

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

STB Finance Docket No. 21510 (Sub-No. 6)

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

(Arbitration Review)

Decided: November 25, 1996

On April 25, 1996, an arbitration board chaired by neutral member Ekehard Muessig issued a decision that denied claims by Joseph A. Boda. Mr. Boda sought benefits under the employee protective conditions the ICC imposed in the 1964 merger between the Norfolk and Western Railway Company (N&W) and the New York, Chicago and St. Louis Railway Company (Nickel Plate).<sup>2</sup> On May 15, 1996, the United Transportation Union (UTU) appealed the arbitral award under the Board's Lace Curtain standards.<sup>3</sup>

N&W responded to UTU's appeal on June 24, 1996. UTU replied to N&W's response. N&W, in turn, filed a surreply. UTU then filed a surrebuttal on September 17, 1996, and N&W replied on October 2, 1996. UTU filed a response to N&W's reply on October 28, 1996, and N&W replied on November 8, 1996.<sup>4</sup>

BACKGROUND

When the Nickel Plate merger was approved, the ICC was required by former section 5(2)(f) of the Interstate Commerce Act (now 49 U.S.C. 11326) to impose a fair and equitable arrangement to protect the interests of railroad employees. Accordingly, the ICC adopted and imposed labor protective conditions which had been negotiated by N&W and its labor unions in a merger agreement (Nickel Plate Agreement).<sup>5</sup> The Nickel Plate Agreement incorporated provisions of the Washington Job Protection Agreement of 1936 and provided "attrition" protection that guaranteed wages and benefits for the working life of affected employees. The Nickel Plate Agreement also specified that no

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). This decision relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326.

<sup>2</sup> See, Norfolk & W. Ry. Co and New York, C. and St. L. Co. Merger, 324 I.C.C. 1, 50 (1964).

<sup>3</sup> 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).

<sup>4</sup> Although these supplemental filings are not normally permitted, we will accept them in the interest of a more complete record.

<sup>5</sup> UTU is the successor to four of the labor unions that signed the agreement.

employee would be placed in a worse position with respect to compensation, working conditions, or benefits during his employment. In return for lifetime economic protection, N&W had the right to transfer the work of protected employees throughout the merged system.

On May 17, 1990, N&W sold a portion of its rail property, the Nickel Plate's Wheeling and Lake Erie (W&LE) district, along with other properties, to the Wheeling Acquisition Corporation.<sup>6</sup> As a result of the sale, N&W abolished the jobs of 40 firemen and trainmen represented by UTU who were protected under the Nickel Plate Agreement. Mr. Boda was listed as one of the protected firemen whose job was abolished.

Mr. Boda and the other designated protected employees had seniority entitling them to take other N&W positions. Instead of exercising that seniority, which may have required them to relocate, the employees submitted claims for displacement allowances under the Nickel Plate Agreement. N&W denied the claims, asserting that employees could not receive displacement allowances because they did not exercise seniority to take available positions. The dispute was then submitted to arbitration.

On March 21, 1991, an arbitral award was issued by a panel chaired by Robert O. Harris upholding the employees' claims. The award (herein, Harris I) found that an N&W employee who lost his job as a result of the W&LE sale was not required to exercise seniority to accept available work in the merged system that is beyond the general location of his present employment in order to be eligible for protective benefits. The award also determined that an employee was entitled to receive protective benefits unless N&W could show that the distance that employee may be required to travel to accept his new assignment would not place him in a worse position than he was in prior to the sale of the W&LE lines.

The ICC reviewed the Harris I award under the Lace Curtain standards and found it to be unsupported by the Nickel Plate Agreement. The ICC noted that the Nickel Plate Agreement contained a bargain requiring that employees exercise seniority to take work available in exchange for economic protections afforded should they ultimately be displaced. The ICC held that, by not requiring employees to exercise seniority, the Harris I award misinterpreted and failed to draw its essence from the Nickel Plate Agreement. The award was vacated and remanded for further proceedings. See Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 9 I.C.C.2d 1021 (1993) (N&W Arbitration Review). The ICC's decision was affirmed in United Transportation Union v. ICC, 43 F.3d 697 (D.C. Cir. 1995) (UTU).

On remand, arbitrator Harris issued a new award (Harris II) on November 3, 1995, that denied the employees' claims for protective benefits.

Mr. Boda's claims. At the time of the W&LE sale, Mr. Boda worked as a fireman in Dillonvale, OH, on N&W's Toledo Division.

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<sup>6</sup> See Wheeling Acquisition Corporation--Acquisition and Operation Exemption--Lines of Norfolk & Western Railway Company, Finance Docket No. 31591 (ICC served Dec. 28, 1990).

Apparently, Mr. Boda refused to exercise his seniority to take other jobs that were available to him elsewhere in N&W's system. As a result, N&W suspended Mr. Boda's Nickel Plate Agreement benefits beginning July 5, 1990, as it did with the other 39 trainmen and firemen involved in the Harris arbitration.

Mr. Boda continued to file monthly claims for protective benefits from July 1990 through July 1991. N&W refused to pay these claims because Mr. Boda failed to exercise seniority to take available work. On July 19, 1991, N&W notified Mr. Boda that he was recalled to service as an engineer assigned to Cleveland, OH. Mr. Boda objected to being recalled to Cleveland, claiming that N&W was required by an agreement dated May 3, 1990, between the N&W and the Brotherhood of Locomotive Engineers (the N&W-BLE Agreement) to recall senior engineers assigned to Cleveland. Mr. Boda asserted that he was a fireman working on the Toledo Division and could not be assigned to Cleveland. Despite his objections, Mr. Boda returned to service on August 17, 1991 as an engineer in Cleveland. On September 17, 1991, Mr. Boda was transferred to Toledo, OH.<sup>7</sup>

Mr. Boda continued to seek benefits under the Nickel Plate Agreement. He also claimed he was entitled to vacation pay in 1991 and 1992 and medical coverage from July 1990 through August 1991. These claims were then submitted to arbitration before Muessig's panel. UTU, which represented Mr. Boda, asked the panel to determine whether Mr. Boda was entitled to benefits for the period July 5, 1990, through August 17, 1991.

In the arbitration, UTU argued that Mr. Boda was not obligated to exercise seniority outside his home terminal, citing the Harris I award as support. UTU noted that the Harris I award "addressed the same exact circumstances involved in the instant case at bar." UTU asserted that N&W recalled Mr. Boda as an engineer soon after the Harris I award was issued to reduce its liability. UTU further argued that, having been recalled to work as an engineer, Mr. Boda was then covered by the provisions of the N&W-BLE Agreement, allowing him to pursue his claims for benefits under the Nickel Plate Agreement.

N&W responded that Mr. Boda's claims were barred by res judicata, arguing that Mr. Boda's claims for benefits have been adjudicated in Harris I and II and have been reviewed by the ICC and a court. Alternatively, N&W asserted that Mr. Boda was not entitled to benefits because he had not exercised seniority.

Arbitrator Muessig agreed with N&W that Mr. Boda's claims were barred by res judicata. The arbitrator indicated that Mr. Boda was one of the claimants involved in the Harris arbitration. He noted that the issue raised by Mr. Boda was the same issue raised in the Harris arbitration, which had been reviewed by the ICC in N&W Arbitration Review, supra, affirmed by an appellate court in UTU, supra, and subsequently denied in Harris II. Considering this procedural history, arbitrator Muessig determined that the doctrine of res judicata prohibited him from adjudicating the same issue and interpreting the same contractual

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<sup>7</sup> Mr. Boda also requested a relocation allowance of \$10,000. Apparently, N&W initially declined the request, but subsequently paid Mr. Boda the \$10,000 relocation allowance on August 27, 1992.

provisions. As a result, arbitrator Muessig summarily dismissed the claims.

UTU is now seeking review of arbitrator Muessig's decision under the Lace Curtain standards. UTU submits that the arbitrator committed an egregious error in invoking the doctrine of res judicata and refusing to consider the merits of the dispute. UTU claims that, at the time of the sale of the W&LE lines, Mr. Boda was a fireman, but when he was recalled to service as an engineer, he became subject to the N&W-BLE Agreement. UTU asserts that as a result of the change in Mr. Boda's employment status, a new dispute arose, which was not the same as that considered by arbitrator Harris. UTU claims that it did not intend to relitigate the issue considered in the Harris arbitration.

UTU argues further that the key issue in the dispute here is N&W's alleged violation of Mr. Boda's rights as an engineer. Assertedly, N&W improperly assigned Mr. Boda to the Cleveland Division rather than recalling engineers already assigned to Cleveland as required by the N&W-BLE Agreement. By subjecting Mr. Boda to the N&W-BLE Agreement, UTU argues, N&W was obligated to make Mr. Boda whole by honoring his claims under the Nickel Plate Agreement.

N&W responded that the Muessig award does not warrant review under the Lace Curtain standards. N&W asserts that this proceeding raises no issues of general transportation importance, nor does it require interpretation of the Nickel Plate Agreement or protective conditions generally. Moreover, N&W asserts, that the ICC has already resolved all of the relevant issues when it reviewed the Harris I decision. N&W states that the case here concerns only the question of whether one employee's claim is barred by the earlier decisions in N&W Arbitration Review and UTU.

N&W contends that arbitrator Muessig correctly decided that Mr. Boda's claims were foreclosed by prior decisions which denied claims for benefits by Mr. Boda and other former Nickel Plate employees who refused to exercise seniority following sale of the W&LE lines. The railroad contends that UTU wants to relitigate whether Mr. Boda was eligible to receive Nickel Plate Agreement benefits. The union is barred by the doctrine of res judicata from doing so, argues the carrier.

N&W further contends that Mr. Boda's recall to service as an engineer is not relevant in determining whether he was eligible for the claimed benefits. N&W notes that Mr. Boda's recall was not considered in the Harris arbitration and was not the issue before the Muessig arbitration. N&W asserts that the only significance of Mr. Boda's recall was that it fixed the end point of the period in which Mr. Boda was ineligible for protective benefits because he refused to exercise seniority. N&W further states that questions about Mr. Boda's recall under the N&W-BLE Agreement were not relevant to the Muessig arbitration.

#### DISCUSSION AND CONCLUSIONS

Under the Lace Curtain standards, the Board, as the ICC's successor, does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." Our review is limited to

"recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Generally, the agency does 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 735-36.

We find no reason to disturb the Muessig award under the Lace Curtain standards. The Muessig award does not involve significant issues of general importance. Instead it involves issues relating to claims by one employee seeking benefits under an agreement that have already been resolved by prior litigation.

Additionally, we do not agree with UTU's assertion that Muessig committed egregious error by deciding that Mr. Boda's claims were barred by res judicata. In St. Louis Southwestern Railway Company Arbitration Appeal, Finance Docket No. 28799 (Sub-No. 9) (ICC served Aug. 15, 1995) (SSW), the ICC had recognized that the doctrines of res judicata and collateral estoppel may be applied to labor disputes to prevent continuous and piecemeal litigation. As discussed in SSW, the doctrine of res judicata or "claim preclusion" forecloses litigation of issues that, although not themselves litigated, could have been raised in a prior suit between the parties. Collateral estoppel or "issue preclusion" forecloses the relitigation of a matter that has been litigated and decided.

UTU argues that the Mr. Boda's claims are not precluded by the Harris arbitration because in the Muessig arbitration, Mr. Boda filed new claims for Nickel Plate Agreement benefits as an engineer with rights under the N&W-BLE Agreement. UTU further asserts that arbitrator Muessig should have considered whether N&W violated the N&W-BLE Agreement by recalling Mr. Boda before other more senior employees. UTU contends that these matters were not litigated and decided in the Harris arbitration, but arose after the Harris I award was issued.

We disagree. The change in Mr. Boda's status is not relevant to deciding whether he was entitled to Nickel Plate Agreement benefits. His claims relate to benefits sought for the period July 1990 through August 1991, when he was a fireman in a non-working status, and had been ineligible for benefits by refusing to exercise seniority. His recall to full working status as an engineer merely marked the end of the period when he was ineligible for benefits. Moreover, arbitrator Muessig's panel acted pursuant to the Nickel Plate Agreement to resolve Mr. Boda's claim. The panel was not convened to decide a dispute about Mr. Boda's recall under the N&W-BLE Agreement, which had its own procedures for resolving disputes.

The Harris arbitration considered whether Mr. Boda and the other protected N&W engineers and firemen affected by the W&LE sale were entitled to Nickel Plate Agreement benefits even though they refused to exercise seniority to obtain available work. Ultimately, the claims were denied. The Muessig arbitration considered Mr. Boda's claims for identical benefits for the period of time he refused to exercise seniority prior to his recall by N&W in July 1991. The Harris arbitration involved the same transaction, time period, protective conditions, and issues as the Muessig arbitration. Accordingly, because Mr. Boda's claims were litigated and denied in the prior Harris arbitration, UTU is barred from relitigating them before the Muessig panel or

here. UTU's appeal does not meet the standards for Lace Curtain review, and we decline to hear the appeal.

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

It is ordered:

1. UTU's request that its appeal of the arbitral decision be heard is denied.

2. This decision is effective on December 3, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams  
Secretary