

FILED

1991

INTERSTATE
COMMERCE COMMISSION

IN THE MATTER OF ARBITRATION BETWEEN

LOUIS D. CATHEY, JR.

and

MIDLOUISIANA RAIL CORPORATION

OPINION AND AWARD

Background

This is an arbitration proceeding arising under Article I, Section 11 of the provisions of New York Dock Railway - Control - Brooklyn Eastern District, 360 ICC 60 (1979), aff'd sub nom. New York Dock Railway v. United States, 609 F. 2d 83 (2d. Cir.1979).

The parties in this dispute are Louis D. Cathey, Jr. (Claimant), a former employee of North Louisiana and Gulf Railroad Company (NorthLou), and MidLouisiana Rail Corporation (MidLou), a rail carrier which had acquired certain rail lines and trackage rights from NorthLou, resulting in the Claimant's loss of employment.

The Arbitrator was appointed by the National Mediation Board on April 23, 1991 pursuant to the provisions of New York Dock.

The Claimant was represented by James D. Caldwell, Esq., of Norman R. Gordon and Associates, Shreveport, Louisiana.

MidLou was represented by Christopher E. Hagerup, Esq., of Weiner, McCaffrey, Brodsky, Kaplan & Levin, P.C., Washington, D.C.

The record in this case begins on October 7, 1987 and concludes with the submission of the last of the parties' briefs in this proceeding on July 12, 1991.

Factual Background

The key events in this case took place in two related but separate proceedings before the Interstate Commerce Commission in 1987.

Mid South Corporation (MidSouth), which had previously formed MidLou for the purpose of acquiring certain trackage rights and rail lines from NorthLou and Central Louisiana and Gulf Railroad Company (Central Lou), successfully petitioned the ICC under 49 USC § 10505 for authority to continue in control of MidLou, in addition to maintaining its control of another rail carrier, MidSouth Rail Corporation (MidSouth Rail).

Pursuant to the provisions of 49 USC § 10505(g), the employee protective conditions established in New York Dock were made applicable to this control transaction. (MidSouth Corporation - Control Exemption - MidSouth Rail Corporation and MidLouisiana Rail Corporation, Finance Docket No. 31063, decided August 17, 1987).

In the second proceeding, Finance Docket No. 31077, MidLou successfully petitioned pursuant to the provisions of 49 USC § 10901 for an exemption to acquire certain rail lines and trackage rights from NorthLou and Central Lou. No employee protective provisions were, however, imposed

by the ICC on this acquisition transaction. (MidLouisiana Rail Corporation - Acquisition and Operation - Certain Lines of North Louisiana and Gulf Railroad Company and Central Louisiana and Gulf Railroad Company, Finance Docket No. 31077, decided July 16, 1987).

On August 26, 1987, MidLou offered alternative employment with another business, or a cash severance payment based on length of service, to any employees of NorthLou or Central Lou who were not re-hired by MidLou as it completed the approved acquisition, contingent upon the execution of a Resignation and Release form by the employee involved. Claimant did not agree to any of these terms, and was terminated from employment effective September 8, 1987.

On October 7, 1987 Claimant through his attorney wrote to MidLou and initiated his quest for coverage under the employee protective provisions of New York Dock; MidLou declined the claim.

Claimant then filed suit against MidLou in U.S. District Court on July 25, 1988, seeking New York Dock protection under the control proceeding. In a Memorandum Ruling dated December 22, 1988, the Court, citing the doctrine of primary jurisdiction, deferred the question of the Claimant's coverage to the ICC. Cathey v. MidLouisiana Rail Corp., Civil Action No. 88-1932 (USDC - W.Dist.-LA. 1988).

By letter of November 15, 1989, Claimant notified MidLou of his intention to invoke the mandatory arbitration provisions of New York Dock. On February 21, 1990 MidLou sought to contest this invocation by filing a petition for clarification with the ICC and concurrently requesting a stay of arbitration pending its disposition. On July 13, 1990 the Commission determined that the matter should proceed to arbitration; it

then dismissed MidLou's petition for clarification and denied its petition for a stay of arbitration. (MidSouth Corporation - Control Exemption - MidSouth Rail Corporation and MidLouisiana Rail Corporation, Finance Docket No. 31063, decided July 13, 1990).

Positions of the Parties

Claimant argues that his termination from employment was a direct result of the control proceeding initiated by MidSouth in Finance Docket No. 31063, and that the acquisition proceeding in Finance Docket No. 31077 was related to and concurrent with the control proceeding, not separate and distinct from it.

Since employee protective provisions were applied to the control transaction, it is not logical to argue that the employees of the acquiring entity are afforded protection, whereas employees of the entity being acquired are not.

Claimant contends that the record demonstrates that MidLou understood and construed the action of the ICC to include the acquisition of NorthLou, and recognition of labor protection for NorthLou employees, including cash severance payments, despite its assertions otherwise.

Accordingly, Claimant argues that he should be determined to be a "dismissed employee" as defined by New York Dock Appendix III, Section I(c), or in the alternative, a "displaced employee" under Appendix III, Section I(b), entitling him to a cash allowance.

MidLou argues at the outset that the claim should fail because of

procedural deficiencies: (1) the Claimant lacks standing to pursue the claim against MidLou since he has never been employed by MidLou; (2) the claim is time-barred because of failure to comply with the time limits of Article I, Section 11(a) of New York Dock; and (3) the Claimant has not met his burden of proof in establishing a claim.

As to the merits of the case, MidLou contends that the ICC and reviewing federal courts have in similar cases consistently rejected the Claimant's line of argument that he is entitled to employee protective benefits, under the control proceeding, the acquisition proceeding, or both.

Although New York Dock conditions were imposed in the control proceeding, the Claimant's employer, NorthLou, was not a party to the proceedings, and it is well settled that only those parties directly involved in the proceedings qualify for the employee protective benefits which are imposed.

As to the acquisition proceeding, MidLou acquired NorthLou pursuant to ICC policies for acquisitions and operations under 49 USC § 10901, and, as is almost always the case in Section 10901 transactions, no employee protective provisions were imposed.

MidLou argues that applicable precedent unanimously supports its substantive position that the Claimant is not entitled to any labor protective benefits, and his claim should therefore be denied.

Findings and Conclusions

Although MidLou has raised procedural questions, it would be best to proceed directly to a disposition of this case on the merits.

Accordingly, for the reasons discussed below, it is determined that the

Claimant is not entitled to employee protective benefits under New York Docket, and the claim must therefore be denied.

In order for the Claimant to succeed, he must be able to demonstrate that he qualifies for benefits under one of the proceedings which took place before the Commission.

(a) The Acquisition Proceeding

Claimant's previous employer, NorthLou, was a party to one of the proceedings, in Finance Docket No. 31077, the acquisition proceeding, where MidLou successfully petitioned under Section 10901 as a non-carrier to acquire trackage rights and rail lines from NorthLou and CentralLou.

Section 10901 requires ICC approval for the acquisition and operation of a rail line by an entity that is not a rail carrier (MidLou had only recently been formed by MidSouth for this specific purpose). Section 10901(e) gives the Commission the discretion to impose certain employee protective conditions for affected employees, but the Commission has generally refrained from doing so unless exceptional circumstances are shown.

This non-imposition policy is explicated at length in ICC Ex Parte No. 392 (SUB - No. 1), "Class Exemption for the Acquisition and Operation of Rail Lines Under 49 USC 10901", 1 I.C.C. 2d 810 (1985), aff'd sub nom. Illinois Commerce Comm. v. ICC, 817 F. 2d 145 (D.C. Cir. 1987), wherein the ICC adopted final rules exempting from regulation most acquisitions and operations under Section 10901; see 49 CFR 1150 et seq.

Thus, in accordance with its settled policy, the Commission did not impose employee protective conditions on the acquisition transaction, and Claimant must look elsewhere in seeking coverage.

(b) The Control Proceeding

Because MidLou would become a carrier subject to ICC regulation upon completion of the acquisition of NorthLou and Central Lou, and since MidSouth already controlled another rail carrier, MidSouth Rail, it became necessary for MidSouth to seek ICC approval to continue in control of MidLou; 49 USC § 11343(a)(5) requires the ICC's prior approval and authorization for the "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers".

Section 11343 transactions are subject to the mandatory labor protection requirements of 49 USC § 11347. In the instant case MidSouth proceeded by seeking an exemption under 49 USC § 10505 from the final review and approval requirements of Section 11343 for its common control of MidLou and MidSouth Rail, and the ICC applied the provisions of 49 USC § 10505(g) to impose labor protective provisions on the transaction.

The question then becomes whether the labor protective provisions apply to any parties other than those directly involved in the proceedings.

The ICC has taken the view that labor protection is not required for employees of non-applicant carriers, i.e., only those who formally participate as parties to a transaction are covered. The Commission's position has received consistent support from the courts.

In Lamoille Valley R.R. v. ICC, 711 F. 2d 295 (D.C. Cir. 1983), the Court held that protection is limited to "a rail carrier involved in the transaction" and "its employees". In Missouri-Kansas-Texas R.R. v. United States, 632 F. 2d 392 (5th Cir. 1980), it was held that protections are for the employees of the merging carriers only, citing precedents beginning with the Washington Job Protection Agreement of 1936 and its subsequent

codification as Section 11347 of the Interstate Commerce Act. See also Southern Pacific Transportation Co. v. ICC, 736 F. 2d 708 (D.C. Cir. 1984), and Crouse Corp. v. ICC, 781 F. 2d 1176 (6th Cir. 1986).

In a recent case directly on point, a U.S. Court of Appeals laid to rest any doubts about who is entitled to protections:

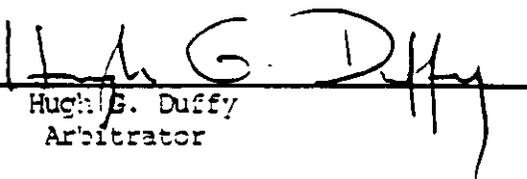
"Finally, even if the prior cases did not definitively address whether under Section 11347 a non-applicant carrier could ever be sufficiently "involved" in a transaction for which approval is sought to trigger labor protection for "affected" employees, we conclude that the ICC's interpretation of "involved" to mean only those who formally participate as parties to a transaction is reasonable".

Railway Labor Executives Association v. ICC, 914 F. 2d 276, 281 (D.C. Cir. 1990).

Clearly, since NorthLou was not a party to the control transaction, none of its employees, including the Claimant, were entitled to the benefit of the labor protective provisions which were imposed.

AWARD

The claim is denied.



Hugh G. Duffy
Arbitrator

Dated: July 23, 1991