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SERVICE DATE – LATE RELEASE JUNE 6, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34000

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND
WC MERGER SUB, INC.

– CONTROL –

WISCONSIN CENTRAL TRANSPORTATION CORPORATION, WISCONSIN CENTRAL,
LTD., FOX VALLEY & WESTERN LTD., SAULT STE. MARIE BRIDGE COMPANY, AND
WISCONSIN CHICAGO LINK LTD.

PETITION FOR INJUNCTIVE RELIEF

Decided: June 6, 2008

The Board is denying the petition of the American Train Dispatchers Association (ATDA) to enjoin the Canadian National Railway Company (CN) from relocating train dispatching work and employees of the Wisconsin Central, Ltd. (WC).

BACKGROUND

In 2001, the Surface Transportation Board approved the acquisition of control of the WC by CN,¹ subject to the agency's standard employee protective conditions established in New York Dock.²

In October 2007, CN orally informed WC train dispatching employees at Stevens Point, WI, that the carrier intended to relocate the train dispatching function from offices of WC at Stevens Point, WI, to a train dispatching office located on the property of CN subsidiary Illinois

¹ Canadian National, et al.–Control–Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890 (2001) (CN–WC).

² 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). The New York Dock conditions were adopted to facilitate the implementation of railroad mergers and to provide benefits to affected employees.

Central Railroad Company (IC) at Homewood, IL. The Homewood location also houses dispatching operations for IC, which CN acquired in 1999.³

In February 2008, CN provided written notice of its relocation plan and it invited WC dispatchers at Stevens Point to relocate to Homewood. CN offered the affected employees, all of whom were then non-union employees, two option packages in association with the move. Package 1 would relocate employees pursuant to a CN document entitled Relocation Policy for U.S. Management Employees. Package 2 provided for reimbursement of out-of-pocket rental housing costs up to \$1,300 per month for up to 3 years, as well as a “special allowance” of up to \$6,500 paid over a 2.5-year period. Employees who declined both options would be deemed to have resigned as of the day of the relocation. CN’s written offer indicated that CN did not promise continued employment in the future for those employees choosing either Package 1 or Package 2. The deadline by which employees were to decide which package (if either) they would accept was February 28, 2008. In its pleading filed on June 3, 2008, WC states that relocation arrangements were worked out with the affected WC dispatchers by the end of February 2008.

On May 22, 2008, the National Mediation Board (NMB) certified ATDA as these employees’ collective bargaining representative. The NMB had begun the certification process on March 13, 2008, at ATDA’s request.

By fax sent on May 21, 2008, ATDA notified CN that it was now the representative for the affected dispatchers. ATDA requested discussions regarding an implementing agreement under New York Dock and asserted that CN could not, pursuant to New York Dock, lawfully proceed with the relocation until such an agreement has been reached.

By letter dated May 28, CN responded with an assertion that New York Dock did not apply to this relocation. CN argued that the relocation is not a coordination or consolidation of work under the 2001 CN-WC control transaction because the WC and IC dispatchers will continue to operate independently. Alternatively, CN argued that the benefits offered to and accepted by the dispatchers complied with, and indeed surpassed, the requirements of New York Dock. CN also responded that a delay would not preserve the status quo because affected employees had already accepted relocation allowances and the carrier had already incurred substantial planning and implementation expense.

By petition filed on May 29, 2008, ATDA asks the Board to enjoin CN from proceeding with the relocation until an implementing agreement in compliance with New York Dock has been reached with ATDA. ATDA asserts that New York Dock applies because CN intends to consolidate the WC and IC workforces. According to ATDA, the affected dispatchers will be on an IC property “working side-by-side” with IC employees and the relocation would not be occurring but for CN’s acquisition of WC. ATDA further asserts that CN’s “take it or leave it” options are not New York Dock implementing agreements because they did not include income

³ Canadian National, et al.–Control–Illinois Central, et al., 4 S.T.B. 122 (1999).

protection in the form of displacement, dismissal, and separation allowances and did not notify employees that they were eligible for protection under New York Dock.

