STB FINANCE DOCKET NO. 32760 (SUB-NO. 36)

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
(PETITION FOR ENFORCEMENT OF ARBITRATION AWARD)

Decided February 24, 2000

While we are not granting the petition of the Transportation• Communications International Union (TCU) for enforcement of an arbitration award, we likewise are declining to declare, as requested by the railroad, that the award is moot. The award is a valid exercise of the arbitrator's discretion and will remain in effect, so that, if the railroad were to implement the changes set out in the plan that led to the arbitration award, the railroad must do so under the terms of the award.

BY THE BOARD:

BACKGROUND

In 1996, we approved the common control of the rail carriers controlled by the Southern Pacific Rail Corporation, including the Southern Pacific Transportation Company (SP), and the rail carriers controlled by the Union Pacific Corporation, including the Union Pacific Railroad Company (UP),[1] subject to our standard *New York Dock* conditions for the protection of employees.[2]

[1] *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996).

[2] *See, New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 366 I.C.C. 60, 84-90 (1979) (*New York Dock*), *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Under *New York Dock*, changes related to approved transactions are implemented by agreements negotiated before the changes occur. If the parties cannot agree on the nature or extent of the changes, the issues are resolved by arbitration, subject to appeal to the Board under a deferential standard of review. 49 CFR 1115.8. The standard for review is provided in *Chicago & North Western Tptn.* (continued...)

In accordance with *New York Dock*, UP and TCU entered into Implementing Agreement No. NYD-217 (NYD-217), a master agreement to implement the coordination and consolidation of clerical forces throughout the merged system. By notice served under Article II of NYD-217 on June 11, 1998, and amended on June 24, 1998, UP notified TCU of its intention to eliminate all clerical positions assigned to SP's Armourdale Yard in Kansas City, KS. UP expressed its intent to transfer the work and the employees to clerical positions to be established under the UP-TCU collective bargaining agreement at UP's Neff Yard, 10 miles away in Kansas City, MO. The work performed by these clerical employees consisted of (1) office and ramp work within the confines of the two yards and (2) "crew hauling" work, whereby engine crews are transported between the locations where they report to work and their trains, between trains, or between their trains and rest facilities.

After TCU objected to the implementation plan proposed in the June 11, 1998, notice, the issues were taken to arbitration. In a letter to TCU, UP agreed to delay the plan during the arbitration. UP reserved the right to cancel the plan and to serve a new notice proposing a new plan at any time, even after the award was issued.[3]

On March 25, 1999, the arbitrator, Robert O'Brien, issued a proposed award. The arbitrator proposed to allow UP to transfer crew hauling work performed from, and crew hauling employees working out of, SP's Armourdale Yard to UP's Neff Yard facility. The arbitrator also proposed to modify the UP collective bargaining agreement so as to preserve certain provisions in the SP collective bargaining agreement pertaining to pay, subcontracting restrictions, and extra board rules. He found that SP's agreement contained superior pay and benefits that he lacked the authority to alter under *New York Dock*, citing to the Board's recent decision in *CSX Corp. — Control — Chessie System and Seaboard Coast Line Industries (Arbitration Review)*, Finance Docket No. 28905 (Sub-No. 22) (STB served September 25, 1998) (*Carmen III*), limiting an arbitrator's authority to override a collective bargaining agreement for purposes

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[2](...continued)
Co.—Abandonment, 3 I.C.C.2d 729 (1987), *aff'd sub nom. IBEW v. ICC*, 826 F.2d 330 (D.C. Cir. 1988), 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. 3 I.C.C.2d at 735-36. Once the scope of the necessary changes is determined by negotiation or arbitration, employees adversely affected by them are entitled to receive comprehensive displacement and dismissal benefits for up to 6 years.

[3] *See,* Declaration of Dean Matter, filed on November 22, 1999, Exh. C; and TCU's Petition for Enforcement, Exh. 4.

of implementation of a Board-approved transaction. The arbitrator proposed to deny UP's request to change the office and ramp work, finding that this aspect of the implementation plan could not be undertaken under *New York Dock* because it was not related to the merger.

After the arbitrator issued his proposed award, UP notified TCU, in a letter dated May 18, 1999, that the carrier was exercising its right to cancel the June 11, 1998, notice on which the clerical implementation plan was based and that the issues involved in the proposed award were therefore moot.[4] TCU disagreed with UP's contention that the issues involved in the arbitration were moot, and the parties argued this issue in executive session and in written submissions. By letter dated August 25, 1999,[5] the arbitrator notified the parties that, while UP had reserved the right to cancel the plan proposed in the June 11, 1998, notice, it was his opinion that UP's exercise of that right did not render the issues moot.

On August 30, 1999, while the arbitrator was evaluating his proposed award, UP served notices to TCU of its intention to abolish the positions of 12 crew haulers at the Armourdale Yard and to absorb the remaining work with the remaining forces at Armourdale. TCU then objected to the August 30, 1999 notice and demanded that any consolidation of clerical work proposed by UP be subjected to the pending arbitration process.

On October 22, 1999, the arbitrator issued his final award (the O'Brien Award). The arbitrator reaffirmed his proposed award with one important exception. He did not attempt to craft a modified UP collective bargaining agreement for the crew hauling work to be performed at UP's Neff Yard. Instead, he required that all such work be performed under SP's agreement with TCU. The arbitrator based this change on UP's stated desire to have the arbitrator select a single agreement rather than attempt to combine provisions from both agreements. In reaching his final decision, he stated (O'Brien Award at 19) that, in determining whether the carrier has the right to override the SP collective bargaining agreement governing those clerical employees engaged in crew hauling at the Kansas City Terminal, the override limitations imposed on *New York Dock* arbitrators by the Board [*Carmen III*] "must be strictly observed." Given the choice of either the UP collective bargaining agreement or the SP collective bargaining agreement, and based on the Board's *Carmen III* decision, the arbitrator imposed the SP collective bargaining agreement, which

[4] Declaration of Dean Matter, filed on November 22, 1999, Exh. D.
[5] Declaration of Dean Matter, filed on November 22, 1999, Exh. E.

was more favorable for the affected employees and TCU. Neither party has appealed the O'Brien Award.

By petition filed on October 26, 1999, TCU requests that we issue an order compelling UP to comply with the O'Brien Award. TCU alleged that UP was contravening the O'Brien Award by taking steps to abolish the positions of 12 clerks performing crew hauling work out of the Armourdale facility, to transfer their work to UP's Neff Yard without allowing them to follow their work, and to require work at Neff Yard to be performed under the allegedly less favorable UP collective bargaining agreement.

By decision served on October 29, 1999, the Board ordered UP to take no action (1) to abolish the positions of the 12 former SP clerks working out of the Armourdale Yard, (2) to transfer their work to UP's Neff Yard facility, or (3) to remove them from the SP collective bargaining agreement, for a period of 60 days from the date of service of that decision (until December 28, 1999).

In a motion requesting a 7-day extension of the deadline for filing a reply to TCU's petition, UP represented that it had canceled its August 30, 1999, notice announcing its intention to abolish the positions of the 12 former SP clerks working out of the Armourdale Yard. By decision served on November 17, 1999, the extension requested by UP was granted. On November 22, 1999, UP filed a reply in opposition to TCU's petition for enforcement. By decision served on December 15, 1999, Chairman Morgan extended the stay for an additional 60 days, until February 26, 2000.

DISCUSSION AND CONCLUSIONS

TCU is asking us to order UP to comply with the O'Brien Award. UP argues that the award may not be enforced because it is moot. UP points to its letter reserving the right to cancel the implementation plan that was to be at issue in the arbitration (the changes proposed in the June 11, 1998, notice) and to serve a new notice adopting a new implementation plan at any time. According to UP, the award is moot because the carrier canceled the implementation plan proposed in its June 11, 1998, notice.

The award is not moot, as it is not without precedential value and could have possible future applicability. UP may seek to implement future merger-related labor changes under *New York Dock*, which would be impacted by the award. Indeed, TCU has already filed grievances alleging that UP's merger-related changes in the reporting points of train crew members have created violations of

collective bargaining agreement provisions governing crew hauling.[6] Depending on the outcome of these grievances, the carrier may seek to invoke its original implementation plan. If so, the O'Brien Award would be binding as to the issues that are the subject matter of that award.

Neither party has appealed the award under 49 CFR 1115.8. However, by seeking enforcement of the award, TCU has raised issues as to the propriety of the award, as we would not enforce an improper award.

The award contains a factual finding that the office and ramp work could not be implemented under *New York Dock* because the changes related to this work were not related to, or caused by, the merger. Under our *Lace Curtain* standard of review, this finding would not be disturbed in the absence of egregious error.

Nor is the award defective for requiring that the crew hauling coordination at issue in the June 11, 1998, notice must take place entirely under the SP collective bargaining agreement. It is well established that carriers' authority to implement labor changes under *New York Dock* is limited, in that carriers are restricted to making labor changes that are necessary to effect the public benefits of transactions approved by the Board. Recognizing this limitation, the arbitrator found that the SP collective bargaining agreement was more favorable to employees than the UP collective bargaining agreement in certain respects and that elimination of these more favorable provisions was not necessary to effect the public benefits of the merger. Rather than attempt to combine provisions from both agreements or to require that the crew haulers transferring from SP's Armourdale yard work under a modified UP agreement, the arbitrator's final award acceded to UP's request for a single collective bargaining agreement, but, in return, his award placed all of the crew haulers transferred from Armourdale Yard, and all of the crew hauling work to be performed at Neff Yard as a result, under the more favorable SP agreement. The arbitrator fully explained what he was doing and why he was doing it. The approach taken by Arbitrator O'Brien and his conclusions were well within his discretion under our *New York Dock* conditions, as interpreted in *Carmen III*.

Although the O'Brien Award is not moot and not without future precedential value, the award itself does not require UP to take any actions that are subject to the award. UP must "comply" with the award only if it adopts the

[6] According to TCU, UP's reallocation of crew hauling work from crew haulers working out of SP's Armourdale Yard under SP's collective bargaining agreement to crew haulers working out of UP's Neff Yard under UP's collective bargaining agreement contravenes the scope rules and subcontracting restrictions in the SP collective bargaining agreement. (*See*, the declarations of Philip A. Beebe and Leslie J. Unrein, attached to TCU's petition.) We do not reach that issue here because the Board is not charged with interpreting collective bargaining agreements.

implementation plan that was at issue in the award, *i.e.*, by making the changes proposed in the June 11, 1998, notice. UP is not required to make such changes. We are aware of no precedent under *New York Dock* that prohibits carriers from withdrawing implementation proposals after they have been put to arbitration, especially where, as here, the carrier expressly reserves the right to do so prior to the arbitration.

The ability of carriers in this situation to change implementation plans is not without constraint, however. Under *New York Dock*, carriers seeking to implement merger-related employment changes must first give notice, enter into negotiations, and submit to arbitration if the negotiations are unfruitful. Thus, if UP adopts a substitute implementation plan that differs from the one proposed in its June 11, 1998, notice, the carrier will have to serve a new notice and proceed under *New York Dock* if there are objections to the notice. Also, if UP later seeks to revive its June 11, 1998, notice or the plan that led to that notice, the carrier will have to observe the O'Brien Award.[7]

The stays imposed in the decisions served on October 29, 1999, and December 5, 1999, need not be extended. The stays provided time for the Board to consider the filings of the parties and to issue, as we have today, a decision addressing the parties' positions.

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

It is ordered:

1. TCU's petition for enforcement of the O'Brien Award is denied. However, the Board finds that the award is a valid exercise of the arbitrator's discretion and will remain in effect.

2. This decision is effective on February 25, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

[7] Other implementation steps that do not precisely duplicate the ones proposed in the June 11, 1998, notice would also likely be affected by the O'Brien Award. UP admits this by committing itself to "application of the SP collective bargaining agreement *in accordance with the O'Brien Award*" if the carrier serves "any" future notice that would consolidate or rearrange crew hauling work in the Kansas City Hub. Declaration of Dean Matter, at 10. [Emphasis added.]