

38976
EB

SERVICE DATE – DECEMBER 16, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 32760 (Sub-No. 45)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY

(Arbitration Review)

Digest:¹ This decision declines to disturb an arbitration award finding that Union Pacific Railroad Company may not use the expedited procedures of a pre-existing national collective bargaining agreement to make certain proposed changes to interdivisional services under its Houston II hub merger implementing agreement.

Decided: December 14, 2010

This decision addresses an appeal by the Union Pacific Railroad Company (UP) of a December 2007 award rendered by Arbitrator Robert Perkovich (Perkovich) in Arbitration Board No. 589. The Perkovich Award addressed a dispute between UP and the Brotherhood of Locomotive Engineers and Trainmen (BLET) about changes in rail operations that UP proposed to implement in the Houston, Tex. area. Perkovich interpreted an agreement implementing changes in rail operations that resulted from the Board-authorized merger of UP and Southern Pacific Transportation Company (SPT).² As explained below, we decline to disturb the arbitrator's award.

¹ 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 in Decisions, EP 696 (STB served Sept. 2, 2010).

² Union Pac./S. Pac. Merger (Union Pac.), 1 S.T.B. 233 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

BACKGROUND

In 1996, the Board approved the acquisition and control of the Southern Pacific Rail Corporation, its rail carrier subsidiaries, and SPT by the Union Pacific Railroad Corporation and its rail carrier subsidiaries, including UP, the surviving rail carrier. Pursuant to 49 U.S.C. § 11326, the Board imposed the employee protective conditions established in New York Dock Railway—Control—Brooklyn Eastern District Terminal (New York Dock), 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Railway. v. United States, 609 F.2d 83 (2d Cir. 1979), as a condition to granting merger approval.

The Agreement at Issue. Following the 1996 merger, UP rearranged its operations system-wide into 16 centralized terminals, called hubs, with spokes (train runs) radiating out from the hubs. Between 1996 and 2001, UP and affected labor organizations with whom UP had various labor agreements, including the Brotherhood of Locomotive Engineers (BLE),³ negotiated separate merger implementing agreements for each of the UP hubs. Among those implementing agreements was the Houston Zones 3, 4, and 5 Hub Merger Implementing Agreement (herein, the Houston II HMIA), dated April 23, 1997. The Houston II HMIA established, among other things, detailed provisions for crew maximum service hours, destination and return runs, second crew dispatching, service compensation, and crew service ordering rules.⁴ This agreement is the subject of UP's appeal.

In negotiating the Houston II HMIA, as well as the agreements at the other hubs, UP and BLE took cognizance of a prior series of industry-wide collective bargaining agreements negotiated between representatives of the rail industry and representatives of the railroad employees (herein, the union or organization). These included the 1971 BLE National Collective Bargaining Agreement (1971 Agreement), the 1986 BLE National Collective Bargaining Agreement (1986 Agreement), and the 1996 BLE National Collective Bargaining Agreement (1996 Agreement).

In Article II of the 1971 Agreement, UP and the nation's other major railroads negotiated with the unions for the ability to implement certain changes to interdivisional services (train runs) and to expand terminal switching limits on an expedited basis.⁵ In 1986, the employee unions and railroads negotiated a new industry-wide agreement. Article IX of the 1986 Agreement further modified the railroads' ability to change or create new interdivisional services on an expedited basis.⁶ Alternatively, the more procedurally complex "major dispute" resolution

³ BLE became BLET, a Division of the Rail Conference of the International Brotherhood of Teamsters, in 2004.

⁴ Reply at 7; Appeal, Ex. 1, Perkovich Award at 3.

⁵ Reply at 4-5; Appeal at 9-10.

⁶ Interdivisional service under these agreements "includes both interdivisional and intradivisional divisional service . . . as well as inter-seniority district and intra-seniority district service." Appeal at 12. Under Article IX of the 1986 Agreement, the carrier seeking to establish new interdivisional service must give the organization at least 20 days written notice specifying

(continued . . .)

process of the Railway Labor Act (RLA) applies when Article II of the 1971 Agreement, Article IX of the 1986 Agreement, and Article IX of the 1996 Agreement do not apply.⁷

The Houston II HMIA makes reference to other existing collective bargaining agreements. The “Applicable Agreements” clause, Article II.A. of the Houston II HMIA states:

All engineers and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect . . . including all applicable national agreements

Where conflicts arise, the specific provisions of this Agreement shall prevail.⁸

The Houston II HMIA also contains separate “Savings Clauses,” Article VI.A., which state:

The provisions of the applicable Schedule Agreement [i.e., the generally applicable collective bargaining agreements] will apply unless specifically modified herein.⁹

The case before the Perkovich Arbitration Board now on appeal concerned the effect to be given Article IX of the 1986 Agreement (Article IX rights) in the context of the Houston II HMIA clauses quoted above.

The Perkovich Award. On June 7, 2006, UP served BLET with a “Notice of Intent” to establish new interdivisional services in the Houston area pursuant to Article IX of the 1986 Agreement. Specifically, UP proposed to consolidate 4 existing freight pools into a single

(continued . . .)

the service it proposes to establish and any terms and conditions it proposes to govern that service. If the carrier and the organization cannot agree by the expiration of the 20-day period, Article IX provides for a relatively expedited arbitration process to resolve the matter: (1) the dispute is to be submitted to arbitration under the Railway Labor Act, 45 U.S.C. § 153, within 30 days after either party has made such a request; and (2) the carrier may implement certain operating changes on a trial basis until the arbitration process is completed. If the dispute goes to arbitration, the panel has 30 days from its creation to rule on the proposed changes, including the proposed terms and conditions.

⁷ Appeal at 9. Article IX of the 1996 Agreement established an expedited procedure for negotiating “enhanced customer service” (i.e. changes in starting times, yard limits, calling rules, on/off duty points, seniority boundaries, and class of service restrictions) and a similar arbitral mechanism to settle those disputes that defy negotiated resolution.

⁸ Appeal, Ex. 6, Houston II HMIA at 11 (emphasis added).

⁹ Id. at 16 (emphasis added).

pool,¹⁰ with Houston as the home terminal and Angleton, Freeport, and Bloomington, Tex., as away-from-home terminals; create a new 22-mile run from Houston north to Spring, Tex., that would be in one division and one seniority district; and set the wages, hours, and terms and conditions for the new run. The parties met on 3 occasions, but could not reach an agreement on the terms and conditions, wages, and hours that would apply to UP's proposed interdivisional changes.¹¹ UP invoked arbitration under Article IX of the 1986 Agreement. The National Mediation Board appointed Perkovich to chair the panel, Arbitration Board No. 589, when the parties could not agree on a neutral arbitrator.

Perkovich framed the issue as whether UP's Notice of Intent was "procedurally proper [and, i]f so, what [should] be the terms and conditions for the new interdivisional service."¹² He found that the proposed changes in interdivisional services and related terms and conditions of employment would conflict with provisions of the Houston II HMIA "with respect to inter alia, first-in-first-out provisions, terminal limits, and seniority rights."¹³ Because he also found that the terms of the Houston II HMIA prevail over the changes proposed under Article IX of the 1986 Agreement, Perkovich concluded that the Notice of Intent was not procedurally proper.¹⁴ In so finding, Perkovich considered the record before him and the prior decisions of Arbitration Board Nos. 581 and 590, which had examined the relationship between UP's hub merger implementing agreements in other hubs and prior collective bargaining agreements (such as the 1986 Agreement.) We discuss these arbitration decisions below.

The Kenis Award. In Arbitration Board No. 581, Arbitrator Ann Kenis (Kenis) rendered a 2004 decision¹⁵ that arose out of a UP proposal in 2003 to establish new interdivisional services in 3 of its other hubs: Kansas City, North Little Rock/Pine Bluff, and St. Louis. Kenis concluded that the 3 hub merger implementing agreements before her precluded UP from exercising its rights under Article IX of the 1986 Agreement. She based her conclusion on the Applicable Agreements clause (Article IV.A.)¹⁶ and the Savings Clauses (Article VIII),¹⁷ both of

¹⁰ UP crews in the Houston hub operate in "turnaround" freight pools; they depart their home terminal, take a train to a certain destination, and then pick up another train and return to the terminal from which they started.

¹¹ According to BLET, the employees met with UP in response to the Notice of Intent, "in an attempt to reach a mutually acceptable agreement with respect to the proposed [interdivisional] service. The union . . . did so while steadfastly maintaining that it was not obligated to engage in such discussions because the [Houston II HMIA] . . . did not give UP the right to establish the [interdivisional] service it proposed." Reply at 9.

¹² Appeal, Ex. 1, Perkovich Award at 1.

¹³ Id. at 4.

¹⁴ Id. at 2-5.

¹⁵ Appeal, Ex. 49, Kenis Award.

¹⁶ Which states, "[w]here conflicts arise, the specific provisions of this Agreement shall prevail." Id. at 22 (emphasis added).

which were common to the 3 hub merger implementing agreements before her and which are identical to those in the Houston II HMIA.

Kenis found nothing in the 3 hub merger implementing agreements that “expressly modified or nullified” Article IX of the 1986 Agreement,¹⁸ and on that basis she found that UP’s Article IX rights “survive under the Savings Clauses.”¹⁹ However, she qualified these findings, noting that while UP’s Article IX rights survive, “their exercise is not unfettered.”²⁰ Kenis examined the effect of the Applicable Agreements clause on UP’s Article IX rights and held that when “those [Article IX] rights have been exercised in a manner that conflicts with or modifies the provisions of the hub merger implementing agreements, the implementing agreements must . . . prevail.”²¹ Kenis observed that this interpretation was also “supported by the express language of the side letters incorporated into each of the three hub merger implementing agreements.”²² Kenis went on to find that such a conflict did exist between the terms of the hub merger implementing agreements and the changes to those terms that would result from UP’s exercise of its Article IX rights.²³ Accordingly, she concluded that UP could not exercise its Article IX rights to establish the proposed new interdivisional services.

UP had also urged Kenis to consider the established past practice of the parties in implementing new interdivisional services, enhanced customer services, or changes in switching limits. Kenis declined to look to that extrinsic evidence of bargaining history and past practice,

(continued . . .)

¹⁷ Which states, “[t]he provisions of the applicable Schedule Agreement will apply unless specifically modified herein.” *Id.* at 8 (emphasis added).

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 22.

²⁰ *Id.*

²¹ *Id.* at 20.

²² *Id.* at 23. These virtually identical side letters referred to the effect of “Item C” of the Savings Clauses, which states that “Nothing in this Agreement will preclude the use of any engineers to perform work permitted by other applicable agreements within the new seniority districts described herein” The side letters further explained that “Item C must be read in conjunction with Item A [of the Savings Clauses], which makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic schedule agreement, take precedence, and not the other way around [and] confirm that the provisions of Article VIII - Savings Clauses may not be construed to supersede or nullify the terms of the Merger Implementing Agreement.” Appeal, Ex. 7, Side Letter No. 9 (Kansas City); Ex. 10, Side Letter No. 20 (North Little Rock/Pine Bluff); Ex. 18, Side Letter No. 10 (St. Louis).

²³ Specifically, she found that “numerous provisions of the implementing agreements governing the operations of trains, methods of compensation, and home terminal locations would be nullified or modified if the new [interdivisional] service runs were put into effect.” *See* Appeal, Ex. 49, Kenis Award at 25.

finding it irrelevant, because the language in the 3 hub merger implementing agreements was, in her view, “patently clear.”²⁴ UP filed an untimely appeal of the Kenis Award, which the Board rejected.²⁵ Subsequently, BLET enforced the Kenis Award through proceedings in the U.S. Court of Appeals for the Seventh Circuit, over UP’s objections that the award was ambiguous.²⁶

The Binau Award. Perkovich also considered UP’s argument that he should follow the precedent set by Arbitration Board No. 590 in a 2006 award rendered by John Binau (Binau). That award resulted from a UP proposal in 2006 to extend switching limits in the Los Angeles hub.²⁷ Instead of the Applicable Agreements clause and Savings Clauses at issue in the 3 hub merger implementing agreements before Kenis, the Los Angeles Hub Merger Implementing Agreement (Los Angeles HMIA) contained an “Agreement Coverage” clause, Article VI.C., which stated:

Except as specifically provided [in this merger implementing agreement], the system and national collective bargaining agreements, awards and interpretation shall prevail.²⁸

There was no provision in the Los Angeles HMIA that corresponded to the Applicable Agreements clause found in the Kenis Award, which stated that in the event of a conflict between the implementing agreement and a national agreement, the implementing agreement would prevail. Binau compared the language in the Los Angeles HMIA to the language before Kenis to determine what, if any, precedential value the Kenis Award held. Finding the Los Angeles HMIA’s Agreement Coverage clause materially distinct from the Applicable Agreements clause at issue in the Kenis Award and that “[BLET] recognize[d] this distinction” both in its brief filed before the Seventh Circuit in BLET v. UP and in its position before

²⁴ Id. at 20.

²⁵ See Union Pac., FD 32760 (Sub-No. 43) (STB served Jan. 21, 2005).

²⁶ After Kenis had issued her award, UP sought to institute in the North Little Rock/Pine Bluff hub the interdivisional service it had formerly proposed for that hub. The U.S. District Court for the Northern District of Illinois denied a civil action filed by BLET to enforce the Kenis Award, finding the Kenis Award ambiguous because it might have found this more limited proposal permissible under the North Little Rock/Pine Bluff hub merger implementing agreement. See Bhd. of Locomotive Eng’rs & Trainmen v. Union Pac. R.R., No. 05 C 7293, 2006 WL 2191967 (N.D. Ill. July 27, 2006). The U.S. Court of Appeals for the Seventh Circuit reversed, holding that “A party subject to an arbitration award cannot be permitted to base a claim that the award is ambiguous on an immaterial change in his conduct after the award is rendered.” Bhd. of Locomotive Eng’rs & Trainmen v. Union Pac. R.R., 500 F.3d 591, 593 (7th Cir. 2007).

²⁷ See Appeal, Ex. 1, Perkovich Award at 4.

²⁸ See Appeal, Ex. 52, Binau Award at 21 & Ex. 8, Los Angeles HMIA (Nov. 18, 1998), Article VI.C. (emphasis added).

Arbitration Board No. 580,²⁹ Binau concluded that the Agreement Coverage clause in the Los Angeles HMIA preserved UP's right to exercise the expedited procedures of Article II of the 1971 Agreement to effect changes in switching limits.³⁰

In looking at both prior awards for purposes of precedent, Perkovich found that the Kenis and Binau Awards "can be reconciled" because Binau had found the language in the Los Angeles HMIA materially different from the language in the hub merger implementing agreements before Kenis.³¹ Perkovich examined the language in the clauses of the Houston II HMIA to determine whether "they are of the type that were before [Kenis] or of the type that were relied upon by [Binau]."³² Finding the language in the Houston II HMIA to be "identical" to the language in the hub merger implementing agreements before Kenis, Perkovich concluded that Kenis' construction of those agreements "between these same parties on the very same property . . . must control [for construing the Houston II HMIA] and we so hold."³³

UP filed an appeal of the Perkovich Award, to which BLET filed a reply.

DISCUSSION AND CONCLUSIONS

Congress has directed the Board to impose employee protective conditions on its approval of railroad mergers.³⁴ Although we retain jurisdiction to resolve disputes regarding the application of these conditions,³⁵ we first require parties to submit these disputes to arbitration, as provided in New York Dock. Article 1, section 11 of New York Dock specifically provides

²⁹ Appeal, Ex. 52, Binau Award at 21.

³⁰ Thus, Binau stated: "It is clear from the award that Referee Kenis based her decision on specific agreement language not found in the Los Angeles Hub Agreement. . . . a side by side comparison of Article IV.A. in the Kenis Award with Article VI, Section C of the Los Angeles Hub Agreement clearly shows the phrase "[W]here conflicts arise, the specific provisions of this agreement shall prevail" is only in Article IV.A. and not in Article VI, Section C of the Los Angeles Hub Agreement." Id.

³¹ See Appeal, Ex. 1, Perkovich Award at 4.

³² Id.

³³ Id. The absence of a side letter in the Houston II HMIA was not important to Perkovich. In his view, the side letters before Kenis simply shed additional light on the parties' intent that the hub merger implementing agreement prevails. Thus, he explained that "because [the Kenis Award] held that such language was clear and unequivocal we feel that its reliance on the side letter was simply an adjunct to its finding." Id. at 4 n.1. UP does not allege egregious error in Perkovich's conclusion in this regard.

³⁴ See 49 U.S.C. § 11326.

³⁵ See Int'l Bhd. of Elec. Workers v. ICC (IBEW), 862 F.2d 330, 336 (D.C. Cir. 1988); Union R.R.—Arbitration Review—United Steel Workers of Am., FD 31363 (Sub-No. 3), slip op. at 4 (STB served Dec. 17, 1998).

for binding arbitration if “the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provisions” of those conditions.³⁶ Arbitrators routinely rule on disputes that concern the interpretation and application of rail merger implementing agreements, and their decisions have been reviewed by the Board and our predecessor, the Interstate Commerce Commission (ICC).³⁷

Where, as here, there is an appeal of an arbitral award that has interpreted the provisions of a merger implementing agreement negotiated pursuant to the provisions in New York Dock, we may exercise our authority to hear the appeal. See Chicago & N. W. Transp. Co.—Aban.—near Dubuque & Oelwein, Iowa, et al. (Lace Curtain), 3 I.C.C.2d 729, 736 (1987) (Lace Curtain), *aff’d sub nom. IBEW*.³⁸ Under Lace Curtain, we limit our review of arbitration awards “to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions.”³⁹ We review issues of causation, the calculation of benefits, or the resolution of other factual questions only for egregious error. An arbitrator commits egregious error whenever an award is “irrational, wholly baseless and completely without reason, or indisputably without foundation in reason and fact.”⁴⁰ We will not overturn an arbitration award unless the award contains egregious error, fails to draw its essence from the labor conditions imposed by the ICC or the Board, or is outside the scope of the arbitrator’s authority under those conditions. In this vein, we give substantial deference to an arbitrator’s interpretation of a collective bargaining agreement, even though we could interpret the agreement differently.⁴¹

Although we rely on arbitrators to assist us in carrying out our responsibilities when they rule on disputes concerning New York Dock matters, this does not mean that our Lace Curtain

³⁶ Separate arbitration and appraisal procedures apply respectively to disputes involving article 1, section 4 ((notice and disputes about the terms of an implementing agreement before the agreement is finalized) and article 1, section 12 (losses from home removal) of New York Dock.

³⁷ See Union Pac. Corp., (Arbitration Review), FD 32760 (Sub-No. 44), slip op. at 5 n.4 and accompanying text (STB served July 27, 2005).

³⁸ See also Appeal, Ex. 49, Kenis Award at 16: “[T]he interpretation and application of merger implementing agreements falls within the ambit of Article 1, Section 11 of the New York Dock Conditions,” citing BLE & UP, New York Dock Arbitration Committee under Article I, Section 11 of the New York Dock Conditions, ICC FD 32760 (LaRocco, 2000 and 2001).

³⁹ See Lace Curtain, 3 I.C.C.2d at 736.

⁴⁰ Union Pac. R.R. v. STB, 358 F.3d 31, 37 (D.C. Cir. 2004) (quoting Am. Train Dispatchers Ass’n. v. CSX Transp., Inc., 9 I.C.C.2d 1127, 1131 (1993)).

⁴¹ Lace Curtain, 3 I.C.C.2d at 735; see also United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

review of arbitral awards is just a perfunctory exercise. Labor arbitrators, however, are experts in labor relations and, indeed, in the very sort of contract issues presented here. Therefore, we do not second-guess these arbitrators lightly and instead limit our review as noted above.

Citing American Train Dispatchers Ass'n, 9 I.C.C.2d at 1127, UP argues that the Board must vacate this arbitration award under the Lace Curtain standard because Perkovich erred egregiously in adopting Kenis' determination that, under the Applicable Agreements clause, UP may not exercise its Article IX rights in a manner that would result in conflicts with provisions of Houston II.⁴² Applying our Lace Curtain standard here, we find no basis for disturbing the Perkovich Award, which is based on a sound rationale and is supported by the arbitral record. We address each of UP's arguments in turn.

I. Was the Kenis Award, and by implication the Perkovich Award, internally inconsistent?

UP does not contest Perkovich's finding that the new interdivisional services and other changes proposed in UP's June 7, 2006 Notice of Intent would in fact conflict with provisions of the Houston II HMIA. Rather, UP challenges Perkovich's holding that the provisions of the Houston II HMIA must prevail over UP's Article IX rights in the event of such a conflict. The bulk of UP's discussion is directed to the reasoning set forth in the Kenis Award, because Perkovich found that Kenis' construction of the agreements before her, which contained the identical language as that in the Houston II HMIA, "must control."⁴³

UP's primary argument is that it was "internally inconsistent" for Kenis, and by implication Perkovich, to find that UP's Article IX rights were preserved by the terms of the Savings Clauses, but could not be invoked for their designated purpose.⁴⁴ BLET counters that this argument is based on a "mischaracterization of Kenis' reasoning." BLET also argues that UP's objection to the reasoning of the Kenis Award represents an impermissible attempt to challenge an award that has already been reviewed and enforced in court.⁴⁵ Because Perkovich gave the Kenis Award significant weight, we will examine it solely to determine if its reasoning is so flawed that Perkovich's reliance on it as precedent would be "irrational, wholly baseless and completely without reason, or indisputably without foundation in reason or fact."⁴⁶

UP contends that:

[i]n her Award . . . Arbitrator Kenis concedes that UP's Article IX rights "were not expressly modified or nullified" by the Merger Implementing

⁴² See Appeal at 28-31.

⁴³ Appeal, Ex. 1, Perkovich Award at 4.

⁴⁴ Appeal at 28 & 30.

⁴⁵ See Reply at 43-44.

⁴⁶ See supra note 40.

Agreements. Despite this conclusion, Arbitrator Kenis then finds that UP **unambiguously** gave up its ability to exercise its Article IX rights where to do so would modify a Merger Implementing Agreement.⁴⁷

This reasoning, according to UP, renders its rights under Article IX a nullity, because “every new interdivisional service will modify some provision of a Merger Implement Agreement.”⁴⁸ Thus, UP argues that Kenis’ conclusions are contradictory, finding that: “the Merger Implementing Agreements do not modify UP’s rights, but they do modify UP’s rights.”⁴⁹

We disagree. Kenis’ reasoning is internally consistent and rational. Her deliberate wording, not quoted in UP’s appeal, found that UP’s Article IX rights “were not expressly modified or nullified” in the Savings Clauses.⁵⁰ But, contrary to UP’s argument, that finding is not inconsistent with Kenis’ finding that UP’s Article IX rights were nevertheless limited by another provision. Moving from her finding that “[UP’s] Article IX rights survive under the Savings Clause,”⁵¹ Kenis next looked to the Applicable Agreements clauses, which she found were intended by the parties to limit UP’s exercise of prior agreement rights, such as its Article IX rights.⁵² Noting that the parties “recognized . . . that circumstances might arise in which the implementing agreements would conflict with these pre-existing agreements,” she added, “[w]hen that happens, the parties agreed that the implementing agreement provisions would prevail. The bargain that was struck is not ambiguous and it is entitled to enforcement.”⁵³ Kenis reasonably interpreted this language as anticipating conflicting circumstances that might arise from the application of national agreements, such as Article IX of the 1986 Agreement. Thus, Kenis rationally gave plain meaning to the Applicable Agreements language, which states that “[w]here conflicts arise, the specific provisions of [Houston II] shall prevail.”

⁴⁷ Appeal at 32.

⁴⁸ Id.

⁴⁹ Id. at 28.

⁵⁰ Appeal, Ex. 49, Kenis Award at 20 (emphasis added). Indeed, Kenis’ preliminary finding on the effect of the Savings Clauses was responsive to a specific point the union made to her about UP’s San Antonio hub. The San Antonio Hub Merger Implementing Agreement had expressly stated that “[n]ew pool operations not covered in this implementing Agreement between Hubs or one Hub and a non-merged area or within a Hub will be handled per Article IX of the 1986 National Implementation Award.” Id. at 20-21. The union had urged Kenis to find that the absence of such similar specific reference in the hub merger implementing agreements before her compelled a negative inference (that UP could not invoke its Article IX rights.) Id. Declaring that “[s]ilence is not sufficient,” Kenis declined to infer that the omission of specific reference to the 1986 Agreement in the Savings Clauses before her would, without more, exclude the 1986 Agreement from the scope of the Savings Clauses. Id. at 22.

⁵¹ Id.

⁵² Id. (“their exercise is not unfettered,” see supra note 20 and accompanying text).

⁵³ Id. at 22-23.

UP asserts that Perkovich’s interpretation cannot reasonably be squared with the intent of Article IX of the 1986 Agreement and Article II of the 1971 Agreement: to permit carriers to expedite needed modifications to the routes, home and away-from-home terminal assignments, and terminal limits established in collective bargaining and implementing agreements. These expedited procedures, according to UP, were recommended in the 1962 report of the Presidential Railroad Commission specifically to replace traditional collective bargaining as the means to best effect modifications, and are a necessary alternative to the protracted major dispute resolution procedures of the RLA “if railroads are to remain efficient, meet customer demand, and compete with other transportation options.”⁵⁴ UP maintains that, in exchange for the expedited procedures it obtained under Article IX, it gave employees “generous wage increases and cost-of-living adjustments [as well as conditions to] protect employees against compensation reductions for a period of years following the implementation of these changes.”⁵⁵ UP protests that it would never have “[given] up its ability to exercise its Article IX rights where to do so would modify a Merger Implementing Agreement.”⁵⁶

UP argues that every exercise of its Article IX rights would “violate some provision of a Merger Implementing Agreement,” thus nullifying its Article IX rights. However, even if it could be demonstrated that the Kenis and Perkovich Awards prevent UP from exercising its Article IX rights in Houston Zones 3, 4, and 5, this would not nullify the Savings Clauses. Under their own terms, the Savings Clauses apply to all provisions of all of the “generally applicable collective bargaining agreements,” not just Article IX of the 1986 Agreement. Therefore, as long as there are provisions of some of these collective bargaining agreements that remain applicable under the Kenis/Perkovich analysis, the Savings Clause would still have effect.

Moreover, UP’s post hoc contention that it “never” would have allowed any limitation on its Article IX rights is inadequate to support a finding of egregious error in the plain meaning Perkovich and Kenis afforded the parties’ contemporaneous expressions of intent in the hub merger implementing agreements. Given these circumstances, Perkovich did not commit egregious error in relying on Kenis’ construction of the plain language of the final bargain that was struck in the hub merger implementing agreements before her.

In fact, UP’s argument requires that we pit the Savings Clauses language against the Applicable Agreements language of the same agreements, rendering the “prevail in the event of conflict” portion of the Applicable Agreements clauses superfluous. UP has not suggested an alternative interpretation of the Applicable Agreements clause that would not render the “[w]here conflicts arise” portion of that clause superfluous.⁵⁷

⁵⁴ Appeal, Ex. 29.

⁵⁵ Appeal at 10.

⁵⁶ Id. at 32.

⁵⁷ See Abraham v. Rockwell Int’l. Corp., 326 F.3d 1242, 1255 (Fed. Cir. 2003) (citing Restatement (Second) of Contracts § 203(a) (1981) (noting “general rule of contract

(continued . . .)

Kenis' construction of the hub merger implementing agreements before her appropriately followed canons of statutory construction by providing meaning to, and compatibility between, both the Savings Clauses and the Applicable Agreements clauses. In this regard, Kenis observed that both parties are:

experienced negotiators. They must be held to have full knowledge of the provisions of the Hub Merger Implementing Agreements and the significance of the clear and unambiguous language contained therein. Moreover, it must be presumed that they did not include language in those agreements with the understanding that the provisions would be rendered superfluous or meaningless."⁵⁸

As shown, Perkovich had ample basis for adopting Kenis' conclusion that UP's Article IX rights under the Savings Clauses in the hub merger implementing agreements before her were circumscribed by the Applicable Agreements clauses, "and not the other way around," and therefore may not be "exercised in a manner that conflicts with or modifies the provisions of the hub merger implementing agreements. . . ."⁵⁹

II. Can the Kenis and Binau Awards be reconciled?

UP asserts that the Kenis and Binau Awards present an "arbitral split"⁶⁰ and that, in reconciling the two awards, Perkovich "draws an irrational and baseless distinction" between the Agreement Coverage language at issue in the Binau Award and the Savings Clauses language at issue in the Kenis Award.⁶¹ Asserting that these contract provisions "cannot rationally be read to mean different things,"⁶² UP attempts to portray a sharp conflict between the Kenis and Binau Awards, asserting that "Arbitrator Binau . . . found that language having the same meaning in a different Merger Implementing Agreement did not affect UP's right to extend switching limits under Article II of the 1971 Agreement."⁶³ UP's argument, however, does not reflect the different language used in the implementing agreements considered by Kenis and Binau and ignores the fact that Binau found that the language before him had a different meaning than the language before Kenis.

(continued . . .)

interpretation that terms of a contract should not be interpreted so as to render them ineffective or superfluous.")).

⁵⁸ See Appeal, Ex. 49, Kenis Award at 23-24.

⁵⁹ Id. at 20 & 23.

⁶⁰ Appeal at 25.

⁶¹ Id. at 26.

⁶² Id. at 27.

⁶³ Id. at 25.

Perkovich’s finding, that the language of the Houston II HMIA is “more like” the language relied on by Kenis than the language relied on by Binau, is amply supported by even the most superficial parsing of the hub merger implementing agreements at issue in all three awards. The Savings Clauses before Perkovich and Kenis all state that:

[t]he provisions of the applicable Schedule Agreement will apply unless specifically modified herein.

And all of the hub merger implementing agreements before Perkovich and Kenis, also contained the more specific Applicable Agreements clause, which states that:

where conflicts arise . . .the specific provisions of [the hub merger implementing agreement] shall prevail.

In contrast, the Agreement Coverage clause before Binau states that:

[e]xcept as specifically provided herein, the system and national collective bargaining agreements, awards and interpretations shall prevail.

It is true that the language of the Agreement Coverage clause (“except as specifically provided herein”) before Binau is similar to the Savings Clauses language (“unless specifically modified herein”) before Kenis and Perkovich. Both clauses provide that the terms of prior collective bargaining agreements apply unless specifically modified by the express language of the hub merger implementing agreement. But Perkovich’s finding, that the language of the Houston II HMIA is “more like” the language before Kenis than the language before Binau,⁶⁴ focused on the presence of the Applicable Agreements clause—“where conflicts arise the specific provisions of this [Houston II] Agreement shall prevail” Unlike the Agreement Coverage and Savings Clauses, the Applicable Agreements clause (“where conflicts arise”) is not limited to conflicts in written contractual provisions. Rather, as Kenis reasonably found, the Applicable Agreements clause contemplates conflicting circumstances or results, such as the conflicting work rules and seniority rights at issue here, that might arise when national agreements are applied, and clearly states that in such circumstances, the specific provisions of the hub merger implementing agreement prevail. In its arguments, UP ignores the Applicable Agreements language and the fact that no parallel language appears in the Los Angeles HMIA before Binau.⁶⁵ Binau, on the other hand, properly distinguished the Agreement Coverage language before him from the Applicable Agreements/Savings Clauses language before Kenis and properly concluded that the absence of the Applicable Agreements language supported a different result.⁶⁶

⁶⁴ Appeal, Ex. 1, Perkovich Award at 4.

⁶⁵ See Reply at 34.

⁶⁶ See supra note 30.

In sum, under both the Savings Clauses before Kenis and Perkovich and the Agreement Coverage clause before Binau, national collective bargaining agreements are made applicable to UP's hub merger implementing agreements unless the implementing agreements "specifically" provide otherwise. Unlike the Agreement Coverage provision before Binau, however, the Savings Clauses before Kenis and Perkovich are all accompanied by an Applicable Agreements clause that ensures that the terms of the hub merger implementing agreements prevail when conflicts result from the application of national collective bargaining agreements.

We would have to ignore the clearly identical language in the hub merger implementing agreements before Kenis and Perkovich, and the contrasting language before Binau, to find no rational or factual basis for Perkovich's determination that the clauses in the Houston II HMIA on their face "are more like those relied upon by [Kenis] than those relied upon by [Binau]."⁶⁷ Perkovich's tandem conclusion—in harmony with Kenis and Binau—is likewise facially reasonable: that differing language in the hub merger implementing agreement before Binau had a different meaning and that the identical language in hub merger implementing agreements before Kenis and Perkovich had the same meaning.

III. Did Perkovich commit egregious error in declining to examine past practices?

Finally, UP argues that Perkovich erred in accepting Kenis' finding that the language of the relevant provisions is "plain and unambiguous."⁶⁸ Citing CSX Corp.—Cont.—Chessie System, Inc. (CSX Corp.), 10 I.C.C.2d 831, 845 (1995). UP contends that the language of the relevant provisions is susceptible to other interpretations, and that Perkovich's failure to consider evidence of the established past practice of the parties to interpret and reconcile those provisions constitutes egregious error.

The past practices of the parties, according to UP, demonstrate that it did not relinquish its Article IX rights where their exercise would result in changing or modifying the terms of its hub merger implementing agreements. UP refers to 16 past instances where it invoked the expedited procedures of the 3 national agreements without objection from BLE/BLET to modify provisions of various merger implementing agreements.

As noted above, we disagree with UP's contention that Kenis, and by implication, Perkovich, egregiously erred in finding the Applicable Agreements clause unambiguous. We must therefore reject UP's argument that Perkovich committed egregious error in declining to look to evidence of the established past practice of the parties to interpret that clause and

⁶⁷ Id. Indeed, UP's argument here appears inherently contradictory: urging that Perkovich should have relied on Binau's ultimate holding, that the 1986 Agreement should prevail, while simultaneously rejecting his holding that the agreements in the Kenis Award were distinguishable from the Los Angeles HMIA before him.

⁶⁸ Appeal at 31 & Ex. 49, Kenis Award at 25.

reconcile it with the Savings Clauses of Houston II.⁶⁹ It likewise was not egregious error for Kenis, when faced with this question, to reason that “parties are entitled to insist on the enforcement of the plain and unambiguous provisions of an agreement, even when a contrary practice exists.”⁷⁰

Further, UP’s reliance on CSX Corp. as precedent for the proposition that this agency has “looked to past practice despite a seemingly clear contractual provision”⁷¹ is misplaced. There the unions argued that the RLA bargaining requirements in two prior local agreements bound the carrier to bargain for merger-related operational changes using RLA, rather than New York Dock, procedures. The ICC’s determination, however, did not rely on past practices alone. The ICC first noted the arbitrator’s finding that the proposed changes did not involve the same territory or property involved in those collective bargaining agreements. Moreover, the arbitrator cited “the absence of specific language in [the pertinent] agreements . . . of such intent,” as well as the carrier’s own explanation for the intended purpose of the RLA bargaining requirement, which the arbitrator found consistent with past practices.⁷² There was no language, such as we have here in the Applicable Agreements clause, suggesting that the RLA bargaining requirements were intended to preempt (if that were even possible) New York Dock procedures.

Nor is it apparent that the evidence of past practices submitted by UP would support a different result than that reached by Kenis and Perkovich. Of the 16 instances of past practices that UP cites, only 8 involved Applicable Agreements clauses or similar language, and only 6 of the 8 involved the implementation of new or changed interdivisional services.⁷³ These 6 instances at best show that there may not have been a conflict with the terms of the relevant

⁶⁹ An arbitrator, when faced with an ambiguous provision in an implementing agreement, one that might rob another provision of any meaning, should “refer[] to the past practices of the parties.” See Black v. STB, 476 F.3d 409, 414 (6th Cir. 2007).

⁷⁰ Appeal, Ex. 49, Kenis Award at 24.

⁷¹ Appeal at 35.

⁷² CSX Corp., 10 I.C.C.2d at 845.

⁷³ One of the 6 instances involved the Houston Zones 1 and 2 Hub Merger Implementing Agreement (and the exact same Applicable Agreements/Savings Clauses language at issue here). UP emphasizes that the arbitrator there, Eckehard Muessig, in imposing terms and conditions on the proposed interdivisional services, observed that “[t]he General Chairman recognizes that, pursuant to Article IX and a long-line of Arbitral Awards, the carrier has the right to establish new interdivisional train service.” Appeal at 33-34 & Ex. 43, Muessig Award at 1.

The other 5 instances concerned the merger implementing agreement applying to the UP—Chicago & North Western Railway Company merger, which contained language similar to Applicable Agreements clause at issue here. See Union Pac. Corp.—Control—Chi. & N. W. Transp. Co., FD 32133 (ICC served Mar. 7, 1995).

hub merger implementing agreement or that BLE/BLET had no reason to oppose UP's exercise of the expedited procedures of the 3 national agreements.⁷⁴

Kenis noted in declining to consider instances of past practices that,

We simply do not know . . . whether the facts giving rise to the interdivisional service changes [UP apparently refers to] were similar to those at bar. [UP] may have been successful in instituting new interdivisional runs in other locations, but that does not preclude [BLET] from relying on the express language negotiated in the three Hub Merger Implementing Agreements at issue.⁷⁵

Indeed, as noted, it may be that UP's past exercise of its Article IX rights in some instances did not conflict with the provisions of the relevant hub merger implementing agreements or that any conflicts that might have resulted were made palatable to BLE/BLET by the accompanying terms and conditions that were offered or negotiated. Even in this case, as discussed above,⁷⁶ BLET first engaged in discussions about whether the proposed changes in interdivisional services sought in the Notice of Intent could lead to a mutually acceptable agreement, but reserved its position that the terms of the Houston II HMIA would nevertheless prevail. Such informal negotiations should not constitute a basis for Perkovich to find that the terms negotiated by UP and BLE—which are spelled out in the Houston II HMIA—were thereby extinguished in cases where conflicts arise.

In conclusion, we find no basis to disturb the Perkovich Award. UP has not shown that the award contains egregious error, that it fails to draw its essence from the labor conditions the Board imposed, or that it falls outside the scope of the arbitrator's authority. Specifically, UP has failed to show that the Kenis Award, and by implication the Perkovich Award, is internally inconsistent, that the Kenis and Binau Awards cannot be reconciled, or that Perkovich erred in declining to examine the past practices of the parties. The record before us does not permit any such findings.

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

⁷⁴ The Muessig Award quoted by UP, for example, is less than 2 pages long, and thus contains little detail from which to understand the context of the statement that UP quotes. See also Appeal, Ex. 38, UP/BLET Memorandum of Agreement at 4 (“The provisions set forth in this Agreement are made to address a unique and special circumstance and are accordingly made without prejudice to the positions(s) of the parties signatory hereto.”); Appeal, Ex. 40, Public Law Board Decision No. 6771 at 3 (“This decision herein pertains to the unique circumstances of this instant case and is not to be viewed as guiding or setting precedent in other interdivisional or intradivisional service disputes.”).

⁷⁵ Appeal, Ex. 49, Kenis Award at 24.

⁷⁶ See supra note 11 & accompanying text.

It is ordered:

1. UP's appeal is denied.
2. This decision is effective on its service date.

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