The Board denies a petition to vacate arbitration award, finding that a guilty plea by the neutral referee to violation of the federal tax laws does not provide a legal basis for vacating the award.

BY THE BOARD:

We are denying the petition of the Brotherhood of Maintenance of Way Employees (BMWE) to vacate an arbitration award issued on January 14, 1999, by William E. Fordenberger, Jr., the Neutral Referee, based on his pleading guilty to violation of the tax laws. We find no legal basis to do so, and do not deem it appropriate to overrule an award that formed the basis for the privately negotiated agreement between management and labor that is in place today.

BACKGROUND

In a decision in the lead Proceeding, CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196 (1998), we approved a series of corporate transactions dividing control of the assets of Consolidated Rail Corporation (Conrail) between CSX Transportation, Inc. (CSXT) and Norfolk Southern Railway Company (NS). Conrail’s role was reduced to controlling assets in “shared asset areas” operated for the benefit of both CSXT and NS. These transactions were approved subject to the labor protective conditions of New York Dock Ry. — Control — Brooklyn Eastern Dist., 366 I.C.C. 60, 84-90 (1979) (New York Dock), aff’d, v. United States, 609 F.2d 83 (2d Cir. 1979).

Under New York Dock, labor 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 our deferential Luce-Curtain

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standard of review. 1 Once the scope of the necessary changes is determined by
negotiation or arbitration, adversely affected employees are entitled to receive
comprehensive displacement and termination benefits for up to 6 years.
Here, the three carriers and various unions were initially unable to negotiate
agreements to implement labor changes sought by the carriers that would affect
employees in crafts performing maintenance-of-way functions in the field and in
shops. 2 When the parties could not agree on an implementing plan, the dispute
was taken to arbitration pursuant to New York Dock. Then, after the parties
could not mutually agree on an arbitrator, the National Mediation Board (NMB),
at the request of the parties, appointed William E. Feddenberger, Jr., to serve as
a neutral arbitrator pursuant to section 411 of the New York Dock conditions. 3
On January 14, 1999, after a hearing, Mr. Feddenberger issued an award (the
Award) imposing an implementing arrangement based, for the most part, on the
implementing plans proposed by the carriers.
The Award was appealed to us by two unions, BMWE and the International
Association of Machinists and Aerospace Workers (IAM). While these appeals
were pending, the unions and carriers continued negotiations that resulted in
settlement agreements on all issues. Subsequently, pursuant to the unions' request, 4
we dismissed their appeal by decision served on May 18, 1999.
By petition filed on December 27, 1999, BMWE requests that we vacate the
Award. BMWE's sole ground for vacating the Award is that it was "the product
of unfair and prejudicial proceedings" because the arbitrator pleaded guilty on
April 7, 1999, to violation of the tax laws.
On January 18, 2000, CSX, NS and Conrail filed replies in opposition to
BMWE's motion to vacate the Award.

DISCUSSION AND CONCLUSIONS

BMWE maintains, generally, that Mr. Feddenberger's violation of federal
tax laws disqualifies him as an arbitrator, necessitating vacation of the Award.

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1 Under 49 CFR 1113.8, the standard for review is provided in Chicago & North Western
2 Employees in these crafts were represented by seven unions.
3 Section 411 specifies:
Within five (5) days from the request for arbitration the parties shall select a neutral
referee and in the event they are unable to agree ** ** then the National Mediation Board
shall immediately appoint a referee.
4 In its Notice of Withdrawal, BMWE stated that the parties had "reached settlement
agreements * * * resolving [their] dispute over the arbitrator implementing agreement of
January 14, 1999."
BMWE claims, in essence, that: (1) Mr. Fredenberger was acting as an agent of the Board and in that capacity was a federal employee when he was involved in the arbitration; (2) his conviction violated the duties imposed on public employees; and (3) such a violation requires that decisions made after the violation occurred be considered void ab initio. While we certainly understand the concerns that BMWE has raised, we do not find it legal arguments valid.

First of all, BMWE’s initial premise is incorrect. Mr. Fredenberger was not an agent of the Board nor a “special Government employee” under 11 U.S.C. 202(a) and 3 CFR 2635.102(1). Rather, he was an independent, neutral arbitrator properly designated by the NMB to render a decision in a matter which the parties were unable to resolve on their own. While it is true that Mr. Fredenberger’s decision would of necessity involve interpreting and deciding matters within the purview of this agency, and that his decision was subject to our review, this does not transform the arbitrator into the Board’s agent.

Nor is there any merit to BMWE’s claim that Mr. Fredenberger was a special government employee. He was not an “officer or employee” of either the Board or the NMB in that phrase is used in defining a “special Government employee” in 11 U.S.C. 202(a). BMWE emphasizes that Mr. Fredenberger was selected by the NMB, not chosen by the parties as was the case in TCU

