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SERVICE DATE - DECEMBER 22, 1998

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 21510 (Sub-No. 5)

NORFOLK AND WESTERN RAILWAY COMPANY AND NEW YORK, CHICAGO AND ST.  
LOUIS RAILROAD COMPANY--MERGER, ETC.

Decided: December 18, 1998

On October 13, 1998, 11 former employees (petitioners)<sup>1</sup> of the former Akron, Canton and Youngstown Railroad Company (AC&Y) filed a petition to reopen this proceeding, alleging material error, new evidence, and substantially changed circumstances. On November 2, 1998, Norfolk Southern Railway Company (NS), successor by merger to Norfolk and Western Railway Company (NW), filed a reply. We will deny the petition.

BACKGROUND

By decision served on May 25, 1995, the former Interstate Commerce Commission (ICC) affirmed an arbitral decision arising from NW's sale of the property of the former AC&Y, together with portions of other property, to the Wheeling Acquisition Corporation (referred to as Wheeling and Lake Erie Railway Company), an unaffiliated company. The sale included the petitioners' entire seniority district. Petitioners were protected under the "Merger Agreement" employee protective conditions that the ICC had imposed in 1964 when it approved<sup>2</sup> the merger of NW with the former New York, Chicago and St. Louis Railway Company (Nickel Plate) and the acquisition of stock control over both the former Wabash Railroad Company and AC&Y.<sup>3</sup>

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<sup>1</sup> The petitioners are: Jerry Kunkle, John Roman, Lawrence C. Rose, Leo H. Tressell, Denver D. Walker, John Koel, Allen Barbour, David W. Cornell, Charles F. Johnson, Glynn Knight, and Billy K. Knight.

<sup>2</sup> Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 324 I.C.C. 1 (1964).

<sup>3</sup> The Nickel Plate merger was governed by the requirement in former section 5(2)(f) (now 49 U.S.C. 11326) of the former Interstate Commerce Act that the ICC condition merger approvals on a fair and equitable arrangement to protect the interests of affected railroad employees. The minimum labor protective conditions that were required at that time were those described in New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952). In the Nickel Plate merger, however, the ICC adopted and imposed the expanded Merger Agreement conditions negotiated by NW and its labor unions. The most important of these benefits was the attrition protection that provided for working-lifetime wage guarantees. It specified that no employee of any of the carriers involved in the Nickel Plate merger could be placed in a worse position with respect to

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Approximately three years after NW sold the former AC&Y property, NW required petitioners to report to work at its Cleveland, OH, Nickel Plate District, which they did under protest. Upon reporting to the Cleveland district, petitioners were given new hire seniority dates by NW ranging from September 8, 1992, to September 17, 1993, despite the fact that, in 1964 when NW had acquired the AC&Y, petitioners had established seniority dates with AC&Y ranging between May 14, 1956, and June 15, 1964. The United Transportation Union (UTU), the successor to the four original labor organization signatories to the Merger Agreement, opposed the transfer and argued that the affected employees were not required either to accept the new assignments or to lose their benefits under the Merger Agreement.<sup>4</sup> Pursuant to the terms of the Merger Agreement, the dispute was submitted to arbitration. An arbitral decision was issued on July 9, 1993.

The arbitrator addressed whether NW violated the Merger Agreement conditions applying to these protected employees when it required them to accept trainmen assignments in different seniority districts in Cleveland and Lima, OH. He found that the obligations under the Merger Agreement are bilateral in that NW is obligated to guarantee wages and benefits, and the employees, in turn, are obligated to make themselves available to work. The arbitrator further found that the positions made available constituted comparable employment in the same general locality because the jobs are all in the same craft or class and did not require a change in residence. Subject to the negotiation of an implementing agreement, the arbitrator found that NW held the right to assign employees to comparable positions in Cleveland and Lima, as a condition to maintaining their compensatory benefits under the Merger Agreement.

The arbitrator then directed that an implementing agreement be negotiated within 90 days of the date of his award. He stated that an implementing agreement was necessary because the reassigned employees were put on the bottom of the seniority list as new employees, thereby placing them in a less advantageous positions than they would have been had they remained in their old seniority district. Also, he expressed concern that placing the employees on the Nickel Plate seniority list might subject these employees to reassignments in areas substantially beyond a normal and reasonable commute from the Cleveland and Lima areas. The implementing agreement was to

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<sup>3</sup>(...continued)

compensation, rules, working conditions, fringe benefits, or rights or privileges at any time during that employee's employment. In return for lifetime economic protection, NW received the right to transfer the work of the protected employees throughout the merged system. To facilitate NW's exercise of this transfer right, labor was directed to enter into implementing agreements that would allow employees to follow their transferred work voluntarily or, if they declined, to be reassigned in the general locality of their last employment.

<sup>4</sup> NW had provided benefits under the Merger Agreement to petitioners during the time between their separation from positions on the former AC&Y property and the time they reported to work in their new assignments.

address these concerns.

UTU sought review of the arbitrator's decision, arguing that he had exceeded his jurisdiction, committed egregious error, and misinterpreted the labor protective conditions imposed by the ICC on the Nickel Plate merger by: (1) permitting NW to compel the transfer of employees to a location where they held no seniority at the time of the merger; and (2) permitting NW to negotiate an after-the-fact implementing agreement. In seeking review of the arbitration award, UTU also argued that it was impossible to develop an implementing agreement integrating the seniority of the former AC&Y seniority district employees into the new seniority district.

By decision served on May 25, 1995, the ICC reviewed the arbitration award and affirmed it. Specifically, the ICC found that NW had the right, as a precondition to the continued receipt of protective benefits under the Merger Agreement, to assign employees to available positions off their former seniority district and that, while NW should have negotiated an implementing agreement before the reassignment took place, the arbitrator's requirement for the parties to reach an implementing agreement after the fact constituted an appropriate solution. The ICC disagreed with UTU that it was impossible to develop an implementing agreement that protected the seniority of eight of the petitioners and sought to ensure that the former AC&Y employees would not be reassigned to a point beyond the general locality of their prior positions that would necessitate a change in residence. Accordingly, under the terms of the arbitration award, NW and UTU were required to negotiate an implementing agreement.

Subsequently, the parties were unable to reach a voluntary agreement and the matter was resubmitted to arbitration. In a Supplemental Opinion and Award issued on January 2, 1996 (Supplemental Award), petitioners won protection from reassignments from their new positions that might necessitate a change in their residences, but their seniority that they had established with AC&Y (as it had stood prior to their reassignment) was not integrated into their new seniority district.

While the supplemental arbitration was pending, petitioners filed a lawsuit in the United States District court for the Northern District of Ohio (Eastern Division) against NW and UTU.<sup>5</sup> Petitioners sought a judgment that NW had violated their rights under the Nickel Plate Merger Agreement and under the AC&Y collective bargaining agreement between NW and UTU, and sought damages from UTU for alleged breaches of UTU's duties of fair representation under the Railway Labor Act during the Merger Agreement arbitration proceedings and for UTU's failure to seek judicial review of the ICC's May 25, 1995 decision, as well as for UTU's alleged deficient handling of petitioners' grievances concerning working conditions at Cleveland.

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<sup>5</sup> John Koehl, et al. v Norfolk & Western Ry., et al., No. 1:95CV2309 (N.D. Ohio) (Koehl v. NW).

On September 2, 1997, the district court granted summary judgment to NW for all claims asserted against it, directed judgment for UTU for all claims asserted by two of the petitioners here,<sup>6</sup> and dismissed all other claims asserted against UTU except for claims alleging a breach of duty of fair representation by UTU concerning local grievances at Cleveland after April 30, 1995. On May 7, 1998, the jury, considering only petitioners' claims concerning UTU's handling of local grievances at Cleveland, returned a verdict in favor of nine of the petitioners. The jury awarded damages in the aggregate amount of \$32,500. On June 9, 1998, the district court judge entered a judgment against UTU and awarded the damages.

Petitioners now argue that the January 2, 1996 Supplemental Award is in non-compliance with the May 12, 1995 ICC decision and that the Supplemental Award must be set aside with an order directing that UTU and NS enter into an implementing agreement integrating the former AC&Y employees' AC&Y date of hire seniority into the Cleveland Nickel Plate District roster. They argue that the arbitration award of July 9, 1993, recognized that this integration is a requirement, that the ICC's decision affirmed it, and that UTU understood its obligation to obtain an integrated roster when it entered into the supplemental arbitration process, but that this was not done. Petitioners provide portions of the deposition of Peter L. Patsouras, a member of the arbitration panel, which was taken with regard to their claims in Koehl v. NW. In his deposition, Mr. Patsouras stated: "[petitioners] were placed at the bottom of the roster in compliance with the existing collective bargaining agreement that required that in a situation like this, new employees or employees that go from one part of the system to another go to the bottom of the roster." Because the January 2, 1996 Supplemental Award did not integrate or protect the petitioners' seniority, petitioners allege that it does not comply with the ICC decision and warrants reopening of this proceeding.

In reply, NS argues that a petition to reopen should not be used as a vehicle for review of an arbitration decision because a specific procedure for such review is provided under 49 CFR 1115.8, which allows an appeal of right to be filed within 20 days of a final arbitration decision. NS points out that petitioners had actual knowledge of the Supplemental Award upon its issuance,<sup>7</sup> petitioners were represented by counsel at the time the Supplemental Award was issued and elected not to file a petition for review by the Board, and petitioners do not state why they did not file a timely petition for review.<sup>8</sup> Accordingly, NW argues that the petition to reopen cannot be viewed as an appeal of right under section 1115.8 because such an appeal is now time-barred.

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<sup>6</sup> C. F. Johnson and L. C. Rose.

<sup>7</sup> Petitioner John Koehl, who had been UTU general chairman for the former AC&Y employees, participated in the proceeding.

<sup>8</sup> NS also notes that the district court judge stated that petitioners knew of the appeal process for the arbitration award and chose not to use it.

NS argues further that UTU's petition to reopen does not meet the criteria of 49 CFR 1115.4 because it does not state in detail in what respects the proceeding involves material error, new evidence, or substantially change circumstances. NS contends that petitioners' mere assertion that the Supplemental Award is in non-compliance with the May 25, 1995 ICC decision does not demonstrate any of these standards.

#### DISCUSSION AND CONCLUSIONS

In Chicago & North Western Tptn. Co. -- Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), the ICC established a limited scope of review of arbitration decisions, which recognizes the unique ability of arbitrators to analyze grievances in light of their knowledge of the industry and labor practices, and their familiarity with specifics of the situation, including factors such as productivity and the impact on employee morale that the arbitral decision may have. 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.<sup>9</sup>

Petitioners apparently recognize that an appeal of right to the Supplemental Award is precluded by 49 CFR 1115.8 and have chosen to file a petition to reopen this proceeding under 49 CFR 1115.4, generally alleging that new evidence, material error and substantially changed circumstances warrant reopening. They have failed to meet this standard. Petitioners appear to want to link their favorable verdict in Koehl v. NW with the proceedings that led to the Supplemental Award. They do not, however, allege in detail or demonstrate how the verdict shows that material error was committed in this proceeding or that the verdict constitutes new evidence or substantially changed circumstances. In fact, petitioners' claims in Koehl v. NW regarding the Supplemental Award or the failure of UTU to appeal that award were dismissed by the district court. Therefore, we cannot draw any inference from the verdict that the arbitration proceedings involved error or were unfair or partial.

We disagree with petitioners' argument that the Supplemental Award fails to comply with the part of the ICC's 1995 decision that attaches importance to the arbitrator's findings concerning the integration of seniority. The ICC affirmed the arbitrator's decision and expressed its disagreement with UTU's position that seniority of petitioners could not be integrated with the Cleveland seniority district, but it did not order that the seniority of the former AC&Y employees be

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<sup>9</sup> The review of arbitral awards in this manner was upheld in International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988), and Employees of the Butte, Anaconda & Pacific v. United States, 938 F.2d 1009, 1013-14 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992).

integrated into the Cleveland Nickel Plate District in any particular way nor did it preclude the result reached in the Supplemental Award. Essentially, the arbitrator consolidated seniority by placing employees new to the situation at the bottom, one recognized way of consolidating seniority in the rail industry. Consequently, we find that the Supplemental Award is in compliance with the ICC's decision.

The ICC's 1995 decision affirmed that the parties should negotiate an implementing agreement. This was accomplished through the Supplemental Award, which protects petitioners from being required to take jobs at locations away from the Cleveland area but does not integrate seniority in the manner sought by petitioners. The integration of seniority districts is a matter that has historically been decided by arbitrators under the Washington Job Protection Agreement of 1936 and subsequently under our labor protective conditions. With the approval of the courts, we have traditionally deferred to the judgments of arbitrators on these matters in the absence of egregious error. See Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company (Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 22), slip op. at 3 (STB served June 26, 1997), citing CSX Corp.--Control--Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990). The Supplemental Award protects petitioners' right to be employed within a reasonable distance of their residences, presumably the ICC's main concern with regard to their seniority rights. And it is not a decision that could be vacated under the Lace Curtain standards even if it had been timely appealed.

Accordingly, the petition to reopen will be denied.

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

It is ordered:

1. The petition to reopen this proceeding, filed on October 13, 1998, is denied.
2. This decision is effective on January 21, 1999.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary