

STB

FD-32760(SUB34)

7-8-99

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SEC

SERVICE DATE - JULY 8, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 34)

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: July 7, 1999

By petition filed on June 23, 1999, under 49 CFR 1115.8, Mr E.E. Schoppa, acting on behalf of himself and other similarly situated employees, requests a 30-day extension, to July 23, 1999, of the deadline for filing an appeal of the decision of Arbitrator R.J. Carvatta.

On July 2, 1999, the United Transportation Union (UTU) and the Union Pacific Railroad Company (UP) filed replies in opposition to the requested extension.

The requested extension will be denied. The arbitrator issued his award on November 17, 1998. On February 1, 1999, the arbitrator issued a decision clarifying the award. Under the assumption that the 20-day deadline began to run on February 1, 1999, rather than November 17, 1998, the appeal was due by February 22, 1999. Thus, petitioners are at least 4 months late in filing an appeal.

Petitioners have not explained their lengthy delay. Petitioners allege that they did not become aware of the effect of the award on them until June 4, 1999. However, in a letter dated May 27, 1999, petitioners' attorney stated that they became aware of the modified award on May 4, 1999.¹ Moreover, petitioners should have been aware of the clarified award even before May 4, 1999, because it was distributed to the "Local Chairpersons in the Houston Hub" on February 10, 1999, and April 16, 1999.² In addition, the dispute was discussed on the web home page of the

¹ Specifically, the letter stated, "... [o]ur clients are concerned about the Carvatta award, as modified on February 1, 1999, but not given by the Union to our clients until May 4, 1999." See Exhibit 1 of UTU's reply filed on July 2, 1999.

² Statement of A. Terry Olin, attached to UP's reply filed on July 2, 1999; statement of David L. Haakey, attached to UTU's reply filed on July 2, 1999.

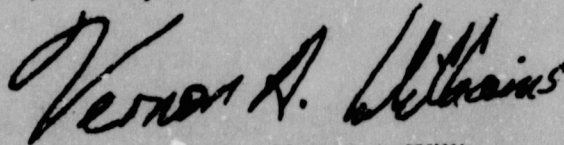
General Committee of UTU's Houston Hub.³

Under these circumstances, petitioners had adequate time to prepare an appeal and have not justified their failure to do so.

It is ordered:

1. The petition for an extension is denied.
2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

A handwritten signature in dark ink, appearing to read "Vernon A. Williams", is written over the typed name and title.

Vernon A. Williams
Secretary

³ Id.

SERVICE LIST FOR: 03-jul-1999 STB FD 32760 34 UNION PACIFIC CORPORATION UNION PACI

CLINTON J MILLER III GENERAL COUNSEL
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

BRENDA J COUNCIL
1650 FARNAM STREET
OMAHA NE 68102-2186 US

JO ANNE RAY
WOODARD HALL & PRIMM PC
7100 CHASE TOWER 600 TRAVIS
HOUSTON TX 77002 US

Records: 3

STB

FD-32760 (SUB 34)

5-9-01

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SERVICE DATE - MAY 9, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 34)

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: May 4, 2001

By decision served July 8, 1999, the Secretary denied a motion, filed June 23, 1999, by Mr. E. E. Schoppa and certain other employees (Movants) for an extension of the deadline to appeal an arbitration decision in this matter (the Carvatta Award). The Secretary found that the extension request was filed more than 4 months late and that Movants had not provided sufficient justification for the delay.¹ On July 28, 1999, Mr. Schoppa filed a motion for reconsideration of the Secretary's decision. The United Transportation Union (UTU or the Union) filed a reply on August 16, 1999, opposing Schoppa's motion. We will deny the motion.

BACKGROUND

In 1996, we approved the acquisition and control of the Southern Pacific Rail Corporation and its rail carrier subsidiaries, including the Southern Pacific Transportation Company (SP), by the Union Pacific Corporation and its rail carrier subsidiaries, including the Union Pacific Railroad Company (UP),² subject to the standard New York Dock employee

¹ See 49 CFR 1115.8 (an appeal of a final arbitration decision must be filed within 20 days of the issuance of the decision, unless a later date is authorized by the Board); see also 49 CFR 1104.7(b) (requests for extension of time to file an appeal must be filed not less than 10 days before the appeal's due date and must be justified by good cause). The Secretary found in this case that any appeal of the arbitral award was due by February 21, 1999, and that any request for an extension of time to file an appeal was due by February 11, 1999.

² See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff'd sub nom.

(continued...)

protective conditions.³ Under New York Dock, changes affecting rail employees that relate to approved transactions must be implemented by agreements negotiated before the changes occur. If the parties are unable to negotiate, or subsequently disagree on the interpretation of, an implementing agreement, the dispute is resolved by arbitration, subject to appeal to the Board under the limited standard of review set out in Chicago & North Western Tptn. Co.—Abandonment, 3 I.C.C.2d 729, 735-36 (1987) (Lace Curtain), aff'd sub nom. IBEW v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Once the scope of the necessary changes is determined by negotiation or arbitration, adversely affected employees are entitled to up to 6 years of comprehensive displacement and dismissal benefits.

Consistent with New York Dock, on June 11, 1997, UTU and UP entered into a merger implementing agreement (MIA) to govern the coordination of UTU trainmen in the Houston Hub, which encompasses southern Texas and Louisiana. UTU and UP proceeded jointly to prepare seniority rosters for the hub, and they attempted to resolve the roster complaints that were being received from employees and UTU officers. The MIA began to be carried out on February 1, 1998. On April 2, 1998, UTU served notice that it would seek arbitration under Article I, Section 11 of New York Dock to resolve the complaints that had been received.

The arbitration hearing was held on September 1, 1998, and the arbitrator, R. J. Carvatta, issued his award on November 17, 1998, but a question subsequently arose as to the intended application of the award. Accordingly, in a letter dated January 19, 1999, UTU and UP jointly requested a clarification, and on February 1, 1999, the arbitrator issued a letter of interpretation. UP and UTU subsequently met to discuss the implementation of the award and the interpretation, and the understanding that they reached was confirmed in a letter dated March 29, 1999. UP proceeded with its planned coordination of the UTU Houston Hub trainmen, pursuant to the Carvatta Award, on or about July 1, 1999.

On June 23, 1999, Movants, all of whom were employed as trainmen in Zone 5 of the Houston Hub, requested an extension to permit them to appeal the arbitration award. They claimed that they had not learned until June 4, 1999, that the seniority rosters would be revised under the arbitration award, and that the 20-day period to file an appeal should not have started until that date. Movants claimed that a 30-day extension of the appeal period was also necessary

²(...continued)

Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

³ See New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

for the arbitrator to respond to a request for clarification filed by Zone 5 trainmen on June 8, 1999.⁴

The extension request was opposed by UTU and UP and was denied in the Secretary's July 8, 1999 decision. Responding to Movants' contention that they did not learn of the effect of the award until June 4, 1999, the Secretary noted that: (1) Movants' own attorney had stated in a May 27, 1999 letter of grievance to the UTU that her clients learned of the award on May 4, 1999; (2) information on the clarified award had been distributed by UTU to its local chairpersons on February 10 and April 16, 1999; and (3) the award had been discussed on UTU's Houston Hub web pages.

In a verified statement accompanying his motion for reconsideration, Mr. Schoppa states that the Houston Hub is vast; that employees in the different zones within the hub learned of the award on different days; that the trainmen for whom the May 27, 1999 letter was written were not from his zone;⁵ and that he did not learn of the award and its effect until June 3, 1999, when he and other off-duty Zone 5 trainmen met with a trainman from Zone 3. Schoppa Motion for Reconsideration, Exhibit A.

Additionally, Mr. Schoppa disputes the Secretary's finding that Movants should have been aware of the clarified award before May 4, 1999. He claims that his local chairman neither gave him a copy of the award nor discussed it with him; that he did not receive notice from UP; that notice was not posted; and that he would have no way of knowing about or retrieving information about the award on a UTU website. Finally, Mr. Schoppa argues that to enforce the appeal deadline would be inconsistent with the precedent of the Board and the Interstate Commerce Commission (ICC) treating late-filing rail employees leniently.⁶ Id.

⁴ The arbitrator's response, if any, to the June 8, 1999 clarification request has not been placed into evidence.

⁵ Mr. Schoppa maintains that the trainmen that learned of the award on May 4, 1999, acted promptly and reasonably in seeking further clarification from the arbitrator on June 8, 1999. He states that Article 28 of the UTU constitution requires members to present their complaints to the union before taking legal action; that the trainmen presented their grievances in the May 27, 1999 letter; and that UTU rejected their grievances in a letter dated June 3, 1999. We note, however, that Article 28 governs civil actions brought by individual members against their officers, not appeals of arbitration awards. Schoppa Motion for Reconsideration, Attachment D (UTU Constitution).

⁶ In support, Mr. Schoppa cites Consolidated Rail Corp.—Acquisition of Control and Merger—Pittsburgh, C. & Y. Ry. (Arbitration Review), STB Finance Docket No. 32419 (Sub-No. 1) (STB served Feb. 3, 1999) (rail employee filing one day late granted second extension to (continued...))

DISCUSSION AND CONCLUSION

Under 49 CFR 1011.7, appeals of decisions of the Secretary and other Board employees who exercise delegated authority "are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."⁷ We find that Mr. Schoppa has not satisfied this high burden.⁸

The arbitral panel, as is customary, provided prompt notice of its award to Mr. Schoppa's representative (the UTU), as well as UP, and Mr. Schoppa does not claim any failure on the part of the arbitral panel in that regard. Rather, Mr. Schoppa's claim rests on the asserted failure of his union to give him actual notice of the final Carvatta Award in sufficient time to permit him to file a timely appeal with the Board within the 20-day period provided under 49 CFR 1115.8.⁹

However, actual notice is not, and could not be, the standard by which our time deadlines are governed. Rather, we (like other regulatory and adjudicatory bodies) calculate filing deadlines based upon a constructive notice standard, subject to waiver in appropriate cases, so that issues can be resolved as expeditiously as possible and authorized transactions can proceed with a reasonable degree of certainty. There is no basis for us to depart from that practice here.¹⁰

⁶(...continued)

file an appeal); MidSouth Rail Corp. & MidLousiana Rail Corp.—Exemption—Acquisition and Operation—Certain Lines of North Louisiana & Gulf R.R. Review of Arbitral Award, Finance Docket No. 30177 (Sub-No. 1) (ICC served July 17, 1992) (rail employee granted an extension to file an appeal); and St. Louis S.W. Ry.—Purchase (Portion)—William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific R.R., Finance Docket No. 28799 (Sub-No. 1) (ICC served June 11, 1991) (rail carrier's late-filed appeal accepted as a petition to declare arbitration award improper, but denied on the merits).

⁷ Mr. Schoppa filed under 49 CFR 1115.3, but because the Secretary's decision was not a decision by the entire Board in the first instance, his motion is, in fact, governed by 49 CFR 1011.7.

⁸ Although Mr. Schoppa's motion for reconsideration was not filed "within 10 days after the date of the [Secretary]'s action," as required by 49 CFR 1011.7, we will not reject it on that ground.

⁹ Mr. Schoppa states that his local chairperson, Steve Parker, "... never gave me a copy of the Carvatta award or discussed it with me and I had no idea that he had received it." Schoppa Affidavit, Exhibit B to Schoppa's Motion for Reconsideration.

¹⁰ In his June 22, 1999 Motion for Extension of Time, Mr. Schoppa stated (at 2) that "[t]he Union has previously taken the position that a Houston Hub trainman has 20 days to
(continued...)

Notwithstanding Mr. Schoppa's claim that he never received actual notice of the award from his local union chairperson, it appears to us that UTU took reasonable actions to notify its members of the Carvatta Award, of the arbitrator's subsequent clarification, and of the UP/UTU letter of understanding,¹¹ and the record indicates that these matters were known and discussed among UTU members at various local UTU meetings.¹² UTU's continuing correspondence to the union's local chairpersons was more than adequate notice, in our judgment, for affected employees to become aware of the Carvatta Award, and all related developments, in time to

¹⁰(...continued)

appeal the award from the date that he received it (emphasis added)." But Mr. Schoppa cites no basis for what he characterizes as the Union position, nor can the Union's asserted position supplant the requirements of our regulations. An actual notice requirement would be exceedingly difficult for us to enforce and apply.

¹¹ The record indicates that UTU took several steps to inform its members affected by the award. Mr. David L. Hakey, General Chairperson of UTU's Committee of Adjustment with jurisdiction over the Houston Hub, stated that his predecessor, Mr. L. W. Parsons, sent the local chairpersons and secretaries of the involved locals a letter containing a copy of the arbitration award on December 2, 1998. Mr. Hakey further indicated that he personally wrote to the same local chairpersons and secretaries on four subsequent occasions to promptly advise them of subsequent developments and to send copies of the pertinent documents as follows: (1) on January 27, 1999, enclosing copies of the award and request for clarification; (2) on January 28, 1999, advising them of the request for clarification and requesting detailed written information about seniority issues; (3) on February 10, 1999, enclosing copies of the award, clarification request, and interpretation; and (4) on April 16, 1999, enclosing copies of the award, clarification request, interpretation, and the March 29, 1999 letter of understanding. UTU Opposition to Extension Request, Hakey Decl. at 1-2 (Exhibit 3). We note that, even if the March 29 letter of understanding were deemed to be the event triggering the 20-day appeal-filing period, Mr. Schoppa's filing would have been untimely.

¹² UP Opposition to Extension Request at 5, Olin Decl. at 4-5.

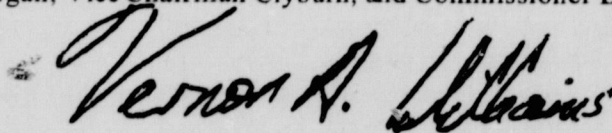
comply with our governing appellate rules in arbitral matters.¹³ Thus, we see no basis for allowing a late-filed appeal.

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

It is ordered:

1. The motion for reconsideration of the Secretary decision served July 8, 1999, is denied.
2. This decision is effective on its date of service.

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



Vernon A. Williams
Secretary

¹³ Unlike the cases relied upon by Mr. Schoppa, this case raises concerns similar to those that we addressed recently in another UP-SP merger-related labor matter, Union Pacific Corp.-Control- Southern Pacific Corp.(Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 39) (BLE/UP) (STB served Dec. 8, 2000). There, we denied a request by the General Chairman of the Brotherhood of Locomotive Engineers for permission to late-file an appeal of an arbitral award on the ground that he did not become aware of the arbitral decision until on or near the date on which the appeal would have been due (May 8, 2000). Like the matter before us here, the arbitral decision had been transmitted to the BLE representative at the arbitration hearing shortly after its issuance (April 18, 2000). However, the award was not received by the BLE Chairman until weeks later, and he did not then immediately request an extension. Under the circumstances, we enforced the explicit filing deadlines contained in our regulations. BLE/UP at 2 & n.3.

SERVICE LIST FOR: 07-may-2001 STB FD 32760 34 UNION PACIFIC CORPORATION, UNION PAC

CLINTON J MILLER III
UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

DANIEL R ELLIOTT III
ASST GENERAL COUNSEL UNITED TRANSPORTATION UN
14600 DETROIT AVENUE
CLEVELAND OH 44107-4250 US

BRENDA J COUNCIL
KUTAK ROCK
1650 FARNAM STREET
OMAHA NE 68102-2186 US

JO ANNE RAY
WOODARD HALL & PRIMM PC
7100 CHASE TOWER 600 TRAVIS
HOUSTON TX 77002 US

Records: 4