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SERVICE DATE – OCTOBER 4, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 33556 (Sub-No. 5)

CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION, AND  
GRAND TRUNK WESTERN RAILROAD INCORPORATED

—CONTROL—

ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY,  
CHICAGO, CENTRAL AND PACIFIC RAILROAD COMPANY, AND CEDAR RIVER  
RAILROAD COMPANY

(Arbitration Review)

Digest:<sup>1</sup> Canadian National Railway appeals an arbitration decision containing conditions governing its planned relocation and integration of train dispatchers from Troy, Mich., to Homewood, Ill. The Board affirms the arbitral decision in part, but because the Board finds that the arbitrator made certain significant legal and factual errors, and otherwise exceeded the scope of his authority, the Board vacates the decision in part and returns this matter to the parties for further negotiation and, if necessary, to arbitration.

Decided: September 29, 2011

Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated (collectively CN) filed a petition for review of an arbitration award arising out of CN's acquisition of Illinois Central Company, Illinois Central Railroad Company, and affiliated carriers (collectively IC). CN asks us to overturn the award. The American Train Dispatchers Association (ATDA) filed a reply in opposition. The Board subsequently held an oral hearing to gather further information in this dispute. We have reviewed the award and, for the reasons explained below, we are vacating it in part and remanding the matter to the parties for further negotiation and, if necessary, to arbitration for further action consistent with our opinion.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

## BACKGROUND

In a decision served on May 25, 1999, the Board approved CN's acquisition and control of IC (CN/IC Merger)<sup>2</sup> subject to, among other things, the standard New York Dock<sup>3</sup> conditions for the protection of railroad employees.<sup>4</sup> Under New York Dock, changes affecting rail employees related to transactions that the Board has approved pursuant to 49 U.S.C. § 11323 must be implemented by agreements, which must be negotiated before the changes occur. If the parties cannot reach an implementing agreement, the terms of the changes impacting employees are resolved through arbitration. Arbitration awards are subject to appeal under the Board's Lace Curtain<sup>5</sup> standard of review, discussed in more detail later in this decision.

Among the proposed changes related to the CN/IC Merger is CN's consolidation of its Troy, Mich., and Homewood, Ill., dispatching facilities. At present, the dispatchers based in Troy are responsible for dispatching former Grand Trunk Western (GTW) lines while the Homewood-based dispatchers are responsible for former IC and Wisconsin Central Ltd. (WC) rail lines.<sup>6</sup> Under CN's proposal, the Troy dispatching facility will close and GTW dispatching operations will be relocated and consolidated with the IC dispatching operations at the Homewood facility.<sup>7</sup> The parties disagree about the nature and extent of that consolidation.

Although it did not initially attempt to consolidate its dispatching functions, CN stated in its approved merger application that the consolidation would improve efficiency, service, and safety by allowing consolidation and unification of operating practices.<sup>8</sup> While the Board approved the CN/IC merger more than 10 years ago, CN delayed the consolidation of the GTW and IC dispatching operations because the 2 operations used different traffic control systems. CN states that since then, the GTW and IC dispatchers have trained on and now use common

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<sup>2</sup> Canadian Nat'l Ry.—Control—Ill. Cent. Corp., 4 S.T.B. 122 (1999) (CN/IC Merger Decision).

<sup>3</sup> N.Y. Dock Ry.—Control—Brooklyn E. Dist. Terminal, 360 I.C.C. 60 (1979) (New York Dock).

<sup>4</sup> In the CN/IC Merger Decision, the Board augmented the New York Dock conditions in one respect: employees who chose not to follow their work to Canada did not lose their otherwise applicable New York Dock protections.

<sup>5</sup> 49 C.F.R. § 1115.8 provides that the standard for review is that established in Chicago & Nw. Transp.—Aban.—near Dubuque and Oelwein, Iowa, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. Int'l Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

<sup>6</sup> CN acquired WC in 2001. Canadian Nat'l Ry. —Control—Wis. Cent. Transp. Corp., 5 S.T.B. 890 (2001).

<sup>7</sup> CN does not seek at this time to consolidate WC dispatching operations with its IC and GTW dispatching operations.

<sup>8</sup> CN/IC Merger Decision, 4 S.T.B. at 243.

traffic control systems, making consolidation practical. ATDA maintains that consolidation is not yet practical because the training is not yet complete.

According to CN, as a result of the proposed consolidation and integration of the GTW and IC dispatchers at Homewood, 6 dispatching positions will be eliminated. The GTW dispatchers in Troy are represented by ATDA while, at Homewood, the IC dispatchers are represented by the Illinois Central Train Dispatchers Association (ICTDA) and WC dispatchers are represented by ATDA.<sup>9</sup>

On February 3, 2009, CN posted notice at its Troy and Homewood dispatching facilities describing the planned consolidation. In the notice, CN announced plans to abolish 16 GTW dispatching positions in Troy and establish 10 new dispatching positions in Homewood. The notice further stated that this consolidation was related to the CN/IC Merger, would improve efficiency, and would lead to better utilization of CN's Homewood dispatchers.

Concurrently, CN advised the general chairmen of ATDA and the ICTDA of its planned action and scheduled negotiating sessions to reach an implementing agreement necessary to complete the transaction. These negotiations were unsuccessful, and, on July 29, 2009, CN exercised its rights under Article 1, Section 4, of New York Dock and commenced arbitration proceedings.

Arbitrator Don A. Hampton issued an award on February 1, 2010 (Hampton Award or Award). The Hampton Award established an implementing agreement specifying the conditions governing the consolidation of GTW and IC dispatching operations. Relevant portions of the implementing agreement provide as follows:

1. The benefits established by the New York Dock conditions are to be applicable to the consolidation of the Troy and Homewood dispatching facilities.<sup>10</sup>
2. No later than February 19, 2010, CN was to post a notice at its Troy dispatching facility for at least 10 dispatcher positions at its Homewood facility to perform the work being transferred from Troy.<sup>11</sup>
3. Within 5 days following the posting of the above notice, each GTW dispatcher was to be required to designate, in order of preference, his or her intent to: (a) accept a dispatching position at the Homewood facility; (b) accept a separation allowance; or (c) exercise seniority to obtain a position under another collective bargaining agreement under which he or she holds seniority. Assignments, awards of positions, and separation allowances were to be made in order of

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<sup>9</sup> The ICTDA, which is also a party of record in this matter, has maintained a neutral stance regarding the relocation and consolidation of dispatching functions.

<sup>10</sup> Hampton Award, Implementing Agreement at 5.

<sup>11</sup> See id. at 2-3.

seniority. Clerical positions were to be made available to employees applying for but not receiving a dispatching position at the Homewood facility, and employees who accepted such positions were to be considered displaced employees and would retain bidding rights for any Homewood dispatcher position that subsequently became available and be eligible for moving benefits if they later obtained such a position.<sup>12</sup>

4. No later than March 1, 2010, CN was to abolish 16 GTW dispatcher positions at its Troy dispatching facility.<sup>13</sup>
5. GTW dispatchers transferring from Troy to Homewood are to remain subject to ATDA representation and the associated collective bargaining agreement (CBA) in effect between ATDA and GTW governing wages, rules and working conditions, “until such time as a single agreement is reached covering all ATDA represented train dispatchers.”<sup>14</sup>
6. CN is to offer a minimum of 6 separation allowances for GTW dispatchers, to be awarded on a seniority basis.<sup>15</sup>
7. GTW dispatchers who exercise their seniority to obtain clerical positions shall be eligible for displacement allowances in accordance with Article I, Section 5, of New York Dock.<sup>16</sup>
8. Employees transferring from Troy to Homewood may choose, in lieu of any and all benefits provided under the moving expenses provisions of New York Dock, special options provided in the Hampton Award. Option (1) provides for payments totaling \$10,000 for employees who relocate their primary residence to the Homewood area and an additional \$10,000 to employees who, within 2 years of their date of transfer, sell their primary residence in the Troy area and relocate their primary residence to the Homewood area. Option (2) provides for payments totaling up to \$31,200 for reimbursement of costs associated with renting or leasing living accommodations in the Homewood area for a period of up to 24 months following transfer from Troy. CN is to pay the taxes for the rent reimbursement to the extent that it is considered ordinary income and subject to taxation. Employees will remain responsible for all other tax liability. Additionally, all relocated employees are to receive up to 4 days, with pay, for the

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<sup>12</sup> Id. at 3-4.

<sup>13</sup> Id. at 2.

<sup>14</sup> Id. at 4.

<sup>15</sup> Id. at 7-8.

<sup>16</sup> Id. at 6.

purpose of locating a residence in the Homewood area, and a one-time \$500 lump sum bonus payment to defray costs associated with house-hunting trips.<sup>17</sup>

In its petition for review filed with the Board on March 8, 2010, CN argues that the Hampton Award raises issues of industry-wide importance, contains egregious error, and is otherwise inconsistent with New York Dock. CN further argues that the Hampton Award: (1) unlawfully blocks the STB-authorized consolidation of GTW and IC train dispatching functions by failing to authorize an override of ATDA's existing CBA; (2) improperly mandates that CN relocate GTW dispatching personnel to Homewood; (3) provides relocation benefits in excess of those required; (4) impermissibly requires CN to provide at least 6 separation allowances that employees may choose in lieu of available dispatching positions at Homewood; (5) impermissibly requires CN to pay displacement allowances to dispatchers who exercise their seniority to fill clerical positions rather than relocate; (6) decides questions of labor representation reserved to the National Mediation Board (NMB); and (7) restricts the consolidation of dispatching operations to such an extent that the consolidation is not the type of action subject to New York Dock.

In its reply filed on April 19, 2010, ATDA counters that, in accordance with Lace Curtain principles, which require deference to the arbitrator and require the Board to uphold decisions falling within the spirit of the New York Dock conditions, the Board should affirm the arbitration award. The parties presented further argument, in support of their positions at an oral hearing before the Board on May 12, 2011.

#### DISCUSSION AND CONCLUSIONS

Under our Lace Curtain standards, we grant substantial deference to arbitrators on issues of causation, the calculation of benefits, and the resolution of other factual questions and review such factual issues only for egregious error.<sup>18</sup> In contrast, we apply a greater degree of scrutiny when reviewing "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions."<sup>19</sup> The Board will overturn an arbitral award if the award is irrational or fails to draw its essence from the imposed labor conditions or is outside the scope of authority granted to the arbitration panel by the conditions.<sup>20</sup> Here, the Award raises significant issues regarding: (1) the applicable standards for determining whether it is necessary to override provisions of a CBA, and (2) the authority of an arbitrator to award benefits that exceed those contained in our New York Dock conditions. As we explain below, we will uphold the Award in part but, because we find that Arbitrator Hampton's Award is in several respects

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<sup>17</sup> Hampton Award, Implementing Agreement, Attchs. B, B(1).

<sup>18</sup> See Lace Curtain, 3 I.C.C.2d at 735. "'Egregious error' means 'irrational,' 'wholly baseless and completely without reason,' or 'actually and indisputably without foundation in reason and fact.'" Am. Train Dispatchers Ass'n v. CSX Transp., 9 I.C.C.2d 1127, 1131 (1993) (citing Loveless v. Eastern Airlines, Inc., 681 F.2d 1272, 1275-76 (11th Cir.1982)).

<sup>19</sup> Lace Curtain, 3 I.C.C.2d at 736.

<sup>20</sup> Id.

inconsistent with New York Dock and in several respects appears to exceed his authority, we will vacate the Award in part and remand this matter to the parties for further negotiations, and if necessary, to arbitration.

### **Authority to Override the CBA**

Standard for authorizing CBA override. The test used to assess the need to override a CBA provision is well-established. When a consolidation or other reallocation of forces follows a transaction that has been authorized by the Board, override is warranted if it is “necessary to carry out [the] approved transaction.”<sup>21</sup> There must be a nexus between the proposed override and the approved transaction, and the consolidation/reallocation of forces (here, of dispatching facilities) must yield a public benefit, such as enhanced efficiency or safety.<sup>22</sup>

Arbitrator Hampton found that override of ATDA’s CBA was not necessary because CN “has not substantiated that efficiencies would be non-existent should the GTW Roster be maintained and the ATDA Collective Bargaining Agreement remain in effect for those GTW Dispatchers transferring from Troy to Homewood.”<sup>23</sup> CN argues that this finding has industry-wide importance, because Arbitrator Hampton has created a new standard that restricts merger-related consolidations.<sup>24</sup> According to CN, this standard requires “a carrier to prove that it could not obtain *any* efficiencies from some other operational change not requiring override of a collective bargaining agreement . . . .”<sup>25</sup>

Arbitrator Hampton’s use of a “non-existent–efficiencies” test is inconsistent with the well-settled standard for overriding CBA terms under New York Dock. Our approval of a consolidation authorizes merging carriers to override CBA provisions as necessary to realize the improved efficiencies that flow from the approved merger. The standard applied by Arbitrator Hampton—disallowing an override whenever any efficiency, however small, could be realized under the existing CBA—could improperly impede the ability of carriers to fully implement a Board-approved merger.

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<sup>21</sup> Norfolk & W. Ry. v. Train Disp. Ass’n, 499 U.S. 117, 127, 134 (1991).

<sup>22</sup> United Transp. Union v. STB, 108 F.3d 1425, 1430-31 (D.C. Cir. 1997).

<sup>23</sup> Hampton Award at 10.

<sup>24</sup> CN Pet. at 2, 19-21.

<sup>25</sup> Id. at 20 (emphasis in original). Counsel for ATDA acknowledged during oral argument that Arbitrator Hampton’s standard may have been incorrect. Counsel stated:

I think that the arbitrator’s statement [of the standard] may be too broad. On the other hand, I would say that in the context of this case, I think that what the arbitrator meant was in fact that the efficiency standard has not been satisfied here, the Board standard. We don’t—we’re not asking you to adopt verbatim the standard that Mr. Hampton put in his award.

In finding Arbitrator Hampton’s standard inconsistent with the settled standard for overriding CBA terms, we do not hold that an override of ATDA’s entire CBA (or any specific part of it) is necessary. While it is true that the Board approved the CN/IC merger with the understanding that CN intended, among other things, to centralize dispatching functions at Homewood,<sup>26</sup> the Board stated explicitly that its approval of the merger should not be taken to mean that any particular CBA changes would be required.<sup>27</sup> As ATDA argues, it may not be “necessary” to override many CBA provisions. Additionally, as the Board noted in the CN/IC Merger Decision, CN itself acknowledged that, due to the end-to-end nature of the merger, implementation would require at the most only modest adjustments to existing CBAs.<sup>28</sup> Thus, there may be provisions in ATDA’s CBA that need not be modified in order for CN to realize the benefits of consolidated dispatching operations.<sup>29</sup> On the other hand, as the Board has previously held, “[a]rbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities . . . .”<sup>30</sup> The extent to which it is necessary to override the CBA should be addressed in further negotiations, or, should negotiations fail, arbitration under the proper standard.

Factual Basis for Override. Under the Lace Curtain standard, we will accept an arbitrator’s factual finding except “‘when there is egregious error,’ meaning that the award is ‘irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact.’”<sup>31</sup> CN argues that Arbitrator Hampton committed egregious error in finding, as a second basis for prohibiting a CBA override, that CN does not intend to integrate or consolidate GTW and IC dispatching functions at this time, and that CN has not made the equipment upgrades or provided training necessary for consolidation. Specifically, Arbitrator Hampton found that CN has not upgraded its traffic control systems or trained its dispatchers in their use. He indicated that this finding supports his decision not to authorize a CBA override, stating, “The [Arbitration] Board is unconvinced that it is a necessity to merge the duties of the

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<sup>26</sup> CN/IC Merger Decision, 4 S.T.B. at 243.

<sup>27</sup> Id. at 163.

<sup>28</sup> CN/IC Merger Decision, 4 S.T.B. at 164 n.101.

<sup>29</sup> In addition, certain provisions that concern “rights, privileges, and benefits” are protected absolutely. United Transp. Union v. STB, 108 F.3d at 1430.

<sup>30</sup> CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., 3 S.T.B. 701, 721 (1998) (citing Fox Valley & W. Ltd.—Exempt. Acq. and Operation—Certain Lines of Green Bay and W. R.R., Fox River Valley R.R. Corp., and the Anhapee & W. Ry., FD 32035 (Sub-Nos. 2-6) (ICC served Aug. 10, 1995) at 3).

<sup>31</sup> Union Pac. R.R. v. STB, 358 F.3d 31, 37 (D.C. Cir. 2004) (citing American Train Dispatchers Ass’n v. CSX Transp., Inc., 9 I.C.C.2d at 1130-31 (internal quotations and citation omitted)).

GTW, IC, and WC Dispatchers to promote the efficiencies as envisioned by the Control Transaction.”<sup>32</sup>

Both CN and ATDA acknowledge that upgrades and training are needed to allow efficient consolidation of GTW and IC dispatching functions. In support of its argument that it has made the necessary upgrades, CN submits the “Second Verified Declaration of Roger Frasure,” dated December 18, 2009, which it originally submitted as part of a post-hearing briefing, prior to issuance of the Hampton Award.<sup>33</sup> In his declaration, Mr. Frasure details the upgrades that CN has made to its traffic control systems and indicates that dispatchers are trained in their use.<sup>34</sup> While ATDA argues in its reply that CN has not made the upgrades or provided training necessary for consolidation of dispatching functions,<sup>35</sup> it fails to provide any supporting evidence. Moreover, ATDA acknowledged during oral argument that CN has made the upgrades,<sup>36</sup> and it does not dispute that consolidation is now possible.

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<sup>32</sup> Hampton Award at 10; see also id. at 9. Of note, the reference to the WC dispatchers, who also work in Homewood, appears to be an inadvertent error. CN does not here seek to merge the duties of its WC dispatchers. Moreover, the Hampton Award makes only 2 passing references to the “WC dispatchers” and states at its outset, “This Board is tasked with resolving the issue of whether [CN] is to be allowed to consolidate the work of GTW Dispatchers with the work of the IC Dispatchers.” Id. at 7.

<sup>33</sup> CN Pet., Exh. B, Second Verified Declaration of Roger Frasure.

<sup>34</sup> In Paragraph 3 of his declaration, Mr. Frasure states:

Since 1999, the IC and GTW dispatchers have been upgraded to use common traffic management systems. The IC dispatchers have been trained and converted to several systems previously used by the GTW dispatchers, such as the TGBO system, the SRS mainframe computer system, and the TOPC train performance managing system. Both the IC and GTW dispatchers also have been upgraded to the state-of-the-art TMDS Wabtec train tacking system. Now that the IC and GTW dispatchers are operating on common systems, [CN] is able to consolidate the work of the two dispatcher groups.

<sup>35</sup> ATDA Reply at 19.

<sup>36</sup> The following exchange between Board Commissioner Mulvey and ATDA Counsel Michael S. Wolly occurred during the oral argument, regarding the “Second Verified Declaration of Roger Frasure,” GTW’s Senior Chief—Chicago Division, dated December 18, 2009:

Commissioner Mulvey: On a point of clarification, counsel for CN said that Mr. Frasure’s statement is that all of the course training, etc., has been done and that . . . they can effectuate the move. Whereas, the union and its filing said that the training had not been done. Would you accept now that what’s [necessary] to train these people . . . to work on different desks has been done or—

(continued . . .)

Thus, the evidence indicates that CN has made the necessary upgrades and provided training to allow consolidation to take place.<sup>37</sup> Arbitrator Hampton, however, did not indicate what evidence persuaded him to conclude that CN did not currently intend to integrate or consolidate the GTW and IC dispatching functions, and he did not indicate whether he considered Mr. Frasure's declaration. Moreover, in making his determination, Arbitrator Hampton did not cite any other evidence showing that CN has not made the necessary upgrades.

Under Lace Curtain, we defer to an arbitrator's factual findings. Deference, however, is not without limits.<sup>38</sup> Here, after reviewing all of the evidence and the statements at oral argument, we find that Arbitrator Hampton's conclusion regarding the current feasibility of consolidation lacks adequate factual record support. We therefore vacate Arbitrator Hampton's finding with respect to whether consolidation is intended by CN and is feasible at this time.<sup>39</sup>

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( . . . continued)

Mr. Wolly: Well, I would say, Mr. Commissioner, that there are two elements to that. One is what he has described for you is the systems are in place and there are common systems. As I stand here today, I would not disagree with him.

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

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

<sup>37</sup> We also note that CN's unchallenged statement that the proposed relocation plan would eliminate 6 dispatcher positions supports its position that some type of coordination of dispatch functions (beyond a mere physical relocation) is intended and imminent.

<sup>38</sup> See Union Pac. R.R. v. STB, 358 F.3d at 36-37.

<sup>39</sup> ATDA itself acknowledges that at least some consolidation of dispatching forces is necessary. It states, "[B]ecause CN proposes to overlap territory in dispatching assignments covering only the Chicago area, there is no valid reason for abrogating the GTW-ATDA agreement for other territory or beyond the positions affected by that change." ATDA Reply at 21. It appears, however, that the need for consolidation is not limited to Chicago-area dispatching operations. As CN's Mr. Frasure states in his Verified Declaration of December 4, 2009 (paragraphs 7-8), following the consolidation of the GTW and IC dispatchers in Homewood, CN plans to conduct cross-training and eliminate other work restrictions, so that dispatchers will have the flexibility to dispatch trains in multiple geographic areas. This will allow CN to improve its flexibility and efficiency. In any event, the extent of the override is a matter that the parties can, at least initially, address through negotiation.

### **Mandatory Consolidation of Dispatchers**

CN objects to the portions of the Award that appear to require CN to initiate consolidation of its dispatching operations by March 1, 2010, in accordance with the terms of the Hampton Award. ATDA concedes that arbitration awards issued pursuant to New York Dock may not require a carrier to proceed with a particular transaction or consolidation. Rather, an award may only establish terms that will apply if and when a carrier does proceed with a consolidation. We agree with the parties that Arbitrator Hampton lacked authority to order CN to proceed with the proposed consolidation, or proceed on a specified timetable. Because such an order is outside of the scope of the arbitrator's authority, we vacate the Hampton Award to the extent it conflicts with New York Dock by requiring CN to proceed with its dispatching consolidation.

### **Permissibility of Benefits Awarded**

New York Dock benefits are a floor, not a ceiling, and therefore employees and carriers are free, in the course of devising implementing agreements, to negotiate an agreement that provides enhanced benefits. Similarly, employees may request enhanced protections, which the Board (but not arbitrators themselves) may grant as a condition to the Board's approval of a merger.<sup>40</sup> Here, however, neither of these events occurred. Therefore, it is outside of the arbitrator's authority to grant enhanced protections,<sup>41</sup> and the Board must decide, as to each challenged benefit, whether the benefit is so outside the scope of New York Dock as to require a finding that Arbitrator Hampton exceeded his authority.<sup>42</sup> The challenged benefits are discussed below.

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<sup>40</sup> In CN/IC Merger Decision, for example, the Board agreed that employees would not be required to follow their work to Canada in order to preserve their benefits under New York Dock. CN/IC Merger Decision 4 S.T.B. at 164-165.

<sup>41</sup> Norfolk S. Corp.—Control—Norfolk & W. Ry. et al., 4 I.C.C.2d 1080, 1087-88 (1988). Indeed, several of the arbitral awards submitted as evidence by ATDA make note of this limitation on arbitral authority. See, e.g., ATDA Reply, Exh. D at 30, Arbitration Award of John B. LaRocco (neutral member), Norfolk S. Corp.—Control—Norfolk & W. Ry. Co and S. Ry., ICC FD 29430 (Sub-No. 1), Feb. 9, 1989 ; Exh. H at 10, Arbitration Award of Herbert L. Marx, Jr. (referee), Seaboard Sys. R.R. v. Am. Train Dispatchers Ass'n, ICC FD 30053, Mar. 7, 1985.

<sup>42</sup> See Lace Curtain, 3 I.C.C.2d at 736. Under Lace Curtain, an arbitrator has “leeway . . . to consider industry practice.” Id. The ICC stated: “[S]o long as the [arbitration board] is interpreting and applying the [labor protective] conditions and not dispensing its ‘own brand of industrial policy,’ we would not object to the [arbitrator] granting *or* denying awards on . . . particular items.” Id. (citation omitted, emphasis in original).

Relocation Benefits.

New York Dock, Article I, Section 9, provides that a relocating employee:

shall be reimbursed for all expenses of moving his household and other personal effects [and] for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceeding 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives.

Additionally, New York Dock, Article I, Section 12, provides that relocating employees are entitled to compensation designed to defray costs associated with selling a residence at a loss or prematurely terminating the lease of a rental property.

The challenged relocation benefits in the Hampton Award, which are contained in Attachment B to its Implementing Agreement, are 2 alternative options available to relocating dispatchers “[i]n lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions,” should they elect them.<sup>43</sup> The 2 in-lieu-of options are as follows:

Option 1. Option 1 provides for a series of payments totaling \$10,000 for employees who sell their residences in the Troy area and relocate to the Homewood area. Employees are to receive the following payments upon relocation to Homewood:

After 15 working days:	\$2,000
After 60 working days:	\$2,000
After 6 months:	\$2,000
After 1 year:	\$2,000
After 15 months:	\$2,000

Each participating employee will also receive an additional \$10,000 upon proof of sale, at fair market value, of a primary residence in the Troy area, and proof of relocation to a new primary residence within a reasonable distance of Homewood.

Option 2. Option 2 provides up to \$31,200 of “rent reimbursement” over a 2-year period to employees who rent residences in the Homewood area as part of their relocation. Payments are to be made at a rate of up to \$1,300 per month, for up to 24 months, to reimburse employees for the following expenses: monthly rent of a residence, basic cable plan, gas and electric services, and parking. To the extent rent reimbursement is treated as taxable income, CN is to pay any taxes due, which will be reported as income to the employees.

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<sup>43</sup> Hampton Award, Implementing Agreement, Attch. B at 1.

Additionally, all employees electing Option 1 or Option 2 are entitled to additional benefits set forth under Attachment B(1), which provides that relocating GTW dispatchers may make 2 house-hunting trips to the Homewood area “for the purpose of locating a residence.”<sup>44</sup> The trips, which may total up to 4 days in combined length, must “be scheduled in conjunction with the Employee’s rest days.”<sup>45</sup> These employees are also to “receive a one-time lump sum bonus payment in the amount of five hundred dollars (\$500) to defray expenses associated with their home hunting trip the Homewood area” as well as “four (4) days with pay.”<sup>46</sup>

CN objects to these relocation packages for two reasons: (1) they provide house-hunting allowances for which New York Dock provides no authority; and (2) the payments established under both Options 1 and 2 impermissibly expand New York Dock’s benefits.

With respect to house-hunting allowances, CN argues that New York Dock limits relocation benefits to “reimbursement for actual moving expenses.”<sup>47</sup> In CN’s view, the “4 days with pay” and the \$500 bonus payment, which the Hampton Award provides to relocating employees who make house-hunting trips pursuant to Attachment B, are not provided for under New York Dock and are therefore impermissible. CN argues in particular that, because New York Dock, Article 1, Section 9, caps compensation for relocation-related “wage loss” at 3 days, the “4 days with pay” that Arbitrator Hampton awarded in connection with relocation exceeds any wage loss-related benefit allowed under New York Dock. ATDA argues that the house-hunting allowances are in accord with industry practice and were proposed by CN during pre-arbitration negotiations.

With respect to the optional relocation payments established under Options 1 and 2, CN argues that New York Dock contains “clear and concise protections to guard against losses related to relocation.”<sup>48</sup> The Options 1 and 2 payments, CN contends, are moving allowances that exceed those permitted under New York Dock. ATDA argues that the Hampton Award’s relocation payments are consistent with New York Dock and industry practice, and further states that CN also proposed paying these benefits during the negotiations that proceeded arbitration.

We agree with CN that the New York Dock conditions do not specifically provide for house-hunting allowances or the relocation payments granted by the Hampton Award. That, however, does not end our inquiry. In Lace Curtain, the ICC found that the arbitration board’s award drew “its essence from the letter and purpose” of the applicable labor protective

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<sup>44</sup> Hampton Award, Implementing Agreement, Attch. B(1) at 1.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> CN Pet. at 29. New York Dock, Art. 1, § 9, provides in part that a relocating employee “shall be reimbursed for all expenses of moving his household . . . .”

<sup>48</sup> CN Pet. at 30.

conditions<sup>49</sup> and that payment of a “lace curtain allowance” and reimbursement of real estate commission and mortgage interest costs were industry practices. As a result, even though the labor protective conditions did not specifically provide for the challenged benefits, the ICC did not disturb the award.

In this instance, we see no egregious error in a finding that house-hunting costs are “expenses of moving,” for which New York Dock provides reimbursement.<sup>50</sup> The provision providing 4 days with pay for house-hunting trips requires employees to schedule their house-hunting trips “in conjunction with . . . rest days”—days on which they are not scheduled to work.<sup>51</sup> Therefore, we see no inherent conflict with New York Dock’s 3-day limit on reimbursement for work missed in connection with moving. Like the reimbursement for the costs of new lace curtains upheld by the ICC, the house-hunting costs and the one-time \$500 bonus payment to defray expenses associated with employees’ house-hunting trips arguably fall within the reimbursement for “all expenses of moving [a] household” provided under New York Dock, and we will defer to the arbitrator on this matter.

In contrast, we find nothing in the record to support a finding that the relocation payments established in Options 1 and 2 are “expenses of moving.” To the contrary, the Hampton Award provides these benefits “[i]n lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions.”<sup>52</sup> The standard New York Dock provisions do not provide for general living expenses such as reimbursement for the cost of renting a residence at the new location as provided in Option 2 of the Hampton Award. Nor do they provide what appears to be an incentive for purchasing and remaining in a new home that is provided in Option 1 of the Hampton Award. These are enhanced benefits that do not draw their essence from New York Dock. Thus, Arbitrator Hampton exceeded his authority by conferring benefits in excess of those imposed by the Board in the CN/IC Merger Decision.

We therefore vacate Option 1 and Option 2, contained in Attachment B of the Hampton Award, as they do not reflect expenses of moving.

#### Separation Allowances.

Article 1, Section 7, of New York Dock provides that *dismissed* employees may opt for separation allowances in lieu of other benefits for which they are eligible. Section 1(c) defines a dismissed employee as a railroad employee “who, as a result of a transaction is deprived of

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<sup>49</sup> Lace Curtain, 3 I.C.C.2d at 736. Because Lace Curtain involved a rail line abandonment rather than a merger, the applicable protective conditions were those established in Oregon Short Line R.R.—Abandonment—Goshen, 360 I.C.C. 91 (1979). Oregon Short Line provides the same substantive benefits as New York Dock, but differs somewhat procedurally.

<sup>50</sup> New York Dock, Art. 1, § 9.

<sup>51</sup> Hampton Award, Implementing Agreement, Attch. B(1) at 1.

<sup>52</sup> Hampton Award, Implementing Agreement, Attch. B at 1.

employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.”

CN contends that the Hampton Award impermissibly requires CN to provide at least 6 separation allowances for the GTW dispatchers, including employees who have not been dismissed, but merely are unwilling to relocate in order to retain railroad employment.<sup>53</sup> Moreover, CN states that it will not be able to eliminate any positions unless it is permitted to fully integrate the dispatching operations at Homewood, rather than merely house the Troy and Homewood dispatchers under the same roof, as provided in the Hampton Award.<sup>54</sup> ATDA argues that the separation allowance requirement is both fair and a “common element of railroad industry agreements,” which “would bridge senior employees to retirement” and leave “the positions they might otherwise bid at Homewood available for junior dispatchers.”<sup>55</sup>

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<sup>53</sup> The Hampton Award provides in relevant part:

There shall be at least six (6) separation allowances offered by the Carrier which shall be determined in accordance with Article I, Section 7 of New York Dock. Hampton Award, Implementing Agreement at 7-8, par 12.

GTW dispatchers must each (a) submit their application for a position at Homewood; (b) accept a separation allowance as provided for in paragraph 12; or (c) state his/her intent to exercise seniority to another position under another Collective Bargaining Agreement under which he/she holds seniority (i.e., the GTW/TCIU [Transportation Communications International Union or clerical] Agreement), in writing, to the individual designated by the Carrier with copy to the Local Chairman . . . . Employees must select their options in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit application, or identify options, will result, in the employee being considered as having elected to exercise seniority under existing GTW/TCIU Agreements or otherwise accept a clerical position as provided in paragraph 4 below. Id. at 3, par 3.

Assignments and awarding of positions shall be made in seniority order. In the event all [Homewood dispatcher] positions provided in paragraph 2 are selected by dispatchers and not all separation allowances are claimed in accordance with paragraph 12, clerical positions, under the GTW/TCIU Agreement will be made available to the remaining employees of the GTW/ATDA seniority roster. Id. at 3-4, par 4.

<sup>54</sup> CN Pet. at 32-33. The arbitrator effectively ruled that the respective GTW and IC dispatchers would remain in silos, thus rendering it impossible to reduce the number of dispatchers needed to perform the necessary work.

<sup>55</sup> ATDA Reply at 25.

The Hampton Award's separation-allowance requirement is impermissible under New York Dock, because a carrier cannot be compelled to provide a specific number of separation allowances without regard to how many employees are actually dismissed—that is, deprived of work—due to consolidation. Here, because Arbitrator Hampton has not permitted any modification of the CBA, the Award appears to mandate separation allowances in a situation where CN will need all of its former Troy dispatchers at the Homewood dispatching center and will not be able to dismiss any employees.<sup>56</sup> As we stated in CN/IC Merger Decision, “A basic part of the bargain embodied in the Washington Job Protection Agreement, upon which the New York Dock conditions are based, is that rail carriers are permitted to move employees from one work site to another in order to achieve the benefits of a merger transaction.”<sup>57</sup> We therefore vacate the provisions in the Hampton Award that mandate at least 6 separation allowances and permit employees who are not dismissed to obtain such allowances.<sup>58</sup>

#### Displacement Allowances.

New York Dock provides that employees who cannot exercise their seniority to obtain a comparable position and instead obtain a position that places them in a worse position may receive displacement benefits.<sup>59</sup> CN argues that the Hampton Award impermissibly permits GTW dispatchers to exercise seniority to assume clerical positions and receive displacement allowances instead of accepting available dispatching positions at Homewood.<sup>60</sup> As ATDA points out, however, the Hampton Award in fact states that only “in the event all positions provided in paragraph 2 [that is, all 10 Homewood dispatching positions] are selected by dispatchers” may the remaining dispatchers seek clerical positions and retain eligibility for displacement allowances.<sup>61</sup> Accordingly, former Troy dispatchers may not bid for clerical positions in lieu of available dispatch positions at Homewood, making CN's concerns on this point unfounded. Therefore, we decline to overturn this provision of the Award.

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<sup>56</sup> It is also possible that, if and when this consolidation proceeds, some or all of the dispatchers who do not successfully bid for dispatch positions at Homewood will become displaced, rather than dismissed employees.

<sup>57</sup> CN/IC Merger Decision, 4 S.T.B. at 164.

<sup>58</sup> We do not decide here whether under other circumstances an arrangement that ensures adequate manpower for the carrier's consolidated operation while permitting older employees to claim separation allowances might fall within the spirit or essence—although not the literal provisions—of New York Dock.

<sup>59</sup> New York Dock, Art. I, §§ 1(b) and 5.

<sup>60</sup> CN Pet. at 33.

<sup>61</sup> Hampton Award, Implementing Agreement at 3, par. 4. ATDA agrees with this interpretation. ATDA Reply at 6, 27.

A separate but related issue raised by CN is whether the Award improperly conveys to employees without Transportation Communications International Union (TCIU) seniority the right to bid for TCIU jobs.<sup>62</sup> Article 2, Section 1, of New York Dock provides that employees who would otherwise be dismissed or furloughed may choose to fill a position in a different craft or class for “which he is, or by training or retraining can become qualified, not, however, in contravention of collective bargaining agreements relating thereto.” Thus, a provision in the Award that requires the carrier to offer clerk positions to dispatchers who would otherwise be dismissed or furloughed appears to be consistent with New York Dock, but only if such a provision does not conflict with the TCIU CBA. Therefore, we will not disturb this provision of the award absent a showing that such a conflict exists.

### **Labor Representation Issues**

CN contends that the Hampton Award impermissibly decides questions of labor representation reserved to the National Mediation Board (NMB) by establishing that ATDA employees “shall remain subject to ATDA representation . . . until such time as a single agreement is reached covering all ATDA-represented train dispatchers.”<sup>63</sup> ATDA agrees that questions of labor representation are reserved to the NMB. ATDA argues, however, that the Hampton Award does not decide any questions of labor representation, but rather merely provides that the GTW dispatchers will remain subject to the ATDA agreement.

We agree that questions of labor representation are reserved to the NMB,<sup>64</sup> and are not within the jurisdiction of the arbitrator or the Board to decide. But because we are, in this decision, returning this matter to the parties for further negotiation, there is no need that this issue—whether the arbitrator here improperly decided questions of labor representation—be addressed at this time.

### **Scope of New York Dock**

Finally, CN argues that the Hampton Award restricts the consolidation of dispatching work to such an extent that, as authorized, “[T]he mere relocation of GTW dispatchers from Troy to Homewood without consolidation is not a transaction covered by New York Dock.”<sup>65</sup>

We disagree. Under New York Dock, any employee placed in a worse position as a result of the merger is eligible for labor protective benefits.<sup>66</sup> As ATDA argues, the relocation at

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<sup>62</sup> CN Pet. at 12.

<sup>63</sup> Hampton Award, Implementing Agreement at 4, par. 5.

<sup>64</sup> CSXT—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., 10 I.C.C.2d 831, 850 (1995) (“the effect of [agency-approved] transactions on selection of union membership is under the jurisdiction of the [NMB] acting under the Railway Labor Act.”).

<sup>65</sup> CN Pet. at 23.

<sup>66</sup> See New York Dock, Art. I.

issue here “could not have been accomplished in the absence of STB authorization of the CN/IC Merger.”<sup>67</sup> Accordingly, even if CN were to merely relocate the dispatchers to a new location as a result of the merger, affected employees would be subject to New York Dock labor protective conditions.

### CONCLUSION

Because the Hampton Award uses the wrong legal standard, makes a significant factual error, and grants benefits to employees that exceed New York Dock, we vacate the Award in part and remand this matter to the parties for further negotiation in accordance with this decision, and, in the event the parties cannot reach settlement, to arbitration for further action consistent with our opinion.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Hampton Award is affirmed in part and vacated in part, and the proceeding is remanded for further action consistent with this decision.
2. This decision is effective on the date of service.
3. A copy of this decision will be served on Arbitrator Hampton at the following address:

Mr. Don A. Hampton  
17690 SE 91st Poplar Terrace  
The Villages, FL 32162

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

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<sup>67</sup> ATDA Reply at 28.