitration proceeding.⁶ He continues to argue that claims are timely if they are filed within 6 years after an employee is disadvantaged, and he disputes that UP was prejudiced or harmed by the delay.

UP responds that petitioner is raising arguments that the Board has already rejected, and that petitioner has failed to identify any material error that justifies reconsideration of the Board's decision.

⁶ Under an agreement between UP and Mr. Grother, the arbitration proceeding was to be handled in two phases. In the first phase, the arbitrator would determine whether "New York Dock is applicable to Grother and whether he may be entitled to some compensation and benefits." If Mr. Grother were determined to have been eligible to receive protective benefits, then, in the second phase, the arbitrator would consider the amount of compensation Mr. Grother would be due.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3(b), a petition for reconsideration must show that the prior action will be affected materially because of changed circumstances or new evidence or that the prior action involves material error. Petitioner has not made the required showing to warrant reconsideration of our earlier decision.⁷

We disagree with petitioner's assertion that, when the claimant is a non-agreement employee, the Board should either resolve New York Dock claims in the first instance without arbitration or review an arbitral decision under a de novo standard. When the claimant is a non-agreement employee, New York Dock generally prescribes arbitration as the means for resolving disputes involving New York Dock benefits. Lace Curtain, 3 I.C.C.2d at 735, specifically provides that mandatory arbitration is appropriate to resolve issues such as whether an individual seeking protection was an "employee" covered by labor protection and whether his or her employment status was affected by a merger. Moreover, mandatory arbitration is consistent with the long-held view that disputes arising out of labor protection conditions are to be resolved by those who are most familiar with the complexities of labor law and the peculiar problems associated with railroad employees. See Leavens v. Burlington Northern, 348 I.C.C. 962, 975 (1977); Cooper v. Penn Central Transportation Co., 342 I.C.C. 459, 463 (1972). As particularly pertinent here, disputes involving non-agreement employees who assert that they were "employees" for purposes of employee protection conditions have been referred to arbitration. See, e.g., Haskell H. Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 67 (1981); L.A. Rowlett, Jr. v. Missouri Pacific Railroad Company, Finance Docket No. 30853 (ICC served Aug. 19, 1987). Finally, the agency's decisions mandating arbitration as the means for resolving individual disputes under its imposed labor protection conditions and asserting jurisdiction to review arbitral awards under the deferential Lace Curtain standards have long been sanctioned by the courts. See, e.g., IBEW v. ICC, *supra*; Brotherhood of Maintenance of Way Emp. v. ICC, 920 F.2d 40, 44-45 (D.C. Cir. 1990); Railway Labor Executives' Ass'n. v. United States, 987 F.2d 806, 811-12 (D.C. Cir. 1993); and United Transp. Union v. ICC, 43 F.3d 697, 700 (D.C. Cir. 1995).

⁷ In the petition for reconsideration, petitioner criticized our decision for not mentioning that the arbitration was before a 3-member arbitration committee or that the decision (with Mr. Grother shown as dissenting) prepared by Arbitrator Ross became effective on January 4, 2006, per agreement of the parties. Petitioner raised similar arguments in a Motion to Strike portions of UP's reply statement filed on April 14, 2006, to which UP replied on April 27, 2006. Petitioner has failed to show that these or other statements that he characterizes as "important missing or misstatements of the arbitral process" are in any way material to this appeal. And he has failed to show that he would be prejudiced by our consideration of the materials he seeks to have stricken. Accordingly, the motion to strike will be denied.

Indeed, Arbitrator Ross cited several arbitration decisions as precedent in determining whether Mr. Grother was an “employee” who was eligible for New York Dock benefits.⁸ Each of these arbitral decisions involved claims by non-agreement employees who, like Mr. Grother, were asserting that they were eligible to receive New York Dock benefits. In each of these decisions, the arbitrator reviewed the factual record to determine if the individual claimant qualified as an “employee” under New York Dock. The Board found no egregious error in Arbitrator Ross’s determination to follow these precedents in reviewing the factual record here and determining that Mr. Grother had not shown that he was an “employee” who was entitled to New York Dock protections. And petitioner has failed to convince us that we materially erred in according deference to the arbitrator’s findings regarding the eligibility of Mr. Grother for New York Dock benefits.

