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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760, Sub-File 44

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)

PETITION OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN
UNION PACIFIC RAILROAD – CENTRAL REGION
FOR REVIEW OF A NEW YORK DOCK ARBITRATION OPINION AND AWARD

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General Chairman
Brotherhood of Locomotive Engineers and Trainmen
Union Pacific Railroad – Central Region

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I.

INTRODUCTION

Union Pacific Railroad – Central Region, General Committee of Adjustment,
Brotherhood of Locomotive Engineers and Trainmen (“BLET”), being duly designated and
authorized collective bargaining representative for the craft of locomotive engineers on the
Union Pacific Railroad (“Carrier” or “UP”) – Central Region, herewith appeals Case No. 1,
Arbitration Opinion and Award, dated April 14, 2005, New York Dock Board of Arbitration (Dr.
James R. McDonnell, Chairman), regarding application of the St. Louis Hub Merger
Implementation Agreement, Side Letter No. 11 to that Agreement, and the October 18, 1999
Agreement, modifying Side Letter No. 11.

A copy of the Opinion and Award is attached hereto as Appendix A. The Submission filed by the undersigned, representing the BLET General Committee of Adjustment for the Union Pacific Railroad – Central Region, before Chairman McDonnell, is attached hereto as Appendix B. The Submission filed by the Carrier before Chairman McDonnell is attached hereto as Appendix C.

II.

STATEMENT OF FACTS GIVING RISE TO SETTING ASIDE THE AWARD AS TO CASE NO. 1

On April 14, 2005, Dr. James R. McDonnell, New York Dock Arbitrator, signed and mailed his Opinion and Award in Case No. 1, wherein he abdicated his authority to resolve the issues between the parties, holding, without support cited from any authority, that Side Letter No. 11 to the St. Louis Merger Implementing Agreement, and the October 18, 1999 Agreement, amending Side Letter No. 11, were not a part of the St. Louis Merger Implementing Agreement:

DECISION

I have reviewed and analyzed all of the documents, evidence, and the written and verbal submissions by the parties in this dispute.

I find that the threshold question submitted by the Union Pacific Railroad Company's Question at issue is controlling.

After months of study I have concluded that I am not empowered to resolve the issue before me.

The Side Letter No. 11 dated April 15, 1998 does not find is genesis in the Merger Implementing Agreement, but rather, stands for what it is; a side letter. In paragraph two (2) of the Side Letter it states:

“The purpose of this Side Letter is to more specifically define the rights and responsibilities of said engineers at Poplar Bluff and Illmo in line with the Merger Implementing Agreement for the St. Louis Hub and Side Letter No. 21.”

It is a stretch to claim that Side Letter No. 11 has a clear and direct connection to the Merger Implementing Agreement. It does not.

I cannot reach the merits in this case because the negative answer to Procedural Issue 1, submitted by the Carrier, will not allow it.

This matter does not find itself in the jurisdictional territory of a New York Dock arbitrator.

AWARD AND ORDER

This committee finds it does not have jurisdiction to resolve the dispute presented.

All claims presented by the Organization in this matter are denied.

(Exhibit A at pp. 3-4; emphasis original and added)

The Organization submits that Side Letter No. 11 was negotiated concurrently with, and as a part of the St. Louis Hub Merger Implementing Agreement. It was ratified as part of the “package” submitted to the membership of the BLET. From a reading of the express language of Side Letter No. 11, it more fully defines the provisions of the St. Louis Hub Merger Implementing Agreement, providing additional options and protection for the UP and former St. Louis Southwestern Railway (“SSW”) employees in relation to their relocation to other terminals from Poplar Bluff, Missouri, Illmo, Missouri, and Dexter, Missouri, within the newly merged Hub, as well as their options and protections if they choose not to relocate to other terminals at the time of implementation of the St. Louis Hub Merger Implementing Agreement:

Side Letter No. 11

April 15, 1998

MR D E PENNING
GENERAL CHAIRMAN BLE
12531 MISSOURI BOTTOM RD
HAZELWOOD MO 63042

MR D E THOMPSON
GENERAL CHAIRMAN BLE
414 MISSOURI BLVD
SCOTT CITY MO 63780

MR JOHN R KOONCE

GENERAL CHAIRMAN BLE
5050 POPLAR AVE STE 501
MEMPHIS TN 38157

Gentlemen:

This refers to the Merger Implementing Agreement for the St. Louis Hub entered into this date.

In Side Letter No. 21 of the Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub into October 9, 1997, Carrier made certain written commitments regarding engineers residing at Illmo and Poplar Bluff. **The purpose of this Side Letter is to more specifically define the rights and responsibilities of said engineers at Poplar Bluff and Illmo in line with the Merger Implementing Agreement for the St. Louis Hub and said Side Letter No. 21.**

This Side Letter addresses three (3) specific groups of engineers:

- A. Former UP engineers assigned to the UP Dupo – Poplar Bluff freight pool (home terminal St. Louis) who have continued to reside at Poplar Bluff under a “reverse lodging” arrangement.
- B. Former UP engineers assigned to UP Salem – Poplar Bluff freight pool (home terminal Salem/Poplar Bluff) who have continued to reside at Poplar Bluff under a “reverse lodging” arrangement.
- C. Former SSW and UP engineers at Illmo and Poplar Bluff who, as a result of the Implementing Agreement, will have their home terminal changed to St. Louis.

Pursuant to the terms of Articles I.A.2. and I.A.5. of the Implementing Agreement covering the St. Louis Hub, the consolidated pool operating between St. Louis and Dexter will be home terminalled at St. Louis, and the pool operating between Salem and Dexter will likewise be home terminalled at Salem. It is the intent and desire of the Carrier that all engineers assigned to this pool who presently reside in Illmo and Poplar Bluff be relocated to St. Louis and Salem. However, considering the large number of engineers who reside at these locations who are reasonably close to retirement age, the Carrier has expressed its willingness to enter into an attrition arrangement for a fixed period of time in order to permit engineers to maintain their residences in the Poplar Bluff and Illmo areas for said period of time while protecting these pools. The terms and conditions of this interim arrangement are as follows:

- 1. Former SSW and UP engineers who are required to be relocated to St. Louis or Salem shall be considered eligible for the relocation

benefits set forth in Article VII.B. of this Implementing Agreement.

2. Former SSW engineers who are assigned to either of these pools who decline to relocate to St. Louis or Salem and exercise the “reverse lodging” option provided in Article I.A.2.g. of the Implementing Agreement shall be considered eligible for the relocation benefits under Article VII.B. of this Implementing Agreement. If such engineers should subsequently relocate to St. Louis under the provisions of this Side Letter or otherwise, such relocation shall be considered to be a seniority move and shall not trigger any further relocation benefits under this Implementing Agreement.
3. Those former UP engineers assigned to the UP Dupo – Poplar Bluff and Salem – Poplar Bluff freight pools who have continued to reside at Poplar Bluff under a “reverse lodging” attrition arrangement may elect to relocate to St. Louis or Salem, and if so relocated, shall be considered eligible for the relocation benefits set forth in Article VII.B. of this Implementing Agreement. If such employees decline to relocate and elect to exercise the “reverse lodging” option provided in this Agreement, they shall become subject to the provisions of the immediately preceding Section 2 hereof. As agreed in Item 2 of Side Letter No. 21 to the NLR/PB Merger Implementing Agreement, it is undisputed that the distance between Poplar Bluff and Dexter shall not be an issue regarding entitlement of such engineers to such relocation benefits.
4. Those engineers described in Sections 2 and 3 above who decline to relocate to St. Louis or Salem and are subsequently forced to relocate because they are unable to hold a regular assignment at Dexter/Poplar Bluff, such relocation shall be considered to be a seniority move and shall not trigger any further relocation benefits under this Implementing Agreement.
5. Effective upon service of a notice by the Carrier, which cannot be served any sooner than April 1, 2005, the “reverse lodging” attrition arrangements set forth in this Implementing Agreement shall become null and void. On and after that date, all engineers described in Sections 1, 2, and 3 above shall be required to protect their respective freight pools at the designated home terminal locations if they choose to continue to occupy such assignments. This change shall be effected by the service of a thirty (30) day notice by the Carrier of its intent to do so.

6. The provisions of this Side Letter No. 11 shall only apply to engineers residing in Poplar Bluff or Illmo or vicinity, and protecting service at such location or vicinity, on October 10, 1997 (date of Carrier's St. Louis Hub Notice).
7. It is understood this Agreement does not operate to preclude an engineer from receiving full relocation benefits under Article VII.B. when required to relocate to Dexter to protect the Dexter-Memphis pool, extra board, or any other assignments established at this location.
8. Under the unique circumstances surrounding this Side Letter, engineers at Poplar Bluff and Illmo and vicinity will not be required to provide proof of relocation to Dexter in order to receive the relocation benefits under Article VII.B.1 and 2., but must do so to receive the additional benefit under Article VII.B.3.

The above-described arrangements are designed to deal with a peculiar situation under specific circumstances, and shall not be refereed to by either party in any other proceeding or negotiations.

If the foregoing adequately and accurately sets forth our agreement and understanding in this matter, please so indicate by signing in the space provided for that purpose below.

Yours truly,

/s/ M. A. Hartman

M. A. Hartman
General Director – Labor Relations

AGREED:

/s/ D. E. Penning
D. E. Penning
General Chairman, BLE

/s/ D. E. Thompson
D. E. Thompson
General Chairman, BLE

/s/ John R. Koonce
J. R. Koonce
General Chairman, BLE

cc: D. M. Hahs
Vice President BLE

J. L. McCoy
Vice President BLE

(Exhibit B, Organization Submission Exhibit D at pp. 45-47; emphasis added)

By Agreement dated October 18, 1999, the undersigned, former SSW General Chairman, D. E. Thompson, and former General Director – Labor Relations – Operating – South, W. S. Hinckley, entered into an Agreement that modified Side Letter No. 11 of the St. Louis Hub Merger Implementing Agreement, along with corresponding sections of the Hub Agreement, expanding the rights of the UP and former SSW Engineers at Illmo, Missouri, Poplar Bluff, Missouri, and Dexter, Missouri, as to the filling of vacancies at Dexter, Missouri, rather than relocate to other terminals, and expanding of the rights of UP and former SSW Engineers at St. Louis, Missouri, Dupo, Illinois, and Salem, Illinois, also within the St. Louis Hub, to remain at those locations rather than be forced to relocate to assignments in Dexter, Missouri:

October 18, 1999

110.61-21-303

Mr. C. R. Rightnowar
General Chairman BLE
320 Brookes Dr. Suite 115
Hazelwood, MO 63042

Mr. D. E. Thompson
General Chairman BLE
414 Missouri BLVD
Scott City, MO 63780

Gentlemen:

This refers to Side Letter No. 11 of the St. Louis Hub Agreement. That side letter, along with corresponding section of the Hub Agreement provide for certain engineers to work at Dexter in the St. Louis – Dexter and Salem – Dexter pools. This arrangement was meant to provide employment at

that point on an attrition basis for a number of years without the need to force “non Dexter” engineers to that location.

Recently a number of engineers were forced to Dexter and it was brought to the attention of the Carrier by the SSW General Chairman that it was the intent of the parties to enter into an agreement to require engineers at Dexter in these two pools to fill other vacancies at Dexter prior to forcing other engineers to Dexter. It was pointed out that similar agreements have been made at other location such as Jefferson City and Pratt with similar attrition arrangements.

In keeping with the parties intent the following is agreed to at Dexter:

“If there are unfilled positions on the extra board, locals or other road assignments (including the Dexter – Memphis pool) with a home terminal at Dexter or in the vicinity, the junior engineers at Dexter, (in the St. Louis – Dexter and Salem – Dexter pools) who are entitled to reverse lodging and held away will be required to cover such positions or assignments. Engineers covered by Side Letter No. 11 who are force assigned under these provisions will not have their TPA’s reduced and will be treated as holding the highest paying assignment at Dexter. When engineers who hold these positions return to the pools, they shall again be eligible for the “reverse” provisions they are currently entitled.”

“An extra board will be maintained at Dexter, Missouri to protect engineer vacancies as per the St. Louis Hub Agreement. This extra board will be maintained at a level of no less than 30% (all fractions are amended downward) of the total number of engineer positions protected by the Dexter extra board.”

If the foregoing adequately and accurately sets forth our joint understanding on this matter please so indicate by signing in the space provided for that purpose. I have sent each of you a copy with the signature copies to General Chairman Thompson. When signed by him, please send them to General Chairman Rightnowar for his signature and forwarding on to me. Your expeditiously handling will assist in releasing any engineers currently forced to Dexter.

Yours truly,

/s/ W. S. Hinckley

W. S. Hinckley

Agreed:

/s/ D E Thompson

General Chairman BLE SSW

/s/ C. R. Rightnowar

General Chairman BLE MPUL

(Exhibit B, Organization Submission Exhibit C at pp. 1-2; emphasis added)

The Carrier, within its Submission, *did not dispute* that Side Letter No. 11 and the October 18, 1999 Agreement, amending Side Letter No. 11, *were a part of* the St. Louis Hub Merger Implementing Agreement, thereby *admitting* that they were a part of St. Louis Hub Merger Implementing Agreement:

...Following development of this compromise arrangement, the parties successfully concluded negotiations for **a merger agreement**, which was signed on April 15, 1998. [Footnote 6] **The St. Louis Hub Merger Agreement was implemented on November 1, 1998.**

The applicable terms and conditions governing this temporary “attrition” arrangement are set forth in Article I, Section A, Paragraphs 2 and 5 and Side Letter No. 11 of the Merger Agreement....

[Footnote 6] A copy of the basic Merger Agreement and Side Letter No. 11 are attached as UP’s Exhibit “D.” (The other **Side Letters and attachments accompanying and comprising the Merger Agreement** have not been provided solely for the purpose of reducing the size of this brief. Copies of the omitted documents will be made available upon request of the arbitration panel.)

(Exhibit C at p. 8, including footnote 6 at the bottom of pp. 8-9; emphasis original and added)

In light of the Carrier’s agreement that Side Letters and attachments accompany and *comprise* the Merger Agreement, Arbitrator McDonnell’s Opinion and Award did not draw its essence from the Agreements before him, nor from the expressly stated facts in the parties’ Submissions, thus failing to issue a rationally-based Opinion and Award, exceeding his authority, and constituting egregious error.

The Carrier's jurisdictional dispute was as to the subject matter, arguing that the relocation benefits and the protection against improperly *forced* relocation, as contained within Side Letter No. 11 and the October 18, 1999 Agreement, modifying same, were not "central" to the implementation of the merger, and were somehow ousted from a New York Dock Arbitrator's jurisdiction (Exhibit C at pp. 32-33); although the Carrier raised a time criteria as to "proximity" of the dispute to the date of implementation (Exhibit C at pp. 34-35), the Carrier was somewhat disingenuous as the dispute first arose on November 12, 2000, slightly more than one (1) year after the signing of the October 18, 1999 Agreement, and approximately two (2) years after implementation of the St. Louis Hub Merger Implementing Agreement (*including Side Letter No. 11*) on November 1, 1998, where the Carrier initially resolved the dispute in favor of the Organization (See, Exhibit B at pp. 14-15; see, also, Exhibit B, Submission Exhibits U and V). It was only after the Carrier's *reversal of its original settlement position of this issue* that the new dispute on the previously resolved issue arose in September 2003. Moreover, as these relocations are delayed through the expressly stated "attrition" process within the applicable Agreements, *supra*, there will also be a delay in time as to the disputes to be resolved. Relocation disputes are within the special knowledge of a New York Dock Arbitrator.

The Carrier also argued that the claims processing employed by the BLET in this matter somehow waived its position as to New York Dock jurisdiction (Exhibit C at p. 36); however, this argument is also disingenuous as the System Agreement – Claim Handling Process, within the Questions and Answers section, provides for such processing:

Q-2: Does this rule apply to claims under Labor Protective conditions?

A-2: Yes, unless the labor protective conditions provide for different time limits or procedures.

(Copy attached hereto as Exhibit D at p. 4)

III.

ARGUMENT

Under the Board's regulations, it has the authority to review a New York Dock Arbitration Award such as the one issued by Arbitrator McDonnell. 49 C.F.R. §1115.8. Under its Lace Curtain decision, the Board reviews arbitration decisions raising "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Chicago & North Western Transportation Co. – Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Brotherhood of Electrical Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988). With regard to the jurisdictional issue presented herein, Delaware and Hudson Ry. Co. – Lease and Trackage Rights Exemption – Springfield Terminal Ry. Co., Finance Docket No. 30965 (Sub-No. 1) (I.C.C. Oct. 4, 1990), provides that the Board will overturn any labor protection arbitration award that "exceeds the authority reposed in the arbitrators." With regard to the merits issue, American Train Dispatchers Association v. CSX Transportation, Inc., 9 I.C.C.2d 1127, 1130-31 (1993), holds that the Board will vacate any arbitration award "when there is egregious error," meaning that the Award is "irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." See, also, Union Pacific Railroad Company v. Surface Transportation Board, 358 F.3d 31, 37 (D. C. Cir. 2004).

Where Arbitrator McDonnell finds that he has no jurisdiction to resolve the dispute on the basis that Side Letter No. 11 and the October 18, 1999 Agreement amending same, are not part of the St. Louis Hub Merger Implementing Agreement (Exhibit A at pp. 3-4), where the parties *did not dispute* that Side Letter No. 11 and the October 18, 1999 Agreement were a part of the St. Louis Hub Merger Implementing Agreement, and, in fact, the parties stated

affirmatively within the their respective Submissions that the Side Letters and attachments *accompanied and comprised* the Merger Implementing Agreement, and the specific, express language of the Side Letters expressly state that they more clearly define the rights of the employees under the Merger Implementing Agreement, his decision is not drawn from the cited Agreements, and is without a rational basis in reason or fact; where, as here, the Opinion and Award are without foundation in reason or fact, the Arbitrator's decision is wholly baseless, and he has exceeded the authority reposed in him as an Arbitrator. Arbitrator McDonnell's Award must be vacated for "egregious error."

Without waiver of the above, and in the alternative, should this Board review the Carrier's jurisdictional arguments as stated within its original Submission before Arbitrator McDonnell, *and which were not the basis of his Opinion and Award*, the Carrier, *arguendo*, but incorrectly, stated that the dispute was unrelated to the merger implementation, and that Side Letter No. 11 provisions for benefits due to relocation, and protection against improper, forced relocation, which is slowly "unfolding" due to the "attrition" process, were somehow unrelated to the merger implementation, the Organization submits that this Board must look squarely at the specific language of Side Letter No. 11, and the October 18, 1999 Agreement amending same, as these two (2) Agreements, which provide the major focus of the dispute (and the sole focus, according to the Carrier, Exhibit C at p. 8, last paragraph), deal exclusively and expressly with the St. Louis Hub Merger Implementing Agreement; this Board has recently stated in Burlington Northern, Inc., Finance Docket No. 32549 (Sub-No. 23), "if the parties...*disagree on the interpretation of an implementing agreement, the issues are resolved by arbitration*, subject to an appeal under our differential Lace Curtain standard of review." (Footnote omitted; emphasis added). The UP now wishes to circumvent, and, therefore, also relates, to the employees merger

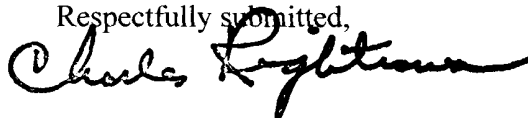
protection provided through the language in the St. Louis Hub Merger Implementing Agreement and applicable Side Letter; as such, this dispute as to the interpretation of the St. Louis Hub Merger Implementing Agreement, Side Letter No. 11, and the October 18, 1999 Agreement amending same, are squarely within the jurisdiction of a New York Dock Arbitrator.

IV.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Brotherhood of Locomotive Engineers and Trainmen, Union Pacific Railroad – Central Region, requests that this Board accept this Petition for review and decide the issues raised herein, vacating Arbitrator McDonnell's Award in Case No. 1, and remand the issues for New York Dock arbitration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles R. Rightnowar", written in a cursive style.

CHARLES R. RIGHTNOWAR
General Chairman
Brotherhood of Locomotive Engineers and Trainmen
Union Pacific Railroad – Central Region
320 Brookes Drive, Suite 115
Hazelwood, MO 63042
(314) 895-5858
(314) 895-0104 (fax)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition to Review and accompanying appendices were served upon Applicant by mailing copies Express Mail, to A. Terry Olin, General Director of Labor Relations, Union Pacific Railroad Company, STOP 0710, 1400 Douglas Street, Omaha, Nebraska 68179-0710 on this 2nd day of May 2005.


Debbie Penning