

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760, SUB-FILE 42

IN THE MATTER OF ARBITRATION BETWEEN UNION PACIFIC RAILROAD
COMPANY AND JOHN E. GROTHER,
NEW YORK DOCK ARBITRATION

(Arbitration Review)

CARRIER'S RESPONSE TO PETITION
FOR RECONSIDERATION



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On February 27, 2006, this Board issued its decision declining to review an award issued by Arbitrator Lynette Ross that denied John Grother's claim for displacement benefits under New York Dock Ry. - Control - Brooklyn E. Dist., 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock"). Specifically, the Board concluded that Arbitrator Ross's determinations that Grother unreasonably delayed in pursuing his claim for benefits and that he was not an employee eligible for benefits were not egregious under the Lace Curtain standard established in Chicago & N.W. Transp. Co. - Abandonment, 3 I.C.C.2d 729, 735 (1987), and affirmed by the D.C. Circuit in International Bhd. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988). Board Decision at 4-8. Having made these findings, the Board did not reach the issue of causation. Id. at 8.

Grother now seeks a second bite of the apple by making the same arguments the Board rejected in its February 27 decision in the form of a Petition for Reconsideration. First, Grother re-argues that the Board should review Arbitrator Ross' award because the entire arbitral process for resolving New York Dock claims is prejudicial and violative of Grother's due process rights.

In place of its court-approved Lace Curtain standard of review, Grother suggests that New York Dock claims involving non-agreement employees be decided directly by the Board, and/or that arbitration awards be reviewed de novo. Second, Grother contends that the Board should review and overturn the determinations made by Arbitrator Ross in this case (i.e., whether Grother was an employee entitled to New York Dock benefits and whether his claim was barred by the doctrine of laches) under this de novo standard. Finally, Grother suggests that, if Arbitrator Ross' factual determinations are overturned by the Board, he is entitled to New York Dock benefits because no dispute exists that he was displaced as a direct result of the UP/SP merger.

As set forth below, these same arguments were made by Grother in his Petition for Review, and rejected by the Board in its February 27 decision. Moreover, Grother's contention that the issue of causation between the UP/SP merger and his transfer to Texas is conceded by UP, or that this Board concluded that a causal link exists, completely misstates the record. This Board's February 27 decision clearly found it unnecessary to reach the issue of causation, instead disposing of Grother's claims on the basis of laches and the fact that he is not an employee eligible for benefits under New York Dock. Board Decision, at 8. Grother's assertion that the issue of causation was somehow decided in his favor is simply wrong.

In the end, Grother's Petition for Reconsideration is nothing more than a second attempt to make the same arguments that the Board has already rejected. Grother fails to identify any material error that justifies reconsideration of the Board's decision and his petition should therefore be denied.

ARGUMENT

Grother moves for reconsideration under 49 C.F.R. § 1115.3(b), which permits reconsideration only upon a showing that (1) the prior action will be "affected materially"

because of “new evidence or changed circumstances” or (2) the prior action involves “material error.” DHX, Inc. Matson Navigation Co. and Sea-Land Serv., Inc., STB Docket No. WCC-105 (reported at 2005 WL 1389356, at *2). The decision whether to grant a petition for reconsideration is vested with the Board and is not reviewable. I.C.C. v. Brotherhood of Locomotive Eng’rs, 482 U.S. 270, 280 (1987) (“where a party petitions an agency for reconsideration on the ground of ‘material error’ . . . an order which merely denies rehearing of . . . [the prior] order is not itself reviewable”); Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246, 261 (3rd Cir. 2001).

Grother first argues that the Board committed material error when it refused to abandon the procedures adopted by the Board and approved by the courts for resolving New York Dock disputes, including the delegation of such disputes to arbitration and use of Lace Curtain review. Board Decision, at 8-9. Grother’s attempt to challenge the entire arbitration process used by the Board under New York Dock is easily rejected given the courts’ unanimous approval of the Board’s use of arbitration to resolve labor protection disputes, its assertion of its jurisdiction to review such arbitral awards, and its Lace Curtain standards of review. Brotherhood of Maint. of Way Employees v. I.C.C., 920 F.2d 40, 45 (D.C. Cir. 1990); International Bhd. of Elec. Workers v. I.C.C., 862 F.2d 330, 335-38 (D.C. Cir. 1988); Railway Labor Executives’ Ass’n v. United States, 987 F.2d 806, 811-12 (D.C. Cir. 1993); and United Transp. Union v. I.C.C., 43 F.3d 697, 700 (D.C. Cir. 1995). Indeed, arbitration has been the method of resolving claims under New York Dock since the ICC promulgated those conditions in 1979.

Grother next argues that the Board committed material error by refusing to review the Arbitrator’s determinations that: (1) his claim was barred by the doctrine of laches; and (2) he was not an employee eligible for benefits under New York Dock. Specifically, Grother suggests

that these determinations were not “factual determinations” and thus not subject to Lace Curtain review. As addressed by Union Pacific in its Response to Petitioner’s Appeal, and as the Board held, Grother’s arguments are inconsistent with Board precedent that recognizes the factual nature of these determinations. Grand T.W.R.R. Co. - Merger - Detroit & Toledo Shore Line R.R. Co. (Arbitration Review), Finance Docket No. 28676 (Sub-No. 2) (Feb. 26, 1996) (reported at 1996 WL 77881) (laches determination unreviewable under Lace Curtain); Rowett v. Missouri Pac. R.R. Co., Finance Docket No. 30853 (July 17, 1987) (reported at 1987 WL 98980, at *3) (determination that claimant was not an “employee” eligible for labor protection subject to Lace Curtain review).

Indeed, it is difficult to imagine determinations that are more factual in nature. To decide the laches issue, the Arbitrator looked to the specific facts regarding the timing of Grother’s claim, his excuse in waiting six years to pursue benefits, and the prejudice that befell UP as a result. To decide the employee issue, the Arbitrator looked to the specific duties Grother performed as the top UP employee in Tucson, compared those to the duties typically performed by railroad officials, and concluded that Grother’s specific duties made him an official outside the scope of unionization. Grother’s suggestion that these were not factual determinations is flatly untrue.

Here, the Board properly applied its Lace Curtain standard of review to Arbitrator Ross’ award and determined that her determinations were not wholly baseless and completely without reason. Union Pacific’s Response to Petitioner’s Appeal, at 13-27. Rather, as the Board properly concluded, they were factual determinations based on a reasoned assessment of the evidence, which for the past 20 years have been vested with arbitrators and subject to a limited Board review. Grother now wants the Board to scrap this long-standing practice and decide New

York Dock claims directly or apply a de novo standard of review to New York Dock arbitrations.

Grother's invitation to scrap these procedures because he lost an arbitration should be rejected.

For these reasons, and as set forth in UP's Response to Petitioner's Appeal, UP respectfully requests that Petitioner's Motion for Reconsideration be DENIED.¹

Respectfully submitted,

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¹ Several arguments made by Grother simply do not merit any response. For example, Grother argues that issues such as laches and whether he was an employee entitled to New York Dock benefits should not be subject to the "egregious whim of a very inexperienced neutral arbitration member," a statement that is insulting to the neutral Arbitrator in this case. Similarly, Grother complains that the Board erred in its understanding of the arbitration process and the matters subject to arbitration. These arguments are absurd; UP cannot begin to understand what Grother is saying that the Board does not understand about the arbitration process under its own New York Dock Conditions.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served, via United States mail, first class postage prepaid, this 5th day of April 2006 on:

Gordon P. MacDougall
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