Petitioner would have us change this long-standing method that we employ for resolving claims by non-agreement employees. He asserts that he should have been able to bring his claim directly to the Board. Petitioner argues that the arbitration procedures in New York Dock are prejudicial in that the procedures are more appropriate for disputes between a carrier and a labor union. We addressed this assertion in the February 28, 2006 decision and found that petitioner did not show that arbitration or the specific procedures used in this arbitration proceeding were prejudicial to non-agreement employees. The petition for reconsideration raises nothing new that would warrant reconsidering this matter. None of the cases cited by petitioner support his argument that direct review is either customary or warranted to address factual disputes involving individual employees. Moreover, as we noted above, there is substantial precedent confirming the use of arbitration for resolving claims of non-agreement employees seeking New York Dock benefits, as is the case with Mr. Grother. While petitioner may disagree with Arbitrator Ross’s decision denying his claims for New York Dock benefits, he has not shown that the procedures used in the arbitration proceeding were unfair or prejudicial to his interests. Nor has petitioner provided any other plausible reason for changing the method for handling claims under New York Dock for non-agreement employees.

⁸ Transportation Communications International Union v. Burlington Northern Santa Fe Railway Company (Suntrup, 2004); B.W. Isabell and the Transportation and Communications International Union v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth, 1998); G.L. Dixon and the Transportation Communications and International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth, 1998); Ross F. Povirk and the Transportation and Communications International Union-ASD v. Union Pacific Railroad Company Southern Pacific Railroad Company (Stallworth, 1998); James V. Nekich v. Burlington Northern Santa Fe Railroad (Ver Ploeg, 1996); Gerald Thomas and Brotherhood of Locomotive Engineers v. Union Pacific Railroad Company (Stallworth, 1988); John F. Adams, Joseph Dominick and James Williamson v. Delaware & Hudson Railway Company (O’Brien, 1987); and B.J. Maeser, T.P. Murphy, E.M. Sengheiser and K.W. Shupp v. Union Pacific Railroad Co., Missouri Pacific Railroad Co. (Seidenberg, 1987).

Similarly, we find no merit to petitioner's still unsupported assertions that the RLA requires that the Board itself determine either in the first instance or de novo a claimant's status as an employee, subordinate official, or senior official for New York Dock purposes.⁹ The fact that the agency has itself, without arbitration, classified groups of employees for RLA purposes is not controlling here. Under long-standing precedent, determinations about the status of an individual employee for New York Dock eligibility purposes have been handled by arbitrators using a case-by-case approach to analyze the factual record. The Board found no egregious error in the arbitrator's use of that approach here, and petitioner has failed to show material error by the Board regarding the resolution of this issue.

Finally, we disagree with petitioner's assertion that the arbitrator addressed the laches issue prematurely or that her determination was not factual in nature. The arbitrator's handling of the laches issue is consistent with the agreement between Mr. Grother and UP governing the phasing of this arbitration proceeding and with arbitral precedent that treats laches as a threshold issue that is properly addressed in the initial phase of an arbitration proceeding.¹⁰ Petitioner offers no support for his argument that the number of years during which a successful New York Dock claimant's wages may be protected has some relevance to the laches determination, which rests on factors such as whether the respondent had enough notice to preserve evidence necessary for its defense and to mitigate its liability. As we found in our February 28, 2006 decision, Arbitrator Ross's ruling that Mr. Grother's claim was barred by laches was supported by the evidentiary record submitted by the parties and thus was not egregious error. The petition for reconsideration goes on to raise the same factual issues that we already considered in our

⁹ Section 1, Fifth of RLA, (45 U.S.C 151) defines the term "employee" as including "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders"

¹⁰ United Transportation Union v. Union Pacific Railroad Company (LaRocco, 1993); Transportation-Communications International Union v. Union Pacific Railroad Company (Rehmus, 1992); Southern Railway Company v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Muessig, 1990); Transportation-Communications International Union v. Union Pacific Railroad Company (LaRocco, 1990); Certain Designated Claimants v. Union Pacific Railroad Company (Seidenberg, 1987). Mr. Grother attempts to distinguish these arbitration decisions on their facts from his situation but fails to convince us that we should review and overturn the findings made in the arbitration decision presented here.

February 28, 2006 decision, and fails to show material error in our deference to the arbitrator on this matter or present any other justification to warrant reconsidering the issue of laches.

Accordingly, petitioner has failed to show that reconsideration of our February 28, 2006 decision is warranted. The petition for reconsideration will be denied.

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

It is ordered:

1. The motion to strike is denied.
2. The petition for reconsideration is denied.
3. This decision is effective on its service date.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary