STB FINANCE DOCKET NO. 28905 (SUB-NO. 28)

CSX CORPORATION--CONTROL--
CHESSIE SYSTEM, INC. AND SEABOARD COAST
LINE INDUSTRIES, INC.

(ARBITRATION REVIEW)

Decided August 21, 1997

The Board affirms the decision by an arbitrator holding that, absent a provision in their collective bargaining agreement that would permit involuntary transfer, dismissed employees do not forfeit their dismissal allowances if they refuse to accept a recall to work that would require them to relocate to a location that would require a change of residence.

BY THE BOARD:

CSX Transportation, Inc. (CSXT) has petitioned for review of an arbitration decision issued on July 11, 1996, by an arbitration panel chaired by neutral member William E. Fredenberger, Jr. We deny the appeal on its merits.

BACKGROUND

On November 17, 1995, CSXT posted a notice addressed to all clerical employees on former Chesapeake & Ohio Railway Company (C&O) lines. The notice informed them of clerical personnel shortages at certain locations and advised them of an anticipated surplus of furloughed clerical employees at other locations. The notice also stated that, under Rule 6(d) of the C&O Clerical Agreement, employees had the right to fill vacancies in seniority districts other than their current district. The employees were told that furloughed clerical employees were expected to apply for such vacant positions and that their

protective benefits under *New York Dock*[1] would be terminated if they failed to accept an available position. On the same day, CSXT sent letters to specific furloughed C&O clerical workers asserting that they had an obligation to apply for the vacant positions.

On December 13, 1995, CSXT notified C.L. Ebrens, a furloughed clerical employee receiving a dismissal allowance under *New York Dock*, that a vacancy existed in Russell, KY, and that he would forfeit his dismissal allowance if he failed to submit a bid for that position. Ebrens, who resided in Ludlow, KY, was also informed that he would receive relocation benefits under *New York Dock* in the event that his bid was accepted and he had to change his residence. Ebrens bid for the position under protest and was awarded it based on his seniority.

The Transportation Communications International Union (TCU) protested CSXT's position that furloughed employees such as Ebrens could lose their *New York Dock* dismissal allowances if they refused to return to duty at a different location. TCU and CSXT could not resolve their dispute, and the issue was taken to arbitration under Article I, section 11 of *New York Dock*, 360 I.C.C. at 87. William F. Fredenburger, Jr. was selected as the neutral member of the arbitration panel.

On July 11, 1996, the Fredenburger Panel (Carrier Member Comiskey dissenting) issued a decision in favor of TCU.[2] The panel held that the issue was governed by the decision of the ICC reviewing the decision of an arbitration panel (R.E. Dennis, neutral member) in *CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 25) (ICC served January 11, 1994) (*Dennis*).[3] The Fredenburger Panel held that furloughed employees may not be deprived of their *New York Dock* dismissal allowances for failure to return to work in a different seniority district. The panel reasoned that the provision of the collective bargaining agreement (CBA) allowing cross-district relocation (Rule 6(d) of the C&O Clerical Agreement) did not impose a *duty* to relocate, citing the following language at page 4 of *Dennis*:

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[1] The Interstate Commerce Commission (ICC) had imposed the benefits set out in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), to provide employee protection under former 49 U.S.C. 11347 [now 49 U.S.C. 11326].

[2] The Fredenburger Panel's decision is reproduced in CSXT's petition and in TCU's reply.

[3] The ICC's decision in *Dennis* is reproduced as part of CSXT Exh. EE in Appendix Volume I of the petition for review.

