STB FINANCE DOCKET NO. 21989 (SUB-NO. 3)

PENNSYLVANIA RAILROAD COMPANY
— MERGER—
NEW YORK CENTRAL RAILROAD COMPANY

(ARBITRATION REVIEW)

Decided December 2, 1998

We are partially granting the appeal brought by 17 former employees of the Cleveland Union Terminals Company of the decision of an arbitration panel (Fred Blackwell, Chairman and neutral member) (hereafter, *the Decision*) denying these employees' claim for benefits under an agreement entered into on January 1, 1964, for the protection of railroad employees who would be affected by the 1968 merger of the Pennsylvania Railroad Company and the New York Central Railroad Company to form the Penn Central Transportation Company.

BY THE BOARD:

BACKGROUND

In 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company (N.Y. Central) agreed to a merger that resulted in the formation of the Penn Central Transportation Company (Penn Central). In the 1970s, the Penn Central went bankrupt, and the great bulk of its assets were transferred in 1976 to a new carrier, Consolidated Rail Corporation (Conrail). The estate of the Penn Central continued to survive in possession of real estate holdings and lines that were not transferred to Conrail. When the appeal in this docket was filed, the surviving company of the estate of the Penn Central was called the "Penn Central Corporation," the respondent in this proceeding. We refer to the respondent Penn Central Corporation as "the carrier" because its predecessor was a rail carrier subject to our jurisdiction when this controversy first arose.

On May 20, 1964, the Brotherhood of Railway Trainmen (BRT) and the two merging carriers entered into an agreement for the protection of employees (the 1964 merger protection agreement).[1] The 1964 merger protection agreement provided considerably more than the standard levels of protection that applied under our *New York Dock* and pre-*New York Dock* formulas.[2] This agreement was signed by the two carriers alone and did not directly refer to any subsidiary carriers.

Before the merger, the N.Y. Central owned 93% of a passenger carrier subsidiary, the Cleveland Union Terminals Company (CUT). The 17 claimant petitioners in this proceeding (claimants) were all yard workers on the CUT. On February 16, 1965, the N.Y. Central and the BRT negotiated an agreement to allow CUT employees an opportunity to work at a nearby N.Y. Central freight yard by merging the CUT seniority roster with the pre-merger seniority roster for N.Y. Central employees who worked at the freight yard. The rosters were merged by placing the former CUT employees at the bottom of the merged roster in the order of their seniority on the CUT, with a common seniority date of September 10, 1964. The N.Y. Central employees who were already working at the freight yard were placed on the roster in order of their dates of employment on the N.Y. Central. All of those dates predated September 10, 1964.

The merger was finalized on February 1, 1968. On February 21, 1968, the claimants and other CUT employees, except for some CUT employees who were retained in the CUT workforce, were furloughed from their CUT jobs effective on February 25, 1968. The furlough notice told the furloughed CUT employees to "immediately contact" the freight yardmaster to "stand for" work in the freight yard under the February 16, 1965 agreement merging the rosters.[3] As explained below, we must distinguish between those of the 17 petitioning

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[1] This agreement was modified on November 16, 1964, on December 21, 1966, and on November 16, 1967.

[2] To meet its obligation to provide employee protection under former 49 U.S.C. 11347, which has been recodified as current 49 U.S.C. 11326, our predecessor agency, the Interstate Commerce Commission (ICC) adopted the benefit formula and procedure set forth in *New York Dock--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

[3] The CUT was not merged into the Penn Central until July 11, 1969, but the prior furlough and reporting notices show that workforce coordination began before the CUT was formally folded into the Penn Central.

claimants who accepted the carrier's invitation to stand for work in the freight yard[4] and those who did not.[5]

When the claimants were furloughed, the BRT and the merging carriers were disputing whether the 1964 merger protection agreement applied to employees of subsidiary railroads like the CUT. The carrier's position was that the agreement applied only to employees of the N.Y. Central and the Pennsylvania Railroad Company. The furloughed employees were fully aware of this dispute. The parties settled this dispute as to the CUT (but not as to other subsidiaries) by an agreement reached on July 11, 1969, under which the parties agreed to apply the 1964 merger protection agreement to CUT employees.[6]

This proceeding involves the efforts of claimants to obtain labor protection benefits pursuant to the 1964 merger protection agreement. While the carrier now agrees that the 1964 merger protection agreement applies to former CUT employees, the carrier has consistently denied that claimants have individually satisfied the conditions established in that agreement for claiming and receiving benefits. On September 15, 1969, the claimants filed suit in a U.S. District Court, alleging two causes of action: (1) failure by the carrier to provide benefits claimed under the 1964 merger protection agreement; and (2) failure by the BRT to provide adequate representation of their interests. By oral ruling issued on July 14, 1976, and a written decision issued on November 29, 1979, the court dismissed the complaint as to inadequate representation and ordered that the remaining issue of claimants' entitlement to benefits under the merger protection agreement be resolved by arbitration.

In compliance with the court's arbitration order, the parties entered into an arbitration agreement on June 18, 1980. An initial arbitration panel met in 1983 but was subsequently disbanded. The current arbitration panel was convened in 1988. The panel held a 3-day oral evidentiary hearing in May 1990.

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[4] The 10 former CUT employees who reported to the freight yard were Messrs. Acree, Benko, Day, Doran, Gastony, Gentile, Norris, Steimle, Tomczak, and Uher.

[5] The 7 former CUT employees who did not report to the freight yard were Messrs. Augustus, Beedlow, Grady, Knopik, McLaughlin, Potosky, and Tannenbaum. These persons were discharged without compensation after failing to respond to a final notice to report dated December 15, 1969.

[6] The ICC subsequently held that the benefits of the 1965 merger protection agreement applied *ab initio* to employees of *all* subsidiary railroads. *Pennsylvania R. Co.--Merger--New York Central R. Co.*, 347 I.C.C. 536, 548 (1974). Moreover, in a July 14, 1976 oral ruling (reproduced in Exh. 54), a court found that both parties had agreed that the former CUT employees were N.Y. Central employees for the purpose of determining their eligibility for protective benefits under the 1964 merger protective agreement. (Note: The exhibit numbers used in this decision refer to the numbers assigned to the exhibits submitted by the claimants in this arbitration appeal.)

On June 22, 1992, the panel entered its *Decision*, which was followed by issuance of a supplemental *Decision* on July 16, 1994, and a dissenting opinion on August 25, 1994. The panel denied all of the claims for benefits, finding that: (1) those claimants who refused to report for work at the freight yard did not have a reasonable basis for their refusal and thereby failed to comply with requirements in the 1964 agreement that employees exercise their seniority rights to obtain available work; and (2) the claimants who reported for work failed to process grievance claims adequately, admitted their ineligibility for benefits, or lost work due to causes that were deemed by the panel not to trigger benefit payments, such as declining business, physical incapacity, or voluntarily quitting work.

On November 16, 1994, claimants filed an appeal of the panel's *Decision* with the ICC,[7] which docketed the appeal as Finance Docket No. 21989 (Sub-No. 2). By decision served on August 1, 1996, in the (Sub-No. 2) proceeding, the Board denied the appeal, finding that claimants' cursory appeal failed to define any issues for, or provide any evidence in support of, review. An appeal of this decision to the Court of Appeals for the 6th Circuit was dismissed by the court based on a stipulation that the Board would re-docket the appeal if claimants filed documents in support of it.

On April 17, 1997, claimants re-filed their appeal with supporting documentation, and the appeal was re-docketed as the instant (Sub-No. 3) proceeding.[8]

The carrier filed a reply in opposition to the appeal on June 24, 1997.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.8, the standard for review of labor arbitration appeals is provided in *Chicago & North Western Transp. Co. — Abandonment*, 3 I.C.C.2d 729 (1987), *aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988), popularly known as the "*Lace Curtain*" case. Under the *Lace Curtain* standard, the Board does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." *Id.* at 735-36. In *Delaware and*

[7] The court previously refused to hear the appeal, finding that jurisdiction lay with the ICC. The court's order is attached as Exhibit D to the carrier's reply.

[8] In their appeal filed on April 17, 1997, claimants request oral argument. We will deny the request for oral argument. We are capable of resolving the legal issues without oral argument as no issues have been presented that cannot be decided based on the written record.

Hudson Railway Company — Lease and Trackage Rights Exemption — Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) *et al.* (ICC served October 4, 1990) at 16-17, *remanded on other grounds in Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C. Cir. 1993), the Interstate Commerce Commission (ICC) elaborated on the *Lace Curtain* standard, as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

We will partially grant the appeal under our *Lace Curtain* standard. We find that the panel erred egregiously and failed to observe the imposed labor protection conditions in summarily denying benefits to the claimants who reported for work at the freight yard. We uphold the panel's denial of benefits to the claimants who did *not* report for work. We will remand the panel's Decision to the parties for action in conformity with this decision.

I. Claimants Who Reported For Work

The parties agreed on a bifurcation of the arbitration process, whereby claimants' basic eligibility for compensation would be explored in Phase I, and thereafter, if they were found eligible, the precise amount of compensation would be determined in a subsequent Phase II. Tr. 134-135. The panel denied all benefits for the 10 former CUT employees who reported for work at the freight yard, refusing to proceed to Phase II on the grounds that the claimants failed to establish their basic eligibility for compensation. The panel found that the claimants who reported for work did not process and establish their grievance claims adequately, in that they failed to pursue arbitration when benefits were not awarded, failed to turn in wage guarantee forms, and failed to show that their wages in their new positions were less than the amounts guaranteed under the protective benefits. The panel also held that employees were required to show that their losses were "as a result of the merger" (hereafter, the "causation requirement") and that this condition was not met, at least for a key witness, Christ Steimle, who "mentioned" loss of jobs due to

declining business and a physical incapacity.[9] The panel also found that at least the key witness Christ Steimle "held the belief at the time that he was not entitled to wage guarantee payments and that the belief had a sound fact basis."[10] As explained below, these findings reflect egregious error and failure to observe the imposed labor protection conditions.

A. Failure to Pursue Arbitration

A review of the history of this proceeding shows that the panel erred egregiously in finding that the claimants who reported for work should be denied all relief because they did not pursue arbitration in a timely manner. As noted, the claimants, instead of proceeding immediately to arbitration of their claims for benefits, brought suit in a federal district court for the benefits and joined an additional claim alleging failure by the BRT to provide adequate representation of their interests. We cannot fault claimants for going to court before they agreed to arbitration, because, as indicated in the court's decision directing arbitration of the claim for benefits, it was not clear at the time that individual employees, as distinguished from their unions, could invoke arbitration.[11]

In any event, the arbitration that was actually before the panel was the only arbitration that claimants needed to pursue in this matter. The court ordered that the issue of claimants' eligibility for benefits be submitted to arbitration. The parties responded by entering into an arbitration agreement. Because the court's order was never appealed and remains in effect today, it is the law of the case, and it may not be collaterally attacked with the argument that claimants' request for benefits must be denied because claimants did not seek arbitration first but rather began their quest for benefits in court. The panel erred in citing failure

[9] *Decision*, at 14. The panel was unclear as to whether benefits were being denied only for Mr. Steimle due to *his* failure to fulfill the alleged causation requirement, or whether failure to fulfill the alleged requirement was grounds for denying benefits for *all* of the claimants who reported for work.

[10] *Decision*, at 15. The panel was unclear as to whether it was finding that (a) only Mr. Steimle had this belief or (b) this belief was held by all of the claimants who reported for work.

[11] Indeed, the order of the United States District Court for the Northern District of Ohio, Eastern Division, dated November 24, 1979, reproduced at Exhibit 55 submitted to the arbitration panel, noted at page 3 that section 1(e) of the 1964 merger protection provided only that arbitration was to be invoked by a "labor organization signatory to this Agreement." Thus, the plain language of the agreement arguably seemed to preclude individual employees from seeking recourse to arbitration. Without citing precedent, the court criticized this restriction as "overly technical" and held that the arbitration provision applied to individual workers as well as to their union.

to arbitrate as a reason for dismissal when the required arbitration was actually before the panel.

B. Wage Guarantee (Claim) Forms

In denying the claims, the panel relied on the fact that lead witness Steimle, who testified that he was the only living claimant who reported for work (Tr. 471), ceased to file claim forms. The panel used this to support its finding that he and the other claimants who reported believed at the time that they were not entitled to benefits.

We disagree with the panel's approach. The fact that witness Steimle and other claimants ceased to file claim forms does not by itself show that they believed at the time that they were not entitled to benefits. Mr. Steimle testified that he and his "fellow employees" sent claim forms to the payroll department and "received no response whatsoever." Tr. 521. A lack of response by the carrier would not be surprising, because claimants were in litigation with the carrier over the provision of benefits. Witness Steimle further testified that his supervisor "thought it was a joke" that he would even bother to apply for protective benefits because he was not going to get benefits anyway. Tr. 522-523. The panel ignored evidence that claimants ceased to file claim forms because of lack of response from the carrier and because of negative feedback from supervisors, rather than because they believed that they were not entitled to benefits.

The panel might have been able to infer that the claimants doubted their eligibility for benefits if they had totally neglected to file claims forms, but the record reveals no such neglect. As discussed above, witness Steimle testified that claimants filed the claims forms and ceased doing so only after receiving no response. Former Assistant Supervisor of Labor Relations George Ellert, the only witness called by the carrier, admitted on cross examination that he did not know whether any of the claimants filed forms (Tr. 647) and in any event would have been aware only of any appeals that may have been filed (Tr. 563-564).

We can draw no inference from the panel's observation (*Decision,* at 14) that claimants (specifically referring to witness Steimle) did not retain copies of their claims forms. The carrier arguably was the proper repository of the forms because only the carrier could take the information on them and compare it with the base ("test period") earnings information in its possession so as to compute

any compensation that may have been owed.[12] Because the carrier was litigating the issue of compensation, it was on notice to keep records of what forms were or were not submitted. Claimants had no duty to administer the compensation scheme and to act as record keepers for that purpose. Moreover, the wage and hour information on the claims forms was relevant only to the subsequent, damages (Phase II) hearing that was never held because the prior, liability (Phase I) hearing resulted in a finding that the employees were not eligible for benefits.

C. The Issue of Causation

The panel found that the claimants who reported to the yard failed to show that their losses were as a result of the merger. This finding will be vacated. The record shows that the claimants who reported for work suffered losses as a result of the merger and provides no reason to find that claimants' losses were due to other causes that would excuse the carrier from paying benefits. Before the merger and furloughs took place, claimants were fully employed at the CUT passenger yard with many years of seniority.[13] Immediately after the merger, claimants were asked to "stand for" work at a nearby freight yard where no work was available for them for many years because they were placed at the bottom of a new seniority list that was created as a result of the merger.[14] The jobs for

[12] On cross examination, carrier witness George Ellert stated that test period pay data were kept by the carrier. Tr. 627.

[13] If the claimants had been on furlough from their prior job at the CUT passenger terminal, the carrier might have been able to argue that their lack of work was pre-existing and thus not due to the furlough, but this was not the case. Moreover, we will not speculate as to whether claimants would have kept their jobs at the CUT passenger yard if the merger had never taken place, as no evidence was introduced on this topic. Moreover, we note that Amtrak was not created until the early 1970s.

[14] The pre-merger CUT seniority roster had 63 men on it. Exh. 2. About 50 of those men transferred to the new, merged seniority roster. Exh. 66. Because there were 509 persons on the merged seniority roster, including the former CUT employees (Exh. 3), work had to be found for many former N.Y. Central employees before it could be offered to the former CUT employees. While the July 11, 1969, agreement allocated 2.46% of the total yard force to former CUT employees, this guaranteed work for only about 9 former CUT employees, none of whom included claimants. *See* the testimony of witness Beedlow at Tr. 243, whose testimony in this respect was not disputed by the carrier. Claimant Christ Steimle stated that he did not have enough new list seniority to obtain a job until 1984 (Exh. 66) or 1985 (Tr. 512). As Mr. Steimle was the senior man of the CUT claimants (Tr. 643-644), it is clear that if he lacked enough seniority to obtain work, the other claimants did also.

which the claimants were expected to "stand" were not actual jobs.[15] The claimants experienced a drop in income immediately after they reported for work at the freight yard and their drop in income was not due to sickness, discipline, or failure to exercise seniority rights.[16] The panel failed even to mention the voluminous evidence submitted by complainants to show injury. It is not clear what else claimants could have submitted to satisfy the panel that they suffered losses as a result of the merger.

The panel's *Decision* is especially questionable because the carrier produced no evidence at all that any of the conditions specified for refusing benefits in the 1964 merger protection agreement were satisfied for the 10 claimants who reported to the freight yard. The carrier (reply at 13) defends the panel's *Decision* on the grounds that the "testimony presented at the hearing" shows that the claimants "had lost work due to declining business." Our examination of the hearing record, however, shows that the carrier made no effort whatsoever to identify specific periods of general business decline, emergency conditions, or other supervening events that would justify nonpayment of benefits under section 1(b) of the agreement. The fact that claimants' losses began to be experienced shortly after the merger and furlough makes it unlikely that supervening causes could explain claimants' losses. Nor

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[15] George Ellert, a former superintendent at the freight yard, initially testified that jobs were available for those who reported for work (Tr. 149), but on cross examination he admitted that claimants were not called back to regular, full-time positions but were instead assigned to an "extra board" or an "extra list," whose members were not guaranteed a specific number of hours of work (Tr. 154-157). At Tr. 258, witness Beedlow testified that claimants were called back to "nonexistent jobs." The carrier did not respond with evidence to the contrary, such as, for example, a list of the claimants who readily found work at the freight terminal.

[16] Concerning the 10 men who reported for work at the yard, witness Beedlow testified generally as to the inability of all claimants to find work after they reported. Tr. 256. More specific evidence as to drop in income was submitted for the following 7 of the 10 claimants who reported to the yard:

Acree. Affidavit from wife. Exh. 62.

Benko. Testimony based on comparison of W-2 forms before and after the furlough. Tr. 170-172. Corroborated by witness Beedlow at Tr. 254.

Day. Testimony based on comparison of W-2 forms before and after the furlough. Tr. 162-170. Corroborated by witness Beedlow at Tr. 252.

Norris. In a letter dated February 18, 1972 (Exh. 51), he wrote that he was "only working several days a month."

Steimle. Testified that he never had regular employment after he reported to the freight yard. Corroborating affidavit from wife. Exh. 66.

Tomczak. Testimony based on comparison of W-2 forms before and after the furlough. Tr. 176-178. Affidavit from widow. Exh. 67.

Uher. Affidavit from widow. Exh. 68.

did the carrier come forward with evidence showing that any claimants were disabled or disciplined in accordance with that provision.

Under the circumstances presented on the record before us, we find that the panel committed egregious error by finding that *none* of the claimants who reported for work were entitled to *any* compensation. Unless an arbitral panel can point to evidence supporting total denial that we have overlooked and that is considerably more compelling than the evidence cited in its *1992 Decision*, summary denial of all benefits is completely unjustified. Some of the reasons cited by the panel here for totally denying compensation, such as the fact that claimants may have found work elsewhere or suffered illness, will be relevant to any determination of the amount of compensation for individual claimants, but these reasons do not justify the denial of all compensation for all of the claimants.

II. Claimants Who Did Not Report For Work

The panel denied the claims of the 7 claimants who never reported for work at the freight yard. The panel ruled that those claimants contravened the 1964 merger protection agreement by failing to exercise their seniority rights to work at the freight yard. The panel rejected two defenses raised by those claimants for their failure to report, *i.e.*, that: (1) the work offered at the freight yard was not comparable work; and (2) a doctrine of "anticipatory breach" excused them from reporting to work on the theory that the carrier was simultaneously breaching its duty to provide protective benefits. We affirm the panel's *Decision* as it pertains to the 7 claimants who do not report for work at the freight yard.

III. Conduct Of Future Proceedings

For the reasons explained above, we are vacating the panel's denial of damages for the 10 claimants who reported to work at the freight yard after the furlough. In accordance with standard practice, we will not affirmatively find that claimants *are* entitled to compensation but will remand the issue of the entitlement to compensation to the parties, who may attempt to resolve the issue among themselves or seek additional arbitration on this issue consistent with this decision.

The current record is not, and was not intended to be,[17] adequate for the computation of the compensation to be received by each individual claimant.

[17] As discussed above, the parties agreed on a bifurcated arbitration procedure.

For each individual claimant, the parties, or an arbitration panel if the parties cannot agree, will have to gather facts that are relevant to determining the amount of compensation under the 1964 merger protection agreement, in areas such as the following: (1) test period earnings and benefits with the carrier; (2) actual earnings with the carrier; (2) replacement income earned with other employers; (3) periods of disability; (4) dismissal for cause; and (5) whether there was a general or seasonal business decline that could excuse compensation under section 1(b) of the 1964 merger protection agreement.

We recognize that the task may be a difficult one for the parties as the issues were pending for about 28 years before our jurisdiction was properly invoked in 1997. Because so much time has passed, we would prefer to be in a position to have rendered a decision that provided final resolution or greater certainty for the parties. Having found that the panel's *Decision* summarily denying all claims was fundamentally unfair to the claimants who reported for work at the freight yard, however, we find it necessary to remand the matter for the unfairness to be corrected. Despite the difficulties they will face, the parties are in the best position to accomplish that. We urge them to work together to reach a just and speedy resolution of all remaining issues.

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

It is ordered:

1. Claimants' request for oral argument is denied.
2. The *Decision* of the panel is vacated as it pertains to the 10 claimants who reported for work, and the proceeding is remanded to the parties for further action consistent with our findings.
3. This decision is effective on December 8, 1998.
4. A copy of this decision will be served on the neutral member of the panel, at the following address:

Fred Blackwell, Esq.
19129 Roman Way
Gaithersburg, MD 20879

By the Board, Chairman Morgan and Vice Chairman Owen.