1 BMWE claims that New York Court arbitrations are analogous to Administrative Law Judges (ALJs). While arbitrators may perform certain functions that are analogous to those performed by ALJs, arbitrators are not public officials. A private party may perform duties analogous to those of a public official, but that does not transform that entity into a public official. Moreover, the cases BMWE cites in this regard are not persuasive. In CSE Transp. Inc. v. United Transp. Union, 85 F.3d 345, 348 (4th Cir. 1996), a decision upholding an anti-trust injunction, the court merely referred to the arbitrator as an ALJ in one instance, and attached no significance to it. In Union Pacific/MKT Merger—[UT] Impeachment Agreement—Arbitration Review, Finance Docket No. 28080 (Sub-No. 28) (ICC served Aug. 9, 1990), a case in which the ICC referred to have an interlocutory appeal of an arbitrator panel’s ruling, the ICC noted that, while it had specific rules for such appeals from ALJs, it had none for arbitrators. This decision, where the ICC clearly noted the distinction between ALJs and arbitrators, undermines BMWE’s position here. Similarly, in CSE Corp. — Control — Chesalet System, etc., Finance Docket No. 29950 (Sub-No. 21) (ICC served July 29, 1990), a decision denying a stay request, the ICC, in declining to render a decision to an arbitrator rather than to the parties, noted that arbitrators, unlike judges, do not traditionally have the power to make a correction in the merits of an award. In a subsequent comment Commissioner Laminoly stated he would remand the award back to the arbitrator. In a footnote, he added “as one serves, an arbitrator acting under the authority of conditions imposed by the Commission * * * i.e., under the authority delegated by the Commission is our agent, akin in standing to an ALJ.” However, the ICC, by not remanding the decision to the arbitrator, squarely addressed and rejected this analogy.

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Arbitration Appeal. This distinction is irrelevant because, regardless of how the arbitrator was selected, that selection does not transform an arbitrator into an officer or employee of an agency of the United States Government. Although Mr. Friedenberger was designated by the NMB, this purely ministerial act by the NMB does not make him an officer or employee of that agency. Nor was he an officer or employee of this agency merely because the subject matter of the arbitration is within our jurisdiction and the decision could be appealed to us. BMWE does not cite any authority to suggest that an arbitrator designated by the NMB to arbitrate a dispute arising from STB-imposed labor protective conditions falls within the ambit of 18 U.S.C. 202(a).

More importantly, there is no authority for the proposition that legal or ethical transgressions, even by public employees, invalidate decisions by the transgressing employees when those decisions have no relationship to the acts or subject matter involved in the transgressions. Mr. Friedenberger's tax law violation had no connection whatsoever with the subject matter of the arbitration. Mr. Friedenberger's subsequent conviction for tax evasion involved his personal financial affairs, not railway labor issues. There is no nexus between the two subject areas.

In addition, there is no authority to support BMWE's contention that arbitral decisions issued after an arbitrator engages in an illegal act, but prior to a conviction for that act, must be overturned. The cases cited by BMWE are inapposite. They deal with the removal and/or eligibility of a decision maker after a conviction, rather than overturning a decision rendered prior to a conviction.

BMWE has not shown that Mr. Friedenberger's tax law violation created a bias against BMWE pertaining to this arbitration. In an attempt to illustrate

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1 Norfolk Southern Corp. v. Control — Norfolk & Western Ry. and Southern Ry. Co. (Arbitration Review), 618 F.2d 1180 (4th Cir. 1980), in which the court found that the arbitrator should not have been named a defendant in a lawsuit because NMB lacked any power in this case and merely provided an arbitrator for the use of disputants...**

2 See NLRB v. E. F. Johnson Co., 152 F.2d 385 (8th Cir. 1945), in which an arbitrator's prior disciplinary actions were held to have affected his impartiality, rendering an impermissible award. As the court stated, at 158 (citation omitted):"...in attempting to vacate the arbitral decision based on 'evident partiality,' appeal raises a significant burden..." It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality. Arbitrations are not held to the ethical standards of Article III judges...**

3 Accordingly, appellant must establish specific facts that indicate improper motives on the part of the arbitrator...**

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prejudice on Mr. Fredenberg’s part, BMWE raises objections to his conduct of the hearing. However, BMWE’s allegations in this regard do not clearly demonstrate bias. More importantly, BMWE has shown no connection between Mr. Fredenberg’s personal tax law violation and the parties to, or subject matter of, the arbitration.

BMWE also questions the propriety of Mr. Fredenberg’s appointment by the NMB. BMWE claims that NMB should not have appointed him as an arbitrator because it knew he was the subject of an ongoing criminal investigation. BMWE asserts that NMB also failed in its responsibilities by not informing the parties of the pending investigation. BMWE argues that, had it known these facts, it would have sought Mr. Fredenberg’s removal. However, NMB’s function of appointing an arbitrator is purely ministerial. BMWE has cited no authority for its argument that NMB had a duty to disclose what was, at the time, merely an investigation, with no certainty that it would ever develop into any sort of action against Mr. Fredenberg.

Moreover, BMWE’s request to vacate the Award is inconsistent with its entry into voluntary settlement effecting certain changes to the arbitrated implementing arrangement that were beneficial to BMWE members. As part of these agreements, BMWE agreed to drop its appeal. When BMWE withdrew its appeal, it relinquished its opportunity to challenge the Award.9

Finally, the Award is an integral part of the settlement agreements modifying it. If we were to vacate the Award, we would be modifying the settlement. Because the carriers are currently operating pursuant to the Award as modified, in the settlement, vacation of the Award could have adverse operational consequences for the parties. One of the purposes of the New York Dock conditions is to avoid this type of disruption by the settlement of disputes through negotiation between the parties. Absent compelling circumstances, which we do not have here, we will not intervene at this stage of the process, after an agreement is privately negotiated and is now in place.

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

9 In particular, BMWE asserts that Mr. Fredenberg scheduled the hearing sooner than BMWE would have preferred, that he did not allow them sufficient opportunity to present their case, and that (Petition, pt.) be allegedly “used as assistant where none was authorized.”

10 Because we have encouraged the settlement of disputes through negotiation between the parties, we are reluctant to jeopardize the negotiation process by allowing one side to repudiate the negotiated agreement.

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It is ordered:
1. RMWE’s petition for vacation of the Award is denied.
2. This decision is effective January 26, 2001.

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