Even if CSXT is correct, it is apparent that the 5-Party Agreement [a January 1, 1991 agreement that allowed relocation across seniority districts] was a voluntary agreement designed to benefit both CSXT in relocating its work force across seniority districts and also clerical employees who elected to move from their present positions to jobs available on other roads. That it was not intended to require them to move is evidenced by the opening words of the agreement, which state that it intended "to give clerical employees * * * an opportunity to fill new positions and vacancies * * *." No mention is made there of a corresponding duty to do so. Moreover, to induce employees to make that election, it offered substantial financial incentives to successful applicants, and it was entirely separate from the implementing agreements under which claimants receive their *New York Dock* benefits.[9] *New York Dock* requires the exercise of seniority rights under the terms of a protected employee's working agreement. As required by Article I, section 5 of *New York Dock*, claimants have fully exercised their seniority under the applicable working agreement. CSXT may not construct an additional barrier by turning the strictly voluntary 5-Party Agreement into a mandatory working agreement governed by *New York Dock* terms and conditions. [Text of footnote 9 omitted.]

By petition filed September 3, 1996, under 49 CFR 1115.8, CSXT requests review of the panel's July 11, 1996 decision. CSXT accompanied this filing with a separately filed motion for leave to exceed the 30-page limit prescribed in 49 CFR 1115.2(d).

On October 23, 1996, TCU filed a reply in opposition to CSXT's petition. TCU accompanied its reply with a separately filed motion for leave to exceed the 30-page limit prescribed in 49 CFR 1115.2(d).

On November 12, 1996, CSXT filed a motion for leave to file a reply to TCU's October 23, 1996 reply. CSXT also tendered the reply it sought to file.

On November 25, 1996, TCU filed a motion to strike CSXT's reply to its reply, arguing that replies to replies are not permitted under 49 CFR 1104.13(c). Two days later, TCU filed a reply to CSXT's reply to its reply, for consideration by the Board in the event that CSXT's pleading is accepted.

PRELIMINARY MATTERS

We are granting the motions for leave to exceed the 30-page limit prescribed in 49 CFR 1115.2(d) and 1115.8. The material submitted by the parties will assist us in reaching a decision.

We are also granting TCU's motion to strike CSXT's November 12, 1996 reply to TCU's reply, except for a portion of the CSXT pleading that rebuts extra-record material submitted by TCU. Under 49 CFR 1104.13(c), replies to replies are not permitted. While we may allow additional pleading for good cause shown, CSXT has not shown good cause. CSXT did not submit newly discovered evidence or precedent arising after the submission of its appeal.

CSXT expresses a desire for a "more complete discussion of the issues raised in TCU's reply." But this is merely an attempt to have the last word in pleading, an advantage that is not granted to appellants in labor arbitration appeals. TCU, however, submitted a declaration of Patrick Murphy that was not a part of the record before the arbitrator. Procedural due process requires that we allow CSXT to rebut that declaration. Accordingly, we will admit the declaration of Mr. Richard P. Byers and the supporting text at point 5 on pages 9-10 of CSXT's pleading.

Because we are not admitting CSXT's reply to a reply (with the exception noted), we will not consider TCU's response to that pleading.

ARGUMENTS OF THE PARTIES

Both parties agree that the CBA allows, but does not require, dismissed employees to return to work at another location. TCU agrees that carriers may cancel dismissal allowances for employees who refuse to return to work in the same seniority district. The dispute is whether a dismissed employee forfeits a dismissal allowance previously awarded under *New York Dock* when the dismissed employee refuses recall to a different location and the CBA does not give management the right to transfer workers involuntarily.

I. CSXT's Arguments

CSXT argues that we must hear its appeal on its merits under our *Lace Curtain* standard of review.[4] According to CSXT, its appeal does not involve

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[4] Under 49 CFR 1115.8, the standard for review is provided in *Chicago & North Western Tptn. Co.--Abandonment*, 3 I.C.C.2d 729 (1987), popularly known as the "*Lace Curtain*" case. In *Wisconsin Central Ltd.--Acquisition Exemption--Lines of Union Pacific Railroad Company*, STB Finance Docket No. 33116 (STB served April 17, 1997) at 6, the Board described the *Lace Curtain* standard:

> We will limit our review to recurring or otherwise significant issues of general transportation importance regarding the interpretation of the statute or of our labor protective conditions. *Lace Curtain* at 736. We will not reverse an arbitrator unless the award failed to draw its essence from the conditions imposed, contained egregious error (which is to say error that may have far reaching consequences for a substantial number of employees subject to the conditions or that may interfere with our ability to oversee implementation of the conditions), or was outside the scope of the

(continued...)

issues of causation, calculation of benefits, or other purely factual issues. CSXT argues that we must review the decision because it raises a significant issue involving the interpretation of *New York Dock, i.e.*, the circumstances under which displacement allowances may be terminated if a dismissed employee declines to be recalled to work.

CSXT argues that the arbitration decision is contrary to the direct language of *New York Dock*, arbitration precedent, and agency decisions interpreting the general scope and intent of *New York Dock*. According to CSXT, if the CBA allows a dismissed employee to relocate and retain seniority, the employee must do so or forfeit the dismissal allowance. CSXT's position is that it does not matter that relocation is voluntary under the CBA because (1) *New York Dock* governs the provision of dismissal allowances and (2) the "fundamental bargain" reflected in *New York Dock* and predecessor labor protection schemes is that, in return for the provision of protection, employees may be required to relocate in order to mitigate the expense of that protection.[5]

CSXT argues that the direct language of *New York Dock* allows termination of Ebrens' dismissal allowance, citing the italicized portion of Article I, section 6(d) of *New York Dock*, below:

> (d) *The dismissal allowance shall cease* prior to the expiration of the protective period *in the event of the employee's* resignation, death, retirement, dismissal for justifiable cause under existing agreements, *failure to return to service after being notified in accordance with the working agreement*, failure without good cause to accept a comparable position which does not require a change of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

CSXT argues that TCU's interpretation of section 6(d) as allowing only recall to the same location would be contrary to Article I, section 1(c)'s definition of "dismissed employee" as an employee whose position is abolished "as a result of a transaction." According to CSXT, if an employee refuses to accept a recall to another location, his lack of employment can no longer be

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[4](...continued)
authority granted by those conditions. Finally, we will only review arbitrators' decisions on issues of causation, calculation of benefits, or resolution of other factual questions to correct egregious error. *Id.*

[5] As an example of a case where this "fundamental bargain" was assertedly recognized, CSXT cites *Norfolk & W. Ry. Co. and New York, C. and St. L. R. Co. Merger*, 9 I.C.C.2d 1021 (1993).

considered to result from the transaction that originally caused his dismissal, and he loses his dismissal allowance because he is no longer a "dismissed employee."

CSXT also argues that the availability of moving expenses in Article I, section 9 and compensation for losses from home removal in Article I, section 12 implies that relocation is not optional under *New York Dock.*

CSXT draws a distinction between this case and the ICC's decision in *Dennis*. CSXT argues, first, that the agency's comments on the merits of that appeal at page 4 of *Dennis*, quoted above, were dicta because the ICC refused to hear the appeal on its merits under *Lace Curtain*. Alternatively, CSXT argues that the ICC, despite its reference to the fact that transfer was voluntary under the CBA, did not intend to hold that *New York Dock* allows employees to decline recalls to different locations without losing their benefits, whenever CBAs merely allow (rather than require) such relocation. According to CSXT, such a holding would have been a drastic departure from settled precedent and, for that reason, would not have been "tossed off in passing" in one paragraph of a decision declining review. According to CSXT, the ICC based its decision in *Dennis* merely on a finding that the "5-Party Agreement" advanced by CSXT as allowing the voluntary transfer between seniority districts cannot be used for this purpose under *New York Dock* because that agreement was merely a side agreement that could be canceled on 30-days' notice.[6] The distinction, according to CSXT, is that the relevant provision of the CBA allowing the transfer between seniority districts, here Rule 6(d) of the C&O Clerical Agreement, is not temporary.

CSXT argues that the weight of arbitration precedent supports its position. CSXT's discussion of arbitration precedent is not confined to cases arising under *New York Dock* and similar ICC decisions imposing labor protection conditions. CSXT also cites decisions of various Special Boards of Adjustment interpreting CBAs. The railroad alleges that those decisions have held that the agreements require employees to exercise seniority rights before they can obtain benefits. While these decisions do not directly involve *New York Dock* or the scope of our labor protection obligations, CSXT views them as persuasive authority.

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[6] On page 2 of *Dennis*, the ICC noted that the panel "found that the agreement was not a *New York Dock* 'working agreement,' because it could be canceled by any party on 30-days' notice." In n.9, the agency apparently upheld the panel's finding in this respect, stating that, "As discussed in this decision, we do not consider the 5-Party Agreement a *New York Dock* implementing agreement or a working agreement."

II. TCU's Arguments

TCU argues that the decision does not meet the *Lace Curtain* standard for review on the merits. The union argues that the appeal involves only an unreviewable factual issue, *i.e.*, whether "the provisions of the Working Agreement and the practices thereunder require dismissed employees receiving *New York Dock* benefits to apply for positions outside their seniority district."

TCU addresses the merits in the event that we decide to hear the case under *Lace Curtain.* TCU argues that, once an employee is dismissed and begins to draw a dismissal allowance under *New York Dock*, the allowance may be terminated only under section 6(d) of *New York Dock.* TCU argues that, under section 6(d) of *New York Dock*, any recall of a dismissed employee must be in accordance with the CBA. Therefore, TCU argues, if the CBA does not allow management to reassign employees to different locations, neither does *New York Dock.*

TCU maintains that CSXT has consistently advised TCU-represented employees that their obligation as dismissed employees to exercise seniority rights goes no further than their seniority district.

TCU disputes the relevance of the arbitration precedent cited by CSXT. TCU distinguishes much of the precedent cited by CSXT on the grounds that those decisions did not involve transfers of employees outside of their seniority districts or require relocation. TCU concedes that three of the arbitration cases cited by CSXT did involve a relocation. But the union distinguishes one case[7] on the grounds that the relocated employee remained in his old seniority district. TCU argues that the remaining two[8] should be accorded less weight because they did not involve the clerical craft.

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[7] Arbitration between Brotherhood of Maintenance of Way Employees and Chicago and N.W. Transp. Co. (September 27, 1982) (Kasher, neutral), CSXT Exh. Q.

[8] Arbitration between CSX Transportation, Inc. and Brotherhood of Railway Carmen (July 12, 1993) (Scheinman, neutral), CSXT Exh. S; arbitration between International Association of Machinists and Aerospace Workers and CSX Transportation, Inc. (January 31, 1995) (Richter, neutral), CSXT Exh. R.

DISCUSSION AND CONCLUSIONS

We will hear the appeal on its merits under our *Lace Curtain* standard of review. Under *Lace Curtain*, as noted, we limit our review to recurring or otherwise significant issues of general transportation importance regarding the interpretation of the statute or of our labor protective conditions. Here, the arbitrator's decision raises a significant issue involving the interpretation of *New York Dock*, *i.e.*, the circumstances under which displacement allowances may be terminated if a dismissed employee declines to be recalled to work. The appeal does not raise issues of causation, calculation of benefits, or other purely factual issues, and the arbitrator's decision was not predicated on findings concerning such issues.

The appeal will be denied. There are two grounds for denial of the appeal, each of which by itself would be sufficient: (1) denial is required under section 6(d) of *New York Dock*; and (2) denial is required under the reasoning of *Dennis*, *supra*.

1. Section 6(d) of *New York Dock*

The requirements for initially granting dismissal allowances are not at issue here. There is no dispute that the dismissal allowance initially granted to Mr. Ebrens was valid. Rather, the controversy is over the circumstances under which previously granted dismissal allowances may be withdrawn. The withdrawal of dismissal allowances after they are initially granted is governed by section 6(d) of *New York Dock*, 360 I.C.C. at 87. Because the specific provisions of section 6(d) govern, the result, contrary to what CSXT claims, does not turn on the definition of a "dismissed employee" in section 1(c) of *New York Dock*.

Most of the precedents cited by the parties involve the initial receipt of a dismissal allowance. Such precedents are not helpful because they have no bearing on the interpretation of section 6(d), which involves the termination of an existing dismissal allowance. The parties' discussion of precedents that do not directly involve interpretation of *New York Dock* also carry little weight. CSXT cites *New York Dock* arbitration precedents that *did* involve the attempted

withdrawal of dismissal allowances that had already been granted.[9] For the reasons explained in this decision, however, these arbitration precedents, which were not appealed, will not be followed here.

As noted by CSXT, section 6(d) has a proviso that allows termination of a dismissal allowance for "failure to return to service after having been notified *in accordance with the working agreement.*" (Emphasis added). This proviso, however, must be considered in light of the next proviso of section 6(d), hereafter called the "change of residence proviso." The change of residence proviso provides that a dismissed employee's dismissal allowance ceases for "failure without good cause to accept a comparable position *which does not require a change in his place of residence.*" (Emphasis added.)

"Working agreement," as used in this section, plainly refers to existing CBAs. Here, as in *Dennis,* it is undisputed that the existing CBA would not permit management to require the employee to accept the proposed transfer. Hence an employee recalled in accordance with the agreement cannot be required to accept such a transfer or forfeit his or her dismissal allowance. The aforementioned change of residence proviso establishes the circumstances under which an employee can be recalled and required to accept a transfer to a comparable position under the labor conditions (*i.e.*, other than as provided for in existing CBAs). That proviso clearly limits the right of transfer of recalled employees, other than as provided by existing CBAs, to locations that do not require a change of residence. An employee may of course elect to be recalled and voluntarily accept a transfer that does not infringe upon the employment rights of others. However, once displaced, an employee cannot be required to do so, other than pursuant to the terms of a CBA if the location of the new position would require a change of residence.[10]

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[9] CSXT cites: (1) a January 1, 1995 arbitration award (Robert Richter, Neutral), CSXT Exh. R; and (2) a July 12, 1993 arbitration decision (Martin P. Scheinman, Neutral), CSXT Exh. S.

[10] The ICC has in the past referred to the fundamental bargain underlying the Washington Job Protection Agreement of May 1936 (WJPA), upon which the *New York Dock* conditions are based, as being that an employee must accept any comparable position for which he or she is qualified regardless of location in order to be entitled to a displacement allowance. However, once an employee properly achieves dismissal status, the calculus changes under both WJPA and our *New York Dock* conditions. Unless a dismissed employee requests and receives training under Article II, he or she cannot be forced to take a comparable position that requires a change of residence unless the underlying CBA itself provides for that result.

Here, the CBA does not permit management to require Ebrens to relocate and the change of residence proviso of section 6(d) restricts the carrier's ability to terminate Ebrens' dismissal allowance for failure to relocate to a position that would require a change of residence after he attained the status of a dismissed employee.

2. The *Dennis* Precedent

As the ICC noted in the above-quoted portion of *Dennis*, upon which the arbitrator relied, *New York Dock* "requires the exercise of seniority rights under the terms of a protected employee's working agreement." The ICC's discussion of collective bargaining rights and their relationship to *New York Dock* labor protection in *Dennis* may have been dicta, but the ICC's reasoning was correct and we will apply in this case. Here, it is undisputed that the applicable provisions of the CBA do not allow management to reassign employees like Ebrens across seniority districts without their consent. Thus, where notice of available comparable positions is given to dismissed employees in accordance with a CBA that does not permit management to require employees to change seniority districts, management may not force employees to do so or lose entitlement to a dismissal allowance under Article I, section 6 of the *New York Dock* conditions.[11]

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

It is ordered:

1. The decision of the panel is affirmed.
2. This decision is effective on September 3, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

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[11] As noted, CSXT argues that Ebrens would lose his status as a "dismissed employee" under section 1(c) of *New York Dock* if he were to refuse recall to another location, on the grounds that he would no longer be able to claim that his lack of employment was a "result of a transaction." However, the sole bases for terminating dismissal allowances once properly commenced are contained in Article I, section 6(d) of *New York Dock*.