On June 3, 2008, WC filed a reply in opposition to ATDA's request for injunctive relief. WC argues that the relocation is not subject to New York Dock because it is not being undertaken to implement the consolidation of CN and WC workforces. According to WC, there is no such consolidation because there is no integration of work here, involving such matters as the selection of forces and the merger of seniority rosters. Rather, WC states that WC dispatchers and IC dispatchers will continue to operate independently of each other and with their own equipment. WC argues that the relocation is a routine action that it could have taken even absent the consolidation. Further, WC states that the relocation cannot be considered a consolidation of workforces merely because the two sets of employees would be co-located in an IC building to which WC would not have had access but for CN's acquisition of control over WC. WC emphasizes that, for New York Dock to apply to the relocation, ATDA must show that the relocation was causally related to CN's acquisition of control over WC. According to WC, ATDA must show that the relocation could not have been made by WC absent the CN-WC transaction.

On June 4, 2008, ATDA filed a reply to WC's reply in opposition to ATDA's request for injunctive relief. ATDA addresses WC's arguments and further argues its position. In response, on June 5, 2008, WC filed a motion to strike the ATDA filing as a prohibited reply to a reply. In the alternative, WC seeks permission to file a further reply. To provide a more complete record, we will accept both of these replies.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 721(b), the Board may issue an appropriate order to prevent irreparable harm. In determining whether to grant injunctive relief, the agency applies the traditional stay criteria, by determining whether: (1) there is a strong likelihood that the movant will prevail on the merits; (2) movant will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay normally carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). Here, we will deny injunctive relief because ATDA has failed to show that such relief is warranted.

It is well established that disputes over whether employment changes are being taken to implement a transaction subject to New York Dock are to be resolved through arbitration,

subject to appeal to the Board.⁴ And it has been the Board's policy not to intervene in matters subject to arbitration before they have been considered by an arbitrator.⁵ Thus, the Board has denied requests to enjoin employment changes before arbitrators have had an opportunity to rule on the issue of whether New York Dock applies.⁶ In this case there is no reason why we should not similarly leave that issue for determination by an arbitrator in the first instance, and we take no position on the merits of that issue.

Moreover, ATDA has not shown that the WC dispatchers would suffer irreparable harm absent injunctive relief. In arguing that we should enjoin the move to prevent irreparable harm, ATDA points out that, under New York Dock, an implementing agreement is to be reached before employees are required to move. But even if we were to enjoin the relocation pending arbitration and an arbitrator were to rule that New York Dock benefits were required, the dispatchers would still be required to relocate in order to preserve their jobs and benefits under New York Dock.⁷ And, if ATDA were to take the matter to arbitration and obtain a favorable ruling, the dispatchers could be made whole financially if the arbitrator were to find that the benefits package offered by CN was less generous than the moving benefits provided under New York Dock.

For the foregoing reasons, we find that the matters brought to us must first be considered in arbitration and that ATDA has not shown that injunctive relief pending an arbitral ruling is warranted. Accordingly, ATDA's petition for injunctive relief will be denied, without prejudice to ATDA's ability to pursue arbitration as discussed in this decision.

⁴ See Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987), *aff'd sub nom. IBEW v. ICC*, 826 F.2d 330 (D.C. Cir. 1988).

⁵ In Walsh v. ICC, 723 F.2d 570 (7th Cir. 1983), the court upheld the agency's refusal to hear a dispute prior to arbitration.

⁶ See Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company — Petition for Emergency Cease and Desist Order, STB Finance Docket No. 33311 (STB served Dec. 4, 1997); Burlington Northern Santa Fe Railway Company v. American Train Dispatchers Department Brotherhood of Locomotive Engineers, STB Finance Docket No. 33429 (STB served July 18, 1997); Illinois Central Corporation and Illinois Central Railroad Company — Control — CCP Holdings, Inc., Chicago, Central & Pacific Railroad Company and Cedar River Railroad Company, STB Finance Docket No. 32858 (STB served June 2, 1998); 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, STB Finance Docket No. 32760 (Sub-No. 44) (STB served July 27, 2005).

⁷ See Norfolk & W. Ry. Co. and New York, C & St. L. R. Co. Merger, 9 I.C.C.2d 1021 (1993).

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

It is ordered:

1. ATDA's petition for injunctive relief is denied, without prejudice to ATDA's ability to pursue arbitration as discussed in this decision.
2. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary