

STB

FD-33388 (SUB 92)

3-9-01

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31713

SERVICE DATE - MARCH 9, 2001

31713
SEC

SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

March 7, 2001

STB Finance Docket No. 33388 (Sub-No. 92)

**CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY-CONTROL AND
OPERATING LEASES/AGREEMENTS-CONRAIL, INC.
AND CONSOLIDATED RAIL CORPORATION**

(Arbitration Review)

NOTICE

A court action, entitled as shown below,
was instituted on or about March 2, 2001,
involving the above-entitled proceeding:

No. 01-1099

Brotherhood of Maintenance of Way Employees

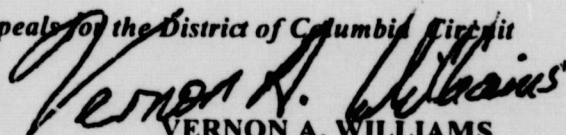
v.

Surface Transportation Board

United States of America

before the

United States Court of Appeals for the District of Columbia Circuit



VERNON A. WILLIAMS
Secretary

JOHN B ROSSI JR
CONSOLIDATED RAIL CORPORATION
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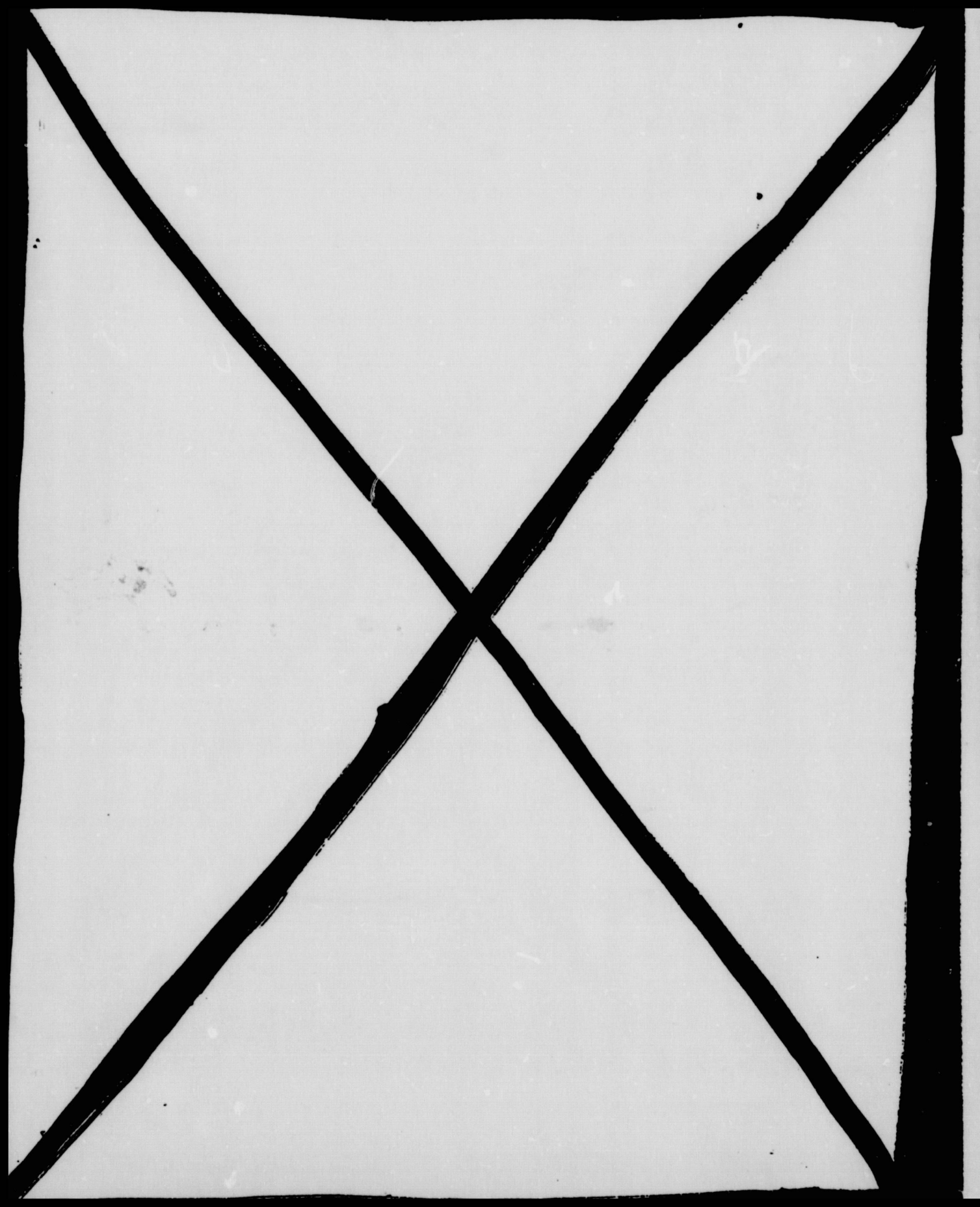
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Records: 5



STB

FD-33388

(SUB 92)

1-26-01

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EB

SERVICE DATE - JANUARY 26, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 92)

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN
CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(Arbitration Review)

Decided: January 23, 2001

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. Fredenberger, 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 overturn 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, served on July 23, 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, New York Dock Ry. 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 Lace Curtain 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.

¹ Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain).

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. Fredenberger, Jr., to serve as a neutral arbitrator pursuant to section 4(1) of the New York Dock conditions.³ On January 14, 1999, after a hearing, Mr. Fredenberger issued an award (the Award) imposing an implementing arrangement based, for the most part, on the implementing plan proposed by the carriers.

The Award was appealed to us by two unions, BMW 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, BMW requests that we vacate the Award. BMW'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, CSXT, NS and Conrail filed replies in opposition to BMW's motion to vacate the Award.

DISCUSSION AND CONCLUSIONS

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

² Employees in these crafts were represented by seven unions.

³ Section 4(1) 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, BMW stated that the parties had "reached settlement agreements . . . resolving [their] disputes over the arbitrated implementing agreement of January 14, 1999."

occurred be considered void ab initio. While we certainly understand the concerns that BMW has raised, we do not find its legal arguments valid.

First of all, BMW's initial premise is incorrect. Mr. Fredenberger was neither an agent of the Board nor a "special Government employee" under 18 U.S.C. 202(a) and 5 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.⁵

Nor is there any merit to BMW's claim that Mr. Fredenberger was a special government employee. He was not an "officer or employee" of either the Board or the NMB as that phrase is used in defining a "special Government employee" in 18 U.S.C. 202(a). BMW emphasizes that Mr. Fredenberger was selected by the NMB, not chosen by the parties as was the case in TCU Arbitration Appeal.⁶ This distinction is irrelevant because, regardless of how the arbitrator was

⁵ BMW claims that New York Dock arbitrators are analogous to Administrative Law Judges (ALJs). While arbitrators may perform certain functions that arguably 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 party into a public official. Moreover, the cases BMW cites in this regard are not persuasive. In CSX Transp. Inc. v. United Transp. Union, 86 F.3d 346, 348 (4th Cir. 1996), a decision upholding an anti-strike 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-UTU Implementing Agreement-Arbitration Review, Finance Docket No. 30800 (Sub-No. 28) (ICC served Aug. 8, 1989), a case in which the ICC refused to hear an interlocutory appeal of an arbitration 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 BMW's position here. Similarly, in CSX Corp.-Control-Chessie System, Etc., Finance Docket No. 28905 (Sub-No. 22) (ICC served July 20, 1990), a decision denying a stay request, the ICC, in declining to remand 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 separate comment, Commissioner Lamboley stated he would remand the award back to the arbitrator. In a footnote, he added "In one sense, 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.

⁶ Norfolk Southern Corp.-Control-Norfolk & Western Ry. and Southern Ry. Co. (Arbitration Review), STB Finance Docket No. 29430 (Sub-No. 21) (STB served Dec. 15, 1999)
(continued...)

selected, that selection does not transform an arbitrator into an officer or employee of an agency of the United States Government. Although Mr. Fredenberger was designated by the NMB, this purely ministerial act by the NMB⁷ 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. BMW 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 issues or subject matter involved in the transgressions. Mr. Fredenberger's tax law violation had no connection whatsoever with the subject matter of the arbitration. Mr. Fredenberger'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 BMW'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 BMW 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.

BMW has not shown that Mr. Fredenberger's tax violation created a bias against BMW pertaining to this arbitration.⁸ In an attempt to illustrate prejudice on Mr. Fredenberger's part, BMW raises objections to his conduct of the hearing. However, BMW's allegations in

⁶(...continued)

(TCU Arbitration Appeal). There, we similarly refused to overturn an arbitration award by Mr. Fredenberger that was issued prior to his conviction on tax matters.

⁷ See Ozark Airlines v. NMB, 797 F.2d 557, 564 (8th Cir. 1986), where the court found that the NMB should not have been named a defendant in a lawsuit "[b]ecause NMB lacked any power in this case and merely provided an arbitrator for the use of disputants"

⁸ See Remmey v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994), where an arbitrator's prior disciplinary infractions were not shown to have affected his impartiality, yielding an impermissible award. As the court stated, at 148 [citations omitted], "In attempting to secure vacatur of the arbitral decision based on 'evident partiality,' appellant carries a significant burden. 'It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality. Arbitrators are not held to the ethical standards of Article III judges....' Accordingly, appellant 'must establish specific facts that indicate improper motives on the part of the arbitrator.'"

this regard⁹ do not clearly demonstrate bias. More importantly, BMW has shown no connection between Mr. Fredenberger's personal tax law violation and the parties to, or subject matter of, the arbitration.

BMW also questions the propriety of Mr. Fredenberger's appointment by the NMB. BMW claims that NMB should not have appointed him as an arbitrator because it knew he was the subject of an ongoing criminal investigation. BMW asserts that NMB also failed in its responsibilities by not informing the parties of the pending investigation. BMW argues that, had it known these facts, it would have sought Mr. Fredenberger's removal. However, NMB's function of appointing an arbitrator is purely ministerial. BMW 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. Fredenberger.

Moreover, BMW'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 BMW members. As part of these agreements, BMW agreed to drop its appeal. When BMW withdrew its appeal, it relinquished its opportunity to challenge the Award.¹⁰

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.

It is ordered:

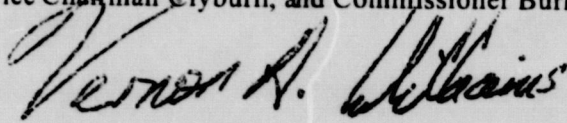
1. BMW's petition for vacation of the Award is denied.

⁹ In particular, BMW asserts that Mr. Fredenberger scheduled the hearing sooner than BMW would have preferred, that he did not allow the union sufficient opportunity to present its case, and that (Petition, at 17) he allegedly "used an assistant where none was authorized."

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

2. This decision is effective on its date of service.

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

A handwritten signature in dark ink, appearing to read "Vernon A. Williams". The signature is written in a cursive, flowing style with some capitalization.

Vernon A. Williams
Secretary

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