

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760, SUB-FILE 47

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Office of Proceedings
February 20, 2014
Part of
Public Record

IN THE MATTER OF ARBITRATION BETWEEN UNION PACIFIC RAILROAD
COMPANY NAD THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN

(Arbitration Review)

MOTION FOR EXTENSION OF TIME AND
LEAVE TO FILE PETITION IN EXCESS OF 30 PAGES

To: Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
Washington, DC 20423-0001

From: Michael P. Persoon
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On behalf of the Brotherhood of Locomotive Engineers and Trainmen

Brotherhood of Locomotive Engineers and Trainmen (“BLET” or the “Organization”) requests an extension until March 14, 2014 for submitting its petition for review of the arbitration decision attached hereto, as provided by 49 C.F.R. 1115.8. BLET also requests leave to file a petition in excess of 30 pages in order to attach such exhibits as are reasonably necessary for the Board to consider the petition.

As grounds for the request for an extension, BLET states that its counsel has preexisting commitments warranting an extension until March 14, 2014. Counsel for BLET sought consent from Union Pacific for the motion to extend time, but did not receive a response by the time of filing.

Date: February 20, 2014

Respectfully submitted,



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Certificate of Service

I hereby certify that I have caused the foregoing motion to be served on the following by email and first class post:

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Date: February 20, 2014



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In the Matter of Arbitration Between:

BROTHERHOOD OF LOCOMOTIVE
ENGINEERS AND TRAINMEN

and

UNION PACIFIC RAILROAD COMPANY

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Arbitration Board No. 598

Applicable Information

Hearing Date: November 14, 2013
Hearing Location: Chicago, Illinois
Date of Award: December 29, 2013

Members of the Committee

Employees' Member: E. L. (Lee) Pruitt
Carriers' Member: Randal P. Guidry
Neutral Member: Marty E. Zusman

Organization's Questions for Arbitration

Question No. 1

Does the Carrier's proposal of July 17, 2013 (as modified) create new pool operations not covered in the Merger Implementing Agreement for the Los Angeles Hub?

Question No. 2

Is the Carrier allowed by Article IX, Section 2 & Section 4 (a) of the 1986 BLE National Arbitration/Agreement, to change or merge seniority districts created by the Merger Implementing Agreement for the Los Angeles Hub and the Merger Implementing Agreement for the Southwest Hub? If the answer is "no," can the Carrier use Article IX, Section 2 & Section 4 (a) of the 1986 BLE National Arbitration/Agreement to remove service from the

seniority district created by the Merger Implementing Agreement for the Los Angeles Hub to the Merger Implementing Agreement for the Southwest Hub?

Question No. 3

If the Carrier's proposal of July 17, 2013 (as modified) is a legitimate good faith exercise of a contractual prerogative, what shall be the terms and conditions governing engineers assigned to or working in the interdivisional service between Yermo, California and West Colton, California, and between Yuma, Arizona and West Colton, California?

Carrier's Questions for Arbitration

Question No. 1

Do the proposed interdivisional operations between Yermo, California, and West Colton, California, and between Yuma, Arizona, and West Colton, California, set forth in Union Pacific Railroad Company's notice dated July 17, 2013, comport with the provisions contained in Side Letter 3 of the Los Angeles Hub Implementing Agreement and Article IX of the 1986 BLE National Arbitration/Agreement, as amended by Article IX of the 1991 BLE National Agreement?

Question No. 2

If the foregoing question is answered in the affirmative, and in accordance with the requirements set forth in Article IX, Section 2 & Section 4 (a) of the 1986 BLE National Arbitration/Agreement, what shall be the terms and conditions governing engineers assigned to or working in the interdivisional service between Yermo, California and West Colton, California, and between Yuma, Arizona and West Colton, California?

Background

This dispute revolves around the Los Angeles (L A) Hub Agreement and is centered

upon Side Letter No. 3. The fundamental issue at bar is this: Does the Carrier have the right within the language of Side Letter No. 3 to change the “home” and “away-from-home” terminals and call that, “new pool operations not covered” by the LA Hub Agreement?

As background, on August 12, 1996, the Surface Transportation Board approved a merger of the Union Pacific and Southern Pacific railroads subject to the New York Dock Labor Protective Conditions. During the process, an arbitrator imposed conditions to control the merger on the area herein under dispute by creating the Los Angeles Hub Agreement. The January 16, 1999 LA Hub Agreement set aside previous seniority districts creating hubs, which allowed engineers to run any service within hubs from the “home” terminal to the “away-from-home” terminals. This system was in place under the LA Hub Agreement with different pool operations, including the “West Colton-Yermo” and the “West Colton-Yuma” pools, with West Colton as the home terminal in each operation. The LA Hub Agreement included Side Letter No. 3. This instant dispute began when the Union Pacific Railroad Company (hereafter the Carrier) proposed major changes on February 11, 2013 and began discussions culminating in a new notice now before this Board.

On July 17, 2013, the Carrier served notice proposing terms and conditions for a “new” pool freight service extending from two different home terminals: Yermo, California and Yuma, Arizona both going to an away-from-home terminal in West Colton, California. It argued that the Interdivisional Notice was proper and controlled by Article IX (Interdivisional Service) of the May 19, 1986 Award of Arbitration Board No. 458. The Arbitration Board imposed the 1986 BLET National Agreement which gave the Carrier the right under Article IX to propose the new pool freight service. The Carrier had withdrawn the earlier February proposal after discussions with the Brotherhood of Locomotive Engineers and Trainmen (hereafter the Organization) led to reconsideration.

In the July 17, 2013 proposal, the Carrier left intact a “long run” operation from Dolores, California as the home terminal with two different pools operating to away-from-home terminals at Yermo, California and Yuma, Arizona. The Carrier made a major change in the “short run” pool service by reversing the home and away-from-home terminals for crews operating between West Colton to Yermo, California and from West Colton to Yuma, Arizona. Where the Carrier had previously established the service under the LA Hub Agreement between these points with West Colton as the home terminal and the other two cities as the away-from-home terminals, a hub and spoke model, it now

proposed reversing the designated terminals. The starting point for the unassigned through freight pools that were proposed would be the home terminal at Yermo, California and the home terminal at Yuma, Arizona, with the away-from-home terminal at West Colton, California for both "short runs" service. The Carrier argued that this new interdivisional service was proper pursuant to Article IX of the 1986 BLET National Agreement as needed for efficiency. The Organization argued the proposal was certainly not "new" service and the Carrier was estopped by Side Letter No. 3 to the LA Hub Agreement.

The parties failed to reach any settlement on the property. The Organization maintains that the Carrier lacked the Agreement right to invoke Article IX and make the changes proposed. The Carrier was prohibited from doing so by the identical language of the Los Angeles and Southwest Hub Implementing Agreements in Side Letter No. 3 from the LA Hub Agreement and Side Letter No. 2 from the SW Hub Agreement. Those Side Letters left intact existing pool arrangements as stated:

New Pools created after this Agreement: New pool operations not covered in this implementing Agreement whether between Hubs or within the Hub shall be handled per Article IX of the 1986 National Arbitration Award.

The Organization holds that the Carrier was barred from its proposed changes by the conditions set in the Hub Agreements, *supra*. The Carrier disagreed arguing that the Hub Agreement and Side Letter No. 3 made this change proper and codified its right to do so. Unable to resolve the dispute the Organization filed suit in the United States District Court for the Northern District of Illinois on August 21, 2013 to enjoin the Carrier from its unilateral attempt to implement the changes in its July 17, 2013 (as modified) notice. Following a day of testimony and evidence, the parties agreed to create this instant Board to decide the issue at bar, while the federal case is stayed (BLET vs. Union Pacific, Case No. 13-cv-5970 N.D. Illinois).

Position of the Union

The Organization's contention is that under the conditions of this claim, the Carrier is not creating anything "new". Under the LA Hub Agreement, the Carrier already has on this property all that it is now requesting. In Section III (Pool Operations/Assigned Service), the Carrier has service with a home terminal at West Colton with operations run as separate pools to away-from-home terminals of Yermo, California and Yuma, Arizona.

These terminals on the two short runs remain the same terminals. There is no change being proposed in the mileage or trackage as the proposed runs will cover the precise mileage, precise track and the same terminals of West Colton and Yermo, California and Yuma, Arizona. Article IX does not apply as the Carrier is constrained by the fact that it signed Side Letter No. 3, *supra*, which states that after the Los Angeles Hub Agreement pools were created that any new pool operations "not covered in this implementing Agreement" would be handled per Article IX. This is not a notice to create "new" pool operations "not covered" by this Agreement. There is no change that constitutes a "new pool created" as the one proposed by the Carrier is already covered by this Implementing Agreement.

What the Carrier has proposed is not permissible under the Hub Agreement as it is not a "new" pool created after this Agreement. All that the Carrier is proposing is to reverse the home terminal and away-from-home terminals to create cost savings. The Organization argues that the Carrier is rearranging the service to gain economic advantage in two key ways. First, the Carrier has had a difficult time obtaining qualified and certified engineers to take the West Colton to Yermo route which is a difficult grade and pays significantly less money. Qualified engineers bid off to routes where they can make more money, leaving less qualified junior engineers forced to take the West Colton-Yermo runs. Since they are less qualified, the Carrier has to pay for a pilot to ride along, raising costs. The Organization argues that if senior engineers had Yermo as a home terminal, they would more likely take the run, reducing Carrier costs. Second, at Yuma, where there is less track space, it is difficult to know when the Carrier will need a train to depart since trains are arriving from the east across country, so they must keep a crew waiting. When the engineer is waiting more than sixteen (16) hours, the engineer must be paid held away-from-home terminal time. This is a payment made while engineers are not working, raising the Carrier's costs. There is no efficiency gained, no real change occurring, and no arbitral precedent to support this as "new service". The Carrier is simply trying to run around the Agreement and Side Letter No. 3 to substantially reduce labor costs.

The Organization holds that *as* this proposed interdivisional service is the very same service which already exists, a substantial reconstruction to obtain only economic gains, it is not permissible. Side Letter No. 3 controls the creating of any new service not contained in the LA Hub Agreement. This is not a new pool operation and the Carrier may not institute it.

The Organization argues that the issue has been previously visited between this

Organization and the Carrier at various other locations. In Arbitration Board No 581, Arbitrator Kenis held that the Union Pacific Railroad Company could not use Article IX in an attempt to create service changes due to the fact that where a Hub Agreement conflicted with other Agreements, the Hub must prevail. Similarly, the Organization points to Arbitration Board No. 590 on this same property with this same LA Hub Agreement, that while supporting the Carrier in that dispute, specifically stated that the Kenis Award was on target in that where conflicts arise, language controls. In Board No. 590, Arbitrator Binau maintained that under Article VI, Section C of the LA Hub Agreement, "National Agreements prevail over the Los Angeles Hub Agreement." Arbitrator Binau did not consider Side Letter No. 3 which given his finding would prevail in this dispute. Similarly, in Arbitration Board No. 589, Arbitrator Perkovich agreed and stated that, "the Hub Merger Implementing Agreements 'shall prevail'." In all of these disputes, the arbitrators found that when conflicts occurred in the Hub Agreements, the specific language held: "except as otherwise provided herein." Within this Hub Agreement there already exists this pool operation and the restrictive language is clear: "New pool operations not covered in this implementing Agreement". Therefore, it is not new to propose it and the Carrier cannot use Article IX of the 1986 National Agreement to recreate an existing service. That violates the Agreement as supported by the above Arbitration Boards, given the explicit language in Side Letter No. 3.

Position of the Carrier

The Carrier argues that the proposed Interdivisional Service is an entirely "new" pool operation permitted by Article IX of the 1986 BLET National Agreement. It points to the fact that the Informal Disputes Committee considering Article IX answered the question: "Can established Interdivisional Service be extended or rearranged under this Article". The Interpretation of Arbitrator La Rocco in Issue 3 stated in pertinent part that:

. . . The Carriers have the right to establish . . . rearranged interdivisional service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement".

The Carrier argues that even if this new service which reverses the away-from-home and home terminal designations were a substantial re-creation, it is still *not* designed solely to

obtain more favorable conditions. In fact, the terms and conditions of the prior service already established are largely carried forward in the Carrier's notice. As such, it is permissible. This service is designed to create efficiencies between long and short runs taking advantage of the changes that have been introduced to rail service. It is not designed solely to obtain more favorable conditions.

The Carrier introduced figures that millions of dollars have been spent to create improvements including the development of some second track and a Colton Crossing Flyover above BNSF's route through West Colton. Moreover, the Carrier provided data and argument that the proposed new pool operations with home terminals of Yuma and Yermo for short runs, will provide efficiencies not presently existing in the movement of traffic for customers. The Carrier argued herein that the modifications improved "the velocity, efficiency and consistency of its operations". However, to make maximum use of the changes and projects on long runs which will operate through West Colton, the short runs in this dispute, which cost more to operate, must become more efficient. The east bound trains originate near West Colton and can be more efficiency controlled. The west bound trains that originate in the east, for example Chicago, arrive at inconsistent times caused by numerous types of delays, requiring crews to wait at Yuma, Arizona, the away-from-home terminal. This is inefficient and reducing the time will reduce held away-from-home pay. By changing Yuma to a home terminal, the Carrier will gain efficiency in connection to long runs and additionally, the Carrier argues it is permissible by the LA Hub Agreement.

The Carrier points to the decision by Arbitrator Binau in Arbitration Board No. 590 recognizing the Carrier's right to introduce new pool service under the National Agreement. Arbitrator Binau stated on this property and about the LA Hub Agreement that, "Article VI, Section C of the Los Angeles Hub Agreement preserves all national agreements that existed prior to the creation of the Los Angeles Hub." Article IX is therefore preserved and Side Letter No. 3 simply confirms that fact by its title and language:

New Pools created after this Agreement: New pool operations not covered in this implementing Agreement whether between Hubs or within the Hub shall be handled per Article IX of the 1986 National Arbitration Award.

As for the Organization's argument that the LA Hub Agreement takes precedence in that Side Letter No. 3 specifically denies the right of the Carrier to create service which is

not new: this service is new. The Carrier argues that the Organization's reading of the Los Angeles and Southwest Hub Agreements is off mark. The Organization is selectively arguing a few disconnected words not read in full comprehension of the total phrase and intent. The intent is stated, "New Pools created after this Agreement" and that is what the Carrier has proposed at bar. This is a new pool. There is nothing in the LA Hub Agreement with a home terminal at Yuma, Arizona. There is nothing in the LA Hub Agreement with a home terminal in Yermo, California and West Colton is not operated in the LA Hub Agreement as an away-from-home terminal. Therefore, it is new service. In support of its argument the Carrier has pointed to a number of Awards holding that the Carrier has the right under the National Agreement to propose new service when it deems such service proper (Public Law Board 7577, Award No. 1; Arbitration Board No. 590; Arbitration Board No. 580, centered on the letter of March 5, 2002 of the Organization's Submission to that dispute). The Carrier fundamentally disagrees with the Organization's arguments that these proposed pool operations are already covered in the Los Angeles Hub Agreement or the Southwest Hub Agreement.

Discussion and Findings

The Board has studied this full and detailed record. In support of its position, the parties have attached a long list of Awards and citations to support all of the various arguments raised in Submissions, Rebuttal Submissions and argument at the hearing. After full consideration, we reach the following conclusions.

Fundamental to the case is BLET's Question No. 1, "Does the Carrier's proposal of July 17, 2013 (as modified) create new pool operations not covered in the Merger Implementing Agreement for the Los Angeles Hub?" The key issue is decided on the language of Side Letter No. 3:

New Pools created after this Agreement: New pool operations not covered in this implementing Agreement whether between Hubs or within the Hub shall be handled per Article IX of the 1986 National Arbitration Award.

Clearly, the determination of the meaning of this Side Letter is central to this dispute. The Organization argues that because the Los Angeles and Southwest Hub Agreements already have pool service between Yermo and West Colton and Yuma and West Colton, this is not new service. Further, this already existing service is included in Side Letter No. 3. It is a

contractual limitation that stops the Carrier from invoking Article IX of the 1986 National Agreement.

Central to the argument of the Organization is that this limitation is similar to that found by Arbitration Board No. 581 (Kenis Award) and Arbitration Board No. 589 (Perkovich Award) which held in other hub agreements that when the Hub Agreement conflicts with other Agreements, the Hub Agreement language must prevail. Further, Arbitration Board No. 590 (Binau Award) which arbitrated this very LA Hub Agreement found similarly that under Article VI, C. that, "National Agreements prevail over the Los Angeles Hub Agreement". However, Binau did not interpret Side Letter No. 3, which is a clear contractual limitation to the use of Article IX as Article VI, C. states, "except as specifically provided herein...". The Organization argues that Side Letter No. 3 specifically protects this already existing service from change. Side Letter No. 3 permits the use of Article IX for proposed "New pool operations not covered in this implementing Agreement . . . (emphasis added)" The Organization is definite that the pool operations proposed are covered: they already exist and are therefore excluded by negotiated language.

The Organization's central argument before this Board is that the language must mean something. The Side Letter in dispute was to create something. The Organization maintains that it means that the Carrier can use Article IX on new pool service, with the express restriction on existing service created by the LA Hub Agreement, i.e. "not covered in this implementing agreement . . ." As the Organization contends:

Instead of giving meaning to the operative language, Union Pacific argues that the only purpose of Side Letter No. 3 was to be "belt and suspenders" and to make clear that the parties were "preserv[ing] UP's Article IX rights...[.]" ... "Belt and suspenders" is code for "surplussage." This Board should not interpret the limiting language "pool operations not covered in this implementing Agreement" as either a belt or braces. Neither can that language be reasonably interpreted as a preservation of a right to change operations covered by the LA Hub Agreement.

That interpretation would really be absurd. . . . If the goal, as it says, was to make doubly clear (belts and suspenders) that it could use Art. IX to change the service put in place as part of the New York Dock labor-protective conditions accompanying the 1996 merger; it would be easy to say so

plainly. For example, “Nothing in this Agreement shall inhibit the Carrier’s use of Ar. IX.” Or maybe, “The Carrier may change all service established by this implementing Agreement through Article IX.”

The Organization strongly argues that the effect of this Side Letter is to restrict the Carrier from what it proposes. The Organization holds that to take a pool operation running on the same track to the same terminals and with the very same mileage and call it “new” because you change the “home” and “away-from-home” terminals would render Side Letter No. 3’s language meaningless.

The Carrier responds to this argument by maintaining that the language is clear and its notice complies with the language. It is proposing a new pool operation that is nowhere to be found in the Implementing Agreement. It is not relevant that it is on the same track, same mileage and same terminals, because it is not the same pool service, but *new* pool operations which do not exist. Nowhere in the entire LA Hub Agreement does the Carrier have West Colton as an away-from-home terminal and Yermo and Yuma as a home terminal. A change in home and away-from-home terminals is not a minor change. It is a major change. This is new service and in compliance with Side Letter No. 3. As new service it is permissible under Article IX, as preserved by Side Letter No. 3. The Carrier argues that to follow the Organization’s argument, the only new service would have to be between new points where the Carrier does not operate trains or have terminals. It finds no restriction to this notice of July 17, 2013 and the LA Hub Agreement language or Side Letter. It points to Public Law Board 7318 Award 20 (Arbitrator Zusman) and Public Law Board 7463, Award 1 (Arbitrator Radek) which found that changes in a home terminal were permissible under Article IX of the 1986 Agreement.

The Organization and Carrier disagree as to the meaning and outcome of Side Letter No. 3. It appears on its face to be clear and unequivocal, but in the context of this dispute the central issue before this Board is not the same as faced by Arbitrators Kenis or Perkovich which had *explicit* language directing a conclusion e.g. Kenis, “Where conflicts arise, the specific provisions of this [Implementing] Agreement shall prevail . . .” There is no clear and explicit language in this LA Hub Agreement listing the disputed reversed terminal designations which are “not covered in this implementing Agreement . . .” There is no current pool service with a home terminal of Yermo, California or Yuma, Arizona. The purpose of the language is made clear in the underlined component as to: “New Pools created after this Agreement”. No one in this industry would consider a change in home terminal as insignificant or minor. It is a major change which affects employees and the

Carrier's operations. The parties dispute the proper interpretation of what the language in Side Letter No. 3 means. It is unclear, causing the dispute over whether this is or is not "new" service.

The Board finds the language has latent ambiguity which is before us as the issue at bar. The argument that the Organization brings before us is that given Side Letter No. 3, the Carrier is restrained because this is the same pool service already in existence. Even further, that if the Carrier is permitted just to take and change the home and away-from-home terminals it is changing the language of the Agreement. The Board is not persuaded by those arguments. The fact is that even the Binaw Award (Arbitration Board 590), which is the only Award to look at the LA Hub Agreement found that the Carrier could change the switching limits in the LA Hub Agreement, even though they were clearly listed in the Agreement. The Carrier could do that because it retained its rights to "all national agreements that existed prior to the creation of the Los Angeles Hub" as indicated in Article VI, Section C.

The Board finds the same logic applies in this instant case. The Carrier has not given up its rights; even in Side Letter No. 3 to utilize its Article IX rights involving new pool operations. The Board has fully considered the Organization's argument that the July 17, 2013 proposal for new pool service was not "new", but already existing and not permitted under the existing Side Letter No. 3. The language of "not covered by this Agreement" means something and if running the same trains over the "same track" with the "same mileage" isn't meant, what is? The Board finds this argument unpersuasive, as the purpose of the language is not explicit and means what it says within the totality of the Agreement allowing for "New Pools created after this Agreement" when they are "New pool operations". What does "new" mean if not new. This pool operation does not exist. The proposal to make it exist is new, by any standard.

The history of Article IX is well known. The purpose is to create an Agreement that would permit the latitude necessary for carriers to establish interdivisional pool operations improving efficiency. This improved efficiency was exchanged for "large wage increases" (Public Law Board 1679, Award No. 1; Arbitration Board No. 586). The focus when language permits "new" pool operations is whether they increase *efficiency* and are not substantially the same pool service.

The Organization has strongly argued that the proposed service is duplication and has no relevance to efficiency. It argues strongly that the proposal is to gain one-sided

“carrier friendly only” benefits (Special Board of Adjustment No. 6741, Award No. 1). It maintains throughout its review of the declarations and Carrier’s assertions that the Carrier is trying to obtain monetary gain, which could increase efficiency. However, Article IX is for pools that increase efficiency and thereafter might produce some monetary gain. The Organization argues there is no efficiency in the reversal of home terminals. As it states, the Carrier can already do what it proposes; has failed to explain how “engineers would mesh into its service once they were at the new “away-from-home” terminal” and,

. . . has not offered evidence supporting its claim that its proposed changes will be a factor in creating “more efficient and faster service . . . There are no intermediary terminals . . . Swapping the location of the home terminal will not allow Union Pacific to avoid any bottleneck: it will not change where the trains start or end; it will not change the need for a crew change; and it will not extend any run or run through any terminal. All it will change is where engineers report to work. There is no operational case for the proposal.

The Board has considered these issues carefully to determine if the proposal is supported by Arbitrator La Rocco’s Issue 3 Interpretation. While the Organization argues strongly that Article IX does not allow the duplication of existing service or to “substantially recreate” existing service, the Carrier’s proposal meets the two part test. Arbitrator La Rocco’s Issue 3 Interpretation clearly held that Carriers:

Have the right to establish extended or rearranged Interdivisional Service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior Interdivisional Service designed solely to obtain the more favorable conditions in the 1986 National Agreement.

The Organization argues that this is a substantial re-creation of the pool service that already exists. The Organization argues that the Carrier cannot effectively create identical service or recreate or modify existing pool service for economic gain when there is no new intermediary terminal, crew change points or evidence of an operational change (Public Law Board No. 3800, Award No. 1 with Carrier Dissent). After a review of the Carrier’s evidence, the Board finds that this is not an improper alteration. It is a permitted rearrangement as it does not occur simply to obtain more favorable conditions in the 1986 National Agreement, *supra*. There is no persuasive base for this argument. This is new rearranged interdivisional service that does not now exist and is therefore permitted.

The Board has also studied the Organization's strong assertions that the Carrier's proposal is a one sided attempt to obtain benefits. As stated often and cited by Special Board of Adjustment No. 6741, "It has historically been held that the impediment to rearranging an existing interdivisional run would be to substantially recreate it in order to access benefits that are one-sided, i.e., 'carrier friendly only' conditions." As argued by the Organization, the assertions are that the Carrier is attempting both to avoid paying pilots and save money on held away-from-home pay to obtain one-sided benefits. The Organization points to the testimony of Randy Guidry and Paulo Tortorice (BLET v. UP, Case No. 13-cv-5970, N.D. Ill. hearing of October 1, 2013) as well as Award support to argue that these "new" proposals are not for any efficiencies, but to obtain one sided financial gain (Public Law Board No. 6740, Award No. 2; Public Law Board 6741, Award No. 1; Public Law Board 6449, Award No. 19). As example, Mr. Tortorice, Locomotive Engineer and Local Chairman testified that the proposal was "just changing the on-duty points" and the senior engineers are not working Yermo "because it's our lowest paid run in Los Angeles." (p. 89). The Organization challenges the efficiency gains and notes that in the Sworn Declaration of Gordon Wellington, Regional Finance Director, the proposal would reduce the Carriers "approximately \$9.0 - \$10.0 million direct labor expenses . . . by at least 2%" (BLET Appendix p. 184). This savings would be obtained not by efficiencies, but by keeping senior engineers at Yermo and by not having to pay the large financial penalty payments for held away-from-home pay at Yuma.

Our careful reading of those Awards and of the testimony does not support the fact that this is one sided gain. The full testimony of General Director of Labor Relations Mr. Guidry is that the proposal is instituted for efficiency. Mr. Guidry testified that:

The overall velocity improvement is going to improve the train capacity and the velocity of those trains. You'll be able to operate more trains, and those more trains, hopefully with increased market share; we'll be able to increase the number of jobs available to engineers in the basin as a whole" (p. 170).

Further, Mr. Guidry testified: "And our ability to have the terminal at Yuma and Yermo into West Colton will better facilitate and mesh with the overall operation in the basin as a whole" (p. 171). The Carrier is permitted to create service if it is new; if it is not a "substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement". The Informal Disputes Committee was clear on this point.

The Organization has not provided substantial evidence that the proposal is “designed solely” and therefore violative of the National Agreement. The Carrier provided sufficient proof of the efficiency obtained by the reversal in home and away-from-home terminals. There is efficiency in increasing the pool service in a manner that produces fewer trains with two engineers. The fact that the Carrier saves money in payment for held away-from-home terminal time also means that with less hours held away, there is more efficiency in operations. The fact that the Carrier would not need pilots means it saves money, but it also means it has more efficient operations. Article IX was to create efficiency and this record supports the fact that a change in away-from-home and home terminals will produce more efficient pool service that meshes with other pools and increases the speed and movement of freight. The fact that the Carrier also obtains additional monetary gains along with efficiency does not negate its proposal. The Board finds the proposal is fully compatible with the operating efficiency documented. The change is not shown to be “merely an opportunistic maneuver singularly designed to take advantage of more favorable conditions” in the National Agreement (Public Law Board No. 5121).

This Board finds that this is a substantial change and not a re-creation. It fundamentally changes the entire pool operation. Even if *arguendo* and we do not concede the point, that the Organization was correct, it is certainly not “designed solely to obtain the more favorable conditions in the 1986 National Agreement”. The Board finds no evidence to draw that conclusion (see again the testimony of R. Guidry, BLET Appendix, pp. 282-289). In fact, all of the evidence of record indicates that the current benefits will remain and the proposal does not contain more favorable conditions than contained in the 1986 National Agreement.

Accordingly, when, as here, the Carrier can document with substantial proof that the change of home and away-from-home is properly new and there exists no estoppel language, the Board must answer the Organization’s Question No. 1 and the Carrier’s Question No. 1 with a “yes.”

Decision and Award

The Organization has asked: “Does the Carrier’s proposal of July 17, 2013 (as modified) create new pool operations not covered in the Merger Implementing

Agreement for the Los Angeles Hub?” The answer is yes. The Carrier has proposed something that is new. Similarly the Carrier asked: “Do the proposed interdivisional operations between Yermo, California, and West Colton, California, and between Yuma, Arizona, and West Colton, California, set forth in Union Pacific Railroad Company’s notice dated July 17, 2013, comport with the provisions contained in Side Letter 3 of the Los Angeles Hub Implementing Agreement and Article IX of the 1986 BLE National Arbitration/Agreement, as amended by Article IX of the 1991 BLE National Agreement?” The answer is yes. Accordingly, the Board turns to the Organization’s Question No. 2.

The Organization has asked in Question No. 2: “Is the Carrier allowed by Article IX, Section 2 & Section 4 (a) of the 1986 BLE National Arbitration/Agreement, to change or merge seniority districts created by the Merger Implementing Agreement for the Los Angeles Hub and the Merger Implementing Agreement for the Southwest Hub? If the answer is “no,” can the Carrier use Article IX, Section 2 & Section 4 (a) of the 1986 BLE National Arbitration/Agreement to remove service from the seniority district created by the Merger Implementing Agreement for the Los Angeles Hub to the Merger Implementing Agreement for the Southwest Hub?”

The Board has carefully reviewed the arguments by the parties to this merged seniority dispute. The Organization points to the facts of seniority and that the Carrier is prohibited from changing or merging seniority districts. Currently, the pool service from West Colton to Yermo, California is completely within the Los Angeles Hub. There is no question that in this run, work opportunities belong to the Los Angeles Hub engineers. The fact that the new pool service begins the run at Yermo with an away-from-home terminal at West Colton changes nothing major in the seniority arrangements, if permitted. What the Organization further objects to is that the Merger Implementing Agreement for the Southwest Hub would be merged or changed by the new pool service which has a home terminal at Yuma, Arizona and ends at West Colton. The objection is based on two arguments. First, Yuma is in the Southwest Hub and not in the Los Angeles Hub. Second, the Organization maintains that Article IX, Section 2 and 4 (a) don’t apply wherein the Implementing Agreement from the Surface Transportation Board instituted seniority conditions to protect engineers from the Union Pacific-Southern Pacific merger. Even if the Carrier is permitted to create a new pool operation, it can’t remove work from one seniority district and move it to another.

The Board has studied the Organization’s argument and Carrier’s detailed rebuttal.

In this instance, the Board notes that Article IX is not in any material way in this instance damaging the extant seniority configuration. There is nothing in this altering of pool arrangements that modifies either the seniority districts, miles run in either seniority district or the Agreements governing these actions. Side Letter No. 3 in the LA Hub Agreement is identical in language to Side Letter No. 2 of the Southwest Hub Agreement. The miles run have not changed for either seniority district. It is important to note that in this instance, the adjacent Southwest Hub has only approximately one per cent (1%) of the current miles run on the Yuma to West Colton pool operation. Therefore if the Board would conclude that the Carrier was wrong in its action, it would be tantamount to permitting Southwest Hub engineers to obtain an inordinate and unfair distribution of work, simply because the home terminal began on the 1% of miles run, even though the Los Angeles engineers go over 99% of territory within the Los Angeles Hub. This would not result in a fair and equitable division of work. It would not be consistent with existing historical division of territory.

The Board has considered many issues in reaching this decision. We note the language of the Southwest Hub, Note No. 1 holds that, "The Hub identifies the on duty points for assignments and not the boundaries of assignments. (This note is further explained in Side Letter No. 2)." The Board is aware that a decision has been previously made which authorized work allocated on the proportion of mileage run when work crossed seniority district boundaries (Public Law Board No. 6833, Award 40). Additionally, the Board notes that the Carrier herein has proposed new pool operations under Article IX, rather than a technical change or modification of seniority districts. The most rational outcome of this Board's determination is that it is illogical to permit a change from what has been currently permitted to allow those who perform almost no train miles on the track from Yuma to West Colton to obtain a substantial change in work opportunities. The Board finds that the answer to the Organization's Question No. 2 is that the Carrier is not proposing to "change or merge seniority districts" but to create new pool service. Accordingly, the Board will permit the continuation of existing configuration as indicated in the Carrier's proposal. The new home terminal of Yuma, Arizona, although technically in the Southwest Hub, will be staffed by the Los Angeles Hub engineers. While this may be the on duty point, their assignments on the Yuma to West Colton run will be almost entirely within the Los Angeles Hub and is therefore equitable in allocation and work opportunities under Article IX.

Having resolved the two former questions of the Organization and the first of the Carrier, the Board turns to the fundamental question raised by both parties and partially

stated identically as, “what shall be the terms and conditions governing engineers assigned to or working in the interdivisional service between Yermo, California and West Colton, California, and between Yuma, Arizona and West Colton, California? The Organization prefaces this question with, “If the Carrier’s proposal of July 17, 2013 (as modified) is a legitimate good faith exercise of a contractual prerogative”, while the Carrier prefaces the same question with, “If the foregoing question is answered in the affirmative, and in accordance with the requirements set forth in Article IX, Section 2 & Section 4 (a) of the 1986 BLE National Arbitration/Agreement”. Both turn to the proposals at bar.

The Board has considered the Carrier’s proposal of July 17, 2013, as amended October 18, 2013 with attached Side Letters. It varies from the Organization’s proposal, amended by the BLET’s Rebuttal Submission to this Board; not exchanged and discussed on property. The facts at bar are that this Board is confronted with two different proposals for the new pool operations. Consideration has been given to the many differences included within the authority of this Board to determine conditions proposed before it.

The Organization argues that the Board should not reach a decision, but permit the parties to continue to negotiate the terms. The Carrier maintains that it has complied with Article IX, Section 1 in that it has served notice specifying “the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service” (Section 1, Article IX). The Carrier further maintains that under Section 3 it met and discussed the notice and unable to agree, was ready to proceed with a trial run, interrupted by court proceedings and now with arbitration. Given Section 4, when the parties can’t agree it is subject to arbitration, but governed by Section 2 of Article IX.

The Board has reviewed first the on-property action of the parties to this dispute. The record indicates that the parties met on July 17, 2013 to consider the Carrier’s proposal. Subsequently the Organization objected to the proposal by letter sent July 24, 2013 (misdated) and with Carrier email response of July 26, 2013. Further, the Carrier and Organization met again on August 13, 2013 with a third meeting planned for October 16, 2013, cut short due to the Organization’s legal action. Certainly the parties exchanged ideas on the proposal. The Organization maintains that the Board should not reach a decision, but permit the parties to negotiate the terms. The Carrier maintains that the terms were proper under Article IX, Section 2 and should be accepted by this Board.

The Board has considered the two different proposals presented by the parties. The Board has studied Article IX. Article IX, Section 2 governs the establishment of interdivisional service specifying five mandatory issues (a through e), other reasonable and practical conditions suggested including any other terms or conditions the parties may negotiate. The Board is clearly constrained by the limiting language on our authority, made clear in Article IX. As Section 1 - Notice explicitly states, the "carrier . . . shall . . . specify the service it proposes . . . and the conditions, if any, which it proposes shall govern the establishment of such service." This puts a painfully difficult burden on the Organization to propose or negotiate conditions. The Organization argues that the change to a very distant new home terminal will cause drastic work life issues on the employees. Certainly, the Board is sensitive to the fact that Yermo is around 100 miles away and Yuma over 200 miles away from the current home terminals. This is a long distance to transverse and will most likely require employees to make tough life choices, including relocating.

The Board is restrained in its actions under Section 4 to those aspects delineated by Section 2 and within the framework of constraint to narrowly observe the purpose of the language. The Board notes that the two proposals are exact only in Carrier's October 18, 2013, Sections 6, 8, 9 and 12. They are largely similar in other areas with additional language, as example, in Carrier's Sections 1, 2 or 3. Each difference is important. The Board has directed its attention to the full Carrier proposal and the many issues raised by the Organization.

The Board finds nothing in the Carrier's proposal that would run counter to the language of Article IX and therefore to directly question its applicability. The Organization has argued that the new home terminals are less desirable living areas. The Organization also raises a large number of issues based on the fact that if the employee continued to live at their current location, they would incur onerous burdens of time and family issues working at the distant new home terminals. Accordingly, the Organization asks this Board to find that the severity of the effect be moderated creating more "reasonable and practical" conditions. The Organization requests a tie up for 24, 36 or 48 hours rest which would allow employees time to be with their families. The Organization also requests a call time of at least four (4) hours advance notice necessary for the extra time the employees would need to get to their work location. The Organization also wants reverse lodging to be permanent so that employees would have a place to stay. The Board is restrained from such action as there is no justification for the Carrier to absorb these costs, when the negotiated language and proposed language protects the employees.

Article IX, Section 7 was negotiated to assure Protection to any employee adversely affected, including a change of residence. Such actions are contemplated by protection required by Section 7 of Article IX, but not an estoppel to the right of the Carrier to create new service.

The Board has seriously considered all of the Organization's proposed changes and additional Sections, within the constraints of Article IX. What is most noticeable to the Board is that the Organization has introduced a number of new proposals, including Reverse Lodging, Tie-Up (permitting mark off for 24, 36 or 48 hours rest), Call Time (of at least four (4) hours), Preservation of Working Conditions and belatedly, Preservation of Pool Service – No Commingling. All of these and other changes in Extra Boards and Overtime, increase costs, decrease efficiency or are beyond the Board's authority.

The Carrier's limitation certainly includes Section 2, holding that, "reasonable and practical conditions shall govern" and that "although they are not limited" to those listed, there is no additional contractual obligation to include proposals suggested by the Organization. What the Carrier is obligated to abide by are those conditions clearly stipulated by Article IX. This Board is similarly constrained by Section 2. The question the Board considers is whether the Carrier's proposal of July 17, 2013 (as amended October 18, 2013) meets the standard.

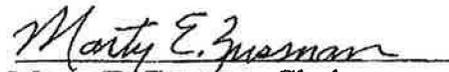
The Board makes clear that it has the authority to assure that the proposal is "reasonable and practical" and the concerns of the Organization are considered. The Board has carefully reviewed the Organization's arguments about the negative consequences for employees forced to move to the undesirable cities of Yermo and Yuma; the needs for permanent reverse lodging, changes in Extra Boards, enhanced overtime or the need for a four (4) hour call. The Board is clearly restricted in awarding any terms beyond those set forth in Section 2, although the parties may or may not agree to do so. The authority of this Board is very limited, particularly as to issues involving compensation (Arbitration Board No. 507; Board of Arbitration No. 580).

The Organization's proposal is beyond the Agreement, which permits the Carrier's actions if such is in compliance with Article IX conditions. The Board is governed by Section 2, which are the required conditions and limits to our authority (see Arbitration Board No. 468). The Board finds nothing in the Carrier's proposal that deviates from the requirements of Section 2. The Board finds almost all of the Organization's requests would increase Carrier costs or more importantly, to increase *inefficiency* of operations,

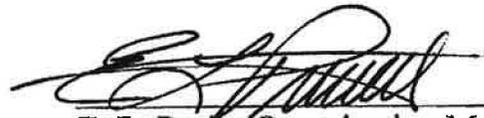
the antithesis of Article IX, Section 2(a): "runs shall be adequate for efficient operations and reasonable in regard to the miles run, hours on duty and in regard to other conditions of work". The Board does not find the Carrier's proposal violative of that condition and does find efficiency at the core of the proposal. The Carrier's proposal must therefore be accepted by this Board. It complies with the requirements of Article IX.

Accordingly, in answer to the Organization's Question No. 3 and the Carrier's Question No. 2 the terms of the interdivisional services between Yermo, California to West Colton, California and Yuma, Arizona to West Colton, California are those proposed by the Carrier on July 17, 2013 (as modified October 18, 2013 and incorporating the attached three Side Letters on Overtime, Reverse Lodging and Work Allocation). Those terms are adopted. This decision is specific to the factual base of this dispute and not as a precedent to other disputes with different circumstances.

The Arbitrator will retain jurisdiction for thirty (30) days in the event either party seeks clarification of this decision or to resolve any applicable disputes.


Marty E. Zusman, Chairman
Neutral Member


R. P. Guidry, Carrier Member


E. L. Pruft, Organization Member
DISSENT ATTACHED

types of efficiencies that matter. That is simply wrong, as I explain below. The Carrier is *not* arguing that additional changes are necessary for it to achieve the efficiencies foreseen by the Union Pacific-Southern Pacific merger, nor could it as it has already achieved those efficiencies.

In particular, the testimony of Mr. Guidry, which is all that the majority relies upon, failed to provide any evidentiary support for the majority's conclusions that:

“The overall velocity improvement is going to improve the train capacity and velocity of those trains.”

Or that,

“[The Carrier's] ability to have the terminal at Yuma and Yermo into West Colton will better facilitate and mesh with the overall operation in the basin as a whole.”

Yes, Mr. Guidry said those things, but simply saying something is not proof; UP provided no proof that what he said was correct, and the majority committed manifest error by failing to require UP to satisfy its burden in this matter.

By considering that flipping the home and away-from-home terminals as a “rearranged interdivisional service [that] constitutes new service within the meaning of Article IX” and not a “substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement,” the majority has eviscerated the meaning of Side Letter No. 3. That is especially evident when Arbitrator LaRocco's Issue 3 Interpretation and the Awards that followed are considered. The majority of the Board has improperly written that bright-line limitation out of the contract. Under the majority's overbroad interpretation, it is doubtful that any proposal could be considered a “substantial re-creation.” The Agreement contemplates that a carrier that wants the types of changes UP proposed here would have to secure them through bargaining. The majority has not honored that part of the bargain that underlies the Agreement.

The majority also acknowledges that the Carrier wants to move away from the “hub and spoke” model it asked for and obtained when the Union Pacific – Southern Pacific merger was approved by the Surface Transportation Board. That proceeding and the resulting merger allowed Union Pacific to avoid RLA Section 6 negotiations with the BLET over changes to engineer seniority, which has long been recognized as a property right. See NRAB Third Division Award No. 4987 (Boyd) (“It has long been settled that *seniority is a valuable property right*.”). Now, by allowing UP to fundamentally change the nature of the service approved by the STB, and the existing seniority rights resulting from that process, without going through the procedures set forth in the *New York Dock* conditions that the STB imposed as a condition of the merger approval, the majority has overstepped its lawful authority and allowed Carrier to take away benefits and protections that were an essential component of the merger approval process.

Finally, in its answers to the remaining questions posed, the majority fundamentally erred in considering itself restrained from approving any of the conditions proposed by the Organization. Section 2 exists because where there is truly “new” service, “new” conditions may be necessary. It recognizes that the “reasonable and practical conditions” imposed may be more than what the Carrier proposes; there is considerable arbitral support for that proposition. Because the majority perceives a limit on its authority that the Agreement does not support, I must dissent to this part of the award as well.

A handwritten signature in black ink, appearing to read 'E.L. Pruitt', written over a horizontal line.

E.L. Pruitt, Organization Member