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April 13, 2011

VIA OVERNIGHT MAIL

Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW, Suite 100
Washington, D.C. 20024

229276

Re: **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, Docket No. FD 33556 (Sub-No. 5) (Arbitration Review).**

Dear Sir/Madam:

Pursuant to the Decision of the Board, served April 7, 2011, scheduling oral argument on May 12, 2011 regarding the March 8, 2010 Petition for Review filed by Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated (collectively "CN"), CN hereby submits an original and ten (10) copies, including one unbound copy, of the submissions it filed in the Arbitration Proceeding under Article 1, Section 4 of the New York Dock Protective Conditions. CN made three separate written submissions:

1. Carrier's Pre-Hearing Submission, including Exhibits 1 through 40, dated November 10, 2009 (P-0001 through P-0768);
2. Carrier's Post-Hearing Submission, including Exhibits A through K, dated December 4, 2009 (P-0769 through P-0830); and
3. Carrier's Response to the ATDA's Post-Hearing Brief (hereinafter "Post-Hearing Response"), including Exhibits A through D thereto, dated December 18, 2009 (P-0831 through P-0891).

In addition, please find enclosed an original and ten (10) copies of the Reply to Post-Hearing Submissions of the American Train Dispatching Association and the Carrier filed by the Illinois Central Train Dispatchers Association (the "ICTDA"). Throughout the Section 4 arbitration proceeding below, the ICTDA has sought to remain neutral and has not proposed a specific implementing agreement. However, because dispatchers represented by the ICTDA will

be affected by the consolidation, the ICTDA was a necessary party to the Section 4 arbitration proceeding and will be bound by the resulting tripartite implementing agreement.

The parties appeared before Arbitrator Don A. Hampton on November 10, 2009 and presented argument. The hearing was not transcribed. As directed by the Board, counsel for CN conferred with counsel the ATDA to ensure that duplicative material is not submitted to the Board. As further directed by the Board, set forth below are "page number citations to any specific evidence in the arbitration record regarding any measures CN took or did not take to consolidate its dispatching systems at issue through upgrades or otherwise."

As part of its continuing effort to consolidate train dispatching on its U.S. properties in a safe and efficient manner, CN has taken the following steps in anticipation of the consolidation of dispatching systems at Homewood, Illinois:

1. Since 1999, the IC and GTW dispatchers have been upgraded to use common traffic management and information systems. The IC dispatchers have been trained and converted to several systems previously used by the GTW dispatchers, such as the TGBO recordkeeping 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 tracking system. Now that the IC and GTW dispatchers are operating on common systems, the Carrier is able to consolidate the work of the two dispatcher groups. (Frasure 2d Verified Decl., Dec. 18, 2009, Carrier's Post-Hr'g Response., Ex. B at ¶ 3 (P0859); Carrier's Post-Hr'g Response at 2-3 (P0835-36)).

2. The Carrier has implemented technology in both IC and GTW dispatching operations to enable redistribution of territories among dispatching desks in response to fluctuating traffic densities. (Frasure 2d Verified Decl., Carrier's Post-Hr'g Response, Ex. B at ¶ 4 (P0859); Carrier's Post-Hr'g Response at 3 (P0836)).

3. The Carrier has recalibrated territory assignments among dispatcher desks, but has been prevented from fully integrating such assignments and, thus, realizing greater flexibility and operational efficiencies made possible via the new technology, due to the current labor structure at issue in this case. ((Frasure 2d Verified Decl., Post-Hr'g Response Ex. B at ¶¶ 4, 6 (P0859); Carrier's Post-Hr'g Response at 4, 10, 15 (P0837, P0843, P0848); Carrier's Post-Hr'g Submission at 11-12 (P0782-83)).

Very truly yours,

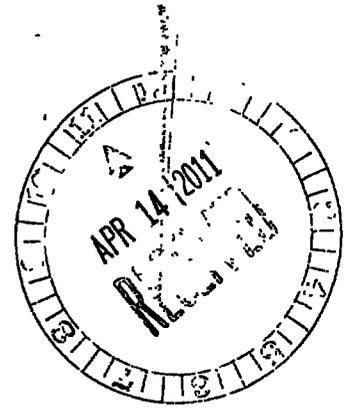


Robert S. Hawkins

Encls.

cc: Michael S. Wolly, Esq. (w/ encl.)
Joseph R. Mazzone, Esq. (w/ encl.)

SURFACE TRANSPORTATION BOARD



Finance Docket No. 33556 Sub. No. 5

**Canadian National Railway Co., Grand Trunk Corp. and Grand Trunk Western R.R., Inc.
- Control - Illinois Central Corp., Illinois Central R.R. Co., Chicago Central & Pacific
R.R. Co., and Cedar River R.R. Co**

229276

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Dated: April 14, 2011

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CARRIER'S SUBMISSION

To

**ARBITRATION BOARD ESTABLISHED
PURSUANT TO ARTICLE 1, SECTION 4
NEW YORK DOCK PROTECTIVE CONDITIONS**

INVOLVING:

**GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY
AMERICAN TRAIN DISPATCHERS ASSOCIATION
ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION**

**NOVEMBER 10, 2009
HOMEWOOD, ILLINOIS**

**ARBITRATION PROCEEDING UNDER
NEW YORK DOCK ARTICLE I, SECTION 4**

In the Matter of the Arbitration between:)	
)	
Grand Trunk Western Railroad Company)	
and Illinois Central Railroad Company,)	
	)	STB Finance Docket 33556
Carriers,)	
	)	Consolidation of GTW and IC
and	)	dispatching work at Homewood,
	)	Illinois
American Train Dispatchers Association)	
and Illinois Central Train Dispatchers)	
Association,)	
)	
Organizations.)	

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INTRODUCTION

The purpose of this Board is to determine the appropriate implementing agreement needed to implement the transaction identified in the Carrier's notice of February 3, 2009. In reaching this determination, the Board must determine whether the case is properly before this Board and whether the agreement proposed by the Carrier meets the requirements of the *New York Dock* protective conditions. The Carrier will show that the issue is properly before the Board and that its proposed agreement fully satisfies the requirements of *New York Dock* for the selection and assignment of forces. The Carrier will further show that the implementing agreement proposed by the ATDA is not proper and exceeds the jurisdiction of the Board.

STATEMENT OF FACTS

In Finance Docket No. 33556, the Surface Transportation Board (STB) approved the purchase by the Canadian National Railway Company (CN), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW)¹ of the Illinois Central Corporation, Illinois Central Railroad Company (IC), Chicago, Central & Pacific Railroad Company (CCP) and Cedar River Railroad Company (CRR) (the "Control Transaction"), effective July 1, 1999, subject to the conditions for the protection of railroad employees described in *New York Dock Railway - Control - Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979) ("*New York Dock*"). The purchase enables the rail system to provide more efficient, more reliable and more competitive rail service. The acquisition also allows the consolidated rail carriers (collectively referred to as the "Carrier") to respond directly to shipper requirements for improved rail infrastructure to handle the growing north-south trade flows stimulated by NAFTA.

¹ After the Control Transaction was approved, the name of GTW changed to "Grand

An important rationale for the STB's approval of the transaction was the fact that the combined system would generate efficiencies. During the approval process for the merger, ATDA requested that the STB impose a condition to forbid the transfer of train dispatching responsibilities over domestic trackage to dispatchers in Canada without certification from the FRA that the transfer could be accomplished without compromising safety. In its decision approving the Control Transaction, the STB explicitly acknowledged the Carrier's intent to centralize dispatching in Illinois. *See Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk W. R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co, Chicago, Central & Chicago R.R. Co. and Cedar River R.R. Co., Finance Docket 33556 (Service Date May 21, 1999)* (“At oral argument, applicants stated that they intend to centralize dispatching in Illinois, not in Canada ...”) (Carrier's Exhibit 1)

In February of 2009, the Carrier determined that in order to achieve some of the efficiencies of the transaction, it would be necessary to transfer GTW dispatching work currently performed in Troy, Michigan to Homewood, Illinois. The Homewood office is newer and has a brand new Transportation Center, substantially better equipped than the Troy office space. Following consolidation of the GTW dispatchers, the Carrier will achieve substantial savings by eliminating the need for its lease in Troy. The Homewood office currently houses all dispatching employees of the IC and affiliated carriers Wisconsin Central and Elgin, Joliet & Eastern Railway. The proposed consolidation finally brings together all U.S. dispatching groups under one roof, with associated efficiencies such as combined managerial and information technology support.

To accomplish such efficiencies, it will be necessary to eliminate excess positions and transfer dispatching work from Troy to Homewood. In addition to physically relocating the current

Trunk Western Railroad Company.”

GTW dispatching work, it also will be necessary to merge the work of the GTW dispatchers, represented by the American Train Dispatchers Association (ATDA), into that of the IC dispatchers, represented by the Illinois Central Train Dispatchers Association (ICTDA). This consolidation, which will entail the reduction of six (6) dispatcher positions, will allow for better coordination of the dispatching territories. Because the planned changes are likely to cause the dismissal or displacement of employees, as well as the coordination of two previously separate groups of employees into one, it is necessary for the Carrier to enter into an implementing agreement providing for the selection and assignment of forces.

On February 3, 2009, in accordance with the provisions of Article I, Section 4 of the imposed *New York Dock* protective conditions (Carrier's Exhibit 2), the Carrier posted notices in Troy and Homewood of its intent to reduce the number of positions in Troy and to consolidate the remaining positions in Homewood under the ICTDA agreement (Carrier's Exhibit 3). Concurrently, the Carrier advised the general chairmen of the organizations that represent both dispatching groups of the notice and promptly scheduled initial meetings to begin negotiations for an implementing agreement necessary to complete the transaction.

An initial meeting was held on February 5, 2009 with the ATDA in Troy and on February 9, 2009 with the ICTDA in Homewood. Formal proposed implementing agreements were not exchanged at either of the meetings. Rather, the primary purpose of these initial meetings was for the Carrier to provide an overview of the planned consolidation and to solicit input from the affected employees' respective bargaining representatives. Both organizations were offered the opportunity to ask questions, make comments and engage in dialogue regarding issues they would like to see addressed in an implementing agreement.

Because the Carrier proposed that the dispatchers consolidated at Homewood would work under the existing ICTDA work rules in effect on the property, and because the consolidation would involve a likely change in residence for the transferred GTW dispatchers, as well as an elimination of excess positions, the ATDA's initial reaction to the planned consolidation was unfavorable, while the ICTDA's initial reaction was one of ambivalence. The Carrier realized that obtaining an implementing agreement with the ATDA would pose the greater challenge and, accordingly, focused its bargaining efforts on the ATDA.

The Carrier wrote to the ATDA on February 10, 2009 proposing various dates in March 2009 for the parties to meet (Carrier's Exhibit 5). When the ATDA responded that it was not available until April 2009 (Carrier's Exhibit 6), the Carrier requested an earlier meeting and proposed alternate dates in late February 2009, during which the ATDA also was not available (Carrier's Exhibit 7). Due to the ATDA's unavailability to meet, bargaining did not resume until April 15, 2009. The Carrier circulated a draft implementing agreement (Carrier's Exhibit 8), which, in an effort to reach a voluntary agreement, provided enhanced benefits to affected employees, shortly in advance of the meeting and the April 15, 2009 meeting was devoted primarily to the Carrier explaining its proposed implementing agreement to the ATDA. The Carrier met separately with the ICTDA on April 16, 2009 to present its proposed implementing agreement (Carrier's Exhibit 9). Both organizations were given the opportunity to make comments and offer suggested revisions.

During the April 15, 2009 meeting, the Carrier and the ATDA tentatively planned to conduct another bargaining session in early June. Unfortunately, on April 22, 2009, the ATDA wrote to the Carrier cancelling the tentative June meeting (Carrier's Exhibit 10). The Carrier immediately responded requesting that the parties continue their bargaining, by

teleconference if necessary (Carrier's Exhibit 11). Over six weeks later, on June 12, 2009, the ATDA finally provided its availability for the requested conference call (Carrier's Exhibit 12). The Carrier agreed to the ATDA's proposed time and the conference call was held four days later on June 16, 2009. At the conclusion of that conference, the Carrier and the ATDA agreed that the Carrier would review and consider modifying its April 15, 2009 proposal. If modifications would not be made, the ATDA then would submit a counter-proposal. Shortly thereafter, the Carrier advised that it would not modify its proposal and requested a counter-proposal from the ATDA. On June 23, 2009, the Carrier requested a further face-to-face meeting to be held almost any time during the first two weeks of July (Carrier's Exhibit 13). On July 15, 2009, the ATDA's Vice President responded as to his indefinite availability (Carrier's Exhibit 14).

On July 25, 2009, more than three months after the Carrier had presented its proposal to the ATDA, the ATDA finally provided its counter-proposal via e-mail (Carrier's Exhibit 15). At the time the ATDA provided its proposal, it confirmed that it would attend the next scheduled face-to-face bargaining session on August 4, 2009. The ATDA's proposal included a minimum of six (6) separation allowances to be awarded according to seniority and numerous financial demands not directly related to the selection and assignment of forces, such as a \$20,000 lump sum payout to each relocating dispatcher (in addition to the Carrier's relocation offer) and a 10% across-the-board pay raise for transferring dispatchers. Even more importantly, the ATDA demanded that the transferred dispatchers remain employees of GTW, maintaining their GTW seniority, and working under the ATDA's collective bargaining agreement with GTW.

The ATDA clearly failed to accept the fundamental nature of the proposed consolidation and the Carrier's hopes for reaching a voluntary agreement began to dim. More than three months ago, on July 29, 2009, the Carrier exercised its rights under Section 4 of *New York*

Dock and initiated the arbitration process by writing to Roland Watkins, Director of Arbitration Services for the National Mediation Board (NMB), requesting a list of neutral referees from which the parties could select a neutral arbitrator for a *New York Dock* Section 4 board (Carrier's Exhibit 16).

On July 30, 2009, the ATDA, via e-mail, cancelled the meeting scheduled for August 4, 2009 (Carrier's Exhibit 17). The Carrier insisted on continuing with the scheduled meeting, but the ATDA refused (Carrier's Exhibit 18). On August 1, 2009, the ATDA responded acknowledging that the parties previously had discussed continuing to bargain for a voluntary agreement even though the arbitration process had been initiated (Carrier's Exhibit 19). Nevertheless, the ATDA reiterated its refusal to continue bargaining. ("You suggest that there is still value in meeting, we don't see it. You have rejected our counter proposal and you told me over the phone that the carrier would not revise its original proposal, which was not acceptable to us. So, what's left to discuss?"). The carrier continued to press for further discussions (Carrier's Exhibit 20).

Meanwhile, the Carrier continued to seek agreement on the terms of an implementing agreement with the ICTDA. On August 5, 2009, the Carrier and ICTDA held a meeting during which the ICTDA expressed a desire to remain neutral and to not participate in the Section 4 arbitration proceedings. When informed of the ICTDA's position, the ATDA responded that the ICTDA should continue to participate. On August 26, 2009, the ICTDA reiterated its position to remain neutral (Carrier's Exhibit 21). However, in the alternative, the ICTDA proposed that the parties adopt the same implementing agreement that the ICTDA had entered into with the Carrier on July 15, 2009 concerning the consolidation of dispatchers from the Elgin, Joliet & Eastern Railway into the Homewood Transportation Center pursuant to a separate control transaction authorized by the STB on December 24, 2008 in Finance Docket No. 35087 (Carrier's Exhibit 22).

On August 27, 2009, the Carrier submitted a final proposal to the parties (Carrier's Exhibit 23). The Carrier's proposed implementing agreement focused on the selection and assignment of forces. It provided that the 16 GTW dispatcher positions in Troy would be abolished and that 10 IC dispatcher positions in Homewood would be created. The affected GTW dispatchers would have the option of applying for one of the newly created Homewood dispatcher positions or exercising their seniority to another position. Dispatchers transferring from Troy to Homewood would be covered under the existing ICTDA agreement in effect at the Homewood Transportation Center, would be credited with prior GTW service for vacation and benefits purposes, and would have their seniority roster dovetailed with the existing IC seniority roster, with prior rights to the positions created as a result of the consolidation. The Carrier's proposal assured that *New York Dock* protective benefits would be available for employees dismissed or displaced by the transaction.

On August 28, 2009, the ICTDA rescinded its proposal (Carrier's Exhibit 24). On August 31, 2009, the ATDA submitted its final proposal to the parties (Carrier's Exhibit 25). The ATDA's final proposal contained the same monetary demands as the ATDA's initial proposal, including a \$20,000 lump sum payment and a 10% pay increase and, in its final proposal, the ATDA actually increased its demand for mandatory separation allowances from six (6) to eight (8). The ATDA continued to insist on agreement that, after relocation, the GTW dispatchers would remain GTW employees, be represented by the ATDA and covered by the ATDA's collective bargaining agreement with GTW.

Since the parties were unable to come to mutual agreement on a neutral referee, the NMB provided a "strike list" from which the parties were to select a neutral referee. On September 17, 2009, the selection process was completed and Mr. Don Hampton was selected. The parties and Mr. Hampton agreed conduct a hearing in this case on November 10, 2009 (Carrier's Exhibit 26).

THE ISSUES

The purpose of this Board is to determine the appropriate implementing agreement needed to implement the transaction identified in the Carrier's notice of February 3, 2009. In reaching this determination, the Board must determine whether the case is properly before this Board and whether the implementing agreement proposed by the Carrier meets the requirements of the *New York Dock* protective conditions. The Carrier will show that the issue is properly before the Board and that its proposed agreement meets the requirements of *New York Dock*. The Carrier will further show that the implementing agreement proposed by the ATDA is not proper and exceeds the jurisdiction of the Board. Accordingly, the Carrier's proposed implementing agreement should be imposed in its entirety.

THE CARRIER'S POSITION

- A. **The consolidation of work at a single reporting point is precisely the type of transaction that reasonably flows from, and is necessary to effectuate the efficiencies of, the STB-approved Control Transaction.**

The jurisdiction of this Board extends only to transactions that have been approved by the STB and upon which the STB has imposed *New York Dock*. During the course of negotiations, neither the ATDA nor the ICTDA objected that the consolidation of dispatching work at Homewood is not a covered transaction, so the Carrier will address this threshold question only briefly. "The ICC, with the approval of the courts, held that the word ["transaction"], as used in 49 U.S.C. 11343, 11344, 11347, and 11341, embraced two categories of transactions: the principal transaction approved by the ICC (generally a consolidation or acquisition of control) and subsequent transactions that were directly related to and grew out of, or flowed from, that principal transaction (such as the consolidation of facilities, transfer of work assignments, etc.)." *CSX Corp. – Control – Chessie*

System, Inc. and Seaboard Coast Line Indust. Inc., 3 S.T.B. 701, Finance Docket No. 28905 (Sub No. 22) (Sept. 25, 1998) (holding that the post-merger consolidation of dispatching positions was a related transaction). “[I]t is now settled that the mere passage of time does not prevent a finding of nexus between the proposed changes and the initially approved transaction.” (Carrier’s Exhibit 27) *Id.* See also *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indust., Inc.*, Finance Docket 28905, 1995 WL 717122 (Service Date Dec. 7, 1995) (“[w]e have never imposed a deadline on making merger-related operational changes. ... If anything, the gradual nature of the merger would have been more likely to benefit employees by providing for a smoother integration of personnel into the merged system”) (Carrier’s Exhibit 28).

Here, there can be no question that the Carrier’s consolidation of dispatchers in Homewood flows from, and is necessary to achieve the efficiencies of the STB-approved Control Transaction, pursuant to which the IC and GTW came under common control. The dispatcher consolidation realistically could not have occurred but for the Control Transaction. Among the most obvious efficiencies to be attained include eliminating the need to rent space in Troy, the integration of equipment, combined managerial and IT support, and the operational flexibilities that arise naturally from combining the work. Finally, while rail labor frequently will argue, unsuccessfully, that that subsequent transaction goes far beyond what the STB contemplated at the time of underlying control transaction, the STB’s decision approving the Control Transaction explicitly referenced, with approval, the Carrier’s intent to consolidated dispatching functions in Illinois. Accordingly, this Board is bound by the STB’s unmistakable mandate to adopt an implementing agreement necessary to effectuate the proposed consolidation in Homewood.

- B. Because the Parties complied with the notice and bargaining requirements of Article I, Section 4 of *New York Dock*, this Board properly has jurisdiction to**

impose an implementing agreement providing for the selection and assignment of forces for the consolidated Homewood dispatching operation.

Under the provisions of Article I, Section 4 of the *New York Dock* protective conditions, an implementing agreement is a prerequisite to implementing any changes in operations that may cause the dismissal or displacement of employees. To facilitate the public benefits of an STB-approved transaction, Article I, Section 4 of *New York Dock* mandates an unusually expedited schedule for bargaining and, if necessary, arbitrating the terms of a proper implementing agreement. Article I, Section 4 of *New York Dock* requires that the Carrier provide at least 90 days notice of the proposed transaction and creates a detailed schedule designed to result in a binding implementing agreement within 90 days after the Carrier's notice. Negotiations for an implementing agreement are expected to begin within five (5) days after the Carrier's posting of the Notice and to continue for at least thirty (30) days. If, after 30 days have elapsed there remains no agreement, either party may invoke arbitration. The parties are permitted five (5) days to select a neutral referee and, if they cannot do so, the NMB immediately will appoint a referee. Article I, Section 4 states that a hearing on the dispute shall commence within twenty (20) days after the selection of the neutral referee and that the referee's final decision shall be rendered within thirty (30) days after the commencement of the hearing. In other words, the *New York Dock* conditions anticipate a total of 90 days between the initial posting of the Section 4 notice and the final decision by the Section 4 arbitration Board.

The Carrier's notice was posted at locations convenient to the interested employees in Homewood, Illinois and Troy, Michigan on February 3, 2009. The notice contained a full and adequate statement of the proposed changes to be affected by the transaction, including an estimate of the number of employees of each class affected by the intended changes. Also, on February 3, 2009, the Carrier notified the representatives of the employees at Homewood and Troy that the

notice had been posted, provided them with a copy of the notice, and proposed a date to begin their implementing agreement negotiations. The notice stated, in unmistakable language, that:

To achieve the efficiencies of the acquisition, it is necessary to consolidate the train dispatching operation of the Grand Trunk Western ("GTW") and the Illinois Central ("IC") into one location. The consolidation will result in the abolishment of sixteen (16) GTW dispatcher positions at Troy, Michigan. Ten (10) dispatcher positions will be established at Homewood, Illinois. The reason for the consolidation is to provide increased efficiency and better utilization of the dispatchers at Homewood.

(Carrier's Exhibit 3). Certainly, the organizations cannot plausibly claim that the notice failed to adequately apprise the employees of the nature of the proposed consolidation.

The Carrier held its first face-to-face meetings separately with the ATDA and ICTDA to discuss the proposed consolidation on February 5, 2009 and February 9, 2009, respectively. In both meetings, the Carrier described in detail how the transfer of work would take place, answered questions, took both comments and suggestions from the organizations, and advised the organizations that the Carrier would consider their requests. The day after the February 9, 2009 meeting with the ICTDA, the Carrier began proposing future meeting dates but, as explained above, the ATDA was not available to meet again until mid-April. After circulating drafts of its recommended implementing agreement, the Carrier met again with the ATDA and ICTDA on April 15, 2009 and April 16, 2009, respectively. Again due primarily to the ATDA's unavailability to meet and its failure to even recommend alternate meeting dates, the Carrier was unable to conduct a third face-to-face bargaining session with the ATDA. However, at the Carrier's suggestion, the ATDA and the Carrier did participate in a telephone conference on June 16, 2009 and, on July 25, 2009, the ATDA submitted a full written counter-proposal.

By July 29, 2009, nearly six months had passed since the Carrier first posted notice of the proposed consolidation and began negotiations with the ATDA and ICTDA. The Carrier also recently received the ATDA's full proposal that contained such fundamentally excessive and irrelevant demands that the Carrier's optimism about expeditiously finalizing an implementing agreement began to wane. Therefore, in order to advance the process of obtaining a proper implementing agreement, the Carrier requested the appointment of a neutral referee, as had been discussed previously with the ATDA. The Carrier held out some hope of reaching a voluntary agreement outside of mediation and insisted the ATDA honor its commitment to meet with the Carrier on August 4, 2009, but the ATDA refused, stating that it did not see any value in further meetings.

The Carrier did meet again with the ICTDA on August 5, 2009 and, on August 26, 2009, the ICTDA submitted, by reference to an earlier agreement, its proposed implementing agreement. The ICTDA withdrew its proposal two days later. The Carrier submitted its final proposal on August 27, 2009 and the ATDA submitted its final proposal on August 31, 2009. The proposals of the Carrier and the ATDA remained insurmountably far apart.

The parties bargained for approximately six (6) months – six times the length of time reserved for bargaining under Article I, Section 4 and twice the total 90-day period in which the parties are expected to conclude a binding implementing agreement, including obtaining an arbitration decision if necessary. The inescapable fact is that the ATDA consistently has remained opposed to the relocation of its members and successfully has postponed the proposed transaction

well beyond the normal *New York Dock* timeframe.² The parties' bargaining history clearly satisfies the requirements of Article I, Section 4.

When faced with allegations of inadequate or surface bargaining, neutral referees appointed pursuant to Article 1, Section 4 will confirm that the parties have bargained for at least 30 days and that the bargaining history contains some indicia of intent to reach agreement. Because the patent purpose of Article I, Section 4 is to finalize an implementing agreement swiftly, neutral referees have been loathe to draw out the process by entertaining every aggrieved party's allegations of insufficient bargaining. For example, in *Conrail and Monongahela Ry. Co. v. IAMAW*, NYD § 4 Arb. (Peterson, June 21, 1993) (Carrier's Exhibit 29), the neutral referee held:

It being apparent the parties engaged in or had opportunity of negotiation for almost twice the period of time prescribed by the *New York Dock* conditions before one party, the Carrier, declared an impasse, there is no basis to hold there was a violation of Section 4 requirements of the *New York Dock* conditions that there be a 30-day period for negotiation of an implementing agreement before the declaration of an impasse and resort to arbitration.

The Arbitration Board thus finds no reason to conclude that the Carrier was premature in declaring an impasse and invoking arbitration for the resolution of the dispute.

In *Norfolk and Western Ry. Co. v. BMW*, NYD § 4 Arb. (Marx, March 13, 1989) (Carrier's Exhibit 30), the parties failed to hold a single face-to-face meeting to discuss the planned transaction because they could not agree on a location for negotiations. However, because "the parties have nevertheless managed to exchange proposals for implementing agreements" and because the parties discussed their respective proposals at the hearing and in their arbitration briefing, Arbitrator Marx concluded that "the matter is fully ripe for arbitral review and decision." "To hold otherwise," observed

² Although the ATDA might proffer a legitimate explanation for any one of the delays in bargaining, the totality of the parties' bargaining conduct strongly suggests the ATDA's pattern

Arbitrator Marx, "would be to sanction delay, perhaps costly to the Carrier and probably without benefit to the Organization" and "would be entirely contrary to the intent to Section 4."

Because the parties have exhausted the requisite notice and bargaining requirements, this dispute is now properly before this Board for final resolution.

C. The Carrier's proposal should be imposed because it is fair and equitable and complies with the requirements of *New York Dock*.

1. The Carrier's proposed Implementing Agreement provides an equitable allocation of forces.

Article I, Section 4 of *New York Dock* states that implementing agreements "shall provide for the selection of forces from all employees involved on a basis accepted as appropriate in the particular case." It is within the prerogative of the Carrier to determine the number of positions abolished and the number of positions, if any, to be created at the location to which the work is transferred. See *Norfolk & Western Ry. Co. v. BRS*, NYD § 4 Arb. (LaRocco Feb. 9, 1989) ("The number of positions to be established at the coordinated facility is the Carriers' prerogative") (Carrier's Exhibit 31); *Seaboard System R.R. v. ATDA*, NYD § 4 Arb. (Marx, March 7, 1985) ("While the 'selection of forces' is at the heart of the Referee's jurisdiction, this must necessarily be accomplished after determination by the Carrier as to the size of the work force it deems necessary") (Carrier's Exhibit 32); *CSX Transp., Inc. v. ATDA*, NYD § 4 Arb. (Ables, Nov. 11, 1988), aff'd by ICC, Finance Docket No. 28905 (Sub No. 23), 1989 WL 239430 (Service Date Sept. 15, 1999) (holding that, where *New York Dock* protection was given, the carrier was free to transfer dispatching work to a non-union facility where the work was performed by low-level managers, without allowing the displaced ATDA-represented dispatchers to follow their work) (Carrier's Exhibit 33).

of delay.

Here, the agreement proposed by the Carrier protects the interests of both the affected GTW and IC employees. Under the Carrier's proposal, the transferred GTW dispatchers will be given preference for specific positions, established solely as a result of the transfer of work. The positions will be separately posted and the transferred dispatchers will have the opportunity to bid on the positions established in Homewood on the basis of their GTW seniority, the same method as currently used on the GTW.³ Those who transfer with their work will be dovetailed into the ICTDA roster and will retain prior rights to such positions until "the employee resigns, retires, becomes disabled, is dismissed from service or is promoted." The Agreement goes on to state that any affected GTW dispatcher who is unable to obtain a dispatcher position in Homewood, due to all being awarded, will have a clerical position provided to them. Likewise, the existing Homewood dispatchers will enjoy increased work opportunities as they will be allowed to bid on any positions that may not filled by transferring GTW dispatchers.

2. The Carrier's Proposed Implementing Agreement provides full *New York Dock* protection to eligible employees, including relocation assistance.

Paragraph 8 of the Carrier's proposed implementing agreement states that "[t]he employee protective benefits and conditions as set forth in the *New York Dock* conditions ... shall be applicable to this transaction." Such protection includes wage protection and relocation assistance. Article I, Sections 9 and 12 of *New York Dock* provide protection against loss in the sale of a home and relocation assistance to employees who are forced to relocate as the result of an implementing

³ In exchange for the dovetailing of their seniority into the existing ICTDA roster, the transferring GTW dispatchers shall not retain any seniority on the GTW. This is an equitable solution previously endorsed by *New York Dock* arbitrators. See *Norfolk & Western Ry. Co. v. BRS*, NYD § 4 Arb. (LaRocco, Feb. 9, 1989) (Carrier's Exhibit 31).

agreement. By incorporating the *New York Dock* conditions, the proposed agreement provides these benefits for any eligible employee.⁴

While *New York Dock* provides allowances for those who are displaced or dismissed as a result of a transaction, the conditions do not provide a specific process for an individual to follow to claim such allowances. The agreement proposed by the Carrier clearly spells out, in paragraphs 11 through 14, the specific information required from those who may consider themselves either displaced or dismissed, as well as when and how to provide such information and when the Carrier shall pay the applicable benefits. In the event that disputes shall arise concerning an employee's eligibility for benefits, the amount of benefits, or similar questions concerning the application of *New York Dock* (other than Section 4), the parties will be able to adjust their disputes in accordance with Article I, Section 11 or, for disputes concerning losses from home removal, in accordance with Article I, Section 12.

3. **The Carrier's proposed Implementing Agreement properly places all dispatchers working at the Homewood Transportation Center, including the transferred former GTW dispatchers, under the existing ICTDA agreement in effect on the property.**

Perhaps the most irreconcilable of differences between the ATDA and the Carrier is the Carrier's proposal to place the transferred GTW dispatchers under the ICTDA agreement currently in effect at the Homewood Transportation Center. However, it is now beyond dispute that, in order to effectuate an STB-approved transaction, the parties or a Section 4 arbitration Board is

⁴The Carrier's proposed implementing agreement, at Paragraph 8, incorporates the long-settled principal that employees who have the opportunity to follow their work, but elect not to do so, shall not be entitled to *New York Dock* benefits. See *Brotherhood of Railway Carmen v. B&O R.R. Co.*, NYD § 4 Arb. (Fredenberger, Jan. 12, 1983) (Carrier's Exhibit 34) ("... employees may not refuse to transfer to Louisville and still come within the definition of a dismissed employee set forth in Article I, Section 1(c)").

authorized to override an existing collective bargaining agreement. Title 49 U.S.C. § 11321(a) states that:

A rail carrier, corporation, or person participating in that [STB] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction...

The United States Supreme Court has held unequivocally that “the exemption from ‘all other law’ in § 11341(a) [subsequently recodified at § 11321(a)] includes the obligations imposed by the terms of a collective bargaining agreement.” *Norfolk & Western Ry. Co. v. ATDA*, 499 U.S. 117, 128 (1991) (Carrier’s Exhibit 35). The STB and Section 4 arbitrators repeatedly have recognized the Supreme Court’s pronouncement as settled law. See *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indust., Inc.*, Finance Docket No. 28905 (Sub No. 27), 1995 WL 717122 (Service Date: Dec. 7, 1995) (“It is well settled that we have the authority to modify collective bargaining agreements when modification is necessary to obtain the benefits of a transaction that we have approved in the public interest”); *BMWE v. Union Pacific R.R. Co.*, NYD § 4 Arb. (Meyers, Oct. 15, 1997) (“The overwhelming weight of relevant authority conclusively establishes that *New York Dock* arbitrators have the authority, in Section 4 proceedings, to override Railway Labor Act procedures and collective bargaining agreements as necessary to achieve the economies and efficiencies that flow from an approved merger”)(Carrier’s Exhibit 36). See also *BLE v. Union Pacific R.R. Co. and Missouri Pacific R.R. Co.*, NYD § 4 Arb. (Seidenberg, Jan. 17, 1985) (observing, prior to *Norfolk & Western*, that “an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act” in holding that an existing collective bargaining agreement may be eliminated entirely) (Carrier’s Exhibit 37).

Moreover, when a proposed transaction seeks to consolidate groups of employees previously working under separate collective bargaining agreements, modern arbitrators have rejected rail labor's argument that multiple collective bargaining agreements should remain in effect or that the arbitrator should craft a new agreement by "cherry picking" provisions from the existing agreements. For example, in *BMWE v. Union Pacific R.R. Co.*, NYD § 4 Arb. (Meyers, Oct. 15, 1997), Arbitrator Meyers recognized that:

It is not possible to properly implement a system operation, and achieve the economies and efficiencies associated with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into, and perhaps completely destroy, any possibility of achieving the efficient, coordinated, economical operation promised by a rail consolidation.

See also Norfolk & Western Ry. Co. v. BRS, NYD § 4 Arb. (LaRocco, Feb. 9, 1989) ("Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction"). Likewise, in *Conrail and Monongahela Ry. Co. v. IAMAW*, NYD § 4 Arb. (Peterson, June 21, 1993), Arbitrator Peterson held that:

[T]o modify or amend the Conrail-IAM&AW Schedule of Rules Agreement to extend or preserve certain rights to former MGA employees would be to debase the principals of the basic understanding as to which agreement would survive the merger, and tend to impede, rather than foster the economies and efficiencies of the merger...

If the transferred GTW dispatchers were to continue under the existing GTW-ATDA agreement, the Carrier would not be able to reduce the number of positions needed to perform the work and a coordination of territories, specifically dispatching in the greater Chicagoland area, could not occur as contemplated. Other efficiencies of operating under a single agreement include better

coordination and communication across the territories, fewer employees necessary to perform the work, a combined extra board from which to draw employees, which is beneficial to the workforce in providing more work opportunity, and the “right-sizing” of territories based on business needs, among others. Given the inherent difficulties in attempting to operate under multiple agreements, or trying to somehow meld the existing ATDA and ICTDA agreements, this Board should ensure that all dispatchers working at Homewood following the consolidation operate under a single, intact collective bargaining agreement.

In choosing which of the existing collective bargaining agreements to apply, Section 4 Arbitrators apply the “controlling carrier” rule. Pursuant to this longstanding doctrine, the collective bargaining agreement in effect on the property to which the work is transferred – in this case Homewood – will control. *See CSX Transp. v. IBEW and TCU*, NYD § 4 Arb. (Simon, April 11, 1997) (“It is apparent that the generally accepted practice among referees is to adopt the ‘controlling carrier’ principal. In this case, the L&N is the controlling carrier as the consolidated facility is an expansion of an existing facility already subject to the L&N/TCU Agreement”) (Carrier’s Exhibit 38); *Norfolk & Western Ry. Co. v. BRS*, NYD § 4 Arb. (LaRocco, Feb. 9, 1989) (“The controlling carrier concept provides that the collective bargaining agreement in effect on the railroad receiving the work ... will thereafter govern the work and workers at the coordinated facility”); *RYA v. Union Pacific R.R. Co. and Missouri Pacific R.R. Co.*, NYD § 4 Arb. (Seidenberg, May 18, 1983) (applying controlling carrier doctrine) (Carrier’s Exhibit 39).

The controlling carrier doctrine not only provides an easily-applied, bright-line rule, but is also supported by sound policy considerations. The collective bargaining agreement in effect on the receiving property presumably already addresses known issues that are particular to the property. Conversely, if the Board were to impose a foreign agreement on the parties, they may find

themselves wrestling with the applicability of provisions not designed for, and not readily adaptable to, the receiving property. Finally, given the economic incentives built into *New York Dock*, such as protection against losses from home removal in Article I, Section 12, a carrier more often than not will elect to merge the smaller group of employee into the existing worksite of the larger group. That is precisely the case here, where ten GTW dispatchers will be consolidated into an existing unit of forty-eight (48) Homewood dispatchers. The controlling carrier doctrine thus suggests that, in a majority of cases, the agreement ratified by the greatest number of the consolidated workforce will remain in effect.

D. The Agreement proposed by the ATDA is excessive and beyond the jurisdiction of this Board.⁵

The final implementing agreement proposed by ATDA provides procedures and benefits in excess of those required by *New York Dock* and seeks agreement on subjects that in no way relate to the selection and assignment of forces. Accordingly, these proposals are outside the jurisdiction of this Board to impose.

1. The ATDA's demand to continue representing the transferred GTW dispatchers is beyond the jurisdiction of this Board.

In addition to its proposal that the transferred GTW dispatchers continue working under the ATDA-GTW agreement, which is utterly impractical and against the great weight of arbitral authority as discussed in Section C(3) above, the ATDA demands that the transferred dispatchers "remain subject to the ATDA representation." The STB has held that the question of

⁵ Because the ICTDA quickly withdrew the implementing agreement that it proposed by reference, the Carrier does not address at this point the ICTDA's withdrawn implementing agreement. To the extent that the ICTDA presents an alternate proposed agreement at the Hearing that is materially different from the Carrier's proposed implementing agreement, the Carrier will address the ICTDA's proposals at the Hearing and/or through post-Hearing briefing.

representation raised by the ATDA is a matter to be decided by the NMB – not the STB or a *New York Dock* Section 4 arbitration Board operating under the STB’s authority:

The unions argue that section 2 of *New York Dock* gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by the UTU, to work under the agreement that BLE negotiated with the B&O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. ... Therefore we find that the issue of which union is to represent WM engineers or receive them as dues-paying members does not involve a right that must be preserved under section 2 of *New York Dock*.

CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indust., Inc., Finance Docket No. 28905 (Sub. No. 27), 1995 WL 717122 (Service Date: Dec. 7, 1995). Numerous Section 4 arbitrators also have recognized that *New York Dock* exists to protect the rights of employees – not their labor unions – and questions of representation are properly addressed to the NMB. *See Norfolk & Western Ry. Co. v. ATDA*, NYD § 4 Arb. (Harris, May 19, 1987) (approving the merger of ATDA-represented dispatchers into a group of non-agreement management dispatchers and holding that “[w]hatever rights the ATDA may have under the Railway Labor Act as an ‘incumbent’ bargaining representative are for determination by the National Mediation Board, not this panel”) (Carrier’s Exhibit 40) ; *RYA v. Union Pacific R.R. Co. and Missouri Pacific R.R. Co.*, NYD § 4 Arb. (Seidenberg, May 18, 1983) (“We find it inappropriate, in drafting an Implementing Agreement pursuant to the *New York Dock* Conditions, to give consideration to such unrelated matters as bargaining agent recognition and union dues collection. The first matter is exclusively within the jurisdiction of the National Mediation Board and the second has to be decided in a forum other than this one”).

2. The ATDA's demands for benefits in excess of those required by *New York Dock* are not a proper subject for Section 4 Arbitration.

Once it became apparent that the parties could not reach a voluntary agreement, the proposed enhancements were withdrawn by the Carrier. "Under Section 4(a), the parties are obligated to bargain about the selection of forces involved in the transaction and an equitable arrangement for the assignment of employees based on the surrounding circumstances of each transaction." *Norfolk & Western R.R. Co. v. BRS*, NYD § 4 Arb. (LaRocco, Feb. 9, 1989). "The parties are free to bargain over subjects beyond the purview of Section 4(a), including pecuniary benefits above the level specified in the *New York Dock* Conditions, but there is no legal obligation (at least in the *New York Dock* Conditions) for either party to bargain about a permissive bargaining subject." *Id.* "If the parties reach impasse on a permissive subject, a Section 4 arbitrator is without authority to resolve the deadlock." *Id.*

Article I, Sections 5 and 6 contained detailed provisions for the calculation and payment of displacement and dismissal allowances, respectively. Article I, Sections 9 and 12 provide relocation benefits that are clear and concise. The Carrier's proposal incorporates all of these benefits, which the STB repeatedly has held to be adequate protection for an employee who is dismissed, displaced, and/or forced to relocate.

Here, the ATDA's proposed implementing agreement includes numerous pecuniary demands well in excess of what is required by *New York Dock*. The ATDA demands that (i) the Carrier provide at least eight separation allowances, to be awarded in seniority order, (ii) relocating employees receive a \$20,000 lump sum plus at least \$10,000 in relocation assistance for employees who relocate their primary residence or \$1,500 per month for employees who rent or lease in the

Homewood area,⁶ (iii) five paid days or \$2,500 for the purpose of locating a residence in the Homewood area, (iv) an across-the-board pay raise of 10% (based on the GTW rates of pay), and (v) employment assistance for relocating employees' spouses. The ATDA was within its rights to request such absurdly lavish pecuniary benefits unrelated to the selection and assignment of forces. The Carrier, of course, has not agreed to these benefits. Since they are well outside of the benefits required by *New York Dock*, this Board lacks the jurisdiction to accommodate the ATDA's demands. *See Conrail and Monongahela Ry. Co. v. IAMAW*, NYD § 4 Arb. (Peterson, June 21, 1993) ("It is beyond the jurisdiction of an arbitration board, such as this, to award an increase in the prescribed moving allowance, absent authority of the parties to make a determination on such a matter").

The Carrier has proposed a fair and equitable agreement, providing for the elimination of excess positions under the ATDA agreement in Troy, Michigan and transferring dispatch work to Homewood, Illinois. There is no justification for this Board to impose any of the enhancements proposed by the ATDA.

CONCLUSION

When the Carrier brought IC and GTW under common control, it did so with the right

⁶ Both options presented by the ATDA are unduly onerous, forcing the Carrier to make lump sum relocation payments not tied to an employee's actual losses and, potentially, forcing the Carrier to insure its employees against declining home values. The ATDA's proposals also could be unworkably subjective, especially in dealing with rental reimbursement. It would be improper for this Board to mandate relocation payments outside of those authorized by *New York Dock*.

to make changes in operations that would achieve the efficiencies of the transaction. Those rights were conditioned upon the Carrier providing *New York Dock* protective benefits to those employees affected by the changes in operations. In the instant case, the Carrier determined that some of the efficiencies of the acquisition could be achieved by eliminating excess ATDA dispatcher positions in Troy, Michigan and transferring the dispatching work to Homewood, Illinois, under the ICTDA agreement. The Carrier complied with all notice requirements of *New York Dock* and met in good faith with the representatives of affected employees in an attempt to reach a voluntary implementing agreement. When all parties could not reach agreement, the Carrier invoked the arbitration procedures of *New York Dock*, bringing the issue of the proper implementing agreement before this Board for final resolution. The final agreement proposed by the Carrier (Carrier's Exhibit 23) unlocks the efficiencies of the underlying control transaction while satisfying fully all requirements of *New York Dock*. It should be imposed in its entirety.

Respectfully submitted,

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Dated: November 10, 2009

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SERVICE DATE - MAY 25, 1999

This decision will be included in the bound volumes
of the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33556¹

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

Decision No. 37

Decided: May 21, 1999

The Board approves, with certain conditions, the acquisition, by Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated (collectively, CN), of control of Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central & Pacific Railroad Company, and Cedar River Railroad Company (collectively, IC).

¹ This decision embraces: STB Finance Docket No. 33556 (Sub-No. 1), Canadian National Railway Company, Illinois Central Railroad Company, The Kansas City Southern Railway Company, and Gateway Western Railway Company — Terminal Trackage Rights — Union Pacific Railroad Company and Norfolk & Western Railway Company; STB Finance Docket No. 33556 (Sub-No. 2), Responsive Application — Ontario Michigan Rail Corporation; and STB Finance Docket No. 33556 (Sub-No. 3), Responsive Application — Canadian Pacific Railway Company and St. Lawrence & Hudson Railway Company Limited.

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INTRODUCTION²

The CN/IC Control Application. By application³ filed July 15, 1998, Canadian National Railway Company (CNR), Grand Trunk Corporation (GTC), and Grand Trunk Western Railroad Incorporated (GTW),⁴ and Illinois Central Corporation (IC Corp.), Illinois Central Railroad Company (ICR), Chicago, Central & Pacific Railroad Company (CCP), and Cedar River Railroad

² Abbreviations frequently used in this decision are listed in Appendix A. Unless otherwise indicated, all monetary amounts referenced in this decision are stated in U.S. dollars.

³ The CN/IC control application is docketed as STB Finance Docket No. 33556.

⁴ CNR is a rail carrier. GTC, a holding company, is a wholly owned subsidiary of CNR. GTW, a rail carrier, is a wholly owned subsidiary of GTC, as are Duluth, Winnipeg and Pacific Railway Company (DWP, a rail carrier) and St. Clair Tunnel Company (SCTC, a rail carrier). CNR, GTC, and GTW, and their wholly owned subsidiaries (including DWP and SCTC, but excluding Illinois Central Corporation and its wholly owned subsidiaries), are referred to collectively as CN.

Company (CRRC),⁵ seek approval under 49 U.S.C. 11321-26 for:⁶ (1) the acquisition by CN of control of IC; and (2) the integration of the rail operations of CN and IC.⁷

Parties Supporting The CN/IC Control Application. The CN/IC control application has been endorsed by more than 240 parties, including more than 190 shippers. See CN/IC-8 and CN/IC-31.⁸

The KCS Trackage Rights Application. By application (referred to as the KCS trackage rights application) filed July 15, 1998, CNR, ICR, The Kansas City Southern Railway Company, and Gateway Western Railway Company⁹ seek the entry of an order under 49 U.S.C. 11102 permitting GWWR to use without restriction three connected segments of track in Springfield, IL, that total approximately 4.6 miles in length and that are owned in part by Union Pacific Railroad Company (UP) and in part by Norfolk Southern Railway Company (NS). The evidence and

⁵ IC Corp. is a holding company, as is CCP Holdings, Inc. (CCPH, a wholly owned subsidiary of IC Corp.). ICR, a rail carrier, is a wholly owned subsidiary of IC Corp. Waterloo Railway Company (WRC, a rail carrier) is a wholly owned subsidiary of ICR. CCP (a rail carrier) and CRRC (also a rail carrier) are wholly owned subsidiaries of CCPH. IC Corp., ICR, CCP, and CRRC, and their wholly owned subsidiaries (including CCPH and WRC), are referred to collectively as IC.

⁶ The transaction for which approval is sought (i.e., the acquisition by CN of control of IC, and the integration of the rail operations of CN and IC) is variously referred to as the CN/IC control transaction and the CN/IC "merger." Because GTW and ICR are Class I railroads, this transaction is classified as a "major" transaction. See 49 CFR 1180.2(a) (classification of 49 U.S.C. 11323 transactions).

⁷ CN and IC are referred to collectively as the applicants (or, sometimes, the primary applicants). The CN/IC control application filed July 15, 1998 (CN/IC-6, -7, -8, and -9) was supplemented on August 14, 1998 (the Safety Integration Plan), September 16, 1998 (CN/IC-16, an errata filing), September 21, 1998 (the Revised Safety Integration Plan), and October 16, 1998 (CN/IC-31, supplemental support statements). See also CN-1 (redacted copies of the Alliance and Access Agreements, filed Feb. 22, 1999, by CN).

⁸ See also CN/IC-56B at 765-832 (statements of support by 42 additional parties, including 30 additional shippers).

⁹ The Kansas City Southern Railway Company and Gateway Western Railway Company, and all other wholly owned (directly or indirectly) subsidiaries of Kansas City Southern Industries, Inc., are referred to collectively as KCS. Gateway Western Railway Company is referred to separately as GWWR.

arguments submitted by applicants and KCS with respect to the KCS trackage rights application are summarized in Appendix B.¹⁰

Commenting Parties Other Than Labor. Submissions respecting the CN/IC control application and/or the KCS trackage rights application have been filed by Union Pacific Railroad Company (UP), Canadian Pacific Railway Company (CPR), St. Lawrence & Hudson Railway Company Limited (St.L&H),¹¹ Ontario Michigan Rail Corporation (OMR),¹² North Dakota Governor Edward T. Schafer, the North Dakota Public Service Commission (NDPSC), the North Dakota Department of Transportation (NDDOT), the North Dakota Department of Agriculture (NDDA),¹³ Exxon Chemical Americas,¹⁴ Occidental Chemical Corporation (Oxy Chem), Rubicon Inc. (Rubicon), Uniroyal Chemical Company, Inc. (Uniroyal),¹⁵ Vulcan Chemicals (Vulcan),¹⁶ The National Industrial Transportation League (NITL), The Fertilizer Institute (TFI),¹⁷

¹⁰ The KCS trackage rights application is docketed as STB Finance Docket No. 33556 (Sub-No. 1). Applicants and KCS contend that the trackage rights sought in the KCS trackage rights application are "related to" the CN/IC control transaction. See CN/IC-6 at 404.

¹¹ CPR and St.L&H filed jointly. CPR, St.L&H, Soo Line Railroad Company (Soo), and Delaware and Hudson Railway Company, Inc. (D&H), are herein referred to collectively as CP.

¹² Comments respecting the Michigan-Ontario tunnel issue raised by CP and OMR have been filed jointly by U.S. Sen. Carl Levin, U.S. Rep. John Conyers, Jr., and U.S. Rep. Carolyn Kilpatrick, and separately by John Engler (Governor of Michigan), Dennis W. Archer (Mayor of the City of Detroit, MI), Michael D. Hurst (Mayor of the City of Windsor, ON), Dewitt J. Henry (Assistant County Executive of Wayne County, MI), Paul E. Tait (Executive Director of the Southeast Michigan Council of Governments), Albert A. Martin (Director of the Detroit Department of Transportation), and W. Steven Olinek (Deputy Director of the Detroit/Wayne County Port Authority).

¹³ Governor Schafer, NDPSC, NDDOT, and NDDA (herein referred to collectively as North Dakota) filed jointly.

¹⁴ Exxon Chemical Americas (ECA) is a division of Exxon Chemical Company (ECC), which is itself a division of Exxon Corporation, as is Exxon Company, U.S.A. (EUSA). ECA, ECC, EUSA, and Exxon Corporation are herein referred to collectively as Exxon.

¹⁵ Rubicon and Uniroyal filed jointly.

¹⁶ Vulcan Chemicals is a business unit of Vulcan Materials Company.

¹⁷ NITL and TFI filed comments jointly. Subsequently, TFI filed a letter in lieu of a brief (TFI-
(continued...))

American Forest & Paper Association (AF&PA), Champion International Corporation (CIC), Weldwood of Canada, Limited (Weldwood),¹⁸ and the United States Department of Transportation (DOT). The evidence and arguments, and any related requests for affirmative relief, contained in these submissions are summarized in Appendix C.¹⁹

Labor Parties. Submissions respecting the CN/IC control application and/or the KCS trackage rights application have been filed by various labor parties, including the Brotherhood of Locomotive Engineers (BLE), the United Transportation Union (UTU), the American Train Dispatchers Department of the Brotherhood of Locomotive Engineers (ATDD), the International Association of Machinists and Aerospace Workers (IAM), the Transportation Communications International Union (TCU), John D. Fitzgerald,²⁰ the Allied Rail Unions (ARU), and the Brotherhood of Maintenance of Way Employees (BMWE). The evidence and arguments, and any related requests for affirmative relief, contained in these submissions are summarized in Appendix D.

Additional Parties. A number of additional parties have also participated in this proceeding. Their submissions have generally been limited to expressions of either support for or opposition to the CN/IC control application, the KCS trackage rights application, or the conditions requested by one or more of the parties urging the imposition of conditions upon any approval of the CN/IC control application.

Summary of Decision. In this decision, we are taking the following action: (1) we are approving the acquisition by CN of control of IC, and the integration of the rail operations of CN

¹⁷(...continued)

2, filed Feb. 18, 1999) and NITL filed a brief (NITL-4, filed Feb. 19, 1999). Thereafter, NITL and applicants filed a "stipulation" setting forth the terms of a settlement agreement entered into by NITL and applicants. See CN/IC-65 and NITL-5 (a single pleading, filed March 17, 1999).

¹⁸ CIC and Weldwood (herein referred to collectively as Champion) filed jointly.

¹⁹ Comments respecting certain pricing practices assertedly used by Canadian lumber producers have been submitted by U.S. Senator Mike DeWine, U.S. Representative Ralph Regula, and U.S. Representative Tom Sawyer.

²⁰ Mr. Fitzgerald serves as General Chairman for United Transportation Union-General Committee of Adjustment (GO-386) on lines of The Burlington Northern and Santa Fe Railway Company (BNSF).

and IC, as proposed in the CN/IC control application;²¹ (2) with respect to Geismar, LA, the location at which KCS will receive, under the CN/KCS Access Agreement, access to three shippers named therein, we are imposing a condition requiring applicants to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS's access to the three Geismar shippers named in the Access Agreement; (3) we are imposing a condition holding applicants to their representation to facilitate the movement of North Dakota grain to points at or near the Gulf Coast by keeping open and competitive their Chicago gateway with CP's Soo subsidiary; (4) we are imposing a condition holding CN to its commitment not to exercise unfairly any rights it may have under its Partnership Agreement with CP to oppose any proposed Detroit River Tunnel improvement project that has sufficient engineering, operational, and economic merit to attract the necessary capital for its construction without derogating the value of CN's existing investment in the CNCP Partnership; (5) we are imposing the New York Dock labor protective conditions²² on the CN/IC control transaction, but we are augmenting those conditions, with respect to this transaction, so that employees who choose not to follow their work to Canada will not thereby be deemed to have forfeited their New York Dock protections; (6) we are imposing as conditions the commitments applicants' made to the United Transportation Union, the terms of the settlement agreements applicants reached with the Brotherhood of Maintenance of Way Employees, and the terms of the two implementing agreements applicants entered into with International Brotherhood of Electrical Workers; (7) we are imposing certain environmental mitigating conditions; (8) we are imposing an oversight condition of up to 5 years to address various matters respecting the CN/IC control transaction, including without limitation (a) concerns regarding the operation of the Alliance Agreement, particularly with respect to ongoing competition within the Baton Rouge-New Orleans corridor, (b) concerns of North Dakota grain shippers with respect to the Chicago gateway, (c) concerns with respect to investment in and operation of the Detroit River Tunnel, (d) concerns with respect to any merger-related link to any unfair pricing practices in the lumber industry, (e) labor's concerns with respect to lack of appropriate labor protective conditions if unauthorized control of applicants and KCS should occur, and (f) any necessary monitoring of the environmental mitigating conditions we have imposed; (9) in connection with our oversight condition, we are retaining jurisdiction to impose additional remedial conditions if, and to the extent, we determine that it is necessary to impose additional remedial conditions and/or to take other actions to address the concerns that prompted the imposition of the oversight condition; (10) we are denying the KCS

²¹ Applicants have made, both in their written submissions and also at the oral argument that was held on March 18, 1999, various representations. Some of these representations are specifically referenced in this decision; others, however, may not be specifically referenced. Applicants will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

²² New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. ICC, 609 F.2d 83 (2d Cir. 1979).

trackage rights application, the OMR responsive application, and the CPR/St.L&H responsive application; and (11) we are denying all other conditions heretofore sought by the various parties to this proceeding.

THE CN/IC CONTROL APPLICATION

Canadian National. CN operates approximately 14,150 route miles in Canada and approximately 1,150 route miles in the United States. CN's routes, which extend west to Prince Rupert and Vancouver, BC, east to Halifax, NS, and south to Chicago, IL, reach every major metropolitan area in Canada and the major U.S. cities of Duluth, MN/Superior, WI, Chicago, IL, Detroit, MI, and Buffalo, NY. CN's Western Service Corridor extends from Prince Rupert and Vancouver on the Pacific Coast of Canada to Thunder Bay, ON, and Chicago, IL. CN's Eastern Service Corridor extends from Halifax on the Atlantic Coast of Canada through Montreal, PQ, and Toronto, ON, and, via the St. Clair Tunnel,²³ on to Chicago, IL. Between Duluth/Superior and Chicago, CN's traffic is carried under haulage agreements over the lines of BNSF and Wisconsin Central Ltd. (WCL).

Illinois Central. IC operates approximately 3,370 route miles running north-south between Chicago, in the north, and the Gulf of Mexico, in the south, and west-east between Sioux City, IA, and Omaha, NE/Council Bluffs, IA, in the west, and Chicago, in the east. IC's main north-south route reaches every major metropolitan area on or near the Mississippi River, including Chicago, IL, St. Louis, MO, Memphis, TN, Jackson, MS, and New Orleans, LA. IC also reaches Baton Rouge, LA, and Mobile, AL. IC has efficient rail connections with all major railroads in the United States, particularly at Chicago, IL, Effingham, IL, Memphis, TN, Jackson, MS, Mobile, AL, New Orleans, LA, and Baton Rouge, LA.

The Combined CN/IC Network. The CN/IC control transaction, which envisions the integration of the rail operations now conducted separately by CN and IC,²⁴ will join the CN system with the IC system at Chicago, resulting in a combined CN/IC network of approximately 14,150 route miles in Canada and approximately 4,520 route miles in the United States. Applicants claim that, given the end-to-end nature of the CN/IC control transaction (Chicago is both the southern terminus of the CN system and the northern terminus of the IC system), the CN/IC control transaction: will create no track redundancies; will result in neither abandonments nor substantial

²³ The St. Clair Tunnel (so called because it crosses the St. Clair River) links Port Huron, MI, and Sarnia, ON. The St. Clair Tunnel is also known as the Sarnia Tunnel. See CN/IC-56A at 152.

²⁴ Applicants have indicated, however, that they intend to preserve IC's separate corporate identity. See CN/IC-6 at 119.

reroutings; and will not reduce any shipper's independent rail alternatives from 3-to-2 or 2-to-1 rail carriers.

Construction Projects. Applicants indicate that, in connection with the CN/IC control transaction, they plan to construct, at Cicero, Cook County, IL (west of Chicago), a connection between a CCP line and a BRC (The Belt Railway Company of Chicago) line. Applicants claim that this connection will allow more efficient movement of traffic to/from points already served by applicants but will not extend service to any new shippers, and that, therefore, construction and operation of this connection does not require approval under 49 U.S.C. 10901. See CN/IC-6 at 25 n.6. Applicants have further indicated that, while the CN/IC control application is pending, they will be upgrading an existing CN/IC connection at Harvey, Cook County, IL (south of Chicago) in order to improve the movement of traffic between CN and IC lines at that location. Applicants claim that this upgrade is one that CN and IC have long been planning and is not dependent on the CN/IC control transaction, and that, therefore, construction and operation of this upgrade does not require approval under 49 U.S.C. 10901. See CN/IC-7 at 113.

Public Interest Justifications. Applicants contend that the CN/IC control transaction, by uniting the east-west CN system (which extends between the Atlantic and the Pacific) with the north-south IC system (which extends between Chicago and the Gulf of Mexico): will create the first integrated, three-coast, single-line-railroad in North America; will enable the combined CN/IC system to provide more competitive service; will intensify competition along the increasingly significant north-south traffic corridors linking U.S. markets to their counterparts in Canada and Mexico; will meet shipper needs for an improved rail infrastructure to handle the rapidly growing north-south trade flows stimulated by the North American Free Trade Agreement (NAFTA); will result in strengthened competition among rail and motor carriers in every market and at every gateway served by the combined CN/IC; and will improve the quality of rail service available to the public.²⁵ Applicants further contend that the CN/IC control transaction will enable the combined CN/IC system to provide its customers: new and improved through train service and extended

²⁵ Applicants indicate: that existing shipper contracts with CN and IC will be honored by the combined CN/IC and will not be altered by the terms of the CN/IC control transaction, see CN/IC-6 at 140; and that rail passenger operations will not be significantly affected by the CN/IC control transaction, see CN/IC-7 at 112-13 and 162-69.

single-line service;²⁶ increased routing options and gateway choices;²⁷ improved coordination; more efficient car and train handling; faster and more reliable deliveries; and better utilization of car and locomotive equipment.²⁸ Applicants claim that the CN/IC control transaction will generate, each year, \$137.4 million in total quantifiable public benefits (i.e., operating efficiencies and cost savings, see CN/IC-56A at 534-36) as well as substantial unquantifiable public benefits (e.g., more competitive options in the transportation marketplace).²⁹

Tender Offer, Merger, and Voting Trust. CNR has already acquired, at a cost of approximately \$1.821 billion³⁰ and pursuant to a series of transactions³¹ that included a cash tender

²⁶ Applicants claim that a core element of the customer benefits to be derived from the CN/IC control transaction will be extended single-line service and the consequent expanded market reach, and enhanced length-of-haul efficiencies.

²⁷ Applicants, which intend to provide shippers with a choice of St. Louis, Memphis, and New Orleans for interchange with UP, BNSF, NS, and CSX Transportation, Inc. (CSX), claim that the new routing options made possible by the CN/IC control transaction will intensify competition: with existing interline routes involving CP, UP, BNSF, and CSX; and also with the single-line routes of NS and CSX.

²⁸ Applicants claim that the CN/IC control transaction will enable the combined CN/IC system to reduce congestion in Chicago by using more run-through trains and by blocking more trains to the north and south of that rail hub.

²⁹ Applicants claim that, because there are few redundancies between the CN and IC systems, the benefits of integrating CN and IC rail operations flow largely from the single-line service, the improved coordination, and the greater length-of-haul efficiencies that are possible with a single operator.

³⁰ The \$1.821 billion figure represents the out-of-pocket cost (i.e., \$39 per share, plus related fees and expenses) of acquisition of the approximately 75% of the then outstanding IC Corp. common stock that was acquired in connection with the cash tender offer consummated on March 14, 1998. The \$1.821 billion figure does not include the non-cash cost of acquisition of (i.e., the "cost" of the approximately 10.1 million CNR common shares given in exchange for) the remaining 25% of IC Corp. common stock that was acquired in connection with the merger consummated on June 4, 1998.

³¹ These transactions were provided for in the Agreement and Plan of Merger (as subsequently amended, the Merger Agreement) entered into on February 10, 1998, by CNR, Blackhawk Merger Sub, Inc. (Merger Sub, an indirect wholly owned CNR subsidiary), and IC Corp. See CN/IC-9 at 1-104 (the Merger Agreement) and at 105-08 (Amendment No. 1 to the Merger Agreement).

offer consummated on March 14, 1998,³² and a merger consummated on June 4, 1998,³³ indirect beneficial ownership of 100% of the common stock of IC Corp. The IC Corp. common stock thus acquired by CNR has been held, and is now being held, in a voting trust pursuant to a voting trust agreement³⁴ that provides that the voting trustee:³⁵ will act by written consent or will vote all IC Corp. stock held by the voting trust in favor of any proposal necessary to effectuate the Merger Agreement, and, so long as the Merger Agreement is in effect, against any other proposed merger, business combination, or similar transaction involving IC Corp; and will generally, with respect to other matters (including the election or removal of directors),³⁶ vote the IC Corp. stock held by the voting trust in the voting trustee's sole discretion, unless the holder(s) of trust certificate(s), with the prior written approval of the Board, directs the voting trustee as to any such vote.³⁷ The voting trust agreement further provides, in essence, that the voting trust shall cease and come to an end if the CN/IC control transaction is approved by the Board and implemented by CNR.³⁸ CNR has indicated that it intends to acquire the IC Corp. stock from the voting trust and to exercise control over IC as quickly as possible after the effectiveness of a final order of the Board approving the CN/IC control application.

Fairness Determination. Applicants seek a determination that the terms under which CNR acquired all of the common stock of IC Corp. are fair and reasonable to the stockholders of CNR and to the stockholders of IC Corp. See Schwabacher v. United States, 334 U.S. 192 (1948).

³² The tender offer resulted in the acquisition, by Merger Sub, of 46,051,761 shares of IC Corp. common stock (approximately 75% of the then outstanding IC Corp. common stock) at a price of \$39.00 per share.

³³ The merger was between IC Corp. and Merger Sub, with IC Corp. being the surviving corporation. In connection with the merger, there was an exchange of the remaining 25% of IC Corp. common stock for approximately 10.1 million common shares of CNR (which represented 10.3% of CNR's post-merger outstanding common shares on a fully diluted basis).

³⁴ See CN/IC-9 at 109-21 (the voting trust agreement).

³⁵ The voting trustee is The Bank of New York.

³⁶ Applicants have indicated: that ICR, CCP, and CRRC remain under the control of their respective boards of directors; and that each present ICR, CCP, and CRRC director either was elected prior to the establishment of the voting trust or was appointed by directors who themselves were elected prior to the establishment of the voting trust.

³⁷ The trust certificate for all IC Corp. stock held by the voting trust is currently held by GTC.

³⁸ See CN/IC-9 at 112-13.

Labor Impact. Applicants indicate that the combined CN/IC system will have approximately 26,000 employees, approximately 5,200 of whom will be in the United States. Applicants contend that, because the CN/IC control transaction is an end-to-end combination, the impact of the transaction on the combined CN/IC workforce will be limited: applicants estimate that, within the United States, the transaction will result in the abolishment of approximately 311 positions and the transfer of approximately 138 other positions, and applicants claim that these impacts will be accommodated largely by normal attrition during the 3-year implementation period.³⁹ Applicants add that the CN/IC control transaction is actually expected to increase work opportunities for the combined CN/IC workforce in the United States.⁴⁰ Applicants estimate that, within the United States, the transaction will result in the creation of approximately 384 positions (which amounts to a net increase of approximately 73 positions). See CN/IC-7 at 273-80 (Labor Impact Statement). See also CN/IC-7 at 281-88 (verified statement of applicants' labor relations witnesses).⁴¹

Labor Protective Conditions. Applicants have indicated that they expect that employees adversely affected as a result of changes made possible by the CN/IC control transaction will be covered by the New York Dock labor protective conditions, or, where applicable, the standard labor protective conditions applicable to trackage rights or other transactions subject to Board jurisdiction. See CN/IC-7 at 201 and 283. Applicants have also indicated that they expect that the Norfolk and

³⁹ Applicants expect to complete full integration of CN and IC rail operations within 3 years.

⁴⁰ Applicants have indicated that they have no plans to transfer to Canada any dispatching functions presently performed in the United States. Applicants have further indicated that, if they develop such plans at some future time, they will do so only after appropriate consultation with the Federal Railroad Administration (FRA). See CN/IC-56A at 198.

⁴¹ Applicants claim that the CN/IC control transaction will require only modest adjustments to collective bargaining agreements (CBAs), seniority districts, seniority rosters, and crew change points. These adjustments, applicants contend, will primarily involve coordination and integration of applicants' combined operations in the Chicago area, and consolidation and integration of functions such as locomotive repair and train dispatching, and also certain general and administrative functions. See CN/IC-7 at 199-207 (Operating Plan, Appendix A: Projected Seniority, Agreement, and Territory Changes Required for the Operating Plan). Applicants add, however, that additional adjustments to existing CBAs (i.e., adjustments beyond those referenced in Appendix A to the Operating Plan) may be necessary as circumstances change, as new traffic and shipping patterns made possible by the CN/IC control transaction evolve, and as applicants acquire experience in operating the combined CN/IC system. See the later discussion of the Board's views on the CBA issue.

Western labor protective conditions⁴² will cover employees adversely affected by any authorizations of trackage rights. See CN/IC-56A at 44.

Two Settlement Agreements With KCS. Applicants contend that the benefits of the CN/IC control transaction will be enhanced by two settlement agreements entered into on April 15, 1998, with KCS:⁴³ an agreement entered into by CN, IC, and KCS (hereinafter referred to as the Alliance Agreement or, on occasion, the CN/IC/KCS Alliance Agreement);⁴⁴ and an agreement entered into by CN and KCS (hereinafter referred to as the Access Agreement or, on occasion, the CN/KCS Access Agreement).⁴⁵ Applicants and KCS contend, in essence, that the two agreements are bona fide settlement agreements⁴⁶ and must therefore be deemed to be "related" to the CN/IC control transaction. Applicants and KCS, however, have not asked us to impose the terms of these agreements as conditions upon approval of the CN/IC control application, and indeed (as noted

⁴² Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653 (1980), aff'd sub nom. RLEA v. ICC, 675 F.2d 1248 (D.C. Cir. 1982).

⁴³ KCS's principal routes extend from Kansas City, MO/KS, via Shreveport, LA, to Beaumont/Port Arthur, TX, Lake Charles, LA, and New Orleans, LA. Other routes extend: between Dallas, TX, and Shreveport, LA; between Shreveport, LA, and Meridian, MS; between Jackson, MS, and Gulfport, MS; and between Meridian, MS, and Birmingham, AL. KCS's GWWR subsidiary operates between Kansas City, KS, and Springfield, IL, and has haulage rights over UP between Springfield, IL, and Chicago, IL. See Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311, slip op. at 2-3 (STB served May 1, 1997) (KCS/GWWR).

⁴⁴ See CN/IC-57 at 253-67; KCS-18 at 7-22. See also CN/IC-57 at 269-72 (the first amendment to the Alliance Agreement); KCS-18 at 23-26 (same).

⁴⁵ See CN/IC-57 at 273-87; KCS-18 at 27-41. IC will not become a party to the Access Agreement until such time as the CN/IC control transaction is approved by the Board and implemented by CN and IC.

⁴⁶ "We agree with applicants and KCS that the Alliance and Access agreements are bona fide settlement agreements; these agreements represent the price that applicants had to pay to secure KCS's support for the CN/IC application." See Decision No. 12, slip op. at 7.

below) applicants and KCS have insisted that the two agreements are not subject to our jurisdiction and, therefore, do not require our approval.⁴⁷

The Alliance Agreement. Applicants claim that the Alliance Agreement: establishes a 15-year CN/IC/KCS "alliance,"⁴⁸ contemplates the coordination, by CN, IC, and KCS (hereinafter referred to as the Alliance railroads), of marketing, operating, investment, and other functions;⁴⁹ seeks to improve CN-IC-KCS interline service by enabling the Alliance railroads to offer single-transaction, through-priced movements and expanded routing options;⁵⁰ and, as opposed to the CN/IC control transaction, will facilitate through train service by the Alliance railroads from/to U.S. markets accessed by KCS but not by IC⁵¹ and, via two KCS affiliates, from/to Mexican markets as well.⁵² Applicants further claim that, on account of the Alliance, the new routing options, extended market reach, and increased efficiencies offered by the CN/IC control transaction will benefit not only shippers served by CN/IC but also shippers served by KCS. Applicants add: that

⁴⁷ As indicated in the text, we shall refer to the Alliance Agreement and the Access Agreement as two separate agreements (although we recognize that portions of the Access Agreement amount to an addendum to the Alliance Agreement).

⁴⁸ The Alliance Agreement was effective on April 15, 1998.

⁴⁹ Although applicants sometimes refer to the Alliance as a "Marketing Alliance," see, e.g., CN/IC-6 at 142, that description does not quite capture the full scope of the Alliance.

⁵⁰ The Alliance will use two main gateways for interchange: Springfield, IL, for traffic moving between CN territory or northern IC territory, on the one hand, and, on the other, Midwest KCS territory; and Jackson, MS, for traffic moving between CN territory or IC territory, on the one hand, and, on the other, southern KCS territory or The Texas Mexican Railway Company (Tex Mex) territory or Mexico. See CN/IC-6 at 143-44; CN/IC-57 at 256-57. The Alliance will also maintain, for certain traffic, a KCS/IC connection at East St. Louis, see CN/IC-6 at 186 (the reference here is only to St. Louis, but apparently to a KCS/IC connection at *East* St. Louis, see CN/IC-56A at 212-17), and may establish one or more additional interchange points as well, see CN/IC-57 at 257-58.

⁵¹ Such U.S. markets include Kansas City, KS/MO, Dallas, TX, Shreveport, LA, and Port Arthur, TX.

⁵² The two KCS affiliates, which connect at Laredo, TX, are: Tex Mex, which operates in Texas between Laredo and Beaumont; and Transportación Ferroviaria Mexicana, S.A. de C.V. (TFM), which operates the largest rail system in Mexico. Mexican markets accessed by TFM include Monterey, Mexico City, and Veracruz, and (on the Pacific Coast) Lazaro Cardenas.

the Alliance creates the potential for the first coordinated rail network under NAFTA;⁵³ and that, although the Alliance is not contingent on implementation of the CN/IC control transaction (and, indeed, is already in place), the Alliance will not be as beneficial as anticipated if the CN/IC control transaction is not implemented.

Restrictions On The Alliance. Applicants claim that, because the Alliance is intended only to promote (and not to reduce) competition, the Alliance will not apply to any movement: (a) which more than one of the Alliance railroads can compete to serve and which is to or from a customer that receives rail service only from such railroads (either by direct physical access or via switching) at either origin or destination of the movement; or (b) which is to or from a customer facility served by a rail carrier not participating in the Alliance and which is open to service by more than one of the Alliance railroads, unless rail competition would not be materially lessened as a result of the application of the Alliance to such movement. See CN/IC-6 at 142; CN/IC-57 at 269. Furthermore: applicants have stipulated that the Alliance Agreement will not apply to any exclusively served shipper if and when that shipper obtains direct access to both CN/IC and KCS via a railroad build-in, a shipper build-out, a grant of haulage or trackage rights, or reciprocal switching; and applicants have promised that if, in the future, there is a question regarding the application of this stipulation, applicants will not object on jurisdictional grounds if parties seek to reopen this proceeding in order to enforce the stipulation. See CN/IC-56A at 21 and 73; see also KCS-17 at 14-15 and 50-51. See also CN/IC-56A at 234-35 (applicants have pledged that IC will set up a regular reporting system to monitor the steps that IC is taking to compete with KCS at all of the points where IC and KCS have competed in the past or will compete in the future).

The Access Agreement. The Access Agreement: provides for the granting of certain haulage and trackage rights (and, as respects such rights, will be effective upon implementation of the CN/IC control transaction); and contemplates new investments in certain joint facilities (and, as respects such new investments, was effective on April 15, 1998).⁵⁴ The Access Agreement provides,

⁵³ Applicants note that the Alliance extends from Canada through the United States to Mexico.

⁵⁴ Applicants have indicated that the Access Agreement "becomes effective upon the implementation of the [CN/IC control transaction], as authorized by the Board." See CN/IC-6 at 144. This statement is not entirely accurate. As respects the haulage and trackage rights, the Access Agreement will indeed become effective upon implementation of the CN/IC control transaction (except that KCS's access to the chemical plants at Geismar may begin at an even later date, as noted below); but, as respects the new investments, the Access Agreement, like the Alliance Agreement which it supplements as respects such new investments, was effective on April 15, 1998. See CN/IC-57 at 280 (effective date of the Access Agreement, in general) and at 273-74 (effective date of the haulage and trackage rights, in general).

in particular:⁵⁵ (1) that KCS will receive access to the IC-served chemical plants of three shippers at Geismar, LA,⁵⁶ (a) with CN/IC to provide haulage for KCS between Baton Rouge, LA, and IC's Geismar Yard, and with CN/IC to provide or arrange for switching at Geismar, and (b) with CN/IC to provide haulage for KCS between Baton Rouge, LA, and Jackson, MS, for traffic moving from/to specified Mid-Atlantic and Southeastern origins and destinations;⁵⁷ (2) that KCS will receive overhead trackage rights on CN/IC between Jackson, MS, and Palmer, MS, for traffic other than coal;⁵⁸ (3) that KCS will receive overhead haulage rights on CN/IC between Hattiesburg, MS, and Mobile, AL, for traffic other than coal;⁵⁹ (4) that CN/IC will provide switching for KCS to and from the Terminal Railway Alabama State Docks for traffic other than coal; (5) that CN/IC will receive overhead haulage rights on KCS between Hattiesburg, MS, and Gulfport, MS;⁶⁰ (6) that KCS will provide switching for CN/IC to and from the Port of Gulfport; (7) that CN/IC and KCS, to capitalize on the growth potential represented by the Alliance, will invest in joint automotive, intermodal, and

⁵⁵ The Access Agreement includes additional provisions not noted here. See, especially, CN/IC-57 at 274-75.

⁵⁶ The three shippers are BASF Corporation (BASF), Borden Chemicals and Plastics Ltd. (Borden), and Shell Corporation (Shell). The Access Agreement contemplates that KCS's access to these shippers will begin on the later of two dates: (1) the date the CN/IC control transaction is implemented and no longer subject to legal challenge; or (2) October 1, 2000. Applicants, noting that KCS has heretofore advanced a proposal to construct a build-in line to obtain access to the three Geismar shippers, see Kansas City Southern Railway Company — Construction and Operation Exemption — Geismar Industrial Area Near Gonzales and Sorrento, LA, Finance Docket No. 32530 (STB served Aug. 27, 1998) (ordering the build-in proceeding held in abeyance pending service of a final decision in the CN/IC control proceeding), claim that the Access Agreement will permit access to the three shippers and, at the same time, will save the substantial cost and avoid the environmental impact of a build-in. KCS, however, has indicated that, the Access Agreement notwithstanding, it would like to preserve the competitive option of a Geismar build-in line. See KCS-17 at 69.

⁵⁷ The Access Agreement provides a procedure whereby KCS's Geismar haulage rights may be converted into trackage rights, if the quality of the services CN/IC provides KCS and its customers is not equal to the quality of the services CN/IC provides with respect to similar movements for its own customers.

⁵⁸ These trackage rights will enable KCS to operate its own trains directly from Jackson, MS, to Gulfport, MS.

⁵⁹ These haulage rights will enable KCS to serve the Port of Mobile and to connect with CSX at Mobile.

⁶⁰ These haulage rights will allow CN/IC customers to reach the Port of Gulfport.

transload facilities at key locations, including Dallas, Jackson, Kansas City, Memphis, Chicago, and Shreveport (Reisor), and in the New Orleans area; (8) that access by CN/IC and KCS to these joint facilities will be assured for the projected 25-year life span of the facilities, regardless of any change in corporate control; and (9) that new facilities may be built under the auspices of the Alliance at other locations as well.

The Two Agreements: Approval Not Sought. Applicants and KCS contend that the Alliance and Access Agreements are not subject to our jurisdiction, and, therefore, they have not submitted such agreements for our approval.⁶¹ (1) Applicants and KCS insist that the Alliance Agreement does not require approval under 49 U.S.C. 11323, which provides that certain transactions involving rail carriers (consolidations, mergers, purchases, leases, contracts to operate, acquisitions of control, acquisitions of trackage rights, and acquisitions of joint ownership in or joint use of railroad lines) may be carried out only with the approval of the Board. Nor, applicants and KCS add, does the Alliance Agreement require approval under 49 U.S.C. 11322, which provides that rail carriers may not pool or divide traffic or services or any part of their earnings without the approval of the Board. The Alliance, applicants and KCS argue, is merely a highly developed version of what is typically called a voluntary coordination agreement (VCA), and, like any other VCA, is not subject to review by the Board, not under 49 U.S.C. 11323 and not under 49 U.S.C. 11322 either. (2) Applicants and KCS have not sought approval for the Access Agreement, apparently on the theory: that approval is not required for the haulage rights and the new investments contemplated by the Access Agreement; and that, although approval is required for the trackage rights contemplated by such agreement, such approval (presumably via an exemption) can be sought at a later date (i.e., after the CN/IC control transaction has been approved but before Access Agreement trackage rights operations are to commence).

Traffic Diversions. Applicants project that the CN/IC control transaction, as augmented by the CN/IC/KCS Alliance and the various arrangements provided for in the CN/KCS Access Agreement, will result in \$248.1 million in total annual CN/IC gross revenues from traffic diversions.⁶² This projection consists of: approximately \$217 million in total annual CN/IC gross

⁶¹ KCS, however, has suggested that, if we rule that the Alliance and Access Agreements are subject to our jurisdiction, we should, on the present record, exempt such agreements pursuant to 49 U.S.C. 10502. See KCS-17 at 54 n.29 and 57 n.30.

⁶² Applicants estimate that the \$248.1 million in total annual CN/IC gross revenues from traffic diversions will be offset by \$157.8 million in total annual CN/IC incremental costs attributable to traffic diversions. Applicants concede that the difference (i.e., CN/IC's total annual net revenue gain of \$90.3 million) must be viewed as a private benefit (not a public benefit) of the CN/IC control transaction. See CN/IC-56A at 542.

revenues from rail-to-rail diversions;⁶³ approximately \$23.4 million in total annual CN/IC gross revenues from truck-to-rail diversions; and approximately \$7.5 million in total annual CN/IC gross revenues from port diversions. See CN/IC-7 at 31.⁶⁴

APPLICABLE STANDARDS

Overview. The applicable statutory provisions are codified at 49 U.S.C. 11321-26. Despite the several factors contained in those provisions, “[t]he Act’s single and essential standard of approval is that the [Board] find the [transaction] to be ‘consistent with the public interest.’” Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981). Accord Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486, 498-99 (1968). In determining the public interest, we balance the benefits of the merger against any harm to competition, essential service(s), labor, and the environment that cannot be mitigated by conditions.

In making our public interest determination in proceedings such as this one involving the merger of at least two Class I railroads, section 11324(b) requires us to consider at least five factors: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

Section 11324(b)(1), requiring that we examine the effect of the transaction on the adequacy of transportation to the public, necessarily involves an examination of the qualitative and quantitative public benefits of the transaction. Quantitative public benefits include estimates of operating efficiencies and other cost savings permitting a railroad to provide the same rail services with fewer resources or improved rail services with the same resources. An integrated railroad can often realize efficiency gains by achieving the economics of scale, scope, and density stemming from expanded operations. Cost savings may result from elimination of interchanges, internal reroutes, more efficient movements between the merging parties, reduced overhead, and elimination of

⁶³ Applicants have also projected: approximately \$68.1 million in total annual KCS gross revenues from rail-to-rail diversions; and approximately \$15.9 million in total annual Tex Mex gross revenues from rail-to-rail diversions. See CN/IC-56B at 561.

⁶⁴ The port diversions are attributable to two ports: Halifax, NS, and Montreal, PQ. See CN/IC-6 at 207.

redundant facilities. These efficiency gains, in varying degrees depending on competitive conditions, have generally been passed on to most shippers as reduced rates and/or improved services.⁶⁵ Qualitative public benefits include enhanced opportunities for single-line service preferred by shippers and more vigorous competition that may result from a transaction.

Competitive harm results from a merger to the extent that the merging parties gain sufficient market power to profit from raising rates or reducing service (or both).⁶⁶ In evaluating claims of competitive harm, we distinguish harm caused by a transaction from disadvantages that other railroads, shippers, or communities may have already been experiencing. Wherever feasible, we impose conditions to ameliorate significant harm that is caused by a merger.

Our general policy statement on rail consolidations, codified at 49 CFR 1180.1,⁶⁷ recognizes that potential harm from a merger may occur from a reduction in competition, 49 CFR 1180.1(c)(2)(i), or from harm to a competing carrier's ability to continue to provide essential services. 49 CFR 1180.1(c)(2)(ii).⁶⁸ In assessing the probable impacts and determining whether to impose conditions, our concern is the preservation of competition and essential services, not the survival of particular carriers. An essential service is defined as one for which there is a sufficient public need, but for which adequate alternative transportation is not available. 49 CFR 1180.1(c)(2)(ii).

⁶⁵ In contrast, benefits to the combining carriers that result from traffic diversions from other carriers and that do not arise from merger-enhanced market power are generally private benefits to the combining carriers that do not add or subtract from public benefits. Benefits to the combining carriers resulting from increased market power are exclusively private benefits that detract from any public benefits associated with a control transaction. See, e.g., Rio Grande Industries, et al. — Control — SPT Co., et al., 4 I.C.C.2d 834, 875 (1988) (DRGW/SP).

⁶⁶ In making our competitive findings under section 11324(b)(5), we do not limit our consideration of competition to rail carriers alone, but examine the total transportation market(s). See Central Vermont Ry. v. ICC, 711 F.2d 331, 335-37 (D.C. Cir. 1983).

⁶⁷ See Railroad Consolidation Procedures, 363 I.C.C. 784, (1981).

⁶⁸ We are also guided by the rail transportation policy, 49 U.S.C. 10101, added by the Staggers Rail Act of 1980, and amended by the ICC Termination Act of 1995 (ICCTA or the Act). See Norfolk Southern Corp. — Control — Norfolk & W. Ry Co., 366 I.C.C. 171, 190 (1982) (NS Control). That policy emphasizes reliance on competition, not government regulation, to modernize railroad operations and to promote efficiency. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4119.

Finally, because our statutory mandate requires a balancing of efficiency gains against competitive harm, the antitrust laws provide guidance, but are not determinative in our merger proceedings. As the Supreme Court noted in McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944):

In short, the [Board] must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy “The wisdom and experience of that [Board],” not of the courts, must determine whether the proposed consolidation is “consistent with the public interest.”^{69]}

Criteria For Imposing Conditions. The various conditions requested by parties involve the exercise of our conditioning power under section 11324(c), which gives us broad authority to impose conditions governing railroad consolidations. Because conditions generally tend to reduce the benefits of a consolidation, they will be imposed only where certain criteria are met. 49 CFR 1180.1(d); Grainbelt Corporation v. STB, 109 F.3d 794, 796 (D.C. Cir. 1997). Conditions will generally not be imposed unless a merger produces effects harmful to the public interest that a condition will ameliorate or eliminate. The principal harms for which conditions are appropriate are a significant loss of competition or the loss by another rail carrier of the ability to provide essential services.⁷⁰

A condition must be operationally feasible, and produce net public benefits. We are disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects. See, e.g., Santa Fe Southern Pacific Corp. — Control — SPT

⁶⁹ Under this standard, we may disapprove transactions that would not violate the antitrust laws and approve transactions even if they otherwise would violate the antitrust laws. United States v. ICC, 396 U.S. 491, 511-14 (1970) (Northern Lines Merger Cases). Moreover, because of our broad conditioning power and our continuing jurisdiction, we may approve transactions with conditions in cases where the antitrust enforcement agencies would either disapprove or approve only following substantial divestiture. Accord Minneapolis & St. L. Ry. Co. v. United States, 361 U.S. 173 (1959); Bowman Transportation v. Arkansas-Best Freight, 419 U.S. 281, 298 (1974); Port of Portland v. United States, 408 U.S. 811, 841 (1972); Northern Lines Merger Cases, 396 U.S. at 514; Denver & R.G.W.R. Co. v. United States, 387 U.S. 485 (1967).

⁷⁰ We also impose conditions as appropriate to carry out our obligations under various environmental statutes, and to carry out our statutory obligations to protect the interests of affected employees. These are discussed in later sections.

Co., 2 I.C.C.2d 709, 827 (1986) (SF/SP), 3 I.C.C.2d 926, 928 (1987); and Union Pacific Corp. Et Al. — Cont. — MO-KS-TX Co. Et Al., 4 I.C.C.2d 409, 437 (1988) (UP/MKT). A condition must address an effect of the transaction, and will generally not be imposed “to ameliorate longstanding problems which were not created by the merger.”⁷¹ Finally, a condition should also be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation.⁷²

DISCUSSION AND CONCLUSIONS

OVERVIEW. This transaction will create a highly efficient rail transportation system spanning the central part of the United States from the Canadian border to the Gulf of Mexico. CN operates a 14,150-mile system throughout Canada, connecting with its 1,150-mile system in the United States, which operates mainly in Minnesota, Wisconsin, Michigan, and Northern Illinois and Indiana. IC operates a profitable 3,370-mile system between Chicago and the Gulf of Mexico.

The chief benefit of the merger is that it will make possible a new, single-line service alternative for many shippers. Applicants will thus be positioned to provide stronger competition to UP, BNSF, CSX, and NS in certain markets. In particular, the merger should significantly intensify competition for the north-south traffic that has achieved greater significance due to NAFTA. As detailed below, the transaction should also generate quantifiable public benefits of more than \$100 million a year. These are made possible mainly through integration of support functions, and more efficient use of equipment and crews.

This transaction is entirely end-to-end, with no overlapping routes. The number of independent railroads currently serving particular shippers is not reduced at any location. The

⁷¹ Burlington Northern, Inc. — Control & Merger — St. L., 360 I.C.C. 788, 952 (footnote omitted) (1980) (BN/Frisco); see also Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (UP/CNW), slip op. at 97.

⁷² See UP/CNW, slip. op. at 97; Milwaukee — Reorganization — Acquisition by GTC, 2 I.C.C.2d 427, 455 (1985) (Soo/Milwaukee II). If, for example, the harm to be remedied consists of the loss of a rail option, any conditions should be confined, where possible, to restoring that option rather than creating new ones. See Soo/Milwaukee II, 2 I.C.C.2d at 455; Union Pacific — Control — Missouri Pacific, Western Pacific, 366 I.C.C. 462, 564 (1982) (UP/MP/WP). Moreover, conditions are not warranted to indemnify competitors for revenue losses absent a showing that essential service would be impaired. BN/Frisco, 360 I.C.C. at 951.

United States Department of Justice (DOJ) has not found it necessary to participate in this proceeding. The application is supported by more than 240 parties, including many shippers, The National Industrial Transportation League (NITL), unions representing more than half of applicants' employees, and local communities. It is opposed in part by only a handful of shippers, certain rail unions, and two of applicants' competitors, UP and CP.

As a threshold matter, we note that we find totally unpersuasive the arguments of UP, Exxon, and others that the Alliance Agreement makes this case a three-way control transaction involving CN, IC, and KCS. As explained below, the Alliance Agreement does not result in common control. All decisions of the Alliance are consensual, and each participant retains the managerial prerogative to veto any action. Thus, control is retained in the management of each carrier. Accordingly, there is no need to recast this case as a three-way merger and require applicants to refile their application on that basis.⁷³ Moreover, the argument of UP and Exxon that the Alliance Agreement will lead to tacit collusion between CN/IC and KCS is contrary both to the evidence applicants have presented here and to our well-established precedents and experience in regulating railroads in two-carrier markets. We have also considered the argument raised by the United States Department of Transportation (DOT) that the Alliance Agreement may impede potential build-in competition between KCS and applicants for traffic in the New Orleans to Baton Rouge, LA corridor. The condition DOT suggests is unwarranted, but we have decided to monitor that situation to ensure that build-in and other competition within this corridor is not diminished.

Very few other competitive issues have been raised, and these are either easily remedied or without merit. The other principal issues raised — relating to the Access Agreement; shippers at Geismar, LA; the Detroit River Tunnel; North Dakota grain movements; the concerns of DOT; the concerns of The Fertilizer Institute (TFI); and the need for Board oversight — are treated in detail below. After carefully examining the record, including the oral argument, we have concluded that the transaction, as conditioned, will result in no competitive harm. It will not diminish competition among rail carriers either in the affected region or in the national rail system. Indeed, the transaction should enhance competition, especially for north-south traffic.

These two systems, CN and IC, will be joined at a single point, Chicago. Therefore, the transaction will result in no track redundancies, abandonments or reroutings. As such, any disruptions to employees, shippers, and communities should be relatively slight, and the risk of service and safety problems during implementation of the merger should be low. Moreover, applicants have filed their Safety Integration Plan (SIP) with us and with the Federal Railroad Administration (FRA), and they and KCS are continuing the process of coordination with FRA concerning the implementation process, which will remain under our oversight until safely

⁷³ Nor is the Alliance Agreement a pooling arrangement that requires our approval under 49 U.S.C. 11322.

completed. Further, as detailed below, our Section of Environmental Analysis (SEA) prepared a thorough Environmental Assessment (EA) in which SEA identified hazardous materials transport as the only aspect of the transaction with potentially significant adverse environmental impacts. SEA believes that, with its recommended conditions, which address hazardous materials transportation and related impacts to environmental justice populations, this transaction will not result in significant environmental impacts. We agree and, accordingly, are imposing those conditions as well as the other environmental conditions that SEA recommends.

The net impact of this merger upon the number of employees of these carriers in the United States should be positive. Applicants anticipate, however, the abolishment of 311 positions, and the transfer of 138 positions, as a result of this transaction. Applicants note that they should be able to achieve most of the reduction in positions through attrition over the 3-year implementation period. At the same time, the transaction will result in the creation over the next 3 years of approximately 384 positions, mainly to handle increased traffic flows. All employees who are adversely affected by the transaction will be protected by the New York Dock conditions, as augmented in this decision.

We have also carefully examined the impact of this transaction on the ability of the combined carriers to meet their financial obligations, pay their fixed charges, and continue to provide quality service to the shipping public. Traffic and revenues will increase substantially due both to the Alliance Agreement and to this transaction. Even without these traffic increases and savings derived from operating synergies, applicants should have no difficulty meeting their financial obligations and continuing to provide quality service. Further, the terms of the acquisition agreement and transactions are just and reasonable to shareholders.

In sum, this transaction meets the public interest test for approval under section 11324. As conditioned, the merger should result in no significant competitive, operational, or environmental problems. Its impact on rail employees should be relatively small, and will be adequately mitigated by our augmented New York Dock conditions. The transaction will make possible significantly improved single-line service for many shippers, and will result in merger synergies that should allow the carriers to provide service at lower cost. A substantial portion of these savings should be passed along to shippers in terms of reduced rates or improved service. Finally, the ability of these carriers to provide quality service will not be impaired, and should be enhanced.

GENERAL ISSUES and SPECIFIC CONDITIONS SOUGHT BY PARTIES.

The Alliance Agreement. UP, CP, and Exxon have argued that the Alliance Agreement results in common control of, or a pooling agreement among, CN, IC, and KCS. They have also argued that it will result in tacit collusion between CN/IC and KCS. DOT has argued that the existence of the agreement may decrease the incentive of IC and KCS to build in to reach shipper facilities that are exclusively served by the other carrier on the important corridor between Baton

Rouge and New Orleans, where KCS and IC maintain parallel routes. After carefully examining this agreement and the arguments of the various parties concerning it,⁷⁴ we conclude that it does not result in common control or pooling, and that it is not likely to reduce competition between applicants and KCS. It has been our practice to encourage settlement agreements in merger proceedings. This derives from our experience that such agreements can be procompetitive and beneficial because they can go beyond what the agency could do with its authority. Such settlement agreements are in the public interest. Overall, this agreement seems procompetitive as well. Because of the concerns raised by DOT, however, we will monitor the operation of the Alliance Agreement, particularly as it relates to competition within the Baton Rouge-to-New Orleans corridor.

The Alliance Agreement is a voluntary agreement among the three railroads to facilitate cooperation on an ongoing basis concerning through routes, including quality of service, joint rates and contracts, and revenue divisions for rail movements using these routes. This type of agreement is entered into regularly by rail carriers without the need for our approval. Applicants have noted that the merger provides a unique opportunity to take advantage of increased north-south and south-north traffic flows made possible by NAFTA. The agreement, which has already been in place for a year and will continue whether or not the merger is approved, is aimed at increasing the ability of these carriers to offer more efficient through service to meet the competitive challenge posed by the larger Class I carriers. The Alliance should be able to enhance the attractiveness of these movements to shippers (although to a lesser extent than will the control transaction)⁷⁵ through service coordination among the participants. Nothing has been presented here to indicate that the agreement is anticompetitive or contrary to the ICCTA, and the agreement does not require our regulatory approval. Nevertheless, the Alliance Agreement is an important settlement agreement related to this merger, and thus it is appropriate for us to scrutinize carefully all of the issues relating to it that have been raised in this proceeding.

a. The Control Issue. "Control" is defined by 49 U.S.C. 10102(3) to include "actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means."

⁷⁴ CP's claims to the contrary notwithstanding, we see no need to initiate an investigation with respect to the Alliance Agreement. The CPR-17 petition (discussed in detail in Appendix C) will therefore be denied. Because the denial of the CPR-17 petition moots the KCS-13 motion (also discussed in detail in Appendix C), that motion will also be denied.

⁷⁵ UP and Exxon have urged that the Alliance Agreement must be treated as a transaction resulting in common control because of statements by various executives of the participating railroads that the Alliance carriers will provide the equivalent of single-line service. This promotional hyperbole should not be viewed as evidence that the Alliance is tantamount to a merger.

The ICC and the Board have frequently described control as "the power to manage the day to day affairs of the entity assertedly controlled." See Declaratory Order — Control — Rio Grande Indus., Inc., Finance Docket No. 31243, slip op. at 3 (ICC served Aug. 25, 1988). Protestants have not shown that the Alliance Agreement (by itself or in combination with the Access Agreement and the transaction before us here) has resulted or will result in common control of KCS, IC, and CN.

We emphasize that these three carriers have not sought, and we are not approving, the common control of these carriers through this agreement. Thus, there can be no "legal control" within the meaning of section 10102. DOT has indicated concern that our statute does not require approval of this agreement, while alliance agreements related to airlines are subject to regulatory scrutiny. We emphasize that any collusive efforts that the participants might undertake under the auspices of this agreement to allocate markets or otherwise diminish competition where they compete with each other (and no such actions appear to be contemplated) would subject these carriers and their management personnel to severe criminal and civil penalties under the antitrust laws. Accordingly, we expect that these carriers will zealously avoid such behavior. Moreover, we will continue to monitor the Alliance Agreement as part of our general oversight in this proceeding, and we are prepared to take any remedial action we deem necessary.

Likewise, the record does not support a finding of actual control. The claim of UP, CP, and Exxon that these three carriers have somehow given over control of their companies to the common enterprise of the Alliance is simply not supported by the record. Indeed, the Alliance Agreement itself makes very clear that all actions of the Alliance must be consensual. This means that any one carrier can veto an Alliance action. Control of KCS, IC and CN remains in the hands of each carrier's individual management; it has not been surrendered to the Management Group of the Alliance. In fact, the Alliance is not an economic entity at all. It collects no revenues, pays no taxes, and redistributes no profits. As applicants point out, for KCS and IC to surrender control to another entity without shareholder approval would contravene their fiduciary duties under Delaware law. Del. Code Ann. Tit. 8, section 141(a).

The fact that the interrelationship among the Alliance carriers is much less pervasive than the overall relationship between UP and CNW that was found by the ICC not to be control in a series of decisions examining this issue severely undercuts UP's claim that the Alliance results in common control. See Union Pacific RR. et al. — Trackage Rights Over CNW, 7 I.C.C.2d 177, 193-94 (1990) (UP Trackage Rights), and cases described therein. On three separate occasions, the ICC found that UP's increasingly extensive agreements with CNW, which went well beyond what is under consideration here with regard to the Alliance, did not constitute control of that railroad. UP admitted in UP/CNW that UP and CNW "already cooperate and coordinate their services to a degree unmatched by any other large railroads in America." UP/CNW-6, V.S. Salzman, in UP/CNW. These relationships included marketing coordinations, haulage rights, joint upgrading of physical facilities, computerized exchange of train location information, permitting UP to quote rates for movements over CNW lines, UP's financing of CNW's purchase of a half interest in rail

lines serving the Powder River Basin, UP's ownership of 30% of CNW's common stock,⁷⁶ and UP's right to designate one member of CNW's Board of Directors.

Another situation involving UP that counters UP's argument here was presented in the Finance Docket No. 32760 proceeding.⁷⁷ There UP entered into a very extensive settlement agreement with BNSF that was much broader in geographic scope, and longer in duration, than the Alliance Agreement. We did not find, and no one even argued, that the BNSF/UP agreement represented an issue of common control. Those precedents strongly support our finding that the Alliance Agreement does not result in common control.

Protestants' attempt to paint the Alliance as a creature that has taken over, or will ultimately take over, the lesser enterprises of the participating railroads, is unpersuasive. Their claim that the Alliance railroads will forgo aggressive competition for certain traffic in favor of cooperation for their more important Alliance traffic is both illogical and contrary to fact. The argument is illogical because KCS and CN/IC will have every incentive to continue to compete aggressively for traffic where they are able to provide service alternatives, just as they have competed in the past. For these carriers to behave otherwise would not be consistent with their economic self interests to compete for traffic they can handle profitably. The argument is contrary to fact because the record demonstrates that Alliance traffic is likely to be a relatively small percentage of the overall traffic of the participating railroads. See, e.g., CN-IC-56A at 73-75; KCS-16 at 51.

It is also significant that the Alliance Agreement, by its terms, does not apply to situations where two or more of the Alliance participants,⁷⁸ now or in the future, are the only head-to-head competitors either at the origin or destination. The agreement states, however, that the agreement may be applied where two of the participants serve an origin or destination that is also served by other railroads, provided that Alliance interline traffic can be coordinated without decreasing competition, and where such coordination is necessary to permit the Alliance carriers to compete with a non-alliance carrier. Of course, coordination in these instances would still be subject to the antitrust laws. These safeguard provisions of the Alliance Agreement are in keeping with its basic

⁷⁶ UP's shares of CNW were non-voting, but were convertible into voting common stock at UP's request.

⁷⁷ See 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, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (UP/SP).

⁷⁸ This also includes all carriers that the Alliance members control.

purpose, which is to facilitate competition with non-alliance carriers for joint movements where the Alliance carriers meet end-to-end, not to permit collusion where the Alliance carriers compete with each other.

TFI and Oxy Chem raise a related issue. They ask for reassurance from applicants and KCS that the Alliance Agreement will not be applied where future build-outs, build-ins, reciprocal switching, or other agreements make what is now a solely served point a point served by both KCS and IC. Applicants have stipulated that they will apply the Alliance Agreement precisely as these parties have suggested.

b. The Collusion Issue. We find the argument that the Alliance Agreement is likely to facilitate tacit collusion through the improper dissemination of confidential data to be without merit. There is nothing about the Alliance Agreement that requires these connecting carriers to reveal to each other any confidential information. Further, carriers are not free under the Act to exchange commercially sensitive information about competitive traffic. 49 U.S.C. 11904. Even before the Alliance Agreement, KCS and IC both competed on some movements and cooperated on others. The same is true of most rail carriers serving overlapping territories. Indeed, competing railroads are required by the Act to cooperate in the formation of through routes and rates. 49 U.S.C. 10703. At the same time, railroads, like other firms, are not permitted to collaborate where they compete. Such collaboration is not permitted under the antitrust laws, and we may not immunize it from antitrust scrutiny under 49 U.S.C. 10706.

The agreement does not compel or make more likely the release of competitively sensitive information about the requirements of particular shippers or about the Alliance carriers' own actual costs of providing service. Carriers that cooperate in the provision of joint rates have always exchanged information about their revenue requirements on a joint movement. The need for such exchanges is limited under the Alliance Agreement to situations where one of the participating carriers believes that the general formula that they have agreed to yields a division that is too low to meet the carrier's revenue requirements. Applicants and KCS have shown that during the time the Alliance Agreement has been in effect, use of this provision has been limited.⁷⁹

Applicants have submitted substantial testimony to the effect that tacit collusion between CN/IC and KCS will not result here. *R.V.S. Velturo, CN/IC-56A (Vol. 1A) at 433-50*. Applicants correctly noted on brief and at oral argument that this economic testimony has not been rebutted, and that witness Velturo was not even deposed by protestants. Neither UP nor Exxon mentioned this evidence at oral argument. Velturo's testimony is fully consistent with our findings in *UP/SP*, slip op. at 116-19, and 267, where we agreed with evidence submitted by UP that tacit collusion would

⁷⁹ Any attempts at price-signaling activities for competitive traffic under the guise of interline ratemaking will continue to remain subject to the antitrust laws.

be very difficult to accomplish and extremely unlikely in two-railroad markets. Our decision on this precise issue was recently affirmed by the United States Court of Appeals for the D.C. Circuit in Western Coal Traffic League v. STB, ___ F.3d ___ (D.C. Cir. 1999), slip op. at 6-8.

As we explained in the UP/SP decision affirmed by the court, there are three elements, all of which are present here, that each make tacit collusion unlikely for markets in which two railroads operate. First, tacit collusion cannot flourish where, as in railroading, rate concessions can and are made secretly through confidential contracts. Second, rail services are extremely heterogeneous, making price comparisons for purposes of collusive behavior difficult. Finally, high and declining fixed costs in the rail industry strongly induce carriers to compete for additional traffic through rate concessions. Despite the fact that DOJ has been informed of this proceeding and has been served with the merger application, and with pleadings containing and discussing the Alliance Agreement, DOJ has not participated in this proceeding. We may conclude from this that DOJ does not find this agreement any more troubling than the normal activities that rail carriers typically undertake in negotiating interline pricing and service arrangements.

c. The Build-in/Build-out Issue. DOT concedes that “[t]he Alliance applies by its terms only to interline traffic, which is a relatively small proportion of Applicants’ total business.” Further, DOT does “not submit that the Alliance is necessarily anticompetitive or otherwise contrary to the public interest.” Nonetheless, DOT is concerned that applicants and KCS may not continue to compete vigorously where they did so head-to-head before the Alliance Agreement, most notably for shippers located along the rail corridor connecting Baton Rouge and New Orleans, LA. But, with one exception, DOT maintains that the proper response is for us to “monitor developments and determine, through experience, whether the participants in the Alliance will behave in the way that they say they will.”

DOT explains that monitoring would provide sufficient protection to those plants served by both KCS and IC, because the Alliance Agreement does not apply to those locations, and the Alliance railroads maintain that they will continue to compete for this traffic. DOT is concerned, however, that monitoring may not be sufficient to preserve the existing level of indirect competition represented by the prospect of IC and KCS each threatening to build in to reach shippers exclusively served by the other:

Given the close relationship of the Alliance railroads, it seems unlikely that they would jeopardize the broader benefits of the Alliance by continuing the aggressive use of build-in tactics.

DOT-3 at 16. DOT requests that we impose a condition giving some other Class I carrier trackage rights over both the IC and KCS lines between Baton Rouge and New Orleans to all points in the corridor where solely served shippers and that carrier believe a build-in/build-out is feasible.

Although we agree with DOT that potential build-ins and build-outs provide important competitive leverage to solely served shippers in their negotiations with rail carriers, we do not expect this competition to be undermined here. Because of DOT's concern, however, we will closely monitor the competitive situation within the Baton Rouge to New Orleans corridor, with particular emphasis on any changes in build-in activity within the corridor. We believe that there remains a very strong incentive for each carrier to be able to originate or terminate movements that are now solely served by the other carrier.

The record shows that Alliance movements will account for only a very small portion of the through movements handled by the important shippers in this corridor. R.V.S. Kammerer, CN/IC-56A (Vol. 1A) at 302. These shippers, many of whom are plastics and chemicals shippers, send and receive shipments to and from users and suppliers all over the United States. Because a majority of these movements require the participation of railroads with a broader geographic reach than either IC or KCS, the preponderance of the interline movements originating or terminating within this corridor for both KCS and IC are not with each other, but with the larger Class I railroads, that is, UP, BNSF, CSX, and NS. Thus, under the Alliance Agreement, KCS and IC will share in the revenues only for a small portion of interline movements originated or terminated by the other carrier. Becoming an origin or destination carrier through a build-in clearly gives these carriers substantial advantages that are not available under the Alliance Agreement. Even if KCS and IC were not prepared to build in to provide service now exclusively provided by the other, the shipper could still build out to reach the other carrier, which would be required to provide service, and presumably would be happy to do so. Thus, overall, very strong incentives for both build-ins and build-outs remain in place.

We note that a key component of the remedy proposed by DOT, the proposed trackage rights over the lines of KCS, is not generally available under the ICCTA. No provision of the Act gives us a general authority to impose trackage rights over the lines of a non-applicant carrier such as KCS. As explained below in the section concerning the application for trackage rights at Springfield, IL, neither the Board nor the ICC has imposed trackage rights over non-applicant carriers in these circumstances. We also seriously question the operational feasibility of permitting another Class I carrier to operate over these densely traveled lines of KCS and IC solely to pick up the inbound and outbound movements of one or two shippers. No evidence has been presented to support the feasibility of such a condition.

d. The Pooling Issue. Protestants have not demonstrated that the Alliance Agreement is a pooling agreement that requires our approval under 49 U.S.C. 11322.⁸⁰ Under that provision, a railroad "may not agree to combine with another . . . rail carrier to pool or divide traffic or services

⁸⁰ Neither UP nor Exxon contended at the oral argument that the Alliance Agreement is a pooling agreement.

or any part of their earnings without the approval of the Board . . .” This provision applies to a division of competitive traffic and service between two or more competing carriers. See UP Trackage Rights, 7 I.C.C.2d at 184. There the ICC explained that “[t]he Commission has defined pooling as a situation where carriers which otherwise would be competitors take a common position toward the public and divide the benefits and costs equally or by special agreement, rather than according to individual performance.” The ICC also said that “[f]irst the arrangement must be between competitors and, second, the arrangement must involve some restraint or potential restraint on competition.” Id.

As we have explained, the Alliance Agreement does not allocate competitive service or markets among KCS, IC, and CN. The Alliance merely sets forth guidelines that facilitate the ability of these carriers to cooperate in the provision of through service in competition with other carriers such as UP with whom they jointly compete. The Alliance Agreement is procompetitive for the same reason that the trackage rights agreement approved between UP and CNW in UP Trackage Rights was procompetitive. It allows several carriers to combine in an efficient through service to compete more vigorously with other carriers, some of whom can provide single-line service. See UP Trackage Rights, 7 I.C.C.2d at 186.

The pooling provision of the statute has no application in these circumstances. No traffic is pooled here, and no revenues are redistributed. Rather, the Alliance Agreement contains a typical division of revenue agreement such as railroads have long used to carry out their obligations to provide rates on through routes under the statute. Interline movements frequently require revenue divisions among the carriers that collaborate to provide interline service. The general formula for division of revenue set forth in the Alliance Agreement may be readjusted where a carrier believes that the formula does not cover its costs. If the carriers reach a consensus, a new division is determined for the movement. If not, then the Alliance Agreement does not apply. This procedure preserves the independence of each participating railroad and ensures that each satisfies its revenue requirements on a particular movement, regardless of the general division of revenue formula that the Alliance carriers have agreed to in advance.

In sum, the Alliance Agreement is not a vehicle for common control, it is not a pooling arrangement, and it is not likely to result in collusion, either overt or tacit. It does not require our approval under the statute, and it remains subject to the antitrust laws.

NITL Stipulation with Applicants. On the day before oral argument, NITL and applicants submitted a stipulation and agreement and requested that we approve that agreement as a condition to our approval of this transaction. TFI has also requested that we impose as a condition certain representations made by applicants earlier in this proceeding, which appear to be embraced by the first part of the NITL agreement. We are pleased to see that applicants and these organizations have negotiated an agreement to allay shipper concerns about changes brought about by this transaction.

Among other things, the NITL agreement provides special protections for certain shippers in the Baton Rouge to New Orleans corridor. For eight shipper facilities in that corridor served by KCS and IC and by no other carriers, the Alliance Agreement would not apply. Moreover, for those facilities, and for any others that are similarly situated, rate increases are limited to the RCAF-A,⁸¹ and service quality is guaranteed, for 10 years.⁸²

DOT is concerned, however, that our formal approval of the NITL agreement might unnecessarily immunize it and related parts of the Alliance Agreement from the antitrust laws. The NITL agreement itself does not require our approval for it to take effect. Absent our approval, the agreement makes clear that shippers are contractually protected.⁸³ Given that contractual protection, DOT's concerns, and the lack of any apparent need for us to impose either the NITL settlement agreement or the representations made to TFI as conditions to remedy competitive harm stemming from the merger, we will not approve the NITL agreement or impose either that agreement or the representations cited by TFI as conditions. We will, however, monitor the concerns expressed by DOT and others over the ongoing competition within the Baton Rouge to New Orleans corridor.

The Access Agreement: Geismar. Three shippers located near Geismar, LA — Rubicon, Uniroyal, and Vulcan — have requested that we condition approval of this merger on CN's granting to KCS haulage rights to allow KCS to serve these three shippers in competition with IC. They seek the same KCS competitive service that will be made available for Shell, Borden, and BASF in the

⁸¹ The Rail Cost Adjustment Factor, or RCAF, was established in the Staggers Act to track quarterly changes in railroad costs. While its initial purpose was to protect from challenge on rate reasonableness grounds rail tariff rate increases that reflected no more than increased costs, it has come to be used by many railroads and shippers as an aide in setting contractual terms. The Board publishes several RCAF series. RCAF-U measures changes in the cost of railroad inputs, unadjusted for productivity change. RCAF-A is formed by adjusting the RCAF-U index to reflect changes in railroad productivity. See 49 U.S.C. 10708.

⁸² At oral argument, Exxon argued that this condition is superfluous because Exxon acknowledges that rates have been going down in recent years, and it expects them to continue to go down. Exxon claims that the condition is anticompetitive because it will somehow facilitate tacit collusion to limit these ongoing price decreases. The condition serves only as a limit on rate increases. It is not an agreement between applicants and KCS to impose increases at these levels. Such an agreement would seem to be a violation of the antitrust laws.

⁸³ According to the stipulation, absent our approval of the agreement as a condition to our approval of the CN/IC transaction, shippers affected by any of the agreement's provisions are to be third-party beneficiaries. The stipulation also indicates that the agreement is to be governed by the law of the District of Columbia.

Access Agreement — haulage service by applicants on behalf of KCS beginning on October 1, 2000, or upon final approval and consummation of the merger, whichever is later. This will permit both IC and KCS to quote single-line rates to these shippers. With certain limitations, we will grant the requested condition so that these three additional shippers will obtain precisely the same relief that is available for the first three shippers under the Access Agreement.

Rubicon, Uniroyal, and Vulcan are now exclusively rail-served by IC. Nevertheless, they would likely have been able to take advantage of a competing KCS service as the result of a construction project for which KCS sought our regulatory approval in Finance Docket No. 32530, Kansas City Southern Railway — Construction and Operation Exemption — Geismar Industrial Area (Geismar). Despite the fact that none of these three shippers came forward to support the Geismar construction application, it now appears that, if the construction had been approved and completed, each could have easily reached the proposed Geismar branch line by constructing short segments of connecting track. Now, because of this merger and the related Access Agreement, it seems improbable that any Geismar construction project will ever be authorized and built. Indeed, because of the pendency of the instant case, we issued a decision holding the construction application in abeyance. Geismar (STB served Aug. 27, 1998).

A loss of a build-in/build-out option may constitute a significant loss of potential competition, depending upon the circumstances. Here, now that KCS has obtained access to the three shippers that would have provided the preponderance of the traffic necessary to make the construction economically viable, it is improbable that KCS will pursue, or that we would approve, this construction project. The Draft Environmental Impact Statement that was prepared in the Geismar construction proceeding identified significant environmental issues. Whether the public need for the line would be sufficient to warrant this construction given that KCS already can provide competitive service to the three original Geismar shippers is far from certain.

We reject applicants' argument that any loss of competition due to the Access Agreement may not be considered by us because it results from a non-jurisdictional settlement agreement. The Access Agreement is clearly merger-related because: it does not become effective unless and until the consolidation is approved; it is between KCS and CN, not IC; and CN entered the agreement to enlist KCS's support for the merger.

We also find that the condition would be operationally feasible. IC is now handling this traffic for its own account without incident. Applicants have already agreed to haul similar traffic for KCS's account to allow KCS to serve shippers in the same area as Rubicon, Uniroyal and Vulcan: Shell, Borden, and BASF. The shipments of Uniroyal, Rubicon, and Vulcan can be handled in the same manner, and perhaps in the same trains, as the shipments of these three other shippers.

The Detroit River Tunnel (DRT). The Detroit River Tunnel Company is wholly owned by an Ontario partnership, in which CN and CP each has a 50% interest. CP and OMR,⁸⁴ among other parties,⁸⁵ allege that after the transaction CN will be disinclined to allow needed improvements on the DRT. CP and OMR argue that improvements are or will soon be needed to accommodate a new generation of large containers and tri-level auto cars. CN's own recently built St. Clair tunnel at Sarnia can already accommodate this equipment. At oral argument, CP emphasized alleged operational problems that it argues stem from CN's control of the DRT's operations. CP and OMR seek divestiture of CN's interest in the DRT. OMR also seeks divestiture of the Canadian Southern Railway Company (CASO), a Canadian railroad running from Windsor to Niagara Falls, that is also owned by the same partnership.

It is undisputed that all of the events and relationships of which protestants complain were already in place well before this proceeding began. Specifically, the joint ownership and control of the DRT is based on a 1983 contract, and CN constructed its St. Clair tunnel and opened it for service in 1995. CN already connected with its wholly owned U.S. subsidiary, GTW, at both Detroit and Sarnia. CASO fell into disuse long ago, when Conrail was formed, so that this line has not been a factor in traffic moving to and from the DRT. Despite these facts, improvements were made in the DRT in the early 1990s at CP's request and without obstruction by CN, even though CN had already decided to invest much of its available capital in the Sarnia Tunnel.⁸⁶ See R.V.S. McManaman and Goodwine, CN/IC-56A (Vol. 1A) at 279-81.

⁸⁴ OMR and CP filed separate responsive applications in this proceeding: STB Finance Docket No. 33556 (Sub-No. 2), Responsive Application--Ontario Michigan Rail Corporation; and STB Finance Docket No. 33556 (Sub-No. 3), Responsive Application — Canadian Pacific Railway Company and St. Lawrence & Hudson Railway Company Limited.

⁸⁵ As previously noted, the following political representatives filed comments regarding the Detroit River Tunnel issue raised by CP and OMR: U.S. Senator Carl Levin, U.S. Representative John Conyers, Jr., and U.S. Representative Carolyn Kilpatrick (joint statement); John Engler (Governor of Michigan); Dennis W. Archer (Mayor of the City of Detroit, MI); Michael D. Hurst (Mayor of the City of Windsor, ON); Dewitt J. Henry (Assistant County Executive of Wayne County, MI); Paul E. Tait (Executive Director of the Southeast Michigan Council of Governments); Albert A. Martin (Director of the Detroit Department of Transportation); and W. Steven Olinek (Deputy Director of the Detroit/Wayne County Port Authority).

⁸⁶ Although CP objects that this construction was completed solely with financing that it provided, it agreed to finance the construction and fully expected the loan to be repaid from DRT revenues.

CP claims, however, that CN will now be less likely to agree to additional DRT improvements because of its \$3 billion investment in IC. CP now interchanges traffic at Chicago with IC, UP, and BNSF. CP contends that, because of its new investment in IC, CN will now have a stronger incentive to impede the flow of CP's cross-border traffic, in an effort to force a shift of that traffic to CN lines in Canada and in the United States, including IC, which will now extend all the way to the Gulf of Mexico.

Similarly, OMR argues that the transaction will give CN an incentive to disadvantage DRT traffic, and that divestiture to it of the DRT and of the CASO lines would permit OMR to upgrade the tunnel,⁸⁷ thereby mitigating that harm by allowing other railroads to compete more effectively against CN and by providing carriers with the incentive to enter into efficient joint-line arrangements at Detroit. OMR also contends that applicants will be able to divert even more traffic than they forecast, creating congestion of the St. Clair Tunnel, which OMR predicts will result in rate increases.

We agree with the assessment of DOT that these protestants have failed to demonstrate a significant causal link between this transaction and the situation they describe. Their concerns over the DRT largely reflect a preexisting situation with little nexus to the merger. Ordinarily, our policy is to deny relief in such circumstances. But, because of the importance of the DRT to international trade, we will impose a condition holding applicants to their representation that they will not frustrate necessary improvements to the DRT.⁸⁸ We accept applicants' representation that they will not oppose DRT improvements that economically benefit the tunnel partnership.⁸⁹ As CN points out, CN derives sufficient revenues from its 50% ownership interest in the DRT to ensure that CN will have an incentive to continue to cooperate in investments that make sense for the partnership. The condition we are imposing and our continued oversight will ensure that CP's position is not undermined in the future.⁹⁰

⁸⁷ At oral argument, OMR conceded that divestiture of the CASO lines was not essential to the relief it seeks.

⁸⁸ No proposal to improve the DRT has been presented by CP.

⁸⁹ Specifically, we accept CN's commitment "not to exercise unfairly any 'rights' it may have under the Partnership Agreement to oppose any proposed Tunnel improvement project that has sufficient engineering, operational and economic merit to attract the necessary capital for its construction without derogating the value of CN's existing investment in the Partnership." CN/IC-56A at 158.

⁹⁰ DOT suggests, as one reason for denying these divestiture requests, that for CN to block needed tunnel improvements merely to disadvantage CP would be a violation of the antitrust laws.

In light of the condition we are imposing, the divestiture remedies protestants seek are unnecessary, and would not be in the public interest. We have often said that divestiture is an extreme remedy not to be imposed lightly, and requiring divestiture of Canadian railroad assets would additionally involve us in difficult issues of sovereignty. Our more narrowly tailored remedy will suffice. There is no reason to believe that the vertical integration of CN and IC at Chicago will diminish competition for cross-border traffic moving through Detroit. Both CN and CP operate there on both sides of the border. CP has available independent connecting railroads at Detroit and at Chicago to arrange service in competition with CN/IC's. Given our condition, traffic flows for this very competitive traffic should be influenced by efficiencies of routing and rates reflecting those efficiencies, and not by constraints imposed by any CN stranglehold on tunnel improvements or tunnel operations. The arguments raised by CP concerning existing operational problems are not convincing. The partnership agreement contains remedies for complaints concerning existing operations, and there is no evidence that these remedies have even been tested.⁹¹ Of course, we will continue to monitor these issues as appropriate. Moreover, CN notes that it is willing to sell its portion of the DRT for fair market value, as determined through private negotiations or by a neutral third party. CN/IC-62 at 33. We encourage the parties actively to pursue this private sector solution, which could result in the best long-term resolution of this issue.⁹²

OMR's argument that the transaction will result in congestion at CN's St. Clair tunnel and in rate increases on CN's lines is totally unsupported. The congestion it predicts is highly unlikely, but if it were to occur, this would merely divert traffic to the DRT, precisely the opposite of the main premise of OMR's responsive application.⁹³ After the merger, CN would continue to have every incentive to avoid congestion at Sarnia, which would impede the efficiency and competitiveness of its service. And even if congestion were to occur at the Sarnia Tunnel, CN's rates over that route would continue to be constrained by the rates on traffic moving via the DRT. We note that the competition for automotive cross-border traffic is overwhelmingly with motor carriers, while both CN and CP face stiff competition for east-west container traffic (using the Port of Halifax) from CSX and NS (using the Port of New York). In sum, OMR's predicted rate increases have no credible foundation.

⁹¹ CP controls operations at other facilities jointly used by CP and CN. Reciprocity in the fair and efficient handling of such traffic would seem to be in both carriers' interests.

⁹² In any event, we do not believe that turning over ownership of this crucial facility and substantial trackage in Canada to a new untested operator, such as OMR, would improve the prospect of necessary capital improvements or be in the public interest. We note that CP opposes OMR's responsive application.

⁹³ We note that the dollar value of cross-border rail flows through the Detroit gateway today significantly exceeds that flowing through the Port Huron gateway.

North Dakota Grain. North Dakota, acting through its Governor, Public Service Commission, and Departments of Transportation and Agriculture, is concerned that after the merger, CN would close or restrict its Chicago gateway for grain movements. North Dakota claims that CN would do this to discourage North Dakota grain shipments so as to favor its new single-line movements of grain from CN origins in Western Canada to destinations on or near the Gulf of Mexico. North Dakota claims that the Soo/IC routing is the most efficient routing for its export grain moving to transfer points in Louisiana and Mississippi. Accordingly, it requests that we impose a condition granting CP's Soo Line, or another carrier designated by North Dakota, haulage rights on agricultural commodities originating at North Dakota points to all points served by IC. This would permit CP to quote rates all the way to New Orleans without consulting with IC. Under North Dakota's proposed condition, IC's current "net contribution" for interline movements to and from Chicago would be frozen.

Applicants note that they cannot close their Chicago gateway with CP's Soo subsidiary and still continue to participate in North Dakota grain traffic moving from Soo origins. They also point to our frequent pronouncements that freezing gateways, rates and routes in railroad mergers has anticompetitive consequences and is not in the public interest. Detroit, T. & I.R.R. v. United States, 725 F.2d 47 (6th Cir. 1984) (aff'g in part and rev'g in part Traffic Protective Conditions, 366 I.C.C. 112 (1982)). Applicants indicate that Soo presently may interchange traffic with five other Class I railroads at the Chicago gateway for movements to Gulf Coast destinations, and that BNSF can provide North Dakota shippers direct access to the Gulf Coast. Because applicants would like to retain this competitive traffic, they emphasize that it is in their interest to keep the Chicago gateway open, and to cooperate with CP's Soo subsidiary in providing reasonable joint rates and efficient through service.

We have carefully reviewed the submissions of applicants and North Dakota. According to North Dakota, any action by applicants that discourages the interchange of traffic between IC and applicants' post-merger competitor CP would harm the state's interests. Applicants emphasize that they would have little, if any, incentive to forgo a productive relationship with North Dakota grain shippers merely to favor their other long-haul prospects because this would result in the loss of this valued traffic to other competitors. According to applicants, CP interchanged a very substantial amount of grain with IC at Chicago in 1996 alone. Applicants have stated that they have no intention of closing the CP/IC gateway. Given this assurance, we will impose a condition holding applicants to their representation to keep this gateway open and competitive. The more extensive remedy sought by North Dakota is thus unnecessary. We will monitor this condition as part of our continuing oversight.

American Forest and Paper Association (AFPA). AFPA asks that we impose conditions that would: (1) remove "paper barriers" in line sales agreements which, according to AFPA, limit the ability of short-lines to interchange traffic with other carriers; (2) prohibit the imposition of such provisions with respect to all Class III carriers connecting with IC or with CN's U.S. subsidiaries;

and (3) require IC and CN's U.S. subsidiaries to enter into "interswitching" arrangements with all major connecting railroads, as required in Canada under the Canadian Transportation Act of 1996. AFPA states that we should exercise our broad conditioning authority to enhance competitive rail alternatives for shippers. Applicants contend that AFPA's conditions are unsupported legislative changes in Board policy that have no nexus to the transaction whatever.

We recognize the importance of AFPA's concerns regarding contractual barriers to routing between and among rail carriers. Issues similar to those raised by AFPA, such as the effect of paper barriers,⁹⁴ continue to be the subject of our proceedings and of an industry-wide agreement entered into by smaller railroads and Class I carriers pursuant to Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (STB served Apr. 17, 1998, and Mar. 2, 1999) (Review of Rail Access).

AFPA acknowledges that the CN/IC merger is in the public interest, and it points to no particular "paper barrier" in current IC or CN interchange arrangements that prevents or inhibits the interchange of traffic between rail carriers. Therefore, AFPA has shown no nexus between this merger and the relief it seeks. Moreover, we recently stated in CSX/NS/CR, slip op. at 57, 77, that, in view of the ongoing negotiations in Review of Rail Access, we will not undo or undermine these private contractual arrangements between rail carriers. As regards the request that applicants be required to enter into Canadian-style interswitching arrangements, AFPA has presented no evidence to show that this relief is required here. This proposal would result in a fundamental restructuring of applicants' relationships with connecting carriers without any showing that the merger causes any harm that needs to be redressed.

Champion. Champion indicates that its paper mill at Bucksport, ME, shipped 2,185 carloads of paper to destinations in the United States in 1997. Champion states that, although its Bucksport facility is solely served by Springfield Terminal Railway, it has alternative rail routings via CN and Conrail and that both it and its customers have benefitted from the cooperative arrangement among these carriers. Champion asks that we impose a condition requiring applicants to maintain rail competition in areas where rail competition is available and to set reasonable rates for captive shippers. Champion, which did not submit a brief or appear at oral argument, has not shown that this transaction will result in any material change or have any negative impact on the rates or routings of the carriers serving Champion. We will review any specific complaints Champion may have under our general oversight condition.

⁹⁴ The term "paper barriers" refers to clauses in contracts for the sale or lease of rail lines to shortline carriers by which Class I carrier sellers seek to ensure that the traffic originated or terminated by shortline carriers on the segments (sold or leased) continues to flow over the lines of the seller to the maximum extent possible. BNSE, slip op. at 17, 94.

Lumber Pricing Issues. Just prior to oral argument, U.S. Senator Mike DeWine, U.S. Representative Ralph Regula, and U.S. Representative Tom Sawyer submitted letters requesting that we hold this proceeding in abeyance until DOJ⁹⁵ completes an investigation into allegations that Canadian lumber producers have used confidential transportation contracts with CN to engage in unfair pricing practices that adversely affect domestic lumber wholesalers. One week later, U.S. Representative Regula submitted a second letter in which he expressed his support for our immediate approval of this merger, but requested that we take the necessary steps to allow for future conditions to the merger that would be linked to any determinations with respect to adverse impacts arising from applicants' role in any unfair pricing schemes.

We have not been provided with sufficient evidence to make any findings with respect to either the existence of any ongoing unfair pricing practices in the lumber industry or any potential link of these practices to the transaction before us. We believe the proper response to these concerns is to note that we are explicitly retaining jurisdiction to impose conditions to remedy any unanticipated merger-related harms that arise during our oversight of this transaction.

OVERSIGHT CONDITION. We are establishing oversight for a period of up to 5 years so that we may assess the competitiveness of service provided by the Alliance Agreement carriers upon implementation of the CN/IC transaction and the effectiveness of the various conditions we have imposed. While NITL/TFI suggest that only a limited oversight condition is needed, DOT has requested that we impose up to a 5-year oversight period. Present circumstances, we believe, warrant imposition of an oversight condition, although we recognize that we might later find that continued oversight is no longer necessary. We therefore will evaluate the necessity for continued oversight on an annual basis.

In addition, we will also monitor whether applicants have adhered to the various representations that they have made on the record during the course of this proceeding. This includes applicants' representation that they will not oppose DRT improvements that economically benefit the tunnel partnership or use their control of tunnel operations to impede CP so that CP's position is not undermined in the future. This also includes applicants' commitment that they will keep the Chicago gateway open and cooperate with CP in providing reasonable joint rates and efficient through service for North Dakota grain movements. We will also monitor competition between applicants and KCS within the Baton Rouge to New Orleans corridor, and stand ready to receive and examine evidence of any merger-related link to any unfair pricing practices in the lumber industry. And, we will continue appropriate monitoring of the environmental mitigating conditions we have imposed, as listed in Appendix E.

⁹⁵ In a letter dated April 12, 1999, from DOJ's Antitrust Division, the Chief of the Transportation, Energy, and Agriculture Section states that DOJ has referred the allegations to the Federal Trade Commission.

Other parties requesting that we impose an oversight condition include UP and IAM. UP contends that a reasonable oversight period will be needed to enable the Board to address any competitive problems created by the Alliance; and IAM, the collective bargaining representative for the craft or class of machinists on GTW, IC, and CCP, contends that, if we determine that the Alliance does not amount to a three-way control transaction, then we should retain oversight jurisdiction to monitor the operation of the Alliance so that, if a transfer of control requiring Board approval does in fact result, New York Dock protection for affected employees will be imposed. If that agreement ultimately does result in control for which approval is authorized, then we will impose New York Dock conditions for the protection of employees.

If problems do arise after approval and consummation of the transaction, involving these or other matters, our oversight condition should provide a fully effective mechanism for quickly identifying and resolving them. We are retaining jurisdiction to impose additional conditions if, and to the extent, we determine that additional conditions are necessary to address unforeseen harms caused by the transaction.

LABOR MATTERS. Our public interest analysis includes consideration of the interests of carrier employees affected by the proposed transaction. 49 U.S.C. 11324(b)(4); Norfolk & Western v. ATDA, 499 U.S. 117, 120 (1991). Applicants have shown that the net impact of this transaction on rail labor should be positive, as the merger will result in a net increase in union jobs. Unions representing more than half of applicants' organized employees (UTU, BMW, International Brotherhood of Electrical Workers, and Brotherhood of Railway Signalmen) have reached agreement and now support the application.⁹⁶ Applicants acknowledge that the transaction will have limited adverse consequences for employees for particular crafts and in certain areas. Applicants anticipate abolishment of 311 positions, and the transfer of 138 positions. They indicate that they should be able to achieve most of this reduction in positions through attrition over the 3-year implementation period. Offsetting these losses, the transaction will also result in the creation over the next 3 years of approximately 384 positions, mainly operating personnel to handle increased traffic flows. These basic projections are unchallenged.

Having weighed the impact upon carrier employees against the other public benefits that should result from the transaction, we conclude that the impacts on employees do not require us to deny approval of the transaction. This is particularly clear when our mitigation of these impacts with the labor protective conditions we are imposing is taken into account.

⁹⁶ According to a recent CN press release, the applicants also have negotiated an implementing agreement with the Brotherhood of Railway Carmen Division of TCU, resulting in applicants' having now signed implementing agreements (in one case, a letter of commitment) with unions representing 67% of the organized work force of CN and IC in the United States.

The basic framework for mitigating the labor impacts of rail consolidations is embodied in the New York Dock conditions. They provide both substantive benefits for affected employees (up to 6 years of full wages, moving allowances, preferential hiring, and other benefits) and procedures (negotiation, or, if necessary, arbitration) for resolving disputes regarding implementation of particular transactions. New York Dock, 360 I.C.C. at 84-90. We may tailor employee protective conditions to the special circumstances of a particular case. This is done where unusual circumstances require more stringent protection than the level mandated in our usual conditions. As specifically indicated below, we will grant certain requests to modify or clarify our basic conditions.⁹⁷

a. The implementing agreement process. A number of parties have raised questions about the implementing agreement process. Under New York Dock, the carriers and employees must arrive at an implementing agreement before any changes in operations affecting employees may occur. If timely agreement cannot be reached, these matters are subject to binding arbitration. As part of this process, under the law as interpreted by the Supreme Court, collective bargaining agreement (CBA) terms may be modified as necessary to carry out a transaction in the public interest. Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991) (Dispatchers).

In approving a rail merger or consolidation such as this, we have never decided in advance precisely what CBA changes, if any, will be required to carry out the transaction, and we will not do so here.⁹⁸ As we recognized in Conrail Merger, and as DOT urges here, those details are best left to the process of negotiation and, if necessary, arbitration under the New York Dock procedures. We will resolve any labor implementing agreement issues only as a last resort, giving deference to the arbitrator. Specifically, our approval of this transaction does not constitute a finding that any override of a CBA is necessary to carry out the transaction; rather, such matters should be left to negotiation and arbitration.

⁹⁷ BLE has made allegations about premature consummation. We note that all employees are protected against adverse consequences of any actions taken in anticipation of the merger by Article I, section 10 of New York Dock.

⁹⁸ Several unions have asked that we make a declaration that it would never be appropriate for an arbitrator to override an entire CBA, and impose another one. We caution the arbitrators that, under the law as limited recently by the Board, they are constrained to make only those CBA changes that are necessary to permit the carrying out of the transaction. CSX Corp. — Control — Chessie System and Seaboard Coast Line Industries (Arbitration Review), Finance Docket No. 28905 (Sub-No. 22) (STB served Sept. 25, 1998) (Carmen II). This decision limits any CBA changes to those made by arbitrators during the period 1940 - 1980.

We admonish the parties to bargain in good faith to embody implementing agreements in CBAs rather than having such agreements arbitrarily imposed. Good faith bargaining has always been an integral component of the New York Dock process. Applicants conceded at oral argument that the arbitrator, and the Board, if necessary, could properly take notice of any abuse of process in their deliberations.

As noted previously, unions representing at least more than 50% of applicants' workforce have reached agreement with applicants and now support the transaction.⁹⁹ The increasing return to negotiated agreements is one of the most positive developments in the consolidations we have recently approved, and we intend to encourage the continuation of that trend.

Various unions claim that Article I, section 3 of New York Dock precludes modification of certain benefits they received as the result of agreements implementing prior mergers approved by the ICC. ATDD stresses that certain ATDD employees enjoy "lifetime protection" as the result of a merger approved by the ICC in 1979, and subsequent CBA modifications made in 1996.¹⁰⁰ But these issues are not yet ripe for us to decide here. First applicants and the unions need to negotiate an implementing agreement. Only if that process fails, and applicants claim that changes need to be made in these CBAs, will it be necessary for an arbitrator to rule on these issues in the first instance. And those arbitrators will be constrained in this process not to change any protected "rights, privileges, and benefits," and only to make those changes that are necessary to carry out this transaction as significantly limited by the Board in Carmen III. See, generally, Carmen III.¹⁰¹

The ICC stated in Railroad Consolidation Procedures, 363 I.C.C. at 793, that, unless unusual circumstances make more stringent protection necessary, it would provide only the protections mandated by section 11347 (now section 11326). Here, however, TCU and others have presented valid concerns that require us to clarify or modify the application of our conditions as they relate to employees whose work may be transferred to Canada as the result of this transaction.

⁹⁹ To the extent that these unions and applicants have asked us to impose their agreements as conditions, we will do so. See UTU-10 and BMW-6 (discussed in detail in Appendix D). See also IBEW-8, filed Apr. 22, 1999 (request by IBEW, made with the consent of applicants, for adoption of the two implementing agreements entered into by IBEW and applicants).

¹⁰⁰ It appears that the particular benefits that concern these unions are actually included in CBAs negotiated as part of the implementing process or thereafter.

¹⁰¹ As noted, due to the end-to-end nature of the proposed combination, applicants themselves have acknowledged that implementation of the CN/IC control transaction will require at the most only modest adjustments to existing CBAs.

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. Such displacements do result in hardships for employees whenever they are required to move their place of residence, and New York Dock thus compensates the employee for the cost of the move. Ordinarily, applicants are not required to make protective payments to these employees who are offered continued employment, but decline to take advantage of it.

That being said, we do not believe that it would be appropriate for us to require employees to move to Canada or else forfeit their New York Dock protections. Such a move could be impeded by Canadian immigration laws, and could create unusually harsh dislocation problems for the families of these employees. We will not construe our conditions to have this effect.¹⁰² Cf. Independent Union of Flight Attendants v. Pan Am. World Airways, 923 F.2d 678 (9th Cir. 1991) (Railway Labor Act (RLA) does not apply extraterritorially); Great Northern Pac. — Merger — Great Northern Ry., 6 I.C.C.2d 919 (1990). Instead, where work is moved to Canada, employees cannot be required to follow their work to Canada or else be deemed to have forfeited their New York Dock benefits.

b. Protection for non-applicant employees. TCU has asked that we impose New York Dock conditions for the benefit of KCS employees under the theory that the transaction before us is really a three-carrier transaction involving KCS, IC, and CN. UTU GCA-386 has asked us to extend New York Dock to the employees of a non-applicant carrier, BNSF. UTU GCA-386 claims that BNSF employees will be harmed because applicants will divert traffic away from BNSF, and that there is an inadequate record on this issue because BNSF has withdrawn from the case.

The ICC, with the approval of the courts, consistently ruled that the employees of a non-applicant carrier, or a carrier not directly involved in a transaction governed by 49 U.S.C. 11323, are not entitled to labor protection under 49 U.S.C. 11326.¹⁰³ In essence, labor protection was intended to cushion the impact on employees of merger-related restructuring of the carriers for which

¹⁰² Although applicants noted at oral argument that New York Dock protections would not be forfeited if an employee could show, as a matter of fact, that he or she was precluded from moving to Canada by Canadian immigration law, we do not believe that employees should be required to make that showing.

¹⁰³ Crouse Corp. v. ICC, 781 F.2d 1176, 1192-93 (6th Cir. 1986), cert. denied, 479 U.S. 890 (1986); Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 410-12 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); Lamoille Valley R. Co. v. ICC, 711 F.2d 295, 323-24 (D.C. Cir. 1983); Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 725 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985); and Railway Labor Executives' Ass'n v. ICC, 914 F.2d 276, 280-81 (D.C. Cir. 1990).

they work, not to insulate employees from competitive impacts of mergers not involving their employers.

As discussed in detail above in the "Alliance Agreement" section, this is not a three-carrier control transaction. Nevertheless, TCU objects that, under the Alliance Agreement, these three carriers have agreed to consider the coordination of work that is now performed by the employees of each of the three carriers pursuant to their respective CBAs. This may be so, but we are not here approving the Alliance Agreement, nor are we approving any consolidation of KCS and the other two carriers, or of any of their employee functions. This means that, before KCS and CN can change any of these work relationships or employee functions in such a way that would be inconsistent with their existing CBAs, each railroad would have to obtain modification of its own CBAs through the RLA bargaining process.¹⁰⁴

In sum, no valid reason has been presented to depart from our consistent practice of not imposing labor protection for the benefit of non-applicant employees, and the RLA process thus will continue to govern their relations with their respective railroads.

c. Safety. Several unions have raised issues relating to the safe implementation of the merger. They raise issues such as deferral of action on this merger until our final rules about safe implementation of mergers are in place,¹⁰⁵ the use of Canadian operating employees unfamiliar with lines in the United States, hours of service and fatigue, and possible transfer of dispatching functions to Canada.

As noted in greater detail in the environmental portion of this decision and as detailed in the Final Environmental Assessment (Final EA) issued on March 8, 1999, the carriers have worked closely with FRA, the agency responsible for enforcement of rail safety regulations, to prepare and submit detailed SIPs that have been scrutinized by both FRA and SEA. As DOT notes, the SIP is a comprehensive written plan detailing how the parties will meld areas such as dispatching, hazardous

¹⁰⁴ IAM asked at oral argument that we retain oversight over the Alliance so that, if it results in common control of applicants and KCS, we would impose New York Dock conditions. If these parties are forced to seek, and we approve, control, then New York Dock conditions will be imposed for the protection of employees.

¹⁰⁵ BLE contends that we should defer any approval of this proceeding until issuance by the Board and FRA of final rules in Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisition of Control, and Start Up Operations, Etc., STB Ex Parte No. 574 (STB served Dec. 24, 1998). BLE asks that we defer action so that the rules developed in that case can be applied in this proceeding. This is unnecessary because the process proposed in Ex Parte No. 574 already is being followed here.

materials transport and handling, planning and training, and the overall safety management process. DOT-3 at 19.

DOT also notes that: "From the date of their initial SIP filing (August 14, 1998) until the present, the Applicants and FRA have met frequently and have addressed all of FRA's concerns as they apply to CN and IC." DOT-3 at 19. SEA reached precisely the same conclusion in its extremely thorough Final EA. Finally, the Board and FRA, with DOT's concurrence, have entered into a Memorandum of Understanding for monitoring of the safe implementation of this transaction. In light of the success of this cooperative effort between applicants and FRA that will continue throughout the implementation of this transaction under the oversight of the Board, we believe that rail labor's safety arguments will be properly addressed through that process.

ATDD says we should impose a condition to forbid transfer of train dispatching responsibilities over domestic trackage to dispatchers in Canada without certification from FRA that the transfer can be accomplished without compromising safety. At oral argument, applicants stated that they intend to centralize dispatching in Illinois, not in Canada, and that they would continue to engage in a consultative role with FRA with respect to any future merger-related changes with safety implications for the territorial United States, such as moving the dispatching function to Canada, and they would give sufficient notice of any such proposed changes. We will hold them to this representation.

DETAILS OF PUBLIC BENEFITS.

Quantifiable and Unquantifiable Public Benefits. The record indicates that this transaction should result in many qualitative benefits to the shipping public, including more single-line service, new and improved routes, more gateway choices, more reliable service, and reduced terminal delay. Applicants also indicate that they expect the acquisition of IC to produce annual quantitative public benefits in a normal year,¹⁰⁶ giving effect to full implementation of the operating plan, of \$137.4 million.¹⁰⁷ These consist of operating efficiencies and other cost savings, including support functions.

¹⁰⁶ "Normal year" refers to a year of operations after the third full year following completion of the transaction.

¹⁰⁷ As we explained in CSX/NS/CR, slip op. at 52, "the clear trend since 1980 has been that railroad efficiencies achieved through mergers or other means have been largely passed along to shippers in the form of lower rates and improved service."

As applicants have explained, the transaction presents significant opportunities for cost savings (public benefits), while the main focus of the Alliance Agreement is revenue growth (private benefits). Below, we present applicants' projections of public benefits:¹⁰⁸

Normal Year Public Benefits
(\$ Millions)

Crew Reductions (Yard)	\$13.822
Crew Reductions (Road)	29.077
Crew Reductions (Taxi and Lodging)	2.713
Reduction of 120 Locomotives	7.743
Reduction of 6,236 Excess Freight Cars	32.859
Reductions in General & Administrative Costs	30.693
Consolidation of Locomotive Repair Facilities	2.108
Rail Traffic Control & Crew Management Control Operations	4.568
Consolidation of Purchasing & Contracting Activities	9.465
Miscellaneous Savings	4.400
Total Public Benefits	\$137.448

It appears that all of these cost reductions can be achieved from combining certain CN and IC operations, and from other synergies connected with CN's acquisition of IC. Protestants have not challenged the availability of those benefits through this transaction. Rather, they are claiming that all of these benefits should be disregarded because they were already available from cooperation between CN and IC under the Alliance Agreement. We note, however, that protestants have not even attempted to detail which particular benefits could have been achieved without the merger, and they are unable to point to any that have already been achieved through the Alliance Agreement. To the contrary, UP concedes that "many of the contemplated coordinations and joint activities have yet to be implemented." UP-8 at 45.

UP also loses sight of the fact that the Alliance Agreement is itself a settlement agreement related to the merger, and as such it is even appropriate for us to consider its benefits as well, just as we did in UP/SP. In that case, we weighed the significant competitive benefits of the entire

¹⁰⁸ These data are from CN/IC-7 and CN/IC-56A, R.V.S. Kent & Klick.

UP/BNSF settlement agreement as merger benefits, not just those elements that we determined were necessary to remedy merger-related competitive harm.

In any event, we and the ICC have consistently recognized that railroad mergers frequently can achieve a degree of coordination beyond that which is available under voluntary coordination agreements such as the Alliance Agreement. This was true in the UP/CNW control transaction, where the ICC specifically rejected arguments that there were no additional merger synergies resulting from UP's control of CNW that were not available under the extensive voluntary coordination agreements between those two carriers that were already in place (UP/CNW, slip op. at 63):

[M]any of the projected efficiency gains from control require more structure than can be realized through selective cooperative agreements. To achieve the efficiency gains and improve service, applicants need to be able to develop and implement a coordination plan based on common management objectives.

The same is true here. Although some unidentified portion of the merger synergies perhaps could have been achieved through cooperation between IC and CN pursuant to the Alliance Agreement, many others could not have been realized absent a full merger. This view is entirely consistent with those expressed by us and by the ICC in earlier rail mergers. For example, in SF/SP, the ICC said: "It seems clear to us that without the unified management resulting from the merger, few if any of the operating economies projected under the Operating Plan are attainable." SF/SP, 2 I.C.C.2d at 872.

Finally, one key element of UP's argument — that the projected public benefits incorporate the impact of savings made possible by increased traffic flows due to the Alliance Agreement — is simply wrong. The 1996 base-year data used by applicants cannot reflect Alliance activities because that agreement was not made until 1998. Applicants have further explained that none of the expected Alliance traffic growth has been incorporated in their estimates of quantitative public benefits, since their benefit calculations are "derived solely as a result of combining historic CN and IC into a single operating entity."¹⁰⁹

In sum, the criticisms that have been raised here are unpersuasive. Moreover, the precise level of quantifiable benefits is not of great moment. Because the modest merger-related harms are fully addressed by the conditions we are imposing, the substantial qualitative benefits shown on this record, by themselves, justify our approval. Further, even if it were appropriate to disregard all

¹⁰⁹ R.V.S. Kent & Klick, CN/IC-56A (Vol. 1A) at 536.

merger savings that might have been achieved by some means short of merger,¹¹⁰ applicants will still achieve substantial quantifiable merger synergies that were not otherwise available.

DETAILS OF FINANCIAL MATTERS.

Financial Condition and Fixed Charges. As detailed below, the record clearly demonstrates that, after its acquisition of IC, CN will remain financially sound, CN's assumption of the payment of IC's fixed charges will be consistent with the public interest, the terms of the acquisition agreements and transactions are just and reasonable to shareholders, and new transaction-related debt issued by CN, together with the assumption by CN of the liabilities of IC, will not impair the acquiring carrier's ability to continue to provide quality service to the shipping public.

This transaction involves the acquisition and control of IC by CN through two separate tender offers, one for the purchase of IC stock, and one for the exchange of IC stock for CN stock. The first tender offer, consummated March 14, 1998, resulted in the acquisition of 75% of IC's common stock (46,051,761 shares) at \$39.00 per share. CN financed this purchase with \$1.8 billion in new debt. The second tender offer, consummated on June 4, 1998, resulted in the remaining 15,350,587 IC shares being exchanged for 10.1 million new common shares of CN stock. All of the IC stock has been placed in a voting trust to avoid unauthorized control pending our review.

Despite this new debt incurred by applicants, their already favorable financial condition will be improved once the merger is fully implemented. CN expects the acquisition to improve its financial position in a normal year by \$216.2 million, including the \$137.4 million in operating efficiencies and cost savings discussed above under "Details of Public Benefits," and an additional \$78.8 million in net operating revenue gains that are private financial benefits. The following table summarizes these projections.

¹¹⁰ Neither the ICC nor the Board has ever followed this approach in calculating merger benefits.

Financial Benefits to CN/IC (\$ in Millions)				
Category	Year 1	Year 2	Year 3	Normal Year
Net Revenue Gains	\$30.1	\$60.2	\$90.3	\$90.3
Positive Operating Benefits	49.6	89.9	106.7	106.7
Acquisition-Related Operating Costs	(30.5)	(71.5)	(4.2)	0.0
Support Functions (Net)	(0.1)	10.4	25.8	30.7
Employee Separation/Relocation Costs	(29.3)	(48.2)	(44.1)	(11.5)
Total Benefits to CN/IC	\$19.8	\$40.8	\$174.5	\$216.2
Percent of Normal Year	9.2%	18.9%	80.7%	100.0%

The private financial benefits to applicants here are derived from several sources, including diversion of traffic from other rail carriers,¹¹¹ diversion of intermodal traffic from truck to rail,¹¹² and intermodal port diversions.¹¹³ The total net increased revenue from these sources in a normal year is projected to be \$78.8 million (\$248.1 million in gross revenues minus \$157.8 million in costs to move this additional traffic and minus employee separation and relocation costs of \$11.5 million). Applicants freely admit that some unquantified portion of the projected revenue gains from traffic diversions derives from the Alliance Agreement.

The argument of UP and Exxon that the Alliance Agreement unduly clouds the determination of CN's fiscal soundness, however, is without merit. It is irrelevant to this issue whether these benefits result from the Alliance Agreement or from the merger. Regardless of their derivation, these financial benefits will have the same positive impact upon the financial fitness and fixed charge coverage ability of applicants after the merger.

¹¹¹ V.S. Woodward & Rogers, CN/IC-7 (Vol. 2) at 1-63.

¹¹² V.S. Bryan, CN/IC-7 (Vol. 2) at 66-100.

¹¹³ V.S. Litzzen, CN/IC-6 (Vol. 1) at 206-211 (Appendix A).

The record indicates that CN's financial ratios following its merger with IC will remain highly favorable. IC has historically been the best performing Class I railroad in the United States. It has had significantly better financial ratios than other carriers, and we or the ICC have found it to be revenue adequate every year since 1990. Protestants have simply failed to demonstrate that this acquisition would be a financial burden on CN. To the contrary, CN should be even stronger financially after the merger.

Applicants submitted pro forma financial statements showing consolidated data for CN after completion of its acquisition of IC, based on 1996 data, for a base year and for each of the first 3 years after completion of the acquisition. These statements reflect the anticipated financial gains from CN's acquisition and operation of IC's assets and the resulting changes in various revenue and expense accounts. Applicants also submitted financial statements for a "normal" year depicting the expected total benefits to be achieved from the acquisition and any normalized additional debt and interest expenses that will be incurred.

Consolidated pro forma income before fixed charges should exceed fixed charges (interest payments for long-term debt) by ratios that gradually rise from 3.3 during the first year after the acquisition to 4.9 during the third year. Similarly, other financial ratios will improve, including the cash throw-off-to-debt ratio, and the operating ratio. Return on equity would move from 9.8% for the first year to 11.3% for a normal year. CN/IC's net income is projected to increase from \$306 million during the first year to \$497 million for the normal year. In sum, the pro forma data presented by applicants indicate that CN, after completion of its acquisition of IC, will possess considerable financial strength. CN should easily be able to generate sufficient income to pay fixed charges, including interest associated with all debt issued to purchase IC stock and debt assumed in the transfer of IC's assets.

Fairness Determination. Section 11324(c) directs us to approve transactions under 49 U.S.C. 11323 when we find that they are consistent with the public interest. Under that standard, we are required to determine whether terms are fair to the shareholders. Schwabacher v. United States, 334 U.S. 182 (1948); Zatz, et al. v. STB, 149 F.3d 144 (2d Cir. 1998).

Applicants' financial advisors, Goldman Sachs (for CN) and the Beacon Group Capital Services and Lehman Brothers (for IC), employed various valuation techniques to determine the fairness of the terms of the stock purchase to the shareholders of each company. No opposing parties presented evidence to challenge this evidence. These investment firms, which have substantial expertise in the valuation of businesses and securities in connection with mergers and acquisitions, found that the consideration paid by CN was fair to its shareholders and to those of IC. After carefully reviewing the arguments and conclusions of these investment firms, we find that the terms of the acquisition agreement are just and reasonable to the shareholders of CN and IC.

RELATED APPLICATION.

KCS-GWWR (Sub-No. 1) Trackage Rights Application. KCS, supported by applicants, has asked us to grant its affiliate, Gateway Western Railroad (GWWR), unrestricted trackage rights over a short segment of a line owned by UP to permit an improved interchange with IC at or near Springfield, IL. Although GWWR currently uses UP's Springfield tracks to interchange with IC, NS and UP, the so-called Ridgely Yard agreement under which UP granted GWWR those rights allegedly impedes GWWR's use of this segment to interchange traffic moving to, from, or via the Chicago Switching District with any carrier other than UP. KCS seeks trackage rights authority under section 11102, which would obviate the Ridgely Yard agreement¹¹⁴ and give KCS unfettered interline access to its Alliance partner IC at Springfield.¹¹⁵

Section 11102 allows us to grant trackage rights to one carrier over another carrier's tracks in or near terminal areas if the grant is in the public interest.¹¹⁶ Where the trackage rights are not merger-related, the applicant is required to meet our competitive access standards.¹¹⁷

In previous railroad mergers, the Board or the ICC has required non-applicant carriers to grant terminal trackage rights to another carrier only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary

¹¹⁴ Alternatively, applicants ask that we override any consent requirements in the underlying trackage rights agreements between GWWR and UP.

¹¹⁵ The unrestricted Springfield connection with KCS sought here would, within the context of the primarily north-south orientation of this merger, result in a relatively small increase in CN-IC/KCS east-west traffic. Applicants have explained that their new Springfield interchange will be used for traffic moving between CN and northern IC territory, on the one hand, and Midwestern United States KCS territory. And applicants' post-transaction traffic density charts, premised on a grant of this trackage rights application, show that only around 15% of new traffic moving into and out of Chicago on IC routings will use the Springfield interchange with KCS.

¹¹⁶ Section 11102(a) also requires us to find that any trackage rights so granted are practicable and in the public interest without substantially impairing the ability of the owning carrier to handle its own business.

¹¹⁷ See 49 CFR 1144; Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd, Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987); Midtec Paper Corp. v. Chicago & N. Western Transp. Co., 3 I.C.C.2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) (terminal trackage rights application requires at least the showing necessary to justify reciprocal switching under 49 CFR 1144).

to remedy or mitigate anticompetitive effects in the transaction, UP/SP, Dec. No. 44, slip op. at 168-69.

In Rio Grande Industries, et al. — Pur. & Track. — CMW Ry. Co., 5 I.C.C.2d 952, 978 (1989) (RGI/CMW), the ICC explained that it could not use its “plenary” authority under former section 11341 “to compel a carrier to grant trackage rights over its line to another carrier.” In that case, the ICC did grant terminal trackage rights under section 11103(a). There in what it termed an “unusual case,” the ICC permitted the assignment of terminal trackage rights against the owner’s wishes in part to allow a service continuation over the CMW lines. The CMW was already in bankruptcy, and the line in question was critical to the CMW operation.

Shortly thereafter, in ruling on a motion to reject a consolidation application in Rio Grande Industries, Inc., et al. — Purchase and Related Trackage Rights — Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505, Decision No. 6 (ICC served Nov. 15, 1989) (RGI/Soo), the ICC again stated its position that it could not use the pendency of a consolidation proceeding as an excuse for imposition of trackage rights over the lines of a non-applicant. RGI/Soo, slip op. at 8. The ICC also stated that it could not under these circumstances assign trackage rights which are unassignable or assignable only with consent. The ICC explained that it could grant terminal trackage rights under section 11103 if a case could be made under the Midtec standard. The ICC also stressed that RGI/CMW was an unusual case in that the agency was trying to maintain the competitive status quo that was being threatened by the insolvency of CMW, while in RGI/Soo it was being asked to alter the existing competitive relationship for no apparent public interest reason.

None of these precedents supports the instant terminal trackage rights application because the rights sought by KCS-GWWR are not designed to remedy any anticompetitive effects of, or fill in any gaps in, a consolidated CN/IC system. An expanded interchange with KCS’s affiliate at Springfield approximately 600 miles north of Jackson, MS, would clearly assist the long-haul interests of KCS, and, to a lesser extent, applicants. Although it might promote the purposes of the Alliance, it is not necessary to carry out the merger.¹¹⁸ Based on applicants’ theory, any railroad that connects anywhere with the merged CN/IC could override its preexisting contractual obligations simply by asserting that the proposal would allow the merger to be more efficient.

It is not clear to us that removing the Ridgely Agreement restrictions is even necessary for Alliance Agreement purposes. UP has been willing to negotiate amendments to the Ridgely

¹¹⁸ With respect to new or rerouted Alliance Agreement train movements between the Southwest and the Chicago Switching District, applicants project that a total of 12 train movements will be created. Although all of these trains could move via Springfield, applicants indicate that only two will do so. The remaining ten will move primarily via Jackson.

Agreement on two occasions, in 1993, and more recently in 1996. UP asserts that these amendments have resulted in a substantial increase in traffic interchanged between KCS and IC, so that three trains per week now move through this Alliance gateway, as compared to the one car per day that KCS and UP interchange there. We prefer and encourage the parties to resolve these sorts of issues, which have little nexus to the merger, through private negotiations.

Moreover, it appears that IC and KCS can effectively accomplish this interchange west of the UP tracks at issue here through construction of additional side track or through the grant by KCS to IC of trackage rights to permit access to a more convenient interchange point on GWWR.¹¹⁹

In sum, there is an insufficient nexus between the merger and applicants' trackage rights proposal to justify consideration under the less demanding public interest standard we have applied in appropriate circumstances within the context of rail merger proceedings. Nor have applicants shown that they need to override GWWR's contractual obligations to UP in order to implement the CN/IC merger.

Thus, the Springfield terminal trackage rights can be granted only if applicants meet the generally applicable competitive access standards. That standard requires that a party seeking terminal trackage rights show that the incumbent carrier has engaged, or is likely to engage, in competitive abuse and that the terminal rights would ameliorate that conduct. See 49 CFR 1144. Applicants have not shown, nor do they even allege, anticompetitive conduct by UP or any other carrier at the Springfield interchange. Accordingly, the application in Sub-No. 1 for terminal trackage rights will be denied, and the Ridgely Agreement restrictions will not be overridden.

ENVIRONMENTAL MATTERS. The National Environmental Policy Act requires that we take environmental considerations into account in our decisionmaking. We must consider the environmental effects of a transaction in deciding whether to approve the transaction as proposed, deny the proposal, or grant it with conditions, including environmental conditions. Accordingly, our Section of Environmental Analysis (SEA) conducted a comprehensive review of the potential environmental impacts. SEA determined that, with its recommended environmental mitigation, the transaction will not result in any significant environmental impacts. We have thoroughly reviewed SEA's analysis. We agree with that analysis, and we will impose SEA's recommended conditions with minor clarifying changes.

¹¹⁹ IC also has trackage rights over the segment. As UP noted at oral argument, IC's rights are unrestricted, and nothing in the Ridgely Agreement restrains IC's use.

Our environmental rules normally call for the preparation of an Environmental Assessment (EA) in railroad merger cases¹²⁰ (49 CFR 1105.6(b)(4)), and SEA followed that process here. SEA issued a Draft EA on November 9, 1998, which analyzed 19 topics, including safety, hazardous materials transport, transportation systems, land use, energy, air quality, noise, biological resources, water resources, historic and cultural resources, and environmental justice.¹²¹ Safety was of primary concern to SEA in conducting its environmental review. The Draft EA included SEA's preliminary recommendations for environmental mitigation addressing hazardous materials transport safety, related environmental justice concerns, and safety integration. SEA conducted comprehensive public outreach to ensure that the affected public, including government agencies and communities, had an opportunity to raise environmental concerns and review and comment on the Draft EA.

In preparing its Final EA, SEA reviewed and responded to the public comments, conducted further analysis, and consulted with appropriate government agencies. SEA issued the Final EA on March 8, 1999, prior to the oral argument and voting conference. In the Final EA, SEA concluded that the transaction would result in system-wide environmental benefits, including reductions in air pollution emissions, fuel consumption, highway traffic, and highway accidents. SEA further concluded that there would be potentially significant environmental impacts only with regard to hazardous materials transport safety and related environmental justice impacts and proposed mitigation to address those effects. As the Draft EA and Final EA show, SEA has taken the requisite "hard look" at environmental issues in these very thorough documents.

An important part of the environmental process here is safety integration. We have required applicants to prepare and file a detailed Safety Integration Plan (SIP), in consultation with FRA, addressing safety integration concerns, including those raised by rail labor and others. The SIP outlines applicants' plans for safe integration of their rail lines, equipment, personnel, and operating practices. Because safety integration is an ongoing process, the SIP will continue to be modified and refined as this transaction moves forward. The Board and FRA also have entered into a Memorandum of Understanding (MOU), with the concurrence of DOT, regarding the ongoing safety integration process.¹²² We will impose SEA's recommended conditions requiring applicants to comply with their SIP and to cooperate with the Board and FRA until FRA advises us that the transaction has been safely implemented.

¹²⁰ SEA noted that this is an end-to-end consolidation, which involves only relatively minor changes in rail operations, no rail line abandonments, and only five minor construction projects.

¹²¹ On November 24, 1998, SEA issued to the public an Errata to the Draft EA containing updated and clarifying information.

¹²² To facilitate public review and comment on this important issue, the Draft EA included the complete SIP, FRA's comments on the SIP, and the MOU. SEA also reviewed the SIP.

In sum, based on its thorough environmental review in the EA process and consideration of the public comments, SEA has recommended, and we are imposing, 15 environmental conditions, the majority of which address safety. These conditions address such issues as hazardous materials transport, environmental justice, construction activity, and safety integration. There is also a condition providing that we may review the continuing applicability of our final environmental mitigation where warranted.

Our final environmental conditions are attached at Appendix E. We will continue appropriate monitoring of these environmental conditions under our general oversight for this transaction.

FINDINGS

In STB Finance Docket No. 33556, we find: (a) that the acquisition by CN of control of IC, and the integration of the rail operations of CN and IC, through the proposed transaction, as conditioned herein, is within the scope of 49 U.S.C. 11323 and is consistent with the public interest; (b) that the proposed transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the proposed transaction has requested inclusion in the transaction, and that failure to include other railroads will not adversely affect the public interest; (d) that the proposed transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges except such as are consistent with the public interest; (e) that the interests of employees affected by the proposed transaction do not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the proposed transaction, as conditioned herein, will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the proposed transaction are just, fair and reasonable to the stockholders of CNR and to the stockholders of IC Corp. We further find that the conditions imposed in STB Finance Docket No. 33556, including but not limited to the oversight condition, are consistent with the public interest. We further find that any rail employees of applicants or their rail carrier affiliates affected by the transaction authorized in STB Finance Docket No. 33556 should be protected by the New York Dock labor protective conditions, as augmented, unless different conditions are provided for in a labor agreement entered into before the carriers make changes affecting employees in connection with the transaction authorized in STB Finance Docket No. 33556, in which case protection shall be at the negotiated level, subject to our review to assure fair and equitable treatment of affected employees.

In STB Finance Docket No. 33556 (Sub-No. 1), we find that requiring UP to permit the use by GWWR of unlimited terminal trackage rights would not be in the public interest.

In STB Finance Docket No. 33556 (Sub-No. 2), we find that the OMR responsive application is not consistent with the public interest.

In STB Finance Docket No. 33556 (Sub-No. 3), we find that the CPR/St.L&H responsive application is not consistent with the public interest.

We further find that this action, with the environmental mitigation conditions set forth in Appendix E, will not significantly affect the quality of the human environment or the conservation of energy resources.

We further find that all conditions requested by any party to the STB Finance Docket No. 33556 proceeding or any of the embraced proceedings but not specifically approved in this decision are not in the public interest and should not be imposed.

It is ordered:

1. The CN/IC control application filed in STB Finance Docket No. 33556 is approved, subject to the imposition of the conditions discussed in this decision. The Board expressly reserves jurisdiction over the STB Finance Docket No. 33556 proceeding and the embraced proceedings in STB Finance Docket No. 33556 (Sub-No. 2) and STB Finance Docket No. 33556 (Sub-No. 3) in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address matters respecting the CN/IC control transaction, including without limitation: (a) concerns regarding the operation of the Alliance Agreement, particularly with respect to ongoing competition within the Baton Rouge-New Orleans corridor; (b) concerns of North Dakota grain shippers with respect to the Chicago gateway; (c) concerns with respect to investment in and operation of the Detroit River Tunnel; (d) concerns with respect to any merger-related link to any unfair pricing practices in the lumber industry; (e) concerns with respect to lack of appropriate labor protective conditions if unauthorized control of applicants and KCS should occur; and (f) any necessary monitoring of the environmental mitigating conditions imposed in this decision.

2. If applicants consummate the approved transaction, they shall confirm in writing to the Board, within 15 days of the date of such consummation. Where appropriate, applicants shall submit to the Board five copies of the journal entries recording consummation of the transaction.

3. All notices to the Board as a result of any authorization shall refer to this decision by date and docket number.

4. No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Board.

5. Applicants must comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced in these ordering paragraphs.
6. Applicants must adhere to all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.
7. With respect to Geismar, LA, applicants must modify the CN/KCS Access Agreement to grant KCS access to Rubicon, Uniroyal, and Vulcan under the same terms and conditions that will govern KCS's access to BASF, Borden, and Shell.
8. Approval of the application in STB Finance Docket No. 33556 is subject to the New York Dock labor protective conditions. Those conditions will be augmented so that employees who choose not to follow their work to Canada will not lose their otherwise applicable New York Dock protections.
9. Applicants must adhere to the commitments they made to UTU.
10. Applicants must adhere to the terms of the CN/IC-BMWE implementing agreement. Applicants must also adhere to the terms of the two implementing agreements entered into with IBEW.
11. Approval of the application in STB Finance Docket No. 33556 is subject to the environmental mitigation conditions set forth in Appendix E.
12. In STB Finance Docket No. 33556 (Sub-No. 1), the KCS trackage rights application is denied.
13. In STB Finance Docket No. 33556 (Sub-No. 2), the responsive application filed by OMR is denied.
14. In STB Finance Docket No. 33556 (Sub-No. 3), the responsive application filed by CPR and St.L&H is denied.
15. All conditions that were requested by any party in the STB Finance Docket No. 33556 proceeding and/or in the three embraced proceedings but that have not been specifically approved in this decision are denied.
16. As respects certain procedural matters not previously addressed: (a) the CPR-17 petition to initiate an investigation is denied; (b) the KCS-13 motion to strike is denied; (c) the BMW-6 joint motion for adoption of the CN/IC-BMWE implementing agreement as a condition of

approval of the CN/IC control application is granted; (d) the UTU-10 joint request for adoption of applicants' commitments to UTU as a condition of approval of the CN/IC control application is granted; and (e) the CN/IC-64 motion to strike is denied, and the CN/IC-64 response is included in the record.

17. This decision shall be effective on June 24, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes commented with separate expressions.

Vernon A. Williams
Secretary

CHAIRMAN MORGAN, commenting:

The Board is presented today with another pro-competitive rail transaction that will provide substantial transportation benefits for many shippers throughout the Nation. In particular, it will provide for expanded service options such as single-line rail service for shippers in the NAFTA corridor and throughout the central United States. In addition, in light of the efficiencies that it will produce, it will provide quantifiable public benefits in excess of \$100 million annually.

The transaction before us also represents another illustration of the positive direction in which labor-management relations have moved in recent years, and should continue to move. Indeed, in the three most recent mergers — those involving the Union Pacific-Southern Pacific, CSX-Norfolk Southern-Conrail, and the CN-IC transaction before us here — the respective applicants have obtained through negotiation the support of unions representing a majority of the carriers' union employees for each of their proposed consolidations.

Notwithstanding this support, there is a concern among rail labor interests about the modification of collective bargaining agreements (CBAs) as a result of Board-approved rail consolidations. This concern extends not only to the breadth of the provisions that may be changed, but also to the duration of the period during which changes may be made. The courts, including the

Supreme Court, have held that under the law CBAs may be modified as necessary to implement a Board-approved transaction, and that the period during which they may be changed can extend for a number of years.¹²³ The Board is bound by court decisions interpreting our statute until the law is changed by Congress,¹²⁴ and when I was named ICC Chairman in 1995, the agency was subject to the constraints imposed by the case law on these issues. However, I note that in none of the merger proceedings decided under my watch prior to the transaction before us here — Burlington Northern-Santa Fe, Union Pacific-Southern Pacific, and CSX-Norfolk Southern-Conrail — has the Board or the ICC affirmatively found it necessary to override a CBA.

Nevertheless, labor interests have expressed concern that cases that were decided before I joined the ICC, along with the ICC's active involvement in the arbitration process, had the effect of skewing negotiations in favor of management. I understand that concern, and I respect and believe in the collective bargaining process. Even given existing law and precedent, I have worked diligently to bring about a level playing field to ensure that management as well as labor have every incentive to engage in good faith negotiations to resolve disputes over the implementation of Board-approved transactions. Under my leadership, in the so-called "Carmen III" case the Board limited to the maximum extent possible under current law the power to override or modify a CBA, returning to the modification authority exercised by arbitrators during the period of 1940-1980 pursuant to the Washington Job Protection Agreement of 1936 negotiated by labor and management. Additionally, the Board has moved away from interjecting itself into the arbitral process and, rather, has emphasized its strong preference for voluntary private-sector resolution of issues such as labor matters. And when more aggressive action has seemed necessary, the Chairman order authority has been used to issue injunctions in order to facilitate and expand opportunities for bargaining.

These efforts to encourage negotiation rather than arbitration have produced significant results. The applicants in the CSX-Norfolk Southern-Conrail transaction have concluded all implementing agreements for that transaction through private negotiation with the many involved unions without the substantive involvement of the Board.¹²⁵ As in CSX-Norfolk Southern-

¹²³ The seminal ICC decision regarding modification of CBAs — the so-called "DRGW" decision — was made in 1983 and adopted by the Supreme Court, in the so-called "Dispatchers" case, in 1991. The case establishing the duration of the change period—the CSX Sub-23 decision—was decided by the ICC in 1992, and affirmed by the D.C. Circuit Court of Appeals in 1994.

¹²⁴ In my letter to Senators McCain and Hutchison dated December 21, 1998, reporting on the Board's rail access and competition proceeding, I suggested that Congress may wish to change the law governing the override of CBAs.

¹²⁵ Indeed, in resolving the last outstanding labor implementation dispute in the Conrail
(continued...)

Conrail, I expect the parties in this case that have not yet reached agreement to work diligently to resolve their issues privately.

As I noted earlier, this positive direction for labor-management relations continues in the CN-IC case. A number of labor parties to this case already have negotiated agreements. The Brotherhood of Maintenance of Way Employees, for the first time, is supporting a major merger and has entered into an agreement with the applicants, which the union believes should serve as a model for how mergers should be implemented. The United Transportation Union, the largest rail union, has again engaged in productive bargaining, and has reached a privately negotiated agreement for the benefit of its membership in yet another merger proceeding. Other unions have also reached agreement, as a result of which, as noted, unions representing a majority of the applicants' work forces support the merger. I applaud the commitment to good faith and the leadership of those involved in these negotiations, and I am certain that the applicants will, in good faith, seek to use private negotiations to arrive at all implementing agreements necessary to implement their transaction.

Certain specific labor concerns have been voiced in this proceeding, which our decision addresses in a variety of ways. First, with respect to moving jobs to Canada, our decision augments New York Dock in this proceeding to provide that workers who do not move to Canada can still retain the benefits of those protective conditions. Second, our decision reiterates the policy that all bargaining in the implementing process is to be conducted in good faith. Third, our decision makes it clear, in line with the Board's recent decision in the CSX-Norfolk Southern-Conrail proceeding, that a decision to approve this merger does not in any way indicate that any particular collective bargaining agreement should be overridden. In this regard, our decision also highlights applicants' recognition of the respect due to prior labor agreements. Fourth, our decision holds applicants to their representations that they will provide advance notice and will consult with the Federal Railroad Administration regarding the safety implications of transferring dispatching functions to Canada, should they decide to do that in the future. Furthermore, our decision, in declining to approve the Alliance Agreement, provides that any changes in CBAs to implement the Alliance will remain subject to the Railway Labor Act process. And finally, our decision imposes oversight to address other concerns of labor about the Alliance Agreement and ongoing safety matters.

Beyond labor matters, I also applaud the applicants and various other parties for working to reach privately negotiated settlement agreements. The applicants reached agreements with the National Industrial Transportation League, several railroads, and various other interested parties, and these negotiated settlements are reflected in the fact that this merger is widely supported by over

¹²⁵(...continued)

acquisition proceeding, the International Association of Machinists and Aerospace Workers credited a Chairman's stay as enabling the parties to reach an agreement.

240 parties. These agreements also are in line with the Board's continuing emphasis on private-sector resolution.

The Board has been presented with a number of other issues related to the merger. Those issues — concerning the benefits of the merger; the Alliance and in particular the Baton Rouge/New Orleans corridor; trackage rights at Springfield; access at Geismar; the movement of North Dakota grain; the Detroit tunnel; and environmental and safety issues — have been addressed fully and fairly in our decision that we are issuing today. And we are imposing oversight to address any significant issues that may arise in the future.

In closing, I believe that this transaction offers clear transportation benefits with minimal adverse consequences. With the agreements that have been reached and the additional conditions that are being imposed, this transaction will advance the public interest for all concerned. Therefore, I support approval of the transaction, as conditioned in our decision.

VICE CHAIRMAN CLYBURN, commenting:

The Surface Transportation Board is required to approve and authorize this acquisition of control if, after consideration of congressionally mandated criteria, the Board finds this transaction to be consistent with the public interest. Accordingly, after careful evaluation of the application, pleadings, and testimony, and after long sessions evaluating the record and the law with the Board staff, I am approving the proposed Canadian National (CN)/Illinois Central (IC) merger transaction.

With the carefully constructed Board conditions, this merger should not diminish competition among rail carriers in the affected region or in the national rail system. Indeed, the transaction should enhance competition. This transaction will create a pro-competitive transportation system spanning most of Canada, the central part of the United States, and the Gulf of Mexico. The combination of CN and IC will make possible a new, single-line service alternative for many shippers, and the applicants will be able to provide better, more efficient service throughout their merged system. In particular, the merger should significantly increase competition for international traffic that is gaining greater strategic importance due to NAFTA. In addition, the Board's staff has found that the merger should generate quantifiable public benefits of more than \$137 million a year through increased single-line service, new and improved routes and gateway choices, more reliable service, and reduced terminal delays.

Because this is an end-to-end merger, the number of independent railroads currently serving particular shippers is not reduced at any location served by CN or IC. The United States Department of Justice has not raised any anticompetitive concerns. The application is supported by more than 240 parties, including many shippers, rail employee unions, and local communities.

I support the concept of privately-negotiated agreements. Parties to these agreements have a vested interest in maximizing efficiencies and enhancing their financial viability. However, the statute does not contemplate blind reliance on projections and claims, nor can the Board ignore the concerns of other participants in this proceeding. In an increasingly concentrated rail industry, it is important for the Board to carefully consider, and promptly resolve, the petitions of affected parties other than the transaction's principals, including small or infrequent rail shippers, communities, carrier employees, and shortlines and regional railroads. Each of these parties also has an important stake in the successful implementation of this transaction.

I am persuaded that the Alliance Agreement between CN, IC, and Kansas City Southern is an example of a privately-negotiated cooperative effort between parties seeking to enhance competition. The Alliance Agreement in this case does not result in the common control of CN, IC, and KCS — all decisions of the Alliance are consensual, and each participant retains the managerial prerogative to veto any action by the Alliance. Thus, there is no need to require KCS to be a co-applicant in this proceeding. I have also carefully considered the argument raised by the United States Department of Transportation (DOT) that the Alliance Agreement may reduce competition between KCS and applicants for traffic in the New Orleans-Baton Rouge, LA, corridor. It is appropriate that we condition this decision to carefully monitor this situation to protect against any harmful diminution of competition.

The Board is also granting haulage rights to KCS over IC's line to serve three additional shippers at Geismar, LA. Because of this merger and its related Access Agreement, it is unlikely that any Geismar construction project will occur even though KCS has previously requested our regulatory approval for such construction. This loss of the build-in/build-out option by the three shippers could have a significant adverse effect on potential competition in the area. Accordingly, the Board's grant of haulage rights to KCS is in the public interest because the Geismar condition is intended to preserve these shippers' pre-merger competitive position.

This transaction should result in no track redundancies, abandonments, or reroutings because the CN and IC systems will be joined at a single point, Chicago. Therefore, I expect that there will be only minimal or no disruptions to employees,¹²⁶ shippers, and communities, and minimal risk of service and safety problems during implementation of the merger. The Board's Section of Environmental Analysis (SEA) has prepared a thorough Environmental Assessment in which SEA evaluated the potential significant impacts of increased rail traffic and has recommended

¹²⁶ Applicants have stated that a limited number of employees in particular crafts and geographic areas may be adversely affected by the transaction. While applicants expect that the transaction will create 384 new positions over the 3-year implementation period, they also anticipate the abolishment of 311 positions and the transfer of 138 positions. Applicants state, however, that most of these job losses should be achieved through attrition.

conditions to mitigate any potential harm to communities from the transportation of hazardous materials. Because the Board considers safety integration an important part of its decisional and oversight role, applicants have been required to prepare and file a comprehensive Safety Integration Plan (SIP) addressing safety concerns raised by the Federal Railroad Administration (FRA), rail labor, and others. As applicants implement their transaction, they will update and refine the SIP to reflect their compliance. We have imposed SEA's recommendation that applicants comply with their SIP and cooperate with the Board and FRA until FRA advises us that the transaction has been safely implemented.

While this transaction was pending, rail employee unions representing more than half of applicants' employees have reached settlement agreements with applicants, and those employees and unions now support the application. I encourage and expect the participants to recognize the integrity of existing collective bargaining agreements to the maximum extent possible. I commend both the unions and rail management for their cooperative attitude that has been exhibited during this proceeding. I encourage and expect good-faith cooperation in negotiating issues remaining between rail management and those unions that have not yet settled with the applicants.

I conclude that this transaction meets the statutory public interest test for approval. As conditioned, I expect the merger to result in no significant competitive, operational, or environmental problems. I expect any negative impact on rail employees to be ameliorated. I expect the transaction to improve significantly single-line service for many shippers, and result in substantial merger benefits that should allow the carriers to provide service at lower cost. A significant portion of these savings should be passed along to shippers in terms of reduced rates or improved service. I approve of the merger, as conditioned, including the necessary Board oversight. The parties must now work to ensure effective and positive integration of all the elements to truly realize all of the benefits, public and private.

COMMISSIONER BURKES, commenting:

The statute sets forth several factors to be determined when approving or disapproving rail mergers; but in my opinion, chief among the factors is the consideration of whether the Board can find the transaction to be consistent with the public interest. In arriving at that determination the Board is required to balance the benefits of a merger against any harm to competition or to essential services that cannot be mitigated by conditions. Thus, from my point of view, when the Board determines, based on economic and competitive merits, that a transaction is consistent with the public interest, the Board is required by statute to approve and authorize the proposed transaction.

In deciding whether I should vote to approve this merger, I asked myself a very direct question: How do I decide, in the context of a transaction of this sort, with attributes that must be

weighed within the framework of rigorous statutory standards, just what is the public interest based on the statute and agency and judicial precedent. In the context of a proposed merger, and from the shipping public's point of view, the public interest should mean competitive options and reasonable rail service. By contrast, for railroads, the public interest should reflect growth and opportunity, better returns on investments, greater and efficient use of assets, and infrastructure improvements.

Not lost in this should be the interests of rail-labor. From my point of view, a finding of the public interest must include a determination of fair working conditions, wages, and enhanced job security.

In addition, the environment and concerns of impacted communities must be considered. In this regard, I believe a finding of public interest should mean the merger presents fair and equitable arrangements in enhancement of the economy, the environment, and the quality of life.

So it was within this overall framework that I looked at the facts of this case. As I stressed at the outset of oral argument in these proceedings, while I may be new to the STB, I was not new to this process, since I have deliberated over many proceedings involving, among others, the legal, economic, and social aspects of transportation issues. I also stressed that I consider myself experienced and adept at listening to arguments, filtering out irrelevancies, and discerning when issues are being adequately addressed by all sides. Know also that I studied the record in these proceedings strenuously.

Based on the facts, evidence, arguments of record, and the briefing and recommendations of the Board's professional staff, I find that this merger satisfies the public interest factors of 49 U.S.C. 11324(c), and I vote to approve it, with the suggested conditions outlined by the Board.

Specifically, first, this merger is end-to-end, with CN and IC joining operations at a single point, Chicago. Thus, at the outset, in the context of this merger, the analysis is fundamentally different from that of recent mergers. For example, this transaction should not result in any track redundancies, abandonments, or reroutings. As such, I believe that any disruptions to employees, shippers, and communities should be minimal, as should the risks of the kinds of service failures that have recently plagued the industry.

The Board's Section of Environmental Analysis prepared a detailed and thorough environmental assessment in which they identified the hazardous material transport concerns and recommended appropriate conditions. I am satisfied.

Likewise, I am convinced that the merger will not disproportionately impact employees of these carriers in the United States. Applicants state that 311 positions may be abolished, and 138 positions may be transferred as a result of the transaction. In my opinion, however, the Board has carefully measured these effects and has appropriately determined that affected rail employees shall

enjoy every form of protective benefit, both substantively and procedurally, they are entitled to, including no diminution, whatsoever, of any right under New York Dock for those who may refuse to accept a site transfer to Canada, regardless of the reason. This aspect of the merger too, satisfies me.

Finally, with respect to the Alliance and Access agreements between the applicants and the Kansas City Southern, I find unconvincing the arguments of some that such agreements have transformed this proceeding to a three-way merger, or that such agreements amount to unauthorized control and/or collusive activity. The genesis of these agreements pre-dates the merger, and I am satisfied, based on the record, the parties' arguments, and the views of the Board's professional staff, that the agreements do not give rise to the kinds of economic and competitive harms feared by some critics. Indeed, I find it not just noteworthy, but persuasive, that the agreements, by their terms, do not apply to situations where two or more participants, now or in the future, are the only head-to-head competitors at origin or destination. I suspect that it was such internal safeguards that resulted in the Department of Justice's abstention here. I am satisfied.

Furthermore, I am a firm believer in the Board's oversight. Just as we expect the parties to honor their commitments and representations, be advised that so too will the Board adhere to its responsibility to monitor these proceedings; and on a moment's notice, will be ready to take corrective action now or in the future.

In conclusion, I find that this merger meets the public interest tests under the statute. I believe that the merger, as conditioned by the Board, will enhance single-line service for many shippers, and produce positive economies of scale, that should result in lower carrier costs and rates. This merger should not result in significant competitive, operational, or environmental problems. And its impact on rail employees, while significant, should nonetheless be mitigated by appropriate substantive and procedural protective benefits.

I vote to approve this merger, subject to the conditions recommended by the Board's staff.

APPENDIX A: ABBREVIATIONS

AF&PA	American Forest & Paper Association
ARU	Allied Rail Unions
ATDA	American Train Dispatchers Association
ATDD	American Train Dispatchers Department of BLE
BASF	BASF Corporation
BC	Province of British Columbia
BLE	Brotherhood of Locomotive Engineers
BMWE	Brotherhood of Maintenance of Way Employes
BNSF	The Burlington Northern and Santa Fe Railway Company
Board	Surface Transportation Board
Borden	Borden Chemicals and Plastics Ltd.
BRC	The Belt Railway Company of Chicago
BRCP	Exxon's Baton Rouge Chemical Plant
BRFP	Exxon's Baton Rouge Finishing Plant
BRPO	Exxon's Baton Rouge Polyolefins Plant
BRPP	Exxon's Baton Rouge Plastics Plant
BRRF	Exxon's Baton Rouge Refinery
BRS	Brotherhood of Railroad Signalmen
CASO	Canada Southern Railway Company
CBA	Collective Bargaining Agreement
CCP	Chicago, Central & Pacific Railroad Company
CCPH	CCP Holdings, Inc.
CFR	Code of Federal Regulations
Champion	CIC and Weldwood
CIC	Champion International Corporation
CMW	Chicago, Missouri and Western Railway Co.
CN	CNR, GTC, and GTW, and their wholly owned subsidiaries (excluding IC Corp. and its wholly owned subsidiaries)
CNCP Partnership	CNCP Niagara Detroit Partnership
CNR	Canadian National Railway Company
CNW	Chicago and North Western Railway Company
Conrail, CR.....	Consolidated Rail Corporation
CP	CPR, St.L&H, Soo, and D&H
CPR	Canadian Pacific Railway Company
CRRC	Cedar River Railroad Company
CSX	CSX Transportation, Inc.
D&H	Delaware and Hudson Railway Company, Inc.
DEA	Draft Environmental Assessment
DOJ	United States Department of Justice

DOT	United States Department of Transportation
DRGW	The Denver and Rio Grande Western Railroad Company
DRT	Detroit River Tunnel
DRTC	Detroit River Tunnel Company
DTI	Detroit, Toledo and Ironton Railroad Company
DTSL	Detroit and Toledo Shore Line Railroad Company
DWP	Duluth, Winnipeg and Pacific Railway Company
EA	Environmental Assessment
ECA	Exxon Chemical Americas
ECC	Exxon Chemical Company
EUSA	Exxon Company, U.S.A.
Exxon	Exxon Corporation, ECA, ECC, and EUSA
FEA	Final Environmental Assessment
FRA	Federal Railroad Administration
Frisco	St. Louis-San Francisco Railway Company
GTC	Grand Trunk Corporation
GTW	Grand Trunk Western Railroad Incorporated
GWWR	Gateway Western Railway Company
IAM	International Association of Machinists and Aerospace Workers
IBB	International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers
IBEW	International Brotherhood of Electrical Workers
IC	IC Corp., ICR, CCP, and CRRC, and their wholly owned subsidiaries
IC Corp.	Illinois Central Corporation
ICC	Interstate Commerce Commission
ICCTA or Act	ICC Termination Act of 1995
ICR	Illinois Central Railroad Company
IMRL	I & M Rail Link, LLC
KCS	The Kansas City Southern Railway Company and Gateway Western Railway Company, and all other wholly owned subsidiaries of Kansas City Southern Industries, Inc.
Merger Sub	Blackhawk Merger Sub, Inc.
MP	Milepost
NAFTA	North American Free Trade Agreement
NCFO	National Council of Firemen and Oilers
NDDA	North Dakota Department of Agriculture
NDDOT	North Dakota Department of Transportation
NDPSC	North Dakota Public Service Commission
NEPA	National Environmental Policy Act
NITL	The National Industrial Transportation League

North Dakota	North Dakota Governor Edward T. Schafer, NDDA, NDDOT, and NDPSC
NRBC	Niagara River Bridge Company
NS	Norfolk Southern Railway Company
NS	Province of Nova Scotia
OMR	Ontario Michigan Rail Corporation
ON	Province of Ontario
Oxy Chem	Occidental Chemical Corporation
PQ	Province of Quebec
RGI	Rio Grande Industries, Inc.
RLA	Railway Labor Act
RLEA	Railway Labor Executives' Association
Rubicon	Rubicon Inc.
SCTC	St. Clair Tunnel Company
SF	The Atchison, Topeka and Santa Fe Railway Company
Shell.....	Shell Corporation
Soo	Soo Line Railroad Company
SMWIA	Sheet Metal Workers International Association
SP	SPT, SSW, SPCSL, and DRGW
SPCSL	SPCSL Corp.
SPT	Southern Pacific Transportation Company
SSW	St. Louis Southwestern Railway Company
STB	Surface Transportation Board
St.L&H	St. Lawrence & Hudson Railway Company Limited
TCU	Transportation Communications International Union
Tex Mex	The Texas Mexican Railway Company
TFI	The Fertilizer Institute
TFM	Transportación Ferroviaria Mexicana, S.A. de C.V.
TPA	Test Period Allowance
Uniroyal	Uniroyal Chemical Company, Inc.
UP	Union Pacific Railroad Company
UTU	United Transportation Union
VCA	Voluntary Coordination Agreement
Vulcan	Vulcan Chemicals
WCL	Wisconsin Central Ltd.
Weldwood	Weldwood of Canada, Limited
WJPA	Washington Job Protection Agreement of 1936
WRC	Waterloo Railway Company

APPENDIX B: THE KCS TRACKAGE RIGHTS APPLICATION

The KCS/IC Springfield Interchange. The KCS/IC interchange at Springfield, IL, that is projected to be one of the two main interchange points for traffic handled by the CN/IC/KCS Alliance, already exists. Applicants and KCS contend, however, that the GWWR trackage rights on which this interchange rests are subject to restrictions that will preclude applicants from achieving all of the efficiencies made possible by the CN/IC control transaction. The KCS trackage rights application seeks, in essence, the removal of these restrictions.

Background. The restrictions to which the GWWR trackage rights are subject, and the precise tracks over which GWWR's trackage rights operations are now conducted, reflect a series of transactions that have occurred over the past decade and a half.¹²⁷

(1) In the mid-1980s: (a) the Chicago, Missouri and Western Railway Co. (CMW) acquired (i) two IC lines (a north-south Chicago-Springfield-East St. Louis line and a west-east Kansas City-Springfield line) that connected in Springfield at a point now known as IC Connection,¹²⁸ and (ii) trackage rights in Springfield over IC tracks not acquired by CMW that ran between IC Connection and Brickyard Junction, and between Brickyard Junction and IC's Avenue Yard,¹²⁹ and (b) IC apparently received back (or retained) trackage rights over a few miles of track at the eastern end of the Kansas City-Springfield line, i.e., the portion lying between (i) an elevator located southwest of Cockrell, IL, at or near MP 193.5, and (ii) IC Connection.

¹²⁷ The record contains three maps that depict past and present rail lines in Springfield. See CN/IC-6 at 423 (map submitted by applicants and KCS); UP-8, Tab C, Ex. 1 (map submitted by UP); NS-8, Tab D, Figure 1-10 (map submitted by NS prior to the withdrawal of its NS-8 comments).

¹²⁸ IC Connection, which is also known as Old KC Jct. and which, in the mid-1980's, was apparently known as KC Jct., is located at or near MP 187.8.

¹²⁹ IC's Avenue Yard is located approximately 3.5 miles north of IC Connection, on a north-south IC line that passes through Springfield and that was not acquired by CMW. The IC Connection-Brickyard Junction tracks run west-east between IC Connection (at or near MP 187.8) and Brickyard Junction (at or near MP 186.1); the Brickyard Junction-Avenue Yard tracks are part of the north-south line itself.

(2) In August 1989, CMW,¹³⁰ N&W,¹³¹ and IC,¹³² and various local authorities, entered into an agreement that provided for the relocation of operations then conducted over certain CMW and N&W tracks¹³³ to new tracks that would be owned by N&W after having been constructed: (a) on a right-of-way extending in a generally west-east direction between (i) approximately the point of intersection of the N&W line and U.S. Hwy. 36, and (ii) a point on the Chicago-Springfield-East St. Louis line known as Hazel Dell (located at or near MP 188.9); and (b) on a right of way extending in a generally north-south direction, and running parallel to (and, indeed, immediately adjacent to) the Chicago-Springfield-East St. Louis line, between (i) Hazel Dell and (ii) a point on the Chicago-Springfield-East St. Louis line known as Iles (which was, in 1989, the junction of the N&W line and the Chicago-Springfield-East St. Louis line).¹³⁴

(3) At a later date in 1989: (a) SPCSL Corp. (SPCSL) acquired from CMW (i) the Chicago-Springfield-East St. Louis line, (ii) a short segment at the eastern end of the Kansas City-Springfield line, i.e., the segment lying between MP 192.4 (at or near Cockrell, IL) and IC Connection, and (iii) the trackage rights over the IC tracks between IC Connection and IC's Avenue Yard;¹³⁵ and (b) in an agreement referred to as the Ridgely Agreement, CMW acquired from SPCSL (i) certain limited trackage rights over SPCSL's (formerly CMW's) lines between the CMW/SPCSL connection at MP 192.4 and SPCSL's (formerly CMW's) Ridgely Yard (located on the Chicago-Springfield-East St. Louis line, approximately 6 miles north of IC Connection), and (ii) certain limited rights to use

¹³⁰ CMW was, by this time, in bankruptcy. For ease of reference, however, we will refer to agreements entered into by CMW's Trustee as if they had been entered into by CMW itself.

¹³¹ Norfolk & Western Railway Company was known as N&W.

¹³² IC was a party to the August 1989 agreement even though that agreement does not appear to have involved the relocation of any tracks owned by IC. IC's participation in the August 1989 agreement apparently reflected the fact that it had trackage rights over the eastern end of the Kansas City-Springfield line.

¹³³ The CMW tracks were at the eastern end of the Kansas City-Springfield line, between approximately MP 191.1 and IC Connection. The N&W tracks ran roughly parallel to, and a few city blocks north of, the CMW tracks.

¹³⁴ Iles (sometimes spelled "Isles") lies a short distance (perhaps four or five city blocks) north of IC Connection. There appears to be, in the vicinity of Iles, a short gap (perhaps no more than a city block in length) in the Chicago-Springfield-East St. Louis line that is bridged by trackage rights over the N&W (now the NS) line. This gap and these trackage rights apparently existed prior to 1989.

¹³⁵ See Rio Grande Industries, et al. — Pur. & Track. — CMW Ry. Co., 5 I.C.C.2d 952 (1989) (RGI/CMW).

Ridgely Yard. The rights acquired by CMW (i.e., the trackage rights and Ridgely Yard use rights) were limited in this crucial respect: CMW could not use such rights to handle any traffic moving from, to, or via the Chicago Switching District, other than traffic handled on a joint-line basis with SPCSL or under haulage arrangements with SPCSL.¹³⁶

(4) In January 1990, GWWR, which was then known as CMW Acquisition Corp., acquired from CMW: (a) the Kansas City-Springfield line between Kansas City, MO, and MP 192.4; (b) the limited trackage rights over SPCSL's lines between the CMW/SPCSL connection at MP 192.4 and SPCSL's Ridgely Yard; and (c) the limited rights to use Ridgely Yard.¹³⁷

(5) In 1994, operations were commenced by N&W, by SPCSL, by GWWR, and by IC on the newly constructed N&W tracks.¹³⁸ SPCSL commenced operations over the portion of the new N&W tracks that lies between a point known as New KC Jct. (located at or near MP 190.6) and Iles. GWWR commenced operations: over the New KC Jct.-Hazel Dell portion of the new N&W tracks (as respects traffic interchanged with SPCSL at Ridgely Yard or with IC at Avenue Yard); over the Hazel Dell-Iles portion of the new N&W tracks (as respects traffic interchanged with SPCSL at Ridgely Yard); and over the Hazel Dell-IC Connection portion of the Chicago-Springfield-East St. Louis line (as respects traffic interchanged with IC at Avenue Yard). IC commenced operations over the New KC Jct.-Hazel Dell portion of the new N&W tracks and over the Hazel Dell-IC Connection portion of the Chicago-Springfield-East St. Louis line. The operations conducted over the new N&W tracks by SPCSL, by GWWR, and by IC are governed by a SPCSL/N&W trackage rights agreement that permits SPCSL, as N&W's tenant, to allow GWWR and IC to operate over the N&W tracks as SPCSL's tenants.¹³⁹ The operations conducted over the Hazel Dell-IC Connection portion of the Chicago-Springfield-East St. Louis line by GWWR and IC are apparently governed by one or more agreements negotiated with UP, although the record is not entirely clear in this regard.

¹³⁶ See CN/IC-6 at 424-38.

¹³⁷ See CMW Acquisition Corp. — Acquisition and Operation Exemption — Lines of Chicago, Missouri and Western Railway Company Between Kansas City, MO, and Cockrell and East St. Louis, IL, Finance Docket No. 31567 (ICC served Dec. 15, 1989). See also KCS-17 at 104.

¹³⁸ The vacated N&W tracks were subsequently removed, as were the vacated SPCSL (formerly CMW) tracks, in each case with the understanding that the rights of way would eventually be transferred to the local authorities.

¹³⁹ See SPCSL Corp. — Trackage Rights Exemption — Norfolk and Western Railway Company, STB Finance Docket No. 33351 (STB served Feb. 12, 1997).

(6) In 1996, SPCSL became a wholly owned subsidiary of Union Pacific Corporation, of which UP is also a wholly owned subsidiary.¹⁴⁰

(7) In November 1996, the Ridgely Agreement was amended by an agreement between GWR and SPCSL that had the effect of allowing a GWR/IC interchange at Springfield for traffic moving from, to, or via the Chicago Switching District, provided, however, that such traffic is originated or terminated (a) on GWR or its corporate affiliates as they existed on December 20, 1993, (b) at stations west of the 100th meridian¹⁴¹ that were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, (c) at stations in Missouri, Arkansas, or Oklahoma that were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, or (d) in the Kansas City, MO, or Kansas City, KS, switching districts.¹⁴²

¹⁴⁰ See 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, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (UP/SP).

¹⁴¹ The 100th meridian is the arc of longitude that lies 100° west of the prime meridian, which is itself the arc of longitude that passes through Greenwich, England. The 100th meridian appears on a map of the United States as a north-south line running through North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

¹⁴² See CN/IC-6 at 439-41. The November 1996 amendments reflect amendments initially made in an agreement between GWR and SPCSL in December 1993. See CN/IC-6 at 408 n.5; UP-8, Tab D at 9.

(8) In 1997 and 1998: GWWR became a wholly owned KCS subsidiary;¹⁴³ SPCSL was merged into UP;¹⁴⁴ and N&W was merged into NS.¹⁴⁵

The Alliance. The CN/IC/KCS Alliance envisions an increased GWWR/IC interchange at Springfield, with GWWR trackage rights bridging the gap between MP 192.4 and Avenue Yard. Such operations will have to be conducted over UP tracks (between MP 192.4 and New KC Jct.),¹⁴⁶ over NS tracks (between New KC Jct. and Hazel Dell),¹⁴⁷ over UP tracks (between Hazel Dell and IC Connection),¹⁴⁸ and (using the Brickyard Junction route) over IC tracks (between IC Connection and Brickyard Junction, and between Brickyard Junction and Avenue Yard).¹⁴⁹ Applicants and KCS insist that the Brickyard Junction route is the only efficient and practical way for GWWR and IC to interchange traffic moving between the Chicago area, on the one hand, and, on the other, Kansas City and points west or south of Kansas City.¹⁵⁰

¹⁴³ See Kansas City Southern Industries, Inc., KCS Transportation Company, and The Kansas City Southern Railway Company — Control — Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997) (KCS/GWWR).

¹⁴⁴ See 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, Finance Docket No. 32760, Decision No. 74, slip op. at 1 n.3 (STB served Aug. 29, 1997).

¹⁴⁵ See Norfolk Southern Railway Company — Merger Exemption — Norfolk and Western Railway Company, STB Finance Docket No. 33648 (STB served Aug. 31, 1998).

¹⁴⁶ The segment between MP 192.4 and New KC Jct. is known as the Airline Block and is approximately 1.8 miles in length.

¹⁴⁷ The segment between New KC Jct. and Hazel Dell is approximately 1.7 miles in length.

¹⁴⁸ The segment between Hazel Dell and IC Connection is approximately 1.1 miles in length.

¹⁴⁹ The record is not entirely clear as to the source of GWWR's trackage rights over IC's tracks between IC Connection and Brickyard Junction, and between Brickyard Junction and Avenue Yard. The context suggests, however, that these trackage rights were acquired by GWWR (then known as CMW Acquisition Corp.) from CMW in January 1990.

¹⁵⁰ GWWR can access IC's Avenue Yard via two partially overlapping routes: the Brickyard Junction route; and an apparently rarely used backup route (not heretofore referenced) which runs via
(continued...)

Applicants and KCS note, however, that Sections 1 and 12 of the 1989 CMW/SPCSL Ridgely Agreement, as amended by the 1996 GWWR/SPCSL agreement, pose obstacles to the GWWR/IC interchange at Avenue Yard that is contemplated by the Alliance. These obstacles would apply to each of the two routings that could be utilized by GWWR between MP 192.4 and Avenue Yard: the Brickyard Junction route (which applicants and KCS would prefer to use); and the Ridgely Yard route (which applicants and KCS would prefer not to use, except on an emergency basis on occasions on which use of the Brickyard Junction route is not feasible).

Section 1 provides, in essence, that the rights granted to GWWR can be used to handle IC traffic moving from, to, or via the Chicago Switching District if, but only if, such traffic is originated or terminated (a) on GWWR or its corporate affiliates as they existed on December 20, 1993, (b) at stations west of the 100th meridian which were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, (c) at stations in Missouri, Arkansas, or Oklahoma which were not served by SPCSL or its corporate affiliates as they existed on December 20, 1993, or (d) in the Kansas City, MO, or Kansas City, KS, switching districts.¹⁵¹

¹⁵⁰(...continued)

Ridgely Yard. The Brickyard Junction route entails operation by GWWR over UP tracks between MP 192.4 and New KC Jct., over NS tracks between New KC Jct. and Hazel Dell, over UP tracks between Hazel Dell and IC Connection, and over IC tracks between IC Connection and Avenue Yard (via Brickyard Junction). The Ridgely Yard route entails operation by GWWR over UP tracks between MP 192.4 and New KC Jct., over NS tracks between New KC Jct. and Hazel Dell, over either NS or UP tracks between Hazel Dell and Iles, over UP tracks between Iles and Ridgely Yard, and over I&M (Illinois & Midland Railroad, Inc., formerly the Chicago & Illinois Midland Railroad Company) tracks between Ridgely Yard and Avenue Yard (although the record is not entirely clear as to the source of GWWR's trackage rights over the I&M line between the two yards). The Brickyard Junction route is preferred because it is a head-on move, whereas the Ridgely Yard route requires GWWR either to run the locomotive around the train at Ridgely Yard or to shove the train on the I&M tracks from Ridgely Yard to Avenue Yard.

¹⁵¹ Section 1, as amended in 1996, provides that the rights granted CMW (now GWWR) under the Ridgely Agreement are solely for the purpose of interchanging cars with SPCSL and facilitating interchanges with IC, I&M, and NS, "of traffic not moving to, from, or via the Chicago Switching District, provided, however, that User [i.e., GWWR] and its affiliates shall have the right to interchange or to connect with IC, and IC's successors or assigns, at Springfield, Illinois for all traffic moving to, from or via the Chicago Switching District, provided that such traffic is originated or terminated (a) on User or its corporate affiliates as they existed on December 20, 1993, (b) at stations west of the 100th meridian which were not served by Owner [i.e., SPCSL] or its corporate affiliates as they existed on December 20, 1993, (c) at stations in Missouri, Arkansas or Oklahoma which were not served by Owner (continued...)

Section 12 provides, in essence, that the rights granted to GWWR will terminate forthwith if GWWR gains access broader than the access provided by Section 1 to traffic moving from, to, or via the Chicago Switching District, or takes any other action which expands the access provided by Section 1 to traffic moving from, to, or via the Chicago Switching District and which is inconsistent with using UP as GWWR's sole connecting carrier for such traffic.¹⁵²

The KCS Trackage Rights Application. In view of the restrictions imposed by the Ridgely Agreement, applicants and KCS seek the entry of an order under 49 U.S.C. 11102 permitting GWWR to use without restriction the three connected segments of trackage that lie between MP 192.4 and IC Connection: the UP tracks between MP 192.4 and New KC Jct.; the NS tracks between New KC Jct. and Hazel Dell; and the UP tracks between Hazel Dell and IC Connection. Applicants and KCS insist that, without such relief, GWWR and IC will be unable to establish an efficient interchange necessary to serve effectively the new competitive traffic movements made possible by the CN/IC control transaction, as augmented by the CN/IC/KCS Alliance. Applicants and KCS claim that establishment of a

¹⁵¹(...continued)

or its corporate affiliates as they existed on December 20, 1993, or (d) in the Kansas City, Missouri or Kansas City, Kansas switching districts. The rights granted hereby may not be used to carry any traffic which originates, terminates, or is forwarded or is received within or moves via the Chicago Switching District (other than, as referenced above, on a joint-line basis with SPCSL interchanging at Ridgely Yard or under haulage arrangements with SPCSL whereby SPCSL physically transports the traffic to or from the Chicago Switching District, as contemplated by a separate agreement of even date herewith [i.e., November 1989] between the parties hereto)." See CN/IC-6 at 425 (the 1989 agreement) and at 440 (the 1996 amendment). See also UP-8 at 71 (the "separate agreement" gave GWWR commercial access via SPCSL to Chicago and Chicago connecting railroads).

¹⁵² Section 12, as amended in 1996, provides: "Except as provided in Section 1, if User [i.e., GWWR] (or any successor to User's interest in the Roodhouse-Kansas City Line) [Roodhouse, IL, is a point on the Kansas City-Springfield line] or any affiliate thereof at any time obtains any access (other than through interchange with Owner [i.e., SPCSL] or haulage by the Owner) to serve or move through the Chicago Switching District to, from or via Springfield or its environs (which for this purpose will mean any place within 25 miles of Springfield), whether by trackage, haulage, voluntary coordination or any other means, or enters into any other agreement or takes any other action which is inconsistent with using Owner as User's sole connecting carrier for traffic moving to, from or via the Chicago Switching District to, from or via Springfield or its environs, this Agreement and the trackage rights and other rights provided herein shall terminate forthwith. If there is any material noncompliance with the limitations on traffic for which the trackage rights provided herein may be used or with the other limitations on use specified herein, this Agreement and the trackage and other rights provided herein shall terminate forthwith." See CN/IC-6 at 431-32 (the 1989 agreement) and at 440 (the 1996 amendment).

CN/IC-GWWR interchange in Springfield may also alleviate congestion in Chicago and reduce the level of traffic potentially implicating environmental concerns. See CN/IC-56A at 217; KCS-17 at 116-17. Applicants and KCS add that, unless UP consents to the removal of the restrictions imposed by the Ridgely Agreement, the imposition of terminal trackage rights under 49 U.S.C. 11102 will be necessary to override this impediment to efficient implementation of the CN/IC control transaction. See CN/IC-7 at 143.¹⁵³

Applicants and KCS contend: that the short segments of track subject to the KCS trackage rights application are "terminal facilities," as that term is used in 49 U.S.C. 11102(a);¹⁵⁴ that the sought trackage rights would enhance the competition provided by the CN/IC control transaction, particularly in the Canada-Chicago-Kansas City corridor, and are therefore clearly in the public interest; and that denial of the sought trackage rights would significantly constrict the efforts of applicants and KCS to provide competitive interline service via Springfield, and would thereby frustrate the public interest.¹⁵⁵ Applicants and KCS further contend that use, by GWWR, of the described terminal facilities is practicable, and would not substantially interfere with the ability of UP and NS to handle their own business.¹⁵⁶

¹⁵³ Applicants and KCS note that we are being asked to impose the rights GWWR already has "free of [the] contractual limitations" to which they are presently subject. See CN/IC-6 at 410. Applicants and KCS add: that, except as indicated, no changes in existing agreements for control of the tracks at issue are anticipated; that UP and NS will continue to maintain and dispatch their own tracks; that GWWR will continue to operate on those tracks as a tenant; that through train service is all that is contemplated by the KCS trackage rights application; that GWWR does not seek the right to serve any industries it does not already have access to serve; and that GWWR does not seek to perform switching or blocking operations over the rail lines of either UP or NS.

¹⁵⁴ Applicants and KCS claim that, within the railroad industry, Springfield is generally considered a terminal area.

¹⁵⁵ KCS argues that GWWR will be CN/IC's only neutral connection at Springfield for traffic originating/terminating in Kansas City and moving in the Kansas City-Chicago corridor to/from CN points beyond Chicago. KCS concedes that UP and NS will also be able to provide Kansas City-Springfield connections for CN/IC, but claims that these connections will not be "neutral" (because UP and NS operate their own Kansas City-Chicago routes, and will therefore prefer to interchange traffic in Chicago, and not in Springfield). See KCS-17 at 114-16.

¹⁵⁶ Applicants and KCS claim that additional trains could be accommodated on the existing trackage, without disrupting operations or necessitating the construction of additional facilities.

Applicants and KCS indicate that they are prepared to negotiate compensation terms with UP as provided in 49 U.S.C. 11102(a), and, with an eye to expediting the full achievement of the public benefits of the CN/IC control transaction, they ask that we not require that compensation terms be established before GWWR is able to begin unrestricted use of the described terminal facilities. Compensation issues, applicants add, need not be addressed unless and until we grant the KCS trackage rights application. See CN/IC-56A at 221.

The KCS Trackage Rights Application: Purposes Served. The KCS trackage rights application, as initially filed on July 15, 1998, emphasizes both the CN/IC control transaction and the CN/IC/KCS Alliance: the restrictions must be removed, it is argued, to allow CN/IC and KCS to serve effectively the new competitive traffic movements made possible by the control transaction, as augmented by the Alliance. See CN/IC-6 at 405. The rebuttal submissions filed on December 16, 1998, continue to emphasize the control transaction, but generally place less emphasis on the Alliance. The relief sought, applicants claim, will enable applicants to achieve the efficiencies fostered by the control transaction by interchanging at Springfield with GWWR significant traffic that they otherwise could not effectively interchange; “[t]hat the Alliance would be a part of the existing environment when the CN/IC merger is implemented,” applicants further claim, “does not mean that the trackage rights are sought in aid of the Alliance as opposed to the Transaction”; and the KCS trackage rights application, applicants add, “has its nexus to and is primarily in aid of the Transaction, not the Alliance.” See CN/IC-56A at 210-11. “A removal of the Springfield restrictions (which is the practical impact of the grant of terminal trackage rights) is necessary,” KCS argues, “to realize one of the major benefits of the CN/IC merger, and to facilitate the flow of traffic between CN/IC and KCS/GWWR.” See KCS-17 at 104.

Midtec Analysis. UP contends that the KCS trackage rights application must be denied for failure to meet the competitive access standards of Midtec Paper Corporation v. CNW et al., 3 I.C.C.2d 171 (1986) (Midtec). Applicants disagree: “UP also relies erroneously upon the ICC’s Midtec standard for competitive access via reciprocal switching under Section 11102 in contexts other than merger conditions. In UP/SP the Board made clear that (as UP had argued there) Midtec does not apply to imposition of terminal trackage rights in the context of a merger.” CN/IC-62 at 48. KCS takes an even more expansive view of our 49 U.S.C. 11102(a) jurisdiction: “[T]he scope of the Board’s authority under the ‘public interest’ test is not limited to granting a terminal trackage rights application simply to alleviate an anticompetitive impact of a merger or to impose a merger condition. The public interest test has also been applied to grant terminal trackage rights in a number of different circumstances: (1) to supply short missing links between merging carriers; (2) to ameliorate the anticompetitive effects of a merger; (3) to impose conditions on a merger; and (4) to implement privately negotiated settlement agreements as part of a merger proceeding. As with the prior merger cases, the grant of the terminal trackage rights application is in the ‘public interest,’ as that term is defined in the merger context, because it is required to implement the Alliance, will improve the interchange between CN/IC and KCS/GWWR, enhance service capabilities, and provide an effective alternative to ineffective and problematic haulage rights.” KCS-20 at 21 (record citation and paragraph break omitted).

Certain Technical Details. (1) Most of the relevant pleadings submitted in this proceeding by applicants and/or KCS indicate that the STB Finance Docket No. 33556 (Sub-No. 1) trackage rights are being sought for GWWR. See, e.g., CN/IC-6 at 49 (line 8) and 404 (line 22); CN/IC-56A at 205 (line 12); KCS-17 at 134 (lines 21-22). Applicants and KCS, however, have also asked that we order that the tracks subject to the KCS trackage rights application "may be used by GWWR *and* IC for movements of traffic they interchange in Springfield without regard to the limitations of the Ridgely Yard agreement and related agreements that would preclude or restrict such interchange or terminate the Ridgely Yard agreement." See CN/IC-6 at 415 (emphasis added). We will assume that the trackage rights sought in the KCS trackage rights application are sought only for GWWR, and not also for IC: (1) because, as noted above, most of the relevant pleadings indicate that such trackage rights are being sought for GWWR, not for IC; and (2) because, as noted below, applicants and KCS have argued that operation by IC between MP 193.5 and IC Connection would be neither practical nor efficient.

(2) Applicants and KCS indicate that, because it is unclear whether the limitations of the Ridgely Agreement apply to GWWR's use of the new NS tracks (as to which UP has the authority to grant trackage rights to GWWR), they have included the new NS tracks in the KCS trackage rights application as a precaution.

(3) There are, between Hazel Dell and Iles (or, more precisely, between the Hazel Dell Interlocking Plant and the Iles Avenue Interlocking Plant), three north-south tracks that all concerned apparently regard as one set of "joint" tracks: an NS siding track (this is the westernmost track); an NS mainline track (this is the center track); and a UP mainline track (this is the easternmost track, and is part of the Chicago-Springfield-East St. Louis line). Between Hazel Dell and Iles, the only crossovers between these tracks are located at the Hazel Dell and Iles Avenue Interlocking Plants. Because there is not, at IC Connection, a crossover between the NS tracks and the UP tracks, GWWR trains moving via the Brickyard Junction route between MP 192.4 and Avenue Yard must run, between Hazel Dell and IC Connection, on the UP tracks. See NS-8, Tab E, Ex. F (a schematic drawing submitted by NS prior to the withdrawal of its NS-8 comments).

(4) GWWR apparently has, pursuant to a GWWR/UP agreement entered into in November 1996, the right to purchase the UP tracks between MP 192.4 and New KC Jct. See UP-8, Tab D at 10 (lines 3-4 and 8-11). The implications, if any, of this right to purchase do not appear to have been addressed by any of the parties to this proceeding. The evidence of record suggests that the purchase of these tracks by GWWR would allow GWWR to create, via the Brickyard Junction route, an unrestricted GWWR/IC interchange at Avenue Yard if but only if: (a) GWWR has, or can acquire, unrestricted trackage rights over the NS track between New KC Jct. and Hazel Dell; (b) GWWR has, or can acquire, unrestricted trackage rights over the NS mainline track between Hazel Dell and a point in the vicinity of IC Connection; and (c) a crossover extending several hundred feet and cutting across the UP mainline track can be constructed in the vicinity of IC Connection between the NS mainline track and the IC track running east from IC Connection.

An Alternative GWR/IC Interchange. Applicants and KCS concede that IC has the right to operate trains between MP 193.5 and IC Connection, over GWR tracks (between MP 193.5 and MP 192.4), over UP tracks (between MP 192.4 and New KC Jct.), over NS tracks (between New KC Jct. and Hazel Dell), and over UP tracks (between Hazel Dell and IC Connection). Applicants and KCS insist, however, that a GWR/IC interchange conducted via IC's trackage rights would be neither practical nor efficient: because there are, at the eastern end of GWR's Kansas City-Springfield line (i.e., between MP 193.5 and MP 192.4), no facilities that would allow for a GWR/IC interchange;¹⁵⁷ and because, even if GWR and IC could move their interchange point to the eastern end of GWR's Kansas City-Springfield line, such a move might trigger certain provisions of the Ridgely Agreement (the reference is apparently to Section 12) that might jeopardize GWR's ability to use the Ridgely Yard route, both as an alternative GWR/IC interchange route¹⁵⁸ and as a route to facilitate GWR/I&M and GWR/NS interchanges.¹⁵⁹

Declaratory Order. Applicants and KCS contend, in essence, that, if we approve the CN/IC control transaction but do not grant the KCS trackage rights application in its entirety, we should hold that any consent requirements in the underlying trackage rights agreements¹⁶⁰ that would prevent the CN/IC control transaction from being carried out as contemplated¹⁶¹ will be overridden pro tanto¹⁶² by

¹⁵⁷ Applicants and KCS indicate: that GWR's nearest yard of any size is located at Roodhouse, nearly 40 miles southwest of Springfield; and that IC does not currently use the NS and UP tracks between New KC Jct. and IC Connection for through freight trains, although it does use such tracks for local trains and for unit grain trains from Cockrell.

¹⁵⁸ KCS notes that the Ridgely Yard route allows for an alternative GWR/IC interchange routing in case of emergency, track maintenance projects, etc.

¹⁵⁹ Applicants and KCS concede, however, that, at present, virtually no traffic moves via a GWR/NS interchange at Springfield.

¹⁶⁰ This is apparently a reference to the 1989 CMW/SPCSL Ridgely Agreement, as amended by the 1996 GWR/SPCSL agreement.

¹⁶¹ The CN/IC control transaction as contemplated by applicants includes the Kansas City-Chicago operations made possible by the CN/IC control transaction as augmented by the CN/IC/KCS Alliance.

¹⁶² *Pro tanto* means "for so much; for as much as may be; as far as it goes."



the immunizing force of 49 U.S.C. 11321(a). See CN/IC-6 at 412 n.9; CN/IC-56A at 208 n.136; KCS-17 at 130-33.¹⁶³



¹⁶³ Neither applicants nor KCS has argued that any such consent requirements should be overridden pursuant to 49 U.S.C. 11321(a) as necessary to carry out the Alliance Agreement, standing alone. See CN/IC-56A at 211 n.142. Applicants and KCS have argued, however, that, under 49 U.S.C. 11321(a), the Board “may override any impediment to the implementation of a merger or *[a]* settlement agreement related to a merger.” See KCS-17 at 132 (emphasis added). See also CN/IC-56A at 211 (similar argument).

APPENDIX C: COMMENTING PARTIES OTHER THAN LABOR

UNION PACIFIC. UP contends that, whether the transaction contemplated by applicants is a two-way CN/IC control transaction (as applicants argue)¹⁶⁴ or a three-way CN/IC/KCS control transaction (as UP argues), the CN/IC control application is fatally deficient and must therefore be dismissed (with leave to re-file). UP also contends that, if the CN/IC control application is not dismissed, UP should be granted haulage rights on IC's line between Baton Rouge and New Orleans to overcome the anticompetitive effects in that corridor of the CN/IC/KCS Alliance. UP further contends that the KCS trackage rights application should be denied.

CN/IC Control Application: Dismissal Urged. (1) UP contends that the transaction contemplated by applicants is a three-way CN/IC/KCS control transaction. UP argues: that the CN/IC control transaction, the CN/IC/KCS Alliance Agreement, and the CN/KCS Access Agreement are interrelated pieces of a single, unitary, three-way transaction aimed at achieving the close alignment and coordination of the three Alliance railroads; that what the Alliance establishes is not an ordinary interline relationship but, rather, an extraordinary alignment of interests that will focus the operational, marketing, and administrative efforts of the Alliance railroads on furthering their shared Alliance interests; that the Alliance establishes an extensive and unique set of institutional mechanisms and contractual obligations that bind the interests and activities of the Alliance railroads together to further their collective pursuit of Alliance objectives; that, to carry out their shared Alliance objectives, the Alliance railroads are in the process of integrating their operations, customer service, marketing, and information systems functions to a degree unprecedented for independent carriers; that the scope and degree of coordination that the Alliance entails is reflected in the substantial benefits that the Alliance railroads themselves anticipate will flow from the Alliance, and the difficulty they have in distinguishing the effects of the Alliance with respect to CN and IC from those achieved by the CN/IC control transaction; and that, under governing precedents, the relationships that the Alliance railroads are in the process of creating involve common control among CN, IC, and KCS.¹⁶⁵

(2) UP contends that, because the transaction for which approval has been sought (the two-way CN/IC control transaction) is not the transaction actually contemplated by applicants (the three-way CN/IC/KCS control transaction), the CN/IC control application filed by applicants must be dismissed. UP further contends that, on the present record, the CN/IC control application cannot be treated as if it were the CN/IC/KCS control application that should have been filed: (a) because KCS is not a party to the application, and, therefore, the application contains none of the essential facts concerning the

¹⁶⁴ UP generally refers to the CN/IC control transaction as the CN/IC "merger."

¹⁶⁵ UP insists that, because the Alliance is in its infancy, it is too early for a substantial documentary record to have been created reflecting actual day-to-day Alliance activity bespeaking a control relationship.

impacts on KCS (traffic impact, financial impact, labor impact, environmental impact, etc.) of the three-way CN/IC/KCS control transaction; and (b) because the application does not analyze the competitive issues raised by a CN/IC/KCS control transaction, which (unlike a CN/IC control transaction) would not be entirely end-to-end.¹⁶⁶

(3) UP contends that, even if we accept applicants' claim that the transaction contemplated by applicants is a two-way CN/IC control transaction, the CN/IC control application filed by applicants is fatally deficient (and, therefore, will have to be dismissed), because (UP argues) all of the claims of public benefits in the CN/IC control application are based on both the CN/IC control transaction and the CN/IC/KCS Alliance. This, UP argues, is a fatal flaw (even assuming that the transaction contemplated by applicants is a two-way CN/IC control transaction), because (UP claims) the Alliance is intended to achieve, and is already achieving, all of the benefits attributed to the CN/IC control transaction. UP contends: that the Alliance-sponsored integrations of the operations, marketing, customer service, and other functions of the Alliance railroads apply to all CN/IC interline traffic, not merely the portion of such traffic in which KCS also participates; that it necessarily follows that the Alliance is intended to achieve the same benefits that the CN/IC control application attributes to the CN/IC control transaction; that, in fact, there is nothing in the CN/IC control application that demonstrates that the CN/IC control transaction itself will have any measurable public benefits; and that, at the very least, there is no way to determine what portion, if any, of the benefits set forth in the CN/IC control application can be achieved only by CN/IC common control. UP insists that, because the CN/IC control application fails to demonstrate the effects of the CN/IC control transaction, it fails to establish that the CN/IC control transaction will be in the public interest.

(4) UP contends that, if the CN/IC control application is not dismissed, we will have to decide whether to include, in our consideration of that application, the effects of the CN/IC/KCS Alliance. UP further contends that, if our approval of the CN/IC control transaction will imply, pursuant to 49 U.S.C. 11321(a), a grant of antitrust immunity for all steps entailed in carrying out the Alliance, we will have to include, in our consideration of the CN/IC control application, the effects of the CN/IC/KCS Alliance. See UP-8 at 29-30.

Baton Rouge-New Orleans Corridor. UP argues that, prior to the establishment of the CN/IC/KCS Alliance, there was IC vs. KCS competition in the Baton Rouge-New Orleans corridor. UP contends: that, in this corridor, IC and KCS have, on the east bank of the Mississippi River, closely

¹⁶⁶ UP further contends that, if the CN/IC control application is resubmitted as a CN/IC/KCS control application, that application should also address common control of KCS and Tex Mex. UP claims that there are, at present, extensive ownership, management, marketing, operating, and other ties between KCS and Tex Mex, and that, in view of these ties, there is reason to believe that KCS and Tex Mex are presently under common control. See UP-8 at 50 n.77.

parallel tracks that serve a large number of chemical plants and other shipper facilities;¹⁶⁷ that many of these facilities are served by both IC and KCS, either directly or by reciprocal switching; that several of these facilities are rail-served only by IC and KCS; and that, although certain other facilities are served by IC and KCS and are also accessible to UP, UP's ability to provide a competitive alternative is greatly reduced by very high reciprocal switch charges. UP further contends: that IC and KCS compete head-to-head for significant volumes of traffic moving from/to the points that both railroads serve in the Baton Rouge-New Orleans corridor; that both IC and KCS can handle traffic from/to these shippers via competing single-line routes to/from points such as New Orleans, Jackson, and St. Louis; and that both IC and KCS can offer fully independent routes for all traffic flows moving via the New Orleans, Baton Rouge, St. Louis, and Chicago gateways. UP adds that, in addition to the benefits of actual head-to-head competition in the Baton Rouge-New Orleans corridor, the close physical proximity of IC's and KCS's lines in this corridor has led each of IC and KCS to compete aggressively by constructing build-ins between its lines and shipper facilities located on the lines of the other. And, UP indicates, a large number of potential future build-in opportunities still exist.

UP argues that, whether the transaction contemplated by applicants is a two-way CN/IC control transaction (as applicants claim) or a three-way CN/IC/KCS control transaction (as UP claims), the Alliance will result in a diminution of the pre-Alliance IC vs. KCS competition. UP contends: that the Alliance will weld IC and KCS together in a community of interests that IC and KCS are unlikely to breach through vigorous competition among themselves;¹⁶⁸ that the melding of interests achieved by the Alliance will cause personnel at IC and KCS who would otherwise be responsible for carrying out aggressive competition against the other railroad to behave cooperatively, not antagonistically, vis-à-vis their Alliance partner; that the Alliance relationship will substantially diminish the incentives that IC

¹⁶⁷ UP also operates in the Baton Rouge-New Orleans corridor, but its tracks lie on the west bank of the Mississippi River.

¹⁶⁸ The argument that the Alliance will eliminate IC vs. KCS competition has been endorsed by BASF and Borden, two of the three Geismar shippers to which KCS will gain access under the Access Agreement. See the BASF letter dated Oct. 27, 1998 (submitted by UP on Jan. 11, 1999): "We had been engaged in discussions with another railroad recently with the prospects of a build-in from their line to our site. We co-developed construction plans to proceed with the build-in, however, this railroad opted not to pursue our proposal and has aligned itself with the current servicing railroad, thus eliminating our competitive proposition. We believe this prevents the competition we originally agreed to pursue with an alternative to the ICRR and we are deeply disappointed with the end result." See also the Borden statement dated Dec. 3, 1998 (also submitted by UP on Jan. 11, 1999): "We understand that KCS now plans to secure access to our Geismar plant via haulage rights on IC/CN line. But we do not believe that KCS and IC/CN will in fact continue to compete aggressively against each other for our business."

and KCS will have to pursue build-ins in this corridor;¹⁶⁹ and that there is a substantial question whether the Alliance Agreement's "carve-out" provision makes the Alliance inapplicable, even as a formal matter, to all of the situations where IC and KCS are or could be head-to-head competitors.¹⁷⁰

UP argues that, to remedy the anticompetitive effects that the CN/IC control transaction and the Alliance will have in the Baton Rouge-New Orleans corridor, we should grant UP haulage rights on IC's Baton Rouge-New Orleans line, to permit UP to access, in the Baton Rouge area and between Baton Rouge and New Orleans:¹⁷¹ all existing "2-to-1" facilities;¹⁷² all facilities to which IC or KCS has committed to build in (or from which the shipper shall build out); and all facilities that are served directly by IC and KCS and that are also accessed by UP, but only via reciprocal switching at a switch charge so high that reciprocal switching access by UP will not attenuate the loss of IC vs. KCS competition.¹⁷³

UP indicates: that the haulage rights it seeks would allow UP to move haulage traffic to/from UP's established points of interchange with IC at Baton Rouge and New Orleans; that the haulage rights it seeks would be identical, in their compensation, service, and other pertinent terms,¹⁷⁴ to the haulage rights that UP entered into with BNSF, and the Board approved, to preserve competition at various "2-to-1" points in the UP/SP merger proceeding;¹⁷⁵ and that, to replicate the IC vs. KCS competition that

¹⁶⁹ UP claims that, for Geismar shippers other than the three to which KCS will receive access under the Access Agreement, the likelihood of a build-in will be diminished because KCS's Geismar build-in will never be constructed, and KCS will never have a line directly adjacent to these other shippers.

¹⁷⁰ The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements. See UP-8 at 58-59.

¹⁷¹ See UP-8, Tab E at 3-11 (UP has identified the facilities it seeks to access, although its list may not be exhaustive).

¹⁷² A "2-to-1" facility is, in this context, any facility now served by IC and KCS (either directly or via reciprocal switch) and by no other railroad.

¹⁷³ UP concedes that there is a line-drawing problem as to when a switch charge becomes too high, but concludes that, in the present context, the line should be drawn in the area of \$400 per car. See UP-8, Tab E at 8-9.

¹⁷⁴ See UP-8, V.S. Peterson at 11-12.

¹⁷⁵ See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific
(continued...)

exists today via potential build-ins/build-outs, new industry sitings, and transload facilities, the haulage rights UP seeks would also give UP the right to serve (a) any existing transload facilities at "2-to-1" points, (b) any new industries or transload facilities located on the IC line over which UP will have haulage rights, and (c) any future build-ins to or build-outs from a KCS industry from/to the IC line or an IC industry from/to the KCS line (with, in either case, UP's haulage rights running to/from the point of connection between the build-in/build-out and the IC line).¹⁷⁶

KCS Trackage Rights Application. UP views the KCS trackage rights application as seeking a Board override, either via a trackage rights grant under 49 U.S.C. 11102(a) or via a declaratory order under 49 U.S.C. 11321(a), of the restriction in the Ridgely Agreement that requires GWR to use UP as its connecting carrier for specific categories of interchange traffic moving from, to, or via the Chicago Switching District. UP insists that the request for a trackage rights grant under 49 U.S.C. 11102(a) should be denied, and the alternative request for a declaratory order under 49 U.S.C. 11321(a) should also be denied.¹⁷⁷

(1) UP contends: that the restriction applicants and KCS seek to avoid was an integral part of the transactions under which GWR and SPCSL acquired their respective portions of CMW's lines; that this restriction was established in order to ensure that CMW's Chicago-Springfield-East St. Louis line (purchased by SPCSL) would continue to handle traffic moving (a) over CMW's Kansas City-Springfield line (purchased by GWR) and (b) from, to, or via Chicago; that, given the context in which this restriction was established, it was legitimate when established; and that, had this restriction not been

¹⁷⁵(...continued)

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, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (UP/SP).

¹⁷⁶ See UP-8 at 63 n.98; UP-8, Tab E at 13. UP apparently has in mind that, in the case of a build-in/build-out to/from the KCS line, the UP haulage rights would run over the IC line. See also UP-8, Tab A at 48-49 (UP suggests: that, at some future date, its haulage rights might need to be converted to trackage rights; and that a reasonable oversight period will be needed to enable the Board to assess the effectiveness of UP's haulage rights and to address any other competitive problems created by the Alliance).

¹⁷⁷ UP regards the KCS trackage rights application as seeking trackage rights over, or a 49 U.S.C. 11321(a) override with respect to, two UP track segments: the 1.8-mile UP segment between MP 192.4 and New KC Jct.; and the 1.1-mile UP segment between Hazel Dell and IC Connection.

established in 1989, SP¹⁷⁸ would not have paid as much as it did for the Chicago-Springfield-East St. Louis line. The KCS trackage rights application, UP argues, seeks to eliminate the restriction without returning the money that SP paid for it. See UP-8 at 69-74.¹⁷⁹ See also UP-22 at 21 n.19 (UP claims that applicants and KCS have not demonstrated that the Alliance will actually generate any Springfield-interchange traffic in addition to that traffic which GWWR is already able to interchange with IC at Springfield).

(2) UP contends that there is no nexus between the control transaction and the trackage rights or override sought by KCS. (a) UP insists that, if the transaction contemplated by applicants is a two-way CN/IC control transaction, there cannot possibly be a nexus. UP argues that, because CN's lines end more than 150 miles from Springfield, the trackage rights or override sought by KCS has nothing to do with combining the CN and IC systems. (b) UP also insists that, even if the transaction contemplated by applicants is a three-way CN/IC/KCS control transaction, there is still no nexus between that transaction and the trackage rights or override sought by KCS. UP argues: that CN/IC/KCS traffic intended to be interchanged at Springfield could instead be interchanged at Chicago,¹⁸⁰ East St. Louis or Jackson; and that CN/IC/KCS traffic that must move via the Chicago-Springfield corridor could be handled in that corridor by UP, consistent with the existing trackage rights agreements and pursuant to haulage rights granted to GWWR as part of the same transaction that gave rise to the GWWR's restricted trackage rights.

(3) UP concedes, in essence, that terminal trackage rights can be granted under 49 U.S.C. 11102(a) or an override approved under 49 U.S.C. 11321(a) if necessary to effectuate conditions intended to remedy competitive harms arising from a merger. UP contends, however, that, because the KCS trackage rights application does not seek to create a competitive alternative to CN/IC, neither the trackage rights sought by KCS nor the override sought by KCS has anything to do with carrying out any condition needed to rectify any competitive harm created either by the CN/IC control transaction or by the CN/IC/KCS Alliance. And, although UP all but concedes that the trackage rights or override sought by KCS might facilitate the CN/IC/KCS Alliance, UP insists that neither the trackage rights nor the override can be approved on that basis. If it were otherwise, UP argues, any railroad that connects at any

¹⁷⁸ The rail carriers formerly controlled by Southern Pacific Rail Corporation (i.e., Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) were referred to collectively as SP.

¹⁷⁹ UP claims that the elimination of this restriction is a long-held commercial objective of GWWR.

¹⁸⁰ UP indicates that a CN/IC-KCS interchange at Chicago would involve a routing via I & M Rail Link, LLC (IMRL), over which (UP claims) KCS has haulage rights. See UP-22 at 21 n.19.

junction with the merged CN/IC would be able to avoid its contractual obligations by arguing that this would allow the merger to be more beneficial.

(4) UP contends that, because the 49 U.S.C. 11102(a) trackage rights sought by KCS cannot properly be considered merger-related, they can only be granted if applicants and KCS meet the competitive access standards announced in Midtec Paper Corporation v. CNW et al., 3 I.C.C.2d 171 (1986) (Midtec). These standards have not been met, UP claims, because there has been no showing that UP, the owner of the trackage at issue, has engaged in competitive abuse with respect to that trackage.¹⁸¹

(5) UP contends that the trackage at issue is not terminal trackage within the scope of 49 U.S.C. 11102(a). UP argues: that the tracks covered by the KCS trackage rights application pass through a rural area south of Springfield; that these tracks lie well to the south of Springfield's yards, interchange points, and industries; that no interchange or classification is conducted on or along these tracks; that the only work other than through-movement work conducted on these tracks is switching at one isolated industry;¹⁸² and that the end point of these tracks (at MP 192.4) is simply a milepost location on a single track line in the middle of a cornfield. And, UP adds, the tracks over which terminal trackage rights have been sought do not even provide direct access to the terminal area of Springfield; it is the tracks to which these tracks connect at IC Connection, UP claims, that actually run into the terminal area.

(6) UP concedes that the UP tracks covered by the KCS trackage rights application could handle the additional traffic anticipated by applicants and KCS. UP insists, however, that operation of GWWR trains via the alternative Ridgely Yard route would not be practical, as doing so would require GWWR to use Ridgely Yard to run around its trains, which (UP claims) would seriously interfere with UP's own use of that yard. See UP-8 at 92 n.122.

(7) UP contends that, if we override, either via a trackage rights grant under 49 U.S.C. 11102(a) or via a declaratory order under 49 U.S.C. 11321(a), the restriction in the Ridgely Agreement that requires GWWR to use UP as its connecting carrier for specific categories of interchange traffic moving from, to, or via the Chicago Switching District: the entire UP-GWWR relationship will have to be renegotiated to compensate UP for the value of the bargain it is losing; and, to this end, we should completely override the Ridgely Agreement and all UP-GWWR agreements relating to the former CMW lines. The "limited" override sought by KCS, UP argues, would result in an unbalanced

¹⁸¹ UP adds that there has also been no showing of competitive abuse on the part of NS, the owner of some (though not all) of the tracks that run between New KC Jct. and IC Connection.

¹⁸² UP claims that MidStates Warehouse at Hazel Dell is the only rail-served industry located between MP 192.4 and IC Connection. See UP-8, Tab C at 4.

agreement that SPCSL would not have negotiated and that no agency would ever have imposed. See UP-8 at 84 n.118.¹⁸³

CANADIAN PACIFIC. CP notes: that it is the only railroad (other than CN) that has lines linking all of the major commercial centers of Canada with all of the U.S. Class I rail systems; that, in particular, its lines serving Ontario and Quebec connect at Detroit with CSX and NS, and connect at Chicago with CSX, NS, UP, and BNSF;¹⁸⁴ and that, because each of CSX, NS, UP, and BNSF reaches the Gulf Coast, and because each of UP and BNSF has lines linking Chicago with gateways to Mexico, it should be possible for CP, by working with one or more of these U.S. connections, to provide efficient, integrated "NAFTA Corridor" rail services in competition with those that will be offered by CN/IC and the CN/IC/KCS Alliance.¹⁸⁵ CP claims, however, that, unless an appropriate condition is imposed, CN will have the wherewithal to thwart the "NAFTA Corridor" rail services envisioned by CP.

Two Ontario/Michigan Crossings. CP insists that there are, on the Ontario/Michigan border, only two important crossings for traffic moving by rail between points in Canada, on the one hand, and, on the other, points in the United States and Mexico (including container traffic moving via the Port of Montreal between points in Europe and points in the United States): the St. Clair Tunnel, which links Port Huron, MI, and Sarnia, ON, which was constructed in the 10th decade of the 20th century, and which is used only by CN; and the Detroit River Tunnel, which links Detroit, MI, and Windsor, ON, which was constructed in the 1st decade of the 20th century, and which is used by CP, CN, CSX, NS, and Conrail.¹⁸⁶ The key difference between the two tunnels, from CP's perspective, is that the relatively new St. Clair Tunnel has something that the relatively old Detroit River Tunnel lacks: sufficient vertical

¹⁸³ The broad override contemplated by UP is directed at two agreements in particular: the Springfield-Chicago Divisions and Haulage Agreement (the Springfield-Chicago Agreement), which gave GWWR commercial access via SPCSL to Chicago and Chicago connecting railroads; and the Godfrey-Springfield Trackage Rights, Haulage and Interchange Agreement (the Godfrey-Springfield Agreement), which provided for the preservation of GWWR's Springfield interchange and Chicago access in the event that GWWR abandoned its Roodhouse-Springfield line. See UP-8 at 71. The broad override contemplated by UP is further directed at certain supplementary agreements that have been negotiated in recent years. See UP-8, Tab D at 9-10.

¹⁸⁴ Although CP's lines also serve British Columbia, Alberta, Saskatchewan, and Manitoba, the focus of its interests in this proceeding is on traffic moving from/to points in Ontario and Quebec.

¹⁸⁵ The "NAFTA Corridor" contemplated by CP is the north-south corridor linking points in Canada (particularly points in Ontario and Quebec), on the one hand, and, on the other, points in the United States and Mexico.

¹⁸⁶ Consolidated Rail Corporation is known as Conrail.

clearance to handle double-stacked 9'6" containers and the new generation of high-dimension rail cars. CP indicates that the Detroit River Tunnel: cannot handle double-stacked 9'6" containers; cannot even handle containers in a 9'6"/8'6" double-stack configuration; can handle only 8'6" or smaller containers in double-stack service; and cannot handle the new generation of high-dimension rail cars.¹⁸⁷

A Third Ontario/Michigan Crossing. CP acknowledges that there is, at Sault Ste. Marie, a third Ontario/Michigan rail crossing. CP insists, however, that the Sault Ste. Marie crossing is not as important as the St. Clair and Detroit River Tunnels: because Sault Ste. Marie is located too far to the north, on Michigan's Upper Peninsula; and because the line that crosses between the United States and Canada at Sault Ste. Marie is operated by WCL, a regional carrier that (unlike CP and CN) does not reach Canada's commercial centers.

Improved Clearance Needed. CP recognizes that, given the capacity differences between the St. Clair and Detroit River Tunnels, CP will be able to offer efficient, integrated "NAFTA Corridor" rail services in competition with those that will be offered by CN/IC and the CN/IC/KCS Alliance only if CP can develop an improved clearance route capable of handling double-stack intermodal containers and the newest generation of high-dimension rail cars increasingly favored by automotive shippers. CP claims, in essence, that, as a practical matter, any such improved route will have to be developed either by enlarging the Detroit River Tunnel itself or by building a new tunnel immediately adjacent to the Detroit River Tunnel. CP contends that, because its only cross-border route serving the Ontario/Michigan border is via its line passing through Detroit and Windsor, it cannot, as a practical matter, develop an improved clearance route by constructing a tunnel at some location other than Detroit-Windsor. CP further contends that, again as a practical matter, any replacement tunnel constructed at Detroit-Windsor will have to be constructed in the Detroit River Tunnel's right-of-way.

¹⁸⁷ The Detroit River Tunnel has two tubes. (1) CP indicates that the north tube, which was recently enlarged (see CPR-14 at 32-33), can handle double-stacked 8'6" containers, as well as conventional tri-level automobile cars. CP concedes that it would be physically possible to move containers in a 9'6"/8'6" double-stack configuration through the north tube, but contends: that a train moving at normal speed with containers in such a configuration would rock, risking collision with the sides of the tunnel; that, therefore, a train handling containers in such a configuration would have to move at an extremely low speed; that, however, even such low speed movements would raise serious safety issues, and would require additional locomotive power; and that, accordingly, the movement of containers in a 9'6"/8'6" double-stack configuration through the north tube would not be operationally feasible. (2) CP indicates that the south tube is even more severely restricted. CP claims that the south tube: can be used only for conventional car types, such as boxcars, tank cars, hoppers, and gondolas; and cannot accommodate multilevel finished automobile cars, many types of automotive parts cars, piggy-backs, or double-stacked containers of any size. CP insists, in fact, that the south tube cannot be used for most tunnel traffic, and that, in consequence, the tunnel cannot, as a practical matter, be used for directional running. See CPR-14 at 126-27.

The Problem. CP contends: that the Detroit River Tunnel is wholly owned by the Detroit River Tunnel Company (DRTC);¹⁸⁸ that DRTC is wholly owned by the CNCP Niagara Detroit Partnership (CNCP Partnership), an Ontario partnership in which CN and CP have equal 50% interests; and that the Detroit River Tunnel has been leased by DRTC to the CNCP Partnership pursuant to a 999-year lease.¹⁸⁹ CP further contends: that the CNCP Partnership Agreement (see CPR-14 at 39-98) designates CN as the partner responsible for day-to-day operation and maintenance of the tunnel (including dispatching and security); that the CNCP Partnership Agreement requires the consent of both partners for any expenditure to improve the clearances of the tunnel; that the CNCP Partnership Agreement requires the consent of both partners for any project involving either construction of a replacement tunnel by DRTC or the use by CP (or a third party) of DRTC approach trackage or right-of-way in constructing a new tunnel; and that, under the CNCP Partnership Agreement, CN would be entitled to ½ of the base charges (net of operating and maintenance expenses) collected for use of any enlarged or replacement tunnel built by DRTC or the CNCP Partnership, even if such enlargement or replacement were funded entirely by CP. CP claims that, although most of the trains using the Detroit River Tunnel are operated by CP,¹⁹⁰ the CNCP Partnership Agreement, as a practical matter: effectively confers upon CN the power to veto any effort by CP to improve the clearance of the Detroit River Tunnel route; and thereby confers upon CN the power to prevent CP and its U.S. Class I connections from creating a second integrated "NAFTA Corridor" route that would compete with CN/IC and the CN/IC/KCS Alliance for the growing volumes of traffic, particularly automotive and intermodal traffic, in that corridor. And, CP adds, it is reasonable

¹⁸⁸ CP claims that DRTC is a Michigan corporation, organized under and subject to Michigan law. See CPR-26 at 006 n.4. Applicants claim that DRTC "is organized dually under the laws of the Dominion of Canada and the State of Michigan." See CN/IC-62 at 31 n.49. For present purposes, the discrepancy is not material.

¹⁸⁹ See Canadian National Railway Company and Canadian Pacific Limited — Acquisition — Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company, Finance Docket No. 30387 (ICC served Sept. 4, 1984) (approving the joint acquisition, by CN and CP, of all interests of Consolidated Rail Corporation in the properties of Detroit River Tunnel Company, Canada Southern Railway Company, and the Niagara River Bridge Company; and noting that CN and CP had created the CNCP Partnership to take title to these interests). See also Canadian National Railway Company and Canadian Pacific Limited — Acquisition — Interests of Consolidated Rail Corporation in Canada Southern Railway Company and Detroit River Tunnel Company, Finance Docket No. 30387 (ICC served Jan. 16, 1985) (denying petitions to reopen the prior decision).

¹⁹⁰ CP indicates that, on average, 16 of the 22 trains that pass through the Detroit River Tunnel each day are operated by CP. See CPR-14 at 132. CP claims that CN's use of the Detroit River Tunnel declined sharply following the opening of the St. Clair Tunnel in 1995, and that CN now operates only one local train (on a round-trip movement) through the Detroit River Tunnel 3 days a week.

to expect that CN, having invested a great deal of money to acquire IC, and having invested more money to construct new intermodal and automotive facilities on the lines of IC and KCS, will have every incentive to "protect" its investments by rejecting any CP proposal that might weaken CN/IC's competitive position vis-à-vis CP.

Relief Sought By CP. CP contends that the CN/IC control application should be denied, unless we condition any order approving that application by requiring CN: to cause the CNCP Partnership to convey to St.L&H 100% of the outstanding shares of DRTC;¹⁹¹ and to make such ancillary changes to the CNCP Partnership Agreement and other agreements relating to the Detroit River Tunnel as may reasonably be necessary to transfer full ownership and management of DRTC and the Detroit River Tunnel from CN to St.L&H. CP contends that the sought divestiture: is necessary to assure the ability of CP and its U.S. Class I connections to mount an effective competitive response to the CN/IC merger and the CN/IC/KCS Alliance; is operationally feasible; would not dilute any public benefits that might otherwise result from the CN/IC merger; would not have a negative impact on CN (because, in recent years, CN's use of the Detroit River Tunnel has been minimal, and because, in any event, CN would retain the right to operate through the Detroit River Tunnel); and would not have a negative impact on competition (because CN and all other current users of the Detroit River Tunnel would retain their existing rights with respect to use of that tunnel).¹⁹²

Nexus. CP concedes that CN's prerogatives under the CNCP Partnership Agreement predate the CN/IC control transaction, but insists that the CN/IC control transaction will increase CN's incentives to exercise those prerogatives. CP claims, in particular, that, post-transaction, CN will have, for the first time, an incentive to use its ownership position in the Detroit River Tunnel for the benefit of IC (which will be under common control with CN) and to the detriment of carriers such as UP and BNSF (which will not). And, CP adds, the CN/IC control transaction in conjunction with the CN/IC/KCS Alliance will give CN a new incentive to hinder construction of a high-clearance tunnel at Detroit in order to enhance its own ability to compete for certain Ontario automotive shipments for which CN does not compete aggressively today. See CPR-26 at 012-014.

¹⁹¹ St.L&H, a wholly owned CPR subsidiary, holds CP's 50% interest in the CNCP Partnership.

¹⁹² In their responsive application, docketed as STB Finance Docket No. 33556 (Sub-No. 3), CPR and St.L&H seek authorization for the acquisition of control of DRTC by St.L&H (and, indirectly, by CPR) through ownership of 100% of the outstanding shares of DRTC. CP accepts that approval of the Sub-No. 3 responsive application would be subject to the labor protective conditions prescribed in New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), although CP insists: that, in view of the fact that DRTC has no operating employees, the Sub-No. 3 transaction will have no adverse impact on any DRTC employees; and that, in view of the fact that the relevant labor forces of CN and CP are comprised solely of Canadian workers, see CPR-14 at 136, the Sub-No. 3 transaction will not affect any U.S. railroad jobs.

Extraterritoriality. CP insists that, although the CNCP Partnership Agreement is governed by Canadian law and although the Canadian end of the Detroit River Tunnel is located in Canada, we have jurisdiction to require CN to vote its interest in the CNCP Partnership to cause the sale of DRTC's stock to St.L.&H. See CPR-26 at 006-008.

CN's Pledge; CP's Response; OMR's Response. CN has indicated that, "to render moot any concern the Board might have with respect to [the 'veto' allegations made by CP and OMR], CN will agree not to exercise unfairly any 'rights' it may have under the [CNCP] Partnership Agreement to oppose any proposed Tunnel improvement project that has sufficient engineering, operational and economic merit to attract the necessary capital for its construction without derogating the value of CN's existing investment in the Partnership. This agreement would be subject to CP's reciprocal agreement to the same effect." See CN/IC-56A at 158. CP insists, however, that despite CN's "highly-caveated" representations concerning its future behavior, and despite CN's claim that its "fiduciary duty" under Canadian law to the CNCP Partnership will discipline CN in the exercise of its partnership prerogatives,¹⁹³ a commonly controlled CN/IC will have, if we do not approve the relief sought by CP, a variety of lawful means at its disposal to prevent the development of an alternative high-clearance rail route on the Ontario/Michigan border. See CPR-26 at 004. See also CPR-26 at 019-025 (CP's analysis of the arguments CN might raise in support of an effort to block a major enlargement of the existing tunnel or the construction of a replacement tunnel). See also OMR-8 at 10-11 (OMR insists that CN's "waffling" has left "plenty of wiggle room" to render the construction of a replacement tunnel at Detroit-Windsor highly unlikely).¹⁹⁴

Schedule Proposed by CP. CP contemplates that the divestiture of CN's interest in DRTC to St.L.&H will occur as soon as practicable following the effective date of a final order of the Board requiring such divestiture. CP proposes that the Board grant the parties a period of 60 days following issuance of the Board's order to negotiate a definitive stock purchase agreement as well as appropriate changes to the CNCP Partnership Agreement and certain ancillary agreements relating to the Detroit River Tunnel. CP suggests that, given the possibility that the parties may be unable to reach a

¹⁹³ See CN/IC-56A at 512-15.

¹⁹⁴ See also CN/IC-62 at 33 & n.50 (applicants have indicated: that CN's interest in the Detroit River Tunnel is for sale at fair market value; that, if the parties cannot agree on the fair market value, CN will sell its interest at the fair market value determined by a neutral third party; that, should CP or OMR later allege that CN has violated either of these commitments, CN will not object to a petition by either party to re-open this proceeding to address any anticompetitive harm found to result from such violation; but that CN reserves whatever jurisdictional and substantive objections it might otherwise make in a control proceeding to this Board's exercise of its conditioning power to secure any end then sought by CP or OMR).

negotiated agreement with respect to these matters, the Board should retain jurisdiction to establish fair and equitable terms.

The Finance Docket No. 30387 Proceeding. CP contends that, in view of the competitive impact of CN's ownership of the St. Clair Tunnel and CN's heightened incentive to exercise its ownership interest in DRTC to thwart effective competition following consummation of the CN/IC control transaction, we have jurisdiction under 49 U.S.C. 722(c): to reopen the Finance Docket No. 30387 proceeding on the grounds of substantially changed circumstances; and to determine that, in view of such substantially changed circumstances, CN's joint control of DRTC is no longer in the public interest. CP adds, however, that we need not invoke our 49 U.S.C. 722(c) jurisdiction, because (CP claims) we possess ample power to deal with the issue by granting the relief sought by CP in this proceeding. See CPR-26 at 007 n.5.

Questions Respecting The Alliance. CP urges careful scrutiny of the CN/IC/KCS Alliance, to determine whether the Alliance and Access Agreements should be subject to regulation pursuant to the carrier control provisions (49 U.S.C. 11323 *et seq.*) and/or the pooling statute (49 U.S.C. 11322). CP claims: that the Alliance and Access Agreements create a unique and unprecedented long-term relationship among CN, IC, and KCS; that, pursuant to these agreements, the three Alliance railroads will closely coordinate their sales and marketing functions, operations, information systems, investments, and equipment fleets; that the relationship between CN/IC, on the one hand, and KCS, on the other hand, will be far more interdependent than that created by the typical "Voluntary Coordination Agreement" between connecting carriers; and that, all things considered, the Alliance may amount to a de facto consolidation of CN, IC, and KCS. CP further claims: that the Alliance specifies the use of two interchange points (Springfield, IL, and Jackson, MS) for all Alliance traffic; that, under this arrangement, on southbound traffic IC effectively surrenders its long haul (to Jackson) to KCS, while on northbound traffic KCS effectively surrenders its long haul (to Kansas City or, via GWWR, to Springfield) to IC; and that the agreement of IC and KCS to surrender traffic to one another at specified gateways for the good of the Alliance may constitute a pooling of services between those carriers.

CPR-17 Petition. In its CPR-17 petition filed November 17, 1998, CP claims that, to enable a better understanding of the CN/IC/KCS Alliance and its impact on the public interest, we should initiate an investigation with respect to the Alliance and, in connection with that investigation, we should require supplementation of the record. CP contends: that the Alliance and Access Agreements may involve a pooling or division of traffic or services under 49 U.S.C. 11322(a); that the Alliance appears to involve elements of common control among, and may result in a diminution of competition in corridors served by, the three Alliance railroads;¹⁹⁵ and that there is a question as to whether, and to what degree, CN might have exercised control or undue influence over IC in connection with the execution of the Alliance

¹⁹⁵ CP contends, in particular, that the Alliance appears to involve common control of at least a substantial part of the day-to-day operations of CN, IC, and KCS.

Agreement. CP therefore asks that we require that applicants and KCS supplement the record with further information addressing the structure, implementation, and competitive effects of the Alliance and Access Agreements. CP asks, in particular, that we require applicants and KCS to address and provide facts regarding the following: (1) the precise nature of the present and future relationship among CN, IC, and KCS created by the Alliance; (2) the criteria of 49 U.S.C. 11323 as applied to the *de facto* consolidation of KCS operations with those of CN and IC; and (3) the competitive impacts of the Alliance and Access Agreements. CP adds that, if we require applicants and KCS to supplement the record, we should also afford CP and other interested parties an opportunity to conduct discovery and to file supplemental comments, and, to the extent that we determine that the Alliance is subject to Board approval, we should afford CP and other interested parties an opportunity to seek appropriate conditions upon such approval.¹⁹⁶

Replies To The CPR-17 Petition. Pleadings responsive to the CPR-17 petition have been filed by applicants (CN/IC-40), KCS (KCS-13), UP (UP-19), and John D. Fitzgerald (JDF-5). (1) Applicants argue: that CP has neither identified any specific respect in which it was denied adequate discovery nor clearly identified the respects in which it seeks supplementation; that the issues raised in the CPR-17 petition are essentially the same as the issues previously raised by UP and other parties in their opposition submissions filed October 27, 1998; that there is no need to consider the CPR-17 issues outside of the process and schedule established for this proceeding; and that, for these reasons, the CPR-17 petition should be stricken or denied, or disposition thereof should be deferred until after the filing of applicants' rebuttal submissions (subsequently filed on December 16, 1998). (2) KCS, in its KCS-13 motion to strike filed November 30, 1998, argues that the CPR-17 petition should be stricken, because it is (in KCS's view) a surreptitious attempt by CP to supplement the arguments already presented in its comments filed October 27, 1998, because it seeks (again in KCS's view) reconsideration of two decisions (Decisions Nos. 6 and 11) after the expiration of the deadline to petition for reconsideration of those decisions, and because (KCS claims) the issues raised in the CPR-17 petition are being fully addressed within the context of the existing procedural schedule.¹⁹⁷ (3) UP argues that, although there is indeed (in UP's view) substantial evidence that the Alliance involves a common control relationship requiring Board approval, the CN/IC control application filed by applicants is subject to a fatal defect that cannot be cured by any amount of supplementation. (4) Mr. Fitzgerald supports the CPR-17 petition.

¹⁹⁶ See also CPR-28 at 25 (CP urges that applicants be required to further "declassify" the details of their arrangements with KCS; the "declassification" that CP has in mind would apparently involve something more than the submission, which we required in Decision No. 31, of redacted copies of the Alliance and Access Agreements).

¹⁹⁷ CP has replied to the KCS-13 motion to strike. See CPR-21 (filed December 4, 1998).

ONTARIO MICHIGAN RAIL CORPORATION. OMR's submissions, much like CP's, are focused upon the anticompetitive impacts that will assertedly exist post-transaction in view of CN's 100% interest in the St. Clair Tunnel and its 50% interest in the Detroit River Tunnel.

Vertical Foreclosure. OMR contends that the CN/IC control transaction will have anticompetitive effects of the "vertical foreclosure" variety because (OMR claims) applicants, to secure the long-haul movement of freight for which they compete with connecting carriers and to maximize their ability to render single-line service, will close existing gateways and through-route, joint-rate arrangements. OMR insists, by way of example, that applicants can be expected to close the Detroit gateway and to cancel whatever through-route, joint-rate arrangements CN may have had (a) with CSX, on traffic moving between CN points in Ontario, on the one hand, and, on the other, points such as St. Louis, Memphis, and New Orleans (which are served by IC and CSX), and (b) with NS, on traffic moving between CN points in Ontario, on the one hand, and, on the other, points such as Peoria, Springfield, and Centralia, IL (which are served by IC and NS). OMR argues that, once CN/IC has closed the Detroit gateway and canceled any present CN-CSX and CN-NS through-route, joint-rate arrangements, the elimination of CSX and NS as competitors for cross-border traffic moving via the Detroit gateway will result in a substantial lessening of competition in the considered markets.¹⁹⁸

The Two Tunnels. OMR argues that the vertical foreclosure effects it anticipates will reflect CN's 100% interest in the St. Clair Tunnel (which OMR calls the Port Huron-Sarnia tunnel, and which can accommodate every kind of rail equipment) and CN's 50% interest in the Detroit River Tunnel (which OMR calls the Detroit-Windsor tunnel, and which can accommodate neither double-stacked 9'6" container flatcars, nor 20'2" tri-level automobile rack cars, nor high-capacity automobile frame cars). OMR contends: that CN/IC's exclusive access to the St. Clair Tunnel will enable CN/IC to foreclose other railroads from participating in the handling of international container and automotive traffic; that, indeed, CN/IC, in conjunction with KCS and KCS's affiliates (Tex Mex and TFM), will endeavor to monopolize that segment of NAFTA traffic flows, effectively denying CP, CSX, and NS, and other North American railroads as well, the opportunity to share in the movement of that traffic; and that, as a result of the CN/IC control transaction, the unified CN/IC (acting in conjunction with KCS, Tex Mex, and TFM) will be the only railroad able (a) to transport double stacked 9'6" containers from the Port of Montreal to such major U.S. markets as St. Louis, Memphis, and New Orleans, and (b) to transport

¹⁹⁸ OMR concedes that neither CSX nor NS has complained of its elimination as a connecting carrier at Detroit on traffic moving to/from U.S. points. OMR insists, however, that CSX and NS are in no position to complain of such matters in view of their own recent participation in the Conrail control proceeding, which (OMR claims) was itself largely premised on the closing of gateways and the cancellation of through-route, joint-rate arrangements. See CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998) (CSX/NS/CR).

automobiles and sports utility vehicles on 20'2" tri-level cars from Mexican assembly plants to distributors in Ontario and Quebec. OMR further contends: that the Detroit River Tunnel, which is incapable of handling much of today's traffic, will become functionally obsolete over the next 10 years as 9'6" containers in double stack service and high cube automobile rail cars become the norm for long-distance movements; that, however, CN, given its access to the St. Clair Tunnel, will have no economic incentive to participate in the construction of a replacement for the Detroit River Tunnel; and that, indeed, CN's economic incentive will be to use its 50% interest in the Detroit River Tunnel and in the lines affording access thereto to block the construction of a replacement tunnel.

Relief Sought By OMR. OMR seeks a Board order requiring CN to convey to OMR CN's 50% interest in the CNCP Partnership. OMR contends that the relief it seeks:¹⁹⁹ will allow for the construction by OMR of a replacement Detroit-Windsor tunnel not controlled by CN, that will have sufficient clearance to accommodate double-stacked 9'6" containers, 20'2" tri-level automobile rack cars, and high-capacity frame cars; will thereby allow for the maintenance of efficient, direct routings alternative to the single-line service to be offered by a unified CN/IC on cross-border shipments of containers, automobiles, automobile parts, and NAFTA traffic flows between the U.S. and Canada, between the U.S. and Mexico, and between Canada and Mexico; and will, therefore, alleviate the anticompetitive consequences of the CN/IC control transaction, enhance the adequacy of transportation service to the public, and safeguard essential railroad services.²⁰⁰

Nexus. OMR concedes that the clearance limitations of the Detroit River Tunnel predate the CN/IC control transaction. OMR contends, however: that the CN/IC control transaction, which will result in a substantial increase in CN's revenue potential from long-haul moves within the United States, will significantly exacerbate the problems posed by the clearance limitations of the Detroit River Tunnel and will thereby increase the need for its early replacement; that the consequences that approval of the CN/IC control application would occasion (the closing of the Detroit gateway, the cancellation of previously existing through-route arrangements, and the loss of intramodal competition) call for

¹⁹⁹ OMR notes that, although the vertical foreclosure effects that it anticipates entail the closing (by CN) of the Detroit gateway and the cancellation (by CN) of existing through-route, joint-rate CN-CSX and CN-NS arrangements, OMR is not seeking a Board order requiring that the Detroit gateway be kept open and that any existing through-route, joint-rate CN-CSX and CN-NS arrangements be continued.

²⁰⁰ OMR concedes that the terms of the CNCP Partnership Agreement appear to preclude the transfer of CN's 50% interest to OMR without CP's express consent. OMR insists, however: that, because CP has not objected to the relief OMR seeks, it is reasonable to infer that CP would consent to the transfer of CN's 50% interest to OMR; and that, in any event, our authority to grant the relief OMR seeks cannot be circumscribed by the terms of a private agreement between CN and CP.

remediation by the Board,²⁰¹ and that an unobtrusive means by which a replacement tunnel could be constructed and the needed remediation accomplished would be a Board order allowing OMR to succeed to CN's 50% interest in the CNCP Partnership, which (OMR claims) would permit OMR to build, immediately adjacent to the Detroit River Tunnel, a high-clearance replacement tunnel between Detroit and Windsor.

Canada Southern. The CNCP Partnership has a 100% interest in the Detroit River Tunnel Company (DRTC); it also has a 100% interest in the Canada Southern Railway Company (CASO), which itself has a 100% interest in the Niagara River Bridge Company (NRBC); and the relief sought by OMR therefore envisions the transfer, from CN to OMR, not only of CN's 50% interest in DRTC but also of CN's 50% interest in CASO and its 50% interest in NRBC. In support of the CASO/NRBC aspect of the relief sought by OMR, OMR contends: that the CASO mainline runs 231 miles between Detroit and Niagara Falls; that, however, CN and CP, each of which has parallel lines of its own, have made little effort to develop CASO's operations; that, at present, roughly 77 miles of the CASO mainline are out of service; that, under OMR's partial ownership, CASO would be developed to handle increasing amounts of overhead and local traffic; that overhead traffic can indeed be developed, given that CASO's Detroit-Buffalo route north of Lake Erie is 110 miles shorter than the CSX and NS routes south of Lake Erie; that local traffic can also be developed, given that CASO has excellent sites for industrial development and given also that southern Ontario has significant prospects for economic development, especially for NAFTA-related businesses; that, therefore, the CASO mainline has the potential to produce significant levels of traffic; and that the additional traffic flows of a rehabilitated CASO would significantly improve the economics of the Detroit-Windsor tunnel project that OMR intends to undertake. OMR adds that, if it is allowed to purchase CN's interest in the CNCP partnership, it intends to work with CP and a regional railroad operator to aggressively develop the CASO route as a major rail feeder to the Detroit River Tunnel.

Extraterritoriality. OMR insists that, although the CNCP Partnership's railroad properties and transportation activities are located mainly in Canada, we have sufficient jurisdiction to grant the relief sought by OMR. OMR contends: that CN is a party to this proceeding, and, as a party, has submitted itself to the jurisdiction of the Board; that CN, by seeking approval for the CN/IC control transaction, is subject to the broad conditioning power with which the Board is vested to assure that the proposed

²⁰¹ OMR claims that, until now, CN has not had much to lose from forfeiting cross-border traffic to its competitors at the Detroit gateway, because, until now, CN's U.S. operations extended only to Chicago. OMR further claims: that the CN/IC control transaction will extend CN's U.S. operations all the way to New Orleans; that the CN/IC/KCS Alliance will extend CN's reach deep into Mexico; that, given the control transaction and the Alliance, CN will henceforth have much more to lose from forfeiting cross-border traffic to its competitors at the Detroit gateway; and that CN will therefore have, post-transaction, a much greater incentive than it has previously had to use its 50% interest in the Detroit River Tunnel to block construction of a high-clearance replacement tunnel.

transaction is consistent with the public interest; and that, “[s]o long as the Board has jurisdiction over the railroad or railroads before it, it matters not that the effect of its decision largely impacts Canadian operations.” See OMR-8 at 6-9. With respect to the CASO/NRBC aspect of the relief sought by OMR, OMR contends: that CASO was built principally as an overhead route for U.S. origin and destination traffic moving between eastern and western points; that CASO has the most direct route between Detroit and Buffalo; that the rehabilitation of CASO as an overhead route could significantly reduce congestion on U.S. rail lines south of Lake Erie; and that it would be contrary to U.S. and Canadian transportation interests to allow the CASO route to disappear. See OMR-8, V.S. Roach at 3.

Schedule Proposed By OMR. OMR contemplates: that the terms and conditions for its acquisition of CN’s 50% interest in the CNCP Partnership will be negotiated by the parties within 90 days of the effective date of the Board’s decision; and that, if negotiations fail, the Board will, upon the request of either party, set the terms and conditions for the acquisition.

Status Of OMR And The New Tunnel. OMR contends: that it is not a railroad or an entity in control of a railroad; that DRTC, CASO, and NRBC comprise a single railroad system; that it therefore follows that acquisition by OMR of control of the CNCP Partnership would not be a transaction requiring approval under 49 U.S.C. 11323; that, in any event, the transaction contemplated by OMR will not involve acquisition by OMR of control of the CNCP Partnership (because, given CP’s 50% interest in that partnership, acquisition by OMR of CN’s 50% interest will not result in “control” within the meaning of 49 U.S.C. 11323); that OMR’s acquisition of CN’s 50% interest in the CNCP Partnership will merely safeguard OMR’s ability to build and operate, immediately adjacent to the Detroit River Tunnel, a new high-clearance tunnel that would be available for the use of the railroads serving the area; that OMR does not contemplate that OMR itself will become a railroad even if OMR constructs a new tunnel; and that the new tunnel will simply replace the existing tunnel, and will not involve any “invasion” of new territory. OMR therefore argues that, even if the relief it seeks is granted and the new tunnel it contemplates is constructed: OMR will not become subject to the jurisdiction of the Board; and construction and operation of the new tunnel will not require the approval of the Board. OMR also argues that, because it is not a railroad and will not become a railroad, and because rail operations through the replacement tunnel that OMR proposes to build will be conducted by the railroads in the area, no employees will be affected by the Board’s approval of the relief sought by OMR.²⁰²

The OMR-CP Relationship. CP contends: that CP and OMR are not acting in concert; that the only agreements that CP has made with OMR (or with its predecessor, American East Corporation) are an agreement concerning the provision of CP traffic data to the predecessor (in order to facilitate its analysis of a possible new rail tunnel at Detroit) and, more recently, an agreement pursuant to which CP agreed to bear half the cost of retaining a consultant to perform a feasibility study for a possible new

²⁰² OMR contemplates that most of the traffic that would move through the new tunnel would be handled by CP, CSX, and NS.

tunnel; that CP has not entered into any agreement with OMR concerning development of the DRTC property; and that there are no undisclosed "interrelationships" between CP and OMR. See CPR-26 at 016-017. CP has also indicated that it opposes the application filed by OMR in STB Finance Docket No. 33556 (Sub-No. 2). See CPR-27 at 2. See also CPR-28 at 23-24 (CP contends that OMR's divestiture proposal does not represent a viable alternative to the relief sought by CP).

COMMENTS RESPECTING TUNNEL ISSUE. A number of parties have submitted comments respecting the Michigan-Ontario tunnel issue raised by CP and OMR.

Comments Of Michigan Gov. John Engler. Governor Engler, who supports the CN/IC control application, indicates that he would like to see a new privately developed rail tunnel between Detroit and Windsor and that he encourages CN and CP to work together to remove impediments to the development of such a tunnel. Governor Engler adds, however, that his support for the CN/IC merger is not predicated upon the resolution of the tunnel issue.

Comments Of U.S. Rep. Carolyn Kilpatrick, U.S. Rep. John Conyers, Jr., And U.S. Sen. Carl Levin. Rep. Kilpatrick, Rep. Conyers, and Sen. Levin contend: that the Detroit-Windsor area needs a new railroad tunnel to provide competition in routes and services along the U.S.-Canada border; that CN's control of both the St. Clair Tunnel and the Detroit River Tunnel will preclude construction of a new tunnel and the competition that would result; and that CN should therefore be required to sell its ownership interest in the Detroit River Tunnel so that a modern new tunnel may be constructed in the Detroit-Windsor corridor.

Comments Of Detroit Mayor Dennis W. Archer. Mayor Archer, who is concerned by CN's ownership of the St. Clair Tunnel and its co-ownership of the Detroit River Tunnel, asks that we examine whether the proposed merger will limit options available to shippers engaged in U.S.-Canadian trade. Mayor Archer asks, in particular, that we address the following questions: (1) Do we agree that an increasing volume of rail traffic is being diverted from Detroit to Port Huron? If so, do we agree that this is due to the limitations of the current Detroit-Windsor tunnel? (2) Do we believe that CN's ownership of the St. Clair Tunnel and its co-ownership of the Detroit River Tunnel limit rail transportation options to shippers in southeast Michigan or elsewhere? If so, could this lead to higher (perhaps monopolistic) prices for shippers moving goods across the U.S.-Canada border? (3) Do we believe that CN's co-ownership of the Detroit-Windsor rail tunnel prevents or limits the ability of others to construct and operate a new rail tunnel in Southeast Michigan?

Comments Of Windsor Mayor Michael D. Hurst. Mayor Hurst contends that, because CN controls the two Michigan-Ontario rail tunnels, the CN/IC merger, if not properly conditioned, will give CN too much control over U.S.-Canada rail traffic, and will thereby result in a substantial drop in rail competition and the economic dislocations that are associated with monopolistic environments. Mayor Hurst therefore asks that we condition the CN/IC merger by requiring CN to divest its 50% interest in the Detroit-Windsor Tunnel and its approaches.

Comments Of Dewitt J. Henry, Assistant County Executive Of Wayne County, MI. Mr. Henry contends: that the merger of CN and IC will reduce transportation competition and economic development potential in the Detroit area; that it will reduce the importance of Detroit as an interchange location with other railroads; that, for these reasons (among others), continued control by CN of both the St. Clair and Detroit River Tunnels is unacceptable; and that CN should therefore be required to sell its ownership interest in the Detroit River Tunnel.

Comments Of Paul E. Tait, Executive Director Of The Southeast Michigan Council Of Governments. Mr. Tait contends that a new Detroit-Windsor area rail tunnel, one able to accommodate modern rail equipment, could provide competition in routes and services along the U.S.-Canada border. Mr. Tait, noting the recent designation by Congress of the I-94 corridor from Port Huron to Chicago through Detroit as a high priority transportation corridor, insists that it is important that any decision we make should not run counter to efforts to increase international trade in Southeast Michigan. And, Mr. Tait adds, in view of the recent allocation by Congress of funds for a new freight intermodal terminal to serve the needs of the automotive industry and other shippers in the Detroit area, it is also important that any decision we make should not adversely affect the viability of this intermodal facility.

Comments Of Albert A. Martin, Director Of The Detroit Department Of Transportation. Mr. Martin contends that, in view of CN's ownership interests in the two Michigan-Ontario rail tunnels, the CN/IC merger may have a detrimental impact on the economic development of the City of Detroit. Mr. Martin adds: that there is a clear need for a new railroad tunnel between Detroit and Windsor; that such a tunnel would provide much needed competition and preclude monopolistic transportation by CN; and that CN should therefore be required to commit to taking all necessary actions to make a new Detroit-Windsor rail tunnel a reality at the earliest possible date.

Comments Of W. Steven Olinek, Deputy Director Of The Detroit/Wayne County Port Authority. Mr. Olinek, who fears that the CN/IC merger will reduce transportation competition and economic development potential in the Detroit area, urges that CN be required to sell its ownership interest in the Detroit River Tunnel.

NORTH DAKOTA. North Dakota farms produce substantial quantities of spring wheat, durum, barley, beans, and oilseeds (these and similar products produced on North Dakota farms are hereinafter referred to generally as "agricultural commodities"). North Dakota indicates that 90% of the agricultural commodities produced in North Dakota are exported from the state, and that the vast majority of North Dakota agricultural products exported from the state are transported by rail. North Dakota further indicates: that it is absolutely dependent upon rail service for the movement of its agricultural commodities to market; that it receives rail service from two Class I railroads (BNSF and Soo), and also from three shortlines that feed traffic to the two Class I railroads; that access to the Pacific North West is provided by BNSF; that access to Minneapolis and Chicago is provided by a single-line

BNSF routing and also by a single-line Soo routing; and that access to the Gulf of Mexico is provided by a single-line BNSF routing and also by a joint-line Soo-IC routing (the Soo-IC routing is via Chicago).²⁰³

The Soo-IC Routing. North Dakota claims that the Soo-IC routing to the Gulf provides access to elevators in Louisiana, Mississippi, and Alabama that are critical to the sale of North Dakota agricultural products on world markets. North Dakota contends that the service package provided by the Soo-IC routing is vastly superior to other service routes: because the cycle times for equipment used on the Soo-IC route are much lower than the comparable cycle times for equipment used on alternative routes; because Soo and IC, unlike BNSF and UP, are regional railroads that have significant financial incentives for moving North Dakota agricultural commodities, that do not serve competing grain markets that make demands on equipment or service, and that have no reason to favor their own long-haul single-line routes; and because certain important elevators in the Gulf region are rail-served exclusively by IC.

Consequences Of CN/IC Merger. North Dakota contends: that farmers in Alberta, Saskatchewan, and Manitoba compete with farmers in North Dakota for the sale of identical agricultural commodities on the world market; that the economic interests of a unified CN/IC (i.e., its desire to maximize its single-line long-hauls) will invariably lead CN/IC to favor agricultural commodities produced in Western Canada vis-à-vis agricultural commodities produced in North Dakota; that CN/IC, to maximize its single-line long-hauls, will raise rates charged to North Dakota shippers for movements on IC from Chicago to the Gulf; and that the resulting loss of the IC gateway (i.e., the resulting loss of the "friendly" IC connection at Chicago) will reduce the competitiveness of North Dakota agricultural commodities on world markets. North Dakota insists that, because North Dakota is so rail-dependent and has already been so hard hit by the recent fall in grain prices world-wide, the reduction in competitiveness that would accompany an unconditioned CN/IC merger would have a catastrophic impact. And, North Dakota warns, the loss of the Chicago gateway with IC might cause Soo to become non-viable in the North Dakota market, which would give BNSF (the only other Class I railroad in North Dakota) a stranglehold on North Dakota's economy.²⁰⁴

²⁰³ North Dakota contends: that trucks simply cannot handle the long-distance movement of significant volumes of agricultural commodities to the Gulf or to barge terminals in Minneapolis or St. Louis; that North Dakota does not have any navigable waterways capable of moving agricultural commodities by barge or ship; that, although small quantities of North Dakota agricultural commodities move to Minneapolis by rail for loading onto barges, it is not economical to move vast quantities of North Dakota agricultural commodities to Minneapolis for loading onto barges; and that, due to the nature and configuration of certain elevators in Louisiana and Mississippi, some of North Dakota's agricultural commodities exports must be moved exclusively by rail.

²⁰⁴ North Dakota insists that a three-railroad joint-line routing involving IMRL would not provide an effective alternative to the pre-merger Soo-IC joint-line routing. A Soo-IMRL-KCS routing,
(continued...)

Consequences Of The Alliance. North Dakota contends that, just as the CN/IC merger will jeopardize the ability of many North Dakota elevators to compete in southeastern domestic markets and in foreign markets accessed via the Gulf of Mexico, the CN/IC/KCS Alliance will similarly impair North Dakota's access to southern domestic markets and Mexican markets.²⁰⁵

Relief Requested. North Dakota urges the imposition of a "gateway protection" condition intended to preserve a competitive gateway for Soo through Chicago to points served by IC. The specific condition sought by North Dakota: would require CN/IC to grant haulage rights to Soo, or to such other carrier as may be designated by North Dakota, to allow that carrier to quote rates on agricultural commodities originating in North Dakota and moving to points served by IC; and would require CN/IC to carry all traffic to and from these elevators or other receivers as agent for the selected carrier in a non-discriminatory manner and at rates which provide IC the same net contribution it currently receives handling traffic at interline rates today to and from Chicago. North Dakota, which opposes the CN/IC merger absent the imposition of the requested condition, insists that the relief it seeks provides the only way to preserve both the ability of Soo to provide essential services in North Dakota and the ability of North Dakota producers of agricultural commodities to compete on a level playing field with producers in Canada and in other regions of the United States. And, North Dakota adds, the haulage condition it seeks: will not adversely affect CN/IC's ability to achieve the announced benefits of the merger; is, in fact, consistent with public statements made by applicants regarding their plans to maintain open gateways post-merger;²⁰⁶ and is, in reality, nothing more than a commercial alternative to an open gateway.²⁰⁷

²⁰⁴(...continued)

North Dakota claims, would be far too circuitous as compared to the Soo-IC routing. And, North Dakota adds, joint-line routings involving either BNSF or UP would not be effective either: because BNSF and UP can be expected to favor markets where they provide single-line service; and because BNSF, in particular, has an interest in expediting Soo's departure from North Dakota.

²⁰⁵ North Dakota indicates that traffic originated by Soo is currently interchanged with KCS at Kansas City en route to southwestern domestic markets and Mexico.

²⁰⁶ Applicants have indicated that a unified CN/IC "will have no incentive to ignore North Dakota's grain traffic by closing gateways." See CN/IC-56A at 132.

²⁰⁷ North Dakota cites Union Pacific — Control — Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982) (UP/MP/WP), and Santa Fe Southern Pacific Corp. — Control — SPT Co., 2 I.C.C.2d 709 (1986), 3 I.C.C.2d 926 (1987) (SF/SP), in support of the proposition that relief should be imposed to protect the essential services provided by Soo, the neutral gateway provided by IC, and the CN-IC routing now available to North Dakota shippers.

Response By CP. CP contends that, in view of applicants' assurances that they will have no incentive to close gateways, there should be no reason why applicants would object to the haulage rights proposed by North Dakota. CP adds that, if we elect to impose such rights, Soo will exercise such rights to provide vigorous competition for north-south grain shipments. See CPR-28 at 24 n.31.

EXXON. Exxon, the largest U.S.-based petroleum refiner and the third largest U.S.-based chemical company, contends that the CN/IC control transaction, together with the CN/IC/KCS Alliance, effects a de facto CN/IC/KCS merger that has harmed and will continue to harm competition at Exxon's Baton Rouge facilities.²⁰⁸

Exxon's Baton Rouge Facilities. Exxon operates, in or near Baton Rouge, five facilities that originate approximately 25% of Exxon's total nationwide rail shipments: its Baton Rouge Plastics Plant (BRPP); its Baton Rouge Polyolefins Plant (BRPO); its Baton Rouge Refinery (BRRF); its Baton Rouge Chemical Plant (BRCP); and its Baton Rouge Finishing Plant (BRFP). Exxon contends that, as a practical matter, these facilities, for the most part: (a) are rail-served both by IC and KCS, but by no other railroad; or (b) are rail-served solely by IC, but have a KCS build-in/build-out option; or (c) are rail-served solely by KCS, but have an IC build-in/build-out option. See ECA-7, V.S. Townsend, Exhibit I (a map). Exxon therefore argues: that, in the context of the Alliance, all of these facilities should be regarded as 2-to-1 facilities; and that the Alliance, by uniting the two carriers (IC and KCS) that together originate 94% of the rail cars moving outbound from these facilities, will have anticompetitive impacts at all of these facilities.²⁰⁹

(1) BRPP is located approximately 2 miles north of Baton Rouge, and has direct rail access both to IC (to which BRPP has always had direct access) and to KCS (to which BRPP has had direct access since the completion, in 1996, of a build-in project). Exxon concedes that UP has access to BRPP via switching, but insists that UP is effectively foreclosed by high switch charges (access via IC would cost \$675 per car; access via KCS would cost \$777 per car).²¹⁰

²⁰⁸ Exxon also contends that the Alliance Agreement is a pooling agreement. See ECA-14 at 8-10.

²⁰⁹ Exxon contends: that truck, barge, and pipeline are not feasible substitutes for the traffic originated at its Baton Rouge facilities; and that, although UP operates within 5 miles of these facilities, UP does not currently have direct physical access to these facilities and UP build-ins to these facilities would not be economically feasible.

²¹⁰ Exxon indicates that the \$777 access-via-KCS switch charge consists of a \$715 charge by KCS and, because KCS will not deliver the car directly to UP, a \$62 charge by IC.

(2) BRPO is located approximately 3.2 miles north of Baton Rouge, and has direct rail access to KCS only. Exxon concedes that both UP and IC have access to BRPO via switching, but insists that both are effectively foreclosed by high switch fees. Exxon contends, however: that it has an IC build-in option; that, in fact, a build-in project from IC to BRPO is under development; and that, prior to the establishment of the Alliance, Exxon and IC intended to complete the build-in by mid-2001.

(3) BRRF and BRCP are located in a single "complex" that is itself located immediately west and north of Baton Rouge. (a) Some of the loading facilities in the BRRF/BRCP complex have direct rail access both to IC and to KCS. Exxon concedes that UP has access to these loading facilities via switching, but insists that, for most of the traffic originating at facilities in the BRRF/BRCP complex, UP is effectively foreclosed by high switch charges (Exxon indicates that UP would have to pay KCS a \$314 per car switch fee and would have to pay IC a \$400 per car switch fee).²¹¹ (b) Some of the loading facilities in the BRRF/BRCP complex have direct rail access either to IC only or to KCS only. Exxon insists, however, that it could, with a modest investment and at its sole discretion (because it is the sole owner of the entire BRRF/BRCP complex), lay track or construct new loading facilities within the complex to access the other railroad.

(4) BRFP is located approximately 3 miles north of Baton Rouge, and has direct rail access to KCS only. Exxon concedes that both UP and IC have access to BRFP via switching, but insists that both are effectively foreclosed by high switch fees. Exxon claims, however, that, because an IC line is located only a mile from BRFP, Exxon has an IC build-in/build-out option at BRFP.

A Three-Way Transaction. Exxon argues that the transaction contemplated by applicants is a three-way CN/IC/KCS transaction. Exxon contends: that the Alliance railroads designed the Alliance to emulate, in every way possible, the single-line service that only a single rail network can provide; that the Alliance railroads have marketed Alliance services as if the three railroads were one; that the level of CN/IC/KCS integration contemplated by the Alliance Agreement has all the hallmarks of a de facto CN/IC/KCS merger; and that, as a practical matter, there is, from the perspective of a shipper like Exxon, no difference between a CN/IC/KCS merger and the CN/IC/KCS Alliance. Exxon further contends that the CN/IC control application confirms that the CN/IC control transaction and the

²¹¹ Exxon concedes that UP does in fact handle traffic originating at loading facilities in the BRRF/BRCP complex, but suggests that, for the most part, UP can handle this traffic either because UP has exclusive access to the destinations or because the switching carrier (IC or KCS) does not have direct control of the entire route. Exxon apparently acknowledges that, even accepting Exxon's view of the effects of the Alliance, the portion of the BRRF/BRCP traffic that UP actually handles should perhaps be regarded, for the most part, as 3-to-2 traffic. See ECA-7 at 6 n.18 (lines 6-8). See also ECA-7, V.S. Coulter at 2 (Exxon indicates that the portion of the traffic that is handled by UP to destinations served directly by the switching carrier moves under contracts that were established at a time when switching fees were significantly lower than they are now).

CN/IC/KCS Alliance are inextricably intertwined. Exxon claims, by way of illustration of this point: that the rail-to-rail diversion study submitted by applicants does not evaluate the effects of the CN/IC control transaction in and of itself, but, rather, evaluates the effects of the CN/IC control transaction in conjunction with the CN/IC/KCS Alliance and the CN/KCS Access Agreement; that, as a practical matter, many of the benefits that applicants claim will be generated by the CN/IC control transaction cannot be realized absent the CN/IC/KCS Alliance; and that the KCS trackage rights application clearly has nothing to do with the CN/IC control transaction in and of itself, but, rather, is entirely related to implementation of the CN/IC/KCS Alliance. The control transaction and the Alliance, Exxon argues, are, in practical effect, two indivisible parts of a single transaction that is intended to effect a de facto CN/IC/KCS merger.

Alleged Harmful Effects Of The Alliance. Exxon insists that the control transaction in conjunction with the Alliance has already had anticompetitive effects that will become more and more significant as existing contracts expire and as CN, IC, and KCS gain experience with the implementation of the Alliance. Exxon contends, in particular: that the Alliance will involve the exchange by IC and KCS of competitively sensitive information; that information gained by IC and/or KCS in Alliance transactions will inevitably be applied in connection with non-Alliance transactions; that IC and KCS cannot be expected both to exchange information with respect to the relatively large amount of traffic that can move via the Alliance and also to remain unaffected by such exchanges when purporting to compete for the relatively small amount of non-Alliance traffic; and that, given the relatively small amount of non-Alliance traffic, the Alliance railroads will have every incentive to divert their assets and personnel to Alliance movements, and will have no incentive to compete on non-Alliance movements. Exxon further contends: that the Alliance railroads do not intend to establish the kinds of safeguards necessary to preserve IC vs. KCS competition; that, because the carve-out provision²¹² permits the Alliance railroads to determine for themselves the traffic for which they will compete, the protections purportedly afforded by that provision will prove to be ineffectual; and that, in any event, no protections at all have been afforded to 1-to-1 shippers that now have build-in options.²¹³ Exxon therefore concludes that the combination of the control transaction and the Alliance will result in a reduction of competition (particularly IC vs. KCS competition), which will itself result (Exxon claims) in increases in rates and decreases in service quality.

²¹² The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements.

²¹³ Exxon claims, by way of example, that, given the Alliance, Exxon's IC build-in to the BRPO facility, which IC had intended to complete by mid-2001, is now in jeopardy, because neither a commonly controlled CN/IC nor a nominally independent IC will have an incentive to support a project that would serve only to cannibalize the monopoly profits of KCS.

Relief Sought. Exxon asks that we condition approval of the CN/IC control transaction by granting another Class I railroad cost-based direct access to Exxon's Baton Rouge facilities for the duration of the "de facto merger" (by which Exxon means the CN/IC control transaction in combination with the CN/IC/KCS Alliance). Exxon also asks that we condition approval of the CN/IC control transaction by imposing, to the extent feasible, conditions that will preserve Exxon's build-in options. Exxon insists that only direct physical access by another Class I railroad will redress the competitive harm caused by the combination of the control transaction and the Alliance.

Response To Applicants. Applicants have stipulated that the Alliance Agreement will not apply to any shipper if and when that shipper obtains direct access to both CN/IC and KCS via a railroad build-in, a shipper build-out, a grant of haulage or trackage rights, or reciprocal switching. Exxon claims that this stipulation lacks an enforcement mechanism. See ECA-14 at 5. Exxon also questions (apparently with reference to KCS) whether applicants consider this stipulation to be enforceable against every Alliance railroad. See ECA-14 at 6 n.19:

OCCIDENTAL CHEMICAL CORPORATION. Oxy Chem supports the CN/IC merger but is concerned that the CN/IC/KCS Alliance may adversely impact future competition at an Oxy Chem chemical production facility located in Convent, LA, on IC's line between Baton Rouge and New Orleans. Oxy Chem indicates: that its Convent facility is presently rail-served exclusively by IC; that, however, the facility is located approximately 7 miles from KCS's parallel Baton Rouge-New Orleans line; and that, therefore, the construction of a 7-mile connector line would give Oxy Chem access to the KCS line and would allow Oxy Chem to enjoy the benefits of IC vs. KCS competition. Oxy Chem further indicates that it is worried that the Alliance Agreement may adversely affect the build-in/build-out opportunity that presently exists at Convent. The existence of the Alliance Agreement, Oxy Chem claims, creates a substantial risk that KCS will be unwilling to compete aggressively against IC to serve Oxy Chem's Convent facility, especially in view of the fact that it is not entirely clear that the Alliance Agreement's carve-out provision is intended to encompass a situation in which direct access to more than one of the Alliance railroads is obtained in the future.²¹⁴

Oxy Chem argues that we should consider, in our review of the CN/IC control transaction, the competitive impacts of the CN/IC/KCS Alliance Agreement as it relates to existing and future competition between IC and KCS. (1) Oxy Chem contends that we should exercise jurisdiction over the Alliance Agreement: because the Alliance Agreement is an integral part of the CN/IC merger transaction; because the substantial coordination of marketing, operations, equipment, and information systems by the Alliance railroads may impact competition between these railroads in the territories where more than one Alliance railroad presently operates; and because, given the degree of coordination envisioned among the Alliance railroads, the Alliance Agreement may amount to an "acquisition of

²¹⁴ The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements.

control" under 49 U.S.C. 11323 that has given and will continue to give each Alliance railroad the power to affect the "day-to day affairs" of each other Alliance railroad. (2) Oxy Chem further contends that, even if we conclude that the Alliance Agreement does not equate to an "acquisition of control" under 49 U.S.C. 11323, we should still undertake to analyze the competitive impact of the Alliance Agreement as part of our review of the CN/IC merger application. We should do so, Oxy Chem insists, on account of the intrinsic relationship that exists between the CN/IC merger and the CN/IC/KCS Alliance, as evidenced by the fact that details respecting the Alliance have been submitted by applicants as integral aspects of the merger.

Oxy Chem contends that, if we approve the CN/IC merger, we should condition our approval by ensuring the preservation of all presently existing opportunities for shippers to receive future competition by obtaining access to more than one of the Alliance railroads. Oxy Chem urges, in particular, the adoption of a condition that would require that the provisions of the Alliance Agreement be clarified to ensure that that agreement will not apply to situations where a shipper obtains direct access to more than one Alliance railroad in the future. This condition, Oxy Chem claims, would ensure that the Alliance Agreement will not eliminate or render meaningless Oxy Chem's presently existing opportunity to obtain future competition at its Convent plant via a build-in from or a build-out to the nearby KCS line.

RUBICON AND UNIROYAL. Rubicon and Uniroyal contend that the CN/IC control transaction, in conjunction with the CN/IC/KCS Alliance and the CN/KCS Access Agreement, will eliminate the KCS build-in option that their IC-served Geismar facilities would otherwise have enjoyed.

The Rubicon/Uniroyal Facilities At Geismar. Rubicon indicates: that it produces seven chemical products at its Geismar facility, which is rail-served exclusively by IC; that approximately 37% of its outbound shipments move by rail; that, in addition, approximately 173,000 tons of chlorine used annually at its facility move inbound by rail; and that, together, the inbound and outbound movements amount to approximately 6,000 rail car shipments a year. Uniroyal indicates: that it produces various products at its Geismar facility, which is rail-served exclusively by IC; and that it relies upon rail service for inbound and outbound shipments amounting to approximately 600 carloads of material per year.

The Finance Docket No. 32530 Proceeding. By petition filed February 24, 1995, KCS sought an exemption from the prior approval requirements of 49 U.S.C. 10901 to construct and operate approximately 9 miles of track beginning at approximately MP 814 on its Baton Rouge-New Orleans line (MP 814 is located on the KCS line in the general vicinity of the intersection of Highways 30 and 61) and extending in a northwesterly direction to the Geismar industrial complex near Gonzales and Sorrento, in Ascension Parish, LA. KCS indicated that the new track would connect with the industrial track and facilities of three large shippers (BASF, Borden, and Shell) that were, and without the new KCS track would continue to be, rail-served exclusively by IC.

By decision served June 30, 1995, our predecessor agency conditionally granted the requested exemption from the prior approval requirements of 49 U.S.C. 10901 for the construction and operation of the new track, subject, however, to further consideration of the anticipated environmental impacts.²¹⁵

In a Draft Environmental Impact Statement served July 16, 1997, our Section of Environmental Analysis (SEA) preliminarily concluded that construction and operation of either of two feasible alternatives (referred to as Route A and Route B) would have no significant environmental impacts, provided that KCS were to implement the mitigation recommended by SEA; and preliminarily recommended that we impose on any final decision approving construction of Route A or Route B conditions requiring KCS to implement the mitigation recommended by SEA.²¹⁶

By decision served August 27, 1998, we ordered that the Finance Docket No. 32530 proceeding be held in abeyance until the issuance of a final written decision in the STB Finance Docket No. 33556 proceeding. We indicated: that the CN/KCS Access Agreement purports to allow KCS to serve the same shippers that the new track would allow it to serve; that, furthermore, the access envisioned by the Access Agreement would avoid the disruptive environmental consequences that would be involved with the physical construction of new track; that it would be hard to justify, either economically or environmentally, the construction contemplated in the Finance Docket No. 32530 proceeding when it had become apparent that approval of the CN/IC control transaction would mean that service by KCS could be provided over existing IC track; and that, given the circumstances, it would be inappropriate to take any further action in the Finance Docket No. 32530 proceeding prior to the issuance of our written decision in the STB Finance Docket No. 33556 proceeding.²¹⁷

²¹⁵ See Kansas City Southern Railway Company — Construction and Operation Exemption — Geismar Industrial Area Near Gonzales and Sorrento, LA, Finance Docket No. 32530 (ICC served June 30, 1995) (but noting, with respect to the Shell facility, that KCS, to reach that facility, would either have to enter into a crossing agreement with IC or receive crossing authority under 49 U.S.C. 10901(d)(1)).

²¹⁶ See The Kansas City Southern Railway Company — Construction Exemption — Ascension Parish, LA [Draft Environmental Impact Statement], Finance Docket No. 32530 (STB served July 16, 1997). See, in particular, the Draft Environmental Impact Statement's Appendix A, Figure A-2 (a map depicting the existing IC line, the existing KCS line, proposed KCS Route A, and proposed KCS Route B, and also the Geismar industrial complex facilities operated by BASF, Borden, Shell, Rubicon, and Uniroyal). See also RUB-14, Tab II, Exhibit A (this paper, which was filed in this proceeding, is a replication, in part, of the Figure A-2 map).

²¹⁷ See Kansas City Southern Railway Company — Construction and Operation Exemption — Geismar Industrial Area Near Gonzales and Sorrento, LA, Finance Docket No. 32530 (STB served Aug. (continued...))

The KCS Build-In Option. Rubicon and Uniroyal argue: that each now has a KCS build-in option; that these options will be eliminated by the CN/KCS Access Agreement; and that, in the context of the CN/IC control transaction, Rubicon and Uniroyal must therefore be regarded as 2-to-1 shippers.

(1) Uniroyal, in support of its claim that it now has a KCS build-in option, contends: that the new track contemplated by KCS in the Finance Docket No. 32530 proceeding includes an "industry connector" that would run through, or immediately adjacent to, Uniroyal's property; that Uniroyal, when it gave its permission for the industry connector to cross its property, did so with the understanding that the industry connector would be extended to the Uniroyal facility; that the planned industry connector is located only a short distance (approximately 2,500 feet) from the Uniroyal facility; and that there are no public rights-of-way which would need to be crossed for the industry connector to be extended to the Uniroyal facility.

(2) Rubicon, in support of its claim that it now has a KCS build-in option, contends: that the planned industry connector is located only a short distance (less than a mile) from the Rubicon facility; that, although an extension to the Rubicon facility would have to cross Uniroyal's property, Uniroyal (which is a partial owner of Rubicon) has advised that it would allow the industry connector, when constructed, to be extended to the Rubicon facility; and that there are no public rights-of-way which would need to be crossed for the industry connector to be extended to the Rubicon facility.²¹⁸

(3) Rubicon and Uniroyal acknowledge that KCS, in its Finance Docket No. 32530 petition, did not explicitly include Rubicon and Uniroyal among the shippers that would be served by KCS's planned Geismar build-in line. Rubicon and Uniroyal contend, however: that the only reason that neither Rubicon nor Uniroyal was mentioned by name in KCS's Finance Docket No. 32530 petition is because neither was then prepared to commit traffic to KCS; that, however, KCS never intended to restrict itself to serving only those shippers (BASF, Borden, and Shell) that had made traffic commitments prior to the filing of KCS's Finance Docket No. 32530 petition; that KCS, in fact, has acknowledged that, regardless of whether a shipper committed in advance to use KCS, KCS did not intend to limit service via the Geismar build-in to the three shippers named in the build-in petition; and that there is nothing in the June 1995 decision conditionally granting the requested exemption that indicates that the build-in, if constructed, would be limited to providing service to the three named shippers only.

²¹⁷(...continued)
27, 1998).

²¹⁸ Rubicon concedes that an extension to the Rubicon facility might have to cross the property of one of the parties named in the Geismar build-in petition (this is apparently a reference either to Borden or to BASF). Rubicon contends, however, that this would not create an obstacle to an extension. See RUB-14 at 24-25.

(4) Rubicon and Uniroyal insist that their KCS build-in options will be effectively superseded by the CN/KCS Access Agreement, which will provide KCS with access to three Geismar shippers (BASF, Borden, and Shell) via IC haulage between Baton Rouge and Geismar, and via IC switching (or switching arranged for by IC) at Geismar. Rubicon and Uniroyal contend that, as a practical matter, the KCS access provided for in the Access Agreement will render moot the construction by KCS of its proposed build-in track; and will thereby remove KCS as a potential competitor in Geismar for Rubicon and Uniroyal (and, indeed, for all shippers other than BASF, Borden, and Shell).

(5) Rubicon adds that the loss of its KCS build-in option will cause Rubicon to suffer particularly onerous consequences. Rubicon contends: that one of its primary competitors is BASF, which competes with Rubicon with respect to products comprising more than 95% of Rubicon's product line, and which (like Rubicon) is now rail-served exclusively by IC; that BASF, however, will be one of the beneficiaries of the Geismar access that KCS will receive under the Access Agreement; that BASF will therefore enjoy the benefits of IC vs. KCS competition; and that this differential impact will leave Rubicon in a precarious market position.

Analytical Approaches. Rubicon and Uniroyal contend that the anticipated loss of their KCS build-in options should be regarded in one of two ways.

(1) Rubicon and Uniroyal argue, first of all, that the CN/IC merger, the CN/IC/KCS Alliance, and the CN/KCS Access Agreement constitute a singular arrangement and must therefore be reviewed as such. Rubicon and Uniroyal contend: that the Alliance contemplates an extremely close marketing and operational relationship among the three pre-transaction Alliance railroads (CN, IC, and KCS) and among the two post-transaction Alliance railroads (CN/IC and KCS); that, as a practical matter, the Alliance and Access Agreements are products of, and opportunities created by, the CN/IC merger; that, given the two agreements, KCS must be regarded as an integral element of the CN/IC merger; that the CN/IC merger, coupled with the two agreements, will have an anticompetitive effect on Rubicon and Uniroyal by eliminating the parallel IC vs. KCS competition at Geismar arising out of the planned KCS build-in; and that the loss of competition at Geismar is a circumstance requiring the imposition of a remedial condition under 49 U.S.C. 11324(c).

(2) Rubicon and Uniroyal argue, in the alternative, that the CN/IC-KCS relationship created by the Alliance and Access Agreements should be regarded as a "pooling" arrangement. Rubicon and Uniroyal contend: that KCS has agreed not to compete with IC in certain geographical areas (i.e., the Baton Rouge-New Orleans corridor) in return for what KCS deems to be a better opportunity (i.e., status as the favored connection for CN/IC in the Canada-to-Mexico corridor); that the agreement by KCS not to compete in certain corridors equates to a pooling agreement; and that, because pooling agreements may be approved only if they do not unreasonably restrain competition, the loss of competition at Geismar is a circumstance requiring the imposition of a remedial condition under 49 U.S.C. 11322(a).

Relief Sought. Rubicon and Uniroyal ask that we require that the Access Agreement as it pertains to Geismar be expanded to include access by KCS to Rubicon and Uniroyal. The sought requirement, Rubicon and Uniroyal argue, would preserve the KCS competitive option that the KCS build-in line would have provided to Rubicon and Uniroyal.²¹⁹

VULCAN. Vulcan contends that the CN/IC control transaction, in conjunction with the CN/IC/KCS Alliance and the CN/KCS Access Agreement, will eliminate the KCS build-in option that its IC-served Geismar facility would otherwise have enjoyed.²²⁰

The Vulcan Facility At Geismar. Vulcan indicates: that it produces various chemical products at its Geismar chloralkali manufacturing facility, which is rail-served exclusively by IC; that it ships approximately 2,800 rail cars of outbound chemical products a year; that it receives between 2,600 and 3,120 rail cars of inbound raw materials a year; and that it anticipates, in late 1999 or early 2000, a major expansion of its Geismar facility that will result in an increase in its demand for rail services on both inbound and outbound movements.

The KCS Build-In Option. Vulcan insists: that it now has a KCS build-in option; and that this build-in option will be eliminated by the CN/KCS Access Agreement.

(1) Vulcan contends: that, for several years prior to the negotiation of the Access Agreement, KCS sought to have Vulcan build out to the KCS build-in line; that KCS knew that Vulcan intended to build out to the KCS build-in line; that, in fact, the build-out by Vulcan was virtually assured (assuming,

²¹⁹ Rubicon and Uniroyal concede that, in the merger context, the typical remedy for the loss of a build-in option is a grant to a third railroad of trackage rights with stop-off privileges at the point of build-in. Rubicon and Uniroyal contend, however, that, in the present context, the typical remedy would not suffice, considering that "the build-in opportunity being eliminated is new construction which will be eliminated due to an agreement between the railroad parties, and further considering that the service extension to Rubicon and Uniroyal would be through a spur of nominal length." See RUB-14 at 29 n.18. See also RUB-14 at 28 (Rubicon and Uniroyal contend that, although the typical build-in issue in the rail merger context involves the loss of a build-in opportunity, the build-in issue raised by Rubicon and Uniroyal involves the loss of the build-in itself). Rubicon and Uniroyal further contend that, in the present context, the only available and appropriate remedy is an extension of the Access Agreement to cover the Rubicon and Uniroyal facilities.

²²⁰ See VUL-6, V.S. Phillips, Appendix A (a copy of the Finance Docket No. 32530 Figure A-2 map to which has been added a notation indicating the location of the Vulcan facility).

of course, that KCS constructed the build-in line); and that KCS was planning to serve Vulcan following completion of the KCS build-in and the Vulcan build-out.²²¹

(2) Vulcan acknowledges that KCS, in its Finance Docket No. 32530 petition, did not explicitly include Vulcan among the shippers that would be served by KCS's planned build-in line. Vulcan also acknowledges that, even after that petition was filed, Vulcan never made any public commitment to build out to the KCS build-in. Vulcan contends, however, that its silence reflected nothing more than a concern for community sentiment (Vulcan claims that opposition to the build-in by many local residents made Vulcan somewhat reluctant to support the build-in plan aggressively) and a sensitivity to KCS's needs (Vulcan claims that KCS, because it was afraid that any indication that the line might serve additional shippers might trigger a delay in the release of the Board's Environmental Impact Statement, did not want Vulcan to make any public commitment to build out to the build-in until after release of that Statement). But Vulcan insists that, despite its silence at the time, it did support the build-in plan and was prepared to use the services of KCS when available.

(3) Vulcan insists: that, as a practical matter, the CN/IC merger, with the associated Alliance and Access Agreements, has effectively halted the previously ongoing build-in process; and that, again as a practical matter, the Access Agreement, if implemented, will eliminate the access to KCS that Vulcan would have enjoyed under the KCS build-in plan.

Analytical Approach. Vulcan contends: that KCS is such a vital part of the transaction crafted by applicants that the various traffic and economic studies undertaken by applicants include KCS as an inseparable component;²²² that the rail system that will emerge post-transaction will reflect the CN/IC control transaction in conjunction with the Alliance and Access Agreements (and will not reflect the CN/IC control transaction in and of itself); that, therefore, the transaction crafted by CN, IC, and KCS must be regarded, in substantial part, as a three-way CN/IC/KCS transaction; that, in crafting this transaction, CN, to preserve IC's position as Vulcan's exclusive rail carrier, used the inducements of a three-carrier "Alliance" to induce KCS to limit its access to Geismar to fewer shippers than it would have served with the build-in; and that we are therefore required to provide a remedy for the substantial reduction in rail competition that will occur post-transaction as a result of this three-way transaction. Vulcan further contends: that this is not a situation in which a potential build-in/build-out option has been eliminated by a merger; that, to the contrary, this is a situation in which an actual build-in/build-out that was in progress has been eliminated by a merger; that, furthermore, this is a situation in which the IC

²²¹ Vulcan concedes that, in order to complete its build-out, it would have had to purchase some land. Vulcan claims, however, that neither Vulcan nor KCS saw this as an impediment to the construction of a Vulcan build-out.

²²² Vulcan claims, in particular, that without KCS there would be none of the "NAFTA Railroad" benefits touted by applicants, and substantially fewer, if any, merger benefits of any kind.

vs. KCS competition that would have existed upon construction of the planned build-in was eliminated by agreement of CN and KCS; and that, as a practical matter, Vulcan's loss of its KCS build-out option is exactly the same kind of loss that would have occurred in connection with an outright IC/KCS merger. The CN/IC merger with its related agreements, Vulcan adds, is the sole reason that Vulcan will not enjoy the benefits of the IC vs. KCS competition that would have been made possible by the KCS build-in.

Relief Sought. Vulcan contends that, in view of the circumstances surrounding the Alliance and Access Agreements and the apparent cancellation of the build-in plan, we should require that the Access Agreement as it pertains to Geismar be expanded to include access by KCS to Vulcan under the same terms and conditions applicable to KCS's access to BASF, Borden, and Shell.

Reply By Applicants To The Geismar Parties. Applicants claim that, even if the KCS build-in line had ultimately been constructed, the Geismar parties (i.e., Rubicon, Uniroyal, and Vulcan) would not have obtained access to KCS service any earlier than the third quarter of 2003. Applicants therefore contend that, even if we decide that relief for the Geismar parties is warranted, any conditions imposed for the benefit of these parties should have an effective date not earlier than 2003. See CN/IC-56A at 344-46.

NITL. On March 17, 1999, NITL²²³ and applicants entered into an agreement (hereinafter referred to as the NITL Agreement) that contains nine numbered paragraphs. See CN/IC-65 and NITL-5 (a single pleading, filed March 17, 1999).²²⁴

Paragraph 1 of the NITL Agreement recites that CN, IC, and KCS have provided NITL with specific assurances: that the Alliance Agreement may not be used where two or more of the Alliance railroads, and no other carriers, directly serve a particular shipper; and that the Alliance Agreement will not abridge a shipper's right to route its traffic.

Paragraph 2 of the NITL Agreement recites that CN, IC, and KCS have also provided NITL with specific assurances that the Alliance Agreement would not apply once a shipper, currently served by only one Alliance member, subsequently gains access to a second Alliance member through a build-in, build-out, or any other access arrangement that permits the second Alliance member to compete with the first to originate or terminate a move at the point of access.

Paragraph 3 of the NITL Agreement contains a list (hereinafter referred to as the Paragraph 3 list) of shippers that are located at or between Baton Rouge and New Orleans and that are jointly served

²²³ NITL is an organization of shippers and groups and associations of shippers conducting industrial and/or commercial enterprises.

²²⁴ NITL has effectively withdrawn the requests for relief set out in its comments and its brief.

by IC and KCS and by no other carrier: Colonial Sugar at Gramercy, LA; Nalco Chemicals at Garyville, LA; Cargill at Reserve, LA; Archer Daniels Midland at Reserve, LA; Dupont Chemical at LaPlace, LA; Bayou Steel at LaPlace, LA; Shell Chemicals at Norco, LA; and Gattermin at Good Hope, LA.

Paragraph 3 provides that, if a shipper (i.e., a shipper not listed in the Paragraph 3 list) that is currently served by only one Alliance member gains access to a second Alliance member through a build-in, build-out or any other access arrangement that permits the second Alliance member to compete with the first to originate or terminate a move at the point of access, that shipper would be added to the Paragraph 3 list. Paragraph 3 further provides: that, if a shipper located at or between Baton Rouge and New Orleans believes that it is similarly situated so that its only competitive alternatives for the origination or termination of traffic by rail at one of its facilities are KCS and IC, such shipper may request to be added to the Paragraph 3 list; and that, if CN or IC declines to do so, the shipper will have the right to seek addition to the list by submitting the matter to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules.

Paragraph 4 of the NITL Agreement provides that, for those customers described in Paragraph 3, CN and IC have agreed to limit annual adjustments to rates and charges to an amount not greater than the annual rate of change in the Adjusted Rail Cost Adjustment Factor (RCAF(A)), for a period of ten years. Paragraph 4 further provides: that this limitation will apply to both contract and common carrier rates and charges; but that, at the Cargill and Archer Daniels Midland facilities at Reserve, LA, these rate protections will apply only on outbound traffic.

Paragraph 5 of the NITL Agreement provides: that, for a period of ten years, service provided by CN and IC to the shippers described in Paragraph 3 will be equal to or better than that provided by IC at the time of the NITL Agreement for comparable movements and volumes of traffic; that "service" will be defined as frequency of switching, average transit time by lane, car supply or such other factors as identified by mutual agreement between CN, IC, and the shipper; and that current service levels will be reviewed and documented for the purpose of the NITL Agreement.

Paragraph 6 of the NITL Agreement provides: that if a shipper described in Paragraph 3 believes that CN or IC has violated the NITL Agreement, the shipper will so advise the Senior Vice-President of Marketing of CN/IC; that, if the shipper does not obtain satisfaction through this course of action, the shipper will have the right to submit the matter to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules; and that, if CN or IC is found at fault, CN or IC would be required either to remedy the fault or to pay damages (determined by the arbitrator) to the shipper, or both. Paragraph 6 further provides that no other remedy would be available.

Paragraph 7 of the NITL Agreement provides: that the parties thereto will submit it by stipulation to the Board and request that it be approved as a condition of approval of the CN/IC control transaction; and that, if the Board does not approve the NITL Agreement as a condition of approval of the CN/IC control transaction, individual shippers affected by any of the provisions of the NITL Agreement shall be third-party beneficiaries. Paragraph 7 further provides: that NITL's concerns

respecting the CN/IC control transaction have been addressed by the NITL Agreement; that NITL will not advocate or support any other condition to Board approval of the CN/IC control transaction or any responsive or inconsistent application that is not also supported by applicants; but that this is not to be construed as an expression by NITL of opposition to any condition or responsive or inconsistent application requested by any other party to this proceeding.

Paragraph 8 of the NITL Agreement provides: that the rights and obligations set forth in the NITL Agreement are contingent upon and will become effective on the date of consummation of the CN/IC control transaction; and that the NITL Agreement will have no continuing force or effect if the Board does not authorize or CN does not consummate the CN/IC control transaction.

Paragraph 9 of the NITL Agreement provides that the NITL Agreement will be governed by the law of the District of Columbia.

Response By UP. UP contends that the NITL Agreement is inadequate to preserve competition in the Baton Rouge-New Orleans corridor. See UP's letter (not designated) filed Mar. 19, 1999. (1) UP claims that the NITL Agreement fails to preserve genuine rail-to-rail competition for 2-to-1 traffic in the Baton Rouge-New Orleans corridor. The NITL Agreement, UP insists, merely imposes a 10-year rate cap, and provides that the quality of service shall not be worsened for that same period. Genuine competition, UP argues, covers much more than this. (2) UP claims that the NITL Agreement fails to accord 2-to-1 status to the four shipper facilities where KCS or IC had committed, prior to the announcement of the CN/IC control transaction and the CN/IC/KCS Alliance, to build in to bring competition to IC or KCS, respectively: the Borden, BASF, and Shell facilities at Geismar (subject to a KCS build-in), and the Exxon Polyolefins Plant at Baton Rouge (subject to an IC build-in). UP also claims that the NITL Agreement does not list as covered facilities certain other facilities where high switch fees applicable to UP make KCS and IC the only actual rail competitors. (3) UP claims that the NITL Agreement fails to preserve competition for future build-ins, future transload facilities, and future industry sitings. (4) UP claims that there is no indication that the adversely affected shippers regard the NITL Agreement as an adequate remedy.

Response By DOT. DOT contends that the NITL Agreement contains many provisions that could present competitive problems if implemented. See DOT's letter (not designated) filed Mar. 22, 1999. (1) DOT notes that Paragraph 1 provides that the Alliance will not apply where two or more of the Alliance railroads, and no other carriers, directly serve a particular shipper. DOT interprets this to mean: that the Alliance will apply where two Alliance railroads and a third railroad directly serve a particular shipper; and that, in situations of that sort, the two Alliance partners will cease to compete with each other for the shipper's business. This, DOT insists, is unacceptable. And, DOT adds, it is unclear whether the phrase "and no other carriers" includes motor, barge, or pipeline carriers. (2) DOT notes that Paragraph 2 provides that the Alliance will not apply once a *shipper*, currently served by only one Alliance member, subsequently gains access to a second Alliance member through a build-in, build-out, or any other access arrangement that permits the second Alliance member to compete with the first

to originate or terminate a *move* at the point of access. DOT claims that Paragraph 2 does nothing to alter the provision in the Alliance Agreement that allows the partners to determine together, on an individual movement basis, whether or not they will continue to compete for a shipper's business. DOT further claims that the language of Paragraph 2 is quite restrictive; DOT notes, by way of example, that, although the "build-in, build-out, or any other access" provision applies only to a single shipper, such undertakings frequently require a group of shippers to justify the project. (3) DOT questions whether the NITL Agreement would be enforceable as against KCS, which (DOT notes) is not a signatory thereto. (4) DOT insists that the NITL Agreement provides yet another reason why the Alliance Agreement (not to mention the NITL Agreement itself) should not be approved by the Board in circumstances where that approval would immunize these undertakings from antitrust purview.

Applicants' Reply To UP. Applicants (in a letter dated March 23, 1999) insist that the NITL Agreement does not recognize that CN/IC and KCS will not compete for 2-to-1 traffic in the Baton Rouge-New Orleans corridor; the longstanding and unquestioned IC vs. KCS competition in that corridor, applicants contend, will continue. Applicants also insist that the Alliance Agreement does not enable the Alliance railroads to accomplish any of the three elements necessary to sustain tacit collusion: the Alliance Agreement, applicants claim, does not enable the railroads to reach tacit agreement without any express communication; the Alliance Agreement, applicants also claim, does not enable the railroads to monitor each other's adherence to any tacit agreement; and the Alliance Agreement, applicants further claim, does not provide the railroads with any credible ability to punish cheating swiftly and effectively.

Applicants' Reply To DOT. (1) Applicants (in a letter dated March 23, 1999) insist that the decades-long competitive rivalry between IC and KCS will continue where it exists today and will expand wherever the economics of new construction make expansion feasible. And, applicants add, the reference to "no other carrier" in Paragraph 1 was understood and will be construed by applicants to mean no other rail carrier. (2) Applicants insist that the reference in Paragraph 2 to "a shipper" was intended and will be construed by applicants to mean any shipper involved in a build-in/build-out. (3) Applicants insist that the fact that only CN and IC are parties to the NITL Agreement merely reflects the fact that CN and IC are the applicants with respect to the CN/IC control transaction; KCS, applicants note, is not an applicant with respect to that transaction. And, applicants add, KCS cannot act unilaterally on behalf of the Alliance.

TFI. TFI, an association of U.S. fertilizer manufacturers, supports the CN/IC merger but seeks the imposition of certain specified conditions.

The Alliance And Access Agreements. TFI urges careful review of the potential competitive effects of the Alliance and Access Agreements. TFI contends that there are concerns: that the three Alliance railroads will have, and indeed may already have, the power to restrict, regulate, oversee, or otherwise affect each others' "day-to day affairs"; that the involvement of each of the Alliance railroads in essential aspects of the operations of each other Alliance railroad will make each of them, and perhaps

has already made each of them, less likely to compete with each other; and that, therefore, the Alliance and Access Agreements will have, and perhaps have already had, a dampening effect on IC vs. KCS competition. TFI insists that, because these potential effects act in combination with the proposed CN/IC control transaction, and because the Alliance and Access Agreements appear to be integral parts of the CN/IC control application, we have the authority to consider the concerns voiced by TFI and to impose necessary conditions to ensure that the feared adverse effects on competition do not occur.

Relief Sought. TFI contends that, given the uncertainties regarding the scope and effect of the Alliance Agreement's carve-out provision,²²⁵ and given also the critical importance of preserving competition between IC and KCS, the Board should condition approval of the CN/IC control transaction by giving legal force and effect to applicants' assurances that the Alliance and Access Agreements will not result in a diminution of competition. TFI requests, in particular, the adoption of a condition that will require that applicants and KCS not apply the Alliance Agreement to any shipper that now has or that in the future may obtain access to both CN/IC and KCS, including access by means of build-ins or build-outs, or by any other means of competitive access.

Limited Oversight Sought. TFI also requests the imposition of a limited oversight condition, in order to ensure that the Alliance and Access Agreements do not have adverse effects on competition between CN/IC and KCS.

Stipulation By Applicants; Response By TFI. Applicants have stipulated, in their rebuttal submissions, that the Alliance Agreement will not apply to any shipper if and when that shipper obtains direct access to both CN/IC and KCS via a railroad build-in, a shipper build-out, a grant of haulage or trackage rights, or reciprocal switching; and applicants have promised that if, in the future, there is a question regarding the application of this stipulation, applicants will not object on jurisdictional grounds if parties seek to reopen this proceeding in order to enforce the stipulation. See CN/IC-56A at 21 and 73 (filed Dec. 16, 1998). TFI has argued, in essence, that this stipulation should be imposed as a condition. See TFI-2 at 1 (filed Feb. 18, 1999).

AMERICAN FOREST & PAPER ASSOCIATION. AF&PA, the national trade association of the forest products and paper industry, believes that the CN/IC control transaction has the potential to benefit the forest products and paper industry, and that, subject to the imposition of conditions intended to eliminate "paper barriers" and to enhance competitive switching alternatives, the CN/IC control application should be approved by the Board. AF&PA insists that the two conditions it seeks: would help to ensure that there will be meaningful competition between a unified CN/IC and other railroads; would thereby promote efficient and cost-effective transportation services and alternatives for shippers;

²²⁵ The reference is to the provision that makes the Alliance inapplicable to certain 2-to-1 and 3-to-2 movements.

and would also help to prevent service failures and disruptions of the type recently experienced on the UP system in the West.

Condition #1: Paper Barriers. AF&PA asks that we condition approval of the CN/IC merger by requiring the elimination of “paper barriers” that prevent or restrict access to or from Class III shortlines that connect with IC or with any U.S. subsidiary of CN. AF&PA contends: that shortlines can provide reliable and efficient service on lower density rail lines that have been “spun-off” by the larger Class I carriers as a result of mergers; that, however, “paper barriers” instituted in line sale agreements and pricing policies of the larger railroads have severely restricted, either directly or indirectly, the ability of their shortline spin-offs to interchange traffic with other rail carriers, even where such routings and connections would be efficient; and that such paper barriers are anticompetitive and, therefore, do not serve the public interest. AF&PA further contends that we should exercise our broad conditioning authority to require the removal of existing paper barriers and to prevent the imposition of such barriers in the future, with respect to Class III shortlines that connect or will connect with IC or with U.S. subsidiaries of CN. AF&PA insists that a condition requiring the removal of paper barriers in connection with this proceeding would be in the best interests of all concerned, including CN/IC and connecting shortlines, and also the shippers and receivers they serve.

Condition #2: Interswitching Arrangements. AF&PA asks that we condition approval of the CN/IC merger by requiring IC and the U.S. subsidiaries of CN to allow increased competitive switching opportunities and alternatives by the use of “interswitching” arrangements comparable to those implemented in Canada under the Canadian Transportation Act, 1996.²²⁶ AF&PA contends: that enhanced rail-to-rail-competition is necessary to ensure low cost, efficient transportation for shippers; that, given our broad conditioning power in merger proceedings²²⁷ and the significant changes occasioned by the ongoing restructuring of the U.S. railroad industry, it would be appropriate to require

²²⁶ AF&PA indicates that the “interswitching” provisions of the Canadian Transportation Act provide that, if a line of one railway company connects with a line of another railway company, an application for an interswitching order may be made to the governing agency by either company, by municipal government, or by any other interested person, including shippers and receivers. AF&PA further indicates: that the interswitching provisions generally cover situations where the point of origin or destination of a continuous movement of traffic is within a radius of 30 kilometers, or a prescribed greater distance, of an interchange; and that, upon application, the governing agency may order the railway companies to provide reasonable facilities for the convenient interswitching of traffic in both directions at an interchange between the lines of either railway and those of other railway companies connecting with them.

²²⁷ AF&PA expresses its belief that we should endeavor, in merger proceedings involving Class I carriers, to expand competitive alternatives available to shortline carriers and their customers to the maximum extent possible.

IC and the U.S. subsidiaries of CN to enter into "interswitching" arrangements with all major connecting railroads, including BNSF, UP, CSX, and NS; and that, because such a condition would allow increased competitive opportunities for shippers, it would be in the public interest.

CHAMPION. Champion, an integrated forest products company that originates a substantial volume of traffic at mills served directly by CN, supports the CN/IC control transaction provided that rail competition for shippers is maintained in areas where rail competition is physically available and further provided that reasonable rates are set for captive shippers.

U.S. DEPARTMENT OF TRANSPORTATION. DOT has addressed, in its brief, the key issues raised in this proceeding.

The CN/IC Control Transaction. DOT contends that the CN/IC merger, looked at separate and apart from the two KCS agreements, presents no overarching competitive difficulties. This merger, DOT believes, is a classic "end-to-end" consolidation in which there is virtually no overlap or head-to-head competition between the merging parties.

The Alliance And Access Agreements. DOT contends that the Alliance and Access Agreements present competitive difficulties and will affect the public interest in a sound and efficient national transportation system, and that we are therefore required to conduct a thorough evaluation of the consequences of these two agreements. DOT notes, in this respect, that the Alliance and Access Agreements:²²⁸ are, in timing, in content, and in legal and practical effect, integral to the CN/IC merger transaction; more closely align the interests of IC and KCS, carriers whose north-south systems parallel each other and who directly compete in particular corridors and points; and will affect large volumes of traffic and rail operations over broad regions of the continent.²²⁹

²²⁸ DOT's analysis is largely directed to the Alliance Agreement and pays little attention to the Access Agreement. And, when it does mention the Access Agreement, DOT tends to focus on only one element thereof: the access that KCS will gain at Geismar.

²²⁹ In support of the proposition that we have the authority to review, and to approve or disapprove, the terms of the Alliance and Access Agreements, DOT cites Union Pacific Corp. et al. — Cont. — MO-KS-TX Co. et al., 4 I.C.C.2d 409, 480 (1988) (UP/MKT) (emphasis added): "We will review and specifically approve or disapprove settlement terms (rather than simply allow them to become effective as contractual matters without action on our part) in two circumstances. First, we will act on settlement terms providing for actions or operations, such as trackage rights or pooling, requiring our approval under the statute. *Second, we may act on settlement terms which affect the public's interest in a sound and efficient national transportation system*, and will approve them if they are consistent with the public interest and if the terms require immunity from the antitrust laws or other laws in order to be

(continued...)

DOT contends: that the joint marketing, operations, and facility investments contemplated by the Alliance Agreement bespeak a collaborative undertaking that emphasizes broad cooperation; that, although the Alliance by its terms applies only to interline traffic (which, DOT concedes, is a relatively small proportion of applicants' total business), it is unprecedented in scope, going beyond customary VCAs; that the combined efforts of CN/IC and KCS to attract traffic onto the Alliance rail network will necessitate significantly increased communication and information exchanges, as well as a great many specific steps to harmonize their operations; that the emphasis on cooperation inherent in such a venture strongly suggests a concomitant de-emphasis on competition among the participants; and that, all things considered, there is reason for concern that the Alliance will adversely affect the incentives of the Alliance railroads to continue to pursue shippers that now receive service from only one of them, but that could be served by the other in the future. DOT cites, by way of example, the Baton Rouge-New Orleans corridor, in which (DOT notes) the lines of IC and KCS are very close together, which means (DOT claims) that either carrier, in the absence of the Alliance, could easily expand service to shippers that now are solely-served by the other. And, DOT adds, neither the Alliance Agreement's "carve-out" provision nor statements by applicants and KCS that they intend to compete vigorously can eliminate the concern that the Alliance may weaken future competition.

DOT emphasizes, however, that, although it believes that the Alliance Agreement presents competitive difficulties, it is not arguing that this agreement is necessarily anticompetitive or otherwise contrary to the public interest. DOT notes, in this regard, that, although the Alliance may be akin to pooling in some respects, and envisions a level of cooperation that is apparently unprecedented in the rail industry, the Alliance appears to be analogous to joint arrangements (often referred to as "alliances") that are commonplace today among air carriers and water carriers, and that may (in DOT's view) represent the future trend among rail carriers as well. DOT has concluded, however, that, aside from the special problem of IC vs. KCS competition in the Baton Rouge-New Orleans corridor, it cannot now be determined whether the Alliance will or will not reduce the incentives for IC vs. KCS competition.

(1) DOT therefore contends, with respect to the effects of the Alliance Agreement in general, that we should establish a period of oversight of 3 to 5 years, to allow for further consideration of evidence and arguments that may be raised by shippers, carriers, and others respecting the effects of the Alliance. See DOT-3 at 15.

²²⁹(...continued)
implemented effectively." See also UP/MKT, 4 I.C.C.2d at 480 n.71, noting that certain settlement agreements reached in connection with the UP/MKT control transaction "do not require our approval because: (1) the settlement terms do not provide for actions or operations requiring our approval under the statute; and (2) the settlement terms do not affect the public's interest in a sound and efficient national transportation system."

(2) DOT further contends, with respect to the effects of the Alliance Agreement in the Baton Rouge-New Orleans corridor in particular, that, in order to assure continued vigorous IC vs. KCS competition: we should closely monitor the behavior of CN/IC and KCS at jointly-served points along this corridor, whether the CN/IC merger is approved or not, see DOT-3 at 16; and, “[t]o restore the *status quo ante*,” see DOT-3 at 24,²³⁰ we should also grant to an independent Class I railroad trackage rights to operate over IC and KCS lines to all points in the corridor where solely-served shippers and that carrier believe a build-in/build-out is feasible, see DOT-3 at 18. With respect to the Baton Rouge-New Orleans corridor, DOT insists: that the unprecedented partnership of the Alliance railroads presents an unacceptable risk of loss of IC vs. KCS competition; that the Alliance particularly threatens the indirect competition represented by the prospect of build-ins to and build-outs from solely-served shippers; and that, in this context, the introduction of an independent Class I railroad is needed to restore the pre-merger competitive environment.

(3) DOT argues that we should deny the request made by Exxon, which has asked that another Class I railroad be granted direct access to Exxon’s Baton Rouge facilities. DOT contends: that Exxon’s interests are comparable to the interests of other shippers located in the Baton Rouge-New Orleans corridor; that the condition sought by Exxon would provide three-railroad service at some of its facilities that are now served by two railroads only, and would provide two-railroad service at other facilities that are now served by one railroad only; and that it would be more appropriate to preserve the indirect competition that Exxon could lose because of the Alliance by granting the condition urged by DOT (i.e., by allowing a neutral carrier to serve the point of the potential build-in/build-out).

(4) DOT contends that the Access Agreement will have the effect of making KCS much less likely to continue efforts to construct, at Geismar, a build-in that, upon completion, would ultimately have benefitted all shippers in the immediate area and that perhaps would have drawn additional shippers as well. See DOT-3 at 13. DOT argues, however, that we should deny the request made by Rubicon, Uniroyal, and Vulcan, which have asked that KCS haulage rights under the Access Agreement be extended to Geismar shippers not named in that agreement. This request, DOT contends, is too broad. “These shippers are directly served by a single railroad today, and would continue to be served by a single railroad if the proposed merger is approved.” See DOT-3 at 17.

Safety Integration Plan. DOT indicates: that applicants and KCS have cooperated with FRA in the development and updating of a Safety Integration Plan (SIP); that the SIP now in existence encompasses operations under the two KCS agreements and addresses the important touchstones of integration, such as the allocation of financial, personnel, and technological resources, as well as the timing and sequence of pertinent events; and that the commitments contained in the expanded SIP to carry out and monitor safety integration among CN/IC and KCS appear to be adequate to assure a safe

²³⁰ DOT claims that the incentives for IC vs. KCS competition already appear to have been dulled in the Baton Rouge-New Orleans corridor. See DOT-3 at 24.

transition in the event the CN/IC control application is approved. DOT adds that FRA will monitor the actual implementation of the SIP and will inform the Board if necessary to resolve any problems.

Transfer Of Dispatching Function To Canada. DOT indicates that it is pleased that applicants do not contemplate moving U.S.-based dispatchers to Canada; the laws and policies of the two countries, DOT notes, differ significantly as respects drug and alcohol abuse, as well as hours of service. DOT adds that it is working to ensure that all dispatchers directing the movement of trains within the United States are subject to the same high levels of scrutiny and safety.

KCS Trackage Rights Application. DOT contends that the terminal trackage rights sought by GWRW cannot be granted as a remedy for any merger-related competitive problem, because (as DOT has already advised) the CN/IC merger will not generate any such problem (and certainly will not generate any such problem in the Springfield area). DOT adds that it takes no position on whether there might be some other basis for a grant of the sought trackage rights, which (DOT insists) are intended to close a "gap" in the Alliance railroads' systems and thereby allow for the smooth interchange of traffic with KCS, and which (DOT also insists) will benefit KCS and the Alliance at least as much as, if not more than, applicants. DOT notes, however, that we have previously indicated that a 49 U.S.C. 11321(a) override of contractual terms requires "a compelling reason." See CSX/NS/CR, slip op. at 73.

The Detroit River Tunnel. DOT urges denial of the requests made by CP and OMR. DOT contends that, although the concerns voiced by CP and OMR are plausible, the problem created by CN's 50% interest in the Detroit River Tunnel constitutes a preexisting situation that will neither be created by nor fundamentally changed by the CN/IC merger and the KCS agreements. DOT adds: that the problem respecting the tunnel is ultimately based in contract; that an appropriate resolution to that problem should therefore be left to the parties to that contract and to other entities with interests therein (like OMR); and that, if the anticompetitive effects anticipated by CP and OMR occur, resort can be had to the antitrust laws.

North Dakota. DOT concedes: that the economic vitality of North Dakota depends on efficient rail access to national and world markets; that, whereas Canadian grain moving in CN single-line service cannot now go beyond Chicago, the merger will allow Canadian grain moving in CN/IC single-line service to move to IC points far beyond Chicago; and that the concerns expressed by North Dakota are therefore understandable. DOT insists, however, that the relief sought by North Dakota should be denied; marketplace incentives, competitive circumstances, and applicants' representations, DOT advises, should ensure that North Dakota growers will not be disadvantaged by the CN/IC control transaction. DOT contends: that, even though the railroad that now originates so much North Dakota grain (Soo) is part of a system (the CP system) that also originates Canadian grain, calculations of economic self-interest have led CP/Soo to originate North Dakota grain; that the same calculations of economic self-interest should lead a unified CN/IC to continue to accept at Chicago Soo-originated grain that IC now accepts at Chicago; and that, in any event, even if CN/IC were to close the Chicago gateway in order to favor long-haul shipments from Canada, it would still face competition from BNSF, as well as

from other railroads and barges. DOT further contends that, even if North Dakota's competitive position vis-à-vis Canadian producers on CN is harmed because these latter shippers will gain single-line service to the Gulf, that harm results from greater, not less, competition, and therefore does not warrant a grant of haulage or trackage rights for Soo. DOT adds, however, that applicants should be held to their representations regarding the Chicago gateway.²³¹

Railroad Labor. DOT contends that we should emphasize: that our decision approving the CN/IC control application does not determine the necessity for, or the extent of, any CBA overrides that applicants may have in mind; that negotiations conducted in good faith are the appropriate means for resolving merger-related labor issues, such as transfer of employees, impact on protected employees, and limited reductions in certain crafts; and that arbitration, if necessary to resolve such issues, should be conducted by neutral parties familiar with railroad labor relations.²³²

COMMENTS RESPECTING LUMBER PRICING SCHEME. Comments have been filed respecting a two-tier, railroad "phantom freight" pricing scheme assertedly used by Canadian lumber producers.

Regula-DeWine Letter. By letter dated March 16, 1999, U.S. Rep. Ralph Regula and U.S. Sen. Mike DeWine have expressed concerns that approval of the CN/IC merger, prior to the resolution of allegations regarding a two-tier, railroad phantom freight pricing scheme assertedly used by Canadian lumber producers, would have a substantial impact on U.S. independent wholesale distributors of softwood lumber. Rep. Regula and Sen. DeWine claim: that the alleged pricing scheme, which they contend violates the Robinson-Patman Act and which they have therefore asked the U.S. Department of Justice (DOJ) to review, disadvantages U.S. independent wholesale distributors who sell and distribute Western Canadian softwood lumber in the southeastern United States; and that this two-tier pricing practice, which they contend is analogous to the motor carrier billing practices that were banned by the 1993 Negotiated Rates Act, constitutes a hidden subsidy to the vertically integrated Western Canadian

²³¹ See CN/IC-56A at 128-29 (applicants have indicated: that a unified CN/IC will not turn its back on North Dakota shippers and their revenue-producing commodities; and that a unified CN/IC will maintain the efficient interchanges IC has with other connecting carriers).

²³² See CSX/NS/CR, slip op. at 125-27: "In approving a rail merger or consolidation such as this, we have never made specific findings in the first instance regarding any CBA changes that might be necessary to carry out a transaction, and we will not do so here. Those details are best left to the process of negotiation and, if necessary, arbitration under the New York Dock procedures." See also CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 22) (STB served Sept. 25, 1998), slip op. at 19 (footnote omitted): "New York Dock prescribes a procedure (negotiation, if possible; arbitration, if necessary) for arriving at an implementing agreement respecting any particular transaction."

lumber producers' wholly owned operations. Rep. Regula and Sen. DeWine further claim that the proposed CN/IC merger would expand the Canadian phantom freight pricing scheme and might therefore provide an unfair pricing advantage to the Western Canadian lumber mills. Rep. Regula and Sen. DeWine have therefore urged that the CN/IC merger be held in abeyance pending the final outcome of DOJ's review of the alleged trade abuses involving the Western Canadian lumber mills and confidential CN contracts.

Sawyer Letter. By letter dated March 17, 1999, U.S. Rep. Tom Sawyer indicates: that, for several years, he has been working with U.S. independent lumber wholesalers in an attempt to obtain relief from the Canadian lumber producers' two-tier railroad phantom freight pricing practice; that, however, Canadian lumber producers, with the full cooperation of CN, have continued to charge U.S. independent lumber wholesalers inflated rates; and that the Canadian lumber producers and CN, by requiring U.S. lumber wholesalers to purchase lumber products at a rate that includes undisclosed freight costs, have engaged and are continuing to engage in a pricing scheme that many believe is analogous to the motor carrier billing practices that were banned by the 1993 Negotiated Rates Act. Rep. Sawyer further indicates: that U.S. independent lumber wholesalers have already been seriously harmed by the pricing activities of CN and IC; and that, if the CN/IC merger is approved before the two-tier pricing practice is fully investigated by DOJ, the injury to the U.S. lumber wholesalers may well place the entire industry in jeopardy. Rep. Sawyer has therefore urged us to postpone any final action on the CN/IC merger until DOJ concludes its review and reports its findings.

Response By Applicants. By letter dated March 23, 1999, applicants have responded to the arguments made in the Regula-DeWine and Sawyer letters. Applicants contend: that U.S. lumber interests have raised no objections to the CN/IC merger; that DOJ, which has not even participated in this proceeding, has raised no objections to the CN/IC merger; that, in fact, the time for raising any such objections is long past; that, furthermore, the objections raised in the Regula-DeWine and Sawyer letters concern pre-existing conditions; that there is no reason to believe that the CN/IC merger would have any relevant relationship to such pre-existing conditions; and that the Regula-DeWine and Sawyer requests to suspend the procedural schedule should therefore be rejected.

Regula Letter. By letter dated March 23, 1999, Rep. Regula, citing the ongoing DOJ investigation, has suggested that, if we approve the CN/IC merger, we should retain jurisdiction to impose additional conditions should it be determined that unfair pricing practices have impacted domestic lumber wholesalers.

Response By Applicants. By letter dated March 25, 1999, applicants have responded to the arguments made in the Regula letter dated March 23, 1999. Applicants contend: that the phantom freight issue is part of a long-standing U.S.-Canada lumber dispute that has been a matter of public discussion, international negotiation, and governmental investigation for many years; that, because rail rates for lumber or wood products have been exempted from regulation, and because rate contracts between railroads and lumber shippers (on which, applicants suggest, the phantom freight allegations are

based) are themselves not subject to regulation, the Board would appear to have no jurisdiction outside the context of a merger proceeding to take action concerning these phantom freight allegations; and that, because no party has timely made a record indicating that there is a problem involving CN that is in any way relevant to the Board's consideration of the CN/IC control application, and because there is no allegation that the phantom freight concerns are even related to the CN/IC control transaction, there would appear to be no basis for the retention of jurisdiction requested in the Regula letter dated March 23, 1999.

APPENDIX D: LABOR PARTIES

BROTHERHOOD OF LOCOMOTIVE ENGINEERS. BLE, the collective bargaining representative for the craft or class of locomotive engineers on GTW, ICR, and CCP, contends that the CN/IC control transaction will serve only to transfer wealth from CN/IC workers to CN/IC stockholders, and, in particular, to CN/IC officers. BLE adds that, because the transaction contemplated by applicants envisions integrations of workforces and consolidations of seniority districts and CBAs within unlimited parameters (and does not envision that the two rail systems will be maintained as separate entities with necessary coordinations), the transaction contemplated by applicants is not a "control" transaction but is, in reality, a "merger" transaction.

Premature Control Alleged; Efforts To Reduce Number Of Protected GTW Employees Alleged; Ongoing Safety Violations Alleged. BLE claims that applicants have taken various actions intended to allow applicants an advance start on their merger and/or to reduce the number of protected GTW employees. BLE claims, in particular: that certain IC employees have been working for CN;²³³ that applicants have coordinated the IC and GTW labor relations departments; that GTW has mimicked an IC program pursuant to which IC has used road switchers to perform work formerly performed by yard service; that GTW has abolished certain assignments at Flat Rock, MI, and has transferred other work elsewhere; that GTW has mothballed the hump at Flat Rock; that GTW has pulled engineers out of service without charges and subjected them to harassment and discipline for marking off for illness, injuries, and inadequate rest; that GTW has violated immigration and naturalization laws by allowing CNR crews to pick up in the United States and to drop off the same cars at other locations within the United States; and that GTW has imposed unsafe operating conditions upon yard engineers and the train dispatchers who transmit orders and instructions to the engineers.

Adverse Effects Anticipated. BLE fears that, if applicants are allowed to do what BLE believes they intend to do, employees represented by BLE will suffer a variety of adverse consequences. BLE contends, among other things: that a net of 34 GTW locomotive engineer positions in and around Detroit, MI, will be abolished; that there will be adverse consequences for IC employees at Chicago, IL, and Jackson, MS;²³⁴ that applicants intend to establish a new consolidated Chicago-area seniority district and a common Chicago-area seniority roster through integration of the western portion of GTW with the northern portion of IC (including the Chicago-area portions of CCP); that applicants intend to adopt one agreement from one railroad in the consolidated seniority district, and to place that agreement in effect

²³³ BLE contends that, in anticipation of the merger: E. Hunter Harrison, formerly chief executive officer of IC, has moved to CN; and Randy Harris, an IC claim agent, has recently been working for both IC and GTW.

²³⁴ BLE indicates that the anticipated adverse consequences at Chicago and Jackson reflect applicants' plans to operate run-through trains through these cities.

for all employees of all railroads involved in the consolidation at that area;²³⁵ and that applicants intend to accomplish, in the Chicago area, the wholesale abolition of the GTW/BLE CBA and the wholesale adoption, in lieu thereof, of the IC/BLE CBA, which (BLE claims) will enable CN to achieve what it was unable to achieve in Canadian National Railway Company — Contract To Operate — Grand Trunk Western Railroad Inc. and Duluth, Winnipeg & Pacific Railway Co., Finance Docket No. 32640 (ICC served Apr. 18, 1995).²³⁶

Canada-U.S. Implications. BLE contends that applicants intend both (a) to move work from the United States to Canada (even though United States employees will not be able to follow this work), and (b) to have Canadian nationals operate trains in the United States. BLE further contends that, in view of the involvement in this merger of a foreign government,²³⁷ in view too of the many differences in the safety, immigration, and labor relations laws applicable to work in the United States and work in Canada,²³⁸ and in view also of the safety implications arising from the use in the United States of Canadian nationals with different training and certification procedures,²³⁹ the issue of appropriate labor protection and proper safety measures needs to be explored further by the Board in conjunction with the FRA. BLE suggests that the merger should be put on hold until this process has been completed.²⁴⁰

²³⁵ See CN/IC-7 at 202: "The Transaction can be fully achieved only if the employees operating trains through, to, or from the Chicago area are covered by a single collective bargaining agreement with an expanded and consolidated seniority district and common seniority roster."

²³⁶ In the Finance Docket No. 32640 proceeding: CNR, GTW, and DWP filed an application seeking approval and authorization under what was then 49 U.S.C. 11343-45 for CNR to contract to operate the properties of GTW and DWP; the ICC held that applicants had failed to establish that the proposed transaction was a contract to operate subject to ICC jurisdiction under what was then 49 U.S.C. 11343(a)(2); and the application was therefore dismissed.

²³⁷ BLE claims that, until recently, CN was operated by the Canadian Government, and that CN's Chief Executive Officer was formerly a high official of the Canadian Parliament.

²³⁸ BLE insists that these variations have never previously been considered in the fashioning of employee protective conditions.

²³⁹ BLE claims, in essence, that U.S. laws respecting railroad safety are more safety-oriented than Canadian laws respecting railroad safety.

²⁴⁰ BLE claims that we have failed to seek out the views of the FRA, even though the situation here is (BLE contends) similar to the situation in Canadian Pacific Limited, et al. — Purchase and Trackage Rights — Delaware & Hudson Railway Company [Arbitration Review], STB Finance Docket No. 31700 (Sub-No. 13) (STB served Dec. 4, 1998) (an arbitrator imposed an implementing agreement (continued...))

Limited Purpose Of An Implementing Agreement. BLE insists: that the sole purpose of an implementing agreement negotiated or arbitrated under New York Dock, Article I, § 4 is to provide a fair and equitable scheme or method for the allocation of jobs and selection of workforces among the employees of the carriers involved in a particular consolidation or coordination, and for the modification of seniority provisions, district parameters, and other contractual provisions necessary to complete the transaction; that only those provisions that must be changed in order to effectuate the transaction are subject to change through the § 4 negotiation or arbitration procedures; that the wholesale abrogation of one agreement and its replacement by another agreement is not necessary for the effectuation of the CN/IC control transaction; and that we should announce that the approval of the CN/IC control transaction does not sanction the wholesale abolishment and replacement of contractual rights. BLE also insists: that, in any event, the "rights, privileges, and benefits" of GTW employees as set forth in the GTW/BLE CBA simply cannot be abrogated; and that provisions that need not be changed or that would transfer wealth from the employees to the carrier and its stockholders are not subject to alteration.

Delay In Action Urged. BLE contends that we should withhold any action on the CN/IC control application until such time as the Board and FRA issue regulations establishing procedures for the development and implementation of safety integration plans (SIPs) by railroads proposing to engage in transactions of the nature of the CN/IC control transaction. See Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control, and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574 (STB served Dec. 24, 1998) (a notice of proposed rulemaking issued jointly by the Board and FRA).²⁴¹

Denial Of CN/IC Application Urged. BLE urges the denial of the CN/IC control application: in view of the efforts by applicants to exercise premature control; in view of the attempts of applicants to reduce the number of protected GTW employees; in view of the anticipated adverse effects on the CBA rights of BLE members;²⁴² and in view of the adverse effects the merger will have upon the employees of

²⁴⁰(...continued)

to effectuate the transfer of five dispatcher positions from Milwaukee, WI, to Montreal, PQ; but, in view of an indication by FRA that the transfer of these positions could adversely affect rail safety, the Board ordered the carriers to refrain from consummating the transaction until the Board has been advised by FRA that FRA's safety concerns have been satisfied).

²⁴¹ BLE argues that safety is adversely impacted when engineers are required to work too many hours on abnormally long shifts with erratic work/rest cycles.

²⁴² BLE contends that implementation of large consolidated seniority districts would allow CN/IC to require engineers to go anywhere within this expanded territory for lengthy periods of time.

(continued...)

other railroads doing business with CN in the Chicago area.²⁴³ BLE claims that the CN/IC merger, like many another railroad merger in recent years, is merely a means to transfer wealth from employees to the railroad through the substitution of more favorable CBAs, through the closing of facilities, through reductions in employment, and through the creation of new and larger seniority districts. And, BLE adds, the CN/IC merger: will not benefit the public; will not promote sound and competitive transportation; and will have adverse effects on public health and safety.

Alternative Relief Sought. BLE contends that, if we do not deny the CN/IC control application, we should, at the very least: add to New York Dock certain conditions; and make, with respect to New York Dock, certain declarations that will govern the negotiation and/or arbitration of any implementing agreements under Article I, §4 of New York Dock. These conditions and declarations, BLE argues, are necessary to fulfill the statutory mandate to provide a fair arrangement for employees.

(1) BLE asks that we impose a condition that would provide that all employees listed on the consolidated seniority rosters would be considered adversely affected and would receive New York Dock protective benefits, and that would require applicants: (a) to calculate and furnish Test Period Allowances (TPAs) of employees to the organization representing them within 30 days following the effective date of the transaction; (b) to provide and pay a TPA to all employees in a consolidated seniority district until implementation of the merger in that district or zone is finalized; and (c) to pay allowances to the employees adversely affected by the merger for the maximum period provided by New York Dock with a deduction of no more than a year of any temporary allowance actually received by the individual pursuant to subparagraph (b).

(2) BLE asks that we impose a condition that would provide that any termination of seniority provisions contained in any national agreement between the organization and the carrier would be inapplicable to any employee hired prior to the effective date of the CN/IC control transaction.

²⁴²(...continued)

And, BLE adds, since the New York Dock conditions have been read to make an employee ineligible for benefits if the employee declines a position for which the employee has seniority, a refusal to take an assignment many miles from home could diminish or eliminate the employee's benefits.

²⁴³ BLE warns that many Chicago-area jobs on other railroads will be eliminated if CN/IC is allowed to implement run-through train operations that will allow its trains to "bypass" Chicago.

(3) BLE asks that we impose a condition that would provide that an employee, upon furnishing proof of actual relocation, would be given an option to elect to receive an "in lieu of" cash relocation allowance of either \$15,000 (for a non-homeowner) or \$25,000 (for a homeowner).²⁴⁴

(4) BLE asks that we make declarations to the effect: that approval of the CN/IC control transaction does not constitute approval for the substitution of an entire CBA on one carrier (the IC CBA) for the CBA covering the employees of another carrier (the GTW CBA); that applicants may not impose an entirely new, complete CBA upon GTW employees under the auspices of a § 4 implementing agreement; and that the only contract changes that may be made by a § 4 implementing agreement are those changes necessary to effectuate the merger and then only if necessary to obtain a transportation benefit that is not labor-related.

(5) BLE asks that we make a declaration to the effect that applicants must negotiate fairly and equitably (i.e., in good faith) with the representatives (i.e., the general chairmen) of the employees affected by the particular consolidation and coordination covered by the § 4 notice and implementing agreement.²⁴⁵

Response By Applicants. Applicants contend: that BLE's allegations that applicants have not bargained in "good faith" are false; that BLE's allegations that applicants have not accorded proper consideration to safety are also false; that BLE's allegations that GTW has threatened, harassed, and/or intimidated engineers are similarly false; and that BLE's allegations that applicants have exercised premature common control are likewise false.²⁴⁶ Applicants also contend that BLE, which has warned that applicants intend to have Canadian nationals operate trains in the U.S., has neglected to mention that, under a practice of long standing, Canadian crews are already operating in the U.S., just as U.S. crews are already operating in Canada; applicants add that, because of the frequency of such movements,

²⁴⁴ BLE indicates that this condition would promote economy and efficiency in the application of relocation allowances. BLE adds that no employee would be entitled to more than one "in lieu of" cash relocation allowance.

²⁴⁵ BLE claims that GTW has refused to negotiate fairly and equitably with BLE in various collective bargaining matters, and, in particular, has refused to institute negotiations on the requisite implementing agreements.

²⁴⁶ Applicants concede that GTW contracted with IC for the services of Randy Harris, an IC claims agent. Applicants insist, however: that it is common practice in the industry to contract out claims agent work; that the Harris arrangement was entered into on an arm's length basis pursuant to a written contract; that, under this contract, GTW, which had need of experienced claims personnel, obtained the services of an experienced employee of IC, which had additional personnel available; and that the Harris contract requires GTW to reimburse IC for this employee's services.

and the experience of U.S. and Canadian regulators in overseeing them, each country recognizes locomotive engineer certifications issued by the other. Applicants further contend that we should reject all of BLE's requests for conditions and benefits other than the customary New York Dock conditions, and should direct BLE to pursue its demands in an Article I, § 4 forum; BLE, applicants claim, seeks to have the Board bypass negotiation and compromise and impose up-front numerous special benefits and procedural advantages for BLE. Applicants further contend, in their CN/IC-64 motion filed Mar. 10, 1999 (CN/IC-64 at 1-2), that, because many of BLE's allegations were first made and/or were elaborated upon in BLE's BLE-6 brief, the "new evidence" improperly included in the BLE-6 brief should be stricken or, in the alternative, applicants' CN/IC-64 response (CN/IC-64 at 3-10, including attached statements) should be included in the record.²⁴⁷

UNITED TRANSPORTATION UNION. Applicants and UTU²⁴⁸ have jointly asked the Board to condition any approval of the CN/IC control application on the following commitments made by applicants, in exchange for which UTU has offered its support for the application. See UTU-10 (filed Mar. 24, 1999).

(1) Applicants have committed that they will provide work opportunities to active UTU-represented employees employed as of the date of approval of the transaction which allows those employees, provided they utilize those work opportunities, to maintain their current level of annual compensation during the protective period, unless applicants experience a significant downturn in their businesses due to the loss of a major customer during the protective period, which will be taken into full account and the employees' protections will be reduced proportionately.

(2) Applicants have committed that in any notice served in this transaction after Board approval, they will propose only those changes to existing CBAs that are necessary to implement the proposed transaction, meaning changes that are related to operational changes that will produce a public transportation benefit not based solely on savings achieved by agreement changes. Applicants have explained in their Operating Plan and Appendices that a unified workforce and single CBA in the Chicago area are necessary to implement the transaction as are the changes related to the proposed service between Battle Creek and Champaign. Further, applicants have indicated their preference for the CBA to be applied in those areas. Applicants will not seek through the implementing agreement process the application of the entire IC agreement on the GTW or vice versa.

²⁴⁷ In the interest of development of a complete record, the CN/IC-64 motion to strike will be denied and the CN/IC-64 response will be included in the record.

²⁴⁸ UTU is the collective bargaining representative for the crafts or classes of conductors, trainmen, and yardmasters on each of the applicant railroads.

(3) Applicants and UTU have committed that they will attempt to negotiate a voluntary implementing agreement before July 1, 1999, and that neither party will seek arbitration under the New York Dock conditions before that date. Applicants recognize that differences of opinion may occur in the implementing agreement process. If the parties have not reached a voluntary agreement, then in order to ensure that any such differences are dealt with promptly and fairly, applicants and UTU agree that applicant and UTU personnel will meet within five (5) days notice from either side if a dispute arises and will agree to expedited arbitration procedures under the New York Dock conditions 10 days after the initial meeting if the matter is not resolved.

(4) Applicants and UTU have committed to address the safety issues raised in the UTU filings that were submitted in this proceeding.

(5) Applicants have consented to the imposition as conditions of the commitments expressed in the foregoing paragraphs.

AMERICAN TRAIN DISPATCHERS DEPARTMENT. ATDD contends that the CN/IC control application should be denied unless conditions are imposed to assure: (1) that train dispatching operations on U.S. lines will not be transferred or otherwise relocated outside the United States as part of, in connection with, or as a result of approval of the CN/IC control transaction; (2) that protective arrangements already in place that guarantee ATDD-represented workers a job for the remainder of their working careers will be unaffected by the CN/IC control transaction; and (3) that the rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits under applicable laws and/or existing CBAs or otherwise will be preserved.

Transfers To Canada. ATDD insists that the CN/IC control application should be denied unless applicants are required to continue to control rail traffic on their domestic lines from train dispatching offices located in the United States. ATDD contends: that FRA believes that a transfer of train dispatching responsibilities over domestic trackage to train dispatchers located outside U.S. borders would be inconsistent with the interests of safety; that, in fact, FRA is considering the initiation of a rulemaking that would establish a blanket prohibition on such cross-border transfers; that, however, there is reason to suspect that applicants intend to use the merger as a basis for transferring train dispatching responsibilities to Canada; and that, therefore, we should not permit the CN/IC control transaction to go forward without enforceable assurances that control of rail traffic on domestic trackage remains in facilities inside the United States subject to all applicable federal oversight and regulation. ATDD therefore asks that we impose a condition that would read as follows: "The Applicants shall not in the future propose the transfer to Canada of any train dispatching operations over any rail lines located in the United States without first obtaining a written certification from the FRA that such transfer is consistent with the operation of a safe and efficient rail transportation system as required by 49 U.S.C. § 10101(8)."

Prior Protective Arrangements. ATDD contends that, pursuant to various agreements²⁴⁹ reached in connection with the GTW/DTI&DTSL control transaction:²⁵⁰ every train dispatcher employed by GTW, DTI, and DTSL who was in active status on August 1, 1986, enjoys protection from wage loss for any reason other than those set forth in Article I, §§ 5(c) and 6(d) of the New York Dock conditions²⁵¹ until he/she qualifies for the early retiree major medical benefits provided under a certain group policy;²⁵² and any train dispatcher who might be subject to losing his/her job can elect “voluntary furlough status” either (a) subject to recall, or (b) not subject to recall.²⁵³

²⁴⁹ These agreements include: (1) a 1979 GTW-RLEA agreement (the Railway Labor Executives’ Association was known as RLEA) that provided for attrition protection, see Norfolk & W. Ry. Co. — Control — Detroit, T. & I. R. Co., 360 I.C.C. 498, 531-32 (1979); (2) a 1979 GTW-ATDA agreement (prior to October 1995, ATDD was known as the American Train Dispatchers Association and was commonly referred to as ATDA), see ATDD-5, Ex. A (comments filed Oct. 27, 1998); (3) a 1986 GTW-ATDA agreement, see ATDD-5, Ex. B (the 1986 agreement consists of a main agreement and various attached sub-agreements); and (4) a 1996 GTW-ATDD agreement, see ATDD-5, Ex. C.

²⁵⁰ The acquisition by GTW of control of the Detroit, Toledo and Ironton Railroad Company (DTI) and the Detroit and Toledo Shore Line Railroad Company (DTSL), a transaction that is herein referred to as the GTW/DTI&DTSL control transaction, was approved in Grand Trunk Western Railroad — Control — Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company, Finance Docket No. 28676 (Sub-No. 1) (ICC decided Nov. 30, 1979). This decision, which is variously referred to as the Finance Docket No. 28676 (Sub-No. 1) decision, the Finance Docket No. 28676 (Sub-No. 1F) decision (the “F” designation was used at the time in connection with files reproduced on microfiche), and the Finance Docket No. 28676 decision (with no reference to a sub-number), is reported in the bound volumes as Norfolk & W. Ry. Co. — Control — Detroit, T. & I. R. Co., 360 I.C.C. 498 (1979).

²⁵¹ Article I, §5(c) provides that a New York Dock displacement allowance shall cease prior to the expiration of the protective period in the event of the employee’s resignation, death, retirement, or dismissal for justifiable cause. Article I, §6(d) provides that a New York Dock dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee’s resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, and failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

²⁵² ATDD notes that this protection is commonly referred to as “lifetime” protection.

²⁵³ A dispatcher who elects voluntary furlough status subject to recall: will be subject to recall
(continued...)

ATDD further contends that, although the CN/IC control application does not mention these existing protective arrangements and gives no indication how applicants intend to treat covered employees in the event the CN/IC control transaction is implemented, applicants, in their rebuttal submissions, have “confirmed that they do not intend to take the position that imposition of New York Dock on this Transaction will preclude an employee otherwise eligible for protective benefits under Finance Docket No. 28676 from making an election of benefits that is consistent with the principles established under Article I, Section 3 of New York Dock.”²⁵⁴

ATDD insists, however, that we should reject the CN/IC control application unless conditions are imposed to assure that existing protective arrangements will not be disturbed or overridden in connection with implementation of the CN/IC control transaction. ATDD contends: that the protective arrangements it seeks to preserve were negotiated as part of the carriers’ compliance with conditions imposed by the ICC in earlier transactions;²⁵⁵ that, however, there is reason to suspect that CN intends to use the New York Dock conditions that will be imposed on approval of the CN/IC control transaction as a mechanism by which to evade the obligations contained in the agreements entered into in connection with the GTW/DTI&DTSL control transaction;²⁵⁶ and that, in this situation, a blanket condition preserving existing protective arrangements is appropriate to assure the preservation of these arrangements.

²⁵³(...continued)

when the active workforce falls below 21 train dispatchers; and will receive a monthly furlough allowance equivalent to 75% of the employee’s average monthly earnings computed in accordance with a certain formula. A dispatcher who elects voluntary furlough status not subject to recall will receive a monthly furlough allowance equivalent to 60% of the employee’s average monthly earnings computed in accordance with a certain formula. Both allowances last until the employee is recalled to service, has filed for a disability annuity under the Railroad Retirement Act, first becomes eligible for an unreduced annuity under the Railroad Retirement Act, or dies, subject, however, to this proviso: protection for an employee who elects voluntary furlough status subject to recall will continue for the rest of his/her railroad career, whereas protection for an employee who elects voluntary furlough status not subject to recall will expire in 2003. Employees on voluntary furlough status suffer no diminution in health, welfare, dental, and 401(k) plan benefits. ATDD indicates that, at the present time, there are 15 GTW train dispatchers on voluntary furlough status, all of whom are subject to recall.

²⁵⁴ See CN/IC-56A at 191 (internal quotation marks omitted).

²⁵⁵ ATDD adds that, if the ICC had not allowed those transactions to occur, CN’s U.S. operations on the GTW, DTI, and DTSL might not have developed to their current operating levels.

²⁵⁶ See CN/IC-56A at 192 (“[S]ome provisions contained in protective agreements may themselves represent impediments to a Transaction, and can and should be overridden.”).

Preservation Of Rates Of Pay, Etc. Applicants have indicated: that there are currently three separate train dispatching centers on the combined CN/IC U.S. rail system (CN trains moving over the physically discrete GTW and DWP lines are dispatched from separate centers in Troy, MI, and Pokegama Yard near Superior, WI, respectively, and IC trains are dispatched from IC's Network Operations Center in Homewood, IL); that the three dispatching centers utilize separate train control and information systems and somewhat different operating practices; that the CN/IC control transaction offers the opportunity to consolidate the dispatching functions and to unify operating practices for the GTW/DWP and IC lines in a manner that will improve efficiency, service, and safety; and that, in order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single CBA with a single seniority roster.

Applicants have further indicated: that, following implementation of the CN/IC control transaction, the dispatching function will be consolidated at Homewood; that the physical relocation, the training on various dispatching systems, and the unification of operating practices will be accomplished in distinct steps; that there will therefore be, for a short interval following the physical relocation, three dispatching operations at Homewood; that, during this interval, the GTW/DWP and IC dispatchers will continue to dispatch their own territories using the equipment and processes with which they are familiar (and, although they will be under the same roof, will dispatch as though they were separate entities); and that, during this interval, a combined operating practices rule book will be produced and the existing dispatching systems will be modified, and all dispatchers will be trained on CN/IC's consolidated U.S. operating rules. See CN/IC-7 at 176-78 and 204. See also the Revised Safety Integration Plan at 67-73.

ATDD contends: that, during the "short interval" referenced by applicants (i.e., during the period that will begin with the physical relocation to Homewood and that will end with the actual consolidation of train dispatching operations), it will not be necessary to bring the three dispatching groups under a single CBA with a single seniority roster; that, until such time as all train dispatching systems themselves are unified, the carriers should be required not to disturb existing collective bargaining relationships; that, because there will be, during the "short interval," separate dispatching operations, there is no warrant for any disruption of CBAs or representation during that interval; and that any disruption of ATDD's existing representative status and agreements would undermine the stability of the labor/management relationship. ATDD further contends: that, even assuming arguendo that pre-transaction representation arrangements are not a "right, privilege or benefit" that must be preserved, no CBA provision may be modified if the modification is not necessary to implementation of the transaction; and that there is, in the present context, no necessity at all, given that ATDD-represented GTW dispatchers are scheduled to continue to work independently from the other train dispatchers at Homewood, just as they did in Troy.

As respects the later integrations contemplated by applicants, ATDD contends: that they should be allowed only if they are directly related to the CN/IC control transaction; and that we should insist that the rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges,

and benefits under applicable laws and/or existing CBAs or otherwise will be preserved. And, ATDD adds, should the day come when a single CBA is applied to all train dispatchers at Homewood, that CBA should be the ATDD-GTW CBA.

INTERNATIONAL ASSOCIATION OF MACHINISTS. IAM, the collective bargaining representative for the craft or class of machinists on GTW, ICR, and CCP, contends that we should condition approval of the CN/IC control transaction on the imposition of New York Dock protection. IAM further contends: that we should make certain declarations respecting the operation of Article I, § 3 and Article I, § 4 of the New York Dock conditions; and that, if we determine that the CN/IC/KCS Alliance does not constitute a control transaction subject to New York Dock protection, we should retain oversight jurisdiction to monitor the operation of the Alliance so that any future transfer of control will not be effected without the requisite labor protection.

Actions Taken In Anticipation Of Merger. IAM claims that, in May 1998, GTW announced furloughs of machinists at its Flat Rock Terminal and Battle Creek Reliability Center that clearly were in anticipation of the CN/IC merger.

Prior Protective Arrangements. IAM is concerned that applicants intend to assert that implementing agreements imposed by an Article I, § 4 arbitrator acting under the auspices of the New York Dock conditions that will be imposed on the CN/IC control transaction can supersede protective arrangements negotiated in connection with the GTW/DTI&DTSL control transaction. IAM notes, in essence, that, although applicants have acknowledged that New York Dock, Article I, § 3 requires the preservation of existing protective arrangements, applicants have also suggested that certain provisions in the protective arrangements arising out of the GTW/DTI&DTSL control transaction may have to be overridden as "impediments" to implementation of the CN/IC control transaction. IAM therefore requests that we affirm: that, pursuant to Article I, § 3, employees subject to protective arrangements arising out of past mergers retain the right to elect the protections afforded under these pre-existing arrangements; and that, consistent with the terms of Article I, § 3, pre-existing protections enjoyed by GTW employees cannot be superseded by the protective conditions imposed in this proceeding.

Article I, § 4. IAM asks that we affirm that, under Article I, § 4, issues regarding CBA overrides are subject first to negotiation, and thereafter, if necessary, are subject to arbitration. IAM also asks that we affirm that the Article I, § 4 negotiation requirement requires that the carrier engage in good faith bargaining.

Oversight Jurisdiction. IAM contends that the CN/IC/KCS Alliance amounts to a CN/IC/KCS control transaction within the meaning of 49 U.S.C. 11323, subject to the imposition of the New York Dock protective conditions. IAM further contends that, if we determine that the Alliance does not amount to a control transaction, we should retain oversight jurisdiction. Such jurisdiction, IAM argues, will enable us to monitor the operation of the Alliance so that, if a transfer of control requiring Board approval does in fact result, New York Dock protection for affected employees will be imposed.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION. TCU, which represents employees of CNR, GTW, DWP, ICR, CCP, and KCS in the clerical, carman, and supervisory crafts and classes, contends: that we should review the Alliance Agreement as part of the CN/IC control transaction, and impose New York Dock labor protection on all of the Alliance railroads; or, if we decide not to impose such protection, that we should, at the very least, retain jurisdiction to monitor the Alliance to ensure that no control transaction is in effect. TCU also contends: that we should impose enhanced New York Dock conditions requiring lifetime attrition protection for those employees who, because of Canadian immigration laws, will be adversely affected by their inability to follow transferred clerical work to Canada; and, if we do not impose such enhanced conditions, that we should, at the very least, mandate that employees unable to follow work transferred to Canada will be considered "dismissed employees" entitled to receive dismissal allowances under New York Dock.

The CN/IC/KCS Alliance. TCU contends that the Alliance, taken in conjunction with the CN/IC control transaction, must be viewed as a transaction that will enable CN and KCS to achieve joint control of IC's interline operations. TCU further contends that the labor protection mandates of the Interstate Commerce Act, as interpreted in New York Dock, must be applied to employees, including KCS employees, affected by the Alliance.

TCU cites: the geographic scope of the Alliance;²⁵⁷ the duration of the Alliance;²⁵⁸ the extent to which the Alliance is intertwined with the CN/IC control transaction; the commitment of the management of the day-to-day affairs of the Alliance to a Management Group made up of the chief executive officers of the Alliance railroads; the intent to coordinate service operations between CN, IC, and KCS to create what will amount to "single-line" service along the north-south NAFTA corridor; and the establishment of a joint marketing strategy to be undertaken by the Alliance railroads. TCU insists: that, because the business of the Alliance will be governed by the Management Group, implementation of the CN/IC control transaction will mean that key marketing decisions and strategies relative to IC's interline operations will be set by a group of which IC will not be an independent member; that, because the Management Group's decisionmaking process will be (by admission of both CN and KCS) consensual, KCS will have an effective veto over decisions respecting IC's interline operations; and that, because this veto will constitute "control" in its purest form, the existence of this veto demonstrates that the Alliance and KCS are subject to the Board's jurisdiction in this matter.²⁵⁹ TCU contends: that,

²⁵⁷ TCU notes that the Alliance covers traffic moving from/to all points open to CN, IC, or KCS, excepting only the relatively few points open both to IC and to KCS.

²⁵⁸ TCU notes that the Alliance will exist for at least 15 years.

²⁵⁹ TCU argues that, although the overall financial impact of the Alliance on CN and KCS may be relatively small, the control that CN and KCS will exercise over IC's interline operations will be far
(continued...)

under 49 U.S.C. 11326, New York Dock must be imposed to protect employees affected by the acquisition by any carrier of control over the operations of another carrier; that, therefore, New York Dock must be imposed to protect employees affected by the acquisition, by CN and KCS, of control of the interline operations of IC; and that, given the context of the Alliance, this means that New York Dock must be imposed not only on CN but also on KCS.²⁶⁰

TCU is especially concerned that, given the wording of the Alliance Agreement, a “coordination” of CN, IC, and/or KCS clerical work, and particularly customer service work, could be approved by the Management Group without the need for another agreement. TCU insists: that a “transaction” (as that term is defined in New York Dock, 360 I.C.C. at 84) includes a “coordination” (as that term is defined in the Washington Job Protection Agreement of 1936, see New York Dock, 360 I.C.C. at 70); that, under the Washington Job Protection Agreement, the term “coordination” means “joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities,” see CSX Corp. — Control — Chessie and Seaboard C.L.L., 6 I.C.C.2d 715, 778 (1990); that the clerical work “coordinations” that may occur under the Alliance must therefore be regarded as “transactions” for purposes of New York Dock; and that, in this light and given the relationship of the Alliance to the CN/IC control transaction, New York Dock is clearly applicable to the “transactions” contemplated by the Alliance railroads.

TCU further contends that, if we do not see fit to evaluate the Alliance as part of the CN/IC control transaction, we should, at the very least, retain jurisdiction to oversee and monitor the Alliance to ensure that it is not used as a device to circumvent the statutory process for approving 49 U.S.C. 11323 control transactions. TCU argues that, even if we determine that the Alliance does not, in and of itself, amount to a control transaction, we must recognize that the Alliance Agreement provides the framework for even more substantial coordinations. And, TCU adds, the retention of jurisdiction will allow us to ensure that, in the event the activities of the Alliance rise to the level of a control transaction, the artful

²⁵⁹(...continued)

more substantial. TCU also argues that, although prior rulings have indicated that neither a voluntary coordination agreement (VCA) nor an operational coordination is per se jurisdictional, the Alliance contains elements of both a VCA and an operational coordination, in addition to a common management structure for implementation of a common interline policy.

²⁶⁰ TCU concedes that, although KCS is not a party to the CN/IC control application, we accepted that application “because it is in substantial compliance with the applicable regulations, waivers, and requirements.” See Decision No. 6, slip op. at 7 (footnote omitted). TCU notes, however, that, although we accepted the CN/IC control application, we specifically “reserve[d] the right to require the filing of supplemental information from applicants or any other party or individual, if necessary to complete the record in this matter.” See Decision No. 6, slip op at 7 n.14.

drafting of the Alliance Agreement will not serve to circumvent our authority to review such transactions.²⁶¹

Enhanced Protection. Applicants have indicated that they intend to consolidate various general and administrative functions, including certain information technology activity and certain accounting activity, in Montreal, PQ. Applicants have further indicated that they may also find it necessary to consolidate other general and administrative functions, including such functions as customer service, clearance, and other centralized tasks. See CN/IC-7 at 205-06.

TCU contends that cases decided by the Board and by the ICC establish that when a carrier, in the course of implementing a Board-approved transaction, transfers an employee's work: (1) an employee has a right to follow the transferred work (assuming, of course, that sufficient positions are available);²⁶² and (2) an employee who declines an opportunity to follow the transferred work forfeits any otherwise available right to New York Dock protection.²⁶³ TCU further contends that, given the restrictions imposed by Canadian immigration laws, the consolidation of various CN/IC clerical and administrative functions at CN facilities located in Canada will effectively deprive clerical employees of

²⁶¹ TCU suggests that, in monitoring the Alliance, we should utilize the criteria set forth in Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962).

²⁶² See, e.g., D&H Ry. — Lease & Trackage Rights Exempt. Springfield Term., 4 I.C.C.2d 322, 330 (1988) (emphasis added): "In the typical case of a consolidation or acquisition, two or more railroads may combine their operations, with either a surviving entity conducting all of the combined operations or each carrier operating some portion of the consolidated operations. Where operations will be combined, the previously separate workforces need to be coordinated. *Offers of comparable employment normally are made by the surviving operating entity to former employees of both railroads before any offers are made to outside parties.* These offers must be accepted (if employees have exercised their seniority and have been dismissed), or the employees lose their protective benefits."

²⁶³ See, e.g., CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), STB Finance Docket No. 28905 (Sub-No. 28) (STB served Sept. 3, 1997), slip op. at 7 n.10: "The ICC has in the past referred to the fundamental bargain underlying the Washington Job Protection Agreement of May 1936 (WJPA), upon which the *New York Dock* conditions are based, as being that an employee must accept any comparable position for which he or she is qualified regardless of location in order to be entitled to a displacement allowance." See also CSX/NS/CR, slip op. at 127: "[T]he basic requirement under New York Dock [is] that employees must accept assignment at a new location that requires them to move their residence, or else forfeit their entitlement to protection allowances."

their right to follow transferred work.²⁶⁴ TCU therefore asks that we impose enhanced New York Dock benefits for these employees.

TCU contends: that New York Dock's requirement of 6 years of labor protection was established as a "fair arrangement" under the presumption that employees would have the right to follow their work; that, however, the "unusual circumstances" of the CN/IC control transaction (i.e., its diminution of the right to follow work) demand enhanced New York Dock protections for all employees who are affected by (i.e., who are either dismissed or displaced as a result of) the inability to follow work that is consolidated in Canada;²⁶⁵ and that the required enhancement should take the form of lifetime attrition protection. TCU further contends that, at the very least, we should mandate that employees unable to follow work transferred to Canada will be considered "dismissed employees" entitled to receive dismissal allowances under New York Dock.

Applicants insist: that New York Dock provides adequate protection to any TCU-represented clerical employees whose positions may be abolished in connection with the CN/IC control transaction; that the fact that a consolidation of work may involve the Canadian border is simply irrelevant to the level of protection adversely affected employees are entitled to receive; and that, in any case, any issues related to the transfer of work to Canada should be referred to the implementing agreement process. "[L]ifetime attrition protection is strongly disfavored; and a transfer of work to another location, or the inability of some adversely affected employees to follow their work, do not amount to 'unusual circumstances' warranting imposition of enhanced protective conditions. Employees are often unable to follow work that is being consolidated. That is precisely why New York Dock (and other protective arrangements beginning with the Washington Job Protection Agreement) provide for protective benefits. Under New York Dock, if an employee is unable to keep a position because work is being consolidated into a limited number of positions, that employee will be entitled to protective benefits — whether the work is consolidated in Montreal or Memphis." See CN/IC-56A at 198-99.

Prior Protective Arrangements. TCU cites CSX/NS/CR, slip op. at 126, in support of the proposition that issues regarding changes that may be sought by applicants in TCU's preexisting

²⁶⁴ TCU contends that, under Canadian law, a non-Canadian who seeks to move to Canada for the purpose of seeking employment must obtain, prior to moving, authorization to enter Canada for employment purposes. TCU further contends, however, that, under Canadian law, Canadian immigration officers are not allowed to issue such authorizations to a person whose employment "in Canada will adversely affect employment opportunities for Canadian citizens or permanent residents in Canada." See TCU-5 at 3-4 (citing Canadian immigration regulations).

²⁶⁵ See CSX/NS/CR, slip op. at 125: "We may tailor employee protective conditions to the special circumstances of a particular case. This is done, however, only if it has been shown that unusual circumstances require more stringent protection than the level mandated in our usual conditions."

protective arrangements with GTW, DWP, and ICR should not be addressed in this decision but, rather, should be left to the process of negotiation and, if necessary, arbitration under Article I, § 4 of New York Dock.

JOHN D. FITZGERALD. Mr. Fitzgerald is primarily concerned with the impact of the CN/IC control transaction upon employees of BNSF. Mr. Fitzgerald contends: that the CN/IC control transaction will recreate an IC affiliation with a transcontinental carrier;²⁶⁶ that this affiliation will work to the detriment of BNSF, because CN and BNSF compete with respect to traffic moving between the Pacific Coast and the U.S. Midwest, including points extending to the South and Southeast; that BNSF will lose traffic to a unified CN/IC; that this loss of traffic will have adverse impacts on BNSF employees; that these adverse impacts may differ as between different groups of BNSF employees; and that, because BNSF has not played an active role in this proceeding, a less than adequate record has been developed with respect to the adverse impacts that will fall upon BNSF employees. Mr. Fitzgerald therefore argues: that the CN/IC control application should be denied;²⁶⁷ and that, if it is not denied, BNSF employees should receive at least the full benefits of the employee protective conditions mandated for applicants' employees. Mr. Fitzgerald also argues: that, if we had issued Decision No. 31 prior to February 9, 1999, his attorney would have sought to participate in the oral argument we held on March 18, 1999;²⁶⁸ that, however, we issued Decision No. 31 after February 9, 1999; and that, because Mr. Fitzgerald's attorney did not participate in the oral argument, Mr. Fitzgerald stands to be prejudiced by our late action respecting the two agreements.

ALLIED RAIL UNIONS. The Brotherhood of Railroad Signalmen (BRS), the International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB), the National Council of Firemen and Oilers (NCFO), and the Sheet Metal Workers International Association (SMWIA), participating collectively as the Allied Rail Unions (ARU), indicated, in their comments filed October 26, 1998, that, although they had not yet taken a position with respect to approval or disapproval of the CN/IC control transaction and/or any conditions that might be necessary in connection with approval thereof, their major concerns regarding the CN/IC control transaction related to: transfers of employees in the crafts represented by the ARU unions; the potential impact of the transaction on existing CBAs and seniority

²⁶⁶ See Illinois Cent. Gulf R. — Acquisition — G. M. & O., et al., 338 I.C.C. 805, 864-73 (1971) (discussing allegations that UP had, at the time, a controlling interest in IC).

²⁶⁷ Mr. Fitzgerald adds, though without explanation, that the KCS trackage rights application should also be denied.

²⁶⁸ In Decision No. 30 (served Jan. 28, 1999), we directed parties wishing to participate in the oral argument to submit a statement to that effect no later than February 9, 1999. In Decision No. 31 (served Feb. 12, 1999), we directed CN to submit redacted copies of the Alliance and Access Agreements by February 22, 1999.

rights; and the position that applicants might take with respect to the continued effect of the employee protective arrangements negotiated in connection with the GTW/DTI&DTSL control transaction.

The ARU unions also indicated, in their comments filed October 26, 1998, that, although they had not yet taken a position, they were prepared to ask the Board to reject the transaction and to make the following declarations in connection with any approval thereof: (1) that rates of pay, rules, and working conditions under existing CBAs must be preserved, except to the extent New York Dock arbitrators permit variances solely in seniority and scope rules in connection with arrangements for selection of forces and assignment of employees; (2) that actions contrary to CBAs will be permitted only upon a showing of real necessity, as opposed to mere convenience or a simple reduction in labor costs; (3) that applicants have shown no necessity for CBA modification, except to some extent for seniority integration under New York Dock; (4) that approval of the transaction does not constitute explicit or implicit approval of the CBA changes described by applicants in their operating plans and attachments; and (5) that employee rights under existing protective agreements, including the agreements entered into pursuant to the GTW/DTI&DTSL control transaction, are preserved and will remain available to covered employees regardless of approval of the CN/IC control transaction.

The ARU unions further indicated, in their comments filed October 26, 1998, that they would reserve a final position for their brief (which, however, they never filed).²⁶⁹

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES. BMWWE, the collective bargaining representative for all maintenance of way forces working for applicants, urges approval of the CN/IC control transaction and indicates that it has already negotiated an implementing agreement (hereinafter referred to as the CN/IC-BMWWE implementing agreement) that resolves all merger-related issues between applicants (i.e., GTW, ICR, and CCP) and BMWWE.²⁷⁰ BMWWE contends that the CN/IC-BMWWE implementing agreement does what a New York Dock implementing agreement should do: it provides for a limited rearrangement of forces, and it reflects an understanding that long-term changes in the collective bargaining relationship must be made through the traditional processes of collective bargaining under the Railway Labor Act. BMWWE adds that we might want to use the CN/IC-BMWWE implementing agreement as a guide to the type of reasonable adjustment of interests that the New York Dock implementing agreement process is intended to achieve.

²⁶⁹ The Brotherhood of Railroad Signalmen has concluded an implementing agreement with applicants. See CN/IC-64 at 5 (filed Mar. 10, 1999). The record appears to contain no indication as to the status of the three other ARU unions.

²⁷⁰ See BMWWE-5, Ex. 1 (filed Feb. 19, 1999). See also BMWWE-6, Attachment (filed Mar. 8, 1999).

The CN/IC-BMWE implementing agreement consists of 18 numbered sections. Sections 1 through 7 provide for the transfer of certain GTW and CCP trackage and a number of GTW and CCP employees to ICR, and provide the transferred employees with continuity of service credit for longevity-based benefits, prior rights to the transferred assignments, and an option to preserve pre-transfer medical and dental benefits. Section 8 provides that, except as otherwise provided, New York Dock shall be applicable to the CN/IC control transaction. Sections 9 through 12 create a process for the administration of dismissal and displacement allowance claims. Section 13 creates for certain laid-off employees of CCP and GTW a preferential right for consideration for certain ICR positions. Section 14 provides for the distribution, to each CN/IC-BMWE employee, of a copy of the CN/IC-BMWE implementing agreement. Section 15 (discussed in more detail below) states certain understandings of the parties. Section 16 provides a mechanism for resolving disputes arising out of the CN/IC-BMWE implementing agreement. Section 17 provides that the provisions of the CN/IC-BMWE implementing agreement are without precedent or prejudice to the position of either party. Section 18 provides that the CN/IC-BMWE implementing agreement will become effective 30 days after the Board's approval of the CN/IC control application.

BMWE places particular emphasis on Section 15 of the CN/IC-BMWE implementing agreement, which states: that the parties understand that future modifications to the CN/IC-BMWE implementing agreement may be necessary to carry out the "financial transaction" set forth in STB Finance Docket No. 33556; that BMWE understands that those changes are subject to notice, negotiation, and possible arbitration under Article I, § 4 of New York Dock; and that the carriers understand "that changes such as the imposition of a system-wide collective bargaining agreement or the abrogation of an entire existing collective bargaining agreement, the merger of or substantial change to existing seniority districts, and/or the creation of system-wide maintenance of way production gangs or regional maintenance of way production gangs not otherwise permissible under current collective bargaining agreements shall not be sought pursuant to the notice, negotiation and possible arbitration process under Article I, Section 4 of the New York Dock conditions." Section 15, in BMWE's view, represents an acknowledgment by BMWE that applicants may need to fine tune their operations, and a corresponding acknowledgment by applicants that the implementing agreement process will only be used for such fine tuning and will not be used to abrogate entire agreements, to impose regional and system gang agreements, or to create a single system-wide CBA.

BMWE contends that we should find that the CN/IC-BMWE implementing agreement adequately addresses the interests of applicants' maintenance of way employees. BMWE further contends that, in view of this agreement, and in view also of applicants' estimate that there will be a net increase in maintenance of way forces on a unified CN/IC, the CN/IC control application should be approved.²⁷¹

²⁷¹ Applicants and BMWE have asked that we incorporate the CN/IC-BMWE implementing
(continued...)

APPENDIX E: ENVIRONMENTAL CONDITIONS

SAFETY: HAZARDOUS MATERIALS TRANSPORT CONDITIONS

Condition 1. Applicants shall comply with current Association of American Railroads (AAR) “key train” guidelines and any subsequent revisions for a period of 5 years from the effective date of the Board’s decision. (See “Recommended Railroad Operating Practices for Transportation of Hazardous Materials,” AAR Circular No. OT-55-B.)

AAR guidelines define key trains as any trains with five or more tank carloads of chemicals classified as a poison inhalation hazard or any train with a total of 20 rail cars with any combination of poison inhalation hazards, flammable gases, explosives, or environmentally sensitive chemicals. The AAR key train guidelines include measures for a maximum operating speed of 50 mph and full train inspections by the train crew whenever a train is stopped by an emergency application of the train air brake or following the report of a defect by a wayside defect detector.

Condition 2. Applicants shall continue to manage the four rail line segments listed in the table below, “Rail Line Segments that Warrant Hazardous Materials (Key Route) Mitigation,” as Key Routes for a period of 5 years from the effective date of the Board’s decision. Applicants shall certify to the Board compliance with AAR’s Key Route guidelines prior to increasing the number of rail cars carrying hazardous materials on these four rail line segments and annually for the 5-year oversight period established by the Board. (See “Recommended Railroad Operating Practices for Transportation of Hazardous Materials,” AAR Circular No. OT-55-B.)

RAIL LINE SEGMENTS THAT WARRANT HAZARDOUS MATERIALS (KEY ROUTE) MITIGATION

Route and Segment(s)	Length (miles)	Rail Line Segment ID
Detroit Intermodal, MI to Mal Junction, MI	14.6	1222

²⁷¹(...continued)
 agreement as a condition of our order approving the CN/IC control application. See BMW-5, Ex. 1, p. 11. See also BMW-6 (filed Mar. 8, 1999; a joint motion for adoption of the CN/IC-BMWE implementing agreement as a condition of approval of the CN/IC control application).

**RAIL LINE SEGMENTS THAT
WARRANT HAZARDOUS MATERIALS
(KEY ROUTE) MITIGATION**

Route and Segment(s)	Length (miles)	Rail Line Segment ID
Mal Junction, MI to Pontiac, MI	0.9	1225
Pontiac, MI to West Pontiac, MI	2.2	1230
West Pontiac, MI to Durand, MI	38.3	1235

Condition 3. Applicants shall distribute a copy of their current hazardous materials emergency response plans to each local emergency response organization or coordinating body in the communities along the four Key Route rail line segments listed in Condition No. 2 and the ten Major Key Routes rail line segments listed in Condition No. 4. Applicants shall certify to the Board compliance with this condition within 6 months of the effective date of the Board's decision. In addition, for a period of 3 years from the effective date of the Board's decision, Applicants shall distribute hazardous materials emergency response plans at least once or whenever they materially change their plans, in a manner that affects coordination with the local emergency response organizations.

Condition 4. Applicants shall work with each local emergency response organization or coordinating body in the communities along the ten rail line segments listed in the table below, "Rail Line Segments that Warrant Hazardous Materials Emergency Response (Major Key Route) Mitigation," to develop a local hazardous materials emergency response plan to be implemented in coordination with the Applicants' hazardous materials emergency response plans. The individual plans shall be consistent with the National Response Team Guidance documents NRT-1 (*Hazardous Materials Emergency Planning Guide*), NRT-1A (*Criteria for Review of Hazardous Materials Emergency Plans*), and the U.S. Environmental Protection Agency's *Technical Guidance for Hazardous Analysis* or other equivalent documents that are used by the affected community's local emergency response organization or coordinating body. Applicants shall certify to the Board compliance with this condition within 1 year of the effective date of the Board's decision.

RAIL LINE SEGMENTS THAT WARRANT HAZARDOUS MATERIALS EMERGENCY RESPONSE (MAJOR KEY ROUTE) MITIGATION

Route and Segment(s)	Length (miles)	Rail Line Segment ID
Matteson (EJE), IL to Kankakee, IL	26.6	187
Kankakee, IL to Otto, IL	5.2	190
Otto, IL to Gilman, IL	20.6	205
Gilman, IL to Champaign, IL	46.3	305
Champaign, IL to Mattoon, IL	45.1	315
Edgewood, IL to Centralia, IL	37.3	360
Centralia, IL to Renlakmine, IL	23.5	365
Renlakmine, IL to Du Quoin, IL	11.7	370
Carbondale, IL to Cairo, IL	54.4	380
Cairo, IL to Fulton, KY	43.5	385

Condition 5. Applicants shall implement a simulation emergency response drill or training session with the voluntary participation of local emergency response committees or coordinating bodies in affected communities along each Major Key Route identified in Condition 4. Applicants shall certify to the Board compliance with this condition within 2 years of the effective date of the Board's decision.

Condition 6. Applicants shall provide dedicated toll-free telephone numbers to the emergency response organizations or coordinating bodies responsible for each community located along the four rail line segments identified in Condition 2 and the ten rail line segments identified in Condition 4. These telephone numbers shall provide access to personnel 24 hours per day, 7 days per week, at the Applicants' dispatch centers where local emergency responders can quickly obtain and provide information regarding the transport of hazardous materials on a given train and appropriate emergency response procedures in the event of a train accident or hazardous materials release. Applicants need not provide these telephone numbers to the public. Before increasing Acquisition-related hazardous materials traffic on these rail line segments, Applicants shall certify to the Board that they have complied with this condition.

Condition 7. As requested by the U.S. Fish and Wildlife Service (FWS), Applicants shall notify and consult with FWS and the appropriate state departments of natural resources in the event of a reportable hazardous materials release with the potential to affect listed threatened or endangered species.

ENVIRONMENTAL JUSTICE CONDITIONS

Condition 8. Applicants shall, with the advice and consideration of responsible local governments, adapt and modify the local component of its required hazardous materials emergency response plan to account for the special needs of minority and low-income populations adjacent to or in the immediate vicinity of the rail line segments in the table below, "Communities that Warrant Tailored Hazardous Materials Emergency Response Mitigation." Applicants shall certify compliance with this condition within 1 year of the effective date of the Board's decision.

**COMMUNITIES THAT WARRANT
TAILORED HAZARDOUS MATERIALS
EMERGENCY RESPONSE MITIGATION**

Community, State	Route and Segment(s)	Rail Line Segment ID
Cairo, IL	Carbondale, IL to Cairo, IL	380
	Cairo, IL to Fulton, KY	385
Carbondale, IL	Carbondale, IL to Cairo, IL	380
Centralia, IL	Edgewood, IL to Centralia, IL	360
	Centralia, IL to Renlakmine, IL	365
Du Quoin, IL	Renlakmine, IL to Du Quoin, IL	370
Mounds, IL	Carbondale, IL to Cairo, IL	380

Condition 9. Applicants shall provide Operation Respond software and any necessary training to the local emergency response center serving minority and low-income populations adjacent to or in the immediate vicinity of Applicants' rail line segments in the communities listed in Condition 8. Applicants shall certify compliance with this condition within 1 year of the effective date of the Board's decision.

Condition 10. As agreed to by the Applicants, Applicants shall provide funds for two representatives of the emergency response organizations from each community listed in Condition 8 to

attend a training session at AAR's Transportation Technology Center in Pueblo, Colorado. Such funding shall include reasonable travel expenses.

CONSTRUCTION CONDITIONS

Conditions 11 and 12 apply to the five Acquisition-related construction activities listed in the table below, "Proposed Construction Projects," as appropriate, to reduce or avoid the potential for environmental impacts resulting from the proposed CN/IC Acquisition.

PROPOSED CONSTRUCTION PROJECTS

State	Location	Description
Illinois	Centralia Yard	Upgrade project.
Illinois	Champaign Yard	Upgrade project.
Illinois	Cicero	Construct a new 1,000-foot connection.
Mississippi	Jackson Yard	Construct 2,140 feet of new rail for a bypass west of the rail yard.
Tennessee	Memphis Yard	Upgrade project.

Condition 11. For all proposed CN/IC Acquisition-related construction activities listed in the table above, "Proposed Construction Projects," Applicants shall employ the Best Management Practices presented in Attachment A, "Best Management Practices for Construction Activities."

Condition 12. For all proposed CN/IC Acquisition-related construction activities listed in the table above, "Proposed Construction Projects," Applicants shall comply with the following Federal, state, and/or local regulations, which have particular applicability in mitigating potential environmental impacts:

Hazardous and Solid Waste Handling

- a) Applicants shall observe all applicable Federal, state, and local regulations regarding the handling and disposal of any waste materials, including hazardous waste, encountered or generated during construction activities. In the event of a hazardous waste spill resulting from proposed construction activities, the

Applicants shall implement appropriate emergency response and notification procedures and the appropriate remediation measures as required by applicable Federal, state, and local regulations.

- b) Applicants shall transport all hazardous materials generated by all proposed construction activities in compliance with DOT's Hazardous Materials Regulations (49 CFR Parts 171 to 179).
- c) Applicants shall dispose of all materials that cannot be reused in accordance with applicable Federal, state, and local solid waste management regulations.

Dust Control

- d) Applicants shall comply with all applicable Federal, state, and local regulations to control and minimize fugitive dust emissions resulting from construction activities. Compliance may involve the use of such control methods as spraying water, installing wind barriers, or providing chemical treatment.

Water Resources Protection

- e) Applicants shall obtain all necessary Federal, state, and local permits for the alteration of wetlands, ponds, lakes, streams, or rivers or if a likelihood exists for construction activities to cause soil or other materials to enter into these water resources. Applicants also shall use Best Management Practices to minimize other potential environmental impacts on water bodies, wetlands, and navigation. (see Attachment A, Best Management Practices for Construction Activities.)

Stormwater Discharge

- f) Applicants shall obtain all necessary Federal, state, and local permits for stormwater discharge, including National Pollutant Discharge Elimination System permits, during construction activities.

Use of Herbicides

- g) Applicants shall use only Environmental Protection Agency-approved herbicides and qualified personnel or contractors for application of right-of-way maintenance herbicides and shall limit such applications to the extent necessary for rail operations.

SAFETY INTEGRATION CONDITIONS

Condition 13. Applicants shall comply with the Safety Integration Plan, which may be modified and updated as necessary to respond to evolving conditions.

Condition 14. Applicants shall participate and fully cooperate with the ongoing regulatory activities associated with the safety integration process, as described in the Memorandum of Understanding agreed to by the Board and the Federal Railroad Administration (FRA), with the concurrence of U.S. Department of Transportation, until FRA affirms to the Board in writing that integration of the Applicants' systems has been completed safely and satisfactorily.

MONITORING AND ENFORCEMENT CONDITION

Condition 15. If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions in this Decision and upon petition by any party who demonstrates such material change, the Board may review the continuing applicability of its final mitigation, if warranted.

ATTACHMENT A: Best Management Practices for Construction Activities

1. Applicants shall restore any adjacent properties disturbed during right-of-way construction or abandonment-related activities to pre-construction or pre-abandonment conditions.
2. Applicants shall encourage regrowth in disturbed areas and stabilize disturbed soils according to standard construction practices or as required by construction permits.
3. Applicants shall use appropriate signs and barricades to control traffic disruptions during construction or abandonment-related activities at or near any highway/rail at-grade crossings.
4. Applicants shall restore roads disturbed during construction or abandonment-related activities to conditions required by state and local jurisdictions.
5. Applicants shall control temporary noise from construction or abandonment-related equipment through use of work-hour controls, operation and maintenance of muffler systems on machinery, and/or other noise reduction methods.
6. If Applicants find previously unknown archeological remains during construction or abandonment-related activities, they shall immediately cease excavation work in the area and contact the appropriate State Historic Preservation Office for guidance and coordination.
7. Applicants shall use appropriate technologies, such as silt screens and straw bale dikes, to minimize soil erosion, sedimentation, runoff, and surface instability during construction or abandonment-related activities. Applicants shall disturb the smallest area possible around any streams and tributaries and shall consult with the appropriate state agent to properly revegetate disturbed areas immediately following construction or abandonment-related activities.
8. Applicants shall ensure that all culverts are clear of debris to avoid potential flooding and stream flow alteration.
9. Applicants shall design and construct proposed construction/abandonment activities so as to preserve effective drainage to maintain the quality of adjacent prime farmland.
10. Applicants shall use appropriate techniques to minimize potential environmental impacts on water bodies, wetlands, and navigation, including the following specific measures:
 - a) If necessary, Applicants shall avoid impacts or losses to wetlands wherever possible. If wetland impacts are unavoidable, Applicants must demonstrate that no practicable alternatives that would avoid or further minimize impacts to wetlands are available. Applicants shall compensate for unavoidable wetland losses at ratios determined by the U.S. Army Corps of Engineers and FWS as to type of wetland affected on a site-by-site basis.



- b) **If necessary, Applicants shall design and replicate compensatory wetlands to match as closely as possible the specific mix of types, functions, and values of the affected wetlands. The compensatory wetlands shall be established via the process of restoration to the extent feasible, and they shall be located in an area as close as practicable to the affected wetlands.**
11. **Applicants shall ensure that abandonment-related activities are designed to preserve land forms and drainage patterns that may provide flood protection.**
12. **Applicants shall ensure that for any construction project, new lighting fixtures installed in new parking and security areas adjacent to residential zoned areas shall be cut off or shielded to avoid effects to residences.**
13. **Applicants shall compensate for trees removed during project activities. Applicants shall replace trees with native saplings, if practicable, at a minimum ratio of 1:1, and replacement shall occur as close as possible to the affected areas.**
14. **Applicants shall establish a staging area for construction equipment in environmentally nonsensitive areas to control erosion and spills.**
15. **Should project activities affect previously unidentified threatened or endangered species and/or their habitat, Applicants shall immediately cease project activities and contact the FWS and the appropriate State Department of Natural Resources for guidance and coordination.**
16. **Applicants shall use established standards for recycling or reuse of construction materials such as ballast and rail ties. When recycling construction materials is not a viable option, Applicants shall specify disposal methods of materials, such as rail ties and potentially contaminated surrounding soils and ballast materials, to ensure compliance with applicable solid and hazardous waste regulations.**
17. **Applicants shall develop a vibration specification for any proposed construction activities associated with the proposed CN/IC Acquisition that involve pile driving, major excavation, or demolition.**



2

NEW YORK DOCK PROTECTIVE CONDITIONS

Finance Docket No. 28250 Appendix III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions.-(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived 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.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation

and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of

the Washington Job Protection Agreement of May, 1936.

8. Fringe benefits.- No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.- Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects 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; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purviews of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claims for reimbursement shall be paid under the provision of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employe of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.- (a) In the event 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 provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint

additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.- (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefor required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement, within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser

whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the Article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLES III, IV, AND V NOT REPRODUCED

3

Labor Relations Department



17641 S. Ashland Avenue
Homewood, Illinois 60430

VIA HAND DELIVERY

February 3, 2009

Mr. M.H. Christofore
President
Illinois Central Train Dispatchers Association
17641 S. Ashland Avenue
Homewood, IL 60430

Mr. Christofore:

Enclosed is a self-explanatory notice that has been posted for the information of interested employees in connection with the acquisition of Illinois Central by Canadian National Railway (STB Finance Docket 33556).

We propose an initial meeting be held at 2p.m. on February 3, 2009, at our Homewood office located at 17641 S. Ashland Avenue in Homewood, Illinois, for the purpose of reaching the necessary implementing agreement.

Please advise if you are available to meet at the above time and location.

Sincerely,

C.K. Cortez

Senior Manager – Labor Relations

GRAND TRUNK WESTERN RAILROAD INCORPORATED
ILLINOIS CENTRAL RAILROAD COMPANY

Notice to Employees

February 3, 2009

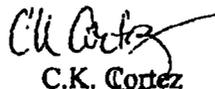
The Surface Transportation Board, in a Decision dated May 25, 1999, approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("ICR"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") (Finance Docket 33556) subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).

The acquisition enables the rail system to provide more efficient, more reliable, and more competitive rail service. The acquisition also responds directly to shipper requirements for improved rail infrastructure to handle the rapidly growing north-south trade flows stimulated by NAFTA.

To achieve the efficiencies of the acquisition, it is necessary to consolidate the train dispatching operation of the Grand Trunk Western ("GTW") and the Illinois Central ("IC") into one location. The consolidation will result in the abolishment of sixteen (16) GTW dispatcher positions at Troy, Michigan. Ten (10) dispatcher positions will be established at Homewood, Illinois. The reason for the consolidation is to provide increased efficiency and better utilization of the dispatchers at Homewood.

Employees who are adversely affected by this transaction will be entitled to the employee protective conditions described in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).

This notice is served pursuant to Article I, Section 4 of the protective conditions.


C.K. Cortez

Senior Manager - Labor Relations

Labor Relations Department



17641 S. Ashland Avenue
Homewood, Illinois 60430

VIA FACSIMILE

February 3, 2009

Mr. J.W. Mason
General Chairman
American Train Dispatchers Association
4689 Hatchery
Waterford, MI 48329

Mr. Mason:

Enclosed is a self-explanatory notice that has been posted for the information of interested employees in connection with the acquisition of Illinois Central by Canadian National Railway (STB Finance Docket 33556).

We propose an initial meeting be held at 11:00 a.m. on February 5, 2009, at our Troy office located at 2800 Livernois Road, Troy, Michigan, for the purpose of reaching the necessary implementing agreement.

Please advise if you are available to meet at the above time and location.

Sincerely,

A handwritten signature in black ink, appearing to read 'C.K. Cortez', written over a circular stamp or mark.

C.K. Cortez
Senior Manager – Labor Relations

P0187

GRAND TRUNK WESTERN RAILROAD INCORPORATED
ILLINOIS CENTRAL RAILROAD COMPANY

Notice to Employees

February 3, 2009

The Surface Transportation Board, in a Decision dated May 25, 1999, approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("ICR"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") (Finance Docket 33556) subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).

The acquisition enables the rail system to provide more efficient, more reliable, and more competitive rail service. The acquisition also responds directly to shipper requirements for improved rail infrastructure to handle the rapidly growing north-south trade flows stimulated by NAFTA.

To achieve the efficiencies of the acquisition, it is necessary to consolidate the train dispatching operation of the Grand Trunk Western ("GTW") and the Illinois Central ("IC") into one location. The consolidation will result in the abolishment of sixteen (16) GTW dispatcher positions at Troy, Michigan. Ten (10) dispatcher positions will be established at Homewood, Illinois. The reason for the consolidation is to provide increased efficiency and better utilization of the dispatchers at Homewood.

Employees who are adversely affected by this transaction will be entitled to the employee protective conditions described in New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).

This notice is served pursuant to Article I, Section 4 of the protective conditions.


C.K. Cortez

Senior Manager - Labor Relations

4



Joseph
Mason/MASON07/IL/CNR/CA

02/06/2009 11:42 AM

To GTRTC, Tracy Miller/MILLER04/CNR/CA@CNR, Hunt
Cary/CARY01/IL/CNR/CA@CNR, Cathy
Cortez/CORTEZ02/CNR/CA@CNR, Roger

cc

bcc

Subject Homewood bound.

ATDA Members, TDE,SDM and myself met with company officials Thursday and Friday to discuss the move to Homewood. Below is what was discussed, Ms. Cortez will schedule another meeting that will be attended by a National Officer along with one of our fellow Dispatchers that will be asked to attend. She will, at that time, have a proposal of what they are offering. I will give you all a copy of the proposal.

- 1) The CN would like to dissolve the ATDA and dovetail our members that chose to go into the ICTDA union and be governed by their contract.
- 2) They want only two desks and would change territories on TD3 to control Port Huron to Valpo, Desk 1 in Homewood would absorb Valpo west.
TD2 would go back to the original territory plus the BLE RR.



Between the 3 of us we asked all the questions that were given to us plus many more. It is really too early to discuss much without having the proposal from Ms. Cortez. We tried to ask the questions for each member of our staff and how it would benefit them, including one time buyout, buying homes (if they would deal with individuals), would Management relocation package be available, New York Dock issues for those who want to stay if any, what about those who did not want to sell their home, Pay increase due to cost of living in Homewood, will jobs be offered for persons without clerical seniority (YES), will the CN take all 16 people and what if no one wants to go. We ask what their plan was if they are not successful in ridding themselves of the ATDA, they had none at this time.

I wish I had more to tell you to ease your minds but all that I can tell you is that I will keep you informed and we all will work hard to get the most that we can for this move.

5

Cathy
Cortez/CORTEZ02/CNR/CA
02/10/2009 09:27 AM

To Joseph Mason/MASON07/IL/CNR/CA@CNR,
atdaclb@yahoo.com
cc Hunt.Cary@cn.ca

bcc

Subject Section 4 meeting dates

Propose the following dates to meet again:

March 12-13 or March 19-20.

Please advise.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

6

Cathy
Cortez/CORTEZ02/CNR/CA
02/13/2009 12:06 PM

To Atdddww@aol.com
cc atdaclb@yahoo.com, ATDAMCCANN@aol.com,
josephwmason1@juno.com, Hunt.Cary@cn.ca
bcc
Subject Re: Section 4 meeting dates

David -

We'd like to meet prior to that so as to prolong the process too much. What about February 19 & 20 or February 26-27. Or any other dates prior to April.

Thanks.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddww@aol.com

02/13/2009 11:48 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, atdaclb@yahoo.com, josephwmason1@juno.com
Subject Re: Section 4 meeting dates

Cathy:

We are unable to meet on the dates you suggest. We are available April 15 and 16. Please advise if these dates work for you. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

This email and any attached files may contain confidential and/or privileged information, and is intended only for the individual(s) named above. If you are not the intended recipient(s), you are advised that any dissemination or disclosure of the contents of this communication is strictly prohibited; please immediately notify the sender and delete this email from your system.

To: Joseph Mason/MASON07/IL/CNR/CA@CNR, atdclb@yahoo.com
From: Cathy Cortez/CORTEZ02/CNR/CA
Date: 02/10/2009 10:27AM
cc: Hunt.Cary@cn.ca
Subject: Section 4 meeting dates

Propose the following dates to meet again:

March 12-13 or March 19-20.

Please advise.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

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7

Cathy
Cortez/CORTEZ02/CNR/CA
02/19/2009 02:19 PM

To Atdddww@aol.com
cc atdacb@yahoo.com, ATDAMCCANN@aol.com,
Hunt.Cary@cn.ca, josephwmason1@juno.com
bcc
Subject Re: Section 4 meeting dates

David -

You are correct, I am working on getting you a proposal. Propose that we at least set up a conference call to address, once you have a document in hand. We will also put April 15 and 16 in our calendars, and are agreeable to single-day dates before then.

I will be in touch. Thanks.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddww@aol.com

02/18/2009 11:09 AM

To Cathy.Cortez@cn.ca
cc atdacb@yahoo.com, ATDAMCCANN@aol.com, josephwmason1@juno.com, Hunt.Cary@cn.ca
Subject Re: Section 4 meeting dates

Cathy:

It is my understanding that the carrier is working on a proposal to present to us. It would then make sense that we have that proposal prior to the meeting so that we will have a chance to review and discuss it. This enhances the opportunity for a more productive meeting.

The dates you suggested in February do not work for us, even if we had your proposal in hand. There may be an opportunity to do something in March should something already on my calendar is canceled.

P0193

I would suggest that we commit to April 15 and 16, but should I see an earlier date open up I'll contact you to see if we can use it. Of course, we can meet in your offices in Homewood to accommodate what may be a somewhat short notice. Please let me know if this is agreeable to you.

Also, while I think it wise to have more than a one-day meeting, should a single day open up would you want to use it instead of waiting until the dates in April?

David

In a message dated 2/13/2009 12:07:59 P.M. Central Standard Time, Cathy.Cortez@cn.ca writes:

David -

We'd like to meet prior to that so as to prolong the process too much. What about February 19 & 20 or February 26-27. Or any other dates prior to April.

Thanks.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddww@aol.com

02/13/2009 11:48 AM

To Cathy.Cortez@cn.ca

cc ATDAMCCANN@aol.com, atdacib@yahoo.com, josephwmason1@juno.com

Subject Re: Section 4 meeting dates

Cathy:

We are unable to meet on the dates you suggest. We are available April 15 and 16. Please advise if these dates work for you. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association

Phone: 210-455-9294

Fax: 210-467-5239

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To: Joseph Mason/MASON07/IL/CNR/CA@CNR, atdacib@yahoo.com

From: Cathy Cortez/CORTEZ02/CNR/CA

Date: 02/10/2009 10:27AM

cc: Hunt.Cary@cn.ca

Subject: Section 4 meeting dates

Propose the following dates to meet again:

March 12-13 or March 19-20.

Please advise.

Cathy Cortez

Senior Manager - Labor Relations

Office: 708.332.3570

Mobile: 312.848.0586

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David W. Volz

Vice President

American Train Dispatchers Association

Phone: 210-455-9294

Fax: 210-467-5239

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8

CARRIER
PROPOSAL
4/15/09

Agreement between

GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY

And their employees represented by

AMERICAN TRAIN DISPATCHERS ASSOCIATION
ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW and IC served notice under Article I, Section 4 of the Protective Conditions of its intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and IC and the American Train Dispatchers Association ("ATDA") and the Illinois Central Train Dispatchers Association ("ICTDA") on behalf of employees represented by each respective to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, provides the necessary protection of employees,

IT IS AGREED:

Identify positions

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment C, subject to the agreement between the GTW and the ATDA will be abolished.
2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for ten (10) ICTDA dispatcher positions at Homewood.
3. GTW dispatchers must submit their application for the above options or state their intent to exercise their seniority to another position under the GTW/TCIU Agreement, in writing, to the individual designated by the carrier, with copy to Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify options, will result in the employee being considered as having elected to exercise seniority under existing GTW/TCIU Agreements.
4. Assignments and awarding of positions shall be made in seniority order. In the event all positions provided in paragraph 2 are selected by dispatchers, clerical positions, under the GTW/TCIU agreement will be made available to the remaining employees on the GTW/ATDA seniority rosters.
5. Employees transferring from Troy to Homewood under provisions of this Agreement shall become IC employees and be subject to the agreement in effect between the ICTDA and IC covering wages, rules and working conditions, subject to the modifications contained herein. On the effective

date of this Agreement, the employees transferred under Paragraph 4 shall be credited with prior GTW service on the IC for benefits and vacation purposes.

6. Employees awarded positions transferred under the provisions of Paragraph 4 and IC employees will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other clerical assignment available under the terms of the CBA or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ICTDA Agreement.
7. Employees awarded positions under Paragraph 4 will forfeit all GTW seniority and their seniority will be dovetailed with the seniority dates held by employees on the IC. In the event two or more employees from the different seniority rosters have identical seniority dates, the employees shall be ranked first by service dates, then, if service dates are the same, by date of birth, the oldest employee to be designated the senior ranking. This shall not affect the respective ranking of employees with identical seniority dates on their former seniority roster.
8. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. It is

understood that if active and regularly assigned dispatchers at Troy decline to apply for any of the ten (10) dispatcher positions at Homewood or if any of the ten (10) positions are left unfilled, then such employees will not be considered deprived of employment and shall not be entitled to the protective benefits contained in the New York Dock conditions as a result of this transaction.

9. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.
10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the

employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

11. Each "dismissed employee" shall provide the carrier's designated individual the following information for the preceding month in which such employee is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the carrier.
- (a) The day(s) claimed by such employee under any unemployment insurance act.
 - (b) The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer(s) and the gross earnings made by the dismissed employee in such other employment.
 - (c) The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and the employee received sickness benefits.

12. If the "dismissed employee" referred to herein has nothing to report account not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for work the entire month, such employee shall submit, on a form provided by the carrier, within the time period provided for in paragraph 11, the form annotated "Nothing to Report."
13. The failure of any employee to provide the information as required in paragraphs 11 and 12 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the carrier of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in paragraph 11, except in circumstances beyond the individual's control.
14. The carrier will make payment of the protective benefits within sixty (60) days of receipt and verification of the information required in paragraphs 11 and 12.
15. Employees transferred from Troy to Homewood under provisions of this agreement may at their option and in lieu of any and all benefits provided by Sections 9 and 12 of the New York Dock conditions (Attachment "A"), be afforded special options as provided in Attachment "B", if eligible. Such election shall be made at the time of transfer.
16. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction

set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.

17. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.
18. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.
19. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization, but not later than May 3, 2009.

Signed this th day of , 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN
RAILROAD COMPANY;
ILLINOIS CENTRAL

For: AMERICAN TRAIN DISPATCHERS
ASSOCIATION

By: _____

By: _____

By: _____

Approved: _____

For: ILLINOIS CENTRAL TRAIN
DISPATCHERS ASSOCIATION

By: _____

By: _____

Approved: _____

ATTACHMENT B

In lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions, employees who accept positions at Homewood may elect, at the time of their transfer, to accept one of the relocation packages as provided below. All transferring employees must select either relocation option (1) or (2), payments subject to taxation:

OPTION (1) GTW Employees who relocate their primary residence to the

Homewood area will receive:

After fifteen (15) working days	\$2,000
After sixty (60) working days	\$2,000
After six (6) months	\$2,000
After one (1) year	\$2,000
After fifteen (15) months	\$2,000

To qualify for the above payments, an employee must be in active service at Homewood at the time such payment is due.

GTW employees who relocate their primary residence and select the benefits of this Attachment at the time of their transfer will be entitled to an additional \$10,000 upon proof of sale, at fair market value, of their primary residence in the Troy area, and proof of relocation to a new primary residence within a reasonable distance of Homewood. To qualify for the benefits of this paragraph, relocation of primary residence, including both sale and relocation, must occur within two (2) years of the date of transfer.

OPTION (2) GTW Employees who rent in the Homewood area:

GTW employees who elect to rent or lease in the Homewood area, will be reimbursed for actual out-of-pocket costs of a rental accommodation, up to One Thousand Three Hundred Dollars (\$1,300) per month ("rent reimbursement"). This rent reimbursement is to be used solely for the accommodations that are necessary in order for the employee to hold a Dispatcher position to Homewood, Illinois and is not intended to, and cannot, be used for any other purpose, including but not limited to enrolling children in school, paying expenses for your present residence (or any other residence), or paying for any additional costs that might incur as a result of relocating.

1. Rent reimbursement includes only the following items: monthly rent; the cost of a basic cable plan; monthly gas (heat) bill; monthly electric bill; and parking at your residence.
2. Rent reimbursement will be provided for only those expenses actually incurred and only up to the amount provided for in paragraph 1. The employee must provide proof that you incurred the expense in a format acceptable to the Company prior to being reimbursed for any expense. Examples of acceptable forms of proof include a signed lease agreement, monthly utility bills issued by the service provider for gas, light, basic cable, and parking. The Company reserves the right to request the employee provide a receipt for proof that the expense has been paid.
3. This is a taxable benefit to the employee, which is subject to taxation as ordinary income. The Company has agreed to pay the taxes for the rent reimbursement to the extent that it is considered ordinary income and

subject to taxation. The employee will remain responsible for all other tax liability. All rent reimbursement and taxes paid by the Company will be reported on the employee's statement of earnings.

4. Rent reimbursement will be provided to the employee for a period of time not to exceed two (2) years, or when one of the following events occur, whichever is sooner: the employee ceases to incur such expense; the employee violates any term of this relocation package; the employee's employment with the Company ends, whether voluntarily or otherwise; or the employee voluntarily chooses to transfer to another position within the Company.
5. Rent reimbursement will be offset if two or more employees rent the same living space.

ATTACHMENT C

	<u>Last Name</u>	<u>Initials</u>	<u>Seniority</u>
1.	Gebard	D.V.	4/19/1977
2.	Facknitz	E.A.	5/22/1977
3.	Campbell	L.P.	12/19/1981
4.	McAfee	M.L.	02/07/1987
5.	Mason	J.W.	11/30/1987
6.	Maidment	S.D.	1/14/1990
7.	Martenis	L.R.	06/02/1991
8.	Spring	M.S.	11/13/1991
9.	Phumley	T.R.	3/07/1993
10.	Maier	A.P.	10/19/1994
11.	Evans	T.D.	12/03/1994
12.	White	L.J.	6/05/1997
13.	Wery	N.D.	09/06/1997
14.	McDonough	K.E.	02/28/1998
15.	Cowgar	K.M.	03/05/1998
16.	Schott	J.F.	09/20/2000



2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that GTW employees may elect to receive a one-time lump sum payment of five hundred dollars (\$500) to offset the costs associated with a familiarization/house hunting trip to the Homewood area. Employees electing the lump sum payment who do not relocate will have the five hundred dollars (\$500) deducted from any future earnings or protective payments.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations

9

CARRIER
PROPOSAL
4/15/09

Agreement between

**GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY**

And their employees represented by

**AMERICAN TRAIN DISPATCHERS ASSOCIATION
ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION**

Notes

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW and IC served notice under Article I, Section 4 of the Protective Conditions of its intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and IC and the American Train Dispatchers Association ("ATDA") and the Illinois Central Train Dispatchers Association ("ICTDA") on behalf of employees represented by each respective to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, provides the necessary protection of employees,

IT IS AGREED:

Identify positions

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment C, subject to the agreement between the GTW and the ATDA will be abolished.
2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for ten (10) ICTDA dispatcher positions at Homewood.
3. GTW dispatchers must submit their application for the above options or state their intent to exercise their seniority to another position under the GTW/TCIU Agreement, in writing, to the individual designated by the carrier, with copy to Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify options, will result in the employee being considered as having elected to exercise seniority under existing GTW/TCIU Agreements.
4. Assignments and awarding of positions shall be made in seniority order. In the event all positions provided in paragraph 2 are selected by dispatchers, clerical positions, under the GTW/TCIU agreement will be made available to the remaining employees on the GTW/ATDA seniority rosters.
5. Employees transferring from Troy to Homewood under provisions of this Agreement shall become IC employees and be subject to the agreement in effect between the ICTDA and IC covering wages, rules and working conditions, subject to the modifications contained herein. On the effective

date of this Agreement, the employees transferred under Paragraph 4 shall be credited with prior GTW service on the IC for benefits and vacation purposes.

6. Employees awarded positions transferred under the provisions of Paragraph 4 and IC employees will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other clerical assignment available under the terms of the CBA or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ICTDA Agreement.
7. Employees awarded positions under Paragraph 4 will forfeit all GTW seniority and their seniority will be dovetailed with the seniority dates held by employees on the IC. In the event two or more employees from the different seniority rosters have identical seniority dates, the employees shall be ranked first by service dates, then, if service dates are the same, by date of birth, the oldest employee to be designated the senior ranking. This shall not affect the respective ranking of employees with identical seniority dates on their former seniority roster.
8. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. It is

understood that if active and regularly assigned dispatchers at Troy decline to apply for any of the ten (10) dispatcher positions at Homewood or if any of the ten (10) positions are left unfilled, then such employees will not be considered deprived of employment and shall not be entitled to the protective benefits contained in the New York Dock conditions as a result of this transaction.

9. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.
10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the

employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

11. Each "dismissed employee" shall provide the carrier's designated individual the following information for the preceding month in which such employee is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the carrier.
- (a) The day(s) claimed by such employee under any unemployment insurance act.
 - (b) The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer(s) and the gross earnings made by the dismissed employee in such other employment.
 - (c) The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and the employee received sickness benefits.

12. If the "dismissed employee" referred to herein has nothing to report account not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for work the entire month, such employee shall submit, on a form provided by the carrier, within the time period provided for in paragraph 11, the form annotated "Nothing to Report."
13. The failure of any employee to provide the information as required in paragraphs 11 and 12 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the carrier of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in paragraph 11, except in circumstances beyond the individual's control.
14. The carrier will make payment of the protective benefits within sixty (60) days of receipt and verification of the information required in paragraphs 11 and 12.
15. Employees transferred from Troy to Homewood under provisions of this agreement may at their option and in lieu of any and all benefits provided by Sections 9 and 12 of the New York Dock conditions (Attachment "A"), be afforded special options as provided in Attachment "B", if eligible. Such election shall be made at the time of transfer.
16. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction

set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.

- 17. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.
- 18. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.
- 19. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization, but not later than May 3, 2009.

Signed this th day of , 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN
RAILROAD COMPANY;
ILLINOIS CENTRAL

For: AMERICAN TRAIN DISPATCHERS
ASSOCIATION

By: _____

By: _____

By: _____

Approved: _____

For: ILLINOIS CENTRAL TRAIN
DISPATCHERS ASSOCIATION

By: _____

By: _____

Approved: _____

ATTACHMENT B

In lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions, employees who accept positions at Homewood may elect, at the time of their transfer, to accept one of the relocation packages as provided below. All transferring employees must select either relocation option (1) or (2), payments subject to taxation:

OPTION (1) GTW Employees who relocate their primary residence to the

Homewood area will receive:

After fifteen (15) working days	\$2,000
After sixty (60) working days	\$2,000
After six (6) months	\$2,000
After one (1) year	\$2,000
After fifteen (15) months	\$2,000

To qualify for the above payments, an employee must be in active service at Homewood at the time such payment is due.

GTW employees who relocate their primary residence and select the benefits of this Attachment at the time of their transfer will be entitled to an additional \$10,000 upon proof of sale, at fair market value, of their primary residence in the Troy area, and proof of relocation to a new primary residence within a reasonable distance of Homewood. To qualify for the benefits of this paragraph, relocation of primary residence, including both sale and relocation, must occur within two (2) years of the date of transfer.

OPTION (2) GTW Employees who rent in the Homewood area:

GTW employees who elect to rent or lease in the Homewood area, will be reimbursed for actual out-of-pocket costs of a rental accommodation, up to One Thousand Three Hundred Dollars (\$1,300) per month ("rent reimbursement"). This rent reimbursement is to be used solely for the accommodations that are necessary in order for the employee to hold a Dispatcher position to Homewood, Illinois and is not intended to, and cannot, be used for any other purpose, including but not limited to enrolling children in school, paying expenses for your present residence (or any other residence), or paying for any additional costs that might incur as a result of relocating.

1. Rent reimbursement includes **only** the following items: monthly rent; the cost of a basic cable plan; monthly gas (heat) bill; monthly electric bill; and parking at your residence.
2. Rent reimbursement will be provided for only those expenses actually incurred and only up to the amount provided for in paragraph 1. The employee must provide proof that you incurred the expense in a format acceptable to the Company prior to being reimbursed for any expense. Examples of acceptable forms of proof include a signed lease agreement, monthly utility bills issued by the service provider for gas, light, basic cable, and parking. The Company reserves the right to request the employee provide a receipt for proof that the expense has been paid.
3. This is a taxable benefit to the employee, which is subject to taxation as ordinary income. The Company has agreed to pay the taxes for the rent reimbursement to the extent that it is considered ordinary income and

subject to taxation. The employee will remain responsible for all other tax liability. All rent reimbursement and taxes paid by the Company will be reported on the employee's statement of earnings.

4. Rent reimbursement will be provided to the employee for a period of time not to exceed two (2) years, or when one of the following events occur, whichever is sooner: the employee ceases to incur such expense; the employee violates any term of this relocation package; the employee's employment with the Company ends, whether voluntarily or otherwise; or the employee voluntarily chooses to transfer to another position within the Company.
5. Rent reimbursement will be offset if two or more employees rent the same living space.

ATTACHMENT C

	<u>Last Name</u>	<u>Initials</u>	<u>Seniority</u>
1.	Gebard	D.V.	4/19/1977
2.	Facknitz	E.A.	5/22/1977
3.	Campbell	L.P.	12/19/1981
4.	McAfee	M.L.	02/07/1987
5.	Mason	J.W.	11/30/1987
6.	Maidment	S.D.	1/14/1990
7.	Martenis	L.R.	06/02/1991
8.	Spring	M.S.	11/13/1991
9.	Plumley	T.R.	3/07/1993
10.	Maier	A.P.	10/19/1994
11.	Evans	T.D.	12/03/1994
12.	White	L.J.	6/05/1997
13.	Wery	N.D.	09/06/1997
14.	McDonough	K.E.	02/28/1998
15.	Cowgar	K.M.	03/05/1998
16.	Schott	J.F.	09/20/2000



2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that GTW employees may elect to receive a one-time lump sum payment of five hundred dollars (\$500) to offset the costs associated with a familiarization/house hunting trip to the Homewood area. Employees electing the lump sum payment who do not relocate will have the five hundred dollars (\$500) deducted from any future earnings or protective payments.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations

10

Cathy
Cortez/CORTEZ02/CNR/CA
04/22/2009 12:26 PM

To Atdddww@aol.com
cc ATDAMCCANN@aol.com, josephwmason1@juno.com,
Hunt.Cary@cn.ca
bcc
Subject Re: GTW NYD Negotiations

David -

Seeing as we're unable to schedule something face-to-face, we'd like to set up a conference call to move forward. What is your availability?

Thanks

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddww@aol.com

04/22/2009 11:03 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com
Subject GTW NYD Negotiations

Cathy:

I'm sorry but I overlooked some other arbitration we have going the first week of June. We are pretty much slammed with PLB hearings trying to get as much done before the money runs out. Anyway, are ya'll available to meet on 6/17 and 6/18?

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

P0222

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Big savings on Dell XPS Laptops and Desktops!

11

**Cathy
Cortez/CORTEZ02/CNR/CA**
05/26/2009 01:36 PM

To Joseph Mason/MASON07/IL/CNR/CA@CNR
cc Hunt.Cary@cn.ca
bcc
Subject Re: MEETING

Joe -

We have been waiting to hear back from you guys with dates. Leo indicated at our last meeting, you'd get us dates once you guys talked to David. As I stated in a previous email, we are willing to do a conference call.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Joseph Mason/MASON07/IL/CNR/CA

**Joseph
Mason/MASON07/IL/CNR/CA**
05/26/2009 01:26 PM

To Cathy Cortez/CORTEZ02/CNR/CA@CNR
'cc'
Subject MEETING

CATHY, WHEN DO I GET TO VISIT WITH YOU AGAIN?

12



Atdddww@aol.com
06/12/2009 11:37 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com
bcc

Subject Telecon

History:  This message has been replied to.

Cathy:

Sorry it took me so long to get back to you. We are available for a conference call to discuss the status of the NYD negotiations on Tuesday, June 16, 2009 at 1:00 PM CDT. Please provide us with a number to dial into the telecon. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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Shop Dell's full line of Laptops now starting at \$349!

13



**Cathy
Cortez/CORTEZ02/CNR/CA**
06/23/2009 10:53 AM

To atdddww@aol.com, atdamccann@aol.com, Joe Mason
cc Hunt.Cary@cn.ca
bcc
Subject Meeting dates

David, Leo & Joe-

We are available any day next week, except July 1st for a meeting and any day the week of July 6th.

Please let us know your availability.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

14

Cathy
Cortez/CORTEZ02/CNR/CA
07/16/2009 08:22 AM

To Atdddvw@aol.com
cc
bcc
Subject Re: Thursday Call

David - Sorry to hear about your mom. Hope all is well. I will wait to hear from you.

Take care.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddvw@aol.com
07/15/2009 04:12 PM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com
Subject Thursday Call

Cathy:

My Mom developed some medical issues and I had to drive to her house last night. I know I promised to call you tomorrow afternoon, but I'm afraid that won't happen. I'm not sure at this point when I'll return home, but I'll keep you posted and will call when I have some news. Of course, this has affected my work on our counter. I'm sorry.

David

Performance you need and the value you want! Check out great laptop deals from Dell!



Atdddw@aol.com
07/21/2009 05:16 PM

To Cathy.Cortez@cn.ca
cc
bcc
Subject Re: ATDA Counter

Sorry. I didn't think to look at one of your emails.

I'll be on a conference call in the morning beginning at 11 AM. Probably last an hour or so.

David

In a message dated 7/21/2009 4:58:06 P.M. Central Daylight Time, Cathy.Cortez@cn.ca writes:

Thanks, David. My numbers are listed below.

I'll try to call you sometime on Wednesday or Thursday morning.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddw@aol.com
07/21/2009 02:43 PM

To Cathy.Cortez@cn.ca
cc
Subject ATDA Counter

Cathy:

As info, I've heard back from Leo and Joe concerning those things they wanted in our counter. I've made those changes and given them the counter to review. Leo is in negotiations with the NS this week, but he is attempting to get some time for a conference call with Joe and I. Once we have the conference call and Leo approves the counter I should be able to get it to you.

Now, the reason I'm doing this by email (and I hate to admit it) I've misplaced your phone numbers. Can you provide me with them once again, please? I'll take better care of them this time. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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A Good Credit Score is 700 or Above. See yours in just 2 easy steps!

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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What's for dinner tonight? Find quick and easy dinner ideas for any occasion.

15



Atdddww@aol.com
07/25/2009 09:50 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com
bcc
Subject ATDA Counter

History:  This message has been forwarded.

Cathy:

Attached is ATDA's Counter Proposal involving the relocation of the GTW Train Dispatchers from Troy to Homewood. As previously mentioned on the phone, we took your proposal and changed it to reflect our counter. That language that has been struck-through, we propose to delete. That language that is in *bold/italics* we propose to add. If you have any questions, please let me know. While I will be on vacation next week, I will periodically be checking my email.

Look forward to seeing you on August 4th at 10:00 AM to continue the negotiations. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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ATDA Counter.doc

ATDA proposal
July 2009

Agreement between

GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY

And their employees represented by

AMERICAN TRAIN DISPATCHERS ASSOCIATION
~~ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION~~

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW and IC served notice under Article I, Section 4 of the Protective Conditions of its intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and IC and the American Train Dispatchers Association ("ATDA") and the ~~Illinois Central Train Dispatchers Association ("ICTDA")~~ on behalf of employees represented by ~~each respective~~ *the ATDA* to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, provides the necessary protection of employees,

IT IS AGREED:

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment C, subject to the agreement between the GTW and the ATDA will be abolished.
2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for ten (10) ~~GTDA~~ *ATDA* dispatcher positions at Homewood.
3. GTW dispatchers must submit their application for the above ~~options~~ *positions* or *accept a separation allowance as provided for in paragraph 12, or* state their intent to exercise their seniority to another position under the GTW/TCIU Agreement, in writing, to the individual designated by the carrier, with copy to Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify options, will result in the employee being considered as having elected to exercise seniority under existing GTW/TCIU Agreements.
4. Assignments and awarding of positions shall be made in seniority order. In the event all 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 on the GTW/ATDA seniority rosters.

5. Employees transferring from Troy to Homewood under provisions of this Agreement shall ~~become IC~~ **remain GTW** employees and be subject to ~~the all~~ **agreements, including all National Agreements**, in effect between the ICTDA and ~~IC ATDA and GTW~~ covering wages, rules and working conditions, subject to the modifications contained herein *until such time as a single Agreement is reached covering the GTW and WC train dispatchers*. ~~On the effective date of this Agreement, the employees transferred under Paragraph 4 shall be credited with prior GTW service on the IC for benefits and vacation purposes.~~
6. Employees awarded positions transferred under the provisions of Paragraph 4 ~~and IC~~ employees will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other clerical assignment available under the terms of the CBA or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ~~ICTDA~~ **ATDA** Agreement.
7. ~~Employees awarded positions under Paragraph 4 will forfeit all GTW seniority and their seniority will be dovetailed with the seniority dates held by employees on the IC. In the event two or more employees from the different seniority rosters have identical seniority dates, the employees shall be ranked first by service dates, then, if service dates are the same, by date of birth, the~~

~~oldest employee to be designated the senior ranking. This shall not affect the respective ranking of employees with identical seniority dates on their former seniority roster.~~

8. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. It is understood that if active and regularly assigned dispatchers at Troy decline to apply for any of the ten (10) dispatcher positions at Homewood or if any of the ten (10) positions are left unfilled, then such employees will not be considered deprived of employment and shall not be entitled to the protective benefits contained in the New York Dock conditions as a result of this transaction, *except as otherwise provided by this Agreement.*

9. & Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.

9. ***GTW train dispatchers shown in Attachment C who exercise their seniority to obtain a TCIU/GTW position shall be considered eligible for a displacement allowance in accordance with Article I, Section 5 of New York Dock. The Carrier shall provide the respective employee with the calculations used to determine his/her displacement allowance within thirty (30) days of assuming the clerical position. The Carrier shall pay such displacement allowance in the first pay period of the month following the month in which a displacement allowance is due.***
10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits

to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

11. ~~Each "dismissed employee" shall provide the carrier's designated individual the following information for the preceding month in which such employee is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the carrier.~~

~~(a) The day(s) claimed by such employee under any unemployment insurance act.~~

~~(b) The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer(s) and the gross earnings made by the dismissed employee in such other employment.~~

~~(c) The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and the employee received sickness benefits.~~

In the event any of the employees shown in Attachment A cannot hold a TCIU/GTW position, cannot acquire a separation allowance as provided in paragraph 12, or cannot acquire a train dispatcher position in Homewood, such employees shall be eligible for a dismissal allowance in accordance with Article I, Section 6 of New York Dock. The Carrier shall provide the respective employee with the calculations used to determine his/her dismissal allowance within thirty (30) days of becoming a dismissed employee. The

Carrier shall pay such dismissal allowance in the first pay period of each month.

12. ~~If the "dismissed employee" referred to herein has nothing to report account not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for work the entire month, such employee shall submit, on a form provided by the carrier, within the time period provided for in paragraph 11, the form annotated "Nothing to Report."~~ *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. Employees shall apply for a separation allowance in accordance with paragraph 3, which shall be awarded in seniority order. An employee awarded a separation allowance shall have the option to take it in a lump sum, payable within fifteen (15) days of the positions being abolished in Troy, or having it spread equally over a certain number of months to reach age sixty (60). Should an employee choose to have the separation spread over a certain number of months to reach age sixty (60), the first payment shall be made in the first pay period following the abolishment of positions and he/she shall continue to receive health benefits in accordance with the same provisions as active employees for each month in which the separation allowance is received. Notwithstanding the provisions of this Section, an employee who stands for a separation allowance may chose to accept a VSA under the provisions of the Collective Bargaining Agreement.*

- ~~13.~~ The failure of any employee to provide the information as required in paragraphs 11 and 12 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the carrier of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in paragraph 11, except in circumstances beyond the individual's control.
- ~~14.~~ The carrier will make payment of the protective benefits within sixty (60) days of receipt and verification of the information required in paragraphs 11 and 12.
- ~~15.~~ 13. Employees transferred from Troy to Homewood under provisions of this agreement may at their option and in lieu of any and all benefits provided by Sections 9 and 12 of the New York Dock conditions (Attachment "A"), be afforded special options as provided in Attachment "B", if eligible. Such election shall be made at the time of transfer.
- ~~16.~~ 14. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.
- ~~17.~~ 15. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive

such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.

18. 16. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.

19. 17. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization, ~~but not later than May 3, 2009.~~

Signed this ____ day of , 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN
RAILROAD COMPANY;
ILLINOIS CENTRAL

For: AMERICAN TRAIN DISPATCHERS
ASSOCIATION

By: _____

By: _____

By: _____

Approved: _____

~~For: ILLINOIS CENTRAL TRAIN
DISPATCHERS ASSOCIATION~~

By: _____

By: _____

Approved: _____



ATTACHMENT A

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. Definitions. – (a) “Transaction” means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
 - (b) “Displaced employee” means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
 - (c) “Dismissed employee” means an employee of the railroad who, as a result of a transaction is deprived of 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.
 - (d) “Protective period” means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee’s length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.
2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad’s employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.
3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and

some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision – (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

- (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.
- (2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.
- (3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances – (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

- (b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.
- (c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earning of such employee in employment other than with the railroad, and the benefits received.
- (d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place or residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. **Moving expenses.** - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects 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 exceed 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 representative; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses where incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. **Arbitration of disputes.** - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event

the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

- (c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.
- (d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.
- (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. – (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence;

- (i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.
 - (ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.
 - (iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.
- (b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

- (c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.
- (d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or re-training physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or re-training is requested by such employee, the railroad shall provide for such training or re-training at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ATTACHMENT B

In lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions, employees who accept positions at Homewood *will receive a \$20,000 lump sum payment (paid no later than thirty (30) days prior to the move) and* may elect, at the time of their transfer, to accept one of the relocation packages as provided below. All transferring employees must select either relocation option (1) or (2), payments subject to taxation:

OPTION (1) GTW Employees who relocate their primary residence to the Homewood area will receive:

After fifteen (15) working days	\$2,000
After sixty (60) working days	\$2,000
After six (6) months	\$2,000
After one (1) year	\$2,000
After fifteen (15) months	\$2,000

To qualify for the above payments, an employee must be in active service at Homewood at the time such payment is due.

GTW employees who relocate their primary residence and select the benefits of this Attachment at the time of their transfer will be entitled to an additional \$10,000 upon proof of sale, at fair market value, of their primary residence in the Troy area, and proof of relocation to a new primary residence within a reasonable distance of Homewood. To qualify for the benefits of this paragraph, relocation of primary residence, including both sale and relocation, must occur within two (2) years of the date of transfer. *In lieu of the*

additional \$10,000 payment, the employee can opt to have the carrier purchase his/her home at the fair market value or the original purchase price, whichever is greater.

OPTION (2) GTW Employees who rent in the Homewood area:

GTW employees who elect to rent or lease in the Homewood area, will be reimbursed for actual out-of-pocket costs of a rental accommodation, up to One Thousand ~~Three~~ *Five* Hundred Dollars (~~\$1,300~~ *1,500*) per month ("rent reimbursement"). This rent reimbursement is to be used solely for the accommodations that are necessary in order for the employee to hold a Dispatcher position to Homewood, Illinois and is not intended to, and cannot, be used for any other purpose, including but not limited to enrolling children in school, paying expenses for your present residence (or any other residence), or paying for any additional costs that might incur as a result of relocating.

1. Rent reimbursement includes only the following items: monthly rent; the cost of a basic cable plan; monthly gas (heat) bill; monthly electric bill; and parking at your residence.
2. Rent reimbursement will be provided for only those expenses actually incurred and only up to the amount provided for in paragraph 1. The employee must provide proof that you incurred the expense in a format acceptable to the Company prior to being reimbursed for any expense. Examples of acceptable forms of proof include a signed lease agreement, monthly utility bills issued by the service provider for gas, light, basic

cable, and parking. The Company reserves the right to request the employee provide a receipt for proof that the expense has been paid.

3. ~~This is a taxable benefit to the employee, which is subject to taxation as ordinary income.~~ The Company has agreed to pay the taxes for the rent reimbursement to the extent that it is considered ordinary income and subject to taxation. ~~The employee will remain responsible for all other tax liability.~~ All rent reimbursement and taxes paid by the Company will be reported on the employee's statement of earnings.
4. Rent reimbursement will be provided to the employee for a period of time not to exceed ~~two (2)~~ *four (4)* years, or when one of the following events occur, whichever is sooner: the employee ceases to incur such expense; the employee violates any term of this relocation package; the employee's employment with the Company ends, whether voluntarily or otherwise; or the employee voluntarily chooses to transfer to another position within the Company.
5. Rent reimbursement will be offset if two or more employees rent the same living space.

ATTACHMENT C

GTW TRAIN DISPATCHER SENIORITY ROSTER

	<u>Last Name</u>	<u>Initials</u>	<u>Seniority</u>	
1.	<i>Lustig</i>	<i>W. D.</i>	<i>1/09/1977</i>	*
2.	Gebard	D.V.	04/19/1977	
3.	Facknitz	E.A.	05/22/1977	
4.	<i>Frasure</i>	<i>R. D.</i>	<i>11/20/1981</i>	*
5.	Campbell	L.P.	12/19/1981	
6.	McAfee	M.L.	02/07/1987	
7.	Mason	J.W.	11/30/1987	
8.	Maidment	S.D.	01/14/1990	
9.	Martenis	L.R.	06/02/1991	
10.	Spring	M.S.	11/13/1991	
11.	<i>Iacoangeli</i>	<i>J. T.</i>	<i>03/06/1993</i>	*
12.	Plumley	T.R.	03/07/1993	
13.	Maier	A.P.	10/19/1994	
14.	<i>Willet</i>	<i>T. E.</i>	<i>10/27/1994</i>	*
15.	Evans	T.D.	12/03/1994	
16.	<i>Seibert</i>	<i>R. L.</i>	<i>05/03/1997</i>	*
17.	White	L.J.	06/05/1997	
18.	<i>Skelton</i>	<i>S. D.</i>	<i>07/19/1997</i>	*
19.	Wery	N.D.	09/06/1997	
20.	McDonough	K.E.	02/28/1998	
21.	Cowgar	K.M.	03/05/1998	
22.	Schott	J.F.	09/20/2000	
23.	<i>Naylor</i>	<i>M. J.</i>	<i>04/23/2001</i>	*
24.	<i>Pollard</i>	<i>G. S.</i>	<i>06/29/2002</i>	*

*** Management**



_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that GTW employees *shall be allowed five (5) days with pay for the purpose of locating a residence in the Homewood area. Said five (5) days may be split up for up to two (2) house-hunting trip and shall be scheduled in conjunction with the employee's rest days. All travel expenses associated with the house-hunting trips shall be paid by the carrier. In lieu thereof, GTW employees may elect to receive a one-time lump sum payment of twenty-five hundred dollars (\$2,500) to offset the costs associated with a familiarization/house hunting trip to the Homewood area. Employees electing the lump sum payment who do not relocate will have the twenty-five hundred dollars (\$2,500) deducted from any future earnings or protective payments.*

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations



_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that rates of pay in effect for GTW train dispatchers at the time of the relocation shall be increased by ten percent (10%) in recognition of the increased cost of living in the Homewood area. This increase shall be effective on the first day the relocating train dispatchers work a position in the Homewood office.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations



_____, 2009

Side Letter No.

*Mr. J.W. Mason
American Train Dispatchers Association*

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that the carrier shall provide employment assistance for the spouses of the relocating train dispatchers at no cost to the employee or spouse. This shall include all costs associated with obtaining new employment in the Homewood area, including those costs associated with using employment agencies.

Sincerely,

*C.K. Cortez
Senior Manager – Labor Relations*

16



Labor Relations

17641 South Ashland Avenue
Homewood, IL 60430

VIA FACSIMILE and US MAIL
July 29, 2009

Mr. Roland Watkins
Director – Arbitration Services
National Mediation Board
1301 K Street NW, Suite 250 East
Washington D.C. 20572

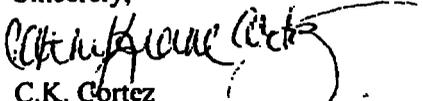
Dear Mr. Watkins:

On February 3, 2009, the Illinois Central Railroad Company (IC) and Grand Trunk Western Railroad Incorporated (GTW) served notice on the American Train Dispatchers Association (ATDA), who represent the GTW dispatchers, and the Illinois Central Train Dispatchers Association (ICTDA), who represent the IC dispatchers, of our intent to transfer work from the GTW in Troy, Michigan to the IC in Homewood, Illinois.

In an attempt to negotiate the required implementing agreements, meetings were held with both the ATDA and ICTDA. The Carriers proposed an agreement to both organizations. That proposal was unacceptable to the ATDA. The ATDA proposed a counter that was unacceptable to the Carriers. Consistent with the provisions of Sections 4 and 11 of New York Dock, the Carrier advised the Organizations they would seek arbitration to resolve the dispute.

There will be three parties to the arbitration: the Carriers, ATDA and ICTDA. At this time the Carrier would like to request a list of neutrals from which the parties can select an arbitrator, in accordance with the NMB memorandum of April 28, 2000. Your prompt response to this request would be greatly appreciated.

Sincerely,


C.K. Cortez
Senior Manager – Labor Relations

Cc: M.H. Christofore, ICTDA
J.A. Czarny, ICTDA
J.W. Mason, ATDA
F.L. McCann, ATDA
D.W. Volz, ATDA

17

Cathy
Cortez/CORTEZ02/CNR/CA
07/31/2009 11:17 AM

To atdddww@aol.com
cc atdamccann@aol.com, Joe_Mason@cn.ca,
JohnCzarny@cn.ca, Joseph.Mason@cn.ca,
Mike.Christofore@cn.ca, ROGER.MACDOUGALL@cn.ca,
bcc

Subject Re: Arbitration letter

David-

We do not want to cancel the meetings for next week. There still is value in meeting, regardless of the letter sent to the NMB. As you are aware, we have spoken for a few weeks now about the possibility of going to arbitration concerning this agreement. During those conversations, we both agreed that even if the process was started, it did not stop us from reaching a voluntary agreement. Therefore, we feel it is in all of our best interests to keep our meeting dates for next week as scheduled.

I am aware you are on vacation. In fact, we tried several times to reach Mr. McCann before his vacation, but our calls were not returned.

I ask that you reconsider for next week. We are keeping the dates and meetings rooms booked for the meetings.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

atdddww@aol.co

m

07/30/2009 06:50

PM

To Cathy.Cortez@cn.ca, Mike.Christofore@cn.ca, JohnCzarny@cn.ca, Joe_Mason@cn.ca,
Joseph.Mason@cn.ca, atdamccann@aol.com
cc ROGER.MACDOUGALL@cn.ca, Timothy.Rice@cn.ca
Subje Re: Arbitration letter
ct

Cathy:

Given the carrier's comments to Mr. Watkins that our counter proposal is unacceptable, we see no reason to meet next week. We regret that the carrier chose this course of action without us

having the benefit of the discussions that were scheduled for next week. Clearly, to do so now would only be a waste of our time and resources. Therefore, we are cancelling the meetings for next week.

We will respond to your letter to Mr. Watkins in due time. I will say, at his point, that your letter to Mr. Watkins is premature given the clear disputes resolution process contained in *New York Dock* .

As you know, I am on vacation this week and will be back in my office on Monday.

David Volz

-----Original Message-----

From: Cathy.Cortez@cn.ca

To: Mike.Christofore@cn.ca; JohnCzarny@cn.ca; Joe_Mason@cn.ca; Joseph.Mason@cn.ca; atdamccann@aol.com; atdddvw@aol.com

Cc: ROGER.MACDOUGALL@cn.ca; Timothy.Rice@cn.ca

Sent: Wed, Jul 29, 2009 2:19 pm

Subject: Arbitration letter



Please call with any questions or comments.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

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18



Atdddww@aol.com
08/01/2009 09:44 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, Joe_Mason@cn.ca,
JohnCzarny@cn.ca, Joseph.Mason@cn.ca,
Mike.Christofore@cn.ca, ROGER.MACDOUGALL@cn.ca,
bcc

Subject Re: Arbitration letter

History:  This message has been replied to.

Cathy:

Yes, we have had several conversations over the last few weeks and we did discuss the carrier's right to request arbitration and I did acknowledge the possibility of reaching a voluntary agreement even if the process was started. However, I never expected the carrier to dismiss our counter proposal without at least first discussing it.

You suggest that there is still value in meeting, we don't see it. You have rejected our counter proposal and you told me on the phone that the carrier would not revise its original proposal, which was not acceptable to us. So, what's left to discuss?

You may release the dates and meeting rooms as we will not meet given the circumstances.

I'm not sure what you are getting at concerning the attempted phone calls to Mr. McCann. Are you suggesting that someone was wanting to talk to him about our counter proposal? Regardless, Mr. McCann's mother had to undergo surgery last week and he was, rightly so, preoccupied with that.

David

In a message dated 7/31/2009 11:18:02 A.M. Central Daylight Time, Cathy.Cortez@cn.ca writes:

David-

We do not want to cancel the meetings for next week. There still is value in meeting, regardless of the letter sent to the NMB. As you are aware, we have spoken for a few weeks now about the possibility of going to arbitration concerning this agreement. During those conversations, we both agreed that even if the process was started, it did not stop us from reaching a voluntary agreement. Therefore, we feel it is in all of our best interests to keep our meeting dates for next week as scheduled.

I am aware you are on vacation. In fact, we tried several times to reach Mr. McCann before his vacation, but our calls were not returned.

I ask that you reconsider for next week. We are keeping the dates and meetings rooms booked for the meetings.

Cathy Cortez
Senior Manager - Labor Relations

Office: 708.332.3570
Mobile: 312.848.0586

Cathy:

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David Volz

-----Original Message-----

From: Cathy.Cortez@cn.ca

To: Mike.Christofore@cn.ca; JohnCzarny@cn.ca; Joe_Mason@cn.ca;
Joseph.Mason@cn.ca; atdamccann@aol.com; atdddww@aol.com

Cc: ROGER.MACDOUGALL@cn.ca; Timothy.Rice@cn.ca

Sent: Wed, Jul 29, 2009 2:19 pm

Subject: Arbitration letter

Please call with any questions or comments.

Cathy Cortez

Senior Manager - Labor Relations

Office: 708.332.3570

Mobile: 312.848.0586

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David W. Volz

Vice President

American Train Dispatchers Association

Phone: 210-455-9294
Fax: 210-467-5239

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19



Atdddww@aol.com
08/01/2009 09:44 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, Joe_Mason@cn.ca,
JohnCzamy@cn.ca, Joseph.Mason@cn.ca,
Mike.Christofore@cn.ca, ROGER.MACDOUGALL@cn.ca,
bcc
Subject Re: Arbitration letter

History:  This message has been replied to.

Cathy:

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I am aware you are on vacation. In fact, we tried several times to reach Mr. McCann before his vacation, but our calls were not returned.

I ask that you reconsider for next week. We are keeping the dates and meetings rooms booked for the meetings.

Cathy Cortez
Senior Manager - Labor Relations

Office: 708.332.3570
Mobile: 312.848.0586

Cathy:

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As you know, I am on vacation this week and will be back in my office on Monday.

David Volz

-----Original Message-----

From: Cathy.Cortez@cn.ca

To: Mike.Christofore@cn.ca; JohnCzarny@cn.ca; Joe_Mason@cn.ca;
Joseph.Mason@cn.ca; atdamccann@aol.com; atdddww@aol.com

Cc: ROGER.MACDOUGALL@cn.ca; Timothy.Rice@cn.ca

Sent: Wed, Jul 29, 2009 2:19 pm

Subject: Arbitration letter

Please call with any questions or comments.

Cathy Cortez

Senior Manager - Labor Relations

Office: 708.332.3570

Mobile: 312.848.0586

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David W. Volz

Vice President

American Train Dispatchers Association



Phone: 210-455-9294

Fax: 210-467-5239

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20



Cathy
Cortez/CORTEZ02/CNR/CA
08/03/2009 03:12 PM

To Atdddvw@aol.com
cc ATDAMCCANN@aol.com, JohnCzarny@cn.ca,
Joseph.Mason@cn.ca, Mike.Christofore@cn.ca,
ROGER.MACDOUGALL@cn.ca, Timothy
bcc
Subject Re: Arbitration letter 

David-

We're sorry to hear that you are adamant about canceling this week's meetings. As I wrote before, I still feel there is value in meeting and that perhaps a voluntary deal can still be made with the parties face-to-face, where we can discuss the issues. We have felt that way during the entire process from our original notice dated February 3, 2009.

Throughout the process, we have attempted to meet with the organization on various dates, and each time we would suggest such dates, the organization was unavailable and suggest dates further into the future. We began meeting on February 5 and afterwards when we suggested dates for February and then March, we were told you could not meet until mid-April. After the meetings in April, when we tried to set up conference calls, dates were not available for another 5-6 weeks from your side, taking us into June. And now you have canceled the final dates for August that we had to book close to 6 weeks ago.

An independent, outside observer might question whether these delays, taken cumulatively might be an attempt to delay the relocation process. We are now well beyond the 90-day process provided for in NYD.



I'm well aware that scheduling can be difficult, what with other bargaining, vacations, arbitration, family issues and travel restrictions. We have experienced all of those issues from our side of the table as well. My statement concerning contacting Mr. McCann was indeed to let you know that we have been and will continue to keep the lines of communication open. His voicemail indicated he was traveling on business. I'm sorry to hear about his mother.

I would ask that we at least schedule some sort of a conference call with the parties, on one of the three dates we had scheduled for this week. Perhaps we can have more dialogue and progress towards some sort of mutual deal. Failing that, we see no alternative but the party-pay arbitration process outlined in NYD.

As of today, we have not received a list of arbitrators from the NMB. Per Section 4.(1) in NYD, we propose using Peter Meyers, on a voluntary basis. If all parties are not agreeable to Mr. Meyers, I suggest we schedule a time to go over a possible list from the NMB.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddvw@aol.com



Atdddvw@aol.com

21



Atdw@aol.com
08/26/2009 05:49 PM

To Cathy.Cortez@cn.ca, Mike.Christofore@cn.ca
cc Hunt.Cary@cn.ca, John.Czarny@cn.ca,
Rick.Pippin@cn.ca, ATDAMCCANN@aol.com,
Joseph.Mason@cn.ca
bcc
Subject Re: ICTDA Proposal

Cathy:

Can you please forward to me the agreement that Mr. Christofore references involving the EJE? Thanks.

David

In a message dated 8/26/2009 1:50:07 P.M. Central Daylight Time, Cathy.Cortez@cn.ca writes:

Thank you, Mike. I am forwarding on to the ATDA for their review. I will respond to you by tomorrow.

Cathy Cortez
Senior Manager – Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586



Mike
Christofore/CHRIST12/IL/CNR/
CA

08/26/2009 01:34 PM

To Cathy Cortez/CORTEZ02/CNR/CA@CNR, Hunt Cary/CARY01/IL/CNR/CA@CNR, John
Czarny/CZARNY/IL/CNR/CA@CNR, Rick Pippin/PIPPIN02/CNR/CA@CNR

cc
Subj ICTDA Proposal
ect

Re:ICTDA Proposal for CN

Cathy Cortez/Sr Mgr Labor Relations CN Railway Homewood ROC Center

Please accept this as our(ICTDA)proposal for the ROC Center Homewood Illinois between the CN and the ATDA and the ICTDA:

We(ICTDA)propose to remain a neutral party in the dispute between the ATDA(American Train Dispatchers Association)and the CN Railway.At this

point in time we(ICTDA)have no dispute with either the CN Railway or the ATDA.We(ICTDA)are not quite sure why we(ICTDA)are being drawn into this

arbitration dispute. Therefore it is our (ICTDA) desire to remain a neutral party in this pending matter.

If however there is no way to remain a neutral in this matter between the CN Railway and the ATDA we (ICTDA) propose the same agreement that we (ICTDA)

have made between us and the CN Railway concerning the former EJ&E RTC's that was signed on the 15th of July 2009 wherein the former EJ&E RTC's were

brought under the scope of the agreement between the CN Railway and the Illinois Central Train Dispatchers Association (ICTDA) pending agreement with

the CN Railway and the ATDA.

Respectfully Submitted

MH Christofore
ICTDA President

AGREEMENT BETWEEN

**ILLINOIS CENTRAL RAILROAD COMPANY (IC)
EJ&E RAILWAY COMPANY (EJ&E)**

AND

**THE ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION (ICTDA)
UNREPRESENTED EJ&E RAIL TRAFFIC CONTROLLER (RTC) EMPLOYEES**

WHEREAS, the Surface Transportation Board in a decision dated December 24, 2008 (STB Finance Docket No. 35087), approved the acquisition ("the Control Transaction") by Canadian National Railway ("CNR") and Grand Trunk Corporation ("GTC") of the EJ&E West Company ("EJ&EW") subject to the conditions for the protection of railroad employees described in New York Dock, and

WHEREAS, with the closing of the Control Transaction, the EJ&E West Company has changed its name to the EJ&E Railway Company ("EJ&E"), and

WHEREAS, the Illinois Central Railroad Company ("IC") is an indirectly wholly-owned subsidiary of GTC, and

THEREFORE, this Agreement is made by and between the IC, the ICTDA and the unrepresented EJ&E RTCs to establish procedures for work covered under the scope of the Agreement performed on the former EJ&E property.

IT IS AGREED:

1. On the effective date of this agreement, all EJ&E RTCs will become IC employees subject to the ICTDA Agreement relating to wages, rules and working conditions and all RTC work performed on the former EJ&E will belong to employees of the IC.
2. All years of service with the EJ&E will be credited for the purposes of benefits.
3. The senior five (5) employees from the EJ&E roster will have their seniority dovetailed with the seniority dates held by employees on the IC. The remaining

EJ&E RTCs will keep their former seniority date, but will be placed in ranking at the bottom of the ICTDA roster.

- 4. In the event two or more employees from the different seniority rosters have identical seniority dates, the employees shall be ranked by date of birth, the oldest employee to be designated the senior ranking. This shall not affect the respective ranking of employees with identical seniority dates on their former seniority roster.**
- 5. All currently active IC and EJ&E RTCs will retain prior rights to the desks on their former territories, based upon their relative seniority standing until December 31, 2012. These rights will only terminate before expiration on December 31, 2012 in the event that: the employee resigns, retires, becomes disabled, is dismissed from service or is promoted.**
- 6. All employees hired after the effective date of this agreement will be IC employees and will establish seniority on the roster without prior rights to any location.**
- 7. When vacancies occur, they will be bulletined and all employees will have the right to bid on such positions. Such positions will be awarded to senior, qualified bidders in the following manner:**
 - a. To employees with prior rights on the desk where the vacancy exists. For example, employees with the designation "J" following their name will have prior rights to former EJ&E vacancies.**
 - b. If no bids are received from employees with prior rights where the vacancy exists, the senior qualified applicant will be awarded the position regardless of the original point at which employed.**

- c. If new positions are created where no one has prior rights, the senior qualified applicant will be awarded the position regardless of the point at which originally employed.
 - d. If no bids are received, the position will be filled in accordance with the ICTDA agreement.
8. The provisions of this Agreement have been designed to address a particular situation. Therefore, the provisions of this Agreement are without precedent or prejudice to the position of either party and shall not be referred to in any other case.
9. The employee protective benefits and conditions as set forth in the New York Dock Conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. Employees referred to in this paragraph who elect the New York Dock Conditions protection shall, at the expiration of their New York Dock Conditions protective period, be entitled to such protective benefits under applicable protective agreements provided they thereafter continue to maintain their responsibilities and obligations under applicable protective agreements and arrangements.
10. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving

written notification to the railroad's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this Paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement, subject to the terms of Article I, Section 3 of the protective conditions.

11. Each "displaced" or "dismissed" employee within sixty (60) days of the end of each month, shall provide the railroad's designated individual the following information for the preceding month in which such employee may be entitled to benefits on a provided standard form:
 - a. The day(s) claimed by such employee under any unemployment insurance act.
 - b. The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer and the gross earnings made by the "dismissed employee" in such other employment. It is understood any subsequent earnings made in other employment may not be used by the Carrier to offset the dismissal allowance so as long as those earnings do not exceed the amount previously earned had the transaction not taken place.
 - c. The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and the employee received sickness benefits.
12. If the "displaced" or "dismissed" employee referred to herein has nothing to report due to not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for

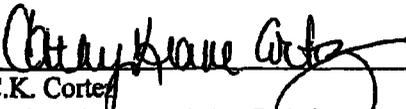
work the entire month, such employee shall submit, within the time period provided for in paragraph 11, the form annotated "Nothing to Report."

13. The failure of any "displaced" or "dismissed" employee to provide the information as required in Paragraphs 10 and 11 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the appropriate labor relations officer of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in Paragraph 10.
14. A copy of this Implementing Agreement with attachments will be posted accessible to RTCs, with sufficient number of copies to be made available to furnish individual copy to employees upon request.
15. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, to consolidate and coordinate the IC and EJ&E RTC work.

16. The appropriate General Chairman will handle any dispute arising out of this Implementing Agreement with the labor relations officer designated by the company to receive such claims and grievances. All unresolved disputes will be disposed of in accordance with the applicable provisions of the protective conditions.

This Agreement is effective upon signing this 15th day of July 2009.

**ILLINOIS CENTRAL RAILROAD
COMPANY and EJ&E RAILWAY
COMPANY**


C.K. Cortez
Senior Manager - Labor Relations


T.E. Rice
Director - Labor Relations


H. Cary
General Manager

EJ&E RTCs


T.M. Andrews


D.L. Baker

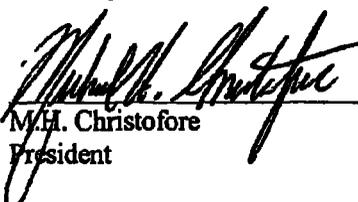

E.A. Girman


T.A. Martisek


N.C. Miller

**ILLINOIS CENTRAL TRAIN
DISPATCHERS ASSOCIATION**

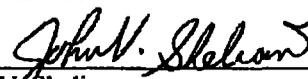

J.A. Czamy
Vice-President


M.H. Christofore
President


D. L. Day


C.R. Miller


W. E. Moore


J.V. Shelian


S.D. Sutherland



Labor Relations

17641 South Ashland Avenue
Homewood, IL 60430

Side Letter No. 1

July 15, 2009

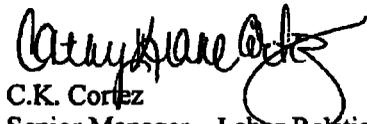
T.M. Andrews; D.L. Baker; D.L. Day
E.A. Girman; T.A. Martisek; C.R. Miller
N.C. Miller; W.E. Moore; J.V. Shelian; S.D. Sutherland

Dear Messrs and Miss:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date

We agreed that during the prior rights period, as such described in Article 5 of the agreement dated July 15, 2009, if the Company contemplates any significant changes to the EJ&E RTC desk, the parties involved will meet to discuss such changes and will agree on proper allocation of the remaining prior rights.

Sincerely,


C.K. Cortez
Senior Manager – Labor Relations



Labor Relations

17641 South Ashland Avenue
Homewood, IL 60430

Side Letter No. 2

July 15, 2009

T.M. Andrews; D.L. Baker; D.L. Day
E.A. Girman; T.A. Martisek; C.R. Miller
N.C. Miller; W.E. Moore; J.V. Shelian; S.D. Sutherland

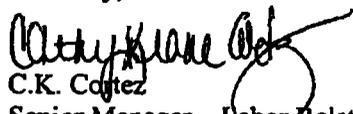
Dear Messrs and Miss:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date.

It was agreed that the following language from the offer letters, effective February 1, 2009, would remain in effect as indicated:

"Employment relationships at CN are deemed 'at-will' that may be terminated at any time, with or without cause and without notice, at the option of the company or yourself. However it is noted that as a former employee of the EJ&E, CN has agreed to offer employment for a two-year period following closing date, provided that there is no cause for your dismissal at an earlier date."

Sincerely,


C.K. Cojtez
Senior Manager – Labor Relations

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EB

SERVICE DATE – LATE RELEASE DECEMBER 24, 2008

This decision will be included in the bound volumes
of printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION—CONTROL—EJ&E WEST COMPANY

Decision No. 16

Decided: December 24, 2008

The Board approves, with certain conditions, the acquisition of control by
Canadian National Railway Company and Grand Trunk Corporation of
EJ&E West Company, a wholly owned, noncarrier subsidiary of Elgin,
Joliet and Eastern Railway Company.

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¹ This decision also embraces Elgin, Joliet and Eastern Railway Company—Corporate Family Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 1); Chicago, Central & Pacific Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 2); Grand Trunk Western Railroad Incorporated—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 3); Illinois Central Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 4); Wisconsin Central Ltd.—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 5); EJ&E West Company—Trackage Rights Exemption—Chicago, Central & Pacific Railroad Company, STB Finance Docket No. 35087 (Sub-No. 6); and EJ&E West Company—Trackage Rights Exemption—Illinois Central Railroad Company, STB Finance Docket No. 35087 (Sub-No. 7).

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SUMMARY

In this decision, we are granting, subject to numerous environmental mitigation and other conditions, the application of Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC) (together, CN or applicants) to acquire control of the EJ&E West Company, a wholly owned non-railroad subsidiary of the Elgin, Joliet & Eastern Railway Company (EJ&E). EJ&E is a Class II railroad that operates approximately 200 miles of track in Northeastern Illinois and Northwestern Indiana, in an arc around Chicago. We are approving a transaction that will greatly improve rail transportation through Chicago, a vital rail transportation center, and will have environmental benefits to those living in and near that city. At the same time, however, the transaction will have adverse environmental impacts on communities along the EJ&E rail line, an area already stressed by existing vehicular congestion and freight and passenger rail traffic.

In reaching our decision, we have balanced both the transportation-related aspects of this transaction and the potential environmental impacts. The Board has carefully examined the effect of the transaction on transportation and competition and the concerns raised by various parties about possible anticompetitive consequences. We conclude that, with the conditions we are imposing, the transaction will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region in the United States, and that, to the extent there are anticompetitive effects, they are insubstantial and outweighed by the transaction's public benefits.

The Board also has engaged in an extensive and thorough environmental review, which was completed with the issuance of the Final Environmental Impact Statement² on December 5, 2008. The level of public participation throughout the environmental review process has been unprecedented. More than 9,500 comments on the Draft EIS were received by our Section of Environmental Analysis (SEA) from members of the public, agencies, elected officials both in Illinois and Indiana, organizations, businesses, and other stakeholders. The “hard look” required by the National Environmental Policy Act that we have taken at the potential impacts—both beneficial and adverse—is documented in the substantial environmental record in this proceeding.

After carefully considering the results of the environmental analysis, and the concerns and issues raised by the parties and other commenters—both pro and con—we are imposing environmental mitigation that we believe is reasonable and appropriate to minimize, and in some cases eliminate, potential adverse environmental impacts of this transaction. Our mitigation includes two grade separations (and requires applicants to bear 67% of the cost of one and 78.5% of the cost of the other), cameras to assist in the timely response of emergency providers, programs related to school and pedestrian safety, noise mitigation, and a 5-year environmental reporting condition requiring applicants to file quarterly reports on the implementation of our environmental mitigation, so that we will be kept apprised of the effectiveness of the conditions. We are also establishing a 5-year formal oversight period, with detailed monthly reporting requirements imposed on the applicant carriers, to allow us to closely monitor applicants’ operations during the oversight period. In addition, applicants will be required to comply with their extensive voluntary environmental mitigation and with the negotiated agreements they have entered into with the National Railroad Passenger Corporation (Amtrak) and communities in Illinois and Indiana containing tailored mitigation that applicants will provide.



INTRODUCTION

The Control Application. By application filed on October 30, 2007, CNR and GTC³ seek approval under 49 U.S.C. 11323-26 for the acquisition of control by CN of EJ&E West Company (EJ&EW), a wholly owned, noncarrier subsidiary of EJ&E.⁴

² Under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., an Environmental Impact Statement (EIS) is prepared for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). An EIS normally is not required in acquisition cases; a more limited Environmental Assessment (EA) generally is sufficient because there are not usually significant environmental impacts from the change in ownership of the operation of existing lines. 49 CFR 1105(6)(b)(4). In this case, however, a full EIS was warranted in view of the large projected traffic increases on certain line segments and the potential impacts of the transaction on a number of communities that would likely result from the increased activity levels on rail line segments and at rail facilities.

³ GTC is a noncarrier holding company through which CNR controls its U.S. subsidiaries.

⁴ The transaction for which approval is sought is variously referred to as the control transaction or merger. This transaction is classified as a minor transaction. See 49 CFR 1180.2 (continued . . .)

Seven Related Filings. Also by application filed on October 30, 2007, CN filed notices of exemption involving an intra-corporate family transaction and the granting of trackage rights. The Sub-No. 1 filing provides for EJ&E to transfer property to EJ&EW, which, at that time, would become a rail common carrier, prior to applicants acquiring control of EJ&EW. The Sub-Nos. 2 through 7 filings provide for grants of trackage rights by EJ&EW to Grand Trunk Western Railroad (GTW), Illinois Central Railroad Company (IC), Chicago, Central & Pacific Railroad Company (CCP), and Wisconsin Central Ltd. (WC), and by IC and CCP to EJ&EW, promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction.

In this decision, the Board is granting the application for acquisition of control, subject to certain conditions, and authorizing the transactions covered by the notices of exemption.

Overview of the Transaction. As explained in the EIS prepared by SEA, Chicago is the only city in the United States where all seven Class I railroads meet to exchange freight or operate by means of trackage rights. Numerous smaller regional and switching railroads also operate in Chicago. One third of all rail freight in the United States moves to, from, or through Chicago. More than 600 freight trains operate within the Chicago metropolitan area each day, transporting an average of 37,500 rail freight cars carrying about 2.5 million tons of freight. In addition, there is passenger service provided by Amtrak, which operates about 78 trains per day; commuter service provided by Metra, which provides commuter service on its own lines and with trackage rights over the lines of freight railroads, and operates 720 trains per day; and commuter service provided by the Northern Indiana Commuter Transportation District (NICTD), which operates 41 trains per day.⁵

The EJ&E rail line, located in Northeastern Illinois and Northwestern Indiana, extends in a 120-mile arc of mainline track around Chicago through Northeastern Illinois and Northwestern Indiana. As the EIS states, the line has provided railroad transportation to the Chicago region for 120 years, and communities along the EJ&E line have benefited from freight and passenger rail service along the line that enhanced their ability to become centers for commerce and services and to function as a shipping point for farm commodities.⁶ According to the EIS, train volumes on the EJ&E rail line have fluctuated during its history, but there has always been some rail traffic on the line. During World War II, the EJ&E rail line generated as many as 50 trains per

(. . . continued)

(classification of transactions under 49 U.S.C. 11323), as applied in Decision No. 2 (served November 26, 2007, and published on November 29, 2007, at 72 FR 67622-67630).

⁵ The large volume of freight and passenger trains (more than 1,400 trains per day) and the use of the same rail lines by multiple rail companies result in delays as trains wait to cross other rail segments or use switching rail lines and yards. Because of current rail traffic congestion, a CN freight train can now take more than 24 hours to travel about 30 miles from near O'Hare International Airport to near Blue Island, IL.

⁶ See, e.g., Final EIS at 1-8.

day to support Chicago's steel and heavy manufacturing industries. The line continued to thrive throughout most of the 1950s and 1960s. While traffic levels declined during the 1970s, traffic rebounded in the 1990s when the rail lines that pass through the center of Chicago became more congested and the EJ&E line became an alternative route for freight moving through Chicago, such as coal and containerized import/export freight. Currently, approximately 3 to 18 trains per day travel along the EJ&E rail line.⁷

Under the transaction, applicants would shift much of the rail traffic currently moving over CN's five rail lines in Chicago to the EJ&E rail line, in order to improve the fluidity of intermodal and other CN traffic that must move into, from, or through Chicago.⁸ As the EIS explains, trains traveling within Chicago currently experience delays because of the congested rail lines and too much dependence on the Belt Railway Company of Chicago (BRC) Clearing Yard, which most of the Class I freight railroads in Chicago now use for train classification.⁹ According to the applicants, acquiring the Kirk Yard and other yards on the EJ&E line, including the East Joliet Yard, would permit CN to use those yards instead of the congested BRC Clearing Yard to classify and switch trains passing through the Chicago metropolitan area. Applicants expect this access to reduce the number of trains that, though bound for other destinations, would otherwise need to travel into Chicago. As a result, rail traffic on CN rail lines inside the EJ&E arc would generally decrease, reducing congestion and enabling CN to improve service to many companies in the Chicago metropolitan area and to those shipping products through Chicago. Thus, at the same time that applicants would increase rail traffic along the EJ&E rail line as a result of the transaction (generally by 15 to 24 trains per day), there would be corresponding decreases in rail traffic, and potential environmental benefits, in communities where CN traffic is routed today.¹⁰

Summary of the Decision. In this decision, the Board is approving CN's acquisition of control of EJ&EW, as proposed in the control application, subject to the following conditions: (1) applicants must adhere to their representation that they will keep all existing active gateways affected by the CN/EJ&E transaction open on commercially reasonable terms; (2) applicants must adhere to their representation that they will waive any defenses they might otherwise have

⁷ See Final EIS Figure ES-3 (at ES-7).

⁸ As discussed in more detail below, applicants give three primary purposes for seeking to acquire control of the EJ&E line. First, they seek to improve applicants' operations in and beyond the Chicago metropolitan area by providing a continuous rail route around Chicago, under CN's ownership, that would connect CN's five rail lines radiating from Chicago. Second, they expect to consolidate rail car classification work at EJ&E's Kirk Yard, as well as smaller facilities at East Joliet, IL and Whiting, IN. Finally, applicants hope to benefit from an important supply line the EJ&E line provides for North American steel, chemical and petrochemical industries, as well as utility companies; they expect the transaction to enable them to develop more extensive relationships with those potential customers. See Final EIS at ES-4.

⁹ See Final EIS at ES-4 and 1-9.

¹⁰ See Final EIS Figure ES-3 (at ES-7), setting out the proposed changes to rail traffic volumes.

as a result of the CN/EJ&E transaction, under the Board's general policy that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule; (3) the New York Dock labor protective conditions, see New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) (New York Dock), will apply to the control transaction; and (4) applicants will comply with the environmental mitigation conditions set forth in Appendix A, including the monitoring and reporting conditions contained therein. Further, the Board is exempting the corporate family transaction at issue in the Sub-No. 1 proceeding. The Board is also exempting the trackage rights at issue in the Sub-Nos. 2 through 7 proceedings, subject to the Norfolk and Western labor protective conditions, see Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980) (Norfolk and Western). The Board is also imposing a 5-year monitoring and oversight condition, and the Board is retaining jurisdiction to impose additional conditions and to take other action if, and to the extent, the Board determines it is necessary to impose additional conditions and to take other action to address matters respecting the CN/EJ&E transaction. Finally, the Board is denying all other conditions sought by the various parties to this proceeding.¹¹

Commenting Parties: Shipper Interests. Comments regarding the control transaction have been filed by various shipper parties, including: Ace Ethanol (Ace); Algoma Steel Inc. (Algoma); American Chemical Service, Inc. (ACS); American Suzuki Motor Corporation (ASMC); Aracruz Celulose USA, Inc. (Aracruz); Aux Sable Liquid Products, LP (Aux Sable); BASF Corporation (BASF); Equistar Chemicals, LP (Equistar); National Industrial Transportation League (NITL); PCS Sales (USA), Inc. (PCS); Potlatch Forest Products Corporation (Potlatch); Prairie Material Sales, Inc. (Prairie Material); Raw Materials, Inc. (RMI); Thomas Lighting; United Parcel Service (UPS); and United Sugars Corporation (United Sugars).¹²

Commenting Parties: Railroad Interests. Comments respecting the control transaction were submitted by: Adrian & Blissfield Railroad (A&BR); Canadian Pacific Railway Company (CPR); CSX Transportation, Inc. (CSXT); Effingham Railroad Company (Effingham); Norfolk Southern Railway Company (NS); and Wisconsin & Southern Railroad Co. (WSOR).

¹¹ On December 8, 2008, UP filed a petition to enjoin and remedy premature exercise of control by CN. CN filed a reply on December 12, 2008, and UP subsequently withdrew its petition on December 19, 2008.

¹² ArcelorMittal USA Inc., ArcelorMittal Burns Harbor LLC, ArcelorMittal Indiana Harbor LLC, ArcelorMittal Kote Inc., ArcelorMittal Tek Inc., ArcelorMittal Hennepin Inc., and ArcelorMittal Riverdale Inc. (collectively, ArcelorMittal), a current customer of EJ&E, filed comments and requests for conditions. By letter filed on May 9, 2008, ArcelorMittal withdrew its opposition to the control transaction, as well as its requests for conditions. Wisconsin Public Service Corporation also filed comments and request for conditions but withdrew as a party of record and its request for conditions by letter on December 10, 2008.

Commenting Parties: Passenger Rail Interests. Two passenger rail interests filed submissions: National Association of Railroad Passengers (NARP); and the Northeast Illinois Regional Commuter Railroad Corporation and the Commuter Rail Division of the Regional Transportation Authority (collectively, Metra).¹³

Commenting Parties: Governmental Parties. The following various governmental parties and local and state interests submitted comments: the United States Department of Transportation (DOT); Illinois Department of Transportation (IDOT); Wisconsin Department of Transportation (WisDOT); the Canadian Chamber of Commerce; the City of Carbondale, IL (Carbondale); the City of Memphis, TN (Memphis); the City of West Chicago, IL (West Chicago); Will County, IL, Village of Bartlett (Bartlett); Village of Crete (Crete); Village of Frankfort, IL (Frankfort);¹⁴ Village of Homewood (Homewood); Village of Mokena, IL (Mokena); Village of South Holland (South Holland); Gary Chicago International Airport Authority (GCIAA); Glendale Heights Chamber of Commerce (GHCC); Memphis Regional Chamber (Memphis Regional);¹⁵ Wheeling/Prospect Heights Area Chamber of Commerce and Industry (WPHC); United Business Association of Midway (UBAM); Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP); United States Representatives Melissa L. Bean (IL), Jerry F. Costello (IL), Donald A. Manzullo (IL), Judy Biggert (IL), Timothy V. Johnson (IL), Peter J. Roskam (IL), and Bill Foster (IL),¹⁶ Bart Stupak (MI), Joe Knollenberg (MI), Thaddeus McCotter (MI), John D. Dingell (MI), Jesse L. Jackson, Jr. (IL), Candice Miller (MI), Tim Walberg (MI), John M. Shimkus (IL), Danny K. Davis (IL), Janice D. Schakowsky (IL), and John M. Shimkus (IL); United States Senators Richard J. Durbin (IL), Debbie Stabenow (MI), and Carl Levin (MI); State Senators Mark Schauer (MI), Karen Tallian (IN), and Susan Garrett (IL); State Representatives Robert A. Rita (IL), Angelo Saviano (IL), Carolyn H. Krause (IL), and Terry Link (IL); Governor of Michigan Jennifer M. Granholm; and Mayor of Chicago Richard M. Daley.

Commenting Parties: Labor Parties. Submissions respecting the control transaction were filed by several labor interest parties, including: the Brotherhood of Locomotive Engineers and Trainmen, A Division of the Rail Conference, the International Brotherhood of Teamsters (BLET); the International Brotherhood of Electrical Workers (IBEW); the American Train

¹³ Amtrak withdrew its comments in opposition and requests for conditions on December 9, 2008. Also on December 9, 2008, Amtrak and CN jointly filed a notice of settlement and request for conditions discussed below.

¹⁴ On December 15, 2008, Frankfort and applicants executed a negotiated agreement. As discussed below, applicants will be required to comply with the terms of the agreement under the Board's environmental mitigation conditions.

¹⁵ Memphis Regional Chamber, the Memphis Regional Logistics Council, and the Memphis Regional Economic Development Council are referred to collectively as Memphis Regional.

¹⁶ The aforementioned United States Representatives filed a joint letter commenting on the merger. United States Representatives Bean, Biggert, and Manzullo each filed separate comments, as well.

Dispatchers Association (ATDA); the National Conference of Fireman & Oilers – SEIU (NCFO);¹⁷ and United Transportation Union – General Committee of Adjustment GO-386 (UTU GCA-386).

Commenting Parties: Environmental Issues. SEA received over 9,500 comments on its Draft EIS, including comments from members of the public, elected officials, Federal and state agencies, and local governments. Summaries of these comments and the issues raised by commenters can be found in the Final EIS, Chapter 3.

THE CNE/J&E CONTROL TRANSACTION

Canadian National. CN is one of Canada's two major railroads, extending from Halifax, Nova Scotia, on the Atlantic coast to Vancouver and Prince Rupert, British Columbia, on the Pacific coast. Through its GTC subsidiary, CNR controls the following rail carriers: GTW, IC, CCP, WC, Duluth, Winnipeg and Pacific Railway Company (DWP), St. Clair Tunnel Company (SCTC),¹⁸ Cedar River Railroad Company (CRRC), Waterloo Railway Company (Waterloo), Sault Ste. Marie Bridge Company (SSMB), Wisconsin Chicago Link Ltd. (WCL), Duluth, Missabe and Iron Range Railway Company (DMIR), Bessemer and Lake Erie Railroad Company (B&LE), and The Pittsburgh & Conneaut Dock Company (P&C Dock). DWP extends the applicants' system from the international border at Duluth Junction, MN/Ramier, MN, over DWP's own lines to Nopeming Junction, MN. GTW also extends applicants' system to Chicago, IL, from the international border at Port Huron, MI/Sarnia, Ontario, and Detroit, MI/Windsor, Ontario. In 1999, applicants acquired IC, thus extending applicants' system from Chicago to the Gulf Coast, and becoming part of a North American Free Trade Agreement (NAFTA) rail network offering shippers access to Kansas City Southern de México, S.A. de C.V. (KCSM), Mexico's largest rail system. In 2001, applicants acquired WCL and its affiliates, and in 2004 applicants acquired the Great Lakes Transportation LLC (GLT) carriers including DMIR, thus providing applicants with a connection between Chicago and applicants' lines west of the Great Lakes. In the GLT transaction, applicants also acquired B&LE and P&C Dock, which, together with applicants' ownership of DMIR and Great Lakes Fleet, LLC (a water carrier operating on the Great Lakes), provides applicants a continuous chain to transport iron ore moving from the Missabe Iron Range of Minnesota to the Union Railroad Company, which serves the Edgar Thompson Steel Works of United States Steel Corporation (USS) in Braddock, PA.

EJ&E West. EJ&EW is an Illinois corporation formed on August 16, 2007, and is a wholly owned, noncarrier subsidiary of EJ&E. EJ&E is a Class II railroad that currently

¹⁷ IBEW, ATDA, and NCFO submitted joint comments. The International Association of Mechanists and Aerospace Workers (IAM) also submitted joint comments with IBEW, et al. In a letter filed on August 13, 2008, IAM states that it has reached an implementing agreement addressing its concerns and does not oppose the proposed transaction.

¹⁸ On September 1, 2008, GTW merged with and into SCTC, with SCTC as the surviving corporation. See 73 FR 43486 (July 25, 2008).

operates over 198 miles of track in Northeastern Illinois and Northwestern Indiana, consisting primarily of an arc around Chicago, IL, extending from Waukegan, IL, southwards to Joliet, IL, then eastward to Gary, IN, and then northwest to South Chicago along Lake Michigan. EJ&E provides rail service to approximately 100 customers, including steel mills, coal utilities, plastics, and chemical producers, steel processors, distribution centers, and scrap processors. EJ&E is a wholly owned indirect subsidiary of USS, a noncarrier. USS owns all of the issued and outstanding stock of Transtar, Inc. (Transtar), a noncarrier holding company, which owns all of the issued and outstanding stock of seven common carrier railroads, including EJ&E.¹⁹

The CN/EJ&E Transaction. Before applicants acquire control of EJ&EW, EJ&E plans to transfer all of its land, rail, and related assets located west of the centerline of Buchanan Street in Gary (together with the real property and related fixtures associated with the hump and Dixie leads located east of Buchanan Street) to EJ&EW, which at that time would become a rail common carrier. As noted above, this transaction is the subject of the Sub-No. 1 related filing. EJ&E would retain its land, rail, and related assets east of the centerline (other than the real property and related fixtures associated with the hump and Dixie leads). It is expected that, if the control transaction is approved and applicants acquire control of EJ&EW, EJ&E would change its name to Gary Railway Company, and EJ&EW would assume the Elgin, Joliet & Eastern Railway Company name.

In order to permit trains of its operating subsidiaries—GTW, IC, CCP, and WC—to operate over EJ&EW's line and provide for maximum operational flexibility, applicants intend to cause EJ&EW to grant trackage rights to those subsidiaries over the entire length of EJ&EW from Waukegan to Gary. Applicants also intend to grant EJ&EW trackage rights over selected portions of its CCP and IC subsidiaries. These proposed trackage rights are the subjects of notices of exemption filed in the related Sub-Nos. 2 through 7 proceedings, providing for grants of trackage rights by EJ&EW to GTW, IC, CCP, and WCL, and by IC and CCP to EJ&EW.

GTC and EJ&E have entered into a Stock Purchase Agreement (SPA), dated September 25, 2007. The SPA provides that, subject to Board authorization of the control transaction, and other conditions, GTC will purchase from EJ&E all of the issued and outstanding common stock of EJ&EW for an overall purchase price of \$300 million, subject to adjustments as provided for in the SPA.

Purposes Served. Applicants state three primary purposes for pursuing the control transaction. First, they believe the control transaction would improve their operations in and beyond the Chicago area by providing CN with a continuous rail route around Chicago, under applicants' ownership, that would connect the five CN lines that presently radiate from Chicago. Second, acquiring EJ&E's rail assets would make available to applicants EJ&E's Kirk Yard—an automated classification facility in Gary—as well as smaller facilities in Joliet and Whiting, IN,

¹⁹ In 2001, Transtar spun off its interest in B&LE, DMIR, P&C Dock, and a water carrier, Great Lakes Fleet, to GLT, which became a holding company controlled by the Blackstone Group. In 2004, in a transaction not involving USS, applicants acquired the GLT subsidiaries.

thus enabling applicants to consolidate car classification work at Kirk and East Joliet Yards and to reduce use of the BRC Clearing Yard. Lastly, applicants state that their system would benefit from the fact that EJ&E provides an important supply line for North American steel, chemical, and petrochemical industries, as well as for Chicago-area utilities and others, which would allow applicants to develop closer and more extensive relationships with companies in and serving those industries.

Transportation Considerations. Applicants state that the control transaction would help meet the need for a more efficient and reliable rail transportation system. Applicants assert that the control transaction would have no anticompetitive effects, as it would connect two transportation systems that do not compete but instead complement each other and would together create a stronger network. Applicants assert that there would be no 2-to-1 shippers, nor 3-to-2 shippers, on the CN/EJ&EW system. Moreover, applicants state that the control transaction would bring about no vertical foreclosure, no reduction in effective geographic competition, and no increase in market power. Applicants state that, as in past transactions, they are committed to keeping gateways open and honoring trackage rights and haulage agreements with all connecting carriers.

Applicants assert that, even if the control transaction had any adverse impacts on competition, those effects would be outweighed by its transportation benefits. The control transaction, applicants assert, would ensure more efficient and reliable rail transportation at a lower cost and would, over time, reduce rail traffic congestion, increase rail capacity for carriers operating in Chicago, and reduce traffic density in Chicago's urban core. Applicants state that the control transaction would provide CN with a continuous route around Chicago, which would make it possible for CN traffic to bypass the congested Chicago terminal. Applicants maintain that this rerouting would benefit CN-served customers in the Chicago area and customers served by other Class I railroads by reducing the demand on the capacity of BRC, Indiana Harbor Belt Railroad (IHB), and other CN lines through the central Chicago terminal area. Further, applicants note, the availability of a continuous CN route around Chicago would greatly improve the fluidity of intermodal and other CN traffic that must move to, from, or through Chicago. Also, the availability of a continuous CN route around Chicago would advance the congestion-reducing objectives of the Chicago Region Environmental and Transportation Efficiency Program (CREATE)²⁰ and make it possible for applicants to more quickly cease operations over the St. Charles Air Line. The control transaction, applicants state, would also eliminate interchanges between EJ&E and CN, making possible single-line service for approximately 10,000 carloads of traffic that the two railroads now carry in interline service each year. Applicants also note that the public would benefit from applicants' plans to spend approximately \$100 million to upgrade EJ&E's infrastructure.

²⁰ CREATE is a public-private partnership between the Chicago Department of Transportation, the Illinois Department of Transportation, and the American Association of Railroads, including Metra and the freight railroads operating in Chicago, to increase efficiency of the region's rail infrastructure and quality of life in the region.

Labor Impacts & Protection. Applicants anticipate two principal labor impacts as a result of the control transaction: the elimination of redundant positions and the organization/integration of forces to realize the efficiencies of the transaction. Applicants estimate that the control transaction would result in the elimination of 114 positions. Applicants anticipate that, to the extent the transaction leads to the elimination of positions, most of these impacts could be accommodated through normal attrition during the implementation period. Applicants' continuing need for experienced, skilled railroaders at its neighboring Chicago operations makes it highly likely that most of the affected employees would have the opportunity to fill other positions opening up elsewhere in applicants' Chicago operation. Applicants state that they would work with the respective collective bargaining units to attempt to secure labor implementing agreements that would provide for the flexibility to fully employ any potentially adversely impacted employee. Applicants further acknowledge that the control transaction would be subject to employee protective conditions and other procedures adopted in New York Dock.

Related Filings. In connection with this transaction, several notices of exemption were filed under 49 CFR 1180.2(d)(3) and 1180.2(d)(7).

Sub-No. 1. In Sub-No. 1, EJ&E filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a transaction within a corporate family. Under this notice of exemption, EJ&E would transfer all its land, rail, and related assets located west of the centerline of Buchanan Street in Gary (together with the real property and related fixtures associated with the hump and Dixie leads located east of Buchanan Street), to EJ&EW, which upon completion of the transfers would become a rail carrier. EJ&E would retain its land, rail, and related assets east of the centerline (other than the real property and related fixtures associated with the hump and Dixie leads). EJ&E intends to consummate the transaction with EJ&EW immediately before CN acquires control of EJ&EW, which would not occur until after approval of the control transaction by the Board. The purpose of the transaction is that it would allow EJ&E to segregate into a separate corporate entity (EJ&EW) the rail properties to be acquired by GTC, thus facilitating the transaction described in the primary application. According to EJ&E, this is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). As a condition to use of this exemption, EJ&E states that any employees adversely affected by the transaction would be protected by the conditions set forth in New York Dock.

Sub-No. 2. In Sub-No. 2, CCP submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant CCP trackage rights over all of EJ&EW's line, which runs between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street, a distance of approximately 120 miles. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, CCP states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 3. In Sub-No. 3, GTW submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant GTW trackage rights over EJ&EW's lines between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street.²¹ Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, GTW states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 4. In Sub-No. 4, IC submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant IC trackage rights over EJ&EW's lines between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, IC states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 5. In Sub-No. 5, WCL submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant WCL trackage rights over EJ&EW's lines between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, WCL states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 6. In Sub-No. 6, CN submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, CCP would grant EJ&EW trackage rights over CCP's lines between milepost 35.7 at Munger, IL, and milepost 8.3 at Belt Crossing, IL. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, CN states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 7. In Sub-No. 7, CN submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, IC would grant EJ&EW trackage rights over IC's lines between milepost 17.9 at Highlawn, IL, and milepost 31.4 at University Park, IL, and between milepost 36.7 at Joliet and milepost 7.9 at Lemoyne, IL. Parties intend to

²¹ GTW currently has trackage rights over EJ&E lines between milepost 36.2 at Griffith, IN, and milepost 24.0 at Eola, IL, which EJ&EW would acquire under Sub-No. 1.

execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, CN states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

DISCUSSION AND CONCLUSIONS

Statutory Criteria. The acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires Board approval. 49 U.S.C. 11323(a)(3), (5). Because the proposed transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by 49 U.S.C. 11324(d), which directs us to approve a control application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to section 11324(d), our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial. If so, we also consider whether the anticompetitive impacts would outweigh the transportation benefits or could be mitigated through conditions.²² As discussed below, the Board also has the authority to consider the potential environmental effects of the transaction and to impose appropriate conditions to mitigate adverse environmental impacts.

Competitive Analysis. After considering the application and the full record in this proceeding, the Board has determined that the proposed control transaction is unlikely to cause a substantial lessening of competition or to create a monopoly or restraint of trade. Currently, no shippers are jointly served by CN and EJ&E. Where both railroads serve transloading and transfer facilities, shippers would still have comparable options to transload freight to or from several carriers in the Chicago area.

Build-out Option. ACS is a shipper solely served by EJ&E and is concerned with the loss of competitive leverage currently afforded by ACS's ability to build out a short distance of track in order to connect with CN. Accordingly, ACS opposes the proposed transaction unless approval of the transaction is conditioned on CN granting trackage rights to ACS (or to a rail carrier created by ACS) and to NS over EJ&E between Griffith and Hartsdale, IN (approximately 3 miles), or between Griffith and Van Loon, IN (approximately 4 miles), in order for ACS to connect with, and be rail served by NS. If for any reason this condition were not imposed, ACS requests the following conditions: (1) CN shall cause EJ&EW to continue to provide ACS with the level of service EJ&E currently provides, i.e., 5 days per week; and (2) CN shall cause EJ&EW to abide by all terms in the EJ&E Transportation Contract

²² Under 49 U.S.C. 11324(c), we have broad authority to place conditions on our approval of section 11323 transactions. See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 899-900 (2000).

EJE-C-0003 between ACS and EJ&E for a period of 5 years from the date of consummation of CN control of EJ&EW, and annually thereafter pursuant to an evergreen provision. CN maintains that ACS has never raised or discussed the possibility of a build-out to either CN or EJ&E and that ACS underestimates the difficulty in building out to the CN line. CN contends that, contrary to ACS's assertions, the control transaction would not eliminate competition provided by build-out opportunities.

The Board's policy has been to preserve the competitive advantages made possible by build-outs.²³ Despite applicants' argument that construction of this build-out would not be feasible, the Board notes that the ultimate test of feasibility is whether the line is actually constructed, not whether the shipper has demonstrated that it is economically feasible.²⁴ The evidence shows that CN's line is in very close proximity to tracks owned by ACS. Should ACS build out to a CN connection, the Board will grant to NS or any third-party carrier the necessary trackage rights on CN to the build-out.²⁵ With this condition, no shipper would suffer a direct merger-related loss of competitive rail service.

Geographic Competition. In examining the effect of the proposed transaction on geographic competition, the Board examines the effect of the transaction on source competition, when two carriers can transport the same product to the same destination but from different origins, or conversely when two carriers transport the same product from the same origin to two different destinations. No party has questioned applicant's analysis or conclusion that there would not be a diminution in source competition as a result of the transaction. Therefore, based on the record, the Board finds that the transaction will not lead to a reduction in geographic competition.

Market Power. The Board also considers whether common control would increase CN's or EJ&E's market power. As noted above, no shipper would face a reduction in the number of rail carriers serving any of its facilities, and no reduction in geographic competition is expected. However, the issue is whether the vertical integration of CN and EJ&E would have any anticompetitive effects for the users of rail transportation services. In its application, CN alleges that there would be no adverse vertical effects on competition and that it would keep all gateways affected by the control transaction open on commercially reasonable terms²⁶ and is committed to honoring trackage rights and haulage agreements with all connecting carriers.²⁷

Equistar contends that the control transaction would result in the loss of a "neutral connection" that allows shippers efficient access to every Class I railroad (with the exception of

²³ See Conrail, 3 S.T.B. at 320; Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 420 (1996) (UP/SP).

²⁴ See Conrail at 319 n.179; UP/SP at 420.

²⁵ DOT also supports this condition.

²⁶ CN-2 at 24.

²⁷ CN-2 at 53.

The Kansas City Southern Railway Company (KCS)) at a range of gateways, as well as numerous short line and regional railroads.²⁸ Several parties anticipate that CN would maximize its own line-haul opportunities along the EJ&E and institute pricing and service to favor its own connecting route.²⁹ Many commenters assert that CN would not provide the same level of service and responsive rates that they currently receive from EJ&E.³⁰

The Board recognizes the vertical effects that might result from the proposed transaction, such as the potential for CN to impair the terms of trackage rights, interchange, or service associated with competing line haul carriers using EJ&E. Likewise, the Board takes seriously any possibility that CN might raise its rivals' costs by acquiring a line that currently provides neutral access to alternative line-haul railroads that compete with one another (including CN). As discussed below, the Board will hold applicants to their representation to keep open affected gateways on commercially reasonable terms. The Board also recognizes that the service received by shippers from a regional short-line railroad, such as EJ&E, might change when the railroad is acquired by a long-haul railroad, such as CN. By imposing the oversight and monitoring condition described below, the Board will be able to address any possible service issues that may arise and to ensure that service levels are reasonable and adequate.

In short, the evidence demonstrates that the transaction, in light of and subject to the conditions imposed in this decision, would not result in either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States.

But even if there were some modest anticompetitive effect, it would be outweighed by the public interest in meeting significant transportation needs. The proposed transaction would greatly improve efficiency for movements through the Chicago area and would benefit shippers through decreased transit times and more reliable service. Currently, traffic movement going through the Chicago area experiences severe congestion, resulting in significant delays of shipments to other parts of the country. Much of CN's traffic moving between its various components must travel through downtown Chicago. Rerouting CN traffic to bypass downtown Chicago would improve the fluidity on CN's system and the rest of the Chicago rail network. Additionally, CN's significant investment in EJ&E's infrastructure would add capacity and improve service currently provided on EJ&E.

Gateways and Requested Conditions. In its application, CN states that it would keep all gateways affected by the control transaction open on commercially reasonable terms³¹ and is committed to honoring trackage rights and haulage agreements with all connecting carriers.³² In

²⁸ See Equistar at 2.

²⁹ See Equistar at 2; Aux Sable at 4, 8-9.

³⁰ See Aux Sable at 5; ACS at 4-6; Equistar at 3.

³¹ CN-2 at 24.

³² CN-2 at 53.

its response to comments, CN further explains that this representation is meant to protect shippers' commercial options, particularly from vertical foreclosure.³³ The Board will hold applicants to their pledge that they will keep all existing gateways affected by the transaction open on commercially reasonable terms.

CSXT and WisDOT contend that CN's representation regarding its gateways is not sufficient.³⁴ Fearing operational problems for its operations in the Chicago area that might reverberate throughout the its entire system, CSXT requests a condition holding CN to its representations until there is mutual consent between CSXT and CN to change the interchange and requiring CN to abide by the commitments CN made to CSXT through confidential correspondence. CSXT goes on to request the following: (1) that the interchange locations for the following railroads and/or specified traffic will continue to be the following: (i) Clearing Yard for interchange between CSXT and Wisconsin Central Ltd.; (ii) Clearing Yard for interchange between CSXT and Minnesota and Western Canada freight; (iii) Barr Yard and Riverdale Yard for interchange between CSXT and Illinois Central Railroad Company; and (2) that all other existing CN and CSXT interchange properties will be handled in accordance with existing agreements. CSXT also requests that the interchange between CSXT and EJ&E that exists as of January 28, 2008, at Curtis Yard will be utilized only for EJ&EW traffic after consummation of the transaction. Applicants claim that their commitment in the application to keep all gateways open on commercially reasonable terms is in no way a commitment to freeze in place all of CN's and EJ&E's interchange locations and related practices, terms, and conditions. Applicants argue, among other things, that moving interchanges is the receiving carrier's prerogative and that the Board and the courts have consistently upheld this right, subject to location reasonableness.

The Board is disinclined to impose conditions that would freeze in place existing interchange locations. Such conditions may have anticompetitive consequences, precluding a carrier from making route changes that improve efficiency and service and from establishing related rate reductions. The Board would prefer to allow a merged entity flexibility in determining the most efficient routes for its newly restructured system, benefiting shippers in the process.³⁵ While interchange locations may change, the Board expects that CN will maintain its ability to interchange traffic effectively with all parties. Indeed, CN will continue to have the obligation to make available reasonable facilities for interchange under 49 U.S.C 10742.

WisDOT also asserts that CN provides no objective manner for the Board to effectively monitor CN's commitment to keeping all existing gateways affected by the transaction open on "commercially reasonable terms," as asserted in CN's application. Accordingly, WisDOT

³³ CN-29 at 40.

³⁴ In relation to the possible vertical effects of the control transaction, many shippers currently served by EJ&E request conditions to address this loss of a "neutral connector" to other line-haul railroads. Their comments and requested conditions are discussed below.

³⁵ See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 903-04 (2001).

requests that the Board define “commercially reasonable terms” in a manner that will allow an objective determination of compliance with their assertion. The Board does not see the need to define “commercially reasonable terms.” Under the operational monitoring condition discussed below, the Board will retain jurisdiction to determine on a case-by-case basis, when raised by an affected party, whether CN has failed to honor its commitment.

Bottleneck Rule; Contract Exception. Under the Board’s “bottleneck” principles,³⁶ in certain circumstances a shipper may separately challenge a portion of a carrier’s rate for a segment of a movement if the shipper has obtained a contract with another carrier for the remainder of the movement (the “contract exception”). Applicants have pledged that they will not assert any claims that would deprive any shipper of the right and opportunity to use the contract exception that the shipper would have had before the transaction. See CN-2 at 75. The Board will hold applicants to their pledge.

Relief Sought by Shippers Served by EJ&E. Several shippers whom EJ&E currently serves assert that the control transaction would result in a diminution in service, noting that a regional short line railroad provides superior service to customers on its line than a Class I railroad that is more concerned with long-haul rail transportation.

ACS. ACS strongly disagrees with CN’s allegations that rail service to shippers would improve as a result of the proposed acquisition. Rather, ACS argues that shippers would be better served by a service-oriented local rail carrier, like EJ&E, than a large carrier like CN, whose headquarters are located far away. The Board will take very seriously any shipper allegation that it is not receiving adequate service to meet its needs as a result of the control transaction. The Board’s oversight condition is intended to address service issues that arise as a result of the control transaction.

Equistar and AuxSable. Equistar owns and operates a polymers plant in East Morris, IL, that is currently served by EJ&E. Equistar states that EJ&E currently provides its East Morris plant a neutral connection that permits Equistar to access not only every Class I railroad, with the exception of KCS, at a range of gateways, but also numerous short-line and regional railroads as well. Equistar has reservations that consummation of the proposed transaction effectively would eliminate such neutral connections, and it anticipates CN’s capturing a substantial portion of those connections to maximize its line-haul opportunities, thereby causing Equistar’s traffic to encounter inefficient and unnecessarily circuitous routing.

While CSXT has the capacity to serve the East Morris plant, Equistar contends that CSXT is not a viable competitor of EJ&E because CSXT does not have the storage-in-transit capacity that is a critical element in service to the plastics industry. Further, Equistar notes that CSXT does not offer a direct line connection between Chicago and East Morris, instead operating under trackage rights over EJ&E accorded between East Morris and Joliet. Equistar is

³⁶ See Central Power & Light Company v. Southern Pacific Transportation Company, 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff’d sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

therefore concerned that any reduction in or restriction of those trackage rights would further compromise CSXT's efforts to serve the East Morris plant. Thus, Equistar asserts, the loss of neutral connections as a result of the proposed transaction would serve to eliminate competition for Equistar's traffic. Accordingly, Equistar requests that the Board condition approval of the control transaction on CN granting trackage rights and storage-in-transit rights consistent with those currently offered by EJ&E to protect Equistar's ability to continue to receive the benefits equivalent to having a neutral connection at its East Morris plant.

Aux Sable is concerned with the reduction of rail competition resulting from CN's acquisition of EJ&E, which Aux Sable believes would jeopardize the existing favorable arrangement covering EJ&E's service to its plant in Channahon, IL. Accordingly, Aux Sable opposes the proposed transaction unless approval is conditioned on the following: (1) during the 10-year period following consummation of CN's control of EJ&EW, CN shall cause EJ&EW to provide the same level of service as currently provided by EJ&E to Aux Sable's plant at Channahon, unless there is a material decrease in rail-based customer demand at the plant during that period; (2) during the 5-year period following consummation of CN's control of EJ&EW, CN will cause EJ&EW not to cancel the agreement whereby Aux Sable leases 5,000 feet of trackage at East Joliet Yard from EJ&E; and (3) CN will cause EJ&EW to assess rates and charges that will ensure economic and non-discriminatory access to rail carriers that connect with EJ&E.

The conditions sought by Aux Sable and Equistar are not appropriate and go beyond what is necessary to address any anticipated adverse effect of the control transaction. As CN notes in its reply, the requested conditions do not seek to remedy a significant loss in competition (as the number of railroads serving Equistar and Aux Sable will remain the same post-transaction). Further, as DOT suggests and CN "generally agrees," CN can be expected to comply with any enforceable contractual commitments as EJ&E's successor-in-interest. The Board further notes that DOT does not support the requested conditions but supports a Board-oversight condition to monitor any service complaints. Accordingly, the conditions sought by Aux Sable and Equistar will be denied. However, as noted above, the Board recognizes the potential vertical effects that would result in losing a "neutral connector" and will hold CN to its representations that it will keep affected gateways open on commercially reasonable terms. The Board takes very seriously concerns regarding the impact on service following the control transaction. The operational monitoring condition the Board is imposing will allow the Board to identify and resolve service problems arising from the approval and consummation of the transaction.

Relief Sought by Wisconsin & Southern Railroad Co. WSOR, a Class II carrier operating in Illinois and Wisconsin, opposes the proposed transaction without the imposition of certain conditions. WSOR asserts that the combined effects of the proposed transaction with the acquisition of control by CPR of Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and Iowa, Chicago & Eastern Railroad Corporation (IC&E) would result in significant rail congestion on those carriers' lines entering Chicago from Wisconsin. WSOR asserts that the increase in coal traffic (should CPR acquire DM&E and construct DM&E's extension of its line

into the Powder River Basin (PRB))³⁷ would make it difficult for CPR to accommodate WSOR's existing overhead service and growth potential.³⁸ WSOR also anticipates that, as CN continues to develop its through traffic to and from Prince Rupert, BC, at the expense of service to its Wisconsin shippers, those customers will be forced to find alternatives and to abandon CN by relocating to other railroads, such as WSOR, thus resulting in congestion on WSOR's own lines into Chicago.

WSOR asserts that, given the dramatic impact of the CN/EJ&E and CPR/DM&E/IC&E proceedings on Midwestern rail service, the Board must consider the adverse impacts of both transactions in deciding whether to grant the conditions sought by WSOR. Further, to relieve the anticipated congestion, WSOR requests that approval of the transaction be conditioned on the Board requiring the following: (1) CN to sell to WSOR CN's former Wisconsin Central rail line from Leithton (milepost 37.9) to Forest Park, IL (milepost 11.0) (where it connects with a line of CSXT, giving WSOR access to the BRC's Clearing Yard) at a price to be negotiated by the parties but subject to Board oversight; (2) CN to grant WSOR overhead trackage rights over CN's line between Grayslake (milepost 44.0) and Leithton (milepost 37.9); (3) CN to assign to WSOR its trackage rights over CSXT from milepost 11.0 to the entrance to the Clearing Yard (also known as CSXT milepost 9.9, distance of about 8.9 miles) or, alternatively, to grant WSOR overhead trackage rights on its entire line from Grayslake (milepost 44.0) to Leithton (milepost 37.9), and then to Forest Park, IL (milepost 11.0) at a fee not to exceed 36 cents per mile, and (4) CN to assign its rights over CSXT into the Clearing Yard.

Although Board regulations provide for the evaluation of the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination in a major merger,³⁹ those regulations do not apply to a minor transaction. And although the Board has approved the CP/DM&E transaction, CP has not yet taken steps to begin constructing a line to the PRB or sought to have the existing restrictions lifted that currently limit the routing of any PRB coal moving over that line.⁴⁰ In the meantime, any projections as to the resulting traffic and congestion, and the effects thereof, continue to be highly speculative. Further, the Board agrees

³⁷ See Dakota, Minnesota & Eastern Railroad Corporation—Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), aff'd, Mayo Foundation, et al. v. Surface Transportation Board, 472 F.3d 545 (8th Cir. 2006) (Mayo Foundation).

³⁸ On September 30, 2008, the Board approved CPR's acquisition of DM&E and IC&E, subject to routing restrictions. See Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081 (STB served Sept. 30, 2008).

³⁹ See 49 CFR 1180.1(i).

⁴⁰ See Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081, slip op. at 25, 27 (STB served Sept. 30, 2008); Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Docket No. 34177, slip op. at 16-17 (STB served July 22, 2002), modified (STB served Oct. 18, 2006).

with CN's assertion that the conditions WSOR seeks do not address competitive harm caused by the proposed transaction. For these reasons, the Board finds WSOR's requested conditions to be inappropriate, and they will be denied. However, the operational monitoring condition will provide a means for the Board to monitor and address any congestion issues resulting from the control transaction.

Relief Sought by Wisconsin State Agencies.

Wisconsin Department of Agriculture, Trade and Consumer Protection. DATCP is concerned with the potential for decreased services to Wisconsin businesses that rely on rail transport. It argues that market concentration results in reduced services to small, remote shippers. Also, DATCP raises concerns about possible diminishing opportunities for short-line connections because of heavily concentrated mainline long-distance traffic, particularly traffic resulting from the opening of the Port of Prince Rupert container terminal. DATCP requests that approval of the proposed transaction be conditioned to clearly ensure that CN is held to a very high standard and commits to preserving access and service to those who may be affected by transport on these lines, whether directly or indirectly.

Wisconsin Department of Transportation. WisDOT is concerned about the transaction's impact on already congested CN lines traversing Wisconsin, particularly with the opening of the Port of Prince Rupert container terminal (scheduled for completion in 2010). WisDOT claims that the transaction would have negative effects on traffic that moves shorter distances; in light of the decrease in originating traffic and the static growth of terminating traffic following CN's acquisition of Wisconsin Central. Further, WisDOT asserts that the increase of traffic on the CN main line through Wisconsin would make it increasingly difficult for CN to accept trainloads of traffic from regional carriers serving Wisconsin.

WisDOT requests that the following conditions be imposed: (1) CN operations would not block access to business or individuals for an unduly lengthy period of time and CN would establish a means of removing blockages within 30 minutes when notified of a blockage; (2) CN would construct additional infrastructure as needed if CN is unable to prevent blockages that last an unduly lengthy period of time; (3) CN would negotiate alternative access to the access to the Chicago terminal area with regional carriers who may be negatively affected by increased CN traffic through Wisconsin; (4) CN would not increase speeds on its lines in Wisconsin above current speeds until the Wisconsin Office of the Commissioner of Railroads determines that grade crossing warning devices at at-grade crossings provide adequate warning for the proposed speed; and (5) CN would share its plan for improvement to trackage in Wisconsin to accommodate the increased volumes including dollar amounts by line segment with WisDOT.

DATCP's and WisDOT's concerns and requested conditions do not address any adverse competitive impacts on freight transportation. WisDOT's assertion that traffic would increase with the opening of the Port of Prince Rupert container terminal may be true, but, as CN notes, the facility would open regardless of the transaction. WisDOT has not shown how the control transaction would have a direct bearing on the increase in overhead traffic that WisDOT anticipates. Therefore, the Board will deny the requested conditions. The Board, however, takes

seriously DATCP and WisDOT's concerns regarding rail service. Pursuant to the operational monitoring condition and oversight period established in this decision, the Board will monitor and address any diminution in service resulting from the control transaction.

Relief Sought by Metra. Metra opposes the proposed transaction unless approval of the application is made subject to conditions that they claim would adequately protect the interests of Metra. Metra is concerned that the proposed increase in traffic on the EJ&E would pose a serious potential challenge to Metra's continued ability to provide high-quality commuter service. Metra notes that CN has stated that it would work with Metra and host freight operators to coordinate operations and adjust operating windows such that the needs of all users would be met and that CN would explore options to facilitate Metra's proposed Suburban Transit Access Route (STAR) line plans. Metra states it has met with CN to negotiate a resolution, but no resolution could be reached. Accordingly, Metra requests three conditions specifically concerning Metra's operations, one of which has a subset of conditions in the alternative. Metra also requests a fourth condition for the public interest.

STAR Line. Metra states that it is currently in the planning stages of instituting commuter operations, referred to as the STAR line, over a portion of the EJ&E. Metra states that at least two segments involving the EJ&E have been identified for future expansion of the STAR line: the Star Line East Segment that would operate along the EJ&E right-of-way from Joliet to Lynwood, IL; and the Star Line North Segment that would operate along the EJ&E right-of-way from Hoffman Estates, IL, to Waukegan. Accordingly, Metra requests that approval of the transaction be conditioned on CN granting trackage rights to Metra between milepost 7.5 and milepost 42.5 on EJ&E's Western Subdivision in order to implement Metra's STAR line, and CN's agreement to work cooperatively to consider future grants of trackage rights as Metra seeks to develop the Star Line East Segment and the Star Line North Segment. CN states that it is willing to cooperate with Metra concerning the STAR line but stresses that EJ&E has not entered into any binding agreement with Metra.

Southeast Service. Metra claims that, in conjunction with the Federal Transit Administration's New Starts Process, it is in the planning stages of developing a new rail service line, the Southeast Service Line, from Chicago to Crete, IL, on the joint right-of-way of UP and CSXT, and will cross the EJ&E at grade at Chicago Heights. Accordingly, Metra requests that approval of the proposed transaction be conditioned on CN agreeing to work cooperatively with Metra on the establishment of a commuter train schedule to accommodate the Southeast Service. The proposed condition also requests that, once such a schedule is established, CN agree to respect the integrity of the schedule and grant commuter trains priority over the Chicago Heights interlocking. CN asserts that the requested condition is unrelated to the competitive effects of the proposed transaction.

West Chicago, IL and Barrington, IL Interlockings. Metra notes two major locations of special concern where Metra trains cross the EJ&E at grade: (1) at West Chicago, IL Interlocking, where Metra trains operating over UP's West Line (UP-W Line) cross EJ&E; and (2) at the Barrington, IL Interlocking, where Metra commuter trains operating over UP's Northwest Line (UP-NW line) cross EJ&E. These trains are operated by UP pursuant to a Purchase of Service Agreement with Metra. Metra states that it seeks to upgrade the UP-W Line

and UP-NW Line to allow greater flexibility that will enable Metra to expand commuter rail service.

EJ&E controls the interlockings at West Chicago and Barrington. Metra states that EJ&E has been vigilant in minimizing freight train interference with Metra commuter trains at those locations. Metra asserts that the potential increase in EJ&E freight traffic, as well as the substantial increase in train lengths, could threaten efficient commuter rail operations crossing this line. Moreover, Metra asserts that any delays to UP freight trains crossing the interlockings could result in dire consequences to Metra's commuter rail service, as both lines rely upon intense coordination between commuter and freight train traffic.

Accordingly, Metra requests that approval of the proposed transaction be conditioned on the control of the West Chicago and Barrington interlockings being transferred from EJ&E to Metra as of the date of consummation of CN's control of EJ&E. In the event that control of those interlockings is not transferred to Metra, Metra states that the following alternative conditions are required: (1) CN shall cause EJ&EW dispatchers in control of the interlockings at West Chicago and Barrington to impose a curfew for freight train operation over those interlockings during peak periods of Metra's commuter operations; (2) CN shall cause EJ&EW dispatchers in control of the interlockings at West Chicago and Barrington to give priority to Metra commuter trains over EJ&EW freight trains at those interlockings during all non-peak hours and avoid any undue interference with the commuter service; and (3) CN shall cause EJ&EW dispatchers in control of the interlockings at West Chicago and Barrington to take due account of UP freight traffic in protecting Metra commuter trains at those crossings.

CN strongly opposes these proposed conditions and asserts that adequate capacity exists for Metra trains and that any additional and longer trains will not be running over and sharing UP lines, but merely cross the same diamonds as UP lines.

Metra's Requested Reporting Condition. Lastly, Metra requests that CN cause EJ&EW to report to the Board regarding the effect of the foregoing conditions on delay of Metra commuter trains at West Chicago and Barrington. The reports sought by Metra would be filed at 6-month intervals for a period of 10 years, beginning 6 months after the date of consummation of CN control of EJ&E. Metra would have the right to reply to any such report. Metra would have the Board expressly retain jurisdiction over the subject matter of the conditions during that 10-year period to take any action that might be required in the public interest.

The Board will not impose Metra's requested conditions concerning the STAR line, the Southeast Service line, or the West Chicago and Barrington interlockings, because they are unrelated to the competitive effects of the proposed transaction. Several of the issues that Metra raises are typically dealt with through negotiations and contracts between railroads. Metra has offered no reasons why the combined CN/EJ&E would be less inclined to negotiate than EJ&E. The Board encourages Metra and CN to negotiate reasonable commercial agreements concerning the STAR line, the issues surrounding the introduction of the Southeast Service through Chicago Heights interlocking, and the interlockings at West Chicago and Barrington.

The Board further notes that many of the concerns surrounding the proposed STAR line and Southeast Service have been addressed in the EIS prepared by SEA.⁴¹ As a voluntary mitigation measure, applicants state that they will operate the West Chicago and Barrington Interlockings according to the current agreements under which EJ&E operates, which require EJ&E to give priority to passenger trains over either UP or EJ&E freight trains. Applicants also commit to working with Metra to explore all options for service on the proposed STAR Line, including use of the EJ&E rail line. The timing and implementation of the STAR Line service remain subject to numerous variables, including securing government funding, but applicants are committed to continuing discussions with Metra on the STAR line. Lastly, applicants commit to complying with any written and executed curfew agreements that are now in effect regarding operations affecting passenger or commuter train service.

The Board also recognizes the concern surrounding any changes in protocol in the handling of passenger train traffic. The Board's operational monitoring condition will require the reporting of current protocol and changes to protocol during the oversight period. Parties, such as Metra, will have ample opportunity to report any diminution in service resulting from the proposed transaction. Further, the Board will hold applicants to their representation that affected gateways will be kept open on commercially reasonable terms.

St. Charles Air Line Route Condition. The St. Charles Air Line (Air Line) is a portion of elevated track that runs across the southern part of downtown Chicago and serves as part of CN's St. Charles Air Line Route (Air Line Route), which is used by CN to move traffic across the city of Chicago. The Air Line Route is also used by six daily Amtrak trains to access Chicago Union Station. As part of the transaction, applicants expect that, after the 3-year implementation period, CN will cease operations over the Air Line Route by rerouting traffic around Chicago on the EJ&EW.⁴² Applicants state these actions will reduce their reliance on suboptimal infrastructure and reduce congestion in downtown Chicago, while advancing the objectives of CREATE and the City of Chicago.⁴³ One aspect of the CREATE Program is the proposed construction of the Grand Crossing Connection between CN and NS. The Grand Crossing Connection would permit CN to discontinue use of the Air Line Route, and trains currently operating on the Air Line Route would use the Grand Crossing Connection to reach Union Station over NS's line. The Grand Crossing Connection is not fully funded and could take years to construct due to financing and regulatory approvals required for the project.

Several parties oppose the proposed transaction and assert that the abandonment of the Air Line Route would result in the disruption or discontinuance of Amtrak service to affected locations.⁴⁴ Parties raise concerns regarding the cost of maintenance of the Air Line Route

⁴¹ See Final EIS at 4-37 (VM 38, VM 39, and VM 41).

⁴² See CN-2 at 32 n.15.

⁴³ See CN-2 at 15-16 n.6, 203-04.

⁴⁴ See DOT Open. at 5-6; City of Mattoon Intent to Participate at 1-2; City of Carbondale at 3, and Champaign County Chamber of Commerce Board of Directors' Notice of Intent to Participate, p. 2. Several members of the United States House of Representatives, including
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should CN cease its operations, as well as concerns regarding funding for the Grand Crossing Connection.⁴⁵ Parties oppose CN's application to acquire control of EJ&E unless the approval of the control transaction is conditioned upon applicants preserving the Air Line Route at its current operating standards for use by Amtrak to access Chicago Union Station with no additional cost to Amtrak or the State of Illinois, until such time that an alternative route using the Grand Crossing Connection is completed and operational.⁴⁶

In their response, applicants addressed these concerns by stating that CN has now agreed to the conditions sought by Amtrak: that Amtrak may remain on the Air Line Route indefinitely, until the Grand Crossing Connection or another acceptable alternative is available, at a cost to be capped at the current level (adjusting only for inflation pursuant to the formula contained in the agreement between CN and Amtrak) and at the level of operating utility currently enjoyed by Amtrak.⁴⁷ Applicants do note, however, that CN never committed itself to making a financial contribution to the Grand Crossing Connection and did not make such a commitment as part of CREATE.⁴⁸

On December 9, 2008, Amtrak and CN jointly filed a notice of settlement and request for conditions. The settlement agreement memorializes the commitments made by CN regarding Amtrak's continued use of the Air Line Route and other IC lines in and near Chicago. Accordingly, CN and Amtrak request that the Board impose conditions that reflect the commitments made in the settlement agreement.⁴⁹

The Board finds that the terms of the settlement agreement sufficiently address the parties' concerns with regard to the Air Line Route. The Board will impose the conditions requested by CN and Amtrak that will effectively allow Amtrak to remain on the Air Line Route until an alternative route acceptable to Amtrak, such as the Grand Crossing Connection, is completed and operational, and that applicants will maintain the Air Line Route at its current operating level for use by Amtrak to access Chicago Union Station with costs to be capped at

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Reps. Melissa L. Bean (IL-08), Jerry F. Costello (IL-12), Donald A. Manzullo (IL-16), Judy Biggert (IL-13), Timothy V. Johnson (IL-15), Peter J. Roskam (IL-06), and Bill Foster (IL-14), have also expressed concern that compromising Amtrak's trains over the Air Line Route could be devastating to Illinois communities.

⁴⁵ See IDOT at 3; Carbondale at 3 (requesting that CN provide funding to help establish the Grand Crossing Connection).

⁴⁶ See Carbondale at 3; NARP at 1-2.

⁴⁷ See CN-29 at 56-7; Joint V.S. of Robert T. Holstrom and Paul E. Ladue at 2. As mentioned above, Amtrak withdrew its opposition and request for conditions on December 9, 2008.

⁴⁸ See CN-29 at 58.

⁴⁹ CN and Amtrak request that its conditions be imposed in lieu of the Voluntary Mitigation measure included in the Final EIS (See Final EIS at 4-37 (VM 37)).

their April 28, 2008 levels, adjusted only for inflation pursuant to the formula contained in the current CN/Amtrak agreement with the effective date of February 1, 1995.

Gary/Chicago International Airport Authority. GCIAA opposes the proposed transaction based on the belief that increased rail traffic would have negative effects on safety and economic development at the Gary/Chicago International Airport. Specifically, GCIAA raises concerns about impairment to its runway expansion project to increase the overall length of its primary runway. The expansion project, which has already begun, is designed to address expansion and safety issues, and to bring the runway up to Federal Aviation Administration (FAA) standards. The expansion plan requires that a portion of the EJ&E line running directly northwest of the runway be relocated. For approximately the last 6 years, GCIAA has tried unsuccessfully to negotiate with EJ&E to relocate 2.3 miles of the line. GCIAA asserts that the proposed transaction would significantly impair its ability to fund and complete the runway expansion. GCIAA explains that the increased traffic would further complicate the proposed track changes and create additional issues with compensating EJ&E for the changes to the track. Additionally, GCIAA asserts that the increased train operations would pose serious safety issues.

While GCIAA's concerns may be valid, its comments, as CN notes, do not allege any adverse competitive impacts in freight transportation. The difficulties in negotiating with EJ&E appear to be a longstanding issue of concern. GCIAA has not shown how future negotiations with applicants would be impeded as a direct result of the control transaction. While the Board urges parties to reach a resolution, GCIAA's comments do not address any competitive harm that would arise from the approval of the control transaction.

The Board notes, however, that GCIAA's safety concerns are addressed in the EIS. As discussed in the Draft EIS, GCIAA, EJ&E, CSX, and NS entered into a four-party Preliminary Memorandum of Understanding (PMOU) on June 27, 2008.⁵⁰ The PMOU provides for relocating the EJ&E rail line, building a bridge over the existing NS Gary Branch, and constructing a separated-grade crossing at Industrial Highway. While further definitive agreements would be required, the PMOU sets forth the core understanding of the parties on the elements of the relocation plan and underlying obligations that would enable the airport to proceed with its expansion plan, while protecting and improving rail operation in northwest Indiana. Because none of the proposed connections or double track would be constructed near the airport, the construction associated with the transaction would not affect the airport or its proposed expansion. As discussed below, the Board is adopting the mitigation condition recommended by SEA in the Final EIS requiring applicants to comply with the PMOU.

Monitoring & Oversight Condition. The Board is establishing an oversight period for 5 years so that it may assess the competitiveness of service provided by CN upon implementation of the proposed transaction, the various service and other impacts of the transaction, and the effectiveness of the various conditions we have imposed. Although the Board does not anticipate anticompetitive consequences from the transfer of control, it is mindful that operational difficulties can arise when implementing transactions of this scope. Therefore,

⁵⁰ See Draft EIS at 3.3-94-96.

approval of the transaction will be conditioned upon a monitoring and oversight condition. If operational problems arise after consummation of the transaction, this oversight condition should provide a fully effective mechanism for quickly identifying and addressing them. The Board retains jurisdiction to impose additional conditions and take other action if, and to the extent, the Board determines it is necessary to address matters related to operations following the transfer of control. At the end of the 5-year oversight period, the Board may elect to extend its oversight for an additional period if conditions warrant. The Board finds that an initial 5-year duration is appropriate, so that the oversight period will begin with the implementation phase (which applicants expect to be completed within 3 years after consummation of their acquisition of control over EJ&EW⁵¹) and continue for a 2-year period following the full implementation of the operating plan.

During the oversight period, the Board will closely monitor whether applicants have adhered to the various representations made on the record in this proceeding. To accomplish this goal we will require CN to report to us monthly on the operational matters described below. CN shall meet with Board personnel to establish appropriate measures and reporting procedures for this monitoring. CN shall continue to report these measures on a monthly basis during the oversight period unless the Board alters or terminates the reporting.

Interchanges. To monitor interchange activity, the Board will require CN to establish measurements of the effectiveness of each current (historic) interchange and to report the same measures for these interchanges post-merger. The reporting shall cover any new interchange should CN move traffic from one or more current interchanges to a new point. The new interchange with the Gary Railway Company shall also be included in the reporting.

Railroad At-Grade Crossings. EJ&E also has at-grade crossings with several railroads in the Chicago area. Several parties have expressed concern about changes in operation or operating protocols at these crossings.⁵² The Board will require monthly reporting and monitoring of the operations at these crossing points. CN shall provide a report of all existing (historic) protocols for service or priority at these crossings and shall report any changes that are made. CN shall also report monthly to the Board any delays occurring at each of these crossings by freight and passenger trains of CN, others using CN, and crossing carriers.⁵³

Train Volumes, Accidents and Incidents, and Street Crossing Blockages. CN will be required to provide monthly the following information pertinent to post-merger operations: the number of trains operating over appropriate segments of the EJ&E and CN lines through Chicago per day; the date and descriptive information about each accident or incident that occurs on the EJ&E rail line or CN lines through Chicago, including grade crossing accidents; and the date and descriptive information about each crossing blocking occurrence on the EJ&E rail line that exceeds 10 minutes in duration.

⁵¹ See CN-2 at 21.

⁵² See Metra at 4-7; WSOR, V.S. Gardner at 4-8.

⁵³ See, e.g., Metra at 8-10.

Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under sections 11323–11325. In the absence of a need for greater protection, the conditions in New York Dock are appropriate for this type of transaction. Because no need for greater protection has been shown (the evidence indicates that the CN/EJ&EW control transaction will be implemented with limited adverse effects on employees), these conditions will be imposed here. Applicants state that most job reductions (estimated at 114) will be addressed through normal attrition during the implementation period, and state that any workforce reductions would allow for increased administrative efficiency, improve equipment utilization and maintenance, and create centralized dispatching and crew-calling offices.

UTU GCA-386 has asked the Board to extend employee protection to include protections for employees of other railroads, in particular employees of BNSF Railway Company (BNSF), engaged in terminal operations in Chicago, Tacoma, WA, and other U.S. ports that would be adversely affected by the CN/EJ&EW control transaction. UTU GCA-386 claims that BNSF employees would be harmed because of the diversion of traffic and diminished competition in conjunction with CN container traffic via Prince Rupert, BC. UTU GCA-386 argues that employee protective conditions are available to non-applicant employees engaged in terminal operations via a “terminal exception.” However, the Board has consistently ruled that the employees of a non-applicant carrier, or employees of a carrier not directly involved in a transaction governed by 49 U.S.C. 11323, are not entitled to labor protection under 49 U.S.C. 11326.⁵⁴ Therefore, UTU GCA-386’s request will be denied.

BLET asks the Board to deny the application and related filings, or, in the alternative, apply New York Dock conditions on the entire transaction, including the proposed grants of trackage rights in STB Finance Docket No. 35087 (Sub-Nos. 2 through 7). BLET contends that these grants of trackage rights would provide CN a level of control over its five subsidiaries that would require Board approval under section 11323, and thus would necessitate the application of New York Dock conditions to the entire unified transaction, instead of imposing the standard level of protection for trackage rights exemptions set forth in Norfolk and Western. BLET also expresses concern regarding applicants’ statement regarding the need to create a single collective bargaining agreement for all train and engine personnel. Lastly, BLET takes issue with CN’s proposal to give trackage rights to GTW and WC over the entire length of EJ&EW’s main line, while EJ&EW would have no corresponding rights over GTW and WC.

New York Dock and Norfolk & Western provide differing levels of protection, but, as it respects affected employees of applicants and their rail carrier affiliates, these differences will be of no consequence: affected employees of applicants and their rail carrier affiliates covered by Norfolk & Western would also be covered by, and would therefore be entitled to the protections of, the New York Dock conditions. Further, as CN notes, any attempt by CN to bring all

⁵⁴ Crouse Corp. vs. ICC, 781 F.2d 1176, 1192-93 (6th Cir. 1986), cert. denied, 479 U.S. 890 (1986); Railway Labor Executives’ Ass’n v. ICC, 914 F.2d 276, 280-81 (D.C. Cir. 1990); Canadian National, et al.—Control—Illinois Central, et al., 4 S.T.B. 122, 165-66 (1999).

Chicago-area train and engine employees under a single collective bargaining agreement would not occur without negotiation and, if necessary, arbitration under New York Dock, subject to the Board's review.⁵⁵ This provision under New York Dock would also address BLET's concerns regarding pending employment proceedings and the proposed allocation of EJ&E employees between the Gary Railway and EJ&EW. Therefore, Board's approval of this transaction does not indicate approval or disapproval of any of the applicants' plans regarding the collective bargaining agreements of affected employees. BLET's request will be denied.

Lastly, IBEW, ATDA, and NCFO file joint comments requesting the Board to condition approval upon assurances from applicants that: (1) the collective bargaining agreements covering these unions' CN and EJ&E members remain intact; (2) CN succeed to EJ&E's contractual obligations in pending contract claims and disciplinary appeals; and (3) employees receive full New York Dock protections. As stated above, New York Dock protections will be imposed. The Board does not issue specific findings regarding any potential changes to collective bargaining agreements an applicant might implement to carry out a transaction. Those discussions are covered by New York Dock. New York Dock protections also apply to pending contract claims and disciplinary appeals. Therefore, the concerns of these parties are adequately addressed by our imposition of New York Dock as a condition to approval of this transaction.

Related Filings. Corporate Family Transaction (Sub-No. 1). In its application, CN has included a notice of exemption filed by EJ&E, under 49 CFR 1180.2(d)(3), that would allow EJ&EW to acquire the land, rail, and related assets of EJ&E located west of the centerline of Buchanan Street in Gary, immediately following the Board's approval of the proposed transaction. The pertinent class exemption exempts transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. Because this transfer, alone, would not affect service levels, operations, or competition, the Board will allow the notice of exemption to take effect on the effective date of this decision.

Trackage Rights Exemption Notices (Sub-Nos. 2 through 7). Applicants have filed six notices of exemption (in Sub-Nos. 2 through 7) under 49 CFR 1180.2(d)(7). In Sub-Nos. 2 through 5, applicants' subsidiaries—CCP, GTW, IC, and WC—seek to obtain trackage rights over EJ&EW, between Waukegan, IL, and Gary, IN. In Sub-Nos. 6 and 7, EJ&EW seeks trackage rights over selected portions of CN's CCP and IP subsidiaries. The pertinent regulation exempts the acquisition of trackage rights by a rail carrier over lines owned or operated by any other rail carrier that are: (1) based on written agreements and (2) not filed or sought in a responsive application in a rail consolidation proceeding. No individual findings under 49 U.S.C. 10502 are necessary as to the trackage rights notices because the transactions fall within the class exemption provided at 49 CFR 1180.2(d)(7). The Board will allow the notices of exemption to take effect on the effective date of this decision.

⁵⁵ See CSX Corp.—Control—Conrail Inc., 3 S.T.B. 196, 328-330 (1998) (“In approving a rail merger or consolidation . . . we have never made specific findings . . . regarding any CBA changes that might be necessary to carry out a transaction.”).

Environmental Issues.

Board Authority. The Board and, before it, the Interstate Commerce Commission (ICC) have long exercised authority to impose environmental mitigation conditions on the agency's approval of transactions governed by what is now section 11324(d).⁵⁶ In its comments on the Draft EIS, CN asserted—for the first time in this or any other such proceeding—that the Board lacks the statutory authority to impose environmental conditions.⁵⁷ CN also questioned whether NEPA applies in a section 11324(d) proceeding because the time provided in section 11325(d) for a final decision is not sufficient for the Board to conduct the environmental review required by NEPA. As discussed below, CN is estopped from contesting the Board's authority to attach environmental mitigation conditions in this case by its contemporaneous Congressional testimony. Moreover, CN waived its other claims by failing to raise them in a timely manner before the Board. Nevertheless, for the benefit of future applicants, we will discuss the basis of the Board's statutory authority to impose environmental mitigation conditions on our approval of transactions subject to section 11324(d).

Estoppel. Three weeks before CN filed its comments on the Draft EIS questioning the Board's authority to impose environmental mitigation conditions, CN's President testified before Congress that the Board already has the authority to conduct an environmental review of the transaction and impose environmental mitigation conditions.⁵⁸ Consequently, CN is barred here from arguing that the Board does not have the authority to impose environmental mitigation conditions by analogy to the doctrine of judicial estoppel.⁵⁹ The elements of judicial estoppel⁶⁰ are present here: CN has taken clearly inconsistent positions before the Board and Congress; it

⁵⁶ See, e.g., Burlington Northern et al.—Control—Washington Central, 1 S.T.B. 792, 803-08 (1996) (BN/Wash. Cent.), aff'd sub nom. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) (Auburn). See also Rail Exemption Procedures, 8 I.C.C.2d 114, 115 (1991) (in mergers under what is now section 11324(d) agency must consider both competitive factors and its obligations under “additional legislation, such as the various Federal energy and environmental statutes”).

⁵⁷ See CN DEIS Comments at 148-49 (filed Sept. 30, 2008) (characterizing the Board's authority to impose environmental conditions in a section 11324(d) transaction as “unclear” and claiming that precedent appears to preclude the Board from imposing conditions to mitigate impacts other than effects on competition and labor).

⁵⁸ CN testified before the Committee on Transportation and Infrastructure of the House of Representatives on September 9, 2008 in opposition to H.R. 6707, the Taking Responsible Action for Community Safety Act. The written testimony and an archived broadcast of this hearing are available on the Committee's website.

⁵⁹ See New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). Estoppel protects the integrity of the judicial process by preventing a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in another proceeding or a different phase of the same proceeding.

⁶⁰ Id. at 750.

convinced Congress that new legislation was unnecessary by assuring them that the Board has environmental conditioning authority; and it would now derive an unfair advantage or impose an unfair detriment if it were not estopped from asserting before the Board the inconsistent position that the Board lacks environmental conditioning power here.

Waiver. In pleadings filed in May and August 2008, CN also suggested that NEPA does not apply to acquisition proposals designated as “minor” under the Board’s rules because the Board is required by statute to reach a decision within 180 days of the filing of the application, which is not adequate time to complete a NEPA review if preparation of an EIS is necessary. CN however, has waived this claim because it did not forcefully raise it in a timely manner.⁶¹ The time for CN to have done so would have been either before or immediately after the Board’s November 26, 2007 decision, which accepted the application as a minor transaction, announced the Board’s intention to prepare an EIS, rather than a more limited EA, in this case, and extended the date for a final decision as needed to complete the full environmental review process. CN failed to do so. Instead, it took the opposite position—that “the Board cannot authorize the Transaction on the merits until the EIS process is complete.”⁶² Had CN presented its current argument to the Board at the outset, the agency would have been in a better position to assess the extent to which NEPA applies and whether there were any suitable ways to shorten the environmental review process from the outset.⁶³

Environmental Conditioning Authority. This agency has had broad authority over rail consolidations since 1920. Prior to 1980, ICC review of all mergers and acquisitions was conducted under a single, broad public interest standard.⁶⁴ In 1980, Congress concluded that the ICC had been taking too long to decide non-controversial cases “where approval is routinely and consistently granted.”⁶⁵ Therefore, as part of its overhaul of railroad regulation in the Staggers Rail Act of 1980 (Staggers Act), Congress narrowed the factors to be considered by the agency in deciding whether to approve rail merger or acquisition proposals that do not involve more than one Class I railroad (current section 11324(d)) and imposed shorter timetables for the review of those cases (current sections 11325(c) and (d)). In applications that do not involve more than one Class I railroad, the schedule for review is either 300 days (for a proposal with regional or national transportation significance, section 11325(c)) or 180 days (for all other proposals, section 11324(d)).

⁶¹ An argument not forcefully raised in a timely manner is generally waived. See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978); Western Resources v. STB, 109 F.3d 782, 793 (D.C. Cir. 1997); Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437-443-44 (2d Cir. 2001). The equitable doctrine of waiver applies with full force to statutory deadlines for agency decisions. See BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006); USAir, Inc. v. DOT, 969 F.2d 1256, 1259-60 (D.C. Cir. 1992).

⁶² Applicants’ Comments on the Draft Scope of Study at 8-9 (filed Feb. 15, 2008).

⁶³ See 40 CFR 1507.3(b),(d) (Council on Environmental Quality (CEQ) regulations permitting agencies to modify EIS procedures where necessary to comply with other statutes).

⁶⁴ See former 49 U.S.C. 11344(c) (1979).

⁶⁵ H. Conf. Rept. No. 1430, 96th Cong., 2d. Sess. 121 (1980).

As noted above, with regard to a transaction that does not involve the merger or acquisition of at least two Class I rail carriers, section 11324(d) directs the Board to approve the transaction unless: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. And because section 11324(d) was enacted specifically to curtail the substantive, transportation-related review of issues that were deemed “routine,” the ICC, shortly after passage of the Staggers Act, concluded that its substantive, transportation-related review in such cases should focus only on the “significant anticompetitive effects” standard in the statute.⁶⁶

Environmental conditions, however, are different, and we believe that Congress in the Staggers Act did not intend to preclude environmental conditions in section 11324(d) cases. Although NEPA was enacted in 1969, it had not come into play in ICC merger cases by the time of the Staggers Act. Nevertheless, Congress considered exempting section 11324 transactions from NEPA, but ultimately chose not to do so.⁶⁷ Because Congress has explicitly exempted other types of rail transactions from NEPA,⁶⁸ its failure to do so here is an important fact suggesting that it did not intend to preclude NEPA’s application.

As a general matter, the Board has broad powers to administer the Interstate Commerce Act, including the rail transaction review provisions. Section 721(a) makes clear that “[e]numeration of a power of the Board . . . does not exclude another power the Board may have in carrying out [the Act].” Section 11324(c) gives the Board explicit authority to impose conditions on rail consolidations subject to section 11324, including section 11324(d) transactions. The agency has always believed that the limitation against imposing traditional public interest conditions unrelated to competition in section 11324(d) transactions does not extend to environmental conditions, and it has imposed environmental conditions in other mergers subject to section 11324(d).⁶⁹

⁶⁶ See Norfolk & Western Ry. Co.—Pur.—Illinois Term. R. Co., 363 I.C.C. 882 (1981) (NW-Illinois Terminal), aff’d sub nom. Illinois Commerce Comm’n. v. ICC, 687 F.2d 1047 (7th Cir. 1982) (Illinois Commerce).

⁶⁷ An early House version of the Staggers Act merger section contained language explicitly providing that NEPA “shall not apply to transactions carried out pursuant to this section [referring to what is now section 11324].” See H.R. 7235, 96th Cong. at §309(a) (May 1, 1980). That language did not appear in either the Conference substitute or the final bill as enacted. See Conf. Rept. at 120-21.

⁶⁸ See Rock Island Railroad Employee Assistance Act, 45 U.S.C. 1010 (“The provisions of [NEPA] . . . shall not apply to transactions carried out pursuant to this chapter”); Milwaukee Railroad Restructuring Act, 45 U.S.C. 917 (same).

⁶⁹ BN/Wash. Cent. 1 S.T.B. at 806-08; Iowa, Chicago & Eastern Railroad—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 slip op. at 13-18 (STB served July 22, 2002) (condition imposing traffic restrictions pending

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The agency's clear demarcation of environmental conditions—as distinct from conditions relating to traditional public interest factors—stems from the special status of environmental protection under a separate legislative mandate. In NEPA, Congress required all federal agencies to incorporate informed environmental considerations into their decision-making. 42 U.S.C. 4332(C). To that end, Congress directed agencies to interpret and administer their statutes, regulations and policies in accordance with the environmental protection policies set forth in NEPA “to the fullest extent possible.” See 42 U.S.C. 4332; see also 40 CFR 1500.6 (CEQ regulation). Thus, where an agency's authority to take a particular action—such as imposing conditions—is grounded in its own statute, NEPA “authorizes the agency to make decisions based on environmental factors not expressly identified in the agency's underlying statute.” Natural Resources Defense Council v. EPA, 859 F.2d 156 (D.C. Cir. 1988). The Board has complied with NEPA's mandate by construing the Interstate Commerce Act to permit the imposition of environmental conditions in mergers subject to section 11324(d).

Although Congress intended NEPA to be broadly applied to virtually all major actions taken by federal agencies, there are certain narrow exceptions to NEPA applicability when there is a “clear and unavoidable” conflict between an agency's statute and NEPA.⁷⁰ As discussed below, however, none of the exceptions applies to the Board's exercise of conditioning authority here, and nothing in the structure or language of the Interstate Commerce Act suggests that Congress intended to preclude the application of NEPA to transactions covered by section 11324(d).

Unless there is a direct conflict between NEPA and an agency's organic statute or some other strong evidence demonstrating Congressional intent to repeal NEPA, then NEPA is to be followed. See Izaak Walton League v. Marsh, 655 F.2d 346, 367 (D.C. Cir. 1981). Although section 11324(d) limits the range of transportation-related conditions that the Board can impose in smaller mergers, it does not directly preclude the Board from considering environmental impacts when determining whether to impose environmental conditions on its approval of such transactions.⁷¹

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subsequent environmental review); Canadian Pacific Railway Railway Co.—Control—Dakota, Minnesota & Eastern Railroad Corp., STB Docket No. 35081 slip op. at 24-26 (STB served Sept. 30, 2008) (same).

⁷⁰ Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976) (Flint Ridge).

⁷¹ Although CN suggests that the decisions in Illinois Commerce, 687 F.2d at 1055, and Lamoille Valley R.R. v. ICC, 711 F.2d 295 (D.C. Cir. 1983) (Lamoille Valley) place such limits on the Board's conditioning authority, we find these cases inapposite. Neither case addresses the Board's authority to mitigate the adverse environmental impacts of rail carrier consolidations. Illinois Commerce did not discuss the scope of the agency's conditioning authority at all in upholding the ICC's determination that the competitive effects approval standard was the proper one for transactions not involving multiple Class I carriers. Lamoille Valley did include a footnote in which the court rejected suggestions that the ICC's ability to condition transactions was broader than its ability to approve or reject the merger as a whole. 711 F.2d at 301 n.3. But (continued . . .)

Consistent with the “direct contradiction” standard, in certain situations the time limits on an agency’s decisionmaking are so short as to reflect a clear Congressional intent to preclude the consideration of environmental issues.⁷² See, e.g., Flint Ridge (30-day time limit too short for NEPA); City of New York v. Minetta, 262 F.3d 169 (2d. Cir. 2001) (60-day time limit too short). The court cases do not support the conclusion that the 300-day review period for section 11324(d) transactions that have regional or national transportation significance and the 180-day review period for all other section 11324(d) transactions are so short as to reflect an intent by Congress to exempt the Board’s decisionmaking from NEPA.⁷³ The Board has conducted environmental reviews of varying detail under these time frames in prior cases, and has made informed decisions with regard to the need (or lack of need) to exercise our authority to impose environmental mitigation conditions.⁷⁴

In light of the foregoing, the Board concludes that Congress authorized the Board to impose conditions to mitigate adverse environmental effects. This is especially so where Board approval of a transaction—by statute—exempts the merging carriers from “all other law,” including state and local environmental laws, “as necessary” to let the carriers carry out the transaction and operate the rail property. See 49 U.S.C. 11321(a). Indeed, the current transaction illustrates why the Board’s conditioning authority must be construed to permit environmental mitigation. The CN/EJ&E transaction is expected to provide nationwide economic benefits by making the interstate rail transportation network more efficient and relieving rail congestion in the Chicago area. But the transaction also will impose substantial

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the footnote is dicta because the court was not reviewing the Board’s authority to impose a particular condition, nor was it considering the effect of NEPA on the Board’s conditioning authority.

⁷² NEPA may also be inapplicable if the agency’s decision is “ministerial” in nature or the agency lacks any discretion to consider environmental findings. See DOT v. Public Citizen, 541 U.S. 752 (2004) (Public Citizen). Here the Board has plenary and exclusive jurisdiction over rail transactions (see section 11321), explicit discretion to determine appropriate conditions on its approval of transactions (see section 11324(c)), and inherent unenumerated powers to carry out the Interstate Commerce Act (see section 721(a)). Accordingly, there is no basis to apply the Public Citizen exception to the Board’s determination of appropriate environmental conditions for mergers covered by section 11324(d).

⁷³ See, e.g., Forelaws v. Johnson, 743 F.2d 677 (9th Cir. 1994) (NEPA applicable despite 9-month deadline).

⁷⁴ See, e.g., BN/Wash. Cent. (EA prepared, environmental conditions imposed); The Kansas City Southern Railway Company, Gateway Eastern Railway Company and The Texas Mexican Railway Company, STB Finance Docket No. 34342, slip op. at 21-23 (STB served Nov. 29, 2004) (Environmental Appendix prepared with notice and comment; environmental conditions imposed). We also have certain procedural flexibility, including, but not limited to, instituting pre-filing notification requirements for merger applications, see, e.g., 49 CFR 1180.4(b), and delaying the effective date of decisions where warranted, see 49 U.S.C. 722(a).

environmental costs on the local communities along the EJ&E line in the form of emergency response delays, increased vehicular traffic congestion and delays, increased noise and vibration, and increased safety issues at highway/rail at-grade crossings. Without a clear statement to the contrary, the Board will not assume that Congress removed any power to impose reasonable and feasible conditions to mitigate these impacts.

Environmental Analysis. With the assistance of SEA, the Board has analyzed the potential environmental impacts of this transaction, which involves changes to rail operations, the related construction of rail connections totaling about 4.9 miles, construction of double-track segments totaling about 19 miles, primarily within existing right-of-way, and changes in rail yard operations, by preparing an EIS addressing a broad range of environmental issues.

The Requirements of NEPA. NEPA requires that the Board examine the environmental effects of proposed Federal actions and to inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). Under NEPA, the Board must consider potential beneficial and adverse environmental effects in reaching its decision. The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential negative environmental impacts. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Robertson v. Methow, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects have been adequately identified and evaluated, the Board may conclude that other values outweigh the environmental costs. Id.

The EIS Process. SEA conducted a detailed analysis of all of the potential environmental impacts associated with the transaction. That analysis involved the development of a comprehensive environmental record to consider and study all aspects of the transaction. On December 21, 2007, the Board published in the Federal Register a Notice of Intent to Prepare an EIS, which initiated the scoping process; requested comments on a draft scope of study for the EIS; and notified the public of planned open house meetings on the draft scope. SEA held 14 scoping open house meetings in seven locations in January 2008. After reviewing and considering all comments received, the Board published a final scope of study for the EIS in the Federal Register on April 28, 2008.

In addition to the public scoping meetings, SEA held agency scoping meetings with Federal, state, and local agencies in Illinois and Indiana. At the Illinois agency scoping meeting, a number of agencies asked for a greater role in development of the Draft EIS. In response, SEA established the following five stakeholder focus area groups: Illinois Natural Resources/Water Resources Agencies, Illinois Transportation/Safety Agencies, Illinois Local Governments, Northern Indiana Agencies/Governments, and Indiana State Agencies. SEA invited 38 agencies to participate in the stakeholder focus area groups and to provide feedback in their areas of expertise. After providing all participants with a copy of the final scope of the EIS, SEA held five stakeholder meetings in the Chicago area on April 29-May 1, 2008. The stakeholders reviewed the methodologies and data sources being used in the analysis for the Draft EIS, offered comments and suggestions, and provided additional data.

SEA consulted extensively with appropriate Federal, state, and local agencies throughout the preparation of the EIS, including the United States Environmental Protection Agency (EPA), the United States Fish and Wildlife Service (USFWS), and state historic preservation offices. SEA also identified 28 communities with minority or low-income populations potentially affected by the transaction. SEA then conducted targeted and specific outreach efforts to engage these communities in the environmental review process, including direct calls to elected officials regarding the environmental review process and meetings with local representatives. SEA also met with the Metropolitan Mayors Caucus in Chicago to answer questions concerning the Board's process and conducted site visits to the project area.

SEA issued the Draft EIS on July 25, 2008, and made it available for public review and comment for a 60-day period to and including September 30, 2008. In addition to soliciting written comments on the Draft EIS, SEA held eight open house/public meetings throughout the Chicago area. Each meeting included an open house session and a more formal public meeting during which attendees could present oral comments. Comment forms were provided in several languages at the public meetings and were accepted on-site or by mail. A bilingual toll-free telephone line has remained open throughout the environmental review period's duration to record comments. Commenters could also submit electronic comments through the Board's website.

SEA received over 9,500 comments on the Draft EIS, including comments from members of the public, elected officials, Federal and state agencies, and local governments. The comments expressed both support for and opposition to the transaction. Many of those expressing support talked generally of project benefits, such as reduced noise or congestion along CN rail lines that would experience a decreased volume of freight rail traffic or improved regional rail traffic efficiency. A number of CN's rail freight customers wrote in support of the transaction because, by providing applicants a quicker route through Chicago, it would give their customers faster and more reliable service in shipping their products both regionally and nationally. Many of the commenters opposing the transaction raised concerns related to traffic delays and congestion, safety, and noise due to increased rail traffic (generally ranging from an additional 15 to 24 trains per day) along the EJ&E line. Commenters also questioned whether the reduction of rail traffic along the CN lines would be permanent and raised concerns that, if rail traffic through Chicago increases in the future, the potential benefits of the transaction could be short-lived.

In preparing the Final EIS, SEA revised information to clarify, update, and correct some information contained in the Draft EIS. In addition, SEA conducted additional analysis and evaluated new information furnished or suggested by agencies and the public during the public comment period. This additional analysis included supplemental evaluation of the potential impacts of the transaction on the Metra STAR Line service and the planned expansion of NICTD commuter service, school safety, hazardous materials transport, quality of life in communities along the EJ&E line, noise and vibration, and biological resources.⁷⁵ Additional and updated

⁷⁵ The results of the additional analysis are presented in Chapter 2 of the Final EIS; a summary can be found in the Final EIS at ES-9 to ES-13.

analysis was also provided on average daily traffic counts (ADT)⁷⁶ and potential effects resulting from changes to: highway/rail at-grade crossings; delays to emergency services; rail operations and safety; air quality and intersection mobility; and modifications to planned changes to the originally-proposed Matteson Connection and a revised Double Track—Leithton Connection.

On November 18, 2008, the Board held a public meeting at its offices in Washington, DC to discuss with SEA major issues raised in comments on the Draft EIS and how SEA proposed to address them in the Final EIS. The meeting was open for public observation, but not public participation. A video broadcast of the staff briefing was accessible to all interested parties, including those in the Chicago area, through the Board's web site. The Final EIS was issued on December 5, 2008.⁷⁷

Alternatives Analyzed. Three alternatives were evaluated during the environmental review process: the proposed action; the no action alternative (under which SEA assessed rail operations that would take place on the EJ&E line if applicants did not acquire control of that line); and the proposed action with conditions, including environmental mitigation measures. As the courts have repeatedly found, under NEPA, the Board need only consider "reasonable, feasible alternatives,"⁷⁸ and the Board agrees with the Final EIS that these were the reasonable and feasible alternatives in this case. Alternatives that do not advance the purpose of the

⁷⁶ ADT measures the average number of vehicles that pass through a given point during a 24-hour period. Of the at-grade crossings, 25 had a predicted ADT of less than 2,500 vehicles in 2015 or had no train increases.

⁷⁷ On December 16, 2008, United States Representatives Melissa L. Bean, Peter J. Visclosky, Donald A. Manzullo, Judy Biggert, Peter J. Roskam, and Bill Foster (collectively, the Illinois Delegation) filed a letter, requesting that the Board reclassify the Final EIS as a revised Draft EIS. In support of this request, the Illinois Delegation notes that the Final EIS contained "substantially different findings and analysis" than in the Draft EIS and states that a revised Draft EIS would allow for further public input and comments on these findings. The Illinois Delegation's request will be denied. As discussed, the Board has taken a hard look at all the environmental issues in this case, provided ample opportunity for public comment, and responded to the concerns that were raised by interested parties and concerned citizens. The additional information set forth in the Final EIS simply clarifies or expands on information in the Draft EIS, and does not rise to the level of "significant new circumstances or information relevant to environmental concerns" cited by the CEQ regulations at 1502.9(c)(1)(ii) as justification for agencies to prepare supplemental environmental documents. Therefore, further environmental review, as suggested by the Illinois Delegation, is not necessary. Moreover, the 5-year environmental reporting and monitoring period, as well as the separate operational oversight period that we are establishing, will allow the Board to keep track of how the applicants implement the transaction and to take appropriate action if necessary.

⁷⁸ Mid States Coalition for Progress v. STB, 345 F.3d 520, 546 (8th Cir. 2003); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991) (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)).

proposal before the agency are not considered reasonable or appropriate.⁷⁹ SEA therefore properly eliminated four other proposed alternatives from detailed study in the EIS because they did not meet applicants' stated purposes and need for the transaction.⁸⁰

The No-Action Alternative. Some citizens and communities along the EJ&E line have asked the Board to withhold its approval of the transaction on environmental grounds and have argued that the Board has the power to do so. The Board need not reach the question of whether the Board has such power, however, because we do not find a basis in the record to deny approval on environmental grounds. Although some communities on the EJ&E line will experience adverse environmental effects, the Board finds that these effects are outweighed by the many transportation and environmental impact benefits that approval of this transaction would bring about.

The transaction should produce substantial transportation benefits by making CN more efficient, reducing transit times, and reducing congestion on rail lines in the Chicago region, many of which were laid out over 100 years ago and were not designed to facilitate the movement of through traffic.⁸¹ Because Chicago is the nation's largest rail hub and one-third of all rail freight traffic in the United States moves to, from, or through Chicago, reducing congestion in Chicago would have wide-ranging beneficial impacts on the movement of freight throughout the country. It would be inconsistent with the Congressional policy "to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and national defense," 49 U.S.C. 10101(4) and other aspects of the Rail Transportation Policy, 49 U.S.C. 10101(1)-(15), to forgo these benefits.

⁷⁹ See Native Ecosystems Council v. USFS, 428 F.3d 1233, 1246-47 (9th Cir. 2005) (the "range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project"); Simmons v. Army Corps of Engineers, 120 F.3d 664, 669 (7th Cir. 1997) (because "identifying, assessing and comparing alternatives costs time and money," an agency need not consider "every conceivable alternative," but should "focus its energies only on the potentially feasible, not the unworkable"). Accord Mayo Foundation at 550; Environmental Law and Policy Center v. NRC, 470 F.3d 676, 683 (7th Cir. 2006).

⁸⁰ These alternatives were: (1) expanded trackage rights to CN; (2) implementation of the CREATE Program in lieu of CN's acquisition of the EJ&E rail line; (3) acquisition of a different rail line within the Chicago metropolitan area; and (4) construction of a bypass outside of the EJ&E rail line well away from the Chicago metropolitan area. As the Final EIS explains (at 1-16), these alternatives would be unreasonable because they would not give CN full ownership and use of a continuous rail route around Chicago and applicants could not gain access to the EJ&E rail yards. Further, some of the alternatives would be more expensive or would adversely impact the environment more than the transaction. See Chapter 2.5 of Draft EIS (at 2-65 to 2-69).

⁸¹ See CN Application, Exh. CN-1 at 23.

Moreover, many communities along CN's existing lines will experience environmental benefits from the reduction in rail traffic as CN reroutes traffic around Chicago over the EJ&E line. The Board does not believe that it is appropriate for these communities to continue to bear the full adverse environmental impacts of rail congestion in Chicago in order to protect the communities along the EJ&E line from traffic increases.

Finally, traffic on the EJ&E line could increase significantly even without CN's acquisition. The Board does not regulate frequency of service except to ensure service adequacy. Therefore, the current owner and the carriers with overhead trackage rights on the EJ&E could increase the frequency of trains on the line without Board approval and without environmental mitigation. Nor is prior Board approval required for many categories of railroad construction. Here, the EJ&E is an operational rail line, and the current owner could double-track the entire line without Board approval and without Board-imposed environmental mitigation. Under these circumstances, the communities along the EJ&E line do not have a "reliance interest" to be free from the adverse effects of traffic increases on the line, and denying the transaction could actually make the communities worse off because the environmental effects of future traffic increases would not be mitigated.

The Board appreciates the concerns of the communities along the EJ&E line and is imposing substantial mitigation measures to reduce the adverse impacts of the increase in traffic levels that will result from approval of the transaction. The Board's consistent practice has been to mitigate only those impacts that result directly from a proposed transaction. However, the Board does not require mitigation for existing environmental conditions, such as the effects of current railroad operations.

Overview of Environmental Mitigation. After carefully considering the entire environmental record, and except as otherwise stated here, the Board adopts all of SEA's analysis and conclusions, including those not specifically discussed below. However, for reasons stated in this decision, the Board is modifying several of SEA's final recommended mitigation conditions. The Board is satisfied that the Draft EIS issued for public review and comment, and the Final EIS, which responds to those comments and contains additional analysis, together have taken the requisite "hard look" at the potential environmental impacts associated with the transaction. The Board agrees with SEA's analysis of alternatives, and with the exceptions addressed below, the Board finds that SEA's final recommended environmental mitigation is reasonable and feasible to address the environmental effects of the transaction that SEA identified as potentially significant in the course of the environmental review.⁸²

As discussed in more detail below, the Board's environmental conditions require applicants to comply with all of their voluntary mitigation,⁸³ and include extensive additional

⁸² The Board has followed here its consistent practice of mitigating only impacts resulting directly from the transaction, and not requiring mitigation for existing conditions and existing railroad operations.

⁸³ Applicants proposed voluntary mitigation measures that were set forth in the Draft EIS. In their comments on the Draft EIS, applicants included revised voluntary mitigation,
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mitigation measures. There is mitigation for eight substantially affected highway/rail at-grade crossings, including requiring two grade separations: one at Ogden Avenue near Aurora, IL, and one at Lincoln Highway in Lynwood (with applicants responsible for 67% of the cost of the grade separation at Ogden Avenue and 78.5% of the cost of the Lincoln Highway grade separation, as discussed below). As the Final EIS explains, two other crossings (Woodruff Avenue and Washington Street) in Joliet also would have qualified for mitigation that could have included a grade separation. However, the City of Joliet and applicants have negotiated a mutually acceptable agreement that includes tailored mitigation that applicants would provide for Joliet that is more far-reaching, in certain respects, than mitigation the Board unilaterally could impose. Therefore, no mitigation for those crossings is imposed beyond requiring compliance with the parties' negotiated agreement.

In addition, there is mitigation requiring applicants to install a closed-circuit television (CCTV) system with video cameras to facilitate emergency service response at seven locations in Illinois and Indiana.⁸⁴ The Board's mitigation also includes noise and vibration mitigation, including assisting Barrington to maintain its existing quiet zone⁸⁵ and vibration mitigation for Fermilab in Batavia, IL. Mitigation related to school and pedestrian safety, including mitigation requiring appropriate fencing, also is imposed. Other conditions address the potential effects of the transaction-related construction activities. There also will be a 5-year environmental reporting and monitoring period condition requiring applicants to file quarterly reports on their progress in implementing the Board's mitigation conditions and also to notify the Board if applicants substantially depart from their traffic projections on the five existing CN lines through Chicago on more than a short-term, temporary basis. This monitoring and reporting condition will allow the Board to take appropriate action if there is a material change in the facts or circumstances upon which we relied in imposing specific environmental mitigation.

Finally, the Board's mitigation requires applicants to comply with the terms of their agreement reached with Amtrak, and their agreements with Joliet, IL, Crest Hill, IL, Dyer, IN, Schererville, IN, Chicago Heights, IL, Mundelein, IL, Hoffman Estates, IL, Frankfort, IL, and Griffith, IN,⁸⁶ and includes mitigation for the transaction-related construction activities. The

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which they supplemented on November 13, 2008. Applicants' final voluntary mitigation addresses such issues as grade crossings, hazardous materials transportation, land use, emergency vehicle delay, community outreach, noise and vibration, and biological and water resources. In some cases, our conditions enhance or modify applicants' voluntary mitigation.

⁸⁴ Some locations recommended for mitigation in the Final EIS have been omitted because of subsequent negotiated agreements.

⁸⁵ A quiet zone is a segment of track along which locomotive horns need not be routinely sounded. The Federal Railroad Administration (FRA) requires railroads to sound horns at highway/rail at-grade crossings unless a quiet zone has been established.

⁸⁶ The mitigation agreements reached with Schererville, Dyer, Chicago Heights, Mundelein, Hoffman Estates, Frankfort, and Griffith were reached after the issuance of the Final
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Board encourages communities and other entities and the applicants to reach negotiated agreements at any time during the environmental reporting period the Board is imposing. Mutually acceptable negotiated agreements can be more far-reaching than site-specific Board-imposed mitigation and are tailored to the specific needs of the community or other entity. Therefore, if negotiated agreements are reached after the Board's decision here has been issued and becomes effective, the Board will impose the terms of these negotiated agreements as additional mitigation conditions in subsequent decisions.⁸⁷

Analysis of Environmental Issues. The EIS evaluated a broad range of environmental issues, including: rail operations, safety, transportation systems (highways, railroads, waterways, and airports), hazardous waste sites, land use, socioeconomics, environmental justice, energy, air quality and climate, noise and vibration, biological resources, water resources, and cultural resources. The study area consisted of the Chicago metropolitan area, which includes the City of Chicago, and approximately 60 smaller communities, in Lake, Cook, DuPage, Grundy, Will, and Kendall counties in Illinois, and Lake County in Indiana. The study area included downtown Chicago, with its relatively high population density, along with surrounding counties that have strong social, economic, and cultural ties to the central urbanized area, as measured by commuting patterns, employment locations, and sense of place. The study area also included the communities along the EJ&E line that would be potentially affected by the increased rail operations associated with the transaction.

As the EIS explains, the transaction as proposed would produce significant transportation efficiency benefits by reducing congestion in Chicago and reducing transit times required to move railcars and would result in environmental benefits to communities located along the five CN rail lines leading into and out of Chicago—including decreased vehicle traffic delay, reduced noise, reduced air emissions, and fewer shipments of hazardous materials by rail. See Final EIS at ES-2-5, 20. At the same time, the EIS makes it clear that communities along the EJ&E rail line would experience increased train traffic, which could result in adverse impacts caused by increases in vehicle traffic delay, noise, air emissions, and risks to pedestrian and vehicular traffic at crossings. Moreover, the environmental analysis shows that pre-existing conditions along the EJ&E rail line already are problematic to the communities along the line. As the EIS explains (see, e.g., Final EIS at 2-32), these communities currently experience substantial vehicular traffic delays and safety risks during peak travel times due to the high

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EIS. The final mitigation conditions in the Final EIS have been revised to reflect these agreements.

⁸⁷ The terms of the negotiated agreements will be imposed in lieu of the site-specific mitigation conditions included in the Final EIS. Specifically, conditions requiring applicants to conduct a review of and address the concerns surrounding the Lake Street and Miller Street highway/rail at-grade crossings have been removed (conditions 7 and 8 in the Final EIS). Also, facilities in Mundelein, Chicago Heights, Schererville, and Griffith have been removed from the list of locations included under condition 18 in the Final EIS. Likewise, the terms of the negotiated agreement reached with Frankfort will be imposed in lieu of condition 14 in the Final EIS, regarding Camp Manitoqua.

volume of cars and trucks on roadways, and train noise and safety risks due to the freight and passenger trains that are currently on the EJ&E rail line.

Specific issues of particular concern. The Board addresses here some of the issues that were of particular concern to commenters during the EIS process. Except as otherwise specifically stated here, the Board is satisfied that all areas of concern have been fully studied and properly analyzed, and we adopt the conclusions in the Final EIS.

Rail Traffic Projections. Concerns were raised throughout the EIS process about the traffic projections used in the EIS. Applicants provided in their operating plan a traffic increase forecast covering the first 3 years following implementation of the transaction, and suggested that forecasts of future conditions beyond that time horizon would not produce accurate and reliable predictions. During scoping, commenters argued that the 3-year projections were too short and that SEA should project traffic until 2020 or beyond.

For the reasons set forth in the Final Scope and the EIS, SEA reasonably decided to use 2015 as the planning horizon year. As SEA explained, that year represented the limit of what is reasonably foreseeable with regard to projected rail traffic on the EJ&E line, and projections beyond 2015 would be speculative. SEA also properly found that the applicants' operating plan and rail traffic forecasts were reasonable and reflected the maximum amount of traffic that would likely move on the EJ&E line in 2015, based on a detailed assessment that evaluated (1) the EJ&E rail line capacity based on a constraint analysis,⁸⁸ Line Occupancy Index (LOI) evaluation,⁸⁹ and use of the Rail Traffic Control (RTC) model⁹⁰ and (2) additional analysis that included major trends in rail freight movement and an economic analysis based on anticipated growth in the gross national product.⁹¹

⁸⁸ A constraint analysis determines the location of bottlenecks, *i.e.*, points or areas of congestion where traffic levels could not be expanded without addressing the congestion. SEA identified and factored in several constraint points on the EJ&E rail line. See Draft EIS at 2-24.

⁸⁹ A Line Occupancy Index is a ratio between the theoretical train capacity of a line segment and the projected actual train use of a line segment. This analysis calculates the amount of time a train would take to pass through a specific segment, taking into account such factors as train speed and length, track speed, number of tracks, and other factors that may affect capacity, such as bridge lifts.

⁹⁰ The RTC model is an industry-standard dispatching model used in this case to evaluate the ability of trains to operate on the EJ&E rail line based on factors such as track alignment, locations of crossings, interlocks, and turnouts. See Draft EIS, at 2-25.

⁹¹ DOT had expressed concerns about some of SEA's assumptions in its comments on the Draft EIS. The Final EIS fully responds to DOT's comment on the Draft EIS, however, and on November 25, 2008, DOT submitted a letter to the Board indicating that its concerns about CN's ability to implement its post-merger operating plan on the EJ&E line, and the concerns of others related to applicants' traffic projections, have now been addressed.

Traffic Caps. As previously noted, the rail traffic projections in the EIS show that, as rail traffic increases on the EJ&E line as a result of the transaction, there would be corresponding decreases—and potential benefits—in the communities along the five CN lines in the Chicago area on which CN's traffic now moves. The traffic decreases would not necessarily be permanent, however, because, even if they increase traffic over the EJ&E line, applicants could decide to reintroduce more trains back onto the CN lines at some point in the future if the demand for applicants' service increases beyond what is reasonably foreseeable today.

During the EIS process, a number of commenters requested that the Board impose traffic caps on the number of trains applicants could route on the lines on which CN's traffic now moves to ensure that the benefits of the transaction are preserved for a specific period of time. But traffic caps would not be reasonable or appropriate here. As discussed above, applicants' traffic projections are consistent with SEA's own extensive analysis. Even if traffic levels on the CN lines turn out to be somewhat higher than what the EIS projects, based on unanticipated changes in market conditions, there still would be less traffic on the CN lines if this transaction is implemented than would be the case if applicants lacked full access to the EJ&E line. Nevertheless, given the concerns that have been raised, the Board will modify the recommended reporting and monitoring condition in the Final EIS to require applicants to notify the Board, in the quarterly reports that applicants will submit for 5 years, of any substantial departure from the projected traffic levels upon which this decision is based. The Board recognizes, however, that there can be emergency or other temporary conditions that could lead applicants to use the current CN lines for traffic that would otherwise be routed over the EJ&E line on a short-term basis. Therefore, the Board's environmental monitoring and reporting condition (number 74) specifically exempts from this reporting requirement the need to report deviations that are only temporary or short-term (i.e., a rerouting to deal with an emergency, or to reduce congestion caused by temporary construction or maintenance activities on a line segment).

Highway/Rail At-Grade Crossing Analysis. Many of the comments expressed concern about the impact on safety and congestion at highway/rail at-grade crossings from increased rail traffic on the EJ&E. Therefore, SEA conducted a comprehensive analysis of highway/rail at-grade crossings that would be potentially affected by the transaction during the environmental review process. SEA's analysis of impacts is based on Federal Highway Administration (FHWA) standards and guidelines for evaluating safety and congestion at at-grade crossings. From a safety perspective, SEA's analyses considered at-grade rail crossing accident probability and safety factors related to increased freight traffic that would result from the transaction. The accident probability analyses addressed the potential for rail and vehicle accidents. The transportation analyses focused on vehicular delays and queue length changes at rail crossings due to the projected increases in rail traffic. Detailed analyses were done at highway/rail at-grade crossings that have an ADT of 2,500 vehicles per day or are within 800 feet of another crossing. SEA conducted the analyses for projected traffic levels in 2015.

The Draft EIS reviewed all highway/rail at-grade crossings on the EJ&E line and the CN lines to identify those that met the threshold for detailed analysis (see Draft EIS, section 4.3). SEA's evaluation of vehicle safety is described in section 4.2 of the Draft EIS. It showed that, while overall predicted highway/rail at-grade crossing accidents would decrease under the transaction, the transaction would cause three crossings on the EJ&E line to have a high

predicted accident frequency.⁹² Three crossings on the EJ&E line would potentially experience a substantial increase in exposure of highway vehicles to trains to one million or greater per day.⁹³

The Draft EIS also evaluated the potential transportation effects of increased rail traffic at highway/rail at-grade crossings by the year 2015. Using screening criteria established by the Board in prior cases involving the construction of new rail lines (see Draft EIS, Table 4.3.1), in particular a minimum ADT of 2,500 vehicles per day in 2015, SEA determined that 87 out of 112 crossings along the EJ&E line met the Board's thresholds for further environmental analysis. SEA performed a detailed analysis of vehicle delays, mobility issues and length of vehicle queues at the 87 crossings in order to assess the potential effects of the transaction on the area's transportation system.⁹⁴

Based on this analysis, SEA concluded in the Draft EIS that 16 crossings would be "substantially affected," which SEA defined as a situation where transaction-related queue length would block a roadway that would not otherwise be blocked; the roadway crossing would be at or over capacity (Crossing Level of Service (LOS) E or F as set forth in the Draft EIS at 4.3-10); or total delay for all delayed vehicles would be more than 40 hours per day. The criteria for determining whether a crossing would be "substantially affected" are based on FHWA guidelines. SEA presented a range of mitigation options for fifteen crossings that could potentially warrant mitigation and requested comments on the mitigation options. See Draft EIS at 4.3-50.

In response to numerous comments on the Draft EIS, SEA updated its analysis of transportation systems in the Final EIS.⁹⁵ The Final EIS identified 13 at-grade crossings on the EJ&E line that would likely be substantially affected by the transaction. The changes reflect

⁹² Woodruff Road in Joliet, IL, and Lake Street and Miller Street in Griffith, IN.

⁹³ Ogden Avenue and Montgomery Road in Aurora, IL, and Lincoln Highway in Lynwood, IL.

⁹⁴ As the Draft EIS explains (at 3.3-1 to 3.3-28), SEA's analysis factored in the expected increase in freight traffic and traffic growth forecasts unrelated to the transaction. SEA calculated blocked crossing time per train; average delay per delayed vehicle; total delayed vehicles per day; vehicle queue length and number of vehicles; average delay for all vehicles; and total delay for all vehicles per day.

⁹⁵ In its updated analysis, SEA used the same three criteria thresholds to determine if highway/rail at-grade crossings would be substantially affected: (1) crossing LOS, (2) effects on queue length, and (3) cumulative delay for all vehicles delayed at a crossing in a 24-hour period. In some cases, SEA has found it adequate to use only LOS, which determines the effects of a proposed transaction at a single point along a roadway at the affected crossing. Crossing LOS, however, does not take into account the effects of a proposal on mobility in a community or region. There are many locations along the EJ&E line where roadways are important to regional mobility, such as Hough Street (IL 59) in Barrington, IL, an important commuter route in the region. Therefore, SEA used queue length and total vehicle delay, in addition to LOS, to fully understand the effects of the transaction on mobility. See Final EIS at 4-7 to 4-8.

updated ADTs provided by the IDOT and Lake County, IL, and the impact of improved train speed.⁹⁶

As the Final EIS explains (at 2-43 to 2-44 and 4-11 to 4-22), SEA considered the individual characteristics of each highway/rail at-grade crossing site, as well as the information provided in public comments, in determining what, if any, mitigation would be appropriate for the substantially affected at-grade crossings. Based on its analysis, SEA recommended mitigation for eight crossings and determined that mitigation was not needed for five crossings.⁹⁷ As part of its analysis of mitigation measures, SEA explained (see Final EIS at 4-9) that mitigation for substantially affected at-grade crossings generally includes: (1) traffic advisory signs to notify drivers to stay clear of intersections; (2) roadway modifications,⁹⁸ or (3) grade separation.⁹⁹ To develop its final mitigation recommendations, SEA considered a host of factors, including the importance of the highway at the crossing to regional traffic flows, existing congestion, existing structures (such as mature trees and local roadways) near the highway/rail at-grade intersection, and the cost of a grade separation. SEA's analysis of each substantially affected crossing is set forth in the Final EIS at 4-7 through 4-22.

SEA ultimately concluded that it would be appropriate for the Board to require two grade separations: one at Ogden Avenue in Aurora, and one at the Lincoln Highway in Lynwood. The Board agrees that a grade separation is warranted at those locations. According to the Final EIS,

⁹⁶ Updating the ADTs removed three crossings and added two as substantially affected. Improved train speed removed two crossings. See Final EIS, Figure 2.5-1 at 2-34, 2-32 to 2-44, and 4-8.

⁹⁷ The eight crossings needing some form of mitigation are: Old McHenry Road, Hawthorn Woods; Main Street, Lake Zurich; Hough Street, Barrington; Ogden Avenue, Aurora; Plainfield-Naperville Road, Plainfield; Woodruff Road, Joliet; Washington Street, Joliet; and Lincoln Highway, Lynwood. The five crossings not needing mitigation are: Diamond Lake Road, Mundelein; Montgomery Road/83rd Street, Aurora; Western Avenue, Park Forest; Chicago Road, Chicago Heights; and Broad Street, Griffith. See Final EIS, Figure 2.5-1, at 2-34. A thorough discussion of why the Board is excluding five of the substantially affected crossings from any mitigation can be found in section 2.5 of the Final EIS.

⁹⁸ Roadway modifications such as widening a road can increase capacity and reduce or eliminate queue length. However, widening a roadway may not be practical, and can potentially create a bottleneck where two lanes merge. Roadway widening also must be consistent with local and regional roadway planning, and the impacts of roadway widening on a community can be greater than the effects of increased train traffic, due to existing conditions (such as structures or mature trees that might need to be removed in order to widen the road). Final EIS at 4-9 to 4-10.

⁹⁹ Grade separating a highway/rail at-grade crossing eliminates any effect of increased train traffic on vehicle queue lengths, as well as potential safety concerns related to the exposure of vehicular traffic to freight trains; however, as the Final EIS states (at 4-10), a grade separation would not eliminate any queuing from traffic lights in a community. Grade separations also can potentially modify community character, and they are extremely costly. See Final EIS at 4-10.

the Ogden Avenue crossing has the highest ADT of any of the impacted at-grade crossings, and the total vehicle delay at the crossing is expected to go from 1,133 minutes per day under the no-action alternative to 4,377 minutes per day after the transaction. Lincoln Highway is also among the highest ADTs; it would go from a total delay under the no-action alternative of 395 minutes per day to 3,034 minutes per day after the transaction. The vehicle queue at the crossing would back up 940 feet and would therefore potentially block the intersection at Sauk Trail (a major thoroughfare).

Woodruff Road and Washington Street in Joliet also would be substantially affected because the total delay of 9,381 minutes and 9,879 minutes respectively are significantly higher than SEA's 2,400 minute threshold, and the transaction is expected to reduce the crossing LOS from LOS B to LOS F. Thus, as the Final EIS concludes, if the applicants' negotiated agreement with the City of Joliet were not in place, SEA would have recommended mitigation for those crossings that could have included grade separations. However, the City has entered into a negotiated agreement with applicants that both parties find satisfactory to address potential local concerns. Accordingly, the Board agrees with SEA that the mitigation for those crossings should be to require compliance with the parties' own agreement. See Final EIS at 4-18 & Table 4.2-1.

The Board will also impose mitigation requiring traffic advisory signs for four of the other substantially affected at-grade crossings to alleviate the potential to block an adjacent intersection because of increased queue length.¹⁰⁰ While numerous commenters requested grade separations at other substantially affected crossings, or questioned how effective traffic advisory signs could be, we agree with SEA's analysis in the Final EIS explaining why a grade separation (or other mitigation such as requests to place the EJ&E line in a trench in Barrington) would not be practical or warranted at those crossings.¹⁰¹ See Final EIS at 4-12, 4-14, 4-18, and 4-22. No mitigation related to roadway modifications (including closures) will be imposed, but as SEA explained (Final EIS at 4-16), where, as in Barrington, IL, roadway modifications could improve conditions, nothing in this decision prevents the community from negotiating with the applicants for roadway modifications.

Grade-Separation Funding. Many commenters requested that we require applicants to fully fund whatever grade-separated crossings we might require. But as SEA explained (Final EIS at 4-22), the primary cause of the existing traffic congestion in the communities along the EJ&E line is the high number of vehicles and lack of capacity on the current roadway system. Even where trains are responsible for traffic congestion, the problem would not be caused solely by applicants' trains on the EJ&E line, but rather by the combined presence of multiple freight railroads and, in some locations, commuter trains as well. It would be inappropriate to hold the applicants responsible for the inadequate roadway system that now exists in the communities along the EJ&E line and the rarity (and in some communities, the absence) of grade-separated

¹⁰⁰ See Final EIS, Table 4.2-1, at 4-11.

¹⁰¹ In response to numerous comments about congestion in the Barrington area, SEA prepared a traffic model to help it evaluate potential mitigation strategies. The results of the analysis show that, under the transaction, the Barrington area total delay time would increase by 4% and 5% during the AM and PM peak periods. See Final EIS at 2-48-49 and Addendum A.

crossings.¹⁰² Because many of the traffic problems along the EJ&E line are existing conditions, it would not be reasonable to require applicants to bear the entire cost of the design and construction of the two grade separations that we are requiring at Ogden Avenue and Lincoln Highway.

At the same time, the Board rejects the argument of applicants and some other railroads that, based on the precedent of grade separations using Federal funds, the Board should require applicants to pay only 5% of the grade-separation cost (the typical railroad share for crossings that obtain Federal funding). FHWA regulations limit railroad contributions to the cost of grade-separated crossings funded with federal highway grants to 5%, on the theory that a railroad typically derives little or no benefit from grade separations. 23 CFR 646.210(b)(1), (3). That rationale does not apply here, however. In this case, the applicants have sought, and in this decision are receiving, the substantial benefit of the Board's approval of this transaction, which will change the character of the EJ&E line from a line serving local traffic that also facilitates longer-haul movements through haulage and trackage rights into a line that will be integrated into CN's North American rail network at the very heart of the system. As the Final EIS shows, this transaction would have a substantial adverse effect on vehicular traffic delays and, in some areas, regional and local mobility and safety at grade crossings. Thus, applicants' share of the cost should be more than the traditional railroad share for grade-separation projects.

In the Final EIS, SEA suggested two different approaches for apportioning the costs of grade separating the crossings at Ogden Avenue and Lincoln Highway:¹⁰³ (1) a regional approach that considers all highway/rail at-grade crossings affected by the transaction on both the EJ&E rail line segments and the CN rail line segments, and measures total regional impact to vehicle delay; and (2) an approach that focuses only on the individual, site-specific impact of the transaction to vehicle traffic delay at Ogden Avenue and Lincoln Highway. (See Final EIS at 4-24 to 4-25). Under SEA's regional approach, applicants' contribution to the cost of the two grade separations would be 15%, because the transaction would cause a net increase in vehicle delay in the Chicago area of 356 hours per day out of a total of 2,259 hours per day for all the highway/rail at-grade crossings examined. (Final EIS at 4-24). Under SEA's site-specific approach, the transaction would contribute 74% of the total expected vehicle delay at Ogden Avenue (because the total delay under the no-action alternative would be 1,133 minutes, which would increase to 4,377 minutes under the transaction). (Final EIS at 4-24 to 4-25). For Lincoln Highway, SEA calculated that the transaction would contribute 87% of the total expected vehicle delay (based on a site-specific analysis showing that the total delay at that crossing under the no-action alternative would be 395 minutes, compared to 3,035 minutes based upon the applicants' projected train increases under the transaction). (Final EIS at 4-25).

In the Final EIS, SEA recommended that the Board use its regional analysis. However, the Board finds that SEA's regional approach understates the specific impact the transaction

¹⁰² The EIS states that, along the CN lines, 58% of all public highway/rail crossings are grade-separated. Along the EJ&E line, 27% are grade-separated.

¹⁰³ Because much of the mitigation we are imposing is site-specific, the Board agrees with SEA that a regional mitigation fund is unnecessary here.

would have on the grade crossings at Ogden Avenue and Lincoln Highway. On the other hand, the Board is concerned that SEA's alternative approach, which assigns cost responsibility to CN based solely on the impact of the transaction on traffic delay at those two crossings, is incomplete because, as noted earlier, the need for mitigation at those intersections arises not only from the transaction-related increase in traffic delay, but from the transaction-related increase in collision exposure as well.

Therefore, the Board will determine CN's required share of the cost of the grade separations at Ogden Avenue and Lincoln Highway by taking into account the share of both traffic delay and collision exposure attributable to the transaction at each intersection. As discussed above, in the Final EIS, SEA calculated that the transaction would contribute 87% of the total expected traffic delay in 2015 at Lincoln Highway and 74% of the expected traffic delay in 2015 at Ogden Avenue. SEA calculated expected changes in collision exposure as well, by using the standard methodology of multiplying the number of trains per day by the number of vehicles per day at each crossing. The following table shows the percentages of collision exposure that is due to pre-existing conditions:

<u>Crossing</u>	<u>2015 No Action (NA)</u>	<u>2015 Proposed Action (PA)</u>	<u>NA/PA as %</u>
Ogden Avenue	723,927	1,821,345	40%
Lincoln Highway	298,217	999,905	30%

This means that the transaction's expected contribution to collision exposure in 2015 at Ogden Avenue is 60% (100%-40%) and at Lincoln Highway is 70% (100%-30%).

The Board's consistent practice has been to require applicants to mitigate only those impacts associated with the proposed action before us, not preexisting conditions. To do so here, for each intersection, the Board will average the transaction-related share of the two relevant impacts—traffic congestion and collision exposure—to arrive at a single figure representing the percentage by which the transaction is expected to contribute to those problems. That figure will constitute CN's required share of the cost of the grade separation at that intersection. Performing that calculation, the Board determines that, at Ogden Avenue, CN's share of the cost will be 67% ((74% transaction-related traffic delay + 60% collision exposure)/2), and, at Lincoln Highway, it will be 78.5% ((87% transaction-related traffic delay + 70% collision exposure)/2).

The Board will not require CN to escrow these funds, nor will it require CN to be obligated indefinitely for its share of the cost of grade-separating the crossings at these intersections. The State of Illinois should notify the Board and CN once the non-CN funds (typically, public funding) necessary to design and construct the two grade separations have been committed and are available. Additionally, a construction contract must be signed and construction initiated no later than 2015. Failure on the part of the State of Illinois to meet the 2015 deadline will result in CN being automatically released from mandated financial responsibility related to these two grade-separation projects.

The Board notes that grade separations usually involve three phases: preliminary engineering/environmental review; right-of-way acquisition/utility relocation; and actual construction. The Board intends for applicants to contribute the cost percentages set out above for each of these phases. However, it would not be fair to require applicants to pay for repeated engineering studies related to these grade separations. Applicants will be obligated to contribute their share of the cost of only one preliminary engineering study for each grade separation. The Board's final conditions reflect these changes. Finally, as part of the Board's quarterly environmental monitoring and reporting requirement (see Appendix A, condition 74), applicants shall report on the progress and costs associated with these two grade-separation projects, so that the Board can monitor the reasonableness of those expenditures.

Quality of Life. The Draft EIS identified only minor effects on populations and demographics, economy, taxes, property values, housing, communities and community cohesion, travel patterns, and community facilities and public services. Many residents of communities along the EJ&E line raised concerns in their comments that increased train traffic due to the transaction would severely impact their quality of life. Following issuance of the Draft EIS, SEA prepared additional analysis on property values, socio-economics, and other quality-of-life issues, which is presented in the Final EIS at 2-74-96, 1-105-111. This analysis shows that air emissions, noise, vibration, and traffic delays from the increase in train traffic on the EJ&E line would affect residences located near the line. But these potential adverse effects are not expected to be great enough to induce a large number of residents to change their behavior or move, and impacts would be limited to the vicinity of the EJ&E line. While the transaction could have some adverse impact on property values, the Final EIS shows that the impacts typically would be far less than the amount claimed by some of the commenters. Further, the Final EIS contains mitigation to reduce the potential quality of life impacts, such as conditions requiring applicants to furnish fencing, identify at-grade crossings where additional pedestrian warning devices may be warranted, and make Operation Lifesaver programs and informational materials regarding railroad safety available. The Board is satisfied that the EIS has fully and appropriately analyzed potential quality-of-life concerns and that the conditions imposed on the transaction (which include applicants' voluntary mitigation and additional conditions developed by SEA) are sufficient to minimize or eliminate them.

Emergency Response. In the Draft EIS, SEA determined that the transaction could adversely affect emergency service providers by increasing the potential for delay at highway/rail at-grade crossings due to increased train operations on the EJ&E line. Based on public comments on the Draft EIS, SEA performed additional analysis and determined that there were a total of 14 fire protection and hospital facilities that might be substantially affected by the transaction. See Final EIS Section 2.6, at 2-49 – 2-65; Table 4.2-2. With the exception of one facility that would not need mitigation because of a grade-separated crossing within a 3-mile radius of its location and six facilities located in communities with negotiated agreements, the Board is imposing mitigation to minimize impacts on emergency response at each of these facilities. The Board's mitigation requires applicants to install a real-time video monitoring (CCTV) system with video cameras at appropriate locations so that the movement of trains can be monitored and reasonably predicted. It also requires applicants to train two individuals from each affected emergency service provider to use the system. See Final EIS at 4-26. Applicants

also proposed several voluntary conditions (VM-42 through 48) that address potential impacts of the transaction on emergency vehicles and during construction.

Commenters raised concerns about how grade-crossing cameras can help emergency responders and the people they are attempting to help if the cameras were to show, for instance, that all area crossings are blocked. However, as the Final EIS explains, since the EJ&E line is in place and an active rail line today, the affected emergency service providers' current dispatching process includes the possibility that a crossing could be blocked. The mitigation that the Board is imposing will provide the emergency dispatchers with better and more timely information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities when appropriate. Therefore, the Board's mitigation is reasonable and feasible to address the potential impacts on emergency response discovered during the environmental review.

School Safety. Many commenters on the Draft EIS raised concerns regarding how the increased traffic along the EJ&E line might impact the safety of school children. Commenters stated that school buses cross the railroad tracks daily and could be delayed if crossings are blocked by trains, and that school children and other pedestrians could be at risk crossing the tracks by foot or bicycle. In response, SEA performed additional analysis to identify schools located along the EJ&E rail line that might be adversely impacted by increased train traffic. In addition, applicants proposed voluntary mitigation to provide fencing along the EJ&E line right-of-way (ROW) for schools and parks within 0.25 miles of the ROW (VM-10), to identify at-grade crossings where additional pedestrian warning devices may be warranted (VM-10); and to provide informational materials concerning railroad safety for schools within 0.50 miles of the ROW (VM-11). Applicants further agreed to make Operation Lifesaver programs available to affected schools (VM-43 and VM-44).

The Board is imposing applicants' voluntary mitigation along with the additional conditions (nos. 11 and 12) developed by SEA to strengthen it. The Board acknowledges that the safety of school children and pedestrians, as well as school bus delay, are important issues. But the EIS shows that the transaction would have only a minor adverse impact beyond existing risk at highway/rail at-grade crossings. In these circumstances, the Board finds that the conditions it is imposing are adequate to address the potential incremental adverse impact of the transaction.

Noise and Vibration. As explained in the Final EIS, applicants have proposed voluntary noise mitigation that would result in meaningful and appropriate noise reduction (see VM-3 through VM-5 and VM-77 through VM-83), which include constructing noise control devices such as noise barriers, installing vegetation or berms, or installing enhanced warning devices to allow communities to achieve quiet zone requirements. Also, the Board has imposed additional noise mitigation that requires applicants to consult with affected communities to identify locations where wheel squeal is considered a nuisance. The Board is also imposing a quiet zone condition for Barrington, noise mitigation for transaction-related construction activities, and vibration mitigation for Fermilab. Thus, the concerns raised about noise and vibration have been appropriately addressed.

Hazardous Materials. The EIS concludes that the transaction would increase the risk of an accident involving the discharge of a hazardous material along the EJ&E line and decrease this risk along the CN lines into Chicago. The Final EIS also explains, however, that the likelihood of a hazardous material incident or spill remains low throughout the region on all of these rail lines. Furthermore, the EIS shows that existing regulations,¹⁰⁴ along with applicants' current system of spill prevention and emergency spill response, and the voluntary and other mitigation the Board is imposing, will be adequate and more effective to address issues related to hazardous material shipments and possible spills than other containment measures suggested by commenters (such as impermeable membranes).

Passenger, Commuter Rail, and Airport Issues. As noted above, in a letter dated December 9, 2008, CN and Amtrak jointly informed the Board that they reached an agreement to amend the operating agreement between Illinois Central Railroad Company and Amtrak, dated February 1, 1995, which governs Amtrak's continued use of the St. Charles Air Line in Chicago. CN and Amtrak ask the Board to accept the terms of the agreement in lieu of applicants' voluntary mitigation measure 37, which the Board will do (see amended VM-37 and condition no. 62). The parties' agreement eliminates any remaining issues related to Amtrak.

In response to comments on the Draft EIS raising concerns about the effects of the transaction on Metra's STAR Line and future NICTD expansion plans, SEA performed additional detailed analysis for the Final EIS (as explained at 2-19 to 2-28). Based on this analysis, we conclude that the transaction will not have a substantial adverse effect on the potential implementation of the STAR Line service on the EJ&E line and that the transaction could potentially benefit future NICTD plans. There is also mitigation assuring continued discussion and cooperation with Metra on development of the proposed STAR line, including possible use of the EJ&E line (VM-39) and mitigation providing for continued access to the pedestrian tunnel between the Metra Park-n-Ride lot and the Metra Matteson train station (VM-40). This mitigation is adequate to address the potential concerns about these issues raised during the EIS process.

Concerns related to the effects of the transaction on Gary/Chicago International Airport expansion plans also have been addressed. The Board's environmental mitigation includes a condition (no. 19) requiring applicants to adhere to the terms of a preliminary memorandum of understanding (PMOU), announced in June 2008, to prevent the transaction from affecting the airport's expansion plans. The PMOU provides a framework to address such issues as relocation of the EJ&E line, construction of a bridge over the existing NS Gary Branch, and construction of a grade-separated crossing at Industrial Highway.

¹⁰⁴ In addition to the regulations cited in the Final EIS, there are new federal regulations governing the transportation of hazardous materials with which applicants must comply. See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 FR 72182 (Nov. 26, 2008) (final rule of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT)).

Environmental Justice. SEA did not identify any disproportionately high and adverse effects on minority or low-income populations in the EIS. However, in recognition of the large Spanish-speaking population in the Chicago metropolitan area and along many segments of the EJ&E line, applicants committed to distributing all media information in Spanish as well as English (see VM-2) and to providing Operation Lifesaver programs in Spanish upon request (see VM-44).

During the preparation of the Draft EIS, SEA conducted environmental justice outreach meetings with leaders who represented community groups and church congregations near the EJ&E line. At those meetings, SEA sometimes needed a translator. As a result, SEA recommended, and the Board is imposing, conditions requiring that certain materials and programs be made available in both English and Spanish, upon request.

Biological Resources. The Board's mitigation requires applicants to designate a local resource agency liaison to work closely with Federal, state, and local natural and water resource agencies, for 5 years from the effective date of the Board's final decision to ensure that adaptive management strategies are developed to protect the area's threatened and endangered species habitat and sensitive ecological resources, such as Cuba marsh and the Lake Renwick heron rookery, near Barrington. See conditions 29-33. In particular, the Board's mitigation requires applicants to work with relevant natural resource stakeholder groups, forest preserve districts, and Federal and state agencies, including USFWS, to establish, and fund for a 5-year period following this decision, appropriate monitoring programs to identify baseline conditions and post-transaction conditions in areas adjacent to forest preserves and designated natural areas for species of concern to these groups. See condition 30.

Following issuance of the Final EIS, the Board received a submittal from the Illinois Natural Resources/Water Resources Stakeholder Group (INR/WRSG), representing four forest preserve districts located on the EJ&E line in Lake, Cook, DuPage and Will Counties, Illinois, as well as the Illinois Department of Natural Resources, USFWS, and EPA. In its submittal, INR/WRSG explains that it is currently negotiating with the applicants and asks the Board to impose additional mitigation to address potentially adverse impacts to critical habitat and wildlife communities caused by construction of the Munger Connection and additional train traffic on the EJ&E.

INR/WRSG asserts that applicants' voluntary mitigation measures 64 and 104 and SEA's recommended mitigation measures 29 and 30, while a good start, are not adequate to satisfy their concerns. Consequently, INR/WRSG requests additional mitigation that would require applicants to: enter into agreements on the management of the four forest preserve districts; develop containment facilities at all new and future construction sites that traverse wetlands or waterways at risk of rapid contamination from possible spills of hazardous materials; transfer certain of CN's railway assets entering and terminating within the Goose Lake Prairie State Park; develop a website to facilitate communication with all resource management agencies; establish a \$10.5 million escrow fund with the USFWS Conservation Fund as partial compensation for adverse wildlife impacts; fund a 5-year study, to be conducted by an independent third-party contractor, on the causal impacts on flora, fauna, and aquatic resources along the EJ&E line

caused by the transaction; and contribute \$1.5 million annually to the USFWS Conservation Fund to meet tiered mitigation obligations determined by the impact study.

The Board appreciates the efforts of the INR/WRSO and notes that the participation of experts with first-hand knowledge and experience in managing natural resources is essential to adapting that management in light of the transaction. The Board has adopted SEA's recommended conditions 29-38 and 49-60 so that applicants can address the range of concerns raised by INR/WRSO in both Illinois and Indiana. There is no reason to believe that the process required under these conditions—that is, consultation, coordination, and study of baseline conditions—will not lead to effective solutions consistent with the goals of INR/WRSO. Imposition of the specific mitigation measures proposed by INR/WRSO would be inconsistent with the process contemplated by SEA's recommended mitigation. Further, requiring the placement of the containment facilities urged by INR/WRSO (impermeable containment membranes capable of holding the equivalent of two tank cars of product) within 500 feet of rail lines that traverse sensitive areas would create a new standard for carriers that transport hazardous materials. And, as discussed in the Final EIS, the Board finds that imposing this requested condition is unnecessary given existing regulations, applicants' current system of spill prevention and emergency spill response, and the voluntary and other mitigation the Board is imposing on this transaction.

The Board expects that progress toward the goal of mutually acceptable solutions will be documented in the quarterly reports mandated by conditions 72-74. If progress is not documented in applicants' reports, further action by the Board could be warranted.

Safety Integration Plan. Pursuant to 49 CFR 1106, applicants prepared a Safety Integration Plan (SIP) that specifically addressed the process applicants propose to safely integrate the two rail systems. Applicants filed the SIP with the Board on December 28, 2007, and submitted the SIP to FRA for review. On June 27, 2008, the applicants submitted a revised version of the SIP addressing certain points raised by FRA, and FRA has approved the revised SIP. SEA also independently reviewed both versions of the SIP. To ensure that applicants complete the ongoing SIP process, the Board is imposing conditions requiring applicants to comply with their approved SIP, which may be modified and updated as necessary to respond to evolving conditions. Under the Board's conditions, the ongoing safety integration process shall continue until FRA notifies the Board that the integration of applicants' operations has been safely completed.

Threatened or Endangered Species. In preparing the Final EIS, SEA and applicants met with the USFWS to discuss concerns raised about the Hine's emerald dragonfly, Karner blue butterfly, Indiana bat, Eastern prairie fringed orchid, turtle crossings, and noise effects on migratory birds. See Final EIS at 4-30. Applicants have provided voluntary mitigation to avoid impacts with Federally or state-listed threatened or endangered species and other species of concern. See VM-102 through VM-108. In addition, SEA recommended conditions 49 through 54 that require additional mitigation to protect biological resources. Based on extensive informal consultation and the Biological Report submitted to USFWS (see Final EIS, Appendix A.9), SEA concludes that the transaction may affect, but is not likely to adversely affect, listed threatened or endangered species. On December 16, 2008, USFWS provided its formal

concurrence finding that, as conditioned, the transaction may proceed without adversely affecting listed threatened or endangered species. Thus, all issues involving threatened or endangered species have been adequately resolved.

Conclusion. The Draft EIS and Final EIS demonstrate that the Board has taken the requisite “hard look” at environmental issues in this case. The Board concurs with SEA’s detailed analysis and conclusions regarding the potential environmental benefits and harms of the transaction and has imposed reasonable and feasible measures to reduce or eliminate potential adverse environmental impacts of the transaction. The Board recognizes that the transaction may have adverse environmental effects that cannot be fully mitigated. For example, horn noise from train operations cannot be fully mitigated without compromising safety. And even with mitigation, there will still be vehicle delays at highway/rail at-grade crossings. However, many of the potential effects (such as vehicle delay) pertain to existing conditions that are present today. Moreover, at the same time that applicants will increase rail traffic along the EJ&E line, there will be corresponding decreases in rail traffic, and potential environmental benefits, in communities along the CN lines in the Chicago area where CN rail traffic is routed today. Given the substantial transportation benefits of this transaction to shippers and interstate commerce, discussed above, the Board is satisfied that the final conditions that it imposes here provide appropriate safeguards to ensure that applicants maintain safe operations and protect the environment and the quality of life in affected communities to the extent practicable following applicants’ acquisition of EJ&EW.

Administrative Appeals. Finally, under the CEQ regulations (40 CFR 1506.10(b)), agencies must wait 30 days from EPA’s Federal Register notice announcing the availability of the Final EIS before issuing a final decision unless they have an internal appeal process. The Board has such a process (see 49 CFR 1115.3(a) (petitions for reconsideration)) and may, therefore, issue this final decision in less than 30 days from December 12, 2008, the date that the Final EIS was noticed. The Board agrees, however, with SEA’s recommendation to extend the administrative appeal process to permit parties to seek agency reconsideration of our final decision within 30 days after it is served, rather than the typical 20 days under 49 CFR 1115.3(e). The Board will consider any petitions for reconsideration in a subsequent decision.

Based on the record, the Board finds:

1. The acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of EJ&E West Company, as conditioned, will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States. The Board further finds that, to the extent that there are any anticompetitive effects, they are insubstantial and are outweighed by the public benefits.

2. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 35087, the proposed acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of EJ&E West Company is approved, subject to the imposition of the conditions discussed in this decision.
2. In STB Finance Docket No. 35087 (Sub-No. 1), the corporate family transaction referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(3).
3. In STB Finance Docket No. 35087 (Sub-No. 2), the CCP trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
4. In STB Finance Docket No. 35087 (Sub-No. 3), the GTW trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
5. In STB Finance Docket No. 35087 (Sub-No. 4), the IC trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
6. In STB Finance Docket No. 35087 (Sub-No. 5), the WC trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
7. In STB Finance Docket No. 35087 (Sub-No. 6), the CNR trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
8. In STB Finance Docket No. 35087 (Sub-No. 7), the CNR trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
9. Applicants must comply with all the conditions imposed in this decision, including, but not limited to all the conditions reflected in Appendix A, whether or not such conditions are specifically referenced in these ordering paragraphs.
10. Applicants must adhere to their representation that a unified CN/EJ&EW will not engage in "vertical foreclosure" by closing gateways, but, rather, shall keep all gateways affected by the control transaction open on commercially reasonable terms.
11. Applicants must adhere to their representation that they "will waive any defenses they might otherwise have as a result of the CN/EJE transaction, under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where shippers prior to

the CN/EJE transaction would have been entitled to regulation of a bottleneck rate under the Board's 'contract exception' to the general rule."

12. Applicants must comply with the monitoring and oversight condition imposed in this decision, and, in connection therewith, must file the monthly operational and quarterly environmental reports containing information discussed in this decision.

13. Approval of the CN/EJ&EW control application is subject to the conditions for the protection of railroad employees described in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

14. Applicants are required to adhere to any and all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

15. Any condition that was requested by any party in the STB Finance Docket No. 35087 proceeding that has not been specifically approved in this decision is denied.

16. Parties have until January 23, 2009, to file petitions for reconsideration. Replies must be filed by February 12, 2009.

17. This decision shall be effective on January 23, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey and Commissioner Buttrey commented with separate expressions.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, commenting:

I write separately to express my reasons for voting to approve the transaction before us.

From an economic policy perspective, I see the proposed project as one of national, if not international, significance. It is also a project that portends the future of transportation planning. Improved mobility of freight through the Chicago area is key to our economy. Those commodities traversing the area include components for construction and production of manufactured goods, energy resources, and finished goods – all of which contribute to the quality of life our citizens enjoy. Increased use of existing rail infrastructure is exactly the type of project our nation must support and implement if we are serious about shifting truck traffic to rail and reducing road traffic congestion.

From a legal perspective, in my view, 49 U.S.C. 11324(d) requires that the Board consider only competitive impacts in determining whether to approve or disapprove a “minor” merger transaction. I do not believe that the Board can deny approval of such a merger on grounds other than potential anticompetitive impacts. As stated in our decision, there will be no anticompetitive effects here, but even if there were, those effects would be outweighed by the public interest in meeting significant transportation needs.

It is gravely unfortunate that this project will impact the communities around Chicago to the extent it will, and I am a proponent of the enhanced mitigations we are ordering here. Indeed, I would have preferred that the Board require additional and more stringent mitigations. Specifically, I would have preferred an approach that closely tied increasing levels of mitigation at applicants’ expense to increasing levels of rail traffic, above the projections used in our analysis of this case. I will carefully scrutinize any divergence from applicants’ projections – both on rail and vehicular traffic – in future oversight proceedings.

NEPA directs that agencies take a so-called “hard look” at potential environmental impacts in carrying out their mandates. I am satisfied we have done so. The Board has the ability to soften the adverse environmental impacts of a merger transaction through reasonable mitigations. Our monitoring and oversight conditions will assure that the mitigations we order here continue to be reasonable once the transaction is implemented and operational.

For these reasons, in addition to those in the Board’s decision, I vote to approve the applicants’ transaction.

COMMISSIONER BUTTREY, commenting:

I join the Board's decision today to approve the proposed control transaction, but I am filing this separate expression to make clear that I would have gone much farther in imposing conditions to mitigate its environmental impacts. I appreciate the hard work that has been done by the Board's Section of Environmental Analysis and the Board's consultant. However, as I explained at the public meeting held on November 18, 2008, to discuss SEA's recommendations, I do not feel that the mitigation conditions outlined in the Final EIS will be enough. And although the Board's decision today does go beyond SEA's recommendations in some respects, I would have gone even farther.

In this proceeding, much has been made of the issue of congestion on the five existing CN lines within the City of Chicago. Indeed, that is the heart of applicants' case for approval of the transaction based on transportation benefits. Furthermore, the anticipated amelioration of some of that existing inner city congestion is the only basis for the Final EIS's conclusion that there are benefits sufficient to offset the high environmental impacts expected for the communities along the existing EJE lines, including several environmentally pristine nature preserves.

I fully support the Board's decision to retain jurisdiction over this transaction and to continue oversight for at least five years and to impose monthly monitoring and public reporting by CN. This will enable the Board, if necessary, to take additional steps or impose additional requirements if conditions warrant. However, I would have gone farther. Consistent with what a number of commenting parties requested, I would have imposed strict traffic caps on the existing CN lines within the City of Chicago as CN's trains are shifted to the outer EJE lines, to ensure that the touted benefits of reduced traffic on the inner city lines would be preserved. In this connection, I would be willing to reopen this proceeding during the oversight and monitoring period if it appears that the applicants do not live up to the commitment to reduce the number of train frequencies in the urban communities.

I also would have required applicants to reach a mutually-acceptable mitigation agreement with every impacted community along the EJE lines before rail volumes could be increased above pre-transaction levels. I commend CN for having reached agreements with many of the impacted communities. Although this process started slowly, the pace began to pick up toward the end of the proceeding after the strength of the opposition became clear. I feel strongly that this process should be allowed to continue. No one is in a better position to determine what mitigation measures are needed and appropriate than the affected community itself. In my view, this Board should not presume to know better than the affected communities what mitigation will be required in the public interest. If this transaction truly has as many potential benefits as applicants claim, then I believe that national, state and local officials would have every incentive to help CN and the affected communities along the EJE reach reasonable compromises in a timely fashion, so that the overall benefits of this transaction could be achieved.



The Chicago area is and has long been a major transportation hub for all modes of transportation — rail, highway, air and water. The insufficiency of the existing Chicago-area rail infrastructure to handle present and future needs for freight and passenger transportation is well known. Possible approaches to solve the problem have been discussed at the local, state, regional and national level for some time. The CREATE project attempted to address the problem on a comprehensive basis but has not yet gained sufficient momentum to provide the answer. In the meantime, individual railroad companies have taken steps to ameliorate their own situations. For instance, new intermodal facilities have been built far outside the city to avoid much of the congestion, and other infrastructure projects have been undertaken by individual railroads in an effort to remove some of their individual bottlenecks.

This transaction is an effort by CN to address its own problems in moving traffic through Chicago. Much of this traffic will be low value intermodal and merchandise traffic from the Pacific rim moving through Chicago on its way to other destinations in the Midwest and Southeast. While I see the benefits to CN's rail operations, I believe that it is unfortunate that this transaction does not address Chicago's insufficient rail infrastructure on a more comprehensive basis. I also fear that it could inhibit future much-needed regional commuter rail options including the proposed STAR Line service.

For all of these reasons, I would have required CN to do more to assure the benefits and ameliorate the impacts, as conditions of the Board's approval of this transaction.

APPENDIX A: ENVIRONMENTAL CONDITIONS

Applicants' Voluntary Mitigation

Safety

Grade Crossings

- VM 1. Applicants shall consult with appropriate agencies to determine the final design and other details of the grade crossing protections or rehabilitations on EJ&EW's rail line. Implementation of all grade crossing protections shall be subject to the review and approval of the Federal Railroad Administration ("FRA") and the appropriate state Departments of Transportation.
- VM 2. Applicants shall coordinate with the appropriate state departments of transportation, counties, and affected communities along the EJ&E rail line to develop a program for installing temporary notification signs or message boards, where warranted, in railroad right-of-way ("ROW") at highway/rail at-grade crossings, clearly advising motorists of the increase in train traffic on affected rail line segments. The format and lettering of these signs shall comply with the Federal Highway Administration's (FHWA) *Manual on Uniform Traffic Control Devices* (FHWA 2007b) and shall be in place no less than 30 days before and 6 months after the acquisition by CN of the control of EJ&EW. The Applicants shall conduct a media campaign throughout the affected counties and communities surrounding the EJ&E rail line advising the public of increased operations along the EJ&E rail line. The campaign shall include the use of different media (radio, television, newspaper, Internet). Applicants shall distribute all information in both English and Spanish, where appropriate.
- VM 3. Where necessary for implementation of a Quiet Zone, and in consultation with the affected community, FRA, and the appropriate state Department of Transportation, Applicants shall construct or install roadway median barriers to reduce the opportunity for vehicles to maneuver around a lowered gate.
- VM 4. Applicants shall cooperate with the municipalities affected to determine which improvements would be necessary for existing Quiet Zones to maintain FRA compliance.
- VM 5. Applicants shall cooperate with interested communities for the establishment of Quiet Zones and assist in identifying supplemental or alternative safety measures, practical operational methods, or technologies that may enable the community to establish Quiet Zones.
- VM 6. Applicants shall consult with affected communities to improve visibility at highway rail at-grade crossings by clearing vegetation or installing lighting to illuminate passing or stopped trains.
- VM 7. Within 6 months of acquisition by CN of the control of EJ&EW, Applicants shall cooperate with the Illinois Department of Transportation, Indiana Department of Transportation and other appropriate local agencies to coordinate a review of

corridors surrounding highway/rail at-grade crossings to examine safety and adequacy of the existing warning devices, and identify remedies to improve safety for highway vehicles.

- VM 8. Where grade-crossing rehabilitation is agreed to, Applicants shall assure that rehabilitated roadway approaches and rail line crossings meet or exceed the standards of the State Department of Transportation's rules, guidelines, or statutes, and the American Railway Engineering and Maintenance of Way Association ("AREMA") standards, with a goal of eliminating rough or humped crossings to the extent reasonably practicable.
- VM 9. For each of the public grade crossings on EJ&EW's rail line, Applicants shall provide and maintain permanent signs prominently displaying both a toll-free telephone number and a unique grade-crossing identification number in compliance with Federal Highway Regulations (23 CFR. Part 655). The toll-free number shall enable drivers to report accidents, malfunctioning warning devices, stalled vehicles, or other dangerous conditions and shall be answered 24 hours per day by Applicants' personnel. At crossings where EJ&EW's ROW is close to another rail carrier's crossing, Applicants shall coordinate with the other rail carrier to establish a procedure and share information regarding reported accidents and grade-crossing device malfunctions.
- VM 10. Within 6 months of acquisition by CN of the control of EJ&EW, Applicants shall cooperate with school and park districts to provide fencing where schools or parks are within one-quarter mile of the right of way and to identify at-grade crossings where additional pedestrian warning devices may be warranted.
- VM 11. Applicants shall continue ongoing efforts with community officials to identify elementary, middle, and high schools within 0.5 miles of EJ&EW's ROW and provide, upon request, informational materials concerning railroad safety to such identified schools.
- VM 12. Within 6 months of the effective date of the Board's final decision, Applicants shall initiate review of the locations of designated pedestrian and recreational trail at-grade crossings along the EJ&E rail line that would see an increase in train traffic under the Proposed Action. The Applicants shall cooperate in the review with local agencies and community trail groups to assess the adequacy of the existing warning devices, to ascertain if particular trail uses or issues reduce the effectiveness of these warning devices, and to identify appropriate remedies to improve safety for pedestrian and recreational trail users.

Construction

- VM 13. Before starting any construction activities for the proposed connections or installation of double track, Applicants shall develop – in conjunction with the affected communities and local fire and emergency response departments along the EJ&E rail line – an adequate plan for fire prevention and suppression and subsequent land restoration during construction and operation along the EJ&E rail line. Applicants shall submit the plan to local communities and local fire and emergency response departments. Applicants' plan shall ensure that all non-turbocharged locomotives are

equipped with functional spark arrestors on exhaust stacks, and carry fire extinguishers suitable for flammable liquid fires, electrical fires, and combustible materials fires, as well as provide for the installation of low-spark brake shoes on all locomotives.

Hazardous Materials Transportation

- VM 14. Applicants shall comply with the current Association of American Railroads (“AAR”) “key route” guidelines, found in AAR Circular No. OT-55-I, and any subsequent revisions.
- VM 15. Applicants shall comply with the current AAR “key train” guidelines, found in AAR Circular No. OT-55-I, and any subsequent revisions.
- VM 16. To the extent permitted and subject to applicable confidentiality limitations, Applicants shall distribute to each local emergency response organization or coordinating body in the communities along the key routes a copy of the Applicants’ current Hazardous Materials Emergency Response Plans.
- VM 17. Applicants shall incorporate EJ&EW into their existing Hazardous Materials Emergency Response Plan.
- VM 18. Applicants shall comply with all hazardous materials regulations of the United States Department of Transportation (including the Federal Railroad Administration and the United States Pipeline and Hazardous Materials Safety Administration) and Department of Homeland Security (including the Transportation Security Administration). Applicants shall dispose of all materials that cannot be reused in accordance with applicable law.
- VM 19. Upon request, Applicants shall implement real-time or desktop simulation emergency response drills with the voluntary participation of local emergency response organizations.
- VM 20. Applicants shall continue their ongoing efforts with community officials to identify the public emergency response teams located along EJ&EW and shall provide, upon request, hazardous material training.
- VM 21. Applicants shall conduct Transportation Community Awareness and Emergency Response Program (TRANSCAER) workshops (training for communities through which dangerous goods are transported) in those communities along the EJ&E rail line that request this training.
- VM 22. Applicants shall assist in the hazardous materials training emergency responders for affected communities that express an interest in such training. Applicants shall support through funding or other means the training of one representative from each of the communities located along the EJ&E rail line segments where the transportation of hazardous materials would increase. Applicants shall complete the training within 3 years from the date that the Applicants initiate operational changes associated with the Proposed Action.
- VM 23. Applicants shall develop internal emergency response plans to allow for agencies to be notified in an emergency, and to locate and inventory the appropriate emergency equipment. Applicants shall provide the emergency response plans to the relevant

state and local authorities within 6 months of acquisition by CN of the control of EJ&EW.

- VM 24. Applicants shall provide dedicated toll-free telephone number to the emergency response organizations or coordinating bodies responsible for communities located along the EJ&E rail line. This telephone number shall provide access to applicant personnel 24 hours per day, 7 days a week, enabling local emergency response personnel to obtain and provide information quickly regarding the transport of hazardous materials on a given train and appropriate emergency response procedures should a train accident or hazardous materials release occur.
- VM 25. In accordance with their Emergency Response Plan, Applicants shall make the required notifications to the appropriate Federal and state environmental agencies in the event of a reportable hazardous materials release. Applicants shall work with the appropriate agencies such as the United States Fish and Wildlife Service, Illinois Environmental Protection Agency and Indiana Department of Environmental Management to respond to and remediate hazardous materials releases with the potential to affect wetlands or wildlife habitat(s), particularly those of federally threatened or endangered species.
- VM 26. Prior to initiating any Transaction-related construction activities, Applicants shall develop a spill prevention plan for petroleum products or other hazardous materials during construction activities. At a minimum, the spill prevention plan shall address the following:
- Definition of what constitutes a reportable spill;
 - Requirements and procedures for reporting spills to appropriate government agencies;
 - Methods of containing, recovering, and cleaning up spilled material;
 - Equipment available to respond to spills and location of such equipment; and
 - List of government agencies and Applicants' management personnel to be contacted in the event of a spill. In the event of a reportable spill, Applicants shall comply with their spill prevention plan and applicable Federal, state, and local regulations pertaining to spill containment and appropriate clean-up.

Transportation Systems

Grade Crossing Delay

- VM 27. Applicants shall comply with the Voluntary Mitigation Agreement concluded with the City of Joliet, which among other things addresses delay at the public highway/rail at-grade crossings at Woodruff Road and Washington Street.
- VM 28. Although Applicants have not identified any grade crossings, other than Woodruff Road and Washington Street, that would require mitigation under SEA's established standards, Applicants shall, upon request, cooperate with municipalities and counties in support of their efforts to secure funding, in conjunction with appropriate state agencies, for grade separations where they may be appropriate under criteria established by relevant state Department of Transportation. Applicants shall

contribute their statutorily required amount of funding to the cost of the grade separation.

- VM 29. Applicants shall examine train operations for ways of reducing highway/rail at-grade crossing blockages.
- VM 30. Applicants shall cooperate with the appropriate state and local agencies and municipalities to:
- Evaluate the possibility that one or more roadways listed in Table ES-1 [of the Draft EIS] could be closed at the point where it crosses the EJ&E rail line, in order to eliminate the at-grade crossing.
 - Improve or identify modifications to roadways that would reduce vehicle delays by improving roadway capacity over the crossing by construction of additional lanes.
 - Assist in a survey of highway/rail at-grade crossings for a determination of the adequacy of existing grade crossing signal systems, signage, roadway striping, traffic signaling inter-ties, and curbs and medians.
 - Identify conditions and roadway, signal, and warning device configuration may trap vehicles between warning device gates on or near the highway/rail at-grade crossing.
 - Cooperate with state and local agencies to develop and implement a plan to grade-separate the highway/rail crossing.
- VM 31. Applicants shall install power switches along EJ&EW where Applicants determine that manual switches could cause stopped trains to block grade crossings for excessive periods of time and that power switches would increase the speed of rail traffic and reduce the likelihood of such blockages.
- VM 32. In order to minimize the number of trains being stopped by operators at locations that block grade crossings on the EJ&EW system, Applicants shall work with other railroads to establish reasonable and effective policies and procedures to prevent other railroads' trains from interfering with Applicants' trains on EJ&EW.
- VM 33. Applicants' design for wayside signaling systems shall be configured and implemented to minimize the length of time that trains or maintenance-of-way vehicles or activities occupy at-grade crossings or unnecessarily activate grade-crossing warning devices.
- VM 34. Applicants shall install control signals ("A" block or absolute stop signals) at the ends of sidings, double track sections, crossovers, and other control switch locations (Applicants 2008a).
- VM 35. Applicants shall operate under U.S. Operating Rule No. 526 (Public Crossings), which provides that a public crossing must not be blocked longer than 10 minutes unless it cannot be avoided and that, if possible, rail cars, engines, and rail equipment may not stand closer than 200 feet from a highway/rail at-grade crossing when there is an adjacent track (Applicants 2008a). If the blockage is likely to exceed this time frame, then the train shall be promptly cut to clear the blocked crossing or crossings.
- VM 36. Applicants shall develop and submit to SEA a report on frequency and duration of train delays at crossing for a period covering the first 3 years of operational changes.

Commuter and Passenger Rail Service

- VM 37. Applicants and the National Railroad Passenger Corporation (Amtrak) will amend the February 1, 1995 operating agreement between Illinois Central Railroad Company (IC) and Amtrak to provide as follows: 1) IC shall maintain the St. Charles Air Line Route and Markham-to-Grand Crossing Route (as each is defined in the Settlement Agreement for purposes of the 1995 Agreement) for use by Amtrak at not less than the 1995 Agreement Section 4.2, "Maintenance of Rail Lines," conditions existing on April 28, 2008; 2) Costs paid to IC by Amtrak for use of the St. Charles Air Line Route shall be capped at their April 28, 2008 levels, adjusted only for inflation pursuant to the formula in Appendix IV of the 1995 Agreement (as it may be amended); 3) Costs paid to IC by Amtrak for use of the Markham-to-Grand Crossing Route shall be determined on the same basis as costs for Amtrak's use of IC's lines between Markham and New Orleans; 4) Amtrak's rights and obligations under these conditions regarding the St. Charles Air Line Route shall cease upon the earlier of (a) six (6) months after Amtrak begins to provide regularly scheduled passenger rail service either over the Grand Crossing Router or over another route that provides an alternative to the St. Charles Air Line Route for passenger rail service to or from Union Station in Chicago that is acceptable to Amtrak, or (b) such time as Amtrak ceases for a continuous period of one (1) year to use the St. Charles Air Line Route to provide regularly scheduled passenger service at least three (3) days per week to and from Union Station in Chicago; 5) Amtrak's rights and CN's obligations under these conditions regarding the Markham-to-Grand Crossing Route shall cease upon such time as Amtrak ceases for a continuous period of one (1) year to use the Markham-to-Grand Crossing Route to provide scheduled passenger rail service at least three (3) days per week to and from Union Station in Chicago. .
- VM 38. Applicants shall operate the key interlockings at West Chicago and Barrington, Illinois, according to the current agreements under which EJ&E operates. Those agreements require EJ&E to give priority to passenger trains over either UP or EJ&E freight trains (Applicants 2008k).
- VM 39. Applicants shall work with Metra to explore all options for service on the proposed STAR Line, including use of the EJ&E rail line. The timing and implementation of STAR Line service remain subject to numerous variables, including securing government funding, but the Applicants are committed to continuing discussions with Metra on the STAR Line (Applicants 2008j).
- VM 40. During and after construction, Applicants shall maintain the pedestrian tunnel from the Metra Park-n-Ride lot to the Metra train station on the east side of the Chicago Subdivision rail line at Matteson (Applicants 2008l).
- VM 41. Applicant shall comply with any written and executed curfew agreements that are now in effect regarding operations affecting passenger or commuter train service.

Emergency Vehicle Delay

- VM 42. Applicants shall notify Emergency Services Dispatching Centers for communities along the affected segments of all crossings blocked by trains that are stopped and may be unable to move for a significant period of time. Applicants shall work with

affected communities to minimize emergency vehicle delay by maintaining facilities for emergency communication with local Emergency Response Centers through a dedicated toll-free telephone number; and providing, upon request, dispatching monitors that allow Emergency Response Center dispatching personnel to see real-time train locations.

- VM 43. Applicants shall make Operation Lifesaver programs available to communities, schools, and other organizations located along the affected segments.
- VM 44. For up to 3 years after acquisition by CN of the control of the EJ&EW, Applicants shall provide Operation Lifesaver programs in Spanish, upon request.

Construction

- VM 45. At least one month prior to initiation of Transaction-related construction activities, Applicants shall provide the information described below regarding Transaction-related construction of sidings, double-tracking, or connections, as well as any additional information, as appropriate, to fire departments and the Local Emergency Planning Commissions ("LEPC") for communities within or adjacent to the construction area:
- The schedule for construction throughout the project area, including the sequence of construction work relating to public grade crossings and approximate schedule for these activities at each crossing;
 - A toll-free number to contact Applicants' personnel, to answer questions or attend meetings for the purpose of informing emergency-service providers about the project construction and operations; and
 - Revisions to this information, including changes in construction schedule, as appropriate.
- VM 46. In undertaking Transaction-related construction activities, Applicants shall use practices recommended by AREMA and recommended standards for track construction in the AREMA Manual for Railway Engineering.
- VM 47. During Transaction-related construction concerning at-grade crossings, when reasonably practicable, Applicants shall consult with the appropriate state Department of Transportation regarding detours and associated signage, as appropriate, or maintain at least one open lane of traffic at all times to allow for the quick passage of emergency and other vehicles.
- VM 48. Applicants shall minimize temporary road closures during construction activities associated with the connections and double track. Applicants shall manage construction schedules to:
- Minimize highway/rail at-grade crossing closures
 - Relay highway/rail at-grade crossing closure schedules to local emergency service providers

Land Use

General Land Use

- VM 49. Before beginning construction activity, Applicants shall survey all suitable habitats potentially impacted by the construction activity for Federally and state-listed threatened or endangered plant species. If any listed plant species are located, Applicants shall implement a mitigation plan in consultation with the appropriate Federal and state agencies.
- VM 50. If identified in the area, Applicants shall coordinate with USFWS-Indiana and The Nature Conservancy (TNC) to monitor effects on the Karner blue butterfly in the West Gary Recovery Unit.
- VM 51. Applicants shall continue with the existing agreements for Paul Ales Branch operation for the protection of the Federally listed Hine's emerald dragonfly.
- VM 52. Applicants shall identify suitable habitat for Franklin's ground squirrel within construction limits, and minimize mowing along the ROW beyond what is necessary for reasonable railroad maintenance and safety.
- VM 53. Land areas that are directly disturbed by Applicants' Transaction-related construction and are not owned by the Applicants (such as access roads, haul roads, and crane pads) shall be restored to their original condition, as may be reasonably practicable, upon completion of Transaction-related construction.
- VM 54. During construction, temporary barricades, fencing, and/or flagging shall be used in sensitive habitats to contain construction-related impacts to the area within the construction Right Of Way ("ROW"). Staging areas shall be located in previously disturbed sites and not in sensitive habitat areas.
- VM 55. To the extent reasonably practicable, Applicants shall confine construction traffic to a temporary access road within the construction ROW or established public roads. Where traffic cannot be confined to temporary access roads or established public roads, Applicants shall make necessary arrangements with landowners to gain access from private roadways. The temporary access roads shall be used only during project-related construction. Any temporary access roads constructed outside the rail line ROW shall be removed and restored upon completion of construction unless otherwise agreed to with the landowners.
- VM 56. During Transaction-related earthmoving activities, Applicants shall remove topsoil and segregate it from subsoil. Applicants shall also stockpile topsoil for later application during reclamation of disturbed areas along the ROW. Applicants shall place the topsoil stockpiles in areas that would minimize the potential for erosion and use appropriate erosion control measures around all stockpiles to prevent erosion.
- VM 57. Applicants shall commence reclamation of disturbed areas as soon as reasonably practicable after Transaction-related construction ends along a particular stretch of rail line. The goal of reclamation shall be the rapid and permanent reestablishment of native ground cover on disturbed areas. If weather or season precludes the prompt reestablishment of vegetation, Applicants shall use measures such as mulching or erosion control blankets to prevent erosion until reseeding can be completed.

- VM 58. Applicants shall limit ground disturbance to only the areas necessary for Transaction-related construction activities.
- VM 59. Applicants shall review the limits of land disturbance prior to construction to determine whether any U.S. Department of Commerce, National Geodetic Survey monuments (that is, a government-owned permanent survey marker) would be disturbed. If any survey monuments would be disturbed, Applicants shall give a 90-day notification to the U.S. Department of Commerce.
- VM 60. Applicants shall consult with the appropriate state, county personnel, Forest Preserve and trail managers prior to construction activities on state land and shall flag the boundaries of the ROW.
- VM 61. Applicants shall notify the trail managers of new construction that intersects trails during final design. Where possible, Applicants shall maintain access to all existing trails, greenways, and scenic corridors during construction. If temporary trail closures are required during construction, Applicants shall provide appropriate signage to detour pedestrian and recreational trail users to a safe alternate route.
- VM 62. Before construction of the Applicants' Proposed Munger Connection adjacent to the Pratt's Wayne Woods Forest Preserve, Applicants shall flag the boundaries of the CN ROW, the EJ&E ROW, and the portion of the Commonwealth Edison ROW required for construction. Applicant shall remain within the flagged boundaries. Unless agreed by the Forest Preserve Management, no construction shall take place outside of the flagged construction area. Where possible, Applicants shall maintain access during construction activities to all existing roads, trails, and facilities within the Pratt's Wayne Woods Forest Preserve.
- VM 63. Applicants shall require contractors to dispose of waste generated during Transaction-related construction activities in accordance with all applicable Federal, State, and local regulations.

Community Outreach

- VM 64. Prior to initiation of Transaction-related construction activities, Applicants shall name a Community Liaison to: consult with affected communities, businesses, and agencies; seek to develop cooperative solutions to local concerns regarding construction activities; be available for public meetings; and conduct periodic public outreach regarding Transaction-related construction activities. The Community Liaison shall be available to consult with businesses and agencies until all Transaction-related construction activities are complete. Applicants shall provide the name and phone number of the Community Liaison to mayors and other appropriate local officials in each community where Transaction-related construction activities will occur.
- VM 65. Applicants shall continue their ongoing community outreach efforts by maintaining, throughout the period of construction of Transaction-related sidings, double-track, and connections, a website about the construction.

Residential

- VM 66. Applicants' Transaction-related construction vehicles, equipment, and workers shall not access work areas by crossing residential properties without the permission of the property owner or occupant.

Business and Industrial

- VM 67. Applicants' Transaction-related construction vehicles, equipment, and workers shall not access work areas by crossing business or industrial areas, including parking areas or driveways, without advance notice to the business owner.
- VM 68. Applicants shall work with affected businesses or industries to appropriately redress Transaction-related construction activity issues affecting any business or industry.
- VM 69. To the extent reasonably practicable, Applicants shall ensure that entrances and exits for businesses are not obstructed by Transaction-related construction activities, except as required to move equipment.

State Lands

- VM 70. Applicants shall consult with the General Land Office ("GLO") of Illinois to coordinate an Easement Agreement for crossing State-owned parks to reach Transaction-related construction areas.

Utility Corridors

- VM 71. Applicants shall make reasonable efforts to identify all utilities that are reasonably expected to be materially affected by the proposed construction within their existing ROW or that cross their existing ROW. Applicants shall notify the owner of each such utility identified prior to commencing Transaction-related construction activities and coordinate with the owner to minimize damage to utilities. Applicants shall also consult with utility owners to design the rail line so that utilities are reasonably protected during Transaction-related construction activities.
- VM 72. Applicants shall use the services of a qualified pipeline engineering firm that is familiar with the project area to assist in the identification of the various pipeline crossings and to assist in the design of crossings as necessary for Transaction-related construction activities.

Air Quality

- VM 73. Applicants shall accelerate implementation of EPA locomotive emissions reduction efforts by installing idling control systems on their switching locomotives assigned to the Chicago area and shall accelerate replacement of switching locomotives that are excluded from EPA emission standards and are now in service at Chicago-area yards that will experience increased yard activity as a result of the Transaction with locomotives that are compliant with EPA Tier 0 or more stringent emission standards.
- VM 74. Applicants, to the extent reasonably practicable, shall adopt efficient fuel saving practices that may include a range of operating practices that will help reduce

locomotive emissions, such as shutting down locomotives when not in use and when temperatures are above 40 degrees.

- VM 75. To minimize fugitive dust emissions created during Transaction-related construction activities, Applicants shall implement appropriate fugitive dust suppression controls, such as spraying water or other approved measures. Applicants shall also regularly operate water trucks on haul roads to reduce dust.
- VM 76. Applicants shall work with their contractors to make sure that construction equipment is properly maintained and that mufflers and other required pollution-control devices are in working condition in order to limit construction-related air emissions.

Noise and Vibration

- VM 77. Applicants shall work with affected communities that have sensitive receptors that would experience an increase of at least 5 dBA [A-weighted decibel] and reach 70 dBA to mitigate train noise to levels as low as 70 dBA by cost effective means as are agreed to by an affected community and Applicants. In the absence of such an agreement, Applicants shall implement cost effective mitigation that could include such measures as (1) constructing noise control devices such as noise barriers, (2) installing vegetation or berming, or (3) installing, or providing funding for installation of, enhanced warning devices in order to provide the level of warning necessary to allow the community to request a waiver from Federal Railroad Administration (FRA) of the requirement to sound the horn and achieve quiet zone requirements.
- VM 78. Applicants shall consult with affected communities and work with their construction contractors to minimize, to the extent reasonably practicable, construction-related noise disturbances near any residential areas.
- VM 79. Applicants shall work with their construction contractors to maintain Transaction-related construction and maintenance vehicles in good working order with properly functioning mufflers to control noise.
- VM 80. In addition to the development of other noise mitigation measures, Applicants shall consider lubricating curves where doing so would both be consistent with safe and efficient operating practices and significantly reduce noise for residential or other noise sensitive receptors. Applicants shall also continue to employ safe and efficient operating procedures that, in lieu of, or as complement to, other noise mitigation measures can have the collateral benefit of effectively reducing noise from train operations. Such procedures include:
- o inspecting rail car wheels to maintain wheels in good working order and minimize the development of wheel flats;
 - o inspecting new and existing rail for rough surfaces and, where appropriate, grinding these surfaces to provide a smooth rail surface during operations;
 - o regularly maintaining locomotives, and keeping mufflers in good working order; and
 - o removing or consolidating switches determined by Applicants to no longer be needed.

- VM 81. To minimize noise and vibration, Applicants shall install and maintain rail and rail beds according to AREMA standards.
- VM 82. Applicants shall comply with FRA regulations establishing decibel limits for train operations.
- VM 83. Applicants shall install or relocate a Wheel Impact Load Detector (WILD) on the EJ&E rail line within three years of acquisition by CN of control of EJ&EW.

Biological Resources

- VM 84. For impacts to non-jurisdictional isolated wetlands habitat along the new line, Applicants shall survey the route to determine if the Hine's emerald dragonfly is present along the ROW.
- VM 85. Upon consultation with U.S. Fish and Wildlife Service, should the Hine's emerald dragonfly be observed on the site of Transaction-related construction activities, Applicants shall implement appropriate measures prior to and during construction to reduce or eliminate impacts on the Hine's emerald dragonfly.
- VM 86. Prior to initiating Transaction-related construction activities, Applicants shall consult with the local offices of the Natural Resource Conservation Service ("NRCS") to develop an appropriate plan for restoration and re-vegetation of the disturbed areas (including appropriate seed mix specifications).
- VM 87. During construction activity, Applicants shall take reasonable steps to ensure contractors use fill material appropriate for the project area.
- VM 88. Applicants shall, to the extent reasonably practicable, revegetate the bottom and sides of the drainage ditches using natural recruitment from the native seed sources in the stockpiled topsoil.

Water Resources

- VM 89. In the case where there is a potential for a railroad drainage ditch to influence wetland hydrology, Applicants shall construct low permeability clay berms (wetland berms adjacent to the drainage channels that would be proximal to the isolated wetlands). These berms would minimize the impact to surface water drainage from the proposed drainage ditch.
- VM 90. Applicants shall compensate in accordance with USACE regulations in both Illinois and Indiana for wetland impacts that cannot be avoided and for impacts that are determined by USACE to be on waters of the U.S. for construction related to the proposed action.
- VM 91. Applicants shall maintain drainage ditches as permanent vegetated swales to provide storm water retention and treatment. Removal of accumulated sediments shall be conducted only as necessary to maintain storm water retention capacity and function.
- VM 92. To minimize sedimentation into streams and waterways during construction, Applicants shall use best management practices, such as silt fences and straw bale dikes, to minimize soil erosion, sedimentation, runoff, and surface instability during project-related construction activities. Applicants shall seek to disturb the smallest area possible around any streams and shall conduct reseeding efforts to ensure proper

revegetation of disturbed areas as soon as reasonably practicable following Transaction-related construction activities.

- VM 93. In order to control erosion, Applicants shall establish staging and lay down areas for Transaction-related construction material and equipment at least 300 feet from jurisdictional waters of the United States and in areas that are not environmentally sensitive. Applicants shall not clear any vegetation between the staging area and the waterway or wetlands. To the extent reasonably practicable, areas with non-jurisdictional isolated waters will not be used for staging and lay down and will only be impacted when necessary for construction. When Transaction-related construction activities, such as culvert and bridgework, require work in streambeds, Applicants shall conduct these activities, to the extent reasonably practicable, during low-flow conditions.
- VM 94. During Transaction-related construction activities, Applicants shall require all contractors to conduct daily inspections of all equipment for any fuel, lube oil, hydraulic, or antifreeze leaks. If leaks are found, Applicants shall require the contractor to immediately remove the equipment from service and repair or replace it.
- VM 95. Applicants shall employ best management practices to control turbidity and disturbance to bottom sediments of surface waters during Transaction-related construction. Applicants shall implement best management practices in wetlands or other waters of the United States to avoid adverse downstream impacts on fish, mussels, and other aquatic biota.
- VM 96. Applicants shall implement their current noxious weed control program during construction and operation of Transaction-related sidings, double-track, and connections. All herbicides used by Applicants shall be approved by the U.S. EPA.
- VM 97. Applicants shall ensure that any herbicides used in ROW maintenance to control vegetation are approved by the U.S. EPA and are applied by licensed individuals who shall limit application to the extent necessary for rail operations. Herbicides shall be applied so as to prevent or minimize drift off of the ROW onto adjacent areas.
- VM 98. During construction, Applicants shall prohibit Transaction-related construction vehicles from driving in or crossing streams at other than established crossing points.
- VM 99. Applicants shall, to the extent reasonably practicable, ensure that any fill placed below the ordinary high water line of wetlands and streams is appropriate material selected to minimize impacts to the wetlands and streams. All stream crossing points shall be returned to their pre-construction contours to the extent reasonably practicable and the crossing banks will be reseeded or replanted with native species immediately following project-related construction.
- VM 100. Applicants shall obtain a National Pollutant Discharge Elimination System ("NPDES") storm water discharge permit from U.S. EPA or appropriate State agencies for Transaction-related construction activities.

Monitoring and Enforcement

- VM 101. Applicants shall submit quarterly reports to SEA on the progress of, implementation of, and compliance with, the mitigation measures for a period covering the first 3 years of operational changes.

Supplemental Voluntary Mitigation Measures

- VM 102. Applicants shall cooperate with Midwest Generation, LLC ("MWG"), to identify locations on Applicants' property, or available to Applicants, on which loaded coal trains could be staged while awaiting delivery to MWG's Will County Generating Station and Joliet Generating Station and which would make unnecessary the construction of additional train storage capacity on MWG property that would adversely affect the Hine's emerald dragonfly or its habitat. If no adequate existing train storage locations can be identified, Applicants shall make reasonable efforts to acquire or construct, at MWG's expense, new train storage capacity, at locations where construction would not have adverse impacts on the Hine's emerald dragonfly or its habitat, and which would make construction of additional storage capacity on MWG's property unnecessary, and shall make that capacity available as needed for staging of coal trains destined for Will County and Joliet Stations.
- VM 103. In consultation with the U.S. Fish and Wildlife Service (USFWS) and relevant natural resource stakeholders, Applicants shall participate in the development of a Habitat Conservation Plan for the Hine's emerald dragonfly or necessary work plans applicable to State and Federally listed threatened and endangered species and take the necessary measures to ensure that rail operations do not cause undue impact to those species.
- VM 104. [Migratory Birds] Where warranted, Applicants shall work with relevant natural resource stakeholder groups, Forest Preserve Districts, the Indiana office of The Nature Conservancy (TNC), Illinois Department of Natural Resources (IDNR), Indiana Department of Natural Resources (INDNR), and USFWS to support the creation or enhancement of migratory bird habitat away from those segments of the EJ&E rail line on which Applicants project Transaction-related increases in rail traffic, and where there is proposed Transaction-related construction of double-track and new or improved connections.
- VM 105. [Rare and Listed Turtles] In consultation with USFWS, Applicants shall construct and maintain adequate passages (that is, pipes or culverts) for turtles to cross through the track bed in areas on the EJ&E rail line between Leithton and Gary on which Applicants expect to increase rail traffic and where habitat for rare and/or listed turtle species (that is, Blanding's or spotted turtle) exists on both sides of the rail line.
- VM 106. [Karner Blue Butterfly] In consultation with USFWS, Applicants shall identify areas of suitable habitat of the Karner blue butterfly within Kirk Yard and in the vicinity of all planned Transaction-related construction of double track and new or improved connections within the State of Indiana for potential habitat protection and/or enhancement. Applicants shall contact TNC about participation in the Safe Harbor Agreement for the Karner blue butterfly.

- VM 107. [Indiana Dune and Swale] In consultation with appropriate Federal and State natural resource stakeholders, including USFWS, INDNR and TNC, Applicants shall designate EJ&EW-owned areas of prime prairie and dune swale habitat for potential land management agreement and/or conservation easement. Should modifications to Kirk Yard be proposed in the future, Applicants shall review proposed plans for upgrading and expansion of Kirk Yard in order to avoid construction in identified dune swale areas. In the event that unavoidable impacts are identified, Applicants shall work with TNC to develop a plan for mitigation of those impacts and improvement of the quality of remaining dune swale areas.
- VM 108. [Eastern prairie fringed orchid] Prior to any ground disturbing activities, Applicants shall hire a qualified biologist to survey for the Eastern prairie fringed orchid (*Platanthera leucophaea*) in areas containing suitable habitat. Applicants shall survey each area on at least three non-consecutive days between June 28 and July 11, as this is when the orchid typically flowers and is most identifiable. If Applicants' biologist finds orchids, Applicants shall not conduct any construction activities in that area and Applicants shall notify USFWS and the Board immediately. The Board shall reinitiate consultation with USFWS. Applicants shall work with the Board and USFWS to determine appropriate measures to offset impacts, most likely providing funding for an ongoing hand pollination project, or providing funding to be used to enhance another orchid site (that is, brush cutting, prescribed burning).

Board's Final Mitigation Conditions

Applicants' Voluntary Mitigation

- 1) Applicants shall comply with their voluntary mitigation measures.

Rail Operations

- 2) As part of the Applicants' quarterly reports that will be required under VM 101, VM 36, and Condition 74, Applicants shall report quarterly to SEA and communities adjacent to or intersected by the EJ&E rail line on the frequency, cause, and duration of train blockages of crossings of 10 minutes in duration or greater, listing each delay and including any notifications from persons affected by the blockage and the time of the beginning and end of each delay. Applicants shall summarize the cause of each type of blockage that the Applicants self-report and shall state how the Applicants intend to reduce the incidence of all blockages not attributed to emergencies or weather-related incidents (sometimes called Acts of God) in the quarterly report.
- 3) Applicants shall distribute to communities adjacent to or intersected by the EJ&E rail line the contact information for the Applicants' community liaison established in VM 64 to ensure that Applicants are aware of highway/rail at-grade crossing blockages lasting 10 minutes or more.

Rail Safety

Safety Integration Plan

- 4) Applicants shall comply with their approved final Safety Integration Plan (SIP), prepared pursuant to 49 CFR 1106, which may be modified and updated as necessary to respond to evolving conditions.
- 5) Applicants shall continue to coordinate with FRA in implementing the approved final SIP, including any amendments thereto. The ongoing safety integration process shall continue until FRA notifies the Board that the integration of Applicants' operations has been safely completed.

Freight Rail Safety

- 6) Applicants shall adhere to all applicable Federal Occupational Safety and Health Administration (OSHA), FRA, and state construction and operational safety regulations to minimize the potential for accidents and incidents on the EJ&E rail line.

Vehicle Safety

Industry Track

- 7) As requested by the Illinois Commerce Commission, Applicants shall notify the Illinois Commerce Commission prior to modifying rail service to existing rail shippers along the EJ&E rail line during the morning and evening commuter rush hours, in areas where: 1) industry tracks cross highway/rail at-grade crossings, and 2) those industry track highway/rail at-grade crossings are protected with warning devices that are not interconnected with or part of the warning devices at a highway/rail at-grade crossing of the same roadway located within 300 feet which experiences commuter rail traffic. Before modifying the rail service Applicants shall allow the Illinois Commerce Commission to review the adequacy of the highway/rail at-grade crossing warning devices and abide by the Illinois Commerce Commission's reasonable determination(s), including contributing to funding any required modifications.

Quiet Zones

- 8) Applicants shall work with Barrington, Illinois, to determine which improvements would be necessary for the City to maintain its quiet zone designation, should the transaction cause it to fall out of compliance with FRA regulations. The existing Barrington Quiet Zone includes the highway/rail at-grade crossings at Lake/Cook Road, Otis Road, Penny Road, Old Sutton Road, Shoe Factory Road, Spaulding Road, and West Bartlett Road. For 3 years from the effective date of the Board's final decision, Applicants shall fund reasonable improvements FRA deems necessary to maintain the existing quiet zone.

Hazardous Materials Transportation Safety

- 9) To supplement Applicants' VM 21, Applicants shall conduct TRANSCAER workshops in English and Spanish upon request for 3 years from the effective date of the Board's final decision authorizing the Proposed Action.
- 10) In addition to Applicants' VM 25, Applicants shall adhere to all EPA regulations as described in 40 CFR 263 and shall coordinate with EPA, state agencies, and local agencies on spill responses.

Pedestrian and Bicycle Safety

- 11) To supplement Applicants' VM 10, Applicants shall coordinate with each affected community prior to installation of this fencing and shall install fencing where the community deems appropriate. Applicants shall furnish and install at their sole expense a standard 6-foot-high, galvanized, chain-link fence at all locations where an effective fence does not currently exist. Upon completion of construction, the fence shall be owned and maintained by the community unless both parties agree otherwise in writing. The community may decide to install fencing that differs from this standard, but Applicants shall only be obligated to provide funds sufficient to construct the standard fence.
- 12) To supplement Applicants' VM 43 and 44, Applicants shall make Operation Lifesaver programs available to communities, schools, and other appropriate organizations located along the EJ&E rail line for 3 years after the effective date of the Board's final decision. The programs will be designed and provided in coordination with the Illinois Commerce Commission and INDOT.
- 13) To address concerns raised by the U.S. Department of Transportation, Applicants shall either continue EJ&E's practice of holding trains south of Ann Street in West Chicago, Illinois, or work with the community to replace the George Street pedestrian crossing. Ann Street is located approximately 0.1 mile south of the George Street pedestrian crossing and 0.3 mile south of the signal in West Chicago. Applicants shall hold their trains at this location to avoid blocking the at-grade crossing at Ann Street (USDOT # 260545V, MP 28.50), the pedestrian crossing at George Street (USDOT # 260806T, MP 28.27), and the at-grade crossing at Church Street (USDOT # 260543G, MP 28.77). Upon obtaining a clear signal, to the extent possible, Applicants' trains shall not stop and block the at-grade crossings.

Transportation Systems***Regional and Local Highway Systems***

- 14) In addition to VM 28, Applicants shall coordinate with the following state and local officials for the expeditious implementation of a grade separation at:
- The highway/rail at-grade crossing of Ogden Avenue and the EJ&E rail line in Aurora (USDOT # 260560X). Coordinate with DuPage County, Illinois, and Aurora, Illinois, the Illinois Department of Transportation (IDOT), and the Illinois Commerce Commission.
 - The highway/rail at-grade crossing of Lincoln Highway (US 30) and the EJ&E rail line in Lynwood (USDOT # 260651D). Coordinate with Cook County, Illinois, Lynwood, Illinois, IDOT, and the Illinois Commerce Commission.

The substantial effects of the transaction on traffic delay, regional and local mobility, and grade-crossing safety warrant an increase over the traditional railroad share of the cost of these grade separations if they are approved and funded. Once applicants have been notified that the required non-CN funds have been committed and obligated, applicants shall pay 67% of the cost of the grade separation at Ogden Avenue and 78.5% of the Lincoln Highway grade separation. Applicants shall pay this percentage of the cost of the preliminary engineering and environmental analysis, final design, ROW acquisition, utility relocation, and construction costs of these grade separations. However, applicants shall not be required to pay for more than one preliminary engineering study for each crossing. This obligation shall only be in effect for projects where construction is initiated no later than 2015. The Board anticipates that IDOT will be the lead agency for the development of these grade separations.

- 15) Applicants shall coordinate with IDOT and the appropriate counties and affected communities to develop a program to install traffic advisory signs on roadway ROW at certain public highway/rail at-grade crossings along the EJ&E rail line. These signs shall clearly advise motorists not to block intersections, and the format and lettering of these signs shall comply with FHWA's *Manual on Uniform Traffic Control Devices*. These signs shall be in place within a year of the effective date of the Board's final decision, subject to the approval of the coordinating agencies, and shall be located near the following intersections:
- a. Old McHenry Road/Midlothian Road, Hawthorn Woods, Illinois
 - b. Main Street/IL 22, Lake Zurich, Illinois
 - c. Hough Street (IL 59)/Northwest Highway (US 14), Barrington, Illinois
 - d. Plainfield-Naperville Road/IL 59, Plainfield, Illinois
- 16) Applicants shall construct the revised connection at Matteson, Illinois, and the revised double track connection at Leithton (near Mundelein, Illinois) as described in the Applicants' letters dated August 21, 2008 and September 17, 2008, respectively.

- 17) As requested by the Illinois Commerce Commission, Applicants shall consult with Illinois Commerce Commission, as well as INDOT, to locate roadway intersections with traffic lights within 1,000 feet of existing highway/rail at-grade crossings along the EJ&E rail line to identify circumstances where queued cars could extend over the EJ&E rail line and to consider reasonable solutions.

Emergency Response

- 18) In addition to VM 42, to further assist with the timely response of the emergency service providers listed in Table ES- 1 below, Applicants shall consult with all appropriate agencies to implement a CCTV system with video cameras placed in locations so that the movement of trains can reasonably be predicted at the highway/rail at-grade crossings listed in Table ES-1. Applicants shall pay for the necessary equipment, including cameras, monitors, poles, cables, controllers, cabinets, communications equipment, electrical connections, or other necessary components, the installation of the equipment, and equipment training for up to two individuals for each emergency service provider listed in Table ES-1 below. Applicants shall work with all appropriate agencies to determine specifications and scheduling for the installation of this system. Applicants shall not be responsible for the ongoing maintenance and operation of the CCTV system after the system is installed and operational.

Table ES- 1. Emergency Service Providers Receiving CCTV at Affected Highway/Rail At-Grade Crossing Locations		
Community	Facility	Highway/Rail At-Grade Crossings
Lake Zurich, Illinois	Lake Zurich Rural Fire Protection District - Station No. 3	Gilmer Road Old McHenry Road Oakwood Road
Barrington, Illinois	Barrington Fire Department - Station No. 1	Lake Zurich Road Northwest Highway (US 14) Hough Street (IL 59) Lake Cook Road/Main Street
Barrington, Illinois	Advocate Good Shepherd Hospital	Lake Zurich Road Northwest Highway (US 14) Hough Street (IL 59) Lake Cook Road/Main Street
Bartlett, Illinois	Bartlett Fire Protection District - Future Station No. 3	Spaulding Road West Bartlett Road Stearns Road
West Chicago, Illinois	West Chicago Fire Protection District Headquarters/Station No. 1	Washington Street Aurora Street Church Street Ann Street
West Chicago, Illinois	West Chicago Fire Protection District - Station No. 3	Washington Street Aurora Street Church Street Ann Street
Plainfield, Illinois	Plainfield Fire Protection District - Station No. 3	111 th Street Ferguson Road/119 th Street 127 th Street

Airports

- 19) Applicants shall comply with the four-party Preliminary Memorandum of Understanding (PMOU) announced by the Gary/Chicago International Airport, EJ&E, CSX, and NS on June 27, 2008, regarding the airport's plan to extend its main runway and to relocate the EJ&E rail line.

Land Use

- 20) Applicants shall consult with and comply with the reasonable requirements of INDNR to demonstrate compliance with the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451-1456) and the Indiana Lake Michigan Coastal Program in accordance with the guidelines found in the Indiana Natural Resources Commission's Information Bulletin #43 (Indiana Natural Resources Commission 2007). Applicants shall demonstrate CZMA compliance prior to initiating any project-related construction activities in Indiana.

Environmental Justice

- 21) In addition to VM 23, which requires Applicants to provide a copy of their emergency response plan to all appropriate state and local authorities within 6 months of the effective date of the Board's final decision, Applicants shall provide the appropriate authorities a Spanish-language version of the emergency response plan, upon request.
- 22) In addition to VM 11, all of Applicants' informational materials concerning railroad safety shall be provided to elementary, middle, and high schools within 0.5 mile of the EJ&E ROW in both English and Spanish, upon request. In addition to VM 65, Applicants shall make materials and information on their project-related website available in both English and Spanish.
- 23) In addition to VM 64, Applicants shall provide a Spanish-language translator to work with the Applicants' community liaison as needed to consult with affected communities and businesses, to attend public meetings, and to conduct public outreach.

Air Quality and Climate

- 24) Applicants shall comply with EPA emissions standards for diesel-electric railroad locomotives (40 CFR 92) when purchasing and rebuilding locomotives.
- 25) Applicants shall notify local fire departments along the EJ&E rail line at least 4 hours before any open burning activities along the EJ&E rail line ROW and in proposed construction areas and shall obtain oral or written permission from the fire departments prior to such burning activities.

Noise and Vibration

- 26) Upon request, Applicants shall consult with communities affected by wheel squeal at existing locations on the EJ&E rail line, and cooperate in determining the most appropriate methods for implementing VM 80.
- 27) Applicants shall make reasonable efforts to notify the U.S. Department of Energy Fermilab in Batavia, Illinois, of potentially significant operational changes, such as substantial increases in train speed and/or axle loadings that could affect their vibration-sensitive equipment.
- 28) In addition to VM 77 through 83 and Condition 74, Applicants shall include in their quarterly reports documentation of their efforts to implement in a timely manner their voluntary noise and vibration mitigation, which is intended to provide effective and measurable noise reduction in areas that qualify for noise mitigation under IDOT or INDOT criteria, as discussed in Chapter 2 of the Final EIS.

Biological Resources

Resource Agency Liaison

- 29) In addition to VM 64, Applicants shall establish a local resource agency liaison(s) with expertise in environmental and natural resource management to work closely with Federal, state, and local natural and water resource agencies (including Fermilab) for the purpose of improved adaptive natural resource management. Applicants shall name their liaison(s) within 1 month of the effective date of the Board's final decision. Applicants' liaison(s) shall ensure that the adaptive management measures developed shall be incorporated into all relevant railroad ROW maintenance contracts. Applicants' liaison(s) shall be available to consult with resource agencies for 5 years following the effective date of the Board's final decision.
- 30) Applicants shall work with relevant natural resource stakeholder groups, forest preserve districts, TNC, INDNR, IDNR and USFWS to establish appropriate monitoring programs. These programs shall include identifying baseline conditions and post-transaction conditions, in areas adjacent to forest preserves and designated natural areas on species of concern to the above groups. Applicants shall fund the monitoring programs for a period of 5 years from the effective date of the Board's decision.

Plant Communities

- 31) In addition to VM 96 and VM 97, Applicants shall work with the natural resource agencies through the Applicants' resource agency liaison(s) (see Condition 29, above) to define sensitive areas where use of herbicides should be restricted.
- 32) In addition to VM 96, Applicants shall consult with and develop cooperative and adaptive management strategies with natural resource agencies to address invasive species spread directly by transaction-related operations. Applicants' local resource agency liaison(s) (see Condition 29, above) shall serve as coordinator(s).

- 33) Applicants, through the local resource agency liaison (established in Condition 29, above), shall work with the forest preserve districts to minimize disruptions and complications to the management and implementation of district-prescribed burn programs, to the extent possible.

Federally Listed and State-Listed Threatened and Endangered Species

- 34) In addition to VM 51, Applicants shall continue to abide by the special conditions of the 1996 USACE Permit #19960211 for train operations on the Paul Ales Branch in order to minimize further effects on the Hine's emerald dragonfly.
- 35) To avoid any direct take of Indiana bats, Applicants shall not remove trees within the former EJ&E ROW with a diameter of 3 or more inches between April 15 and September 15. Applicants shall avoid or minimize tree clearing and snag removal within project-related construction area limits.

Water Resources

- 36) Within 6 months of the effective date of the Board's final decision, Applicants shall consult with EPA, Illinois Environmental Protection Agency (IEPA), and Indiana Department of Environmental Management (IDEM) regarding sensitive surface or groundwater resources along the EJ&E rail line and potential cost-effective preventative measures that could be taken to protect such resources from potential contamination in the unlikely event of a hazardous material release from a rail car on the EJ&E rail line. Applicants shall include in their quarterly reports documentation of the outcome of their consultations and shall abide by the consulting agencies' reasonable requirements.
- 37) In addition to VM 90, and in response to concerns raised by INDNR, Applicants shall coordinate project-related wetland mitigation planning with INDNR.
- 38) Applicants shall meet with EPA, USFWS, and USACE during the design of all project-related construction (including the locations of connections and double track) and shall comply with the reasonable requirements of those agencies in order to avoid and minimize, to the extent feasible, effects on wetlands and biological resources.

Constructions

Rail Operations

- 39) In addition to VM 40, Applicants shall maintain access to the pedestrian tunnel from the Metra Park-n-Ride lot to the Metra train station on the east side of the Chicago Subdivision at Matteson, Illinois. Construction of the Applicants' proposed connection shall not interfere with the public's access along Front Street in Matteson. Prior to the proposed construction, Applicants shall consult with Metra to devise reasonable requirements pertaining to coordinating tunnel access, track construction and existing pedestrian safety.

Rail Safety

- 40) Applicants shall consult with state Departments of Transportation and other appropriate agencies and shall abide by the reasonable requirements of the Illinois Commerce Commission or INDOT prior to constructing, relocating, upgrading, or modifying highway/rail at-grade crossing warning devices on the EJ&E rail line.

Hazardous Waste Sites

- 41) Applicants shall use established standards for recycling or reuse of construction materials, such as ballast and rail ties. When recycling construction materials is not a viable operation, the Applicants shall use disposal methods that comply with applicable solid and hazardous waste regulations.
- 42) Applicants shall follow American Society of Testing and Materials (ASTM) E1527-05, Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process, prior to construction activities related to the Proposed Action in areas where potential contamination may be encountered (ASTM 2005). If the Applicants encounter contamination (or signs of potential contamination) during these activities, Applicants shall perform a Phase 2 environmental investigation.

Land Use

- 43) In addition to VM 70, in response to concerns raised by IDNR, Applicants shall consult with IDNR or INDNR to coordinate a reasonable easement agreement for crossing state-owned parks in Illinois or Indiana, respectively, to reach project-related construction areas.
- 44) In addition to VM 54, VM 60, and VM 62, Applicants shall flag the boundaries of any project-related construction near a forest preserve, nature preserve, protected area, local park, scenic corridor, or land and water reserve and shall coordinate with the respective owners and/or managers and abide by their reasonable requirements.
- 45) Applicants shall store construction-related equipment and materials in established storage areas or on the Applicants' property.

- 46) Prior to construction of double track near Gilmer Road near Hawthorn Woods, Illinois, Applicants shall coordinate with and abide by the reasonable requirements of Hawthorn Woods regarding the Gilmer Road scenic corridor.

Noise and Vibration

- 47) Applicants shall implement best management practices when developing construction plans and performing transaction-related construction activities to ensure that construction-related noise and vibration effects are minimized to the extent possible.
- 48) Applicants shall design and build all new transaction-related, curved track sections of 3 degrees or above in a manner that minimizes or eliminates the potential for wheel flange squeal using guidance provided by AREMA standards.

Biological Resources

- 49) Applicants shall immediately cease transaction-related construction in the event that a previously unidentified Federally or state-listed threatened or endangered species is encountered during transaction-related construction activities. In that event, Applicants shall consult with USFWS for Federally-listed species and IDNR and/or INDNR for state-listed species for guidance on how to minimize transaction-related effects and protect these species, and shall comply with the reasonable solutions suggested by those agencies. Applicants' resource agency liaison(s) (see Condition 29, above) shall serve as coordinator(s).
- 50) In addition to VM 86, Applicants shall not include any invasive weed species in seed mixes for revegetation of areas that would be disturbed during transaction-related construction activities.
- 51) Applicants shall avoid construction of the Munger connection within Pratt's Wayne Woods Forest Preserve, or any other identified migratory bird nesting or breeding area, during the bird breeding season (April through August) to avoid disturbance of breeding birds.
- 52) Prior to transaction-related construction activities, Applicants shall reexamine the Federal and state lists of threatened and endangered species for any newly listed species and shall consult with the appropriate resource agencies on any newly listed species. Applicants' resource agency liaison(s) (see Condition 29, above) shall serve as coordinator(s).
- 53) Applicants shall ensure that all equipment for transaction-related construction activities is washed prior to entering the construction site and after the construction activities are completed. Prior to leaving the construction site, Applicants shall inspect all construction equipment and remove any attached flora, fauna, mud or seeds.
- 54) Applicants shall maintain the current access to Pratt's Wayne Woods near Wayne, Illinois at the Applicants' Proposed Munger Connection in accordance with existing access and management agreements.

Water Resources

- 55) Applicants shall compensate for effects on isolated wetlands according to the regulations of the State of Indiana for transaction-related construction activities. Isolated wetlands in Indiana are regulated as State Regulated Wetlands (SRWs) under 327 Indiana Administrative Code (IAC) 17.
- 56) For transaction-related construction activities, Applicants shall mitigate for effects on isolated wetlands according to the regulations of Lake and DuPage counties in Illinois, both of which have specific mitigation requirements for effects on isolated waters and their associated buffer areas.
- 57) When performing transaction-related construction activities, Applicants shall not affect existing wetlands in order to create the ponds or stormwater detention that may be required for the management of stormwater runoff.
- 58) Applicants shall comply with the reasonable requirements of the Will County, Illinois Stormwater Management Ordinance for all transaction-related construction activities in Will County.
- 59) When performing transaction-related construction activities, Applicants shall avoid increasing upstream flood elevations in Federal Emergency Management Agency (FEMA)-regulated floodplains and shall obtain a Letter of Map Revision (LOMR) from FEMA where construction of bridges, culverts, or embankments would result in an unavoidable increase in 100-year flood elevations greater than 0.1 foot.
- 60) Prior to beginning transaction-related construction activities, Applicants shall delineate wetlands and conduct floristic quality assessments in jurisdictional wetland and non-jurisdictional wetland habitat in transaction-related construction areas along the EJ&E rail line (including the six connections and the proposed double track).

Cultural Resources

- 61) During transaction-related construction activities, Applicants shall immediately cease excavation work if archeological resources are encountered during construction activities. Applicants shall inform and consult with the appropriate State Historic Preservation Office and/or appropriate Tribal Historic Preservation Office regarding appropriate measures for addressing the resource, and shall comply with the reasonable requirements those agencies suggest.

Agreements

- 62) Applicants shall comply with the terms of their agreement with Amtrak as set forth in VM 37.
- 63) Applicants shall comply with the terms of the negotiated agreement that was executed by Joliet, Illinois and the Applicants on August 25, 2008.
- 64) Applicants shall comply with the terms of the negotiated agreement that was executed by Crest Hill, Illinois and the Applicants on November 18, 2008.

- 65) Applicants shall comply with the terms of the negotiated agreement that was executed by Dyer, Indiana and the Applicants on December 4, 2008.
- 66) Applicants shall comply with the terms of the negotiated agreement that was executed by Chicago Heights, Illinois and the Applicants on December 8, 2008.
- 67) Applicants shall comply with the terms of the negotiated agreement that was executed by Mundelein, Illinois and the Applicants on December 9, 2008.
- 68) Applicants shall comply with the terms of the negotiated agreement that was executed by Schererville, Indiana and the Applicants on December 11, 2008.
- 69) Applicants shall comply with the terms of the negotiated agreement that was executed by Hoffman Estates, Illinois and the Applicants on December 15, 2008.
- 70) Applicants shall comply with the terms of the negotiated agreement that was executed by Frankfort, Illinois and the Applicants on December 15, 2008.
- 71) Applicants shall comply with the terms of the negotiated agreement that was executed by Griffith, IN and the Applicants on December 18, 2008.

Monitoring and Enforcement

- 72) If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change, the Board may review the continuing applicability of its final mitigation, if warranted.
- 73) Applicants shall retain a third-party contractor to assist SEA in the monitoring and enforcement of mitigation measures on an as-needed basis until Applicants have completed transaction-related construction activities, as well as a period covering the first 5 years from the effective date of the Board's final decision.
- 74) In addition to VM 101, Applicants shall submit quarterly reports to SEA on the progress of, implementation of, and compliance with these mitigation measures for a period covering 5 years from the effective date of the Board's final decision. Applicants shall notify the Board in their quarterly reports if applicants substantially depart from their traffic projections on the five existing CN lines through Chicago on more than a short-term, temporary basis.

APPENDIX B: ABBREVIATIONS AND ACRONYMS

A&BR	Adrian & Blissfield Railroad
Ace	Ace Ethanol
ACS	American Chemical Service
Algoma	Algoma Steel, Inc.
Amtrak	National Railroad Passenger Corporation
Aracruz	Aracruz Celulose USA, Inc.
ASMC	American Suzuki Motor Corporation
ATDA	American Train Dispatchers Association
Aux Sable	Aux Sable Liquid Products, LP
B&LE	Bessemer and Lake Erie Railroad Company
BASF	BASF Corporation
BLET	Brotherhood of Locomotive Engineers and Trainmen
BNSF	BNSF Railway Corporation
BRC	Belt Railway Company of Chicago
CCP	Chicago, Central & Pacific Railroad Company
CEQ	Council on Environmental Quality
CNR	Canadian National Railway Company
CPR	Canadian Pacific Railway Company
CREATE	Chicago Region Environmental and Transportation Efficiency Program
CRRC	Cedar River Railroad Company
CSXT	CSX Transportation, Inc.
DATCP	Wisconsin Department of Agriculture, Trade and Consumer Protection
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DMIR	Duluth, Missabe and Iron Range Railway Company
DOT	United States Department of Transportation
DWP	Duluth, Winnipeg and Pacific Railway Company
Effingham	Effingham Railroad Company
EJ&E	Elgin, Joliet and Eastern Railway Company
EJ&EW	EJ&E West Company
EPA	United States Environmental Protection Agency
Equistar	Equistar Chemicals, LP
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
GCIAA	Gary Chicago International Airport Authority
GHCC	Glendale Heights Chamber of Commerce
GLT	Great Lakes Transportation LLC
GTC	Grand Trunk Corporation
GTW	Grand Trunk Western Railroad
IBEW	International Brotherhood of Electrical Workers
IC	Illinois Central Railroad Company

IC&E	Iowa, Chicago & Eastern Railroad Corporation
ICC	Interstate Commerce Commission
IDOT	Illinois Department of Transportation
INR/WRSB	Illinois Natural Resources/Water Resources Stakeholder Group
KCS	Kansas City Southern Railway Company
KCSM	Kansas City Southern de Mexico, S.A. de C.V.
Memphis Regional	Memphis Regional Chamber
Metra	Northeast Illinois Regional Commuter Railroad Corporation and the Commuter Rail Division of the Regional Transportation Authority
NAFTA	North American Free Trade Agreement
NARP	National Association of Railroad Passengers
NCFO	National Conference of Firemen & Oilers-SEIU
NEPA	National Environmental Policy Act
NICTD	Northern Indiana Commuter Transportation District
NITL	National Industrial Transportation League
NS	Norfolk Southern Railway Company
P&C Dock	Pittsburgh & Conneaut Dock Company
PCS	PCS Sales (USA), Inc.
PHMSA	Pipeline and Hazardous Materials Safety Administration
Potlatch	Potlatch Forest Products Corporation
Prairie Material	Prairie Materials Sales, Inc.
RMI	Raw Materials, Inc.
SCTC	St. Clair Tunnel Company
SSMB	Sault Ste. Marie Bridge Company
STAR	Suburban Transit Access Route
Transtar	Transtar, Inc.
UBAM	United Business Association of Midway
United Sugars	United Sugars Corporation
UP	Union Pacific Railroad Company
UPS	United Parcel Service
USFWS	United States Fish and Wildlife Service
USS	United States Steel Corporation
UTU GCA-386	United Transportation Union—General Committee of Adjustment GO-386
Waterloo	Waterloo Railway Company
WCL	Wisconsin Chicago Link Ltd.
WC	Wisconsin Central Ltd
WisDOT	Wisconsin Department of Transportation
WPHC	Wheeling/Prospect Heights Area Chamber of Commerce and Industry
WSOR	Wisconsin & Southern Railroad Co.

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CARRIER final

Agreement between

**GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY**

And their employees represented by

**AMERICAN TRAIN DISPATCHERS ASSOCIATION
ILLINOIS CENTRAL TRAIN DISPATCHERS ASSOCIATION**

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW and IC served notice under Article I, Section 4 of the Protective Conditions of their intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and IC and the American Train Dispatchers Association ("ATDA") and the Illinois Central Train Dispatchers Association ("ICTDA") on behalf of employees represented by each respective organization to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, and to provide the necessary protection of employees,

IT IS AGREED:

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment B, covered under the agreement between the GTW and the ATDA will be abolished.
2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for ten (10) IC dispatcher positions at Homewood.
3. GTW dispatchers must submit their application for the above options or state their intent to exercise their seniority to another position under another Agreement to which they may hold seniority, in writing, to the individual designated by the carrier, with a copy to the employee's Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an application, or identify options, will result in the employee being considered as furloughed without protection.
4. Assignments and awarding of positions shall be made in seniority order. In the event all positions provided in paragraph 2 are selected by dispatchers, clerical positions under the GTW/TCIU agreement will be made available to the remaining employees on the GTW/ATDA seniority rosters.
5. Employees transferring from Troy to Homewood under provisions of this Agreement shall become IC employees and be subject to the agreement in effect between the ICTDA and IC covering wages, rules and working conditions, subject to the modifications contained herein. On the effective

date of this Agreement, the employees transferred under Paragraph 4 shall be credited with prior GTW service on the IC for benefits and vacation purposes.

6. Employees awarded positions transferred under the provisions of Paragraph 4 and existing IC employees will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other dispatcher assignment available under the terms of the CBA or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ICTDA Agreement.
7. Employees awarded positions under Paragraph 4 will forfeit all GTW seniority and their seniority will be dovetailed with the seniority dates held by employees on the IC. In the event two or more employees from the different seniority rosters have identical seniority dates, the employees shall be ranked first by service dates, then, if service dates are the same, by date of birth, the oldest employee to be designated the senior ranking. This shall not affect the respective ranking of employees with identical seniority dates on their former seniority roster.
8. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement. It is understood that if active and regularly assigned dispatchers at Troy decline to

apply for any of the ten (10) dispatcher positions at Homewood or if any of the ten (10) positions are left unfilled, then such employees will not be considered deprived of employment and shall not be entitled to the protective benefits contained in the New York Dock conditions as a result of this transaction.

9. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.
10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit

(regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

11. Each "dismissed employee" shall provide the carrier's designated individual the following information for the preceding month in which such employee is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the carrier.
 - (a) The day(s) claimed by such employee under any unemployment insurance act.
 - (b) The day(s) claimed by such employee worked in other employment, the name(s) and address(es) of the employer(s) and the gross earnings made by the dismissed employee in such other employment.
 - (c) The day(s) for which the employee was not available for service due to illness, injury or other reasons for which the employee could not perform service and whether the employee received sickness benefits.
12. If the "dismissed employee" referred to herein has nothing to report account of not being entitled to benefits under any unemployment insurance law, having no earnings from any other employment, and was available for work the entire

month, such employee shall submit, on a form provided by the carrier, within the time period provided for in paragraph 11, the form annotated "Nothing to Report."

13. The failure of any employee to provide the information as required in paragraphs 11 and 12 shall result in the withholding of all protective benefits during the month covered by such information pending receipt by the carrier of such information from the employee. No claim for protective benefits shall be honored beyond sixty (60) days from the time specified in paragraph 11, except in circumstances beyond the individual's control.
14. The carrier will make payment of the protective benefits within sixty (60) days of receipt and verification of the information required in paragraphs 11 and 12.
15. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.
16. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.
17. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement

and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.

18. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization, but not later than September 21, 2009.

Signed this th day of , 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN
RAILROAD COMPANY; and
ILLINOIS CENTRAL

By: _____

Approved: _____

By: _____



By: _____

For: AMERICAN TRAIN DISPATCHERS
ASSOCIATION

By: _____

Approved: _____

For: ILLINOIS CENTRAL TRAIN
DISPATCHERS ASSOCIATION

By: _____

ATTACHMENT A

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. Definitions. – (a) “Transaction” means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) “Displaced employee” means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) “Dismissed employee” means an employee of the railroad who, as a result of a transaction is deprived of 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.

(d) “Protective period” means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee’s length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad’s employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and

some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision – (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

- (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.
- (2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.
- (3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances – (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

- (b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.
- (c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earning of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place or residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. **Moving expenses.** - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects 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 exceed 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 representative; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. **Arbitration of disputes.** - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event

the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

- (c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.
- (d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.
- (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. – (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence;

- (i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.
 - (ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.
 - (iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.
- (b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

- (c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.
- (d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or re-training physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or re-training is requested by such employee, the railroad shall provide for such training or re-training at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ATTACHMENT B

	<u>Last Name</u>	<u>Initials</u>	<u>Seniority</u>
1.	Gebard	D.V.	4/19/1977
2.	Facknitz	E.A.	5/22/1977
3.	Campbell	L.P.	12/19/1981
4.	McAfee	M.L.	02/07/1987
5.	Mason	J.W.	11/30/1987
6.	Maidment	S.D.	1/14/1990
7.	Martenis	L.R.	06/02/1991
8.	Spring	M.S.	11/13/1991
9.	Plumley	T.R.	3/07/1993
10.	Maier	A.P.	10/19/1994
11.	Evans	T.D.	12/03/1994
12.	White	L.J.	6/05/1997
13.	Wery	N.D.	09/06/1997
14.	McDonough	K.E.	02/28/1998
15.	Cowgar	K.M.	03/05/1998
16.	Schott	J.F.	09/20/2000

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Cathy
Cortez/CORTEZ02/CNR/CA
11/04/2009 10:41 AM

To Danielle.Farley@cn.ca, Kristen.Wilson@cn.ca,
Robert.Hawkins@BIPC.com, joseph.sirbak@BIPC.com
cc
bcc
Subject Fw: Proposal/ICTDA-CN-ATDA

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

--- Forwarded by Cathy Cortez/CORTEZ02/CNR/CA on 11/04/2009 10:40 AM ---

Mike
Christofore/CHRIST12/IL/CN
R/CA

To Cathy Cortez/CORTEZ02/CNR/CA@CNR, John Czarny/CZARNY/IL/CNR/CA@CNR, Rick
Pippin/PIPPIN02/CNR/CA@CNR, Hunt Cary/CARY01/IL/CNR/CA/Atdddvw@aol.com, "Leo
McCann" <atdamccann@aol.com>

08/28/2009 02:34 PM

cc
Subj Proposal/ICTDA-CN-ATDA
ect

Cathy Cortez/Sr Manager Labor Relations CN Railroad

Per our(ICTDA)proposal sent to you on August 26 2009 for upcoming arbitrtion hearing between CN
Railroad/ICTDA/ATDA ,at this time we(ICTDA)

are withdrawing this proposal effective immediately.We(ICTDA)will get back with you as soon as possible
on this matter.Thank You.

MH Christofore
President ICTDA

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ATDA final

Agreement between

**GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY**

And their employees represented by

AMERICAN TRAIN DISPATCHERS ASSOCIATION

WHEREAS, the Surface Transportation Board, in decisions dated May 25, 1999, (STB Finance Docket No. 33556), approved the acquisition by Canadian National Railway Company ("CNR"), Grand Trunk Corporation ("GTC"), and Grand Trunk Western Railroad Incorporated ("GTW"), of Illinois Central Corporation ("IC Corp."), Illinois Central Railroad Company ("IC"), Chicago, Central & Pacific Railroad Company ("CCP") and Cedar River Railroad Company ("CRRC") subject to the conditions for the protection of railroad employees described in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), and

WHEREAS, on February 3, 2009 the GTW served notice under Article I, Section 4 of the Protective Conditions of its intent to change operations as a result of the above transaction, and

WHEREAS, the parties to this agreement agree that this Implementing Agreement, made by and between the GTW and the American Train Dispatchers Association ("ATDA") on behalf of employees represented by the ATDA to establish procedures for the transfer of work and employees whose positions will be abolished on the GTW, provides the necessary protection of employees,



IT IS AGREED:

1. On the effective date of this agreement, sixteen (16) GTW Dispatcher positions, identified in Attachment C, subject to the agreement between the GTW and the ATDA will be abolished and the work they perform will be transferred to Homewood.
2. No less than ten (10) days prior to the effective date of this agreement, the GTW will post notices at Troy for at least ten (10) GTW dispatcher positions at Homewood to perform the work being transferred. Should additional positions be needed to perform such work, they shall be offered to those Troy dispatchers who are not part of the initial transfer of employees, as provided below.
3. 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 Agreement), in writing, to the individual designated by the carrier, with copy to Local Chairman, within five (5) days from date of posting. Employees must select their option(s) in order of preference. Employee elections identified on their application will be considered irrevocable. Failure to submit an 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.

30

Please indicate your agreement by signing in the space provided.

Sincerely,

/s/ R. E. Swert

R. E. Swert
Vice President-Labor Relations

I concur:

R. J. McMullen

JHB/mas
RJMSIDE2.JHB

EMPLOYES EXHIBIT 33

P0520

SIDE LETTER NO. 1
CONRAIL-IAM&AW
NY DOCK (MGA)

~~---SIDE LETTER NO. 2---~~

October 16, 1992

Mr. Raymond J. McMullen
General Chairman
International Association of
Machinists and Aerospace Workers
RD #1, Box 756A
Altoona, PA 16601

Re: Monongahela Railway Company - Conrail Merger
ICC Finance Docket 31875

Dear Mr. McMullen:

This confirms the discussions held concerning the merger implementing agreement.

In our discussions and in the Notice previously provided the Carrier advised that IAM positions would be moved from Brownsville to Waynesburg concurrent with the coordination of MGA work with Conrail.

We further advised that we anticipate moving five of the seven current Machinists positions and abolishing two positions, as portions of the work now performed by those positions will be performed by Conrail forces and the Altoona Shops.

We agree that concurrent with the coordination of work and the movement of IAM positions to Waynesburg, Carrier will establish new positions at Altoona equal to the number of positions permanently abolished on the MGA. Those positions will initially be advertised and filled on *seniority* MGA prior rights basis. Former MGA employees awarded these positions will be entitled to moving expenses and benefits in accordance with Article I Section 9 and 12 of New York Dock conditions. Employees following their work and accepting transfer in accordance with this Agreement shall have their names and MGA seniority dates dovetailed into the existing appropriate Conrail IAM Seniority District Roster, *their names will be removed from the District 12A Roster.*

EMPLOYES EXHIBIT 32

requirements of Article I, Section 4 of the New York Dock
Labor Protective Conditions imposed by ICC Finance Docket
31875.

Signed this _____ day of _____, 1992, at

FOR THE EMPLOYEES:

FOR CONSOLIDATED RAIL
CORPORATION:

General Chairman
International Association of
Machinists and Aerospace Workers

Vice President-Labor Relations

APPROVED:

FOR THE MONONGAHELA RAILWAY
COMPANY:

International Association of
Machinists and Aerospace Workers

a job offer that would under existing agreements require a change in residence will be eligible to receive the moving expenses provided under paragraph 3 of this Agreement.

7. The dismissal allowance of any employee shall be reduced to the extent of any earnings made by the employee outside of the employment of Conrail. Employees receiving a dismissal allowance must, upon request, provide documentation attesting to the amount of such outside earnings. Failure to provide such documentation upon request, or upon evidence of any fraudulent submission of claims, shall result in a suspension of benefits.

8. This Agreement will become effective upon five (5) days advance notice to the involved General Chairmen of the International Association of Machinists and Aerospace Workers, unless otherwise agreed, and constitutes the required implementing agreement and fulfills all other

5. An employee who is affected by the transaction and entitled to benefits under Section 5 or 6 of the New York Dock conditions may file a written request on the form provided, with the Manager-Labor Relations, Suite 201 Conrail Building, 424 Holiday Drive, Pittsburgh, PA 15220, for a statement of test period earnings for use in developing his or her displacement or dismissal allowance. A claim for protection must be presented on the form provided and must be submitted to Conrail's Manager-Labor Relations within sixty (60) days following the end of the month in which the adverse affect is claimed.

6. An employee who is deprived of employment as a Machinist as a result of this transaction may be offered a position as a Machinist at any location. Such employee shall be given thirty (30) days' written notice by certified mail (with copy to the General Chairman) of such offer and must elect in writing one of the following options prior to the expiration of the notice: (1) to accept the offer; (2) to resign from all service and accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May, 1936 (if a change in residence is required); or (3) to be furloughed without protection during the period of such furlough. In the event an employee fails to make such an election, he shall be considered to have exercised option 3. Employees accepting

amended, between Conrail and the International Association of Machinists and Aerospace Workers, will be applicable to the former Monongahela Railway Company employees covered by this Agreement, and Monongahela Railway Company Agreements are terminated.

2. On the effective date of this Agreement, all MGA employees represented by the International Association of Machinists and Aerospace Workers will be dovetailed into the Conrail-IAM Seniority District "0012A" roster with a Prior RR code "MGA" and a Prior Roster code "0001", and that such employees will be available to perform service on a coordinated basis subject to applicable Conrail agreements. On the effective date of this Agreement Conrail-IAM Seniority District "0012A" will be expanded to encompass the former territory of the MGA.

3. Employees affected as a result of this transaction will be afforded the benefits prescribed by the ICC as set forth in the New York Dock conditions which are, by reference, incorporated herein and made a part hereof.

4. Any prior continuous service and qualifying years with the Monongahela Railway Company shall be credited for vacation, personal leave and other benefits which are granted on the basis of qualifying years of service.

AGREEMENT MADE THIS DAY OF 1992, UNDER
ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS,
BETWEEN THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS AND CONSOLIDATED RAIL CORPORATION AND THE
MONONGAHELA RAILWAY COMPANY IN CONNECTION WITH THE MERGER OF
THE MONONGAHELA RAILWAY COMPANY INTO CONRAIL PURSUANT TO
INTERSTATE COMMERCE COMMISSION ORDER IN FINANCE DOCKET
NO. 31875

Whereas the Interstate Commerce Commission in Finance
Docket No. 31875 granted approval of the merger of the
Monongahela Railway Company (hereinafter referred to as MGA)
into Consolidated Rail Corporation (hereinafter referred to
as Conrail) subject to "New York Dock" Labor Protective
conditions and that the ICC further approved the assignment
of leases of the MGA to Conrail; and

Whereas, the Carriers intend to effect the coordination
of work performed by employees represented by the
International Association of Machinists and Aerospace
Workers in connection with the merger, including the
movement of maintenance of equipment work to Waynesburg and
Conway, PA.

IT IS AGREED:

1. On the effective date of this agreement, the
Collective Bargaining Agreement effective May 1, 1979, as

EXHIBIT 13

positions which may arise out of application of the implementing agreement.

The exception to the above findings is that the Arbitration Board believes the implementing agreement should include that Side Letter of Understanding which the Carrier had initially proposed to the IAM&AW, but withdrew when it declared an impasse, or, namely, a letter dated October 16, 1992, and presented to this Board by the IAM&AW as Employee Exhibit No. 32, and which will be attached to this Arbitration Board decision and hereinafter be identified as Side Letter No. 1 to the Implementing Agreement. This side letter concerns the anticipated transfer of portions of work from the MGA to Altoona, PA, and the right of former MGA employees to be initially awarded a position created as a consequence of such action. It is also evident from the record that the same situation may well apply with respect to a transfer or work from the MGA to Conway, PA. Thus, this side letter will be considered as likewise applicable to any position which initially involves the transfer of portions of work from the former MGA to Conway, PA.

Accordingly, in study of the record and arguments of the parties, the Arbitration Board finds that the Implementing Agreement which the Carrier has proposed for adoption, namely, Exhibit 13 to its written presentation, and here attached as Attachment "A", meets the criteria set forth in Article 1, Section 4 of the New York Dock Conditions in effecting the coordination of work performed by employees represented by the IAM&AW on the MGA in a manner as authorized by the ICC. Therefore, the Arbitration Board finds that such document, together with the addition of previously mentioned Side Letter of Understanding No. 1, shall be held to constitute the appropriate Implementing Agreement for the merger of MGA employees represented by the IAM&AW into Conrail.

AWARD:

The Question at Issue is disposed of as set forth in the above Findings of the Arbitration Board.



Robert E. Peterson, Arbitrator

June 21, 1993

The Arbitrator would hope that in final resolution of the instant dispute that the Carrier would reconsider its position and grant employees represented by the IAM&AW the same level of benefits it was willing to provide in pre-arbitration meetings and as is contained in certain letters of agreement with the other craft organizations, i.e., five (5) working days off with pay and a \$500 transfer or lace curtain allowance.

Current Work Continuation:

The IAM&AW asks that the implementing agreement provide the four Maintenance of Way Machinists "be allowed to maintain and perform all the work currently performed on the MGA" and the one Maintenance of Equipment Machinist "be allowed to maintain and perform all the locomotive work currently performed on the MGA that is not transferred to another location." Further, it asks that if the work is transferred to Canton, Ohio or other Conrail locations, that the Machinists it represents have the right to follow such work.

The IAM&AW also desires that work on other equipment and highway vehicles be identified and retained for the former MGA Machinists and that it be advised where the vehicles and equipment are being transferred to if not retained on the former MGA property, "and that the Machinists be allowed to follow the work if proper."

Except as will be discussed below, this Arbitration Board finds no reason to hold that a newly created position at a location to which work formerly performed on the MGA may be transferred should be awarded to a former MGA employee on the basis that work attached to the creation of such position will be exclusively work of the former MGA. Certainly, when work of the nature here involved on the MGA is transferred and integrated into the Conrail system in implementation of the merger it will be difficult, if not impossible, to distinguish what work had previously been work restricted to or performed by former MGA employees.

The Conrail--IAM&AW Schedule of Rules Agreement, which, as stated above, is to be adopted by the parties as part of the implementing agreement, prescribes the manner in which new positions and vacancies will be advertised, posted, and announcements made as to the name of the successful applicant after the close of the advertisement.

Provision is also made in such Agreement for the awarding of advertised positions or vacancies as concerns employees having prior right seniority in the craft and class in which the vacancy exists to be given first consideration, even if working out of their craft or class. Thus, it would seem that the IAM&AW concerns are without merit and that the applicable and current rules of the Conrail--IAM&AW Schedule of Rules Agreement should apply and prevail with respect to the advertisement and awarding of

whether a particular employee meets the definition of a displaced employee are dependent upon individual circumstances. These questions are properly justiciable in a proceeding pursuant to Article I, Section 11 of the New York Dock Conditions rather than this [Section 4] proceeding."

In the light of the aforementioned considerations, and in keeping with the findings of many past boards, such as in the case before Arbitrator Fredenberger, this Arbitration Board finds no basis to conclude that an arbitrated implementing agreement may properly mandate a TPA provision in the manner requested by the IAM&AW.

Moving Allowance:

The IAM&AW initially requested that, in addition to those moving benefits contained in Article I, Section 9, of the New York Dock conditions, "employees electing to transfer to a new point of employment requiring a change of residence as a result of jobs offers" be provided "an allowance for any and all other expenses" in accordance with a schedule that would call for payment of \$400 allowance on the date of transfer; a second \$400 allowance at the end of 120 days of compensated work; and a third \$400 allowance at the end of 190 days of compensated work. The foregoing notwithstanding, in its presentation to the Arbitration Board, the IAM&AW proposed that the machinists required to transfer be given a "lace curtain" allowance similar to that contained in the implementing agreement the Carrier entered into with the Carmen's Organization, i.e., a \$500 allowance.

The IAM&AW also asks that the implementing agreement stipulate reimbursement of wage losses be five (5) days rather than the three (3) day reimbursement which is prescribed in the New York Dock conditions.

It is beyond the jurisdiction of an arbitration board, such as this, to award an increase in the prescribed moving allowance, absent the authority of the parties to make a determination on such a matter.

Section 9 of the New York Dock conditions specifically says that the affected employee shall be reimbursed for an actual wage loss "not to exceed 3 working days." No mention is made in those conditions of "other expenses" or a schedule of allowances for other expenses.

This finding notwithstanding, the Arbitration Board would be remiss if it did not say, as Arbitrator Scheinman said in a dispute involving this Carrier and the TCIU, and wherein the Carrier had agreed to permit the arbitrator to make a determination about moving allowances: "We believe it inequitable to provide a different level of benefits to former MGA employees who must move... as a result of this transaction."

In this same respect, it would seem to the Arbitration Board that the certification of an employee solely on the basis of the implementation of a transaction, rather than the certification and construction of a TPA at the time the employee is in fact adversely affected, would be to prematurely commence the tolling of the protective period during which the affected employee would be entitled to a job protection or displacement allowance.

That the Carrier, in an implementing agreement with the Brotherhood of Maintenance of Way Employees, was agreeable to providing that employees on the MGA who are in active service on a date certain "will be certified as a 'Displaced Employee' adversely affected by the transaction" and "will be provided their test period averages," must be viewed in the light of that understanding being one of a voluntary nature in settlement of the merger notice and other pending labor matters, and also stipulating the following:

"It is further agreed that notwithstanding the certification provided for above, any such employee adversely affected due to any of the following causes will not be entitled to receive either a dismissal allowance or a displacement allowance as a result thereof:

- o Employee's own choice (e.g. voluntarily bidding to a lower rated position).
- o Return of other (senior) employees from leave of absence, disability, injury or vacation.
- o Medical disqualification of the Claimant.
- o Emergency or work stoppage.
- o External statutory changes such as amendments to the Hours of Service Law or FRA regulations."

In any event, aside from the above understanding between the Carrier and the BMWWE being one of a voluntary or collective bargaining nature, it is not, as here sought by the IAM&AW, the providing of a TPA "with no strings attached."

Arbitrator William E. Fredenberger, Jr. in a decision which he issued under date of January 12, 1983 in a dispute between the Brotherhood of Railway Carmen and the Baltimore and Ohio Railroad/Louisville and Nashville Railroad involving what shall be contained in an arbitrated implementing agreement, in holding that issues concerning displacement allowances were not properly justiciable in the proceeding before him, said:

"The question of whether the Carriers are obliged to furnish test period earnings as well as the question of

In support of the logic of its seniority proposal, the Carrier points up that in every implementing agreement reached by mutual agreement or under Section 4 arbitration, the appropriate Conrail Pittsburgh area seniority district has been expanded to encompass the former MGA territory, and that in no instance has the MGA been kept a separate seniority district as here requested by the IAM&AW.

The Carrier further submits, and the Arbitration Board believes rightly so, that the advertisement and awarding of positions should be basically pursuant to the applicable rules agreement, or, as here, the Conrail-IAM&AW Schedule of Rules Agreement. In this respect, it is noted that Section 5 of Article I of the New York Dock conditions prescribes that to eligible for a displacement allowance there must be "the normal exercise of seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced."

Accordingly, in consideration of the record and arguments of the parties, the Arbitration Board finds the Carrier proposal for the expansion of the Pittsburgh Seniority District to include the former MGA territory to be meritorious and appropriate for the protection of seniority rights and the assignment of employees made necessary by the merger of the MGA into Conrail.

The Test Period Average:

A test period average (TPA) is a meaningful measurement of past earnings of a displaced employee in the establishment of an affected employee's job protection allowance. It permits a determination to be made as to the extent, if any, that a displacement allowance is payable each month during the term of a protective period as a consequence of the employee having been adversely affected as a direct result of the transaction.

A TPA is not, however, something to which an employee is entitled account an indirect affect of the transaction, or on the basis of speculative belief that the transaction may be cause for reduced compensation or loss of a job at a future date.

For it to be concluded, as the IAM&AW asks, that a TPA be given to all MGA Machinists, "with no strings attached," would require this Arbitration Board to go outside the meaning and intent of the New York Dock conditions and give blanket certification to all employees. Such action would be in disregard of those provisions of the New York Dock conditions which condition entitlement to either a dismissal or displacement allowance on a showing that the transaction has had an adverse affect on an employee, or, as set forth in such conditions, that as a "result of a transaction" the affected employee "is deprived of employment" or is "placed in a worse position with respect to his compensation and rules governing his working conditions."

CONRAIL-IAM&AW
NY DOCK (MGA)

made effective that: (1) a new Conrail-IAM&AW Seniority District Roster be established to encompass the former territory of the MGA, including South Brownsville and Waynesburg, PA; (2) two new rosters be created at Waynesburg, one for shop work and the other for maintenance of way work; (3) employees following their work and accepting transfers to other locations on Conrail where work on former MGA locomotives, roadway machines, equipment, etc., has been transferred have their names and MGA seniority dates dovetailed into the existing appropriate Conrail-IAM&AW Seniority District Roster; and, (4) in the event that employees accept transfer to a Conrail location where no MGA work has been transferred they shall have their name placed at the bottom of the appropriate Conrail-IAM&AW Seniority District Roster.

The IAM&AW also asks that the implementing agreement provide that employees who transfer to other Conrail-IAM Seniority Districts will retain seniority at South Brownsville and be subject to recall to a permanent vacancy known to be of at least 60 days duration, with the Carrier paying reasonable expenses in connection with an employee accepting recall and returning to South Brownsville.

The Carrier, on the other hand, proposes that all MGA employees represented by the IAM&AW be dovetailed into the Conrail-IAM&AW Seniority District "0012A" roster with a Prior RR Code "MGA" and a Prior Roster code "0001", and that such employees be available to perform service on a coordinated basis subject to applicable Conrail agreements. The Carrier has also proposed that on the effective date of the implementing agreement that Conrail-IAM&AW Seniority District "0012A" be expanded to encompass the former territory of the MGA.

In this latter regard the Carrier has stated that those IAM&AW Machinists who are designated to retain prior rights will have prior rights to all machinists positions subsequently advertised on the former MGA territory.

The Carrier asserts that its seniority proposal provides the MGA employees full integration of their seniority on the Pittsburgh area seniority roster, and that this is appropriate since it says the preponderance of locomotive work formerly done at Brownsville by IAM&AW represented employees will be performed at the Conway Diesel Shop because the MGA locomotive fleet will be integrated into the Conrail system locomotive fleet, while some unquantified amount of heavy repair work will be done at Altoona, PA.

Further, the Carrier says that the vast preponderance of the work on maintenance of way machinery will continue to be performed on the former MGA property, and that its proposal to assign MGA prior rights to positions headquartered on the former MGA assures that machinists who had performed the work will have first rights to continue to perform the work on the former MGA territory.

as to the terms of an implementing agreement.

Schedule of Rules Agreement:

The parties are basically in agreement that the current Conrail-IAM&AW Schedule of Rules Agreement, effective May 1, 1979, be the surviving rules agreement when the MGA is merged into Conrail. However, the IAM&AW asks that such rules additionally include or provide as follows:

1. A continuation of language contained in a 1988 MGA letter agreement concerning training and tools.
2. A listing of all MW equipment presently maintained by IAM&AW employees and a list of shop equipment to be transferred to Waynesburg and agreement that those employees would continue to maintain the equipment in the future.
3. That a former Pennsylvania Railroad agreement concerning highway vehicle maintenance applicable to portions of Conrail territory (former PRR property) cover the MGA territory.

Given the few number of employees involved i.e., seven, and the rather limited geographical confines of the MGA as compared to the rather extensive size of the Conrail labor force and the extent of its system properties, both parties have wisely chosen to be in general agreement that the Conrail--IAM&AW Schedule of Rules Agreement be applicable when the former MGA employees are merged into Conrail, albeit, as indicated above, the IAM&AW would like to amend that Agreement to preserve certain MGA rules.

In the opinion of the Arbitration Board, to modify or amend the Conrail-IAM&AW Schedule of Rules Agreement to extend or preserve certain rights to former MGA employees would be to debase the principles of the basic understanding as to which agreement would survive the merger, and tend to impede, rather than foster the economies and efficiencies of the merger, even if it was to be held, which it is not, that there was merit to the aforementioned desires of the IAM&AW.

Seniority and Seniority Rosters:

Three of the total of seven active employees represented by the IAM&AW on the MGA work in the Locomotive Shop. The four other employees work in the Maintenance of Way and Signal Department. The employees are currently on two separate seniority rosters: (1) Machinists Seniority Roster No. 1, South Brownsville Locomotive Facilities, and (2) Machinists Seniority Roster No. 2, South Brownsville Maintenance of Way Shops.

The IAM&AW asks that on the date the implementing agreement is

implementing agreement provisions thereafter proposed by the IAM&AW, clearly demonstrate an overall awareness on the part of the IAM&AW representatives of the intentions of the Carrier as concerns the merger of employees, work, and facilities of the MGA into Conrail.

Accordingly, the IAM&AW protest that the notice was defective and did not meet the requirements of Section 4 of Article I of the New York Dock conditions is found to be without merit.

The Impasse and Arbitration:

The parties engaged in a number of informal and formal meetings and telephone conversations regarding the notice as well as the terms of an implementing agreement. That both parties insisted on remaining firm on a number of issues and were thereby not able to reach mutual accord is unfortunate. However, that the parties have not been able to amicably resolve their differences does not support a finding that there was a lack of good faith bargaining or that they had not in fact reached an impasse in negotiation of an implementing agreement.

Section 4 of Article I of the New York Dock conditions intends there be a speedy resolution of disputes involving an implementing agreement. It calls for "negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this Appendix [III]" to begin within five days of the receipt of a notice. And, Section 4 states that if at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment to arbitration.

As indicated above, informal discussions were conducted between the parties before the notice was formally served on September 23, 1992. The parties met on October 15 and 16, 1992, and exchanged written proposals. Subsequent meetings and telephone conferences were held on November 6, 1992 and January 5, 6, 11, and 13, 1993. It was not until some two weeks later, on January 27, 1993, that the Carrier declared an impasse and intent to submit the dispute to arbitration.

It being apparent the parties engaged in or had opportunity of negotiation for almost twice the period of time prescribed by the New York Dock conditions before one party, the Carrier, declared an impasse, there is no basis to hold there was a violation of Section 4 requirements of the New York Dock conditions that there be a 30-day period for negotiation of an implementing agreement before the declaration of an impasse and resort to arbitration.

The Arbitration Board thus finds no reason to conclude that the Carrier was premature in declaring an impasse and invoking arbitration for the resolution of the dispute.

Turning now to the merits of arguments advanced by both parties

FINDINGS AND OPINION OF THE BOARD:

The Board will first address the procedural issues raised by the IAM&AW, i.e., (1) the validity of the Carrier notice; and, (2) the question of whether the impasse declared by the Carrier was premature.

The Notice:

Section 4 of Article I of the New York Dock conditions calls for the posting and serving of a written notice which shall contain "a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes."

The Carrier notice was not inconsistent with the requirements of Section 4. It was timely served and posted; it identified the decision issued by the ICC for merger of the MGA into Conrail; it announced that the conditions of protection of employees as embodied in the New York Dock conditions will be provided; it noted that "it is intended to unify, coordinate and/or consolidate facilities used an operations and services performed separately by Conrail and the MGA;" it gave a general description of the affect that the merger would have on employees; it identified the positions and departments where those positions work on the MGA which were to be retained or abolished; it gave an estimate of the number of employees to be affected; and, it indicated the expected coordination and/or consolidation of work would occur, "on or about January 1, 1993, or earlier if an implementing agreement is reached or referee decision rendered."

Although the Carrier subsequently found reason to change some aspects of the notice, that circumstance does not support a contention that the Carrier had not essentially met the notification requirements of the New York Dock conditions. Section 4 does not define what shall constitute a perfect notice. Rather, it seems to call for the serving of a notice that is sufficiently composed so as to alert both employees and their labor representatives to the intended transaction and thereby trigger the consummation of any necessary implementing agreement.

Further, nothing in the Section 4 notice requirements or other provisions of the New York Dock conditions appear to mandate the extent of information sought by the IAM&AW, namely, drawings, prints, pictures, and other information concerning a new facility which is to be built; a list of equipment that employees represented by the IAM&AW repair, rebuild or rehabilitate; or, a list of all shop equipment contemplated on being moved by the Carrier from one location to another location.

The above observations of the Arbitration Board notwithstanding, it would seem that those meetings and conferences which preceded and followed the serving of the Carrier notice, as well as the

simply desire a Test Period Average for all the MGA Machinists, with no strings attached. We want to establish a separate seniority district for the MGA employees, containing rosters for Maintenance of Way and Maintenance of Equipment and for the four (4) Maintenance of Way Machinists to be allowed to maintain and perform all the work currently performed on the MGA. Also, that the (1) Maintenance of Equipment Machinist be allowed to maintain and perform all the locomotive work currently performed on the MGA that is not transferred to another location. Further, if the work is transferred to Canton, OH or other Conrail location, we want the Machinists to have the right to follow their work, with all protective benefits and to be able to dovetail their seniority. We do not want Machinists work assigned to another Craft that is not entitled to perform same.

In the event that the Carrier transfers running repair locomotive work to Conway and heavy repair to Altoona, we want the Maintenance of Equipment Machinists to have the right to follow their work, with all protective benefits and to be able to dovetail their seniority. In addition, we desire that the work on other equipment and highway vehicles be identified and retained for the former MGA Machinists and that the IAM be advised where the vehicles and equipment are being transferred to if not retained on the former MGA property and that the Machinists be allowed to follow the work if proper.

We further desire that all MGA Machinists positions at Brownsville be abolished and new positions be established and advertised for the respective locations to where the work is being transferred, including Waynesburg. Also we desire that the Machinists required to transfer to another work location be given a five (5) day moving allowance and a lace curtain allowance similar to what the Carrier provided in the Carmen's Agreement.

The Organization has attached a proposed Implementing Agreement which we firmly believe is fair and suitable, and in conformity with the provisions of the New York Dock conditions established for handling of this transaction."

Accordingly, the IAM&AW says that if the Carrier notice is not found to be premature that the implementing agreement proposed by the Carrier should be rejected, and that the implementing agreement which the IAM&AW has offered into record should be adopted in a resolution of the dispute.

4. Notice did not specify what work would be moved and where.

5. Notice did not specify where the affected employees would be required to move to."

The IAM&AW offered a summary listing of what it calls "the needed and requested information that the Carrier refused to furnish the Organization in connection with this transaction." Basically, it said it should be provided the following information:

1. Estimated number of employees of each shop craft/class that will be affected by the intended change.
2. Drawings, prints, pictures, or any type of information concerning the new facility to be built at Waynesburg, PA.
3. A list of the equipment that the employees represented by the IAM&AW repair, rebuild, or rehabilitate.
4. A list of the shop equipment that the employees represented by the IAM&AW repair, rebuild, or rehabilitate.
5. A list of all the shop equipment contemplated on being moved from South Brownsville, PA to Waynesburg, PA.

Accordingly, the IAM&AW maintains that the notice which the Carrier served is procedurally defective and the arbitration process premature in the assertion that "proper negotiations as required could not and cannot be conducted until the Carrier provides a full and adequate notice of the true proposed changes to be affected by the transaction."

Additionally, the IAM&AW contends that the Carrier has failed to "engage in good faith negotiations and by doing so, has proposed an agreement to the Organization that does not adequately address the concerns, needs and rights of the employees and most certainly does not meet the requirements of New York Dock." In this same respect, the IAM&AW says the implementing agreement which has been proposed by the Carrier is inferior to agreements offered other crafts on the MGA.

In its ex parte brief to this Arbitration Board, the IAM&AW offered the following conclusionary statement of its position:

"In conclusion, the Organization only desires a fair and equitable Agreement for the Machinists employed by the MGA, that would protect their rights and entitlements and preserve the work currently performed by them. We

territory.

Four machinist positions currently perform the work of maintenance and repair of maintenance of way equipment on the MGA and work in the Engineering Department, Maintenance of Way Shops at Brownsville. These positions are: one gang leader, two machine inspectors and one assistant machine inspector. These positions perform the following work:

Electric and gas welding and cutting, repair of gasoline and diesel engines, hydraulic pumps, motors, etc., on all types of M. of W. Equipment. Repair of company vehicles with or without hyrrail wheels. Rebuilding and installation of rail lubricators. Performance of road work.

Following the merger and coordination of work, Conrail plans on keeping all four IAM positions in the MW Department working on the former MGA territory. These employees will perform repair and maintenance duties connected with running repairs of MW equipment in the field. Major repairs or overhaul of MW machinery such as tampers, ballast regulators, tie removers, and spikers, among others, will be performed when necessary at the Conrail system MW facility at Canton, OH. This shop performs all such major repairs and rehabilitation of MW machinery used throughout the Conrail system."

Based upon the foregoing contentions the Carrier asserts that the procedural objections raised by the IAM&AW are without merit and that the proposed implementing agreement which attached to its letter of January 27, 1993 should be selected by the Arbitration Board in resolution of the Question at Issue.

POSITION OF THE IAM&AW:

The IAM&AW maintains that the notice of the intended transaction which the Carrier served did not fully meet the requirements of Section 4 of Article I of the New York Dock conditions. It bases this contention upon the following stated objections:

- "1. Notice did not contain a full and adequate statement of the proposed changes to be affected by such transaction.
2. Notice did not include the number of employees of each class or craft to be affected the intended changes.
3. Notice did not state the specific dates when the transaction would occur.

In response to the implementing agreement which is proposed by the IAM&AW, the Carrier says that although there are a few areas of basic agreement with such proposal, that there are several areas where there is fundamental disagreement. In this latter regard, the Carrier says the implementing agreement proposed by the IAM&AW goes beyond the requirements of the New York Dock conditions and also beyond the authority of this arbitration committee under Section 4 of Article I of the New York Dock conditions.

In its ex parte brief to this Arbitration Board, the Carrier provided the following description of the work currently being performed and to be performed following the full merger of the MGA into Conrail:

"IAM-represented employees perform work in the Locomotive Shops and the Maintenance of Way Shops, both located in the same building in South Brownsville, PA. The locomotive shop employs three machinists; one lead machinist and locomotive inspector; one air brake inspector; and one machinist working in the air brake room/machine shop. These positions perform the normal machinist work associated with locomotive maintenance and repair. This work includes:

- Service and Inspection (FRA) of Locomotives on Inspection Track. Adding oil, changing brake shoes.
- Machine Shop work - Lathe, Milling, Saw Cutting Metal, Threading Stock.
- All heavy and running repairs on Locomotives.
- Maintenance of MofE Equipment and Vehicles.
- Maintenance and rebuilding of air equipment - Locomotives.
- Locomotive (FRA) Test Work.

Following full merger and integration of the MGA into Conrail, all MGA locomotives will be integrated into the Conrail locomotive fleet. As such, all scheduled and heavy locomotive maintenance and repair work formerly performed by MGA employees will be performed at the Conrail Locomotive Shop at Conway, PA (about 25 miles from Pittsburgh and 94 miles from South Brownsville). Some heavy locomotive repair work will also be performed at the Conrail facilities at Altoona, PA.

Once full coordination of the locomotive work is achieved, there will only be sufficient work to retain one Machinist position performing work on locomotives on the former MGA property. This position will primarily perform light maintenance and running repairs on locomotives in the Conrail fleet operating on the former MGA

CONRAIL-IAM&AW
NY DOCK (MGA)

'prior rights' to Machinists' positions headquartered on the former MGA territory.

3) Former MGA employees will be credited by Conrail with their prior continuous MGA service and qualifying years, for the purposes of vacation, personal leave and other benefits granted on the basis of qualifying years of service.

4) An employee who is affected by the transaction may request an appropriate form to request a test period average and a displacement or dismissal allowance. Any claim for such protection must be made within 60 days of the adverse effect.

5) An employee who is deprived of employment and unable to secure a position may be offered a position in the Machinists craft at any location. When such offer is made, the employee at his option shall select to accept the offer, resign and accept a termination allowance, or be furloughed without protection.

6) Any dismissal allowance shall be reduced by outside earnings.

7) The implementing agreement will become effective upon the giving of five (5) days notice to the appropriate General Chairman of the IAM."

The Carrier says that a comparison of the proposed implementing agreement which it has submitted for the IAM&AW "is, in most respects, identical to the several agreements that have been voluntarily adopted by other crafts involved in the merger of the MGA into Conrail." In this respect, the Carrier submitted into evidence copy of implementing agreements governing other MGA employees in both the non-operating crafts (Electricians; Sheet Metal Workers; Firemen & Oilers; Train Dispatchers; and, Maintenance of Way Employees) and the operating crafts (Engineers; Conductors; and, Trainmen).

The Carrier also offers that in disputes that were settled by arbitrated awards under Section 4 of the New York Dock conditions, one involving Engineers represented by the UTU(E), and the second arbitrated award involving Clerks represented by the TCU, that in each such instance it was determined that the Conrail collective bargaining agreement would be applied and the MGA agreements will be abrogated.

Further, the Carrier submits that in every negotiated agreement or arbitration award, the former MGA territory was incorporated into the adjacent Conrail Pittsburgh Division Seniority territory and the MGA seniority roster was merged into the Conrail Pittsburgh area seniority roster.

It is quite clear that the parties are at an impasse over their attempts to reach an implementing agreement and that New York Dock requires that the parties resolve this dispute through arbitration. The Carriers further take the position that any dispute over the adequacy of the notice is referable to the Arbitrator under Article I, Section 4.

Mr. Burton will call you shortly in an attempt to reach agreement on a neutral for arbitration."

On March 8, 1993 the IAM&AW, in a four-page letter, set forth why it was taking issue with several of the Carrier's past and current contentions and why it believed that the IAM&AW proposal should be the implementing agreement. In closing, the Organization said "if you are unable to give serious consideration to our positions and cannot meet most of the conditions required to reach an Agreement" that it would and did submit the names of arbitrators for consideration as a neutral member "to adjudicate our dispute."

The parties jointly selected Robert E. Peterson to chair the Arbitration Board.

The parties were requested to and did provide pre-hearing briefs to the Arbitration Board. Hearings in this matter were held in Philadelphia, PA on May 4, 1993. At such hearings the parties stipulated to the issue in dispute being that which appears above as the Question at Issue. Further, at such hearings both parties presented oral and rebuttal argument and introduced additional evidentiary documents.

POSITION OF THE CARRIER:

The Carrier asserts that its notice and the terms of its proposed implementing agreement meet all the necessary requirements of the New York Dock conditions.

In its brief, the Carrier described the implementing agreement it has proposed to basically provide as follows:

"1) The Conrail/IAM schedule agreement, including the union shop agreement, will be applicable to all former MGA employees. All MGA/IAM agreements will be terminated.

2) Employees holding seniority on the MGA/IAM seniority rosters will be dovetailed into the Conrail/IAM seniority district roster (for the adjacent and larger Pittsburgh Division) the Conrail-IAM seniority district '0012A' will be expanded to encompass the former territory of the MGA. Former MGA Machinists will hold

ferences were subsequently held between the parties on November 6, 1992, January 5, 6, 11, and 13, 1993.

On January 27, 1993 the Carrier confirmed in a letter to the representative for the IAM&AW that it was "unwilling to accede to the Organization's demands and it was clear that the parties were at an impasse over their efforts to reach an implementing agreement." The Carrier advised that it was thereby withdrawing "the proposed side letters and all oral proposals previously offered in an effort to reach a mutually accommodative implementing agreement."

In its January 27, 1993 letter the Carrier proposed adoption of an implementing agreement which it attached to such letter; it announced its intent to submit the above stated Question at Issue to final and binding arbitration; and, it named Jeffrey H. Burton as its representative in the selection of a neutral referee.

On January 31, 1993 the representative for the IAM&AW responded to the Carrier letter, stating in part the following:

"Please be advised, it is the Machinists position, that the Carrier's invoking the arbitration process at this time is premature and improper, as proper negotiations as required could not and cannot be conducted until the Carrier provides a full and adequate notice of the true proposed changes to be affected by the transaction.

Therefore, I respectfully request that the Carrier provide a complete, full, and adequate notice to the Machinists. If the Carrier will provide the required notice and its representatives engage in good faith negotiations, I believe it is possible to reach an agreement that will be mutually beneficial and satisfactory to all concerned, without the need of arbitration."

In a February 23, 1993 five-page letter to the IAM&AW, the Carrier set forth why it believed a proper notice had been served; it recalled discussions which had taken place at past informal and formal meetings; and, it offered why it believed the parties were at an impasse. In this latter regard, the Carrier said:

"It is the Carrier's position, as the foregoing so clearly indicates, that they have fulfilled the requirements of New York Dock, have negotiated in good faith, and indeed have attempted to meet the employees' concerns through offers to establish new positions and to supply information concerning prior earnings of IAM represented employees. Notwithstanding this, the Organization has not yielded in its position concerning pre-certification and now insists negotiations should continue.

Thereafter, on September 23, 1992, the Carrier gave formal written notice of the intended transaction. This notice reads:

"Pursuant to the decision of the Interstate Commerce Commission in Finance Docket No. 31875, Consolidated Rail Corp. -- Merger -- Monongahela Railway Co., Monongahela Railway Company (MGA) will merge into Consolidated Rail Corporation (Conrail). Conrail will also assume MGA's position as lessee of the Waynesburg Southern Railway properties and of the CSXT's rail line between Catawaba Junction; WV and Grant Town, WV.

As a result of the Carrier's exercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Conrail and MGA.

This coordination and/or consolidation will result in the retention of one (1) machinist position working in the Locomotive Facilities headquartered at South Brownsville, PA, two machinist positions in the Locomotive Facilities will be abolished. The four (4) machinist positions in the Maintenance of Way Shops will be retained. It is anticipated that this coordination and/or consolidation of work will occur on or about January 1, 1993, or earlier if an implementing agreement is reached or referee decision rendered. It is also anticipated that subsequent to this date all remaining machinist positions at South Brownsville, PA will be relocated to Waynesburg, PA.

It is intended that all MGA employees represented by the International Association of Machinists and Aerospace Workers will, on the effective date of the unification, coordination and/or consolidation, be integrated into the Conrail-IAM Seniority District '0012A' roster with a Prior RR code 'MGA' and a Prior Roster code '0001', and that such employees will be available to perform service on a coordinated basis subject to applicable Conrail agreements.

The I.C.C. order provides employee protection in accordance with the conditions for the protection of employees embodied in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), and these conditions will be provided. This notice is served pursuant to Article I, Section 4 of those conditions."

The parties met on October 15 and 16, 1992; they exchanged written proposals, but they were unable to reach mutual agreement on an implementing agreement. Joint meetings and/or telephone con-

East Division, extends from Brownsville, south along the Monongahela River, and terminates at Fairview, a length of 79 miles.

* * * * *

The merger is intended to increase efficiencies between MGA and Conrail and thus to improve the combined system's ability to compete with NS and CSXT. The operating plan calls for: (1) removing the current MGA-Conrail interchange at West Brownsville on traffic to/from Conrail and moving the crew change point to Waynesburg to maximize the road train mileage; (2) consolidating maintenance-of-way and clerical functions; (3) centralizing the train and crew dispatching functions; (4) modernizing the MGA's maintenance of way equipment; and (5) constructing or rehabilitating certain rail line to improve capacity and speed operations. Applicants contend that these economies and efficiencies will enable Conrail to quote more competitive rates allowing more MGA-origin coal to be mined and sold.

* * * * *

MGA is essentially a coal carrier. In 1989 and 1990, 99 percent of MGA's traffic was coal. Of that, more than 80 percent was interchanged with Conrail in 1989. In 1990, 83 percent was interchanged with Conrail. Of the remaining 17 percent, 16 percent was interchanged with PLE and 1 percent with CSXT."

The Commission, in addressing Labor Issues related to the merger, declared that the conditions for protection of railroad employees described in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60, (1979), aff'd sub nom. New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979) (the New York Dock conditions), were appropriate to protect employaees affected by this transaction "in the absence of need for greater protection, which is not sought or shown on this record."

The Carrier, on September 9, 1992, following informal discussion about the merger with representatives of the International Association of Machinists and Aerospace Workers (the IAM&AW), gave such representatives, for their review, advance copy of a notice which it said it intended to post pursuant to Section 4 of Article I of the New York Dock conditions. At the same time, the Carrier forwarded to the IAM&AW copy of what it called "a stand-ard proposed implementing agreement."

On September 15 and on September 18, 1992, representatives for the IAM&AW and Conrail discussed in telephone conversations the content of the Carrier notice and the implementing agreement and exceptions which the IAM&AW representatives took to such matters.

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31875

In the Matter of an Arbitration between

CONSOLIDATED RAIL CORPORATION
AND MONONGAHELA RAILWAY COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS

FINDINGS & AWARD

QUESTIONS AT ISSUE:

1. Does the implementing agreement proposed by the Carriers meet the criteria set forth in Article 1, Section 4, of the New York Dock conditions in effecting the coordination of work performed by employees represented by the International Association of Machinists and Aerospace Workers on the Monongahela Railway Company with that performed on Consolidated Rail Corporation in connection with the merger authorized by the Interstate Commerce Commission in Finance Docket No. 31875?
2. If the answer to 1 is "No," what implementing agreement is appropriate?

BACKGROUND:

On October 10, 1991, the Interstate Commerce Commission (the ICC or Commission) in Finance Docket No. 31875 approved the merger of the Monongahela Railway Company (the MGA) into the Consolidated Rail Corporation (Conrail) (collectively, the Carrier). The Commission found the Carrier proposal to be "a minor transaction."

In its decision, the Commission stated the following as concerns the increased efficiencies to be accomplished by merger of the MGA into Conrail:

"MGA handles almost exclusively coal traffic. It operates a 162-mile line in West Virginia and southwestern Pennsylvania, consisting of two branches named West Division and East Division that meet at Brownsville, PA. The West Division extends west from Brownsville across the Monongahela River to West Brownsville and then generally southwest 55 miles to Blackville, WV. The

NATIONAL RAILWAY LABOR CONFERENCE

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CHARLES L. HOPKINS, Jr.

Chairman

G. F. DANIELS

Vice Chairman

D. P. LEE
Vice Chairman and
General Counsel

R. P. ORIGER
Director of Labor Relations

July 7, 1993.

CIRCULAR NO. 15-259

TO MEMBER ROADS:

As information, attached is a copy of an award rendered by an Arbitration Board established pursuant to Article I, Section 4, of the New York Dock Protective Conditions, with Arbitrator Robert E. Peterson, involving the International Association of Machinists and Aerospace Workers and Consolidated Rail Corporation and Monongahela Railway Company.

The Board approved the Implementing Agreement proposed by the carrier, with the addition of one Side Letter of Understanding, to cover the coordination of work.

Yours very truly,

R. P. ORIGER

Director of Labor Relations

Attachment

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intersecting the Mountain Subdivision to the working limits of the Brunswick-Cumberland Pool with Brunswick remaining the home terminal and Cumberland the away from home terminal.

5. The working limits of the Henry Pool will be combined with the working limits of the Cumberland-Grafton Pool. Cumberland will remain as the home terminal. Grafton will remain as the away from home terminal.

6. Elkins, W. Va. will be closed as a supply point and terminal for other than outlying point assignments, transferring the protection of service between Tygart Junction and Bergee to the supply point of Grafton by adding that territory to the working limits of the Grafton-Cowan Pool. Laurel Bank will be added as an away from home terminal for that pool. Elkins and Laurel Bank will thereafter be an outlying point for the Cumberland supply point.

NOTE: Notwithstanding any other provisions of this Agreement, to foster an efficient and economic environment for the retention and growth of business on this marginal line, when service is needed on the Tygart-Bergee line, qualified employees in the Grafton-Cowan Pool will be called ahead of unqualified employees. When there are no qualified employees available in the pool, the Carrier may call qualified extra employees ahead of unqualified pool employees.

C. Employees may be required to perform service throughout the coordinated territory in accordance with the B&O schedule agreement in the same manner as though such coordinated territory was included within their original seniority district.

APPENDIX

CSXT's Statement of Changes Under Section 4 of New York Dock¹

Article I

A. Effective upon ten (10) days advance notice, all train operations and the associated work forces of the former WM, RF&P, and a portion of the former C&O, will be transferred, consolidated and merged into the train operations and associated work force on the former Baltimore and Ohio in the territory hereinafter described:

Philadelphia, Pa. - Cumberland, Md. (former B&O)
Cherry Run, Md. - Baltimore, Md. (former WM)
Hagerstown, Md. - Lurgan, Pa. (former WM)
Baltimore, Md. - Potomac Yard, Va. (former B&O)
Brunswick, Md. - Potomac Yard, Va. (former B&O)
Potomac Yard, Va. - Richmond, Va. (former RF&P)
Charlottesville, Va. - Richmond, Va. (former C&O)
Brunswick, Md. - Winchester, Va. (former B&O)
Cumberland, Md. - Brooklyn Jct. W. Va. (former B&O)
Grafton, W. Va. - Muddlety, W. Va. (former B&O)
Benwood, W. Va. - Huntington W. Va. (former B&O)
Tygart Jct. W. Va. - Bergoo, W. Va. (former B&O and WM)

which areas comprise the territory shown on the sketch designated as Attachment "A."

NOTE: All branches and industrial tracks intersecting the above listed lines and all pre-existing territorial rights of the involved districts are included in the coordinated territory.

B. The following initial operational changes will be placed into effect upon implementation of the Consolidation:

1. Charlottesville, Va. will be closed as a supply point and terminal for other than outlying point assignments, transferring all other work to Richmond, Va. Charlottesville will thereafter be an outlying point for the Richmond supply point. The Piedmont-Washington Subdivision will be added to the working limits of the Richmond-Potomac Yard Pool.

2. Hanover, Pa. will be closed as a supply point and terminal for other than outlying point assignments, transferring all other work to Baltimore, Maryland. The territory between Baltimore and Hanover will be added to the working limits of the Baltimore-Brunswick Pool. Hanover will thereafter be an outlying point for the Baltimore supply point.

3. Hagerstown, Md. will be closed as a supply point and terminal for other than outlying point assignments, transferring the protection of service to and from Harrisburg to a through freight pool out of Cumberland (operating through Hagerstown). The territory between Cherry run and Hanover will be added to the working limits of the Baltimore-Brunswick pool. Hagerstown will thereafter be an outlying point for the Brunswick supply pool.

4. The protection of certain service west of Cumberland will be transferred to Brunswick by adding the territory west of Cumberland on the Mountain Subdivision and former WM lines

¹ Source: Pages 1-3 of CSXT's proposed implementing agreement with BTU transmitted to the unions on Feb. 23, 1994, reproduced in Attachment 1 of volume I of the Appendix of Exhibits to CSXT's petition filed June 9, 1993. The same provisions appear in CSXT's proposed implementing agreement with BLE in Attachment 2.

The unions have not even alleged that the consolidation of agreements in any way impairs the ability of CSXT employees to bargain collectively with the railroad. Nor are the rights, benefits, and privileges granted by past negotiations impaired. CSXT is proposing action that is made possible by transactions that we have authorized. Employees affected by those transactions are entitled to the benefit of New York Dock conditions, which have been imposed here.

CONCLUSIONS

We conclude that the implementing agreements proposed by CSXT satisfy the requirements of our labor protection conditions and should be adopted. The coordination proposed by CSXT is linked to transactions subject to New York Dock and was thus properly before the Arbitrator. By pursuing arbitration under New York Dock, CSXT did not contravene language in prior implementing agreements requiring that future changes must be made under the RLA because these agreements were not intended to apply to the changes sought here. Finally, we find that the changes may be made even if they are inconsistent with existing collective bargaining agreements and that our authority to require these changes is consistent with the requirement of section 2 of New York Dock that "rights, privileges and benefits" of existing collective bargaining agreements be preserved.

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

It is ordered:

1. The findings of fact and conclusions of law in the Arbitrator's award are upheld, as supplemented in this decision, and the implementing agreements proposed by CSXT are adopted.
2. This proceeding is discontinued.

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioner Simmons.

Vernon A. Williams
Secretary

(SEAL)

attaching to his employment, including without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions so long as such benefits continue to be accorded to other employees of the bargaining unit, inactive service or furloughed as the case may be.

We believe that this is compelling evidence that the term "rights, privileges, and benefits" means the "so-called incidents of employment, or fringe benefits," Southern Ry. Co.--Control--Central of Georgia Ry. Co., 317 I.C.C. 337, 366 (1962), and does not include scope or seniority provisions.

In any event, the particular provisions at issue here do not come within "rights, privileges, or benefits" because they have consistently been modified in the past in connection with consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions. The AIDA court looked to past conduct in consolidations when it ruled that scope rules were not among those provisions protected as "rights, privileges, and benefits." 28 F.3d at 1163. The court relied, in part, on CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 I.C.C.2d 713, 736, 742 (1990) (Carmen II), and its recitation of the power of arbitrators under the Washington Job Protection Agreement of 1936 and pre-1976 labor conditions.

Seniority provisions have also been historically modified with regularity by arbitrators in connection with consolidations. See Carmen II, 6 I.C.C.2d at 721, 736-737, 742, and 746 n.22. Thus, both scope rules and seniority provisions have historically been changed without RLA bargaining and, accordingly, are not eligible for protection as "rights, privileges, and benefits."

The unions argue that section 2 of New York Dock gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the BAO rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd.--Exemption Acquisition and Operation--Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), alio pp. at 7. Therefore, we find that the issue of which union is to represent WM engineers or receive them as dues-paying members does not involve a right that must be preserved under section 2 of New York Dock.

As noted, the parties dispute whether section 2 of New York Dock is merely a savings clause that preserves the collective bargaining agreement provisions that are not required to be modified in order to effectuate Commission-authorized transactions. We need not resolve that issue here. The decisions upholding our authority to change collective bargaining agreements are not premised on section 2 being merely a savings clause.

CSXT has convinced this arbitrator that it is necessary to change the seniority districts of the train and engine service affected by its proposal if the territory of the erstwhile C&O, B&O, WM and RFP to be coordinated is to be run as a distinct and unified rail freight operation. Were the Carrier required to continue operating this territory as four separate railroads each with its own work force and seniority districts the operating efficiencies contemplated by the coordination would be illusory. (Emphasis added.)

Here, the "transaction" is not, as labor contends, the modification of the collective bargaining agreements but rather the mergers of four previously separate railroads into a single entity. The merging of the seniority districts does not have its genesis in the modification of the collective bargaining agreements. As long as the C&O, B&O, WM and RFP remained separate railroads, the employees of each must of necessity have worked independently of each other. Approval of the merger was the action that permitted these four groups of employees to be welded into one. Once the merger had taken place, the consolidation of the employees--and the modification of the collective bargaining agreements--became necessary if the efficiencies of the single work force, made possible by the merger, were to be realized.

We must also determine whether the CBA provisions to be changed--(1) "scope" provisions governing "ownership" of work;" and (2) seniority provisions--are "rights, privileges, and benefits" that must be preserved. The D.C. Circuit Court remanded RLEA to permit the Commission to define the meaning and scope of the phrase "rights, privileges, and benefits" in section 405 of the Amtrak Act as incorporated into 49 U.S.C. 11347. 987 F.2d at 814.

The history of the phrase "rights, privileges, and benefits" indicates that it has traditionally meant what it implies--the incidents of employment, ancillary emoluments or fringe benefits--as opposed to the more central aspects of the work itself--pay, rules and working conditions. The genesis of section 405 of the Amtrak Act was the Urban Mass Transit Act of 1962 (UMTA), which authorized federal financial assistance to state and local governments for the improvement of urban mass transit systems. Section 13(c) of that Act (now codified as 49 U.S.C. 5331(b)) required the Secretary of Labor to certify as "fair and equitable" arrangements to protect affected employees. The first requirement of section 13(c) for a "fair and equitable" arrangement was "the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise."

Since no UMTA financing could be completed without the Secretary of Labor's section 13(c) certification, a model protective agreement was developed to permit rapid and dependable processing of applications. The current regulations of the Department of Labor provide that the Secretary will certify pursuant to section 13(c) if the parties adopt the Model Agreement. 29 CFR 215.6. Paragraph 10 of the Model Agreement sets forth the type of rights, privileges, and benefits that are "preserved" (emphasis added):

(10) No employee receiving a dismissal or displacement allowance shall be deprived during his protection period of any rights, privileges, or benefits

¹¹ See ATDA, 24 F.3d at 1160-61 for discussion of scope provisions.

changes sought by CSXT would improve efficiency,²³ a factual finding entitled to deference under our Lace Curtain standard. CSXT has supported its claims that merging the separate seniority rosters into one will produce real efficiency benefits; see volume III of the Appendix of Exhibits to the Petition of CSXT, Tab B at 8-13. Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that cost decreases are reflected in rate decreases. Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.

The changes sought by CSXT do not appear to be a device merely to transfer wealth from employees to the railroad. Indeed, there does not appear to be a significant diminution of the wealth of the employees. The extent of unionization will not change. The reduction in labor costs will occur through more efficient use of employees and equipment, not by any reduction in current hourly wages and benefits.²⁴ In order to use employees more efficiently, CSXT will require some employees to work different territories and report to different staging areas. Some employees may have to move. Moving expenses are a benefit under our New York Dock compensation formula.

The one adverse effect on employees from the proposed consolidation of seniority districts apparent from the record is that some employees may have to travel to protect their seniority rights. A specific instance cited was that terminal reporting points for engineers working out of Cumberland, MD, would be 100 miles away. No reduction in wages or change in working conditions would exist, except the minor changes noted. Employees subject to these changes would be compensated under New York Dock. For that reason, the criteria of BLEA have been met.

In considering whether the actions taken by CSXT comport with BLEA, we need to consider the court's decision in ATA, which adopted the BLEA standard, adding (26 F.3d at 1164, emphasis supplied):

In other words, the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain.

The Arbitrator found that the consolidation of the seniority districts would lead to lower costs, hence resulting in transportation benefits. But the unions have asserted that these benefits arise merely from the modification of the CBA, thereby contravening the court's holding in ATA.

We disagree. On page 16 of his decision, Arbitrator O'Brien states:

²³ See note 16, above.

²⁴ Certain WM employees may experience minor changes in compensation due to minor differences between the B&O and WM collective bargaining agreements. But the differences apply only to small numbers of employees and in atypical situations. Any changes in compensation would be compensable under New York Dock.

awards cited by CSXT, going back over 10 years, show that neither party had any reason to view this language as restricting CSXT's ability to invoke New York Dock to implement future operational changes, an ability that CSXT would not have readily given up. This usage history is consistent with CSXT's position that the language is boilerplate language that provides merely that matters touched upon in implementing agreements can be changed pursuant to transactions that do not require our approval without going through New York Dock procedures.

Because we are upholding the Arbitrator's finding that the intent of the language requiring RLA procedures was not to bar future coordinations under New York Dock, we do not have to reach CSXT's argument that carriers have no authority to waive their statutory right to have such issues governed by Commission procedures under section 11347 and New York Dock rather than RLA procedures.

4. Ability to override prior agreements. It is well settled that we have the authority to modify collective bargaining agreements when modification is necessary to obtain the benefits of a transaction that we have approved in the public interest. See the cases cited in note 7, supra. At issue here are the limits of that authority. In particular, the issue is whether the changes sought by CSXT comport with the court's decision in RLA.

The court in RLA did not intend to make every change an impermissible change in rights, privileges, or benefits. As the court stated (987 F.2d at 814), "Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor-- an obviously absurd position--§ 565 (of the Rail Passenger Service Act, 45 U.S.C. 565) (and hence § 11347) does seem to contemplate that the ICC may modify a CBA." [Citation omitted.] Nor did the court hold that changes in work location or the switching of employees from work under one collective bargaining agreement to another involved impermissible changes in rights, privileges, or benefits.

To determine which changes are permissible, the court in RLA established the following standard (987 F.2d at 814-815):

. . . it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary" to effectuate a covered transaction. (Citation omitted.)
We look therefore to the purpose for which the ICC has been given this authority (to approve consolidations). That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer

In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely a transfer of wealth from employees to their employer.

This standard has been met here. The Arbitrator did not commit error (much less egregious error) in finding that the

²⁴(...continued)

were expanded. The unions do not dispute CSXT's position that they did not raise the RLA language as an objection to subsequent expansion.

reason to question this finding, much less to find it egregiously wrong.²⁴

Nor do we find egregious error in the Arbitrator's premise that the prior agreements were not intended to cover future coordinations involving different track and territories. While it can be argued that CSXT bound itself to RLA procedures as a condition for changing the coordinations involving the lesser included track at issue in the prior agreements, the carrier cannot reasonably be found to have intended these agreements as perpetually waiving New York Dock procedures for future coordinations involving territories of substantially greater extent and differing scope. Such a waiver would have barred the carrier from any future New York Dock coordination between the track involved in the prior agreements and the remainder of the CSXT system, thereby creating an "island" of unintegrated operations in its system. We cannot plausibly find that the carrier intended to use the minor and routine 1983 and 1992 agreements to bind itself to such a significant restriction, at least in the absence of specific language in those agreements or other credible evidence of such intent.

(b) East dealings. The Arbitrator also implied that past dealings show that the RLA requirement was not intended to bar the instant coordination.²⁵ Under general contract law, the intent of parties to an agreement can be ascertained from a course of dealing or usage of the trade. Custom and usage, as reflected in the arbitration agreements cited by CSXT, contravenes the contention that RLA procedures are required for subsequent coordination efforts under New York Dock.²⁶ The

²⁴ The Arbitrator's finding that different territory was involved was not egregiously wrong. An inspection of the track involved in the prior agreements (see the agreements and diagrams cited in note 11, above) indicates that much of the track and the scope of the coordination differs:

1. The WM trackage involved in the two 1983 agreements coordinating operations on the WM and the B&O only partially overlaps the WM trackage at issue here. Part of the WM trackage involved in the 1983 agreements seems to have been abandoned.

2. The B&O track involved in the 1992 agreements coordinating operations on the RFP and the B&O ran from Potomac Yard to Baltimore and Philadelphia and from Potomac Yard west to Brunswick and east again to Baltimore, a small subsegment of the B&O track involved here. Unlike the agreements at issue here, the 1992 agreements did not involve C&O track.

²⁵ The Arbitrator stated (Award at 20):

It is also noteworthy that CSXT and its predecessors have negotiated several implementing agreements containing language similar to that involved in the Harris award. Many of those properties were subsequently coordinated without resort to the RLA. Rather, they were coordinated in accordance with ICC procedures.

²⁶ The agreements are discussed on pages 29-30 of CSXT's reply filed June 29, 1993 and appear in exhibits 36, 38, 39, 40, 41, 42, and 43. In each of the five implementing agreements cited by CSXT, the union did not object to the expansion of the coordination of operations under New York Dock, notwithstanding the presence of similar language referring to the RLA in the prior implementing agreements establishing the coordinations that
(continued...)

Emergency Board 219. Without Presidential Emergency Board 219, the new district would most likely have been smaller (due to a smaller range of crew travel), but some coordination would still have been possible. The connection between the merger decisions and the coordination was not severed by the action of the Emergency Board. A reasonably direct causal connection remains between our decisions and the coordination. Our standard of "reasonably direct connection" was applied in: (1) Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Railway Company (Petition for Review of Arbitral Award), Finance Docket No. 28583 (Sub-No. 24) (ICC served June 23, 1988); and (2) Maine Central Railroad Company--Lease (Arbitration Review), Finance Docket No. 29730 (Sub-No. 1A) (ICC served Dec. 8, 1988), aff'd Brotherhood of Maintenance of Way Emp. v. I.C.C., 920 F.2d 40 (D.C. Cir. 1990). Thus, the Arbitrator did not commit egregious error by finding a connection.

3. RLA bargaining requirements in prior agreements. The parties dispute whether the coordination sought by CSXT would contravene provisions in prior implementing agreements that allegedly require that subsequent coordinations be accomplished through bargaining under the RLA.

We uphold the Arbitrator's decision that these provisions impose no such requirement. The intent of the provisions requiring RLA bargaining was not to bar this type of coordination under New York Dock. The lack of intent was manifested in two ways: (1) differences in the territories involved; and (2) past dealings.

(a) Territorial differences. The Arbitrator found that the changes proposed by CSXT here do not involve the same territory or property involved in the prior agreements.¹⁰ We have no

¹⁰ In making this finding, the Arbitrator distinguished an earlier arbitration award where Arbitrator Harris found to the contrary (Award at 19):

The Unions cite a 1994 award rendered by Neutral Robert O. Harris in a case between the UTU and CSXT (involving Carrier's notice to coordinate work performed on the C&O and the Louisville and Nashville Railroad Company) in support of its contention. Arbitrator Harris found that because of an earlier implementing agreement involving the same properties, CSXT was precluded from asking for de novo arbitration to coordinate property subject to an implementing agreement which, by its express terms, may only be changed pursuant to the RLA. The Carrier has appealed the Harris award to the ICC.

It appears that Arbitrator Harris concluded that an implementing agreement may not be changed in a second coordination of the same properties except in accordance with the terms of the implementing agreement. However, CSXT and or its predecessors agreed to implementing agreements involving the WM and the RFP&P. Evidently, there were no implementing agreements involving the B&O and the C&O. Since over 80% of the territory the Carrier now proposes to coordinate involves former B&O and C&O property the Carrier is not now seeking coordination of "the same properties" which were subject to earlier implementing agreements, in this Arbitrator's judgment.

opportunity to make these changes was created by an entire series of decisions. These began with the 1963 and 1967 decisions that brought the B&O, C&O, and WM under common control and ended with the 1992 decision that formally merged the RFP into the CSXT system.¹⁹ All of these decisions played a role in creating the opportunity for CSXT to coordinate operations in the proposed Eastern District by use of a single pool of employees. This opportunity cannot be attributed solely to any individual decision in this series of decisions.

The relevant inquiry is whether the action at issue is linked to prior Commission action in which we imposed New York Dock conditions. As long as the actions at issue are rooted in transactions subject to New York Dock, it does not matter whether these conditions were imposed in one transaction or several. The conditions do not vary from case to case. The only question is whether they are applicable. The unions do not dispute that they are. Neither logic nor precedent supports the unions' contention that the basis for a carrier's action must be found in a single, Commission-approved transaction, rather than in a series of them.

The unions' position is based on an assumption that CSXT had a duty to implement whatever New York Dock-related coordinations involving C&O, B&O, and WM track when these carriers first came under common control or soon thereafter. If CSXT had been under such a duty, the instant coordination arguably could have been criticized as too late to be accomplished under New York Dock.

But we have never imposed a deadline on making merger-related operational changes. In fact, in CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, 8 I.C.C.2d 715, 724 n. 14 (1992), we held that causality is not diminished with the passage of time:

Causality, however, is not ~~not~~ diminished by a lengthy delay in exercising authority previously granted. This is not analogous to laches. There could be any number of reasons why an entity formed as a result of a Commission-approved transaction might wish to postpone a coordination which could have been undertaken earlier.

We have been given no reason to depart from this holding here. CSXT merged its operations gradually, delaying many changes until the corporate entities were merged. This approach does not appear to be unreasonable on its face, and no showing has been made that it is unreasonable. Nor has any showing been made that CSXT's gradual merger of its operations prejudiced the rights of employees under New York Dock. If anything, the gradual nature of the merger would have been more likely to benefit employees by providing for a smoother integration of personnel into the merged system.

The unions note that the order of Presidential Emergency Board 219 increasing the basic mileage of train and engine service employees influenced the benefits of the coordination. See the statements of Don M. Menefee and John T. Reed, attached to the unions' Appendix of Exhibits filed with its petition on June 9, 1993. Without the merger decisions, however, there could have been no coordination at all, notwithstanding Presidential

¹⁹ The Arbitrator's failure to include the pre-1980 transactions as grounds for his jurisdiction did not affect his jurisdiction because this agency, like courts operating under modern rules of pleading and practice, may uphold its jurisdiction for any valid legal reason, regardless of whether that reason is pleaded or argued.

The parties dispute the relevance of section 11341(a). The unions question the Arbitrator's premise that modifications of collective bargaining agreements may be ordered pursuant to 49 U.S.C. 11341(a), on the grounds that section 11341(a) does not apply to transactions that are approved under our section 10505 exemption authority.¹⁶ In response, CSXT argues that, first, the Arbitrator did not rely exclusively on section 11341(a) but also relied on section 11347, and, second, that the Arbitrator related the changes to Finance Docket No. 28905 (the common control proceeding), which was not approved via an exemption under section 10505.

DISCUSSION

As noted, the parties raise four main issues. The threshold issue is whether we may hear the appeal on its merits.

1. Whether the appeal should be heard. We will hear the appeal. Under our Lace Curtain standard of review, we do not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error. Here, the Commission must decide the issue of whether the changes involve "rights, privileges and benefits" that must be preserved under section 2 of New York Dock because the arbitrator deferred resolution of it to us. The Arbitrator's decision on the issue of whether the proposed changes are linked to a prior transaction is a factual issue. That decision should not be set aside except for egregious error. The third issue raised on appeal, whether the railroad has bound itself to follow RIA procedures in undertaking the changes at issue here, involves factual determinations by the arbitrator which merit our deference. However, because it goes beyond mere factual questions, it warrants our review under the Lace Curtain standards.

2. Whether the changes proposed are linked to or caused by a prior approved transaction. The parties dispute whether the labor changes proposed by CSXT are linked to, or caused by, a prior approved transaction subject to New York Dock, i.e., whether they were properly before the Arbitrator. We find that the changes were properly before the Arbitrator under New York Dock.

The Arbitrator's finding on linkage is a factual finding as to causation, and, as such, is entitled to deference under our Lace Curtain standard of review. Such findings are reversed only upon a showing of egregious error.

The Arbitrator's finding of linkage was not egregious error. The purpose of the changes is to ensure that CSXT ceases to operate as a collection of separate railroads and fully enjoys the operational economies of being a unified system.¹⁷ The

¹⁶ We have asserted two statutory grounds for modification of collective bargaining agreements: section 11347, the statutory basis of New York Dock; and section 11341(a).

¹⁷ The unions dispute CSXT's statement, that operations in the proposed district are being conducted as though they continued to belong to separate railroads, on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts. See the statements of UTU General Chairmen Robert J. Will and John T. Reed, attached to the unions' reply filed June 29, 1995. We find, however, that operations in the proposed district have not been merged, based on the statement of CSXT's Director of Employee Relations Michael O. Rogers, attached to CSXT's response filed July 28, 1995.

In its petition for review filed June 9, 1995, CSXT asks us to decide the issue that the Arbitrator declined to decide, i.e., whether the changes proposed by CSXT would fail to preserve the "rights, privileges and benefits" of existing collective bargaining agreements. Briefly, CSXT argues that the changes do not alter prior rights, privileges, or benefits because: (1) the pay, benefits, and other "key terms" of the prior agreements will not change; (2) all employees will continue to be covered by collective bargaining agreements (the B&O agreements); and (3) our labor protection obligations have never been interpreted as giving employees of a merged carrier like CSXT the "right" or "privilege" of working only on the lines of their former employers.

The unions argue that, under RLEA, the changes must be necessary to secure the public benefits of the merger and that the changes at issue fail this test. CSXT responds that its changes will effectuate the cited transactions by merging operations on lines where train operations are allegedly being conducted as though they continued to belong to separate railroads. The unions dispute CSXT's statement (that operations in the proposed district are being conducted as though they continued to belong to separate railroads) on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts.¹⁴

CSXT argues that the changes meet the standard imposed in RLEA for changing prior practices that interfere with attainment of the public benefits of the transaction. CSXT argues that: (1) the changes will improve operational efficiency; (2) this improvement is a public benefit under RLEA; and (3) the cost savings from this improvement satisfy RLEA by not creating merely a transfer of wealth from labor to CSXT.¹⁵ Concerning this last point, CSXT contrasts the operational changes proposed here with changes in pay and pension benefits (not proposed here) and other changes that, according to CSXT, can directly transfer wealth from labor to carriers. CSXT accuses the unions of interpreting RLEA as disallowing any changes to collective bargaining agreements, not just changes that are designed to transfer wealth from labor to carriers.

The parties dispute the broader implications of section 2 of New York Rock. CSXT views the "rights, privileges and benefits" language of section 2 as merely creating a savings clause that preserves the collective bargaining agreement provisions that are not required to be modified in order to effectuate Commission-authorized transactions. The unions respond that RLEA precludes CSXT's argument.

The unions dispute CSXT's position that the changes are not important enough to constitute changes in "rights, privileges and benefits." In particular, the unions argue that changes in the location where employees work must be considered in any evaluation of whether "rights, privileges and benefits" are changed and that we may not consider only pay and benefits. The unions also argue that union representation is a right that must be preserved.

¹⁴ See Appendices A and B of the unions' reply filed June 29, 1995.

¹⁵ The parties sometimes argue in terms of whether the changes "flow solely from modification to labor agreements" or use similar terms. When they do this, they seem to be disputing whether we would be contravening RLEA by mandating changes that are designed less to secure the public benefits of transactions than to transfer wealth from labor to the carrier.

CSXT notes that the changes involve property of the RF&P, the last carrier to come under the complete control of CSXT. CSXT responds to the unions' argument that our 1980 decision in Finance Docket No. 28903 (Sub-No. 27) cannot be the source of the changes allegedly because it is too old by (1) pointing to decisions where we have assertedly held that causality is not diminished by time and (2) arguing that CSXT was not able to integrate the operations of its subsidiaries until the subsidiaries were actually merged into CSXT, a lengthy process that was not concluded until 1992.

3. RLA bargaining requirement in prior decisions

In their petition for review, the unions argue that the merger transactions have already been covered by implementing arrangements and that the coordination sought here would improperly reopen these prior agreements.¹² The unions maintain that the prior implementing agreements require that the changes proposed here be accomplished through bargaining under the Railway Labor Act (RLA) rather than arbitrations under New York Dock.¹³

In its reply, CSXT responds that the language in question is old boilerplate language going back as far as 1959 that provides merely that matters touched upon in implementing agreements can be changed pursuant to transactions that do not require our approval without going through New York Dock procedures. CSXT cites five implementing agreements where representatives of labor allegedly did not argue that the language required bargaining under the RLA to implement transactions requiring Commission approval. The carrier also argues that it cannot credibly be found to have agreed to a one-sided bargain that would have permanently waived its ability to accomplish future coordinations through the New York Dock procedures. Finally, CSXT argues that it had no authority to waive its statutory right to have these issues governed by Commission procedures under section 11347 and New York Dock, rather than RLA procedures.

4. Ability to override prior agreements

Both parties tacitly assume that CSXT's changes would in fact contravene collective bargaining agreements. As in prior cases where our authority under New York Dock was at issue, neither party systematically discusses how the collective bargaining agreements would bar the changes sought by management in the absence of action by this agency. Instead, the parties restrict their argument to whether we may compel the changes under New York Dock. The Arbitrator did not resolve this issue.

¹² The prior agreements alleged by the unions to bar the instant coordination due to language requiring modification pursuant to RLA procedures are: (1) the two 1983 coordination agreements between (a) the B&O and WM and BLE and (b) B&O and WM and UTU, both of which involved lesser included territory (see Exh. 9 to the unions' Appendix of Exhibits); and (2) the two 1992 coordination agreements between (a) CSXT, RF&P, and UTU (see Exh. 10 to the unions' Appendix of Exhibits) and (b) CSXT, RF&P, and BLE (see Exh. 11 to the unions' Appendix of Exhibits), both of which involved lesser included territory.

¹³ The language in question typically provides that: "This agreement . . . shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended." See, e.g., the 1979 implementing agreement reached between the B&O, WM, and several unions, in CSXT's petition filed June 9, 1995, Appendix volume II, exhibit 36, page 8.

ARGUMENTS OF THE PARTIES

The parties raise four main issues: (1) whether we should hear the appeal under our Lace Curtain standards; (2) whether the operational changes proposed by CSXT are linked to, or caused by, a prior approved transaction subject to New York Docket, i.e., whether they were properly before the Arbitrator; (3) whether the changes would improperly reopen prior implementing agreements by contravening provisions in them that allegedly require that such changes be accomplished through bargaining under the RLA; and (4) whether the changes are the type of changes that may justify our overriding collective bargaining agreements or, alternately, involve "rights, privileges and benefits" that must be preserved under section 2 of New York Docket.

1. Whether the appeal should be heard

In its reply filed June 29, 1993, CSXT argues that the Arbitrator's findings of fact should not be reviewed under our deferential Lace Curtain standard of review (see n. 6, SURFA), under which we do not review arbitrators' findings as to issues of causation, the calculation of benefits, or the resolution of other factual questions. In this category of unreviewable issues, according to CSXT, are the Arbitrator's findings that (1) the operational changes proposed by CSXT grow out of the prior control and merger transactions and that (2) CSXT demonstrated a need to modify collective bargaining agreements to realize the benefits of the merger.

In their June 29, 1993 reply to CSXT, the unions argue that the Arbitrator's award is fully reviewable under our Lace Curtain standard on the grounds that the Arbitrator made egregious errors of fact and law.

2. Whether the changes proposed are linked to or caused by a prior approved transaction

In their petition for review filed June 9, 1993, the unions argue that the Arbitrator lacked jurisdiction under New York Docket to consider the changes sought by CSXT pursuant to our authority to approve operational changes that are necessary to effectuate mergers. That is so, according to the unions, because the changes cannot be linked to, or were not caused by, any of the merger transactions cited by CSXT. The unions maintain that the changes sought here are due to pre-1980 control proceedings not cited by the carrier and involving the property at issue. According to the unions, the changes cannot be linked to the 1980 decision that put Chessie and SCLI under common control because they do not involve SCLI property."

In its reply, CSXT advances various arguments to show that the labor changes proposed by CSXT grow out of the prior control and merger transactions. CSXT cites various decisions where this agency or arbitrators acting under its authority assertedly allowed changes under New York Docket. Responding to the unions' argument that, because the changes do not involve SCLI property, they cannot be linked to Finance Docket No. 28905 (Sub-No. 27),

" The unions sometimes discuss this issue of linkage or causation in terms of whether "the consolidation of seniority rosters and seniority districts" (reply filed June 29, 1993 at 6) or an attempt to realize "efficiencies" (petition filed June 9, 1993 at 19) can be considered to be "transactions" under New York Docket. Although the unions' choice of words sometimes differs, the underlying issue is the same-- whether CSXT is attempting to implement a transaction or transactions that are subject to New York Docket.

held on March 28, 1995. Arbitrator O'Brien issued his award on April 24, 1995.

The Arbitrator's findings of fact and law favored CSXT. He found that the operational changes were subject to New York Dock because they "directly related to and flowed from" the merger authorizations by which CSXT was created. (Award at 9.) The Arbitrator rejected the unions' arguments that: (1) the changes were not subject to New York Dock because they were not related to specific decisions imposing New York Dock protection (but, rather, a whole group of decisions); and (2) the changes cannot be related to any of the transactions approved in the decisions because the decisions are stale. The Arbitrator also held that, acting under our precedent, he had "the authority under both Section 11341(a) and 11347 to modify existing collective bargaining agreements" when they frustrate attainment of the public benefits of transactions approved by this agency. (Award at 14.) Concerning such benefits, the Arbitrator found that CSXT had in fact shown that the changes were necessary to attain the public transportation benefits of the transactions. (Award at 16-18.)

Although his findings of fact and law favored CSXT, the Arbitrator stopped short of adopting the implementing agreements¹ proposed by CSXT. He cited Article I, section 7 of New York Dock, which provides in pertinent part,

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of a railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Arbitrator O'Brien noted that, in RLEA, the court ruled that section 11347 of the Interstate Commerce Act (49 U.S.C. 11347) mandates that rights, privileges and benefits afforded employees under existing collective bargaining agreements must be preserved.¹⁰ The court remanded the case to the Commission to define "rights, privileges and benefits." As the Arbitrator noted, we have not yet rendered a ruling in that proceeding. Because we have not yet ruled on the court's remand, the Arbitrator declined to rule on the issue. The Arbitrator left it to the Commission to determine whether the changes proposed by CSXT would be contrary to any such "rights, privileges and benefits." (Award at 21-22.)

On June 9, 1995, CSXT and the unions filed petitions for review of the Arbitrator's award. On June 29, 1995, CSXT and the unions filed replies. On July 28, 1995, CSXT filed a petition for leave to file a reply to the reply filed on June 29, 1995, by the unions. By decision served August 22, 1995, we granted CSXT's petition and allowed the unions to file a reply to the substantive arguments raised therein. The unions filed a reply on September 4, 1995.

¹⁰ The court noted, RLEA at 813-814, that section 11347 incorporates the protections afforded under the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U.S.C. 565, which provides, inter alia, that "rights, privileges and benefits" afforded employees under existing collective bargaining agreements be preserved.

This agency (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction.¹ Those contesting proposals that we exercise our authority to override collective bargaining agreements argue that: (1) New York Dock requires the preservation of pre-transaction bargaining agreements; or (2) the changes may not be made because they are not (perhaps due to the passage of time) related to, or necessary for effectuating the purposes of, the proposed transaction. Under New York Dock, employees affected when a collective bargaining agreement is overridden must be compensated pursuant to the formula established therein, which provides comprehensive displacement and termination benefits for up to 6 years.

This proceeding has arisen because of CSXT's efforts to make operational changes that are allegedly related to, and necessary to realize the operational benefits from, certain mergers that helped to create the present-day CSXT. On January 10, 1994, CSXT served a notice on the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) (jointly, "the unions") of its intention to invoke the authority of New York Dock to make operational changes and related employee assignments in order to effectuate the public benefits of the transactions.

Briefly, CSXT is proposing to coordinate train operations in a portion of its system, its new "Eastern B&O Consolidated District" (the "Eastern District"), by transferring work, abolishing and creating positions, and merging seniority rosters. All engineers and trainmen working in the new district would be placed under CSXT's collective bargaining agreements with UTU and BLE covering the former B&O lines. The notice reveals a net loss of 3 positions (47 abolished minus 42 established). CSXT made minor alterations and proposed further details as to the implementation of these coordinations in draft implementing agreements (one for each union) transmitted to the unions on February 25, 1994. In the Appendix to this decision, we have reproduced the major operational changes that were proposed in Article I of CSXT's draft implementing agreements.²

The unions refused to participate in the negotiation of an implementing agreement, objecting that: (1) the changes may not be made under New York Dock because they violate existing collective bargaining agreements; (2) CSXT improperly related the changes to the whole group of Commission decisions³ rather than specified individual decisions; and (3) the changes cannot be related to any of the transactions approved in the decisions because the decisions are too old. CSXT then invoked arbitration under New York Dock. Unable to negotiate, the parties selected Robert M. O'Brien as the arbitrator. An arbitration hearing was

¹ Where modification is necessary, we may act under either section 11347 or section 11341(a). CSX Corp. -- Control -- Chassis and Seaboard C.L.L., 4 I.C.C.3d 641 (1988), modified 6 I.C.C.3d 715 (1990); Brandywine Valley R. Co. -- Pur. -- CSX Transp., Inc., 3 I.C.C.3d 784 (1989); Railway Labor Executives' Ass'n v. United States, 287 F.2d 806 (D.C. Cir. 1993) (BLEA); Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991); and American Train Dispatchers Association v. I.C.C., 26 F.3d 1157 (D.C. Cir. 1994) (ATDA).

² The notices and letters of transmittal to the unions appear in attachments 1 and 2 of volume I of the Appendix to CSXT's petition filed June 9, 1993. The specific changes announced for each union were the same.

³ See note 3, SURTA, for a statement of the decisions.

CSX Corporation into its subsidiary CSXT.³ The last steps in this process involved the RF&P Railroad. In 1991, CSXT spun off RF&P Railroad's non-rail assets and created the Richmond, Fredericksburg & Potomac Railway Company ("RF&P Railway") to acquire and to operate RF&P Railroad's rail assets. CSXT invoked our class exemption for corporate families to obtain approval for the acquisition and control.⁴ In 1992, CSXT again invoked our corporate family class exemption to operate RF&P Railway directly and to assume all of its rights and obligations.¹

The decisions creating present-day CSXT were approved subject to our standard labor protection conditions. These conditions were adopted in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock) to implement our mandate to provide such protection under 49 U.S.C. 11347. Under New York Dock, labor changes that are related to Commission-approved transactions are established by implementing agreements negotiated before the changes occur. If the parties cannot reach an implementing agreement, the issues are resolved by arbitration. Arbitration awards may be appealed to the Commission under our Lace Curtain standard of review.⁴

³ In CSXT -- Control -- Chessie and Seaboard, the Commission authorized the CSX Corporation ("CSX") to acquire control of the 6 subsidiary rail carriers of Chessie and the 10 subsidiary rail carriers (the so-called "Family Lines") of SCL, through the merger of Chessie and SCL into CSX. Two years later, in Seaboard Coast Line R.R. -- Merger Exemption -- Louisville & N. R.R., Finance Docket No. 30033 (ICC served Nov. 8, 1982), the Seaboard and the L&N (both of which were subsidiaries of SCL in 1980) merged to form the Seaboard System, Inc. Subsequently, in Baltimore & O. R.R. and Chesapeake & O. Ry. -- Merger Exemption, Finance Docket No. 31033 (ICC served May 22, 1987), the B&O merged into the C&O. Later that year, C&O merged into the recently created CSXT. See Chesapeake & O. R.R. and CSX Transp. Inc. -- Merger Exemption, Finance Docket No. 31106 (ICC served Sept. 18, 1987).

⁴ See the notice of exemption in CSX Corporation, et al. -- Corporate Family Transaction Exemption -- Richmond, Fredericksburg and Potomac Railroad Company, Finance Docket No. 31954 (ICC served Oct. 31, 1991)..

⁵ CSX Transportation, Inc. -- Operation Exemption -- Richmond, Fredericksburg and Potomac Railway Company, Finance Docket No. 32020 (ICC served Apr. 13, 1993).

⁶ Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Transp. Co. -- Abandonment, 3 I.C.C.2d 729 (1987), popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Commission does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." Id. at 729-736. In Delaware and Hudson Railway Company -- Lease and Trackage Rights Exemption -- Springfield Terminal Railway Company, Finance Docket No. 30963 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, reanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), we elaborated on the Lace Curtain standard as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

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This decision will be printed in the bound volumes of the ICC printed reports at a later date.

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

DECISION

DEC 7 1995

Finance Docket No. 28905 (Sub-No. 17)

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.
AND
SEABOARD COAST LINE INDUSTRIES, INC., ET AL.
(Arbitration Review)

Decided: November 22, 1995

The Commission finds that employment changes proposed by the petitioning railroad may be effected pursuant to arbitration under the agency's standard New York Dock conditions for protecting employees adversely affected by agency-approved consolidations

BY THE COMMISSION:

We uphold the findings of fact and conclusions of law in the award of Arbitrator Robert M. O'Brien concerning the implementing agreements proposed by CSX Transportation, Inc. ("CSXT") to effect that carrier's coordination of operations in a new operating district. Because the proposed implementing agreements are necessary to effect the proposed transaction and would not override any "rights, privileges and benefits" that must be preserved under our New York Dock labor protection conditions, we conclude that those agreements satisfy the requirements of our labor protection conditions. The agreements should therefore be adopted.

BACKGROUND

CSXT in its present form was created by a series of transactions approved by this agency. In our 1980 decision in Finance Docket No. 28905 (Sub-No. 1) ET AL.,¹ we allowed CSX Corporation, a noncarrier holding company, to control as subsidiary corporations the Chessie System, Inc. ("Chessie"), Seaboard Coast Line Industries, Inc. ("SCLI"), and, indirectly through stock ownership, the Richmond, Fredericksburg & Potomac Railroad Company ("RF&P Railroad").² The railroads controlled by Chessie included the Chesapeake & Ohio Railway Company ("C&O"), the Baltimore & Ohio Railroad Company ("B&O"), and the Western Maryland Railway Company ("WM"). The railroads controlled by SCLI included the Seaboard Coast Line Railroad (Seaboard), the Louisville and Nashville Railroad Company (L&N), the Clinchfield Railroad, and several smaller carriers.

In a subsequent series of decisions, we approved the consolidation of the railroad corporate entities controlled by

¹ CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 163 I.C.C. 521 (1980) (CSXT--Control--Chessie and Seaboard).

² At that time, RF&P Railroad was controlled (65.9%) by the Richmond-Washington Company, which, in turn, was owned by Chessie (40%) and SCLI (40%).

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answer here. As with the other proceeding covered by this decision, we will reinstate the order issued in Dispatchers I, affirming the arbitral decision for the reasons provided in Carmen II and discussed above at length.

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

It is ordered:

1. The motion for oral argument filed by RLEA is denied.

2. In Finance Docket No. 28905 (Sub-No. 22), the order entered by the ICC in its decision in Carmen I affirming in part and reversing and vacating in part the LaRocco Award is affirmed as complying with the standards established by the ICC in Carmen II and by various intervening decisions of the ICC, the United States Court of Appeals for the D.C. Circuit, and this Board.

3. In Finance Docket No. 29430 (Sub-No. 20), the order entered by the ICC in its decision in Dispatchers I affirming the Harris Award is affirmed as complying with the standards established by the ICC in Carmen II and by various intervening decisions of the ICC, the United States Court of Appeals for the D.C. Circuit, and this Board.

4. This decision is effective on October 25, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

CBA was necessary. Harris Award, at 11-15. In 1988 the ICC, relying heavily on the necessity standard announced in Maine Central, affirmed. Dispatchers I, 4 I.C.C.2d at 1086-87.³⁰ Two years later the ICC changed course. By order entered June 21, 1990, the ICC reversed and vacated the Harris Award, effectively remanding the proceeding to the parties. Carmen II, 6 I.C.C.2d at 775, ordering paragraph 2. The proceeding was remanded to allow NS and ATDA to continue the implementing process in accordance with Article I, section 4 of the New York Dock conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[] in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 756-57. Eight years have now passed, but this proceeding appears to be today in essentially the same posture it was in on June 21, 1990. A new implementing agreement has not yet been reached and so far as we have been advised, neither party has attempted to compel further arbitration.³¹

As a result, the decision we reach today may be declaratory only and not affect the rights of any of the employees involved. However, the question of the manner in which the New York Dock labor conditions affect arbitrator's rights to set aside CBA provisions where necessary to implement approved transactions remains a vital one and it is that question we have attempted to

³⁰ "Imposition of the collective bargaining agreement [i.e., a transfer of the CBA from Roanoke to Atlanta] would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." Dispatchers I, 4 I.C.C.2d at 1086.

³¹ The record indicates that, after the Harris Award was issued, the Roanoke/Atlanta transfer was carried out and positions at Atlanta were offered to the nine active and three furloughed Roanoke supervisors. Of the nine active supervisors, eight moved to Atlanta and one declined. Of the three furloughed supervisors, one moved to Atlanta and two declined. As of July 2, 1990: of the eight active supervisors who had moved to Atlanta, seven had retired and one was still actively employed there; and the one furloughed supervisor who had moved to Atlanta was also still actively employed there. See NS's July 2, 1990 petition for stay of the ICC's Carmen II decision, at 3 n.3 and at 8 n.8.

proceeding been held in abeyance pending final action by the Supreme Court. NS argues that the order entered in Carmen II (reversing and vacating the Harris Award) is a nullity, because, as a matter of law, the Supreme Court's reversal of the D.C. Circuit's Carmen decision reinstated the ICC's Dispatchers I decision. The reversal of a court judgment, NS insists, nullifies orders issued in any subsequent proceeding that were dependent upon the reversed judgment. Carmen II, in NS's view, was dependent upon Carmen, because, again in NS's view, the ICC issued Carmen II solely to comply with the D.C. Circuit's Carmen decision. NS therefore urges that we simply reinstate the ICC's Dispatchers I decision.

We conclude, for the reasons provided above in our discussion of the equivalent argument advanced by CSX, that Carmen II was not nullified by the Supreme Court's N&W decision, and we therefore reject NS's request that we simply reinstate Dispatchers I. We will, however, reinstate the order affirming the Harris Award, but for the reasons set forth in Carmen II.

We now turn to the issues that remain open for reconsideration in light of N&W: the approved transaction issue and the necessity issue. We will decide the approved transaction issue ourselves, because it is immediately obvious that there can be but one answer to this question and because we do not want to unnecessarily extend this already protracted proceeding. There can be no doubt that the centralization of power distribution for the N&W system in Atlanta was sufficiently related to the transaction approved in NS Control as to satisfy the standards for relatedness established in CSX 23 and approved by the D.C. Circuit on review in ATDA, discussed supra, and we so find. We will also decide the necessity issue implicit in the Article I, section 4 implementing agreement process, because it is clear that there are transportation benefits to N&W's proposal sufficient to satisfy the necessity criteria established by the D.C. Circuit in BLEA, ATDA, and UTU.

In the Finance Docket No. 29430 (Sub-No. 20) proceeding, the focus of the necessity issue has been the pre-1986 CBA that covered ATDA-represented supervisors at Roanoke. The Roanoke/Atlanta transfer proposed by NS in 1986 effected a CBA override by leaving the CBA in Roanoke while transferring the "work function" previously performed thereunder to CBA-free Atlanta. Dispatchers I, 4 I.C.C.2d at 1086. In 1987 the arbitration committee determined that an override of the Roanoke

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As we have indicated earlier, we need not decide whether this transaction meets the standard for necessity embodied in 49 U.S.C. 11341/11321 upon which the Carmen I and Dispatchers I decisions were based or implicit in 11347/11326 as a result of the Carmen II decision and certain decisions of the D.C. Circuit, especially UTU and ATDA, which have embraced the Carmen II approach, because it is clear that it satisfies both. Under these circumstances, we reaffirm the [ICC's] decision in Carmen I as consistent with the approach adopted in that decision and affirmed by the Supreme Court in N&W and as satisfying the alternative and more limited approach adopted in Carmen II which we are reaffirming here.

CSX and BRC should attempt to resolve any remaining aspects of the dispute concerning transfer of personnel from Waycross to Raceland by negotiation. If an agreement has not been reached by the end of the 30-day negotiation period required by Article I, section 4, either party may then (or thereafter) demand binding arbitration in accordance with Article I, section 4.

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In 1987 the arbitration committee adopted, with one minor exception, the implementing agreement that had been proposed by NS, Harris Award, at 17-18, and in 1988 the ICC affirmed, Dispatchers I, 4 I.C.C.2d at 1092. In 1989 the D.C. Circuit reversed the ICC's decision and remanded to the ICC in order that the ICC might determine whether further proceedings were necessary. Carmen, 880 F.2d at 574. In 1990 the ICC reversed and vacated the Harris Award, effectively remanding the proceeding to the parties to continue the implementing process in accordance with Article I, section 4 of the New York Dock conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[] in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 757. Finally, in 1991, the Supreme Court reversed the D.C. Circuit's Carmen decision and remanded to the D.C. Circuit for further proceedings, N&W, 499 U.S. at 134, and the D.C. Circuit remanded to the ICC for reconsideration in light of N&W.

NS, advancing an automatic nullification argument much like CSX's, contends that the outcome in the Finance Docket No. 29430 (Sub-No. 20) proceeding should be what it would have been had the

provided for the transfer of work but vacated and remanded for further negotiation or arbitration, if necessary, the part of the award that prohibited the transfer of employees. Two years later the ICC changed course, and vacated and remanded the entire proceeding to allow CSX and BRC to negotiate or arbitrate, "if necessary, to reach [a] new implementing agreement[] in accordance with the standards set forth in this decision."²⁹ Carmen II, 6 I.C.C.2d at 756-57.

We are now affirming the Carmen I order in all respects. We expect CSX and BRC to negotiate or arbitrate, if necessary, any issues associated with the transfer of personnel we have found to be required to the extent these issues continue to have vitality.

CSX contends that the ICC erred in Carmen II in retreating from the necessity standard announced in DRGW and relied upon in Carmen I, and CSX 23, 8 I.C.C.2d at 721. CSX 23, however, was in this respect somewhat of an overstatement of our authority under the necessity provision implicit in Article I, section 4 of the New York Dock conditions as interpreted in Carmen II. See ATDA, 26 F.3d at 1165. We will therefore adhere to the position announced in Carmen II that the authority of arbitrators to modify collective bargaining agreements is limited by the practice of arbitrators from 1940-1980 for cases subject to the New York Dock conditions.

²⁹ The record indicates that, after the LaRocco Award was issued, CSX transferred the work and the non-Orange Book-protected employees to Raceland. See CSX Comments (Mar. 1, 1993) at 9 n.15. The record suggests that no Orange Book-protected employees have ever been transferred to Raceland. See CSX's July 2, 1990 petition for stay of the ICC's Carmen II decision, at 4: "[T]he transfer of BRC members subject to the Orange Book protections has been deferred pending the outcome of the litigation surrounding the consolidation." See also BRC Comments (Mar. 1, 1993) at 31 ("[After the LaRocco Award was issued], the carriers closed the Waycross repair facility and abolished the positions of carmen employed at that facility. A total of 88 carmen and 11 painter positions were abolished at that time. Of these carmen, 54 accepted separation pay and terminated their employment with the SCL. Twenty-three other carmen bid on new positions on the rip track located at Waycross. Nine or 10 junior employees who were unable to hold a position at Waycross accepted transfers to Raceland.") (footnotes omitted).

The ICC, in its 1992 CSX 23 decision, discussed the scope of the principal transaction approved in CSX Control. Quoting parts of the passage we have quoted in whole, the ICC concluded that "as far back as 1980, we contemplated that the applicants could undertake operational changes to improve efficiency which we had not considered in the decision and that specific approval of these coordinations was not necessary." CSX 23, 8 I.C.C.2d at 725. We agree with this assessment, which was approved by the D.C. Circuit Court of Appeals on review in ATDA, 26 F.3d at 1165. We believe those decisions are dispositive of the substantially identical issue here.

We agree with the ICC and the D.C. Circuit and adopt the view that the approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to, and fulfill the purposes of, the principal transaction.²⁸ CSX 23, 8 I.C.C.2d at 722. As long as there is "a reasonably direct causal connection between the [principal] transaction and the operational changes sought to be implemented," such operational changes are embraced within the principal transaction. CSX 23, 8 I.C.C.2d at 724 n.14. The 1986 Waycross/Raceland transfer meets these tests. It is directly related to the 1980 CSX Control principal transaction (common control of C&O and SCL allowed CSX to consolidate the work performed at Waycross and Raceland) and it fulfills the purposes of the principal transaction (one such purpose was the achievement of efficiencies made possible by common control). We therefore conclude that the 1986 Waycross/Raceland transfer was embraced within the principal transaction approved in the 1980 CSX Control decision.

In the Finance Docket No. 28905 (Sub-No. 22) proceeding, the focus of the necessity issue has always been the Orange Book, and, in particular, the twin prohibitions respecting transfer of work and transfer of employees. In 1987 the arbitration committee determined that an override of the work transfer prohibition was necessary, but that an override of the employee transfer prohibition was not necessary. LaRocco Award, at 35-38. In 1988 the ICC, relying heavily on the necessity standard announced in DRGW, determined that an override of both prohibitions was necessary. Carmen I, 4 I.C.C.2d at 648-50. Thus the decision in Carmen I affirmed the award insofar as it

²⁸ Importantly, it follows that any employees affected by the transfer are entitled to labor protection.

Both CSX and BRC have quoted from the following passage in CSX Control:

We find that the applicants' estimate of employee impacts is reasonable. What dislocations there are promise to be short term. It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements. However, no wholesale disruption of the carriers' work force should occur. Only at points where the basically end-to-end systems meet does it appear that perceptible dislocations will result. Those common point locations are clearly identified. We believe that the standard conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically.

CSX Control, 363 I.C.C. at 589. Both CSX and BRC have quoted from this passage, but they have emphasized different parts of it. CSX has emphasized that the ICC was aware that there might be "additional coordinations" (i.e., coordinations beyond those specifically mentioned in the CSX Control application), and that employees might be affected by the proposed transaction "in the future." This, CSX contends, demonstrates that the ICC anticipated that transactions such as the 1986 Waycross/Raceland transfer would be embraced within the principal transaction approved in CSX Control. BRC emphasizes the ICC's expectation that employee dislocations would be "short term" and that perceptible dislocations would occur only at points "where the basically end-to-end systems meet." Noting that the 1986 Waycross/Raceland transfer was six years delayed (and was therefore not a "short term" dislocation) and that Waycross and Raceland are hundreds of miles apart (and therefore are not located at junction points of the two end-to-end systems), BRC contends that the cited passage demonstrates that the ICC never anticipated that transactions such as the 1986 Waycross/Raceland transfer would be embraced within the principal transaction approved in CSX Control.

solely to comply with the D.C. Circuit's Carmen decision. CSX therefore urges that we simply reinstate, without further ado, the ICC's Carmen I decision.

Carmen II was issued upon the predicate that the court of appeals decision overturning Carmen I was correct but it was not issued solely in compliance with the court of appeals decision, and therein lies the flaw in CSX's argument. As the Supreme Court recognized in N&W, 499 U.S. at 128 n.3, in denying labor respondent's motion to dismiss, Carmen II was decided on an alternative basis which could not be said to have ended the dispute between the parties there. As a result, the Supreme Court concluded that the definitive interpretation of section 11341 provided by its decision may affect the ICC's Carmen II decision. Id. There was no suggestion in the decision of the Supreme Court that its decision supplanted the Carmen II decision. In fact, the Supreme Court noted the pendency of a review proceeding and went on to say that the court on review might not agree with the ICC's interpretation in Carmen II, 499 U.S. at 126-28, n.2 and 3. It was to permit the ICC [and now the Board] to arrive at a determination as to what effect, if any, the Supreme Court's N&W decision would have on Carmen II, that Carmen II was remanded to the ICC. We conclude that the N&W decision should have no effect and that Carmen II should stand as decided subject of course to the subsequent developments in the law referred to in this decision and subject to our modification of the relief provided in Carmen II.

In cases reviewing decisions involving CBA modification under sections 11347/11326 and Article I, section 4 of our New York Dock conditions, the D.C. Circuit has adopted a two part test: (1) is there a nexus between the changes sought and an approved transaction, and (2) is there a transportation benefit to the public from the transaction. If the answers to both questions (1) and (2) are in the affirmative, then the modifications are deemed necessary and permitted unless they involve "rights, privileges, and benefits" protected from change by Article I, section 2 of New York Dock. See UTU, 108 F.2d at 1430-31.

Award insofar as it had approved the movement of the work performed at Waycross, (2) reversed the LaRocco Award insofar as it had created an Orange Book employees exception to the prescribed implementing agreement, and (3) remanded to the committee (in effect, to the parties) for further proceedings consistent with the ICC's decision subject to the admonition that the transfer of employees would be subject to New York Dock protections. Carmen I, 4 I.C.C.2d at 650, 655. In 1989 the D.C. Circuit reversed the ICC's decision and remanded to the agency to permit it to determine whether further proceedings were necessary. Carmen, 880 F.2d at 574. In 1990 the ICC reversed and vacated the LaRocco Award, effectively remanding the entire proceeding to the parties to recommence the implementing process in accordance with Article I, section 4 of the New York Dock conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[]" in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 757. Finally, in 1991, the Supreme Court reversed the D.C. Circuit's Carmen decision and remanded to the D.C. Circuit for further proceedings, N&W, 499 U.S. at 134; and the D.C. Circuit remanded both Carmen I and Carmen II to the ICC for reconsideration in light of N&W.

If the Finance Docket No. 28905 (Sub-No. 22) proceeding had been handled by the ICC in the usual fashion, it would have been held in abeyance while a certiorari petition was pending, and, once certiorari had been granted, it would have continued to be held in abeyance pending a decision of the Supreme Court. If this proceeding had been handled in that fashion, the Supreme Court's N&W decision would have returned the proceeding to the D.C. Circuit, which could then have decided the various issues it had left open in Carmen. And, if this proceeding had been handled in the usual fashion, the ICC would never have issued its Carmen II decision.

CSX contends that, even though this proceeding was not handled in the usual fashion, the outcome should be the same as if it had been. CSX argues that the order entered in Carmen II (reversing and vacating the LaRocco Award) is a nullity, because, as a matter of law, the Supreme Court's reversal of the D.C. Circuit's Carmen decision reinstated the ICC's Carmen I decision. The reversal of a court judgment, CSX insists, nullifies orders issued in any subsequent proceeding that were dependent upon the reversed judgment. Carmen II, in CSX's view, was dependent upon Carmen, because, again in CSX's view, the ICC issued Carmen II

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11347 and the New York Dock conditions, because the orders of the ICC in Carmen I and Dispatchers I are affirmable under either section 11341 or section 11347. Therefore, following the lead of the D.C. Circuit under substantially identical circumstances in ATDA, 26 F.3d at 1165, we affirm the orders in Carmen I and Dispatchers I applying the reasons and standards articulated in Carmen II as discussed herein. We vacate the order in Carmen II insofar as it vacates the arbitrators' decisions and remands the matters to the parties for further negotiation and arbitration, if necessary. We believe this approach is appropriate because, as in ATDA, the transportation benefits from the consolidations proposed by NS and CSX are sufficient to pass the RLTA necessity test and we can see nothing to be gained by further prolonging this already very protracted process.

We believe it would be unwise to attempt to resolve the issue of the reach of section 11341, now section 11321, in the abstract as that issue is not presented in this case. We would prefer to address it in the context of a case in which our New York Dock conditions do not apply so that the question of whether section 11341, now section 11321, is limited by section 11347, now section 11326, in the modification of collective bargaining agreements is the sole issue presented. Such a proceeding will of necessity take account of changes made by the ICCTA, which in effect limit our imposition of New York Dock labor conditions to consolidations or acquisitions of control as described in current section 11326(a).

The Board continues to be committed to a process of negotiation first and arbitration, if necessary, to arrive at implementing agreements. See Conrail, where the Board in response to requests by rail labor made clear that the approval of the transaction does not indicate approval or disapproval of CBA overrides that have been argued to be necessary to carry out the transaction. Decision No. 89, slip op. at 126-127.

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In 1987 the arbitration committee directed CSX and BRC to adopt the implementing agreement that had been proposed by CSX, subject to one exception: that Waycross employees covered by the Orange Book could not be compelled to transfer to Raceland. LaRocco Award, at 41. In 1988 the ICC (1) affirmed the LaRocco

The Commission's interpretation is reasonable. See American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 847-48 (D.C. Cir. 1995) (holding that the ICC's interpretation of New York Dock rules is entitled to substantial deference by a reviewing court). Under the Commission's interpretation, "rights, privileges and benefits" are protected absolutely, while other employee interests that are not inviolate are protected by a test of "necessity," pursuant to which there must be a showing of a nexus between the charges sought and the effectuation of an ICC-approved transaction. Under this scheme, the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by Congress.

Id.

Takings. An argument has been advanced that any CBA override effected under Article I, section 4 of the New York Dock conditions amounts to a "taking" of private property in violation of the Fifth Amendment. That question cannot be resolved by a New York Dock arbitrator, it cannot be resolved by an administrative agency reviewing an award issued by the arbitrator, and it cannot be resolved even by an appellate court reviewing a decision entered by the administrative agency. See RLEA, 987 F.2d at 815-16 (takings claims can be adjudicated only in the court of Federal Claims or, in certain limited circumstances, in a District court).²⁷

Whether Section 11341 Is Limited by Section 11347. As discussed, in 1991 the Supreme Court left open the question whether CBA overrides authorized by 49 U.S.C. 11341 might be limited by 49 U.S.C. 11347. N&W, 499 U.S. at 134. We conclude that, where as here New York Dock conditions are required to be imposed, section 11341 is constrained by section 11347 and the provisions of these labor conditions. We believe that it is unnecessary and would be unwise here to attempt to resolve the issue of the reach of section 11341 unconstrained by section

²⁷ Because we cannot adjudicate a takings claim under any circumstances, we have no reason to determine whether certain supposed procedural defaults bar adjudication of the takings claims raised in the present proceedings.

preserved.²⁶ "[I]t is now well established that changes in rates of pay, rules, and working conditions can be required by this agency or by arbitrators acting under New York Dock. Carriers may invoke New York Dock to modify such CBA terms when modification is necessary to obtain the benefits of a transaction that was approved as being in the public interest." CSX 27 Stay Decision, slip op. at 3.

In affirming the ICC's Sub-No. 27 Decision, the court observed (108 F.3d at 1430):

[2] In this case, the Commission offers a definition: "rights, privileges, and benefits" refers to "the incidents of employment, ancillary emoluments or fringe benefits—as opposed to the more central aspects of the work itself—pay, rules and working conditions." See Commission decision at 14, reprinted in J.A. 237. And "the incidents of employment, ancillary emoluments or fringe benefits" refers to employees' vested and accrued benefits, such as life insurance, hospitalization and medical care, sick leave, and similar benefits. See id. at 15, reprinted in J.A. 238. According to the Commission, seniority provisions are not within the compass of "rights, privileges, and benefits" protected absolutely from the Commission's abrogation authority. See id. On this point, the Commission notes that seniority provisions "have consistently been modified in the past in connection within [sic] consolidations. This may be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions."

Id.

The court went on to affirm this definition in the following language, which is dispositive of the issue:

²⁶ See CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27) (STB served Jan. 4, 1996) (CSX 27 Stay Decision).

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and benefits has now been established by an ICC decision, which we have adopted and applied,²⁴ and by the affirmance of that ICC decision by the D.C. Circuit. In CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27) (ICC served Dec. 7, 1995) (CSX 27) (slip op. at 14-16), the ICC defined the rights, privileges, and benefits that cannot be overridden to include such things as group life insurance, hospitalization and medical care, free transportation, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation. Protected rights, privileges, and benefits do not embrace scope rules and seniority provisions. Such rules and provisions, the ICC noted, have historically been changed in arbitration conducted under Article I, section 4 of the New York Dock conditions, or under the comparable provisions of the predecessor labor protective conditions imposed prior to 1979. The rights, privileges, and benefits that must be preserved, the ICC added, do not include pre-transaction union representation arrangements.²⁵ Aff'd, UTU.

In explaining our denial of a petition to stay the ICC's CSX 27 decision, we indicated that rates of pay, rules, and working conditions are not rights, privileges, or benefits that must be

²⁴ Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company-Control and Merger-Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company (Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 22) (STB served June 26, 1997).

²⁵ The ICC pointed out, however, that once a transaction has been implemented pursuant to an award imposed under Article I, section 4 of the New York Dock conditions, questions respecting union representation arrangements are subject to the sole jurisdiction of the National Mediation Board under the RLA. "The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act." CSX 27, slip op. at 15 (citation omitted).

operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators 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, if these changes are identified with reasonable particularity. But arbitrators should not assume that all pre-transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purposes of a transaction. (footnote omitted).

Rights, Privileges, and Benefits. The necessity standard of 49 U.S.C. 11341(a) and 11347 provides one check upon the CBA modification authority entrusted to arbitrators under Article I, section 4 of the New York Dock conditions. The rights, privileges, and benefits standard of Article I, section 2 of New York Dock²³ provides another check upon that authority. That provision states that certain rights, privileges, and benefits afforded employees under pre-transaction CBAs must be preserved. RLFA, 987 F.2d at 814 (noting, however, that not every word of every CBA establishes a right, privilege, or benefit); ATDA, 26 F.3d at 1163 (indicating that a CBA "scope" provision creates no rights, privileges, or benefits).

Although it was a hotly contested issue at the time these proceedings were remanded, the definition of rights, privileges

²³ Article I, section 2 of the New York Dock conditions, 360 I.C.C. at 84, provides: "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

(slip op. at 2) (citation omitted). Whatever the standard of necessity may be where only 11341(a) is involved, it is settled that there is one and only one necessity standard where section 11347 and the New York Dock conditions are relied upon by the arbitrator as the basis for overriding CBA provisions. ATDA, 26 F.3d at 1164-65.

Although, as we have noted above, the ICC in Carmen II did not attempt to define what would constitute necessity in such cases, the D.C. Circuit Court of Appeals has subsequently held, and we have accepted that holding, that a CBA override can be effected only where there are transportation benefits of the underlying transaction; it cannot be effected if the only benefit of the modification derives from the CBA modification itself. RLEA, 987 F.2d at 814-15. "[W]e do not see how the agency can be said to have shown the 'necessity' for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease)." RLEA, 987 F.2d at 815. "[T]he benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain." ATDA, 26 F.3d at 1164. See also UTU, 108 F.3d at 1431.

Under the approach adopted in Carmen II, the necessity determination generally had to be made in the first instance by an arbitrator, though it was generally reviewable by the ICC.

As stated by the ICC in its Fox Valley decision (slip op. at 3):

Arbitrators should also be aware that in [RLEA] the court admonished us to identify which changes in pre-transaction labor arrangements are necessary to secure the public benefits of the transaction and which are not. *We have generally delegated to arbitrators the task of determining the particular changes that are and are not necessary to carry out the purposes of the transaction, subject only to review under our Lace Curtain standards [referenced below]. Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the*

efficiencies of consolidation' to be achieved)." CSX 23, 8 I.C.C.2d at 722.

In our view, "approved" transactions include those specifically authorized by the ICC, such as the various proposals we have approved which led to the formation of CSXT and those that are directly related to and grow out of, or flow from, such a specifically authorized transaction. The instant transaction, the transfer of the dispatching functions, falls into the latter category. The existence of this second category of transactions is implicit in the definition of the term "transaction" in the standard labor protective conditions: "[A]ny action taken pursuant to authorizations of the ICC on which these provisions have been imposed." New York Dock, 360 I.C.C. at 84, CSX 23, 8 I.C.C.2d at 720-21 (footnote and internal cross-references omitted). The omitted footnote cites New York Dock, 360 I.C.C. at 70: "[T]he broad definition [of 'transaction'] is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 et seq., because the event actually affecting the employees might occur at a later date than the initial transaction, yet still pursuant to our approval (consolidation of employee rosters, et cetera)." In ATDA, 26 F.3d at 1165, the court, in affirming CSX 23, found reasonable the ICC's view that the term approved transaction "extends to subsidiary transactions that fulfill the purposes of the main control transaction"; the court added that "[t]he ICC's elastic construction of 'approved transaction' in this case mirrors [the] settled understanding [of the term]." Moreover, it is now settled that the mere passage of time does not prevent a finding of nexus between the proposed changes and the initially approved transaction. UTU, 108 F.3d at 1430-31.

Necessity. A CBA override can be had only if such override is necessary to carry out a transaction approved under 49 U.S.C. 11344(c). The necessity requirement is explicit in 49 U.S.C. 11341(a); it has been held to be implicit in 49 U.S.C. 11347, Carmen II, RLEA, 987 F.2d at 814-15; it is therefore, on both counts, part and parcel of Article I, section 4 of the New York Dock conditions. "This 'necessity' finding is not optional; pre-transaction labor arrangements cannot be modified without it." Fox Valley & Western Ltd.-Exemption Acquisition and Operation-Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company (Arbitration Review), Finance Docket No. 32035 (Sub-Nos. 2-6) (Fox Valley) (ICC served Aug. 10, 1995)

working definition by the courts, see RLEA, ADTA, and UTU, and we will adopt it too.

The ICC also explained in Carmen II that three additional crucial limitations restrict the CBA modifications that can be effected by an arbitrator under section 4. The transaction sought to be implemented must be an approved transaction; the modifications must be necessary to the implementation of that transaction; and the modifications cannot reach CBA rights, privileges, or benefits protected by Article I, section 2 of the New York Dock conditions. We agree with the ICC and will discuss how we intend to apply each of these limitations in the light of intervening court decisions.

Approved Transaction. Section 11343(a) provided that certain transactions could be carried out only with the approval and authorization of the ICC; section 11344(c) provided that the ICC should approve and authorize such transactions only if they were consistent with the public interest; section 11347 directed the ICC, when approving such transactions, to require the rail carrier to provide a fair arrangement protective of the interests of its employees; and section 11341(a) provided that a rail carrier participating in an approved transaction was exempt from otherwise applicable law, as necessary to carry out the transaction. But none of these provisions defined the scope of the transaction approved by the ICC under section 11344(c) and thereby immunized against other law under section 11341(a).

Although a narrow interpretation of the word *transaction* has frequently been sought by rail labor, it is now settled that the proper and court-approved interpretation of the word *transaction* is the interpretation established by the ICC. The ICC, with the approval of the courts, held that the word, as used in 49 U.S.C. 11343, 11344, 11347, and 11341, embraced two categories of transactions: the principal transaction approved by the ICC (generally a consolidation or acquisition of control); and subsequent transactions that were directly related to and grew out of, or flowed from, that principal transaction (such as consolidations of facilities, transfer of work assignments, etc.). "The approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to and fulfill the purposes of the principal transaction (i.e., those which, the Supreme Court noted, would allow 'the

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ICC noted, embraced more than selection and assignment of forces, narrowly defined. It encompassed also the modification of certain contractual rights; it embraced whatever was necessary to the effectuation of those projects that were the direct results of the merger.

Negotiators and arbitrators may well have followed the rubric of "selection of forces and assignment of employees" when administering the provisions governing the effect of consolidations. The scope of these terms, however, is not well defined. It must extend beyond the mere mechanism for selection or assignment of employees, and include the modification of certain important contractual rights. Southern [Southern Ry. Co.—Control—Central of Georgia Ry. Co., 331 I.C.C. 151 (1967)] and Bernstein [an arbitrator cited in Carmen II] make it clear that work was transferred from one railroad to another despite contrary contractual provisions in CBAs. It was also obvious that contractual seniority rights were modified in order to consolidate rosters of the two separate, combining railroads. See Southern at 165, 185. These rosters may have been "dove-tailed" or another method [may have been] agreed upon or decreed by an arbitrator. We can assume that the reassignment of employees would have regularly taken place despite CBA prohibitions. These actions are the sort that would be necessary to permit almost any consolidation of the functions of two merging railroads. The WJPA procedures make it possible.

Carmen II, 6 I.C.C.2d at 742 (footnotes omitted).

In short, the ICC in Carmen II defined the scope of authority of arbitrators to modify CBAs under Article I, section 4 of New York Dock by reference to the practice of arbitrators during the period 1940-1980. Although this is by no means a bright line definition, it has been accepted as a practicable

Article I, section 4, which permits CBA modifications to be arrived at on an expedited schedule through binding arbitration, provides in pertinent part:

Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days [i.e., 30 days after the railroad contemplating a transaction has provided written notice of such intended transaction] there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures: (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee. (2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence. (3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

New York Dock, 360 I.C.C. at 85.

The implementing agreements imposed in arbitration under labor conditions that antedated New York Dock generally focused on selection of forces and assignment of work. See, e.g., WJPA section 5, reproduced at Carmen II, 6 I.C.C.2d at 779. The ICC, in the course of discussing this matter at some length in its Carmen II decision, noted that "[i]f the 1940-80 arbitrators felt themselves bound by these terms, they must have defined them broadly enough to include contract changes involving the movement of work (and probably employees) as well as adjustments in seniority." Carmen II, 6 I.C.C.2d at 721. Nevertheless, the dispute resolution mechanism established by WJPA section 5, the

approaches, which the Supreme Court recognized but expressly declined to resolve in N&W, 499 U.S. at 134, that gave rise to the remand of these cases, and it is this issue that has remained unresolved to this date.²⁰

The present proceedings arise out of implementing agreement arbitrations conducted under the auspices of Article I, section 4 of the New York Dock conditions. The procedural mechanism provided, like the procedural mechanism provided by the WJPA from which section 4 was derived,²¹ reflects the understanding that CBA modifications necessary to permit implementation of transactions approved by the ICC under 49 U.S.C. 11344 could not be relegated to the purposefully drawn-out procedures provided by the RLA.²² The RLA seeks to preserve labor peace by preserving the CBA status quo, and it was recognized that, in many instances, preservation of the CBA status quo would effectively thwart full implementation of rail carrier transactions approved by the ICC under 49 U.S.C. 11344.

¹⁹(...continued)

CBA's that permitted the carrying out of the transaction while maintaining labor peace. We trust that these parties will be able to call upon their institutional memories to again resolve these matters consistently and amicably, now that we have removed two major impediments to the process."

²⁰ Other issues that were alive at the time of the remand have since been definitively resolved. The issue of the relationship between Article I, section 2 and Article I, section 4 has been resolved by a series of decisions in the D.C. Circuit culminating in UTU v. STB, 108 F.3d 1425 (D.C. Cir. 1997) (UTU). So too has the issue of necessity for purposes of 49 U.S.C. 11347 and 11326. RLEA, 987 F.2d at 806. We refer to these issues herein solely for clarity of exposition.

²¹ Article I, section 4 of the New York Dock conditions can be traced directly back to the WJPA. See Carmen II, 6 I.C.C.2d at 732-40. See also RLEA, 987 F.2d at 813; ATDA, 26 F.3d at 1159-60.

²² A copy of the WJPA can be found in Carmen II, 6 I.C.C.2d at 778-93. The procedural mechanism now provided by New York Dock, Article I, section 4 is derived from the similar procedural mechanism provided by WJPA sections 4, 5, and 13.

transaction-with any obstacle to its accomplishment being overridden.¹⁸ Under the alternative approach reflected by the ICC's Carmen II decision, the scope of the arbitrator's authority was defined in terms of the process as conducted by arbitrators during the period from 1940-1980. Carmen II, 6 I.C.C.2d at 740-45.¹⁹ It was the potential conflict between these two

¹⁸ The immunity provision has been characterized as *self-executing*. This phrase has reference to the immunizing power of 49 U.S.C. 11341(a) vis-à-vis transactions directly related to and growing out of, or flowing from, a specifically authorized transaction. Because the immunity provision was self-executing, its immunizing power did not depend upon a declaration by the ICC that a particular exemption was necessary to a particular approved transaction. "Section 11341 is self-executing and does not condition exemptions on the ICC's announcing that a particular exemption is necessary to an approved transaction." CSX Corp.-Control-Chessie and Seaboard C.L.L., 8 I.C.C.2d 715, 723 n.12 (1992) (CSX 23), aff'd, American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994) (ATDA). "[Section 11341], as its plain language indicates, does not condition exemptions on the ICC's announcing that a particular exemption is necessary to an approved transaction. Rather, § 11341 automatically exempts a person from 'other laws' whenever an exemption is 'necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.' 49 U.S.C. 11341. The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 298 (1987) (Stevens, J., concurring) (footnote omitted). See also CSX 23, 8 I.C.C.2d at 723-24 (the immunity provision does not extend "only to matters specifically mentioned by us in approving the transaction. Rather, § 11341(a) immunity covers the future coordinations expected to flow from the control transaction that we approved, and our approval of the principal transaction also extends to these directly related actions."), aff'd ATDA, 26 F.3d at 1164. The majority in the N&W case adopted the reasoning of the Stevens opinion, 499 U.S. at 132-33.

¹⁹ See also Carmen II, 6 I.C.C.2d at 721: "It appears that arbitrators, management and labor developed approaches in the 1940-80 period for resolution of the inevitable conflicts with
(continued...)"

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Leases/Agreements-Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998) (Conrail), slip op. at 126-27, where, at the request of various organizations representing employees, it expressly stated that "approval of this transaction does not indicate approval or disapproval of any of the CBA overrides that applicants have argued are necessary to carry out the transaction; the arbitrators are free to make whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law."

Arbitration plays a central role in the process of implementing approved transactions under New York Dock. The New York Dock conditions do not prescribe, and they could not possibly prescribe, a one-size-fits-all standard respecting implementation of particular transactions. Instead, New York Dock prescribes a procedure (negotiation, if possible; arbitration, if necessary) for arriving at an implementing agreement respecting any particular transaction.¹⁷ The New York Dock conditions do not themselves specify how and to what extent CBAs may be overridden by arbitrators in arriving at arbitrarily imposed implementing agreements. The authority to do so derives from 49 U.S.C. 11341 as explained by the ICC in Carmen I and Dispatchers I and affirmed by the Supreme Court in N&W and from 49 U.S.C. 11347 as explained by the ICC in Carmen II.

Under the approach reflected by the ICC's decision in Carmen I and Dispatchers I, as affirmed by the Supreme Court in N&W, the scope of the arbitrator's authority to override CBA terms was said to be limited only by the scope of the approved

¹⁷ An implementing agreement is either an agreement negotiated by management and labor or an "agreement" imposed in an arbitration proceeding. The arbitrators' awards, in the absence of an agreement between the carriers and the representatives of the affected employees, constitute the implementing agreements specified under New York Dock and which we have required to be in effect before a transaction affecting employee rights can be consummated. Fox Valley & Western Ltd.-Exemption Acquisition and Operation- Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company (Petition for Emergency Cease and Desist Order), Finance Docket No. 32035 (ICC served Aug. 26, 1993) (slip op. at 3).

immunity would apply only when *necessary* to carry out a properly *approved transaction*, and the Court emphasized "that neither the conditions of approval, nor the standard for necessity, is before us today." N&W, 499 U.S. at 134.

New York Dock. The basic framework *both* for mitigating the labor impacts of consolidations *and* also for bypassing the drawn-out RLA procedures that would otherwise be applicable to particular transactions was created in the Washington Job Protection Agreement of 1936, was enacted into law by the Transportation Act of 1940,¹⁵ and was carried into its present form in 1979 when the ICC issued the New York Dock conditions. That framework provides *both* substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) *and* a procedural mechanism (negotiation, if possible; arbitration, if necessary) for resolving disputes respecting implementation of authorized transactions. See New York Dock, 360 I.C.C. at 84-90.¹⁶

Most recently the Board affirmed the importance it places on negotiation first, and arbitration, if necessary, to arrive at implementing agreements in its recent decision in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating

¹⁵ See, generally, Carmen II, 6 I.C.C.2d at 732-40 (discussing the Washington Job Protection Agreement of 1936 and the Transportation Act of 1940).

¹⁶ The ICC adopted arbitration procedures to ensure that "those most familiar with the complexities of labor law and particular problems associated with railroad employees would determine disputes arising out of such conditions." Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 9 I.C.C.2d 1021, 1025 (1993) (Nickel Plate 4) (citation omitted), aff'd United Transp. Union v. ICC, 43 F.3d 697 (D.C. Cir. 1995). See also Amer. Train Dispatchers Assoc. v. CSX Transp., Inc., 9 I.C.C.2d 1127, 1130 (1993) (CSX 24), aff'd American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 845-46 (D.C. Cir. 1995) (both the ICC and the court held, *inter alia*, that the ICC could require the parties to a dispute arising under labor protective conditions to submit that dispute to arbitration, even though a party might prefer to forgo arbitration and to have the ICC decide the dispute in the first instance).

and NS Corporation, respectively; the ICC approved such transactions upon finding that each was consistent with the public interest, CSX Control, 363 I.C.C. at 597-98, and NS Control, 366 I.C.C. at 249; and, because each such transaction involved the control of at least two Class I railroads, the ICC considered, with respect to each transaction, the interests of the carrier employees affected by the proposed transaction, CSX Control, 363 I.C.C. at 588-92, and NS Control, 366 I.C.C. at 229-31.

Section 11347 directed the ICC, when approving a rail carrier transaction under 49 U.S.C. 11344, to require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who were affected by the transaction as "the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." In response to the addition, in 1976, of the reference to the terms established under section 565 of title 45 (i.e., the terms established under section 405 of the RPSA), the ICC developed the New York Dock¹⁴ conditions which were imposed upon the primary transactions at issue in CSX Control and NS Control. CSX Control, 363 I.C.C. at 604; NS Control, 366 I.C.C. at 253.

Section 11341(a) provided that a carrier, corporation, or person participating in a transaction approved by the ICC under 49 U.S.C. 11344 was "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction" (emphasis added). Section 11341(a) was variously referred to as the immunity provision, the exemption provision, and the override provision (because it "immunized" a rail carrier from laws that might otherwise have been applicable, it "exempted" that carrier from the requirements of such laws, and it effected an "override" of such laws). In the 1991 N&W decision, the Supreme Court held that the immunity provision reached both the Railway Labor Act itself (because the RLA was a "law") and also CBAs entered into under the RLA (because immunity from a law implies immunity from the obligations imposed by that law). N&W, 499 U.S. at 133. The Court noted, however, that such

¹⁴ New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. ICC, 609 F.2d 83 (2d Cir. 1979).

Preliminary Procedural Matter. RLEA has moved (on behalf of itself and its member organizations) that these proceedings be assigned for oral argument. We think that the matters at issue in these proceedings have been adequately addressed in the written pleadings, and that oral argument would not assist us in any substantial way in our resolution of these matters. We will therefore deny RLEA's motion.

DISCUSSION AND CONCLUSIONS

Analytical Framework

United States Code. The analytical framework within which these proceedings arose and under which they must be decided rests primarily upon 49 U.S.C. 11343, 11344, 11347, and 11341.¹³

Section 11343(a) provided that certain rail carrier control "transactions" could be carried out only with the approval and authorization of the ICC. The control by CSX Corporation of the Chessie holding company (which itself controlled several rail carriers) and the SCLI holding company (which itself controlled several additional rail carriers) was a "transaction" within the scope of 49 U.S.C. 11343(a). The control by Norfolk Southern Corporation of rail carriers N&W and Southern was likewise a "transaction" within the scope of 49 U.S.C. 11343(a).

Section 11344(a) provided that the ICC could begin a proceeding to approve and authorize a transaction referred to in 49 U.S.C. 11343 on application of the person seeking that authority. Section 11344(c) directed the ICC to approve and authorize any such transaction when it found that the transaction was consistent with the public interest. Section 11344(b)(1)(D) provided that, if the transaction involved the merger or control of at least two Class I railroads, the ICC, in reaching its decision under section 11344(c), would first have to consider several factors including, among others, "the interest of carrier employees affected by the proposed transaction." Applications seeking approval for the CSX Control transaction and the NS Control transaction were filed with the ICC by CSX Corporation

¹³ As indicated in note 1, these provisions have been carried forward by the ICCTA and recodified as 11323, 11324, 11326, and 11321, respectively.

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scope of the approved transaction" ICC v. Locomotive Engineers, supra, at 298 (STEVENS, J. concurring in judgment).¹⁰ We express no view on these matters, as they are not before us here.

N&W, 499 U.S. at 134 (brackets and ellipsis in original).

Back To The Court Of Appeals. Subsequent to the Supreme Court's N&W decision, the ICC's decisions in Carmen I, Dispatchers I, and Carmen II were all subject to review in the court of appeals. Carmen I and Dispatchers I were there on remand from the Supreme Court; Carmen II was there on direct appeal. By order filed September 17, 1991, the court of appeals remanded these cases and two additional cases "for reconsideration in light of the Supreme Court's decision."

Comments Solicited. By decision served November 13, 1992, the ICC invited the parties to the Carmen case and the Dispatchers case, and other interested persons as well, to submit, with regard to any issues in these cases that remained open for reconsideration in light of the Supreme Court's N&W decision, comments and replies. In due course, comments and replies were submitted by CSX, BRC, NS, RLEA,¹¹ NRLC, UP, and Conrail.¹²

¹⁰ This reference is to Justice Stevens' concurring opinion in ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 287 (1987).

¹¹ RLEA is the acronym for the Railway Labor Executives' Association, which submitted its pleadings on behalf of itself and its member organizations, one of which was ATDA. ATDA has since become a Department of the Brotherhood of Locomotive Engineers. See Delaware and Hudson Company-Lease and Trackage Rights-Springfield Terminal Railway Company (Arbitration Review), Finance Docket No. 30965 (Sub-No. 4) (ICC served Aug. 30, 1994) (slip op. at 1 n.1).

¹² NRLC is the acronym for the National Railway Labor Conference. UP is the acronym for Union Pacific Railroad Company and Missouri Pacific Railroad Company. Conrail is the acronym for Consolidated Rail Corporation.

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Before addressing the merits, however, the Supreme Court emphasized that its decision did not resolve certain issues:

By its terms, the exemption applies only when necessary to carry out an approved transaction. These predicates, however, are not at issue here, for the Court of Appeals did not pass on them and the parties do not challenge them. For purposes of this decision, we assume, without deciding, that the ICC properly considered the public interest factors of § 11344(b)(1) in approving the original transaction, that its decision to override the carriers' obligations is consistent with the labor protective requirements of § 11347, and that the override was necessary to the implementation of the transaction within the meaning of § 11341(a). Under these assumptions, we hold that the exemption from "all other law" in § 11341(a) includes the obligations imposed by the terms of a collective-bargaining agreement.

N&W, 499 U.S. at 127-28 (footnote omitted; emphasis in original).

At the very end of its opinion, the Supreme Court again emphasized what was not being decided:

The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the ICC held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n. 2, *supra*.⁹ It also might be true that "[t]he breadth of the exemption [in § 11341(a)] is defined by the

⁹ In its notes 2 and 3, the Supreme Court took note of Carmen II, and certain statements with respect to the interplay of sections 11341(a) and 11347. See N&W, 499 U.S. at 126 n.2 and at 128 n.3.

process in accordance with Article I, section 4 of the New York Dock conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 757. The two outstanding arbitration awards were vacated, because the arbitrators in the two cases had "based their decisions on pronouncements [in DRGW and Maine Central] that the Carmen court found to be incorrect statements of the law and that we modify in this decision," Carmen II, 6 I.C.C.2d at 721.⁸

At The Supreme Court. In N&W the Supreme Court, holding that a carrier's exemption under section 11341(a) "from all other law" includes the carrier's legal obligations under a CBA, reversed the D.C. Circuit's Carmen judgment and remanded for further proceedings. The Supreme Court's N&W decision amounted to an affirmation of a key aspect of the ICC's decisions in DRGW, Maine Central, Carmen I, and Dispatchers I.

We hold that, as necessary to carry out a transaction approved by the ICC, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers.

N&W, 499 U.S. at 133.

⁸ In a decision served July 20, 1990 (with corrections served July 25, 1990, and August 13, 1990), the ICC denied petitions to stay the effectiveness of Carmen II that had been filed by CSX and NS. In a decision served October 29, 1990, the ICC denied petitions seeking administrative reconsideration that had also been filed by CSX and NS. The denial of the stay petitions allowed the Carmen II decision to become effective, and, following the denial of the reconsideration petitions, should have led in due course to further negotiation and, if necessary, further arbitration. However, so far as the record before us indicates, it did not.

arbitrator acting under Article I, section 4 was authorized to override any term of a CBA that impeded the effectuation of a merger.

In Carmen II the ICC made three refinements to the DRGW doctrine. *First*, the ICC substituted section 11347, which provides for the imposition of labor protective conditions in connection with an approved transaction, for section 11341(a) as the authority for modifying CBAs while foreclosing resort to RLA remedies. *Second*, the ICC set forth a more balanced interpretation of Article I, section 2 of New York Dock. Article I, section 2, the ICC indicated, cannot realistically be interpreted as bearing its literal meaning, i.e., that CBAs shall be preserved without any qualification whatsoever. What Article I, section 2 means, the ICC found, is that contract rights shall be respected and not overridden unless necessary to permit an approved transaction to proceed.⁷ *Third*, the ICC tempered what it had said in DRGW and Maine Central. It was still true, the ICC stated in Carmen II, that CBAs and the RLA had to yield to allow implementation of an approved transaction. However, section 11347, and the protective conditions imposed thereunder, only required CBAs and the RLA to yield to permit modifications of the type traditionally made by arbitrators under the WJPA and the ICC's conditions from 1940 to 1980; and section 11341(a) reinforced 11347 by requiring the RLA to yield so as not to block the sort of changes permitted under section 11347. The ICC did not attempt to define what changes should be considered to be necessary but stated in Carmen II that CBAs and the RLA should not be overridden simply to facilitate a transaction, but should be required to yield only when and to the extent necessary to permit the approved transaction to proceed.

The ICC did not attempt, in Carmen II, to apply its section 11347 analysis to the facts of the two proceedings then before the ICC (and now before the Board). Rather, in recognition of the central role accorded negotiation and arbitration in the fashioning of an implementing agreement, these two proceedings were "remanded to the parties to continue the implementing

⁷ This was the first time the concept of necessity had been expressly applied to modification of a CBA by an arbitrator under 49 U.S.C. 11347—a concept that was embraced by the D.C. Circuit in RLFA v. United States, 987 F.2d at 806, 814-15 (D.C. Cir. 1993) (RLFA).

substantially the same and provided for mandatory binding arbitration, were designed to resolve covered disputes with a certain measure of dispatch and to overcome the obstacle of CBA provisions that might otherwise have prevented consummation of an approved transaction.

Carmen II indicates that the 40-year era of labor peace ushered in by the 1940 enactment of section 5(2)(f) ended about 1980 arguably due in part to a change mandated by the Railroad Revitalization and Regulatory Reform Act of 1976: the addition of the requirement that the ICC impose labor protection at least as protective of the interests of employees as the terms established under section 405 of the Rail Passenger Service Act (RPSA). This gave birth to Article I, section 2 of the New York Dock conditions which provide for the preservation of collective bargaining rights. Rail labor contended for a literal reading of Article I, section 2 so as to prevent any modifications of CBA provisions in approved consolidations except through resort to RLA procedures.⁶ The carriers, on the other hand, responded with a reading of Article I, section 4 of the New York Dock conditions which would permit an arbitrator to change any provision of a CBA deemed an impediment to the approved consolidation. In Carmen I and Dispatchers I, the ICC applied the interpretation of Article I, section 4 of New York Dock and the section 11341(a) immunity provision commonly associated with its 1983 DRGW decision and its 1985 Maine Central decision (hereinafter referred to collectively as the DRGW doctrine). The DRGW doctrine asserted that, as a result of section 11341(a), the ICC approval of a transaction operated automatically to override all laws, including the RLA, as necessary to carry out an approved transaction, and that CBAs conflicting with an approved transaction had to give way. Under the DRGW doctrine, it was understood that the Article I, section 4 binding arbitration rule trumped the Article I, section 2 "preservation of contracts" rule. It was further understood that, by virtue of section 11341(a), a New York Dock

⁶ More specifically, rail labor forced the ICC to address the issue in DRGW by seeking a declaration that the DRGW and MKT railroads could not operate over trackage rights imposed by the ICC to counteract the anticompetitive effects of a merger it had approved utilizing their own crews without negotiating with the employee organizations representing employees of the merged carriers under the RLA. The ICC concluded otherwise and its interpretation was ultimately upheld by the Supreme Court in N&W.

decision on certiorari, reversing the D.C. Circuit. Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (N&W).

On Remand. In the interim the ICC issued Carmen II, which held that, in connection with an approved transaction, CBAs and collective bargaining rights could be modified, without resort to RLA procedures, under the auspices of section 11347 and the protective conditions imposed thereunder. Thus, according to the ICC's decision, the CBA override authority that the court of appeals had held could not be based on section 11341(a) has a basis in section 11347 and Article I, section 4 of the New York Dock labor conditions. Section 11341(a) was found available to be relied upon for an RLA override authority commensurate with the changes in CBAs that could be effected under section 11347.

The Carmen II analysis is based upon the historical development of section 11347 and ICC labor conditions. The history behind this provision, leading to its enactment in 1940 as section 5(2)(f), is long and complex, and involves the Transportation Act of 1920, the Railway Labor Act of 1926, the Emergency Railroad Transportation Act of 1933, certain amendments to the Railway Labor Act enacted in 1934, the Washington Job Protection Agreement of 1936 (WJPA), and the Transportation Act of 1940.

The ICC indicated in Carmen II that the enactment of section 5(2)(f) in the Transportation Act of 1940 codified the legal framework that had been agreed upon by the negotiators of the WJPA in 1936, and set the stage for a 40-year era of labor peace with regard to mergers and consolidations. Upon approving a post-1940 merger or consolidation proposed by two or more railroads, the ICC would impose WJPA-based protective conditions. Rail management and rail labor would then negotiate implementing agreements to permit smooth implementation of the transaction, and, in the event of impasse, arbitrators were empowered to modify CBAs when necessary to implement the transaction. Prior to 1936, these negotiations would have been conducted under the interminable RLA dispute resolution procedures applicable to major disputes, and deadlock might well have been the result. After 1940, the mechanism for an RLA bypass having been put in place, these negotiations would have been conducted under the WJPA, under comparable procedures negotiated in connection with the particular transaction, or under the comparable section 5(2)(f)-mandated procedures contained in the ICC's labor conditions. These various procedures, all of which were

provisions in existing CBAs and in the RLA. The committee also ruled that Article I, section 4 of the New York Dock conditions empowered it to approve the transfer of work from a location subject to a CBA to a location not subject to a CBA. Accordingly, the committee adopted, with one minor exception, the implementing agreement that had been proposed by NS.

In Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co., 4 I.C.C.2d 1080 (1988) (Dispatchers I), the ICC affirmed the committee's decision and award. The ICC said that, under the auspices of the section 11341(a) exemption, the mandatory arbitration scheme of Article I, section 4 of New York Dock took precedence over RLA procedures whether asserted independently or based on an existing CBA.

Article I, section 4 of New York Dock provides for compulsory, binding arbitration of disputes. It has long been the ICC's view that private collective bargaining agreements and RLA provisions must give way to the ICC-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission. Absent such a resolution, the intent of Congress that Commission-authorized transactions be consummated and fully implemented might never be realized. Moreover, 49 U.S.C. § 11341(a) exempts from other law a carrier participating in a § 11343 transaction as necessary to carry out the transaction.

Dispatchers I, 4 I.C.C.2d at 1083 (footnote omitted).

At The Court Of Appeals. In Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989) (Carmen), the court of appeals, ruling that the section 11341(a) immunity provision did not empower the ICC to override a CBA, reversed the ICC's decisions in Carmen I and Dispatchers I and remanded the records to the ICC in order that the ICC might determine whether further proceedings were necessary. The ICC accepted the remand, and, on June 21, 1990, it served its decision on remand, CSX Corp.-Control-Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990) (Carmen II). CSX and NS, however, did not agree with the decision of the court of appeals; instead, they sought certiorari; and, on March 19, 1991, the Supreme Court issued its

Finance Docket No. 28905 (Sub-No. 22), et al.

In 1982, when the ICC approved the NS Control transaction, each railroad system performed its own power distribution work. On the N&W, power distribution was performed at an N&W facility in Roanoke, VA, by supervisors who were represented by the American Train Dispatchers Association (ATDA), and who were covered by an ATDA/N&W CBA. On the Southern, power distribution was performed at a Southern facility in Atlanta, GA, by supervisors who were considered management, and who, for this reason, were neither represented by a union nor covered by a CBA.

In September 1986, N&W and Southern (hereinafter referred to collectively as NS) notified ATDA that power distribution for the two railroad systems would be consolidated. This consolidation would involve the transfer of the work performed in the N&W's Roanoke facility to the Southern's Atlanta facility, which would thereafter be responsible for power distribution for the entire NS system. It was envisioned that the work at the Atlanta facility would be performed by Southern supervisors, and therefore would not be subject to a CBA. In a proposed implementing agreement, NS offered the N&W supervisors the opportunity to request consideration for new supervisor positions to be created on the Southern. NS was unwilling, however, to assign the transferred N&W supervisors the same duties and territorial responsibilities they had had on the N&W. NS and ATDA attempted to negotiate regarding the proposed consolidation, but they were unable to reach agreement. The matter was then submitted to arbitration.

On May 19, 1987, the arbitration committee entered its decision and award (Harris Award). The committee, relying heavily upon the ICC's 1985 Maine Central decision,⁵ determined, in essence, that, under Article I, section 4 of the New York Dock conditions, it had jurisdiction to formulate an implementing agreement, and that, pursuant to section 11341(a), the implementing agreement would be immunized from conflicting

⁵ Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Company-Exemption From 49 U.S.C. 11342 and 11343, Finance Docket No. 30532 (ICC served Sept. 13, 1985) (Maine Central), aff'd mem. sub nom. RLEA v. ICC, 812 F.2d 1443 (D.C. Cir. 1987). (Commission order approving transaction and imposing labor protection-rather than RLA-governs labor management relations in implementing approved transaction.)

The ICC reversed the part of the committee's opinion and award that created an Orange Book employees exception to the prescribed implementing agreement. The ICC ruled that the committee had erred in fashioning a standard of "slight impairment of the transaction" for permitting a CBA provision to conflict with the implementation of an approved transaction. This "slight impairment of the transaction" standard, the ICC stated, contradicted the correct standard ("a transaction hurdles all legal obstacles preventing implementation"), and would effectively undercut the ICC's authorization of the transaction at issue.

[E]ven if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission.

Carmen I, 4 I.C.C.2d at 649-50. The ICC added that, even if the committee's "slight impairment of the transaction" standard were appropriate, the evidence of record did not support the application of that standard in the present circumstances. The evidence, the ICC said, established that a prohibition against the transfer of Orange Book protected employees "imposed a significant, if not insurmountable, obstacle to implementation of the transfer." Carmen I, 4 I.C.C.2d at 649. Accordingly, the ICC set aside the portion of the decision holding that CSX may not require transfer of employees and remanded the matter with the instruction that such transfers are of course subject to the terms set forth in New York Dock for the protection of the interests of affected employees.

Finance Docket No. 29430 (Sub-No. 20). In Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co., 366 I.C.C. 171 (1982) (NS Control), the ICC authorized Norfolk Southern Corporation to acquire control of the separate railroad systems of Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern). The approval was subject to the New York Dock conditions.

system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock conditions." LaRocco Award, at 37.

Accordingly, the committee, in formulating an implementing agreement, directed the parties to adopt the implementing agreement that had been proposed by CSX, subject to this one significant exception: that Waycross employees covered by the Orange Book could not be compelled to transfer to Raceland.

In CSX Corp.-Control-Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988) (Carmen I), the ICC affirmed in part and reversed in part the committee's opinion and award, and remanded to the committee for further proceedings consistent with the ICC's decision.

The ICC affirmed the part of the committee's opinion and award that approved the movement of the work performed at Waycross. The ICC noted that the committee had concluded that "it had the authority to move both work and employees to Raceland, despite potentially conflicting provisions in the RLA and the Orange Book Agreement ('the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation,' award at 34). This is a correct statement of our position and we affirm the committee's finding on its authority." Carmen I, 4 I.C.C.2d at 649. The ICC restated the applicable standard as follows:

[T]he carrier is permitted to carry out and fully implement [a transaction the Commission has authorized] despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in New York Dock or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion.

Carmen I, 4 I.C.C.2d at 650.

under Article I, section 4 of the New York Dock conditions, it had jurisdiction to formulate an implementing agreement, and that, pursuant to 49 U.S.C. 11341(a), the implementing agreement would be immunized from conflicting provisions in the Railway Labor Act (RLA) and in existing CBAs. The committee further determined, however, that, on account of the section 11341(a) "necessity" requirement, such an implementing agreement had to "reasonably accommodate" existing CBAs and collective bargaining rights.⁴ The "reasonable accommodation" formula attained particular significance on account of the committee's finding that the Orange Book, in explicitly according SCL the right to transfer Orange Book protected employees and their work throughout the SCL system, implicitly barred SCL and its successors from transferring Orange Book protected employees or their work beyond the SCL system.

The implementing agreement that the committee formulated reflected what it considered to be a "reasonable accommodation" of the section 11341(a) immunity provision with the Orange Book agreement. Acknowledging section 11341(a), the committee concluded that the Orange Book provision barring the transfer of the work of covered employees beyond the former SCL system "must be subordinated to the Carriers' right to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland." LaRocco Award, at 36-37. But, reflecting its "reasonable accommodation" standard, the committee ruled that the Orange Book provision barring the transfer of covered employees beyond the former SCL system would not be thus subordinated. "Unlike the work, the Orange Book limitation on transferring covered employees throughout the SCL

³(...continued)

decision was vacated on procedural grounds in ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987).

⁴ "[T]he [section 11341(a)] exemption is only triggered when necessary To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. . . . If feasible, the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights." LaRocco Award, at 33 (emphasis added).

Finance Docket No. 28905 (Sub-No. 22), et al.

In 1980, when the ICC approved the CSX Control transaction, C&O operated a freight car heavy repair shop at Raceland, KY, and SCL operated a freight car heavy repair shop at Waycross, GA. These two shops continued to function for the next several years. The Raceland shop continued to perform freight car heavy repair work for C&O, and the Waycross shop continued to perform freight car heavy repair work for SCL and, after a time, for SCL's corporate successor, an entity first known as Seaboard System Railroad, Inc. and later known as CSX Transportation, Inc. (CSXT).

In August 1986, C&O and CSXT (hereinafter referred to collectively as CSX) served notice under New York Dock, Article I, section 4, on BRC and other involved unions that, on or about December 31, 1986, the Waycross freight car heavy repair shop would be closed and its functions would be transferred to the Raceland freight car heavy repair shop. The notice stated that the work to be moved from Waycross to Raceland, which was then being performed at Waycross under the SCL Agreement, would be "coordinated with such work presently being performed at Raceland under the C&O Agreement." The notice indicated that 149 positions (121 of which were represented by BRC) would be abolished at Waycross, and that 107 positions (99 of which would be represented by BRC) would be established at Raceland. CSX and BRC attempted to negotiate regarding the proposed transfer, but were unable to reach agreement. The matter was then submitted to arbitration.

On March 23, 1987, the arbitration committee entered its opinion and award (LaRocco Award). The committee, relying heavily upon the ICC's 1983 DRGW decision,³ determined that,

²(...continued)
(those employed on or before July 1, 1967) certain lifetime job protections.

³ Denver and Rio Grande Western Railroad Company-Trackage Rights Over Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO, et al., Finance Docket No. 30000 (Sub-No. 18) (ICC served Oct. 25, 1983) (DRGW), rev'd sub nom. Brotherhood of Locomotive Engineers v. ICC, 761 F.2d 714 (D.C. Cir. 1985), discussed infra, at 10. A few months after the entry of the committee's opinion and award, the D.C. Circuit's
(continued...)

Finance Docket No. 28905 (Sub-No. 22), et al.

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DISCUSSION AND CONCLUSIONS

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BACKGROUND

Finance Docket No. 28905 (Sub-No. 22). In CSX Corp.—Control-Chessie and Seaboard C.L.I., 363 I.C.C. 518 (1980) (CSX Control), the ICC approved, subject to the New York Dock conditions, the control by CSX Corporation of two noncarrier railroad holding companies, the Chessie System, Inc. (Chessie) and Seaboard Coast Line Industries, Inc. (SCLI). The railroads controlled by Chessie included the Chesapeake and Ohio Railway Company (C&O). The railroads controlled by SCLI included the Seaboard Coast Line Railroad Company (SCL).²

² In Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (1963) (SCL Merger), the ICC had approved, subject to the then standard labor protective conditions, the formation of the SCL through the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). In 1966, in anticipation of the consummation of the SCL Merger transaction, SAL and ACL had entered into a labor protective agreement, commonly referred to as the Orange Book agreement, with the Brotherhood of Railway Carmen (BRC) and 16 other unions. The Orange Book gave SCL the right to transfer work and employees throughout the merged SCL system, and gave all covered employees (continued...)

We are affirming the orders entered by the ICC in these proceedings in its decisions served in 1988, affirming in one case (4 I.C.C.2d 1080) and affirming in part and reversing in part in the other (4 I.C.C.2d 641) the arbitration awards previously entered in these proceedings in accordance with Article I, section 4 of the New York Dock conditions. New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock). We do so employing the reasons and the standards set forth in the ICC's subsequent 1990 decision in this matter served on June 21, 1990 (6 I.C.C.2d 715). However, we are not remanding the matters to the parties for further negotiation as that decision proposed to do because developments in the law since then have made it unnecessary to do so and because the parties have waited long enough for a final resolution of these proceedings.

We answer the question left open by the Supreme Court decision in Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 134 (1991) (N&W), as follows: Where New York Dock labor protection is required to be imposed upon a rail consolidation by virtue of 49 U.S.C. 11347, now section 11326, the scope of an arbitrator's authority to modify collective bargaining agreements (CBAs) as "necessary ... to carry out the transaction" under section 11341(a), now section 11321(a), is limited by the provisions of these labor protective conditions as explained by the ICC in its 1990 decision and as updated and further explained in this decision. We conclude that it is unnecessary, premature and inappropriate for us to address in the abstract at this time the reach of the immunity provision of section 11341(a), now section 11321(a), where it is not constrained by the required imposition of New York Dock labor conditions.

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29606
EB

SERVICE DATE - SEPTEMBER 25, 1998

This decision will be included in the bound volume of printed reports at a later date.

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION-CONTROL-CHESSIE SYSTEM, INC.
AND SEABOARD COAST LINE INDUSTRIES, INC.
(ARBITRATION REVIEW)

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION-CONTROL-
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY
(ARBITRATION REVIEW)

Decided: September 22, 1998

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), effective January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission), and established the Surface Transportation Board (Board). The Act transferred from the ICC to the Board a number of the functions formerly performed by the ICC, including the rail carrier control functions formerly codified at 49 U.S.C. 11341-11347, and now codified at 49 U.S.C. 11321-11326.

Section 204(b)(1) of the ICCTA provides, in general, that any proceedings pending before the ICC at the time of its termination and that involve functions transferred from the ICC to the Board shall be decided by the Board under the law as in effect prior to the enactment of the ICCTA. We will therefore decide these proceedings under the old law (i.e., under old 49 U.S.C. 11341, 11343, 11344, and 11347).

ICCTA made no significant changes to the substantive law as relevant to these proceedings, although it did effect a renumbering of the sections. All further statutory references in this decision will be, except as specifically indicated otherwise, to the sections of the law as in effect prior to January 1, 1996.

27



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Checked by AVG - www.avg.com

Version: 8.5.423 / Virus Database: 270.14.27/2453 - Release Date: 10/23/09 06:56:00

ARE UNACCEPTABLE I WILL ATTEMPT TO ACCOMODATE THE PARTIES IF THEY CAN REACH CONSENSUS ON A MUTUALLY AGREEABLE DATE.

I AM FLEXIBLE ON THE LOCATION BUT MY PREFERENCE WOULD BE ORLANDO OR THE CHICAGO AREA.

PLEASE ADVISE AT YOUR EARLIEST CONVENIENCE AS I ASSIGN DAYS ON A "FIRST COME. FIRST SERVED" BASIS.

SINCERELY,

DON HAMPTON
ARBITRATOR

Don Hampton
Donmed8@embarqmail.com
-----Original Message-----

From: Cathy.Cortez@cn.ca
Date: 9/17/2009 5:11:30 PM
To: donmed8@embarqmail.com
Cc: atdddvw@aol.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; lmazzone@schenklawfirm.com
Subject: NYD arbitration

Mr. Hampton -

This is in regards to our phone conversation this afternoon. Thank you for agreeing to take on our tri-party New York Dock arbitration. We would like to schedule with you and if you could let us know your soonest availability and location, we would appreciate it.

The parties are :

American Train Dispatchers Association - David Volz is the contact.
Illinois Central Train Dispatchers Association - Joseph Mazzone is the contact
Illinois Central Railroad & Grand Trunk Western Railroad - Cathy Cortez is the contact.

Thank you & we look forward to hearing from you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Don Hampton
Donmed8@embarqmail.com

-----Original Message-----

From: Cathy.Cortez@cn.ca
Date: 9/21/2009 4:23:17 PM
To: Don Hampton
Cc: atdddwy@aol.com; imazzone@schenkfirm.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca
Subject: Re: NYD arbitration

Mr. Hampton - The parties would like to suggest a date of November 10th for the arbitration, in Chicago.

Can you please confirm if that is acceptable?

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

"Don Hampton"
<donmed8@embarqmail.com>

09/18/2009 09:12 AM

To: <Cathy.Cortez@cn.ca>
cc: <atdddwy@aol.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>, <imazzone@schenkfirm.com>
Subject: NYD arbitration
ct

TO: ALL CONCERNED

IN REGARDS TO THE ABOVE REFERENCED NEW YORK DOCK ARBITRATION I WOULD SUGGEST OCTOBER 21, 2009 OR NOVEMBER 3, 2009. IF THESE DATES

P0433

Mr. Hampton -

The parties have agreed to meet at the Carrier's offices located at

17641 S. Ashland Avenue
Homewood, IL 60430

I would recommend hotels in the Tinley Park area, located at 183rd & Harlem Avenue. They are approximately 10 miles from the office.

I suggest we begin at 10am, unless that is a conflict for anyone.

Thank you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

"Don Hampton"
<donmed8@embarqmail.com>

09/21/2009 06:38 PM

To: <Cathy.Cortez@cn.ca>
cc: <atdddww@aol.com>, <jmazzone@schenkfirm.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>
Subject: NYD arbitration
cl

TO: All Concerned

November 10th, 2009 is acceptable to me and I have reserved this date on my schedule.

Please advise at a later date the exact time and location.

Sincerely,

Don A. Hampton
Arbitrator

P0432

Sent: Friday, October 23, 2009 12:29 PM

To: donmed8@embarqmail.com; Cathy.Cortez@cn.ca

Cc: jmazzone@schenklawfirm.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; Timothy.Rice@cn.ca

Subject: Re: NYD arbitration

Mr. Hampton:

There is a Holiday Inn Select located at 18501 S Harlem Ave, Tinley Park, IL 60577; phone 708-444-1100. The Canadian National rate is \$89.00 per night. There is a restaurant on property that has good food and the sleeping rooms are nice.

David W. Volz

Vice President

American Train Dispatchers Association

Phone: 210-455-9294

Fax: 210-467-5239

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In a message dated 10/23/2009 11:23:38 A.M. Central Daylight Time, donmed8@embarqmail.com writes:

In regards to the above referenced arbitration 10:00 am is fine with me. Anyone have recommendfations on a hotel?

Don Hampton

Arbitrator

Don Hampton

Donmed8@embarqmail.com

-----Original Message-----

From: Cathy.Cortez@cn.ca

Date: 10/23/2009 11:51:57 AM

To: Don Hampton

Cc: atdddvw@aol.com; jmazzone@schenklawfirm.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; Timothy.Rice@cn.ca

Subject: Re: NYD arbitration



Atdddw@aol.com
10/23/2009 01:57 PM

To jmazzone@schenklawfirm.com,
donmed8@embarqmail.com, Cathy.Cortez@cn.ca
cc Mike.Christofore@cn.ca, Rick.Pippin@cn.ca,
Timothy.Rice@cn.ca, ATDAMCCANN@aol.com,
mwolly@zwerdliing.com, josephwmason1@juno.com,
bcc

Subject Re: NYD arbitration

10:00 AM start time if fine with the ATDA as well.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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In a message dated 10/23/2009 1:37:16 P.M. Central Daylight Time,
jmazzone@schenklawfirm.com writes:

On behalf of the ICDTA, 10:00am start time is fine.

Joseph R. Mazzone

3033 West Jefferson St

Suite 208

Joliet, Illinois 60435

Ph 815-725-7000

Fx 815-725-7141

The information contained in this transmission is attorney privileged and/or confidential information intended for the use of the individual or entity named above.

If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

From: Atdddw@aol.com [mailto:Atdddw@aol.com]



atdddvw@aol.com
10/14/2009 06:44 PM

To Cathy.Cortez@cn.ca, Mike.Christofore@cn.ca,
jmazzone@schenklawfirm.com
cc atdamccann@aol.com, mwolly@zwerdli.com
bcc

Subject Re: NYD submissions

History: This message has been forwarded.

Cathy:

We are still in the process of preparing our submission and I'm not sure we'll have it ready in time to exchange prior to the hearing date. If that changes, I'll let you know.

David

-----Original Message-----

From: Cathy.Cortez@cn.ca
To: atdddvw@aol.com; Mike.Christofore@cn.ca; jmazzone@schenklawfirm.com
Sent: Wed, Oct 14, 2009 3:25 pm
Subject: NYD submissions

Gentlemen -

I would suggest we agree on a date to exchange submissions prior to the arbitration on November 10th. We can then advise Mr. Hampton on when to expect his copies.

Thanks.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586



 **Cathy**
Cortez/CORTEZ02/CNR/CA
10/14/2009 03:25 PM

To atdddww@aol.com, Mike
Christofore/CHRIST12/IL/CNR/CA@CNR,
jmazzone@schenklawfirm.com

cc

bcc

Subject NYD submissions

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Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

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ARBITRATOR

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Donmed8@embarqmail.com
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Date: 9/17/2009 5:11:30 PM

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Cc: atdddvw@aol.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; jmazzone@schenklawfirm.com

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Illinois Central Railroad & Grand Trunk Western Railroad - Cathy Cortez is the contact.

Thank you & we look forward to hearing from you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Fx 815-725-7141

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If the reader of this message is not the intended recipient you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited

From: Cathy.Cortez@cn.ca [mailto:Cathy.Cortez@cn.ca]
Sent: Friday, September 18, 2009 9:41 AM
To: atdddww@aol.com; Mike.Christofore@cn.ca; jmazzone@schenkfirm.com; Rick.Pippin@cn.ca
Subject: Fw: NYD arbitration

Gentlemen -

Further to Mr. Hampton's email, my preference is October 21st in Chicago. Once we can all agree on time and location, I will respond to him with copies to everyone, if that is acceptable.

Thank you.

Cathy Cortez
Senior Manager – Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

— Forwarded by Cathy Cortez/CORTEZ02/CNR/CA on 09/18/2009 09:39 AM —

"Don Hampton"
<donmed8@embarqmail.com>

09/18/2009 09:12 AM

To: <Cathy.Cortez@cn.ca>
cc: <atdddww@aol.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>, <jmazzone@schenkfirm.com>
Subject: NYD arbitration
ct

TO: ALL CONCERNED

IN REGARDS TO THE ABOVE REFERENCED NEW YORK DOCK ARBITRATION I

P0426



Atdddvw@aol.com
09/21/2009 03:06 PM

To jmazzone@schenklawfirm.com, Cathy.Cortez@cn.ca,
Mike.Christofore@cn.ca, Rick.Pippin@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com,
mwolly@zwerdfling.com
bcc

Subject Re: NYD arbitration

The ATDA is available on November 10, 2009 for the hearing and we have no objection to it taking place in Chicago.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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In a message dated 9/18/2009 2:17:18 P.M. Central Daylight Time, jmazzone@schenklawfirm.com writes:

Ms Cortez and Gentlemen,

I am unavailable for the two dates offered by Mr Hampton. I am available on November 9th through the 12th. I am sure that this matter can be presented in one day.

We would also prefer the hearing take place in the Chicago area.

I will await your responses.

Thanks

Joseph R. Mazzone
3033 West Jeferson St
Suite 208
Joliet, Illinois 60435
Ph 815-725-7000



Cathy
Cortez/CORTEZ02/CNR/CA
09/17/2009 04:11 PM

To donmed8@embarqmail.com
cc atdddvv@aol.com, Mike
Christofore/CHRIST12/IL/CNR/CA@CNR, Rick
Pippin/PIPPIN02/CNR/CA@CNR,
bcc

Subject NYD arbitration

Mr. Hampton -

This is in regards to our phone conversation this afternoon. Thank you for agreeing to take on our tri-party New York Dock arbitration. We would like to schedule with you and if you could let us know your soonest availability and location, we would appreciate it.

The parties are :

American Train Dispatchers Association - David Volz is the contact.
Illinois Central Train Dispatchers Association - Joseph Mazzone is the contact
Illinois Central Railroad & Grand Trunk Western Railroad - Cathy Cortez is the contact.

Thank you & we look forward to hearing from you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586



Cathy
Cortez/CORTEZ02/CNR/CA
09/15/2009 03:36 PM

To atdddww@aol.com, Mike
Christofore/CHRIST12/IL/CNR/CA@CNR,
jmazzone@schenklawfirm.com
cc Hunt.Cary@cn.ca, Timothy.Rice@cn.ca

bcc

Subject Arbitrator selection

Confirming that we have a call scheduled for 3pm CDT on Thursday, September 17th to "strike" arbitrators from the list provided by the NMB.

Please use the following dial-in:

Dial in # 866-305-1459
Access Code 3323563#

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586



P0423



Cathy
Cortez/CORTEZ02/CNR/CA
09/08/2009 03:43 PM

To atdddww@aol.com, Mike
Christofore/CHRIST12/IL/CNR/CA@CNR
cc
bcc
Subject Strike List

David & Mike -

I'd like to pick some time this week to strike names from the strike list we received from the NMB. I can set up a dial-in for us, given our separate locations, to move the process along. Please let me know your availability.

Thanks!

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

P A N E L

Re: New York Dock - Illinois Central Railroad, Grand Trunk Western Railroad
(Canadian National), American Train Dispatchers Association and Illinois Central
Train Dispatchers Association

James Darby

Brian Clauss

Joan Parker

Don Hampton

Gerald Wallin

Lisa Kohn

James Nash



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

September 1, 2009

Ms. C. K. Cortez
Senior Manager – Labor Relations
Canadian National
17641 South Ashland Avenue
Homewood, IL 60430

Mr. F. L. McCann, President
American Train Dispatchers Association
1370 Ontario Street
Suite 1040
Cleveland, OH 44113

Mr. M. H. Christofore, President
Illinois Central Train Dispatchers Association
3411 Regan Road
Joliet, IL 60431

Re: New York Dock – – Illinois Central Railroad, Grand Trunk Western
Railroad (Canadian National), American Train Dispatchers Association and
Illinois Central Train Dispatchers Association

Dear Ms. Cortez, Messrs. McCann and Christofore:

Reference is made to the request from the Canadian National Railroad for the National Mediation Board to provide a strike list of experienced arbitrators in New York Dock arbitration.

The list of seven (7) arbitrators is enclosed. You may access each arbitrator's resume/bio and contact information by going to our website, www.nmb.gov, under Arbitration.

Sincerely,

A handwritten signature in cursive script that reads "Roland Watkins".

Roland Watkins
Director, Arbitration Services

Enclosure

Labor Relations

17641 South Ashland Avenue
Homewood, IL 60430



VIA FACSIMILE
August 31, 2009

Mr. Roland Watkins
Director – Arbitration Services
National Mediation Board
1301 K Street NW, Suite 250 East
Washington D.C. 20572

Dear Mr. Watkins:

This is in response to your letter dated August 21, 2009, requesting a list of fifteen (15) preferred arbitrators for a New York Dock arbitration board. Listed below are our selections:

1. Gilbert Vernon
2. Robert Peterson
3. John LaRocco
4. Thomas Rinaldo
5. Robert Perkovich
6. Rodney Dennis
7. Don Hampton
8. Joshua Javits
9. Gerald Wallin
10. Brian Clauss
11. Helen Witt
12. Joan Parker
13. Elizabeth Wesman
14. Jacalyn Zimmerman
15. Lisa Kohn

Thank you for your assistance.

Sincerely,


C.K. Coffey
Senior Manager – Labor Relations



Atdddw@aol.com
09/21/2009 03:06 PM

To jmazzone@schenklawfirm.com, Cathy.Cortez@cn.ca,
Mike.Christofore@cn.ca, Rick.Pippin@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com,
mwolly@zwerdliing.com

bcc

Subject Re: NYD arbitration

The ATDA is available on November 10, 2009 for the hearing and we have no objection to it taking place in Chicago.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

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In a message dated 9/18/2009 2:17:18 P.M. Central Daylight Time,
jmazzone@schenklawfirm.com writes:

Ms Cortez and Gentlemen,

I am unavailable for the two dates offered by Mr Hampton. I am available on November 9th through the 12th. I am sure that this matter can be presented in one day.

We would also prefer the hearing take place in the Chicago area.

I will await your responses.

Thanks

Joseph R. Mazzone
3033 West Jefferson St
Suite 208
Joliet, Illinois 60435
Ph 815-725-7000

WOULD SUGGEST OCTOBER 21, 2009 OR NOVEMBER 3, 2009. IF THESE DATES ARE UNACCEPTABLE I WILL ATTEMPT TO ACCOMODATE THE PARTIES IF THEY CAN REACH CONSENSUS ON A MUTUALLY AGREEABLE DATE.

I AM FLEXIBLE ON THE LOCATION BUT MY PREFERENCE WOULD BE ORLANDO OR THE CHICAGO AREA.

PLEASE ADVISE AT YOUR EARLIEST CONVENIENCE AS I ASSIGN DAYS ON A "FIRST COME. FIRST SERVED" BASIS.

SINCERELY,

DON HAMPTON
ARBITRATOR

Don Hampton
Donmed8@embarqmail.com
-----Original Message-----

From: Cathy.Cortez@cn.ca
Date: 9/17/2009 5:11:30 PM
To: donmed8@embarqmail.com
Cc: atdddvw@aol.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; imazzone@schenkfirm.com
Subject: NYD arbitration

Mr. Hampton -

This is in regards to our phone conversation this afternoon. Thank you for agreeing to take on our tri-party New York Dock arbitration. We would like to schedule with you and if you could let us know your soonest availability and location, we would appreciate it.

The parties are :

American Train Dispatchers Association - David Volz is the contact.
Illinois Central Train Dispatchers Association - Joseph Mazzone is the contact
Illinois Central Railroad & Grand Trunk Western Railroad - Cathy Cortez is the contact.

Thank you & we look forward to hearing from you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Fx 815-725-7141

The information contained in this transmission is attorney privileged and/or confidential information intended for the use of the individual or entity named above.

If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

From: Cathy.Cortez@cn.ca [mailto:Cathy.Cortez@cn.ca]
Sent: Friday, September 18, 2009 9:41 AM
To: atdddvw@aol.com; Mike.Christofore@cn.ca; jmazzone@schenkklawfirm.com; Rick.Pippin@cn.ca
Subject: Fw: NYD arbitration

Gentlemen -

Further to Mr. Hampton's email, my preference is October 21st in Chicago. Once we can all agree on time and location, I will respond to him with copies to everyone, if that is acceptable.

Thank you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

--- Forwarded by Cathy Cortez/CORTEZ02/CNR/CA on 09/18/2009 09:39 AM ---

"Don Hampton"
<donmed8@emberqmail.com>

09/18/2009 09:12 AM

To <Cathy.Cortez@cn.ca>
cc <atdddvw@aol.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>,
<jmazzone@schenkklawfirm.com>
Subject: NYD arbitration
ct

TO: ALL CONCERNED

IN REGARDS TO THE ABOVE REFERENCED NEW YORK DOCK ARBITRATION I

P0416

SINCERELY,

DON HAMPTON
ARBITRATOR

Don Hampton
Donmed8@embarqmail.com

-----Original Message-----

From: Cathy.Cortez@cn.ca

Date: 9/17/2009 5:11:30 PM

To: donmed8@embarqmail.com

Cc: atdddvw@aol.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; imazzone@schenklawfirm.com

Subject: NYD arbitration

Mr. Hampton -

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The parties are :

American Train Dispatchers Association - David Volz is the contact.

Illinois Central Train Dispatchers Association - Joseph Mazzone is the contact

Illinois Central Railroad & Grand Trunk Western Railroad - Cathy Cortez is the contact.

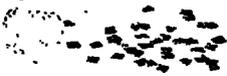
Thank you & we look forward to hearing from you.

Cathy Cortez

Senior Manager - Labor Relations

Office: 708.332.3570

Mobile: 312.848.0586



Cathy
Cortez/CORTEZ02/CNR/CA
09/21/2009 03:18 PM

To "Don Hampton" <donmed8@embarqmail.com>
cc atdddww@aol.com, jmazzone@schenklawfirm.com,
Mike.Christofore@cn.ca, Rick.Pippin@cn.ca
bcc
Subject Re: NYD arbitration

Mr. Hampton - The parties would like to suggest a date of November 10th for the arbitration, in Chicago.

Can you please confirm if that is acceptable?

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586



"Don Hampton"
<donmed8@embarqmail.com>

09/18/2009 09:12 AM

To <Cathy.Cortez@cn.ca>
cc <atdddww@aol.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>,
<jmazzone@schenklawfirm.com>
Subje Re: NYD arbitration
ct

TO: ALL CONCERNED

IN REGARDS TO THE ABOVE REFERENCED NEW YORK DOCK ARBITRATTION I WOULD SUGGEST OCTOBER 21, 2009 OR NOVEMBER 3, 2009. IF THESE DATES ARE UNACCEPTABLE I WILL ATTEMPT TO ACCOMODATE THE PARTIES IF THEY CAN REACH CONSENSUS ON A MUTUALLY AGREEABLE DATE.

I AM FLEXIBLE ON THE LOCATION BUT MY PREFERENCE WOULD BE ORLANDO OR THE CHICAGO AREA.

PLEASE ADVISE AT YOUR EARLIEST CONVENIENCE AS I ASSIGN DAYS ON A "FIRST COME. FIRST SERVED" BASIS.

Illinois Central Railroad & Grand Trunk Western Railroad - Cathy Cortez is the contact.

Thank you & we look forward to hearing from you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

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FREE Animations for your email - by IncrediMail! [Click Here!](#)

09/18/2009 09:12 AM

<Cathy.Cortez@cn.ca>
cc <atdddvw@aol.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>,
<jmazzone@schenkfirm.com>
Subj Re: NYD arbitration
ect

TO: ALL CONCERNED

IN REGARDS TO THE ABOVE REFERENCED NEW YORK DOCK ARBITRATION I WOULD SUGGEST OCTOBER 21, 2009 OR NOVEMBER 3, 2009. IF THESE DATES ARE UNACCEPTABLE I WILL ATTEMPT TO ACCOMODATE THE PARTIES IF THEY CAN REACH CONSENSUS ON A MUTUALLY AGREEABLE DATE.

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PLEASE ADVISE AT YOUR EARLIEST CONVENIENCE AS I ASSIGN DAYS ON A "FIRST COME. FIRST SERVED" BASIS.

 SINCERELY,

DON HAMPTON
ARBITRATOR

Don Hampton
Donmed8@embarqmail.com
-----Original Message-----

From: Cathy.Cortez@cn.ca
Date: 9/17/2009 5:11:30 PM
To: donmed8@embarqmail.com
Cc: atdddvw@aol.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca; jmazzone@schenkfirm.com
Subject: NYD arbitration

Mr. Hampton -

This is in regards to our phone conversation this afternoon. Thank you for agreeing to take on our tri-party New York Dock arbitration. We would like to schedule with you and if you could let us know your soonest availability and location, we would appreciate it.

The parties are :

American Train Dispatchers Association - David Volz is the contact.
Illinois Central Train Dispatchers Association - Joseph Mazzone is the contact

P0412



"Don Hampton"
<donmed8@embarqmail.com>
>
09/21/2009 06:38 PM

To <Cathy.Cortez@cn.ca>
cc <atdddvw@aol.com>, <jmazzone@schenkfirm.com>, <Mike.Christofore@cn.ca>, <Rick.Pippin@cn.ca>
bcc
Subject Re: NYD arbitration

TO: All Concerned

November 10th, 2009 is acceptable to me and I have reserved this date on my schedule.

Please advise at a later date the exact time and location.

Sincerely,

Don A. Hampton
Arbitrator

Don Hampton
Donmed8@embarqmail.com
-----Original Message-----

From: Cathy.Cortez@cn.ca
Date: 9/21/2009 4:23:17 PM
To: Don Hampton
Cc: atdddvw@aol.com; jmazzone@schenkfirm.com; Mike.Christofore@cn.ca; Rick.Pippin@cn.ca
Subject: Re: NYD arbitration

Mr. Hampton - The parties would like to suggest a date of November 10th for the arbitration, in Chicago.

Can you please confirm if that is acceptable?

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

"Don Hampton"
<donmed8@embarqmail.com>

To

P A N E L

Re: New York Dock – Illinois Central Railroad, Grand Trunk Western Railroad
(Canadian National), American Train Dispatchers Association and Illinois Central
Train Dispatchers Association

Thomas Rinaldo

Gilbert Vernon

Robert Peterson

Nancy Eischen

Brian Clauss

Lewis L. Ellsworth

John LaRocco

Sinclair Kossoff

Joshua M. Javits

Jacalyn Zimmerman

Rodney Dennis

Don Hampton

James Nash

Almalee Guttshall

Elizabeth Wesman

James Darby

Robert Perkovich

Ann Kenis

Helen Witt

Joan Parker

Joseph Cassidy

Dennis Campagna

Lisa Kohn

Michael Jordan

Gerald Wallin

Margo Newman

Edwin Benn

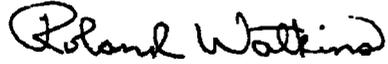
Sean Rogers

Gayle Gavin

Janice Frankman

The contact information and resumes of the arbitrators are available at www.nmb.gov.

Sincerely,

A handwritten signature in black ink that reads "Roland Watkins". The signature is written in a cursive style with a large initial "R".

Roland Watkins
Director, Arbitration Services

Enclosure



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

August 21, 2009

Ms. C. K. Cortez
Senior Manager – Labor Relations
Canadian National
17641 South Ashland Avenue
Homewood, IL 60430

Mr. F. L. McCann, President
American Train Dispatchers Association
1370 Ontario Street
Suite 1040
Cleveland, OH 44113

Mr. M. H. Christofore, President
Illinois Central Train Dispatchers Association
3411 Regan Road
Joliet, IL 60431

Re: New York Dock – – Illinois Central Railroad, Grand Trunk Western
Railroad (Canadian National), American Train Dispatchers Association and
Illinois Central Train Dispatchers Association

Dear Ms. Cortez, Messrs. McCann and Christofore:

Reference is made to the request from Canadian National for the National Mediation Board to provide a strike list of experienced arbitrators in New York Dock arbitration. A copy of the NMB's procedure for matters of this nature is enclosed.

A list of thirty (30) potential arbitrators is enclosed. You are each requested to provide a list of fifteen (15) preferred arbitrators from this list. Your information will be kept confidential and used only for the purposes of this case. The Board will promptly provide you with a panel of seven neutrals after receiving your preferences. The lists, along with other relevant information will be considered by the Board in compiling the panel of seven arbitrators. The lists must be submitted by 4:00 p.m., August 31, 2009. You may submit the information by facsimile. The number for Arbitration Services is 202-692-5086.

P0408

scheduled for next week. Clearly, to do so now would only be a waste of our time and resources. Therefore, we are canceling the meetings for next week.

We will respond to your letter to Mr. Watkins in due time. I will say, at his point, that your letter to Mr. Watkins is premature given the clear disputes resolution process contained in *New York Dock* .

As you know, I am on vacation this week and will be back in my office on Monday.

David Volz

-----Original Message-----

From: Cathy.Cortez@cn.ca

To: Mike.Christofore@cn.ca; JohnCzarny@cn.ca; Joe_Mason@cn.ca;
Joseph.Mason@cn.ca; atdamccann@aol.com; atdddww@aol.com

Cc: ROGER.MACDOUGALL@cn.ca; Timothy.Rice@cn.ca

Sent: Wed, Jul 29, 2009 2:19 pm

Subject: Arbitration letter

Please call with any questions or comments.

Cathy Cortez

Senior Manager - Labor Relations

Office: 708.332.3570

Mobile: 312.848.0586

[Hot Deals at Dell on Popular Laptops perfect for Back to School](#)

David W. Volz

Vice President

American Train Dispatchers Association

Phone: 210-455-9294

Fax: 210-467-5239

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Yes, we have had several conversations over the last few weeks and we did discuss the carrier's right to request arbitration and I did acknowledge the possibility of reaching a voluntary agreement even if the process was started. However, I never expected the carrier to dismiss our counter proposal without at least first discussing it.

You suggest that there is still value in meeting, we don't see it. You have rejected our counter proposal and you told me on the phone that the carrier would not revise its original proposal, which was not acceptable to us. So, what's left to discuss?

You may release the dates and meeting rooms as we will not meet given the circumstances.

I'm not sure what you are getting at concerning the attempted phone calls to Mr. McCann. Are you suggesting that someone was wanting to talk to him about our counter proposal? Regardless, Mr. McCann's mother had to undergo surgery last week and he was, rightly so, preoccupied with that.

David

In a message dated 7/31/2009 11:18:02 A.M. Central Daylight Time, Cathy.Cortez@cn.ca writes:

David-

We do not want to cancel the meetings for next week. There still is value in meeting, regardless of the letter sent to the NMB. As you are aware, we have spoken for a few weeks now about the possibility of going to arbitration concerning this agreement. During those conversations, we both agreed that even if the process was started, it did not stop us from reaching a voluntary agreement. Therefore, we feel it is in all of our best interests to keep our meeting dates for next week as scheduled.

I am aware you are on vacation. In fact, we tried several times to reach Mr. McCann before his vacation, but our calls were not returned.

I ask that you reconsider for next week. We are keeping the dates and meetings rooms booked for the meetings.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Cathy:

Given the carrier's comments to Mr. Watkins that our counter proposal is unacceptable, we see no reason to meet next week. We regret that the carrier chose this course of action without us having the benefit of the discussions that were

face-to-face, where we can discuss the issues. We have felt that way during the entire process from our original notice dated February 3, 2009.

Throughout the process, we have attempted to meet with the organization on various dates, and each time we would suggest such dates, the organization was unavailable and suggest dates further into the future. We began meeting on February 5 and afterwards when we suggested dates for February and then March, we were told you could not meet until mid-April. After the meetings in April, when we tried to set up conference calls, dates were not available for another 5-6 weeks from your side, taking us into June. And now you have canceled the final dates for August that we had to book close to 6 weeks ago.

An independent, outside observer might question whether these delays, taken cumulatively might be an attempt to delay the relocation process. We are now well beyond the 90-day process provided for in NYD.

I'm well aware that scheduling can be difficult, what with other bargaining, vacations, arbitration, family issues and travel restrictions. We have experienced all of those issues from our side of the table as well. My statement concerning contacting Mr. McCann was indeed to let you know that we have been and will continue to keep the lines of communication open. His voicemail indicated he was traveling on business. I'm sorry to hear about his mother.

I would ask that we at least schedule some sort of a conference call with the parties, on one of the three dates we had scheduled for this week. Perhaps we can have more dialogue and progress towards some sort of mutual deal. Failing that, we see no alternative but the party-pay arbitration process outlined in NYD.

As of today, we have not received a list of arbitrators from the NMB. Per Section 4.(1) in NYD, we propose using Peter Meyers, on a voluntary basis. If all parties are not agreeable to Mr. Meyers, I suggest we schedule a time to go over a possible list from the NMB.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddvw@aol.com



Atdddvw@aol.com
08/01/2009 09:44 AM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, Joe_Mason@cn.ca,
JohnCzamy@cn.ca, Joseph.Mason@cn.ca,
Mike.Christofore@cn.ca, ROGER.MACDOUGALL@cn.ca,
Timothy.Rice@cn.ca
Subject Re: Arbitration letter

Cathy:

Cathy
Cortez/CORTEZ02/CNR/CA
08/04/2009 08:27 AM

To atdamccann@aol.com
cc arb@nmb.gov, John.Czarny@cn.ca,
josephwmason1@juno.com, Mike
Christofore/CHRIST12/IL/CNR/CA@CNR,
bcc

Subject Fw: Arbitration letter

Mr. McCann -

I am in receipt of your email dated August 3, 2009, concerning the carrier's request to the NMB for a list of neutrals for arbitration. By now I presume you would have received my email, where I indicated that the carrier wishes to move to arbitration and suggested Mr. Peter Meyers as the neutral. I have forwarded again below, for your reference.

My July 29, 2009 letter to Mr. Watkins does in fact reference both Sections 4 and 11 of New York Dock. However, it is Section 4 that would apply to the dispute as we have here. Section 11 refers to dispute resolution once an Implementing Agreement would be in place and such issues that may arise from the application of such an agreement. Both sections were listed, as they are the processes by which to follow when there are disputes. However, it was in error that I included Section 11 at this time.

Clearly, Section 4 is proper in this case. Section 4 does not require a Carrier nor a Union member be assigned to an arbitration committee, as you request in your letter. Section 4(3) states: *"The decision of the arbitrator shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute."*

Given that the Carrier has given you notice today of our intent to go to arbitration and suggested Mr. Peter Meyers as the arbitrator, we request your response within 5 days. I remain available to discuss other possible referees if you prefer to call.

Thank you.

Cathy Cortez
Senior Manager - Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

— Forwarded by Cathy Cortez/CORTEZ02/CNR/CA on 08/04/2009 08:22 AM —

Cathy
Cortez/CORTEZ02/CNR/CA
08/03/2009 03:12 PM

To Atdddww@aol.com
cc ATDAMCCANN@aol.com, JohnCzarny@cn.ca,
Joseph.Mason@cn.ca, Mike.Christofore@cn.ca,
ROGER.MACDOUGALL@cn.ca, Timothy
Rice/RICE05/WI/CNR/CA@CNR, Hunt.Cary@cn.ca
Subject Re: Arbitration letter

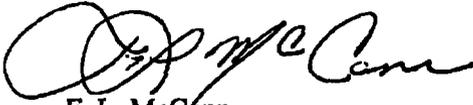
David-

We're sorry to hear that you are adamant about canceling this week's meetings. As I wrote before, I still feel there is value in meeting and that perhaps a voluntary deal can still be made with the parties

It should be noted that any written request for arbitration should also be served on the ICTDA. The ICTDA should notify me of its member to the arbitration committee.

By copy of this letter to Mr. Watkins I am asking that he not provide the list you requested and give the parties the opportunity to select an arbitrator consistent with the provisions of *NYD*.

Very truly yours,



F. L. McCann
President

cc via email: Roland Watkins, NMB
M. H. Christofore, ICTDA
J. A. Czarny, ICTDA
D. W. Volz, ATDA
J. W. Mason, ATDA



F. L. McCann
President

American Train Dispatchers Association

AFL-CIO AND TTD — RAIL DIVISION
1370 ONTARIO STREET, SUITE 1040
CLEVELAND, OHIO 44113-1736
TELEPHONE: (216) 241-2770 • FAX: (216) 241-6286

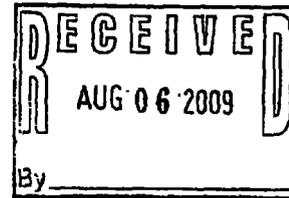


PROUD AMERICANS

August 3, 2009

VIA EMAIL

Ms. C. K. Cortez
Senior Manager – Labor Relations
Canadian National Railroad
17641 S. Ashland Ave.
Homewood, IL 60430



Dear Ms. Cortez:

This is in response to your July 29, 2009 letter to Mr. Roland Watkins, Director Arbitration Services of the National Mediation Board (NMB) wherein you “request a list of neutrals from which the parties can select an arbitrator.” I take issue with this request to Mr. Watkins for the following reasons.

First of all, you state in your letter to Mr. Watkins that “the Carrier advised the Organizations they would seek arbitration to resolve the dispute.” While it is true that you told ATDA VP Volz that the Carrier was contemplating arbitration if it did not receive the ATDA’s counter proposal, I have not received a request from the Carrier to arbitrate a dispute under *New York Dock (NYD)*. Furthermore, the ATDA complied with the Carrier’s request and provided its counter proposal by email on July 25, 2009 and the Carrier rejected it without any discussions whatsoever.

Secondly, your request to Mr. Watkins is premature. Your letter references the provisions of “Sections 4 and 11 of New York Dock.” Section 11, reads in part:

“Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who will serve as chairman.”

Again, I have not received a written request from the Carrier referring a dispute to arbitration, nor has the Carrier advised me who its member to the arbitration committee will be.

Once the Carrier complies with the provisions of *NYD* and provides me with a written request identifying the dispute it wishes to refer to arbitration and advises me of the Carrier’s member to the arbitration committee, I will notify the Carrier of the ATDA’s member to the arbitration committee.

26



_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that the carrier shall provide employment assistance for the spouses of the relocating train dispatchers at no cost to the employee or spouse. This shall include all costs associated with obtaining new employment in the Homewood area, including those costs associated with using employment agencies.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations



_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that rates of pay in effect for GTW train dispatchers at the time of the relocation shall be increased by ten percent (10%) in recognition of the increased cost of living in the Homewood area. This increase shall be effective on the first day the relocating train dispatchers work a position in the Homewood office.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations



_____, 2009

Side Letter No.

Mr. J.W. Mason
American Train Dispatchers Association

Dear Mr. Mason:

This will confirm our understanding reached during negotiations leading to the Implementing Agreement of this date in connection with the transfer of train dispatching work of the GTW to Homewood, Illinois.

It was agreed that GTW employees shall be allowed five (5) days with pay for the purpose of locating a residence in the Homewood area. Said five (5) days may be split up for up to two (2) house-hunting trip and shall be scheduled in conjunction with the employee's rest days. All travel expenses associated with the house-hunting trips shall be paid by the carrier. In lieu thereof, GTW employees may elect to receive a one-time lump sum payment of twenty-five hundred dollars (\$2,500) to offset the costs associated with a familiarization/house hunting trip to the Homewood area. Employees electing the lump sum payment who do not relocate will have the twenty-five hundred dollars (\$2,500) deducted from any future earnings or protective payments.

Sincerely,

C.K. Cortez
Senior Manager – Labor Relations

ATTACHMENT C

GTW TRAIN DISPATCHER SENIORITY ROSTER

	<u>Last Name</u>	<u>Initials</u>	<u>Seniority</u>	
1.	Lustig	W. D.	1/09/1977	*
2.	Gebard	D.V.	04/19/1977	
3.	Facknitz	E.A.	05/22/1977	
4.	Frasure	R. D.	11/20/1981	*
5.	Campbell	L.P.	12/19/1981	
6.	McAfee	M.L.	02/07/1987	
7.	Mason	J.W.	11/30/1987	
8.	Maidment	S.D.	01/14/1990	
9.	Martenis	L.R.	06/02/1991	
10.	Spring	M.S.	11/13/1991	
11.	Iacoangeli	J. T.	03/06/1993	*
12.	Plumley	T.R.	03/07/1993	
13.	Maier	A.P.	10/19/1994	
14.	Willett	T. E.	10/27/1994	*
15.	Evans	T.D.	12/03/1994	
16.	Seibert	R. L.	05/03/1997	*
17.	White	L.J.	06/05/1997	
18.	Skelton	S. D.	07/19/1997	*
19.	Wery	N.D.	09/06/1997	
20.	McDonough	K.E.	02/28/1998	
21.	Cowgar	K.M.	03/05/1998	
22.	Schott	J.F.	09/20/2000	
23.	Naylor	M. J.	04/23/2001	*
24.	Pollard	G. S.	06/29/2002	*

* Management

cable, and parking. The Company reserves the right to request the employee provide a receipt for proof that the expense has been paid.

3. The Company has agreed to pay the taxes for the rent reimbursement to the extent that it is considered ordinary income and subject to taxation. All rent reimbursement and taxes paid by the Company will be reported on the employee's statement of earnings.
4. Rent reimbursement will be provided to the employee for a period of time not to exceed four (4) years, or when one of the following events occur, whichever is sooner: the employee ceases to incur such expense; the employee violates any term of this relocation package; the employee's employment with the Company ends, whether voluntarily or otherwise; or the employee voluntarily chooses to transfer to another position within the Company.
5. Rent reimbursement will be offset if two or more employees rent the same living space.

additional \$10,000 payment, the employee can opt to have the carrier purchase his/her home at the fair market value or the original purchase price, whichever is greater.

OPTION (2) GTW Employees who rent in the Homewood area:

GTW employees who elect to rent or lease in the Homewood area, will be reimbursed for actual out-of-pocket costs of a rental accommodation, up to One Thousand Five Hundred Dollars (\$1,500) per month ("rent reimbursement"). This rent reimbursement is to be used solely for the accommodations that are necessary in order for the employee to hold a Dispatcher position to Homewood, Illinois and is not intended to, and cannot, be used for any other purpose, including but not limited to enrolling children in school, paying expenses for your present residence (or any other residence), or paying for any additional costs that might incur as a result of relocating.

1. Rent reimbursement includes only the following items: monthly rent; the cost of a basic cable plan; monthly gas (heat) bill; monthly electric bill; and parking at your residence.
2. Rent reimbursement will be provided for only those expenses actually incurred and only up to the amount provided for in paragraph 1. The employee must provide proof that you incurred the expense in a format acceptable to the Company prior to being reimbursed for any expense. Examples of acceptable forms of proof include a signed lease agreement, monthly utility bills issued by the service provider for gas, light, basic

ATTACHMENT B

In lieu of the benefits provided for in Sections 9 and 12 of the New York Dock conditions, employees who accept positions at Homewood will receive a \$20,000 lump sum payment (paid no later than thirty (30) days prior to the move) and may elect, at the time of their transfer, to accept one of the relocation packages as provided below. All transferring employees must select either relocation option (1) or (2), payments subject to taxation:

OPTION (1) GTW Employees who relocate their primary residence to the Homewood area will receive:

After fifteen (15) working days	\$2,000
After sixty (60) working days	\$2,000
After six (6) months	\$2,000
After one (1) year	\$2,000
After fifteen (15) months	\$2,000

To qualify for the above payments, an employee must be in active service at Homewood at the time such payment is due.

GTW employees who relocate their primary residence and select the benefits of this Attachment at the time of their transfer will be entitled to an additional \$10,000 upon proof of sale, at fair market value, of their primary residence in the Troy area, and proof of relocation to a new primary residence within a reasonable distance of Homewood. To qualify for the benefits of this paragraph, relocation of primary residence, including both sale and relocation, must occur within two (2) years of the date of transfer. In lieu of the

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part 1 of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

- (c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.
- (d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or re-training physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or re-training is requested by such employee, the railroad shall provide for such training or re-training at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

- (c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.
- (d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.
- (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. – (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence;

- (i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.
 - (ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.
 - (iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.
- (b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

9. **Moving expenses.** - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects 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 exceed 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 representative; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. **Arbitration of disputes.** - (a) In the event the railroad and its employees or their authorized representative cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event

6. Dismissal allowances. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earning of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place or residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances – (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

- (b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.
- (c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. **Notice and Agreement or Decision – (a)** Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

- (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.
- (2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.
- (3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

ATTACHMENT A

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

ARTICLE I

1. **Definitions.** – (a) “Transaction” means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
 - (b) “Displaced employee” means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
 - (c) “Dismissed employee” means an employee of the railroad who, as a result of a transaction is deprived of 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.
 - (d) “Protective period” means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee’s length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.
2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad’s employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.
3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and

17. This Agreement shall be effective upon not less than ten (10) days written notice from the company to the organization.

Signed this ____ day of, 2009 at Homewood, Illinois.

For: GRAND TRUNK WESTERN
RAILROAD COMPANY;
ILLINOIS CENTRAL

For: AMERICAN TRAIN DISPATCHERS
ASSOCIATION

By: _____

By: _____

By: _____

Approved: _____

separation allowance may chose to accept a VSA under the provisions of the Collective Bargaining Agreement.

13. Employees that transferred from Troy to Homewood under provisions of this agreement may at their option and in lieu of any and all benefits provided by Sections 9 and 12 of the New York Dock conditions (Attachment "A"), be afforded special options as provided in Attachment "B." Such election shall be made at the time of transfer.
14. This agreement shall constitute the required agreement, as stipulated in Article I, Section 4 of the protective conditions, for the transfer of work as indicated in the notice of February 3, 2009. The parties understand that in the future, other implementing agreements may be necessary to carry out the financial transaction set forth in STB Finance Docket No. 33556. The parties understand that such agreements are subject to notice, negotiation and possible arbitration under Article I, Section 4 of the New York Dock conditions.
15. Any dispute arising out of this Implementing Agreement and the Attachments will be handled by the General Chairman with the officer designated to receive such claims and grievances for the Company. All unresolved disputes will be disposed of in accordance with the applicable provisions of New York Dock.
16. The provisions of this Implementing Agreement have been designed to address a particular situation. Therefore, the provisions of this Implementing Agreement and the Attachments are without precedent or prejudice to the position of either party and shall not be referred to in any other case.

11. In the event any of the employees shown in Attachment C cannot hold a position under another GTW collective bargaining agreement (i.e. TCIU/GTW), cannot acquire a separation allowance as provided in paragraph 12, or cannot acquire a train dispatcher position in Homewood, such employees shall be eligible for a dismissal allowance in accordance with Article I, Section 6 of New York Dock. The Carrier shall provide the respective employee with the calculations used to determine his/her dismissal allowance within thirty (30) days of becoming a dismissed employee. The Carrier shall pay such dismissal allowance in the first pay period of each month.
12. There shall be at least eight (8) separation allowances offered by the Carrier, which shall be determined in accordance with Article I, Section 7 of New York Dock. Employees shall apply for a separation allowance in accordance with paragraph 3, which shall be awarded in seniority order. An employee awarded a separation allowance shall have the option to take it in a lump sum, payable within fifteen (15) days of the positions being abolished in Troy, or having it spread equally over a certain number of months to reach age sixty (60). Should an employee choose to have the separation spread over a certain number of months to reach age sixty (60), the first payment shall be made in the first pay period following the abolishment of positions and he/she shall continue to receive health benefits in accordance with the same provisions as active employees for each month in which the separation allowance is received. Notwithstanding the provisions of this Section, an employee who stands for a

determine his/her displacement allowance within thirty (30) days of assuming the clerical position. The Carrier shall pay such displacement allowance in the first pay period of the month following the month in which a displacement allowance is due.

10. Nothing contained herein shall be construed as depriving any employee of any rights or benefits or eliminating any obligation which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both New York Dock and some other job security or other protective conditions or arrangements, the employee shall elect between the benefits under New York Dock and similar benefits under such other arrangement and, for so long as the employee continues to receive such benefits under the provisions which the employee so elects, the employee shall not be entitled to the same type of benefit (regardless of whether or not such benefit is duplicative) under the provisions which he does not so elect; and, provided further, that after expiration of the period for which such employee is entitled to protection under that arrangement which the employee so elects, the employee may then be entitled to protection under the other arrangement for the remainder, if any, of the protective period under that arrangement. There shall be no duplication or pyramiding of benefits to any employees, and the benefits under New York Dock, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

covered by the ATDA-GTW agreements or, 2) the employee resigns, retires, becomes disabled, is dismissed from service or is promoted. Once a position established under Paragraph 2 is no longer subject to prior rights under this paragraph, it will, if necessary, be filled in accordance with the ATDA Agreement subject to paragraph 4 above.

7. The employee protective benefits and conditions as set forth in the New York Dock conditions, attached hereto as Attachment "A," shall be applicable to this transaction. There shall be no duplication of benefits by an employee under this agreement and any other agreement or protective arrangement.
8. Any employee determined to be a "displaced" or "dismissed" employee as a result of this transaction, who is otherwise eligible for protective benefits and conditions under some other job security agreement, conditions or arrangements shall elect in writing within sixty (60) days of being affected between the protective benefits and conditions of this agreement and the protective benefits and conditions under such other arrangement by giving written notification to the carrier's designated individual, with copy of such election to the employee's General Chairman. Should any employee fail to make an election of benefits during the period set forth in this paragraph, such employee shall be considered as electing the protective benefits and conditions of this agreement.
9. GTW train dispatchers shown in Attachment C who exercise their seniority to obtain a TCIU/GTW position shall be considered eligible for a displacement allowance in accordance with Article I, Section 5 of New York Dock. The Carrier shall provide the respective employee with the calculations used to

4. Assignments and awarding of positions shall be made in seniority order. In the event all 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 on the GTW/ATDA seniority roster. (See Attachment C). Employees who accept such clerical positions shall be considered displaced employees who retain rights to bid positions performing the dispatching work transferred to Homewood as such positions become available, and to transfer to such positions on the same terms and conditions applicable to those Troy train dispatchers who initially transfer to Homewood. They shall receive advance notice of such vacancies and be afforded a minimum of ten (10) days in which to bid. Failure to submit a bid will result in the surrender of all rights under this Agreement.
5. Employees transferring from Troy to Homewood under provisions of this Agreement shall remain subject to ATDA representation and all agreements, including all National Agreements, in effect between the ATDA and GTW covering wages, rules and working conditions, subject to the modifications contained herein, until such time as a single Agreement is reached covering all ATDA-represented train dispatchers working at Homewood.
6. Employees awarded positions created pursuant to paragraph 2 will retain prior rights to those positions based upon their relative seniority standing as transferred. These rights will only terminate in the event that 1) the transferring GTW employee successfully bids to any other assignment not

IN THE MATTER OF ARBITRATION .

between :

NORFOLK AND WESTERN :
RAILWAY COMPANY :

and :

BROTHERHOOD OF MAINTENANCE OF :
WAY EMPLOYEES :

Pursuant to Article I,
Section 4, Oregon Short Line
R. Co.--Abandonment--Goshen
390 I.C.C. 91 (1979)

HEARING HELD AT NORFOLK, VIRGINIA, DECEMBER 19, 1988

POST-HEARING BRIEFS SUBMITTED
JANUARY 10, 1989 AND FEBRUARY 6, 1989

APPEARANCES

For the Organization:

John O'B. Clarke, Jr., Esq.
Highsaw & Mahoney, P.C.

William E. LaRue, Vice-President

W. A. Bon, Esq., General Counsel

For the Carrier:

Jeffrey S. Berlin, Esq.
Amy R. Doberman, Esq.
Richardson, Berlin & Morville

William P. Stallsmith, Jr., Esq.
Senior General Attorney

R. S. Spenski, Sr., Assistant Vice-President
Labor Relations

Mark S. MacMahon, Director, Labor Relations

②

PROCEDURAL CONSIDERATIONS

This matter arises from the Carrier's determination to abandon three rail lines and discontinue service on a fourth line. Such action was approved by the Interstate Commerce Commission, subject to imposition of the so-called Oregon Short Line ("OSL") labor protective conditions. As provided by Article I, Section 4 of OSL, the Organization seeks to formulate implementing agreements with respect to each of the four transactions.

OSL Article I, Section 4 reads in pertinent part as follows:

4. Notice and Agreement or Decision. - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or

displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures [for arbitration]:

. . .

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

Notices were posted as to the four transactions on various dates from June 8, 1988 to August 15, 1988, with copies sent to the respective General Chairman of the classes and crafts affected. In such letters, the Carrier stated its view that any "rearrangement of forces . . . will be met through the normal exercise of seniority" and concluded that it did not "anticipate the need for any agreements" with the Organizations as to such rearrangement.

The Organization's General Chairman responded in each instance by expressing its wish, under OSL Article I, Section 4, to negotiate implementing agreements, stating the Organization would be available "at our regular meeting location in Cleveland, Ohio". The Carrier expressed its willingness to meet, but at the Carrier's headquarters in Norfolk, Virginia.

This exchange gave rise to the procedural dispute which requires review here.

In further correspondence with the Carrier, the General Chairman insisted on holding the proposed meetings in Cleveland,

relying upon the terms of letters exchanged on December 23 and December 30, 1968. In the first of these letters concerning the Carrier's centralizing its labor relations work in Roanoke, an Assistant Vice President stated to the Organization's President:

You further advised me that you would be willing to arrange to see that Section 6 notices would be handled in Roanoke, but that you would like for us to continue for the present to meet the General Chairman in Cleveland and St. Louis on other matters . . . I told you that I appreciate your arranging to have the Section 6 notices handled in Roanoke, and that we would make arrangements to continue to meet the General Chairman periodically in Cleveland and St. Louis on other matters.

The Carrier responded by stating it did not believe it was "under any obligation" to meet in Cleveland. The Carrier cited the OSL provision that states "a place shall be selected to hold negotiations for the purpose of reaching agreement". The Carrier again proposed to meet in Norfolk, simultaneously sending the Organization, between August 16 and August 23, 1988, copies of proposed implementing agreements covering each transaction.

After receiving a further "demand" from the Organization to meet in Cleveland, the Carrier suggested that the matter be handled by telephone conference. This was not accepted. The Carrier then moved to bring the matter to arbitration as provided in OSL. Following agreement on selection of a neutral for the arbitration proceedings, the Organization's Vice-President wrote to the Carrier on November 8, 1988, submitting

an Organization proposal for an implementing agreement, without retreating from the earlier disagreement concerning meeting place for negotiations.

As a further note, the proposed implementation agreement offered by the Organization at the arbitration hearing differed in some respects from its November 8, 1988 version.

As a result, the Organization seeks a negative answer to the procedural question at issue. The Organization presents the question in this form:

Has the Carrier met the provisions of Article I, Section 4 of the OSL Conditions, as it relates to the selection of a place to hold negotiations and the thirty (30) day time requirements after commencing negotiations, to make the issue of an appropriate implementing agreement a proper subject to arbitration as provided in the Conditions?

There can be no doubt that both the Carrier and the Organization failed to meet the Section 4 requirement that "a place shall be selected to hold negotiations". It follows that negotiations, in the sense of face-to-face meetings, did not "commence . . . and continue for at least thirty (30) days". It was the Organization, not the Carrier, which determined that implementing agreements were required. That objective could be achieved only if the Section 4 procedure is met, and the place of meeting is obviously of much lesser significance than the actual exchange of views of the parties. This is especially true since OSL specifies that a place for meeting shall be selected, and this can be accomplished only by mutual agreement. The Organization's insistence that the 1968 exchange of letters

must be read to apply to all circumstances involving claims and other matters arising out of the parties' agreements has an arguably sound basis. In the face of the Carrier's position that the 1968 letters are not so all-encompassing, some flexibility is required when dealing with ICC imposed conditions which carry their own mandate as to selection of place for negotiations.

On the other hand, the Carrier's insistence on Norfolk as the only acceptable place for negotiations is also not conducive to the mutual selection directed by Section 4.

What must be kept in the forefront for consideration, however, is the patent purpose of Section 4 as an entity. Section 4 requires advance notice of transactions, but it also provides a method of prompt resolution of differences as to affected employees within specified time periods in order to permit the Carrier to go forward with its proposed operational changes. This procedure clearly was not intended to be held captive to a failure to select a place for negotiations.

As to the negotiation process itself, the parties have nevertheless managed to exchange proposals for implementing agreements, despite the aforementioned difficulties. In addition, the suggested provisions have been discussed in detail in pre-hearing briefs, in the arbitration hearing, and in post-hearing briefs. The conclusion follows that the matter is fully ripe for arbitral review and decision. To hold otherwise would be to sanction delay, perhaps costly to the Carrier and probably without benefit to the Organization. Such would be entirely

contrary to the intent of Section 4. Nor is there any assurance that, without third party intervention, the issue of appropriate place for negotiation would be expeditiously resolved, even if the matter were returned to the parties, as suggested by the Organization.

Thus, in response to the question posed by the Organization, the failure of both parties to "select" a meeting place does not make the issue of appropriate implementing agreements an improper subject for arbitration.

FINDINGS

Consideration now turns to the formulation of Implementing Agreements to meet the requirements of OSL Section 4 in relation to four proposed actions by the Carrier, as follows:

Abandonment of 80.4 miles of line between Lafayette, Indiana and Gibson City, Illinois

Abandonment of 21.9 miles of line between Frankfort and Linden, Indiana

Abandonment of 4.8 miles of line in the area of Connersville and Beesons, Indiana

Discontinuation of service in the area of Van Buren and Marion, Indiana.

The Carrier proposes four separate Implementing Agreements, asking a finding that these "meet the criteria" set forth in Section 4. The Organization offers one text for an Implementing Agreement, to be adapted to each abandonment or discontinuance, and seeks a finding that this is a "proper resolution to the dispute".

The Carrier anticipates that the Lafayette-Gibson City abandonment will result in the elimination of one Maintenance of Way Foreman and three Laborer positions. The Frankfort-Linden abandonment involves the anticipated elimination of one Maintenance of Way Laborer. As to the Connersville-Bessons abandonment and the Van Buren-Marion service discontinuance, the Carrier anticipates that no employees will be adversely affected, since no traffic has originated or terminated on either line for at least two years.

The Carrier's proposed Implementing Agreements are limited to acknowledging the number of positions to be eliminated and stating that affected employees are covered by OSL conditions. As will be seen, the Organization's proposed Implementing Agreement concerns a number of specific matters relating to the transactions, to be discussed further below.

The Carrier contends that for these "simple transactions", its proposed texts are sufficient. The Carrier warns against any arbitrated agreements which might confer benefits not found in OSL conditions. The Organization argues that its proposals are intended to spell out with some specificity benefits mandated in OSL and are also concerned with the possible effects on employees as a result of events which may follow the transactions.

The Referee determines, at the outset, that the Organization may properly raise concerns for which resolution may be found in the terms of an Implementing Agreement. The Carrier's concise statement that affected employees are covered

by OSL conditions, without more, obviously does not address these concerns. The Referee is guided by the Interstate Commerce Commission's June 3, 1981 decision in Finance Docket No. 29096, Durango & Silverton Narrow Gauge RR Co. - Acquisition and Operation, which states as follows:

Realizing the delicacy of the issue of reassignment or dismissal, we incorporated into Oregon III the provision that the parties come to a mutual agreement on that subject. Section 4 provides that when a transaction may result in a dismissal or displacement of employees or rearrangement of forces, such a rearrangement or displacement "shall be made on the basis of an agreement or decision under this Section 4." We contemplated bilateral talks which would produce a mutual agreement on the "rearrangement of forces."

The role of the referee comes into play when the parties fail to reach an agreement. When bilateral talks break down, the referee's decision becomes a substitute for a mutual agreement. Because his decision is "final, binding, and conclusive," and must be obeyed by the parties, the referee must render an opinion as to every issue or subject which would be discussed during bilateral negotiations between the carrier and employee representatives. The referee is to reconcile all disputes over which he has jurisdiction. Given the importance of reassignment and displacement, a referee should play a major role in formulating or devising a scheme for the rearrangement of forces where the parties have not been able to settle this matter.

For the sake of convenience, the Referee will determine the terms of a single Implementing Agreement, with the understanding that, by introduction of the necessary preliminary information, this can readily be adapted to four separate agreements, one for each transaction. The language as proposed by the Carrier is for the most part duplicated in that proposed by the Organization, and this will form the first portion of

the Implementing Agreement. What follows, then, will be a review of each of the proposals made by the Organization. In summary, the Organization seeks provisions to cover these topics (as well as other less significant textual exposition):

1. The process of filing and maintaining claims for benefits
2. Definitions relative to entitlement for moving expenses and losses from home removal
3. Reference to separation allowances, as provided in OSL Section 7.
4. Use of the Carrier's Maintenance of Way employees in salvage work on abandoned track
5. Employment rights for employees in the event of sale and subsequent use of abandoned track
6. Distribution of copies of the Implementing Agreement.

Each of these will be separately considered. (Citation of "Section" refers to the Organization's proposal, while "OSL Section" refers to the appropriate portion of OSL Article I.)

Filing and Maintaining Claims for Benefits

The Carrier's proposal includes sample forms to be used by employees making request for benefit entitlements. The Organization provides samples of forms which it considers less cumbersome. Since it will be the Carrier which is paying benefits, if and when appropriate, it is reasonable that it may designate the type of form to be used for this purpose.

The Organization would require affected employees to file applications with the Carrier's "highest designated officer".

It also seems reasonable to permit the Carrier to determine the proper channel for processing benefit applications.

Relocation Definition

In its proposed Section 6, the Organization seeks to include a specific definition of "change in residence" as it may apply to OSL Sections 9 and 12. This is the familiar "thirty mile" test. As the record shows, such has been included in many other implementing agreements. Legislative and judicial citation both for and against the inclusion of a definition is abundant. The Carrier argues that inclusion of the 30-mile test could prove a windfall to employees where new work location and/or residence distance might involve only a few miles. The Carrier contends that OSL Section 11, involving arbitration of disputes, is sufficient to resolve any problems here.

The Organization argues that definition becomes significant not only as to actual change of residence but in the application of OSL Sections 5(b) and 6(d), wherein employees must determine whether or not they are required to accept a position elsewhere.

On balance, the Referee finds that the dangers of a windfall benefit carry less weight than the advantages of clarification of the provisions of OSL Sections 9 and 12. Inclusion of the definition plows no new ground and does not, in the Referee's view, extend or exceed OSL conditions.

Separation Allowances

OSL Section 7 provides that dismissed employees shall have the option of electing a specific lump sum payment as

separation allowance. The Organization's proposed Section 7 would, first, simply repeat this provision and second, add such right for displaced employees. In support of this, the Organization refers to a past instance where displaced employees had been granted such allowance. Nevertheless, the Referee concludes that such expansion of OSL Section 7 goes beyond the intended scope of OSL and is thus not appropriate in the Implementing Agreement.

Salvage Work

The Organization raises the question of assignment of salvage work which may be performed at the Carrier's direction on lines after they are abandoned. The Carrier contends that this provision is inappropriate in that such work assigned can be "properly handled" under the existing scope rule of the schedule agreement. During the arbitration proceedings, the Organization modified its position. The suggested modification would preserve existing agreement rules in the event such salvage work is performed. This clarification is appropriate and does not grant any additional rights to the Organization beyond the scope of OSL conditions.

Employment Opportunities On Sale of Line

In its proposed Section 8(b), the Organization seeks a provision concerning the possible eventuality of sale of abandoned track to a purchaser who may subsequently use the line. The Organization wishes to include in the Implementing Agreement a purchase stipulation binding the Carrier to notify affected Maintenance

of Way employees holding seniority on the line as to employment opportunities with the further stipulation that such employees "desiring positions shall be given first priority hiring, in seniority order". Notification to the General Chairman is also sought.

The Organization points out that such proposal does not impose protective conditions on the purchaser, nor does it go to the terms of any existing sale contract. Rather, the Organization views this proposal as a legitimate obligation on the Carrier as to "protective arrangements" for affected employees.

The Organization relies in part on the applicability of Section 405 of the Rail Passenger Service Act (45 U.S.C., Section 565(b)), which requires in Section 405(a) that railroads "provide fair and equitable arrangement to protect the interest of employees", and in Section 405(b) that such arrangements include "(2) the continuation of collective-bargaining rights; . . . [and] (4) assurances of priority of reemployment of employees terminated or laid off". The Carrier disputes that this provision is fully applicable in the situation here. Whether or not Section 405 is applicable, the Referee notes the reference in Section 405(b) to "reemployment", which can reasonably be seen to refer to reemployment by the Carrier.

These transactions do not involve coordination of lines by a single carrier or a merger, which bring different considerations into play. In sum, the conclusion must be reached that the requested restriction on the Carrier's terms of sale

in a hypothetical eventuality is not encompassed in the OSL conditions which the Carrier must provide.

Distribution of Copies of Agreement

As a minor point, the parties are in dispute concerning distribution of the Implementing Agreement to employees. The Referee sees no onerous burden on the Carrier to distribute copies to those employees assigned to the affected lines, those affected by the exercise of displacement rights by such employees, as well as those employees who may request a copy.

Other Matters

The Referee has reviewed the full texts of the agreements as proposed by both parties and the argument related thereto. Failure to discuss other matters within these Findings does not indicate lack of consideration of such matters. Where such proposals are not included in the Implementing Award, they have been deemed to be inappropriate and/or redundant.

A W A R D

The Implementing Agreements, adapted as appropriate in the introductory section to each transaction, shall be as provided in Appendix A, which is incorporated in this Award.



HERBERT L. MARX, Jr., Referee

NEW YORK, N.Y.

DATED: March 13, 1989

APPENDIX A

IMPLEMENTING AGREEMENT
BETWEEN
NORFOLK AND WESTERN RAILWAY COMPANY
(LINES OF THE FORMER NICKEL PLATE RAILROAD)
AND ITS EMPLOYEES REPRESENTED BY
THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

WHEREAS, Norfolk and Western Railway Company has filed with the Interstate Commerce Commission an application for a certificate permitting the abandonment of its line of railroad between _____

_____ (specify line);

and

WHEREAS, regulatory approval for this abandonment was granted by the Interstate Commerce Commission's certificate and decision in Finance Docket No. AB-290 (Sub-No. _____); and

WHEREAS, the Interstate Commerce Commission imposed the employee protective conditions described in its decision in Oregon Short Line Railroad Company - Abandonment - Goshen, 360 ICC 91 (1979), (a copy of the I.C.C. Decision is made a part of this Agreement as Attachment "A" and a copy of the Oregon Short Line Conditions is made a part of this Agreement as Attachment "B"), and

WHEREAS, pursuant to Article I, Section 4 of the Oregon Short Line conditions, Norfolk and Western has served Notice of its intentions to its employees concerning the aforescribed abandonment and discontinuance;

NOW, THEREFORE, IT IS AGREED:

Section 1. As a result of the abandonment of the Norfolk and Western line described above, the following positions will be

abolished:

POSITION

HEADQUARTERS

(Insert positions and headquarters: if none, so state)

Section 2. (a) The provisions of the current working agreement between the Brotherhood of Maintenance of Way Employees and the Norfolk and Western Railway Company (New York, Chicago & St. Louis Railroad Company) will govern the assignment, displacement, or other disposition of maintenance of way employees affected by the transaction as described above.

(b) Employees affected as a result of this transaction will be afforded the benefits prescribed by the ICC as set forth in the Oregon Short Line Railroad Company - Abandonment - Goshen employee protective conditions which are, by reference, incorporated herein and made a part hereof. Copy of such conditions is attached hereto and identified as Attachment A. Copy of Request for Entitlement Form and Claim Form are appended as Attachments B and C.

(c) The filing of the initial claim for benefits, as provided in Article I, Section 5 (Displaced), Article I, Section 6 (Dismissal), Article I, Section 7 (Separation), and Article I, Sections 9 and 12 (Moving and Relocation Expenses) shall be made with the Carrier's designated officer. Upon receipt of the initial claim, the Carrier shall promptly respond as to the acceptance or denial of the claim. If such claim is to be denied, the Carrier

shall so advise the employee and his designated representative of the reason for such denial.

Section 3. An employee will be entitled to the applicable benefits provided in Section 9 (Moving Expenses) and Section 12 (Losses From Home Removal). The term "change in residence" means transfer to a work location which is located either (a) outside a radius of thirty (30) miles of the employee's former work location and further from his residence than was his former work location or (b) is located more than thirty (30) normal highway route miles from his residence and also further from his residence than was his former work location.

Section 4. Neither the Interstate Commerce Commission orders nor this Implementing Agreement may be read as authorizing the abrogation, modification or supersession of any applicable provision of any agreement between the Carrier and the Brotherhood of Maintenance of Way Employees when, and if, the Carrier salvages the material on any line to be abandoned pursuant to the ICC order involved in this transaction.

Section 5. This Implementing Agreement with all attachments referred to herein shall constitute the required agreement as stipulated in Article I, Section 4 of the Oregon Short Line protective conditions.

Section 6. A copy of this Implementing Agreement with all attachments will be furnished to employees assigned to the line as

described in Section 1 above, employees affected by the exercise of displacement rights by such employees, and those employees who may request a copy.

Section 7. The provisions of this Implementing Agreement shall become effective on fifteen days' written notice by the Carrier to the Brotherhood of Maintenance of Way Employees.

ATTACHMENT B

NORFOLK SOUTHERN CORPORATION
NORFOLK AND WESTERN RAILWAY
SOUTHERN RAILWAY

Request for Entitlement to Benefits.

Instructions: This Entitlement to Benefits Form is to assist the Employee and the Company in determining whether the Employee has been adversely affected by the merger, coordination, consolidation or abandonment. We wish to do this as promptly as possible in order to expedite valid claims for displacement or dismissal allowances. You may help by completing the form with as many helpful facts as will assist the Company in its initial determination as to whether you have been adversely affected.

Completed forms should be forwarded to:

Mr. G. C. Edwards
Asst. Director Labor Relations
Norfolk Southern Corporation
8 N. Jefferson Street
Roanoke, VA 24042-0024

Notice of: [] Placement in a worse position with respect to my compensation and rules governing my working conditions.

or

[] Deprivation of Employment.

Name: _____ SSA No. _____

Address: _____

Occupation: _____ Location: _____

Seniority Roster No.: _____ Seniority Date: _____

Seniority Standing: _____ District: _____

1. Identify agreement under which compensation is due:

2. What date were you first placed in a worse position or deprived of employment? _____

How? [] Position Abolished. [] Displaced by _____
(Name)

[] Other. Explain _____

3(a). What position did you hold immediately prior to the date shown in item 2?

Position _____ Location _____

Rate of pay (specify hourly, daily, monthly): _____

(b) What position do you currently hold?

Position _____ Location _____

Rate of pay (specify hourly, daily, monthly): _____

4. Identify the transaction involved in your being placed in a worse position or deprived of employment:

5. Explain in detail (to the extent possible) how the transaction changed your work situation and caused you to be adversely affected.

6. Compensation Data: (If available)

List the amount of compensation you received in the last twelve months in which you performed service immediately prior to the month in which you were affected.

Month	Year	Compensation	Month	Year	Compensation
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

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NATIONAL RAILWAY LABOR CONFERENCE

1901 L STREET, N.W., WASHINGTON, D.C. 20036/AREA CODE: 202-862-7200

CHARLES I. HOPKINS, Jr.

Chairman

D. P. LEE
Vice Chairman and
General Counsel

R. T. Kelly
Director of Labor Relations

G. F. DANIELS
Vice Chairman

June 21, 1989

CIRCULAR NO. 15-203

TO MEMBER ROADS:

As information, there is attached copy of an award rendered February 9, 1989 by Neutral Member John B. LaRocco in the matter of arbitration between the Brotherhood of Railroad Signalmen and Norfolk Southern Corporation involving the application of the New York Dock protective conditions pursuant to ICC Finance Docket NO. 29430 (Sub. No. 1). Also attached is the Labor Member's Dissent thereto.

Also enclosed is an award rendered March 13, 1989 by Referee Herbert L. Marx, Jr., in the matter of arbitration between the Brotherhood of Maintenance of Way Employes and Norfolk and Western Railway Company involving application of the Oregon Short Line protective conditions pursuant to ICC approved line abandonments and discontinuance of service.

Very truly yours,

R. T. KELLY

Director Labor Relations

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:)	
)	
NORFOLK & WESTERN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and CENTRAL OF GEORGIA RAILROAD COMPANY,	)	Pursuant to Article I, Section 4 of the New York Dock Conditions
)	
Carriers,	)	ICC Finance Docket No. 29430 (Sub-No. 1)
)	
and)	
	)	Roanoke Signal Shop Coordination
BROTHERHOOD OF RAILROAD SIGNALMEN,)	
)	
Organization.	)	OPINION AND AWARD
)	

Hearing Date: October 11, 1988
Hearing Location: Norfolk, Virginia
Date of Award: February 9, 1989

MEMBERS OF THE COMMITTEE

Employees' Member: W. D. Pickett
Carrier Member: Mark R. MacMahon
Neutral Member: John B. LaRocco

APPEARANCES

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Grand Lodge
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William P. Stallsmith, Esq.
Senior General Attorney
Norfolk Southern Corporation
One Commercial Pl., 11th Flr.
Norfolk, VA 23510-2191

OPINION OF THE COMMITTEE

I. INTRODUCTION

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the Norfolk Southern Corporation's application to acquire the Norfolk and Western Railway Company (NW), the Southern Railway Company (SR) and their affiliated and/or subsidiary railroad enterprises. Norfolk Southern Corporation-Control-Norfolk and Western Railway. Co. and Southern Railway, F.D. No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982). The SR did and does own all Central of Georgia Railroad Company (CG) stock. To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Norfolk Southern Corporation (NS), the NW and the SR pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347; 366 I.C.C. 173, 229-231 (1982).

Although Section 4 of the New York Dock Conditions contemplates adjudication by a single arbitrator, the parties agreed to establish this tripartite Arbitration Committee to decide this dispute.¹ The Arbitration Committee was formed under Section 4 without prejudice to the Organization's position that this Committee lacks jurisdiction over this case.

¹ All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

The Committee received pre-hearing submissions from both parties and it entertained extensive oral argument during the October 11, 1988 hearing. The parties elected to file post-hearing briefs which the Neutral Member received on or before December 7, 1988. At the Neutral Member's request, the parties waived the thirty-day time limitation, set forth in Section 4(a)(3) of the New York Dock Conditions, for issuing this decision.

II. BACKGROUND AND SUMMARY OF THE FACTS

The NW operates a signal repair shop at Roanoke, Virginia. SR and CG employees perform shop signal repairs for their respective railroads at a shop located in East Point, Georgia. While SR and CG workers perform signal repairs under a common roof, the East Point shop is not a coordinated facility. SR signalmen (currently four) repair SR signal devices and are governed by the SR Schedule Signalmen's Agreement while a CG Relay Repairman (presently one position) performs repairs on CG signal mechanisms under the CG Signalmen's Agreement.

On April 13, 1988, the Carriers notified the Organization of their "...plan to coordinate the work performed by Central of Georgia and Southern Railway signal employees in the East Point, Georgia Signal Relay Repair Shops into the Norfolk and Western Signal Relay Repair Shop at Roanoke, Virginia." The Carriers estimated that the coordination would result in the elimination of two Signalmen positions. The Carriers will reap substantial savings and economic efficiencies by having all NW, SR and CG signal shop repair work performed at Roanoke. Besides the

economics of scale associated with the coordination, the Carriers will make more productive use of the NW's Roanoke shop which is much newer than the East Point facility and has ample capacity to absorb the influx of SR and CG shop signal repair work. The parties stipulated that the planned coordination was not expressly stated in the Carriers' application to the ICC in the 1982 control case.

The parties held three days of face-to-face negotiations.² They met on May 25-26, 1988 and June 30, 1988. At the initial conference, the Carriers proposed an Implementing Agreement which merely affirmed that the New York Dock Conditions would apply to employees dismissed or displaced due to the coordination. Either shortly before or at the June 30, 1988 meeting, the Carriers embellished their prior proposal by giving East Point workers an opportunity to follow their work to Roanoke; permitting those employees who transferred to Roanoke to retain their SR or CG seniority; providing that the seniority dates of CG or SR workers who go to Roanoke be dovetailed into the NW Eastern Region Signalmen's seniority roster; and promulgated a "prior rights" process for filling subsequent vacancies at the coordinated facility. Under the Carriers' prior rights proposal, subsequent vacancies on any Roanoke position occupied by a worker, who had transferred from the SR or the CG, would be advertised across the

² The Organization conducted negotiations with the Carriers but reserved the right to later raise its jurisdictional contention. In its April 27, 1988 letters replying to the Carriers' April 13, 1988 notices, the Organization asserted that Section 4 of the New York Dock Conditions was inapplicable to the transfer of shop signal repair work.

NS system. Employees from the vacating incumbent's seniority district would hold a preferential right to the vacancy. The process would apply to each successive vacancy but a position would lose its "prior rights" status if no employee from the incumbent's seniority district bid on and filled the vacancy.

Prior to the June 30, 1988 conference, the Organization proffered a proposed implementing agreement which not only incorporated the New York Dock Conditions but also contained terms covering a plethora of other subjects. The Organization's proposed implementing agreement included terms which would grant signal workers pecuniary benefits in excess of those prescribed in the New York Dock Conditions; preserve the applicability of SR, NW and CG scope rules to signal repair work performed at the Roanoke Shop (presumably based on the property where the work originated);³ provide that CG and SR employees who move to Roanoke would continue to work under their present CG or SR Schedule Agreements; prohibit the Carriers from contracting out any work covered by the scope of any one of the three schedule agreements; force the parties to negotiate a contract to clarify the implementing agreement before the Carriers place the

³ Nonetheless, the Organization acknowledged that CG and SR signal repair work will be commingled with similar NW work at the coordinated facility. [TR 66, 81, 124] Consequently, the coordination will render it impossible to preserve these separate scope rules. The Organization further conceded that a Section 4 arbitration panel could write an implementing agreement which allows work to cross scope rule boundaries but the concession should not be construed as a relinquishment of the Organization's right to raise (in court) its fundamental argument that the ICC's New York Dock Conditions cannot abrogate, change, amend or delete any collective bargaining provision or any collective bargaining right. [TR 50, 90-91]

coordination into effect; automatically certify that all Roanoke signal shop workers are affected by the coordination and entitled to New York Dock benefits;⁴ impose certain notice requirements on the Carriers; vest employees with benefits under other protective arrangements in lieu of New York Dock entitlements; and permanently allocate coordinated shop positions to the NW, SR and CG. The Organization also attached a Memorandum of Agreement to its proposal granting signal employees the exclusive right to perform all signal case wiring and/or fitting work although the Organization contends that current NW, SR and CG scope rules already cover such work. However, the Organization raised the signal case wiring issue for two reasons. First, two Public Law Boards adjudged that the NW's and SR's purchase of pre-wired signal cases did not violate the NW and SR scope rules. [See Public Law Board No. 2044, Award No. 4 (Van Wart) and Public Law Board No. 3244, Award No. 21 (Schienman)]. Second, the Organization successfully tied a similar Memorandum of Agreement

⁴ At the arbitration hearing, the Organization explained that it did not intend to automatically certify all NW, CG and SR signal shop workers. Instead, the Organization wanted assurances from the Carriers that, if they were detrimentally affected now or in the future, Roanoke signal shop workers would have access to New York Dock benefits and any additional benefits contained in the implementing agreement. [TR 145-146] However, Section 2(a) of the Organization's proposed implementing agreement states that all named employees "...will be considered as adversely affected as a result of the implementation of the provisions of this Memorandum of Agreement...." The clear and unambiguous Section 2(a) language would establish an absolute presumption that all workers at Roanoke and East Point (even those who decline to follow their work) are adversely affected by the coordination. Nevertheless, the controversy is moot because the Organization realizes that only employees who are actually and adversely affected by the coordination are entitled to benefits.

to an April 14, 1987 New York Dock implementing agreement it negotiated (not arbitrated) with CSX Transportation, Inc.

While there is a factual conflict over whether or not the Carriers bargained in good faith, the parties concur that they each deemed the other's proposed implementing agreement unacceptable. Thereafter, the Carriers invoked interest arbitration pursuant to Section 4 of the New York Dock Conditions. The Carriers withdrew their second proposed implementing agreement and now ask this Committee to adopt an implementing agreement which is substantially similar to its original proposal. The Carriers' third proposal would permit East Point employees to bid on whatever new positions the NW established at Roanoke as a result of the coordination. (If the coordination will result in the elimination of two positions, the Carriers will only be creating three new positions at Roanoke.) If SR and CG employees at East Point transfer to Roanoke, their seniority would be dovetailed into the appropriate NW seniority roster. The Carriers' third proposal does not contain the retention of seniority and prior rights provisions found in their second proposal. Arbitration under Section 4 of the New York Dock Conditions is not final offer arbitration and, thus, the Carriers are free to retract proposals that they made in the quid pro quo spirit of negotiations. The Carriers are not estopped from urging this Committee to adopt their third proposal as the implementing agreement to cover this transaction. On the other hand, the Organization petitions us to adopt its implementing agreement which we described in the preceding paragraph.

III. STATEMENT OF THE ISSUES

This case raises three major issues:

1. Does this Committee have subject matter jurisdiction? Stated differently, is the Carriers' intended signal shop repair work coordination a transaction within the meaning of Section 1(a) of the New York Dock Conditions?

2. Did the Carriers negotiate in good faith with the Organization over the terms and conditions of an implementing agreement during the minimum thirty day bargaining period in accord with Section 4(a) of the New York Dock Conditions?

3. Assuming that this Committee has jurisdiction, what is the appropriate substantive content of an implementing agreement? An ancillary issue is whether transferring SR and CG employees will be governed by some or all the provisions of the SR or CG Schedule Signalmen's Agreements.

IV. THE POSITIONS OF THE PARTIES

A. The Carriers' Position

Although the instant signal shop repair coordination was not mentioned in the Carriers' application in the control case, it is the type of post-acquisition coordination which the ICC anticipated that the Carriers might implement subsequent to the ICC's approval of the acquisition. The ICC implicitly condoned future transactions which enhance operational efficiencies. The Commission understood that the Carriers would "...realize a number of benefits related to coordination of shop and repair facilities...." 366 I.C.C. 173, 212. The ICC also observed that, "It is possible that further [employee] displacement may arise as

additional coordinations occur." [Brackets added for clarification] Id. at 230. In his November 26, 1980 verified statement, NW President Claytor informed the ICC that the Carriers might conduct future coordinations. The Organization quotes portions of the Carriers' application out of context. While the application suggested that the Carriers did not intend to coordinate signal work at Cincinnati, Ohio, they did not promise the ICC that they would never coordinate signal work elsewhere. In other railroad merger cases, the ICC has held that its approval in the control case extends to future coordinations which might reasonably be expected to flow from the original transaction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22), ICC Decision issued June 25, 1988. [See also, NW/SR v. ATDA, NYD § 4 Arb. (Harris; 5/19/87); affirmed, Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. 29430 (Sub-No. 20), ICC Decision dated May 24, 1988.] In the Union Pacific merger case, the ICC refused to condition future transfers of work on the carriers' attainment of the ICC's express approval following notice and an opportunity for hearing. Union Pacific Railroad-Control-Missouri Pacific Railroad, 366 I.C.C. 462, 622 (1982). The Organization admitted at the arbitration hearing that if the Carriers formally asked the ICC for authorization to coordinate the two signal shops, the ICC would summarily grant their request.

The Carriers sincerely attempted to reach a negotiated implementing agreement with the Organization. By providing signal employees on the CG and SR with prior rights, the Carriers

thought that its second proposal had addressed most of the Organization's concerns. Contrary to the Organization's allegation, the Carriers did not use this Section 4 arbitration proceeding as leverage to force the Organization to execute the Carriers' proposed implementing agreement. Similarly, the Carriers did not mislead the Organization into believing that the coordination encompassed solely relay repair work. The Carriers' April 13, 1988 notice indicated that all work performed by the East Point Signal Shop employees would be shifted to Roanoke. The Organization's bad faith bargaining charge is insulting. Out of 240 coordinations, the Carriers have had to resort to interest arbitration in only five instances. Due to the Organization's intransigence, a negotiated agreement was not possible in this particular case. The Organization broke off negotiations because the Carriers rightly refused to consider its Memorandum of Agreement which would bar the Carriers from purchasing prewired signal cases.

The Organization misunderstands the essence of this coordination. Following the movement of work from East Point to Roanoke, there will no longer be any CG or SR signal repair work. All signal shop repairs will be NW work. Since the work will be commingled, any device, regardless of whether it originated on the NW, SR or CG, will be repaired by an NW employee in the signal shop. The Carriers, not the Organization, design the parameters of the coordination and decide which property will perform shop signal repair work. Under the controlling carrier concept, the work is placed under the collective bargaining

agreement in effect at the location receiving the work. RVA v. MP/UP, NYD § 4 Arb. (Seidenberg; 5/18/83). Section 4 compels the parties to submit their disputes to binding interest arbitration so that the approved transaction can be consummated despite restrictions in existing collective bargaining agreements or employee rights under the Railway Labor Act. Denver and Rio Grande Western Railroad Company-Trackage Rights-Missouri Pacific Railroad Company, F.D. No. 3000 (Sub-No. 18), I.C.C. Decision dated October 19, 1983; Maine Central Railway Company, Georgia Pacific Corporation and Springfield Terminal Railway Company, Exemption from 49 U.S.C. 11342 and 11343, F.D. No. 30532, ICC Decision dated August 22, 1985. This Committee is absolutely bound to follow the ICC's pronouncement since it derives its authority from the Commission. United Transportation Union v. Norfolk and Western Railway Company, 822 F.2d 1114 (D.C. Cir. 1987). If SR and CG signalmen carried their respective schedule agreements with them to Roanoke, the Carriers would have to apply three separate pay, discipline, displacement and bidding provisions effectively nullifying any savings generated from the transaction. Of course, the Organization may handle the representation of the transferring employees as it sees fit but it cannot import the SR and CG Schedule Agreements to Roanoke.

The Carriers vehemently object to virtually every provision in the Organization's proposed implementing agreement. The Organization's proposals concerning signal case wiring and a ban on contracting out work are outside the ambit of negotiation and arbitration under Section 4 of the New York Dock Conditions.

These subjects do not concern the rearrangement of shop signal forces or the equitable selection of employees to perform the coordinated work. If the Organization wants to bargain about signal cases or subcontracting, it should serve a Section 6 notice under the Railway Labor Act. The Organization improperly seeks relocation expenses for transferring employees under Article XII of the January 12, 1982 National Signalmen's Agreement in lieu of less favorable expense reimbursements in the New York Dock Conditions because Article XII applies solely to intracarrier transfers. The Organization's implementing agreement designates each Roanoke shop position as an NW, SR or CG job. Such a provision serves to incorporate SR and CG seniority districts into the Roanoke Shop which is equivalent to carrying forward the CG and SR Schedule Agreements. The Organization is also half-heartedly attempting to dictate the number of positions the Carriers must maintain in the coordinated facility. The Organization is again invading management's prerogative to determine the parameters of the transaction. Moreover, the Organization's proposal is unworkable since whenever a displacement occurs, say on the SR, the SR employee could bump a Roanoke Shop worker compelling him to move to a faraway point on the SR system. Sections 5 and 11 of the Organization's proposed implementing agreement are unacceptable because they would require the parties to reach another contract before the Carriers could effectuate the coordination. There is no language in the New York Dock Conditions allowing the Organization to postpone implementation of the coordination once

an implementing agreement is negotiated or arbitrated. Side Letter No. 1 and Section 6 of the Organization's implementing agreement would grant employees per diem relocation and real estate benefits well beyond those specified in the New York Dock Conditions. Finally, the Organization's proposal raises a number of issues which are within the exclusive province of a Section 11 arbitration committee. Section 11 insures that current employees are protected should this coordination affect them sometime in the future.

While the Organization's implementing agreement is highly inappropriate, the Carriers' proposal presented to this Arbitration Committee conforms to the requirements of Section 4. The Carriers' implementing agreement contains an equitable method for filling new positions at the coordinated facility. It specifically permits current East Point employees to bid on the new Roanoke positions. Since their work is being moved to Roanoke, East Point Signalmen should have an opportunity to follow their work. The Carriers' prior rights provision included in their second proposed implementing agreement is unnecessary to achieve an equitable rearrangement of forces at the coordinated facility.

B. The Organization's Position

Inasmuch as the Carriers failed to specifically mention the combining of SR, CG and NW shop signal work in their ICC application, the intended coordination is not a transaction as defined in Section 1(a) of the New York Dock Conditions. Section 1(a) unambiguously stated that a transaction is an activity

"...taken pursuant to authorizations of this Commission...."
Simply put, the ICC never approved the coordination of East Point Shop signal repair work into the NW's Roanoke facility. Absent a transaction, the Carriers may not invoke the New York Dock Conditions as a vehicle to change existing collective bargaining agreements. SSR v. BMWE, NYD § 4 Arb. (Zumas; 8/20/83). In their application, the Carriers represented to the ICC that there would be no mass relocation of workers and that employee displacements would end about six months following the NS's acquisition of the NW and SR. The ICC, in its approval, confirmed that there would be "...no wholesale disruption of the carriers' work force...." 366 I.C.C. 173, 230. The Carriers further promised the ICC that, "No change in Southern's existing communications and signal facilities are planned." Id. at 204. SR President H. H. Hall, in his November 28, 1980 verified statement to the ICC, forecasted the complete coordination of NW and SR sales, finance, and public affairs offices but the NW and SR would otherwise continue to operate as separate entities. At the time of their application, the Carriers promulgated a table of positions to be transferred which notably makes no allusion to signalmen or signal repair shops. Based on the Carriers' representations, the ICC logically concluded that signal work would be unaffected by the acquisition. The CSX case relied on by the Carriers is of dubious validity since one Commissioner opined that the parties could not agree to vest a Section 4 arbitrator with subject matter jurisdiction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22), ICC Decision

issued June 25, 1988 and dissenting opinion subsequently issued. It is ludicrous to characterize the coordination as a transaction arising under the 1982 control case because the Carriers served their notice more than seven years after the ICC's approval. It is equally ridiculous to imply that the Carriers originally intended to coordinate the signal shops back in 1982. Since they admittedly had no such intention, the ICC could hardly approve of the coordination by implication. Upon application, the ICC undoubtedly would authorize the signal shop coordination, but the Carriers must still abide by the ICC's admonition that "No change or modification shall be made in the terms and conditions approved in the authorized applications without the prior approval of the Commission." [Emphasis added.] 366 I.C.C. 173, 255. Since an approved transaction has not materialized, the New York Dock Conditions are inapplicable.

Assuming, arguendo, that the Committee decides that the coordination is a New York Dock transaction, exercising jurisdiction over this dispute is premature because the Carriers' bad faith bargaining prevented the parties from conducting meaningful negotiations over the terms and conditions of an implementing agreement. The Carriers stubbornly refused to discuss the Organization's proposal. Instead, they gave the Organization an ultimatum: either capitulate and agree to the Carriers' proposed implementing agreement or arbitrate. The Organization views the New York Dock Conditions as the floor or starting point for negotiations. If the employees were entitled to the minimal benefits set forth in the New York Dock Conditions

and nothing more, there would be no reason for the ICC to mandate a thirty-day period for negotiations. The Organization's proposed implementing agreement, albeit containing some items outside the ordinary purview of New York Dock Conditions, was designed to provide a reasonable level of protective benefits to the involved employees. The proposal was not out of line with New York Dock implementing contracts that this Organization has negotiated on other properties. Moreover, the Organization's negotiators were confused as to the precise parameters of the work to be transferred to Roanoke. The Carriers hinted that they were coordinating only signal relay repair work raising the Organization's legitimate suspicion that the Carriers planned to contract out other types of shop signal repair work. It is regrettable that the parties had to resort to arbitration because many of the areas of disagreement could have been resolved if the Carriers had simply been willing to consider some of the Organization's proposals. This Committee should order the parties to return to the negotiating table so they can endeavor to reach a negotiated implementing agreement.⁵

The Organization realizes that a Section 4 arbitrator may modify or override the terms of collective bargaining agreements

⁵ This statement is the Organization's requested remedy for the Carriers' alleged bad faith bargaining. Presumably, the Organization contemplates that we would retain jurisdiction over this case and later determine the contents of an implementing agreement if good faith negotiations do not result in a negotiated implementing contract. The Organization did not argue that, in the absence of good faith negotiations for the period specified in Section 4 of the New York Dock Conditions, this Committee is deprived of its original jurisdiction over the case and that to reinstate the Section 4 process, the Carriers would have to serve new Section 4 notices.

to the extent necessary for the Carriers to consummate the transaction. 49 U.S.C. § 11341(a). However, the exemption from the Railway Labor Act is not limitless. In this case, the transaction can accommodate a continuation of some of the rules in the CG and SR Schedule Agreements. Specifically, carrying forward pay, discipline and other comparable provisions from the SR and CG Schedule Agreements would not bar the transaction. Preserving most of the CG and SR agreements and allowing transferring workers to maintain their status as CG or SR employees in the coordinated facility would not impede the Carriers from efficiently operating the Roanoke Shop just as CG employees and SR workers have been efficiently performing signal repair work under a common roof at East Point. Although the work at the coordinated facility will be placed under the NW scope rule, the implementing agreement should still provide some reciprocal terms to exclusively reserve the work for the signal craft. This Committee would be impermissibly narrowing the CG and SR scope rules if it forever took the work away from the employees on those properties. Thus, despite the commingling of shop signal repair work, the positions at Roanoke should be allocated to employees on the NW, SR, and CG. Each position can perform any signal repair work but SR and CG employees should have a continuing opportunity to work in the Roanoke shops especially since the genesis of some of the work will be within the SR or CG systems. More importantly, the Organization is concerned that the Carriers are using this coordination as a subterfuge to contract out signal repair work. If work is

currently reserved exclusively to signal workers by the scope rule in the SR agreement, the Organization fears that placing the work under the NW agreement will allow the Carriers to claim that such work is no longer reserved solely to the signal craft: Also, there is the possibility that work could be subject to the SR scope rule but be outside the boundary of the NW scope rule. A Section 4 arbitration cannot be utilized as a pretext for interest arbitration under the Railway Labor Act. SR v. BRS, NYD § 4 Arb. (Fredenberger; 10/5/82). Suffice it to say, the ICC has never taken the extreme position that the New York Dock Conditions can be used as a tool to extinguish existing collective bargaining agreements.

Finally, the Organization's proposed implementing agreement incorporates terms which will equitably govern the coordination. The Carriers should be obligated to notify employees of the possibility that they could be entitled to New York Dock benefits. The Carriers must inform signal employees about where and how to file claims so that the Carriers do not chill their entitlement to New York Dock benefits. If the Carriers correspond with an individual worker with regard to this coordination, it should send a copy to the Organization's General Chairman. The Organization is not advocating that the parties negotiate a second implementing agreement but it simply seeks an agreed upon clarification of the implementing agreement to avoid any future misunderstandings. Also, the Carriers must assure the Organization that if any NW, SR or CG signal worker is affected by this coordination, the employee will have access to protective

benefits provided by the implementing agreement. The Carriers, on the other hand, are attempting to restrict their liability to a small group of employees, that is, those workers who transfer from East Point to Roanoke. Lastly, the implementing agreement should contain a prohibition against subcontracting out the coordinated work to prevent the Carriers from using the New York Dock Conditions as a pretext for evading the scope rules. If, as the Carriers contend, all signal shop repair work will be performed by employees at Roanoke, the Carriers cannot take any exception to a provision which will reserve the work exclusively to the signal craft.

V. DISCUSSION

A. Jurisdiction

The threshold question is whether or not the coordination of shop signal repair work is a transaction within the meaning of Section 1(a) of the New York Dock Conditions. As the parties stipulated, neither the Carriers' application nor the ICC's approval in the control case expressly described the coordination of CG and SR East Point signal repair work into the NW's Roanoke shop. In addition, the record does not contain any evidence demonstrating that the Carriers held any unexpressed intent to transfer signal shop work from East Point to Roanoke at the time the ICC approved the NS acquisition. Thus, as the Organization stresses, this Committee is confronted with deciding whether or not the transfer of signal work is a New York Dock transaction when 1) the transfer was not expressly alluded to in the control case; and 2) the Carriers lacked any original intent to

coordinate signal shop repair work when the ICC approved the control case. Put differently, the issue becomes whether or not the Carriers' action, planned six years after the control case, constitutes a New York Dock transaction.

Section 1(a) defines a transaction as "...any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." A careful reading of the literal definition reveals that not every action need be approved by the Commission to attain status as a New York Dock transaction. The words "taken pursuant to" does not connote that the Carriers must obtain the ICC's express approval for each and every transaction. Rather, the definition contemplates that there must be a rationale nexus between the Carriers' action and the Commission's approval in the original control case.

Consistent with the Section 1(a) definition, the ICC has ruled that the Carriers need not obtain the Commission's prior approval to engage in an activity which was not expressly embraced in the control case so long as it is "...the type of action that might reasonably be expected to flow from the control transaction." Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. No. 29430 (Sub-No. 20); ICC Decision dated May 24, 1988; (Affirming NW/SR v. ATDA, NYD § 4 Arb. (Harris; 5/19/87). The ICC's ruling means that some carrier actions are transactions because they fall within the penumbra of the control case.

The signal shop repair work consolidation is the type of action that the Carriers could reasonably be expected to pursue

under the auspices of the control case inasmuch as the Carriers will accrue the same economic savings that the acquisition was designed to achieve and the coordination will provide the public with more efficient and affordable rail service. Since the private and public benefits of the coordination conform to the goals of the NS acquisition, the signal shop repair coordination is clearly premised on the Commission's authorization. Indeed, the Organization indirectly concedes that the coordination naturally flows from the control transaction because it acknowledged that if the Carriers were to make application, the ICC would quickly and routinely approve the signal shop repair work coordination. [TR 37]

Nevertheless, the Organization argues that regardless of whether the coordination reasonably flows from the control case, the Carriers promised the ICC that they did not plan to coordinate signal facilities. There is some doubt that the Carriers made such a broad representation to the ICC. NW President Claytor, in his November 26, 1980 verified statement, declared that there might be "...further coordination of functions over time..." aside from those coordinations detailed in the Carriers' operating plans presented to the ICC. Apparently, the Carriers' application and the ICC's opinion approving the acquisition dwelled extensively on NW-SR common point consolidations. However, the ICC never precluded the possibility that the Carrier would engage in some unspecified future coordinations involving non-contiguous points pursuant to the original authorization. The ICC wrote:

...the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions. 366 I.C.C. 173, 230.

Even though the Carriers told the Commission that they did not intend to coordinate signal work at Cincinnati, Ohio, a common point, the Organization did not cite any representation (made by the Carriers) that all signal employees would be immune from any future coordination. The above quote shows that the ICC foresaw that the Carriers might engage in future transactions that did not involve mass employee relocations. The coordination of shop signal repair work at Roanoke will only cause the abolition of five East Point positions which can hardly be characterized as a wholesale disruption of the Carriers' work force.

This Committee finds, as a matter of fact, that the Carriers' intended coordination of East Point signal shop repair work into the NW's Roanoke facility constitutes a transaction within the meaning of Section 1(a) of the New York Dock Conditions.

B. Implementing Agreement Negotiations

The compulsory negotiating period, which the ICC incorporated into Section 4(a) of the New York Dock Conditions, promotes the preferred labor-management policy of encouraging the parties to reach an agreement of their own accord without the necessity for outside intervention. The Section 4(a) interest arbitration provision fulfills a two-fold purpose. First,

arbitration prevents delays in transaction implementation. A carrier is able to obtain an implementing agreement, the condition precedent to effectuation of the transaction, should a labor organization refuse to negotiate in an effort to block the transaction. Second, the arbitration requirement impels the parties to reach a consensus to avoid the inherent risks of handing their dispute to a third party. Therefore, we agree with the Organization that Section 4(a) of the New York Dock Conditions contemplates that the parties will conduct meaningful, good faith negotiations.

Good faith bargaining is an amorphous principle. A party to negotiations is not guilty of bad faith bargaining simply because the parties were unable to reach an agreement. The duty to bargain in good faith is not equivalent to an obligation to reach an agreement. Therefore, a breakdown in negotiations does not raise any presumption that one party engaged in bad faith bargaining.

The Organization initially charges that the Carriers bargained in bad faith because they adamantly refused to even discuss the Organization's proposed implementing agreement. Despite this allegation, the Organization admitted at the arbitration hearing that the parties spent considerable time reviewing the Organization's proposal. [TR 114-115] Most importantly, the Carriers' second proposed implementing agreement shows that not only did the parties extensively discuss the Organization's concerns about the coordination, but also the

Carriers were open to compromises. Thus, there is no merit to the Organization's allegation that the Carrier issued the Organization an ultimatum (sign our agreement or arbitrate).

The crux of the Organization's bad faith bargaining charge arises from the Carriers' reluctance to consider subjects which they believed were outside the ambit of negotiating a New York Dock implementing agreement. The Organization became frustrated because the Carriers were reluctant to negotiate over the Organization's Memorandum of Agreement regarding the wiring and fitting of signal cases. The Organization also sought monetary benefits in excess of those provided by the New York Dock Conditions.

Under Section 4(a), the parties are obligated to bargain about the selection of forces involved in the transaction and an equitable arrangement for the assignment of employees based on the surrounding circumstances of each transaction. In addition, the parties also bargain about how the New York Dock Conditions will apply. Signal case wiring is not a mandatory bargaining subject under Section 4(a). Rather, it is a permissive bargaining subject.⁶ The parties are free to bargain over subjects beyond the purview of Section 4(a), including pecuniary benefits above the level specified in the New York Dock Conditions, but there is no legal obligation (at least in the New

⁶ While the Organization's proposal that would effectively prohibit the Carriers from purchasing prewired signal cases is a permissive subject for bargaining under Section 4(a) of the New York Dock Conditions, it is a mandatory bargaining subject under Section 6 of the Railway Labor Act.

York Dock Conditions) for either party to bargain about a permissive bargaining subject.⁷ If the parties reach impasse on a permissive subject, a Section 4 arbitrator is without authority to resolve the deadlock. Since the arbitrator could not resolve the impasse, the Organization could hold every transaction hostage to demands wholly unrelated to the selection and rearrangement of forces. While the Organization entered into New York Dock implementing agreements containing terms which addressed permissive bargaining subjects on other railroad properties, these were negotiated as opposed to arbitrated implementing agreements.

Because of the nomenclature (the titles of the shops) in the Carriers' April 13, 1988 notice, the Organization incorrectly formed the impression that the transaction governed only relay repair work. The notice, however, clearly stated that all East Point signal repair work will be coordinated into Roanoke. Moreover, the confusion generated by the name of the East Point

⁷ The parties may agree to include in their implementing agreement monetary benefits in excess of those in the New York Dock Conditions, but an arbitrator is bound by the level of benefits set forth in the New York Dock Conditions. SR/NW v. BRAC, NYD § 4 Arb. (LaRocco; 7/17/84); But see, BM/MC v. ATDA, NYD § 4 Arb. (Sickles; 8/6/85). Although the ICC confirms that a Section 4 arbitrator is limited by the Commission mandated level of protection, it has suggested that there may be benefits that draw their essence from the New York Dock Conditions without being specifically enumerated therein. Such benefits would be mandatory subjects for bargaining and a Section 4 arbitrator could include such benefits in an implementing agreement. See Footnote 10 in the ICC's May 24, 1988 decision Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. 29430 (Sub-No. 20).

and Roanoke facilities did not hamper negotiations. The Carriers' three proposed implementing agreements as well as the Organization's proposed implementing agreement provided for the coordination of all East Point shop signal repair work with identical work at the Roanoke facility.

In summary, both parties exerted sincere efforts toward reaching an agreement. It follows that this Committee has jurisdiction to fashion an implementing agreement to govern the coordination of shop signal repair work.

C. The Appropriate Contents of an Implementing Agreement.

a. The Applicability of SR and CG Schedule Agreements.

When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroads. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the Organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR Schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would

totally thwart the transaction. The Carriers persuasively argued that they could never attain operational efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements. The ICC has unequivocally ruled that existing collective bargaining agreements are superseded by the necessity to implement the approved transaction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22); ICC Decision issued June 25, 1988. The ICC broadly interprets the statutory clause exempting approved transactions from other laws including the Railway Labor Act. Id. Maine Central Railroad and Springfield Terminal Railway Co., F.D. 30532; ICC Decision dated August 22, 1985; 49 U.S.C. 11341(a). In the Maine Central case, the ICC observed, "Such a result is essential if transactions approved by us are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements affecting changes in working conditions necessary to implement those transactions." Maine Central, supra at 7. The approved transaction is exempt from all legal obstacles under the self-executing operation of Section 11341 of the Interstate Commerce Act. Brotherhood of Locomotive Engineers v. Boston and Maine Corporation, 788 F.2d 794, 800-801 (1st Cir. 1986).

This Committee is a quasi-judicial extension of the ICC and thus we are bound to apply the ICC's interpretation of the Interstate Commerce Act and the New York Dock Conditions. United Transportation Union v. Norfolk and Western Railway Co., 822 F.2d

1114, 1120 (D.C. Cir. 1987). The ICC's authoritative announcements that existing collective bargaining agreements and collective bargaining rights must give way to the approved transaction does not warrant extensive analysis. Suffice it to say, that the Organization clings to an old line of arbitral authority which the ICC overruled in Maine Central Railroad and Springfield Terminal Railway Co., F.D. 30532; ICC Decision dated August 22, 1985 and Denver, Rio Grande and Western Railroad-Trackage Rights-Missouri Pacific Railroad, F. D. 30000 (Sub-No. 18); ICC Decision issued October 19, 1983.⁸

The controlling carrier concept provides that the collective bargaining agreement in effect on the railroad receiving the work, in this case the NW, will thereafter govern the work and workers at the coordinated facility. RYA v. MP/UP, NYD § 4 Arb. (Seidenberg; 5/18/83). UP/MP v. UTU, NYD § 4 Arb. (Brown; 1/85).

While the NW Schedule Signalmen's Agreement will apply to the work and workers at the NW facility to accommodate the transaction, we need to address the Organization's allegation that the Carriers are engaging in the transaction to circumvent the scope rules in the CG and SR agreements. The Carriers may

⁸ For example, for the proposition that a Section 4 arbitrator may not modify, vitiate or change existing collective bargaining agreements, the Organization relies heavily on SR v. BRS, NYD § 4 Arb. (Fredenberger; 10/5/82) which followed the Illinois Terminal Trilogy. Subsequent to the Denver, Rio Grande and Maine Central decisions, Section 4 arbitrators have consistently held that they have the authority to override existing collective bargaining agreements where those agreements undermine the transaction. SR/NW v. BRAC, NYD § 4 Arb. (LaRocco; 7/17/84); SR/ICG v. UTU, NYD § 4 Arb. (Harris; 5/2/88); BLE v. UP/MP, NYD § 4 Arb. (Seidenberg; 1/17/85); UP/WP v. ATDA, NYD § 4 Arb. (Fredenberger; 5/27/84); and BRC v. CSX/C&O, NYD § 4 Arb. (LaRocco; 3/23/87).

not invoke the New York Dock Conditions where their sole objective is to change an existing collective bargaining agreement. It cannot construct a sham transaction to circumvent Section 6 of the Railway Labor Act. SSR v. BMW, NYD § 4 Arb. (Zumas; 8/20/83). However, the Organization has not come forward with any evidence proving that the Carriers intend to shift work from East Point to Roanoke and then to contract out work which they could not have farmed out to an outsider if the work remained at East Point. Put differently, we do not find any evidence that the transaction is motivated by the Carriers' desire to circumvent onerous collective bargaining agreement provisions. Nevertheless, we will reserve to the Organization the right to progress a claim under Section 11 of the New York Dock Conditions that an employee was adversely affected by the coordination because the Carriers used the coordination as a pretext for contracting out work belonging exclusively to the signal craft. In other words, employees adversely affected by this transaction will be covered by the New York Dock Conditions even if the adverse effect (emanating from the transaction) arises sometime after the Carriers implement the coordination. Since such a right is already contained in the New York Dock Conditions, it is unnecessary to include a separate clause incorporating this right into the implementing agreement.

b. Other Items to be Included in the
Implementing Agreement

At the arbitration hearing, the parties concurred that Section 10 of the Organization's proposed implementing agreement shall be included in the implementing agreement. [TR 192]

While the Carriers resisted the inclusion of Section 2(b) of the Organization's implementing agreement in both its pre-hearing and post-hearing submissions, the Carriers declared, at the arbitration hearing, that they did not have a problem with the election of benefits component of Section 2(b). [TR 149-150] Therefore, the parties should adopt the last two sentences of Section 2(b) of the Organization's proposal with the following modifications. The introductory phrase in the second sentence shall be replaced with: "If an employee is entitled to benefits under this agreement and one or more other protective arrangements,..." In the final sentence of Section 2(b) the words "within a reasonable period" should be substituted for "during the period set forth in this paragraph (b)." The implementing agreement shall not contain the first sentence of Section 2(b) inasmuch as the New York Dock Conditions do not require the Carriers to ferret out employees who are potentially entitled to New York Dock benefits. Such a provision is unnecessary and does not prejudice an affected worker inasmuch as Section 11 does not contain any fixed time deadlines for instituting a claim for New York Dock benefits.

With regard to Section 9 of the Organization's proposed implementing agreement, the parties concur that the Carriers should supply those employees who presently work at the East Point or Roanoke signal shops (as well as those workers who fill new jobs established at the Roanoke shop) with a copy of the implementing agreement within thirty days after implementation of the transaction. [TR 191]

The Carriers and the Organization agreed that the implementing contract should include a provision that the Carriers shall handle employee claims using the standard procedure customarily followed by the Carriers in protection matters. The Carriers shall notify the Organization if there is a change in the identity of the designated officer who handles protective claims under the implementing agreement. However, the implementing agreement should not rigidly include any particular claim form or claim procedure. [TR 182]

During our discussion of the jurisdictional question, the bargaining issue and the applicability of the SR and CG Schedule Agreements, this Committee made it abundantly clear that most of the substantive items in the Organization's proposed implementing agreement are inappropriate for an arbitrated implementing agreement. Therefore, the implementing agreement shall not contain a prohibition against subcontracting out or any rider pertaining to signal case wiring. In addition, we must exclude from the implementing agreement any terminology which would operate to allow employees transferring from East Point to Roanoke to continue working under the SR or CG Schedule Agreements. Also, this Committee lacks the authority to provide the Organization with monetary benefits in excess of the minimum level set forth in the New York Dock Conditions. Thus, the implementing agreement shall not contain the Organization's proposals relating to additional per diem benefits, real estate expense reimbursements and other relocation expenses. Unless

expressly stated in our Opinion, we reject the provisions of the Organization's proposed implementing agreement.

Since we are applying the controlling carrier concept to this transaction, those CG and SR employees who bid on and transfer to Roanoke shall have their seniority dovetailed into the appropriate regional signalmen roster on the NW.⁹ It would be unworkable to permit other SR and CG employees to have the right to displace workers who transfer from the CG or SR to Roanoke. Reciprocally, the employees transferring to Roanoke from the SR and CG shall not retain any seniority rights on their former carrier.

Sections 3(a) through 3(d) of the Organization's proposed implementing agreement manifest the Organization's attempt to dictate the number of positions that the Carriers must maintain in the coordinated facility. The number of positions to be established at the coordinated facility is the Carriers' prerogative. However, the Organization convincingly argues that the implementing agreement should contain an equitable recognition that shop signal repair work flowing into the coordinated facility will be coming from the SR and CG as well as the NW. The prior rights provision, as drafted by the Carriers in their second proposed implementing agreement, constitutes a suitable rearrangement of forces for this particular transaction. BRC v. C&O/SR, NYD § 4 Arb. (Marx; 12/5/84). Filing subsequent

⁹ The Organization may still have these former SR and CG employees represented by the General Chairman on their former property. This Committee will not intrude into internal union affairs.

vacancies at the coordinated facility with SR or CG signal workers (who voluntarily transfer and would have been able to bid on the positions if they had remained at East Point) when the vacating incumbent came from the SR or CG is a sufficient acknowledgment that the coordination involves SR and CG shop signal work. Thus, the implementing agreement shall incorporate the Carriers' prior rights language found in its second proposed agreement but without the provision allowing the transferring employees to retain their SR or CG seniority.

It would be superfluous and redundant to require the parties to enter into a contract overlaying their implementing agreement prior to effectuation of the transaction. The Organization has failed to cite any provision of the New York Dock Conditions that compels the parties to negotiate a second contract clarifying the terms and conditions of the implementing agreement. Should the parties disagree over the interpretation or application of the implementing agreement, either party may progress the dispute to arbitration under Section 11 of the New York Dock Conditions.

Finally, this Committee notes that the Carriers derived their five-day notice provision, contained in Article I, Section 1 of their proposed agreement, from the Schedule Agreements which provide for five days advance notification of job abolishments. In its proposed implementing agreement, the Organization sought a thirty day notification period. In this case, the employees have been aware of the impending transaction since April, 1988, and thus thirty days additional notice is unwarranted. However, regardless of the terms of the SR and CG Schedule Agreements,

East Point workers should be afforded five working days notice of implementation of the transaction. Five working days notice is especially appropriate for shop employees. Thus, the word "working" should be inserted after "(5)" in Article I, Section 1 of the Carriers' proposal.

In conclusion, the parties shall adopt the Carriers' third proposed implementing agreement with the additions and modifications enunciated in our Opinion.

AWARD AND ORDER

This Arbitration Committee renders the following Award:

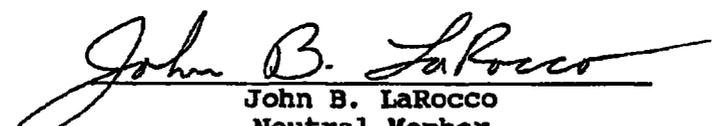
1. This Committee has jurisdiction over the subject matter of this dispute and finds, as a matter of fact, that the Carriers' intended coordination of East Point and Roanoke shop signal repair work is a transaction within the meaning of Section 1(a) of the New York Dock Conditions.
2. The parties shall enter into an implementing agreement consistent with the Opinion. The parties shall adopt the Carriers' third proposed implementing agreement, making the amendments and modifications as specified herein.
3. The parties shall comply with this Award within thirty days of the date stated below provided, this thirty day time period shall not delay the Carriers' implementation of the transaction upon proper notice.

DATED: February 9, 1989

W. D. Pickett
Employees' Member



Mark R. MacMahon
Carrier Member



John B. LaRocco
Neutral Member

LABOR MEMBER'S DISSENT
to
THE OPINION AND AWARD
INCLUDING THE ROANOKE SIGNAL SHOP COORDINATION

In the matter of arbitration hearing between:

Norfolk & Western Railway Company, Southern Railway Company
and Central of Georgia Railroad Company

vs.

Brotherhood of Railroad Signalmen

For your information and file. VMS 4-24-89
cc: C. R. Vaught, General Chairman
V. J. Sartini, General Chairman
M. R. MacMahon, Carrier Member
J. B. LaRocco, Neutral Member
W. D. Pickett, Employees' Member

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We must take issue with the factual findings of the arbitrator, we believe that such findings are non-sequester and contrary to the evidence presented at the arbitration hearing.

The arbitrator's reprobative indictment has failed to recognize the established line of demarcation between his so called "quasi-judicial extension of the ICC" and the ICC's assumption that it somehow has the authority to override and/or circumvent the Railway Labor Act or provisions as set forth in the New York Dock Conditions. Contrary to the arbitrator's allegation wherein he stated that "Suffice it to say, that the Organization clings to an old line of arbitral authority which the ICC overruled in Main Central Railroad and Springfield Terminal Railway Co., F.D. 30532; ICC decision dated August 22, 1985 and Denver, Rio Grande and Western Railroad-trackage Rights-Missouri Pacific Railroad, F.D. 30000 (Sub-No.18); ICC decision issued October 19, 1983." It is obvious that we seem to be involved in a game of one-upmanship. Therefore, in repudiation, one must merely look at several recent U.S. District Court decisions wherein they have held that the ICC does not have the express authority to deviate or allow exemptions which are mandated by the Railway Labor Act. As stated by U.S. District Court Judge Paul G. Hatfield in a ruling on the Butte, Anaconda and Pacific Railway Co., Montana vs. Railway Labor Executives Association, et al. CV-85-073-BU-PGH, dated February 2, 1989. "The ICC has no express authority to exempt transactions from the requirements of any other federal statutes".

In a decision rendered by United States District Court, Judge Block, Re: Railway Labor Executives Association vs. Pittsburgh & Lake Erie Railroad Company, Civil Action No. 87-1745, dated March 29, 1987:

* * * * *

"This Court concludes that the mere fact that Congress has granted the ICC broad authority to regulate the transportation industry cannot be read to imply that Congress intended to annul the provisions of the RLA, particularly in light of the strong Congressional policies underlying the RLA, Union Pacific Railroad Company v. Sheehan. supra."

There is no proper or rational basis for supporting the Carrier's overt actions to circumvent the Railway Labor Act and the separate schedule Agreements or for the arbitrator to sanction such action. The unfounded reasoning by the referee has done nothing more than to camouflage both the facts and circumstances of this case. As indicated in the facts of this case, the Carrier's application, and the ICC decision under Finance Docket No. 29430 were completely void of any reference or indication that the Carrier remotely contemplated the consolidation of the signal shops, a fact detailed in a notarized statement by Carrier's President Robert B. Claytor, Re: Finance Docket 29430. "...There are, of course, existing plans for some coordination of operations, set out in detail in the operating plan, with further coordination of functions over time, but, apart from the necessary consolidation of the sales functions, described in Mr. Hall's statement, at this time we do not plan any consolidations of other departments or mass relocation of employees in implementing our plan." (Emphasis added) Mr. Claytor's statement, along with ICC's decision in Finance docket 29430, wherein their only reference to signal force changes indicated that "no change in Southern's existing communications and signal facilities are planned." Therefore, these statements clearly decree that absolutely no changes in signal facilities were anticipated by the Carrier or sanctioned by the ICC under Finance Docket 29430 and as stated within the ICC order, "No change or

modifications shall be made in the terms and conditions approved in the authorized applications without prior approval of the commission." (Emphasis added)

The impropriety of the referee's decision is clearly demonstrated, wherein, he has acknowledged that, "as the parties stipulated, neither the Carriers' application nor the ICC's approval in the control case expressly described the coordination of CG and SR East Point signal repair work into the NW's Roanoke shop. In addition, the record does not contain any evidence demonstrating that the Carriers held any unexpressed intent to transfer signal shop work from East Point to Roanoke at the time the ICC approved the NS acquisition. Thus, as the Organization stresses, this Committee is confronted with deciding whether or not the transfer of signal work is a New York Dock transaction when 1) the transfer was not expressly alluded to in the control case; and 2) the Carriers lacked any original intent to coordinate signal shop repair work when the ICC approved the control case. Put differently, the issue becomes whether or not the Carriers' action, planned six years after the control case, constitutes a New York Dock transaction."

The referee's opinion and award is a contradiction of facts and logic, and flies in the face of unrefutable evidence presented on the property and at the arbitration hearing; as clearly defined in New York Dock Conditions Article I Section 1 (9), "'transaction' means any action taken pursuant to authorizations of this Commission to which these provisions have been imposed."

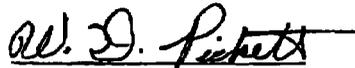
The obvious fact remains, as acknowledged by all parties to this dispute, that the Carrier lacked approval from the ICC to coordinate and consolidate its signal shops. Therefore, this so-called transaction clearly falls under the provisions of the Railway Labor Act under General Duties - Seventh; "No carrier, its officers or agents shall change the rates of pay, rules, or

working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." As clearly demonstrated, the Carrier's actions, with the arbitrators blessings, have violated not only the provisions of the New York Dock Conditions but the once sacrosanctity of the Railway Labor Act.

The arbitration panel should have additionally dismissed this dispute on the grounds it did not have jurisdiction; based on the fact that the Carrier failed and refused to bargain in good faith, as mandated in New York Dock and the Railroad Labor Act.

The fundamental facts in this case clearly demonstrate that the opinion and award is palpably erroneous.

Organization Member.



W. D. Pickett, Vice President

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F I N D I N G S

This is an arbitration proceeding pursuant to the provisions of the New York Dock Labor Protective Conditions (under Appendix III, Article I, Section 4) imposed by the Interstate Commerce Commission in Finance Docket Number 30053.

The dispute involves the announced intention of the Seaboard System Railroad (the "Carrier") to coordinate, transfer and/or reassign certain train dispatching functions performed by employees represented by the American Train Dispatchers Association (the "Organization") from offices in Birmingham, Alabama, to offices in Atlanta, Georgia; Bruceton, Tennessee; Jacksonville, Florida; and Mobile, Alabama.

Written notice of such proposed changes was sent to appropriate Organization officials by letter dated October 22, 1984. Under date of November 10, 1984, the Organization responded, requesting resolution of a number of questions raised by the proposed move. The parties met to discuss the matter on November 13, 1984, at which time the Carrier presented a proposed Implementing Agreement to the

Organization. Discussions continued on November 14 and 29, 1984. When no accord was reached, the Carrier served notice by letter dated December 20, 1984, of its intention to invoke the arbitration provisions set forth in Appendix III, Article I, Section 4 of New York Dock. As a result, the Referee was selected by the parties to hear and resolve the dispute. Hearing was held in Jacksonville, Florida on January 17, 1985. The parties were given full opportunity to present oral and written argument.

As arranged at the hearing, the parties filed post-hearing summaries, which were received by the Arbitrator on January 29, 1985. The Arbitrator also received on February 11, 1985 a letter from the Carrier "taking exception" to portions of the Organization's post-hearing summary.

The parties agreed to extend the time limit for submission of the Referee's Award to 30 days beyond receipt of the final document.

The Carrier's proposal for the "coordination, transfer and realignment of train dispatching territory" involves the abolishment of seven Train Dispatcher positions and the positions of Chief, Assistant Chief, Night Chief, and Relief Chief Dispatchers at Birmingham, as well as one dispatching position at Jacksonville. The Carrier proposes no addition to forces at the locations to which dispatching duties would be transferred from Birmingham. The proposed changes would assign various subdivisions to Train Dispatchers at other

locations; the Main Line Train Dispatchers would continue at present, with the Nashville Division Superintendent having jurisdiction of the line north of Birmingham and the Mobile Division Superintendent having jurisdiction over Birmingham and the line south of Birmingham.

Adequacy of the Notice

The Organization's initial position is that the Carrier's notice of October 22, 1984 should be dismissed, because it fails in several respects to meet the requirements mandated by Article I, Section 4 of New York Dock.

First, the Organization notes that the notice seeks to eliminate the position of Chief, Assistant Chief and Night Chief Dispatchers, "but does not provide for the transfer or other disposition of work presently performed by these positions". Second, the notice, according to the Organization, does not provide for the transfer or other disposition of work on the Sylacauga Subdivision. Third, the Organization alludes to an overall "restructuring program" of the CSX Corporation, of which Seaboard System Railroad is a part. The Organization argues that it is entitled to receive protection now for Train Dispatchers from the effects of further consolidations of which the Birmingham move is reported to be a part.

Article I, Section 4 of New York Dock reads in pertinent part as follows:

4. Notice and Agreement or Decision -
(a) Each railroad contemplating a transaction which is subject to these conditions and may cause

the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. . . .

The Referee does not find that these allegations on the Organization's part are of sufficient weight for a finding that the Carrier has failed to make a "full and adequate statement of the proposed changes". As to the work of the Chief Dispatcher and others performing such work, the Carrier's notice spells out in four or five numbered paragraphs how train dispatching work will be assigned to other points. Another numbered paragraph (No. 6) indicates jurisdictional responsibility for Main Line Train Dispatchers remaining at Birmingham as being assigned to Superintendents of the Nashville and Mobile Superintendents. The work of a Chief Dispatcher can logically only have substance insofar as it relates to the amount of dispatching work at a location requiring a "Chief" function. The notice is clear on its face that the functions of the positions referred to by the Organization are to be disbursed as outlined by the Carrier to various other points, with no "Chief" function remaining at the much reduced Birmingham office.

As to reference to the trackage in the Sylacauga Subdivision, this appears to have been subject to recent reorganization. The parties have exchanged sufficient information as to which Division this Subdivision is a part. Clearly, any confusion about this does not affect the rearrangement of forces proposed by the Carrier.

The Organization, quite understandably, is concerned not only with each transaction affecting the employees it represents; it also wishes to know how such moves fit into longer range consolidation plans which the Carrier may have. Nevertheless, Section 4 (a) refers to contemplation of "a transaction" and requires a "full and adequate statement" about "such transaction" (emphasis added). The Carrier has met its obligation as to the Birmingham train dispatching move, even if information is not included about future transactions which may or may not now be in the planning stage and about which precise information may or may not now be known to the Carrier. The Organization is protected, of course, by the New York Dock requirement of further notice, discussion and, if necessary, arbitration of any further moves.

The Referee thus finds that the Carrier's notice of October 22, 1984 meets the requirement of Article I, Section 4. This leads to the determination of the terms of a resulting Implementing Agreement.

The Implementing Agreement

The Carrier and the Organization have provided each other and the Referee with proposed Implementing Agreements to cover this transaction.

Before selecting from among the terms proposed by the parties, the Referee notes both the extent and limitations of his authority as provided in Article I, Section 4. The operative second paragraph of this section reads as follows:

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. . . .

This provision refers to an agreement with respect to "application of the terms and conditions of this appendix". The cited "appendix" includes displacement, dismissal and separation allowances (Section 5, 6 and 7); maintenance of fringe benefits (Section 8); and moving expenses and loss from home removal (Sections 9 and 12). Separate from these is the requirement of an "agreement or decision" as to "the selection of forces from all employees involved on a basis

accepted as appropriate for application in the particular case". It will be these criteria which will guide the Referee in his formulation of an Implementing Agreement.

An analysis of the Carrier's proposed Agreement reveals the following: Paragraph 1 states that the New York Dock labor protective conditions "shall be applicable". In stating the obvious (see New York Dock Article I, Section 4), the Carrier also argues that the conditions should be as stated in New York Dock, without amendment or embellishment. Paragraphs 2 through 7 describe the revised assignment of dispatching work, concerning which there appears to be no reason to dispute the Carrier's determinations. Paragraph 8 describes the classifications and, to some degree, the responsibility of Train Dispatchers remaining at Birmingham. Paragraph 9 refers to "former SCL Train Dispatchers" who transferred to Birmingham and states that they "will be required" to exercise Clerk seniority if they do not stand for a Train Dispatch position. Paragraphs 10-13 are general provisions, on which comment will be made below.

The Organization's proposed Implementing Agreement consists of two Articles. Article I concerns "Changes To Be Effected" and duplicates provisions of the Carrier's proposed Agreement. Article II concerns "Terms and Conditions" which, for the purposes of the Referee's findings, may be analyzed in the following manner (numbers referring to the Sections of Article II):

General Definitions:

1. Definition of displaced and dismissed employees
2. Definition of change of residence
23. Selection of choice of protective benefits and conditions
24. Test period information and filing of claims

Seniority Rights:

3. Exercise of seniority
19. Duration of seniority rights
20. Displacement rights in other crafts

Benefits and Conditions of Employment

4. Vacation and sick leave benefits
5. Qualifying time
- 6 through 10. Transfer and relocation costs and conditions
17. Extension of sick leave benefits
18. Improvement of expense allowance
21. Separation allowances

Establishment of New Positions

11. through 16. Creation of additional positions
22. Guaranteed Assigned Train Dispatcher positions

✓

Consideration now turns to which of these proposed provisions should be included in the Implementing Agreement. These will be addressed under the categories adopted above by the Referee.

Establishment of New Positions

The Carrier's formal notice to the Organization on October 22, 1984 specified the abolishment of 11 positions at Birmingham and one at Jacksonville. In detailing the transfer of responsibilities to other locations, the Carrier gave no indication of the establishment of comparable new positions. Sections 11-16 of the Organization's proposal would establish new positions in Birmingham and at other locations. Under these Section 4 New York Dock proceedings, there is no mandate provided to permit the Referee to direct the Carrier to maintain or establish a work force of particular size or description. While the "selection of forces" is at the heart of the Referee's jurisdiction, this must necessarily be accomplished after determination by the Carrier as to the size of the work force it deems necessary. Thus, the Referee has no grounds to consider the Organization's suggestion as to the addition of positions. The Carrier posits a coordination of work which it believes can be accomplished by abolishing 12 positions. Should it be found that the realignment requires additional positions to accomplish the work as rearranged by the Carrier, the

Organization then indeed has a vital concern in reference to the rights to such positions of employees whose positions were abolished in the transaction. This, however, is a separate matter, to be reviewed below.

Benefits and Conditions of Employment

As cited above, a number of the Organization's proposals would expand on conditions specifically set by New York Dock. This is particularly true of the Organization's proposed Sections 6 through 10, which would set conditions for employees who may transfer to a new point of employment. Conditions for such transfers are covered in Article I, Sections 9 and 12 of New York Dock. The Carrier may do no less than is provided in Sections 9 and 12. The jurisdiction of the Referee does not extend, however, to providing for the expansion of such relocation benefits as are sought by the Organization. This position is supported by other similar recent arbitration proceedings. In an Oregon Short Line III proceedings (comparable to New York Dock proceedings), Referee Richard Kasher stated as follows (in Illinois Central Gulf-United Transportation Union, December 19, 1980):

The levels of benefits have been established by the Appendix. The implementing agreement properly deals with the means by which such levels are to be afforded, but may not raise or lower them unless the parties have so agreed.

Section 17 seeks added sick leave and supplemental sickness benefits for certain Train Dispatchers, and Section 18 seeks a substantially increased allowance for Extra Train Dispatcher expenses. Based on the reasoning outlined above, such changes are beyond the jurisdiction of the Referee to consider. Similarly, Section 21 seeks formulas for separation allowances which subject is covered in New York Dock Article I, Section 7, and requires no embellishment here.

There are, however, two Organization proposals in this general category which the Referee finds fully appropriate for the Implementing Agreement. The first is Section 4, which seeks to clarify the retention (not expansion) of vacation and sick leave benefits for displaced Train Dispatchers. This is entirely consonant with New York Dock Article I, Section 8, which protects employees affected by a transaction from being deprived of "benefits attached to his previous employment".

Likewise, Section 5 proposes a means of providing conditions for qualifying on unfamiliar territory, which may be necessary as a result of the transaction. The Organization states without contradiction that these proposed conditions are identical to those in a previous similar agreement. As part of the "selection of forces", the Referee finds this proposal appropriate for inclusion in the Implementing Agreement.

per [signature]
General Definitions

Sections 1, 12, 23, and 24 of the Organization's proposals do not seem to be at serious variance with the somewhat briefer references to the same subjects in the Carrier's proposal. An exception appears to be the Organization's specification that "change in residence" means a new work location more than 30 miles from the employees current work location. Another may be the Organization's proposal, in Section 24 (b) of the precise means for settling disputes in reference to claims for displacement or dismissal allowances. The Award will direct the parties to coordinate these Sections of the Organization's proposals with those of the Carrier's proposal, provided, however, that if such agreement is not promptly achieved, the reference to 30 miles will not be included and the claim adjustment procedure recommended by the Organization will be included.

Seniority Rights

Since the Carrier starts with the assumption of abolishment of positions without the creation of new positions elsewhere, the Carrier's Implementing Agreement makes no provisions of "selection of forces". The Organization understandably challenges such assumption. As stated above, the Referee has no basis on which to impose new positions on the Carrier. In pursuance of the purposes of Article I, Section 4, however, it is entirely

proper to provide for the protection of seniority rights of Birmingham Train Dispatchers in the event that the rearrangement of work does lead to new Train Dispatcher work opportunities in the locations where the work is assigned. Thus, the Referee finds that the proposed provision in Section 3 (b) of the Organization's proposal to be appropriate, with the limitation that it shall apply only during the protective period for the Train Dispatchers.

Support for this view is found in Referee Jacob Seidenberg's Award in Baltimore & Ohio, etc. and Brotherhood of Maintenance of Way Employees, etc. (ICC Finance Docket No. 30095, August 31, 1983), in which it is stated:

While it is unquestioned that the B&O has the sole discretion to determine the size of the work force it wants to use from N&SS forces, no Neutral can prescribe the size of the work force that must be utilized. However, this does not mean that the B&O can, or should be permitted, unilaterally to extinguish the vested seniority and pension rights of inactive N&SS employees. The B&O intends to operate on N&SS property and it is inappropriate for the B&O to take action that would cause the N&SS to lose permanently their recall rights to work on N&SS territory, if the exigencies of operations should warrant such a happy state. We find the B&O's amended proposal to hire inactive N&SS employees as new B&O employees, is not a satisfactory resolution of this problem.

Section 3 (a) and (c) are not required, since they involve conditions already adequately covered in New York Dock itself.

Section 19 of the Organization's proposal seeks protection of the "duration of . . . employment" goes well beyond the protective period prescribed by New York Dock

and is thus inappropriate. Likewise, displacement rights in another craft, covered in the Organization's Section 20, is not required, since wage protection rights are fully covered in New York Dock itself.

Carrier's Proposed Agreement

Section 13 of the Carrier's proposal refers to possible "conflict" in the Implementing Agreement and "currently effective working agreements". Without knowledge as to what such "conflict" might be, the Referee finds it inappropriate to include this provision within the jurisdictional limit of New York Dock Article I, Section 4.

* * * * *

The Referee places great emphasis on the desirability of Implementing Agreements such as this to be arrived at insofar as possible by negotiations between the parties rather than by the ultimate binding authority of an arbitration award. The Referee also is aware of the Carrier's understandable need to move forward with the transaction as expeditiously as possible. The Referee will therefore prescribe a further period limited to 15 days during which the parties may make any further adjustments in the Agreement by mutual accommodation. Should such opportunity prove unnecessary or lead to no accommodation, then the Implementing Award will, of course, become effective as stated by the Referee.

A W A R D

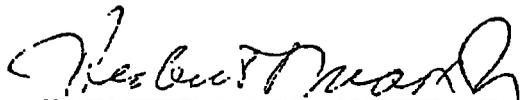
The implementing Award between the Carrier and the Organization in reference to the Train Dispatcher functions at Birmingham shall be as follows:

1. The "Memorandum of Agreement" proposed by the Carrier (Carrier Exhibit D) shall be adopted, except for Section 13.

2. Sections 1, 2, 23, 24 of Article II of the Organization's proposed "arbitrated Implementing Agreement" shall be coordinated with the appropriate sections of the Carrier's proposal, in the manner prescribed in the Findings.

3. Section 3 (b) (limited to the protection period) and Sections 4 and 5 of Article II of the Organization's proposed agreement shall be appropriately numbered and adopted as part of the Implementing Agreement.

4. Within 15 days of the receipt of this Award, or upon a mutually agreed later date, the parties shall meet for the purposes of carrying out Paragraph 2 of the Award and to make any other adjustments in the terms of the Implementing Agreement which may be reached at such meeting. Failure to agree at such meeting on any adjustments will make the Award final as specified in Paragraphs 1 through 3 above.


HERBERT L. MARX, JR., Referee

New York, N. Y.

Dated: March 7, 1985

33

Before
ROBERT J. ABLES
Arbitrator

-----X
.
.
CSX Transportation, Inc., .
Employer .
and .
Dispute Concerning
New York Dock
Conditions
.
American Train .
Dispatchers Association, .
Organization .
.
-----X

 Proceedings:

Robert J. Ables, Washington, D. C., appointed by the National Mediation Board on April 27, 1988, as neutral referee to decide this dispute. Pre-hearing submissions by each party received by the neutral referee on June 16, 1988. Arbitration hearing: Jacksonville, Florida; June 23, 1988. Post-hearing submissions concerning Public Law Board No. 3829 received by the neutral referee on June 30, 1988. Post-hearing briefs received: July 25, 1988. Carrier submission with respect to the decision in Public Law Board No. 3829 received by the arbitrator: October 11, 1988.

Date of Decision:

November 11, 1988.

CSX Transportation, Inc.

and

American Train Dispatchers Association

Dispute Concerning New York Dock Conditions

OPINION

I. ISSUE

This dispute is simple to identify but difficult to resolve.

It is, after authorized merger of railroads, the next step in a series of steps to effect the efficiencies and economies contemplated by Interstate Commerce Commission when it authorized the merger, with certain built-in,

statutory, protection for employees adversely affected by the merger (consolidation, coordination, etc.), requiring thereby an award favoring the carrier. In the alternative, it is such a big step as to constitute a difference in kind, raising very large questions about the fundamental relationship of labor and management during active merger action in the railroad industry, requiring, possibly, an award favorable to the union.

In a metaphor, the question is whether railroads, such as this one, propose to get a foot in the door to potentially big, big changes in employee protective considerations after merger and, if so, what to do about it and, if not, to help stop so much litigation about what is a relatively small labor problem in the scheme of things for the four employees involved in this dispute, represented by their union, American Train Dispatchers Association (ATDA).^{1/}

^{1/} The arbitrator's vantage point is as author of probably the first published treatise of employee protection in the railroad industry in the United States and service as neutral referee in subsequent evolving problems. Report of the Presidential Railroad Commission, Appendix Volume III, "The History of and Experience Under Railroad Employee Protection Plans" (1962).

II. FACTS

CSX Transportation, Inc. (CSXT), one of the nation's largest railroads, evolving after mergers of the Seaboard Coastline Railroad and Louisville and Nashville Railroad, which merged with the Chesapeake and Ohio Railroad and the Baltimore and Ohio Railroad, asks to have it determined in this proceeding that the "New York Dock" employee protection conditions prescribed by the Interstate Commerce Commission, when it authorized the underlying railroad mergers, which were exempted from the anti-trust laws, should be considered such that the work of four, union, high-ranked dispatchers (of locomotive power)^{2/} in the coal producing area around Corbin, Kentucky, be transferred to Jacksonville, Florida where the company is near completing plans to centralize, for the entire system, all such power distribution, and where the work in dispute would be performed by non-bargaining unit employees (non-contract dispatchers).

The fundamental dispute between the parties, CSXT and ATDA, is not so much the content or application of New York Dock protective conditions for the four contract dispatchers affected by the planned change, as it is the right of the company to abolish those four jobs at Corbin, Kentucky and not give the work of those

^{2/} Now known as "Assistant Chief/Power" or, as in this proceeding, "contract dispatchers".

jobs to contract dispatchers, at Jacksonville, since dispatching of locomotive power is still required in Corbin as much, if not more, as before.

The contest is not new.

For 10 years, the parties have been locked in arbitration proceedings, or in court, whether the classification rule of one of the parties' collective bargaining agreement must be construed to preserve the dispatching work for contract dispatchers, as the union maintains, or not, as the carrier maintains.

The latest round in this litigation favors the carrier.^{3/}

^{3/} Very pertinent to the question and to the present proceeding is that, in October, 1988, CSXT submitted to this arbitrator the decision of Herbert L. Marx, Jr., chairman and neutral member of Public Law Board No. 3829, concurred in by the CSXT representative of that board, favoring the carrier's position on the question. After a long recitation of previous litigation in the question, the arbitrator, in his findings, noted: that there exists, now, in Jacksonville the position of Power Coordinator -- a management job; the union's argument was unpersuasive that such management work duplicates, replaces or substitutes for covered -- contract -- dispatcher jobs; and that the carrier was persuasive "the new positions, at or near the top of the management hierarchy of the Operations Control Center, are concerned with overall system-wide control and direction, overseeing the continuing functions of those in the Train Dispatcher Group". Opinion p. 9. Arbitrator Marx concluded the union had not shown that the management level positions established at Jacksonville fit the definition of positions, the duties of which fall within the scope of the train dispatcher group. Thus, he denied the claim to classify dispatching work in issue as within the train dispatcher classification.

The union, considering the contingency of an adverse finding under Public Law Board No. 3829, argues, in the present proceeding, that the present arbitrator may still find under New York Dock that "the work of power distribution now being performed at Corbin should be performed by agreement employees at Jacksonville because the carrier cannot show that to do otherwise is necessary to effectuate the Commission's original order". It argues further that, because there are assistant chief positions at Jacksonville, "it is the carrier's burden to convince this panel that depriving agreement dispatchers of their work is necessary to effectuate the Commission's control order". ATDA pre-hearing submission, Opinion, pp. 7 and 14.

The union has been on a failing track on neutral decisions on these matters. It points to no recent decision by court, arbitrator, Interstate Commerce Commission or other neutral tribunal, preserving work of the kind in issue under New York Dock or other employee protective conditions, upon authorized merger.

The carrier, to the contrary, is alive with decisions supporting its asserted right to take implementing action to effect economies and efficiencies of operations.

It argues here that precedent is so clear and substantial, stare decisis controls, obviating thereby need to examine further the legal basis of its decision to

Transfer locomotive power dispatching work from Corbin to Jacksonville under systemwide, centralized, control.^{4/}

In any event, the carrier argues the implementing agreement it proposed to the union following it having served a New York Dock Article 1, Section 4 notice on the ATDA on February 12, 1988 ("to transfer certain work associated with train operations to Jacksonville, Florida", proposing in this respect the abolishment of four (4) CSXT Assistant Chief/Power positions at Corbin, Kentucky) "fully and adequately protects the interests of the affected employees" and is consistent with conditions imposed by the Interstate Commerce Commission in relevant proceedings (Finance Dockets 30053, 31033 and 31106) and with implementing agreements previously negotiated between the parties in similar transactions". Pre-hearing submission, pp. 3 and 4.

In support of its argument that proposed actions under New York Dock conditions (New York Dock Ry-Control -- Brooklyn East. Dist. 60 I.C.C. 60 (1979)) are not different from previous authorized actions involving this and other merged railroads, the carrier relies primarily on the following referee decisions: David H. Brown (December 16, 1986); H. Raymond Cluster (November 23, 1982);

4/

Transfer of other than locomotive power dispatching duties by Assistant Chief/Power is not involved in this dispute because unit employees have been assigned such work.

Robert O. Harris (May 19, 1987), sustained by the Interstate Commerce Commission, with dissent, on June 10, 1988;^{5/} and Robert E. Peterson (May 24, 1982).^{6/}

^{5/} The ATDA has advised it will appeal this decision.

^{6/} Special deference at the "trial" level is given to decisions of labor arbitrators as contrasted, for example, with the Interstate Commerce Commission decisions which lately seem to treat decisions of neutral arbitrators, who are selected by the parties or appointed by the National Mediation Board, as decisions by Interstate Commerce Commission Administrative Law Judges, with "remand" and other like action. See, for example, I.C.C. Decision, Finance Docket No. P-905 (Sub. No. 22), CSX Corp. - Control - Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (June 8, 1988). At the arbitration level, the railroad industry should enjoy no special status. Arbitrators who decide cases about the operation and therefore the safety of nuclear power or ammunition plants, deep coal mining operations and the like, or whether thousands of employees should lose their pensions on a buy-out, need no special review cushion before appropriate court consideration to maintain the essence of arbitration, which should be final and binding decisions, with very narrow exceptions, recognizing that difficult questions in dynamic times -- like employee protection after merger -- may produce unclear and, possibly contrary, results, to be resolved by new agreements, changes in law, etc.

III. FINDINGS

A series of favorable awards on the application of New York Dock conditions is better than none but none of those referenced awards is hard precedent, on-point, concerning transferring work which clearly has been done by contract employees and where that work remains to be done after the consolidating action, as here.

Arbitrator Brown, in a dispute between this company and the UTU on New York Dock conditions, had before him the question whether a tentative agreement for the selection and assignment of conductors and trainmen was equitable. The ultimate decision allocating work on a percentage basis between these two covered crafts does not reach the question of abolishing work of covered employees to be done by non-contract employees.

Arbitrator Cluster was concerned with the number of yard assignments resulting from a consolidation. The arbitrator made a series of findings on: protection for (covered) engineers off the consolidated railroads; an order selection list to fill regular and extra yard engineer positions in the consolidated terminal; home road rules under "schedule", i.e., union agreements; and certain travel allowances under consolidated yard conditions. None of these findings reaches the present question.

Arbitrator Harris, in a dispute concerning New York Dock conditions between the Norfolk and Western Railway Company, Southern Railway Company, and the American Train Dispatchers Association, had before him a proposed transfer of work "of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia". Opinion, p. 2. The N&W, a product of earlier mergers, did not itself have an agreement with the ATDA but the union had agreements with each of the railroads which had merged into the N&W. When the merged company proposed to assign power distribution in a "power bureau" to non-ATDA dispatchers, the ATDA, in a dispute before the Third Division of the National Railroad Adjustment Board, prevailed, following which the parties agreed that "supervisors" who worked out of such power bureau would be represented by ATDA. The Southern Railroad, however, controlled its distribution of power out of Atlanta, with non-contract dispatchers. The question before the arbitrator was the effect on bargaining rights when the merged carrier proposed to concentrate power distribution for the entire system in Atlanta using non-contract dispatchers. The arbitrator, noting the "unusual rearrangement" (p. 9) concerning contract and non-contract dispatchers, decided that the "central issue" (p. 11) in the case was the

reconciliation of Sections 2 and 4 of Appendix I to New York Dock.^{7/}

Concentrating on this issue of relative authority under the Railway Labor Act and the Interstate Commerce Act for a substantial part of his opinion, the arbitrator then reaches what was the question in dispute, which was whether the resulting work of distributing power was to be done by contract or non-contract dispatchers. In an opinion going off on representation rights, to be determined by the National Mediation Board,^{8/} but noting that the carrier, in its last proposed implementing agreement, offered to consider awarding new dispatcher positions in Atlanta to covered dispatchers, the arbitrator concluded he could not change the terms of New York Dock and, because the union proposed an implementing agreement

7/

This is a heavy litigated matter involving the precedence of the Railway Labor Act or the Interstate Commerce Act in New York Dock employee protection conditions, where the parties cannot agree on an implementing agreement following an authorized merger. The question, following a number of arbitration and court decisions, seems settled in favor of the Interstate Commerce Act.

8/

The Interstate Commerce Commission found this explanation to be "confusing". I.C.C. Decision, Finance Docket No. 29430 (Sub. No. 20, Norfolk Southern Corp. - Control - Norfolk & Western Railway Co. and Southern Railway Co. (June 10, 1988), p. 5.

and one such by the carrier being beyond the terms of New York Dock, they could not be acted on, but that the carrier's second proposal "will be placed in effect" (p. 17). Presumably, the carrier's second proposal was adopted on the basis it did not exceed New York Dock, although such presumption is by inference, since the opinion does not identify the basis for the conclusion. The employee member, in a strong dissent, did not accept the arbitrator's decision favoring the carrier's position.

Arbitrator Peterson, in a dispute between the Southern and N&W Railroads as the employer and the Railroad Yardmasters of America, had before him whether proposed implementing agreements provided an appropriate basis for the selection of forces. He adopted a "fair and reasonable" standard, noting that "consideration could not be given to a supposed superiority of rights for represented employees to retain job opportunities to the detriment of non-represented, non-contract, employees by the same job class or craft" (p. 17) where the union contract provides that non-contract employees -- presumably doing the same work as contract employees -- "shall have afforded substantially the same levels of protection as afforded to members of labor organizations" *ibid.* in selection of forces. Since the union held no representation rights at the surviving yard under the proposed rearrangement of forces, the union agreement could not be extended to the yard.

The Brown decision did not involve work transferred to uncovered employees. The Cluster decision was a garden variety dispute under New York Dock as to which covered employees get resulting work. Harris was lost -- which happens to all arbitrators in different cases, during changing times, in cases argued by very able attorneys -- as here -- with a dizzying array of court, arbitration and agency awards. The Peterson case did not involve management people doing scope work.

These are not ringing decisions demanding their adoption in this dispute, as the carrier argues.

Each of such decisions however is a bit in a mosaic favoring the consensus of neutrals that a railroad should have reasonable opportunity to effectuate the improvements of operations and cost it persuaded the Interstate Commerce Commission was the object of the proposed merger sufficient to be granted authority to make implementing changes without undue concern about restrictions under otherwise applicable anti-trust law.

But the question remains: how far?

For the first time under New York Dock, based on the sophisticated submissions of the parties, the question is clear: can contract jobs be abolished and the work, still to be performed in those jobs, be transferred to non-contract employees at a different location?

It must be clear. The work in issue is not to be done by unrepresented, non-supervisory, employees, or union employees represented by another craft off another railroad, or by road and yard employees with different seniority rights. The work is to be done by managers, "low level" managers, as the carrier makes clear -- but managers.

Scattering its shots somewhat, the union here argued various theories to support its claim that the employer was violating applicable agreements by not letting contract locomotive power dispatchers at Corbin follow their work to Jacksonville. It argued precedence of the Railway Labor Act over the Interstate Commerce Act and of Section 2 over Section 4 of Article I of New York Dock, and the scope rule, with many footnoted references to court decisions on employee protection conditions upon authorized merger. In its pre-hearing brief, the union made what may be taken as a collateral argument on the effect of the carrier's action on the union, as distinct from employees affected by this transaction. It notes that, although the centralization of train dispatching functions was contemplated, "de-unionization of an integral part of the operation -- the distribution of locomotive power -- was in [no] way alluded to" by the Commission authorizing the overall consolidation. (p. 10.)

By the time of post-hearing brief, the union argued strongly that the effect of the carrier's proposal "is

to take the work out of the union's jurisdiction" and that if the carrier's position in this dispute is accepted:

The carrier can use New York Dock time after time as a tool to reduce its organized work force and the influence and ability of this organization to represent its employees in the process. (pp. 3 and 4).

The union's concern is real -- which is not to say sufficient to sustain its claim.

A "coordination" was a term more commonly used than merger, in earlier times going back to the Washington Job Protection Agreement of 1936, describing changes to make railroad operations more efficient and less costly. They frequently were limited to consolidating yards or tracks. Now, whole companies are absorbed in mergers, sometimes repeatedly. Displacement of employees and concomitant need for protection from the effects of such actions, as prescribed by statute^{9/} and underlying protective conditions prescribed by the Interstate Commerce Commission or Department of Transportation (for airline mergers) are now much more widespread.

9/

49 U.S.C. & 11341, et seq.

As a determined tide is hard to stop, it is with increasing difficulty neutrals can see a particular consolidation, change in operation, purchase of new equipment, or application of new technology, as not being within the intent of the Commission's blessing when it approved the merger. The Commission could not reasonably anticipate all the changes -- either in kind or degree -- that would logically flow from its authorization to merge carriers. Absent the parties themselves agreeing how to accommodate the changes, neutrals are hard-put to consider substituting their judgment for that of carriers why the change either will not effect the economies and efficiencies projected or that some artificial bar, like limits of New York Dock conditions or the public interest connection between authorized mergers and changes, prevent the proposed operational changes.

In this case, the carrier's action may be seen as a first new step, having the potential of union busting. It will not be found however that this was a purpose of the carrier. (If so, the decision might have gone for the union.)

Despite protestations to the contrary, the union relied heavily on a favorable award in the scope dispute before arbitrator Marx. If the union had prevailed, the decision here could have flowed logically that distributio. of power, at least in Corbin, Kentucky, should be done by contract dispatchers, particularly as the carrier

Petitioner has not demonstrated that in the absence of a stay it will suffer irreparable harm. ATDA argues that its members who are affected by the transfer will be irreparably harmed because they will be compelled to move from Roanoke to Atlanta, that those employees who transfer will lose the protections of their collective bargaining agreements while the petition for review is pending, and that those employees who choose not to transfer will, by exercising their seniority rights, displace other employees.

ATDA's arguments are not persuasive. The potential harm that they foresee is not irreparable. If employees were to suffer monetary damage attributable to the move, petitioner has not shown why it is not possible for those employees to be adequately compensated under the New York Dock conditions. Since employees transferred to Atlanta will have an opportunity to obtain representation, it has not been shown that the employees will be foreclosed from receiving protections under a new collective bargaining agreement. Furthermore, N&W and Southern have indicated that the involved employees (except for one retiring employee) have elected to transfer to Atlanta and thus no employee displacement will occur.

As to harm to other parties, the record shows that N&W and Southern will realize a \$26 million capital investment saving and an annual \$2 million operating expense saving, exclusive of labor cost savings, from the coordination. To stay the transfer would delay the coordination and thereby prevent the carriers from realizing these savings. In addition, the carriers indicate that they, as well as numerous N&W management employees have made certain preparations in expectation of the transfer and that additional costs would be incurred should the transfer be delayed. The N&W management employees have sold their homes or terminated their leases in Roanoke and purchased new homes or entered into leases in Atlanta. Additional costs would have to be incurred for the N&W management employees to retain residences in Roanoke. The carriers have installed computer and telephone equipment in Atlanta; if they are unable to effectuate the transfer on June 6, 1987, the carriers will incur additional computer and telephone costs to relay distribution information to Roanoke.

Petitioner has also failed to show that the public interest favors a stay. The Commission, in Norfolk Southern Control, has found that coordination of the carriers is in the public interest. The economies to be realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would delay these economies that have already been shown to be in the public interest.

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

It is ordered:

1. The petition for stay is denied.
2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)

- (3) that other interested parties will not be substantially harmed; and
- (4) that the public interest supports the granting of the stay.

Petitioner's showing under the last three factors is unpersuasive, and its contention that it will likely prevail on the merits is at best arguable.

In regard to prevailing on the merits, ATDA raises jurisdictional questions and a substantive question about the terms and conditions of the implementing agreement accepted by the arbitration panel. First, as to the jurisdictional issues, ATDA argues that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the Railway Labor Act (RLA), and the arbitration panel's authorization of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned in the Commission's authorization in Norfolk Southern Control.

Petitioner has not shown that it is likely to prevail on its jurisdictional arguments. The arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the transaction. The transfer is not subject to the RLA because the Commission, in Norfolk Southern Control, authorized the coordination of N&W and Southern under NS, subject to New York Dock. The mandatory arbitration provisions of New York Dock take precedence over the RLA dispute resolution procedures in transactions approved by this Commission. See Finance Docket No. 30932, Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Company--Exemption from 49 U.S.C. 11342 and 11343 (not printed), served September 13, 1989. The proposed transfer, although not specifically mentioned in Norfolk Southern Control, is one of the future coordinations expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. See arbitration decision, pp. 10-11. The arbitration panel, citing Maine Central, correctly exercised its jurisdiction over the dispute arising from the transfer.

Second, ATDA argues that the arbitration panel made a substantive error in accepting verbatim the terms and conditions of an implementing agreement proposed by the carriers. ATDA had proposed that the New York Dock conditions be imposed along with certain other conditions. Furthermore, at first the carriers had also proposed expanding the New York Dock protections with additional conditions. However, the carriers' later proposal included only New York Dock conditions. The arbitration panel found that it was not authorized to "change the terms of the New York Dock conditions" and placed into effect the later proposed implementing agreement of the carriers since the other two proposals "go beyond the terms of an implementing agreement set forth in New York Dock." This raises an interesting, and perhaps significant, issue concerning the authority of the arbitration panel to set the terms and conditions of the implementing agreement. We cannot determine at this time, however, whether petitioner's position on this issue will likely prevail. Even if we were to assume that it would, we still conclude that the other stay factors do not weigh in favor of granting a stay.

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SERVICE DATE

JUN 10 1987

3.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION--CONTROL--NORFOLK AND WESTERN
RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

Decided: June 5, 1987

On May 29, 1987, the American Train Dispatchers Association (ATDA) filed a petition for stay pending the Commission's review of the arbitration award in the matter of Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association, Award of Referee Harris, May 19, 1987.^{1/} Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a reply.

The arbitration process was invoked under the provisions of the employee protective conditions we imposed in connection with our approval of the acquisition of control by Norfolk Southern Corporation (NS) of N&W and Southern in Norfolk Southern Corp.--Control--Norfolk & W. Ry. Co., 366 I.C.C. 173 (1982) (Norfolk Southern Control). The employee protective conditions imposed in that proceeding are those set forth in New York Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

At issue here is NS's coordination of the locomotive power distribution of N&W and Southern. NS will transfer N&W's locomotive power distribution supervisors, who are represented by ATDA, from N&W's Systems Operating Center at Roanoke, VA, to Southern's Control Center in Atlanta, GA, where they will work with Southern's power distribution supervisors, who have historically been considered management and not subject to a collective bargaining agreement. The arbitration award imposed an implementing agreement to effectuate this coordination of forces.

The Commission's authority to review arbitration awards was recently asserted in Chicago and North Western Transportation Company--Abandonment--Near Dubuque and Oelwein, IA, I.C.C. 2d (1987) (Oelwein).^{2/} Pending our review of the arbitration award, we have been asked to stay the award's effectiveness. Assuming we have the authority to stay an arbitration award pending our review, although we are not so deciding that issue here, we conclude that a stay would not be justified.

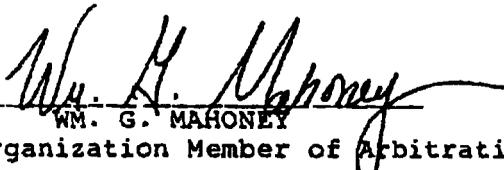
In determining whether petitioner has demonstrated entitlement to a stay, we refer to the four factors identified in Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 1841 (D.C. Cir. 1977):

- (1) that there is a strong likelihood that the movant will prevail on the merits;
- (2) that the movant will suffer irreparable harm in the absence of a stay;

^{1/} ATDA also filed a petition for review of the arbitration award. That petition will be considered in a subsequent decision.

^{2/} ATDA contends that arbitration awards under the New York Dock Conditions are reviewable in the courts and that the Commission can participate in such disputes solely through court referral. In light of Oelwein, ATDA submitted its petition for stay to the Commission, BUT it states that it does so without prejudicing its right to judicial review.

the entire Decision and the record in this case, one is compelled to conclude that the Decision has fallen victim to egregious errors and would visit the bitter consequences of those errors only upon the N&W employees.


WM. G. MAHONEY
Organization Member of Arbitration Panel

May 19, 1987

SOC employees". ^{3/} Therefore, the Decision would impose the Carriers' second proposed implementing agreement which "only allows them [SOC Supervisors] to request consideration for employment in that city [of Atlanta]". (Decision, pp. 16-17.)

Article I, Section 4 of New York Dock requires the "transaction . . . [to] provide for the selection of forces from all employees involved on a basis accepted as appropriate . . . and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." (Emphasis supplied.) Section 9 of New York Dock requires the carrier to pay the affected employee's moving expenses. There is nothing in New York Dock, any decision of the Commission, or any arbitration decision prior to this one which holds an arbitrator cannot impose a "fair and equitable" agreement or that he must accept a provision which violates Section 4 by merely "considering" employees for work taken from them. (Decision, p. 16.)

If one compares the explicit, simple English in which Sections 4 and 9 are couched with the statements on pages 16 and 17 of the Decision and follows that comparison with a review of

^{3/} No reason was given as to how the ATDA proposal exceeded New York Dock limitations.

Decision concludes at page 11 that the "central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix [sic] I to New York Dock." It then finds, after quoting extensively from the Commission's 1985 Maine Central decision and an arbitration decision reached thereafter, that Section 2 is now wholly meaningless. (See, Decision, p. 14.)

The Decision quotes from a 1985 decision of an Arbitrator Brown in which he states that arbitrators under New York Dock "are commissioned to exercise . . . [the] full authority [of the ICC] to achieve a fair and equitable solution of the dispute before us"^{2/}, but then reaches a result which is clearly unfair and inequitable. The Decision justifies this result by engaging in hypertechnical reasoning which defies even a cursory scrutiny. For example, the Decision determines that the employees have lost no rights because their representation on N&W resulted from "recognition, not election" and their "present collective bargaining agreement [sic] [which] . . . may not be carried along," involve rights of the Organization and not the individual employees. Another example is the Decision's conclusion that ATDA's proposed implementing agreement and the first of the two proposals submitted by NS have gone "beyond the terms of the New York Dock Conditions" presumably because they would give "the first right to the new positions in Atlanta to

^{2/} Emphasis supplied. See also ATDA Brief, pp. 15-19 for analysis of authorities on "fair and equitable" requirements.

5. If the "approved transaction" was not simply approval of NS control of N&W and Southern but extended to particular changes in operations, services or facilities, the change involving the SOC Supervisors could not have been "approved" because it was never presented to the Commission and, in any event, the Interstate Commerce Act does not provide the I.C.C. with jurisdiction to approve such changes. (ATDA Subm., pp. 14-17, 19; ATDA Brief, pp. 2, 4-5.)
6. The Arbitration Panel and the parties are governed by the orders issued in the NS Control case which explicitly preserve the Railway Labor Act and collective bargaining rights of the employees in Section 2 of New York Dock and contain no contrary provisions or later orders from which the Organization could have appealed. (ATDA Brief, pp. 2,4,8.)
7. Assuming such authority to exist in the I.C.C. and the arbitrator, such superseding authority could not be exercised unless "necessary" to "carry out the transaction" and the implementing agreement submitted by ATDA demonstrated it was not "necessary" to strip SOC Supervisors of their rights in order to accomplish the transfer desired by NS. (ATDA Subm., pp. 19-20, 21-28; ATDA Brief, pp. 2, 3 n1, 5-6, 6 n3, 7, 14, 14 n7; Transcript of Hearing, pp. 191, 192, 203-204.)

This last argument of ATDA was rejected by the simple device of ignoring it.

Regarding the elimination of employee rights in the face of Section 2 of New York Dock which specifically preserves such rights and in the absence of any language in the orders governing the NS control case to indicate otherwise, the

The Decision errs in its confusion of the several contentions of the Organization and its failure to mention others.

At page 7, the Decision inaccurately characterizes the Organization's position as follows:

"It further contends that even if the ICC has such power [to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees], it could only be exercised when necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval."

The position of the Organization was, and remains:

1. The ICC has no authority, and therefore a New York Dock arbitrator has no authority to extinguish the Railway Labor Act and collective bargaining agreement rights of employees. (ATDA Subm., pp. 12-14, 19-21; ATDA Brief, pp. 1, 7, 9-13.)
2. Even if the ICC might have such rights, it has never claimed the statutory authority to eliminate the Railway Labor Act and collective bargaining rights of entire classes of employees; in this case the entire class of SOC Supervisors on the N&W. (ATDA Subm., pp. 17-19, 21; ATDA Post-Hearing Brief, pp. 1-2, 4.)
3. If such authority existed it could be exercised only if necessary to carry out the transaction approved. (ATDA Subm., p. 19-20; ATDA Brief, p. 2, 5-6, 6 n3, 7, 14, 17.)
4. The "approved transaction" was fully consummated or "carried out" when NS achieved control of N&W and Southern in 1982, therefore, no exemption authority could now be triggered or activated. (ATDA Subm., p. 18, 20.)

but gives no reason for that conclusion 1/; and, then proceeds to the incredible conclusion, again unsupported, that the employees' loss of their agreements and their statutory representation "does not change the rights of the individual employees." The Decision finally concludes its discussion of the rights of the N&W employees by saying that those employees can, in effect, retrieve the rights they did not lose by petitioning the National Mediation Board for an election after they get to Southern, provided they can demonstrate the Southern work is that of "employees or subordinate officials within the meaning of the Railway Labor Act." (Decision, p. 15.)

The same paragraph concludes that the only loss occasioned by the transfer "is the incumbency status of the ATDA" (Decision, p. 15) and since that is not protected by New York Dock it need not be addressed. But if ATDA has any rights as an "incumbent bargaining representative" they "are for determination by the National Mediation Board, not this panel." The Decision, having stripped the N&W employees of their representation and Railway Labor Act rights, then reaches its final, incongruous conclusion that with regard to the Organization "the NMB has exclusive jurisdiction over representation matters."

1/ Perhaps no supporting reason is offered because this conclusion would seem clearly contrary to established law. BN, Inc. v. ARSA, (7th Cir. 1974) 503 F.2d 58, 63.

Indeed, if this be a valid award, all future arbitrations under Section 4 of the New York Dock conditions have been rendered futile for it has laid a foundation upon which the railroads can erect corporate edifices unburdened by rules of law or statutory or contractual provisions; all will be superseded by the "automatic exemption" provisions of Section 11341(a) of the Interstate Commerce Act.

On the issue of the employees' representation rights, the Decision is a gaggle of contradictions and unsupported conclusions. At page 9 the Decision identifies the SOC Supervisors as "employees who have chosen to be represented for the purpose of collective bargaining". At pages 14 and 15, it reaches a contrary conclusion in holding that the employees' loss of their representation rights and their collective bargaining agreement is no loss at all because their right to representation "was never recognized through an election under the auspices of the National Mediation Board." The distinction between "election" and "recognition" in the latter statement is itself contradictory of the historical rulings of the National Mediation Board, including those contained in its very recent decision in TWA/Ozark Airlines, 14 N.M.B. 215 (April 10, 1987).

The Decision first concludes at page 15 that the "present collective bargaining agreement [sic] between N&W and ATDA may not be carried along [when the work is transferred to Southern]"

Rec'd 5/28/87 JSB

DISSENT OF ORGANIZATION MEMBER

I must dissent from the Decision and Award (Decision) dated May 19, 1987, which was drafted by the Chairman and Neutral Member and concurred in by the Carriers' Member.

The Decision sanctions the unilateral transfer of work from Norfolk and Western Railroad SOC Supervisors and Assistant Chief Dispatchers to non-agreement personnel on the Southern Railway. The subject work is exclusively reserved to N&W employees under numerous longstanding agreements between the American Train Dispatchers Association ("ATDA" or "Organization") and the railroads which now constitute the N&W system through merger. N&W employees' exclusive right to this work was confirmed by the National Railroad Adjustment Board, Third Division in Award No. 16556 (ATDA Exhibit No. 1). The transfer of the work creates a major dispute under the Railway Labor Act.

The Decision mischaracterizes the position of the ATDA; it is replete with factual and legal errors; it renders conclusions without attempting to justify them; and, it reaches contradictory conclusions regarding the jurisdiction of the National Mediation Board, for it usurps that jurisdiction by stripping from the SOC Supervisors their representation rights while holding that the National Mediation Board "has exclusive jurisdiction over representation rights" of the ATDA.

proposed by the Carriers on November 11, 1986.


Robert O. Harris
Chairman and Neutral Member


R.S. Spanski
Carrier Member
[Concur / ~~Dissent~~]


W. G. Mahony
Organization Member
[Concur / Dissent]

May 19, 1987

The Organization offered a proposed implementing agreement which would have continued the Organization as the representative of the transferred employees and any employees subsequently hired or promoted to the SR Control Center. It also contained provisions regarding the movement of household goods and the sale of homes of transferred employees

This panel may not change the terms of the New York Dock Conditions. Only the parties may by mutual agreement modify such conditions. Since the first Carrier proposal, that of October 7, 1986, and the Organization proposal both go beyond the terms of an implementing agreement set forth in New York Dock, the second proposed Implementing Agreement of the Carriers, that of November 11, 1986, will be placed in effect.

Award

The parties shall adhere to the Implementing Agreement as proposed by the Carriers on November 11, 1986, subject only to the following:

Within a period of 14 days following the date of this Award, the parties shall meet to determine if there are any mutually agreeable revisions of the November 11, 1986, proposal. If no agreement is reached on any such changes during the above specified 14-day period, the Implementing Agreement shall be as

II

The Carriers offered a proposed implementing agreement on October 7, 1986. They offered a second proposed implementing agreement on November 11, 1986, and have submitted the latter as the agreement to be found appropriate by this panel.

The original Carrier agreement indicated that the new positions created in the SR Control Center would be offered first to N&W employees currently holding SOC positions in Roanoke. Those positions not filled would then be offered to other qualified N&W employees holding SOC seniority. It further indicated that N&W employees accepting positions would be relocated at the expense of the Carriers. Finally, it indicated that an employee who declines an offer of employment in the SR Control Center may exercise his seniority under applicable rules and agreements.

The second Carrier agreement proposes "NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta." It will also encompass all protections afforded by New York Dock conditions.

The basic difference in the two agreements is that the first agreement gives the first right to the new positions in Atlanta to SOC employees and the second only allows them to request consideration for employment in that city.

to do that. This argument bears analysis. It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ADTA may not be carried along; however this does not change the rights of individual employees. Nor does it eliminate a class of employees, since that class was never recognized through an election under the auspices of the National Mediation Board. If, as the ADTA claims, the Superintendents of Transportation are employees or subordinate officials within the meaning of the Railway Labor Act, they, as individuals, will have the right to petition the National Mediation Board for the selection of a representative for the purposes of collective bargaining. What is lost by the transfer is the incumbency status of the ADTA, a status arrived at through recognition, not through election. The protections afforded by New York Dock are to individual employees, not to their collective bargaining representatives. Whatever rights the ADTA may have under the Railway Labor Act as an "incumbent" bargaining representative are for determination by the National Mediation Board, not this panel. The NMB has exclusive jurisdiction over representation matters. See the Order by Justice O'Connor (A-716) of April 2, 1987 in Western Airlines, Inc. and Delta Air Lines, Inc. v. International Brotherhood of Teamsters and Air Transport Employees, U.S. (1987). Motion to vacate the stay orders was denied by the full Supreme Court on April 6, 1987.

its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.

The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority, to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive.

The panel hearing the instant dispute has exactly the same authority as that noted by Arbitrator Brown, quoted above. Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supercedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly evolved reconciliation of the conflict between the two sections.

The Organization has raised another point which is worthy of discussion. It states that the ICC cannot take away the collective bargaining rights of the employees involved in the coordination and that the effect of this coordination is exactly

See REA Express, Inc. v. B.R.A.C., 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and with Section 7 of the RLA which provides that arbitration awards thereunder may not diminish or extinguish any of our powers under the Interstate Commerce Act. */

*/ For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supercede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

Prior to, at the time of, and subsequent to this ICC decision, various arbitrators ruled that Section 4 effectively superceded the Section 2 protection contained in New York Dock and that new conditions could be imposed pursuant to such a Section 4 arbitration award. 2/ It should be noted that in at least two cases arbitrators who had made earlier decisions regarding the interrelationship between sections 2 and 4 have changed their position.

In the Union Pacific et al. and UTU case, Arbitrator Brown opens his discussion of the case with the following:

The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives

2/ N&W. et al. and UTU (Ables, 9/25/85); Union Pacific R.R. et al. and UTU (Brown, 1/85); C&O. Seaboard System RR. and Brotherhood of Railway Carmen (Marx, 12/15/84); Union Pacific et al. and American Train Dispatchers Association (Fredenberger, 5/27/84); BLE and Union Pacific et al. (Seidenberg, 1/17/85)

arbitration under Section 4 of the New York Dock conditions. ^{1/}

On August 23, 1985, the ICC in the Maine Central Railroad Co. case (Finance Docket No. 30532) issued a decision in which it discussed the interrelationship of the ICC orders in consolidation cases and the Railway Labor Act. In that decision, the ICC stated:

In Southern Control, the Commission observed that section 6 of RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. Southern Control was the Commission's response to a Supreme Court directive in Railway Labor Executives' Association v. N.S., 379 U.S. 199 (1964), that the Commission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.

Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration.

^{1/} N&W, Illinois Terminal RR. Co. and Railroad Yardmasters of America and UTU (Sickles, 12/10/81); N&W, Ill. Term. RR. Co. and BLE and UTU (Zumas, 2/1/82); N&W, Ill. Term. RR. Co. and UTU (Edwards, 2/11/82); B&O, Newburgh & So. Sh. Ry. Co. and BME (USW (Seidenberg, 8/31/83); B&O, Newb. & S. Sh. Ry. Co. and BLE (Fredenberger, 9/15/83).

since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system. This Panel concludes that the instant coordination was authorized by the ICC and that the question before the Panel is the application of New York Dock standards to that coordination.

The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix I to New York Dock. As noted earlier, Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of Section 4, and its authority derives from that section.

Prior to 1981, the question of whether a carrier could, through a consolidation of forces, affect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules, or working conditions, or of representation under the Railway Labor Act occur through

York Dock is appropriate for the protection of applicants' employees affected by this proceeding without any of the suggested modifications.

The basic questions, then, are whether the type of consolidation desired by the Carriers was authorized by the ICC in its decision and if it was, what are the protections afforded by New York Dock.

The Organization has contended that the consolidation of the Roanoke SOC with the Atlanta Control Center was not part of the original submission of the Carriers in which they listed the expected consolidations which would be made if the joint control was approved by the ICC. The Organization believes that only the actual consolidations specifically approved by the ICC were authorized; any other consolidation is outside the scope of the ICC decision. The language quoted above seems to belie that contention since it specifically states: "It is possible that further displacement may arise as additional coordinations occur." Had the ICC not believed that there would be additional coordinations, beyond those which had been listed in the submissions to it, it would not have needed to put that sentence into its decision. And having put it in, it must have had a reason -- the general approval of coordinations which would meet the goal of greater efficiencies upon which the rationale of the decision was based. At the hearing, testimony was received which indicates that there will be a substantial saving to the combined carrier through the planned coordination, both in capital costs

this dispute is an appropriate rearrangement under the authority granted the Carriers by the ICC decision allowing their joint control.

Finally, the Carriers contend that the Implementing Agreement which they proposed is an appropriate basis for this rearrangement of forces.

Discussion

I

As noted by the Organization, this is an unusual rearrangement of forces since it combines employees who have chosen to be represented for the purposes of collective bargaining with other employees who are not so represented. However, like all other New York Dock cases, the Panel must first look to its own authority to act.

As noted above, this proceeding is the result of a request by the Carriers in accordance with the ICC decision which allowed joint control of the Carriers. In its decision, the ICC (366 ICC 171, 230) stated:

We find that the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions.

It noted further (366 ICC 171, 231):

We find that the minimum statutory protection of New

"explicitly commands preservation of Railway Labor Act and collective bargaining agreement rights. Section 2 of Appendix I states:

The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of a railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The Organization states that even if one were to assume otherwise and also assume that the proposed SOC transfer had been presented to and approved by the ICC, that those assumptions could not be used as a basis for the elimination of collective bargaining and Railway Labor Act rights because the continued existence of those rights does not subject the proposed SOC transfer "to the risk of nonconsummation as a result of the inability of the parties to agree on a new collective bargaining agreement" as required by the ICC decision in the Maine Central decision.

The Carriers contend that the Organization's procedural arguments are without merit. They state that the Arbitration Panel has authority under Section 4 of New York Dock II to fashion an implementing agreement. The Carriers further contend that the argument regarding Section 2 is without merit since recent ICC decisions have refuted the Organization's contention and decisions have been issued by various referees under the authority contained in the ICC decisions. The Carriers also contend that the rearrangement of forces which is the subject of

Contentions of the Parties

It is the position of the Organization that it has represented the SOC Supervisors who perform power distribution duties on the N&W under an agreement entered into April 1, 1971, and that the transfer of work involved in this proceeding was not included within the list of jobs which the merged carrier intended to "abolish, create or transfer as a result of ICC approval of its application for joint control" in Finance Docket No. 29430 (Sub.-No. 1). It is the organization's position that the transfer of these jobs is not allowable under the ICC order and that the ICC and this Arbitration Panel have no authority to change wages, rules, or working conditions of employees which are protected by the Railway Labor Act and Section 11347 of the Interstate Commerce Act (49 USC 11347).

It is the Organization's second contention that even if its first contention is not agreed to, the ICC "has never claimed for itself the extraordinary statutory power to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees." It further contends that even if the ICC has such power, it could only be exercised where necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval.

Finally, the Organization contends that this Arbitration Panel, created under the ICC's New York Dock II decision,

which engines are on the fuel rack. He has some of this conversation to make sure that he minimizes his switching.

Mr. Bradley further indicated that at the present time the NS system is operated with two regions -- Northern (N&W) and Southern (Southern). When consolidation takes place it will be possible to change this system and there is consideration being given to not only rationalizing the system between North and South -- they are now generally divided but there are some anomalies because of the trackage of the two railroads -- but also to having the system configured into East and West regions instead. He also indicated that he believes that each of the STL jobs should be interchangeable and that an individual should be able to shift from one region to another.

Mr. Bradley noted that the differences between the STLs and the System Operations Center (SOC) Supervisors are in the tools which the STL uses. Because the STL utilizes the CRT, he has the ability to communicate with other members of the railroad, while the SOC board is an informational system that is available only to the people standing in the SOC.

The pay of STL's is about ten percent higher than that of SOC Supervisors although it cannot be exactly compared because the benefit packages are different and each STL has his salary set by his manager. It may be different from any other STL's salary.

would be realized. Mr. Martin further testified that because the two systems were operated separately the accounting functions were carried in the same manner as if they were independent companies and locomotives were only transferred between the railroads in large batches rather than singly.

Mr. H. H. Bradley, Assistant Vice President of Transportation of the Southern, testified that he was in charge of the Control Center in Atlanta. He described the job of Superintendent of Transportation - Locomotive (STL) as follows:

The STL when he comes on duty would discuss with the off-going STL anything unusual that has occurred during the prior eight hours of an exceptional type nature.

He would then start pulling up his screens on the CRT looking at inventories of locomotives at the major hump yards where the majority of the engines are located. These are electronic hump yards. They look at the inventory and see if there is anything unusual. The STL would know the schedules of the trains for which he has to provide locomotives.

We have an operating plan over the system, and in a normal situation the locomotives cyclicly move from one train to another train to another train and then complete the cycle. And he would have to look for exceptions, if he had a mechanical failure. And then he would have to supply another locomotive.

Then he looks and starts talking with the Chiefs in addition to a tonnage report he has available to see if we have any unusual amount of traffic. He looks to see if there have been any trains annulled that are not to be operated, that have provided extra power, or there may be a problem where there is no power at the end of a normal run, if the train has been canceled.

Looking at these by division, knowing his inventory and knowing the train schedules, he will actually assign locomotives by number into the CRT in many cases. But that is done generally with discussion with the Shop Foreman who knows which engines have been serviced,

Adjustment Board issued an award which sustained the position of ATDA. Thereafter, an agreement was reached between N&W and ATDA that the supervisors who worked out of the "power bureau" would be represented by ATDA.

The Southern, which controls its distribution of power out of Atlanta, utilizes Superintendents of Transportation, who are nonagreement officers. It has done so for at least 22 years with such personnel.

Facts

After the merger, Norfolk Southern determined to consolidate all of the control functions for the entire system in one location. Mr. J.R. Martin, Senior Assistant Vice President, Transportation Planning, of the Southern testified that Atlanta was chosen and that all of the control functions involved in the movement of cars and the assignment of costs when other railroads utilize NS tracks already have been transferred to the control center there. The only remaining consolidation is the one involved in this dispute, the assignment of locomotive power. Mr. Martin indicated that a single control center would effect efficiencies in the utilization of motive power of about one per cent. With 2,200 locomotives, this would mean 22 less locomotives would be needed, a saving of \$28 million in capital investment and a saving of \$2 million a year in operating expenses. This does not include savings in labor cost which

to the unavailability of Vice President Mullinax on the scheduled date for an executive session of the panel, "I am appointing Mr. W. G. Mahoney to replace Mr. Mullinax as our member of the arbitration board."

The parties submitted pre-hearing briefs, a hearing was held on February 26, 1987, in Roanoke, Virginia, and the parties then submitted post-hearing briefs. The panel has met twice in executive session and the matter is now ready for decision. -

Background

The N&W was itself formed as the result of several mergers in the 1960's. ATDA had agreements with each of the railroads which had merged into N&W. The agreements contained scope language which stated that the Assistant Chief Train Dispatcher would "supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work." Accordingly, the Assistant Chief Train Dispatchers issued instructions to mechanical department personnel regarding the number and identity of locomotives to be used on trains originating at their respective terminals. ATDA did not represent Train Dispatchers on the original N&W. Following the merger the N&W "power bureau" assumed responsibility for all of the merger carriers and the ATDA represented dispatchers were no longer assigned the work in question. ATDA appealed this assignment and the Third Division of the National Railroad

Appointment

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of Norfolk Southern (NS) to obtain control of the separate railroad systems of Norfolk & Western (N&W) and Southern Railroad (Southern) under Finance Docket No 29430 (Sub.-No. 1). Included in the approval order was the requirement that New York Dock II Conditions apply.

On September 12, 1986, pursuant to New York Dock II Conditions and the ICC order, N&W notified the American Train Dispatchers Association (ATDA) that it intended to transfer the work of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia. Thereafter, the parties engaged in negotiations on October 7, 27, 28, and November 10 and 11, 1986, and were unable to reach agreement upon an implementing agreement. Unable to reach agreement upon a neutral referee, on December 4, 1986, N&W requested the National Mediation Board to appoint a neutral and by letter dated December 9, 1986, Robert O. Harris was nominated to sit as the neutral. The Carriers named R. S. Spenski, Assistant Vice President - Labor Relations, as its member of the panel and the Organization designated H. E. Mullinax, Vice President, as its member. On May 13, 1987, the neutral and Carrier members of the panel were informed by R. J. Irvin, President of the American Train Dispatchers Association that due

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In the Matter of Arbitration
between
Norfolk and Western Railway Co.
Southern Railway Company
and
American Train Dispatchers Assn.
-----X

Pursuant to Article I
Section 4, N.Y. Dock II,
Conditions - ICC Finance
Docket No. 29430
(366 I.C.C. 171)

DECISION AND AWARD

Appearances

For the Carriers

Jeffrey S. Berlin, Esquire
Richardson, Berlin & Morvillo

William P. Stallsmith, Jr., Esquire
Norfolk Southern Corporation

For the Organization

William G. Mahoney, Esquire
Higsaw & Mahoney, P.C.

NATIONAL RAILWAY LABOR CONFERENCE

1901 L STREET, N.W., WASHINGTON, D.C. 20036/AREA CODE: 202-862-7200

CHARLES L. HOPKINS, Jr.

Chairman

D. P. LEE
Vice Chairman and
General Counsel

R. T. Kelly
Director of Labor Relations

G. F. DANIELS
Vice Chairman

July 15, 1987

CIRCULAR NO. 15-156

TO MEMBER ROADS:

There is attached copy of an award dated May 19, 1987 rendered by Chairman and Neutral Member Robert O. Harris in the matter of arbitration between the Norfolk and Western and Southern Railway Companies and the American Train Dispatchers Association involving application of the New York Dock protective conditions imposed pursuant to ICC Finance Docket No. 29430.

Also enclosed are the Organization Member's Dissent and the ICC's Decision of June 5, 1987 denying the ATDA's request for a stay of the effectiveness of the award.

Yours very truly,

R. T. KELLY

Director of Labor Relations

P0739

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(5) With regard to Initial Assignments we find that all employees on the integrated single seniority roster (Attachment "B") shall be afforded the opportunity to bid simultaneously in accordance with the requisite provisions of the UP Schedule on all yardmaster positions in the Omaha/Council Bluffs Terminal. The bulletining and assignment of these positions shall be administered in such a manner so as to make the effective date of these assignments concurrent with the effective date of the consolidation of the Terminal.

(6) We find that service credits shall be accorded to all Missouri Pacific employees who transfer to the Union Pacific in accordance with the Implementing Agreement. These MP employees shall be treated for Agreement purposes as though their MP service was performed on the Union Pacific Railroad.

AWARD: In order to effect these Findings and related cognate matters, and to carry out the purposes and intent of the New York Dock Conditions, the parties shall adopt and execute the Attached Implementing Agreement. (Attachment "A").



JACOB SEIDENBERG, New York
Dock Conditions Arbitrator

May 18, 1983

nate UP employees who, prior to the consolidation, worked west of the River as "OH" employees and UP employees who have worked east of the River as "CB" employees. Missouri Pacific yardmasters should be also treated and designated as employees who worked west of the River.

We find that Yardmaster positions should be designated either "OH" or "CB" assignments based on where a preponderance of the work was performed.

We find that there should be no prior rights designation to yardmasters who acquire seniority after the date of the consolidation.

A copy of the consolidated seniority roster for the Omaha/Council Bluffs Terminal, embodying these principles, is attached hereto as Attachment "B".

(4) We find with regard to Protective Benefits and Obligations thereunder, that the New York Dock Conditions as prescribed by the ICC in its Finance Docket No. 30,000 shall apply to those employees directly affected by the transfer and consolidation of the Terminal.

The attached Implementing Agreement (Attachment "A") contains the specific details pertaining to "test earnings", the affect of unemployment compensation as well as other earnings on the prescribed allowances.

The Implementing Agreement also contains the prescribed Monthly Form to be used to calculate benefits and allowances for "Dismissed" and "Displaced Employees". See Attachment "D".

consideration to such unrelated matters as bargaining agent recognition and union dues collection. The first matter is exclusively within the jurisdiction of the National Mediation Board and the second has to be decided in a forum other than this one.

(2) We find that the ICC has declared in Finance Docket 30,000 that the controlling carrier concept shall be applicable, when it held that Omaha/Council Bluffs yards were to be operated by Union Pacific as a Union Pacific single controlled terminal, as a consolidated common point. This concept is not now open to question or contest by the Organization. We find further that, consonant with this concept, is this single terminal can be operated under Union Pacific wage rates and schedule rules. Also consonant with this concept is that Missouri Pacific Yardmasters may be transferred to the Union Pacific RR and function under the Union Pacific Schedule Agreement and wage rates.

(3) While we find impressive the Carriers' arguments in favor of dovetailing into a single seniority roster for a single integrated terminal, nevertheless, we conclude, that we should accept the Organization's plea that the constructed seniority roster reflect and recognize the "prior rights" of affected employees. Acceptance of prior rights here would recognize the dominant and established role that UP yardmasters have long occupied in the Omaha and Council Bluffs yards.

We find that therefore it would be appropriate to desig-

On April 19, 1983 the Organization petitioned the Arbitrator for leave to submit a Supplemental Submission for implementing the terminal consolidation.

On May 4, 1983 both parties notified the Arbitrator that they had convened on April 19, May 2 and 3, 1983 but were unable to reconcile their differences and were at impasse. The Carriers also objected to the Organization being granted permission at this time to file a Supplemental Submission, and it maintained that the Arbitrator should proceed to draft an Implementing Agreement based on the record made at the April 18, 1983 hearing. On the same day, the Organization renewed its request for permission to file a Supplemental Submission.

On May 6, 1983, the Arbitrator issued an Award denying the Organization's request, because he found that the Organization had persisted in holding to its procedural position throughout the proceedings, and that it would be inappropriate now to allow the Organization to present a substantive position after its procedural position had been rejected.

Since the parties were unable to negotiate voluntarily an Implementing Agreement, the Arbitrator has promulgated such an Agreement which is Attachment "A" to this Decision and Award.

We also make the following conclusionary Findings in explanation of the major provisions of the attached Supplemental Agreement:

(1) We find it inappropriate, in drafting an Implementing Agreement pursuant to the New York Dock Conditions, to give

sions which resulted in the establishment of the New York Dock Conditions arbitration machinery.

On April 18, 1983 the Arbitrator met in Omaha with the parties in interest. Prior to this meeting, and in preparation thereof, the Carriers presented the Arbitrator with their pre-hearing Submission dealing both with the history of the negotiations as well as the Carriers' substantive position on the disputed issues. The Organization's Submission, while it related briefly to the history of negotiations, stressed its procedural position, namely, that it was inappropriate to arbitrate this dispute while the issue of representation was being litigated in federal appellate courts. The Organization also emphasized the untenable financial position it was being maneuvered into by the UP refusing to transmit to it the dues it was collecting from yardmasters. The Carriers reiterated that the matters that the Organization persisted in raising were matters that had to be resolved in other fora.

At the conclusion of the April 18, 1983 arbitration hearing, the Arbitrator directed the parties to continue to engage in good faith bargaining for twenty days, because it was evident to him that the parties had not bargained, except superficially, over the core issues relating to the selection and rearrangement of forces incident to the operation of a single combined terminal. The Arbitrator instructed the parties to engage in good faith bargaining until they reached agreement, but this bargaining period would not extend beyond May 9, 1983. On April 16, 1983 the Arbitrator issued an Interim Award to this effect.

On March 3, 1982 the parties met and discussed, inter alia, the concept of "controlling carrier". The Organization wanted the Carriers to agree to pay Union Pacific rates at Omaha Council Bluffs and Kansas City, but to have the Missouri Pacific Schedule Agreement apply at Kansas City and Omaha/ Council Bluffs and MP rates and schedule rules would apply at Kansas City.

The Organization also raised the issue of Bridge Dispatchers and Yardmaster training. The Carrier objected to considering the first issue because it was extraneous to this arbitration proceeding and moreover, it was a subject that was being considered a public law board on the UP property.

On March 16, 17, 18, 1983, the parties met and discussed a number of subjects. The principal focus was on seniority, with the Organization stressing the acceptance of the "prior rights" principle, with the Carriers favoring the dovetailing of seniority. At the March 16 session, the Organization again asserted that the Carrier's February 14, 1983 Notice could not be negotiated until the issues of representation and dues collection were settled. At the March 17 meeting the Carriers set forth their reasons why the "prior rights" concept was not an appropriate method of dealing with the seniority issue. The Organization persisted in seeking to get an agreement on the representation and dues matters. Despite offers and counter offers on these subjects, no agreement could be reached and negotiations broke off. On March 18 the parties commenced discus-

and was dealing with the RYA as the appropriate bargaining agent of the yardmasters.

The chronology of events involved in this dispute is:

On February 14, 1983 the Carriers served notice on the Organization of its wish to effect a consolidation of the Missouri Pacific and the Union Pacific yardmaster operations being performed at Omaha and Council Bluffs into a single combined operation controlled by the Union Pacific and under the Union Pacific Schedule Agreement rules.

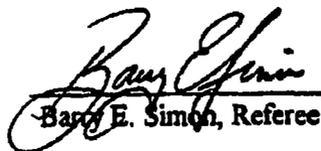
The initial bargaining session was convened on February 23, 1983 with the Carriers presenting substantive proposals in furtherance of the objectives of their February 14, 1983 Notice. The Organization took the position that it could not negotiate an implementing agreement unless the Union Pacific recognized its representatives as "first class" representatives in the same way as it did other employee representatives on the property. It added that this recognition could be evidenced by the UP issuing a formal statement stating that the RYA was the recognized bargaining agent of the yardmasters and by the UP releasing to it the dues it had collected but not forwarded to the RYA since the National Mediation Board had issued a certification to another yardmaster organization, but which NMB action had been restrained by a federal district court. The Carriers' response was that the RYA's requests regarding formal recognition and union dues collection were not proper subjects to raise in a New York Dock arbitration proceeding.

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suggested by the TCU, may expose the Carrier to liability under age discrimination laws. Therefore, such a provision would not be appropriate.

With respect to the TCU's request that dismissal allowances under a plan that permits an employee to maintain insurance coverage should not be reduced by \$500 per month, the Referee finds he has no authority to grant the relief sought by the TCU. Even with the \$500 per month reduction, the allowance to be paid is an enhancement to the benefits required under *New York Dock*. To eliminate the reduction would effectively further enhance the benefit. The TCU has not shown the Referee has the authority to grant any protective benefits above and beyond those required by *New York Dock*. Accordingly, the TCU's request must be denied.

Award: To the extent it is consistent with the above Findings, the Implementing Agreement proposed by the Carrier on March 26, 1996, with agreed upon modifications, provides an appropriate basis for the selection of forces made necessary by the transaction described in Carrier's notice of January 23, 1996. The issue of prior rights for IBEW represented employees is remanded to Carrier and the IBEW. The Referee retains jurisdiction over this issue and either party may invoke arbitration after sixty days following the date of this Award.


Barry E. Simon, Referee

Dated: April 16, 1997
Arlington Heights, Illinois

the Commission held this was a matter for the National Mediation Board acting under the Railway Labor Act.¹⁸

The Referee is not satisfied there is a necessity to forever preclude IBEW employees from bidding on subsequent vacancies at the consolidated facility. Employees holding IBEW seniority on the respective districts as of the date of the transaction should be able to bid on the positions that will be filled by IBEW represented employees when those positions become vacant on a permanent basis. Additionally, a proportional number of new positions at the facility should be available to current IBEW employees through the exercise of seniority. Not giving these employees prior rights to such positions would make it possible for the Carrier to restore the remaining 27 abolished positions and make them available only to TCU represented employees. This would not be equitable. To afford the parties an opportunity to draft their own agreement to extend such prior rights, the Referee remands this issue to the Carrier and the IBEW. The Referee, however, shall retain jurisdiction over this matter and should the parties fail to reach agreement within sixty days following the date of this Award, either party may invoke arbitration.

Turning to the TCU's objections to the Carrier's proposed agreement, the Referee finds that the Carrier's Section 6(b) reference to Julian date as a basis for "breaking the tie" when two employees have the same seniority date is a fair procedure. Using birth date, without the year of birth, essentially yields a random number which is totally unbiased. Using the year of birth, as

¹⁸CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc., Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995) slip op. at 15.

ready, the fact remains that radio repair has long been performed at this site. Carrier may have been inartful in its choice of words in some of its notices, but this does not change the fact that there already is a radio repair facility at Louisville and Carrier is transferring more jobs there.

The Award of Referee Suntrup must be distinguished from the facts herein. In that case, the Referee clearly was faced with unique circumstances not present here. The Referee does not reject the principle of "controlling carrier." Instead, he wrote:

... For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver despite good faith promises by the company about a future contract which have been made before, but are not properly before, this forum and which, yet on the other hand, have not been tested in an actual Section 6 set of negotiations. To accept the SPL's arguments before this forum would be tantamount to nullifying the labor agreements which it has negotiated with about 85 percent of its dispatchers, with the collective bargaining agent which now represents one hundred per cent of its dispatchers, in favor of an agreement which it has with the other 15 percent under an arrangement with a collective bargaining agent which has lost any and all representation rights.

In the instant case, there is no evidence Carrier selected the Louisville site for any reasons other than those it has stated, namely that it is centralized within the system and that it can take advantage of the United Parcel Service hub. There is no suggestion that the applicable agreement was a consideration, or that the agreement is more advantageous to the Carrier than any of the others. There is, therefore, no basis for the Referee to reject the "controlling carrier" principle.

In reaching the conclusion to apply the L&N/TCU Agreement to the entire facility, the Referee need not address the issue of representation. In Finance Docket No. 28905 (Sub-No. 27),

The remaining question is whether the L&N/TCU Agreement is the appropriate agreement to apply. While the Referee is sensitive to the IBEW's concerns for its membership, the question must be addressed objectively. If one single agreement is going to apply, there must be some basis for selecting that agreement. The mere fact that the majority of the employees in the consolidated facility come from the IBEW craft is not persuasive. Because those ten employees are covered by three different agreements, it is evident that no single agreement covers a significant number of the employees relative to any of the others. In fact, the agreement covering the largest number of employees (five) is the L&N/TCU Agreement.

Nor is it appropriate to make qualitative judgments about the different agreements. First of all, that would not be possible in this case as the agreements were not put into evidence. Even if they were, it would be an impossible task to determine which agreement, taken in its entirety, is "the best." Some "better" provisions of one agreement may be outweighed by "better" provisions on different matters in another agreement. Furthermore, what may be beneficial for one employee may be immaterial to another. Even on the issue of sub-contracting, which was of particular concern to the IBEW, it is impossible to determine which agreement affords the greater protection to the employees because of the different factors involved.

It is apparent that the generally accepted practice among referees is to adopt the "controlling carrier" principle. In this case, the L&N is the controlling carrier as the consolidated facility is an expansion of an existing facility already subject to the L&N/TCU Agreement. This is not a new facility, as argued by the IBEW. While Carrier might have to perform substantial work to make it

devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroad. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the Organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR Schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operation efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements.

In this case, as well, Carrier avers there would be no way to distinguish what work belonged to a particular agreement. It also notes there are significant differences in some of the basic rules of the agreements. The Referee concurs that it would hamper the efficiency and economy of the consolidation if Carrier were to be required to manage 17 employees under four (or even two¹⁷) different collective bargaining agreements. Carrier should be allowed to utilize the employees in the facility without being restricted by the artificial barriers imposed by different agreements. This is one of the objectives of the consolidation. The Referee finds it significant that the IBEW was unable to cite a single case, other than the Suntrup Award, discussed below, under *New York Dock* or any other protective condition where a Referee has imposed more than one collective bargaining agreement upon a consolidated work force. Thus, it is the Referee's conclusion that the adoption of a single collective bargaining agreement at the consolidated facility is necessary to effectuate the transaction.

¹⁷The IBEW has, in fact, asked that the B&O/IBEW Agreement be applicable to all ten IBEW jobs because it covers the majority of the IBEW jobs affected.

As the IBEW notes, the Carrier must demonstrate that its proposed changes are necessary to effectuate the transaction. The standard of "necessity" was defined in *Executives* as follows:

What, then, does it mean to say that it is necessary to modify a CBA in order to effectuate a proposed transaction? In this case the Commission reasonably interpreted this standard to mean "necessary to effectuate the purpose of the transaction." If the purpose of the lease transaction were merely to abrogate the terms of a CBA, however, then "necessity" would be no limitation at all upon the Commission's authority to set a CBA aside. We look therefore to the purpose for which the ICC has been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the "necessity" for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease).¹⁶

As noted above, the Organizations here have not disputed the necessity of consolidating the work. Obviously, Carrier will realize greater efficiency by centralization, as evidenced by the fact that it will be able to use only 17 employees in the single facility while it requires 44 employees currently. Additionally, economies will be realized by maintaining only one facility and one inventory. Finally, turnaround time will be enhanced by the proximity to the United Parcel Service hub.

What Carrier must also demonstrate is the necessity of operating this facility under a single collective bargaining agreement, rather than multiple agreements as urged by the IBEW. The record reflects that there are three IBEW Agreements covering these employees, one of which covers only two of the employees. In this regard, Carrier convincingly cites the LaRocco Award, wherein the Referee wrote:

When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal

¹⁶*Railway Labor Executives' Assn. v. U.S.* 987 F.2d 806, 815 (D.C. Cir. 1993).

of the power of arbitrators under the Washington Job Protection Agreement of 1936 and pre-1976 labor conditions.

Seniority provisions have also been historically modified with regularity by arbitrators in connection with consolidations. See *Carmen II*, 6 I.C.C.2d at 721, 736-737, 742, 742, and 746 n.22. Thus, both scope rules and seniority provisions have historically been changed without RLA bargaining and, accordingly, are not eligible for protection as "rights, privileges, and benefits."

The unions argue that section 2 of *New York Dock* gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the B&O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd. - Exemption Acquisition and Operation - Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), slip op. at 7. Therefore, we find that the issue of which union is to represent WM engineers or receive them as dues-paying members does not involve a right that must be preserved under section 2 of *New York Dock*.¹⁴

The Commission's interpretation was found by the Court of Appeals to be reasonable and "exactly what was intended by Congress."¹⁵ The Referee concludes, therefore, that the Carrier's proposed implementing agreement does not abrogate rights, privileges and benefits that Section 2 of *New York Dock* requires be preserved. The proposed agreement, in Side Letter 10, permits IBEW represented employees to elect to retain their coverage under the Supplemental Sickness Benefit plan during the protective period. The IBEW has cited no other "right, privilege or benefit," as those terms are applied, that might be abrogated by the proposed agreement.

¹⁴*CSX Corp. - Control - Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995) slip op. at 14-15.

¹⁵*United Transportation Union v. Surface Transportation Board*, D.C. Cir, March 21, 1997, at 10.

working conditions. The genesis of section 405 of the Amtrak Act was the Urban Mass Transit Act of 1962 (UMTA), which authorized federal financial assistance to state and local governments for the improvement of urban mass transit systems. Section 13(c) of that Act (now codified as 49 U.S.C. 5333(b)) required the Secretary of Labor to certify as "fair and equitable" arrangements to protect affected employees. The first requirement of section 13(c) for a "fair and equitable" arrangement was "the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise."

Since no UMTA financing could be completed without the Secretary of Labor's section 13(c) certification, a model protective agreement was developed to permit rapid and dependable processing of applications. The current regulations of the Department of Labor provide that the Secretary will certify pursuant to section 13(c) if the parties adopt the Model Agreement. 29 CFR 215.6. Paragraph 10 of the Model Agreement sets forth the type of rights, privileges, and benefits that are "preserved" (emphasis added):

(10) No employee receiving a dismissal or displacement allowance shall be deprived during his protection period, of any rights, privileges, or benefits attaching to his employment, including without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions so long as such benefits continue to be accorded to other employees of the bargaining unit, inactive *(sic)* service or furloughed as the case may be.

We believe that this is compelling evidence that the term "rights, privileges, and benefits" means the "so-called incidents of employment or fringe benefits," Southern Ry. Co. -- Control -- Central of Georgia Ry. Co., 317 L.C.C. 557, 566 (1962), and does not include scope or seniority provisions.

In any event, the particular provisions at issue here do not come within "rights, privileges, or benefits" because they have consistently been modified in the past in connection within consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions. The ATDA court looked to past conduct in consolidations when it ruled that scope rules were not among those provisions protected as "rights, privileges, and benefits." 26 F.3d at 1163. The court relied, in part, on CSX Corporation -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 I.C.C.2d 715, 736, 742 (1990) (Carmen II), and its recitation

provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary to effectuate a covered transaction. CSX, 6 I.C.C.2d 715 (1990) ("We assume that any changes in CBAs will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute"). We agree that whatever else a "fair arrangement" entails, the modification of a CBA must at a minimum be necessary to effectuate a transaction. [footnotes omitted]¹³

In that case, Referee Kasher awarded an implementing agreement that required the Springfield Terminal Railway Company, in operating leased lines, to apply the rates of pay, rules and working conditions contained in the lessor carriers' collective bargaining agreements. The Commission, finding that the preservation of the lessor carriers' rates of pay and work rules would effectively foreclose the transaction, stayed the Kasher Award and remanded that issue to the parties. Unable to reach agreement, the parties submitted the dispute to Referee Harris, whose Award modified the lessor carriers' agreements.

The Commission discussed the definitions of "rights, privileges and benefits" in its review of the Award of Referee O'Brien in the dispute involving this Carrier, the United Transportation Union and the Brotherhood of Locomotive Engineers. Because the Commission had not yet rendered a ruling on the remand in *Executives*, Referee O'Brien declined to rule on the issue of whether the Carrier's proposed changes would be contrary to existing "rights, privileges and benefits." The Commission then wrote:

The history of the phrase "rights, privileges, and benefits" indicates that it has traditionally meant what it implies -- the incidents of employment, ancillary emoluments or fringe benefits -- as opposed to the more central aspects of the work itself -- pay, rules and

¹³*Railway Labor Executives' Assn. v. U.S.*, 987 F.2d 806, 814 (D.C. Cir 1993).

Accordingly, the Referee finds that the consolidation of radio repair work at Louisville constitutes a transaction pursuant to the various orders of the Interstate Commerce Commission within the meaning of Article I, Section 1(a) of the *New York Dock* Conditions. Carrier has complied with the notice requirements of Article I, Section 4, and has properly invoked arbitration. The Referee thus finds he has jurisdiction over the matter before him.

The issue dividing the IBEW and the Carrier is whether the Carrier's proposal to place all employees at the consolidated facility under the scope of the L&N/TCU Agreement is necessary to effectuate the transaction. The IBEW further suggests Section 2 of *New York Dock* places limitations upon the Referee, namely that he must preserve the rights, privileges and benefits existing under the collective bargaining agreements. This second point requires the Referee to consider what is meant by the Section 2 requirement.

It is the Referee's conclusion the Commission's intent in Section 2 has now been clarified.

In *Railway Labor Executives' Assn v. U.S.*, the Court of Appeals wrote:

The statute clearly mandates that "rights, privileges, and benefits" afforded employees under existing CBAs be preserved. Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor — an obviously absurd proposition — § 565 (and hence § 11347) does seem to contemplate that the ICC may modify a CBA.

At that level of generality, at least, the ICC's interpretation seems eminently reasonable, indeed indisputable. The Commission has not, however, addressed the meaning, and thus the scope, of those "rights, privileges, and benefits," that must be preserved, nor has it determined specifically whether the CBA provisions at issue here are entitled to statutory protection under that rubric. We thus remand for the ICC to make that determination in the first instance.

Regardless of how the ICC may read the above provision, however, it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission

of employees who have the same employment date in the Communications Department based upon date of birth, including year of birth. The TCU also objects to the requirement in Paragraph 5 of Side Letter No. 2 that the monthly dismissal allowance be reduced by \$500 for each month needed by the employee to reach age 61.

At the hearing, the Carrier addressed three other objections raised by the TCU and reached a settlement with both Organizations. Specifically, Carrier agreed to delete the phrase "however no such claim for protective benefits shall be honored beyond ninety (90) days from the time specified in Sub-section (c) of this Section" from Section 7(e) in return for the TCU's waiver of its objection to Section 7(d). Additionally, Carrier and the Organizations agreed to delete the parenthetical phrase "except promotion to a non-contract position" from Section 9.

Findings: Neither the IBEW nor the TCU dispute the Carrier's right and need to consolidate the work of radio repair pursuant to the various ICC orders relied upon by Carrier, nor do they challenge the Carrier's selection of Louisville as the appropriate location for such consolidation. Additionally, they concur in the Carrier's formula for the allocation of personnel at the consolidated facility. The TCU further concurs with the Carrier's proposal to apply the L&N/TCU Agreement to all work and employees at the consolidated facility, although the IBEW does not. The TCU raises several objections to miscellaneous provisions of the implementing agreement, on which the IBEW was silent.

The IBEW also asks that the implementing agreement ensure that in the event the Carrier has underestimated the amount of work to be performed at the new facility, work that cannot be done at the Center be performed on the property rather than contracted to outside vendors. If the Carrier has more work for the facility than the number of jobs it initially creates can do, the IBEW desires the Carrier to be obliged to either create additional positions in the same ratio as the original positions, or have the work revert to the locations where it formerly would have been done by the positions to which it formerly would have been assigned. It argues that work should in no event be contracted out, absent agreement of the union representing the affected employees at that former location.

Position of the TCU: The TCU supports the Carrier in its adoption of the "controlling carrier" principle. It avers that the Commission and the courts have long held that the Carrier is contractually obligated to assign work to the class and craft performing such work by virtue of the scope of the collective bargaining agreement in effect on the property to which the work is being assigned. The TCU cites several Referee decisions pursuant to *New York Dock* applying this principle. It concludes that the Referee must follow the Commission's authority, arbitral precedence and established jurisdictional/representational boundaries by placing all of the coordinated work under the collective bargaining agreement already in place at Louisville.

The TCU, at the hearing, raised objections to certain parts of Carrier's March 26, 1996, proposed implementing agreement. Specifically, it asserted Section 6(b) should determine ranking

far from convinced . . . that sustaining the company's position on this matter would produce reasonable, harmonious labor relations. . . . [T]he SPL suggests that all dispatchers fall under a contract which the BLE-ATDD argues is either no contract at all [fn. omitted] and/or which was negotiated for a minority of the dispatchers at a location which is not even the dispatching location where the new dispatching center will be. For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver. . . .

The IBEW urges the Referee to follow the same approach as did Referee Suntrup, *i.e.*, direct that the existing agreements remain in effect, continuing to cover the employees they covered prior to the coordination until the parties reach a single collective bargaining agreement to cover all employees at the coordinated facility. According to the IBEW, a facility with joint union representation is not unprecedented on this property. It cites IBEW and TCU represented employees working side-by-side, performing essentially the same work, at Atlanta.

The IBEW further objects to the Carrier's proposal that would have all future vacancies arising at the new facility being filled through the L&N/TCU Agreement, which would foreclose other IBEW represented employees from opportunities for this work. Instead, the IBEW proposes that the implementing agreement provide that new positions that are created and vacancies that occur after the initial transaction be filled in a manner that retains the ratio of BRS/IBEW/TCU workers that existed initially. It suggests that openings that occur due to the retirement, separation or transfer of a former C&O, B&O, C&OCT or SCL maintainer be first bulletined to other IBEW-represented employees on that former property and, if not filled by that process, then be offered to other IBEW employees elsewhere on the system before being bulletined to other crafts.

resolution of jurisdictional issues from questions of continuing contract application. It concludes, therefore, that resort to the Mediation Board is not the appropriate forum for determining the continuing application of the collective bargaining agreements to the transferred positions.

The IBEW asks the Referee to ensure that transferred employees will have their "rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges and benefits . . . under . . . existing collective bargaining agreements or otherwise" preserved as required by Section 2 of *New York Dock*. This, says the IBEW, is the Referee's prime responsibility. Insofar as the Carrier's intent, argues the IBEW, is to subject the transferring employees to terms and conditions of employment inferior to those they now enjoy by virtue of agreement or otherwise, the Referee is authorized by Section 4 of *New York Dock* to direct preservation of the superior terms and conditions for these employees as a condition for implementation of the transaction.

The IBEW cites the decision of Referee Suntrup in *Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company v. Brotherhood of Locomotive Engineers - ATDD Division*, (May 25, 1994), wherein the employees, under the Carrier's plan, would have been covered by an agreement with the Dispatchers Steering Committee, which had represented dispatchers on the former Denver & Rio Grande Western Railroad. As in the instant case, says the IBEW, the dispatchers transferring to Denver, constituted the majority of the consolidated workforce and were working under the agreement with the American Train Dispatchers Association. The IBEW quotes Referee Suntrup, noting he was

privileges and benefits" be applied to the IBEW represented employees at the new facility. Citing *Railway Labor Executives' Assn. v. U.S.*⁹ ("*Executives*"), the IBEW asserts §11347 of the Interstate Commerce Act (as well as its successor, §11326(a) of the ICC Termination Act) "clearly mandates that 'rights, privileges, and benefits' afforded employees under existing CBAs be preserved."¹⁰ The IBEW concludes that *Executives* holds that a *New York Dock Referee* is prohibited from modifying those parts of collective bargaining agreements which establish "rights, privileges or benefits" for labor and allows the modification of other parts of agreements only when "necessary to effectuate a transaction."¹¹

The IBEW argues Carrier is required to prove that the purported benefits of the proposed consolidation cannot be achieved unless the existing agreements are overridden. Absent such a showing of necessity, says the IBEW, the Carrier's position that those agreements should no longer apply to its members must be rejected. In support of its position, the IBEW cites *Norfolk & Western Railway Co. v. ATDA*.¹² That case, says the IBEW, also requires that any "decision to override the carriers' obligations [must be] consistent with the labor protective requirements of §11347."

The IBEW denies that the issue of which collective bargaining agreement will apply is a representation issue. It notes the National Mediation Board has distinguished its jurisdiction over the

⁹987 F.2d 806 (D.C. Cir. 1993).

¹⁰*Id.* at 814.

¹¹*Id.* at 814-815.

¹²499 U.S. 117 (1991).

these employees stand to lose much in the way of rights, privileges and benefits by not continuing to work under the IBEW Agreements. The IBEW insists there is nothing in its Agreements that could not be applied to their continued performance of radio repair work at the new location.

The IBEW disputes the Carrier's contention that the consolidation will take place at an existing facility. It submits the Centralized Radio Service Center is being created especially for this transaction, and currently has neither employees nor a collective bargaining agreement to cover work at the Center. It contends the building to be used could not accommodate the new facility without major modifications. It notes all of the current Louisville jobs will be abolished and all of the positions at the new facility are identified by Carrier as "new positions." It cites Carrier's submission as saying Carrier proposes "to create a single radio service center" and locate it at Louisville. This language, says the IBEW, is evidence the Center has not existed prior to this transaction.

The IBEW states the Carrier proposes to apply the L&N/TCU Agreement solely on the basis of geography, but the fact that the Center will be located within the confines of what was once the L&N is pure fortuity. It notes the L&N has not existed for years and that the work to be performed by the BRS and IBEW employees has not been done before on the L&N. It suggests allowing mere location to govern the terms and conditions of employment would enable the Carrier to manipulate its labor relations by relocating assignments across former property lines to avoid dealing with certain unions.

The IBEW argues Section 2 of *New York Dock* requires the existing IBEW Agreements setting forth "rates of pay, rules, working conditions and all collective bargaining and other rights,

his apparent belief that the SP was attempting to obtain an unfair bargaining advantage over the ATDD by forcing it to succeed to the independent union's non-traditional collective bargaining agreement.

Carrier argues that its proposed change meets the standard set by the Commission that it be necessary to realize the efficiencies of the approved merger. It submits the consolidation could not be accomplished if it had to continue repairing the radios on the former properties, or to have multiple sets of radio repairmen under one roof working under separate agreements.

Finally, the Carrier avers its offer of enhanced protective benefits, e.g., separation allowances, moving expenses, etc., is contingent upon the work being coordinated under a single collective bargaining agreement. Otherwise, argues the Carrier, the Referee has no authority to grant protective benefits in excess of those contained in the *New York Dock* Conditions.

Position of the IBEW: The IBEW argues that employees it represents who transfer to Louisville should continue to be covered by their IBEW Agreements. It notes that 61% of the 44 jobs to be abolished (27 jobs) are held by IBEW members, and that 59% of the 17 new jobs (10 jobs) will be held by IBEW maintainers. It avers their average hourly wage is \$16.48⁴ plus a 65¢ per hour skill differential. It further says they enjoy significant protection against subcontracting and are covered by a supplemental sickness plan in lieu of sick leave. The IBEW concludes, therefore, that

⁴\$16.46 on the C&O, \$16.48 on the B&O and B&OCT, and \$16.51 on the SCL. At the hearing the IBEW acknowledged that the current IBEW rate of pay is lower than the TCU rate of pay.

whether the proposed changes would be contrary to the condition that "rights, privileges and benefits" shall be preserved. Carrier asserts the Commission authorized the consolidation of rosters under single agreements,⁶ and was upheld by the Court of Appeals.⁷

Carrier distinguishes this case from *Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company v. Brotherhood of Locomotive Engineers - ATDD Division*, (Referee Suntrup, May 25, 1994), cited by the IBEW. While Referee Suntrup found the work was being coordinated at a new dispatching center, Carrier denies it is proposing to build a new facility. It insists the existing facility for the radio repair shop at Osborn Yard on the former L&N at Louisville has been remodeled to handle the increased work and employees at that location. Carrier also avers Referee Suntrup's Award involved unique facts not present in the instant case. In particular, Carrier notes the SP train dispatchers who were going to the new facility were represented by the American Train Dispatchers Department of the BLE, while the DRGW dispatchers had been represented by an independent union, which had lost its status as representative when the National Mediation Board found that the SP and the DRGW constituted a single carrier and certified the ATDD as representative of all dispatchers. Carrier asserts Referee Suntrup was reluctant to put all dispatchers under the DRGW Agreement when the union had lost its status as representative. Carrier suggests Referee Suntrup's reluctance also came from

⁶CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc., Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995).

⁷*United Transportation Union v. Surface Transportation Board*, D.C. Cir., March 21, 1997.

necessity to implement the approved transaction. *CSX — Control — Chessie and Seaboard Cost Line*, F.D. 28905 (Sub-No. 22); ICC Decision issued June 25, 1988.

In line with the above decision, Carrier asserts that a single working agreement at the coordinated facility is plainly necessary for safe and efficient operations. It submits that its decision to propose the L&N/TCU Agreement was based upon the "controlling carrier concept," under which the work is placed within the scope of the agreement in effect at the location receiving the work. Carrier notes this concept was applied by Referee LaRocco in the above cited case. On this property, Carrier cites fifteen instances between 1985 and 1993 where employees were placed under different collective bargaining agreements when work was consolidated.

Carrier further cites the decision of Referee Ables in *CSX v. American Train Dispatchers Association* (November 11, 1988), in which Carrier was authorized to consolidate power distribution work at Jacksonville, Florida, with the work being performed by managerial employees. This decision, notes the Carrier, was affirmed by the Commission⁴ and the Court of Appeals.⁵

Carrier also cites the decision of Referee O'Brien wherein this Carrier sought to combine the employees of various properties onto single seniority rosters of the Brotherhood of Locomotive Engineers and the United Transportation Union under the agreements applicable to the former B&O. While Referee O'Brien found the changes proposed by the Carrier were necessary to attain the public transportation benefits of the authorized transactions, he left it to the Commission to determine

⁴*CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 23).

⁵*American Train Dispatchers Association v. I.C.C.*, 26 F.3d 1157 (D.C. Cir. 1994).

welfare benefits, notes the Carrier, are covered by national agreements, to which all of the non-operating crafts are a party.

Notwithstanding this fact, the Carrier argues it would be unrealistic and impractical to operate a consolidated facility while maintaining several different working agreements for all the employees working there. Because of the disparity between some of the rules in these agreements, the Carrier asserts it would effectively have separate facilities under one roof if more than one agreement were to be applied. Furthermore, the Carrier contends there would be no way to distinguish what work belonged to a particular agreement. It insists it is essential to have a single working agreement if it is to realize the economies that are anticipated when the work is centralized and coordinated.

Carrier cites the decision of Referee LaRocco in *BRS v. NW/SR/CG* (February 9, 1989), involving the consolidation of shop signal repair work from the three carriers to a single facility at Roanoke, Virginia. It quotes Referee LaRocco as follows:

When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroads. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operational efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements. The ICC has unequivocally ruled that existing collective bargaining agreements are superseded by the

Department with the Carriers, their ranking in the class will be determined by their Julian calendar date of birth.

* * *

8. Employees who accept positions in the coordinated CSXT Radio Shop will be credited with prior service under existing agreements applicable to them prior to the coordination for purposes of annual vacations, sick leave, pass privileges, personal leave days, job stabilization and other service-related benefits under the Schedule Agreement between former L&N and TCU.

* * *

Side Letter No. 10

It was agreed that any IBEW or BRS represented employees transferring to the coordinated operation will be given the option of remaining under the coverage of the Supplemental Sickness Benefit plans applicable to them for a period of time equal to no greater than six years following their transfer. This election will be in lieu of the sick leave benefits they would have otherwise accrued under the former L&N TCU Communications Agreement.

This election must be made in writing at the time of transfer and will be irrevocable.

The Carrier asserts this agreement would not change the terms of its agreements with either the BRS or the IBEW on the other former properties. Although those agreements would cease to apply to the work being transferred and consolidated, Carrier points out they would continue to apply to radio repair work not included in the consolidation.

Carrier alleges placing the employees at the consolidated facility under the L&N/TCU agreement would not work a significant change in most of the rules under which these employees work. According to the Carrier, many of the terms of the various former property communications agreements are either the same or very similar. Some subjects, such as vacations and health and

(b) With respect to the IBEW represented properties (B&O, B&OCT, C&O Southern and SCL) the positions allocated to the IBEW represented employees shall be advertised to all active employees holding positions as Communications Employees on the districts listed above. The positions will be awarded to the senior qualified applicants from the applicable districts: i.e., 2 positions for the C&O Southern, 4 positions for the B&O, and 4 positions for the SCL. In the event one or all of the positions are not filled by employees from the C&O Southern, B&O or SCL respectively, the positions will be awarded to the senior qualified applicant(s) from the other IBEW represented properties, considered as a group, if any. If there are no qualified applicants the positions will be filled in accordance with paragraph (d) below.

(c) With respect to the TCU represented property (L&N) the positions allocated to the L&N represented employees shall be advertised to all active employees holding positions as Communications Employees on the former L&N. The positions will be awarded to the senior qualified applicants from the applicable district with preference being given to the incumbents of the positions abolished as a result of the coordination. In the event one or all of the positions are not filled by incumbents of the abolished positions, the positions will be awarded to the senior qualified employees making application. If there are no qualified applicants the positions will be filled in accordance with paragraph (d) below.

(d) In the event any of the positions referred to in (a),³ (b) and/or (c) remain to be filled, they will be filled under the terms of the L&N TCU Communications Agreement.

* * *

6. (a) Employees assigned to positions in the consolidated operation at Louisville pursuant to Section 4(a) or (b) of this agreement will have their seniority on the district on which working transferred to and dovetailed onto the former L&N System Communications Class 1 and 1-A Rosters and will have their names removed from their current district roster. Current L&N TCU Communications Employees assigned to positions in the consolidated operation at Louisville pursuant to Section 4(c) or (d), who have not previously established seniority in Class 1-A shall establish such seniority pursuant to the L&N TCU Schedule Agreement.

(b) In the event that two or more employees have the same seniority date the employee having the earlier employment date in the Communications Department with any of the CSXT affiliated carriers will be the senior of such employees in ranking for that class. If two (or more) such employees have the same employment date in the Communications

³Section 4(a) provides for the selection of forces from BRS represented properties, and is similar in construction to Section 4(b).

facility will allow it to take advantage of the fact that United Parcel Service maintains its centralized distribution hub there. Any radio repaired at Louisville by 11:00 pm can be delivered to any location on the Carrier's system by the following day, according to the Carrier. These efficiencies and improvements, argues the Carrier, will enable it to reduce 27 positions. Some of these position reductions, says the Carrier, will be accomplished from blanked positions that have been vacant since the original notice was served.

The Carrier has proposed an implementing agreement that would, *inter alia*, have the effect of placing all of the radio repair positions at Louisville under the former L&N/TCU Agreement, which is the agreement currently governing radio repair work at Louisville. In this regard, the relevant provisions of the Carrier's proposed agreement, dated March 26, 1996, read as follows:

1. The work of evaluating, diagnosing and repairing of Locomotive Radios, RDUs (Receiver Display Units), Defect Detector Radios, MCPs (Mobile Communications Packages), Portable Radios, Vehicle and other Mobile Equipment Radios, except for peripheral repairs (knobs, microphones and antennas), circuit boards for BCPs (Base Communications Packages) and Base Station (Dispatcher) Radios, which is currently being performed throughout the CSXT System, will be transferred to and consolidated at Louisville, Kentucky, where such work will thereafter be performed on a coordinated CSXT basis by Carrier under the scope of the Schedule Agreement between former L&N and TCU. . . .

2. It is further understood and agreed that the work covered by the scope and classification rules of the respective schedule agreements which is not being specifically coordinated in this Agreement will continue to [be] performed under such respective schedule agreements.

* * *

4. Positions established in the coordinated shop will be initially filled according to the following procedures:

* * *

Position of the Carrier:² The Carrier notes that although the various railroads have been merged into the CSXT, the work forces on the former carriers, as well as the work they protect, have not yet been fully coordinated into a single system. It avers the continued operation of separate radio repair facilities on the former properties results in significant inefficiencies in the use of equipment, facilities and employees, impeding the Carrier's ability to provide the rail service required in today's highly competitive market. Without the coordination it seeks, Carrier asserts it is required to maintain duplicate facilities, parts inventories, tools and work benches. It contends that employees at some of these locations do not have sufficient radio repair work to keep them fully occupied, requiring them to perform other communications work during their workdays. Further, Carrier says it is required to maintain artificially inflated radio inventories due to the inconsistent and sometimes inefficient means of repairing radios and the logistical problems of having the operable radios where they are needed to run trains.

To remedy these problems, Carrier proposes to create a single radio service center that will inspect, evaluate, test and repair a wide range of radio equipment required for it to operate its transportation system. This consolidation, according to the Carrier, will permit it to repair radios more efficiently, reduce radio down time, return radios to customers on a more timely basis and allow it to reduce inventories and equipment. Carrier says its selection of Louisville as the site for this

²To a large extent, the Carrier's submission, as well as its supplemental submission, dealt with issues that were raised only by the Brotherhood of Railroad Signalmen. To the extent that those issues were not raised by either the IBEW or the TCU, the Referee considers them no longer to be in dispute. Accordingly, this portion of the Discussion will synopsize only those issues that are still in dispute between the remaining parties.

A hearing in this matter was scheduled for March 18, 1997, in Rosemont, Illinois. On March 13, 1997, the Carrier reached an agreement with the Brotherhood of Railroad Signalmen on this matter. It was therefore concluded that the BRS was no longer a party to this dispute. The hearing proceeded with the Carrier, the IBEW and the TCU.

Issues Presented:

The Carrier proposes the following Statement of Issue:

(1) Does the Implementing Agreement proposed by the Carriers on March 26, 1996, provide an appropriate basis for the selection of forces made necessary by the transaction described in Carrier's notice of January 23, 1996?

(2) If the answer to (1) above is negative, then what would be the appropriate basis for the selection of forces?

The IBEW, not taking issue with the proportional selection process for the initial filling of newly-created positions in the new Centralized Service Center as described in the Carrier's March 26, 1996, proposal, suggests the additional issue:

What collective bargaining agreement(s) should be applicable in the newly-created Centralized Radio Service Center in Louisville?

It is the Referee's decision that the issue proposed by the Carrier is broad enough to encompass the issue proposed by the IBEW. Accordingly, the Referee adopts the Carrier's Statement of Issue.

On January 23, 1996, pursuant to the above orders of the Commission, Carrier served notice upon the International Brotherhood of Electrical Workers ("IBEW"), the Transportation Communications International Union ("TCU"), the Brotherhood of Railroad Signalmen ("BRS") and the employees represented by these Organizations. This notice advised of the Carrier's intent to "consolidate at Louisville, Kentucky certain radio repair work which is currently being performed throughout the CSXT System and to have such work performed thereafter on a coordinated basis." According to this notice, Carrier intended to abolish a total of 44 positions at 24 different locations throughout the system and establish 17 new positions in a Centralized Radio Service Center at Louisville. The notice indicated Carrier intended this transaction to occur on or about April 22, 1996. The work involved would be the repair function for all radios with the exception of end of train devices (EOT's) and vehicle radios.

Subsequent to the service of this notice, the Carrier met with representatives of the three organizations with the objective of reaching an agreement to implement the transaction. When the parties were unable to reach agreement, the Carrier, on July 3, 1996, invoked the arbitration provisions of Article I, Section 4 of *New York Dock*. Receiving no response from the Organizations, the Carrier, by letter dated July 15, 1996, asked the National Mediation Board to appoint a neutral Referee pursuant to Section 4(1) of *New York Dock*. The National Mediation Board subsequently appointed a neutral Referee, who later found it necessary to resign the appointment. Consequently, by letter dated January 15, 1997, the National Mediation Board appointed Barry E. Simon to serve as the neutral Referee.

Background: CSX Transportation, Inc. ("Carrier," "CSXT") is the result of several mergers authorized by the Interstate Commerce Commission ("Commission"), beginning with the decision on September 23, 1980, in ICC Finance Docket No. 28905, to permit CSX Corporation to control the railroad subsidiaries of Chessie System, Inc. ("Chessie") and Seaboard Coast Line Industries, Inc. ("SCLI").¹ At that time, the railroads controlled by Chessie included the Chesapeake & Ohio ("C&O"), the Baltimore & Ohio ("B&O") and the Western Maryland ("WM"). SCLI consisted of the Seaboard Coast Line ("SCL"), the Louisville and Nashville ("L&N"), the Clinchfield and several smaller carriers. This decision also authorized CSX Corporation to control the Richmond, Fredericksburg & Potomac ("RF&P"). In 1982, in Finance Docket No. 30053, the Commission approved the merger of L&N into SCL, with the resultant company being renamed Seaboard System Railroad. In 1987, in Finance Dockets 31033 and 31106, the Commission approved the merger of B&O into C&O, and then C&O into CSX. The Commission then approved the merger of WM into CSXT in 1988 (Finance Docket 31296, and the merger of Clinchfield into CSXT in 1990 (Finance Docket 31695). Finally, in 1992, in Finance Docket 32020, the Commission approved an agreement for CSXT to operate the properties of RF&P in the name and account of CSXT. In each of these transactions, the Commission imposed protective conditions as set forth in *New York Dock Railway — Control — Brooklyn Eastern District Terminal*, 354 I.C.C. 399 ("New York Dock").

¹CSX Corp. — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980).

**ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NOS. 28905, 30053, 31033, 31106, 31296, 31695 AND 32020**

In the Matter of Arbitration Between:)
)
CSX TRANSPORTATION, INC.,)
)
Carrier,)
)
and)
) **Radio Repair Consolidation**
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS and)
)
TRANSPORTATION COMMUNICATIONS)
INTERNATIONAL UNION,)
)
Organizations.)

OPINION AND AWARD

Date of Hearing: March 18, 1997
Location of Hearing: Rosemont, Illinois
Date of Award: April 11, 1997

Appearances:

For the Carrier:

James B. Allred, Director, Labor Relations
Nicholas S. Yovanovic, Esq., Assistant General Counsel
Ronald M. Johnson, Esq., Akin, Gump, Strauss, Hauer & Feld, L.L.P.

For the International Brotherhood of Electrical Workers:

Glen A. Heinz, General Chairman
Daniel L. Davis, International Vice President
Michael S. Wolly, Esq., Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C.

For the Transportation Communications International Union:

L. H. Tackett, General Chairman
Carl H. Brockett, International Vice President

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We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiency and benefits which were the prime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

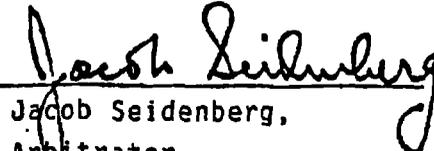
We conclude that the approved proposals, as amended, covering the three common points are an appropriate method for the selection and assignment of forces, and should be effected by the prescribed implementing agreements.

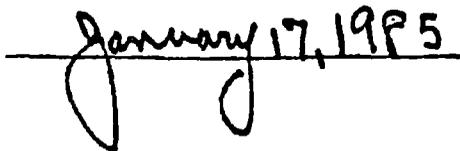
Decision:

Pursuant to Article I, Section 4 of the New York Dock Conditions, we find that the implementing agreement set forth in Carriers' Attachment No. 1 shall be the method for selecting and assigning the forces for the Salina operation.

We find further that implementing agreement, as amended, set forth in Carriers' Attachment No. 2, shall be the method for selecting and assigning the forces for the McPherson-El Dorado operation.

We also find that the implementing agreement set forth in Carriers' Attachment No. 3 shall be the method for selecting and assigning the forces in the Beloit operations.


Jacob Seidenberg,
Arbitrator


January 17, 1985

The Carriers propose to abolish these listed MP operated Local Assignments and serve Beloit with a consolidated operation to be operated by MP crews because most of the employees living near Beloit are MP employees. The consolidated assignment shall operate, however, under UP rules and schedule provisions.

The Organization contends there is no valid basis to compel MP employees to operate UP rules. The MP employees should be allowed their own rules, rates of pay and working conditions when they function under their allocated proration.

Findings:

We find the allocation of work of Beloit as proposed by the Carriers is fair and reasonable and therefore the description of work set forth in Attachment No. 3, attached to Carriers' Submission, should be governed by the Carriers' proposed implementing agreement.

Accordingly, Carriers' Attachment No. 3 with its attachments shall constitute the implementing agreement to handle operations at Beloit, including the designated territory listed in aforesaid Attachment.

In summary we are aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected Organization and employees. However, the Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement.

of pay and working conditions.

Findings:

We find that the objectives of the coordination and consolidation would be facilitated by the Carriers' proposals as set forth in their Attachment NO. 2 attached to Carriers' Submission, with one exception, namely, that when the MP engineers operate the local freight assignment their home terminal should be El Dorado rather than Salina. The great bulk of MP engineers live in the vicinity of El Dorado and there is no persuasive reason why these engineers should travel approximately 90 miles to work that assignment. However, we find that in the interest of uniformity and consistency of operations that the assignment should operate under UP rules rather than shift back and forth periodically between MP and UP.

Accordingly, we find that Carriers' Attachment No. 2 with its Attachments set forth in its Submission, except as herein amended, shall constitute the implementing agreement to handle the UP and MP traffic between Salina and El Dorado.

Beloit

Beloit is serviced both by UP and MP. The Up services it with local freight assignments operating out of Salina while the MP services it with a local assignment operating out of Concordia. In addition the MP operates several local freight assignments operating west of Frankfort such as:

Atchison-Concordia Local
Concordia-Stockton Local
Down-Lenora Local

ment (attachment No. 1) with its addenda, more effectively achieves the consolidation and coordination of the operations at Salina. We are not at liberty to overlook that the ICC approved the consolidation under the common control of the Union Pacific Railway System. Accordingly, we find that Carriers' Attachment No. 1, dated September 18, 1984, constitutes the appropriate arrangement for the Salina operations and it is to be the implementing agreement for the Salina operation.

McPherson-El Dorado

McPherson is serviced by both the UP and MP. The UP services McPherson by a local freight assignment operating out of Salina while the MP services it by a local freight assignment operating out of El Dorado. Salina is 35.4 miles from McPherson while El Dorado is 61.7 miles from McPherson.

The Carriers propose to serve McPherson by combining both local freight assignments into a single local to be governed by UP schedule and operating rules. The UP would man the operation for five months and the MP for seven months. The Organization's counter proposal is to apportion the work - 36% to UP and 64% to the MP. The Carriers propose Salina to be the home terminal, and the Organization counter proposes that Salina be the home terminal, when the UP engineers are manning the assignment and El Dorado will be the home terminal when MP engineers are protecting the work. The Organization further proposes that when MP engineers operate their allotted proration they will operate under MP rules and MP schedule provisions covering rates

The Carriers now propose to service Salina by a single UP traveling road switcher which will operate within a 50 miles area of Salina under the UP's operating and schedule rules. The MP traveling switcher will be abolished.

The Organization proposes that the Road Switcher shall be operated by MP employees and it will not perform any switching within the switching limits of Salina.

The Carrier also sets forth how road operations will be handled into and out of Salina and off the MP's Salina Division. These proposals are to have UP crews handle traffic routed via UP while MP crews will handle traffic routed via the MP. Employees adversely affected will receive the protection of the New York Dock Conditions.

The Organization stresses that MP engineers will only be able to exercise their seniority on their own seniority district. If they transfer to another seniority district, they would be listed after the most junior employee in that district. The Organization stresses that since the New York Dock Conditions now offer maximum protection for only six years, this does not effectively afford any meaningful protection to younger employees. It urges the work should be prorated on the basis of engine hours or road miles.

Findings:

After reviewing the detailed proposal contained in the draft implementing agreements of the parties attached to their respective Submissions, we conclude that the Carriers Implementing Agree-

ing under a different set of operating rules and different labor agreement than the ones under which they formerly functioned.

We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.

When we turn to the substantive aspects of the dispute dealing with the three common points, there are three separate and discrete matters which will be treated in considering the proposed implementing agreements.

Salina, Kansas

This point is currently served by both the UP and MP. Both Carriers serve it by freight assignments. The UP also serves it by switch engine assignments, and the MP by a traveling switch engine.

The Carrier maintains that the arbitration awards rendered prior to October 19, 1983, must be deemed to have been superceded by the ICC's Clarification Decision. Since the ICC authored the New York Dock Conditions, its holdings as to the intent and purpose of these Conditions must be deemed superior to any arbitral decisions interpreting the Conditions. The Carriers add the ICC Clarification makes it patently clear that no existing working conditions in a collective bargaining agreement barred the execution of the ICC approved Consolidation.

The Carrier further stresses that since the ICC rendered its Clarification Decision there have been two arbitration awards which held there was jurisdiction in an Article I, Section 4 arbitration proceeding to consider changes in existing collective bargaining agreements.

The Carrier states on the basis of the present record there can be no doubt that this Arbitrator, acting under Section 4, has the jurisdiction and authority to approve the transfer of work from the Missouri Pacific to the Union Pacific and place the transferred work under the operating rules and collective bargaining agreements of the Union Pacific.

Findings: (Procedural)

On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operat-

by mutual consent. If further asserts that it would be ironic to transmute the New York Dock Conditions from a shield designed to protect employee interests to a sword to deprive employees of their Railway Labor Act protections.

The Organization alludes to several (6) arbitration awards which have found that arbitrators acting under the mandate of Section 4 lack the authority to modify or vitiate existing collective bargaining agreements, in light of the explicit provisions of Section 2. The Organization notes that the Carriers, despite all of the cited awards, did not even request the ICC to overrule these arbitration awards. The Carriers should not be permitted in the instant case to overrule these well reasoned awards.

The Organization notes that the October 19, 1983 ICC clarification has been appealed to the Federal Courts and the appeal is still pending.

Carrier's Position (Procedural)

The Carrier states that since the ICC issued its October 19, 1983 Clarification, the jurisdictional question raised by the Organization is moot and settled. The ICC has held its authority over railroad consolidations is exclusive and plenary, and its approval of a transaction exempts such a transaction from the requirements of all laws including the Railway Labor Act. The Carriers note that the ICC Clarification states:

"If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payments of specified benefits, our jurisdiction to approve transactions requiring changes in the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

merits, we must review a procedural objection which the Organization has interposed to the Arbitrator's jurisdiction to consider the dispute.

Organization's Position (Procedural)

The Organization notes that Article I, Section 2 of the ICC prescribed New York Dock Conditions states:

"2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Organization maintains that the Carriers seek to avoid their statutory obligation under the Railway Labor Act, not to unilaterally change rates of pay or terms of working conditions, except in accordance with the provisions of Section 6 of the RLA. The Organization specifically protests the Carriers' efforts to get rid of the Local Agreement of August 10, 1946 in effect on the Missouri Pacific as well as other working conditions. The Organization stresses that at each of the three common points the Carriers do not propose to abandon tracks or facilities. It just seeks to substitute Union Pacific employees and Union Pacific rules for Missouri Pacific employees and Missouri Pacific rules without complying with the RLA requirements.

The Organization asserts the explicit language of Section 2 of Article I, proscribed the Carriers from utilizing Section 4 of Article I as a means to change existing agreements, except by

1982 the petitions of the Union Pacific RR, the Missouri Pacific RR and the Western Pacific RR to consolidate and create a new railway system.

In the course of effectuating this new railroad network, the affected Carriers sought to achieve certain "common point consolidations". The parties to this dispute reached agreement on seven common points, but were unable, after six conferences, to reach agreement at the following three common points: Salina, Kansas, McPherson, Kansas; and Beloit, Kansas.

On October 30, 1984, the disputants agreed to submit the matter to arbitration, as provided for by Article I, Section 4 of the New York Dock Conditions. These Conditions had been imposed by the Interstate Commerce Commission upon the Carriers as protections for the employees of the three Carriers affected by the consolidation.

The parties selected the Undersigned to hear and decide the dispute.

On October 19, 1983, the ICC issued a Decision under Finance Docker No. 30,000 (Sub - No. 18) in response to petitions filed both by the BLE and UTU relative to the Commission's plenary jurisdiction over rail consolidation vis a vis the requirements of the Railway Labor Act.

The substantive aspects of the dispute stem from the notices served by the Carriers on the Organization pertaining to the selection and assignment of forces at the three common points, and counter proposals thereto. However, before we can deal with the

In the Matter of Arbitration :
Between :
Brotherhood of Locomotive Engineers :
and : DECISION
Union Pacific Railroad Company :
Missouri Pacific Railroad Company :
.. .. . :
.. .. . :

File : Finance Docket No. 30,000
Arbitrator : Jacob Seidenberg, Esquire
Hearing : December 13, 1984
Appearances : Brotherhood of Locomotive Engineers
W.A. Hirst - Vice President
E.E. Watson - Vice President

Carriers
R.D. Meredith-Director Labor Relations -
Union Pacific
R.P. Mitchell-Director Labor Relations -
Missouri Pacific

Post Hearing Briefs Received : December 29, 1984

- Issues : i). Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and have transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?
- 2). Does the proposed transfer of work constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock transaction?

Background: The instant dispute has been precipitated as a result of the Interstate Commerce Commission approving on October 20,

NATIONAL RAILWAY LABOR CONFERENCE

1901 L STREET, N.W., WASHINGTON, D.C. 20038/AREA CODE: 202-862-7200

CHARLES I. HOPKINS, Jr.

Chairman

ROBERT BROWN
Vice Chairman

R. T. Kelly
Director of Labor Relations

D. P. LEE
Vice Chairman and
General Counsel

March 14, 1985

CIRCULAR NO. 15-83

TO MEMBER ROADS:

As information, there is attached copy of an award rendered on January 17, 1985 by Arbitrator Jacob Seidenberg in the matter of arbitration involving the Union Pacific and Missouri Pacific Railroad Companies and the Brotherhood of Locomotive Engineers, concerning application of the New York Dock conditions provided in ICC Finance Docket No. 30,000.

This award is significant in allowing the carrier to transfer work under one collective bargaining agreement, and have such transferred work performed under a different collective bargaining agreement, pursuant to the Arbitrator's jurisdiction granted under Article I, Section 4 of the New York Dock Conditions. This award effectively overturns a prior award of Arbitrator Seidenberg involving the Baltimore and Ohio Railroad Company, Newburgh and South Shore Railway Company, Brotherhood of Maintenance of Way Employees and the United Steel Workers of America, dated August 31, 1983 and distributed in our Circular No. 15-56 dated March 20, 1984.

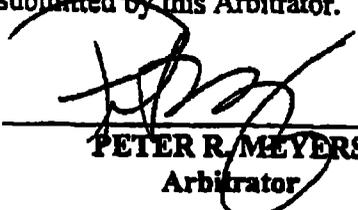
Yours truly,

R. T. KELLY

Director of Labor Relations

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posed by the Carrier are answered in both the negative and the affirmative. Certain provisions from each party's proposed implementing agreement, including all of those provisions as to which the record reveals that the parties have agreed, are included in the Implementing Agreement submitted by this Arbitrator.



PETER R. MEYERS
Arbitrator

**Dated this 15th day of October, 1997
in Chicago, Illinois.**

established so that the described loans could be processed and then reach an affected employee in a timely fashion, and how such a system could be protected from potential problems of abuse. Moreover, if such loans are to be made available only for employees who have at least five days of unused vacation time, it is possible that this would benefit a relatively small number of employees. There is no showing that such a provision would be workable or would contribute in any meaningful way to the fairness and equity of the proposed system operations.

As for Section 12, the Organization's assertion that the election of allowances contained in the DRGW contract must be preserved as a negotiated benefit ignores the fact that the implementation of the Carrier's proposed system operations means that the DRGW agreement, as well as the SP agreement, are being abrogated. Adopting such a system of election for employees throughout the Carrier's entire maintenance of way operation in its western territory would be a costly administrative burden that would do little or nothing to advance the fairness and equity of the situation. This provision shall not be included in the implementing agreement.

Award

The first Question at Issue posed by the Organization is answered in the affirmative.

The second Question at Issue posed by the Organization is answered in the affirmative.

The final Question at Issue posed by the Organization and the Question at issue

system operations be at the highest prevailing rates allowed maintenance of way employees filling similar positions on the UP, DRGW, and SP.

As for Section 11 of the Organization's proposal, it was apparent at the hearing that the parties reached an agreement as to the concept underlying this measure, although there were some differences between the parties as to language. Under these circumstances, it is appropriate to include this provision, as proposed by the Organization.

Sections 6, 10, and 12 of the Organization's proposal fare less well. Section 6 suggests the imposition of a cap of 1000 miles on the distance from home base that an employee would be required to travel to a work site. Given the geographic size of the Carrier's western territory, such a cap would completely undercut the implementation of the proposed system operation. Such a cap cannot be imposed as part of the implementing agreement if it is to have its intended effect. Section 10 proposes a system of issuing short-term loans, made against unused vacation time, to assist employees with expenses associated with returns to service. As the Organization itself indicates in its submission, however, the rules generally applicable to employees represented by the Organization, presumably including both those employed by this Carrier and those employed by other carriers, call for *per diem* meal and lodging allowances, as well as travel allowances, that are paid after the actual expenses are incurred. If this is the system that is in place and followed by carriers generally, it would be inappropriate to require this Carrier to adopt a less advantageous one. It also is difficult to comprehend how such a system could be

The Organization's final Question at Issue and the single Question at Issue posed by the Carrier seek essentially the same answer: which of the parties' proposals constitutes the more fair and equitable basis for implementing the proposed system operations. Prior to invoking these Section 4 arbitration proceedings, the parties did meet and negotiate over the terms of an implementing agreement; as shown in their respective proposed implementing agreements, the parties were able to reach agreement on a substantial number of issues. These areas of agreement must form the basis of the implementing agreement developed through this proceeding. Accordingly, all of those provisions that the parties both have indicated were agreed upon form the basis of the implementing agreement developed here.

The Organization's proposal contains some measures in addition to those upon which the parties reached agreement. Focusing on those proposed additional terms that the Organization emphasized in its submission, Sections 9 and 11 of the Organization's proposal both merit inclusion in the implementing agreement. Section 9 refers to rates of pay for positions in the proposed system operations, and it mandates that highest rate provided among the SP, DRGW, and UP prevail as the rate of pay applicable to these positions. Such a proposal is appropriate, in that employees who fill these positions will be assuming certain additional burdens and hardships, particularly the burden of having to work in areas much farther from their home bases than they are now required to work. Fairness and equity require that the rates of pay applicable to the positions in the proposed

maintenance of way work is to be consolidated into a more efficient, economical system operation, as is necessary to achieve the purposes of the approved merger, then it is necessary for the parties to operate under a single collective bargaining agreement.

As is its right, the Carrier has chosen to adopt the provisions of the collective bargaining agreement between UP and BMWE to govern its maintenance of way operations in the western portion of the combined system. The Organization has not argued that one of the other relevant contracts should be adopted instead of the one chosen by the Carrier. The Carrier's election means that the relevant SP and DRGW system production gang agreements are effectively abrogated. There is no legitimate basis for insisting that the parties attempt to operate under several collective bargaining agreements, when it is abundantly clear that the post-merger consolidated rail operation can exist and do business most efficiently if the maintenance of way employees in the expansive western territory of the consolidated system are working under a single set of contractual provisions, seniority protections, and work rules. One can understand the frustration felt by the Union after having negotiated collective bargaining agreements that are now abrogated by the current law in this area. However, in answer to the second Question at Issue Proposed by the Organization, this Arbitrator finds that it is necessary to abrogate the SP and DRGW system production gang agreements and Article XVI of the September 26, 1996, BMWE-NCCC agreement, as well as to modify the UP system production gang agreements, in order to most efficiently and economically carry out the transaction.

western territory effectively would become a single seniority district under the Carrier's proposals. On this record, it is evident that under the particular circumstances surrounding the approved merger underlying this proceeding, the implementation of system operations for the Carrier's maintenance of way work, as proposed in the Carrier's February 4, 1997, notice, will yield significant economies and efficiencies in its operations.

As the ICC/STB repeatedly has found, such efficiencies and economies constitute a public transportation benefit. Moreover, this is precisely the showing that the Carrier must make in this proceeding to support its proposal for the implementation of system operations. The purpose of the approved merger is to generate a transportation benefit for the public. As emphasized by the United States Court of Appeals for the District of Columbia Circuit, transportation benefits include the promotion of economical and efficient transportation. *Railway Labor Executives Association*, 987 F.2d 806, 815 (D.C. Cir. 1993).

It is not possible to properly implement a system operation, and achieve the economies and efficiencies associated with such a consolidation, if a carrier and organization attempt to continue to operate under several collective bargaining agreements. Conflicting contractual provisions, differences in work rules, and basic problems of coordination between and across several collective bargaining agreements inevitably will cut into, and perhaps completely destroy, any possibility of achieving the efficient, coordinated, economical operation promised by a rail consolidation. If the Carrier's

The Organization's second Proposed Question at Issue, whether it is necessary to abrogate these various agreements in order to carry out the transaction, also must be answered in the affirmative. It generally has been recognized that rail consolidations, such as the one underlying this proceeding, generate a public transportation benefit to the extent that they lead to more efficient and economical operations. Rail consolidations, if properly effectuated, can mean more streamlined operations, with increased efficiency in the assignment of employees and the completion of work projects. In this proceeding, the Carrier has presented competent evidence that these very efficiencies and economies can be realized in connection with the merger at issue if it is allowed to implement system operations for its maintenance of way work. The other side of this contention is, of course, that without the implementation of such a system operation, it will not be possible to achieve all of the economies and efficiencies that a rail consolidation typically is designed to yield.

The Carrier convincingly has shown that if it implements a system operation, then it will be able to schedule its maintenance of way employees in a more efficient and productive manner. It will be possible for the Carrier to schedule work projects over its entire western territory, thereby making allowances for weather extremes and corridor traffic needs. The need to abolish and re-bid positions on various road work gangs as the work crosses over currently existing seniority district boundaries, and the delay and administrative costs associated with these steps, also would be eliminated; the entire

Commerce Act, to override the Railway Labor Act and the collective bargaining agreements as necessary to achieve the economies and efficiencies that are the purpose of the underlying rail consolidation. Again, a line of ICC/STB decisions, as well as federal court decisions, culminating in the United States Supreme Court's decision in *Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991), expressly hold that such authority is a fundamental part of the process through which a rail consolidation is effectuated.

The ICC/STB previously has considered and rejected the Organization's assertion that Section 4 proceedings, such as this one, essentially are limited to physical transfers of work and the coordination of operations in terminal areas following a merger or consolidation. There is no express support in either the statutory law or relevant decisional precedent for the Organization's contention that any other adjustments associated with the implementation of a rail consolidation must be made through collective bargaining under the Railway Labor Act. The overwhelming weight of relevant authority conclusively establishes that *New York Dock* arbitrators have the authority, in Section 4 proceedings, to override Railway Labor Act procedures and collective bargaining agreements as necessary to achieve the economies and efficiencies that flow from an approved merger. This Arbitrator accordingly has authority to modify, as necessary, to carry out the transaction, the September 26, 1996, BMW- NCCC agreement, as well as the relevant UP, SP, and DRGW system production gang agreements.

In approving the UP/SP merger, the STB imposed the *New York Dock* protections on the rail consolidation. Article I, Section 1(a) of the *New York Dock Conditions* defines "transaction" as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." There can be no question that in approving the merger, and imposing the *New York Dock* provisions, the STB authorized the Carrier to act so as to achieve the economies and efficiencies of the merger. In compliance with the procedures mandated in the *New York Dock Conditions*, the Carrier issued its February 4, 1997, notice, which contains the required specifics associated with its proposal to establish system operations affecting maintenance of way employees working in its western territory. The operational changes that the Carrier has proposed are directly related to the STB-approved merger that is the foundation of this proceeding. Because the Carrier's February 4, 1997, notice proposes a course of action to effectuate the STB-approved merger, a course of action whereby the Carrier seeks to consolidate and unify its maintenance of way forces and operations, the notice does, in fact, concern a *New York Dock* transaction. After reviewing the extensive materials submitted by the parties, this Arbitrator must find that the first Question at Issue posed by the Organization must be answered in the affirmative. Accordingly, this Arbitrator has the authority to consider the merits of the matter presented here.

The extensive relevant precedent submitted by the parties also leaves no doubt that this Arbitrator has authority, under Sections 11341(a) and 11347 of the Interstate

Decision

This Arbitrator has carefully reviewed all of the evidence and testimony in the record, as well as the written briefs submitted by the parties. In this proceeding, each side has posed certain Questions at Issue, each of which must be answered. These Questions at Issue highlight various aspects of the fundamental dispute between the Carrier and the Organization here: whether and how a system operation for the Carrier's maintenance of way work in its western territory should be implemented?

The first question that must be addressed is one posed by the Organization: Does the UP's notice of February 4, 1997, concern a "transaction" under Section 1(a) of *New York Dock*? This question raises what is, essentially, a jurisdictional issue. If the February 4, 1997, notice does not concern a *New York Dock* transaction, then this Board cannot proceed to any of the substantive issues presented here. There is extensive decisional precedent available on this point from the ICC/STB, and it must be emphasized that because this Arbitrator's authority flows directly from the STB, this Arbitrator is bound to follow decisions and rulings issued by the STB and its predecessor, the ICC. After a thorough review of the numerous documents, court decisions, arbitration awards, and law review articles submitted by the parties, this Arbitrator must find that that precedent overwhelmingly establishes that the Carrier's February 4, 1997, notice does concern a "transaction," as that term is defined in Article I, Section 1(a), of the *New York Dock Conditions*.

unobstructed business.

The Carrier maintains that the different collective bargaining agreements and the various seniority districts exacerbate all of these problems. The Carrier asserts that extending the present UP system operations to encompass the SP/WL, DRGW, and WP makes sense for both business and the employees. The Carrier emphasizes that system operations would allow the employees an opportunity to move to seasonal work, rather than be furloughed. In addition, the Carrier would have greater flexibility to work around climatic changes and corridor traffic needs. The Carrier further stresses that under the proposed system operations, it can accomplish more with less, thus realizing the economies and efficiencies of the merger.

The Carrier emphasizes that its proposed changes are necessary to achieve the public transportation benefits of the merger. As the ICC previously has found, consolidating carriers achieve cost reductions, and these cost reductions are a public benefit. The Carrier asserts that its proposed implementing agreement is designed to promote more economical and efficient transportation; and it places the burden of *New York Dock* protections on the Carrier when it implements these economies and efficiencies. The Carrier maintains that its proposed implementing agreement complies with the goals of the STB's decision approving the merger. The Carrier ultimately argues that its proposed implementing agreement should be adopted.

Oregon in November through mid-December. With the current collective bargaining agreements in place, the Carrier cannot make changes that would eliminate or alleviate problems caused by scheduling in such different climates without incurring delay, additional manpower needs, and greater costs. The Carrier asserts that if all of these systems are put under the Union Pacific collective bargaining agreement, then it could schedule crews to work in the southern and western areas from late fall through early spring, then move the crews to the northern regions from late spring through early fall.

The Carrier additionally argues that the current system also results in manpower shortages within a seniority district when road work is done within that district. Positions are left temporarily vacant due to a maintenance of way project because employees are taken from their regular maintenance positions to work on the road crew. Moreover, when a project crosses seniority district lines, the positions are all abolished and then re-bid for the new seniority district, which affects the continuity of the crew and the work. The Carrier maintains that in a system without seniority districts, as it proposes, the mobility of the work force would not face such limits and employees could be kept working in suitable climates throughout the year. In addition, gangs would benefit from continuity through the elimination of the need to re-bid; the Carrier asserts that a crew that has worked together for some time will be more productive than a new group of employees. Moreover, with separate collective bargaining agreements applying to the different east-west corridors, work currently is scheduled in such a way that none of the corridors is left open for

arbitrators have authority to modify or set aside collective bargaining agreements as necessary to realize the merger efficiencies identified by the carrier.

The Carrier goes on to argue that both STB and judicial precedent establish that the promotion of more economical and efficient transportation constitutes a public transportation benefit. The Carrier therefore asserts that because the transportation benefit flowing to the public from the underlying transaction in this matter will be effectuated by the operational efficiency associated with system operations, its proposed implementing agreement should be imposed here.

The Carrier then points out that as a result of the UP/SP merger, it currently has ten system tie gangs and twelve system rail gangs working across its Western Territory. Some of the gangs are on UP lines, others on DRGW lines, and the rest on SP lines. Moreover, these various gangs are separated by different seniority districts that are split between these lines, and the seniority districts even split the lines internally. The Carrier contends that under the current system and collective bargaining agreements, the movement and efficiency of all the rail and tie gangs are hindered by climate changes, manpower shortages, and equipment allocation problems.

As an example of these various hindrances, the Carrier points out that due to work-schedule limitations caused by conflicting seniority rosters, the 1997 schedule was not able to account for climate concerns. One tie gang worked from June through October in southern Arizona and New Mexico, while another tie gang is scheduled to work in northern

approved transaction, such as the merger at issue. The Carrier emphasizes that it also well established that the Section 11341(a) exemption for approved transactions extends to subsidiary transactions that fulfill the purposes of the main control transaction. As applied to the instant matter, the proposed establishment of system operations is a subsidiary transaction that fulfills the purposes of the approved merger, the main control transaction, by achieving the economies and efficiencies, for the public benefit, that lie at the heart of the merger. The Carrier maintains that there is a direct causal relation between the UP/SP merger coordination approved by the STB and the operational changes that it seeks in this proceeding to implement that coordination. This Arbitrator therefore has the jurisdictional authority to modify the collective bargaining agreements, as proposed by the Carrier, because these modifications are necessary to effectuate the efficiencies and economies of the merger underlying this proceeding.

Moreover, the Carrier asserts that the definition of "transaction" contained in Article I, Section 1, of *New York Dock* includes the transfer of work and employees in order to effectuate an approved merger and achieve the economies and efficiencies that were the motives for seeking the merger. The Carrier asserts that it is well established that the ICC/STB and, by extension, *New York Dock* arbitrators have the jurisdictional authority to transfer work and employees from one collective bargaining agreement to another, notwithstanding contrary requirements of the Railway Labor Act or the collective bargaining agreements themselves. It similarly is well established that *New York Dock*

expenses; under this section, the Carrier, and not the employee, would subsidize the Carrier's start-up costs for system gangs. The Organization then argues that its proposed Section 11 incorporates a rule that applies to PEB 219 production gangs under Article XVI of the September 26, 1996, agreement. The Organization points out that because the Carrier is seeking to obtain PEB-219-style system gang rules, it is fair that the Carrier also accept PEB 219 system gang financial obligations, as its competitor has. The Organization further asserts that its proposed Section 12 adopts the DRGW election of allowances, which is a right, privilege, or benefit that cannot be taken from DRGW employees. The Organization maintains that these allowances are not part of an employee's rate of pay, but instead are a negotiated benefit that partially reimburses the employee for the cost of living away from home. For ease of administration, the Organization proposes that the election of allowances be available to all employees in the system operations.

The Carrier's Position

The Carrier initially contends that this Arbitrator has both the jurisdictional authority and the obligation to adopt the Carrier's proposed implementing agreement. The Carrier points out that neutrals in Article I, Section 4, proceedings act as agents of the STB; they are therefore bound by ICC/STB precedent. Both the STB and the federal courts have definitively established that *New York Dock* arbitrators have authority, under Sections 11341(a) and 11347 of the Interstate Commerce Act, to override Railway Labor Act procedures and collective bargaining agreements as necessary to carry out an ICC/STB

portions that it wants. The Organization argues that a full imposition of PEB 219 rules, as amended by the September 26, 1996, agreement, would be fair to employees, and it would not give the Carrier an advantage over its competitors, such as BNSF, which operate under the full PEB 219 production gang rules.

The Organization points out that of the fifteen sections and one appendix contained in its proposal, the parties agreed in principal as to ten sections and the appendix. The Organization asserts that the remainder of its proposed sections merit inclusion in any implementing agreement that is put in place between the parties. The Organization then focused on each of these five sections.

The Organization asserts that its proposed Section 6 applies a tentatively agreed-upon rule, placing a limit of 1000 miles that an employee would be required to travel to work from his home territory, to all employees in system operations. The Organization also maintains that its proposed Section 9, mandating that positions in system operations will be paid at the highest rate extant for that positions on SP, DRGW, or UP, is legitimate under PEB 219. The Organization contends that if the Carrier considers these system operations to be essential, then it should pay for them at the highest rates prevailing in the merged system. The Organization's proposed Section 10 is designed to ameliorate the economic hardship to employees returning to service after furlough. This section would use unused vacation as collateral for a cash advance from the Carrier to cover the initial costs to a furloughed employee of returning to work, including travel, meal, and lodging

that the 1991 elections by carriers, either to accept or reject the PEB 219 regional and system gang production rules, should be frozen. The Organization contends that PEB 229's findings should be given great weight here. The Organization maintains that the Carrier now is trying to use *New York Dock* as an end run around decisions that it made during Railway Labor Act proceedings, decisions that carried long-term consequences. The Carrier's position here has nothing to do with the Railway Labor Act barring merger efficiencies; instead this matter has to do with the Carrier previously making what it now believes were incorrect choices.

The Organization then emphasizes that the Carrier's last proposed implementing agreement permitted the UP, SP, and DRGW employees to refuse to work on the territories of the other railroads. Such an arrangement would preserve the pre-merger system gang operations for current employees, and it would extend new seniority rules only to yet-to-be-hired employees. The Organization asserts that the acquisition of such prospective contractual rights is a matter for bargaining under the Railway Labor Act.

The Organization further contends that if this Arbitrator does fashion an implementing agreement, then the Organization's proposed arrangement should be selected. The Organization argues that its proposed implementing agreement is fair and equitable to the employees' interests. The Organization's proposal essentially provides that if the Carrier is to obtain PEB work rules under *New York Dock*, then it must be required to assume all of those rules; the Carrier cannot be allowed to pick and choose only those

Carrier itself has proposed, for example, to maintain three separate system maintenance of way operations, and it has kept the UP and SP maintenance of way operations separate, except for system gang operations, through *New York Dock* implementing agreements. The Organization therefore asserts that the narrow question presented is whether the creation of a UP-SP-DRGW system production gang territory, and the corresponding abrogation of the SP and DRGW agreements and Article XVI of the September 26, 1996, agreement, is necessary to carry out the UP-SP merger. The Organization contends this is not necessary.

The Organization goes on to point out that the Carrier chose, on three separate occasions since 1991, to end its efforts under the Railway Labor Act to seek the same system gang rules that it seeks here. The most recent such occasion was in July 1997, after it served the *New York Dock* notice at issue here, when the Carrier agreed to perpetuate its earlier election not to operate regional or system production gangs over the SP and DRGW. The Organization contends that if the Carrier truly believed that system production operations over all carriers coming under its common control were "necessary" to carry out this and earlier mergers, then it would have elected, in 1991, to take the rights granted to it by PEB 219. The Carrier's actions demonstrate that these rules are not necessary to the operation of a merged carrier. The Organization additionally points to a determination by PEB 229, which both the Carrier and the Organization extensively briefed regarding system production gang rules, that such rules are not necessary; PEB 229 recommended

Carrier's existing voluntary agreements, made after the effective date of the UP-SP merger, that it would not seek PEB 219 regional or system gang rules bar the February 4th notice.

The Organization then contends that even if the Carrier's notice does concern a transaction under *New York Dock*, the Carrier cannot show that abrogating the SP and DRGW system production gang agreements, as well as Article XVI of the September 26, 1996, agreement between the Organization and the National Carriers' Conference Committee ("NCCC"), is necessary to carry out the UP-SP merger. The Organization acknowledges that the UP-SP merger allows the Carrier to utilize maintenance of way equipment throughout the merged system, to plan maintenance of way capital projects on a system-wide basis, and to create a system-wide maintenance of way budget. The Organization points out, however, that none of the collective bargaining agreements at issue prevent such actions, nor do they prevent the public from obtaining any reasonable transportation benefits from the merger.

The Organization asserts that the collective bargaining agreements do limit the distance from home that maintenance of way employees may be required to work; the contracts set territorial limits on the scope of the system production gang operations. To the extent that any collective bargaining agreement puts such a territorial limit in place, it limits any carrier's flexibility in the assignment of employees. The Organization contends that the existence of a contractual term that limits a carrier's operational flexibility cannot be considered a term that must be overridden *per se*. The Organization points out that the

Carrier's proposal is appropriate for collective bargaining, but does not concern a *New York Dock* transaction. The Union points out that this Carrier, as well as others, sought to obtain through bargaining under the Railway Labor Act the same type of rules that the Carrier seeks here. The Carrier previously argued to PEB 229 that it needed Railway Labor Act bargaining relief to operate regional or system production gangs, and it did not then suggest that *New York Dock* might provide the same relief. The Organization points out that the parties have fully and fairly battled over regional and system production gangs for more than eleven years under the Railway Labor Act. The Organization suggests that the Carrier may be frustrated by its inability to get its way under the Railway Labor Act, so it now is advancing the novel theory that everything occurring under the Railway Labor Act has no effect because the operation of regional or system production gangs over carriers coming under common control actually is a transaction under *New York Dock*. The Organization contends that this is a frivolous and destabilizing theory, and it should be rejected.

Moreover, the history of the Carrier's dealings with the Organization, including three agreements in which the Carrier pledged to not try to operate system production gangs in the manner proposed in its notice, serves as an estoppel against the Carrier in this proceeding. The Organization asserts that the Carrier's bargaining with the Organization, pursuant to the Railway Labor Act, over the very rules it now seeks under *New York Dock* constitutes an admission that its notice is invalid. The Organization emphasizes that the

change in the status of the former UP, SP, and DRGW employees, does not constitute a "coordination," so it cannot be a transaction under *New York Dock*. The reported WJPA decisions establish that coordinations involve the transfer of work from one carrier to another, or the closing of facilities and the corresponding consolidation of work from those facilities to a new central location. The Union maintains that there are no reported WJPA decisions concerning a "coordination" of maintenance of way forces similar to what the Carrier proposes in this proceeding.

The Union stresses that in its proposal, the Carrier is not seeking to join facilities or transfer work from one carrier to another; instead, the Carrier is seeking to expand the territory over which UP, SP, and DRGW employees must exercise their seniority in order to maintain their right to regional or system production gang work. The Organization asserts that the Carrier's proposal most closely resembles a proposed carrier action in a WJPA case that the arbitrator held was not a coordination. The Carrier's proposal amounts only to a change in crew assignments that simply would result in a larger seniority district for system operations. The Organization points out that under the Carrier's proposal, the SP would continue to operate separately, under different work rules from those used by the UP. The Organization contends that the Carrier's proposal is a legitimate one for collective bargaining under the Railway Labor Act, but it does not concern a transaction under *New York Dock*.

The Union also emphasizes that the parties' past dealings demonstrate that the

(“UP”), Southern Pacific Western Lines (“SPWL”), UP(WP), and Denver & Rio Grande Western Railroad (“DRGW”) territories.

The Organization reserved its right to challenge the legitimacy of the Carrier's February 4, 1997, notice, but it acknowledged receipt of the notice and agreed to meet with the Carrier to discuss the proposed system operations. The parties met and engaged in negotiations, but they were unable to reach an agreement as to the proposed system operations or how it would be implemented. The parties did, however, reach tentative agreements as to certain issues; most of these appear to be included in the proposed implementing agreements that the parties submitted in the course of these proceedings.

Because the parties were unsuccessful in reaching an implementing agreement, the arbitration provisions contained in Article I, Section 4, of the *New York Dock Conditions* were invoked.

The Organization's Position

The Organization initially contends that the Carrier's notice of February 4, 1997, does not concern a “transaction” as that term is defined in Article 1, Section 1, of *New York Dock*. Because this issue is jurisdictional, if the Carrier's notice does not concern a transaction, then this Arbitrator is without authority to proceed any further. Contending that “transaction” is synonymous with the term “coordination” that is used under the Washington Job Protection Agreement (“WJPA”), the Union maintains that the seniority reorganization proposed in the Carrier's notice, which it previously characterized as a

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

Factual Background

This matter originates with the Union Pacific Corporation's ("UPC") filing, on November 30, 1995, of an application with the Interstate Commerce Commission ("ICC") seeking to obtain approval of a proposed merger of the rail carriers controlled by UPC with the rail carriers controlled by Southern Pacific Rail Corporation. The Surface Transportation Board ("STB"), the ICC's successor agency, subsequently approved the proposed merger, and it imposed the employee protective conditions found in the *New York Dock Conditions* upon the Carrier in implementing the approved merger.

As required by *New York Dock*, the Carrier issued a notice, on February 4, 1997, of its intention to establish system operations under the provisions of the collective bargaining agreement between Union Pacific Railroad and the Brotherhood of Maintenance of Way Employees. The proposed system operations, if implemented, will affect maintenance of way employees working in the Carrier's western territory, which includes Union Pacific

1. **Definitions.** - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

...

4. **Notice of agreement of decision.** -- (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to the application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

Question at Issue Posed by the Carrier

Does the Carrier's Proposed Arbitration Award constitute a fair and equitable basis for the selection and assignment of forces under a *New York Dock* proceeding so that the economies and efficiencies - the public transportation benefit - which the STB envisioned when it approved the underlying rail consolidation of the SP into the Union Pacific will be achieved?

Questions at Issue Posed by the Organization

Does the UP's notice of February 4, 1997 concern a "transaction" under Section 1(a) of *New York Dock*?

If the UP's notice does concern a transaction, is it necessary to abrogate Article XVI of the September 26, 1996 BMW- NCCC agreement that applies to UP, SP and DRGW; abrogate the relevant SP and DRGW system production gang agreements; and modify the UP system production gang agreements in order to carry out the transaction?

If it is necessary to abrogate all of the above agreements, which arrangement is more fair and equitable to the interests of the affected employees: BMW's or UP's?

Relevant Contract Provisions

NEW YORK DOCK CONDITIONS

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

Introduction

This is a proceeding under Article I, Section 4, of the *New York Dock Conditions*. Upon application by the Union Pacific Corporation, the Surface Transportation Board (hereinafter "STB"), successor to the Interstate Commerce Commission, approved a merger between rail carriers controlled by the Union Pacific Corporation with rail carriers controlled by Southern Pacific Corporation. In approving this merger, the STB imposed the employee protective conditions known as the *New York Dock Conditions*. By letter dated February 4, 1997, the Union Pacific Railroad Company (hereinafter "the Carrier") notified the Brotherhood of Maintenance of Way Employees (hereinafter "the Organization") of its intent to establish system operations affecting maintenance of way employees working primarily in the western territory of the merged system. The Organization acknowledged receipt of the notice and agreed to meet with the Carrier, although it expressly reserved the right to challenge the legitimacy of the notice. The parties accordingly met and attempted to reach an implementing agreement, but ultimately were unsuccessful.

The arbitration provisions of *New York Dock* subsequently were invoked. Pursuant to Article I, Section 4, of the *New York Dock Conditions*, this matter then came to be heard before Neutral Arbitrator Peter R. Meyers on September 16, 1997, at Chicago, Illinois. The parties additionally filed written submissions in support of their respective positions.

**ARBITRATION PROCEEDING
UNDER NEW YORK DOCK IMPLEMENTING AGREEMENT
ARTICLE I, SECTION 4**

In the Matter of the Arbitration between:

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

and

**UNION PACIFIC RAILROAD
COMPANY**

**OPINION AND AWARD
Issue: Assignment of Forces**

Date of Hearing: September 16, 1997
Place of Hearing: Chicago, Illinois
Date of Award: October 15, 1997

PETER R. MEYERS, Arbitrator
360 East Randolph Street, Suite 3104
Chicago, Illinois 60601
312-616-1500

APPEARANCES

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mon-point coordination projects, mechanical and engineering department coordinations, locomotive and car utilization improvements, and internal rerouting efficiencies. Each of these projects is discussed separately below." *Ibid.*

2727, 113 L.Ed.2d 95, 59 USLW 4189, 118 Lab.Cas. P 10,598

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In the discussion that followed, the ICC did discuss plans to expand the car production facilities at Raceland, Kentucky in order to make cars for a member line that had been buying its cars from an independent manufacturer. The ICC found that the applicants had failed to show that the public would derive any benefit from this plan. There was no discussion of the consolidation of that facility by closing Seaboard's car repair shop in Waycross, Georgia. Nor did the ICC discuss the consolidation of locomotive works in *Norfolk Southern Corp.-Control-Norfolk & W.R. Co. and Southern R. Co.*, 366 I.C.C. 173 (1982).

*143 I cannot subscribe to a late-blooming interpretation of a 71-year-old immunity statute that gives the Commission a roving power-exercisable years after a merger has been approved and consummated to impair the obligations of private contracts that may "prevent the efficiencies of consolidation from being achieved." *Ante*, at 1165. The Court's decision may represent a "better" policy choice than the one Congress actually made in 1920, cf. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-101, 111 S.Ct. 1138, 1148, 113 L.Ed.2d 68 (1991) but it is neither an accurate reading of the command that Congress issued in 1920, nor is it a just disposition of claims based on valid private contracts.

I respectfully dissent.

U.S. Dist. Col., 1991.

Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n
499 U.S. 117, 111 S.Ct. 1156, 136 L.R.R.M. (BNA)

lows that what Michigan law might give these dissenters on a windingup or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service....

.....

"We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id.*, 334 U.S., at 200-201, 68 S.Ct., at 968.

It is true that the effect of the *Schwabacher* decision was to extinguish whatever contractual rights the dissenting shareholders possessed as a matter of Michigan law. But the Court did require the ICC, on remand, to consider whatever value the Michigan law claims might have in connection with its final conclusion that the merger plan was "just and reasonable." A fair reading of the entire opinion makes it clear that the holding was based more on the ICC's "complete control of the capital structure to result from a merger," *id.*, at 195, 68 S.Ct., at 965, than on the exemption at issue in these cases. *Schwabacher* cannot fairly be read as authorizing carriers to renounce private contracts that limit the benefits achievable through the merger.

*142 III

There is tension between the Court's interpretation of the exemption that is now codified in 49 U.S.C. § 11341(a) and the labor-protection conditions set forth in 49 U.S.C. § 11347. The latter section requires an ICC order approving a railroad merger to

impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat. 1337, as amended, 45 U.S.C. § 565. One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the *New York Dock* conditions described by the Court, *ante*, at 1159. As the Court notes, that condition provides that the benefits protected " 'under applicable laws and/or existing collective bargaining agreements ... shall be preserved unless changed by future collective bargaining agreements.' " *Ibid.* (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining agreements would survive any ICC approved merger.

As I noted in my separate opinion in *ICC v. Locomotive Engineers*, 482 U.S. 270, 298, 107 S.Ct. 2360, 2376, 96 L.Ed.2d 222 (1987), the statutory immunity provision in § 11341 is self-executing and becomes effective at the time of the ICC approval. "The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." *Ibid.* (footnote omitted). In neither of the cases before the Court today did the ICC approval of the merger purport to modify or terminate any collective-bargaining agreement. The ICC approval orders were entered in 1980 and **1171 1982 and contained no mention of either of the proposed transfers of personnel that are now at issue and about which the union was first notified several years after the ICC orders were entered. ^{FN8}

FN8. In the ICC order approving the merger of Chessie System, Inc., and Seaboard Coast Line Industries, Inc., the ICC discussed how the coordination of facilities would generate significant cost reductions and improved economic efficiency. *CSX Corp.-Control-Chessie System, Inc., and Seaboard Coastline Industries, Inc.*, 363 I.C.C. 521, 556 (1980). The ICC noted:

"These savings will spring from com-

Gulf, Mobile & Ohio, 282 I.C.C. at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its 'contractual obligations for the payment of rent'). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act." 279 U.S.App.D.C., at 244-245, 880 F.2d, at 567-568.

FN6. "No State shall ... pass any ... Law impairing the Obligation of Contracts...." U.S. Const., Art. I, § 10, cl. 1.

FN7. After reviewing the legislative history, Judge Ginsburg concluded:

"From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. Cf. *Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906, 917 (D.C.Cir.1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties." 279 U.S.App.D.C., at 247, 880 F.2d, at 570.

*140 II

In my opinion, the Court's reliance on the decision in *Schwabacher v. United States*, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948), is misplaced. In that case, the owners of two percent of the outstanding preferred stock of the Pere Marquette Railway brought suit in the United States District Court to set aside an ICC order approving a merger between that corporation and the Chesapeake and Ohio Railway Corporation. In approving the merger, the ICC had found that the market value of plaintiffs' preferred shares ranged, at different times, from \$87 to \$99 per share, and that the stock that they received in exchange pursuant to the merger agreement would have realized about \$90 and \$111 on the same dates. Thus, the terms of the merger, as applied to the plaintiffs' class, were just and reasonable. Plaintiffs contended, however, that the exchange value of their shares amounted to \$172.50 per share because the merger was a "liquidation" as a matter of Michigan law, and the Pere Marquette Charter provided that in the event of liquidation or dissolution, the preferred shareholders were entitled to receive full payment of par value plus all accrued unpaid dividends.

The ICC order approving the merger did not resolve the Michigan law question. The ICC considered the issue too insignificant to affect the validity of the entire transaction, and left the matter for resolution by negotiation or later litigation. On appeal from the **1170 District Court's judgment sustaining the ICC order, this Court held that the ICC's finding that the exchange value was just and reasonable foreclosed any other claim that the dissenting shareholders might assert *141 concerning the value of their shares. Whatever Michigan law might provide for the preferred shareholders in the event of a winding-up or liquidation could not determine the just and reasonable value of shares in the continuing enterprise. The essence of the Court's holding is set forth in this passage:

"Since the federal law clearly contemplates merger as a step in continuing the enterprise, it fol-

228 U.S., at 105, 107, 33 S.Ct., at 448, 449; *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 161-162, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922); *Central Transfer Co. v. Terminal Railway Assn. of St. Louis*, 288 U.S. 469, 474-475, 53 S.Ct. 444, 446, 77 L.Ed. 899 (1933); *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U.S. 500, 513-515, 56 S.Ct. 546, 551-552, 80 L.Ed. 827 (1936); *United States v. Borden Co.*, 308 U.S. 188, 197-206, 60 S.Ct. 182, 187-192, 84 L.Ed. 181 (1939); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-228, 60 S.Ct. 811, 846-847, 84 L.Ed. 1129 (1940); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457, 65 S.Ct. 716, 725-726, 89 L.Ed. 1051 (1945); *United States Alkali Export Assn., Inc. v. United States*, 325 U.S. 196, 205-206, 65 S.Ct. 1120, 1126, 89 L.Ed. 1554 (1945); *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 809-810, 65 S.Ct. 1533, 1540, 89 L.Ed. 1939 (1945); *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 9, 78 S.Ct. 514, 520, 2 L.Ed.2d 545 (1958); *United States v. Radio Corp. of America*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959); *California v. FPC*, 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). The other two cases involve regulations with explicit exemptions from the antitrust laws, but do not support the position taken by the Court in this case. In *Maryland & Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960), this Court held that § 6 of the Clayton Act's exemption of agricultural cooperatives from the antitrust law only protected the formation of those associations; once formed they could not engage in any further conduct that would violate the antitrust laws. In *Pan American World Air-*

ways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Court held that the exemption relieving airlines from the operation of the antitrust laws when certain transactions were approved by the Civil Aeronautics Board did not exempt the airlines from all antitrust violations, but only exempted them from violations stemming from activity explicitly governed by the regulatory scheme.

Of greater importance, however, is the Court's rather remarkable assumption that an exemption "from 'all other *139 law' " should be read to encompass the restraints created **1169 by private contract.^{FN5} *Ante*, at 1164. Even if the text of the present Act could bear that reading, it is flatly inconsistent with the text of the 1920 Act, which relieved the participating carriers "from the operation of the 'antitrust laws' ... and of all other restraints, limitations, and prohibitions of law, Federal and State...." 41 Stat. 482. Moreover, given the respect that our legal system has always paid to the enforceability of private contracts—a respect that is evidenced by express language in the Constitution itself^{FN6}—there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the antitrust laws. Had Congress intended to convey the message the Court finds in § 11341, it surely would have said expressly that the exemption was from all restraints imposed by law or by private contract.^{FN7}

FN5. Again Judge Ginsburg's observation is pertinent:

"Moreover, the ICC's proposed insertion of 'all legal obstacles' into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. *Cf.*

whenever a criminal law, tort law, or any regulatory measure impedes the efficient operation of a new merged carrier, the carrier can avoid such a restriction by virtue of the ICC approval of that merger. Nor does the text of § 11341 contain any suggestion that *137 such an approval would impair the obligation of private contracts.^{FN3} Rather, as **1168 both an application of the *ejusdem generis* canon and an examination of the legislative history show, the purpose of the exemption was to relieve the carriers "from the operation of the antitrust and other restrictive or prohibitory laws." H.R.Conf.Rep. No. 650, 66th Cong., 2d Sess., 64 (1920) (emphasis added).

FN3. As Judge D.H. Ginsburg, writing for the Court of Appeals, noted:

"We cannot sustain the ICC's position that this provision empowers it to override a [collective-bargaining agreement (CBA)]. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from 'the antitrust laws and from all other law' to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to CBAs. Nor has the ICC explained how we can read the term 'other law,' as it has done, to mean 'all legal obstacles.' *Dispatchers*, J.A. 207. None of the Supreme Court decisions, discussed below, authorizing the ICC to abrogate an 'other law' even suggests that the term means 'all legal obstacles.' The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. See *Gulf, Mobile & Ohio R.R. Co.-Abandonment*, 282 I.C.C. 311, 335 (1952) ('None of the

decisions in the [Supreme Court] cases ... relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.')."
Brotherhood of Railway Carmen v. ICC, 279 U.S.App.D.C. 239, 244, 880 F.2d 562, 567 (1989).

The Court speculates that the reason the 1920 Congress explicitly referred to the antitrust laws was simply to avoid the force of the rule that repeals of the antitrust laws by implication are not favored, citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963). In that case, however, the rule was announced in the context of the industry's argument that federal regulatory approval of a transaction exempted the transaction from the antitrust laws even though the regulatory statute was entirely silent on the subject of exemption. *Ibid.* The authority cited in the *Philadelphia**138 to support this rule sheds no light on the question whether a statute creating a broad exemption for mergers would naturally be read to include all statutes that otherwise would have prohibited the consummation of a merger of large rail carriers.^{FN4}

FN4. All but two of the cases that the Court cited in the *Philadelphia* decision to support the rule against implicit repeals of the antitrust statutes arose under a regulatory framework in which there was no mention of exemption. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350, n. 28, 83 S.Ct. 1715, 1734, n. 28, 10 L.Ed.2d 915 (1963). See *United States v. Trans-Missouri Freight Assn.*, 166 U.S., at 314-315, 17 S.Ct., at 548-549; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898); *Northern Securities Co. v. United States*, 193 U.S., at 343, 374-376, 24 S.Ct., at 459, 476-477 (plurality and dissenting opinions); *United States v. Pacific & Arctic R. & Nav. Co.*

pressly favored the consolidation of railroads. The policy of consolidation embodied in the 1920 Act would obviously**1167 have been frustrated by the federal antitrust laws had Congress not chosen to exempt explicitly all approved mergers from these laws. Section 407 of that Act provided, in part:

FN1. See *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897); *United States v. Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898); *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904); *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *United States v. Union Pacific R. Co.*, 226 U.S. 61, 33 S.Ct. 53, 57 L.Ed. 124 (1912); *United States v. Pacific & Arctic R. & Nav. Co.*, 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742 (1913).

"The carriers affected by any order made under the foregoing provisions of this section ... shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' ... and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat. 482.

Both the background and the text of § 407 make it absolutely clear that its primary focus was on federal antitrust laws. Sensibly, however, Congress wrote that section using language broad enough to cover any other federal or state law that might otherwise forbid the consummation of any approved merger or prevent the immediate operation of its properties under a new corporate owner. Not a word in the statute, or in its legislative history, contains any hint that the approval of a merger by the Interstate Commerce Commission (ICC) would impair the obligations of valid and otherwise enforceable private contracts.

Given the present plight of our Nation's railroads, it may be wise policy to give the ICC a power akin to, albeit greater *136 than, that of a bankruptcy court to approve a trustee's rejection of a debtor's executory private contracts.^{FN2} Through nothing short of a *tour de force*, however, can one find any such power in 49 U.S.C. § 11341, or in either of its predecessors. Obviously, consolidated carriers would find it useful to have the ability to disavow disadvantageous long-term leases on obsolete car repair facilities, employment contracts with high salaried executives whose services are no longer needed, as well as collective-bargaining agreements that provide costly job security to a shrinking work force. If Congress had intended to give the ICC such broad ranging power to impair contracts, it would have done so in language much clearer than anything that can be found in the present Act.

FN2. Section 365 of the Bankruptcy Code, 11 U.S.C. § 365, allows a trustee to assume or reject a debtor's executory contracts and unexpired leases subject to the *subsequent* approval of the bankruptcy court. Collective-bargaining agreements can be rejected only if the additional requirements of 11 U.S.C. § 1113 are met.

The Court's contrary conclusion rests on its reading of the "plain meaning" of the present statutory text and our decision in *Schwabacher v. United States*, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948). Neither of these reasons is sufficient. Moreover, the Court's reading is inconsistent with other unambiguous provisions in the statute.

I

With or without the *ejusdem generis* canon, I believe that the normal reader would assume that the text of § 11341 encompasses the antitrust laws, as well as other federal or state laws, that would otherwise prohibit rail carriers from consummating approved mergers, and nothing more. See *ante*, at 1163. That text contains no suggestion that

States v. Lowden, 308 U.S. 225, 233, 60 S.Ct. 248, 252, 84 L.Ed. 208 (1939), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. 49 U.S.C. §§ 11344(b)(1)(D), 11347; see also *New York Dock Railway-Control-Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60 (1979). Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If § 11341(a) did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations**1166 would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, e.g., *Burlington Northern R. Co. v. Maintenance of Way Employes*, 481 U.S. 429, 444, 107 S.Ct. 1841, 1850, 95 L.Ed.2d 381 (1987) (resolution procedures for major disputes “virtually endless”); *Detroit & T. S. L. R. Co. v. United Transportation Union*, 396 U.S. 142, 149, 90 S.Ct. 294, 298, 24 L.Ed.2d 325 (1969) (dispute resolution under RLA involves “an almost interminable process”); *Railway Clerks v. Florida East Coast R. Co.*, 384 U.S. 238, 246, 86 S.Ct. 1420, 1424, 16 L.Ed.2d 501 (1966) (RLA procedures are “purposely long and drawn out”). The immunity provision of § 11341(a) is designed to avoid this result.

We hold that, as necessary to carry out a transaction approved by the Commission, the term “all other law” in § 11341(a) includes any obstacle imposed by law. In this case, the term “all other law” in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers. We affirm the Commission’s interpretation of § 11341(a), not out of deference in the face of an *134 ambiguous stat-

ute, but rather because the Commission’s interpretation is the correct one.

This reading of § 11341(a) will not, as the Court of Appeals feared, lead to bizarre results. *Brotherhood of Railway Carmen v. ICC*, 279 U.S.App.D.C., at 244, 880 F.2d, at 567. The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the Commission held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n. 2, *supra*. It also might be true that “[t]he breadth of the exemption [in § 11341(a)] is defined by the scope of the approved transaction....” *ICC v. Locomotive Engineers, supra*, 482 U.S., at 298, 107 S.Ct., at 2376 (STEVENSON, J., concurring in judgment). We express no view on these matters, as they are not before us here.

The judgment of the Court of Appeals is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice STEVENSON, with whom Justice MARSHALL joins, dissenting.

The statutory exemption that the Court construes today had its source in § 407 of the Transportation Act of 1920 (1920 Act). 41 Stat. 482. Its wording was slightly changed in 1940, 54 Stat. 908-909, and again in 1978, 92 Stat. 1434. There is, however, no claim that either of those amendments modified the coverage of the exemption in any way. It is therefore appropriate to begin with a consideration of the purpose and the text of the 1920 Act.

*135 Before the First World War, the railroad industry had been the prime target of antitrust enforcement.^{FNI} In 1920, however, Congress adopted a new national transportation policy that ex-

68 S.Ct., at 968.

FN4. Section 5(11) of the Transportation Act of 1940 provided:

"[A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission...."

The recodification of this language in § 11341(a) effected no substantive change. See H.R.Rep. No. 95-1395, pp. 158-160 (1978), U.S.Code Cong. & Admin. News 1978, p. 3009. See also *ICC v. Locomotive Engineers*, 482 U.S. 270, 299, n. 12, 107 S.Ct. 2360, 2376, n. 12, 96 L.Ed.2d 222 (1987) (STEVENS, J., concurring in judgment).

[7][8] Just as the obligations imposed by state contract law did not survive the merger at issue in *Schwabacher*, the obligations imposed by the law that gives force to the carriers' collective-bargaining agreements, the RLA, do not survive the merger in this case. The RLA governs the formation, construction, and enforcement of the labor-management contracts in issue here. It requires carriers and employees to make reasonable efforts "to make and maintain" collective-bargaining agreements, 45 U.S.C. § 152 First, and to refrain from making changes in existing agreements except in *132 accordance with RLA procedures, 45 U.S.C. §§ 152 Seventh, 156. The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing

agreements." *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 242, 70 S.Ct. 577, 579, 94 L.Ed. 795 (1950). As the law which gives "legal and binding effect to collective agreements," *Detroit & T. S. L. R. Co. v. United Transportation Union*, 396 U.S. 142, 156, 90 S.Ct. 294, 302, 24 L.Ed.2d 325 (1969), the RLA is the law that, under § 11341(a), is superseded when an ICC-approved transaction requires abrogation of collective-bargaining obligations. See *ICC v. Locomotive Engineers*, 482 U.S. 270, 287, 107 S.Ct. 2360, 2370, 96 L.Ed.2d 222 (1987) (STEVENS, J., concurring in judgment); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (CA1 1986); *Missouri Pacific R. Co. v. United Transportation Union*, 782 F.2d 107, 111 (CA8 1986); *Burlington Northern, Inc. v. American Railway Supervisors Assn.*, 503 F.2d 58, 62-63 (CA7 1974); *Bundy v. Penn Central Co.*, 455 F.2d 277, 279-280 (CA6 1972); *Nemitz v. Norfolk & Western R. Co.*, 436 F.2d 841, 845 (CA6), *affd*, 404 U.S. 37, 92 S.Ct. 185, 30 L.Ed.2d 198 (1971); *Brotherhood of Locomotive Engineers v. Chicago & N. W. R. Co.*, 314 F.2d 424 (CA8 1963); *Texas & N. O. R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 161-162 (CA5 1962); *Railway Labor Executives Assn. v. Guilford Transp. Industries, Inc.*, 667 F.Supp. 29, 35 (Me.1987), *affd*, 843 F.2d 1383 (CA1 1988).

Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC-approved transaction makes sense of the consolidation provisions of the Act, which were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Texas v. United States*, 292 U.S. 522, 534-535, 54 S.Ct. 819, 825, 78 L.Ed. 1402 (1934). The Act requires the Commission to approve consolidations in the public interest. 49 U.S.C. § 11343(a)(1). Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to *133 transferred employees" as well as "the loss of seniority rights," *United*

499 U.S. 117, 111 S.Ct. 1156, 136 L.R.R.M. (BNA) 2727, 113 L.Ed.2d 95, 59 USLW 4189, 118 Lab.Cas. P 10,598
(Cite as: 499 U.S. 117, 111 S.Ct. 1156)

ory statute are strongly disfavored," *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963), Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a). Second, the otherwise general term "all other law" "includ [es]" (but is not limited to) "State and municipal law." This shows that "all other law" refers to more than laws related to antitrust. Also, the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the **1164 word "all," that the phrase "all other law" includes federal law other than the antitrust laws. In short, the immunity provision in § 11341 means what it says: A carrier is exempt from *all law* as necessary to carry out an ICC-approved transaction.

[5][6] The exemption is broad enough to include laws that govern the obligations imposed by contract. "The obligation of a contract is 'the law which binds the parties to perform their agreement.' " *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429, 54 S.Ct. 231, 237, 78 L.Ed. 413 (1934) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197, 4 L.Ed. 529 (1819)). A contract depends on a regime*130 of common and statutory law for its effectiveness and enforcement.

"Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660, 43 S.Ct. 651, 655, 67 L.Ed. 1157 (1923).

A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in § 11341(a) from "all other law" effects an override of contractual obligations, as necessary to carry out an approved transaction,

by suspending application of the law that makes the contract binding.

Schwabacher v. United States, 334 U.S. 182, 68 S.Ct. 958, 92 L.Ed. 1305 (1948), which construed the immediate precursor of § 11341(a), § 5(11) of the Transportation Act of 1940, ch. 722, § 7, 54 Stat. 908-909, ^{FN4} supports this conclusion. In *Schwabacher*, minority stockholders in a carrier involved in an ICC-approved merger complained that the terms of the merger diminished the value of their shares as guaranteed by the corporate charter *131 and thus "deprived [them] of contract rights under Michigan law..." 334 U.S., at 188, 68 S.Ct., at 962. We explained that the Commission was charged under the Act with passing upon and approving all capital liabilities assumed or discharged by the merged company, and that once the Commission approved a merger in the public interest and on just and reasonable terms, the immunity provision relieved the parties to the merger of "restraints, limitations, and prohibitions of law, Federal, State, or municipal," as necessary to carry out the transaction. *Id.*, at 194-195, 198, 68 S.Ct., at 964-965, 966. We noted that before approving the merger, the Commission had a duty "to see that minority interests are protected," and emphasized that any such minority rights were, "as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id.*, at 201, 68 S.Ct., at 968. Once these interests were accounted for, however, "[i]t would be inconsistent to allow state law to apply a liquidation basis [for valuation] to what federal law designates as a basis for continued public service." *Id.*, at 200, 68 S.Ct., at 968. Relying in part on the immunity provision, we held the contract **1165 rights protected by state law did not survive the merger agreement found by the Commission to be in the public interest. *Id.*, at 194-195, 200-201, 68 S.Ct., at 964-965, 967-968. Because the Commission had disclaimed jurisdiction to settle the shareholders' complaints, we remanded the case to the Commission to ensure that the terms of the merger were just and reasonable. *Id.*, at 202,

the parties do not challenge them. For purposes of this decision, we assume, without deciding, that the Commission properly considered the public interest factors of § 11344(b)(1) in approving the original transaction, that its decision to override the carriers' obligations is consistent with the labor protective requirements of § 11347, and that the override was necessary to the implementation of the transaction within the meaning of § 11341(a). Under these *128 assumptions, we hold that the exemption from "all other law" in § 11341(a) includes the obligations imposed by the terms of a collective-bargaining agreement.^{FN3}

FN3. On May 23, 1990, and again on September 19, 1990, the union respondents filed motions to dismiss the case as moot. They argued that in light of the alternative ground for decision offered by the ICC on remand from the Court of Appeals, see n. 2, *supra*, the meaning and scope of § 11341(a) was no longer material to the dispute. The Union respondents reassert their mootness argument in their brief on the merits. Brief for Respondent Unions 18.

We disagree. The Commission predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of § 11341(a). Thus, our definitive interpretation of § 11341(a) may affect the Commission's remand order. Agency compliance with the Court of Appeals' mandate does not moot the issue of the correctness of the court's decision. See, e.g., *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 791, n. 1, 105 S.Ct. 3439, 3443, n. 1, 87 L.Ed.2d 567 (1985); *Schweiker v. Gray Panthers*, 453 U.S. 34, 42, n. 12, 101 S.Ct. 2633, 2639, n. 12, 69 L.Ed.2d 460 (1981); *Maher v. Roe*, 432 U.S. 464, 468-469, n. 4, 97 S.Ct. 2376, 2379-2380, n. 4, 53 L.Ed.2d 484 (1977). In addition, the alternative

basis offered by the Commission on remand does not end the controversy between the parties. The parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the Commission's interpretation of the Act in its review of the remand order.

[2] As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, supra*, 467 U.S., at 842-843, 104 S.Ct., at 2781. The contested language in § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history, between positive enactments and common-law rules of liability. Nor does it support the Court of Appeals' conclusion that Congress did not intend the immunity clause to apply to contractual obligations.

[3][4] *129 By itself, the phrase "all other law" indicates no limitation. The circumstance that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth. There is a canon of statutory construction which, on first impression, might seem to dictate a different result. Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. See *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84-85, 111 S.Ct. 415, 422, 112 L.Ed.2d 374 (1990). The canon does not control, however, when the whole context dictates a different conclusion. Here, there are several reasons the immunity provision cannot be interpreted to apply only to antitrust laws and similar statutes. First, because "[r]epeals of the antitrust laws by implication from a regulat-

to override provisions of a collective-bargaining agreement. 279 U.S.App.D.C., at 250, 880 F.2d, at 573. The court remanded the case to the Commission for a determination on these issues.

After the Court of Appeals denied the carriers' petitions for rehearing, the carriers in the consolidated cases filed petitions for certiorari, which we granted on March 26, 1990. 494 U.S. 1055, 110 S.Ct. 1522, 108 L.Ed.2d 762. ^{FN2} We now reverse.

FN2. On September 9, 1989, the Commission also filed a petition for rehearing, and requested the court to refrain from ruling on the petition until the Commission could issue a comprehensive decision on remand addressing issues that the Court of Appeals left open for resolution. On September 29, 1989, the Court of Appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand." App. to Pet. for Cert. in No. 89-1027, p. 54a.

On January 4, 1990, the Commission reopened proceedings in the case remanded to it. On May 21, 1990, two months after we granted the carriers' petitions for certiorari, the Commission issued its remand decision. *CSX Corp.-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715. In its decision, the Commission adhered to the Court of Appeals' ruling that § 11341(a) did not authorize it to override provisions of a collective-bargaining agreement. The Commission held, however, that § 11341(a) authorized it to foreclose resort to RLA remedies for modification and enforcement of collective-bargaining agreements "at least to the extent of [its] authority" to impose labor-protective conditions under § 11347. *Id.*, at 754. The Commission explained that the § 11347 limit on its §

11341(a) authority "reflects the consistency of the overall statutory scheme for dealing with CBA modifications required to implement Commission-approved mergers and consolidations." *Id.*, at 722. The Commission remanded its decision to the parties for further negotiation or arbitration.

On December 4, 1990, the union respondents petitioned the Court of Appeals for review of the Commission's remand decision. The petition raises three issues: (1) whether § 11341(a) authorizes the ICC to foreclose employee resort to the RLA; (2) whether § 11347 authorizes the ICC to compel employees to arbitrate changes in collective-bargaining agreements; and (3) whether abrogation of employee contract rights effected a taking in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment.

*127 II

[1] Title 49 U.S.C. § 11341(a) provides:

"... A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction...."

We address the narrow question whether the exemption in § 11341(a) from "all other law" includes a carrier's legal obligations under a collective-bargaining agreement.

By its terms, the exemption applies only when necessary to carry out an approved transaction. These predicates, however, are not at issue here, for the Court of Appeals **1163 did not pass on them and

agreement between the union and Seaboard known as the "Orange Book." The Orange Book provided that the carrier would employ each covered employee and maintain each employee's work conditions and benefits for the remainder of the employee's working life. The Brotherhood contended that the Orange Book prevented CSX from moving work or covered employees from Waycross to Raceland.

When negotiations broke down, both the union and the carrier invoked the arbitration procedures under § 4 of *New York Dock*. The arbitration committee ruled for the carrier. It agreed with the union that the Orange Book prohibited the proposed transfer of work and employees. It determined, however, that it could override any Orange Book or RLA provision that impeded an operational change authorized or required by the ICC's decision approving the original merger. The committee then held that the carrier could transfer the heavy repair work, which it found necessary to the original control acquisition, but could not transfer employees protected by the Orange Book, which it found would only slightly impair the original control acquisition. Both parties appealed the award to the Commission.

A divided Commission affirmed in part and reversed in part. The Commission agreed the committee possessed authority to override collective-bargaining rights and RLA rights that prevent implementation of a proposed transaction.*125 It reasoned, however, that "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *CSX Corp.-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 4 I.C.C.2d 641, 650 (1988). The Commission thus affirmed the arbitration committee's order permitting the transfer of work but reversed the holding that the carriers could not transfer Orange Book employees.

3. The unions appealed both cases to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals considered

the cases together and reversed and remanded to the Commission. *Brotherhood of Railway Carmen v. ICC*, 279 U.S.App D.C. 239, 880 F.2d 562 (1989). The court held that § 11341(a) does not authorize the Commission to relieve a party of collective-bargaining agreement obligations that impede implementation of an approved transaction. The court stated various grounds for its conclusion. First, because the court did not read the phrase "all other law" in § 11341(a) to include "all legal obstacles," it found "no support in the language of the statute" to apply the statute to obligations imposed by collective-bargaining agreements. *Id.*, at 244, 880 F.2d, at 567. Second, the court analyzed the Transportation Act, 1920, ch. 91, § 407, 41 Stat. 482, which contained a predecessor to § 11341(a), and found that Congress "did not intend, when it enacted the immunity provision, to override contracts." 279 U.S.App.D.C., at 247, 880 F.2d, at 570. The court noted that Congress had "focused nearly exclusively ... on specific **1162 types of laws it intended to eliminate-all of which were positive enactments, not common law rules of liability, as on a contract." *Ibid.* The court further noted that Congress had often revisited the immunity provision without making it clear that it included contracts or collective-bargaining agreements. *Ibid.* Finally, the court did not defer to the ICC's interpretation of the Act, presumably because it determined that the Commission's interpretation was belied by the contrary " 'unambiguously*126 expressed intent of Congress,' " *id.*, at 244, 880 F.2d, at 567 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)).

In ruling that § 11341(a) did not apply to collective-bargaining agreements, the court "decline[d] to address the question" whether the section could operate to override provisions of the RLA. *Brotherhood of Railway Carmen, supra*, at 247-250, 880 F.2d, at 570-573. It also declined to consider whether the labor protective conditions required by § 11347 are exclusive, or whether § 4 of the *New York Dock* conditions gives an arbitration committee the right

in which affected N & W employees would be made management supervisors in Atlanta, and would receive increases in wages and benefits in addition to the relocation expenses and wage protections guaranteed by the *New York Dock* conditions. The union contended that this proposal involved a change in the existing collective-bargaining agreement that was subject to mandatory bargaining under the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.* The union also maintained that the carriers were required to preserve the affected employees' collective-bargaining rights, as well as their right to union representation under the RLA.

Pursuant to § 4 of the *New York Dock* procedures, the parties negotiated concerning the terms of the implementing agreement, but they failed to resolve their differences. As a result, the carriers invoked the *New York Dock* arbitration procedures. After a hearing, the arbitration committee ruled in the carriers' favor. The committee noted that the transfer of work to Atlanta was an incident of the control transaction approved by the ICC, and that it formed part of the "additional coordinations" the ICC predicted would be necessary to achieve "greater efficiencies." The committee also held it had the authority to abrogate the provisions of the collective-bargaining agreement and of the RLA as necessary to implement the merger. Finally, it held that because the application of the N & W bargaining agreement would impede the transfer, the transferred employees did not retain their collective-bargaining rights.

*123 The union appealed to the Commission, which affirmed by a divided vote. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and [Railway Labor Act] provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." App. to Pet. for Cert. in No. 89-1027, p.

33a. Accordingly, the Commission upheld the arbitration committee's determination that the "compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." *Id.*, at 35a. The Commission also held that because the work transfer was incident to the approved merger, it was "immunized from conflicting laws by section 11341(a)." *Ibid.* Noting that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function," the Commission upheld the decision to override the collective-bargaining agreement and RLA provisions. *Id.*, at 37a.

2. In No. 89-1028, the Commission approved an application by CSX Corporation to acquire control of the Chessie System, Inc., and Seaboard Coastline Industries, Inc. **1161CSX Corp.-Control-Chessie System, Inc., and Seaboard Coastline Industries, Inc., 363 I.C.C. 521 (1980). Chessie was the parent of the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railway Company; Seaboard was the parent of the Seaboard Coast Line Railroad Company. In approving the control acquisition, the Commission imposed the *New York Dock* conditions and recognized that "additional coordinations may occur that could lead to further employee displacements." 363 I.C.C., at 589.

*124 In August 1986, the consolidated carrier notified respondent Brotherhood of Railway Carmen that it planned to close Seaboard's heavy freight car repair shop at Waycross, Georgia, and transfer the Waycross employees to Chessie's similar shop in Raceland, Kentucky. The carrier informed the Brotherhood that the proposed transfer would result in a net decrease of jobs at the two shops. Pursuant to *New York Dock*, the carrier and the union negotiated concerning the terms of an agreement to implement the transfer. The sticking point in the negotiations involved a 1966 collective-bargaining

at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

“(A) the effect of the proposed transaction on the adequacy of transportation to the public.

“(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

“(C) the total fixed charges that result from the proposed transaction.

“(D) the interest of carrier employees affected by the proposed transaction.

“(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.”

When a proposed merger involves rail carriers, the Act requires the Commission to impose labor-protective conditions on the transaction to safeguard the interests of adversely affected railroad employees. § 11347. In *New York Dock Railway-Control-Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (CA2 1979), the Commission announced a comprehensive set of conditions and procedures designed to meet its obligations under § 11347. Section 2 of the *New York Dock* conditions provides that the “rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits ... under applicable laws and/or existing collective bargaining agreements ... shall be preserved unless changed by future collective bargaining agreements.” 360 I.C.C., at 84. Section 4 sets forth negotiation and arbitration procedures for resolution of labor disputes arising from an approved railroad merger. *Id.*, at 85. Under § 4, a merged or consolidated railroad which plans an operational change that

may cause dismissal or displacement of any employee must provide the employee and his union 90 days’ written notice. *Ibid.* If the carrier and union cannot agree on terms and conditions within 30 days, each party may submit the dispute for an expedited “final, binding and conclusive” determination by a neutral arbitrator. *Ibid.* Finally, the *New York Dock* conditions provide affected employees with up to six years of income protection, as well as reimbursements for moving costs and losses from the sale of a home. See *id.*, at 86-89 (§§ 5-9, 12).

B

The two cases before us today involve separate ICC orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements.

1. In No. 89-1027, the Commission approved an application by NWS Enterprises, Inc., to acquire control of two previously separate rail carriers, petitioners **1160 Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). See *Norfolk Southern Corp.-Control-Norfolk & W.R. Co. and Southern R. Co.*, 366 I.C.C. 173 (1982). In its order approving control, the Commission imposed the standard *New York Dock* labor-protective conditions and noted the possibility that “further displacement [of employees] may arise as additional coordinations occur.” 366 I.C.C., at 230-231.

In September 1986, this possibility became a reality. The carriers notified the American Train Dispatchers’ Association, the bargaining representative for certain N & W employees,*122 that they proposed to consolidate all “power distribution”-the assignment of locomotives to particular trains and facilities-for the N & W-Southern operation. To effect the efficiency move, the carriers informed the union that they would transfer work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia. The carriers proposed an implementing agreement

Stallsmith, Jr. James S. Whitehead, Nicholas S. Yovanovic, and James D. Tomola filed briefs for petitioner in No. 89-1028.

Jeffrey S. Minear argued the cause for the federal respondents in support of petitioners in both cases pursuant to this Court's Rule 12.4. On the briefs were *Acting Solicitor General Roberts, Deputy Solicitor General Shapiro, Lawrence S. Robbins, Robert S. Burk, Henri F. Rush, and John J. McCarthy, Jr.*

William G. Mahoney argued the cause for the union respondents in both cases. With him on the brief was *John O'B. Clarke, Jr.*†

†*Richard T. Conway, Ralph J. Moore, Jr., D. Eugenia Langan, and David P. Lee* filed a brief for the National Railway Labor Conference as *amicus curiae* urging reversal.

*119 Justice KENNEDY delivered the opinion of the Court.

The Interstate Commerce Commission has the authority to approve rail carrier consolidations under certain conditions. 49 U.S.C. § 11301 *et seq.* A carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction...." § 11341(a). These cases require us to decide whether the carrier's exemption under § 11341(a) "from all other law" extends to its legal obligations under a collective-bargaining agreement. We hold that it does.

I

A

"Prior to 1920, competition was the *desideratum* of our railroad economy." *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315, 74 S.Ct. 574, 584, 98 L.Ed. 710 (1954). Following a

period of Government ownership during World War I, however, "many of the railroads were in very weak condition and their continued survival was in jeopardy." *Ibid.* At that time, the Nation made a commitment to railroad carrier consolidation as a means of promoting the health and efficiency of the railroad industry. Beginning with the Transportation Act of 1920, ch. 91, 41 Stat. 456, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy ... so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." *United States v. Lowden*, 308 U.S. 225, 232, 60 S.Ct. 248, 252, 84 L.Ed. 208 (1939). See generally **1159*St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, *supra*, 347 U.S., at 315-321, 74 S.Ct., at 583-587.

Chapter 113 of the Interstate Commerce Act, recodified in 1978 at 49 U.S.C. § 11301 *et seq.*, contains the current statement of this national policy. The Act grants the Interstate Commerce Commission exclusive authority to examine, condition, and approve proposed mergers and consolidations of *120 transportation carriers within its jurisdiction. § 11343(a)(1). The Act requires the Commission to "approve and authorize" the transactions when they are "consistent with the public interest." § 11344(c). Among the factors the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." § 11344(b)(1)(D).^{FN1} In authorizing a merger or consolidation, the Commission "may impose conditions governing the transaction." § 11344(c). Once the Commission approves a transaction, a carrier is "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." § 11341(a).

^{FN1}. Section 11344(b)(1) provides:

"In a proceeding under this section which involves the merger or control of

grievances arising under existing agreements. Railway Labor Act, §§ 2, subds. 1, 7, 6, as amended, 45 U.S.C.A. §§ 152, subds. 1, 7, 156.

****1157 Syllabus** ^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Once the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation under the conditions set forth in Chapter 113 of the Interstate Commerce Act (Act), 49 U.S.C. § 11301 *et seq.*, a carrier in such a consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction" § 11341(a). In these cases, the ICC issued orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements. The Court of Appeals reversed and remanded, holding that § 11341(a) does not authorize the ICC to relieve a party of collectively bargained obligations that impede implementation of an approved transaction. Reasoning, *inter alia*, that the legislative history demonstrates a congressional intent that § 11341(a) apply to specific types of positive laws and not to common-law rules of liability, such as those governing contracts, the court declined to decide whether the section could operate to override provisions of the Railway Labor Act (RLA) governing the formation, construction, and enforcement of the collective-bargaining agreements at issue.

Held: The § 11341(a) exemption "from all other law" includes a carrier's legal obligations under a collective-bargaining agreement when necessary to carry out an ICC-approved transaction. The exemption's language, as correctly interpreted by the ICC, is clear, broad, and unqualified, bespeaking an unambiguous congressional intent to include**1158 any obstacle imposed by law. That language neither

admits of a distinction between positive enactments and common-law liability rules nor supports the exclusion of contractual obligations. Thus, the exemption effects an override of such obligations by superseding the law-here, the RLA-which makes the contract binding. Cf. *Schwabacher v. United States*, 334 U.S. 182, 194-195, 200-201, 68 S.Ct. 958, 964-965, 967-968, 92 L.Ed. 1305. This determination makes sense of the Act's consolidation provisions, which were designed to promote economy and efficiency in interstate transportation by removing *118 the burdens of excessive expenditure. Whereas § 11343(a)(1) requires the ICC to approve consolidations in the public interest, and § 11347 conditions such approval on satisfaction of certain labor-protective conditions, the § 11341(a) exemption guarantees that once employee interests are accounted for and the consolidation is approved, the RLA-whose major disputes resolution process is virtually interminable-will not prevent the efficiencies of consolidation from being achieved. Moreover, this reading will not, as the lower court feared, lead to bizarre results, since § 11341(a) does not exempt carriers from all law, but rather from all law *necessary* to carry out an *approved* transaction. Although it might be true that § 11341(a)'s scope is limited by § 11347, and that the breadth of the exemption is defined by the scope of the approved transaction, the conditions of approval and the standard for necessity are not at issue because the lower court did not pass on them and the parties do not challenge them here. Pp. 1162-1166.

279 U.S.App.D.C. 239, 880 F.2d 562, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 1166.

Jeffrey S. Berlin argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 89-1027 were *Mark E. Martin* and *William P.*

361VI(A) General Rules of Construction**361k187 Meaning of Language****361k194 k. General and Specific**

Words and Provisions. Most Cited Cases

Statutes 361 ↪208**361 Statutes****361VI Construction and Operation****361VI(A) General Rules of Construction****361k204 Statute as a Whole, and Intrinsic Aids to Construction****361k208 k. Context and Related Clauses. Most Cited Cases**

Under principle of ejusdem generis, when general term follows specific one, general term should be understood as reference to subjects akin to one with specific enumeration; however, this canon does not control when whole context dictates different conclusion.

[4] Statutes 361 ↪158**361 Statutes****361V Repeal, Suspension, Expiration, and Revival****361k158 k. Implied Repeal in General. Most Cited Cases**

Repeals of antitrust laws by implication from regulatory statute are strongly disfavored.

[5] Contracts 95 ↪1**95 Contracts****95I Requisites and Validity****95I(A) Nature and Essentials in General****95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases**

Obligation of contract is law which binds parties to perform their agreement.

[6] Contracts 95 ↪167**95 Contracts****95II Construction and Operation****95II(A) General Rules of Construction****95k167 k. Existing Law as Part of Con-**

tract. Most Cited Cases

Laws which subsist at time and place of making of contract, and where it is to be performed, enter into and form part of it, as fully as if they had been expressly referred to or incorporated in its terms; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.

[7] Commerce 83 ↪85.7**83 Commerce****83III Interstate Commerce Commission****83III(A) Organization and Authority****83k85.1 Regulation of Carriers in General; Railroads and Pipe Lines****83k85.7 k. Combinations and Consolidations of Carriers; Agreements. Most Cited Cases** Interstate Commerce Commission (ICC) was authorized to issue orders exempting parties to approved railway mergers from provisions of collective bargaining agreements; section of Interstate Commerce Act providing that carrier in such consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction * * *," superseded law which made collective bargaining agreements binding, i.e., Railway Labor Act. Railway Labor Act, §§ 2, subs. 1, 7, 6, as amended, 45 U.S.C.A. §§ 152, subs. 1, 7, 156; 49 U.S.C.A. § 11341(a).**[8] Labor and Employment 231H ↪1523****231H Labor and Employment****231HXII Labor Relations****231HXII(H) Alternative Dispute Resolution****231HXII(H)2 Matters Subject to Arbitration****231Hk1522 Carriers; Railway Labor Act****231Hk1523 k. In General. Most Cited Cases**

(Formerly 232Ak414 Labor Relations)

Railway Labor Act extends both to disputes concerning making of collective agreements and to

H

Supreme Court of the United States
NORFOLK AND WESTERN RAILWAY COM-
PANY, et al., Petitioners,

v.

AMERICAN TRAIN DISPATCHERS' ASSOCI-
ATION et al.

CSX TRANSPORTATION, INC., Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN et al.
Nos. 89-1027, 89-1028.

Argued Dec. 3, 1990.

Decided March 19, 1991.

Interstate Commerce Commission (ICC) issued orders exempting parties to approved railway mergers from the provisions of collective bargaining agreements, and union petitioned for review. The Court of Appeals for the District of Columbia Circuit, D.H. Ginsburg, Circuit Judge, 880 F.2d 562, reversed and remanded, and carriers' petition for certiorari was granted. The Supreme Court, Justice Kennedy, held that under the Interstate Commerce Act, a carrier may be exempted from its legal obligations under a collective bargaining agreement when necessary to carry out an ICC-approved transaction.

Court of Appeals reversed, case remanded.

Justice Stevens issued a dissenting opinion in which Justice Marshall joined.

West Headnotes

[1] Commerce 83 ↪85.7

83 Commerce

83III Interstate Commerce Commission

83III(A) Organization and Authority

83k85.1 Regulation of Carriers in General; Railroads and Pipe Lines

83k85.7 k. Combinations and Consol-

idations of Carriers; Agreements. Most Cited Cases Under statute providing that carrier in consolidation under Interstate Commerce Act "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction * * *," exemption "from all other law" includes carrier's legal obligations under collective bargaining agreement when necessary to carry out ICC-approved transaction; that language neither admits of distinction between positive enactments and common-law liability rules nor supports exclusion of contractual obligations, and thus, exemption effects override of such obligations by superseding law which makes contract binding. 49 U.S.C.A. § 11341(a).

[2] Statutes 361 ↪181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

Statutes 361 ↪190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

In construing statutes, Supreme Court begins with language of statute and asks whether Congress has spoken on subject; if intent of Congress is clear, that is end of matter, for court, as well as agency, must give effect to unambiguously expressed intent of Congress.

[3] Statutes 361 ↪194

361 Statutes

361VI Construction and Operation

35

gross earnings made by the dismissed employee in such other employment.

(b) In the event an employee referred to in this Section 7 is entitled to unemployment benefits under applicable law but forfeits such unemployment benefits under any unemployment insurance law because of his or her failure to file for such unemployment benefits (unless prevented from doing so by sickness or other unavoidable causes) for purposes of the application of Sub-section (c) of Section 6, Article I of the New York Dock Conditions, they shall be considered the same as if they had filed for, and received, such unemployment benefits.

(c) If the employee referred to in this Section 7 has nothing to report under this Section 7 account of their not being entitled to benefits under any unemployment insurance law and having no earnings from any other employment, such employee shall submit, within the time period provided for in Sub-section (a) of this Section 7, on the appropriate form annotated "Nothing to Report".

(d) The failure of any employee referred to in this Section 7 to provide the information required in this Section 7 shall result in the withholding of all protective benefits during the month covered by such information pending Carrier's receipt of such information from the employee.

8. Nothing in this implementing agreement shall be interpreted to provide protective benefits less than those provided in the New York Dock Conditions or exclude coverage to those covered by New York Dock Conditions imposed by the I.C.C. and incorporated herein by paragraph 1.

9. The provisions of this Agreement shall become effective upon ten (10) days advance written notice by the B&Q and L&N to their respective General Chairman.

4. Upon expiration of the ten-day bulletin, determination will be made of the employees who have bid and who have been awarded a position at South Louisville Shops. In the event any position advertised at South Louisville Shops is not filled in accordance with the foregoing, Glenwood carmen may exercise seniority pursuant to B&O Rule 24(h) and the unfilled positions will accrue to employees on the South Louisville Carman Roster.

5. (a) Employees accepting positions at South Louisville on the L&N will have their seniority date, as it appears on the Glenwood Carman's Roster, dovetailed on the appropriate roster to which transferred upon reporting to work, and their name will be removed from the Glenwood Carman Roster. Where, following this procedure results in two (2) or more employees having the same seniority date on the dovetailed roster, their respective positions on the roster will be determined by continuous service standing and then by lot.

(b) Employees transferring to South Louisville will be assigned positions in accordance with the bulletins advertising positions; thereafter, changes in the coordinated operation in the filling of vacancies, abolishing or creating positions and reduction or restoration of force will be governed by application of the L&N Scheduled Agreement.

(c) B&O carmen who are awarded positions in the coordinated South Louisville operation will become L&N employees subject to the rules of the Agreement between Louisville and Nashville Railroad Company and Brotherhood Railway Carman of the United States and Canada.

6. In order that the provisions of the first proviso set forth in Article I, Section 3 of the New York Dock conditions may be properly administered, such employee determined to be a displaced or dismissed employee as a result of this Agreement, who also is otherwise eligible for protective benefits and conditions under some other job security or other protective conditions or arrangements shall, within ten (10) days after notification of his monetary protective entitlement under the New York Dock Conditions, elect between the benefits thereunder and similar benefits under such other arrangement. In the event an employee does not make an election within the ten (10) day period specified herein, he shall be considered to have elected to retain the protective benefits he is presently eligible to receive. This election shall not serve to alter or affect any application of the substantive provisions of Article I, Section 3.

7. (a) Each dismissed employee shall provide either B&O or L&N with the following information for the preceding month in which he is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the Carrier:

1. The day(s) claimed by such employee under any unemployment insurance act.
2. The day(s) each such employee worked in other employment, the name and address of the employer and the

ATTACHMENT

ARBITRATED IMPLEMENTING AGREEMENT

BETWEEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

AND THEIR EMPLOYEES REPRESENTED BY THE

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA

WHEREAS, this transaction is made pursuant to Interstate Commerce Commission decisions in Finance Docket No. 28905 (Sub.-No. 1) and related proceedings, and

WHEREAS, The Baltimore and Ohio Railroad Company and Louisville and Nashville Railroad Company, hereinafter designated respectively as "B&O" and "L&N" gave notice in accordance with Article I Section 4(a) of the conditions for the protection of employees enunciated in New York Dock Ry. - Control Brooklyn Eastern Dist., 360 I.C.C. 60(1979) hereinafter designated as "New York Dock Conditions" of the intent of the B&O to discontinue operation of the wheel shop at Glenwood, Pennsylvania and transfer such work to the L&N Railroad South Louisville Shops,

WHEREAS, the parties have conferred, but have reached no agreement,

NOW, therefore, it is determined:

1. The Labor Protective Conditions as set forth in the New York Dock Conditions which, by reference hereto, are incorporated herein and made a part hereof, shall be applicable to this transaction.

2. As a result of this transaction, the B&O will discontinue operation of the car wheel shop located at Glenwood, Pennsylvania, and the B&O carmen positions assigned at that location will be abolished. Thereafter, B&O's car wheel operations will be performed by L&N at their South Louisville Shops, Louisville, Kentucky, and all work at that location accruing to carmen under the provisions of the Collective Bargaining Agreement between L&N and Brotherhood Railway Carmen will be performed by employees on the Carmen's Seniority Roster at South Louisville, Kentucky.

3. Positions to be established on L&N at South Louisville Shops, effective with the date of coordination, will be bulletined at Glenwood, Pennsylvania, for a period of ten (10) days and will accrue to employees on the Glenwood Carmen Roster Central Region Seniority Points 6, 7, 8, 9 and 10.

basis for the selection and rearrangement of forces pursuant to the coordination which gave rise to this proceeding. This Decision and the implementing agreement are intended to resolve all outstanding issues in this proceeding as provided in Article I, Section 4 of the New York Dock Conditions.


William E. Fredenberger, Jr.
Neutral Referee

January 12, 1983

the same hourly rate as his previous position. The Organization vigorously disagrees on the ground that the Carriers' position does not consider variations in overtime. The Carriers respond that equalizing overtime in effect at the Glenwood Shop answers the Organization's contention.

Both the Carriers and the Organization raise issues concerning the displacement allowance which are not properly justiciable in this proceeding. As provided in the attachment hereto the New York Dock Conditions are made applicable to this transaction. The question of whether the Carriers are obligated to furnish test period earnings as well as the question of whether a particular employee meets the definition of a displaced employee are dependent upon individual circumstances. These questions are properly justiciable in a proceeding pursuant to Article I, Section 11 of the New York Dock Conditions rather than this proceeding.

Finally the Organization requests this Neutral to rule that all carmen employees at the South Louisville Shops who are junior to the two Glenwood carmen who transfer to Louisville are entitled to the protections of the New York Conditions once the transfer has been effectuated. Again, the Conditions are applicable to the transaction and all of the Carriers' employees affected by it. However, the question of whether a particular employee was affected by the transaction is a matter for an Article I, Section 11 proceeding.

The attached arbitrated implementing agreement, which is hereby made a part of this Decision, constitutes the Neutral's determination under Article I, Section 4 of the New York Dock Conditions as to the appropriate

This Neutral believes that the Carriers' proposal for treatment of the two Glenwood carmen who transfer to Louisville is fair and equitable both to the transferees and to the carmen at the South Louisville Shops. The Carriers' proposal would enable the Glenwood carmen to follow their work and would afford them a realistic opportunity to retain it. The Organization's proposal on the other hand effectively would deny the Glenwood carmen a realistic opportunity to follow their work. It would treat the work transferred from Glenwood as work accruing to carmen in Louisville without regard for the fact that the work once belonged to carmen at Glenwood. The Carriers' proposal balances the equities, and it should be implemented.

Pointing to the fact that considerable bumping among carmen employees at the Glenwood Shop will occur as a result of this transaction, the Organization urges that each bumped employee will be a displaced employee within the meaning of Article I, Section 1(b) of the New York Dock Conditions entitled to a displacement allowance as provided in Article I, Section 5. The Organization urges that the Carriers be required to furnish each Glenwood carman in the bumping chain with figures showing his average monthly compensation. The Carriers would furnish the two Glenwood carmen who ultimately lose their positions with such figures, but with respect to all others the Carriers take the position that it is under no obligation to furnish such information until the employee demonstrates a loss of earnings in the new position.

The Carriers contend that no Glenwood carman in the bumping chain is displaced unless or until the employee cannot retain a position paying

South Louisville Shops. The record supports the conclusion that the two positions to be created in Louisville will result from that transfer of work.

The Organization's argument that the two Glenwood carmen who ultimately lose their positions are dismissed employees is without merit. The Organization's reliance upon Article I, Section 6(d) of the New York Dock Conditions is misplaced. That Section provides, inter alia, that a dismissed employee may not be compelled to take a position requiring a change of residence as a condition of continuing to receive a dismissal allowance. However, Section 6(d) does not define a dismissed employee. That definition appears in Article I, Section 1(c). As the Carrier points out, in its decision in Finance Docket No. 28905 the ICC was requested by labor organizations to expand the definition of a dismissed employee so as to protect employees from having to relocate. The ICC specifically refused to modify the definition of a dismissed employee as urged by the Organizations. The ICC has spoken authoritatively on the matter, and this Neutral must follow the ICC's pronouncement.

It follows from the foregoing determination that for purposes of Article I, Section 1(c) of the New York Dock Conditions the Carriers may require the two Glenwood Carmen who ultimately lose their positions at Glenwood to transfer to the two new positions at the South Louisville Shops. Put another way, as urged by the Carriers, these two employees may not refuse to transfer to Louisville and still come within the definition of a dismissed employee set forth in Article I, Section 1(c).

The Organization contends that the two new positions to be created at the South Louisville Shops, a wheel inspector and a Fork Lift-Pettibone Crane Operator, are not comparable to the two positions to be abolished at Glenwood Shop. Crane operation at the South Louisville Shops is not part of the carmen's craft, and the Carriers have not confirmed that the wheel inspector will primarily inspect wheels. The Organization urges that the new positions rightfully accrue to carmen at the South Louisville Shops rather than the two carmen at Glenwood whom the Carrier proposes to transfer to Louisville.

The Organization argues that the two Glenwood carmen who actually are unable to hold a position at Glenwood will be dismissed employees within the meaning of Article I, Section 1(c) of the New York Dock Conditions and that as such the Carriers cannot force them to accept positions in Louisville because to do so would require a change of residence contrary to the protection against such a forced move afforded by Article I, Section 6(d) of the New York Dock Conditions. If, however, the two displaced carmen at Glenwood elect to transfer to Louisville the Organization agrees that dovetailing of seniority would be appropriate and that the L&N working agreement should apply to them. However, the Organization urges that they should receive no special protection from bumping as proposed by the Carriers.

While the record in this proceeding does not contain sufficient evidence to support a finding as to the comparability of the two positions to be abolished at the Glenwood Shop and the two positions to be created at the South Louisville Shops, the record clearly substantiates that work of the carmen's craft at the Glenwood Shop will be transferred to the

New York Dock Conditions to resolve all questions which the parties could have settled through negotiations but failed to do so, this duty does not extend to matters beyond the Neutral's jurisdiction. By its Decision in Finance Docket No. 28905 (Sub. No. 1) the ICC granted the Carriers the authority to engage in the transaction which was the subject of the Carriers' September 2, 1982, notice. Creation of two carmen positions at the South Louisville Shops is an integral part of that transaction. The authority of a Neutral acting under Article I, Section 4 extends to the selection of forces to fill the two positions to be created at the South Louisville Shops, but it does not extend to review of the Carriers' decision to create such positions.

The Carriers argue that their proposal to transfer the two carmen employees from Glenwood to Louisville is most appropriate under the circumstances of this case. By closing the B&O's Car Wheel Shop at Glenwood, Pennsylvania, and transferring that work to the L&N South Louisville Shops, all of B&O's car wheel needs will be met by the L&N at its South Louisville Shops. The two new carmen positions reflect the need for additional employees to perform the work transferred to Louisville from Glenwood. The carmen from Glenwood would simply follow the work of their craft to Louisville. The Carriers propose to dovetail the seniority of the transferees with employees on the carmen's seniority roster for the South Louisville Shops. While the Carriers propose that the transferees be subject to the L&N working agreement with the Organization, the Carriers also propose to allow the transferees to be bumped from their new positions only by employees presently working in a position at the South Louisville Shops.

on November 23, 1982. Hearing was held in this matter pursuant to Article I, Section 4(a)(1) on December 13, 1982, at which time the parties presented written submissions and oral argument.

FINDINGS:

The parties have complied with the procedural requirement of Article I, Section 4 of the New York Dock Conditions, and the question at issue noted above is properly before this Neutral for determination.

The gravamen of the dispute in this proceeding is how the two new positions created at the South Louisville Shops should be filled. The Carriers would transfer the two carmen employees who ultimately lose their positions at the Glenwood Shop to the newly created carmen positions at the South Louisville Shops. However, the Organization argues that the two new positions should be offered to the carmen forces at the South Louisville Shops, many of whom are on furlough.

At the outset the Organization questions the propriety of creating two new carmen positions at the South Louisville Shops. The Organization contends that the new positions are not comparable to the positions abolished at Glenwood. The Carriers maintain that a Neutral acting under Article I, Section 4 of the New York Dock Conditions has no jurisdiction to review a Carrier's determination as to the size of its work force. The Organization disagrees contending that the creation of the two positions at the South Louisville Shops is at the heart of this proceeding.

The Carriers' jurisdictional argument is well founded. While it is the duty of a Neutral acting under Article I, Section 4 of the

On September 2, 1982, the Baltimore & Ohio Railroad Company (B&O) and the Louisville & Nashville Railroad Company (L&N), two carriers over which CSX Corporation had acquired control by virtue of the Commission's Decision in Finance Docket No. 28905 (Sub. No. 1), served notice upon the Brotherhood Railway Carmen of the United States and Canada (BRC or Organization) pursuant to Article I, Section 4 of the New York Dock Conditions. The notice stated that the Carriers intended to discontinue operation of the B&O Car Wheel Shop at Glenwood, Pennsylvania and to transfer and coordinate such work with the work performed on the L&N railroad at its South Louisville shops, Louisville, Kentucky. The notice also stated that two carmen positions would be abolished at the Glenwood Shop and two carmen positions established at the South Louisville Shops.

Further pursuant to Article I, Section 4 of the New York Dock Conditions, the parties met on September 14, 1982, for the purpose of reaching agreement with respect to the selection and assignment of forces resulting from the coordination and with respect to the application of the New York Dock Conditions to the coordination. The Carriers submitted a written proposal at this meeting, but the parties were unable to reach agreement. The parties met again on October 14, 1982, but the dispute remained unresolved.

Thereafter, the Carriers invoked the arbitration procedures of Article I, Section 4 of the New York Dock Conditions. The parties did not select a Neutral Referee as provided in Article I, Section 4 and as further provided therein the Carriers applied to the National Mediation Board for appointment of a Referee. That agency appointed the undersigned

Arbitration pursuant to Article I - Section 4 of the employee protective conditions developed in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) as provided in ICC Finance Docket No. 28905 (Sub. No. 1) and related proceedings

PARTIES	Brotherhood Railway Carmen of the)	
	United States and Canada)	
TO		
	and)	
DISPUTE		DECISION
	The Baltimore and Ohio Railroad)	
	Company)	
	Louisville and Nashville Railroad)	
	Company)	

QUESTIONS AT ISSUE:

What provisions shall be contained in an arbitrated implementing agreement pursuant to Article I, Section 4 of the New York Dock Conditions in order to provide an appropriate basis for the selection and assignment of forces and the application of the New York Dock Conditions with respect to the transaction which was the subject of the Carrier's September 2, 1982, notice?

BACKGROUND:

On September 25, 1980, the Interstate Commerce Commission (ICC) served its Decision in Finance Docket No. 28905 (Sub. No. 1) approving acquisition of control by CSX Corporation of rail carriers subsidiary to Chessie System, Inc. and Seaboard Coast Line Industries, Inc. The Commission in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979) (New York Dock Conditions).

(d) The failure of any employee referred to in this Section 7 to provide the information required in this Section 7 shall result in the withholding of all protective benefits during the month covered by such information pending Carrier's receipt of such information from the employee.

8. Nothing in this implementing agreement shall be interpreted to provide protective benefits less than those provided in the New York Dock Conditions or exclude coverage to those covered by New York Dock Conditions imposed by the I.C.C. and incorporated herein by paragraph 1.

9. The provisions of this Agreement shall become effective upon ten (10) days advance written notice by the B&O and L&N to their respective General Chairman.



6. In order that the provisions of the first proviso set forth in Article I, Section 3 of the New York Dock conditions may be properly administered, such employee determined to be a displaced or dismissed employee as a result of this Agreement, who also is otherwise eligible for protective benefits and conditions under some other job security or other protective conditions or arrangements shall, within ten (10) days after notification of his monetary protective entitlement under the New York Dock Conditions, elect between the benefits thereunder and similar benefits under such other arrangement. In the event an employee does not make an election within the ten (10) day period specified herein, he shall be considered to have elected to retain the protective benefits he is presently eligible to receive. This election shall not serve to alter or affect any application of the substantive provisions of Article I, Section 3.

7. (a) Each dismissed employee shall provide either B&O or L&N with the following information for the preceding month in which he is entitled to benefits no later than the tenth (10th) day of each subsequent month on a standard form provided by the Carrier:

1. The day(s) claimed by such employee under any unemployment insurance act.
2. The day(s) each such employee worked in other employment, the name and address of the employer and the gross earnings made by the dismissed employee in such other employment.

(b) In the event an employee referred to in this Section 7 is entitled to unemployment benefits under applicable law but forfeits such unemployment benefits under any unemployment insurance law because of his or her failure to file for such unemployment benefits (unless prevented from doing so by sickness or other unavoidable causes) for purposes of the application of Sub-section (c) of Section 6, Article I of the New York Dock Conditions, they shall be considered the same as if they had filed for, and received, such unemployment benefits.

(c) If the employee referred to in this Section 7 has nothing to report under this Section 7 account of their not being entitled to benefits under any unemployment insurance law and having no earnings from any other employment, such employee shall submit, within the time period provided for in Sub-section (a) of this Section 7, on the appropriate form annotated "Nothing to Report".

a period of ten (10) days and will accrue to employees holding assignment on the Glenwood Machinist Roster, Central Region Seniority Point 6.

4. (a) Upon expiration of the ten-day bulletin, determination will be made of the employees who have bid and who have been awarded a position at South Louisville Shops. At the same time, determination will also be made of those employees whose jobs are being abolished as a result of this coordination and who, rather than bid on a position in the coordinated operation at South Louisville Shops, have elected to exercise displacement rights over junior regularly assigned employees whose positions are not being abolished. Such employees will designate the positions on which they intend to exercise seniority rights, and junior employees to be affected thereby shall make the same determination.

(b) In the event any positions advertised in the coordinated operation at South Louisville Shops are not filled in accordance with Paragraph (a), Glenwood employees whose positions are to be abolished and who have not bid on advertised positions in the coordinated operation or who do not have sufficient seniority to exercise seniority on other positions on the roster, and employees who are to be displaced through the exercise of seniority as described in Paragraph (a) and are unable to exercise seniority on other positions on the roster, will be assigned to the unfilled position(s) at South Louisville Shops in reverse order of seniority. Such assignment will be by letter signed by the appropriate Carrier officer with copies to the Local Chairman and General Chairman. An employee assigned a position at South Louisville Shops who fails to report to the position on the effective date of assignment, or as otherwise arranged with the L&N officer having jurisdiction at that location, except under circumstances beyond his control, shall forfeit protection as set forth in Article I, Section 6 of the New York Dock Conditions.

(c) The junior Glenwood employee(s) will be assigned in accordance with Paragraph (b) until the position(s) are either filled or until the employees described in such Paragraph (b) are exhausted.

(d) In the event employees at Glenwood fail to accept positions to which they are entitled at South Louisville Shops, such unfilled positions shall then accrue to the employees at the latter location. Positions then unfilled will be filled by recall of furloughed employees, if any, and then by new hires.

5. (a) Employees accepting positions at South Louisville on the L&N will have their seniority date, as it appears on the Glenwood Machinist Roster, dovetailed on the appropriate roster to which transferred upon reporting to work, and their name will be removed from the Glenwood Machinist Roster. Where, following this procedure results in two (2) or more employees having the same seniority date on the dovetailed roster, their respective positions on the roster will be determined by continuous service standing and then by age, oldest first.

(b) Employees transferring to South Louisville will be assigned positions in accordance with the bulletins advertising positions.

ATTACHMENT

ARBITRATED IMPLEMENTING AGREEMENT

BETWEEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

AND THEIR EMPLOYEES REPRESENTED BY

INTERNATIONAL ASSOCIATION OF MACHINIST AND AEROSPACE WORKERS

WHEREAS, this transaction is made pursuant to Interstate Commerce Commission decisions in Finance Docket No. 28905 (Sub.-No. 1) and related proceedings, and

WHEREAS, The Baltimore and Ohio Railroad Company and Louisville and Nashville Railroad Company, hereinafter designated respectively as "B&O" and "L&N" gave notice in accordance with Article I Section 4(a) of the conditions for the protection of employees enunciated in New York Dock Ry. - Control Brooklyn Eastern Dist., 360 I.C.C. 60(1979) hereinafter designated as "New York Dock Conditions" of the intent of the B&O to discontinue operation of the wheel shop at Glenwood, Pennsylvania and transfer such work to the L&N Railroad South Louisville Shops,

WHEREAS, the parties have conferred, but have reached no agreement,

NOW, therefore, it is determined:

1. The Labor Protective Conditions as set forth in the New York Dock Conditions which, by reference hereto, are incorporated herein and made a part hereof, shall be applicable to this transaction.

2. As a result of this transaction, the B&O will discontinue operation of the car wheel shop located at Glenwood, Pennsylvania, and the B&O machinist and machinist helper positions assigned at that location will be abolished. Thereafter, B&O's car wheel operations will be performed by L&N at their South Louisville Shops, Louisville, Kentucky, and all work at that location accruing to machinists under the provisions of the Collective Bargaining Agreement between L&N and the International Association of Machinist and Aerospace Workers will be performed by employees on the Machinist's Seniority Roster at South Louisville, Kentucky.

3. Positions to be established on L&N at South Louisville Shops, effective with the date of coordination, will be bulletined at Glenwood, Pennsylvania, for

This Neutral is sensitive to the fact that his Decision of January 12, 1983, in an Article I, Section 4 proceeding between these Carriers and the Brotherhood Railway Carmen of the United States and Canada involving the transfer of carmen to the South Louisville Shops provided for application of the L&N working agreement to the transferees. However, in that case the Carriers and the Organization agreed that the L&N agreement would have such application.

Accordingly, no provision will be contained in the arbitrated implementing agreement applying the L&N agreement to machinists who transfer to the South Louisville Shops.

The attached arbitrated implementing agreement, which is hereby made a part of this Decision, constitutes the Neutral's determination under Article I, Section 4 of the New York Dock Conditions as to the appropriate basis for the selection and rearrangement of forces pursuant to the coordination which gave rise to this proceeding. This Decision and the implementing agreement are intended to resolve all outstanding issues in this proceeding as provided in Article I, Section 4 of the New York Dock Conditions.


William E. Fredenberger, Jr.
Neutral Referee

DATED: January 19, 1983

Organization relies upon a Decision by the undersigned in an Article I, Section 4 proceeding between the Southern Railway Co. and the Brotherhood of Railroad Signalmen which the Organization contends supports its position.

As the Carriers note, this Neutral's Decision in the Southern Railway case involved a situation where to grant the Carrier's request would have extinguished a collective bargaining agreement, a factor not present in the case decided by Neutral Peterson and so noted by him. Nevertheless, this Neutral's review of the Peterson Decision and his Decision in the Southern Railway proceeding forces the conclusion that no jurisdiction exists in this case to grant the Carriers the relief they request.

It is true as the Carriers contend that in the instant case the B&O agreement will continue in effect at the Glenwood Shop and thus application of the L&N agreement would not result in the destruction of the Glenwood Shop agreement. In this Neutral's opinion that distinction does not vest jurisdiction in him to apply the L&N contract.

The rationale of this Neutral's jurisdictional ruling in the Southern Railway case, and the awards upon which it was based, is that a Neutral under Article I, Section 4 has no authority to alter rates of pay, rules or other benefits preserved by Section 2 of the New York Dock Conditions. Accordingly, such Neutral has no authority to modify a collective bargaining agreement where the parties have not agreed to confer that authority upon him. In the instant proceeding the Organization has not agreed to the Carriers' proposal or to submit the issue voluntarily to arbitration.

two employees may have the same seniority date and the same service date. The Carriers would resolve the ranking by lot, but the Organization proposes that the oldest employee in chronological age be ranked ahead of the younger employee. The Organization's proposal seems more consistent with the principle of seniority, and it will be included in the arbitrated implementing agreement.

The Carriers and the Organization failed to reach agreement on whether the L&N working agreement should apply to Glenwood machinists who transfer to the South Louisville Shops or whether the B&O working agreement should apply. The Organization challenges the jurisdiction of this Neutral to resolve the issue on the basis of Section 2 of the New York Dock Conditions which provides:

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The Carriers argue that such jurisdiction exists and that the L&N agreement should apply because that agreement will be applicable to all other machinists working at the South Louisville Shops.

In support of their jurisdictional argument the Carriers rely upon a Decision under Article I, Section 4 of the New York Dock Conditions by Neutral Robert Peterson involving the Southern Railway Co.-Norfolk & Western Railway Co. and Railroad Yardmasters of America. In that Decision Neutral Peterson applied to transferees the agreement in effect on the property to which they transferred as a result of a coordination. The

The Organization relies upon an Award in an Article I, Section 4 proceeding, issued after the ICC's Decision in Finance Docket No. 28905, involving the CSX Corporation and the Brotherhood of Railway Airline and Steamship Clerks, Freight Handlers, Express and Station employees-Irwin M. Lieberman, Neutral. That Award contains language which appears contrary to the thrust of the ICC's Decision. However, that Award dealt with a displacement allowance and not a dismissal allowance. Furthermore, the Award does not assess the ICC's Decision. Accordingly this Neutral does not find the Award persuasive.

Thus, it is concluded that the Glenwood Shop machinists may not refuse to transfer to Louisville and still come within the definition of a dismissed employee set forth in Article I, Section 1(c).

The Organization urges that seniority be observed in the transfer of employees from the Glenwood Car Wheel Shop to the South Louisville Shops, and the Carriers do not disagree. In fact the Carriers' proposed agreement recognizes that proposition. However, the Organization seeks a provision in the arbitrated implementing agreement allowing employees who do transfer a reasonable time to report. This Neutral does not believe that specification of a time or period for reporting is necessary. It is contemplated that the parties will follow the rule of reason in this regard.

Both the Carriers and the Organization agree that any transferees to Louisville should have their seniority dovetailed into the Louisville roster. The only apparent difference between the Carriers' proposal and the Organization's proposal on this matter concerns the situation where

the opportunity for the work in the event the Glenwood Shop machinists do not follow their work. This appears to be a more appropriate basis for the assignment of forces than that urged by the Organization.

The Organization contends that the Glenwood Shop machinists cannot be forced to transfer to Louisville at the peril of losing protection under the New York Dock Conditions because such a move requires a change of residence. The Carriers urge that they cannot refuse such transfer and continue to be dismissed employees within the meaning of Article I, Section 1(c) of the New York Dock Conditions.

In support of its contention the Organization analyzes the treatment of the terms "dismissed employee" and "change of residence" in various protective agreements and arrangements. The Organization argues that it is the intent of those conditions and arrangements that employees not be forced to move against their wishes if such move involves a change of residence. The Organization seeks specific language in the arbitrated implementing agreement which it contends would apply this protection to the coordination in this case.

The basic defect in the Organization's argument, as the Carrier notes, is that it ignores the history of this issue before the ICC. In its Decision in Finance Docket No. 28905 the Commission was requested by labor organizations to expand the definition under Article I, Section 1(c) of the New York Dock Conditions of a dismissed employee so as to protect employees from having to relocate. The ICC specifically rejected the organizations' request. The ICC has spoken authoritatively on the matter, and this Neutral must follow the ICC's pronouncement.

employment for those capable of holding it through the exercise of seniority and to make whole those employees who must take positions producing less compensation or who lose their positions altogether. In the final analysis the Organization's request for language is not necessary to a fair and equitable arrangement for the selection of forces, and accordingly it will not be included in the arbitrated implementing agreement.

The Organization disputes the need for the creation of nine new machinists' positions at the South Louisville Shops and argues that the work to be performed by employees in those positions should accrue to L&N employees, many of whom are on furlough. The Carriers argue that inasmuch as substantial work is being transferred from the Glenwood Car Wheel Shop to the South Louisville Shops, the positions are justified and that they should accrue to the Glenwood Shop machinists to whose craft the work originally belonged.

By its Decision in Finance Docket No. 28905 (Sub. No. 1) the ICC granted the Carriers authority to engage in the transaction which was the subject of the Carriers' September 2, 1982, notice. Creation of the machinists' positions at the South Louisville Shops is an integral part of that transaction. The authority of a Neutral acting under Article I, Section 4 extends to the selection of forces to fill those positions, but it does not extend to review of the Carriers' decision to create such positions.

The Carriers' proposal recognizes the equitable interest of the Glenwood Shop machinists in the work which was part of their craft. It permits those employees to follow their work. It allows the L&N machinists

Closure of the Glenwood Backshop and the resulting effects on employees flowed from a transaction under the Master Transfer Agreement and not the New York Dock Conditions. Once employees exercised their seniority pursuant to the Master Transfer Agreement only those remaining at Glenwood actually would be affected by the transfer pursuant to New York Dock. With respect to Article I, Section 3 of the New York Dock Conditions, there simply is no election remaining for the machinist employees who transferred to Huntington, because by transferring they elected to take jobs at Huntington rather than to bump into the Car Wheel Shop at Glenwood which they knew would be closed within a short time and all machinists' positions abolished there.

It is true that the difficulties here were to some extent created by the Carriers. Furthermore, the fact that the Carriers served both notices on the same day would support the inference that they were attempting to exert pressure on the Organization to reach agreement under Article I, Section 4 of the New York Dock Conditions by creating the potential situation which actually resulted. Nevertheless, the Carrier apparently tried to effectuate both transactions simultaneously, and if they had been successful the employees would have had the choice the Organization seeks here. Only the parties' failure to reach agreement precluded that choice. Under these circumstances the Carriers did not violate their obligations under the New York Dock Conditions.

It must be borne in mind that the function of the New York Dock Conditions as well as most protective arrangements is to preserve

junior employees are out of work and collecting dismissal allowances, all under the Master Transfer Agreement.

The Carriers argue that under Article I, Section 3 of the New York Dock Conditions, inter alia, employees must elect between the protections of the New York Dock Conditions and those offered by any other protective arrangement under which they are entitled to benefits. However, the Organization argues that the Carriers' actions deprived employees of a meaningful choice between benefits under the Master Transfer Agreement and benefits under the New York Dock Conditions because on December 6, 1982, no agreement had been reached or arbitrated pursuant to Article I, Section 4 of the New York Dock Conditions.

The Carriers argue that the Organization seeks to "unscramble the eggs" which would unduly burden the Carriers. The Carriers point out that they attempted to effectuate simultaneously the closure of the Backshop and the Car Wheel Shop at Glenwood, Pennsylvania, but were unable to do so by December 6, 1982, because the parties failed to reach agreement by that date.

The unfairness of the Carriers' actions, emphasized so strongly by the Organization, is more apparent than real. What the Organization actually seeks is the option for the most senior employees, and thus the least likely to lose their positions, to transfer to Louisville or Huntington. While the choice between transferring to Louisville or Huntington understandably is a highly desirable one, there is nothing fundamentally unfair about the absence of that choice under the circumstances of this case.

the effective date was set for December 6, 1982, the same effective date set for the closure of the Glenwood Car Wheel Shop and the abolition and creation of machinists' and machinist helpers' positions in connection therewith.

Both notices served on September 2, 1982, affected the same seniority group, and apparently much of the time spent in the negotiating meetings held pursuant to Article I, Section 4 of the New York Dock Conditions was spent discussing the notice served under the Master Transfer Agreement and its potential effects. The Carriers implemented the notice concerning the Glenwood Backshop on December 6, 1982, although at that time, as is evidenced by the instant proceeding, no agreement had been reached pursuant to Article I, Section 4 of the New York Dock Conditions. As a result the Glenwood Backshop was closed, and several employees on the seniority roster transferred to Huntington, West Virginia.

The Organization contends that the Carriers' action was unfair and asks this Neutral to right the perceived wrong to the employees by providing in the arbitrated implementing agreement that any machinist employees holding an assignment at the Glenwood Shop on September 2, 1982, be given thirty days to elect the benefits flowing from the Decision in this proceeding or those under the Master Transfer Agreement.

The Organization points out that by closing the Glenwood Backshop on December 6, 1982, the Carrier forced employees to exercise their seniority, either to transfer to Huntington, West Virginia, which several did, or to displace junior employees working in the Glenwood Car Wheel Shop. As a consequence, most present members of the machinist craft working in the Glenwood Car Wheel Shop are very senior employees, while

on November 30, 1982. Hearing was held in this matter pursuant to Article I, Section 4(a)(1) on December 20, 1982, at which time the parties presented written submissions and oral argument.

FINDINGS:

The parties have complied with the procedural requirements of Article I, Section 4 of the New York Dock Conditions, and the question at issue noted above is properly before this Neutral for determination.

The Carriers take the position that their proposed agreement covering this transaction is fair, equitable and appropriate. The Organization holds a contrary view on several points.

At the outset the Organization contends that the question at issue in this proceeding must be resolved against the background of another coordination which the Organization urges has direct and substantial impact upon the coordination here. On September 2, 1982, the same date the Carrier served notice triggering this proceeding, the B&O and the Chesapeake & Ohio Railway (C&O) served notice upon the IAM of the Carriers' intent to discontinue all work in connection with locomotive repair performed at the B&O Glenwood Backshop, Glenwood, Pennsylvania, and to transfer and consolidate such work with work being performed at the C&O Huntington Locomotive Shop, Huntington, West Virginia. The notice stated that 25 machinists' and 4 machinist helper's positions would be abolished at Glenwood Backshop and 13 machinists' and 2 machinist helper's positions added to the Huntington Locomotive Shop. This notice was furnished pursuant to the C&O-B&O-Western Maryland coordination agreement (Master Transfer Agreement) with the IAM, and

On September 2, 1982, the Baltimore & Ohio Railroad Company (B&O) and the Louisville & Nashville Railroad Company (L&N), two carriers over which CSX Corporation had acquired control by virtue of the Commission's Decision in Finance Docket No. 28905 (Sub. No. 1), served notice upon the International Association of Machinists and Aerospace Workers (IAM or Organization) pursuant to Article I, Section 4 of the New York Dock Conditions. The notice stated that the Carriers intended to discontinue operation of the B&O Car Wheel Shop at Glenwood, Pennsylvania and to transfer and coordinate such work with the work performed on the L&N railroad at its South Louisville Shops, Louisville, Kentucky. The notice also stated that positions of 12 machinists and 4 machinist helpers would be abolished at the Glenwood Shop and 9 machinists' positions established at the South Louisville Shops.

Further pursuant to Article I, Section 4 of the New York Dock Conditions, the parties met on September 15 and 16, October 21 and 22 and November 1, 1982, for the purpose of reaching agreement with respect to the selection and assignment of forces resulting from the coordination and with respect to the application of the New York Dock Conditions to the coordination. The Carriers submitted a written proposal at the October 21 meeting. However, the parties were unable to reach agreement, and the dispute remained unresolved.

Thereafter, the Carriers invoked the arbitration procedures of Article I, Section 4 of the New York Dock Conditions. The parties did not select a Neutral Referee as provided in Article I, Section 4 and as further provided therein the Carriers applied to the National Mediation Board for appointment of a Referee. That agency appointed the undersigned

Arbitration pursuant to Article I - Section 4 of the employee protective conditions developed in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) as provided in ICC Finance Docket No. 28905 (Sub. No. 1) and related proceedings

PARTIES	International Association of)	
	Machinists and Aerospace Workers)	
TO)	
	and	)	DECISION
DISPUTE)	
	The Baltimore and Ohio Railroad)	
	Company)	
	Louisville and Nashville Railroad)	
	Company)	

QUESTIONS AT ISSUE:

What provisions shall be contained in an arbitrated implementing agreement pursuant to Article I, Section 4 of the New York Dock Conditions in order to provide an appropriate basis for the selection and assignment of forces and the application of the New York Dock Conditions with respect to the transaction which was the subject of the Carrier's September 2, 1982, notice?

BACKGROUND:

On September 25, 1980, the Interstate Commerce Commission (ICC) served its Decision in Finance Docket No. 28905 (Sub. No. 1) approving acquisition of control by CSX Corporation of rail carriers subsidiary to Chessie System, Inc. and Seaboard Coast Line Industries, Inc. The Commission in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979) (New York Dock Conditions).

NATIONAL RAILWAY LABOR CONFERENCE

1801 L STREET, N.W., WASHINGTON, D.C. 20038/AREA CODE: 202--882-7200

CHARLES I. HOPKINS, Jr.

Chairman

ROBERT BROWN
Vice Chairman

D. P. LEE
Vice Chairman and
General Counsel

R. T. Kelly
Director of Labor Relations

June 8, 1983

CIRCULAR NO. 15-45

TO MEMBER ROADS:

As information, there is attached copy of Arbitration Award dated January 12, 1983 rendered by Neutral Referee William E. Fredenberger, Jr. involving the Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company and the Brotherhood Railway Carmen of the United States and Canada.

Also attached is copy of Arbitration Award dated January 19, 1983 rendered by Neutral Referee Fredenberger involving the Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company and the International Association of Machinists and Aerospace Workers. Both awards involve application of New York Dock employee protective conditions imposed by the ICC in Finance Docket No. 28905 and related proceedings.

Yours truly,

R. T. KELLY

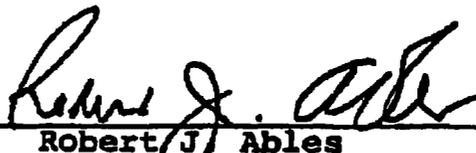
Director of Labor Relations

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IV. DECISION

The claim that four Assistant Chiefs/Power at Corbin, Kentucky shall follow their work to Jacksonville, Florida is denied.

Subject to this denial, the implementing agreement of the parties on January 9, 1988 shall apply to such unit employees.



Robert J. Ables
Neutral Referee

Dated: November 11, 1988

It is also pertinent in the carrier's favor that CSXT has used non-contract power distribution dispatchers at Jacksonville for a long time, thus eliminating any thought that, in this operation, it is consolidating power dispatch responsibilities with a purpose of taking the work from the union.

As to the Commission's order containing any bar to the disputed transfer, the Commission traditionally has shied away from being too specific in these matters and there is no history, precedent or other legal basis to infer that the Commission intended to include a bar to the disputed transfer.

That part of the organization's case, therefore, asking that New York Dock conditions be interpreted or applied to require Corbin, Kentucky contract locomotive power dispatchers to follow the work to Jacksonville is denied.

Subject to this finding, there is no legal or fair reason not to authorize the protective conditions for the four identifiable assistant chief/power dispatchers at Corbin the same protective conditions as was extended to about 20 other unit employees under an implementing agreement by the parties on January 9, 1988.^{11/}

11/

The parties disagree whether the agreement on January 9, 1988 was meant to apply to the four unit employees involved in this dispute. Except for following the work, as the union urges in its proposed implementing agreement -- but which is denied -- the question is academic because the carrier is willing to extend the same protection to the four unit employees at Corbin, Kentucky as it provided to other unit employees not involved in this dispute.

accepts such operations as being "unique" to other carrier operations, with its special requirements for movement of coal, often inter-divisional as well as local.

That decision having gone against the union, the only basis for deciding this New York Dock question in the union's favor is to find the coal movement work so special that only Corbin locomotive power dispatchers can do the job (at Jacksonville), ^{10/} or that the Interstate Commerce Commission order permitting this underlying merger contained at least an implicit bar against allowing consolidations permitting transfer of bargaining unit work to managers.

The union has not shown either of these conditions.

Clearly, distribution of power for locomotives at Corbin can be done at Jacksonville, the same as presently -- or soon will be -- done for all other points on the entire system, permitting obvious efficiencies and thus economies, as information about all power needs is centralized with the dispatchers and policy deciders in one place to make rational decisions that far-flung, complex operations seem to require.

Where this power distribution work is to be done no longer is in question. It will be done in Jacksonville.

SURFACE TRANSPORTATION BOARD



Finance Docket No. 33556 Sub. No. 5

**Canadian National Railway Co., Grand Trunk Corp. and Grand Trunk Western R.R., Inc.
- Control - Illinois Central Corp., Illinois Central R.R. Co., Chicago Central & Pacific
R.R. Co., and Cedar River R.R. Co**

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-PART II of III-

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Dated: April 14, 2011

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**ARBITRATION PROCEEDING UNDER
NEW YORK DOCK ARTICLE I, SECTION 4**

In the Matter of the Arbitration between:)	
)	
Grand Trunk Western Railroad Company)	
and Illinois Central Railroad Company,)	
	)	STB Finance Docket 33556
Carriers,)	
)	
and	)	Consolidation of GTW and IC
	)	dispatching work at Homewood,
	)	Illinois
American Train Dispatchers Association)	
and Illinois Central Train Dispatchers)	
Association,)	
)	
Organizations.)	

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Exhibit J	Verified Declaration of Roger Frasure
Exhibit K	Side Letter Agreement #6 (Sept. 27, 1999)

I. INTRODUCTION

Effective July 1, 1999, the Surface Transportation Board (“STB”) approved the acquisition of the Illinois Central Corporation, Illinois Central Railroad Company (“IC”), Chicago, Central & Pacific Railroad Company (“CCP”) and Cedar River Railroad Company (“CRR”) by the Canadian National Railway Company (“CN”), Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated (“GTW”).¹ See *Canadian National Railway Co., Grand Trunk Corp. and Grand Trunk Western R.R., Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago Central & Pacific R.R. Co., and Cedar River R.R. Co.*, STB Finance Docket No. 33556. In its Application for the STB’s approval of this transaction (the “Control Transaction”), filed over a decade ago, the Carrier expressly set forth its plan to eventually relocate GTW’s dispatching functions to Homewood, Illinois and consolidate the dispatching work with IC’s, in order to optimize customer service and safety:

Applicants will need to consolidate these dispatching facilities and practices, in a manner that will best utilize Applicants’ work forces to improve efficiency, maximize the opportunity for backup relief, and consequently optimize customer service and safety, in order to implement the Transaction. Section 10.2 of the Operating Plan describes the process through which Applicants will consolidate the three existing train dispatching facilities into IC’s facility in Homewood. In order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single collective bargaining agreement with a single seniority roster.

A copy of relevant pages of the Carrier’s STB Application is attached hereto as Exhibit A.

In furtherance of its longstanding plan, the Carrier announced on February 3, 2009 its intention to transfer the GTW dispatching work now performed in Troy, Michigan to Homewood with an accompanying transfer of ten (10) dispatching positions from Troy to

¹ The name of GTW was recently changed to “Grand Trunk Western Railroad Company.”

Homewood and the consolidation of those dispatching positions with IC dispatching positions already at Homewood. The Carrier bargained with the representatives of the GTW dispatchers, the American Train Dispatchers Association (“ATDA”), and the IC dispatchers, the Illinois Central Train Dispatchers Association (“ICTDA”) – for nearly six months.² The Carrier has proposed an implementing agreement which provides for an orderly and equitable selection and assignment of forces pursuant to the *New York Dock* labor protective conditions, with the generous *New York Dock* benefits available to protect employees affected by the consolidation.

Unfortunately, the ATDA categorically rejects the fundamental purpose of the transfer, the actual consolidation of the GTW and IC dispatching work. The ATDA dragged out the bargaining process far beyond the normal negotiating timeframe, proposed prohibitively onerous conditions well in excess of those contemplated by *New York Dock*, and has demanded that the transferred GTW dispatchers remain completely walled-off from the IC dispatchers through a rigid division of work, separate seniority rosters, and separate collective bargaining agreements.

In the Control Transaction, the STB approved a genuine merger of the GTW and IC, not merely a transfer of rail lines that the Carrier would henceforth continue to operate as entirely separate rail carriers. *See United Transp. Union v. STB*, 108 F.3d 1425, 1431 (D.C. Cir. 1997) (“there is little point in consolidating railroads on paper if a consolidation of operations

² The ICTDA has sought to remain neutral. However, because it is necessary for the Carrier to consolidate the work of the GTW and IC dispatchers, IC dispatchers will unavoidably be affected by the consolidation and the ICTDA is a necessary, if reluctant, party to this Section 4 arbitration proceeding. Because the ICTDA is not currently proposing a specific implementing agreement and has not espoused any strongly-held positions with respect to the consolidation – other than its desire to remain neutral – the Carrier focuses its arguments in this Post-Hearing Submission on the positions advanced by the ATDA. Of course, the ICTDA and the IC dispatchers it represents must be bound by the tripartite implementing agreement that will be imposed through this proceeding.

cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation”). The Carrier’s proposed implementing agreement aims to unlock the efficiencies of the Control Transaction, while the ATDA’s proposed implementing agreement seeks to defeat them. The Carrier therefore respectfully submits that the Arbitrator must reject the ATDA’s proposed implementing agreement and impose the Carrier’s proposed implementing agreement in full.

II. FACTUAL BACKGROUND

The Carrier’s Pre-Hearing Submission contains a detailed and thoroughly documented history of both the Carrier’s decision to relocate the work presently performed by the GTW dispatchers in Troy, Michigan to Homewood, Illinois and consolidate the work of the GTW dispatchers with IC dispatchers and the Carrier’s good faith bargaining, over a period of nearly six months, with the ATDA and ICTDA in an attempt to reach a voluntary implementing agreement providing for the assignment and selection of forces related to the consolidation. The Carrier will not rehash the procedural history leading to this Section 4 arbitration.

Because of the long history in the rail industry of consolidating train dispatching functions following mergers, the necessity of consolidating train dispatching work is both self-evident, and well accepted by *New York Dock* arbitrators. However, since the ATDA’s only argument at the Hearing was that co-location of the GTW dispatchers in Homewood would be sufficient and that it was not “necessary” to consolidate their work with that of the IC dispatchers, it is -- once again -- necessary for the Carrier to spell out points that have been litigated many times over.

A description of the historical development of the CN rail system in the United States is helpful to explain the instant transaction. CN was incorporated in 1919 as one of

Canada's two transcontinental railroads. (See EJ&E Application, attached hereto as Exhibit A, at 17).³ The Duluth, Winnipeg and Pacific Railway Company ("DWP"), which has been a CN subsidiary since 1919, extends the CN system from the international border at Duluth Junction/Rainier over DWP's own lines to Nopeming Junction, MN. (Id.). Since 1923, the CN system has also included GTW, which extends CN's system from the international border at Port Huron/Sarnia and Detroit/Windsor to Chicago, the hub of the North American rail network. (Id.).

In 1999, recognizing the growing importance of north-south traffic to the North American economy and achieving the goals of the North American Free Trade Agreement, the Carrier acquired IC, along with the CC&P and the CRR, in order to position itself to better serve this growing market by extending its system from Chicago to the Gulf Coast. (See EJ&E Application at 17-18; IC Acquisition Map, attached hereto as Exhibit B). In 2001, the Carrier acquired Wisconsin Central Ltd. and its affiliates ("WC"), which greatly expanded the Carrier's reach throughout Wisconsin and Michigan's Upper Peninsula. (See EJ&E Application at 18; WC Acquisition Map, attached hereto as Exhibit C). In 2004, the Carrier acquired the Duluth, Missabe and Iron Range Railway Company ("DM&IR"), with operations through the Minnesota Iron Range, and the Bessemer and Lake Erie Railroad Company ("B&LE"), which runs through northern Ohio and Western Pennsylvania. (See EJ&E Application 18; GLT Acquisition Map, attached hereto as Exhibit D). Most recently, the Carrier completed its acquisition of the Elgin, Joliet & Eastern Railway ("EJ&E") in 2008. See *Canadian National Railway Co. and Grand*

³ The EJ&E Application refers to the Railroad Control Application filed on October 30, 2007 in *Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Finance Docket No. 35087. Because the referenced Railroad Control Applications are extremely lengthy documents, often containing multiple volumes, only the cited pages are included in the Carrier's exhibits hereto.

Trunk Corp. – Control – EJ&E West Co., STB Finance Docket No. 35087 (Service Date Dec. 24, 2008). The EJ&E loops around Chicago, allowing trains to travel around, rather than through, central Chicago and connects, *for the first time*, the WC to the GTW and IC trackage. (See EJ&E Application at 22; EJ&E Acquisition Map, attached hereto as Exhibit E).

In seeking STB approval for each of these vital acquisitions, the Carrier explained that efficiencies would be achieved by eventually creating a consolidated dispatching operation in Homewood, Illinois. Most pertinent to the present transaction, the Carrier openly explained in its application to acquire the IC that “[f]ollowing approval of the Transaction, CN/IC will consolidate the dispatching function at Homewood.” (See IC Application, attached hereto as Exhibit F, at 177).⁴ Moreover, “[i]n order to achieve these changes and efficiencies,” the Carrier explained to the STB, “it will be necessary to bring these dispatching groups under a **single collective bargaining agreement with a single seniority roster.**” (Id. at 204) (emphasis added). In its Labor Impact Statement, the Carrier estimated that twelve (12) of the then thirty-one (31) dispatcher positions in Troy would be abolished. (Id. at 279). The remaining nineteen (19) Troy dispatcher positions would be transferred to Homewood. (Id.). The Carrier calculated that the eventual complete integration of dispatching operations would result in “compensation savings of about \$2.8 million annually.” (Id. at 178).

The consolidation of dispatchers was expressly addressed during the STB’s consideration of the Control Transaction. The ATDA argued to the STB that the Control Transaction should not be approved unless (i) dispatching functions could not be moved to Canada, (ii) existing protective arrangements applicable to ATDA-represented dispatchers

⁴ The IC Application refers to the Railroad Control Application filed on or about July 8, 1998 in *Canadian National Railway Co., Grand Trunk Corp. and Grand Trunk Western R.R., Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago Central & Pacific R.R. Co., and Cedar River R.R. Co.*, STB Finance Docket No. 33556.

remain in effect in perpetuity, and (iii) existing ATDA collective bargaining agreements be preserved. (*See* Brief of the ATDA, STB Finance Docket No. 33556, filed Feb. 19, 1999, attached hereto as Exhibit G). In the event of a future consolidation of work, as the Carrier now proposes, the ATDA demanded that the STB “insist that the rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits under applicable laws and/or existing collective bargaining agreements or otherwise will be preserved.” (*Id.*). However, in its decision approving the Control Transaction, the STB explicitly acknowledged the Carrier’s intent to consolidating dispatching in Illinois and the **only** condition imposed by the STB was that dispatching functions not be consolidated in Canada without prior approval. *See Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk W. R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co, Chicago, Central & Chicago R.R. Co. and Cedar River R.R. Co.*, Finance Docket 33556 (Service Date May 21, 1999) (“At oral argument, applicants stated that they intend to centralize dispatching in Illinois, not in Canada ...”). The STB did not adopt the ATDA’s demand that approval of the Control Transaction be conditioned on explicit protection of pre-existing collective bargaining agreements.

It is important to note that an important factor in the STB's consideration of a transaction is the ability of a combined rail system to perform work with fewer employees than separate railroads. Thus, the reduction of train dispatching positions made possible by a true consolidation (rather than a co-location, as ATDA proposes) is essential to accomplish the public benefits of the transaction approved by the STB.

In each subsequent acquisition, the Carrier has addressed its intent with respect to consolidating dispatchers. *See* EJ&E Application at 234 (“CN intends to centralize the train

dispatching functions to Homewood in a phased approach”); DM&IR Application,⁵ attached hereto as Exhibit H, at 174-75 (explaining that “dispatching and crew calling office may be combined with those in other CN locations, resulting in some job reductions ... once systems have been put in place to ensure proper coordination of train movements across CN and the GLT Railroads”); WC Control Application,⁶ attached hereto as Exhibit I, at 34 (explaining that “CN is upgrading its existing dispatching system to a new common system for operations over the former IC and GTW lines” but noting that it did not intend to integrate the WC dispatchers, which utilized a different system -- and dispatched non-contiguous trackage -- for at least three years).

The Carrier has consolidated its dispatching function in a gradual, orderly process in order to ensure safety and customer service. The Carrier initially consolidated the dispatching work into three primary locations, based on the territory dispatched, as well as the compatibility of dispatching systems. The DM&IR and DWP dispatching functions, previously located in Duluth, Minnesota and Pokegama, Wisconsin, respectively, were consolidated in Stevens Point, Wisconsin, as part of the dispatching functions performed by the existing WC dispatchers in Stevens Point in 2004 and 2005. (See Frasure Decl. at ¶ 2).⁷ The B&LE dispatching functions were consolidated in Troy, Michigan along with the existing GTW dispatchers based in Troy

⁵ The DM&IR Application refers to the Railroad Control Application filed on November 5, 2003 in *Canadian National Railway Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co., and The Pittsburgh & Conneaut Dock Co.*, STB Finance Docket No. 34424.

⁶ The WC Application refers to the Railroad Control Application filed on April 9, 2001 in *Canadian National Railway Co., Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corp., Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Co., and Wisconsin Chicago Link Ltd.*, STB Finance Docket No. 34000.

⁷ The Verified Declaration of Robert Frasure is attached hereto as Exhibit J.

shortly after the Carrier's acquisition of B&LE in 2004. (See Frasure Decl. at ¶ 3). The dispatcher functions performed by the EJ&E dispatchers were consolidated in Homewood, Illinois, with the work of the existing IC dispatchers in July 2009. (See Frasure Decl. at ¶ 4).

The Carrier agreed to delay consolidating the work of the GTW and IC dispatchers in the years immediately following the Control Transaction as part of an agreement with ATDA to keep the GTW dispatchers in Troy for six years. (See September 27, 1999 Side Letter Agreement #6, attached hereto as Exhibit K). The Carrier has complied with that obligation and is now free to move forward with this consolidation. By seeking GTW's agreement to forestall consolidation of train dispatching work, ATDA implicitly recognized the Carrier's right to do so pursuant to the Control Transaction.

Recently, the Carrier has begun the process of consolidating its three remaining dispatching centers into the Carrier's Homewood Transportation Center. The Carrier announced in October 2007 that it would relocate the dispatchers then working in Stevens Point, Wisconsin to Homewood. (See Frasure Decl. at ¶ 5). At the time, the lines of the WC and the IC were not contiguous. As a result, the work of the WC dispatchers could not be combined with other railroads, and there was no public benefit to be obtained from consolidating the work of the WC and IC dispatchers, as opposed to merely relocating the WC dispatchers to Homewood. (Id.).⁸

⁸ On May 22, 2008, nine days before the relocation of the WC dispatchers was to take effect, the National Mediation Board certified the ATDA as the representative of the WC dispatchers. See *Canadian National Railway Co., Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisconsin Central Transportation Corp., Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Co., and Wisconsin Chicago Link Ltd.*, STB Finance Docket No. 34000, 2008 WL 2321818 (Service Date June 6, 2008). The ATDA filed an emergency petition with the STB on May 29, 2008, seeking to have the relocation of WC dispatchers enjoined. See *id.* By order dated June 6, 2008, the STB denied the ATDA's petition and the relocation of the WC dispatchers occurred shortly thereafter. See *id.*

Thus, the Carrier could only accomplish the limited objective of relocating the WC dispatchers to Homewood without the ability to consolidate their work with that of the IC.

With the acquisition of EJ&E, the true consolidation of train dispatching functions has become more critical. Here, as in past consolidations, the Carrier is proceeding in a gradual fashion to ensure safety and customer service. On the operations side, the Carrier and the labor organizations representing the Carrier's operating crafts have executed an agreement, known as the Chicago Coordination Agreement, providing for wide-ranging reciprocal trackage rights in the Chicagoland area. (See Frasure Decl. at ¶ 6). With this landmark agreement, the Carrier has achieved the right to operate trains originating on any one of the traditional lines throughout the geographic region encompassed by the Chicago Coordination Agreement. (Id.). However, while a train and engine crew now is able to operate a train from Battle Creek, Michigan to Griffith, Indiana, and on to either Memphis or Winnipeg, *four separate dispatchers presently are required to assume responsibility for the train as it passes through each of the historic dispatching territories in the Chicago Terminal.* (Id.). This results in obvious operational inefficiencies that would be eliminated by consolidating the work of the Carrier's dispatchers under a single collective bargaining agreement. (Id.).

III. ARGUMENT

A. The Consolidation of the GTW Dispatchers With the Existing IC Dispatchers in Homewood Is Necessary to Achieve the Efficiencies of the Control Transaction

1. The Legal Standard of Necessity

Congress has granted the STB exclusive authority over rail transactions such as the Control Transaction. See 49 U.S.C. § 11321(a). A rail carrier participating in an STB-approved transaction "is exempt from the antitrust laws and from all other law ... as necessary to

let that rail carrier ... carry out the transaction..." *Id.* The exemption from "all other law" includes the Railway Labor Act and permits the STB, or arbitration panels acting under Article I, Section 4 of *New York Dock*, to override the provisions of existing collective bargaining agreements as "necessary" to carry out the approved "transaction." *See Norfolk & Western Ry. Co. v. ATDA*, 499 U.S. 117, 128 (1991). Arbitrators fashioning an implementing agreement under the *New York Dock* conditions are required to create an agreement that permits the Carrier to achieve the efficiencies made possible by the approved transaction.

The courts and the STB will engage in two-stage analysis to determine whether a collective bargaining agreement may be overridden in connection with an STB approved transaction. First, there must be a logical link or "nexus" between the changes sought and the STB approved transaction. *United Transportation Union v. STB*, 108 F.3d 1425, 1430 (D.C. Cir. 1997). Second, the transaction must yield a "transportation benefit to the public." *Id.* at 1431.

The term "transaction" encompasses "two categories of transactions: the principal transaction approved by the [STB] (generally a consolidation or acquisition of control) and subsequent transactions that were directly related to and grew out of, or flowed from, that principal transaction (such as a consolidation of facilities, transfer of work assignments, etc.)." *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indust. Inc.*, STB Finance Docket No. 28905 (Sub No. 22), 1998 WL 661418 at * 13, (Service Date: Sept. 25, 1998). "[T]he approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to, and fulfill the purposes of, the principal transaction." *Id.* at * 19. "As long as there is a reasonably direct causal connection between the [principal] transaction and the operational changes sought to be implemented, such operational changes are embraced within the principal transaction." *Id.* (internal quotations omitted).

If the subsequent transaction is related to the underlying approved transaction, existing collective bargaining agreements may be overridden when “necessary in order to secure to the public some transportation benefit flowing from the underlying transaction.” *CSX Corp.*, 1998 WL 661418 at * 14 (quoting *RLEA v. United States*, 987 F.2d 806, 815 (D.C. Cir. 1993)).

2. Particular Efficiencies To Be Achieved By Consolidating the GTW and IC Dispatchers.

Here, to achieve fully the efficiencies of the Control Transaction, it is necessary to consolidate the work of the GTW dispatchers with that of the IC dispatchers currently based in Homewood. Such a consolidation will permit the Carrier to reorganize the geographic scope of existing “desks,” or teams of dispatchers assigned to dispatch trains over a particular geographic area, with the elimination at least one desk. (See Frasure Decl. at ¶ 7). Cross-training and eliminating restrictions tying the consolidated dispatchers to only the historical geographic boundaries of previously independent railroads will allow the Carrier the flexibility to “backfill” work from one desk to another in the event of storms, derailments, labor disputes affecting other carriers, or other unanticipated circumstances, thereby protecting service and reducing costs. (See Frasure Decl. at ¶ 7). Finally, the Carrier currently maintains an “extra board,” available to fill in as necessary, for each of the IC and GTW dispatcher groups. (See Frasure Decl. at ¶ 8). A genuine consolidation of the two dispatcher groups will permit the Carrier to combine the two extra boards and enhance the availability of trained, qualified dispatchers to cover absences. (See Frasure Decl. at ¶ 8).

Eliminating redundant positions, particularly in support functions such as train dispatching, is a core efficiency to be achieved in any rail merger. In the Carrier’s 1998 application to the STB in the Control Transaction, the Carrier explicitly represented that it intended to eliminate twelve (12) GTW train dispatcher positions in Troy and transfer nineteen

(19) GTW train dispatcher positions from Troy to Homewood. (See IC Application at 279). Such a significant reduction in the number of positions simply could not be possible if the Carrier merely relocated the GTW dispatching work without a true consolidation. Moreover, consolidation of the GTW and IC dispatchers will eliminate the number of hand-offs between dispatcher groups of trains operating freely within the greater Chicagoland area pursuant to the Chicago Coordination Agreement, resulting in obvious efficiencies.

The heart of the ATDA's argument is that consolidating the work of the GTW dispatchers and IC dispatchers at Homewood is not "necessary" to achieve the efficiencies of the transaction approved by the STB in the Control Transaction. Rather, the ATDA contends, this Arbitrator should impose an implementing agreement that merely co-locates the GTW dispatchers at Homewood, while leaving them effectively walled-off from the other dispatchers located at Homewood. The ATDA argues that GTW dispatchers should not be permitted to dispatch trains over the lines of affiliated rail carriers and especially objects to any other dispatchers controlling train movements over the GTW. (ATDA Pre-Hearing Submission at 7-8). ATDA opposes any merging of seniority rosters or the elimination of any other provision of the GTW dispatcher's current collective bargaining agreement. (ATDA Pre-Hearing Submission at 8-9).

ATDA's argument is utterly incongruent the *New York Dock* implementing agreement process. First, if the Arbitrator were to accept the ATDA's position and effectively wall-off the GTW dispatchers, the planned consolidation would be converted to a mere relocation. If the Carrier were merely relocating work from one location to another, no regulatory approval would be required – *New York Dock* would not even apply, this Section 4

arbitration would be unnecessary, and the relocating GTW dispatchers would not be entitled to the *New York Dock* protections.

Second, none of the efficiencies described above could be achieved if this Arbitrator accepted the position unabashedly put forth by ATDA that GTW dispatchers should remain functionally walled-off from the IC dispatchers. The efficiencies to be achieved by consolidating the GTW and IC dispatchers arise from increasing operational flexibility and eliminating positions made redundant as a result of such flexibility.⁹ In the highly-competitive freight transportation industry, these costs savings will be passed on to shippers, resulting in a benefit to the public. The cost savings associated with a reduction in positions needed to perform a particular task, such as train dispatching, has long been recognized as an important public benefit:

Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. ... Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.

CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indust., Inc., Finance Docket No. 28905, Sub.-No. 27, 1997 WL 392876, * 2 (Service Date July 1, 1997) (quoting *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indust., Inc.*, Finance Docket No. 28905, Sub.-No. 27, Slip. Op. at 13 (Service Date December 7, 1995)). The elimination of redundant positions and the consolidation of previously-separate functions represent core

⁹ In addition to the efficiencies achieved by consolidating the work, the relocation will reduce the Carrier's costs by eliminating the need to lease space in Troy and by allowing for the consolidation of management and information technology support functions. (See *Frasure Aff.* at ¶ 9).

efficiencies obtained through every rail merger – and do not merely transfer wealth from employees to their employer. Here, although differences in wage and benefits plans between GTW and IC make a direct apples-to-apples comparison difficult, GTW dispatchers on balance will earn the same or more *after* they are consolidated with the IC dispatchers and working under the ICTDA agreement. (See Frasure Decl. at ¶ 10).

In the event that any employee is adversely affected and suffers a loss in monthly earnings, the STB made clear in its approval of the Control Transaction that any such employee will be entitled to receive the generous labor protective benefits under *New York Dock*. See *Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk W. R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co, Chicago, Central & Chicago R.R. Co. and Cedar River R.R. Co.*, Finance Docket 33556 (Service Date May 21, 1999). Moreover, the Implementing Agreement proposed by the Carrier in this Section 4 arbitration proceeding contains detailed guidance on how an affected employee may submit a *New York Dock* claim for payment. If a dispute arises concerning whether a particular employee is entitled to *New York Dock* benefits, or the appropriate level of benefits, Article I, Section 11 of the *New York Dock* conditions contains a mechanism for resolving such disputes, culminating in binding arbitration.

3. The Carrier Relocated the WC Dispatchers Under Unique Circumstances Not Present Here.

At the hearing, the ATDA argued that the Carrier should relocate but not consolidate the GTW dispatchers, as the Carrier previously did with a group of WC dispatchers. However, at the time the WC dispatchers were relocated to Homewood, the lines of the WC did not physically connect to the lines of the IC, and EJ&J was not yet part of the Carrier's rail system. Because WC train and engine crews could not run south of the terminus of the WC line,

there was no benefit of integrating the work of the WC dispatchers with that of the IC dispatchers prior to the Carrier's acquisition of the EJ&E.

The relocation of the WC dispatchers was initiated before the Carrier's acquisition of the EJ&E and the Chicago Coordination Agreement, while the consolidation of the GTW dispatchers was initiated after the Carrier's acquisition of the EJ&E and the Chicago Coordination Agreement. This critical difference in the background circumstances explains why the Carrier now is seeking to consolidate the GTW dispatchers, while in 2008 it could only relocate the WC dispatchers, and was unable to combine their work with that of the IC. The Board should summarily reject the ATDA's argument that the Carrier now should be restrained from achieving the efficiencies of the Control Transaction because it treated the WC dispatchers differently, under different circumstances that limited the efficiency enhancements possible at that time.

B. The Implementing Agreement Proposed By the ATDA Would Defeat the Efficiencies of the Transaction and Impermissibly Goes Beyond the Proper Scope of an Article I, Section 4 Arbitration Proceeding.

1. To Effectuate the Proposed Consolidation, It is Necessary to Merge The Work of GTW and IC Dispatchers, With Both Groups of Employees on a Single Seniority Roster and Working Under a Single Collective Bargaining Agreement.

In its Pre-Hearing Submission, the ATDA asserts that the GTW dispatchers should remain walled-off because the Carrier does not intend to actually consolidate the work of the GTW and IC dispatchers. For example, on page 3 of the ATDA's Pre-Hearing Submission, it contends that "CN/IC is not merging the GTW and IC rail traffic control systems" but merely, "moving the GTW control system from Troy to a building at Homewood where IC and WC dispatchers already work." As explained above, the ATDA's position is factually incorrect. The

conclusions that ATDA draws from its disingenuous mischaracterization of the proposed consolidation therefore are fatally flawed.

First, the ATDA proposes that GTW dispatchers retain prior rights over the work of dispatching trains over GTW trackage. The ATDA correctly observes that the Carrier's proposal "would only grant prior rights to the transferred *positions*, not the transferred *work*." (ATDA Pre-Hearing Submission at 7) (emphasis in original). As explained above, the Carrier intends to consolidate the *work* of the GTW and IC dispatchers in areas like Chicago where the Carrier's various affiliates already have broad-ranging reciprocal trackage rights. While the Carrier has no immediate plans to completely integrate the remainder of the GTW and IC rail systems, the cross-training of GTW and IC dispatchers and overlap of dispatching territories are necessary to achieve the efficiencies of the Control Transaction. Simultaneous with the elimination of all GTW dispatching work from Troy, the Carrier intends to create ten (10) new dispatcher positions at Homewood. In this context, it makes sense to afford the transferring GTW dispatchers prior rights over the newly-created *positions*. However, prior rights over the GTW dispatchers' former *work* is antithetical to the very purpose of the transaction, which is to co-mingle the work of the GTW dispatchers and the IC dispatchers to the maximum extent operationally feasible. *See, e.g., Conrail and Monongahela Ry. Co. v. IAMAW*, NYD § 4 Arb. (Peterson, June 21, 1993) (rejecting the union's demand to retain prior rights over work performed prior to the merger because "when work of the nature here involved on the MGA is transferred and integrated into the Conrail system in implementation of the merger it will be difficult, if not impossible, to distinguish what work had previously been work restricted to or performed by former MGA employees").

For the same reason, the ATDA's position set forth in Section B(3) of its Pre-Hearing Submission is misguided. The ATDA proposes that the GTW dispatchers who do not transfer to Homewood at the time of consolidation retain, indefinitely, "the right to bid on positions at Homewood that dispatch trains over GTW tracks..." (ATDA Pre-Hearing Submission at 10). However, because the Carrier intends to *consolidate* the work, it becomes illogical to refer to former *GTW work*. With the reorganization of dispatcher desks at Homewood consistent with the Carrier's operational needs, the distinction between GTW work and IC work will blur almost immediately, and eventually may disappear entirely. As stated in Paragraph 4 of the Carrier's proposed implementing agreement, GTW dispatchers unable to exercise their seniority to obtain positions at Homewood will be offered clerical positions under the GTW/TCIU agreement and, of course, all affected employees will be eligible for protective benefits under *New York Dock*.

Second, the ATDA claims that transferred GTW dispatchers should remain on a separate seniority roster and continue to work under their existing ATDA agreement. But, the factual predicate for that argument is similarly flawed:

Because the GTW system is not being integrated with the rest of the CN/IC system, there is no good reason to integrate seniority rosters or eliminate collective bargaining agreements at this time.

(ATDA Pre-Hearing Submission at 8). Again, the ATDA's premise is simply wrong. It is true that Carrier is not proposing to fully integrate the entire GTW and IC *systems* at this time, but that is in no way inconsistent with the Carrier's unambiguous intention to consolidate the work of the GTW and IC *dispatchers*, particularly in geographic areas where the rail systems do in fact overlap today.

If the GTW and IC dispatchers were to maintain separate seniority rosters and an opening becomes available on a reorganized desk dispatching trains over the lines of both traditional railroads, to which list would the Carrier look to fill the position? If the GTW and IC dispatchers continued to work under two separate collective bargaining agreements, which agreement would cover employees working at such a consolidated desk? Any attempt to have one consolidated dispatcher workforce operating under two distinct seniority rosters and collective bargaining agreements would be rife with confusion. Such a state of affairs no doubt would provoke grievances and defeat the very efficiencies that justify the consolidation.

The Carrier's proposed implementing agreement provides for an equitable dovetailing of GTW and IC seniority rosters – a practical solution that has been endorsed by New York Dock Section 4 arbitrators. See, e.g., *See Norfolk & Western Ry. Co. v. BRS*, NYD § 4 Arb. (LaRocco, Feb. 9, 1989). Similarly, the Carrier proposes to place the consolidated GTW and IC dispatchers under a single collective bargaining agreement – the only workable solution where, as here, the work of two previously-separate groups of employees will be co-mingled at a single location under common managers. As explained in detail in the Carrier's Pre-Hearing Submission, the "controlling carrier" doctrine mandates that this Arbitrator apply the existing agreement in place at the receiving location – the ICTDA agreement.

2. Absent Agreement By the Parties, the Arbitrator May Not Award the Enhanced Protective Benefits Demanded by the ATDA.

New York Dock provides perhaps the most generous employee protection recognized by American law. During these challenging economic times, when mass layoffs and reductions in wages and benefits have become an everyday occurrence, *New York Dock* assures rail employees affected by an STB-approved transaction (including all of the GTW dispatchers at

issue in this case) with six (6) years of protection, in addition to relocation benefits that appear exceedingly generous by today's standards.

As explained in the Carrier's Pre-Hearing Submission, the Carrier's initial proposed implementing agreement contained certain enhanced relocation benefits – above and beyond the normal *New York Dock* benefits – in an effort to secure a quick and amicable agreement that would permit the Carrier to implement the dispatcher consolidation and begin enjoying the efficiencies from the consolidation. Also as detailed in the Carrier's Pre-Hearing Submission, the ATDA was principally responsible for dragging out the *New York Dock* bargaining process months beyond the normal bargaining period. When the ATDA finally provided its full counterproposal, it became obvious that the ATDA was diametrically opposed to the very premise of the consolidation – the actual consolidation of the GTW and IC dispatchers' work. The ATDA's unwavering opposition has persisted to this day. Parties to an implementing agreement frequently will have disagreements over details affecting the assignment and selection of forces, and the 30-day bargaining period is intended to permit the parties time to resolve such differences. But, the parties here are not dickering over details. The ATDA rejects the core premise of the consolidation.

The simple fact is that ATDA refused to accept the enhancements to *New York Dock* offered by the Carrier in order to obtain a voluntary implementing agreement. Having rejected the core concept behind such an agreement, the Organization cannot now complain that the carrier will not offer enhanced benefits that were offered only to achieve a nonexistent voluntary implementing agreement.

As explained in the Carrier's Pre-Hearing Submission, *New York Dock* arbitrators have recognized that the arbitration process is designed to address the selection and assignment

of forces and, absent *voluntary agreement by the parties*, arbitrators lack the jurisdiction under Article I, Section 4 to impose an implementing agreement providing benefits greater than the already generous benefits set forth in *New York Dock*. See *Norfolk & Western R.R. Co. v. BRS*, NYD § 4 Arb. (LaRocco, Feb. 9, 1989); *Conrail and Monongahela Ry. Co. v. IAMAW*, NYD § 4 Arb. (Peterson, June 21, 1993). Having rejected any concept of a voluntary implementing agreement, the Arbitrator must follow the standard *New York Dock* provisions.

a. Pay Raises

In Section B(5) of the ATDA's Pre-Hearing Submission, the ATDA argues that the GTW dispatchers "live primarily in Pontiac, MI" and should be given an across-the-board 10% pay increase to reflect the allegedly-higher cost of living in Homewood, IL. First, as a factual matter, the ATDA is mistaken. However, only two (2) of the GTW dispatchers currently reside in the atypically-depressed city of Pontiac. (See Frasure Decl. at ¶ 10). More importantly, the *New York Dock* conditions plainly provide for wage protection – not wage *enhancement* based upon comparative costs of living. The ATDA is unable to cite to a single award in which a *New York Dock* arbitrator imposed an across-the-board pay increase in like circumstances and the ATDA's demand must be rejected.

b. Spousal assistance

The ATDA also seeks one year of job counseling and placement assistance for spouses of transferring GTW dispatchers. (ATDA Pre-Hearing Submission at 13). Again, the ATDA offers absolutely no support for this demand, which is plainly outside of the protections afforded by *New York Dock*.

c. Five Paid Days for "House Hunting Trips"

Article I, Section 9 of *New York Dock* allows employees reimbursement for actual moving expenses plus an employee's "actual wage loss, not exceeding 3 working days." *New York Dock* makes no provision whatsoever for "house hunting trips." However, the ATDA, again without legal justification, demands five (5) paid days so that an employee may take up to two house hunting trips, as well as reimbursement for all travel expenses associated with such trips or a \$2,500 lump sum, at the employee's option. (ATDA Pre-Hearing Submission at 14). This proposal, which will cost the Carrier at least \$36,000.00, is outside of the protections afforded by *New York Dock* and therefore must be rejected.

d. Eight Separation Allowances

The ATDA further demands that the Carrier fund "at least eight separation allowances," to be "offered in seniority order." (ATDA Pre-Hearing Submission at 14). The admitted rationale behind this demand is to "bridge senior employees to retirement," in other words, to guarantee that those employees with the greatest ATDA seniority never need to work again. *New York Dock* is intended to provide affected employees willing to follow their work with wage protection – not to result in a windfall for employees who choose not to work at all. The law is clear that "employees who refuse to transfer with available work are not considered 'dismissed employees' and therefore are not entitled to either a 'dismissal allowance' or a 'separation allowance' under the *New York Dock* Conditions." *IAMAW and Guilford Transp. Indust.*, NYD § 4 Arb. (O'Brien, Feb. 2, 1987). The ATDA cites similar allowances that were offered to DM&IR dispatchers in 2005. However, the ATDA neglects to explain that the allowances offered as part of the DM&IR consolidation with WC were part of a *voluntary agreement pursuant to which the work was transferred*. (See Frasure Decl. at ¶ 2). Because

artificial “separation allowances” are outside of the protections afforded by *New York Dock*, the Arbitrator may not impose such allowances in an implementing agreement.

e. Lump Sum Monetary Relocation Packages

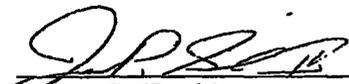
Finally, the ATDA proposes “lump sum” relocation packages worth \$40,000.00 or more for each transferred GTW dispatcher who owns his home and total packages worth up to \$92,000.00 for each transferred GTW dispatcher who rents his home. (ATDA Pre-Hearing Submission at 15-16). However, Article I, Sections 9 and 12 of *New York Dock* provide clear and concise relocation benefits and the Carrier’s proposed implementing agreement ensures that transferring employees will receive the full relocation benefits to which they are legally entitled. However, “[i]t is beyond the jurisdiction of an arbitration board, such as this, to award an increase in the prescribed moving allowance, absent authority of the parties to make a determination on such a matter.” *Conrail and Monongahela Ry. Co. v. IAMAW*, NYD § 4 Arb. (Peterson, June 21, 1993).

IV. CONCLUSION

For all of the reasons set forth herein, as well as in the Carrier's Pre-Hearing Submission, the Carrier respectfully submits that the Arbitrator must reject the ATDA's proposed implementing agreement and impose the Carrier's proposed implementing agreement in its entirety.

Respectfully submitted,

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Dated: December 4, 2009

A

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
- CONTROL -
EJ&E WEST COMPANY

RAILROAD CONTROL APPLICATION

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October 30, 2007

Finally, after consummation of the CN/EJ&EW Transaction, customers of EJ&E would no longer be served by the subsidiary of a major integrated steel producer, whose operations are oriented primarily to the needs of that producer, but would be served by an industry-leading transportation company with a proven track record of customer service, a rail network extending to three coasts in North America, and an extensive equipment pool that would become available for service on EJ&E's lines. CN views the EJ&E lines as a strategic investment, and it would have the interest and resources to make longer-term investments in plant, equipment, and systems as they become needed to maintain the long-term stability and viability of EJ&EW as part of the CN system. The initial investments that CN plans to make in the EJ&E lines are discussed in the Operating Plan (Exhibit 15 to the Application) and in the accompanying Verified Statement of David L. Novak.

BRIEF SUMMARY OF TRANSACTION
(SECTION 1180.6(a)(1)(i))

The Parties

CNR was incorporated in 1919 as one of Canada's two transcontinental railroads, extending from Halifax on the Atlantic to Vancouver and Prince Rupert on the Pacific. DWP, which has been a CN subsidiary since 1919, extends the CN system from the international border at Duluth Junction/Ranier over DWP's own lines to Nopeming Junction, MN. Since 1923, the CN system has also included GTW, which extends CN's system to Chicago from the international border at Port Huron/Sarnia and Detroit/Windsor.

In 1999, recognizing the growing importance of north-south traffic to the North American economy and achieving the goals of the North American Free Trade

Agreement ("NAFTA"),⁷ CN acquired IC in order to position itself to better serve this growing market by extending its system from Chicago to the Gulf Coast. As a result of that transaction and of CN's 1998 marketing alliance with The Kansas City Southern Railway Company ("KCS"), CN has become part of a NAFTA rail network offering shippers access to Kansas City Southern de México, S.A. de C.V. ("KCSM"), Mexico's largest rail system. In 2001, CN acquired WCL and its affiliates, and in 2004 it acquired the GLT carriers including DMIR, thus providing CN with a connection between Chicago and the CN lines west of the Great Lakes. In the GLT transaction, CN also acquired B&LE and P&C Dock, which, together with CN's ownership of DMIR and Great Lakes Fleet, LLC (a water carrier operating on the Great Lakes), provides CN a continuous supply chain for iron ore moving from the Missabe Iron Range of Minnesota to the Union Railroad Company, which serves the Edgar Thompson Steel Works of United States Steel Corporation ("USS") in Braddock (near Pittsburgh), PA.

EJ&E is a Class II railroad with a history dating back to the 1880's. The initial railroad that would become the present-day EJ&E was incorporated in 1884, and began operations two years later, running between Joliet and Aurora. Through a series of mergers and acquisitions, by 1891 EJ&E was running between Waukegan, IL and McCool, IN, just east of Griffith, IN. Construction in and around Gary continued through the end of the 19th Century, and in 1901 EJ&E was purchased by USS.

EJ&E was owned and operated by USS from 1901 until 1988, when, as part of a financial restructuring, it became, along with a number of other transportation companies owned by USS, a subsidiary of a new holding company, Transtar, Inc., which was in turn

⁷ See *Canadian Nat'l Ry. - Control - Ill. Cent. Corp.*, 4 S.T.B. 122, 131, 142 (1999).

PURPOSE OF THE TRANSACTION
(SECTION 1180.6(a)(1)(iii))

CN has three primary purposes in pursuing the acquisition of EJ&EW. The first is to improve CN's operations in and beyond the Chicago area by providing CN with a continuous rail route around Chicago, under CN's ownership, that would connect the five CN lines that presently radiate from the City. This would increase CN's operational flexibility for traffic moving from, to, and across the Chicago terminal and reduce CN's dependence on suboptimal infrastructure, such as the St. Charles Air Line, or trackage rights over other carriers, such as the IHB and BRC, for such movements.⁹

In addition, the acquisition of EJ&E's rail assets would make available to CN EJ&E's Kirk Yard – an automated classification facility at Gary, IN, with its 109 tracks and 95 track-miles – as well as its smaller facilities at Joliet and Whiting. This would permit CN to rationalize its yard operations in the Chicago area by consolidating car classification work at Kirk and East Joliet Yards that is now carried out at CN's Glenn, Hawthorne, and Markham Yards, and by reducing use of BRC's Clearing Yard.

Finally, CN's system would benefit from the fact that EJ&E provides an important supply line for the North American steel, chemical, and petrochemical industries, as well as for Chicago area utilities and others. CN expects that the acquisition of EJ&EW would allow it to develop closer and more extensive relationships with companies in and serving those industries.

⁹ Similarly, one of the chief reasons for CN's acquisitions of DMIR in 2004 and of WC in 2001 was to secure ownership of the routes used for CN freight between Nopeming Junction, MN, and South Itasca, WI, and between Superior, WI, and Chicago, IL.

CN intends to integrate these personnel under a single agreement. CN would need the operational flexibility to utilize police personnel at any point on the combined CN/EJ&EW system where police protection is needed.

Yardmasters. – Yardmasters are employed at various locations in the greater Chicago area by IC. EJ&E employs yardmasters at Kirk Yard and Joliet, which would be transferred to EJ&EW and thus acquired by CN. (EJ&E also employs yardmasters at Gary Mill today, and after the Transaction, its Gary Railway successor would continue to do so.) CN continues to study the consolidation of yardmasters, and may do so at a later date.

Train Dispatching. – CN presently operates three separate train dispatching centers in the United States. IC and CCP trains are dispatched from the Region Operations Center in Homewood, Illinois. Trains on DWP, WC and DM&IR lines are dispatched from a dispatching center in Stevens Point, Wisconsin. GTW and B&LE trains are dispatched from Troy, MI. All of CN's existing dispatching centers in the U.S. utilize similar equipment.

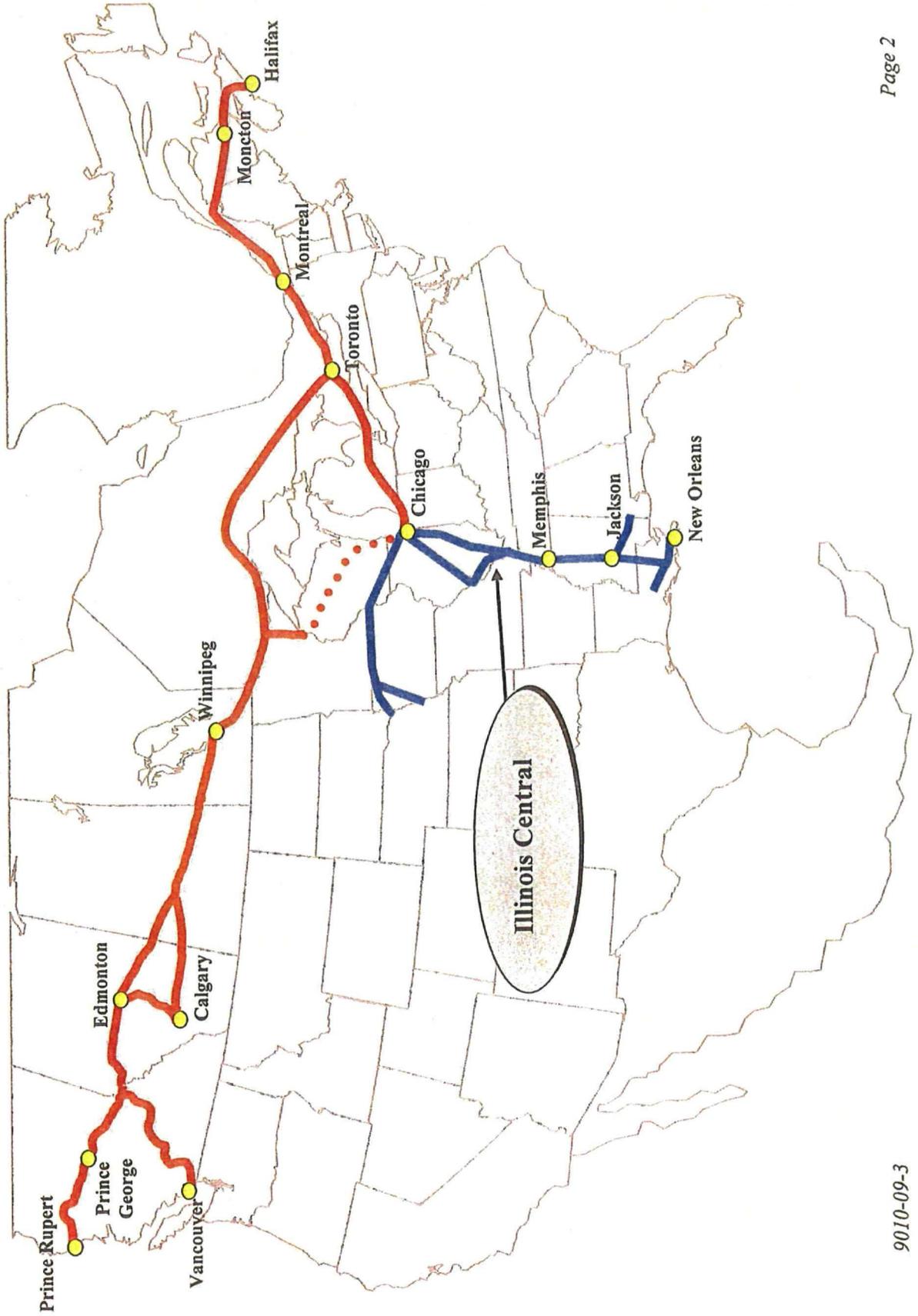
On EJ&E, trains are dispatched from an office at Joliet, using different equipment. CN intends to centralize the train dispatching function to Homewood in a phased approach.

Conclusion.

The preceding are the foreseeable changes that are necessary to achieve the goals of the Operating Plan and to achieve the increases in efficiency and enhanced transportation benefits to the public made possible by the Transaction. It is likely that other additional coordinations that would provide improved service and efficiencies and which are directly related to and grow out of or flow from the Board's approval may become apparent and would be implemented by the combined CN/EJ&EW system. These additional coordinations may result in additional changes that might affect collective bargaining agreements or Railway Labor

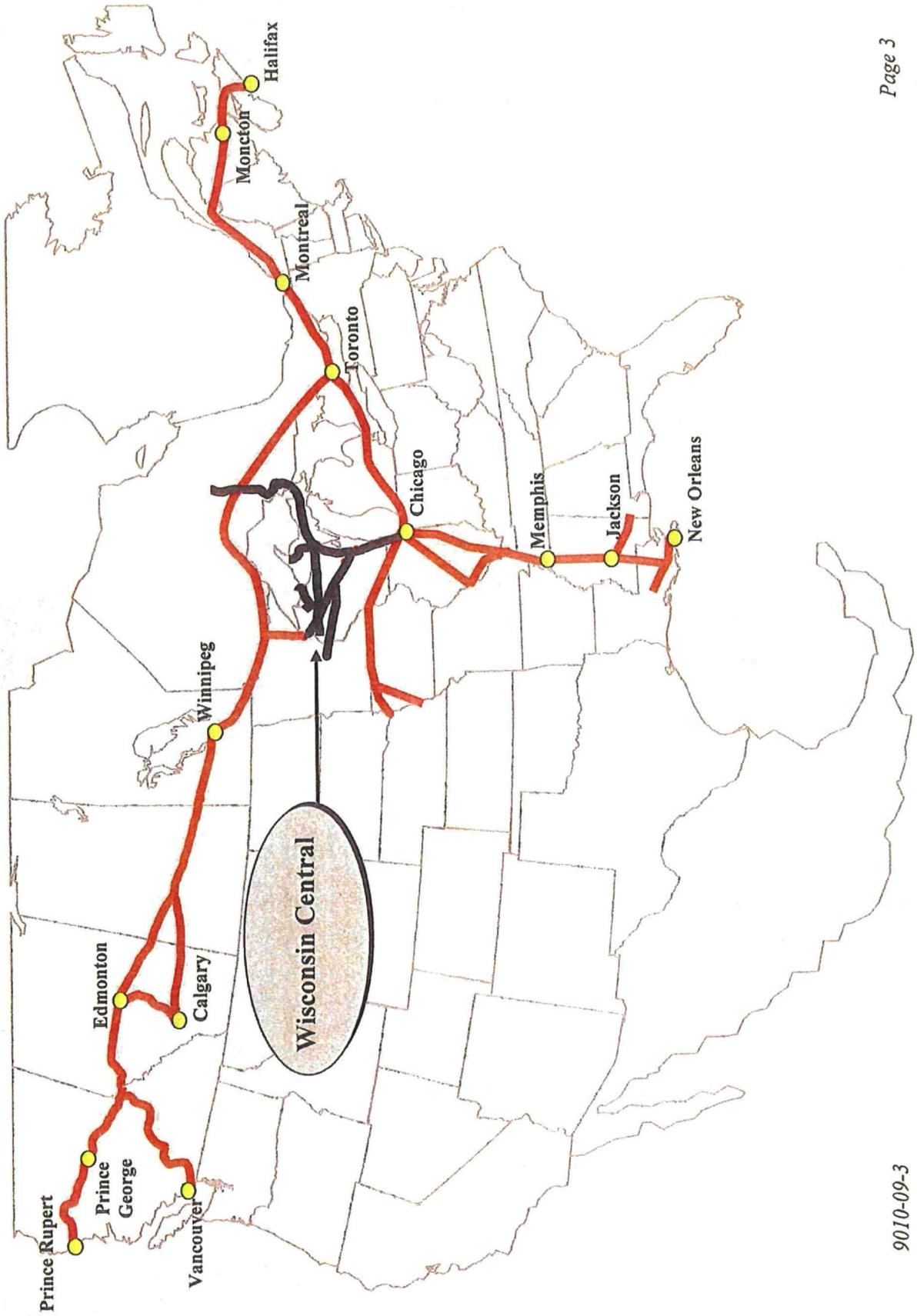
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Acquisition of Illinois Central in 1999



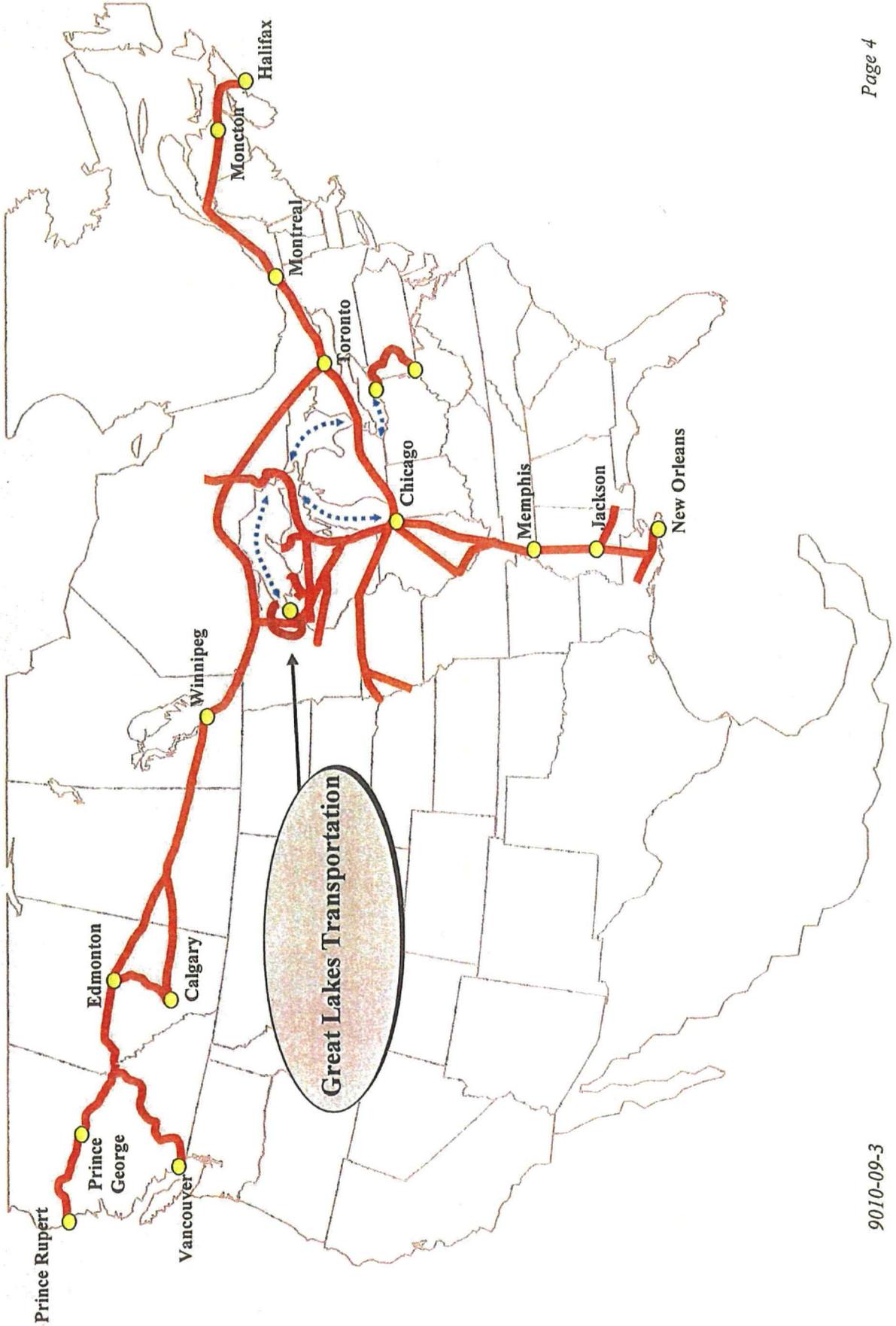
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Acquisition of Wisconsin Central in 2001



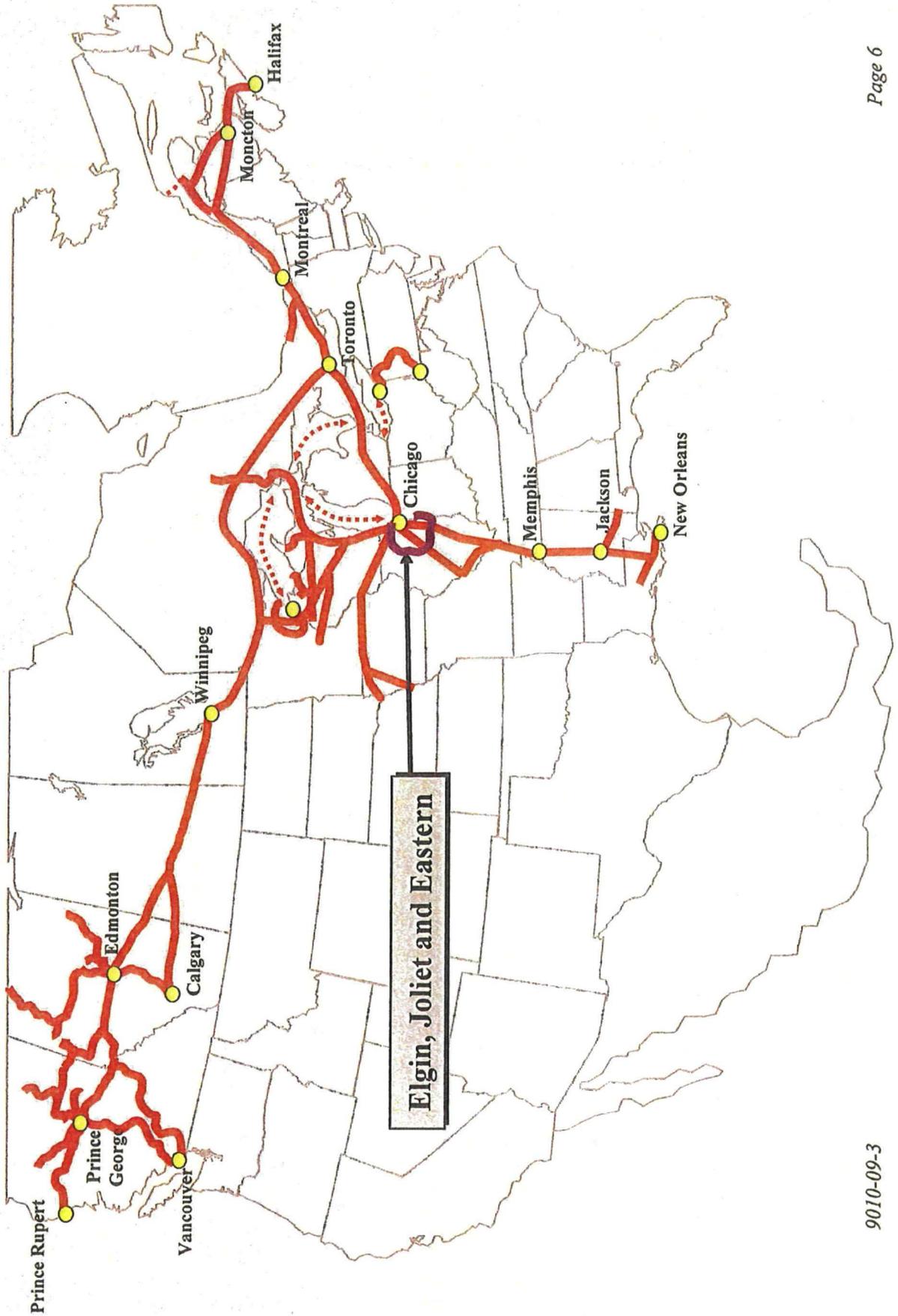
D

Acquisition of Great Lakes Transportation in 2004



E

Acquisition of EJ&E in 2009



F

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33556

**CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION,
AND GRAND TRUNK WESTERN RAILROAD INCORPORATED
-- CONTROL --
ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD
COMPANY, CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND
CEDAR RIVER RAILROAD COMPANY**

RAILROAD CONTROL APPLICATION

VOLUME 2 OF 4

**TRAFFIC STUDIES, OPERATING PLAN, LABOR IMPACT STATEMENT,
DENSITY CHARTS, AND SUPPORTING STATEMENTS
(EXHIBITS 13 AND 14)**

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July 1998

EXHIBIT 13 -- OPERATING PLAN

1.0 INTRODUCTION

1.1 Purpose and Scope

This Operating Plan describes how the railroad system that will result from the CN/IC Transaction will operate to serve its customers. The Operating Plan focuses on the changes that will result from the Transaction and describes how CN/IC will manage those changes. The Plan is divided into the following principal subject areas:

- Development of the Operating Plan
- Patterns of Service
- Yard and Terminal Changes and Consolidations
- Impacts on Traffic Densities
- Track Work and New Construction
- Impact on Passenger and Commuter Service
- Equipment Requirements and Utilization
- Centralized Functions
- Coordination of Equipment Maintenance
- Coordination of Maintenance of Way
- Safety Integration
- Operating Organization
- Management Information Systems/Communications
- Purchasing

CN and IC are acutely aware of the importance of high-quality customer service operations, and they recognize the need for very careful implementation of the integration of their two customer service operations. Accordingly, at least as an initial matter, the merged network expects to maintain the customer service organization and facilities that the railroads have in place today. As described elsewhere in this Operating Plan, improved CN/IC data transfers regarding train and car status on each network will provide improved visibility of traffic across the systems on day one of the implementation period.

Over time, as the SRS system is implemented across the merged network and opportunities present themselves for greater integration and efficiency, CN/IC will take advantage of those opportunities, but not at the expense of quality service. Shippers, however, can expect significant logistical savings from the increasingly precise and comprehensive customer service that the merged system will be able to provide.

10.2 Train Dispatching

The train dispatching function is of central importance for both the efficiency and the safety of rail operations. Currently, IC trains are dispatched from the Network Operations Center in Homewood, Illinois. CN system trains moving over the physically discrete GTW and DWP lines are dispatched from separate centers in Troy, Michigan, and Pokegama Yard near Superior, Wisconsin, respectively.

The three dispatching centers utilize separate train control and information systems and somewhat different operating practices. The CN/IC combination offers the

opportunity to unify the dispatching facilities and practices of these three U.S. rail operations in a manner that will improve efficiency, service and safety.

Currently, IC maintains six full-time and one part-time dispatching desks at Homewood, and controls train movements utilizing the Digicon traffic management system. GTW's Troy center maintains four full-time desks and employs the TDPro CAD system. The much smaller DWP line requires only one desk and maintains a hard-wire panel for train control on a portion of the line. GTW and DWP dispatchers coordinate train movements on U.S. lines with activity occurring on the rest of the CN system through communications with CN dispatching centers in Edmonton and Toronto.

The CN/IC Transaction offers the opportunity to consolidate the dispatching functions for the IC, GTW and DWP lines, resulting in substantial savings and improved rail service and safety. Following approval of the Transaction, CN/IC will consolidate the dispatching function at Homewood. The appropriate steps and timetable will be detailed in the Safety Integration Plan.

CN/IC intends to consolidate the dispatching functions as well as to unify operating practices. CN/IC will accomplish the physical relocation, the training of various dispatching systems, and the unification of operating practices in distinct steps.

As an initial step, the GTW and DWP offices will be relocated to Homewood. As part of this step, the DWP dispatching will be combined with an appropriate GTW dispatching desk. Thus, for a short period at the beginning of implementation, CN/IC will employ three dispatching operations at Homewood. This will facilitate communications between the dispatchers in the interim period. This interval will also provide the time

necessary for the second step, the production of, and training on, a combined operating practices rule book. Modifications will be made to the existing dispatching systems, TDPPro CAD and Digicon, to accommodate changes to these operating practices. CN/IC will provide training in the unified operating practices for all affected personnel. CN/IC will work closely with FRA in planning and implementing these changes.

CN is exploring whether to implement a new state-of-the-art dispatching system, the Rail Traffic Management System (RTMS), to control train operations on its existing network. At an appropriate time, CN/IC also will extend RTMS to its U.S. lines at no additional cost. Eventually, the entire North American CN/IC rail system will be controlled using a single, state-of-the-art system. This plan will maximize the efficiency and safety of CN/IC's cross-border traffic flows. After RTMS is implemented and fully tested, the existing TDPPro CAD and Digicon systems will be phased out.

One of CN/IC's highest priorities is to avoid any possible service disruptions or safety concerns during the implementation of this systemwide upgrade. For this reason, CN/IC will carefully test and will thoroughly train its personnel in RTMS, as well as in its harmonized operating practices, before any cutover to new operations.

As a result of this upgrade and integration, CN/IC will achieve significant improvements in the efficiency and safety of train operations, as well as compensation savings of about \$2.8 million annually.

utilize Battle Creek crews, and to maintain one common extra board at Battle Creek, to protect all service originating at Battle Creek, both eastbound and westbound.

3. Train Dispatching

There are three separate train dispatching centers on the combined CN/IC United States rail system -- IC trains are dispatched from the Network Operations Center in Homewood, Illinois, and CN trains on GTW and DWP lines are dispatched from separate centers in Troy, Michigan, and Pokegama, Wisconsin. These three dispatching centers utilize separate train control and information systems and somewhat different operating practices. Applicants will need to consolidate these dispatching facilities and practices, in a manner that will best utilize Applicants' work forces to improve efficiency, maximize the opportunity for backup relief, and consequently optimize customer service and safety, in order to implement the Transaction. Section 10.2 of the Operating Plan describes the process through which Applicants will consolidate the three existing train dispatching facilities into IC's facility in Homewood. In order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single collective bargaining agreement with a single seniority roster.

4. Crew Management

CN performs crew management functions for GTW in Troy, Michigan, and Toledo, Ohio, and for DWP in Pokegama, Wisconsin. IC's crew management center is located in Homewood, Illinois. CN will consolidate GTW and DWP crew calling and timekeeping functions into IC's Homewood facility. CN/IC will utilize a single crew

CN - IC Labor Impact Statement

Year	Location		Classification	Jobs Transferred	Jobs Abolished	Jobs Created	Transferred To		Year
2	Detroit	MI	Nonagreement		1				1
3	Detroit	MI	Nonagreement		7				1
1	Detroit	MI	Nonagreement	6			Homewood	IL	1
2	Detroit	MI	Nonagreement		4				2
3	Detroit	MI	Nonagreement		1				3
	Jackson	MS	Nonagreement			1			2
1	Memphis	TN	Nonagreement			1			1
	Memphis	TN	Nonagreement			3			2
2	Waukegan	WI	Nonagreement		1				1
	Little Creek	MI	Railway Supervisors	4			Homewood	IL	1
3	Little Creek	MI	Railway Supervisors	1			Memphis	TN	1
1	Little Creek	MI	Railway Supervisors		8				1
2	Little Creek	MI	Railway Supervisors		1				3
3	Little Creek	MI	Sheet Metal Workers		2				1
	Little Creek	MI	Sheet Metal Workers	5			Homewood	IL	1
1	Homewood	IL	Train Dispatchers		5				2
	Detroit	MI	Train Dispatchers		12				1
2	Detroit	MI	Train Dispatchers	19			Homewood	IL	1
	Waukegan	WI	Train Dispatchers		3				1
3	Waukegan	WI	Train Dispatchers	3			Homewood	IL	1
2	Atlanta	IL	Trainmen			8			2
3	Atlanta	IL	Trainmen			2			3
2	Campaign	IL	Trainmen			4			1
1	Campaign	IL	Trainmen			7			2
2	Campaign	IL	Trainmen			4			3
3	Chicago	IL	Trainmen			9			1
1	Chicago	IL	Trainmen			5			2
2	Chicago	IL	Trainmen			4			3
3	Scottsbluff	IL	Trainmen			3			2
2	London	KY	Trainmen			1			1
1	London	KY	Trainmen			1			2
3	London	KY	Trainmen			4			3
1	Monroe Rouge	LA	Trainmen			3			2
1	Little Creek	MI	Trainmen		20				1

G

BEFORE THE SURFACE TRANSPORTATION BOARD

ATDD - 6

In the Matter of:

Finance Docket No. 33556

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

BRIEF OF AMERICAN TRAIN DISPATCHERS DEPARTMENT - BLE

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The American Train Dispatchers Department of the
International Brotherhood of Locomotive Engineers ("ATDD")
represents employees of the Grand Trunk Western Railroad in the
craft or class of train dispatchers.

P0811

BEFORE THE SURFACE TRANSPORTATION BOARD

ATDD - 6

In the Matter of:

Finance Docket No. 33556

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

BRIEF OF AMERICAN TRAIN DISPATCHERS DEPARTMENT - BLE

The American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers ("ATDD") submits this brief in support of its position that the proposed transaction should be rejected unless the conditions described below are attached to the Board's approval.

**The Board Should Reject the Application Unless the Carriers
Are Required to Honor Existing Protective Agreements**

As ATDD explained in its Comments, every train dispatcher employed by Grand Trunk Western Railroad Company (GTW), the Detroit, Toledo & Ironton Railroad Company (DTI), and the Detroit and Toledo Shore Line Railroad Company (DTSL) who was in active status on August 1, 1986 enjoys protection from wage loss for any reason other than those set forth in Article I, Section 5(c) and 6(d) of the New York Dock conditions "until [he/she] qualifies for early retiree major medical benefits provided under Group

Policy GA-46000. See ATDD Comments at 1-4. This is more commonly known as "lifetime protection". Id. at 2. This protection was established in connection with ICC Finance Docket No. 28676.

ATDD and GTW are also party to a 1996 agreement that allows all train dispatchers who might be subject to losing their jobs to choose "voluntary furlough status." Id. at 2-3. The agreement allows covered employees to elect that option either (a) subject to recall to service when the active workforce falls below 21 train dispatchers and "receive a monthly furlough allowance equivalent to seventy-five percent (75%) of the employee's average monthly earnings" computed in accordance with a formula in the agreement, or (b) not subject to recall, in which case a 60% monthly allowance applies. Both allowances last until the employee is recalled to service, has filed for disability annuity under the Railroad Retirement Act, first becomes eligible for an unreduced annuity under the Railroad Retirement Act, or dies, but the employees who agree to be subject to recall are protected for the rest of their railroad careers; the protection for those who are not subject to recall expires in 2003.¹ There are 15 GTW train dispatchers on voluntary furlough status, all subject to recall.

The Application does not mention these existing protective arrangements or how the Applicants intend to treat the covered

¹ Employees on voluntary furlough status suffer no diminution in health, welfare, dental, and 401(k) plan benefits. ATDD Comments at 3.

employees in the event the proposed transaction is approved. However, in their Rebuttal, the Applicants repeat a statement from their answers to interrogatories posed by the Allied Rail Unions to the effect that affected employees would be permitted to elect to continue to receive benefits enjoyed under F.D. 28676 "consistent with the principles established under Article I, Section 3 of New York Dock." Rebuttal Vol. 1A at 191. Based on this interrogatory response, the Applicants maintain that it is "unnecessary and inappropriate" for the Board to consider ATDD's request for a condition expressly confirming that this transaction may not proceed unless those prior protective agreements are preserved. Id.

In fact, the issuance of a blanket condition that assures the preservation of existing protective arrangements is appropriate here. The protective agreements that ATDD seeks to preserve were negotiated as part of the carriers' compliance with conditions imposed by the ICC in earlier transactions. Had the ICC not allowed those transactions to occur, CN's U.S. operations on the GTW, DTI and DTSL might not have developed to their current operating levels. The agreements with ATDD and other unions were integral to those CN-controlled carriers becoming what they are today.

The clear implication to be drawn from CN's position is that it wants to escape from those obligations. The carrier is now not bashful in admitting to the Board, without identifying any specific agreement provisions, that "some provisions contained in.

protective agreements may themselves represent impediments to a Transaction, and can and should be overridden." Rebuttal Vol. 1A at 192.

CN easily could have told the Board what it intends in this regard. Instead, it is lying back and assuring the Board that this can be deferred to another day. We submit that the Applicants know exactly which existing protective agreements they intend to try to avoid or evade. (If there were none, the carriers simply would have said so.)

The Board should resolve this issue up front. The carriers have not made even the barest showing that it is necessary for them to override those agreements in order to effectuate the transaction. The Board should reject the Application unless the Applicants are required not to disturb the protective arrangements that resulted from earlier consolidations of the carriers that are part of CN.

**The Board Should Reject the Application
Unless The Applicants Are Required to Continue
To Control Rail Traffic On Their Domestic Lines From Train
Dispatching Offices Located in the United States**

The Board is well-aware that the Federal Railroad Administration considers the transfer of train dispatching responsibilities over domestic trackage to train dispatchers located outside U.S. borders to be inconsistent with the interests of safety. Most recently, in connection with Finance Docket No. 31700 (Sub-No. 13) CANADIAN PACIFIC LIMITED, ET AL.-- PURCHASE AND TRackage RIGHTS -- DELAWARE & HUDSON RAILWAY COMPANY

(December 4, 1998) ("CP/D&H"), the Board stayed a transfer of train dispatching from Milwaukee to Montreal in deference to such safety concerns expressed by the FRA.

The Board now has in the record...a definitive statement from the FRA that these positions should not be moved. Given this statement by FRA that the transfer of these positions could adversely affect rail safety, we will not allow their transfer to go forward under the authority of our labor conditions. Therefore, the carriers are hereby ordered to refrain from consummating their transaction by effecting these transfers until we have been advised that the safety concerns of FRA have been satisfied.

The FRA is considering initiating a rulemaking that will establish a blanket prohibition on such cross-border transfers.

The Applicants here have stated that they "have no plans to transfer any dispatching functions or responsibilities presently performed in the United States to Canada" and that therefore, "there is no issue for the Board to address." Rebuttal Vol. 1A at 198. This representation should not lead the Board to defer consideration of the union's concern. Based on its experience in the CP/D&H situation, where there also was no present indication of carrier plans to transfer dispatching operations to Canada when CP sought approval to purchase D&H, the Board should ensure that the carriers can not later interpret agency silence during the approval process as implicit recognition of a right to undertake such a cross-border transfer in the future. In the CP/D&H case, all parties concerned were put to considerable expense and anguish that could have been avoided early-on by a definitive statement by the FRA and the Board. It is now clear that both agencies recognize the significance of the safety

issues raised by cross-border rail traffic control.

In the CP/D&H case, the FRA clarified its position against permitting the control of domestic rail traffic from outside the United States late in the day; the ATDD was able to bring this clear message to the Board's attention only two days before the transfer was scheduled to happen. Fortunately, the Board was acted to stop the carriers on the eve of the transfer. Such last minute filings can be avoided here.

We are encouraged by the STB/FRA December 31 joint notice of proposed rulemaking which announces plans for greater cooperation in the future. That notice describes a process for FRA oversight of carrier compliance with Safety Integration Plans that underlie Board approvals of transactions like this one. It also provides for FRA to "provid[e] information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction." STB proposed rule § 1106.4(4). See also FRA proposed rule § 244.17(f). Our satisfaction with that proposed process notwithstanding, in this particular transaction which involves the consolidation of a Canadian corporation with a domestic carrier, we consider it imperative that the Board not wait to address this issue. The Board should impose this simple condition:

The Applicants shall not in the future propose the transfer to Canada of any train dispatching operations over any rail lines located in the United States without first obtaining a written certification from the FRA that such transfer is consistent with the

operation of a safe and efficient rail transportation system as required by 49 U.S.C. § 10101(8).

Not only is this condition totally in keeping with both agencies' proposed rules and this Board's responsibility for promoting a safe rail transportation system, it also will avoid the possibility of unnecessary proceedings in the future.

In their Rebuttal, the Applicants say that even if they "were to consider at some time in the future the transfer of dispatching functions from the U.S. to Canada, they would do so only with appropriate consultation with FRA." Rebuttal Vol. 1A at 198. This ambiguous statement should not cause the Board to brush the issue aside. The Board should not permit this transaction to go forward if there is any possibility that train dispatching over the thousands of miles of U.S. trackage in the combined system will be controlled from outside the borders of this country without FRA's express approval.

The Board now knows from its CP/D&H experience that the policy and safety issues associated with a possible cross-border transfer of train dispatching are not simply conjecture. It should not approve the Application without enforceable assurances that control of rail traffic on domestic trackage remains in

² The Applicants do not say what they consider to be "appropriate" consultation. Nor do they say why simple "consultation" rather than FRA approval is adequate to satisfy safety concerns? In CP/D&H the carriers "consulted" with the FRA -- they responded to an FRA inquiry about the proposed transfer to Canada. They maintained before this Board that nothing more was required of them to satisfy 49 U.S.C. § 10101 safety concerns and were about to implement the transaction when this Board stopped them.

facilities inside the United States subject to all applicable federal oversight and regulation. The condition ATDD proposes would satisfy that objective.

The Board Should Reject the Application Unless the Carriers Preserve Existing Collective Bargaining Agreements

The Applicants intend to transfer 19 ATDD-represented train dispatchers jobs from the GTW train dispatching center in Troy, Michigan to the train dispatching facility in IC's Network Operations Center in Homewood, IL. Application Vol. 2 at 204. Twelve positions at Troy will be abolished in the process. Application Vol. 2 at 279.

They first propose to relocate the GTW and DWP offices, to Homewood and combine DWP dispatching with an appropriate GTW desk. For some time thereafter, the GTW and IC dispatchers will continue to function separately, albeit under the same roof. Application Vol. 2 at 177-178. As explained in the Safety Integration Plan ("SIP"), the these dispatchers "will continue to perform dispatching as though they were separate entities, albeit under the same roof." SIP at 67-68. The dispatchers controlling GTW and DWP movement

will remain completely separate from those controlling movements on IC territory, and dispatchers will continue to dispatch their own territory using the equipment and processes with which they are familiar. Thus, the train dispatchers will not notice any difference in their day-to-day activities other than the fact that they will be working out of a different location. The changes will also be totally transparent to train operation and field forces.

SIP at 68.

In these circumstances, and absent any presentation of evidence by the carriers in support of their position, the Board should reject the Applicants' contention that "[i]n order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single collective bargaining agreement with a single seniority roster" (Application Vol. 2 at 204) before the actual consolidation of train dispatching operations occurs.

Until such time when all train dispatching systems themselves are unified, the carriers should be required not to disturb existing collective bargaining relationships. As there will be separate dispatching operations, no disruption of the employees' collective bargaining agreements or representation is warranted. Any disruption of ATDD's existing representative status and agreements would undermine the stability of the labor/management relationship. That is *inconsistent* with achieving that goal. The Applicants claim that avoidance of "possible service disruptions or safety concerns during the implementation of this systemwide upgrade" is "[o]ne of CN/IC's highest priorities." (Application Vol. 2 at 178). Requiring the carriers to continue to honor all existing agreements with ATDD during the transition from multiple train dispatching systems to a single integrated system is *consistent* with that goal.

In their Rebuttal, the Applicants assert that ATDD's position "is contrary to the principle that pre-transaction

representation arrangements are not a 'right, privilege or benefit' that must be preserved." Rebuttal Vol. 1A at 203. What the Applicants ignore is the principle that no cba provision may be modified if the modification is not proven necessary to implementation of the transaction. Here, even assuming arguendo that no right, privilege or benefit is implicated, necessity is totally absent as the ATDD-represented train dispatchers are scheduled to continue to work independently from the other train dispatchers at the Homewood facility, just as they did in Troy.

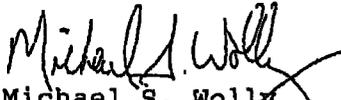
As for later integrations, if they are directly related to Board approval of this transaction, the Board should insist that the rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits under applicable laws and/or existing collective bargaining agreements or otherwise will be preserved.

CONCLUSION

To summarize, ATDD opposes approval of this transaction unless the Board imposes conditions that assure that (1) train dispatching operations on all U.S. lines will not be transferred or otherwise relocated outside the United States as part of, in connection with, or as a result of the Board's approval, (2) protective arrangements already in place that guarantee ATDD-represented workers a job for the remainder of their working careers will be unaffected by the transaction, and (3) that the rates of pay, rules, working conditions and all collective

bargaining and other rights, privileges and benefits under applicable laws and/or existing collective bargaining agreements or otherwise will be preserved.

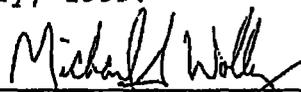
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CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief of the American Train Dispatchers Department - BLE was served upon all parties of record by either hand-delivery or first class mail, postage prepaid, this 19th day of February, 1999.



Michael S. Wolly

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**SURFACE
TRANSPORTATION BOARD**

**SURFACE
TRANSPORTATION BOARD
BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34424



**CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION**

- CONTROL -

**DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY,
BESSEMER AND LAKE ERIE RAILROAD COMPANY,
AND THE PITTSBURGH & CONNEAUT DOCK COMPANY**

RAILROAD CONTROL APPLICATION

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November 5, 2003

period, and affected employees could in some cases have the opportunity to fill other positions that might open up elsewhere in CN's U.S. operations.

The Transaction would generate efficiency gains that would likely affect employment levels in three primary areas.

First, as shown in the Labor Impact Exhibit set forth as Attachment B, the largest anticipated impact is in the area of general and administrative ("G & A") positions. CN intends to streamline duplicative administrative activities, including those performed by third parties. This would primarily affect executive and senior management personnel in Monroeville, PA and Duluth, as well as clerical ranks providing administrative services for the GLT Carriers. After the Transaction, B&LE would no longer perform administrative work that it currently performs on behalf of GLF. CN has no current plans for workforce reductions on P&C Dock. CN intends to use employees now working across the CN system to perform rail accounting and finance functions now performed by GLT.

Second, the CN/GLT Transaction would permit significant improvements in equipment utilization and maintenance activities. As newer cars and locomotives are integrated into the fleet of the combined system, maintenance requirements should drop. Further, as discussed earlier, under CN's current plan, heavy locomotive repair work would be relocated to the CN Woodcrest shop at Homewood, IL, where there is sufficient capacity to handle the additional work. Some employees would be offered the opportunity to follow this work (*see* Attachment B). CN plans to continue carrying out lighter locomotive and car repair work at existing DMIR shops at Keenan Yard and Two Harbors.

Finally, in the transportation area, dispatching and crew calling offices may be combined with those in other CN locations, resulting in some job reductions. Some employees

would have the opportunity to relocate to follow this work. The dispatching and crew calling offices would only be combined once systems have been put in place to ensure proper coordination of train movements across CN and the GLT Railroads.

CN does not foresee that the exchange of trackage rights between DWP and DMIR, which CN proposes in order to enhance the flexibility of its operations on the parallel lines between Shelton Junction and Nopeming Junction, would result in any adverse effect on train and engine service employees.

In all cases, CN would first attempt to make any necessary reductions through attrition. Where work opportunities require relocation of employees represented by labor organizations, CN would seek implementing agreements with those organizations that would allow the efficient use of the services of experienced employees at locations where job opportunities exist. CN has a strong track record in previous control transactions of voluntarily reaching implementing agreements with labor organizations, and sees no reason to expect any different outcome with the CN/GLT Transaction. Moreover, if any further Transaction-related reductions are required, eligible employees would be covered by employee protective conditions established in either *New York Dock Ry. – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), or, in the case of trackage rights, *Norfolk & Western Ry. – Trackage Rights – Burlington Northern Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry. – Lease & Operation – California Western R.R.*, 360 I.C.C. 653 (1980).

Management employees whose positions are eliminated as a result of the Transaction, and who are not offered a job opportunity elsewhere in the CN system, would be

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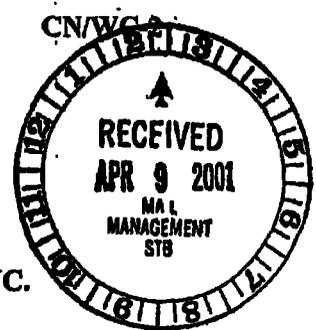
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34000

CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION, AND WC MERGER SUB, INC.

-CONTROL-

WISCONSIN CENTRAL TRANSPORTATION CORPORATION, WISCONSIN
CENTRAL LTD., FOX VALLEY & WESTERN LTD., SAULT STE. MARIE BRIDGE
COMPANY, AND WISCONSIN CHICAGO LINK



RAILROAD CONTROL APPLICATION

VOLUME 1 OF 2

SUPPORTING INFORMATION, SUMMARY OF BENEFITS, STATEMENTS OF
APPLICANTS' PRINCIPAL OFFICERS, OTHER SUPPORTING STATEMENTS,
RELATED APPLICATION, DENSITY CHARTS, OPERATING PLAN - MAINTENANCE
AND SERVICE ASSURANCE PLAN

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Counsel for Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, Illinois Central Railroad Company, and North American Railways, Inc.

April 9, 2001

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Office of the Secretary

APR 09 2001

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across the CN/WC system through contact with a single CSC or customer service representative. CN/WC's customer service will be designed to provide the same seamless efficiency as its train operations.

9.3 Train Dispatching

The train dispatching function is critically important for both the safety and the efficiency of rail operations. CN's principal dispatching centers are located in Edmonton, Toronto, Montreal, and Homewood (Chicago). CN also has smaller dispatching operations in Troy and Superior.

WC's dispatching of U.S. operations is handled at Stevens Point; ACRI is dispatched from Steelton (Sault Ste. Marie), ON.

As is common with other large railroads, CN has different dispatching systems on different parts of its network. For years, those systems have worked safely and efficiently together to move trains across the CN network, and to and from CN's connections. Unrelated to the Transaction, CN is upgrading its existing dispatching system to a new common system for operations over the former IC and GTW lines. WC's different dispatching system and operating practices are integrated across its system in the U.S. Here again, WC's systems have worked well, both for train movements within its system and for hand-offs to and from its connections, including CN. Applicants have no plans to integrate the railroads' existing dispatching systems during the three-year merger implementation period.

9.4 Crew Management

CN's principal crew management operations are in Moncton, NB, Edmonton, and Homewood. CN also has smaller crew management operations in Troy and Superior. WC operates a centralized crew management operation in Stevens Point. WC is installing a crew

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VERIFIED DECLARATION OF ROGER FRASURE

1. My name is Roger Frasure. I am employed as Senior Chief – Chicago Division by Grand Trunk Western Railroad Company (GTW), and together with its U.S. rail affiliates, the Carrier). I have been in that position for 12 years. In that capacity, I have personal knowledge generally of the Carrier's efforts to consolidate dispatching functions and, in particular, of the Carrier's current plan to consolidate the dispatching functions of the Grand Trunk Western Railroad Company ("GTW") and the Illinois Central Railroad Co. ("IC") in Homewood, Illinois.

2. The dispatching functions of the Duluth, Missabe & Iron Range Ry. Co. ("DM&IR") and the Duluth, Winnipeg and Pacific Ry. Co. (DWP) previously located in Duluth, Minnesota and Pokegama, Wisconsin, respectively, were consolidated in Stevens Point, Wisconsin, as part of the dispatching functions performed by the existing Wisconsin Central Ltd. ("WC") dispatchers in Stevens Point in 2004 and 2005. In both consolidations, the Carrier was able to negotiate voluntarily implementing agreements with the representatives of the affected dispatchers.

3. The dispatching functions of the Bessemer and Lake Erie R.R. Co. ("B&LE") were consolidated in Troy, Michigan along with the existing GTW dispatchers based in Troy shortly after the Carrier's acquisition of B&LE in 2004.

4. The dispatcher functions of the Elgin, Joliet & Eastern Ry. Co. ("EJ&E") were consolidated in Homewood, Illinois, with the work of the existing IC dispatchers in July 2009.

5. Recently, the Carrier has begun the process of consolidating its three remaining dispatching centers in Stevens Point, Troy, and Homewood, into the Carrier's Homewood Transportation Center. The Carrier announced in October 2007 that it would relocate the dispatchers then working in Stevens Point, Wisconsin to Homewood. At the time, the lines of the WC and the IC were not contiguous. As a result, the work of the WC dispatchers could not be combined feasibly with other railroads, and there was no benefit to be obtained from consolidating the work of the WC and IC dispatchers, as opposed to merely relocating the WC dispatchers to Homewood. Thus, the Carrier relocated the WC dispatchers to Homewood, but was unable to combine their work with that of the IC.

6. The Carrier and the labor organizations representing the Carrier's operating crafts have executed an agreement, known as the Chicago Coordination Agreement, providing for wide-ranging reciprocal trackage rights in the Chicagoland area. With this landmark agreement, the Carrier has the right to operate trains originating on any one of the traditional lines throughout the geographic region encompassed by the Chicago Coordination Agreement. However, while a train and engine crew now is able to operate a train from Battle Creek, Michigan to Griffith, Indiana, and on to either Memphis or Winnipeg, four separate dispatchers presently are required to assume responsibility for the train as it passes through each of the historic dispatching territories in the Chicago Terminal. This results in obvious operational inefficiencies that would be eliminated by consolidating the work of the Carrier's dispatchers under a single collective bargaining agreement.

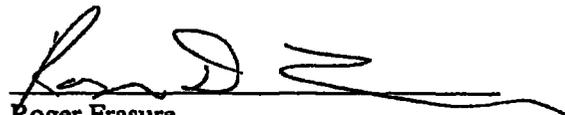
7. Once the work of the GTW and IC dispatchers is consolidated at Homewood, the Carrier will have the flexibility to reorganize the geographic scope of existing "desks," or teams of dispatchers assigned to dispatch trains over a particular geographic area, with the anticipated elimination at least one desk. Cross-training and eliminating restrictions tying the consolidated dispatchers to only the historical geographic boundaries of previously independent railroads will allow the Carrier the flexibility to "backfill" work from one desk to another in the event of storms, derailments, labor disputes affecting other carriers or other unanticipated circumstances, thereby protecting service and reducing costs.

8. The Carrier also currently maintains an "extra board," available to fill in as necessary, for each of the IC and GTW dispatcher groups. Following the consolidation of the GTW and IC dispatcher, the Carrier will be able to combine the two extra boards and enhance the availability of trained, qualified dispatchers to cover absences.

9. The consolidation of GTW and IC dispatching functions at Homewood will result in further efficiencies by eliminating the need for the Carrier to lease separate office space in Troy, Michigan and by permitting common management and information technology support functions.

10. Based upon the Carrier's recent review of its records, only two of the GTW dispatchers currently reside in Pontiac, Michigan. Although differences in wage and benefits plans between GTW and IC make a direct apples-to-apples comparison difficult, GTW dispatchers on balance will earn the same or more after they are consolidated with the IC dispatchers and working under the ICTDA agreement.

11. I have read the foregoing Verified Declaration, and I swear under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.



Roger Frasure

Dated: December 4, 2009

K



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GRAND TRUNK WESTERN RAILROAD INCORPORATED

DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY

September 27, 1999

Our Files: 8000-691
8390-4-176
Side Letter No. 6

Ms. Ann Snyder, General Chairwoman
Brotherhood of Locomotive Engineers
American Train Dispatchers Department
2120 Old Lane
Waterford, MI 48327-1333

Dear Ms. Snyder:

This will confirm that the parties have fully and finally resolved the Troy, Michigan, relocation issue and grievance filed in behalf of all ATDD employees.

The Company also makes the commitment that the Train Dispatch Office will remain within the Detroit tri-county area (Wayne, Oakland and Macomb Counties) for a period of six (6) years from the date of this Agreement,

Yours very truly,

M. J. Kovacs
Senior Manager Labor Relations

AGREED:

Ann Snyder, General Chairwoman

ENTERED
Office of Proceedings

APR 14 2011

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SURFACE TRANSPORTATION BOARD



Finance Docket No. 33556 Sub. No. 5

**Canadian National Railway Co., Grand Trunk Corp. and Grand Trunk Western R.R., Inc.
– Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago Central & Pacific
R.R. Co., and Cedar River R.R. Co**

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Co., Chicago Central & Pacific R.R. Co., and
Cedar River R.R. Co.*

Dated: April 14, 2011

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**ARBITRATION PROCEEDING UNDER
NEW YORK DOCK ARTICLE I, SECTION 4**

In the Matter of the Arbitration between:)	
)	
Grand Trunk Western Railroad Company)	
and Illinois Central Railroad Company,)	
	)	STB Finance Docket 33556
Carriers,)	
	)	Consolidation of GTW and IC
and	)	dispatching work at Homewood,
	)	Illinois
American Train Dispatchers Association)	
and Illinois Central Train Dispatchers)	
Association,)	
)	
Organizations.)	

CARRIER'S RESPONSE TO THE ATDA'S POST-HEARING BRIEF

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Dated: December 18, 2009

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I. INTRODUCTION

In its Post-Hearing Brief, the ATDA¹ bases its entire argument on a single factual assertion. The ATDA repeats, over and over again, that the Carrier intends only to relocate the GTW dispatchers to Homewood, while leaving untouched their present work assignments. As the Carrier demonstrates yet again, this contention - the linchpin of the ATDA's argument - is wrong. The Carrier consistently has maintained that the purpose of the present transaction is to allow the work of the GTW dispatchers to be consolidated with the work of the IC dispatchers. Because the Carrier intends to implement a genuine consolidation of GTW and IC dispatching work, an override of the ATDA-GTW collective bargaining agreement, including the elimination of scope rules limiting the GTW dispatchers to dispatching trains only over the historic lines of the GTW, and the dovetailing of GTW and IC dispatcher seniority rosters, is necessary to achieve the efficiencies of the Control Transaction. Additionally, the enhanced benefits sought in the ATDA's proposed implementing agreement are beyond the scope of protections afforded by *New York Dock* and therefore may not be imposed by the Arbitrator absent an agreement of the parties. Finally, while the Carrier challenges the ATDA's mischaracterization of the parties' bargaining history, the parties' dispute on this point is ultimately irrelevant because all parties acknowledge that the terms of the appropriate *New York Dock* implementing agreement are now ripe for determination in this Section 4 arbitration proceeding.

¹ Unless otherwise indicated, capitalized terms used herein shall have the same meanings attributed to them in the Carrier's Pre-Hearing Submission and Post-Hearing Submission.

II. FACTUAL INACCURACIES IN THE ATDA'S POST-HEARING BRIEF

A. **The Carrier Has Maintained Consistently That Its Intent in Implementing the Present Transfer of GTW Dispatchers to Homewood Was To Consolidate the Work of the GTW and IC Dispatchers.**

The ATDA seeks footing for its belief that the Carrier intends merely to relocate the GTW dispatchers to Homewood in the Carrier's 1998 application in the Control Transaction. **At that time**, over a decade ago, it was not operationally feasible to consolidate the work of the IC and GTW dispatchers immediately, since they utilized different traffic management systems and information systems. *See* IC Control Application at 51-52.² Due to these critical operational differences in 1998, the Carrier explained to the STB that it intended to first physically relocate the GTW dispatchers to Homewood and train all of the dispatchers on common dispatching systems. *See id.* at 51-53. After this "short," "interim" period, the Carrier explained, it would be in a position to achieve the full efficiencies of the Control Transaction by consolidating the work of the dispatching groups under a single collective bargaining agreement with a single seniority roster. *See id.* at 52-53, 204.

By the time the Carrier issued its *New York Dock* Section 4 notice on February 3, 2009, the IC and GTW were using the same dispatching systems and so today there is no need for a short, interim period of co-location prior to actual consolidation. (*See* 2nd Frasure Decl. at ¶ 3).³ Since the Carrier's acquisition of IC in 1999, 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. (*See id.*). While the IC and GTW dispatchers also used different train tracking systems

² Relevant excerpts from the IC Control Application are attached hereto as Exhibit A.

³ The Second Verified Declaration of Roger Frasure is attached hereto as Exhibit B.

at the time of the Control Transaction, both groups of dispatchers now have been upgraded to the state-of-the-art TMDS Wabtec train tracking system. (*See id.*)

As discussed in the Carrier's opening Post-Hearing Brief, just a few months after the Control Transaction was approved by the STB, the ATDA bargained to obtain a temporary moratorium on the transfer of GTW dispatching work outside of the Troy area. (*See Carrier's Post-Hearing Submission at 9, Ex. K*). The Carrier agreed to the ATDA's proposed temporary moratorium, in part, because the differences in technology at the time would make it impossible for the Carrier to immediately achieve the efficiencies of truly merging the GTW and IC dispatchers. (*See 2nd Frasure Decl. at ¶ 2*). Technical and operational advancements during the intervening period eventually rendered obsolete the multi-step approach designed by the Carrier to address the circumstances existing in 1998. Because the IC and GTW dispatchers **already** have been trained on and upgraded to **common** dispatching systems, there is no longer any rationale for merely moving the IC and GTW dispatchers into a common building prior to actually integrating their work.

In the currently independent GTW and IC dispatching operations, the technology in place allows the Carrier to perform workload studies to monitor if operations could be improved by redistributing territories between the existing desks. (*See 2nd Frasure Decl. at ¶ 4*). Based on ever-changing traffic densities along the Carrier's rail lines, the Carrier periodically moves work among the existing desks. (*See id.*). For example, the Carrier recently recalibrated territory assignments among dispatcher desks due to a decline in traffic related to the auto industry. (*See id.*). Once the GTW and IC dispatching operations are consolidated, the Carrier will be able immediately to begin reassigning territories between the former "GTW" and "IC" desks, as necessitated by the Carrier's business needs. (*See id. at ¶ 5*). These reassignments of

work will blur the distinction between former GTW dispatching work and former IC dispatching work. (*See id.*) The consolidation of work is likely to result in increased work opportunities for the current GTW dispatchers, who will be able to take on any excess traffic on the IC lines, and vice versa. (*See id. at ¶ 6*). These operational efficiencies and enhanced work opportunities would be rendered impossible if the ATDA's proposed implementing agreement is imposed. (*See id.*)

The Carrier is puzzled by the ATDA's dogged insistence that the transaction sought by the Carrier in its Section 4 Notice and in this *New York Dock* arbitration proceeding is the mere relocation of GTW dispatchers to Homewood. ATDA seemingly expects that, by repeatedly misstating the Carrier's intent, it can change the nature of the consolidation. The Carrier's Section 4 Notice explicitly states that "it is necessary to **consolidate** the train dispatching operation of the [GTW and IC] into one location." (Carrier's Pre-Hearing Submission, Ex. 3) (emphasis added). The Carrier's Section 4 Notice goes on to explain that sixteen positions will be abolished in Troy and ten new positions will be created in Homewood. (*Id.*) The ATDA surely understands that the Carrier could not perform the existing GTW dispatching work, with less than two-thirds of the current number of employees, without actually merging the work of the IC and GTW dispatchers.

In its very first set of meetings with the ATDA and ICTDA on February 5 and 9, 2009, the Carrier explained its plan to consolidate the work of the IC and GTW dispatchers. (*See Cortez Decl. at 4*).⁴ One "smoking gun" proving that the ATDA understood the true purpose of the transaction is the February 6, 2009 e-mail of Joseph Mason, a General Chairman of the ATDA. (*See Carrier's Pre-Hearing Submission, Ex. 4*). Three days after the Carrier's posting of

⁴ The Verified Declaration of Cathy Cortez is attached hereto as Exhibit C.

its Section 4 notice, and one day after the initial meeting between the Carrier and the ATDA, Mr. Mason reported to his fellow GTW dispatchers that:

They want only two desks and would change territories on TD3 to control Port Huron to Valpo, Desk 1 in Homewood would absorb Valpo west. TD2 would go back to the original territory plus the BLE RR.

(Id.). In other words, mere days after the instant consolidation was announced, Mr. Mason understood that the Carrier did **not** intend to simply pick up the GTW dispatching operation and relocated it, unchanged, to Homewood. The ATDA has understood from the beginning that the Carrier intended to reorganize the existing dispatching desks, **including the transfer of work between the former “GTW” desks and the former “IC” desks**. The Carrier never equivocated from this core purpose of the transaction. (*See* Cortez Decl. at ¶ 5).

B. The ATDA Mischaracterizes the Parties’ Bargaining History and Was Principally Responsible for Delays In the Parties’ Negotiations for a Voluntary Implementing Agreement.

The ATDA contends that it was the Carrier, not the ATDA, that frustrated the bargaining process. (*See* ATDA Post-Hearing Brief at 9). In its initial Pre-Hearing Submission, the Carrier described in detail its efforts to negotiate a voluntary implementing agreement with the ATDA and the ICTDA, as evidenced by the considerable correspondence between the parties. (*See* Carrier Pre-Hearing Submission at 3-7). The Carrier submitted that the unusually long delays, on balance, should be attributed to the ATDA, which benefited from the resulting delay in the consolidation of the GTW dispatchers in Homewood. There is no benefit to again recounting every communication between the parties, as there is no disagreement that the parties’ dispute over the proper terms of an implementing agreement is now ripe for adjudication by the Arbitrator. However, three points raised in the ATDA’s Post-Hearing Brief concerning the parties’ bargaining history merit a brief reply.

First, the ATDA blames the Carrier for the delays through March and April 2009 because the Carrier did not provide its written draft implementing agreement until shortly before the April 15, 2009 negotiating session. However, the undeniable record of the parties' communications shows that days after the Carrier first presented its proposal to the ATDA orally, Cathy Cortez, the Carrier's Senior Manager – Labor Relations, proposed four potential dates in March 2009. (Carrier's Pre-Hearing Submission, Ex. 5). The ATDA countered with two dates in April 2009. (Carrier's Pre-Hearing Submission, Ex. 6). Ms. Cortez responded insisting that the parties meet earlier than April so as not to prolong the process and suggested four possible dates in February 2009. (*Id.*). The ATDA responded insisting on its originally-proposed dates in April, but expressed a willingness to meet earlier, if a date became available. (Carrier's Pre-Hearing Submission, Ex. 7). No interim dates became available, and the parties did not meet again until April 15, 2009. While the ATDA is correct that Ms. Cortez agreed to provide a formal written draft implementing agreement in advance of the parties' next bargaining session (*id.*), the bargaining history does not support the ATDA's contention that the next bargaining session was delayed until April because of the Carrier's timing in providing the written draft. Instead, the bargaining history shows that, starting February 10, 2009, the Carrier repeatedly suggested dates in February and March; the ATDA would not meet anytime before April 15, 2009; and, as the ATDA wanted, the next bargaining session was held on April 15, 2009.⁵

⁵ The Carrier further submits that the ATDA overstates the role of the Carrier's formal written draft implementing agreement, since Ms. Cortez orally informed the ATDA of the Carrier's intent with respect to the dispatcher consolidation on February 5, 2009. (Cortez Decl. at ¶ 6). Naturally, if the ATDA had agreed to any of the earlier meeting dates proposed by the Carrier, Ms. Cortez would have provided a written draft in advance of such meeting. (*See id.*)

Second, on a related note, the ATDA contends that “when [the Carrier] did finally complete the proposal, it didn’t give it to the ATDA until the Union’s representatives showed up for bargaining on April 15, not ‘shortly in advance of the meeting’ as the Carrier declares.” (ATDA Post-Hearing Brief at 10) (relying on Volz Decl. at ¶ 4). In fact, Ms. Cortez forwarded the Carrier’s proposed implementing agreement to the ATDA the morning of April 14, 2009. (See Cortez Decl. at ¶ 6, Ex. 2). Ms. Cortez’s e-mail of April 14, 2009 was sent to Mr. Volz, Mr. McCann, and Mr. Mason at the same e-mail addresses the parties used throughout these negotiations. (See, e.g., Carrier’s Pre-Hearing Submission, Ex. 10; Volz Decl., Attachment A). While the question of whether the ATDA received the Carrier’s draft proposal on the morning of April 14, 2009 or the morning of April 15, 2009 is ultimately irrelevant to the issues before this Arbitrator, it demonstrates starkly the ATDA’s incorrect account of the parties’ actual negotiating history.

Third, the ATDA is incorrect that, following a conversation between Mr. Mason and Hunsdon Cary, the Carrier’s General Superintendent - Transportation, Mr. Cary and Ms. Cortez agreed to consider changing the Carrier’s position on consolidating the GTW dispatchers under the IC collective bargaining agreement. In fact, Mr. Cary and Ms. Cortez responded that they would “work with the ATDA” to reach a voluntary implementing agreement, but never specifically referred to the ATDA’s demand for the GTW dispatchers to continue working under a separate collective bargaining agreement than the IC dispatchers. (See Cortez Decl. at ¶ 5). During negotiations, the Carrier never wavered from its long-held position that, in order to realize the efficiencies of the Control Transaction, the actual work of the GTW and IC dispatchers would be consolidated at Homewood under a single collective bargaining agreement with a single seniority roster. (See *id.*).

III. LEGAL ARGUMENT

A. **The Carrier Satisfies the “Necessity” Test for Overriding the Existing CBA Rights of the GTW and IC Dispatchers.**

The Carrier and the ATDA both rely on the STB’s seminal decision in *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indus., Inc.*, 3 STB 701 (STB 1998) (“*Carmen IIP*”), and the prior rulings relied on in *Carmen III*, as outlining the appropriate standards for determining whether the override of the GTW and IC dispatchers’ Railway Labor Act CBA rights is “necessary” to achieve the potential efficiencies of the STB-approved Control Transaction. (See Carrier’s Pre-Hearing Submission at 8-9; Carrier’s Post-Hearing Submission at 12; ATDA’s Post-Hearing Brief at 1-2). *Carmen III*, which found the necessity test to be satisfied, recognized the longstanding rule that a CBA override is appropriate when necessary to carry out an STB-approved transaction, which results in underlying transportation benefits, such as “enhanced efficiency, greater safety, or some other gain” other than those derived from the CBA modification itself. (Carrier Pre-Hearing Submission, Ex. 27 at 25-26, 29) (internal citations omitted). *Carmen III* also reiterated the STB’s position that “[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, if these changes are identified with reasonable particularity.” (*Id.* at 27) (quoting *Fox Valley & Western Ltd. – Exemption Acquisition and Operation – Certain Lines of Green Bay and Western R.R. Co., et al.*, Finance Docket No. 32035 (Sub Nos. 2-6) (ICC Service Date Aug. 10, 1995)).

The Carrier once again submits that an override of the ATDA’s and ICTDA’s CBA rights is necessary to realize the efficiencies of the Control Transaction. As explained in

Section II (A) above, as well as in Sections III(A)(1) and (2) of the Carrier's Post-Hearing Submission, at least since its application in the Control Transaction, the Carrier has intended to **consolidate** the work of the GTW and IC dispatchers in Homewood under a single collective bargaining agreement and single seniority roster. Doing so is necessary to achieve fully the efficiencies of the Control Transaction. A mere relocation may reduce certain overhead costs associated with maintaining separate physical locations, but a genuine consolidation of the GTW and IC dispatching work is required to reorganize the territories of existing desks, eliminate at least one dispatching desk, obtain the flexibility to "backfill" from one desk to another in the event of unanticipated disruptions, reduce the number of hand-offs between trains otherwise operating freely in the greater Chicagoland area under the Chicago Coordination Agreement, combine the separate dispatcher "extra boards" and enhance the availability of trained, qualified dispatchers to cover absences. (See Carrier's Post-Hearing Submission at 12-13). Eliminating positions made redundant by the Control Transaction and improving the Carrier's ability to serve the public through increased operational flexibility are public benefits of the Control Transaction that will be thwarted if the GTW dispatchers are restricted to dispatching trains only over the GTW line and "walled off" through a separate collective bargaining agreement and seniority roster, as proposed by the ATDA.

The ATDA's argument against the override of the GTW dispatchers' CBA rights is based on the fatally flawed premise that the Carrier intends merely to relocate, rather than consolidate, the GTW dispatchers. For example, the ATDA incorrectly contends that the Carrier has "at no time" since the Control Transaction indicated that it would be eliminating the short, interim pre-consolidation co-location period. "Consequently," concludes the ATDA, "the Carrier has not shown that elimination of the ATDA CBA is presently necessary to effectuation

[sic] the move of the GTW dispatchers to Homewood.” (ATDA Post-Hearing Brief at 4) (emphasis added). After curiously quoting its own Pre-Hearing Brief for the proposition that the GTW system is not being integrated with the rest of the Carrier’s system, the ATDA goes on to argue that it is “premature” for the Carrier to rely on the “operational flexibilities that arise naturally from combining work” because “there is no evidence that assignment of work across GTW-IC operating lines is imminent.” (*Id.*). The ATDA even attempts to distinguish the considerable Section 4 arbitral authority relied on by the Carrier on the ground that such cases involved the consolidation, co-mingling, or merger of previously distinct work. (*Id.* at 5-6). **Yet that is exactly what the Carrier is seeking to achieve through this consolidation of GTW and IC dispatchers and, in claiming otherwise, the ATDA is simply putting the rabbit in the hat.**

As discussed in Section II (A) above, the Carrier intended a “short,” “interim” period of co-location due to technical and logistical hurdles to real consolidation at the time of its 1998 application in the Control Transaction, but the Carrier has since eliminated those impediments and has been completely forthcoming about its current intent to achieve a genuine consolidation, both in its Section 4 notice and in its subsequent negotiations with the ATDA and ICTDA. Another defunct impediment to the planned consolidation of the GTW and IC dispatchers was a bargained-for agreement between the Carrier and the ATDA, in which the Carrier agreed not to move the GTW dispatching work out of the Troy area for a period of six (6) years. (*See* Carrier Post-Hearing Brief, Ex. K). One of the reasons that the Carrier ultimately consented to the ATDA’s proposal, four months after the STB’s approval of the Control Transaction, was because the technical and logistical impediments to full consolidation prevented the Carrier from achieving the full efficiencies of the planned dispatcher consolidation

at that time. (See Frasure Decl. at ¶ 2). During the next round of collective bargaining in 2005, the ATDA served a Section 6 notice seeking to extend the Carrier's commitment not to transfer the GTW dispatchers from the Troy area.⁶ (See Cortez Decl. at ¶ 2, Ex. 1). The ATDA was unable to obtain an extension of the "stay put" agreement in the parties' most recent round of bargaining. (See Cortez Decl. at ¶ 2). The ATDA should not be permitted to obtain through arbitration that which it was unable to obtain at the bargaining table.

The law is clear that "[c]arriers may invoke *New York Dock* to modify such CBA terms [as rates of pay, rules, and working conditions] when modification is necessary to obtain the benefits of a transaction that was approved as being in the public interest." *Carmen III*, Carrier's Pre-Hearing Submission, Ex. 27 at 29 (quoting *CSX Corp. – Control – Chessie System, Inc. and Seaboard Coast Line Indus., Inc., et al.*, Finance Docket No. 28905 (Sub-No. 27) (ICC Service Date Dec. 7, 1995)). Moreover, 49 U.S.C. § 11321(a), upon which the Railway Labor Act override is founded, categorically states that a "rail carrier ... in that approved or exempted transaction is exempt from ... all other law ... as necessary to let that rail carrier ... carry out the transaction..." 49 U.S.C. § 11321(a) (emphasis added). See also *Norfolk Southern Rail Co., et al. and Bhd. of Maintenance of Way Employes, et al.*, NYD § 4 Arb. (Fredenberger, Jan. 14, 1999) ("rights under the Railway Labor Act must yield to considerations of the effective implementation of an approved transaction") (emphasis added).⁷ In other words, a *New York Dock* Section 4 arbitrator has a strict duty to impose an implementing agreement that carries out the approved transactions and allows the public benefits to occur. The Carrier here has

⁶ Under the Railway Labor Act, collective bargaining agreements do not expire, but instead become amendable upon either party serving a notice, as provided by Section 6 of the Act. See 45 U.S.C. § 156.

⁷ The award in *Norfolk Southern Rail Co., et al. and Bhd. of Maintenance of Way Employes, et al.*, NYD § 4 Arb. (Fredenberger, Jan. 14, 1999) is attached hereto as Exhibit D.

demonstrated with particularity the efficiencies to be achieved through the consolidation of GTW and IC dispatchers and submits that the Arbitrator is obligated to adopt an implementing agreement that permits such public benefits to be realized.

B. The Carrier Proposes a Fair and Equitable Allocation of Forces and the Non-Transferring GTW Dispatchers Should Not Retain GTW Seniority With Prior Rights to the Consolidated Homewood Dispatching Positions.

Contrary to the ATDA's contention, the Carrier is proposing an equitable allocation of forces for both the GTW dispatchers who are consolidated at Homewood and those who are not. Currently, under the ATDA collective bargaining agreement, the GTW dispatchers are paid a uniform annual salary of \$74,894. (Cortez Decl. at ¶ 9). Pursuant to the ICTDA collective bargaining agreement, dispatchers qualified on a desk earn a minimum of \$70,000 annually, which increases to a minimum of \$75,000 annually after one year of service. (*Id.*). Because the Carrier's proposed implementing agreement credits the transferring GTW dispatchers with their prior GTW service for this purpose, each transferring GTW dispatcher will receive a salary increase following consolidation. (*Id.*).

Eligible GTW dispatchers who are unable to transfer to Homewood also are treated equitably under the Carrier's proposed implementing agreement. Those who fail to exercise seniority to other positions are provided, by the Carrier's proposed implementing agreement, clerical positions under the GTW/TCIU agreement. (Carrier's Pre-Hearing Submission, Ex. 23 at ¶ 4). The Carrier, of course, was under no legal obligation to offer positions to these dispatchers, either during or after the *New York Dock* protective period. These GTW dispatchers will be eligible for full protection against wage losses for a period of six (6) years pursuant to *New York Dock*. Assuming, *arguendo*, that the wage discrepancy between GTW dispatchers and GTW/TCIU clerks cited by the ATDA might begin to adversely affect the

non-transferring dispatchers six years from now, it is worth noting that immediate layoffs following corporate mergers unfortunately have become an everyday occurrence and these employees will have received extremely generous protections unheard of elsewhere in the American economy.

Turning to the ATDA's demand for continued seniority rights for non-transferring GTW dispatchers, the ATDA's proposal is utterly unworkable since, as here, the Carrier intends to intermingle prior GTW and IC dispatching work. As such, it would be impossible to determine over which positions the non-transferring GTW dispatchers' continued GTW seniority would grant them prior rights. Attempting to implement the ATDA's demand also would frustrate the efficiencies of the transaction. *See Norfolk Southern Ry. Co., et al. and Bhd. of Maintenance of Way Employees, et al.*, NYD § 4 Arb. (Fredenberger, Jan. 14, 1999) at 7-8, 11, 13 (eliminating the pre-existing seniority rights of transferred employees and rejecting the organization's demand for "flowback" rights whereby after initially bidding on a position on one of the three carriers involved, a furloughed employee could exercise seniority to a position on either of the other two carriers, because doing so "could impair establishment of a well-trained and unified work force" and "[w]hile employee choice is a laudable goal, it cannot be placed ahead of efficient implementation of the transaction").

The arbitral awards that ATDA relies upon in support of its claim for continued GTW seniority all are distinguishable from the present case on this point. In *Seaboard System Railroad and ATDA*, NYD § 4 Arb. (Marx, March 7, 1985), the Carrier proposed eliminating twelve positions in Birmingham, Alabama and transferring the work to other offices, without creating any new positions at the other locations. The Carrier's proposed implementing agreement specified, in several paragraphs, how the Birmingham work would be allocated to the

various other locations. The Arbitrator recognized that he was without authority to second-guess the Carrier's determination about the size of its work force. Surely, however, there was reason to doubt that the Carrier could absorb the Birmingham work at its other offices without the transfer of a single Birmingham employee. Given this unique factual scenario, in which the Carrier made a precisely identified redistribution of work without the transfer of a single employee, the Arbitrator accepted the ATDA's proposal to maintain the seniority rights of the affected Birmingham dispatchers, but only during the *New York Dock* protective period and only "in the event that the rearrangement of forces does lead to new Train Dispatcher work opportunities in the locations where the work is assigned."

Here, in contrast, the Carrier is not attempting to absorb all of the GTW dispatching work into the existing IC dispatcher workforce, but instead realistically has determined that ten new positions will need to be created at Homewood. Also, the Carrier here intends to actually consolidate the dispatching work such that some desks now will be dispatching trains over territories that constitute both the traditional GTW lines and the traditional IC lines. Because of this co-mingling of the work, it will be impossible to determine whether a future work opportunity constitutes "GTW work" or "IC work" or whether it was directly caused by the present consolidation. These critical factual differences between the present case and *Seaboard System Railroad* make the limited preservation of seniority rights adopted by Arbitrator Marx an unworkable option here.

Moreover, Arbitrator Marx based his holding in the *Seaboard System Railroad* case on an even earlier arbitration decision, *Baltimore & Ohio R.R. Co. and BMWED*, NYD § 4 Arb. (Seidenberg, August 31, 1983), from which the ATDA quotes at length. (ATDA Brief at 7, n.2). First, Arbitrator Seidenberg issued his decision in the *B&O* case eight years before the

Supreme Court's unequivocal holding in *Norfolk & Western Ry. Co. v. ATDA*, 499 U.S. 117, 128 (1991) that collective bargaining agreements must be overridden as necessary to effectuate an STB-approved transaction. Therefore, Arbitrator Seidenberg's seniority rights ruling, which followed **immediately** after his "conclu[sion] that we lack the authority to set aside the collective bargaining agreement in effect between N&SS and the USWA, even though it may impede the speedy integration of the N&SS and the B&O," retains virtually no persuasive value today. Second, two sentences after the passage from the *B&O* decision cited by ATDA, Arbitrator Seidenberg notes that "the instant situation does not represent a situation where the carrier is abandoning a property or closing an office." Therefore, it is questionable whether, even under his pre-*Norfolk & Western* interpretation of an arbitrator's responsibility to override a collective bargaining agreement, Arbitrator Seidenberg would have preserved the GTW dispatchers' seniority rights where, as here, the Carrier intends to close permanently the Troy dispatching office and consolidate all GTW dispatching work at Homewood.

C. Absent a Voluntary Agreement of the Parties, the Arbitrator Lacks Authority Under *New York Dock* to Impose the Wage, Benefit, and Relocation Enhancements Demanded by the ATDA.

The Carrier already has analyzed thoroughly each of the wage, benefit, and relocation enhancements sought by the ATDA and demonstrated how such enhancements are outside the scope of *New York Dock* and therefore beyond the authority of the Arbitrator to impose upon an unwilling party. (*See* Carrier's Pre-Hearing Submission at 20-23; Carrier's Post-Hearing Submission at 17-24). The ATDA concedes that the enhanced benefits it seeks are "novel," and does not point to a single Section 4 arbitration award granting such benefits. (ATDA Post-Hearing Brief at 9).

Instead, the ATDA briefly cites to two awards for the general proposition that a Section 4 arbitrator may award extra-*New York Dock* benefits that “draw their essence from” or are “within the context and spirit of” *New York Dock*. In *Norfolk & Western Ry. Co. and Bhd. of R.R. Signalmen*, NYD § 4 Arb. (LaRocco Feb. 9, 1989), Arbitrator LaRocco recognized, in a footnote, the theoretical possibility of benefits drawing their essence from *New York Dock* without being specifically enumerated therein. See Carrier’s Pre-Hearing Submission, Ex. 31 at 24, n.7). However, Arbitrator LaRocco did not award any such ephemeral benefits, but rather held that:

[T]his Committee lacks the authority to provide the Organization with monetary benefits in excess of the minimum level set forth in the New York Dock Conditions. Thus, the implementing agreement shall not contain the Organization’s proposals relating to additional per diem benefits, real estate expense reimbursements and other relocation expenses.

Id. at 30. Similarly, in *Chicago & North Western Transp. Co. – Abandonment – Near Dubuque and Oelwein, IA*, 3 I.C.C.2d 729 (ICC April 17, 1987), which dealt primarily with the proper standard of review over arbitral decisions, the parties’ dispute focused on the arbitrator’s calculation of moving expenses under the *Oregon Short Line* conditions and the arbitrator’s authority to determine a valuation of the claimant’s home. On the first issue, the ICC recognized an arbitrator’s “leeway” to consider particular moving expenses not specifically enumerated in the *Oregon Short Line* conditions. *Id.* at 736. As to such minor matters as calculating a claimant’s moving expenses, the ICC held that it would not second-guess the arbitrator’s judgment. *Id.* However, the ICC warned that arbitrators should not interpret its holding as permitting arbitrators to dispense their “own brand of industrial policy.” *Id.* As to the valuation of the Claimant’s home, the ICC upheld the arbitrator’s determination because, while the *Oregon Short Line* conditions did not authorize the arbitrator to make the determination, the parties

“clearly and unmistakably consented” to have the arbitrator resolve the issue. *Id.* at 737. The details of calculating expressly-provided benefits are categorically different than the creation of entirely new benefits sought by the ATDA here. *Chicago & North Western* therefore does not support the ATDA’s demands for wage, benefit, and relocation enhancements that are plainly not contemplated by *New York Dock*, absent the clear and unmistakable consent of both parties. *See also Norfolk Southern Ry. Co., et al. and Bhd. of Maintenance of Way Employees, et al.*, NYD § 4 Arb. (Fredenberger, Jan. 14, 1999) at 11 (rejecting the organization’s demand for separation allowances that would impermissibly expand the benefits of *New York Dock* and, in any event, would expose the carrier to undue expense).

D. The ATDA’s Characterization of the Parties’ Bargaining History is Wrong, but Ultimately Irrelevant Because All Parties Agree that the Arbitrator Has Jurisdiction to Impose a Proper *New York Dock* Implementing Agreement.

The ATDA devotes approximately a quarter of its Post-Hearing Brief to challenging the Carrier’s timeline and description of the parties’ bargaining history. (*See* ATDA Brief at 9-12). As discussed in Section II (B) above, the Carrier disputes the ATDA’s attempt to blame the Carrier for the delays in the bargaining process.

However, assuming *arguendo* that the delays, which inured to the benefit of the ATDA-represented dispatchers who successfully postponed their transfer to Homewood well beyond the normal timeframe contemplated by *New York Dock*, were the fault of both parties, the ATDA fails to explain how this might be relevant. The parties bargained for approximately six (6) months and the ATDA continues to reject the core premise of the consolidation. At this point, there is no reason to believe that additional bargaining would result in a voluntary agreement.

In fact, the ATDA does not propose additional bargaining. (See ATDA Post-Hearing Brief at 12) (seeking as relief imposition of the ATDA's proposed implementing agreement). This is not a case where the labor organization claims the arbitrated imposition of an implementing agreement is premature based on the carrier's alleged inadequate bargaining. Compare *Norfolk Southern Ry. Co., et al. and Bhd. of Maintenance of Way Employes, et al.*, NYD § 4 Arb. (Fredenberger, Jan. 14, 1999) at 19 (rejecting the organization's objection to the arbitrator's authority, based on the fact that the parties participated in a single three-hour bargaining session, because "[t]he Carriers thus were looking at an unacceptable delay in negotiations that would extend far beyond any time for such contemplated by Article I, Section 4"). As the Carrier first argued in its Pre-Hearing Submission, the Arbitrator now properly has jurisdiction to impose an implementing agreement providing for the selection and assignment of forces for the consolidated Homewood dispatching operation. (Carrier's Pre-Hearing Submission at 9-14).

IV. CONCLUSION

For all of the reasons set forth herein, as well as in the Carrier's Pre-Hearing Submission and opening Post-Hearing Submission, the Carrier respectfully submits that the Arbitrator must reject the ATDA's proposed implementing agreement and impose the Carrier's proposed implementing agreement in its entirety.

Respectfully submitted,

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Datcd: December 18, 2009

A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33556

**CANADIAN NATIONAL RAILWAY COMPANY,
GRAND TRUNK CORPORATION,
AND GRAND TRUNK WESTERN RAILROAD INCORPORATED
-- CONTROL --
ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD
COMPANY, CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND
CEDAR RIVER RAILROAD COMPANY**

RAILROAD CONTROL APPLICATION

VOLUME 2 OF 4

**TRAFFIC STUDIES, OPERATING PLAN, LABOR IMPACT STATEMENT,
DENSITY CHARTS, AND SUPPORTING STATEMENTS
(EXHIBITS 13 AND 14)**

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July 1998

EXHIBIT 13 -- OPERATING PLAN

1.0 INTRODUCTION

1.1 Purpose and Scope

This Operating Plan describes how the railroad system that will result from the CN/IC Transaction will operate to serve its customers. The Operating Plan focuses on the changes that will result from the Transaction and describes how CN/IC will manage those changes. The Plan is divided into the following principal subject areas:

- Development of the Operating Plan
- Patterns of Service
- Yard and Terminal Changes and Consolidations
- Impacts on Traffic Densities
- Track Work and New Construction
- Impact on Passenger and Commuter Service
- Equipment Requirements and Utilization
- Centralized Functions
- Coordination of Equipment Maintenance
- Coordination of Maintenance of Way
- Safety Integration
- Operating Organization
- Management Information Systems/Communications
- Purchasing

CN and IC are acutely aware of the importance of high-quality customer service operations, and they recognize the need for very careful implementation of the integration of their two customer service operations. Accordingly, at least as an initial matter, the merged network expects to maintain the customer service organization and facilities that the railroads have in place today. As described elsewhere in this Operating Plan, improved CN/IC data transfers regarding train and car status on each network will provide improved visibility of traffic across the systems on day one of the implementation period.

Over time, as the SRS system is implemented across the merged network and opportunities present themselves for greater integration and efficiency, CN/IC will take advantage of those opportunities, but not at the expense of quality service. Shippers, however, can expect significant logistical savings from the increasingly precise and comprehensive customer service that the merged system will be able to provide.

10.2 Train Dispatching

The train dispatching function is of central importance for both the efficiency and the safety of rail operations. Currently, IC trains are dispatched from the Network Operations Center in Homewood, Illinois. CN system trains moving over the physically discrete GTW and DWP lines are dispatched from separate centers in Troy, Michigan, and Pokegama Yard near Superior, Wisconsin, respectively.

The three dispatching centers utilize separate train control and information systems and somewhat different operating practices. The CN/IC combination offers the

opportunity to unify the dispatching facilities and practices of these three U.S. rail operations in a manner that will improve efficiency, service and safety.

Currently, IC maintains six full-time and one part-time dispatching desks at Homewood, and controls train movements utilizing the Digicon traffic management system. GTW's Troy center maintains four full-time desks and employs the TDPro CAD system. The much smaller DWP line requires only one desk and maintains a hard-wire panel for train control on a portion of the line. GTW and DWP dispatchers coordinate train movements on U.S. lines with activity occurring on the rest of the CN system through communications with CN dispatching centers in Edmonton and Toronto.

The CN/IC Transaction offers the opportunity to consolidate the dispatching functions for the IC, GTW and DWP lines, resulting in substantial savings and improved rail service and safety. Following approval of the Transaction, CN/IC will consolidate the dispatching function at Homewood. The appropriate steps and timetable will be detailed in the Safety Integration Plan.

CN/IC intends to consolidate the dispatching functions as well as to unify operating practices. CN/IC will accomplish the physical relocation, the training of various dispatching systems, and the unification of operating practices in distinct steps.

As an initial step, the GTW and DWP offices will be relocated to Homewood. As part of this step, the DWP dispatching will be combined with an appropriate GTW dispatching desk. Thus, for a short period at the beginning of implementation, CN/IC will employ three dispatching operations at Homewood. This will facilitate communications between the dispatchers in the interim period. This interval will also provide the time

necessary for the second step, the production of, and training on, a combined operating practices rule book. Modifications will be made to the existing dispatching systems, TDPro CAD and Digicon, to accommodate changes to these operating practices. CN/IC will provide training in the unified operating practices for all affected personnel. CN/IC will work closely with FRA in planning and implementing these changes.

CN is exploring whether to implement a new state-of-the-art dispatching system, the Rail Traffic Management System (RTMS), to control train operations on its existing network. At an appropriate time, CN/IC also will extend RTMS to its U.S. lines at no additional cost. Eventually, the entire North American CN/IC rail system will be controlled using a single, state-of-the-art system. This plan will maximize the efficiency and safety of CN/IC's cross-border traffic flows. After RTMS is implemented and fully tested, the existing TDPro CAD and Digicon systems will be phased out.

One of CN/IC's highest priorities is to avoid any possible service disruptions or safety concerns during the implementation of this systemwide upgrade. For this reason, CN/IC will carefully test and will thoroughly train its personnel in RTMS, as well as in its harmonized operating practices, before any cutover to new operations.

As a result of this upgrade and integration, CN/IC will achieve significant improvements in the efficiency and safety of train operations, as well as compensation savings of about \$2.8 million annually.

utilize Battle Creek crews, and to maintain one common extra board at Battle Creek, to protect all service originating at Battle Creek, both eastbound and westbound.

3. Train Dispatching

There are three separate train dispatching centers on the combined CN/IC United States rail system -- IC trains are dispatched from the Network Operations Center in Homewood, Illinois, and CN trains on GTW and DWP lines are dispatched from separate centers in Troy, Michigan, and Pokegama, Wisconsin. These three dispatching centers utilize separate train control and information systems and somewhat different operating practices. Applicants will need to consolidate these dispatching facilities and practices, in a manner that will best utilize Applicants' work forces to improve efficiency, maximize the opportunity for backup relief, and consequently optimize customer service and safety, in order to implement the Transaction. Section 10.2 of the Operating Plan describes the process through which Applicants will consolidate the three existing train dispatching facilities into IC's facility in Homewood. In order to achieve these changes and efficiencies, it will be necessary to bring these dispatching groups under a single collective bargaining agreement with a single seniority roster.

4. Crew Management

CN performs crew management functions for GTW in Troy, Michigan, and Toledo, Ohio, and for DWP in Pokegama, Wisconsin. IC's crew management center is located in Homewood, Illinois. CN will consolidate GTW and DWP crew calling and timekeeping functions into IC's Homewood facility. CN/IC will utilize a single crew

B

SECOND VERIFIED DECLARATION OF ROGER FRASURE

1. My name is Roger Frasure. I am employed as Senior Chief – Chicago Division by Grand Trunk Western Railroad Company (“GTW” and together with its U.S. rail affiliates, the “Carrier”). I have been in that position for 12 years. In that capacity, I have personal knowledge generally of the Carrier’s efforts to consolidate dispatching functions and, in particular, of the Carrier’s current plan to consolidate the dispatching functions of the GTW and the Illinois Central Railroad Co. (“IC”) in Homewood, Illinois.

2. When the Carrier acquired the IC in 1999, the IC dispatchers and GTW dispatchers utilized different traffic management and information systems that would have made it impossible to immediately realize the efficiencies of the IC acquisition by consolidating the work of the two dispatcher groups. Based in part on these difficulties, the Carrier reached an agreement with the representative of the GTW dispatchers, the American Train Dispatchers Association (“ATDA”), to not transfer the GTW dispatcher outside of the Troy area for a period of six years.

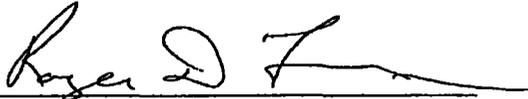
3. Since 1999, the IC and GTW dispatchers have been upgraded to use common traffic management and information systems. The IC dispatchers have been trained and converted to several systems previously used by the GTW dispatchers, such as the TGBO system, the SRS mainframe computer system, and the TOPC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

4. In both the IC and GTW dispatching operations, technology is in place to allow the Carrier to perform workload studies to monitor if operations could be improved by redistributing territories between the existing desks. Based on ever-changing traffic densities along the Carrier’s rail lines, the Carrier periodically moves work among the existing desks. For example, the Carrier recently recalibrated territory assignments among dispatcher desks due to a decline in traffic related to the auto industry.

5. Once the IC and GTW dispatching operations are consolidated, the Carrier will be able immediately to begin reassigning territories between desks formerly designated as exclusively IC or GTW desks, as necessitated by the Carrier’s business needs. These reassignments of work will blur the distinction between former GTW dispatching work and former IC dispatching work.

6. The planned consolidation of GTW and IC dispatching work is likely to result in increased work opportunities for both groups of dispatchers. The Carrier will have the flexibility to assign excess traffic on the IC lines to dispatchers who previously dispatched trains exclusively over the GTW territory, and vice versa. The operational efficiencies and enhanced work opportunities anticipated by the Carrier would be eliminated if the GTW dispatchers were limited to dispatching trains only over the GTW lines or were otherwise walled-off from the IC dispatchers through a separate collective bargaining agreement or seniority roster.

7. I have read the foregoing Second Verified Declaration, and I swear under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.



Roger Frasure

Dated: December 18, 2009

C

VERIFIED DECLARATION OF CATHY CORTEZ

1. My name is Cathy Cortez. I am employed as Senior Manager – Labor Relations by the Illinois Central Railroad Co. (“IC” and together with its U.S. rail affiliates, the “Carrier”). I have been in that position for 10 years. In that capacity, I have personal knowledge generally of the Carrier’s relations with the collective bargaining representatives of its employees, including the American Train Dispatchers Association (“ATDA”) and the Illinois Central Train Dispatchers Association (“ICTDA”), and, in particular, of the Carrier’s bargaining with the ATDA and ICTDA concerning the consolidation of the dispatching functions of the Grand Trunk Western Railroad Company (“GTW”) and the IC in Homewood, Illinois.

2. Four months after the Carrier’s acquisition of the IC was approved by the Surface Transportation Board, the Carrier and the ATDA executed a side letter on September 27, 1999 in which the Carrier agreed not to move the work of the GTW dispatchers outside of the Troy area for a period of six (6) years. During the next round of collective bargaining between the Carrier and the ATDA in 2005, the ATDA served a Section 6 notice, attached as Exhibit 1, seeking to extend the Carrier’s commitment not to transfer the GTW dispatchers from the Troy area. The ATDA was unable to obtain an extension of the “stay put” agreement in the parties’ most recent round of bargaining.

3. On February 3, 2009, the Carrier posted *New York Dock* Section 4 notices in Troy and Homewood informing affected employees of the Carrier’s intent to consolidate the GTW and IC dispatching groups in Homewood. Concurrently, the Carrier informed the general chairmen of the ATDA and ICTDA of its Section 4 notice and promptly scheduled initial meetings with both organizations.

4. The Carrier first met with the ATDA on February 5, 2009 in Troy and with the ICTDA on February 9, 2009 in Homewood. During these first meetings, the Carrier informed the organizations of the Carrier’s intent to consolidate the work of the IC and GTW dispatchers and even offered an example of one potential desk reorganization scenario that could be made possible by the consolidation.

5. Throughout its negotiations for a voluntary implementing agreement with the ATDA and ICTDA, the Carrier expressed its willingness to “work with the ATDA” but never equivocated with respect to the core purpose of the transaction, namely the actual consolidation of the GTW and IC dispatching work at Homewood, with both groups of dispatchers operating under a single collective bargaining agreement with a single seniority roster.

6. After the February 5, 2009 meeting with the ATDA, I promptly attempted to schedule a second bargaining session and provided the ATDA with multiple possible dates in February and March 2009. The ATDA was unable to provide any availability prior to April 15, 2009. I outlined the Carrier’s proposal to the ATDA orally in our February 5, 2009 meeting and agreed to provide a full written proposed implementing agreement in advance of our next meeting. As promised, I prepared and circulated the Carrier’s written proposed implementing agreement to the representatives of the ATDA on the morning of April 14, 2009. Attached as Exhibit 2 is a copy of the e-mail I sent transmitting the proposal to the ATDA. If the ATDA had

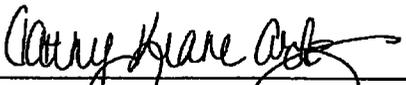
been willing to meet earlier than April 15, 2009, I would have provided the Carrier's draft implementing agreement in advance of such meeting.

7. During the April 15, 2009 meeting, the Carrier and the ATDA tentatively planned to conduct another bargaining session in early June. Unfortunately, on April 22, 2009, the ATDA cancelled the tentative June meeting. I immediately attempted to schedule a third meeting, by teleconference if possible. On June 12, 2009, the ATDA provided its availability for the requested conference call. The Carrier agreed to the ATDA's proposed time and the conference call was held on June 16, 2009. On June 23, 2009, the Carrier requested a further face-to-face meeting and offered very wide availability during the first two weeks of July. On July 15, 2009, the ATDA's Vice President responded as to his indefinite unavailability.

8. On July 25, 2009, the ATDA finally presented a counter-proposal to the Carrier via e-mail. The ATDA's draft agreement, which sought to maintain the transferred GTW dispatchers as GTW employees working under the GTW-ATDA collective bargaining agreement with GTW seniority, failed to acknowledge the fundamental nature of the Carrier's proposed consolidation. The Carrier initiated the arbitration process on July 29, 2009 but nevertheless insisted that the parties meet on August 4, 2009, as previously scheduled. The ATDA refused, claiming that it did not see any further value in meeting.

9. Currently, under the ATDA collective bargaining agreement, the GTW dispatchers are paid a uniform annual salary of \$74,894. Pursuant to the ICTDA collective bargaining agreement, dispatchers qualified on a desk earn a minimum of \$70,000 annually, which increases to a minimum of \$75,000 annually after one year of service. Because the Carrier's proposed implementing agreement credits the transferring GTW dispatchers with their prior GTW service for this purpose, each transferring GTW dispatcher will receive a salary increase following consolidation.

10. I have read the foregoing Verified Declaration, and I swear under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.



Cathy Cortez

Dated: December 18, 2009

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**AMERICAN TRAIN DISPATCHERS ASSOCIATION
GTW SYSTEM COMMITTEE
119 S CORBIN ST - HOLLY, MI 48442
TELEPHONE: 248-634-4268**

January 10, 2005

CERTIFIED MAIL

**Mr Jack Gibbins
CN Labor Relations
17641 South Ashland Avenue
Homewood, IL 60430-1345**

Dear Mr. Gibbins:

This is notice served pursuant to Section 6 of the Railway Labor Act of our desire to revise and supplement existing agreements in accordance with the proposals set forth in Attachment "A" (Wages and Rules) and Attachment "B" (Health and Welfare) hereto, effective January 1, 2005.

It is our desire that conference on this notice begin at the earliest practicable date, and in any event not later than thirty (30) days after your receipt of this notice. We request that within ten (10) days after your receipt you suggest a time and place for such beginning conference.

This notice is separate and apart from, and in addition to, any others which may have been previously submitted to you and which are still pending, and those which may subsequently be submitted.

Yours truly,

**W Patrick Howard
General Chairman**

**Cc: F. L. McCann, President ATDA
A. M. Snyder, VP ATDA**

P0863

ATTACHMENT "A" (Wages and Rules)

- 1. Wages**
- 2. C.O.L.A.**
- 3. Bereavement**
- 4. Vacations**
- 5. 401 (k)**
- 6. Training Pay**
- 7 Shift Differential**
- 8. Longevity Pay**
- 9. Meal Allowance**
- 10. Supplemental Retirement Annuity**
- 11. Comp Time**
- 12. Job Protection**
- 13. Gain Share**
- 14. Collate Agreement**
- 15. Office Relocation**
- 16. Moratorium Period**

ATTACHMENT "A" (Wages and Rules)

1. WAGES

Effective January 1, 2005, and each January 1 thereafter, increase the daily rates of pay for all train dispatchers by five percent (5%)

Increase the daily rates of pay for all train dispatchers by \$30.00/day for addition of BLE territory.

2. COST OF LIVING ADJUSTMENT

The concept of cost-of-living allowance as set forth herein shall be without offsets, caps or limitations. Such allowances shall continue beyond the moratorium of this agreement. Such allowances, and further cost-of-living adjustments will be based on the change in the BLS CPI during the respective measurement period shown in the following table. Measurement Period and Effective Dates of Adjustment conforming to those shown below shall be applicable to all periods subsequent to those specified with the effective dates of adjustment beginning April 1, July 1, October 1, January 1.

Measurement Periods

<u>Base Month</u>	<u>Measurement Month</u>	<u>Effective Date of Adjustment</u>
January 2005	April 2005	July 1, 2005
April 2005	July 2005	October 1, 2005
July 2005	October 2005	January 1, 2006
October 2005	January 2006	April 1, 2006

The formula will be based on a 1 cent per hour increase for each .1 of a point in the Consumer Price Index for urban wage earners and clerical workers (Revised Series) (CPI-W) (1982-1984 = 100), U.S. Index, all items, unadjusted as published by the Bureau of Labor Statistics, U.S. department of Labor. It is intended that any remainder above .05 point of change after the conversion will be counted.

The cost-of-living allowance will apply to all wages, now or subsequently in effect, including but not limited to: straight time; overtime; vacations; holidays; special allowances; arbitrates; travel allowances; student and/or training rates; instructors' rates; protective employee rates and earnings guarantees. All of which shall be applied in the same manner as basic wage adjustments have been applied in the past.

Effective as of March 31, June 30, September 30, and December 31, of each year the cost-of-living allowance then in effect will be incorporated into basic rates of pay for all purposes

Each one cent per hour of cost-of-living allowance will be treated as an increase of two dollars (\$2.00) in the basic monthly rates of pay produced by application of this agreement.

3. BEREAVEMENT

Increase bereavement leave from three (3) days off without loss of pay to five (5) days off without loss of pay.

ATTACHMENT "A" (Wages and Rules)

4. VACATIONS

Revise vacation time to included 6 days per week.

5. 401(k)

Revise current agreement to require employer match of 50% of the employee's contributions to the 401(k) plan.

6. TRAINING PAY

Revise current agreement by increasing the training pay from forty-five (45) minutes at the straight time rate to one (1) hour at the straight time rate.

7. SHIFT DIFFERENTIAL

Establish a rule to provide additional compensation of \$4.00 per day for working second shift and \$8.00 per day for working third shift.

8. LONGEVITY PAY

Establish a rule to provide for additional compensation of one-half (.005) percent per year of service per day at the then effective straight time rate of pay.

9. MEAL ALLOWANCE

Establish a rule that provides for additional compensation of twenty (20) minutes at the overtime rate of pay for a meal allowance or a twenty (20) minute meal period.

10. SUPPLEMENTAL RETIREMENT ANNUITY

Establish a rule that provides for a Supplemental Retirement Annuity for all train dispatchers that retire from the service of the carrier equal to a monthly annuity of \$100.00 per year of service with the carrier.

11. COMP TIME

Revise Comp Time formula to allow payment for each overtime day of eight (8) hours at the straight time rate and comp time of four (4) hours at the straight time rate. Comp Time to be taken at eight (8) hour intervals. All unused comp time paid at the straight time rate.

12. JOB PROTECTION

Extend the protection provision of the schedule agreement to all train dispatchers currently working and provide for automatic inclusion after 30 months of service as train dispatcher

13. GAIN SHARE

Eliminate sick pay from cost savings and substitute the following:

ATTACHMENT "A" (Wages and Rules)

14. **COLLATE AGREEMENT**

The current agreement to be collated by the carrier before the end of the moratorium period and every ten (10) years thereafter

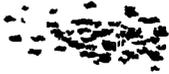
15. **OFFICE RELOCATION**

Written assurance that the Troy RTC Center will not be relocated before the end of the moratorium of this agreement.

16. **MORATORIUM PERIOD**

This agreement will continue for a period of four (4) years from January 1, 2005 through December 31, 2008.

2



Cathy
Cortez/CORTEZ02/CNR/CA
04/14/2009 11:25 AM

To Atdddww@aol.com
cc ATDAMCCANN@aol.com, josephwmason1@juno.com
bcc
Subject Re: 4/15 Meeting

Attached for your review is the proposal for discussion tomorrow. I apologize for the delay.

Cathy Cortez
Senior Manager – Labor Relations
Office: 708.332.3570
Mobile: 312.848.0586

Atdddww@aol.com

04/13/2009 05:04 PM

To Cathy.Cortez@cn.ca
cc ATDAMCCANN@aol.com, josephwmason1@juno.com
Subject 4/15 Meeting

Cathy:

We'd like to start the meeting at 10am on the 15th. Leo is flying in that morning and arrives Midway at 830am. This will give him time to make it to your offices. Thanks.

David W. Volz
Vice President
American Train Dispatchers Association
Phone: 210-455-9294
Fax: 210-467-5239

This email and any attached files may contain confidential and/or privileged information,

P0868

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GTW Dispatchers Impl Agmt proposal.doc

D

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK CONDITIONS

PARTIES	NORFOLK SOUTHERN RAILWAY COMPANY,)	
	CSX TRANSPORTATION, INC., and)	
	CONSOLIDATED RAIL CORPORATION,)	
)	
TO	and)	
)	
DISPUTE	BROTHERHOOD OF MAINTENANCE OF WAY)	
	EMPLOYES; INTERNATIONAL BROTHERHOOD)	
	OF BOILERMAKERS, IRON SHIP BUILDERS,	)	DECISION
	BLACKSMITHS, FORGERS AND HELPERS;)	
	BROTHERHOOD RAILWAY CARMEN DIVISION)	
	- TRANSPORTATION COMMUNICATIONS)	
	INTERNATIONAL UNION; INTERNATIONAL)	
	BROTHERHOOD OF ELECTRICAL WORKERS;)	
	NATIONAL CONFERENCE OF FIREMEN AND)	
	OILERS; INTERNATIONAL ASSOCIATION OF)	
	MACHINISTS AND AEROSPACE WORKERS; and)	
	SHEET METAL WORKERS' INTERNATIONAL)	
	ASSOCIATION)	

HISTORY OF DISPUTE:

In October 1996 CSX Corp. (CSX) and Conrail, Inc. (Conrail) consummated an agreement to merge rail operations. In response Norfolk Southern Corp. (NSC) set about to purchase all outstanding Conrail voting stock. In April 1997 NSC and CSX agreed upon a plan for joint acquisition of Conrail which resulted in an application to the Surface Transportation Board (STB), successor to the Interstate Commerce Commission (ICC), to effectuate the plan.

In a Decision served July 23, 1998, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.-- Control and Operating

Lease Arrangements -- Conrail Inc. and Consolidated Rail Corp. Finance Docket No. 33388, Decision No. 89 (Decision No. 89), the STB approved the plan subject to the labor protective conditions set forth in New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal, 360 ICC 60 (1979) (New York Dock Conditions). Decision No. 89 approved the acquisition by Norfolk Southern Railway Company (NSR) and Norfolk and Western Railway Company (NW) (collectively known as Norfolk Southern (NS) and CSX Transportation, Inc. (CSXT) of the vast majority of Consolidated Rail Corporation's (CRC) rail assets, operations and employees the distribution of which was authorized as per agreement of the three Carriers involved. According to that agreement thousands of CRC rail miles and employees were to be allocated to CSXT and NS and integrated with the operations of those Carriers with CRC continuing its railroad operations only in three specific geographic locations known as the Shared Assets Areas (SAAs) to be operated by CRC with a drastically reduced employee complement for the joint benefit of NS and CSXT.

On August 24, 1998 the rail carriers involved in Decision No. 89 gave notice under Article I, Section 4 of the New York Dock Conditions to the Carriers' employees represented by the Brotherhood of Maintenance of Way Employees (BMWE) and the six shopcraft labor organizations, i.e., the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (IBBB), the Brotherhood Railway Carmen Division - Transportation Communications International Union (BRC), International Brotherhood of Electrical Workers (IBEW), National Conference of

Firemen and Oilers (NCFO), International Association of Machinists and Aerospace Workers (IAMAW) and the Sheet Metal Workers' International Association (SMWIA). The notice stated that NS and CSXT would coordinate maintenance of way operations, including centralization of rail welding and equipment repair functions, performed by CRC with their maintenance of way operations except for the SAAs which would have greatly reduced maintenance of way operations most of which would be performed by CSXT and NS. In so doing, the notice further detailed, existing CRC seniority districts would be abolished and new ones formed on NS and CSXT. Moreover, except on the SAAs and one seniority district of one Carrier, the CRC collective bargaining agreements (CBAs) would not apply. Rather, NS and CSXT CBAs or those of their subsidiaries would apply as designated by the Carriers.

Further pursuant to Article I, Section 4, the Carriers and the BMWE began negotiations for an implementing agreement on September 1, 1998 and met on other dates thereafter. However, negotiations were unproductive. The Carriers met with both BMWE and the shopcraft organizations on September 24 for negotiations. Those negotiations fared no better.

On October 28, 1998 the Carriers invoked arbitration under Article I, Section 4. The parties were unable to agree upon selection of a Neutral Referee, and as provided therein the Carriers requested that the National Mediation Board (NMB) appoint such Referee. The NMB appointed the undersigned by letter of November 13, 1998.

By conference call among the Neutral Referee, the Carriers and the Organizations, a prehearing briefing schedule was established, and hearings were set for December 15 through 18, 1998. Prehearing briefs were filed, and hearings were held as scheduled.

FINDINGS:

After a thorough review of the record in this case the undersigned concludes that the various issues raised by the parties are properly before this Neutral Referee for determination.

Further review of the extensive record, consisting of approximately 300 pages of prehearing submissions or briefs together with several hundred pages of exhibits and attachments thereto as well as over 1,000 pages of hearing transcript, forces the conclusion that in order for this Decision to be clear and cogent some parameters must be established at the outset. First, while all the relevant facts and the arguments of the parties have been thoroughly reviewed and evaluated, only those deemed to be decisionally significant by the Neutral Referee are dealt with or addressed in this Decision. Secondly, there must be some mechanism for the orderly consideration of the issues or disputes.

Accordingly, while recognizing that this is a single proceeding which must result in an arbitrated implementing arrangement or arrangements which dispose of all outstanding issues, this Neutral Referee deems it appropriate to distinguish the issues or disputes between the BMW and the Carriers from those between the shopcraft

organizations and the Carriers. The undersigned recognizes that there may be some overlap of these considerations inasmuch as IAMAW has an interest in some maintenance of way functions in addition to those involved in the consolidation of shops and that BMWWE has an interest in shop consolidations other than its interest in general maintenance of way functions. Nevertheless, separate consideration is deemed most appropriate.

1. Nonshop Maintenance of Way Issues or Disputes

Negotiations between BMWWE and the Carriers produced final proposals for an implementing agreement by each side the terms of which differ significantly with respect to several issues. With some exceptions the BMWWE proposal would preserve the terms of the CRC CBAs with that organization and make them applicable to the CRC employees transferred to CSXT and NS. By contrast, the Carriers' proposal with some exceptions would apply CBAs between the BMWWE and CSXT, NS or their subsidiaries to CRS employees who become employed by the two Carriers. CRC CBAs would continue to apply on the SAAs.

This situation is subject to certain provisions of the New York Dock Conditions and the ICC, STB court and arbitral authorities pertaining thereto.

In addition to Article I, Section 4 of the New York Dock Conditions, the proceeding in this case is governed by Article I, Section 2 which provides:

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

At issue in this case is the authority of the undersigned under Article I, Section 4 to override or extinguish, in whole or in part, the terms of pre-transaction CBAs. That authority is defined by Article I, Section 2. The most recent authoritative pronouncement with respect to such authority came in the STB's Decision in CSX Corp -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905 (Sub-No. 22) and Norfolk Southern Corp. --Control -- Norfolk and Western Ry. Co. and Southern Ry. Co., Finance Docket No. 29430 (Sub-No. 20), served September 25, 1998 (Carmen III). Therein the STB defined the authority "... by reference to the practice of arbitrators during the period 1940 - 1980 . . ." under the Washington Job Protection Agreement (WJPA) and ICC adopted labor protective conditions and by the following limitations:

The transaction sought to be implemented must be an *approved transaction*; the modifications must be *necessary* to the implementation of that transaction; and the modifications cannot reach CBA *rights, privileges or benefits* protected by Article I, Section 2 of the New York Dock conditions.

The STB went on to detail the meaning of the terms "approved transaction," "necessary" and "rights, privileges and benefits." The undersigned deems it best to apply the STB interpretations of those terms to the various issues and disputes in this case as they are addressed.

BMWE and the Carriers are in dispute as to how CRC employees should be allocated among CSXT, NS and CRC as operator of the SAAs. The Carriers' proposal would allocate those employees to the Carrier which is allocated the territory upon which the employees worked for CSC. BMWE, on the other hand, proposes to have CRC abolish all jobs and have the three Carriers rebulletin those jobs to be bid upon by the transferring employees. Also, the BMWE proposes to allow all such employees a type of "flowback" right whereby after initially bidding a position on one of the three Carriers, an employee could exercise seniority to a position on either of the other two Carriers. Thus, a senior employee furloughed on one of the Carriers could avail himself or herself of a position on one of the other two.

BMWE argues that only under its allocation plan would employees have a meaningful choice as to where they want to work. Such choice, urges the Organization, is guaranteed to affected employees under the New York Dock Conditions.

The Carriers in support of their proposal argue that it is the most efficient and least disruptive method by which to allocate the employees. The Carriers point out that it does not involve job abolishments and rebidding which the Carriers foresee will result in

substantial delays to implementation of the transaction as well as relocation of hundreds and perhaps thousands of employees.

The undersigned believes the Carriers have the stronger position on this point. While employee choice is a laudable goal, it cannot be placed ahead of efficient implementation of the transaction. In Decision No. 89 the STB approved the transfer of CRC operation and employees to the three Carriers. Prompt effectuation of those objectives was an implicit element of the transaction. Moreover, in imposing the New York Dock Conditions the STB presumably intended application of the strict time limits of Article I, Section 4. BMW's proposal could delay implementation of the transaction several months beyond what would be required under the Carriers' plan. Moreover, the BMW's "flowback" proposal could impair establishment of a well-trained and unified work force on each of the three Carriers. It certainly would stifle the competition between CSXT and NS envisioned by the STB when it approved the transaction.

Based upon the foregoing, the undersigned believes that the Carriers' proposal for the allocation of former CRC employees is the most appropriate. Adoption thereof meets the tests set forth by the STB in *Carmen III*. It falls within the gambit of the selection and assignment of forces made necessary by the transaction, a subject matter frequently dealt with by arbitrators in the 1940-80 era. It involves the principle transaction approved by the STB in Decision No. 89. Its adoption is necessary to the implementation of that transaction which, as the STB explained in *Carmen III*, means that it is necessary to secure a public transportation benefit. It does not involve a right, privilege or benefit

under any CBA required to be maintained by Article I, Section 2 of the New York Dock Conditions.

The parties also are in dispute as to the proper modifications of seniority in connection with the transaction. As noted above, the Carriers' propose to abolish CRC's seniority districts and create new ones on their respective properties. Doing so would contravene the seniority provisions of the CRC/BMWE CBA. BMW's proposal would modify somewhat existing CRC seniority districts but basically would maintain and apply them to the operations of the three Carriers.

Under the CRC/BMWE CBA there are eighteen seniority districts. Under the plan for allocation of CRC rail operations, NS and CSXT will receive some of those districts as a whole and some as fragments. NS plans to organize the CSC lines it is allocated into one new Northwest Region consisting of three (Dearborn, Pittsburgh and Harrisburg) Divisions. These would be added to NS's existing two operating regions encompassing nine operating divisions. CSXT will organize the CRC operations it receives by combining them with certain CSXT seniority districts into three new consolidated districts (a Northern District, a Western District and an Eastern District). CRC as operator of the SAAs in three geographic areas will maintain separate seniority districts for those areas. The three acquiring Carriers propose to dovetail the seniority of CRC employees onto the rosters of the new seniority districts.

At the outset the BMW's argues that at least in some of the Carriers' seniority districts there is no genuine transaction within the meaning of the New York Dock

Conditions and thus this Neutral Referee has no authority to effectuate any changes in the seniority arrangements. The Organization maintains that there is no genuine consolidation or coordination of functions.

The Carriers attack the BMWWE seniority proposal, much as they did the Organization's proposal for allocation of employees, as an attempt to maintain the status quo of CRC operations. The Carriers emphasize that within the CRC seniority districts are over 120 zones outside of which employees are not required to exercise seniority. This fact allows CRC employees to decline work outside the zones which is wholly inconsistent with the operating efficiencies which were an important factor in the STB's Decision No. 89. Accordingly, the Carriers urge, their proposal must be adopted in order to effectuate an important purpose of the transaction. Moreover, the Carriers emphasize, the BMWWE proposal will provide for a separation allowance for furloughed employees which, given the effect of zone seniority, would significantly increase the Carriers' costs in connection with this transaction.

BMWWE argues that its proposal protects CRC employees from being forced to work over much larger geographic areas thereby increasing travel time and time away from home for such employees. BMWWE asserts that its membership will make every effort to secure work thus minimizing the possibility of numerous and expensive separation allowance payments. The Organization urges that on NS former CRC employees will be deprived of significant work equities, and the CSXT would be worse.

The Organization contends that the dovetailing would be detrimental to existing NS and CSXT employees.

Once again, this Neutral Referee concludes that the Carrier has the stronger case.

While the nature of this transaction is somewhat unusual, the fact remains that the very matters BMWWE contends do not constitute a transaction were considered by the STB when it approved the transaction. NS, CSXT and CRC as the operator of the SAAs have simply sought to implement the transaction by taking the very actions contemplated by the STB in Decision No. 89. Imposing the seniority structure of CRC upon NS and CSXT operations would seriously hamper them in terms of increasing efficiencies and competition between NS and CSXT. Flexibility with respect to the work force is key to the success of the transaction. The CRC seniority arrangements would severely restrict that flexibility. Moreover, even if this Neutral Referee had the authority under Article I, Section 4, to include a provision for a separation allowance, which he doubts he possesses because it would expand benefits of the New York Dock Conditions, to do so in this case would expose the Carrier to undue expense.

The undersigned believes his decision on this point complies with the applicable tests set forth in Carmen III. Adjustment or modification of seniority arrangements by arbitrators under protective conditions was common during the period from 1940 to 1980. The adoption of the adjustments and modifications in this case are necessary to realize a public transportation benefit. The STB has determined that seniority is not a right, privilege or benefit under Article I, Section 2 of the New York Dock Conditions.

The parties further disagree as to what working agreement will apply to the CRC employees taken over by CSXT, NS and CRC as operator of the SAAs. BMWWE argues that with limited modifications the CRC/BMWWE agreement should apply. With the exception of CSXT's Northern District where the CRC/BMWWE CBA would continue to apply without substantial modification and the three geographical SAAs where that agreement would apply with some modifications, NS and CSXT would apply the existing CBA between those Carriers and BMWWE applicable to the territory on which former CRC employees will work.

The basic argument advanced by BMWWE in favor of its proposal is that such application would minimize disruption to the lives of former CRC employees and would preserve rates of pay rules and working conditions as provided in Article I, Section 2 of the New York Dock Conditions for those employees. Emphasizing that the former CRC employees will be working for NS and CSXT in maintenance of way operations the structure of which is different on those Carriers from that of CRC as it presently exists, both CSXT and NS maintain that applying the CRC/BMWWE agreement as BMWWE urges would materially detract from the increased efficiency expected in connection with the transaction.

The Carriers also argue that they must be free to apply their own policies with respect to their maintenance of way operations and that the best way to do so is to apply their BMWWE agreements. As examples, the Carriers point out that BMWWE has agreed with CSXT to apply the System Production Gang (SPG) agreement which has been

highly efficient and successful on that property and that BMW has agreed with NS to apply the District Production Gang (DPG) agreement on its property which has had similar success. However, the Carriers point out, application of the CRC working agreement to CRC employees coming to work for the two Carriers will materially diminish the efficiencies and economies otherwise available under the DPG and SPG agreements.

Again, the record in this case convinces the Neutral Referee of the superiority of the Carriers' position on this issue. Two plain goals of the STB's approval of the transaction in Decision No. 89 are more efficient and less costly operations by the Carriers involved and a serious competitive balance between NS and CSXT. Application of the CRC/BMW CBA as the working agreement for former CRC employees who become employed by CSXT and NS strikes at the heart of both propositions.

Accordingly, this Neutral Referee concludes that the Carriers' proposal for application of CBAs should be adopted over that of BMW. The undersigned believes that this determination complies with the tests set forth by the STB in *Carmen III*. The public transportation benefit to be derived is, as noted above, increased operating efficiencies, reduced costs and the promotion of competition between NS and CSXT. It does not involve a right, privilege or benefit protected from change by Article I, Section 2 of the New York Dock Conditions.

The parties are in further dispute with respect to the use of outside contractors by NS and CSXT for rehabilitation and construction projects necessary to link the Carriers'

system with allocated CRC lines and to upgrade track and increase capacity. The Carriers emphasizes that these projects would be temporary and that under the BMWWE's proposal it would be required to hire and then lay off substantial numbers of employees. Nor, emphasizes the Carriers, does BMWWE's proposal allow for NS, CSXT or third parties to perform maintenance of way functions for CRC as operator of the SAAs where those functions cannot be performed efficiently by the drastically reduced employee complement of CRC.

Once again the Carriers' arguments are more persuasive than those of the BMWWE. Restriction on contracting out, either through the scope clause of a CBA or a specific prohibition therein, is a common provision in railroad CBAs. As BMWWE points out, it is entitled to respect and observance under the STB's decision in Carmen III. However, the application of such restrictions in the instant case would cause serious delay to implementation of the transaction insofar as capital improvements are concerned and would unduly burden CRC with an employee complement it could not keep working efficiently. Accordingly, elimination of those restrictions meets the necessity test set forth by the STB in Carmen III. Moreover, it is not a right, privilege or benefit guaranteed maintenance under Article I, Section 2 of the New York Dock Conditions.

However, BMWWE maintains that there are several rights, privileges and benefits in this transaction protected from abrogation or modification by Article I, Section 2 of the New York Dock Conditions. First among these, urges the Organization, is the CRC/BMWWE Supplemental Unemployment Benefit, (SUB) Plan. The Carriers contend

that the plan falls within the category of wages, hours and working conditions under Article 1, Section 2 which are not immutable but which may be eradicated or modified under the necessity test. Moreover, the Carriers urge the plan is in the nature of an alternative protective arrangement to the New York Dock Conditions to be accepted or rejected by employees as an exclusive source of protection.

The undersigned believes the Organization has the stronger position on this point. As the Organization points out, the STB in Carmen III specifically identified unemployment compensation as a protected right, privilege or benefit. Supplemental unemployment benefits are so closely related as to attain the same status. Accordingly, the arbitrated implementing arrangement or arrangements resulting from this proceeding are deemed to include the CRC/BMWE Supplemental Unemployment Benefit plan.

The Organization also contends that a CRC shoe allowance and an L&N laundry allowance which would be applicable on CSXT also are rights, privileges and benefits under Article 1, Section 2. This Neutral Referee cannot agree. The Carriers make the stronger argument that these benefits are analogous to other provisions of collective bargaining agreements which do not represent vested or accrued rights of the nature identified by the STB in Carmen III as being elemental to rights, privileges and benefits. Accordingly, the undersigned finds that they are not rights, privileges and benefits which must be preserved under Article 1, Section 2.

In its prehearing submission the BMWWE argued that the New Jersey Transit (NJT) rail operations flowback rights allowing NJT commuter employees who formerly worked

for CRC the right to exercise seniority on CRC if furloughed from NJT constituted a right, privilege or benefit under Article I, Section 2. The Carriers while denying such status for the arrangement pointed out that under both BMW's and the Carriers' proposals the arrangement would be honored. Accordingly, it is to be considered part of the arbitrated implementing arrangement or arrangements which issue in connection with this Decision.

Also in its prehearing submission BMW contended that the CRC Continuing Education Assistance Plan and the CRC Employee Savings Plan constituted rights, privileges and benefits under Article I, Section 2. However, at the hearing when the Carriers demonstrated that they had plans superior to those at issue, BMW withdrew its contention that the plans arose to such status in this particular case, reserving the right to raise the issue in another context. Accordingly, the CRC plans will not be considered part of any arbitrated implementing arrangement or arrangements resulting from this Decision.

The IAMAW has CBAs with CRC covering approximately thirty-eight employees performing nonshop maintenance of way work. As a result of the transaction in this case those employees will be allocated to NS, CSXT and CRC as operator of the SAAs. Under the Carriers' proposal those employees would be placed under the applicable BMW CBA with each Carrier. As a result IAMAW no longer would represent those employees.

The IAMAW challenges the jurisdiction of this Neutral Referee to impose the BMW E agreements upon the thirty-eight employees transferred to the three Carriers as violative of the representational rights of those employees, a matter within the exclusive jurisdiction of the NMB to resolve. IAMAW urges retention of the CRC BMW E agreement for application to those employees because that agreement protects the representation status of the IAMAW and the rights of the employees it represents. Alternatively, the Organization seeks application of its agreements with the three Carriers which would preserve its status as representative of those employees when they come to work for the three Carriers.

The Organization's point is well taken that questions of employee representation are within the exclusive jurisdiction of the NMB to resolve under the Railway Labor Act. However, the STB has long held, with judicial approval, that rights under the Railway Labor Act must yield to considerations of the effective implementation of an approved transaction. The most recent statement of that doctrine came in a case involving this transaction. See Norfolk & Western Ry. Co., et al & Bro. of RR. Signalmen, et al, Case No. 98-1808, USCA 4th Cir, Dec. 29, 1998. Accordingly, the Organization's jurisdictional argument is without merit.

Nor is this Neutral Referee persuaded that he should adopt IAMAW agreements with the three Carriers to apply to the thirty-eight employees who come to work for those Carriers rather than the BMW E agreements with those Carriers. Although there was some discussion at the hearing that the IAMAW and the Carriers might reach an

agreement as to the applicability of one or more agreements with that Organization to the transferred employees, the undersigned has not been informed that agreement on such applicability was reached. In the absence thereof the IAMAW's request for implementation of its proposal is based solely upon its desire to maintain its status as representative of the employees. While that desire is understandable, as noted above it raises an issue beyond the scope of the jurisdiction of this arbitrator.

In view of the foregoing, the IAMAW's proposal will not be adopted.

2. Consolidation of Roadway Equipment Maintenance and Repair Functions and Rail Welding Functions

Presently CRC maintains and repairs roadway equipment at its shop in Canton, Ohio. That shop will be closed and the work transferred to the CSXT Shop in Richmond, Virginia and the NS Roadway Shop in Charlotte, North Carolina. Additionally, CRC's rail welding shop at Lucknow (Harrisburg), Pennsylvania will be closed and its functions transferred to the CSXT's Rail Fabrication Plant in Atlanta, Georgia and to CSXT rail welding facilities in Russell, Kentucky and Nashville, Tennessee. The Carriers' proposal would allow affected CRC employees at Lucknow and Canton to follow their work to the shops to which it is transferred. Their seniority would be dovetailed onto existing rosters at those points and the employees would work under CBAs applicable to those locations. BMW's interest in this phase of the transaction is that it represents most of the CRC employees to be transferred from Lucknow and Canton. The shopcrafts' interests arise

by virtue of the fact that those Organizations represent CSXT and NS employees at one or more of the shops receiving the work and employees from Canton and Lucknow.

At the outset the shopcrafts raise jurisdictional objections to this Neutral Referee's authority to impose an arbitrated implementing arrangement on the parties with respect to the consolidation of the maintenance of way shop work. The basis for this contention is that the Carriers did not engage in the prerequisite negotiations with the shopcraft organizations as required by Article I, Section 4 of the New York Dock Conditions. The Organizations point out that in reality there was but one meeting between the Carriers and the Organizations which took place on September 24, 1998 and lasted a scant three hours. This, the Organizations urge, did not comply with the spirit or the letter of the thirty-day negotiating period contemplated by Article I, Section 4.

Although the Organizations characterize the September 24, 1998 meeting as a take it or leave it session on the Carrier's part, it appears that the Organizations actually informed the Carriers that before they should negotiate with the Carriers for an implementing agreement the Carriers should reach a master implementing agreement with BMW. Negotiations with that Organization never were fruitful and such an agreement apparently was not possible. The Carriers thus were looking at an unacceptable delay in negotiations that would extend far beyond any time for such contemplated by Article I, Section 4. Under these circumstances the undersigned does not believe the Carriers' handling of this matter constituted a violation of its negotiating obligations under Article I, Section 4.

The shopcraft organizations also challenge the propriety of the Carriers providing notice by fax of the meeting to attempt to select a Neutral Referee for this case. The Organizations argue that the notice of the meeting, to be accomplished by conference call, did not reach many of the Organizations and thus effectively eliminated them from participation therein. The use of a fax machine to transmit important information has the advantage of speed. However, there are drawbacks. Nevertheless, this Neutral Referee cannot conclude that what occurred in this case amounted to a violation of the terms of Article I, Section 4.

The shopcraft organizations seek to expand bidding opportunities for the jobs to be created for employees following their work from the closed CRC shops to the NS and CSXT facilities. The Organizations also question the qualifications of transferring employees as legitimate craft members, citing the fact that the work performed in the closed shops was not under shopcraft contracts and the employees performing that work never met the more rigid craft qualifications applicable at NS and CSXT facilities. The IBEW, in particular, seeks modifications to the Carriers' proposed implementing agreement to assure that the shopcrafts agreement in effect at the location to which employees are transferred will be strictly followed.

The Carrier maintains that to open the new jobs to bid as desired by the shopcrafts would seriously dilute the principle that an employee should follow his or her work to where it is transferred. Moreover, the Carriers emphasize, there are provisions in the existing applicable CBAs for training or retraining employees who cannot qualify for jobs

within a craft. The Carriers maintain that the changes such as those sought by IBEW in the Carriers' implementing proposal are unnecessary.

This Neutral Referee agrees with the Carrier on this issue. To over extend the bidding process would compromise the right of employees to follow their work. Problems with qualifications can be resolved by application of training and retraining provisions in existing CBAs. While clarification of agreement terms always is desirable, the undersigned believes that in this case what the IBEW seeks borders upon establishing the terms of a CBA which is beyond the jurisdiction of a Neutral Referee under Article I, Section 4.

BMW E apparently has no objection to the consolidation of the shop work here at issue or with the dovetailing of seniority. However, BMW E's proposal would seek to restrict the performance of transferred work to the particular facility to which transferred when existing applicable CBAs permit the Carrier more flexibility. Moreover, BMW E apparently seeks a bidding pool even broader than that sought by the shopcrafts. Based upon foregoing holdings in this case, the undersigned believes that neither position has merit.

Accordingly, this Neutral Referee finds that the Carriers' proposal with respect to the closing of CSC shops and the transfer of maintenance of way work performed there and the employees performing it to NS and CSXT facilities is appropriate for application to this case and that the proposals of BMW E and the shopcraft organizations are not.

Attached hereto and made a part hereof are arbitrated implementing arrangements the purpose of which is to resolve all outstanding issues and disputes raised by the parties in this proceeding.


William E. Fredenberger, Jr.
Neutral Referee

DATED: January 14, 1999