UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20661

UNITED TRANSPORTATION UNION,

Plaintiff-Appellant,

VERSUS

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-94-1660)

(June 21, 1995)

Before GARWOOD and BARKSDALE, Circuit Judges, and BRAMLETTE, District Judge.[1]

PER CURIAM:[2]

The United Transportation Union (UTU) contends that the district court erred in holding that, during a dispute between the UTU and the Union Pacific Railroad Company (UP), the action of a binding arbitration panel (established pursuant to a congressional enactment), wherein it postponed arbitration of one of the disputed

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[1] United States District Judge for the Southern District of Mississippi, sitting by designation.

[2] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

issues, was not without authority in that it was not contrary to public policy. We **AFFIRM**.

I.

In 1990, pursuant to § 10 of the Railway Labor Act (RLA), 45 U.S.C. § 160, President Bush issued Executive Order No. 12,714, 55 Fed. Reg. 19,047 (1990), which created Presidential Emergency Board (PEB) 219 to investigate disputes between various rail carriers and labor unions, including the UTU and UP. At the beginning of 1991, PEB 219 recommended, *inter alia*, that the issue of crew consist[3] be resolved separately on each railroad by negotiations; and, if negotiations were unsuccessful, then, upon request by either party, by binding arbitration.

On April 18, 1991, amidst a national rail strike, Congress enacted, and the President signed, legislation providing for the resolution of railroad labor-management disputes. Pub. L. No. 102-29, 105 Stat. 169 (1991) (P.L. 102-29). Pursuant to P.L. 102-29, the recommendations of PEB 219 became binding upon the parties (including the UTU and UP), as though they were arrived at by agreement of the parties under the RLA.[4] ***Id.*** § 1(3).

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[3] "Crew consist" concerns the composition of the crews to be used on trains.

[4] The binding effect of the legislation was subject to certain review procedures, none of which are pertinent in this case.

That November, UP invoked the P.L. 102-29 arbitration procedures for the crew consist issue with respect to its Gulf Coast, T & P,[5] and TPMP[6] agreements with the UTU. Eventually, the National Mediation Board appointed Arbitration Panel No. 18 to hear the matter.[7] In August 1993, the arbitration panel issued its decision; with respect to UP's request for conductor-only operations in yard, local, road switcher, and non-revenue service, the crew consist would not change, but, after 18 months, UP could seek to renegotiate this particular matter, and, if no agreement is reached, the parties would then proceed with binding arbitration.[8]

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[5] Texas & Pacific Railway.

[6] Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans.

[7] Originally, the National Mediation Board appointed Arbitration Panel No. 8. That panel, however, ruled that it lacked jurisdiction over UP's request for arbitration. UP then filed suit in federal district court seeking a review of that ruling. The district court held that P.L. 102-29 required the dispute to proceed to arbitration. ***Union Pac. R.R. v. United Transp. Union***, 868 F. Supp. 867 (S.D. Tex. 1993), *aff'd per curiam*, 14 F.3d 54 (5th Cir. 1994) (TABLE). While the appeal was pending, Arbitration Panel No. 18 was appointed to consider the merits. The UTU sought, unsuccessfully, to overturn the appointment of this arbitration panel. ***United Transp. Union v. National Mediation Bd.***, No. 93-0428, 1993 WL 764220 (D.D.C. June 8, 1993).

[8] In pertinent part, the arbitration panel in its decision and award declared:

> The Panel finds that with respect to the crew consist in local freight, road switcher, and yard service, the existing standard crew consist of a conductor and helper or foreman and helper shall continue to be the required consist for a minimum of 18 months. Thereafter, if the Carrier, based on its experience with the conductor-only operation in through freight, elects to phase in the conductor-only operation in these classes of service it may do so in accordance with the conditions set forth

The UTU filed this action, claiming that the arbitration panel lacked authority to impose future arbitration. Concluding that the arbitration award was consistent with, and fulfilled, the intent and purpose of Congress in enacting P.L. 102-29, the district court granted summary judgment to UP.

II.

The UTU maintains that Arbitration Panel No. 18 acted in contravention of public policy by directing future, binding arbitration (if required). Although a summary judgment is reviewed *de novo*, *e.g.*, ***D.E.W., Inc. v. Local 93, Laborers' Int'l Union of N. Am.***, 957 F.2d 196, 199 (5th Cir. 1992), judicial review of labor arbitration awards is extremely limited. *See* ***United Paperworkers Int'l Union v. Misco, Inc.***, 484 U.S. 29, 36-38 (1987); ***International Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.***, 538 F.2d 1116, 1120 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977). Notwithstanding this narrow review, not all arbitration awards are inviolate. We will refuse to enforce an award that, *inter alia*, is contrary to public policy. *E.g.*, ***Misco***, 484 U.S. at 43; ***W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.***, 461

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in the Attachments.

In turn, the Attachments provided:

> Should the parties, upon consideration and conference regarding the request, be unable to reach agreement within thirty (30) calendar days that such assignment(s) may be operated with a crew of conductor/foreman-only, the parties agree that such issue shall be resolved by final and binding arbitration.

U.S. 757, 766 (1983). "Such a public policy, however, must be well defined and dominant, and is to be ascertained `by reference to the laws and legal precedents and not from general considerations of supposed public interests'". ***W.R. Grace***, 461 U.S. at 766 (quoting ***Muschany v. United States***, 324 U.S. 49, 66 (1945)). The public policy question is ultimately one for the court. ***Misco***, 484 U.S. at 43; ***W.R. Grace***, 461 U.S. at 766.

The UTU contends that the panel's decision providing for future arbitration contravenes national labor law policy against compulsory arbitration.[9] Although P.L. 102-29 does not authorize explicitly binding arbitration beyond the initial arbitration proceeding, we conclude that the decision of Arbitration Panel No. 18, wherein it delayed resolution of the crew consist issue, is consistent with public policy.

In addition to containing a detailed framework to facilitate the voluntary settlement of labor disputes, the RLA

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[9] In advancing this point, the UTU distinguishes between "grievance" arbitration and "interest" arbitration. The former concerns interpretation or application of an existing agreement's terms; the latter, resolution of new contract provisions or new terms for an existing agreement. *See* ***Hirras v. National R.R. Passenger Corp.***, 44 F.3d 278, 280-81 (5th Cir. 1995) (under the RLA, "minor" disputes concern existing agreements; "major" disputes concern creation of new contractual rights); ***NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252***, 543 F.2d 1161, 1163 n.4 (5th Cir. 1976) (distinguishing between "grievance" arbitration and "new contract" arbitration). Although the RLA mandates binding arbitration for resolution of "minor" disputes, the Act simply encourages, as a general matter, voluntary arbitration for resolution of "major" disputes. *See*, *e.g.*, ***Consolidated Rail Corp. v. Railway Labor Executives' Ass'n***, 491 U.S. 299, 302-304 & n.3 (1989). As developed *infra*, this dichotomy is not relevant in light of the congressional enactment of P.L. 102-29.

> discourages ... industrial and railroad labor strike[s], walkouts, [and] lockouts .... But when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each [side]. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate.

Florida E. Coast Ry. v. Brotherhood of R.R. Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965). Furthermore, as the Supreme Court recognized in ***Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.***, 394 U.S. 369 (1969), despite the fact that there have been proposals to replace "this final resort to economic warfare with compulsory arbitration and antistrike laws[,] ... no such general provisions have ever been enacted". ***Id.*** at 379. Thus, the UTU's contention that the labor policy of this country supports the use of self help, *i.e.*, strikes, rather than binding arbitration, is accurate as a general statement. But, in the same breath when it acknowledged this policy, the Court recognized also that such a policy can be changed: "Congress and the Executive have taken emergency *ad hoc* measures to compel the resolution of particular controversies". ***Id.***

Obviously, by enacting P.L. 102-29, Congress deviated from the norm in railroad labor-management relations. In so doing, it modified the public policy with respect to the instant crew consist dispute. Self help would not be allowed; binding arbitration, if necessary, would resolve the issue. Thus, when Arbitration Panel No. 18 provided a mechanism for the subsequent resolution of the

crew consist issue, it was not acting in contravention of public policy, but, in fact, was advancing the dictates of P.L. 102-29.

The 1991 law in issue also sought "to provide for a settlement of the railroad labor-management disputes between certain railroads ... and ... their employees". Pub. L. No. 102-29. Simply put, we do not view the panel's action as requiring new arbitration. Instead, it has postponed arbitration of this issue, with it to take place only as a last resort. When one considers the breadth of issues involved in the 1991 dispute,[10] as well as the labor policy embodied in P.L. 102-29, Arbitration Panel No. 18's decision to maintain the crew consist *status quo*, to permit the issue to be negotiated, and to provide for the resolution of crew consist by binding arbitration (if necessary) was compatible with the purpose of that law.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[10] For the scope of the dispute, consider:

> Over the period of the last 29 years, we have had, I believe, 10 or 11 different occasions where we have had to take action with regard to a strike in the railroad industry. None have involved disputes over issues as extensive as the range of issues that are involved in this strike -- disputes over working conditions, wages, health care issues. These complex issues involve 98 carriers, 11 unions, and some 200,000 employees in the railroad industry.

137 CONG. REC. S4,658 (daily ed. April 17, 1991) (statement of Sen. Kennedy).