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SERVICE DATE – JANUARY 21, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 43)

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: January 19, 2005

We are denying the petition filed by the Union Pacific Railroad Company (UP) seeking to late-file an appeal of an arbitration award.

BACKGROUND

On or about March 12, 2004, an arbitrator issued a decision in a New York Dock¹ arbitration proceeding concerning UP's attempt to implement labor operational economies by commencing "interdivisional service" in Arkansas and Tennessee. According to UP, those economies were contemplated under the Board's 1996 decision approving the merger transaction in 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).

On April 26, 2004, after considering UP's objections to the award, the arbitrator notified the parties that the decision would stand as issued, and the carrier received a letter to that effect on

¹ The underlying transactions here were approved subject to the standard employee protective conditions established in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). Under New York Dock, labor issues in merger proceedings that cannot be resolved by the parties may be resolved by arbitration, subject to appeal to the Board.

April 29, 2004. On May 4, 2004, a UP officer discussed the arbitrator's decision with in-house counsel, who then retained an outside counsel to pursue an appeal, which was due on May 17, 2004.

On or about July 19, 2004, a partner in the outside counsel's law firm advised UP that the attorney handling the matter had failed to seek an extension of time to file an appeal with the Board and had taken no action to pursue an appeal. After spending a week attempting to locate the outside counsel, the carrier finally reached the attorney and learned that the attorney had been suffering from medical problems, which caused the attorney to be unable to pursue an appeal. The carrier then retained other outside counsel for the appeal.

On August 2, 2004, UP filed a motion for an extension of time, until August 31, 2004, to file an appeal of the arbitrator's decision, arguing that the outside counsel's medical problems were beyond the carrier's control and citing precedents where extensions were granted.

On August 11, 2004, the Brotherhood of Locomotive Engineers and Trainmen (BLET) filed a reply in opposition to UP's motion, responding that: (1) the carrier became aware of the award within a few days via the carrier-member of the panel;² (2) the carrier has a large in-house legal department that could have ensured that a timely appeal was filed; (3) the carrier provided no evidence that retained counsel's "alleged medical problem" was sufficient to prevent the carrier from contacting that counsel or counsel's law firm to check on the status of the appeal before its deadline expired; and (4) the carrier provided no evidence that it attempted to contact retained counsel before the expiration of the deadline. BLET cited precedents where extensions were denied.

On August 31, 2004, the carrier filed a second request for an extension of time, requesting a new deadline of September 20, 2004.

On September 15, 2004, BLET filed a reply in opposition to the carrier's second request for an extension. BLET reiterated its prior arguments in opposition to the carrier's first request for an extension and added the arguments that: (1) the carrier's current legal counsel could have filed an appeal before August 31, 2004, because current counsel must have had the file at least before August 2, 2004, when the original request for extension was filed; and (2) the carrier's request for an extension in this proceeding is inconsistent with its opposition to acceptance of an appeal filed only 1 day after the due date by the Brotherhood of Locomotive Engineers in another proceeding involving the same merger approval, docketed as STB Finance Docket No. 32760 (Sub-No. 40).

On September 20, 2004, the carrier filed its appeal from the award and, on September 21, 2004, the carrier filed a motion to exceed the page limit for such appeals. On September 28, 2004,

² The carrier does not dispute that it was aware of the award.

BLET filed a motion for an extension of time to file a reply to the carrier's appeal, and, on November 1, 2004, filed its reply and a motion to exceed the page limit.

DISCUSSION AND CONCLUSION

An appeal of an arbitration decision must be filed within 20 days of its issuance, unless the Board grants an extension. 49 CFR 1115.8. A request for extension must be filed no less than 10 days before the appeal is due and must be justified by good cause. 49 CFR 1104.7(b). The arbitral decision here issued with finality on April 26, 2004, when the arbitrator notified the parties that the decision would stand, thereby assuring the parties that any appeal would be from a decision that would not change while the appeal was being heard. Thus, under 49 CFR 1115.8 and 1104.7(b), appeals of the arbitrator's decision were due by May 17, 2004, and requests for extension were due on May 7, 2004. Because the deadline for requesting extensions of time to file appeals expired on May 7, 2004 and UP did not file until August 2, 2004, we will treat UP's motion for extension as a request for waiver of this deadline and will determine whether the carrier has shown good cause for waiver and extension.

In determining whether good cause has been shown, the purpose of the time limits must be taken into account. Their purpose is the efficient conduct of agency business so as to minimize the cost of delay on the parties and to bring finality to arbitration awards. Our goal is to administer deadline requirements impartially so as to provide certainty and predictability to all parties. In light of this purpose and goal, a party proposing waiver and extension has the burden of explaining why good cause exists.

The carrier here has not shown good cause for waiver and extension. The carrier is a sophisticated party with a large legal department. As the deadline approached, UP's legal department should have known that nobody from the outside counsel's firm had been contacting key UP personnel about statements, facts, etc., that would have to be part of an appeal. The carrier is faulted for not overseeing its pending litigation to ensure that the important May 17, 2004 filing deadline would be met or an extension timely requested to assure that the railroad's petition would be heard. The carrier discovered the missed deadline only when outside counsel's law firm (apparently on its own initiative) informed the carrier on July 19, 2004, that the deadline had been missed. Even then, it took the carrier until August 2, 2004, merely to request an extension.

Moreover, while UP argues otherwise, precedent does not support the carrier's request for an extension. In cases where the Board has granted an extension, the requesting party has been unsophisticated and/or a timely request for extension was filed. In Consolidated Rail Corporation – Acquisition of Control and Merger – Pittsburgh, Chartiers & Youghioghney Railway Company, STB Finance Docket No. 32419 (Sub-No. 1) (STB decisions served Dec. 31, 1998, and Feb. 3, 1999)

(Conrail–Acq.–PC&Y), the Board granted an untimely extension request filed one day late by a lone employee who needed time to retain counsel. In Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp., STB Finance Docket No. 32760 (Sub-No. 35) (STB decisions served Oct. 22, 1999, and Dec. 14, 1999) (UP/SP), the Board granted untimely extension requests filed by a lone employee on the appeal’s due date. In Brotherhood of Maintenance of Way Employees v. Union Pacific Railroad Company (Arbitration Review), Finance Docket No. 30964 (Sub-No. 1) (ICC served Mar. 27, 1991) (BMWE v. UP), the Interstate Commerce Commission granted an untimely extension request to a lone employee who was not served with the arbitrator’s decision for 29 days after its issuance and who was erroneously told by union counsel that he had 45 days to appeal. And in MidSouth Rail Corporation – Control Exemption – MidSouth Rail Corporation and MidLouisiana Rail Corporation, Finance Docket No. 31063 (Sub-No. 1), et al. (ICC served Dec. 30, 1991) (MidSouth), the Board granted an untimely extension request to a lone employee who sought review without benefit of counsel.

In arbitration proceedings involving circumstances similar to those present here, the Board consistently has denied extension requests. For example, in a recent arbitration appeal involving UP, the Board denied an extension requested by a union to file an appeal where the interval between notice of the decision and the filing of an untimely request for extension was shorter (1 month 4 days or, at most, about 2 months) than the interval in question here. Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp., STB Finance Docket No. 32760 (Sub-No. 39) (STB served Dec. 8, 2000). Similarly, in Union Pacific Corp. – Control and Merger – Southern Pacific Rail Corp., STB Finance Docket No. 32760 (Sub-No. 34) (STB decisions served July 8, 1999, and May 9, 2001), union employees’ request to late-file an appeal was denied where the request was filed more than 4 months late and sufficient justification was not provided for the delay.

The Board has granted extension requests in instances where an unsophisticated party, such as a lone employee, requested a short extension soon after the date for filing an extension. Conrail–Acq.–PC&Y, UP/SP, and MidSouth. The Board has also granted an extension where the party learned of the arbitrator’s decision long after that decision was issued. BMWE v. UP. No similar circumstances to these cases exist here because UP is a sophisticated party that regularly participates in these arbitrations and UP’s request came nearly 3 months after the deadline to request an extension.

Given the facts presented here and Board precedent, we conclude that, while the situation is unfortunate, under Board precedent, UP has failed to show good cause for waiver and extension. Because we are denying the carrier’s request to late-file its appeal, we will not consider either the appeal itself or related motions.

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

It is ordered:

1. UP's request to late-file an appeal of an arbitration award is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary