STB FINANCE DOCKET NO. 32760 (SUB-NO. 33)

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
(ARBITRATION REVIEW)

*Decided April 27, 2000*

The Board denies a petition seeking review of an arbitration decision imposing an implementing agreement on Union Pacific Railroad Company and the United Transportation Union permitting the railroad to create "the Salina Hub" in Salina, KS, and to relocate a home terminal from Pratt, KS, to Herington, KS.

BY THE BOARD:

We are denying a petition filed by Lyn Swonger and James Spaulding (petitioners) who are seeking review of an arbitration decision that had been issued by neutral referee William E. Fredenberger, Jr. on March 25, 1999. The arbitrator imposed an implementing agreement between Union Pacific Railroad Company (UP) and the United Transportation Union (UTU) that permitted UP to create "the Salina Hub" in Salina, KS, and to relocate a home terminal from Pratt, KS, to Herington, KS.

## BACKGROUND

We approved the common control and merger of the rail carriers controlled by the Union Pacific Corporation and the rail carriers controlled by the Southern Pacific Rail Corporation (SP) in 1996.[1] In our decision, we imposed the employee protective conditions in *New York Dock Ry. — Control — Brooklyn*

[1] *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*UP/SP*), *aff'd sub nom., Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

*Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*). The UP is the surviving rail carrier following the merger.

The operating plan submitted by the applicants in *UP/SP* indicated that UP intended to use a "hub and spoke" system to implement the merger, with one hub located at Salina. On June 4, 1998, UP gave notice to UTU, pursuant to Article 1, section 4 of *New York Dock*, that it intended to create the hub in Salina. UTU and UP then tentatively agreed on an implementing agreement for the Salina Hub. The tentative agreement provided that employees would be dovetailed into the seniority roster based upon their date of hire on the property at which they were last employed.

The UTU Associate General Chairperson representing employees of SP's subsidiary, the St. Louis Southwestern Railway Company (SSW), objected to the agreement. Employees who had been originally hired by the former Chicago, Rock Island and Pacific Railroad Company (RI) to work on the Tucumcari line, and who were then subsequently hired by SSW when it acquired the line, apparently did not agree with the hire dates that would be used to form the new seniority roster. The matter was then submitted to arbitration. In his decision, the arbitrator adopted the tentative agreement that UP and UTU had negotiated and authorized UP to close its terminal in Pratt and transfer the affected employees to Herington.

On April 14, 1999, petitioners Swonger and Spaulding, who are members of UTU, appealed the arbitrator's decision on behalf of themselves and all other trainmen who had been employed by the RI and SSW.[2] UP and UTU responded in opposition to the appeal on May 4, 1999.

[2] We will grant petitioners' request for leave to file a supplemental appendix that exceeds the 30-page limit established in 49 CFR 1115.2(d). The supplemental filing contains material that was submitted in the arbitration proceeding and is relevant to the issues raised in the appeal. We will, however, deny petitioners' request for oral argument. We can resolve the legal issues here without oral argument, as no issues have been presented that cannot be decided based on the written record. A request by petitioners to stay the effect of the arbitration decision pending a ruling on their petition to review the arbitration decision was denied in a decision served on April 30, 1999.

## ARGUMENTS OF THE PARTIES

*Seniority.* Swonger and Spaulding assert that the arbitrator improperly modified their seniority when he adopted the implementing agreement between UP and the UTU for the Salina Hub. Under the implementing agreement, the petitioners' seniority is based on the date that they were hired by SSW when it acquired the Tucumcari line, which was March 24, 1980. They claim that their seniority should be based on the date they were originally hired by the RI. They note that, in contrast, the agreement bases seniority dates for UP employees on their original dates of hire with UP. Petitioners allege further that the change in their seniority rights was not necessary to carry out the approved transaction.

Petitioners contend further that they have a contractual right to preserve their RI seniority under court orders entered in *Jerry W. Volkman v. United Transportation Union*, Case No. 83-6025-T (D. Kan. July 21, 1993, and December 15, 1993) (*Volkman*).[3] *Volkman* involved claims by former RI employees for benefits under a labor protection agreement dated March 4, 1980, which applied to the sale of former RI rail lines. According to petitioners, their court-sanctioned seniority rights should be preserved above and beyond rights under a collective bargaining agreement.

Petitioners assert further that paragraph 2 of the *New York Dock* conditions requires that their rights must be preserved "unless changed by future collective bargaining agreements or applicable statutes." Petitioners state that the arbitrator did not address whether their seniority rights should be preserved under applicable law. Nor, they claim, did he determine whether the specific changes were "necessary" for the transaction.

In its response, UP contends that the arbitrator did not violate the court's orders in *Volkman* or exceed any limits on his authority when he adopted the agreement that UP and UTU had reached for the Salina Hub. The carrier notes that the court, in *Volkman,* rejected a request by former RI employees for full "carryover" seniority and confirmed that the seniority date of former RI employees was March 24, 1980, the date they were hired by SSW. *Volkman,* 724 F. Supp. at 1335. UP points out further that the court's July 21, 1993, order provides that "those prior rights may be modified by future collective bargaining as are prior rights granted under the existing labor contracts between the defendants SSW and UTU." UP maintains that the petitioners' prior rights were

[3] The background of the dispute is discussed in *Volkman v. United Transp. Union*, 724 F. Supp. 1282 (D. Kan. 1989). The July 21, 1993, order was the court's final judgment on the claims. The court then issued an order on December 15, 1993, approving a settlement agreement.

modified through the process of collective bargaining, as had been contemplated by the court in *Volkman*.

UP asserts that the arbitrator had explained that the "hub and spoke" operations at Salina would enable UP to achieve public transportation benefits and operating efficiencies and that modifying petitioners' seniority was necessary to implement the coordination. UP further notes that the implementing agreement modifies the prior rights of all employees in the Salina Hub, and that petitioners were treated no differently than any other employees.

In replying to the petitioners, UTU makes many of the same arguments as UP. The union adds that, for nearly 20 years, the former RI employees have used their 1980 seniority date with SSW. In UTU's view, to permit petitioners to resurrect their original RI seniority date now would be exceedingly unfair to the other employees involved in this and prior mergers. UTU asserts that the arbitrator found that the method agreed to by UTU and UP was a fair and equitable method of blending the rights of the former SSW and RI trainmen with those of other UP affected employees. UTU contends that petitioners have asserted no basis for the Board to disturb that finding.

*Relocation of terminal.* In their appeal, the petitioners contend that UP has not demonstrated a public transportation benefit by relocating the Pratt terminal to Herington. They argue that the public, including affected employees, would not benefit by requiring trainmen to drive 135 miles to report to work. They assert that the employee fatigue factor is inconsistent with the public transportation benefit determined by the arbitrator.

UP says that the petitioners have not presented any evidence to support their claims of inadequate housing and public facilities at Herington. To the contrary, UP submitted letters from city officials in Herington, indicating there is more than an adequate supply of housing and public facilities in and around Herington. UP states further that employees who did not believe that suitable housing or public facilities are available in Herington have the option of remaining in Pratt.[4] UP further notes that employees are accorded relocation benefits under the *New York Dock* conditions.

The UTU states that the petitioners have not demonstrated that egregious error occurred to warrant review of the arbitrator's findings on the relocation of the Pratt terminal.

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[4] UP states that, as early as November 1998, only nine employees elected to remain at Pratt, while 28 employees agreed to relocate to Herington. UP notes further that the employees who elected to remain in Pratt will not be required to commute to Herington for their assignments.

## DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.8, the standard for review of arbitration decisions is provided in *Chicago & North Western Tptn. Co. — Abandonment*, 3 I.C.C.2d 729 (1987), *aff'd sub nom., International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*Lace Curtain*). Under *Lace Curtain*, we accord deference to arbitrators' decisions and will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Review of arbitral decisions has been limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions." We generally do not overturn an arbitral award, unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it is outside the scope of authority granted by the conditions. *Id.* at 736.

Swonger and Spaulding ask us to review the arbitrator's determination regarding the seniority roster at Salina. Typically, the Board defers to the arbitrator's determination on seniority matters. *See, Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company — Merger, Etc.*, Finance Docket No. 21210 (Sub-No. 5) (STB served December 22, 1998).

The arbitrator found that the seniority provisions in the implementing agreement fairly and equitably blended the rights of the petitioners with those of other affected employees, and that it was consistent with the court orders in *Volkman*. Petitioners have not demonstrated that the arbitrator's decision was irrational, that it exceeded his authority or that egregious error occurred warranting review under the *Lace Curtain* standard. To the contrary, *Volkman* supports the arbitrator's use of March 24, 1980, as the seniority date for the former RI employees.

The arbitrator determined that there were public transportation benefits from implementing the "hub and spoke" operations at Salina that warranted modifying the seniority rights of employees. These are factual findings to which we must accord deference to the arbitrator under the *Lace Curtain* standard of review. *See, 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. 22) (STB served June 26, 1997). Petitioners have failed to show that the arbitrator committed

egregious error in making these findings. Therefore, we decline to review these findings.

Petitioners' claim that there is no public transportation benefit from relocating UP's terminal from Pratt to Herington also is without merit. In *UP/SP,* 1 S.T.B. at 362-64, we noted that, to meet the statutory requirement that the transaction be found to be consistent with the public interest, we had to examine the effect of the transaction on the adequacy of transportation to the public (*See,* former 49 U.S.C. 11344(b)(1)(A) and current 49 U.S.C. 11324(b)(1)). This, in turn, required us to determine the public benefits that would result from the transaction. We defined "public benefits" as efficiency gains, such as cost reductions and service improvements. We then determined that the applicants should realize public benefits of $534 million per year from more efficient operations. *Id.* at 376. Among the efficiencies specifically discussed were the streamlining and consolidation of transportation functions and operations at major terminals. Consequently, the arbitrator found that UP's "hub and spoke" operation at Salina is an obvious public transportation benefit.

Petitioners claim that the purported unavailability of housing and other non-transportation related facilities should have been weighed against the "public benefits" of the transaction. It is too late for petitioners to raise such issues. In any event, these matters are properly compensated by moving allowances and other benefits under *New York Dock.* Thus, petitioners have not met our standard for review under *Lace Curtain* for these matters, as well.

Accordingly, we decline to review the arbitrator's decision.

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

*It is ordered*:

1. Petitioners' request to exceed the page limitation in 49 CFR 1115.2(d) is granted. Petitioners's request for oral argument is denied.
2. We decline to review the arbitrator's decision.
3. This decision is effective on May 1, 2000.

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