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C-O-N-T-E-N-T-S

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P-R-O-C-E-E-D-I-N-G-S

(9:30 a.m.)

1
2
3 CHAIRMAN ELLIOTT: Good morning,
4 welcome. Today we'll hear oral arguments on
5 two separate cases here at the Board. Before
6 we begin, I'd like to welcome our new member,
7 Ann Begeman. She just came on two weeks ago,
8 and so we're very excited to have her here to
9 have a full panel. And, I assume she's
10 excited after going through the process to be
11 here.

12 VICE CHAIRMAN BEGEMAN: I'm glad I
13 made it through.

14 CHAIRMAN ELLIOTT: Yes. First of
15 all, we'll proceed with Canadian National
16 Control Transaction of IC, Finance Docket
17 Number 33556, Sub-Number 5. This case
18 concerns a challenge by CN to an arbitration
19 award that the company says would block a
20 planned consolidation of its Troy, Michigan
21 and Homewood, Illinois dispatching facilities.

22 The American Train Dispatchers

1 Association, or ATDA, opposes the challenge
2 saying, "The arbitrator correctly found that
3 CN has not upgraded its dispatching system and
4 trained its dispatchers in a way that would
5 allow the consolidation to proceed."

6 In an effort to move things along,
7 the Board members will not be making opening
8 remarks this morning, but I wanted to cover a
9 few procedural matters before we begin. We've
10 asked each party to make a short statement of
11 its argument. The counsel should be prepared
12 to answer questions from the Board at any time
13 during your allotted time.

14 I assure you that we have read all
15 of your pleadings and there's no reason to
16 repeat every argument. Each side has been
17 allotted a total of 20 minutes. As the party
18 filing the appeal, CN will open. CN has
19 requested 15 minutes on opening, ATDA then
20 will have 20 minutes, and CN has reserved five
21 minutes for rebuttal.

22 If you wish to make a change to

1 your reserved rebuttal time, please advise us
2 when you begin your opening presentation. Any
3 party making a PowerPoint presentation or
4 using similar hard copy aids using materials
5 previously placed in the record, should have
6 provided those materials in hard copy to
7 opposing counsel and the Board.

8 We will have any pages used today
9 in such presentations bound into the
10 transcript of this proceeding. Speakers,
11 please note the timing lights are in front of
12 me. You will see a yellow light when you have
13 one minute remaining and a red light when your
14 time has expired. The yellow one-minute light
15 will be accompanied by a single chime and the
16 red light signifying that your time has
17 expired will be accompanied by two chimes.

18 Please keep to the time you have
19 been allotted. When you see the red light and
20 hear the double chime, please finish your
21 thought and take a seat. In addition, just a
22 reminder to everyone, please turn off your

1 cell phones.

2 We will now proceed. Counsel for
3 CN, please step up to the podium, introduce
4 yourself, indicate if you wish to change your
5 time for rebuttal, and then begin.

6 MR. HAWKINS: Thank you, Mr.
7 Chairman. My name is Robert Hawkins. I
8 represent the Canadian National Railway
9 Company and the other petitioners in this
10 matter. And, we will stick with the five
11 minutes for rebuttal.

12 This is a petition for review of a
13 labor arbitration award reached pursuant to
14 the New York Dock Labor Protective Conditions.
15 As we point out in the petition for review,
16 this Board should review and vacate that
17 decision because the decision of the
18 arbitrator both implicates industry-wide
19 issues of recurrence and because the
20 arbitrator committed multiple egregious errors
21 in the decision.

22 The fundamental defect in the

1 award in this case is it expressly refuses to
2 permit CN to consolidate the dispatching
3 function of the Grand Trunk and the Illinois
4 Central at Homewood, Illinois. This was
5 discussed at the regional application and then
6 the Board's approval of the control
7 transaction.

8 And, as we stand here today, CN
9 continues to maintain two separate dispatching
10 centers simply because there's an arbitration
11 award that compels it to do so. The employees
12 in question used the same equipment, and this
13 Board has been advised previously in
14 connection with other transactions that the
15 equipment has been upgraded to a common
16 platform. That information is in the record
17 and it is undisputed.

18 In addition, the arbitrator in
19 this case created an entirely new separate set
20 of labor protective conditions that do not
21 draw their essence from New York Dock and that
22 are separate and apart and above what the New

1 York Dock conditions require.

2 At the outset, it's important to
3 recognize what the arbitrator did not hold.
4 We have identified in the papers before you a
5 number of public benefits that are not
6 available simply by relocating the work
7 without consolidating it and mixing and
8 matching as I would say between the different
9 groups of employees.

10 The arbitrator did not say that
11 you could get to those efficiencies through
12 means other than what we have proposed in the
13 implementing agreement or in the implementing
14 agreement proposed by the arbitrator himself.
15 He said that the company should not be
16 permitted to achieve those public benefits.

17 In doing so, he undermined this
18 Board's decision in granting the control
19 transaction. In substantial measure, this
20 Board relies on the public benefits, including
21 the efficiencies of a transaction when
22 deciding to approve a transaction. That --

1 CHAIRMAN ELLIOTT: Could you
2 elaborate on what those public benefits would
3 be? I know you --

4 MR. HAWKINS: Yes, sir.

5 CHAIRMAN ELLIOTT: -- in some of
6 your earlier pleadings, you focused on the
7 actual move and the closing down of the
8 facility in Troy, and then -- so those are
9 pretty clear cut. And, I think the arbitrator
10 would allow that. But after that, over and
11 above just the way the transaction or the
12 consolidation is set up right now, what other
13 benefits would there be, other than the
14 closing down and I guess the combining of
15 management?

16 MR. HAWKINS: Okay. The
17 incidental, the incidental expense reductions
18 are one thing, but number one, you can reduce
19 the number of dispatchers only by
20 consolidating the work. If you pick up the
21 dispatchers lock, stock, and barrel, and
22 simply move them and continue to have a wall

1 between the Grand Trunk and the IC
2 dispatchers, then you fail to have the
3 efficiencies that allow you to move work from
4 one desk to another and expand the size of
5 certain desks in the Chicago area.

6 So the arbitrator mistakenly
7 thought, it appears, that you could move the
8 work and reduce the number of dispatchers.
9 You can't do that. CN does not employ
10 dispatchers at Troy that it doesn't need.

11 So if the work cannot be
12 interwoven, consolidated, in a true New York
13 Dock sense with the Illinois Central work,
14 then you have to have the same number of
15 dispatchers. And, that's one.

16 CHAIRMAN ELLIOTT: With respect to
17 that, I noticed in your pleading you said that
18 there would one desk shut down in the
19 Chicagoland area. Why do you need to have six
20 positions shut out if there's only one desk
21 shutting down?

22 MR. HAWKINS: Relieve positions and

1 other vacancies in similar --

2 CHAIRMAN ELLIOTT: So you just
3 think the six would follow because of the
4 efficiencies of consolidating the two, so
5 there'd be guys to fill in other spots?

6 MR. HAWKINS: Exactly.

7 CHAIRMAN ELLIOTT: Okay.

8 MR. HAWKINS: And, there is no
9 contrary record evidence. I mean, that is the
10 estimate of six positions, so that benefit,
11 which is a public benefit as this Board has
12 recognized many times, the ability to perform
13 the same work with fewer people reduces cost.
14 And, that cost reduction ultimately redounds
15 to the benefit of shippers in a highly
16 competitive industry such as this.

17 CHAIRMAN ELLIOTT: And, you're not
18 arguing that this is a single transportation
19 system now the way it's set up.

20 MR. HAWKINS: No. That would be an
21 argument that an organization may petition a
22 different Board for.

1 CHAIRMAN ELLIOTT: Right.

2 MR. HAWKINS: We're not arguing
3 that, and the Board has never said that is
4 required to have a single transportation
5 system to achieve efficiencies of a control
6 transaction. The cases are replete with
7 references where a carrier that has control
8 over multiple entities will move support
9 functions, clerical, dispatching, other types
10 of support functions from one entity to
11 another, consolidate them, achieve the public
12 benefits of the transaction.

13 The issue of whether there's a
14 common or a single transportation system is a
15 completely different inquiry and it's not
16 required for this decision.

17 CHAIRMAN ELLIOTT: I just have one
18 more followup. My understanding of this
19 transaction when it occurred originally is it
20 was basically an end-to-end transaction, and
21 then around the Chicago area that's where they
22 somewhat overlap. My concern here is IC is a

1 large railroad, probably about 3,000 miles.

2 MR. HAWKINS: Right.

3 CHAIRMAN ELLIOTT: And, GTW is
4 about 600 miles, and it only seems like they
5 overlap in this one small area in Chicago.
6 Why do you need to merge the whole system
7 together for dispatching, and to override the
8 entire agreement? Couldn't you just leave it
9 consolidated in the Chicago area and then
10 leave the other external parts alone?

11 MR. HAWKINS: To achieve the
12 efficiencies, you need to be able to move the
13 work in accordance with the needs of service.
14 And, one of the facts that is essential to
15 recognize here is that those needs will change
16 and those are set forth in the declarations of
17 Roger Fraseur.

18 And, the needs of service change
19 on a periodic basis, depending on the needs of
20 service. So that you can't just put a rigid
21 barrier at one location and say, "That's where
22 it's going to end." So, no, in order to

1 achieve the public benefits of this
2 transaction, you need to put the same
3 employees under the same collective agreement.

4 COMMISSIONER MULVEY: There seems
5 to be a dispute between how far along you are
6 with regard to retraining the dispatchers.
7 The union suggests that you haven't, they're
8 not ready for this and you haven't done all
9 the things that you said you were going to do
10 with regard to retraining and making the
11 dispatchers, who are going to be moved,
12 capable in the new area.

13 You did provide evidence from the
14 Roger Fraseur declaration that this was
15 ongoing. Would you say that the union has
16 overstated its position and that you have in
17 fact done everything necessary to retrain
18 them? Or is there still further work that's
19 needed to be done before you can go ahead and
20 actually make this move?

21 MR. HAWKINS: With all due regard
22 to the union's counsel, this has been done.

1 We have advised the Board in the SIP, in the
2 EJ&E transaction that these people are in a
3 common platform. They use exactly the same
4 equipment.

5 There is no contrary record
6 evidence. And, when you take a look at the
7 record, what the union cites are two things.
8 Number one, the original application back in
9 1998 when we did not have common dispatching
10 systems and told this Board that we did not
11 have it.

12 But, the only other citation that
13 the union gives is citations to its own brief.
14 There is no evidence of record, no confident
15 evidence of record, to suggest that these
16 dispatch systems are not identical.

17 If you look at the affidavits of
18 Roger Fraseur, it's harder to get any clearer
19 than that. This issue was raised in front of
20 the arbitrator and it was puzzling, and,
21 therefore, recognizing that this day might
22 come, went back and put together iron clad

1 affidavits that identified not only on a
2 conclusory sense that it is common equipment,
3 they're using the same equipment, we actually
4 went on and identified what those system were.
5 There is not a shred of evidence in the record
6 to the contrary, zero.

7 COMMISSIONER MULVEY: In the
8 second verified declaration of Mr. Fraseur,
9 there are seven paragraphs of what's being
10 done, would you say that all of those have
11 been met then?

12 MR. HAWKINS: Yes, they have. And,
13 we previously advised this Board and the FRA,
14 so it's not news to this Board, but it's also,
15 in terms of arbitration review, it is
16 undisputed in terms of the factual record
17 before the arbitrator. There is no contrary
18 evidence.

19 Now, back in 1998, it was a
20 different story. Back then the dispatch
21 systems were different. And we told this
22 Board that we would co-locate the forces for

1 a period of time and then integrate them
2 thereafter. But then after that, the ATDA
3 asked for a six-year moratorium on the move
4 and of the work. And since the carrier
5 couldn't achieve the public benefits of the
6 transaction at the time, it agreed.

7 But that moratorium expired
8 several years ago, and as we have pointed out
9 in numerous places within the record, and I
10 would say generally, it's in the 800 series of
11 pages. And, I know that's an awfully
12 voluminous record to read in two weeks, but
13 from 80 -- let's see. It's in the 800 series.

14 The carrier has put these
15 dispatchers in a common platform. They used
16 the same equipment. The only thing that
17 prevents a true consolidation is approximately
18 200 miles and one arbitration award.

19 COMMISSIONER MULVEY: Just one
20 final point. You keep talking about public
21 benefits. Aren't these really private
22 benefits. These cost reductions and these

1 savings, which may be passed on to shippers,
2 but aren't they still considered to be private
3 benefits rather than public benefits?

4 MR. HAWKINS: No.

5 COMMISSIONER MULVEY: You're not
6 cutting down on pollution or something like
7 that.

8 MR. HAWKINS: We understand. There
9 are additional public benefits. I didn't
10 actually finish answering the Chair's question
11 a few minutes ago, but there are additional
12 public benefits in addition to the cost
13 savings, but this Board has recognized time
14 and time again that in these large
15 transactions where you're able to take and
16 perform the same amount of work with fewer
17 people, that is a public benefit.

18 That is one of the benefits that
19 we quantify as part of the application process
20 and that this Board relies on in granting
21 approval of a transaction. That in and of
22 itself would have justified this

1 consolidation.

2 But in addition to that, in the
3 Chicago area, allowing the carrier to truly
4 consolidate the work and not just co-locate
5 people under different agreements and a silo
6 between them, there are a number of additional
7 benefits. In the Chicago area, multiple
8 dispatchers now have to handle the same train
9 just because of the historical boundaries
10 between the properties.

11 In addition to that, the carrier
12 wants to set up a combined extra Board. You
13 can't combine the extra Boards if there's a
14 jurisdictional rule that says, "I can't do
15 work on the Grand Trunk or I can't do work on
16 the Illinois Central."

17 The technology is in place to
18 allow these, the barriers or, not the
19 barriers, the distinctions between these
20 various desks to move. And, traffic
21 fluctuates to a great degree. It actually
22 fluctuates by shift so that you can have a

1 desk with responsibility for more than one
2 area depending on what time of the day the
3 employee works.

4 All that goes out the window when
5 you have a silo and a jurisdictional wall. In
6 the event of storms or derailments, the
7 carrier would be able use the combined
8 workforce to protect all of the territory.
9 Not so when you have a jurisdictional barrier
10 that says, "I'm a Grand Trunk person, that's
11 not my work."

12 So, there are quite a few
13 additional public benefits, but certainly the
14 efficiencies of the transaction hinge on the
15 ability of the carrier to combine folks in
16 other crafts. I misspoke. This applies to
17 every craft whether it's training engine
18 service, whether it's the clerks, whether it's
19 the dispatchers, this is an issue of industry-
20 wide concern.

21 And, respectfully, this Board is
22 the guardian of the New York Dock labor

1 protective conditions, which have been based
2 on the Washington job and several other labor
3 protective conditions over time. The Board
4 has reviewed arbitration awards where that is
5 necessary to protect the integrity of the
6 conditions.

7 This award chops at the integrity
8 of those conditions. There's no question
9 about it. And, what the arbitrator did here -
10 - let me just discuss a little bit about the
11 transaction.

12 Obviously, the control transaction
13 is one where CN acquired control over the
14 Illinois Central and identified and quantified
15 a number of public benefits that flowed from
16 that. The consolidation of dispatching work
17 is not an afterthought. It was something that
18 was addressed openly in the control
19 transaction.

20 The ATDA came in and asked for
21 preservation of its collective bargaining
22 agreements. This Board declined to award

1 that. The Board did say that people don't
2 have to follow their work to Canada, but that
3 was the only augmentation this Board made in
4 the New York Dock conditions.

5 So, this transaction, the
6 subsidiary transaction, you know, you have the
7 control transaction, the subsidiary
8 transaction thereafter flows naturally from
9 the original control transaction. Again, as
10 I say, this was not an afterthought.

11 The necessity test. In order to
12 accomplish the public benefits that I've just
13 talked about, you have to have these people
14 under a single agreement. You cannot
15 accomplish those benefits. You cannot combine
16 extra Boards. You cannot move work between
17 one desk to another. It's important and
18 critical to have these folks under a single
19 agreement.

20 There are two additional issues,
21 which I think I'll address on rebuttal, which
22 are the benefits that are in excess of New

1 York Dock and why that's a problem here, and
2 what we would ask you to do, if in fact you
3 grant the petition for review, so I'll save
4 that for rebuttal. Thank you.

5 CHAIRMAN ELLIOTT: Thank you, Mr.
6 Hawkins.

7 Now, we'll hear from counsel for
8 ATDA. I apologize for using the wrong
9 acronym. Please step up, introduce yourself
10 for the record, and begin, Mr. Wolly.

11 MR. WOLLY: Good morning, Mr.
12 Chairman and fellow members of the Board. One
13 of the issues that has not been addressed here
14 is the very narrow standard of review that
15 applies to awards rendered by arbitrators
16 under the conditions imposed by this agency.

17 The Board generally defers to an
18 arbitrator's decision and will not grant
19 review unless there are recurring or otherwise
20 significant issues of general importance
21 regarding the interpretation of the agency's
22 labor conditions. That standard is not met

1 here, but let's talk for a moment about that
2 standard because it is the union's position
3 that this dispute is sui generis.

4 It is an unusual dispute, but it
5 is limited to the circumstances of this
6 particular transaction. What the railroad
7 must satisfy is first to demonstrate that this
8 award raises recurring or otherwise
9 significant issues.

10 If it is able to establish that,
11 those issues must be of general importance
12 regarding the interpretation of the labor
13 conditions. In other words, they must extend
14 beyond the dispute over this particular
15 movement of dispatching work from one place to
16 the other.

17 Then the Board has instructed that
18 awards are not vacated because of substantive
19 mistake unless there is egregious error when
20 the award fails to draw its essence from the
21 conditions or where the arbitrator exceeds
22 specific limits on his or her authority. And,

1 finally, the Board has defined egregious error
2 to mean irrational, holy baseless, completely
3 without reason, or actually and indisputably
4 without foundation in reason or fact.

5 These are standards that are near
6 identical to what the Supreme Court has said
7 applies in ordinary labor cases, and this
8 Board in its Lace-Curtain decision, adopted
9 that. So, let's take a look at whether or not
10 this award in fact fits within those very
11 narrow standards.

12 The railroad admits to you today,
13 as it has to and as it did in the arbitration,
14 that it is not creating a single
15 transportation system. When in its initial
16 filings after the arbitration, and apparently
17 it had to explain this after the arbitration
18 hearing because at that hearing, it did not
19 adequately explain it.

20 At pages 787 of the record and 788
21 of the record, the railroad says, "The carrier
22 has no immediate plans to completely integrate

1 the remainder of the GTW and IC rail systems,
2 and it is true that the carrier is not
3 proposing to fully integrate the entire GTW
4 and IC systems at this time. And, yet, what
5 the railroad has proposed is a complete
6 eradication of a collective bargaining
7 agreement that applies to a system that the
8 railroad will continue to hold out to the
9 public as a separate rail system, that being
10 the GTW system."

11 The vast majority of the work that
12 is going to be moved from Troy to Homewood is
13 work that deals with that separate GTW system.
14 And, to pick up on what the Chairman asked of
15 counsel for the railroad, it is relevant that
16 all the railroad has put in the record is some
17 need to cross assign in the Chicagoland area.

18 In fact, that could be done with a
19 far more limited approach to this. Now, the
20 arbitrator in this case determined that the
21 railroad did not carry its burden to
22 demonstrate that the entire collective

1 bargaining agreement be tossed, and so he did
2 not allow them at this time, and I stress, at
3 this time, to remove from the train
4 dispatchers of GTW the collective bargaining
5 agreement terms under which they presently
6 work.

7 He did not foreclose it at some
8 time in the future when in fact all of the
9 rail operations that are being dispatched out
10 of this same facility in Homewood are in fact
11 integrated.

12 COMMISSIONER MULVEY: The Hampton
13 award suggests that the standard for
14 determining whether our collective bargaining
15 should be overridden is whether one can prove
16 that the transactions, efficiencies, and
17 benefits would be nonexistent without the
18 override. But the prior ICC Board decisions
19 indicate that the standard is whether the
20 override is necessary, and not necessarily
21 nonexistent whether it's typically necessary
22 to carry the transaction. Can you harmonize

1 these two formulations?

2 MR. WOLLY: Under the facts that
3 were presented to Arbitrator Hampton, the
4 railroad was not able to sustain the necessity
5 side of the Board's determinations.

6 COMMISSIONER MULVEY: So, you
7 failed to meet either standard.

8 MR. WOLLY: I beg your pardon?

9 COMMISSIONER MULVEY: You failed to
10 meet either standard then in your view?

11 MR. WOLLY: I believe that he did,
12 that it did in front of this arbitrator, so
13 even if you believe that the arbitrator
14 perhaps overstated what the standard was and
15 you can tell from the union's submissions to
16 the Board that we accept the standard of the
17 Board, which is, it must be shown that it is
18 necessary to effectuate the transaction to
19 override the agreement.

20 And, our position was that the
21 railroad had not shown that, that this award
22 stands on its feet and should not be set

1 aside, should not even be considered for
2 review once you apply that standard to the
3 facts that are presented here.

4 The GTW work, by the way under
5 this agreement, will remain readily
6 identifiable, or at least for the most part,
7 readily identifiable. And, this alone easily
8 supports the determination of the arbitrator
9 that one of the conditions applicable to this
10 transaction is that those GTW dispatchers
11 retain the prior rights to perform this work.

12 What he has directed is that if
13 the railroad insists on only creating ten jobs
14 in Homewood to perform this work, that those
15 who are left behind have the opportunity
16 should vacancies occur at Homewood to move to
17 Homewood to follow that work. And, that is
18 actually a very valuable condition for these
19 employees, because frankly the wage that a
20 train dispatcher earns is considerably more
21 than what a clerical employee might earn if
22 the train dispatcher retains clerical work

1 rights or if they trained dispatcher is
2 granted voluntarily a clerical positions upon
3 losing his train dispatcher positions, which
4 is something the carrier is willing to do.

5 The carrier says, "It's impossible
6 to administer something like that." We
7 suggest that merely saying that is not fact.
8 It is very clear from the record that what the
9 carrier intends to do, and they use the word
10 "silo" as if the train dispatchers are
11 suggesting that, but we are not.

12 What the carrier intends to do is
13 to continue to have IC dispatchers dispatch
14 over IC lines, GTW dispatchers dispatch over
15 GTW lines, and by the way, they also happen to
16 have the Wisconsin Central Railroad system,
17 which is subject to newly filed proceeding in
18 front of this Board, but they are keeping that
19 separate as well.

20 Insofar as counsel says to you,
21 "Well, in a case of a snowstorm, in the case
22 of some terrible natural disaster," well, the

1 fact of the matter is that collective
2 bargaining agreement bends in the event of an
3 emergency. And, if it is necessary to address
4 an emergency and there's an inadequate
5 workforce, clearly, the carrier is able for
6 that fixed period of time to address the
7 emergency conditions without regard to the
8 kind of problem that they are telling you
9 today would totally interfere with their
10 ability to effectuate the transaction that
11 they ask the Board authority for some 13 years
12 ago.

13 COMMISSIONER MULVEY: On a point of
14 clarification, counsel for CN said that Mr.
15 Fraseur's statement is that all of the course
16 training, etc., has been done and that they
17 can effectuate the move. Whereas, the union
18 and its filing said that the training had not
19 been done. Would you accept now that what's
20 necessary to train these people to be, to work
21 on different desks has been done or --

22 MR. WOLLY: Well, I would say, Mr.

1 Commissioner, that there are two elements to
2 that. One is what he has described for you is
3 the systems are in place and there are common
4 systems. As I stand here today, I would not
5 disagree with him.

6 Insofar as training is concerned,
7 there are different issues when someone is
8 training as a dispatcher over different
9 territories. Dispatchers have to learn. You
10 know, you can't just take a train dispatcher
11 and say, "I know you know how to dispatch over
12 this territory between point A and point B.
13 Sit over here and do between point C and point
14 D without any training."

15 In fact, there is that kind of
16 qualification training on every railroad, but
17 insofar as what he tells you about the
18 computer systems, the dispatching systems, as
19 I stand here today, we don't disagree with
20 that.

21 I will address for a few minutes
22 the question of benefits. This Board has in

1 its Lacey-Curtain decision and followup
2 decisions --

3 CHAIRMAN ELLIOTT: Mr. Wolly,
4 before we move on, just so you stay on the
5 same topic, going to the Commissioner's
6 question about the standard "has not
7 substantiated the deficiencies would be
8 nonexistent, etc." I don't think it can be
9 disputed that statement in itself is not a
10 correct statement of the benefits standard.
11 Would you agree with that?

12 MR. WOLLY: I'm not sure which
13 statement you're referring to.

14 CHAIRMAN ELLIOTT: The arbitrator
15 in his award said, "CN has not substantiated
16 that efficiencies would be nonexistent should
17 the GTW roster be maintained and the ATDA
18 collective bargaining agreement remain in
19 effect for those GTW dispatchers transferring
20 from Troy to Homeland."

21 MR. WOLLY: I think that the
22 arbitrator's statement may be too broad. On

1 the other hand, I would say that in the
2 context of this case, I think that what the
3 arbitrator meant was in fact that the
4 efficiency standard has not been satisfied
5 here, the Board standard. We don't -- we're
6 not asking you to adopt verbatim the standard
7 that Mr. Hampton put in his award.

8 CHAIRMAN ELLIOTT: Because as I
9 read it under this standard, what CN is, has
10 requested, I think the arbitrator was correct,
11 but under the stricter standard with respect
12 to whether there's a public benefit as a
13 result of the consolidation, whether or not
14 you agree that they meet that standard, it's
15 possible that they could meet it and they
16 could not meet this other standard. It's
17 possible that you could meet one standard and
18 not meet the other.

19 MR. WOLLY: I would say it is
20 possible for the carrier not to meet the
21 stated standard that is in Mr. Hampton's
22 award, and also not meet the standard that

1 this Board has more explicitly set forth in
2 its decisions.

3 CHAIRMAN ELLIOTT: At that point,
4 wouldn't it be the best way for us to handle
5 this is to remand it back to the arbitrator
6 and have him use the correct standard and just
7 to make sure that the arbitrator knew what
8 standard they were ruling on?

9 MR. WOLLY: Yes.

10 CHAIRMAN ELLIOTT: Okay, thank you.

11 VICE CHAIRMAN BEGEMAN: Can I ask a
12 question? Mr. Hawkins, you know, made -- his
13 statement made clear, I think, that CN's
14 position is that they are consolidating, that
15 they're not simply relocating, at least I
16 believe that's what he was communicating.

17 You indicated that they actually
18 are still going to just be relocated doing
19 separate operations, separate dispatching.
20 What evidence is it that you've been given
21 from the railroad that everything is going to
22 be separate?

1 MR. WOLLY: From the record that's
2 been established in this proceeding if you
3 specifically look at the submissions that were
4 filed by the carrier, its pre-hearing, post-
5 hearing, and post-hearing reply submissions,
6 there's a consistent theme in them. And that
7 theme is that they need, they say, to do this
8 because of efficiencies that they may someday
9 be able to accomplish by virtue of this, but
10 the arbitrator determined that the
11 efficiencies that they're really looking
12 toward relates specifically --

13 VICE CHAIRMAN BEGEMAN: I wasn't
14 asking what the arbitrator determined, but
15 rather you were saying that --

16 MR. WOLLY: Yes, the evidence --

17 VICE CHAIRMAN BEGEMAN: -- what
18 they're planning is not what they say they're
19 planning, and that's what I'm curious about.

20 MR. WOLLY: Well, they said to the
21 arbitrator, and this is record evidence, that
22 their problems were primarily the lease that

1 they had in Troy, their technology
2 integration, their use of similar management,
3 and their problem that they faced in the
4 Chicagoland area. Based on that evidence, the
5 arbitrator did not believe that it was
6 necessary to effectuate the transaction to
7 totally eliminate the train dispatchers'
8 collective bargaining agreement.

9 VICE CHAIRMAN BEGEMAN: Perhaps I
10 wasn't being clear and I apologize. What I'm
11 getting at is what your statement just was a
12 few moments ago: that the grand plan is that
13 as they relocate people, these dispatchers to
14 Chicago, everyone is still going to operate
15 separate systems and not consolidate, which
16 seems very counter to what Mr. Hawkins just
17 said, and so I'm trying to understand what the
18 facts are.

19 MR. WOLLY: I think that the
20 confusion may stem from the use of the word
21 "systems." What Mr. Hawkins is telling you is
22 that they're going to be using the same train

1 dispatching systems. And, what I'm telling
2 you is that while they may be using the same
3 physical-type of equipment and technology,
4 they're actually not going to be altering the
5 public system.

6 CN has more than one rail system
7 that it holds out to the public. It holds out
8 the GTW system. It has separate employees
9 under that system. It holds out an IC system.
10 It holds out a WC system. It has other
11 carriers. For example, it has the DM&IR and
12 the DWP. Two systems that it is asking for
13 your approval in a separate transaction to
14 bring into one.

15 It operates the WC system out of
16 the same physical facility using the same
17 technology, the same technological systems,
18 but it is not dispatching the trains on the WC
19 system in an integrated way. And, we're
20 saying --

21 VICE CHAIRMAN BEGEMAN: So you
22 contend that they are simply relocating and

1 they're not consolidating?

2 MR. WOLLY: We are contending that
3 that is what is happening, but for the
4 potentiality of the Chicagoland area. And,
5 that the determination by the arbitrator that
6 it is essentially premature to override the
7 entire collective bargaining agreement because
8 they are not establishing the necessity to do
9 that should be sustained by this Board.

10 If I can for a minute address the
11 issue of the benefits that the arbitrator has
12 imposed to be associated with the elimination
13 of jobs. As you know, the carrier has
14 proposed to eliminate six train dispatching
15 jobs and to move ten people, if they so choose
16 to move, to Homewood.

17 And, I would urge the Board to
18 remember that under its Carmen Three case, the
19 Board has held there is no one size fits all
20 standard to these kinds of transactions. Yes,
21 the conditions are somewhat specific.
22 However, the Board on numerous has determined

1 that as long as what a New York Dock
2 arbitrator does falls within the context and
3 spirit of the conditions, and that is the
4 standard from the Lace-Curtain case, the Board
5 will not disturb the arbitrator's finding.

6 COMMISSIONER MULVEY: Is there any
7 case from the ICC or the Surface
8 Transportation Board which has held that an
9 arbitrator may require a carrier to provide
10 benefits that are far more generous than those
11 in New York Dock? Is there any leeway for
12 arbitrators to make adjustments in the New
13 York Dock requirements, but still be in
14 compliance or is New York Dock limiting, and
15 therefore, the arbitrator cannot go beyond the
16 benefits in New York Dock?

17 MR. WOLLY: In fact, in the Lace-
18 Curtain case, which has similar benefits under
19 the Oregon shortline conditions, in that area,
20 the Board did in fact determine that even
21 though there were certain things that that
22 arbitrator granted that were not specifically

1 identified with the New York Dock, they fell
2 within the context and the spirit of New York
3 Dock. So, the answer to your question is yes.
4 Thank you.

5 CHAIRMAN ELLIOTT: Thank you,
6 counsel. Next we'll hear from counsel for CN.
7 Please proceed with your rebuttal.

8 Mr. Hawkins, my the way, before
9 you get started, I asked Mr. Wolly this
10 question about the standard, and I think
11 everyone is in agreement here that the
12 arbitrator may have applied a standard that
13 was overly broad. And, I presume you agree
14 with that.

15 And, I suggested that maybe the
16 best avenue would be a remand to have the
17 arbitrator take a look at the case under the
18 more, the appropriate standard, the narrower
19 standard. Would CN also be in agreement with
20 that path as a way of resolving this dispute?

21 MR. HAWKINS: We've looked at that
22 issue and, and frankly, think that a remand

1 perhaps to the parties or then to a separate
2 arbitrator is appropriate. The Board has
3 reviewed this issue on a number of occasions,
4 and there are some cases involving the CSX.

5 There's a cite at 2001 Westlaw
6 63300, and then there's the Pennsylvania
7 Railroad decision at 3 Surface Transportation
8 Board 834. These were not addressed in our
9 papers because Mr. Wolly raised it in his, in
10 a footnote to his pleading.

11 The Board has typically remanded
12 the matter to the parties for discussion
13 consistent with the Board's determination, and
14 thereafter, the parties are free to select an
15 arbitrator pursuant to the New York Dock
16 conditions. The Board has expressed
17 reservations from time-to-time that remanding
18 a case to the same arbitrator may be
19 inappropriate.

20 There was an arbitrator Harris
21 decision where he expressed that the doctrine
22 of functus officio may bar the arbitrator from

1 undertaking a remand. Since the arbitrator is
2 not a federal tribunal, it's not like a judge
3 who has continuing jurisdiction over the
4 matter. The jurisdiction is decided on a
5 case-by-case basis and granted to the
6 arbitrator in that regard.

7 The Board has also expressed
8 concern that from time-to-time that remanding
9 the case to the same arbitrator may result in
10 additional delay. And, with all due respect,
11 we believe that that issue is appropriate to
12 consider here given the difficulties that this
13 award has in a number of respects.

14 So, the Board has discretion to go
15 in any of those directions. We respectfully
16 submit that a remand to the parties or
17 directly to the appointment of a new
18 arbitrator is appropriate.

19 With respect to the questions
20 regarding the enhancements to New York Dock,
21 the Board has spoken on this issue. And, the
22 Board has said that requests, and this is the

1 Norfolk Southern case, 4 I.C.C. 2nd 1080,
2 which is in our papers, "The proper forum for
3 employees or unions to request enhancements to
4 New York Dock is before this Board, not in
5 arbitration."

6 And, the Board has made it clear
7 in a number of arbitration review cases that
8 where an arbitrator interprets or applies the
9 existing New York Dock conditions, that the
10 arbitrator's decision will generally be
11 affirm, but not where you create brand-new
12 benefits. In this case, the arbitrator
13 corrected, created six separation allowances
14 to be issued in seniority order.

15 You only have 16 dispatchers in
16 Troy. And, the arbitrator said that six of
17 those people can take separation allowances,
18 not follow their work, and that undermines the
19 fundamental benefit, the fundamental bargain,
20 of the New York Dock and the Washington Job
21 Protection Agreement.

22 In this Board's own decision

1 approving the IC transaction, the Board
2 reiterated at page 43 of the control decision
3 that a fundamental tenet of the New York Dock
4 and every other labor protection condition
5 issued by the Board is that employees must
6 follow their work as a condition of retaining
7 protection.

8 The arbitrator jettisoned that in
9 this case. And, again, that's a further
10 reason why it's egregious error and why it is
11 an issue of continuing industry-wide
12 importance. Not only that --

13 CHAIRMAN ELLIOTT: Let's assume in
14 that situation, the arbitrator was assuming
15 that at least ten people would follow their
16 work and that six would stay back. I know in
17 the present situation you say that's not going
18 to happen.

19 MR. HAWKINS: I can't make that
20 assumption, and no arbitrator can make that
21 assumption, but again, the Board --

22 CHAIRMAN ELLIOTT: So you're saying

1 fundamentally, he can't just slot six
2 separation allowances.

3 MR. HAWKINS: Exactly.

4 CHAIRMAN ELLIOTT: Okay.

5 MR. HAWKINS: Exactly. Our
6 experience in applying the New York Dock
7 conditions is that people for personal reasons
8 or a variety of other reasons choose not to
9 follow their work. They go to different
10 industries, they may go to a different
11 railroad, there's all sorts of things why
12 somebody may choose not to relocate, even if
13 that means they lose their benefits.

14 COMMISSIONER MULVEY: Well, there
15 aren't enough slots in Homewood, right, to
16 handle all 16. There's only ten slots being
17 created and there are 16 people, correct?

18 MR. HAWKINS: Well, there are 16
19 people at Troy, but the question of how many
20 will actually follow their work --

21 COMMISSIONER MULVEY: Well, does
22 the Hampton award require that CN pay this

1 allowance to those employees who could obtain
2 Homewood dispatcher positions, but instead
3 elect to exercise their seniority rights and
4 fill the clerical positions?

5 MR. HAWKINS: Yes, they do. Yes,
6 absolutely. If you read Sections 3 and 9
7 together, it orders the carrier to give
8 employees a choice that they select. One of
9 those choices is to take, what Mr. Wolly said,
10 a lowered paid clerical position in Troy, but
11 then Section 9 of the agreement says that
12 employee still gets protection. So, you've
13 eliminated the economic incentive for the
14 employee to follow their work.

15 COMMISSIONER MULVEY: So you get
16 displacement allowance to make up for the
17 difference then.

18 MR. HAWKINS: Right, you get topped
19 up your normal salary. It is difficult to
20 imagine a clearer attack to the New York Dock
21 benefits.

22 COMMISSIONER MULVEY: So, it's not

1 -- you would say that that requirement is not
2 consistent with New York Dock then.

3 MR. HAWKINS: No. And, if you look
4 at the particular circumstances of this case,
5 the arbitrator has already offered six people
6 buyouts. Now, in the context of a voluntary
7 agreement where the carrier gets what it needs
8 and believes it has enough forces to protect
9 the work, that's one thing, but this isn't a
10 voluntary agreement. This is a New York Dock
11 arbitration.

12 So you have six people who have
13 the buyouts and then you have a number of
14 people, and the record is not clear as to how
15 many people hold clerk seniority, so I won't
16 tell you how much how many there are, but the
17 bottom-line is, these are responsible jobs and
18 you cannot simply move the, the work without
19 having people trained and capable of
20 performing it.

21 Two additional points. It is a
22 stunning piece of this argument to hear that

1 the organization now agrees that we have
2 common equipment. Now, we understand that
3 there may be some period of familiarization.
4 That's true in training engine service. It's
5 true in many other crafts where people move to
6 a different location.

7 You go through a period of
8 familiarizing yourself with physical
9 characteristics of the territory, and I'm sure
10 there might be some initial training required
11 here, but the equipment is the same. And, the
12 arbitrator, to the extent that he was mistaken
13 on that, is dead wrong and there is no record
14 evidence to support it.

15 In answer to the Vice Chair's
16 questions, the issue of whether CN will
17 integrate the work, those are facts that --
18 within CN's control. Again, CN has said that
19 they're going to consolidate the work, all the
20 evidence of record, especially Tab 4 to our
21 opening submission to the arbitrator says that
22 it's going to be a consolidation of the work,

1 there's no contrary evidence. Thank you.

2 CHAIRMAN ELLIOTT: Thank you very
3 much for your attendance today and presenting
4 your thoughtful arguments and we'll take this
5 matter under advisement.

6 COMMISSIONER MULVEY: I have one
7 more question, if that's okay.

8 CHAIRMAN ELLIOTT: Oh, I'm sorry.

9 COMMISSIONER MULVEY: Let me ask
10 one final question to the CN representative.
11 To what extent does the CN override of the
12 overall collective bargaining agreement with
13 ATDA? Does it contend that the entire
14 collective bargaining agreement must be set
15 aside or only those provisions of the
16 bargaining agreement that prevents CN from
17 consolidating its Troy and Homewood
18 dispatching forces in the manner envisioned in
19 the merger application? So, is it a complete
20 set aside or just specific provisions?

21 MR. HAWKINS: Consistent with other
22 STB decisions, our position is that the

1 employee should be placed under the ICTDA
2 collecting bargaining agreement and that there
3 would be the rights, privileges, and benefits
4 that are preserved under the New York Dock
5 conditions for some period of time.

6 COMMISSIONER MULVEY: Thank you.

7 MR. HAWKINS: So, they should be
8 under one collective bargaining agreement. We
9 believe that's consistent with precedent.

10 COMMISSIONER MULVEY: Thank you.

11 CHAIRMAN ELLIOTT: Thank you very
12 much, counsel.

13 (Whereupon, the above-entitled
14 matter concluded at 10:16 a.m.)
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In the matter of: Canadian Nation RR v ATDA

Before: STB

Date: 05-12-11

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