

BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 32760, SUB-FILE 47

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

(Arbitration Review)

APPEAL FROM ARBITRATION AWARD

Respectfully submitted,



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Statement of Jurisdiction

The underlying arbitration was conducted pursuant to Article 1, Section 11 of the *New York Dock* Conditions and interpreted the provisions of a merger implementing agreement. *See New York Dock Railway – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), and affirmed in *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979). As such, the Board has jurisdiction and authority to hear this appeal. *See, e.g., Chicago & N. W. Transp. Co. – Abn. – near Dubuque & Oelwein, Iowa, et al. (Lace Curtain)*, 3 I.C.C. 2d 729, 736 (1987), *aff'd sub nom. IBEW v. ICC*, 862 F.2d 330, 336 (D.C. Cir. 1988).

Standard of Review

This Board reviews arbitration awards where the issues at stake are recurring or otherwise significant. *See Lace Curtain, supra*. In reviewing an arbitration award, the Board gives substantial deference to the arbitrator's interpretation of a collective bargaining agreement, but will overturn an award that is: (1) irrational, wholly baseless, without reason, or without foundation in reason and fact (collectively referred to as "egregious error"); (2) that fails to draw its essence from the labor conditions imposed by the Board or its predecessor; or (3) is outside the scope of the arbitrator's authority. *See, e.g., Union Pac. R.R. v. STB*, 358 F.3d 31, 37 (D.C. Cir. 2004).

This appeal presents a significant and recurring issue. As shown by the history of disputes over the use of Article IX, *see, e.g., Finance Docket No. 32760, Sub File 45 (UP Appeal of the Perkovich Award)*, this is a dispute that has arisen in the past and will arise in the future. Further, as the continued use of the hub-and-spoke model that was a condition of the merger approval is at stake and this a case of first impression on that factual issue, it is important for the Board to address the matters contained herein. The challenged Award and any decision by this

Board will undoubtedly play an important role in the near future relations between the parties across the entire Union Pacific system.

Introduction and Summary of the Argument

The core of this appeal involves two issues. *First*, the preservation of the hub and spoke model that is at the heart of the agreements that implemented the 1996 UP-SP merger, as approved in Finance Docket No. 32760, Decision 44 (August 6, 1996). By flipping the location of home terminals from the “hub” at West Colton to the “spokes” at Yuma and Yermo, UP will end the hub and spoke model. *See* Figure 1. No longer will engineers report to work at a central hub and work runs out to the different end points of the spoke system, benefitting both the engineers and Union Pacific. Instead, Union Pacific will require engineers to have their “home” terminal at Yermo – effectively requiring them to move from their homes and work exclusively runs originating at Yermo (the other home terminals would be too distant). By granting UP leave to implement this plan, the Award is contrary to the essence of the labor conditions imposed by the Board in approving the UP-SP merger and should be vacated under *Lace Curtain*.

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Figure 1



Second, the arbitrator’s interpretation of Side Letter No. 3 is wholly irrational as it renders that provision without effect or meaning. Side Letter No. 3 is an express savings clause protecting the integrity of the pool operations put in place by the LA Hub Agreement from Union Pacific’s unilateral use of Art. IX of the 19856 National Agreement to modify the hub-and-spoke model. In order to reach its outcome, the Award not only negates any protection that Side Letter No. 3 gave to pool operations covered by the merger implementing agreement, but it is directly contrary to all arbitral authority interpreting Article IX of the 1986 National Agreement and relies on an irrational interpretation of the word “new,” which bars the use of Art. IX to “substantially recreate” existing train service. *See O’Brien Award* (Exhibit B at BLET Appx 98); *LaRocco Award* (Exhibit B at BLET Appx 314).

In addition to these core issues, the Arbitrator plainly erred in comprehending the scope of his own authority under Section 2 of Article IX of the 1986 National Agreement, and by refusing to act under the authority granted, was not in accord with his jurisdiction. *See Union Pacific R.R. Co. v. BLET*, 558 U.S. 67, 71 (2009)(“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.’...The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies.”)(internal citations omitted). When Arbitrator Zusman held that he was “restricted in awarding any terms beyond those set forth in Section 2 [of Article IX],” he clearly misunderstood the scope of his authority, which reaches even to imposing conditions that would discourage Union Pacific from implementing its proposed changes. *See* Exhibit B at BLET Appx 313 (LaRocco Award).

These fundamental errors show that the Award fails to draw its essence from the labor protective conditions imposed as part of the approval of the UP-SP merger and is otherwise founded on egregious error. Further, because the changes are directed at nothing more than decreasing labor costs to increase profits through attempting to restrict seniority and limit held-away-from-home pay, they are contrary to the terms of the merger approval process. *See Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 815 (D.C. Cir. 1993)(Purpose of Board in allowing modifications of collective bargaining agreements “...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.”) *cited* in separate comments of Commissioner Owen in Finance Docket 32760, Decision 44. For all the reasons set forth in this brief, the Board should vacate the Award and preserve the hub-and-spoke model that was the essence of the labor protective conditions imposed on Union Pacific in the merger.

Facts

This Board is intimately familiar with the details of the merger of the Southern Pacific and Union Pacific in 1996, having devoted an inordinate amount of time and resources to that transaction. As part of the approval of its merger with the Southern Pacific in 1996, Union Pacific negotiated a series of “merger implementing agreements” that set up a “hub and spoke” model across its merged system. This process and the protections put in place in the merger agreements (hub agreements), including the use of the hub and spoke model, were an integral part of the merger approval process. *See, e.g.*, 49 U.S.C. § 11326 (labor protective conditions).

This hub and spoke model was a key aspect of Union Pacific’s ability to enjoy the efficiencies of the merger because it allowed for the combining of seniority districts. It is also key to the engineers who work in these combined seniority districts. In this case, the relevant merger implementing agreement (hub agreement) is the LA Hub Agreement. *See* Exhibit B at BLET Appx 27-59.

The LA Hub Agreement established various pool operations, including two that are relevant to this dispute, the “West Colton-Yermo” and “West Colton-Yuma” pools. These pools operate service between West Colton, California, which is relatively centrally located in the LA Hub, and two terminals that are located at the far reaches of the hub, Yermo, California and Yuma, Arizona. In fact, the Yuma terminal is technically part of the adjacent Southwest Hub, not the LA Hub. Engineers in these pools report to West Colton as their home terminal with Yuma or Yermo as their away-from-home terminal.

The LA Hub Agreement also incorporated a number of Side Letters, including Side Letter Number 3, which contains the following relevant term:

New Pools created after this Agreement: New pool operations not covered in this implementing Agreement whether between

Hubs or within the Hub shall be handled per Article IX of the 1986 National Arbitration Award.

LA Hub Agreement at 28 (emphasis in original).

The May 19, 1986 Award of Arbitration Board No. 458 imposed the 1986 National Agreement on the parties. Article IX of that agreement, entitled “Interdivisional Service,” provides procedures whereby Union Pacific “may establish interdivisional service.” Section 1 of Art. IX describes the notice that Union Pacific must give and Section 2 provides a non-exhaustive list of conditions that may govern the service described in the notice; Section 2 mandates that the conditions of the service must be “reasonable and practical.” Section 4 provides for arbitration of disputes, including over the “reasonable and practical” conditions relating to the effects of the change per Section 2. *See* Exhibit A at BLET Appx 60-64.

On February 11, 2013, Union Pacific served a notice, purportedly pursuant to Art. IX, in order to advise BLET of its desire to establish “two separate unassigned through freight pools operating between an area to be known as the Los Angeles Basin Metroplex (“LABM”) and Yermo, California, and between the LABM and Yuma, Arizona.”¹ Union Pacific’s letter suggested that these new pools would help them recognize the efficiencies gained through certain infrastructure improvements, including the construction of new second main track and an overpass outside West Colton called the “Colton Flyover.” In April 2013, Union Pacific provided BLET a second draft of its proposal for this service.

On July 17, 2013, Union Pacific issued a new notice, also purportedly pursuant to Article IX. In that notice, Union Pacific withdrew its notice of February 11. In the July 17 notice, Union

¹ While the intent to create a “Metroplex” has not been developed in this litigation, it is further evidence of Union Pacific’s intent to eliminate the hub-and-spoke model and replace it with a “Metroplex” or “node” model where it could have engineer go on or off duty at any point within the LA Hub, regardless of the home or away-from-home terminal designations in the merger implementing agreement.

Pacific informed the BLET of its desire to establish “two separate unassigned through freight pools operating between Yermo, California, and West Colton, California and between Yuma, Arizona and West Colton, California.”

Union Pacific’s notice informed BLET that the Carrier intended to “establish” pool operations that would run the same trains over the same track and between the same terminals as engineers in the “West Colton-Yuma” and “West Colton-Yermo” pools established by the LA Hub Agreement are, and have been for many years, already running. But according to Union Pacific’s notice, engineers would now report on duty at home terminals in Yuma and Yermo, with West Colton as their away-from-home terminal. In its letter, Union Pacific offers that the reason for these changes in operations is so that it can benefit from “more efficient and faster service options in this corridor” by “more efficiently utilize[ing] its train and engine service crews by operating longer runs and adopting more innovative and service-responsive procedures within the Los Angeles Basin.”

BLET responded by letter dated July 24, 2013. That letter objected to Union Pacific’s notice by disputing that the July 17, 2013 Notice created any new interdivisional service and pointing out that Union Pacific already had the right to operate longer runs – all the way from LATC/East Yard to both Yermo and Yuma – but that it chose not to.

Union Pacific replied by letter dated July 26, 2013, and revealed two new reasons for its July 17, 2013 Notice: (1) “address[ing] ongoing and chronic qualification/ certification issues inherent to [West Colton to Yermo]” and (2) to “solve away from home terminal issues [at Yuma].” These purposes – effectively a desire to save on labor costs – were confirmed in subsequent sworn statements or testimony.

Argument

1. By eliminating the hub and spoke model, the Award fails to draw its essence from the labor conditions imposed in the merger approval and should be vacated.

The fundamental operational change in the approval of the UP-SP merger was the creation of a hub-and-spoke model, achieved through combining Union Pacific and Southern Pacific seniority districts in various Hub Agreements. *See, e.g.*, Breen, Dennis; “The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits, Bureau of Economics, Federal Trade Commission, March 11, 2004(“The merger also provided an opportunity to introduce a hub and spoke system for deploying train crews. That is, wherever each railroad had a major terminal, train crews were combined into a single workforce with crews assigned to any spoke as needed, as compared to labor’s insistence in the past that crews be dedicated to specific routes.”); *see also Swonger v. Surface Transp. Bd.*, 265 F.3d 1135, 1139 (10th Cir. 2001)(“Under the negotiated operating plan for the merger, the Union Pacific announced its intention to use a so-called "hub and spoke" system.”); Union Pacific appeal from arbitration award, Finance Docket No. 32760, Sub File 45 (Attached as exhibit C) at 5 (“Following the UP/SP Merger, UP rearranged its operations into a “hub and spoke” system. A series of hubs were established, with runs (spokes) emanating from each hub.”); Union Pacific Investor Factbook (1999)(“The hub-and-spoke network greatly increases efficiency in major cities by qualifying crews on multiple line segments.”).²

This change from seniority on a dedicated-run basis to a hub-and-spoke system – permitted by the sweeping statutory authority of the STB in approving mergers – allowed Union Pacific to lawfully abrogate contractually vested seniority rights of engineers that were property rights otherwise protected by the Fifth and Fourteenth Amendments. *See* Award No. 4987

² Available online at: <http://www.up.com/investors/factbooks/factbook99/uprrhigh99.pdf>

NRAB (Third Division) (Boyd)(“It has long been settled that seniority is a valuable property right.”). This change allowed Union Pacific to – as part of a merger – avoid having to go through Major Dispute process or otherwise collectively bargain for those changes under Section 6 of the Railway Labor Act.

In this case, the relevant merger implementing agreement, or hub agreement, is the LA Hub Agreement. *See* Exhibit B at BLET Appx 27-59. That Hub Agreement (the name itself is telling) created the Los Angeles Hub – “a new seniority district.” *Id.* at BLET Appx. 27. That new seniority district created three “pool operations.” *Id.* at BLET Appx 31-33. Directly relevant to this case is the “West Colton-Yermo and West Colton-Yuma” pool, created in LA Hub Agreement Section III.A. *Id.* This pool creates a central home terminal – a hub – that allows for engineers to work multiple pools to away-from home terminals at the “spokes.” Clearly, the efficiency identified by everyone including Union Pacific was that a single crew, working out of a single hub, could service multiple line segments where before the competing seniority districts would have stood in the way.

But under the challenged Award, this system will be eliminated. Union Pacific now wants engineers to work particular line segments, e.g., Yermo to West Colton, and seeks to accomplish this by moving engineers’ home terminals (and as a result their actual homes) out to the spokes, in order to prevent those engineers from working on other line segments. This is directly contrary to the essence of the merger and for that reason, even if the Board agrees that the proposed service is “new” and allowed under Art. IX, it should still vacate the challenged Award. Because approving mergers is within the primary authority of this Board, less deference is due to arbitrator’s opinion on this issue. *See, e.g., UTU v. ICC*, 43 F.3d 697, 700 (D.C. Cir. 1995)(discussing *Norfolk & W. Ry. Co. v. Nemitz*, 404 U.S. 37, 42 (1971)).

Union Pacific has put in writing the goals it seeks to accomplish through this change. Specifically for Yermo, it wants to force engineers to move to the high desert to force them to work an undesirable run on a dedicated basis – contrary to the flexibility provided by the hub-and-spoke model. This will lead to a reduction in “pilot pay.” Specifically for Yuma, it wants to reduce the amount it has to pay engineers for keeping them held at Yuma (the “spoke”) by a fiat of declaring Yuma to the “home” terminal. It expects to increase the amount of time it keeps engineers at the spokes, effectively eliminating the mutually-beneficial aspects of the hub model. As stated in the sworn declaration of, Thomas Williams, Union Pacific’s Director of Transportation Services for the LA Hub:

4. The changes contemplated by Union Pacific's July 17 Article IX notice are designed to allow Union Pacific to operate more efficiently into and out of the Los Angeles area, including the Ports of Los Angeles and Long Beach. Currently we have a number of train runs with home terminals in West Colton and Los Angeles. Engineers can bid on these assignments. We have a difficult time keeping the West Colton to Yermo and West Colton to Yuma pools staffed with qualified engineers who are familiar with operating locomotives over the involved routes because other runs exist where engineers can make more money (sometimes for fewer hours of work). As a result, **engineers tend to bid off these runs, in particular the West Colton - Yermo run.** This often results our being required to use an engineer who may not have operated over these sections of track as often or as recently. **Often, this requires the use of "pilot,"** a second engineer who is qualified and familiar with operating a train on that track or route and who rides along with the newly assigned engineer who just bid on to this pool. **Both the pilot and the engineer have to be paid, raising Union Pacific's costs which must, in turn, be passed on to shippers of freight.**

5. Creating new home terminals in Yermo and Yuma will decrease the frequency that this occurs. Engineers are less likely to bid on new assignments if they involve a change in their home terminal. We would also expect that, over a good deal time (especially as attrition occurs due to anticipated retirements in the Los Angeles area), employees manning these runs to live in the Yuma or Yermo areas, rather than central or urban Los Angeles. Therefore, engineers with home terminals in Yuma or Yermo are more likely to remain on these pools if their home terminals are in those cities.

* * * *

7. ... it is far more difficult to predict when Union Pacific will need a train to depart [Yermo or Yuma]. As a result, Union Pacific frequently has to have employees waiting for trains in those cities. This is especially true at Yuma because there is little room to leave a train sitting while we wait for a crew to become available to take the train to its destination. **When an engineer is waiting to work at an away from home terminal, Union Pacific is**

required (after a certain number of hours) to begin to pay the engineer even though they are not working. This pay is not required at the home terminal. Having engineers with home terminals in Yuma and Yermo will decrease the amount of time spent at the away from home terminal, thereby reducing costs and improving rail competitiveness.

Exhibit B at BLET Appx 180-81; *see also*, Sworn Declaration of Gordon Wellington, ¶ 5, BLET Appx at 184 (Proposed plan would save \$180k to \$200k annually in direct labor expenses by keeping senior engineers at Yermo and reducing held away from home pay at Yuma).

Because the Award does not draw its essence from the labor condition imposed by the merger, it should be vacated.

- 2. The Award's interpretation of Side Letter No. 3 of the LA Hub Agreement and Art. IX of the 1986 National Agreement is in egregious error in its lack of fidelity to the contractual language and in its irrational and baseless interpretation of the word "new."**

The key error – a fundamental and egregious error – in the Award's lack of fidelity to the contractual language on page 11 of the Award, where Arbitrator Zusman found:

The Carrier has not given up its rights; even in Side Letter No. 3 to utilize its Article IX rights involving new pool operations.

The basic error in that analysis – analysis that was material to the Award – is that it fails to engage with the plain language of the contract. Side Letter No. 3 states:

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

Exhibit B at BLET Appx 54.

The plain language of the contract states that "new pool operations" "shall be handled per Article IX" *only* when they are "not covered in this implementing agreement." That means that if a "pool operation" *is* covered by the LA Hub Agreement, it shall *not* be handled "per Article IX." This is a clear limitation on Union Pacific's right to use Article IX – a clear "estoppel" in the language of the Award.

Of course – even in the Award – this analysis ultimately turns on the question of whether pool operations are “new,” i.e., can service be “new” where it is over the “same track” as existing service with the “same mileage” as existing service and between the “same terminals” as existing service. And those similarities are undisputed. *See* Exhibit B at 19 (testimony of Randy Guidry). Contrary to the Award, Petitioner believes that when the proposed service is identical in all those aspects it “substantially recreates” existing service and is not “new.”³ Under the relevant contractual authority interpreting Article IX, “new service” is shown where: (1) the mileage is changed, (2) a terminal is run through or (3) service is lengthened. *See Eischen Award* (Exhibit B at BLET Appx 108-109); *Quinn Award* (*id.* at BLET Appx 71)(new service both extended mileage and ran through a terminal); *Fredenberger Award* (*id.* at BLET Appx 84)(service is new where none existed); and *O’Brien Award* (*id.* at BLET Appx 90-91)(running through a terminal). None of those conditions are present here. All the relevant authority, beginning with the *LaRocco Award* (*see* Exhibit B at BLET Appx 314) state that if the proposed service “substantially recreates” existing service, it is not new and the Carrier cannot invoke Article IX. Here, the proposed service does substantially – if not wholly – recreate the existing pool operations set forth in the LA Hub Agreement and it was egregious error to find otherwise. The Award should be vacated.

As admitted by Union Pacific, the benefits of its proposed service was the \$180k to \$200k in annual labor savings described in the sworn statements and testimony of its officers. Exhibit B at BLET Appx 180-81; *see also*, Sworn Declaration of Gordon Wellington, ¶ 5, BLET Appx at 184 (Proposed plan would save \$180k to \$200k annually in direct labor expenses by

³ The Award – in passing – suggests on page 11 that the test of whether service is “new” or not is whether it increases efficiency: “The focus when language permits “new” pool operations is whether they increase *efficiency* and are not substantially the same pool service.” This test is wholly new, a complete deviation from the existing test of “substantial recreation” and non-sensical.

keeping senior engineers at Yermo and reducing held away from home pay at Yuma). This is just the type of “one-sided” benefit that is prohibited under the Art. IX precedent and the arbitrator erred egregiously in finding otherwise.

On this point – whether the service is “new,” all the arguments made by either the BLET or Union Pacific boil down to one issue: is service that covers the same mileage, over the same track, between the same terminals, and without running through an existing terminal “new service?” BLET maintains its position that switching the location of the home and away-from-home terminals is a “substantial recreation” of existing service and as such is not “new” and cannot be made through Article IX, *even if* Union Pacific is allowed under Side Letter No. 3 to in principle use that contractual provision. In its simplest formulation: a “Yermo to West Colton Pool” substantially recreates a “West Colton to Yermo Pool” and likewise for Yuma. If the proposed service – as every common sense definition would suggest – is not “new,” but is a “substantial recreation,” then the Board should vacate the Award on the basis that it was an egregious error for Arbitrator Zusman to find that it was “new.”

3. Under the Kenis, Binou, and Perkovich Awards, Side Letter No. 3 operates as a savings clause that protects the pool operations created in the LA Hub Agreement.

This Board is familiar with the long-running dispute between the parties over the Kenis Award, which Union Pacific has repeatedly argued to be internally inconsistent and illegitimate. *See, e.g.,* Exhibit C; *see also BLET v. Union Pacific R.R. Co.*, 500 F.3d 591 (7th Cir. 2007). Just like the Seventh Circuit Court of Appeals, this Board rejected that argument. *See* Finance Docket 32760, Sub File 45 (decision dated December 14, 2010 at 10)(“Kenis’ reasoning is internally consistent and rational.”). This Board has summarized the three awards –Kenis, Binou and Perkovich – as follows:

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

Id. at 14.

But even thought this case arises under the LA Hub Agreement and the Binau line rather than the Kenis/Perkovich line, there is an important distinction that acts to "save" the terms of the LA Hub Agreement from Art. IX. That distinction is Side Letter No. 3, which *was never interpreted* in the Binau Award.

First, Article VI, Section C of the LA Hub Agreement (Agreement Coverage Clause) contains a carve-out for terms in the LA Hub Agreement: "*Except as specifically provided herein* the system and national collective bargaining agreements...shall prevail (emphasis supplied)." Exhibit B at BLET Appx 37. But the LA Hub Agreement – in Side Letter No. 3 – does "specifically provide" that Art. IX of the 1986 National Agreement can only be applied in handling "pool operations not covered in this implementing agreement." *Id.* at BLET Appx 28. Because the West Colton-Yermo and West Colton-Yuma "pool operations" are covered in the LA Hub Agreement in Article 3, Section A, those terms prevail over Art. IX. *Id.* at BLET Appx 31-32. This prevents – as a threshold matter – Union Pacific from invoking Article IX to change the West Colton pool operations.

The end result, as argued more fully at Exhibit B pp. 11-14, is that the pool operations established by the LA Hub Agreement – specifically the three pool operations specifically

created in Article 3 – may not be changed through Article IX of the 1986 National Agreement and do act as an “estoppel” of that right. *Cf.* Award at 14 (“...there exists no estoppel language.”). As Binau never interpreted Side Letter No. 3, that award is due no deference on this point. Likewise, because Arbitrator Zusman’s analysis of this issue turned on his – wrong – analysis that the proposed service was “new,” it is subject to the same review for egregious error as argued above. *See* Award at 11.

Because Side Letter No. 3 specifically saves pool operations established by the LA Hub Agreement from unilateral change under the procedures of Article IX of the 1986 National Agreement, the Award should be vacated, consistent with the Kenis Award and Perkovich Award and the holding to the contrary was an egregious error. *See* Exhibit B BLET Appx 136-140 (Perkovich), 141-170 (Kenis).

4. There was no lawful or factual basis for Arbitrator Zusman to issue the Award on the basis that Union Pacific would gain new operational efficiencies.

Even if Union Pacific could rely on operational efficiencies as a basis to “substantially recreate” existing service with new conditions, it must provide a foundation in fact for those efficiencies. But apart from vague statements from Randy Guidry that lacked any foundation in fact, there is no record from which Arbitrator Zusman could determine whether the proposed changes would create any operational efficiencies apart from hoped-for reductions in labor costs.

While Union Pacific, through Randy Guidry, tried to argue for some operational efficiencies such as velocity improvement, there was no actual evidence to support those arguments. *See, e.g.,* Award at 13 (quoting Mr. Guidry); Award at 7. But in the hundreds of pages of exhibits submitted by Union Pacific, there was not a single study performed by its operations department as to how switching a home and away from home terminal would increase velocity. Neither was there a single report – let alone any “data” as falsely suggested by the

Award at page 7 – that showed how moving the home terminal from the “hub” at West Colton to the “spokes” at Yuma and Yermo would increase efficiencies or allow for greater coordination of east-bound and west-bound traffic. There is simply no factual foundation for these efficiencies.

The only factual foundation for any “efficiency” supports an impermissible “efficiency” – a “transfer [of] wealth from employees to their employer.” *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 815 (D.C. Cir. 1993). *See*, Award at 13 (Union Pacific expected to save at least 2 % of \$9-\$10 million in direct labor expenses). To be blunt: Union Pacific wants to move engineers from their homes and families in desirable parts of southern California to remote desert towns up to 200 miles away in order to save roughly \$200k a year; all the while eliminating the hub and spoke model it sought and gained through the merger approval process. *See* Exhibit B at BLET Appx 208-220 (testimony of Paulo Tortorice related to impact of move); Exhibit B at BLET Appx 289 (testimony of Randy Guidry). Rather than maintain a central hub at West Colton that allows flexibility for both Union Pacific and its engineers as was created in the merger approval process, Union Pacific wants to move home terminals from the “hub” to the “spokes” at Yermo and Yuma. Even if it were legitimate for the Arbitrator to consider these alleged efficiencies, because the only efficiency that had any basis in fact was prohibited – i.e. a wealth transfer from employee to employer – the Board egregiously erred in finding that the proposed service was “new.”

5. The Award was irrational and without foundation or reason where it held that it was required to accept the conditions proposed by Union Pacific because they complied with the requirement of Article IX.

Union Pacific included bare-bones terms and conditions governing its proposed service. BLET responded with other “new” conditions that were necessary to ensure that the terms and conditions of the allegedly “new” service were “reasonable and practical” as per Section 2 of

Article IX of the 1986 National Agreement. *See* Exhibit B at BLET Appx 62 (Section 2 of Article IX); *see also id.* at 30-41, detailing BLET proposal and justifications. Chief among these proposed conditions was increasing call time (the lead time Union Pacific must give an engineer to report for work) from 1.5 hours to 4 hours in order to make it reasonable for persons who live near West Colton and to report to work at their new home terminal in Yuma and a Tie-Up Agreement that would allow that same engineer to spend a day at home with his family. *See id.* at 36.

The Arbitrator did not truly consider these conditions – or whether they were “reasonable and practical” per the contractual language – because he believed he was precluded from doing so. *See* Award at 20 (“The Carrier’s proposal must therefore be accepted by this Board. It complies with the requirements of Art. IC.”); *id.* at 19 (“The Organization’s proposal is beyond the Agreement, which permits the Carrier’s actions if such is in compliance with Article IX conditions.”); *id.* (“What the Carrier is obligated to abide by are those conditions clearly stipulated by Article IX. This Board is similarly constrained by Section 2. The question the Board considers is whether the Carrier’s proposal...meets the standard.”).

This analysis has no basis in the contract language, which states that “Reasonable and practical conditions shall govern the establishment of the runs described, *including but not limited to the following...* (emphasis supplied)” Exhibit B at BLET Appx 62. The language could not be more clear that the “reasonable and practical conditions” are “not limited” to those listed. This error is egregious, and is contrary to the controlling precedent which anticipates that there could be such onerous conditions imposed under Section 2 of Article IX that the Carrier would forego the implementation of the new service. *See* Exhibit B at 313 LaRocco Award

(“An arbitrated interdivisional run agreement might apply conditions so onerous the Carrier is deterred from instituting the interdivisional service.”).

Conclusion

Three things are clear from this case. To begin, for the first time since the merger with the Southern Pacific, Union Pacific has attempted to change from a hub-and-spoke model by requiring engineers to report to work at the ends of the spokes. This is directly contrary to the “essential bargain” of combining seniority districts into a hub-and-spoke model.

Second, this proposed service is not “new” in any meaningful sense of the word. The trains will travel between *exactly* the same points. The crew changes will be made at *exactly* the same points. The mileage will be *exactly* the same. All that will change is where engineers are required to report to work and hence where they will be required to move their families and live.

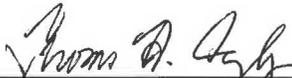
Third, Union Pacific knows that the changes it wants to make are contrary to the labor protective conditions imposed on it in the merger including in the LA Hub Agreement. That is why it argues from a standpoint of “efficiencies” – it wants to show that it needs these changes to enjoy the benefits of the merger. There is no real reason to argue these efficiencies otherwise. Whether proposed service is efficient, inefficient, or neutral cannot really determine whether that service is “new.” And we know that Union Pacific – contemporaneous with the negotiations over its proposed changes – sent a “New York Dock Notice” to the UTU (cc’d to the BLET) that it intended to “implement...changes to the coordination and consolidation of UP and SP operations” and that “the purpose of these changes is expressly directed at further achievement of more streamlined, efficient and safe operations... [.]” Exhibit D. In response, the UTU rejected the notice, highlighting the fact that Union Pacific reported to this Board in 2001 that the merger

was completed. Exhibit E; *see also* Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (STB served Dec. 20, 2001), slip op. at 5 (“[t]he evidence submitted by UP...demonstrates...that the public benefits that the UP/SP applicants predicted have been achieved... [.]”).

BLET agrees with the sentiment expressed by the UTU in that letter that “[t]he real driver behind [Union Pacific’s] unlawful and improper attempt to serve notice under auspices of New York Dock is the desire to abrogate and circumvent the Railway Labor Act.” *Id.* Union Pacific does not want to bargain over changes, and by resorting to subterfuge in its dealings with the BLET and the UTU has shown disregard for the STB, disregard for the labor protections put in place, and disregard for the rule of law. The Award should be vacated.

Date: March 14, 2014

Respectfully submitted,



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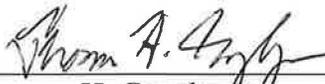
Attorneys for the Organization

Certificate of Service

I hereby certify that I have caused a copy of the foregoing appeal together with all exhibits to be sent via email and first class post to the following person:

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760, SUB-FILE 47

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

(Arbitration Review)

EXHIBIT LIST TO APPEAL

Exhibit

Description

- AAward
- B.....BLET Brief and Appendix
- C.....Union Pacific Appeal of Perkovich Award
- DUnion Pacific NY Dock Notice of March 6, 2013 (UTU)
- E..... UTU response to Union Pacific NY Dock Notice

Exhibit A

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

Question No. 3

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

Carrier's Questions for Arbitration

Question No. 1

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

Question No. 2

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

Background

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

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

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

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

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

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

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

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

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

Position of the Union

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

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

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

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

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

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

Position of the Carrier

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

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

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

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

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

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

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

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

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

Discussion and Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision and Award

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

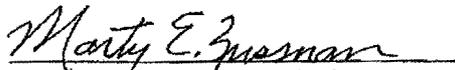
The Board makes clear that it has the authority to assure that the proposal is "reasonable and practical" and the concerns of the Organization are considered. The Board has carefully reviewed the Organization's arguments about the negative consequences for employees forced to move to the undesirable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

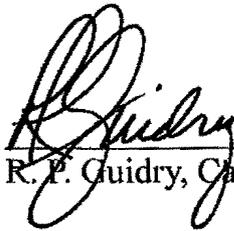
The Organization's proposal is beyond the Agreement, which permits the Carrier's actions if such is in compliance with Article IX conditions. The Board is governed by Section 2, which are the required conditions and limits to our authority (see Arbitration Board No. 468). The Board finds nothing in the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

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

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

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


Marty E. Zusman, Chairman
Neutral Member


R. P. Guidry, Carrier Member


E. L. Pruft, Organization Member
DISSENT ATTACHED

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

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

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

Or that,

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

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

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

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

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

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

E.L. Pruitt, Organization Member

Exhibit B

**ARBITRATION
BEFORE THE SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED BY AGREEMENT**

<u>PARTIES TO THE DISPUTE</u>)	
)	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, GENERAL COMMITTEE OF ADJUSTMENT, UNION PACIFIC WESTERN LINES AND HARBOR LINE, ("Organization" or "BLET")	)	Dr. Marty E. Zusman, Chairman and Neutral Member
)	
AND)	
)	
UNION PACIFIC RAILROAD COMPANY, ("Carrier" or "Union Pacific"))	
)	
<u>ARB. CASE NO. 598</u>		

This case turns on whether Union Pacific will create "new pool operations not covered by [the LA Hub Agreement]," within the meaning of Side Letter No. 3, or "new interdivisional service" for purposes of Article IX of the 1986 Agreement when it merely reverses the designations of "home" and "away-from-home" terminals on existing service established by the LA Hub Agreement. Denying that Article IX can even apply in the first place, BLET's common sense argument here is that service from B to A is no different than service from A to B, when it covers the exact same mileage over the exact same trackage between the exact same terminals. Likewise, contrary to Side Letter No. 3, Union Pacific is not offering to create "new pool operations not covered by this Agreement" but is only moving the spot where engineers in existing pool operation

must report to work. Because the service will not change, Union Pacific cannot implement its proposal.

Further, and contrary to Union Pacific's Art. IX Notice, its proposal is not in response to changing traffic patterns or designed to operate its rail system more efficiently. *See*, July 17, 2013 Notice at Appx 2. Union Pacific's real purpose, as admitted in sworn declarations and testimony from its own officers, is to avoid paying engineers money they now earn for existing service. Specifically, by switching the home terminals for this existing service, Union Pacific believes it can reduce the amount that it pays: (1) to "pilots" who assist engineers working difficult, heavy-grade territory between West Colton and Yermo and (2) to engineers whom it keeps at the "away-from-home" terminals in Yuma and Yermo.

These are all matters that Union Pacific could raise in collective bargaining with BLET, and it should be understood that BLET is willing to discuss changes in the LA Hub Agreement in negotiation or bargaining. But Union Pacific has no right unilaterally to ignore the specific provisions of the LA Hub Agreement covering the home and away-from-home terminals for this service.

Because Union Pacific's proposed pool operations are not "new" and directly modify existing provisions for "pool operations [] covered" by the LA Hub Agreement, Union Pacific cannot invoke the procedures of Art. IX of the 1986 National Agreement, as provided for in Side Letter No. 3 to the LA Hub Agreement. The plain contract language and arbitral precedent dooms Union Pacific's arguments because it is at least "substantially recreating" if not outright duplicating existing service from A to B (i.e.,

from West Colton to Yermo and from West Colton to Yuma). Accordingly, the answer to both the Carrier's and the Organization's Question No. 1 is "no."

Organization's Statement of Facts

Union Pacific's July 17, 2013 Notice seeks to change conditions that were put in place as part of the Surface Transportation Board's approval of its merger with Southern Pacific. Those conditions set up a "hub and spoke" model that combined a number of seniority districts and created pools of service with set home and away-from-home terminals.

On November 30, 1995, Union Pacific filed an application with the Interstate Commerce Commission (hereinafter "ICC") to acquire control of and consolidate its rail operations with those of Southern Pacific and its affiliated entities pursuant to statutory provisions then-codified at 49 U.S.C. §§ 11343-45. On January 1, 1996, pursuant to the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, the Surface Transportation Board (hereinafter "STB") assumed jurisdiction over the transaction. In a decision dated August 6, 1996 and issued August 12, 1996, the STB approved the merger subject to the "New York Dock Labor Protective Conditions" (hereinafter "New York Dock Conditions") established in *New York Dock Railway – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), and affirmed in *New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979).

Under the New York Dock Conditions, Union Pacific must follow certain procedures before taking any action pursuant to the STB's order authorizing the merger that will have an impact on labor conditions. Union Pacific and BLET followed those

procedures in attempt to reach an implementing agreement to consummate the merger in the Los Angeles area. Unable to reach an agreement, the parties proceeded to arbitration under Section 4 of the New York Dock Conditions and the arbitrator imposed the Merger Implementing Agreement for the Los Angeles Hub (the "LA Hub Agreement") that would control the effectuation of the Union Pacific-Southern Pacific merger on the territory within the Los Angeles Basin. The LA Hub Agreement became effective on January 16, 1999.

The LA Hub Agreement, along with other so-called "hub implementing agreements," allowed Union Pacific to implement a "hub and spoke" system for deploying train crews. Prior to the merger, engineers earned seniority within a district that consisted of a specific train run or set of runs. As part of its approval of the merger, STB allowed Union Pacific to set aside previous collective bargaining agreements in order to consolidate these seniority districts into larger seniority districts called hubs. Under this "hub and spoke" system, engineers have seniority to run any service within the hub. This consolidation allowed Union Pacific to achieve the efficiencies of the merger by allowing it more flexibility in staffing service within a hub, while providing parallel protection to engineers whose seniority would be impacted. Under this system, an engineer is assigned to a "pool" that operates service from a "home terminal" to an "away-from-home terminal" and back. But, that engineer can be reassigned to any of the other pool operations within the hub and maintain his or her seniority.

The LA Hub Agreement established various pool operations, including two that are relevant to this dispute, the "West Colton-Yermo" and "West Colton-Yuma" pools.

These pools operate service between West Colton, California, which is relatively centrally located in the LA Hub, and two terminals that are located at the far reaches of the hub, Yermo, California and Yuma, Arizona. In fact, the Yuma terminal is technically part of the adjacent Southwest Hub, not the LA Hub. Engineers in these pools report to West Colton as their home terminal with Yuma or Yermo as their away-from-home terminal.

The LA Hub Agreement also incorporated a number of Side Letters, including Side Letter Number 3, which contains the following relevant term:

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

LA Hub Agreement at 28 (emphasis in original).

The May 19, 1986 Award of Arbitration Board No. 458 imposed the 1986 National Agreement on the parties. Article IX of that agreement, entitled “Interdivisional Service,” provides procedures whereby Union Pacific “may establish interdivisional service.” Section 1 of Art. IX describes the notice that Union Pacific must give and Section 2 provides a non-exhaustive list of conditions that may govern the service described in the notice; Section 2 mandates that the conditions of the service must be “reasonable and practical.” Section 4 provides for arbitration of disputes, including over the “reasonable and practical” conditions relating to the effects of the change per Section 2.

On February 11, 2013, Union Pacific served a notice, purportedly pursuant to Art. IX, in order to advise BLET of its desire to establish "two separate unassigned through freight pools operating between an area to be known as the Los Angeles Basin Metroplex ("LABM") and Yermo, California, and between the LABM and Yuma, Arizona." Union Pacific's letter suggested that these new pools would help them recognize the efficiencies gained through certain infrastructure improvements, including the construction of new second main track and an overpass outside West Colton called the "Colton Flyover." In April 2013, Union Pacific provided BLET a second draft of its proposal for this service.

On July 17, 2013, Union Pacific issued a new notice, also purportedly pursuant to Article IX. In that notice, Union Pacific withdrew its notice of February 11. In the July 17 notice, Union Pacific informed the BLET of its desire to establish "two separate unassigned through freight pools operating between Yermo, California, and West Colton, California and between Yuma, Arizona and West Colton, California." Figure 1 shows the locations of West Colton, Yermo and Yuma (including highway, not railroad, mileage).

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Figure 1



Union Pacific’s notice informed BLET that the Carrier intended to “establish” pool operations that would run the same trains over the same track and between the same terminals as engineers in the “West Colton-Yuma” and “West Colton-Yermo” pools established by the LA Hub Agreement are, and have been for many years, already running. But according to Union Pacific’s notice, engineers would now report on duty at home terminals in Yuma and Yermo, with West Colton as their away-from-home terminal. In its letter, Union Pacific offers that the reason for these changes in operations is so that it can benefit from “more efficient and faster service options in this corridor” by “more efficiently utilize[ing] its train and engine service crews by operating longer runs and adopting more innovative and service-responsive procedures within the Los Angeles Basin.”

BLET responded by letter dated July 24, 2013. That letter objected to Union Pacific's notice by disputing that the July 17, 2013 Notice created any new interdivisional service and pointing out that Union Pacific already had the right to operate longer runs - all the way from LATC/East Yard to both Yermo and Yuma - but that it chose not to.

Union Pacific replied by letter dated July 26, 2013, and revealed two new reasons for its July 17, 2013 Notice: (1) "address[ing] ongoing and chronic qualification/certification issues inherent to [West Colton to Yermo]" and (2) to "solve away from home terminal issues [at Yuma]." These purposes - effectively a desire to save on labor costs - were confirmed in subsequent sworn statements or testimony.

BLET filed suit in the United States District Court for the Northern District of Illinois on August 21, 2013, and sought temporary and preliminary relief enjoining Union Pacific from unilaterally implementing its proposed changes. *BLET v. Union Pacific*, Case No. 13-cv-5970 (N.D. Ill.) A full day hearing was held on October 1, 2013, with the BLET presenting live testimony from General Chairman Bill Hannah and Local Chairman Paulo Tortorice; and Union Pacific presenting live testimony from Director of Labor Relations Randy Guidry. After that hearing and without the district court issuing an order, the parties negotiated the creation of this Board to resolve their dispute. The federal case is stayed.

Authorities Mentioned

STB Orders

- STB Decision No. 44, dated August 6, 1996 in Finance Docket No. 32760, approving the merger of Union Pacific and Southern Pacific and imposing New York Dock labor protective conditions. ("**1996 Merger Approval**").

Contracts

- The Merger Implementing Agreement for the Los Angeles Hub between the Union Pacific Southern Pacific Transportation Company and Brotherhood of Locomotive Engineers ("**LA Hub Agreement**")
- Side Letter No. 3 to the LA Hub Agreement ("**Side Letter No. 3**")
- The 1986 BLET-UP National Agreement ("**1986 National Agreement**")
- The Merger Implementing Agreement for the Southwest Hub between the Union Pacific Southern Pacific Transportation Company and Brotherhood of Locomotive Engineers ("**Southwest Hub Agreement**")

Arbitral Authority

Related to the requirement that the proposed service be "new"

- "**Quinn Award**" (PLB No. 6740, Case No. 2, Award No. 2)
BLE and BNSF
- "**Fredenberger Award**" (PLB No. 3800, Case No. 1, Award No. 1)
UTU and BN
- "**O'Brien Award**" (PLB No. 6741, Award No. 1)
BLE and BNSF
- "**Eischen Award**" (PLB No. 6449, Case No. 19, Award No. 19)
BLET and UP
- "**LaRocco Award**" (1986 National Agreement Informal Disputes Committee, Issue No. 22) BLE and NCCC

On the question of the relation between prior contracts and hub agreements

- **"Kenis Award"** (Arb. Board No. 581) BLET and UP
- **"Perkovich Award"** (Arb. Board No. 589) BLET and UP
- **"Binau Award"** (Arb. Board No. 590) BLET and UP

Jurisdiction and Procedural Issues

By Agreement, the Organization and the Carrier established this Special Board of Adjustment ("Board") and selected Dr. Marty E. Zusman to serve as the Chairman and Neutral Member. That Agreement was negotiated in connection with a lawsuit filed by BLET, seeking to enjoin Union Pacific from unilaterally implementing the changes contained in its July 17, 2013 notice. *BLET v. Union Pacific*, Case No. 13-cv-5970 (N.D. Ill.). A full day hearing was held in that case, and the transcript is attached as an exhibit to this Brief. See BLET Appx. at 185-307.

Side Letter No. 3 to the LA Hub Agreement provides the sole authority for Union Pacific to create new interdivisional service apart from that created in the LA Hub Agreement, the specifics of which prevail over the 1986 National Agreement. So while Side Letter No. 3 incorporates Art. IX of the 1986 National Agreement, whether Art. IX may be relied upon here remains a question under the LA Hub Agreement. Thus it is still exclusively subject to the primary jurisdiction of a New York Dock arbitration panel, subject to review by the Surface Transportation Board. See, e.g., *B'hd. of Maintenance Way Employees v. Conrail*, 789 F. Supp. 2d 533, 546 (D. N.J. 2011)(New York Dock arbitrator has exclusive authority to interpret Hub Agreements).

Historically, three cases have had significance for Art. IX issues between BLET and Union Pacific and warrant preliminary discussion. The Kenis Award held that Union Pacific could not use Art. IX to change service established by a hub agreement where the changes would nullify or modify "numerous provisions of the implementing agreements governing the operations of trains, methods of compensation and home

terminal locations.” See Kenis Award at Appx 168-69 (hub agreements prevail in conflicts with “other applicable agreements”).¹ The BLET Central Region enforced the Kenis Award against Union Pacific, in an action that culminated in its favor before the United States Court of Appeals for the Seventh Circuit. *BLET v. Union Pacific*, 500 F.3d 591 (7th Cir. 2007).

The Perkovich Award – issued *after* Binau – made the same finding in short order. Perkovich Award at Appx 139. The STB affirmed the Perkovich Award on Union Pacific’s appeal. See STB Docket No. FD 32760 (Sub-No. 45).

Binau arose on this property after Union Pacific served notice under Art. II of the 1971 National Agreement of its intent to “move the east switching limit at Colton 1.95 miles eastward.” Binau Award at Appx 113. In permitting Union Pacific to make that change, Binau distinguished Kenis on the basis of contractual language.

The language in Kenis stated that:

where conflicts arise [between the hub agreement and an earlier CBA] the specific provisions of [the hub agreement] shall prevail.

Binau at Appx 125.

Referee Binau compared that language to the parallel language in the LA Hub Agreement – Article VI.C, which reads:

Except as specifically provided herein the system and national collective bargaining agreements, awards and interpretations shall prevail.

¹ Kenis dealt with hub agreements in North Little Rock/Pine Bluff, Kansas City and St. Louis. Perkovich interpreted the Houston Hub Agreement. Binau interpreted the LA Hub Agreement.

See Binau Award at Appx 132. (“ Article VI, Section C of the Los Angeles Hub Agreement preserves all national agreements that existed prior to the creation of the Los Angeles Hub.”) On the basis of that language, the Binau Award held that “National Agreements prevail over the Los Angeles Hub Agreement.” *Id.*

But Binau *did not interpret Side Letter No. 3* – the controlling contractual provision in this case. Side Letter No. 3 does contain a *specific contractual limitation* imposed on Union Pacific by the STB. That *specific contractual limitation* is that Union Pacific cannot use Art. IX of the 1986 National Agreement to “establish interdivisional service” that is “covered in [the LA Hub Agreement].” This *specific contractual limitation* is anticipated by the same Article VI, Section C that was interpreted in Binau, because it states, “[e]xcept as specifically provided herein...[.]” Side Letter No. 3 “specifically states” that service covered by the LA Hub Agreement is protected.²

While Kenis and Perkovich arise under different hub agreements than Binau, the general principle in each is that where a *specific term* of a hub agreement conflicts with another agreement, the *specific term* in the hub agreement prevails.³ Article VI, Section C of the LA Hub Agreement recognizes this same principle in the language “except as

²The specific limitation in Side Letter No. 3 is similar to the limitation at issue in the Kenis Award, where hub agreements provided that post-merger, engineers would be able to work within a 25-mile radius of their home terminal until retirement. As such, Union Pacific was precluded from using Art. IX to change service in a manner that conflicted with this right.

³ When Kenis and Binau are read together, it is clear that from a practical perspective there is little difference between the language “**where conflicts arise [between agreements]**” in Kenis and the language “[e]xcept as specifically provided herein” in Binau.

otherwise provided herein," which incorporates the limitation in Side Letter No. 3 and must mean something. Here, the plain language of Side Letter No. 3 means what it says: Union Pacific cannot use Art. IX of the 1986 National Agreement on existing pool operations. Nothing in the Binau Award is to the contrary.

Organization's Statement of the Issues

Question No. 1

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

Question No. 2

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

Question No. 3

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

Organization's Position

When is service between West Colton and Yuma not service between West Colton and Yuma: *when it is service between West Colton and Yuma*. While this may sound more like the start of an Abbot and Costello routine than a legal argument, it is what Union Pacific is forced to argue here. Union Pacific would have this Board find that existing service between exactly the same terminals, on exactly the same lines of rail, over exactly the same distance is somehow “new service” that is not already “covered by the [LA Hub Agreement]” simply because it switches the starting point with the ending point. From any outside or objective position, there is not a single thing that is “new” about this service.

Side Letter No. 3 expressly prohibits Union Pacific from using Art. IX of the 1986 National Agreement on pool operations existing in the LA Hub Agreement, including pool service between West Colton and Yermo and West Colton and Yuma. The contract language states:

New Pool operations *not covered in this implementing Agreement* whether between Hubs or within the Hub shall be handles per Article IX of the 1986 National Arbitration Award.

Art. IX allows Union Pacific to:

...establish interdivisional service, in freight or passenger service, subject to the following procedures.

These provisions together allow Union Pacific to establish new service. But it is not the “service” that is new in Union Pacific’s proposal – it is only the conditions that are forced on engineers; conditions that move them hundreds of miles from their

homes, their families, and the home terminals put in place by the STB in the LA Hub Agreement. The service is already covered by the LA Hub Agreement - it is service between West Colton and Yuma and West Colton and Yermo. The proposed service is exactly the same.

Unlike every other case where arbitrators have allowed Art. IX be used to create new runs, Union Pacific here is not: (1) changing mileage, (2) running through a terminal, or (3) lengthening service. See Eischen Award at Appx 108-109 (comparing Awards from Referees Twomey and LaRocco); Quinn Award at Appx 71 (Proposed service extended mileage and ran through terminal at Fresno); Fredenberger Award at Appx 84 (establishment of service where none previously existed); O'Brien Award at Appx 90-91 (proposed service ran through terminal). Nor is Union Pacific introducing new service where it did not have the right to operate such service under existing rules in the schedule agreements, which is the intent of Art. IX. LaRocco Award, Appx at 311-12. Further, Union Pacific's motivation is to secure one-sided benefits, including specifically reducing pilot pay and held away from home pay. Cf. Fredenberger Award at Appx 84; Eischen Award at Appx 108-109 (Citing LaRocco for the proposition that a carrier may not "propos[e] only a minor modification in an existing interdivisional run with the motive of procuring the more favorable conditions[.]").

The only thing "new" in the proposed service is that Union Pacific wants to require engineers to report to work at the "spokes" of the hub and spoke model instead of at the "hub," close to their homes. But a bus service from St. Louis to Chicago and back would

not be "new" just because one day there was a change of drivers at St Louis instead of Chicago or vice versa. Neither is Union Pacific's proposed service "new."

1. Union Pacific's proposal does not create "new service not otherwise covered by [the LA Hub Agreement]" and therefore it may not proceed under Art. IX because it duplicates existing service.

As shown above, the plain contract language prevents Union Pacific from crating its proposed service because that service is not "new" and exactly duplicates existing service. In interpreting Art. IX and related contractual provisions, past arbitral authority have looked to whether the proposed service would:

...substantially recreate [existing service] in order to access benefits that are one-sided, i.e., "carrier friendly only" conditions.

See, e.g., O'Brien Award at Appx 98.

Union Pacific's Art. IX Notice "substantially recreate[s]" existing service covered by the LA Hub Agreement. Currently, the LA Hub provides for service between both West Colton and Yermo and West Colton and Yuma and therefore does not satisfy either Side Letter No. 3 or Art. IX. LA Hub Agreement, Sec. III.A (Pool Operations/Assigned Service). Union Pacific's proposed service does more than "substantially recreate" existing service - it duplicates existing service. Trains will still run between West Colton and Yermo and West Colton and Yuma. *See* July 17, 2013 Notice at Appx 15. As stated under oath by Union Pacific's General Director of Labor Relations, Randy Guidry on cross-examination:

Q (By Michael Persoon) And it's true also that service between West Colton and Yermo and West Colton and Yuma is covered in [the LA Hub Agreement], isn't it?

A (By Randy Guidry) Yes.

Q And it's your position that because you flipped those and you say this is -- this isn't service from West Colton to Yermo; this is service from Yermo to West Colton, isn't it your position that that is service that's not covered by this implementing agreement?

A **Our position, that a run from Yuma with a home terminal at Yuma to West Colton and a home terminal from Yermo to West Colton does not currently exist. And to establish that would be new service, yes, sir. That's my position.**

Q So it's -- it's your testimony that that service from Yermo to West Colton that you seek to implement is not covered in this implementing agreement?

A **Not as stipulated in this implementing agreement, no, sir. It would be new service; would be a new pool operation.**

Q And that's because it's a different home terminal and a different away-from-home terminal, right?

A **That's correct.**

Q Even though it's on the same track, right?

A **That's correct.**

Q Even though it's the same mileage, right?

A **That's correct.**

Testimony of Randy Guidry (BLET v. UP, Case No. 13-cv-5970, N.D. Ill. hearing of October 1, 2013), Appx at 280-81. *See also id.*, Appx. at 286 (proposed service would not run through West Colton).

Union Pacific's own admissions prove that it cannot invoke Side Letter No. 3 or Art. IX in order to make the changes it proposes in its July 17, 2013 Notice. The service

it proposes as “new” is “on the same track,” has “the same mileage,” and has the same terminals as existing service under the LA Hub Agreement. It is the same as service already covered in the LA Hub Agreement.

The service proposed by Union Pacific in its July 17, 2013 Notice does not make types of changes even close to those that have justified reliance on Art. IX in the past. For example, in 2003 BNSF invoked Art. IX to create a 236 mile run between Stockton and Bakersfield over the existing 194 mile run between Richmond and Fresno. Not only was this new run longer; it ran through Fresno, unlike the existing service. See Quinn Award at Appx 71-72. Similarly, in the O’Brien Award, BNSF used Art. IX to run through the terminal at Newton, Kansas and on to either Arkansas City, Kansas or Wellington, Kansas. See Appx at 90-91.⁴

None of the factors suggesting “new” service are present here – Union Pacific is not changing anything other than where it wants engineers to report to work. As such, the conditions of neither Side Letter No. 3 nor Art. IX are not satisfied and Union Pacific may not implement its proposal.

2. Article IX does not provide Union Pacific a right to move home terminal unrelated to actually creating new service.

Art. IX allows Union Pacific to:

...establish interdivisional service, in freight or passenger service, subject to the following procedures.

⁴ While Union Pacific has suggested that it wants to operate “longer runs,” see July 17, 2013 Notice at Appx 14-15, the proposed service *is not longer than existing service*. Further, Union Pacific already has the right to operate longer runs – all the way from LATC/Yard Center to both Yermo and Yuma, but it does not. See BLET letter of July 24, 2013 at Appx 25.

But even apart from its intersection with Side Letter No. 3, Art. IX does not allow Union Pacific to “substantially recreate” (or as here, duplicate) existing service. That is, Art. IX *allows only the creation of new service*, not the recreation or duplication of existing service. See Eischen Award at Appx 108-109; Quinn Award at Appx 71; Fredenberger Award at Appx 84; O’Brien Award at Appx 90-91.

For this reason, apart from Union Pacific not having the right under Side Letter No. 3 to take these actions, Union Pacific does not have the right under Art. IX to rename the starting point of existing service as the end point, and vice versa because the *service* remains the same.

3. The limiting language in Side Letter No. 3 – “not otherwise covered by this Agreement” - must be given meaning.

The portion of Side Letter No. 3 related to the use of Art. IX reads:

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

A fundamental rule of contract interpretation is to give meaning to all clauses. An important clause in Side Letter No. 3 is that Union Pacific can only use Art. IX on pool operations “not covered in this implementing agreement.” But if Union Pacific is allowed to proceed by simply renaming the service between West Colton and Yermo or Yuma, which is “covered in [the LA Hub Agreement],” then this clause will have no meaning.

The Fredenberger Award confronted a nearly identical issue where the Burlington Northern sought to use Art. XII of the 1972 UTU National Agreement, which like Art. IX here provided a right to establish interdivisional service under certain circumstances.⁵ Referee Fredenberger rejected the Carrier's overreach, stating:

...it is an even more fundamental proposition of agreement interpretation that language in an agreement which is clear and unambiguous on its face is not subject to interpretation. We believe Section 4 of Article XII is clear and unambiguous. *It provides that Art. XII shall have no applicability to intraseniority district service existing on the effective date of the agreement.* (emphasis supplied).

Fredenberger Award at Appx 83.⁶

The result must be the same here. The limitation in Side Letter No. 3 ("new pools *not covered in this implementing Agreement*") is effectively identical to that involved in the Fredenberger Award. If the limitation means anything, it means that Union Pacific cannot use Art. IX to recreate or modify *existing* service, or even to move an existing pool operation on existing service. Art. IX – which is what Side Letter No. 3 incorporates – does not allow for such trivial changes and neither does Side Letter No. 3 itself. The meaning is clear – if Union Pacific desires to create truly new service not already covered by the LA Hub Agreement it can do so under Art. IX. But Side Letter No. 3 does not give a right that does not exist in Art. IX.

⁵ "[I]nterdivisional, interseniority district, intradivisional or intraseniority district service in effect on the date of this Agreement is not affected by this rule."

⁶ The Fredenberger Award went on to note that other Awards relied on by the Carrier "[e]ach involved the establishment of such service where none previously existed."

4. Union Pacific's proposal is an attempt to gain one-sided benefits.

There can be no doubt what Union Pacific's intent is in serving its July 17, 2013 Notice – it wants to: (1) avoid paying pilots on the West Colton to Yermo run and (2) limit its held-away-from-home pay. See Testimony of Paulo Tortorice (BLET v. UP, Case No. 13-cv-5970, N.D. Ill. hearing of October 1, 2013) Appx at 199-206 (describing matters related to use of pilots on West Colton-Yermo service); Testimony of Randy Guidry Appx at 286-292 (discussing pilot issue and held-away-from home issue). That is the type of “one-sided benefit” precluded by arbitral authority. See O'Brien Award, Eischen Award, Quinn Award. Yet it is clear these are the “changes” Union Pacific seeks, as shown by the sworn testimony of Director of Labor Relations, Randy Guidry, on cross examination:

Q (Michael Persoon) So maybe you can tell me how that's going to be more efficient for them to report to work at Yermo.

A (Randy Guidry) I think we've touched on it somewhat with Mr. Hannah and Mr. Tortorice's testimony. Obviously, having one locomotive engineer on a train instead of two is more efficient. I don't think anyone would dispute that. Likewise, the held-away-from-home terminal issues that they were complaining about we think with the repositioning of the new pool at Yuma and Yermo will help eliminate some of that given how those trains are going to have to mesh with the overall transcontinental operation.

Q So you identified two efficiencies to me -- right? -- eliminating a pilot and limiting held-away-from-home time. Right?

A Those were efficiencies that were discussed earlier, and I wouldn't disagree with those.

Q Can you identify any other efficiency?

change under its proposal. Further, Union Pacific *already has the right to operate longer runs, but chooses not to*. As expressly communicated to Union Pacific by BLET:

...the Carrier also *currently has the right* to run service all the way from LATC/East Yard to both Yermo and Yuma. Union Pacific - for reasons known to it - has chosen to "zero out" this service instead of utilizing this longer run.

July 24, 2013 letter, Appx at 25.

In following correspondence, Union Pacific offered different justification for its proposal, admitting that the purpose of swapping the home and away-from-home terminals was to:

...positively address ongoing and chronic qualification/certification issues inherent to these transportation corridors and solve away from home terminal issues...[.]

July 26, 2013 letter, Appx at 23.

The second justification is relevant only to showing that Union Pacific is using its Art. IX notice *not* to create new service by lengthening runs, changing mileage or running through terminals, but only to secure one-sided benefits. As admitted by Union Pacific, its real reason for the proposed notice is, "to minimize [its] contractual obligation to pay engineers money." Testimony of Randy Guidry, Appx at 289. Each of the two terminal swaps - at Yermo and Yuma - is meant to address a different "problem," but neither changes service or operations.

The Carrier's concern on the Yermo run is that engineers with the most seniority do not bid on that run because it pays less than other available runs. This means that junior engineers work between West Colton and Yermo. But because that territory is

dangerous - it has a heavy grade - engineers must have meet exacting qualifications to operate a train over that territory on their own. Because these junior engineers - working the less-desirable, less-profitable run - sometimes do not possess all the special qualifications, they must be accompanied by a pilot who is familiar with the heavy grade territory. Paying for this pilot is what Union Pacific wants to avoid and it wants to do this by frustrating the use of seniority by the most experienced engineers. Forcing them to report to work at Yermo as their home terminal is the device by which Union Pacific hopes to accomplish its goal. *See, e.g.,* testimony of Paulo Tortorice, Appx at 199-206.

The concern for the Yuma run is that Union Pacific wants to both keep engineers in Yuma for extended periods *and* avoid paying them their contractually due "held away from home" pay, i.e., pay that they are due each hour past 16 they are kept at the away from home terminal. *See, e.g.,* testimony of Paulo Tortorice, Appx at 197-98.

Union Pacific acknowledges these goals. By sworn declaration offered by Union Pacific, Thomas Williams, the Director of Transportation Services for the LA Hub, stated:

4. The changes contemplated by Union Pacific's July 17 Article IX notice are designed to allow Union Pacific to operate more efficiently into and out of the Los Angeles area, including the Ports of Los Angeles and Long Beach¹ Currently we have a number of train runs with home terminals in West Colton and Los Angeles Engineers can bid on these assignments. We have a difficult time keeping the West Colton to Yermo and West Colton to Yuma pools staffed with qualified engineers who are familiar with operating locomotives over the involved routes because other runs exist where engineers can make more money (sometimes for fewer hours of work). As a result, **engineers tend to bid off these runs, in particular the West Colton - Yermo run.** This often results our being required to use an engineer who may not have operated over these sections of track as often or as recently. **Often,**

this requires the use of "pilot," a second engineer who is qualified and familiar with operating a train on that track or route and who rides along with the newly assigned engineer who just bid on to this pool. Both the pilot and the engineer have to be paid, raising Union Pacific's costs which must, in turn, be passed on to shippers of freight.

5. Creating new home terminals in Yermo and Yuma will decrease the frequency that this occurs. Engineers are less likely to bid on new assignments if they involve a change in their home terminal. We would also expect that, over a good deal time (especially as attrition occurs due to anticipated retirements in the Los Angeles area), employees manning these runs to live in the Yuma or Yermo areas, rather than central or urban Los Angeles. Therefore, engineers with home terminals in Yuma or Yermo are more likely to remain on these pools if their home terminals are in those cities.

* * * *

7. ... it is far more difficult to predict when Union Pacific will need a train to depart [Yermo or Yuma]. As a result, Union Pacific frequently has to have employees waiting for trains in those cities. This is especially true at Yuma because there is little room to leave a train sitting while we wait for a crew to become available to take the train to its destination. **When an engineer is waiting to work at an away from home terminal, Union Pacific is required (after a certain number of hours) to begin to pay the engineer even though they are not working. This pay is not required at the home terminal. Having engineers with home terminals in Yuma and Yermo will decrease the amount of time spent at the away from home terminal, thereby reducing costs and improving rail competitiveness.**

Sworn Declaration of Thomas Williams, Appx at 180-81. *See also*, Sworn Declaration of Gordon Wellington, ¶ 5, Appx at 184 (Proposed plan would save \$180k to \$200k annually in direct labor expenses by keeping senior engineers at Yermo and reducing held away from home pay at Yuma).

The Fredenberger Award is again illustrative. In that case,

...the Carrier made no operational changes in the service at issue in this case when it established [new] interdivisional service. *The Carrier acknowledges that the motivation and effect of instituting such service under Article XII is to extinguish the automatic release rules applicable at [the Kelly Lake terminal].*" (emphasis supplied)

Fredenberger Award at Appx 84.

Again, there is no disputing that the “service” that is not being changed; only staffing. This is not what is allowed by Side Letter No. 3 or Art. IX.

Even if Union Pacific had the right to take the actions proposed in its July 17, 2013 Notice and swap the home and away-from-home terminals, it cannot do so in bad faith as it is here. First, Union Pacific initially claimed it needed to make these changes in order to have “longer runs.” But it is not making any longer run and is not even currently using the longer runs it has the right to operate. Second, as shown by its officers’ testimony, the reasons given in its July 17, 2013 Notice relating to operational efficiencies is a pretext for finding ways to avoid the consequences of its other contracts. Last, its actual purpose is to: (1) frustrate engineers’ use of seniority in order to reduce pilot pay; and (2) to force engineers to stay at Yuma without being paid for held-away-from-home time. These factors show Union Pacific’s bad faith, and that bad faith should be rejected. *See, e.g., Elkouri & Elkouri, How Arbitration Works* (7th edition, 2012), 13-7, 8 (“Even where the agreement expressly stated a right in management, expressly gives it discretion as to a matter, or expressly makes it the ‘sole judge’ of a matter, management’s action must not be arbitrary, capricious, or taken in bad faith.”).

5. Union Pacific cannot use Art. IX to move work to a different seniority district put in place by the Surface Transportation Board as part of the labor protective conditions associated with the approval of Union Pacific’s merger with the Southern Pacific.

As previously noted, the Yuma terminal is part of the adjacent Southwest Hub (governed by a separate hub agreement), not the LA Hub; therefore LA Hub engineers

do not have any seniority standing at Yuma. The conditions put in place by the LA Hub Agreement are labor protective conditions meant to alleviate the consequences resulting from the STB permitting collectively bargained agreements - with significant protections for seniority - to be set aside as part of its approval of the Union Pacific-Southern Pacific merger. Nothing in Side Letter No. 3 allows Union Pacific to change "seniority districts" or to move work from one seniority district to another. Side Letter No. 3 allows the creation of "new pool operations not covered in [the LA Hub Agreement] whether between Hubs or within the Hub...[.]" But it does not extend to allowing the creations of pool operations that would remove work from one seniority district - a seniority district created as part of the labor protective conditions accompanying the rail merger - into another.

Because the entire purpose of not just the LA Hub Agreement, but every hub agreement, was to create defined seniority districts that would protect engineers from the impact of the Union Pacific-Southern Pacific merger, the answer to the first part of the Organization's Question No. 2 should be "no." See Kenis Award, Perkovich Award, Binau Award (each standing for the proposition that Art. IX cannot be used where a direct conflict exists between proposed use and hub agreement). Because the creation of the combined seniority districts is an express part of the LA Hub Agreement- perhaps the most important part - Union Pacific cannot use Art. IX to undermine those seniority districts.

For the above reasons, the answer to the second part of the Organization's Question No. 2 should be consistent with maintaining the conditions of the seniority district created by the LA Hub Agreement.

6. Union Pacific's Notice is flawed for other reasons.

Union Pacific's Notice also is fatally flawed because the intent of Art. IX is to permit a carrier to introduce service where it did not have the right to operate such service under existing rules in the schedule agreements. Art. IX. LaRocco Award at Appx 311-13. Not only does Union Pacific "have the right" to operate service between West Colton and Yuma, and between West Colton and Yermo, it has exercised that right continuously since the LA Hub Agreement took effect. Under the doctrine set forth in the LaRocco Award, Union Pacific may not properly invoke Art. IX to swap the home terminals in the service, because Art. IX does not convey such a right to any railroad.

7. If the Board finds Union Pacific's Art. IX Notice proper, the affected engineers are due certain protections in order to ensure that the conditions are "reasonable."

If this Board answers the Organization's Question No. 1 in the affirmative, the question remains as to what the terms and conditions governing the "new" service will be. Under Art. IX, Sec. 2, the terms and conditions must be "reasonable and practical." As a threshold matter, the most appropriate course for the Board would be to consider remanding this issue to the parties for negotiation as contemplated by Art. IX. The

Article calls for arbitration of the actual conditions only after the parties have failed in their attempts to negotiate such conditions. Here, the parties have not engaged in such negotiations due to their differences over the propriety of the Carrier's Notice itself.

But in the instance it decides this issue immediately, BLET stresses that Union Pacific's decision to require engineers to report on duty at Yuma and Yermo - hundreds of miles from their homes and families - instead of at West Colton will have a drastic impact. This drastic impact will require mitigating accommodations in order for the conditions to be "reasonable and practicable." Sub-section (a) states:

In the event the Board determines it should decide this issue now, the Board must consider the harsh adverse effect the Carrier proposes to inflict upon the engineers now operating the service. One cannot understate the impact of Union Pacific's decision to require engineers to report on duty at Yuma and at Yermo - hundreds of miles from their homes and families - instead of at West Colton. This drastic impact will require significant mitigating accommodations in order for the conditions to be "reasonable and practicable." Art. IX Sub-section (a) states:

- (a) Runs shall be adequate for efficient operations and reasonable in regards to miles run, hours on duty and in regard to other conditions at work.

That section provides the contractual authority to implement reasonable conditions.

A major problem that - left unmitigated - would render the conditions of work under the proposed service unreasonable for engineers is that their family life will suffer beyond what is reasonable to expect. As testified to by one engineer (who is also a BLET officer):

- Q (Michael Persoon) And how many nights a week do you get to spend with your family now?
- A (Paulo Tortorice) **Now, probably about four nights a week.**
- Q And that's when you're working, for example, from the West Colton home terminal?
- A **Right. It would depend on what I'm working, obviously.**
- Q About how long does it take you to get to the West Colton terminal from your home in Temecula?
- A **Well, it's between 45 minutes and an hour, somewhere around there.**
- Q And how long would it take you to get from your home in Temecula to your new away-from-home terminal in Yuma, Arizona?
- A **Oh, five and a half, six hours.**
- Q Would you be able to continue living at your home in Temecula if you had to show up for work every day in Yuma, Arizona?
- A **No. We have a 90-minute call. That's impossible.**
- Q So when you say a 90-minute call, it means Union Pacific will contact you and say, "You've got to show up for work in 90 minutes," right?
- A **A computer voice calls you and says, "You're on." They butcher my name pretty good: "P. Tortorice, you're on duty on the" -- whatever the train symbol may be at -- you know, you know what run you're on at whatever time. If it's 12:00, usually it's, you know, 1:45 or 2:00. They have a little -- little bit of fluctuation, but not six hours.**
- Q So when you're in a window of where it's likely you're going to be called for work, you basically need to be within 90 minutes of your home terminal, right?
- A **Right. It's -- you kind of get a little more alert. We**

call it being first out. First out means you're the guy -- you're the next guy. Now, sometimes that train doesn't get called for a while, but you had better be in a place where you have your stuff, you have your lunch, you've got everything where you're ready to go to work.

Q So to use a baseball analogy, you know when you're on deck and when you're in the hole?

A **That's right. You'd be on deck.**

Q So if your home terminal is flipped from the current home terminal at West Colton to, for example, an away-from-home terminal at Yuma, Arizona, how many nights a week do you think you'd get to spend with your family?

A **Zero. I mean, how am I going to go from six hours away to there into a one-room hotel? I mean, three kids and a wife, that's not going to work.**

Q Well, let's talk about that a little bit. Why do you say zero?

A **Well, because my family -- my family's not going to uproot. You know, when I got married, our kids were very important to us. Education is very important to us. My wife has a master's in education. When we moved to Temecula, part of the reason we moved there is because they have great schools....**

* * * *

Q So if these changes were put into place, would your family move to Yuma?

A **I'll tell you what my wife said. I'll be living in a trailer in the parking lot in Yuma, and my family will be there. So, no, they wouldn't move. And it would create a -- it would be unbearable. Let's put it that way. I mean, you know, I'm a hands-on dad. I like to go to baseball practice. I like to go to ballet. I like to do all that stuff. And when I can do it, tired or not, I make it. Well, that's out of the equation living six hours away. So ...**

Q So let's look at one example. You said that you'd -- if

you had to move, you'd go from spending four nights a week with your family to zero nights a week with your family, right?

A Correct.

* * * *

Q So if you -- if these changes were made and your home terminal was now Yuma -- so you had to be within the 90-mile radius of Yuma so you could report to work on time and you couldn't stay with your family in Temecula -- how would you get any time with your family?

A I wouldn't. I would have no time. I mean, the only way I would do it is if I laid off and went home. I mean, it's not leaving you much of an option.

Q Well, what about when you're at the new away-from-home terminal at West Colton?

A Well, yeah, I guess. When you're there and you have your 16 hours off and you're on 10 hours' undisturbed rest and then from that terminal you've got to get to your house, which is an hour away -- which, by the way, there's no vehicle to get you there. So you could call your wife at 2:00 a.m. and pack up the kids, have her pick you up and then take you home, I mean, that's probably not the -- you're not going to get Husband of the Year if you do that. So it would be pretty close to impossible.

And, I mean, you do have to rest at some point in time too because we don't want engineers falling asleep. I mean, that's priority is get your rest.

Q So if I'm hearing you right, once you got to the away-from-home terminal at West Colton -- which is, of course, currently the home terminal -- you'd have roughly 16 hours before Union Pacific would want to get you back on a train to avoid paying HAT time, right?

A Correct.

Q And in that 16 hours, you'd need to get about the 10 hours of rest that you're federally required to have before you operate a train again for safety reasons, right?

A Correct.

Q And then in that six -- other six hours, your wife would have to come and get you, drive you back home, and then drive you back to the terminal, right?

A Correct.

Q And do you know what time your train is going to get in to the terminal at West Colton?

A You never know. I mean -

Q Could it be midnight?

A Could be 2:00 a.m.; could be 3:00 a.m. It's usually not going to be a convenient time. So then you limit those opportunities based on is it daylight? Are they home? Are they at school? I mean, there's a lot of different factors.

Testimony of Paulo Tortorice (BLET v. UP, Case No. 13-cv-5970, N.D. Ill. hearing of October 1, 2013), Appx at 209-11; 216-17.

The family hardship that Mr. Tortorice described would be similarly visited upon the other engineers working in this service a direct result of the home terminal being moved to Yuma or Yermo from West Colton. While that harm is most severe at Yuma - which is more than 200 miles from West Colton in the Arizona desert; it is also severe at Yermo - which is nearly 100 miles from West Colton, in the Mojave Desert.

In order to make this service - which is *not* new, which is already covered by the LA Hub Agreement, and which should not be allowed - remotely reasonable, engineers will need different rights with respect to their work-rest cycle. Chief among the conditions proposed by BLET in Appendix A is Section 13, "Tie-Up." That condition reads:

Tie-Up. Any employee operating in this freight service returning to the home terminal after completion of a trip shall be permitted to mark off for 24, 36, or 48 hours rest at the time he/she registers arrival. The Carrier shall not - directly or indirectly - discipline any employee for exercising this right.

This condition is necessary to allow engineers who are forced to tie-up at Yermo and Yuma, hundreds of miles from their homes and families, the opportunity to mark off uncompensated for up to 48 hours in order to return to their actual homes, see their families and attend to their domestic responsibilities. Otherwise, as Mr. Tortorice put it, they will spend “zero” nights a week with their family. *See also* Testimony of Randy Guidry, Appx at 298 (Union Pacific’s proposal would “increase the amount of time...that crews are going to stay...at Yuma.”).

Of related importance is greater call time. Section 14, “Call Time,” states:

Call time. The Carrier shall provide to employees operating in this freight service at least four (4) hours advance notice of their obligation to report on duty.

Like the tie-up condition, this condition is necessary to make the service “reasonable” in order to create any chance for engineers to stay at their home and have enough lead time to report for work at their now-distant “home” terminal. By increasing the lead time from 1.5 hours to 4 hours, this provision would maintain conditions proportionally similar to what is currently in effect by accounting for the greater distance from the engineers’ homes to their now-distant home terminals. BLET also proposes that it would be reasonable to require Union Pacific to maintain the “reverse lodging” (basically offering away-from-home lodging at the new “home” terminal) on a permanent basis rather than with a two-year sunset as it currently proposes.

Conclusion

It would be a farce to call the proposed service "new" service, not already covered by the LA Hub Agreement. It exactly duplicates existing service between West Colton and Yermo and West Colton and Yuma. Further, Union Pacific's actual reason for proposing the service is to: (1) reduce pilot pay by attempting to restrict engineers' use of their seniority at Yermo and (2) reduce held-away-from-home time at Yuma, not by reducing the amount of time engineers are stuck there but by making it their home terminal. This attempt should be rejected.

For all the foregoing reasons, BLET requests that the Board:

1. Answer its first question in the negative.
2. Answer the first part of its second question in the negative and answer the second part in a manner consistent with preserving the seniority districts created by the LA Hub Agreement.
3. If necessary - answer its third question by ordering that the conditions be those included on the enclosed Appendix A.

Date: November 5, 2013

Respectfully submitted,



Michael P. Persoon

On behalf of the Organization

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Appendix A – Conditions

UNION PACIFIC RAILROAD COMPANY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN

**YERMO-WEST COLTON
YUMA-WEST COLTON
INTERDIVISIONAL SERVICE**

In connection with Union Pacific Railroad Company's Notice dated July 17, 2013 – as amended as to conditions of service on October 18, 2013 – wherein it advised its intent to establish new unassigned (pool) through freight service between Yermo, California and West Colton, California and Between Yuma, Arizona and West Colton, California pursuant to Article IX, "Interdivisional Service" of the 1986 BLE National Agreement, the following shall apply to any employee operating in this freight service, or filling a vacant assignment, or made up assignment:

1. Interdivisional Service. Union Pacific may establish the following pool freight operations:

A. Yermo, California - West Colton, California.

- i. Home terminal for this run will be Yermo, California.
- ii. Away-from-home-terminal for this run will be West Colton, California.
- iii. Length of run will be 130 miles.

B. Yuma, Arizona - West Colton, California.

- i. Home terminal for this run will be Yuma, Arizona.
- ii. Away-from-home-terminal for this run will be West Colton, California.
- iii. Length of run will be 198 miles.

2. Terminals for Run.

- A. Yermo, California, shall be the home terminal for employees working between Yermo and West Colton. West Colton shall be the away-from-home terminals for Yermo based crews.

- B. Yuma, Arizona shall be the home terminal for employees working between Yuma and West Colton. West Colton shall be the away-from-home terminal for Yuma based crews.

3. Miles of Run. Crews working in this interdivisional service will be allowed the following miles:

- A. The miles run between Yermo - West Colton is 130 miles.

- B. The miles run between Yuma - West Colton is 198 miles.

Note: The mileages specified above are subject to final verification by the parties.

4. Rates of Pay. Except as set forth herein, applicable provisions of the Agreement between the Union Pacific Railroad and the Brotherhood of Locomotive Engineers & Trainmen covering the UP/SPWL and provisions of the National BLE/BLET Agreements shall apply.

The existing trip rates currently established for the West Colton/Mira Loma to Yermo and West Colton/Mira Loma to Yuma pool freight runs shall be applied to the new runs established under this agreement.

5. Overtime. Employees operating in this freight service shall have overtime commence when their on-duty time is in excess of 12 hours, unless other existing agreements call for payment of overtime to commence prior to 12 hours on duty.

6. Transportation. Transportation will be provided in accordance with Section (2)(c) of Article IX of the May 19, 1986 National Agreement.

7. On and Off Duty Points. The Carrier will designate, with the Organization's advice and consent, the on- and off-duty points for crews in this service pursuant to Article VI, Section A, 2 of the 1998 BLE Los Angeles Hub Agreement and Article IX, Section 2 (c) of the 1986 BLE National Agreement. Such on and off duty

points will have appropriate facilities as currently required by the controlling collective bargaining agreement.

8. Meal Allowance and Eating En Route. Meal allowances at the away from home terminal will be governed by Article IX, Section 2 (d) of the 1986 BLE National Agreement. Meals enroute for not stopping to eat enroute will be governed by Article IX, Section 2 (e) of the 1986 BLE National Agreement.

9. Suitable Lodging. Suitable lodging will be provided by the Carrier in accordance with Section 1 of Article II of the June 25, 1964 National Agreement.

10. Reverse Lodging. Upon request, the Carrier shall continue to provide to employees operating in this freight service "reverse lodging" at the home terminals of Yuma and Yermo. Such lodging shall meet the requirements of Section 1 of Article II of the June 25, 1984 National Agreement, and shall also have in each room a microwave and refrigerator.

11. Extra Boards. The Carrier may establish guaranteed extra board(s) pursuant to Attachment "A" of the BLE and UP/SPWL November 3, 1997 Modifications Agreement. Nothing in these conditions shall allow Union Pacific to extend or restrict the territory on which existing extra boards operate.

12. Hours of Service Relief. Turnaround service/hours of service relief shall be handled by the extra board, if available, prior to using pool crews. Employees used for this service may be used for multiple trips in one tour of duty in accordance with the designated collective bargaining agreement. Nothing in this agreement prevents the use of other crews to perform work currently permitted by prevailing agreements, including, but not limited to yard crews performing hours of service relief within the road/yard zone, ID crews performing service and deadheads between terminals, road switchers handling trains within their zones and using a crew from a following train to work a preceding train.

13. Tie-Up. Any employee operating in this freight service returning to the home terminal after completion of a trip shall be permitted to mark off for 24, 36, or 48 hours rest at the time he/she registers arrival. The Carrier shall not - directly or indirectly - discipline any employee for exercising this right.

14. Call time. The Carrier shall provide to employees operating in this freight service at least four (4) hours advance notice of their obligation to report on duty.

15. Employee Protection. Employees adversely affected by the initial implementation of this interdivisional service will be afforded the protection benefits provided in Section 7 of Article IX of the May 19, 1986 BLE National Agreement.

16. Preservation of Working Conditions. Except as specifically addressed herein, none of the conditions in the Merger Implementing Agreement for the Los Angeles Hub between the Union Pacific Southern Pacific Transportation Company and Brotherhood of Locomotive Engineers shall be modified, changed, abrogated, limited or abridged. This includes specifically the limitation set forth in Section VI.B.3, Note 1, of that Agreement, or the terms in Side Letter No. 3 to that Agreement, prohibiting the application of the "Twenty-Five Mile Zone" to Eastbound trains coming into West Colton. That limitation is specifically preserved regardless of whether for purposes of any train West Colton is a "home" or "away-from-home" terminal. Further, the existing territorial limits of extra board service shall remain unaffected.

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UNION PACIFIC RAILROAD COMPANY

Frank A. Tamislea
Dir. Labor Relations
Tel: (916) 789-6346

Western Region

10031 Foothills Blvd.
Roseville, CA 95747



February 11, 2013

W 910.40 - 36

(Via E-Mail & UPS Mail)

Mr. D. W. Hannah
General Chairperson
Brotherhood of Locomotive Engineers
and Trainmen
1902 Orange Tree Lane, Suite #120
Redlands, CA 92374

Dear Mr. Hannah:

Pursuant to Article IX of Appendix B to Award of Arbitration Board No. 458, dated May 19, 1986 (also referred to as the May 19, 1986 BLE National Agreement), as amended by Article X of the Agreed Upon Implementation of Public Law 102-29, effective July 29, 1991 (also referred to as the 1991 BLE National Agreement), this letter shall serve to advise of Union Pacific Railroad Company's ("UP") desire "... to establish interdivisional service ..." and simultaneously serve as its "... [requisite] written notice to the ... [Brotherhood of Locomotive Engineers and Trainmen] of its desire to establish..." two separate unassigned through freight pools operating between an area to be known as the Los Angeles Basin Metroplex ("LABM") and Yermo, California, and between the LABM and Yuma, Arizona. Accordingly, and in compliance with the requirements of Article IX, Section 1 of the May 19, 1986 National Agreement, the purpose of this notice is to "... specify the service ... [UP] proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service."

Prior to describing the pertinent parameters of this new service and the proposed conditions attendant thereto, it is relevant to discuss UP's reasons for implementing this new service. Competition for the transportation of goods, including intermodal traffic, into and out of the Los Angeles Basin is keenly competitive. While UP's transportation service offerings between the Los Angeles Basin and Midwest and East Coast markets are good, significantly more efficient and faster service options are available from UP's principal competitors - i.e., the Burlington Northern Santa Fe Railway Company ("BNSF") and trucks. Notwithstanding the competitive edges they hold, UP strives diligently to improve continuously the quality and competitiveness of its transportation products. To this end, and with the view that "... every minute counts ...," UP constantly works to wring every minute of delay, congestion and variability out of its routes and transportation products. Obviously, for it to do otherwise would be nothing short of an immediate recipe for failure. Therefore, to accomplish its goals, UP aggressively pursues a number of strategies designed to improve the velocity, efficiency and

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effectiveness of its operations. One element of our strategy is to ensure our infrastructure is maintained at a very high level in order to avoid delays relating to track condition slow orders, etc. Another focuses on deployment of the latest technologies to enhance safety and facilitate train movements. Perhaps one of the most critical and effective strategies for improving our competitive posture lies in our strategic deployment of capital for infrastructure improvements (i.e., new commercial facilities, line and yard capacity enhancements, etc.) A key tactic in UP's long-term capital expenditure strategy has been to address or fix "bottleneck" areas that contribute to significant service delays or congestion, diminished velocity, increased or unnecessary re-crews (i.e., dogcatching), or inefficient use of train crews. Nowhere is this perhaps more evident than in the lines leading into or out of the Los Angeles Basin. For example, over the last four years alone, UP has spent over \$360 million constructing over 93 miles of second main track, between Los Angeles, California, and El Paso, Texas. The result of these expenditures is more efficient and competitive route between Los Angeles and eastern markets, with approximately 72% of the route now equipped with double track. UP plans to spend nearly \$590 million more over the next five to six years to complete the double track between Los Angeles and El Paso.

Another striking example of UP's drive to improve its competitive posture and garner an increasing share of the Los Angeles Basin transportation market is evidenced by its commencement last year of constructing the "Colton Flyover." This nearly \$100 million project will provide UP with a "bridge" or "overpass" over BNSF's route through Colton, California, and an opportunity to eliminate a major source of congestion and improve train velocity in the central and eastern portions of the Los Angeles Basin.

With this level of strategic investment, it is incumbent upon UP to obtain the operational and service benefits improvements contemplated when it embarked on these expensive construction projects and, in particular, to physically translate these benefits into new, improved and innovative services and operations that will benefit shippers. UP's continuing investment in maintaining its routes into and out of the Los Angeles Basin at high levels and the investment in projects like the Colton Flyover will provide UP with a foundation for adopting innovative operations and services designed to significantly reduce train delay and terminal congestion, improve train velocity, thus further improve our service product for Los Angeles Basin shippers. The construction of the Colton Flyover will, in particular, enable UP to more efficiently utilize its train and engine service crews by operating longer runs and adopting more innovative and service-responsive procedures for assigning train crews at on-duty locations and tying up crews at off-duty locations within the Los Angeles Basin. In conjunction with this, the ultimate result will be the opportunity for further traffic growth into/out of the Los Angeles Basin and an increase in lucrative railroad jobs.

With the foregoing in mind, UP intends to establish two new interdivisional service operations between an area to be known as the Los Angeles Basin Metroplex ("LABM") and Yermo and between the LABM and Yuma, with LABM serving as the home terminal locale for both interdivisional service operations and with Yermo and Yuma as the away-from-home terminals. The LABM will essentially be comprised of the area between the Ports of Los Angeles/Long Beach, Taylor Yard, Riverside, and the present eastern, northern and southern

switching limits near Colton. (A more detailed description of the Los Angeles Basin Metroplex is contained in the proposed implementing document accompanying this notice.) In regard to our requirements, as indicated in Article IX, "...to specify the service ... [UP] proposes to establish and the conditions ... it proposes shall govern ...," a synopsis of our proposed new interdivisional service operations and a proposed implementing agreement for the new services are respectively provided below and as an accompaniment to this notice. In summary, UP proposes the following new interdivisional service:

1. **New Pool Freight Operations/Service**

A. Pursuant to this notice, UP may establish two new interdivisional service operations. New interdivisional unassigned (pool) through freight service will be established between the Los Angeles Basin area and Yermo, California, and between the Los Angeles Basin area and Yuma, Arizona. The home terminal locale for both operations (LABM – Yermo and LABM – Yuma) will be the Los Angeles Basin Metroplex (LABM) and, specifically, the on-/off-duty locations (Nodes) within the LABM. It is not intended that the runs between the LABM and Yermo and between the LABM and Yuma will be operated as a single pool with a single home terminal locale. Yermo, California and Yuma, Arizona will be the away-from-home terminals for the two (2) separate freight pools.

1. The territory comprising the LABM will be essentially bounded by the Ports of Los Angeles and Long Beach, LATC, East Los Angeles to West Colton, California. (The specific boundary locations for the LABM are set forth in the implementing agreement proposal accompanying this notice.)
2. Employees will go on or off duty at any location within the LABM and, accordingly, can get, receive or deliver their train to any location comprising, or within the confines of, the LABM.
3. To facilitate matters pertaining to determining an employee's trip compensation, on-duty time, etc., the LABM will be divided into five on-/off-duty nodes. The major train arrival or departure points within each of the five nodes are summarized below:

LABM On-/Off-Duty Nodes	Primary Train Arrival/Departure Locations
Port	Dolores, ICTF, Thenard, Port of Los Angeles, Port of Long Beach, Mead
Downtown	LATC, East Los Angeles, Gemco

LABM On-/Off-Duty Nodes	Primary Train Arrival/Departure Locations
Suburban	City of Industry, Bartolo
Midway	Pomona, Montclair, Mira Loma
East	Kaiser, Riverside, West Colton, Colton

4. An employee may be called to operate a train or deadhead from a location within the LABM (i.e., at any of the LABM Nodes identified above) and will report to the specified location within the Node to work or deadhead therefrom. Similarly, an employee operating a train and arriving in or deadheading into the LABM may be required to operate the train to any location within the LABM.
5. An employee arriving at the away-from-home terminals at Yermo or Yuma will be used (called) on a first-in, first-out basis out of Yermo or Yuma, as appropriate, to work or deadhead to the home terminal (i.e., any point within the LABM).
6. An employee going on duty at a location within the LABM will not be required to go off-duty on a subsequent trip at that same location. Accordingly, an employee returning to the LABM from the away-from-home terminal that worked a train or deadheaded to an off-duty location within the LABM other than where he or she initially went on duty from their previous trip will be provided transportation to the location where he or she went on duty for their prior trip/tour of duty.
7. Employees tying up at either their home or away-from-home terminal at the conclusion of a tour of duty will be placed on the appropriate board listing based on their off-duty time.
8. Employees will be compensated in accordance with controlling collective bargaining agreement provisions based on the distance the employees are required to operate a train. To simplify calculations for mileages used in determining an employee's compensation, the following mileages will be used:

LABM To/From Yermo

Originating (On-Duty) Location	Destination (Off-Duty) Location	Run Miles * (Miles Worked)
Any location within Port Node	Yermo, California	175 miles
Any location within Downtown Node	Yermo, California	168 miles
Any location within Suburban Node	Yermo, California	137 miles
Any location within Midway Node	Yermo, California	116 miles
Any location within East Node	Yermo, California	105 miles
Yermo, California	Any location within Port Node	175 miles
Yermo, California	Any location within Downtown Node	168 miles
Yermo, California	Any location within Suburban Node	137 miles
Yermo, California	Any location within Midway Node	116 miles
Yermo, California	Any location within East Node	105 miles

LABM To/From Yuma

Originating (On-Duty) Location	Destination (Off-Duty) Location	Run Miles * (Miles Worked)
Any location within Port Node	Yuma, Arizona	280 miles
Any location within Downtown Node	Yuma, Arizona	262 miles

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 Mr. D. W. Hannah
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Any location within Suburban Node	Yuma, Arizona	243 miles
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LABM To/From Yuma

Originating (On-Duty) Location	Destination (Off-Duty) Location	Run Miles * (Miles Worked)
Any location within Midway Node	Yuma, Arizona	224 miles
Any location within East Node	Yuma, Arizona	209 miles
Yuma, Arizona	Any location within Port Node	280 miles
Yuma, Arizona	Any location within Downtown Node	262 miles
Yuma, Arizona	Any location within Suburban Node	243 miles
Yuma, Arizona	Any location within Midway Node	224 miles
Yuma, Arizona	Any location within East Node	209 miles

* - The specified mileages are subject to verification by the parties

- B. The terms and conditions contained in the controlling collective bargaining agreement, applicable BLE/BI.ET National Agreements, including, but not limited to, Article IX of the 1986 BLE National Agreement, as amended by Article X of the 1991 BLE National Agreement, and applicable practice and arbitral precedent, as well as the terms of the Agreement will apply to the interdivisional service established pursuant to this notice.

As indicated above, a proposed agreement detailing the terms and conditions for these new services accompanies this notice.

In Article X of the 1991 BLE National Agreement, BLE and various carriers, including UP, specifically and unambiguously "... *[committed] themselves to the expedited processing of negotiations concerning interdivisional runs, including those involving running through home terminals, and ... to request the prompt appointment by the National Mediation Board of*

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an arbitrator when agreement cannot be reached." (Emphasis ours) Consistent with this commitment, we are eager to commence promptly the requisite negotiations on this matter. Accordingly, we suggest the parties meet to discuss this service and negotiate the requisite agreement on **February 27, 2013 at 9:00 AM at our regional offices in Roseville, CA.** We would appreciate your prompt attention to this matter and anxiously await your reply.

Yours truly,



F.A. Tamisiea
Director – Labor Relations

Attachment

CC: Mr. W. R. Turner – Omaha, Mail Stop #0710
Mr. A. T. Olin – Omaha, Mail Stop #0710
Mr. R. P. Guidry – Omaha, Mail Stop #0710
Ms. M. J. Ahart – Omaha, Mail Stop #0710
Mr. F. C. Johnson – Omaha, Mail Stop #1755
Mr. R. S. Blackburn – Omaha, Mail Stop #1180
Mr. K. H. Hunt – Omaha, HDC
Mr. S. K. Keller – Roseville, CA
Mr. C. A. Wilbourn – Roseville, CA
Mr. D. B. Foley – Roseville, CA
Mr. R. N. Doerr – Bloomington, CA
Mr. J. A. Landers – Omaha, HDC
Ms. K. K. Dunn – Omaha, HDC/CMS
Mr. A. A. Leazenby – Omaha, HDC/CMS
Mr. P. G. Kenny – Omaha, HDC/CMS
Mr. D. S. Johnson – San Bernardino, Train Mgmt.
Mr. M. N. Bailey – Omaha, Finance
Mr. G. J. Wellington – Roseville, Finance

MEMORANDUM OF AGREEMENT
#71____48
(920.40-36)

Between

UNION PACIFIC RAILROAD COMPANY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN

**LOS ANGELES BASIN METROPLEX – YERMO
LOS ANGELES BASIN METROPLEX - YUMA
INTERDIVISIONAL SERVICE**

In connection with Union Pacific Railroad Company's Notice dated February 11, 2013, wherein it advised its intent to establish new interdivisional unassigned (pool) through freight service between the single consolidated Los Angeles, California Metropolitan area separated into five (5) administrative areas consisting of the Ports of Los Angeles, California, downtown Los Angeles, California, Suburban Los Angeles, California, Midway Los Angeles, California, and the East (West Colton) area of Los Angeles, California and Yermo, California and between the consolidated Los Angeles Metropolitan area and Yuma, Arizona pursuant to Article IX, "Interdivisional Service", of the 1986 BLE National Agreement, the parties agree the following shall apply to this new service:

Section 1. Interdivisional Service. Union Pacific may establish two (2) separate new unassigned pool freight operations with the Los Angeles Basin Metroplex (LABM) as the home terminal and Yermo, California and Yuma, Arizona as the away-from-home terminals.

Section 2. Terminals for Runs.

- (a). The Los Angeles Basin Metroplex (LABM), shall be the home terminal for employees working between LABM and Yermo, California as well as the home terminal for employees working between LABM and Yuma, Arizona.
- (b). Yermo, California shall be the away-from-home terminal for employees working between Yermo and the LABM. Yuma, Arizona shall be the

away-from-home terminal for employees working between Yuma and the LABM.

- (c). Road crews may receive or leave their trains anywhere within the LABM Complex and in connection therewith perform the applicable National Agreement Road/Yard moves within the LABM.

Section 3. Designated On-/Off- Duty Points & Miles Of Run.

- (a). There will be five (5) -on/-off duty nodes within the home terminal of the LABM operating to/from Yermo, California and to/from Yuma, Arizona. Crews may be called to report for work or go off duty at one of the following designated points within an identified node. Crews will be paid the actual run miles specified in the tables below with a minimum of a basic day:

LABM To/From Yermo

LABM On-/Off Duty Nodes	Primary Train Arrival/Departure Locations	Run Miles LABM - Yermo
Port	Dolores, ICTF, Thenard, Port of Los Angeles, Port of Long Beach, Mead	175 miles
Downtown	LATC, East Los Angeles, Gemco	168 miles
Suburban	City of Industry, Bartolo	137 miles
Midway	Pomona, Montclair, Mira Loma	116 miles
East	Kaiser, Riverside, West Colton, Colton	105 miles

LABM To/From Yuma

LABM On-/Off Duty Nodes	Primary Train Arrival/Departure Locations	Run Miles LABM - Yuma
Port	Dolores, ICTF, Thenard, Port of Los Angeles, Port of Long Beach, Mead	280 miles
Downtown	LATC, East Los Angeles, Gemco	262 miles
Suburban	City of Industry, Bartolo	243 miles
Midway	Pomona, Montclair, Mira Loma	224 miles
East	Kaiser, Riverside, West Colton, Colton	209 miles

Note: The mileages specified above are subject to final verification by the parties.

(b). The Carrier will designate the on- and off-duty points for crews in this service pursuant to Article VI, Section A, 2 of the 1999 BLE Los Angeles Hub Arbitration/Agreement and Article IX, Section 2 (c) of the 1986 BLE National Agreement.

(c). The on- and off-duty points will have appropriate facilities.

Section 4. Rates of Pay, Rules and Working Conditions.

(a). Except as set forth herein, applicable provisions of the Agreement between the Union Pacific Railroad and the Brotherhood of Locomotive Engineers & Trainmen covering the UP/SPWL and provisions of National BLE/BLET Agreements shall apply.

(b). Trip rates will be developed in accordance with Article V of the December 16, 2003 BLE National Agreement for engineers working on runs established pursuant to this Agreement. Any of the nine (9) pay elements referenced in this Agreement will not change how it is to be applied or included in the calculation of a trip rate for these runs pursuant to Article V of the December 16, 2003 BLE National Agreement.

Section 5. Overtime. Employees operating in this freight service will be allowed overtime after actual miles run divided by 16.25 overtime divisor pursuant to Article IV, Section 2 of the November 1, 1991 BLE National Agreement.

Section 6. Transportation. Transportation will be provided in accordance with Section (2) (c) of Article IX of the May 19, 1986 BLE National Agreement.

(a). Employees who are called to work a train or deadhead from one of the LABM arrival/departure locations listed for a corresponding on-/off-duty node will report to duty at that location to work and/or deadhead to the appropriate away-from-home terminal of Yermo, California or Yuma, Arizona.

(b). Employees returning to the home terminal (LABM) from the applicable away-from-home terminal, Yermo/Yuma, who work a train and/or deadhead to an arrival/departure location other than where he/she initially went on duty from their previous trip, will be provided transportation back to the location where they went on duty on the previous trip for tie-up.

Section 7. Board Position/Placement, Runarounds.

(a). Employees arriving at the far terminal of Yermo or Yuma will be placed on their regular respective pool board based on their final off-duty time and will operate first-in, first-out back to the LABM home terminal.

- (b). Employees arriving the LABM home terminal will be placed on their regular respective (Yermo or Yuma) pool board at the home terminal based on their final off duty time and will operate first-in, first-out at the home terminal.

- (c). Until trip rates are established, a terminal runaround may only occur when employees assigned to the same pool board (Yermo or Yuma), depart on a working trip out of the same location within the same LABM On-/Off Duty (Node) area, depart the same yard, and both trains have their power attached to their train and depart in other than the order called. "Depart" means that a train has started moving for a bonafide departure. Departure runarounds do not apply to crews who are called to deadhead. As indicated in Section 4 above, once trip rates are established this pay element will be incorporated therein and no longer exist.

Section 8. Meal Allowance and Eating En Route. Meal allowances at the away from home terminal will be governed by Article IX, Section 2 (d) of the 1986 BLE National Agreement. Meals enroute for not stopping to eat enroute will be governed by Article IX, Section 2 (e) of the 1986 BLE National Agreement.

Section 9. Suitable Lodging. Suitable lodging will be provided by the Carrier in accordance with Section 1 of Article II of the June 25, 1964 National Agreement.

Section 10. Extra Boards. The Carrier may establish or reduce guaranteed extra board(s) within the LABM pursuant to Attachment "A" of the BLE and UP/SPWL November 3, 1997 Modifications Agreement.

Section 11. Hours-of-Service Relief. Turnaround service/hours of service relief shall be handled by the extra board, if available, prior to using pool crews. Employees used for this service may be used for multiple trips in one tour of duty in accordance with the designated collective bargaining agreement. Nothing in this agreement prevents the use of other crews to perform work currently permitted by prevailing agreements, including, but not limited to yard crews performing hours of service relief within the road/yard zone, ID crews performing service and deadheads between terminals, road switchers handling trains within their zones and using a crew from a following train to work a preceding train.

Section 12. Employee Protection. Employees adversely affected by the initial implementation of this interdivisional service will be afforded the protection benefits provided in Section 7 of Article IX of the May 19, 1986 BLE National Agreement.

Section 13. Implementation. On the effective date of this agreement, the Carrier will post an advance bulletin for this interdivisional service. Thereafter,

employees who have a standing application on file with CMS for this interdivisional service will be assigned in accordance with the applicable seniority assignment rules.

Section 14. Effective Date. The Carrier shall give the General Chairman seven (7) days' written notice of its desire to implement this Agreement.

Signed at _____, this ____ day of _____.

FOR THE BROTHERHOOD OF LOCOMOTIVE
ENGINEERS & TRAINMEN

FOR THE UNION PACIFIC
RAILROAD COMPANY:

D.W. Hannah
General Chairman

F.A. Tamisiea
Director Labor Relations

R.P. Guidry
General Director
Labor Relations

UNION PACIFIC RAILROAD COMPANY

Western Region

D. B. Foley Dir. Labor Relations
Tel: (916) 789-6345

10031 Foothills Blvd.
Roseville, CA 95747



July 17, 2013

Carrier File: 920.40-35

Mr. D. W. Hannah
General Chairperson BLET
1902 Orange Tree Lane, Suite #120
Redlands, CA 92374

(Hand delivered)

Dear Sir:

Pursuant to Article IX of Appendix B to Award of Arbitration Board No. 458, dated May 19, 1986 (also referred to as the May 19, 1986 BLE National Agreement), as amended by Article X of the Agreed Upon Implementation of Public Law 102-29, effective July 29, 1991 (also referred to as the 1991 BLE National Agreement), this letter shall serve to advise of Union Pacific Railroad Company's ("UP") desire "... to establish interdivisional service ..." and simultaneously serve as its "... [requisite] written notice to the [Brotherhood of Locomotive Engineers and Trainmen] of its desire to establish..." two separate unassigned through freight pools operating between Yermo, California, and West Colton, California and between Yuma, Arizona and West Colton, California. In compliance with the requirements set forth in Article IX, Section 1 of the May 19, 1986 National Agreement, the purpose of this notice is to "... specify the service ... [UP] proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service."

In conjunction with this notice, Union Pacific concurrently withdraws its prior notice of February 11, 2013 to your Organization of its desire to establish two separate unassigned through freight pools operating between an area described as the Los Angeles Basin Metroplex (LABM) and Yermo, California, and between the LABM and Yuma, Arizona.

Prior to describing the pertinent parameters of this new service and the proposed conditions attendant thereto, it is relevant to discuss UP's reasons for implementing this new service. Competition for the transportation of goods, including intermodal traffic, into and out of the Los Angeles Basin is keenly competitive. While UP's transportation service offerings between the Los Angeles Basin and Midwest and East Coast markets are good, significantly more

efficient and faster service options are available from UP's principal competitors – i.e., the Burlington Northern Santa Fe Railway Company ("BNSF") and trucks. Notwithstanding the competitive edges they hold, UP strives diligently to improve continuously the quality and competitiveness of its transportation products. To this end, and with the view that "... *every minute counts* ...," UP constantly works to wring every minute of delay, congestion and variability out of its routes and transportation products. Obviously, to do otherwise would be nothing short of an immediate recipe for failure. Therefore, to accomplish its goals, UP aggressively pursues a number of strategies designed to improve the velocity, efficiency and effectiveness of its operations. One element of our strategy is to ensure our infrastructure is maintained at a very high level in order to avoid delays relating to track condition slow orders, etc. Another focuses on deployment of the latest technologies to enhance safety and facilitate train movements. Perhaps one of the most critical and effective strategies for improving our competitive posture lies in our strategic deployment of capital for infrastructure improvements (i.e., new commercial facilities, line and yard capacity enhancements, etc.) A key tactic in UP's long-term capital expenditure strategy has been to address or fix "bottleneck" areas that contribute to significant service delays or congestion, diminished velocity, increased or unnecessary re-crews (i.e., dogcatching), or inefficient use of train crews. Nowhere is this perhaps more evident than in the lines leading into or out of the Los Angeles Basin. For example, over the last four years alone, UP has spent over \$360 million constructing over 93 miles of second main track, between Los Angeles, California, and El Paso, Texas. The result of these expenditures is more efficient and competitive route between Los Angeles and eastern markets, with approximately 72% of the route now equipped with double track. UP plans to spend nearly \$590 million more over the next five to six years to complete the double track between Los Angeles and El Paso.

Another striking example of UP's drive to improve its competitive posture and garner an increasing share of the Los Angeles Basin transportation market is evidenced by its commencement last year of constructing the "Colton Flyover." This nearly \$100 million project will provide UP with a "bridge" or "overpass" over BNSF's route through Colton, California, and an opportunity to eliminate a major source of congestion and improve train velocity in the central and eastern portions of the Los Angeles Basin.

With this level of strategic investment, it is incumbent upon UP to obtain the operational and service benefits improvements contemplated when it embarked on these expensive construction projects and, in particular, to physically translate these benefits into new, improved and innovative services and operations that will benefit shippers. UP's continuing investment in maintaining its routes into and out of the Los Angeles Basin at high levels and the investment in projects like the Colton Flyover will provide UP with a foundation for adopting innovative operations and services designed to significantly reduce train delay and terminal congestion, improve train velocity and thus further improve our service product for Los Angeles Basin shippers. The construction of the Colton Flyover will, in particular, enable UP to more efficiently utilize its train and engine service crews by operating longer runs and

adopting more innovative and service-responsive procedures within the Los Angeles Basin. In conjunction with this, the ultimate result will be the opportunity for further traffic growth into/out of the Los Angeles Basin and an increase in lucrative railroad jobs.

With the foregoing in mind, UP intends to establish two new interdivisional service operations between Yermo, California and West Colton, California and between Yuma, Arizona and West Colton, California with Yermo and Yuma serving as the home terminals and with West Colton as the away-from-home terminal locale for both interdivisional service operations. In regard to our requirements, as indicated in Article IX, "...to specify the service ... [UP] proposes to establish and the conditions ... it proposes shall govern ...," a synopsis of our proposed new interdivisional service operations and a proposed implementing agreement for the new services are respectively provided below and as an accompaniment to this notice. In summary, UP proposes the following new interdivisional service:

New Interdivisional Service (Runs):

1. Yermo, California – West Colton, California.
 - A. Home terminal for this run will be Yermo, California.
 - B. Away-from-home-terminal for this run will be West Colton, California.
 - C. Length of run will be 130 miles.

2. Yuma, Arizona – West Colton, California.
 - A. Home terminal for this run will be Yuma, Arizona.
 - B. Away-from-home-terminal for this run will be West Colton, California.
 - C. Length of run will be 198 miles.

The mileages set forth above for each of the runs are subject to final verification by the parties.

The terms and conditions contained in the controlling collective bargaining agreement, applicable BLE/BLET National Agreements, including, but not limited to, Article IX of the 1986 BLE National Agreement, as Amended by Article X of the 1991 BLE National Agreement, and applicable practice and arbitral precedent, as well as the terms of the Agreement will apply to the interdivisional service established pursuant to this notice.

As indicated above, a proposed agreement detailing the terms and conditions for these new services accompanies this notice.

In Article X of the 1991 BLE National Agreement, BLE and various carriers including UP, specifically and unambiguously "... ***[committed] themselves to the expedited processing of negotiations concerning interdivisional runs, including those involving running through home terminals, and ... to request the prompt appointment by the National Mediation Board of an arbitrator when agreement cannot be reached.***" (Emphasis ours) Consistent with this commitment, we are eager to commence promptly the requisite negotiations on this matter. Accordingly, we suggest the parties meet to discuss this service and negotiate the requisite agreement on **July 17, 2013 at 10:00 AM at the Hilton San Francisco Financial District.** We would appreciate your prompt attention to this matter and anxiously await your reply.

Yours truly,



D. B. Foley
Director – Labor Relations

(Attachment)

CC: Shane Keller - RVP
Chad Wilbourn - ARVP
Rod Doerr - Super't
Terry Tate - Gen. Dir. Qual Srv
Gordon Wellington - Dir Fin
Ken Hunt - VP HDC
Terry Olin - AVP LR
Randy Guidry - Gen Dir LR
Pete Jeyaram - Dir LR
Vanessa Warren - Asst Dir LR
Jay Reilly - Asst Dir LR
Josephine Jordan - Gen Dir CMS
Pat Kenny - Dir CMS
Tony Leazenby - Dir CMS
Cliff Johnson - Sr. Dir Tk

MEMORANDUM OF AGREEMENT

#71_____48
(920.40-35)

Between

UNION PACIFIC RAILROAD COMPANY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN

YERMO – WEST COLTON
YUMA – WEST COLTON
INTERDIVISIONAL SERVICE

In connection with Union Pacific Railroad Company's Notice dated July 17, 2013, wherein it advised its intent to establish new unassigned (pool) through freight service between Yermo, California and West Colton, California and Between Yuma, Arizona and West Colton, California pursuant to Article IX, "Interdivisional Service", of the 1986 BLE National Agreement, the parties agree the following shall apply to this new service:

Section 1. Interdivisional Service. Union Pacific may establish the following new pool freight operations:

1. Yermo, California – West Colton, California.
 - A. Home terminal for this run will be Yermo, California.
 - B. Away-from-home-terminal for this run will be West Colton, California.
 - C. Length of run will be 130 miles.

2. Yuma, Arizona – West Colton, California.
 - A. Home terminal for this run will be Yuma, Arizona.
 - B. Away-from-home-terminal for this run will be West Colton, California.

C. Length of run will be 198 miles.

Note: As in the 1986 BLE National Agreement and this Agreement, the term interdivisional service includes interdivisional, interseniority district, intradivisional and/or intraseniority district service.

Section 2. Terminals for Run. (a). Yermo, California, shall be the home terminal for employees working between Yermo and West Colton. West Colton shall be the away-from-home terminals for Yermo based crews.

(b). Yuma, Arizona shall be the home terminal for employees working between Yuma and West Colton. West Colton shall be the away-from-home terminal for Yuma based crews.

Section 3. Miles of Run. Crews working in this interdivisional service will be allowed the following miles:

- A. The miles run between Yermo – West Colton is 130 miles.
- B. The miles run between Yuma – West Colton is 198 miles.

Note: The mileages specified above are subject to final verification by the parties.

Section 4. Rates of Pay, Rules and Working Conditions. Except as set forth herein, applicable provisions of the Agreement between the Union Pacific Railroad and the Brotherhood of Locomotive Engineers & Trainmen covering the UP/SPWL and provisions of National BLE/BLET Agreements shall apply.

- (a) The existing trip rates currently established for the West Colton/Mira Loma to Yermo and West Colton/Mira Loma to Yuma pool freight runs shall be applied to the new runs established under this agreement.

Note: This Agreement shall not serve to modify, amend or restrict any existing rights of the Carrier including, but not limited to, Article III (A.) of the UP/SP BLET Los Angeles Hub Merger Implementing Agreement concerning trains originating or terminating at Mira Loma, California.

Section 5. Overtime. Employees operating in this freight service will be allowed overtime after actual miles run divided by 16.25 overtime divisor pursuant to Article IV, Section 2 of the November 1, 1991 PEB 219 BLE National Agreement.

Section 6. Transportation. Transportation will be provided in accordance with Section (2) (c) of Article IX of the May 19, 1986 BLE National Agreement.

Section 7. On and Off Duty Points. The Carrier will designate the on- and off-duty points for crews in this service pursuant to Article VI, Section A, 2 of the 1998 BLE Los Angeles Hub Agreement and Article IX, Section 2 (c) of the 1986 BLE National Agreement. Such on and off duty points will have appropriate facilities as currently required by the controlling collective bargaining agreement.

Section 8. Meal Allowance and Eating En Route. Meal allowances at the away from home terminal will be governed by Article IX, Section 2 (d) of the 1986 BLE National Agreement. Meals enroute for not stopping to eat enroute will be governed by Article IX, Section 2 (e) of the 1986 BLE National Agreement.

Section 9. Suitable Lodging. Suitable lodging will be provided by the Carrier in accordance with Section 1 of Article II of the June 25, 1964 National Agreement.

Section 10. Extra Boards. The Carrier may establish guaranteed extra board(s) pursuant to Attachment "A" of the BLE and UP/SPWL November 3, 1997 Modifications Agreement.

Section 11. Hours-of-Service Relief. Turnaround service/hours of service relief shall be handled by the extra board, if available, prior to using pool crews. Employees used for this service may be used for multiple trips in one tour of duty in accordance with the designated collective bargaining agreement. Nothing in this agreement prevents the use of other crews to perform work currently permitted by prevailing agreements, including, but not limited to yard crews performing hours of service relief within the road/yard zone, ID crews performing service and deadheads between terminals, road switchers handling trains within their zones and using a crew from a following train to work a preceding train.

Section 12. Employee Protection. Employees adversely affected by the initial implementation of this interdivisional service will be afforded the protection benefits provided in Section 7 of Article IX of the May 19, 1986 BLE National Agreement.

Section 13. Implementation. On the effective date of this agreement, the Carrier will post a bulletin for this interdivisional service. Thereafter, employees who have a standing application on file with CMS for this interdivisional service will be assigned in accordance with the applicable seniority assignment rules.

Section 14. Effective Date. The Carrier shall give the General Chairman seven (7) days' written notice of its desire to implement this Agreement.

Signed at _____, this ____ day of _____.

FOR BROTHERHOOD OF LOCOMOTIVE
ENGINEERS & TRAINMEN

FOR UNION PACIFIC
RAILROAD COMPANY:

D. W. Hannah
General Chairman

D. B. Foley
Director Labor Relations

UNION PACIFIC RAILROAD COMPANY

Western Region

D. B. Foley Dir. Labor Relations
Tel: (916) 789-6345

10031 Foothills Blvd.
Roseville, CA 95747



July 26, 2013

Carrier File: 920.40-35

Mr. D.W. Hannah
General Chairman BLET
1902 Orange Tree Lane, Suite 120
Redlands, CA 92374

(Sent Via E-mail & US Mail)

Dear Sir:

This letter confirms our July 17, 2013, meeting in San Francisco wherein we discussed the establishment of new interdivisional service in the Yermo/West Colton and Yuma/West Colton transportation corridors. As the newly-issued July 17, 2013 notice outlined, this service was being established pursuant to Article IX "Interdivisional Service" of the May 19, 1986 BLE National Agreement, as amended and in response to certain items of concern BLET had voiced in earlier LABM Interdivisional Service negotiations.

Additionally, this letter responds to yours dated February 24, 2013, received via e-mail on July 24, 2013 referencing BLET's review of the Carrier's July 17, 2013 Interdivisional Notice. Typographical error aside, BLET's correspondence wrongly contends the Carrier's July 17, 2013 Interdivisional Notice and Proposed Draft Agreement "...does not create any new interdivisional service, and is therefore an improper application of Article IX..." As will be shown, such contention has been repeatedly and soundly rejected by competent authorities.

An Informal Disputes Committee established pursuant to Article XVI of the May 19, 1986 National Agreement decided a host of issues shortly after the 1986 BLET National Agreement was implemented. Debating those issues before a competent arbitrator were the very framers of the 1986 National Agreement. Among the disputes decided by that Committee was "Issue 3" as it is commonly known. That decision held Carriers clearly have the right to establish, extend or rearrange interdivisional service to obtain the efficiencies contemplated by Article IX. Neutral Member John B. La Rocco states in pertinent part:

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

Because the term interdivisional service as used in Article IX includes interdivisional, interseniority district, intradivisional and/or intraseniority district service, Carriers are permitted virtually any operating transformation to enhance general operating efficiency and/or compliment its overall transportation effort providing it meets the tenets of Issue 3. The rearrangement of home terminals can be part of any operating transformation.

In fact, on property Award No. 1 of PLB 3965 addressed this very issue. In that case Union Pacific served an Article IX Notice on a BLET Eastern District General Chairman to establish interdivisional service between Fremont and North Platte, Nebraska. That General Chairman took procedural exception to the notice likewise contending interdivisional service already existed in this territory and the Carrier was barred from so changing this operation under the guise of an Article IX notice. BLET also argued, as do you, the only means available to the Carrier for such change was through Section 6 of the Railway Labor Act. Rejecting BLET's arguments in there entirety Referee Jacob Seidenberg states:

"... The Board finds that it was pursuant to the May 1971 National Agreement that the parties negotiated the December 16, 1971 Agreement and implemented that Agreement on July 1, 1972 by a Notice dated May 1, 1972. These Agreements established the interdivisional service between Council Bluffs and North Platte and eliminated Grand Island as the away-from-home terminal for Engineers of the First and Second Seniority Districts.

"The Board finds no provision in the appropriate terms of the December 16, 1971 Agreement and Implementing Notice of May 1, 1972 that indicates or suggests that the Carrier could not, or was in any way prohibited from or limited in, establishing another interdivisional run within the territorial confines of Council Bluffs and North Platte, subject to the requisite Agreement provisions. It is difficult to hold analytically that there was any contractual prohibition against establishing a run within those confines but not quite as extensive, i. e., Fremont to North Platte and return. ...

"... In summary since the Board finds no probative evidence in the record to show that the Carrier's October 2, 1984 Notice was contractually proscribed, it has no recourse but to conclude that the aforesaid Notice was proper, notwithstanding the December 16, 1971 Agreement provided

for interdivisional service on the territory covered by the October 2, 1984 Notice..."

In the instant case, your conceding the fact compensation was not diminished from an "Article IX" perspective makes the Carrier's case on its face. BLET cannot in any way argue the Carrier's motives are *"solely to obtain to obtain the more favorable conditions in the 1986 National Agreement."* Union Pacific's valid reasons for more efficient and faster service options in this corridor were clearly outlined in its July 17, 2013 Notice.

BLET representatives made clear during previous "LABM" negotiations that certain items were not acceptable and suggested several alternatives for Union Pacific to consider. After listening to BLET and taking into account its issues, factors, concerns and suggestions our operating strategy was modified. As you were advised, our long pool operations between Delores/ICTF and Yermo and Delores/ICTF and Yuma would be reestablished under existing agreement provisions. However that alone does not address all of the required efficiencies. The newly proposed short pool and existing long pool arrangements will stabilize the workforce, positively address ongoing and chronic qualification/certification issues inherent to these transportation corridors and solve away from home terminal issues previously experienced and complained of by both parties. Moreover, this operating strategy diminishes BLET's multiple reporting point and excessive limbo and commuting time concerns within the Los Angeles Metropolitan Area. Lastly, the proposed short pool operation does not contemplate operating through Colton which was another issue BLET had with the previous operating strategy.

This letter will also serve as confirmation that the parties will meet in Las Vegas, Nevada at 8:00 AM on Tuesday August 13, 2013. A conference room has been reserved for the meeting at the Golden Nugget Hotel, 129 East Fremont, to continue negotiations pursuant to and consistent with your Organization's commitment to *"...mutually commit themselves to expedited processing of negotiations concerning interdivisional runs..."* as set forth in Article X of the November 1, 1991 BLE National Implementing Agreement.

If you have any further questions regarding this please call my office at your convenience.

Yours truly,



D. B. Foley
Director – Labor Relations

CC: Mike Twombly - BLET International VP
mtcotrain@aol.com

CC: Shane Keller - RVP
Ken Hunt - VP HDC
Rod Doerr - Super't
Terry Tate - Gen. Dir. Qual Srv
Gordon Wellington - Dir Fin
Brian McGavock - Super't HDC
Terry Olin - AVP LR
Randy Guidry - Gen Dir LR
Pete Jeyaram - Dir LR
Vanessa Warren - Asst Dir LR
Jay Reilly - Asst Dir LR
Josephine Jordan - Gen Dir CMS
Pat Kenny - Dir CMS
Tony Leazenby - Dir CMS
Cliff Johnson - Sr. Dir Tk



Brotherhood of Locomotive Engineers and Trainmen

UNION PACIFIC WESTERN LINES & PACIFIC HARBOR LINE, Inc.
1902 Orange Tree Lane, Suite 120
Redlands, CA 92374
(909) 792-1200 • Fax (909) 792-1211

D.W. HANNAH
Chairman

July
February 24, 2013

Certified Mail No. 7012 2920 0000 8557 6295
Return Receipt Requested

Mr. David Foley, Director, Labor Relations
Union Pacific Railroad Company
10031 Foothills Blvd.
Roseville, CA 95747

Org. File Claims E-20800 LABM

Dear Sir,

I have reviewed your letter of July 17, 2013, which purports to serve a Notice under Article IX of the May 19, 1986 National Agreement, of Union Pacific's intent to establish new interdivisional service. Without belaboring other problems with that Notice, it simply *does not create any new interdivisional service*, and is therefore an improper application of Article IX.

Union Pacific's Notice seeks to establish new service: (1) from Yermo to West Colton and (2) from Yuma to West Colton. This is *not* new service. As clearly set forth in the Los Angeles Hub Agreement, created as part of the Union Pacific – Southern Pacific merger, operations were instituted from West Colton to Yermo and from West Colton to Yuma. Union Pacific, in fact and reality, currently operates interdivisional service over the *exact same* territory it seeks to establish as "new" interdivisional service by its Article IX Notice of July 17, 2013. Notably, the mileage of UP's "new" proposed service is *exactly the same* as that of the existing service, i.e., 130 Basic Day miles from West Colton to Yermo, and 198 miles from West Colton to Yuma.

In fact, the Carrier also *currently has the right* to run service all the way from LATC/East Yard to both Yermo and Yuma. Union Pacific – for reasons known to it – has chosen to "zero out" this service instead of utilizing this longer run.



It is transparent that the true purpose of the Carrier's Article IX notice is to change an existing home terminal. This is not a proper nor allowable use of Article IX. The only means for securing a change in home terminal is pursuant to collective bargaining under Section 6 of the Railway Labor Act.

In light of the foregoing, the BLET – while willing to meet and negotiate in good faith – does not recognize the legitimacy of Union Pacific's purported Article IX notice of July 17, 2013, and asks that the Carrier formally withdraw it. Please advise if you intend otherwise.

Sincerely,

A handwritten signature in black ink, appearing to read "D.W. Hannah". The signature is written in a cursive style with a large, stylized initial "D".

D.W. Hannah

cc: Executive Committee (Email)
Mr. P. Tortorice, Local Chairman, Division 5 (Email)
Mr. K. Richards, Local Chairman, Division 56 (Email)
Mr. D. Carroll, Local Chairman, Division 660 (Email)
Mr. R. Sprague, Local Chairman, Division 28 (Email)

**MERGER IMPLEMENTING AGREEMENT
Los Angeles Hub**

between the

**UNION PACIFIC
SOUTHERN PACIFIC TRANSPORTATION COMPANY
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS**

In Finance Docket No. 32760, the U.S. Department of Transportation, Surface Transportation Board ("STB") approved the merger of the Union Pacific Corporation ("UPC"), Union Pacific Railroad Company/Missouri Pacific Railroad Company (collectively referred to as "UP") and Southern Pacific Rail Corporation, Southern Pacific Transportation Company ("SP"), St. Louis Southwestern Railway Company ("SSW"), SPCSL Corp., and The Denver & Rio Grande Western Railroad Company ("DRGW") (collectively referred to as "SP"). In approving this transaction, the STB imposed New York Dock labor protective conditions.

In order to achieve the benefits of operational changes made possible by the transaction, to consolidate the seniority of all engineers working in the territory covered by this Agreement into one common seniority district covered under a single, common collective bargaining agreement.

IT IS AGREED:

I. Los Angeles Hub

A new seniority district shall be created that encompasses the following area: UP territory including milepost 164.42 East of Yermo westward to end of track in the Los Angeles Basin and SP territory from (not including) Santa Barbara and milepost 460.0 at (including) Hivolt, and between Burbank Jct and Palmdale Jct, East to milepost 731.5 at (not including) Yuma including all tracks in the Los Angeles Basin and shall include all main and branch lines, industrial leads and stations between the points identified.

NOTE 1: Engineers with home terminals within the hub may work to points outside the Hub without infringing on the rights of other engineers in other Hubs and engineers outside the Hub may work to points inside the Hub without infringing on the rights of engineers inside the Los Angeles Hub. The Hub identifies the on duty points for assignments and not the boundaries of assignments. (This note is further explained in side letter No. 3)

II. Seniority and Work Consolidation.

The following seniority consolidations will be made:

11/06/98

A. A new seniority district will be formed and a master Engineer roster(s) shall be created for the Los Angeles Hub for the engineers on the current SP seniority roster and the current UP Seniority roster and PE Seniority roster or on a SP auxiliary board from a point inside the Hub but working outside the Hub or UP engineer borrowed out to other locations that will return to the Hub upon release. It does not include borrow outs or auxiliary board engineers to the Hub, if any. All such engineers must be on one of these rosters or in training on January 13, 1998.

B. The new roster will be created as follows:

1. UP, SP and PE Engineers will be dovetailed based upon the current engineer seniority date within the Hub. This shall include any engineer working in trainman/fireman service with an engineer's seniority date. If this process results in engineers having identical seniority dates, seniority ranking will be determined by the engineer's earliest retained hire date with the Carrier.
2. All engineers who entered training after January 13, 1998 and are promoted in the Hub after January 13, 1998 will be considered common engineers(holding no prior rights), and placed on the bottom of the roster. Those engineers who entered training prior to January 13, 1998 and are promoted after that date will be entitled to any prior rights set forth in this agreement. This includes those who entered training and have been hostling.
3. All engineers placed on the rosters may work all assignments protected by the roster in accordance with their seniority and the provisions set forth in this Agreement.
4. Engineers placed on the Los Angeles Hub Roster shall relinquish all seniority outside the new roster area upon implementation of this Agreement and all seniority inside the Los Angeles Hub held by engineers outside the Hub shall be eliminated.
5. For the purposes of prior rights, SP San Joaquin engineers who remain in the LA Hub, SP Los Angeles and PE engineers will be dovetailed into one SP prior right roster.

NOTE: San Joaquin engineers who have a right in the Roseville Hub Agreement to bid and relocate on assignments where work is moved will continue to do so in accord with those agreement provisions. Until that time they shall remain on the LA Hub roster.

C. Engineers who are on an authorized leave of absence or who are dismissed and later reinstated will have the right to displace to the appropriate roster, provided his/her seniority at time of displacement would have permitted him/her to hold that selection. The

parties will create an inactive roster for all such engineers until they return to service in a Hub or other location at which time they will be placed on the appropriate seniority rosters and removed from the inactive roster.

D. Prior rights and dovetail rights shall be governed by the following:

1. Until new extra boards are established the current ones shall be prior righted and protect the same assignments that they protected pre-merger. Once new extra boards are established they shall be filled from the dovetail rosters.
2. Road switchers and work trains that go on duty at pre-merger points that were clearly an SP or a UP point shall be filled using the prior right roster.
3. Road Switchers, local freights and work trains that go on duty at a pre-merger point that was a joint location or at a point where on duty points are consolidated, shall be filled as follows:

Harbor area:	70% SP and 30% UP
City of Industry	75% SP and 25% UP

Engineers will be required to fill their prior right positions in the pre merger part of the above two areas first. For example, UP engineers will fill Paramount and Mead positions if available prior to former SP positions in the Harbor area.

NOTE: When on duty points of the two former Carriers are consolidated a ten (10) day advance notice will be given.

4. Locals that run to or from Yermo shall be prior righted to the UP roster regardless of the on duty point. Locals that run West (such as Oxnard, Gemco, Palmdale and Santa Barbara) to pre merger SP destinations shall be prior righted to the SP roster regardless of the on duty point. This does not apply to locals that run to the Harbor area as that has been a joint area. All other locals shall be prior righted based on the on duty point.
5. Extra work trains shall be filled from the extra boards.
6. Victorville helpers shall be UP prior righted and Colton Helpers shall be SP prior righted.
7. Except as otherwise provided for in this agreement, all assignments at LATC/East Yard shall be prior righted on a 50/50 percentage basis per shift, at West Colton they shall be SP prior righted and at Yermo they shall be UP prior righted. Any new facility assignments established at other locations after the merger shall be filled from the dovetail roster. (This does not apply

to expansions of existing facilities)

8. Pools that run only to Yermo shall be UP prior righted and pools that run only to Yuma and/or Indio shall be SP prior righted up to the baseline number for the specific destination. The baseline number shall be 99(SP) and 37(UP). (The numbers 99 and 37 come from the number of pool turns the respective properties have had for the past two years). Turns above the baseline number shall be filled in one of the two following methods:
 - a. If either the UP or SP drop below the baseline by a minimum of three turns and the other pools increase by a minimum of three then the Local Chairman may request that the increase in turns, up to the number decreased in the other pools, be prior righted to the roster that lost the turns. These turns will be the first ones whose prior rights are phased out in E, 2, below.
 - b. All increases not filled by a, above shall be filled from the dovetail roster.
9. In determining the baseline, the SP shall add up the number of turns that go to Indio and Yuma, whether from West Colton or LATC/East Yard and subtract from that 35 (which represents their premerger portion of the West Colton-Basin Pool). The UP shall add up the number of turns that go to Yermo, whether from the West Colton or LATC/East Yard and subtract 9 (which represents their premerger portion of the West Colton-Basin Pool). Since there is more than one pool the Local Chairman shall designate how the prior right turns are allocated between the pools and once designated they cannot be changed.

Example: The SP baseline is 99. After implementation the West Colton-Yuma pool has 45 turns and the LATC/East Yard-Yuma pool has 25. The total is 70. When one adds the 35 allocated to the West Colton-Basin pool the total comes to 105. This is 6 over the baseline. The Local Chairman must designate how many of the 45 and 25 turns are prior righted leaving six non prior right turns. If he designates all 25 in the LATC/East Yard and 39 in the West Colton pools then he cannot later change the designation.
10. The West Colton-Basin pool shall be prior righted on an 80(SP)/20(UP) basis up to the number 44 and shall be filled on a dovetailed basis after that number. The attached chart shows the specific job allocation.
11. Assignments at Yuma, both regular and extra board, protected by the West Colton source of supply shall be governed as follows:
 - a. The assignments shall be prior righted to SP engineers holding

seniority in the Los Angeles Hub on the day this agreement is implemented.

- b. If an assignment goes no bid/application then it shall be filled by an engineer from the adjoining Hub.
- c. LA Hub SP prior right engineers shall have bid/application rights to vacancies on these assignments and shall not have displacement rights to them if they are held by an engineer from the adjoining Hub for a period of time not to exceed 6 months from the date the engineer from the other Hub holding the assignment is assigned, unless the 6 month period of time is waived by the engineer holding the assignment.

NOTE: These provisions shall become applicable when the adjoining area is under a merger agreement/award.

- 12. Engineers who are on assignments on the day of implementation shall remain on those assignments unless they make application to another vacancy or are displaced by engineers with displacement rights under the controlling CBA. This agreement does not create displacement rights due to its implementation.

E. Prior rights shall be phased out on the following basis:

- 1. Non pool freight prior right assignments shall have the prior rights phased out at the rate of 25% per year beginning with the start of year eight and 25 % with the start of year nine. The local chairman shall designate in writing 30 days prior to the end of each year the assignments that will no longer be prior righted the next year. Failure to do so will result in the Carrier selecting the assignments. The remaining prior rights (50%) shall be phased out through attrition.
- 2. Pool freight prior right assignments shall have the prior rights phased out at the rate of 25% per year beginning with the start of year eight and 25 % with the start of year nine. The remaining prior rights (50%) shall be phased out through attrition.
- 3. Yuma positions shall be prior righted until attrited.

III. POOL OPERATIONS/ASSIGNED SERVICE

The following operations may be instituted:

A. West Colton-Yermo and West Colton-Yuma - These operations will be run as separate pools. Trains originating or terminating at Mira Loma may be operated by West Colton engineers with the on and off duty point at West Colton. Engineers in this pool that take trains to and from Mira Loma shall be governed as follows:

1. This only applies when engineers go through Riverside and does not permit West Colton pool engineers to run through West Colton to Pomona and then back down the Riverside line to Mira Loma.
2. Engineers in the West Colton-Yuma pool shall be paid actual miles between Mira Loma and Yuma.
3. Engineers in the West Colton-Yermo pool with a trainman/engineman seniority date subsequent to October 31, 1985 shall be paid a 30 minute arbitrary in addition to all other payments when delivering or receiving trains at Mira Loma. Should the engineer receive the train on the outbound trip and deliver one on the return trip then they shall be entitled to two 30 minute payments.
4. Engineers on duty time shall begin and end at West Colton and not at Mira Loma.
5. If pool engineers hostler their power to and from Mira Loma they shall be paid the mileage from West Colton to Mira Loma.
6. For those eligible engineers, ITD shall be computed from the time on duty at West Colton until departure is made from Mira Loma and FTD shall be computed from the time the engineer "yards" the train at Mira Loma and ties up at West Colton. This does not change the method used to calculate ITD and FTD but identifies that Mira Loma will be considered "in the terminal" for these calculations.

B. LATC/EAST YARD-Yermo/Yuma - These operations shall be run as two separate pools, one to Yuma and one to Yermo.

NOTE: The parties recognize that traffic disruption due to track work, and potential temporary line closures for other reasons, may result in several trains using alternate routes in **A** and **B** above. In these instances, CMS shall contact the Local Chairman, and engineers from the route with reduced traffic shall be called to operate on the other line with calls being alternated between the two pools.

C. West Colton- Basin - These operations shall be run as one pool or a combination of pool service, with the home terminal at West Colton, and assigned service. Assigned service shall designate the home and away from home terminal. Assigned service shall have a single away from home terminal for each assignment. The pool shall have three away from home terminals of; the combined SP/UP LATC/LA East Yard terminal/LA/Long Beach Harbor area, Anaheim, and Gemco. This pool may be run as straight away with engineers tying up at the far terminal or as turn around. Service to City of Industry shall be run as turn around service with the engineer working or being

deadheaded in combination service back to West Colton at the end of the tour of duty.

NOTE: The Carrier shall give a ten day notice for the implementation of service in (A),(B), and (C), above if not given in the notice to implement this Hub agreement. Notice may be given individually or for more than one operation. Operations in place prior to the implementation of this Agreement shall continue until the Carrier serves notice to implement new operations and abolish old operations or the BLE exercises the cancellation clauses of the flat rate agreements.

D. Any pool freight, local, work train, hostler or road switcher service may be established in accordance with the controlling CBA.

E. None of the engineers in (A) through (D) above shall be restricted, in or between the terminals of their assignment, as to where they may set out or pick up cars or leave or receive their train. The type and amount of work shall be governed by the controlling CBA. All engineers may operate over any and all tracks and alternate routings between locations.

IV. EXTRA BOARDS

A. The Carrier may establish extra boards at any location in accordance with the governing CBA. The Carrier will give a thirty day notice of the consolidation of pre-merger extra boards and the notice provisions of the governing CBA shall be used in the establishment of new extra boards.

B. If there are no rested and available West Colton pool engineers at the away from home points LATC and the Harbor area, then the closest extra board may be used to work trains back to West Colton. When so used they will not be tied up at West Colton but will deadhead back to their on duty point. If sufficient traffic exists to warrant a pool to protect this service then a pool shall be established. The use of this pool shall be ahead of using a West Colton engineer in combination deadhead service.

C. Exhausted extra boards.

1. If one of the above extra boards is exhausted, then another (secondary)extra board may be used prior to using other sources of supply. Secondary extra boards shall be identified by bulletin.

2. An engineer called from his/her extra board for an assignment in another area not principally covered by their extra board shall be handled as follows:

a. Pay received for this assignment shall not be used as an offset for extra board guarantee but shall be in addition to, however, it shall be used in computing whether the engineer is entitled to protection pay at the end of the month.

- b. An engineer unavailable at time of call for secondary assignments shall have a deduction made in their extra board guarantee in accordance with the extra board agreement and shall have an offset to their protection in accordance with the protection offset provisions. If miss called for secondary calls, the engineer shall not be placed on the bottom of the board but will hold his/her place.
- c. An engineer unavailable at time of call for secondary assignments shall not be disciplined.

D. On a temporary basis, until the Yuma area is under a merger agreement/award that provides for the consolidated Yuma extra board to cover El Centro vacancies and Yuma based assignments, The LA Hub extra board at Yuma will continue to protect all assignments that it protected pre-merger.

V. TERMINAL AND OTHER CONSOLIDATIONS

A. The SP LATC and UP LA East Yard shall be combined into a single terminal covering the existing terminal limits for each Carrier and the connecting trackage between the two terminals. Yard engineers shall not be restricted as to where in the terminal they can operate.

B. The provisions of A above will not be used to enlarge or contract the current limits except to the extent necessary to combine into a unified operation.

C. In the LA Hub, prior to this implementing Agreement, there existed several trackage rights, stations and Harbor areas used by both Carriers. With the implementation of this Agreement all areas, trackage, stations and facilities in the Hub shall be common to all engineers as a single unified system. Engineers shall not be restricted in the Hub where they can operate except on the basis of CBA provisions that set forth limits of an assignment such as the radius of a road switcher.

D. Riverside Line - When heading west, trains that pass Colton Crossing onto the Riverside line may be operated by West Colton-Basin crews as if "in the terminal". When heading East, trains that reach Streeter, a point directly south of West Colton on the Riverside line, may be operated by West Colton-Yuma or West Colton Yermo crews as if "in the terminal". This does not apply to Mira Loma trains as those trains have separate provisions.

VI. AGREEMENT COVERAGE

- A. General Conditions for Terminal Operations.

1. Initial delay and final delay will be governed by the controlling collective bargaining agreement, including the Duplicate Pay and Final Terminal Delay provisions of the 1986 and 1991 National and Implementing Agreements and awards.
2. Engineers will be transported to/from their trains to/from their designated on/off duty point in accordance with Article VIII, Section 1 of the May 1986 National Agreement. The Carrier shall designate the on/off duty points for engineers.
3. The current application of National Agreement provisions regarding road work and Hours of Service relief under the combined road/yard service Zone, shall continue to apply. Yard engineers at any location within the Hub may perform such service in all directions out of their terminal.

B. General Conditions for Pool/Assigned Operations in Article III.

1. The terms and conditions of the pool operations set forth in Article III (A), and (B) shall be the same except where specifically provided otherwise in those Sections. The terms and conditions are those of the surviving collective bargaining agreement as modified by subsequent national agreements, awards and implementing documents and those set forth in this Agreement.
2. The terms and conditions of the pool and assigned service in Article III (C) shall be as follows:
 - a. The pool shall operate first in/first out at the home terminal.
 - b. Engineers, if operated in pool service to Gemco and Anaheim, shall be operated first in/first out at each away from home location.
 - c. Engineers operated to LATC/LA East yard and the Harbor shall be treated as one pool, stay at the same lodging facility and shall operate first in/first out from the far terminal for calls to either LATC/LA East yard or the Harbor to return to West Colton. The lodging facility shall be the on and off duty point for this pool when at the away from home point.
 - d. Pool engineers shall be paid in accordance with Sections 1,2,5, and 6 of the flat rate road switcher agreement effective September 16, 1996. The flat rate for these assignments shall be \$300.00/engineer. These payments shall be inclusive of any payments for not stopping to eat. When given a call and release, the call and release rules shall apply for engineers in this pool in lieu of the flat rate.

- e. In addition, that agreement shall be amended so that the cancellation clause shall be a one year notice unless the hours of service is changed from the current 12 hour provisions, in which case the cancellation notice shall be a 30 day notice. If canceled then the engineers shall be paid in accordance with pool freight service conditions based on the miles of the assignments.
 - g. Other payments made to the pool engineers will be in accordance with the held way from home provisions, overtime after 12 hours, the 25 mile zone payments, payments that are applicable when another person is in the cab such as an employee in training and runarounds of the governing CBA. The held time payment shall be made at the rate as provided in section 5(a) of the agreement (156.11) subject to all future wage and cola adjustments.
 - h. If there is both pool service and assigned service to the same location, they shall not be combined at the far terminal but shall operate independently from each other for the return trip.
 - l. Local freight assignments shall operate under local freight work and pay rules.
 - j. Separate and apart deadheading shall be paid in accordance with the National Agreement provisions and shall not be paid the flat rate. Separate and apart deadheading shall be from the home or away from home point to the away from home or home point when not connected with service. It does not include any deadheading in connection with service that would be covered in the flat rate.
 - k. Unless canceled sooner than the implementation date of this agreement, Agreement E&F 188-138 dated January 5, 1995 and all side letters and Questions and Answers to it are cancelled with the implementation of this agreement.
3. **Twenty-Five Mile Zone** - As provided in the note below, pool engineers may receive their train up to twenty-five miles on the far side of the terminal and run on through to the scheduled terminal. Engineers shall be paid an additional one-half ($\frac{1}{2}$) basic day for this service in addition to the miles run between the two terminals. If the time spent in this zone is greater than four (4) hours, then they shall be paid on a minute basis.

NOTE 1: This provision will apply at Yermo and Yuma for all pool engineers and at West Colton for LA Hub and Bakersfield pool engineers (only on trains that have not reached West Colton)

from Bakersfield, Yermo and Yuma). It does not apply to trains that have not reached West Colton from the West.

NOTE 2: The Twenty five mile zone towards Yermo and Yuma shall be measured from Colton Crossing which shall extend to milepost 563.7 towards Yuma.

4. **Turnaround Service/Hours of Service Relief.** Except as provided in (3) above, turnaround service/hours of service relief at both home and away from home terminals shall be handled by extra boards, if available, prior to using pool engineers. Engineers used for this service may be used for multiple trips in one tour of duty in accordance with the designated collective bargaining agreement rules. Extra boards may handle this in all directions out of a terminal.
5. Nothing in this Section B (3) and (4) prevents the use of other engineers to perform work currently permitted by prevailing agreements, including, but not limited to yard engineers performing Hours of Service relief within the road/yard zone, ID engineers performing service and deadheads between terminals, road switchers handling trains within their zones and using an engineer from a following train to work a preceding train and payments required by the controlling CBA shall continue to be paid when this work is performed.

C. Agreement Coverage - Engineers working in the Los Angeles Hub shall be governed, in addition to the provisions of this Agreement, by the Collective Bargaining Agreement selected by the Carrier, including all addenda and side letter agreements pertaining to that agreement and previous National Agreement/Award/Implementing Document provisions still applicable. Except as specifically provided herein the system and national collective bargaining agreements, awards and interpretations shall prevail. None of the provisions of these agreements are retroactive. The Carrier has selected the SP WEST modified BLE Agreements.

VII. PROTECTION.

A. Due to the parties voluntarily entering into this agreement the Carrier agrees to provide New York Dock wage protection (automatic certification) to all prior right engineers who are listed on the Los Angeles Hub Merged Rosters and working an assignment (including a Reserve Board) on January 13, 1998. (The term working shall also include those engineers disciplined and later returned to work and those full time Union Officers should they later return to service with the Carrier.) This protection will start with the effective (implementation) date of this agreement. The engineers must comply with the requirements associated with New York Dock conditions or their protection will be reduced for such items as layoffs, bidding/displacing to lower paying assignments when they could

hold higher paying assignments, etc. Protection offsets due to unavailability are set forth in the Questions and Answers and side letter #1.

B. This protection is wage only and hours will not be taken into account.

C. Engineers required to relocate under this agreement will be governed by the relocation provisions of New York Dock. In lieu of New York Dock provisions, engineers required to relocate may elect one of the following options:

1. Non-homeowners may elect to receive an "in lieu of" allowance in the amount of \$10,000 upon providing proof of actual relocation.
2. Homeowners may elect to receive an "in lieu of" allowance in the amount of \$20,000 upon providing proof of actual relocation.
3. Homeowners in Item 2 above, who provide proof of a bona fide sale of their home at fair value at the location from which relocated, shall be eligible to receive an additional allowance of \$10,000.
 - (a) This option shall expire five (5) years from date of application for the allowance under Item 2 above.
 - (b) Proof of sale must be in the form of sale documents, deeds, and filings of these documents with the appropriate agency.
4. With the exception of Item 3 above, no claim for an "in lieu of" relocation allowance will be accepted after two (2) years from date of implementation of this agreement.

NOTE: The two (2) year provision of this paragraph (4) shall be extended for engineers if operations affecting those engineers are not instituted until less than ninety (90) days remain in the two year period. If not instituted within 21 months of implementation then affected engineers shall have a one year extension from the date operations are instituted to request an "in Lieu of" payment.

5. Engineers receiving an "in lieu of" relocation allowance pursuant to this implementing agreement will be required to remain at the new location, seniority permitting, for a period of two (2) years.
6. In addition to those engineers required to relocate, engineers at the location where assignments are relocated from shall be treated as required to relocate under this Agreement, seniority governing, on a one for one basis equal to the number of assignments transferred. Once the number of in lieu

of allowances are granted equal to the number of assignments transferred all other moves associated with the specific number of assignments transferred will not be eligible for any moving allowance. The following is a list of assignments that will be transferred:

- a. Assignments to West Colton for the West Colton-Basin pool/assigned service.
- b. Assignments to West Colton for the West Colton-Yermo pool.
- c. Assignments to LATC for the LATC-Yuma pool.
- d. Extra board assignments in connection with the above moves. Engineers who are augmenting an extra board from a regular extra board shall be considered as assigned at the regular extra board point for determining whether relocation provisions shall apply.

D. There will be no pyramiding of benefits.

E. National Termination of Seniority provisions shall not be applicable to Engineers hired prior to the effective date of this agreement.

F. Engineers will be treated for vacation, payment of arbitraries and personal leave days as though all their service on their original railroad had been performed on the merged railroad. Engineers assigned to the Los Angeles Hub seniority roster with a seniority date prior to January 13, 1998 shall have entry rate provisions waived and engineers hired after that date shall be subject to the rate progression provisions of the controlling CBA. Those engineers leaving the Los Angeles Hub will be governed by the CBA where they then work.

VIII. FAMILIARIZATION

A. Engineers involved in the consolidation of the Los Angeles Hub covered by this Agreement whose assignments require performance of duties of a new geographic territory not familiar to them will be given familiarization opportunities as quickly as possible. Engineers will not be required to lose time or ride the road on their own time in order to qualify for these new operations.

B. Engineers will be provided with a sufficient number of familiarization trips in order to become familiar with the new territory. Issues concerning individual qualification shall be handled with local operating officers. The parties recognize that different terrain and train tonnage impact the number of trips necessary and an operating officer will be assigned to the merger that will work with the local managers of Operating Practices in implementing this Section. If disputes occur under this Agreement they may be addressed directly with the appropriate Director of Labor Relations and the General Chairman for expeditious resolution.

C. It is understood that familiarization required to implement the merger

consolidation herein will be accomplished by calling a qualified engineer (or qualified Manager of Operating Practices) to work with an engineer called for service on a geographical territory not familiar to the engineer.

D. Engineers who work their assignment (road or yard) accompanied by an engineer taking a familiarization trip shall be paid one (1) hour at the pro rata rate), in addition to all other earnings for each tour of duty. This payment shall not be used to offset any extra board payments. The provision of 3 (a) and (b) Training Conditions of the System Instructor Engineer Agreement shall apply to the regular engineer when the engineer taking the familiarization trip operates the locomotive.

E. Locomotive engineers will not be required to make the decision on whether or not an engineer being familiarized is sufficiently familiarized for the territory.

F. An engineer concerned about familiarization on his/her assignment must contact a Manager Operating Practices prior to being called to resolve the concerns.

IX. IMPLEMENTATION

The Carrier shall give 30 days written notice for implementation of this agreement and the number of initial positions that will be changed in the Hub. Thereafter implementation provisions of the various articles shall govern any further changes.

X. HEALTH AND WELFARE

A. Engineers currently are under either the National Plan or the Union Pacific Hospital Association. Engineers coming under a new CBA will have six months from the implementation of this agreement to make an election as to keeping their old coverage or coming under the coverage of their new CBA. Engineers who do not make an election will have been deemed to elect to retain their current coverage. Engineers hired after the date of implementation will be covered under the plan provided for in the surviving CBA.

This Agreement is entered into this ____ day of _____ 1998.

For the Organization:

For the Carrier:

General Chairman BLE UP

General Director Labor Relations

General Chairman BLE SPWest

General Chairman BLE PE

Vice-President BLE

Vice-President BLE

BLE QUESTIONS AND ANSWERS LOS ANGELES HUB

Article I - LOS ANGELES HUB

- Q1. How far east of Yermo may a LA Hub engineer work?
A1. This Question is answered in detail in side letter No.3
- Q2. When the language says "not including" a point may engineers work into that point and if so what work may they do.
A2. Yes, engineers may work into those points. For example, LA Hub pool engineers may work into Yuma and perform any work permitted by applicable agreements for that class of service with Yuma as their final terminal. The "not including" refers to putting assignments with a home terminal on duty at that location. Both West Colton and Las Vegas pool engineers may work into the common terminal of Yermo, however only LA Hub engineers have seniority to hold yard, local, road switcher and extra board assignments that go on duty with Yermo as a home terminal.

Article II - SENIORITY AND WORK CONSOLIDATION

- Q3. How long will prior rights be in effect?
A3. These will be phased out at differing times depending on the type of service.
- Q4. Are full time union officers including full time state legislative board representatives, Company officers, medical leaves and those on leave working for government agencies covered under Article II, C?
A4. Yes.

- Q5. How many engineers are covered by the inactive roster referenced in Article II.C?
A5 The "inactive roster" noted in Article II.C, refers to the status of engineers who are not in active service who pre-merger were on a UP roster in the Los Angeles Hub or at a location on SP West Lines during the qualifying period set forth in the assorted Hub Agreements. Such engineers include those on leave of absence for government, union and company service, medical leave including disability, etc. Because those engineers have rights to exercise seniority upon return to active service but may not do so from inactive status, such engineers will be required to select a Hub upon their return to active service. It is not possible to predict the number of people who may return from inactive status and, thereafter, the Hub that such people may select upon their return. Therefore, eligibility to mark up in a Hub must be determined for each individual upon that individual's return to active status.

ARTICLE III - POOL/ASSIGNED SERVICE OPERATIONS

- Q6. What will be the mileage paid in West Colton-Yermo pool service?
A6. The actual mileage between those two points with a minimum of a basic day for service or combination deadhead/service. If the engineer receives or leaves a train at Mira Loma then engineers with a post October 31, 1985 trainman/engineer seniority date are entitled to a one-half hour arbitrary payment.
- Q7. What will be the mileage paid in the West Colton-Yuma pool?
A7. Same as the pre merger mileage, 198 miles. If the engineer goes to Mira Loma then additional mileage will be paid.
- Q8. Will existing pool freight terms and conditions apply on all pool freight runs?
A8. No. The terms and conditions set forth in the surviving collective bargaining agreements and this document will govern.
- Q9. Will there be both assigned service and pool service at the same time in the West Colton-Basin operations?
A9. The Carrier has the right to establish the type of service needed to service its customers. As such it may have assigned service to some areas and pool service to other areas at the same time.
- Q10. Will West Colton-Basin engineers be tied up a second time at an away from home point?
A10. No, if they take a train to some point other than the home terminal they will be transported to the home terminal. For example, if a West Colton-Basin engineer whose previous tour of duty took him/her to the Harbor, takes a train from the Harbor to LATC after they have obtained their rest, they will not be tied up at LATC, which would be a second tie-up at a far terminal but shall be transported back to West Colton.

Q11. Are there any van miles paid for riding to and from Mira Loma?

A11. No, since ITD and FTD is applicable or the half hour arbitrary van miles are not paid.

Q12. Does payment of miles run to Mira Loma from Yuma or the arbitrary from Yermo extend "free time" before ITD and FTD time is paid for?

A12. No.

ARTICLE IV - EXTRA BOARDS

Q13. How many extra boards will be established at implementation?

A13. The number is not known at this time. There will be a phase in of the familiarization process and they will consolidated and established as this process proceeds.

Q14. Are these guaranteed extra boards?

A14. Yes. The pay provisions and guarantee offsets and reductions will be in accordance with the surviving CBA guaranteed extra board agreement.

Q15. When will the Yuma extra board cover all the assignments provided for in this agreement.

A15. If after merger discussions with those engineers representatives from the adjoining Hub an implementing agreement/award so provides it will take place with the implementation of that agreement/award.

Q16. In Article IV B, will engineers be worked back from West Colton to their original on duty point?

A16. No, these engineers are made up extra board or pool engineers handling an imbalance of trains when no rested and available away from home engineers, and will be deadheaded back to their on duty point.

Q17. How will these engineers be paid?

A17. They will be paid under the flat rate provisions and their trip to West Colton and deadhead back shall be considered as one tour of duty.

ARTICLE V - TERMINAL CONSOLIDATIONS

Q18. Are the national road/yard Zones covering yard engineers measured from the new terminal limits where the yard assignment goes on duty?

A18. The new terminal/station limits where the yard engineer goes on duty will govern.

ARTICLE VI - AGREEMENT COVERAGE

Q19. When the surviving CBA becomes effective what happens to existing claims filed under the other collective bargaining agreements that formerly existed in the LA Hub?

- A19. The existing claims shall continue to be handled in accordance with those agreements and the Railway Labor Act. No new claims shall be filed under those agreements once the time limit for filing claims has expired for events that took place prior to the implementation date.
- Q20. How will vacations for 1999 be handled?
A20. They will continue to be handled under the CBA that covered them at the beginning of the year. Vacations for 1999 will be scheduled at the end of 1998 under the provisions of the then prevailing agreements.
- Q21. If an engineer in the 25 mile zone is delayed in bringing the train into the original terminal so that it does not have time to go on to the far terminal, what will happen to the engineer?
A21. Except in cases of emergency, the engineer will be deadheaded on to the far terminal.
- Q22. Is it the intent of this agreement to use engineers beyond the 25 mile zone?
A22. No.
- Q23. In Article VI, is the ½ basic day for operating in the 25 mile zone frozen and/or is it a duplicate payment/ special allowance?
A23. No, it is subject to future wage adjustments and it is not duplicate pay/special allowance.
- Q24. How is an engineer paid if they operate in the 25 mile zone?
A24. If a pre-October 31, 1985 engineer is transported to its train 10 miles East of Yermo and he takes the train to West Colton and the time spent is one hour East of Yermo and 9 hours between Yermo and West Colton with no initial or final delay earned,(total time on duty 10 hours) the engineer shall be paid as follows:
- A. One-half basic day for the service East of Yermo because it is less than four hours spent in that service.
 - B. The road miles between Yermo and West Colton with a minimum of a basic day .
 - C. Overtime based on the governing CBA. Since the trip is less than 130 miles, overtime will commence after 8 hours on duty so one hour will be paid at overtime.
- Q25. Would a post October 31, 1985 engineer be paid the same?
A25. In this case yes. The National Disputes Committee has determined that post October 31, 1985 engineers come under the overtime rules established under the National Agreements/Awards/Implementing Agreements that were effective after that date for both pre-existing runs and subsequently established runs. As such, the post October 31, 1985 engineer would receive the overtime in C above because the overtime provisions on runs of less than a basic day are the same for both pre and

post October 31, 1985 engineers.

- Q26. How will initial terminal delay be determined when performing service in the 25 mile zone?
- A26. Initial terminal delay for engineers entitled to such payments will be governed by the applicable collective bargaining agreement and will not recommence when the engineer operates back through the on duty point. Operation back through the on duty point shall be considered as operating through an intermediate point.
- Q27. Are any payments retained that are triggered by a West Colton Basin engineer turning or performing work that prevents them from turning?
- A27. No
- Q28. Are any payments retained for any engineer receiving or leaving a train dockside?
- A28. No.
- Q29. Can you give some examples of deadheads that would and would not be eligible for the flat rate pay and what is the deadhead rate?
- A29. The deadhead rate is \$156.11/daily and \$19.51/hourly. The following would govern:
- Example 1: A West Colton engineer is called to deadhead to the Harbor and obtain rest. This would not be eligible for the flat rate. If the engineer was called one hour after tying up and told to take a train back this would not be combined with the first deadhead because he had been instructed to tie-up and had done so. He/she would be paid the flat rate for the return trip separate from the deadhead over.
- Example 2: A West Colton engineer is at the away from terminal and after rest is deadheaded back to West Colton. This would not be eligible for the flat rate.
- Example 3: A West Colton engineer takes a train to LATC then is driven to Dolores and takes a train to City of Industry and is deadheaded back to West Colton without a break in service. This is covered under the flat rate agreement and no additional payment is made.
- NOTE : When an employee is being paid under the flat rate provisions then the wording used to tell an engineer that they are being transported or deadheaded as part of their tour of duty is not material and does give rise to a separate and apart claim.
- Q30. Does the language of VI B 4 prohibit the use of pool freight engineers in straight away combination deadhead/service from picking up a train whose engineer had earlier expired under the Hours of Service Act?

- A30. No, the language of Article VI B 5 clearly preserves that service. The language of VI B 4 provides that extra boards will be used before pool engineers in turnaround service and does not require that they be used prior to pool engineers in straight away service.
- Q31. May engineers run through their destination terminal up to 25 miles?
- A31. No, the twenty-five mile provisions are only for obtaining a train on the far side of a terminal and not for running through their destination terminal.

ARTICLE VII - PROTECTION

- Q32. What rights does an engineer have if he/she is already covered under labor protection provisions resulting from another transaction?
- A32. Section 3 of New York Dock permits engineers to elect which labor protection they wish to be protected under. By agreement between the parties, if an engineer has three years remaining due to the previous implementation of Interdivisional Service the engineers may elect to remain under that protection for three years and then switch to the number of years remaining under New York Dock. It is important to remember that an engineer may not receive duplicate benefits, extend their protection period or count protection payments under another protection provision toward their test period average for this transaction.
- Q33. How will reductions from protection be calculated?
- A33. In an effort to minimize uncertainty concerning the amount of reductions and simplify this process, the parties have agreed to handle reductions from New York Dock protection as follows:
1. **Pool freight assignments** - 1/15 of the monthly test period average will be reduced for each unpaid absence of up to 48 hours or part thereof. Absences beyond 48 hours will result in another 1/15 reduction for each additional 48 hour period or part thereof.
 2. **Five day assignments** - 1/22 of the monthly test period average will be reduced for each unpaid absence of up to 24 hours or part thereof. Absences beyond 24 hours will result in another 1/22 reduction for each additional 24 hour period or part thereof.
 3. **Six & seven day assignments** - The same process as above except 1/26 for a six day assignment and 1/30 for a seven day assignment.
- NOTE:** There shall be no offset from protection for rest days on five day and six day assignments,.
4. **Extra board assignments** - 1/30 of the monthly test period average will be reduced for each unpaid absence of up to 24 hours or part thereof.

Absences beyond 24 hours will result in another 1/30 reduction for each additional 24 hour period or part thereof.

NOTE: Absences on the extra board shall be calculated from the time of unavailability (layoff, missed call, etc) until the next time called for service. For example: If a engineer lays off on Monday at noon, marks up the next day, Tuesday, and does not work until 2 AM on Wednesday, then they shall be off for protection purposes for thirty-eight (38) hours and shall be deducted 2/30 of their protection.

- Q34. Why are there different dollar amounts for non-home owners and homeowners?
A34. New York Dock has two provisions covering relocating. One is Article I, Section 9, Moving Expenses and the other is Section 12, Losses from Home Removal. The \$10,000 is in lieu of New York Dock moving expenses and the remaining \$20,000 is in lieu of loss on sale of home.
- Q35. Why is there one price on loss on sale of home
A35. It is an in lieu of amount. Engineers have an option of electing the in lieu of amount or claiming New York Dock benefits. Some people may not experience a loss on sale of home or want to go through the procedures to claim the loss under New York Dock.
- Q36. What is loss on sale of home for less than fair value?
A36. This refers to the loss on the value of the home that results from the Carrier implementing this merger transaction. In many locations the impact of the merger may not affect the value of a home and in some locations the merger may affect the value of a home.
- Q37. If the parties cannot agree on the loss of fair value what happens?
A37. New York Dock Article I, Section 12(d) provides for a panel of real estate appraisers to determine the value before the merger announcement and the value after the merger transaction.
- Q38. What happens if a engineer sells the home for \$20,000 to a family member?
A38. That is not a bona fide sale and the engineer would not be entitled to either an in lieu of payment or a New York Dock payment for the difference below the fair value.
- Q39. What is the most difficult part of New York Dock in the sale transaction?
A39. Determine the value of the home before the merger transaction. While this can be done through the use of professional appraisers, many people think their home is valued at a different amount.
- Q40. Who is required to relocate and thus eligible for the allowance?
A40. A engineer who can no longer hold a position at his/her location and must relocate to hold a position as a result of the merger. This excludes engineers who are borrow outs or forced inside the Hub and released and engineers who have to

exercise seniority due to a non merger event.

Example : Due to the new West Colton-Yermo pool an engineer can no longer hold a position at East Yard and must work at West Colton. Since this is a result of the merger transaction then the engineer may be eligible.

Q41. Are there any seniority moves that will be treated as required to relocate?

A41. Yes and the following are examples:

Example 1: Ten turns are reduced in the West Colton-Yuma pool and ten turns are added in the LATC-Yuma pool. Ten senior engineers at West Colton may make application for those positions and be entitled to a relocation allowance should they meet the mileage criteria.

Example 2: The same ten turns are moved, however, a more senior engineer on a City of Industry road switcher makes application for one of the turns. Since the senior engineer is not following his/her work nor required to relocate the application is a seniority move and does not trigger a relocation allowance.

Q42. Are there mileage components that govern the eligibility for an allowance?

A42. Yes, the engineer must have a reporting point farther than his/her old reporting point and at least 30 highway miles between the current home and the new reporting point and at least 30 highway miles between reporting points.

Example 1: If the on-duty point for road engineers is relocated from East Yard to LATC, both within the same Terminal, this does not trigger a relocation allowance.

Example 2: An engineer lives in Long Beach, 18 miles from his/her on duty point and as a result of the merger must report at West Colton, 70 miles from their residence. If they relocate then they would be eligible for a relocation allowance.

Example 3: An engineer resides at Ontario and works at Gemco. Due to the merger they are required to report to West Colton. Since West Colton is closer than Gemco they are not entitled to a relocation allowance.

Q43. At what time did an engineer need to be a home owner to qualify as a home owner for relocation purposes?

A43. New York Dock protects home owners due to loss on sale of home that are caused by the merger. A person who purchases a home after the merger was approved in September 1996 would not be affected by the merger because they were not a home owner at that time.

Q44. Will engineers be allowed temporary lodging when relocating?

- A44. Engineers entitled to a relocation allowance shall be given temporary lodging for thirty (30) consecutive days as long as they are marked up.
- Q45. Are there any restrictions on routing of traffic or combining assignments?
A45. There are no restrictions on the routing of traffic in the Los Angeles Hub once the 30 day notice of implementation has lapsed. There will be a single collective bargaining agreement and limitations that currently exist in that agreement will govern (e.g. radius provisions for road switchers, road/yard moves etc.). However, none of these restrictions cover through freight routing. The combining of assignments between the Carriers is covered in this agreement and is permitted.
- Q46. Will the Carrier offer separation allowances?
A46. The Carrier will review its manpower needs at each location and may offer separation allowances if the Carrier determines that they will assist in the merger implementations..
- Q47. What period will be used for the TPA?
A47. Calendar year 1998 for engineers not electing to retain SP West modification/engineer protection.
- Q48. How will Union Officers TPA's be established?
A48. The Carrier will average the two above and two below (on the pre-merger rosters) in any service. If greater than their regular TPA it shall be used. Engineers with unusually high or low TPA's will not be considered.
- Q49. Since UP engineers hired after January 13, 1998 have a five year entry rate rule and the SP engineers have a three year entry rate rule how will the UP engineers be treated at implementation?
A49. They will come under the SP rule and will have their entry rates adjusted upward.

Article IX -FAMILIARIZATION

- Q50. Are there a set number of trips that an engineer will take in learning new territory?
A50. No, since engineers have differing experiences the number of trips will vary and the local chairmen will work with local operating officers on the number and type of trips needed.

Article X - IMPLEMENTATION

- Q51. On implementation will all engineers be contacted concerning job placement?
A51. No, the implementation process will be phased in and engineers will remain on their assignments unless abolished or combined and then they may place on another assignment. When the Carrier posts the notice on pool changes and increases and decreases in extra boards Local Chairman will assist in handling the bidding, application and placement process at that time and engineers may be contacted for

placement if insufficient bids/applications are received. The new seniority rosters will be available for use by engineers who have a displacement.

Q52. What is meant by the term "harbor area"

A52. The harbor area is the area from Dominguez Jct (SP) and Douglas Jct (UP) and dockside. Engineers that report to an on duty point within this area may leave or receive their train anywhere between these two points and dockside.

Q53. If any existing road territory is turned into a switching territory would prior rights still exist?

A53. Yes

Q54. Are the road switchers that go on duty in the Imperial Valley remaining in the LA Hub?

A54. Yes, pursuant to the provisions of IV D.

Q55. Is the road switcher agreement E&F1-2248 going to apply for road switchers currently governed by it?

A55. Yes except that the cancellation clause has been amended to one year and the rate of pay is as provided in this agreement. The agreement will also now apply to all road switchers west of West Colton in the LA Hub.

Q56. What is meant by assigned service?

A56. Local freight and road switcher service.

November 6, 1998
Side Letter No. 1

Dear Sirs:

During our discussions on New York Dock and extended Protection we discussed the issue of a pool engineer taking a single day paid absence such as a Personal Leave day or single day vacation and the impact it will have on his/her protection. In an effort to simplify the process and to provide the pool engineer with an alternative the parties agree that a pool engineer shall have one of the following options:

- (1) Elect a single paid personal leave or vacation day and hold their turn so that if it obtains a first out status they will be first out when they are marked up no less than 24 hours later, with no deduction from their protection; or
- (2) Elect a minimum of two consecutive days paid personal leave days on pools whose round trip district miles are 400 or less or a minimum of three consecutive days on pools whose round trip district miles are more than 400 miles and not hold their turns. If the minimum number of consecutive days are met for each round trip, then no deduction will be made in their protection.

Question #1: If the round trip district miles of a run are 390 miles and initial and or final terminal delay make a payment over 400 miles how many personal leave days must be used.

Answer #1: Only the district miles are used for determining the number of personal leave days to be used. In this case two personal leave days would qualify for no deduction.

Question #2: If the round trip district miles are over 400 miles how is a deadhead counted.

Answer#2: Deadheads are already taken into account by using a 1/15th offset for pools. Since most pools do not average 15 round trips per month a 1/15th offset is less than using the average for each pool. As a result the round trip district miles are used for determining the number of personal leave days that would substitute for no offset and in this case three personal leave days would qualify.

Question #3: If the Yuma pool returns to Mira Loma, employees in that pool will not know if their trip would have gone over 400 miles at the time of layoff. How will they be governed?

Answer #3: The round trip district miles of the pool is the determining factor and trips that take a West Colton-Yuma pool to Mira Loma will not change the minimum two consecutive personal leave or vacation days since the regular pool round trip is 396 miles.

(3) Elect a single paid personal leave or vacation day and not hold their turn resulting in payment of a single day with a corresponding 1/15th deduction from protection.

The option must be selected by the engineer at the time the personal leave or vacation day is granted. Engineers must file the protection form each time they take paid days in accordance with the above options.

Yours truly,

W.S. Hinckley

Agreed:

General Chairman BLE

General Chairman BLE

General Chairman BLE

November 6, 1998
Side Letter No.2

Dear Sirs:

This refers to our several discussions concerning Yuma and the Carrier's plans for assignments at that location and the extra board plans for that area.

Currently Yuma is the away from home terminal for West Colton crews. In addition there are a couple of assignments (local/road switcher) that work east and a couple of assignments (local/ road switcher) that work west from Yuma. Sometimes the Carrier has run the Imperial Valley assignments from Yuma and sometimes from West Colton.

In addition to the provisions of this agreement, the following will apply:

1. The two extra boards will be consolidated on a 50/50 basis with the LA Hub entitled to prior rights to the even number assignments up to the number of assignments on their extra boards when the extra boards are consolidated. For example, if there are three extra board assignments at time of consolidation then the LA Hub shall have prior rights to numbers 2, 4, and 6. There will then be one extra board at Yuma and the extra board at Yuma will be used to fill short term vacancies on all assignments that have Yuma as a home terminal whether LA Hub vacancies or the Hub that includes Tucson, and EL Centro assignments.
2. The extra board will perform hours of service relief/turnaround service as far west as Niland (MP 667) in the LA Hub and as far east as is negotiated in the next Hub.
3. These prior rights are to be attrited and are not under the phase out provisions

Yours truly,

W.S. Hinckley

Agreed:

General Chairman BLE

General Chairman BLE

General Chairman BLE

November 6, 1998
Side Letter No.3

Gentlemen:

During negotiations the parties spent considerable discussion concerning the intent and meaning of NOTE 1 of Article I. It was agreed that further detail would be provided in a side letter explaining how different types of operations would be affected.

Therefore, the following is meant to give further definition to the NOTE.

Road Switchers: Road Switcher agreements in the controlling CBA provide for a 25 mile limit unless specifically provided otherwise. A road switcher that goes on duty inside the Hub and covered by the 25 mile provisions, would be limited by those provisions even though the 25 miles would take the assignment into the adjoining Hub. For example, a road switcher at Yermo (LA Hub assignment) would therefore be limited to 25 miles from the station limits in either direction. Similarly a road switcher that goes on duty in another Hub may work to its limits even if those limits include part of the LA Hub.

Locals on duty inside the Hub: Current locals that go on duty inside the Hub may continue to operate to points outside the Hub. New locals that go on duty in the Hub that will work in two or more Hubs will be established in accordance with CBA provisions including Article IX national ID provisions.

Locals on duty outside the Hub: Current locals that go on duty outside the Hub may continue to operate to points inside the Hub. New locals that go on duty in the Hub that will work in two or more Hubs will be established in accordance with CBA provisions including Article IX national ID provisions.

Current Pools and Pools established by Merger Agreements: These pools may operate between their designated terminals even if outside the Hub. At Yermo and Yuma they may operate up to 25 miles beyond the terminal when picking up a train in accordance with the 25 mile provisions of Article VI B 3. Bakersfield pool crews will be governed by their 25 mile provisions for trains East of West Colton but not for trains that are West of West Colton including the area between LATC and the Harbor area.

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

Extra Boards: LA Hub extra boards may go as far as Santa Barbara on the

Coast Line, as far as Hivolt on the line to Bakersfield from West Colton and Palmdale from LATC and as far as Kelso towards Las Vegas to perform hours of service relief. The Yuma extra board may go as far as Niland in the LA Hub to perform hours of service relief.

NOTE: It is not the intent to supersede the provisions of 3(c) of Article 6 of the controlling CBA. Hours or service relief required west of M.P. 667 (Niland) will continue to belong to the West Colton Pool.

Example 1: A road switcher on duty at Yermo may work in any direction up to the limits of its radius as set by the road switcher agreement without infringing on the rights of Salt Lake Hub crews.

Example 2: A West Colton pool freight crew would continue to operate through freight from West Colton to Yuma and perform the same work as it performed pre-merger.

Example 3: A Bakersfield pool freight crew would continue to operate through freight from Bakersfield to West Colton and perform the same work as it performed pre-merger.

Example 4: LA Hub crews would work the Dolores unit oil train that runs to Mojave and back to the Basin if the home terminal is in the Basin.

Yours truly,

W.S. Hinckley

Agreed:

General Chairman BLE

General Chairman BLE

General Chairman BLE

November 6, 1998
Side Letter No. 4

Gentlemen:

During our negotiations we discussed several times running a pool from the harbor area to Yermo and Yuma. Several points were discussed including having these operations combined with the LATC pool and having dual reporting points for the combined pools. Due to several uncertainties in how the Alameda corridor would operate once it was completed and any operating restrictions that would be placed on this area by government entities that are involved in its planning, building and operations, the Carrier agreed to remove this item from our negotiations. This withdrawal was without prejudice to either parties position on the appropriateness of the operations and aspects of this service and does not otherwise affect the merger of the two Carriers in the Harbor area.

If this service is instituted in the future then the Carrier will serve an Article IX Interdivisional Notice to cover its implementation.

Yours truly,

W.S. Hinckley

Agreed:

General Chairman BLE

General Chairman BLE

General Chairman BLE

November 6, 1998
Side Letter No. 5

Gentlemen:

The parties recognize the need to coordinate the implementation of this Hub with that of the Roseville Hub and to allow sufficient time to properly set up pools and extra boards that an interim period is needed to assist in these matters. The following shall govern.

1. The interim period shall begin with the implementation of this agreement.
2. New York Dock wage protection shall not begin until the interim period is over except it shall be no longer than one year from the implementation date. Wage Protection during the interim period shall be known as interim protection and shall be governed by all the applicable provisions of this agreement.
3. During the interim period San Joaquin engineers in the LA Hub will be required to continue to work pool assignments to Bakersfield and San Luis Obispo and supporting extra boards and will be considered as holding the highest paying position they can hold until the work is relocated. This will not negatively impact their rights to a relocation if otherwise eligible.
4. Pool assignments and extra boards shall be established gradually to provide time to familiarize engineers on new assignments and still keep operations fluid. For example: When the West Colton-Yermo pool is established a temporary separate extra board will be set up to cover this service and to familiarize on the other West Colton assignments. When the two extra boards are sufficiently familiarized then they may be combined. Also the West Colton- Basin pool may be established a few assignments at a time to properly familiarize engineers.
5. All pay provisions as established in this agreement shall go into effect on implementation day, even for the remaining LATC/Dolores pool as it is phased out.

Prior to implementation the Carrier will advise the single on duty point for the LATC/Dolores pool until phased out.

Yours truly,

W.S. Hinckley

Agreed:

General Chairman BLE

General Chairman BLE

General Chairman BLE

November 6, 1998

Mr. M.A. Mitchell
General Chairman BLE
44 North Main
Layton, Utah 84041

Mr. E.L. Pruitt
General Chairman BLE
2414 Edison HWY
Bakersfield CA 93307

Dear Sirs:

The question was raised as to an apparent discrepancy in the milepost designations at Yermo. It was correctly pointed out that the mileposts in the Salt Lake Hub and Los Angeles Hub do not coincide at Yermo.

During the Salt Lake Hub negotiations an agreement was not reached with all employees and it was necessary to proceed to arbitration. Since we were drawing new boundary lines the Carrier took the position that all connecting points of Hubs were common points and as such it would be appropriate to have the Salt Lake Hub go to the far West end of Yermo and the Los Angeles Hub go to the far East end of Yermo showing an overlap of the common terminal.

During subsequent merger negotiations it was agreed by both parties that initial and final terminals were common to all pool crews that worked into and out of them. This has been a long standing practice especially with ID runs and it was not necessary in the future to "overlap" the connecting points. What is important is that all parties understand that Yermo terminal is in the Los Angeles Hub for filling assignments that go on duty in the terminal. It is an away from home point for Las Vegas crews and they may continue to perform the same work associated with their pools that they have performed previously.

It was agreed that it was not necessary to "correct" the milepost designation in the Salt Lake Hub award as this letter sets forth the proper and intended designation of Yermo as a Los Angeles Hub terminal for crews with a home terminal at that location.

Yours truly,

W.S. Hinckley

Agreed:

General Chairman BLE

General Chairman BLE

BLE
MAY 19, 1986

APPENDIX B

AWARD
of
ARBITRATION BOARD NO. 458
DATED MAY 19, 1986
between railroads represented by the
NATIONAL CARRIERS' CONFERENCE COMMITTEE

and

employees of such railroads represented by the
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

Section 3 - Incidental Work

Road and yard employees in engine service and qualified ground service employees may perform the following items of work in connection with their own assignments without additional compensation:

- (a) Handle switches
- (b) Move, turn, spot and fuel locomotives
- (c) Supply locomotives except for heavy equipment and supplies
generally placed on locomotives by employees of other
crafts
- (d) Inspect locomotives
- (e) Start or shutdown locomotives
- (f) Make head-end air tests
- (g) Prepare reports while under pay
- (h) Use communication devices; copy and handle train orders,
clearances and/or other messages.
- (i) Any duties formerly performed by firemen.

Section 4 - Construction of Article

Nothing in this Article is intended to restrict any of the existing rights of a carrier.

This Article shall become effective June 1, 1986 except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representatives on or before such date.

ARTICLE IX - INTERDIVISIONAL SERVICE

Note: As used in this Agreement, the term interdivisional service includes interdivisional, interseniority district, intradivisional and/or intraseniority district service.

An individual carrier may establish interdivisional service, in freight or passenger service, subject to the following procedure.

Section 1 - Notice

An individual carrier seeking to establish interdivisional service shall give at least twenty days' written notice to the organization of its desire to establish service, specify the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service.

Section 2 - Conditions

Reasonable and practical conditions shall govern the establishment of the runs described, including but not limited to the following:

(a) Runs shall be adequate for efficient operations and reasonable in regard to the miles run, hours on duty and in regard to other conditions of work.

(b) All miles run in excess of the miles encompassed in the basic day shall be paid for at a rate calculated by dividing the basic daily rate of pay in effect on May 31, 1986 by the number of miles encompassed in the basic day as of that date. Weight-on-drivers additives will apply to mileage rates calculated in accordance with this provision.

(c) When a crew is required to report for duty or is relieved from duty at a point other than the on and off duty points fixed for the service established hereunder, the carrier shall authorize and provide suitable transportation for the crew.

Note: Suitable transportation includes carrier owned or provided passenger carrying motor vehicles or taxi, but excludes other forms of public transportation.

(d) On runs established hereunder crews will be allowed a \$4.15 meal allowance after 4 hours at the away from home terminal and another \$4.15 allowance after being held an additional 8 hours.

(e) In order to expedite the movement of interdivisional runs, crews on runs of miles equal to or less than the number encompassed in the basic day will not stop to eat except in cases of emergency or unusual delays. For crews on longer runs, the carrier shall determine the conditions under which such crews may stop to eat. When crews on such runs are not permitted to stop to eat, crew members shall be paid an allowance of \$1.50 for the trip.

(f) The foregoing provisions (a) through (e) do not preclude the parties from negotiating on other terms and conditions of work.

Section 3 - Procedure

Upon the serving of a notice under Section 1, the parties will discuss the details of operation and working conditions of the proposed runs during a period of 20 days following the date of the notice. If they are unable to agree, at the end of the 20-day period, with respect to runs which do not operate through a home terminal or home terminals of previously existing runs which are to be extended, such run or runs will be operated on a trial basis until completion of the procedures referred to in Section 4. This trial basis operation will not be applicable to runs which operate through home terminals.

Section 4 - Arbitration

(a) In the event the carrier and the organization cannot agree on the matters provided for in Section 1 and the other terms and conditions referred to in Section 2 above, the parties agree that such dispute shall be submitted to arbitration under the Railway Labor Act, as amended, within 30 days after arbitration is requested by either party. The arbitration board shall be governed by the general and specific guidelines set forth in Section 2 above.

(b) The decision of the arbitration board shall be final and binding upon both parties, except that the award shall not require the carrier to establish interdivisional service in the particular territory involved in each such dispute but shall be accepted by the parties as the conditions which shall be met by the carrier if and when such interdivisional service is established in that territory. Provided further, however, if carrier elects not to put the award into effect, carrier shall be deemed to have waived any right to renew the same request for a period of one year following the date of said award, except by consent of the organization party to said arbitration.

Section 5 - Existing Interdivisional Service

Interdivisional service in effect on the date of this Agreement is not affected by this Article.

Section 6 - Construction of Article

The foregoing provisions are not intended to impose restrictions with respect to establishing interdivisional service where restrictions did not exist prior to the date of this Agreement.

Section 7 - Protection

Every employee adversely affected either directly or indirectly as a result of the application of this rule shall receive

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the protection afforded by Sections 6, 7, 8 and 9 of the Washington Job Protection Agreement of May 1936, except that for the purposes of this Agreement Section 7(a) is amended to read 100% (less earnings in outside employment) instead of 60% and extended to provide period of payment equivalent to length of service not to exceed 6 years and to provide further that allowances in Sections 6 and 7 be increased by subsequent general wage increases.

Any employee required to change his residence shall be subject to the benefits contained in Sections 10 and 11 of the Washington Job Protection Agreement and in addition to such benefits shall receive a transfer allowance of four hundred dollars (\$400.00) and five working days instead of the "two working days" provided by Section 10(a) of said agreement. Under this Section, change of residence shall not be considered "required" if the reporting point to which the employee is changed is not more than 30 miles from his former reporting point.

If any protective benefits greater than those provided in this Article are available under existing agreements, such greater benefits shall apply subject to the terms and obligations of both the carrier and employee under such agreements, in lieu of the benefits provided in this Article.

This Article shall become effective June 1, 1986 except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representatives on or before such date. Article VIII of the May 13, 1971 Agreement shall not apply on any carrier on which this Article becomes effective.

ARTICLE X - LOCOMOTIVE STANDARDS

In run-through service, a locomotive which meets the basic minimum standards of the home railroad or section of the home railroad may be operated on any part of the home railroad or any other railroad.

A locomotive which meets the basic minimum standards of a component of a merged or affiliated rail system may be operated on any part of such system.

ARTICLE XI - TERMINATION OF SENIORITY

The seniority of any employee whose seniority-in engine or train service is established on or after November 1, 1985 and who is furloughed for 365 consecutive days will be terminated if such employee has less than three (3) years of seniority.

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ARTICLE XII - FIREMFN

PUBLIC LAW BOARD NO. 6740

Case No. 2

Award No. 2

PARTIES TO DISPUTE: BROTHERHOOD OF LOCOMOTIVE ENGINEERS

-and-

BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY

QUESTION AT ISSUE

Does the Agreement proposed by the Carrier to govern the establishment and operation of interdivisional freight service with home terminal at Stockton, California, to operate between Stockton and Bakersfield, California, satisfy the requirements of Sections 1 and 2 of Article IX of the May 19, 1986, BLE Arbitrated National Agreement?

ARTICLE IX – INTERDIVISIONAL SERVICE

Section 1- Notice

An individual Carrier seeking to establish interdivisional service shall give at least twenty days' written notice to the organization of its desire to establish service, specify the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service.

Section 2 – Conditions

Reasonable and practical conditions shall govern the establishment of the runs described, including but not limited to the following:

- (a) Runs shall be adequate for efficient operations and reasonable in regard to the miles run, hours on duty and in regard to other conditions of work.
- (b) All miles run in excess of the miles encompassed in the basic day shall be paid for at a rate calculated by dividing the basis daily rate of pay in

effect on May 31, 1986 by the number of miles encompassed in the basic day as of that date. Weight-on-drivers additives will apply to mileage rates calculated in accordance with this provision.

- (c) When a crew is required to report for duty or is relieved from duty at a point other than the on and off duty points fixed for the service established hereunder, the Carrier shall authorize and provide suitable transportation for the crew.

Note: Suitable transportation includes Carrier owned or provided passenger carrying motor vehicles or taxi, but excludes other forms of public transportation.

- (d) On runs established hereunder crews will be allowed a \$4.15 meal allowance after 4 hours at the away from home terminal and another \$4.15 allowance after being held an additional 8 hours.
- (e) In order to expedite the movement of interdivisional runs, crews on runs of miles equal to or less than the number encompassed in the basic day will not stop to eat except in cases of emergency or unusual delays. For crews on longer runs, the carrier shall determine the conditions under which such crews may stop to eat. When crews on such runs are not permitted to stop to eat, crew members shall be paid an allowance of \$1.50 for the trip.
- (f) The foregoing provisions (1) through (e) do not preclude the parties from negotiating on other terms and conditions of work. . . .

Section 3 – Procedure

Upon serving a notice under Section 1, the parties will discuss the details of operations and working conditions of the proposed runs during a period of 20 days following the date of the notice. If they are unable to agree, at the end of the 20-day period, with respect to runs which do not operate through a home terminal or home terminals of previously existing runs which are to be extended, such run or runs will be operated on a trial basis until completion of the procedures referred to in Section 4. This trial basis operation will not be applicable to runs which operate through home terminals.

Section 4 – Arbitration

- (a) In the event the Carrier and the organization cannot agree on the matters provided for in Section 1 and the other terms and conditions referred to in Section 2 above, the parties agree that such dispute shall be submitted to arbitration under the Railway Labor Act, as amended, within 30 days after arbitration is requested by either party. The

arbitration board shall be governed by the general and specific guidelines set forth in Section 2 above. . . .

Section 5 – Existing Interdivisional Service

Interdivisional service in effect on the date of this Agreement is not affected by this Article.

BACKGROUND:

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

The Burlington Northern Santa Fe Railway Company (hereinafter referred to as BNSF or the Carrier) transports substantial international freight that arrives in containers at the ports of Los Angeles and Long Beach, California. BNSF ships this freight east to Chicago via its so-called “racetrack” which operates through San Bernardino and Barstow, California and Winslow, Arizona.

After the containers are unloaded at Chicago, the Carrier transports them to ports in Seattle, Washington and Portland, Oregon over its Northern lines. After the containers are loaded onto ships, the trains that transported them, so-called “buggies” or “bare tables,” return to Southern California to pick up loaded containers for the trip to Chicago over the “racetrack.” The Carrier refers to this as “I-5” traffic since the tracks over which these trains operate parallel highway Interstate 5 on the west coast. Both the Carrier’s “bare table” traffic operating southward and its “I-5” freight traffic operating northward is growing appreciably.

As a result of the merger of the Union Pacific Railroad (hereinafter referred to as the Union Pacific or the UP) and the Southern Pacific Transportation Company (hereinafter referred to as the Southern Pacific or the SP) the Carrier gained trackage rights between Keddie and Stockton, California.

BNSF has intermodal facilities at the Richmond/Oakland, California ports. On July 20, 1972, the so-called "*Riverbank Run-Through*" Agreement was negotiated with the Brotherhood of Locomotive Engineers (hereinafter referred to as the BLE or the Organization) for engine service employees and the United Transportation Union (hereinafter referred to as the UTU) for ground service employees. This Agreement allows double-ended pool crews to operate in interdivisional service between Richmond (Oakland) and Calwa (Fresno) California. These pool crews operate through the terminal at Stockton and the terminal at Riverbank, California.

As the Carrier's "I-5" traffic began to increase, it was absorbed into the Riverbank run-through pools. According to the Carrier, for several reasons, it soon became obvious that using this interdivisional (ID) pool to handle traffic to and from Stockton, California, was inefficient.

Currently, crews in the Riverbank run-through pools go on duty at Richmond and are transported by highway 76 miles to Stockton where they take charge of the train and operate it the 125 miles to Fresno. Because these ID pool crews are transported over crowded Northern California highways from Richmond to Stockton, travel time is difficult to estimate. Moreover, trains operating south to Stockton operate over Union Pacific tracks that are controlled by the UP. Therefore, the UP determines when BNSF trains will be released to operate to Stockton.

There have been times when a BNSF train has blocked the UP mainline at Stockton waiting for a crew to arrive from Richmond. This adversely affects Union Pacific's operations. At other times, a pool crew arrives at Stockton before the southbound train arrives. This reduces the legal hours of service available to crews and it is not unusual for crews to outlaw before they reach Fresno.

In order to increase the number of trains it may operate on the "I-5" corridor, the Carrier intends to obtain trackage rights over the UP between Stockton and Bakersfield, California, a distance of approximately 236 miles. The Carrier estimates that securing such trackage rights will double its capacity.

On September 8, 2003, the Carrier served notice on the Organization pursuant to Article IX, Section 1, of the May 19, 1986 Award of Arbitration Board No. 458 to establish interdivisional service between Stockton and Bakersfield, California through the terminals of Riverbank and Fresno. Stockton would be the home terminal and Bakersfield the away-from-home terminal for this ID service. The Carrier included a proposal with its September 8, 2003, notice specifying the service it intended to establish and the conditions it proposed to govern this interdivisional service.

On October 16, 2003, the Carrier held a joint meeting with the BLE and the UTU to discuss its notice to establish ID service between Stockton and Bakersfield, California. As a result of discussions at that meeting, the Carrier modified the proposal it had appended to its September 8, 2003, notice. According to the BNSF, its modified proposal included several benefits that exceed the "*reasonable and practical*" conditions required by Article IX, Section 2, of the 1986 Award of Arbitration Board No. 458. For instance, Engineers in this ID service would receive a meal allowance greater than that provided by

the BLE National Agreement; all miles in excess of a basic day were to be paid for at the conductor-only overmile rate; Locomotive Engineers in this service would be allowed to advance their vacations to coincide with layover days at the home terminal; they would be allowed to mark up during the last 24-hour calendar day of vacation to avoid missing a trip; and they would not be required to trade trains moving in the opposite direction.

The Carrier maintains that it made it manifestly clear to the Organization at the October 16, 2003 meeting that the modified proposal was contingent on the proposal being ratified and if the proposal was not ratified the enhanced benefits in the proposed agreement would be withdrawn. The agreement failed ratification. Therefore, the dispute was submitted to arbitration in accordance with Article IX, Section 4, of the 1986 Award of Arbitration Board No. 458. The matter came before this Board for a hearing on March 10, 2004. Based on the evidence and arguments advanced by the Organization and the Carrier at that hearing, this Board hereby renders the following decision.

FINDINGS and OPINION

On February 26, 2004, the Organization advised the Carrier that it does not consider the proposed interdivisional pool freight service between Bakersfield and Stockton "new" service. Rather, in the Organization's view, the Carrier is attempting to establish interdivisional service within the current Richmond - Calwa interdivisional run that has been in existence since 1972. According to the Organization, Article IX of the 1986 BLE National Agreement prohibits carriers from establishing interdivisional service within and overlapping an existing interdivisional run.

This Board respectfully disagrees with the Organization's contention that the proposed ID service does not constitute new interdivisional service. In our opinion, the

interdivisional service proposed by the Carrier in its September 8, 2003, notice involves new freight business to and from the Pacific Northwest on BNSF's Northern California Division. There are 236 district miles between Stockton and Bakersfield whereas the ID run between Richmond and Fresno is 194 miles. Moreover, the new ID run will operate through Fresno to Bakersfield while the Riverbank ID pools stop at Fresno.

On the Riverbank interdivisional service, Richmond and Calwa (Fresno) are the home terminals for the pool freight crews. On the interdivisional service proposed by the Carrier, Stockton will be the home terminal for the pool freight crews and Bakersfield will be the away-from-home terminal. The new interdivisional service proposed by the Carrier will be separate and distinct from the Riverbank ID run, in this Board's opinion.

The Organization argues that a March 31, 1987 decision rendered by the Informal Disputes Committee that was established pursuant to the 1986 BLE National Agreement supports its position that the Carrier does not have the right under Article IX of the 1986 National Agreement to establish interdivisional service between Stockton and Bakersfield, California, since this proposed interdivisional service is within and overlapping an existing [Riverbank] interdivisional run. However, a careful reading of that the decision actually supports the Carrier's position in the instant dispute, in our opinion.

In the dispute that was before the Informal Disputes Committee, the Southern Pacific Transportation Company had superimposed elongated interdivisional service on preexisting interdivisional service. That, of course, is not what BNSF is proposing. For example, the current 76 miles between Richmond and Stockton that is part of the Riverbank run will not be included in the interdivisional service proposed by the Carrier.

Additionally, the Riverbank run will continue to exist after the proposed interdivisional service between Stockton and Bakersfield is established. Engineers will work in both pools. The proposed Stockton-Bakersfield ID run will not affect the existing Richmond-Fresno ID run.

The Informal disputes Committee went on to find that:

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

In the instant dispute, the Carrier is not proposing a “*substantial re-creation*” of the Richmond-Fresno interdivisional service, in the opinion of this Board. Nor is this new interdivisional service “*designed solely*” to obtain the more favorable conditions in the 1986 BLE National Agreement. Rather, the objective of the new service is to increase freight traffic on BNSF’s Northern California Division and to make this operation more efficient by eliminating the deadheading of pool crews from Richmond to Stockton and allowing them to run through Fresno to Bakersfield.

That the proposed interdivisional service will traverse some of the same territory traversed by the Richmond-Fresno ID pools does not make it impermissible under Article IX of the 1986 BLE National Agreement, in this Board’s opinion. As explained above, the Carrier is not simply superimposing elongated interdivisional service on preexisting interdivisional service to obtain the more favorable conditions in the 1986 BLE National Agreement. Rather, it is proposing to establish new interdivisional service in Northern California to increase its freight service between the Pacific Northwest and Southern California and to make this service more efficient. The Carrier has the right to establish

this interdivisional service pursuant to Article IX of the 1986 BLE National Agreement, in our judgment, notwithstanding the Organization's objections.

Article IX, Section 2, of the 1986 BLE National Agreement mandates that "*reasonable and practical*" conditions must govern interdivisional service that is proposed by a carrier. Article IX, Section 2, sets forth examples of reasonable and practical conditions, such as the runs must be reasonable regarding miles run and hours on duty. Section 2 also explains how employees are to be compensated when miles run exceed the miles encompassed in the basic day. Further, it requires carriers to provide employees suitable transportation when a crew is required to report for duty or is relieved from duty at a point other than the on and off duty point established for the interdivisional service. It also provides crews a meal allowance and, under some circumstances, an allowance when they are not allowed to stop and eat.

Article IX, Section 2, expressly states that the parties may negotiate other terms and conditions of employment in addition to those set forth in Section 2 (a) - (e). If they are unable to reach an agreement and arbitration is invoked, the arbitration board is governed by the general and specific guidelines set forth in Section 2.

The conditions proposed by the Carrier for the Stockton-Bakersfield interdivisional service exceed the reasonable and practical conditions required by Article IX, Section 2, of the 1986 BLE National Agreement, in this Board's opinion. The proposed run is 236 miles, which is not unreasonable or impractical. Pool crews should be able to complete this run in eight hours, according to the Carrier. Crews will be provided suitable transportation when they are required to report for duty or are relieved

from duty at points other than Stockton or Bakersfield. They will also be allowed meal allowances in accordance with BLE National Agreements.

The conditions that the Carrier proposed for the Stockton-Bakersfield interdivisional service exceed those required by Article IX, Section 2, of the 1986 BLE National Agreement in several respects. For instance, the agreement contains a "*foot of the board*" arrangement that the Organization proposed. Additionally, employees in this service will be allowed to advance their vacations to coincide with layover days at the home terminal. They will also be allowed to mark up during the last 24-hour calendar day of their vacation so as to avoid missing a round trip. Further, if these employees are required to perform local freight work they will receive the pre-1985 switching allowance.

Since pool Engineers on the interdivisional service proposed by the Carrier also will work the Richmond-Fresno ID run they should receive the benefits provided by the Riverbank Run-through Agreement, according to the Organization. Among other benefits, this would include overtime after 10 hours and payment at the conductor-only overmile rate for all miles in excess of those encompassed in the basic day. The Organization contends that these employees are also entitled to continuous held-away-from home terminal pay after the expiration of 16 hours and a monetary allowance if they are required to change trains between their initial and final terminals.

With one exception, this Board does not find the Organization's proposals warranted. It is noteworthy that some of these proposals, such as the overmile rate and a meal allowance in excess of that provided in the BLE National Agreement, were in the tentative agreement that failed ratification.

A compelling argument can be made that employees should not receive benefits in arbitration that they expressly rejected during negotiations. This Board agrees with that logic. This is particularly so in the present case where the Carrier specifically informed the BLE that the modified proposal that was agreed to on October 16, 2003, contained benefits that were expressly contingent on ratification of this proposal and these enhancements would be withdrawn if the proposal were not ratified. Nevertheless, under the unique circumstances extant in this case, we find that Locomotive Engineers in the proposed interdivisional service between Stockton and Bakersfield are entitled to the conductor-only overmile rate even though overmiles are entirely unrelated to this new interdivisional service.

In 1990, the former Santa Fe Railway Company asked its Locomotive Engineers for financial relief in order to avoid bankruptcy. The Engineers agreed to freeze their wages for five years to help the Santa Fe avoid a potential bankruptcy. Because of this concession, their basic daily rate of pay is below the national average for Locomotive Engineers. As a *quid pro quo* for this concession, the Santa Fe agreed to allow Engineers in Riverbank ID service the conductor-only overmile rate for all miles in excess of those encompassed in the basic day. Engineers earned that benefit and it should be continued for employees in the Stockton – Bakersfield ID service, in this Board's opinion. Other than this, the agreement proposed by the Carrier for this interdivisional service shall be adopted. That agreement is appended hereto and made part of this Award.

reasoned that if the parties wanted to preclude any further rearrangement of existing interdivisional runs under a 1985-86 Article IX notice, they certainly had the opportunity to clarify that intent. What they did say was:

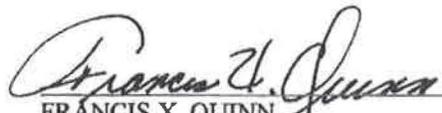
“Interdivisional service in effect on the date of this Agreement is not affected by this Article.”

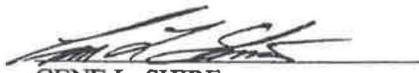
It is clear there is no barrier to serving an Article IX notice to rearrange and/or extend an existing interdivisional run, and the notice would be deemed invalid only if it were shown to be a substantial re-creation of existing service designed to take advantage of the more favorable Article IX, Section 2 conditions.

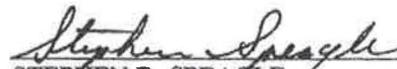
The record supports BNSF’s position in this dispute. There is no substantial re-creation of any existing interdivisional service in question here. BNSF found it necessary to extend and/or rearrange existing interdivisional service in the face of significant operational necessities brought about due to a significant increase in volume. We must conclude that notice was proper and that the proposed conditions meet those required under the National Agreements.

Award:

The questions at issue are answered in the affirmative.


FRANCIS X. QUINN
Chair and Neutral Member


GENE L. SHIRE
Carrier Member


STEPHEN D. SPEAGLE
Organization Member

Fort Worth, Texas
April 12, 2004

PUBLIC LAW BOARD NO. 3900

PARTIES	BURLINGTON NORTHERN RAILROAD)	
	)	AWARD NO. 1
TO	AND)	
	)	CASE NO. 1
DISPUTE	UNITED TRANSPORTATION UNION)	

STATEMENT OF CLAIM:

Claim of Lake Superior Seniority District Conductor D. D. Peterson, Brakemen J. D. Finn and R. D. Maki for 313 miles at the through freight rate applicable to 126-145 cars handled, in lieu of 219 miles allowed for March 16, 1984, when they performed unassigned freight service in and out of the terminal at Kelly Lake, Minnesota.

All analogous subsequent claims are covered by this submission as set forth in paragraph (C) of Item "F" of Mediation Agreement signed January 13, 1955 (N.M.B. Case A-4495) and by this reference are hereby made a part of this claim.

BACKGROUND:

a. History of Dispute

The issue in this case is whether the Carrier properly has established interdivisional service as provided in Article XII of the 1972 National Agreement with the Organization. As the Carrier notes, if so the claim must fail, but if not the claim is valid.

The dispute underlying the claim in this case centers around freight service maintained by the Carrier between Kelly Lake, Minnesota in the heart of Minnesota's iron ore country and the Carrier's ore docks at Allouez, Wisconsin on Lake Superior from which the ore is shipped. This freight service has operated since the turn of the century. Kelly

Lake, which is one hundred miles northwest of Superior, Wisconsin is and always has been the away from home terminal for all unassigned chain gang pool freight and chain gang ore pool service crews. Allouez is the home terminal for such crews.

In 1923 technology enabled the crews operating between Kelly Lake and Allouez to complete their work within the hours of service law. The parties agreed that crews could operate through Kelly Lake without taking rest so long as Kelly Lake remained a terminal where the automatic release rule applied. The 1970s saw the emergence of the taconite industry in the iron ore range. Plants opened at points beyond Kelly Lake. When those plants were serviced by Carrier crews, under the automatic release rule the crews ended a day when they entered Kelly Lake and began a new one when they left that point.

On January 17, 1984 the Carrier served notice on the Organization pursuant to Article XII of the 1972 National Agreement that it wished to establish interdivisional service between Allouez and Kelly Lake. The effect of this action would eliminate the automatic release rule and thus payment for a second day to crews leaving Kelly Lake to service plants beyond that point. The Organization challenged the Carrier's right to take such action. The Carrier was unable to obtain an agreement with the Organization. The Carrier unilaterally instituted interdivisional service on March 16, 1984.

The Organization filed the claim in the instant case the purpose of which is to test the Carrier's right to establish inter-divisional service. The claim was denied. The denial was appealed to

the highest officer of the Carrier designated to hear such disputes. However, the dispute remains unresolved, and the parties have placed it before this Board for determination.

b. Parties' Positions

The Organization bases the claim upon conductors' Rule 15(b) and trainmen's Rule 74(c), otherwise known as the automatic release rules, providing that conductors and trainmen arriving at their away from home terminal end their service and are automatically released from their previous run or trip. They are entitled to a new day when they depart from that terminal. In the case of Kelly Lake conductors and trainmen are released automatically when they reach the terminal and are entitled to a new day when they depart from there to service the taconite plants. The Organization points out that for 85 years Kelly Lake has been a distant or away from home terminal for the ore crews and freight crews passing through it. The Organization emphasizes that in 1925 it agreed the crews would not stop to rest at Kelly Lake in return for which Kelly Lake would always be the away from home terminal for the crews and the point at which the automatic release rules would apply.

The Organization argues that the Carrier had no authority under Article XII of the 1972 UTU National Agreement to take the action at issue in this case. Emphasizing that Article XII allows a Carrier to "establish" interdivisional service, the Organization points out that ore crews and freight crews operated through Kelly Lake in intraseniority

service, the same as interdivisional service for purposes of Article XII, for many years prior to the 1972 National Agreement. The Organization urges that the procedures for institution of "interdivisional" service set forth in Section 1 of Article XII have no application to existing service. The Organization cites the agreed upon questions and answers relating to Article XII which it contends, taken as a whole, evidence the intent of the parties that Article XII apply to interdivisional service to be instituted in the future. In further support of its position, the Organization points to Section 4 of Article XII which provides that "[I]nterdivisional, interseniority district, intradivisional or intraseniority district service in effect on the date of this Agreement is not affected by this rule." The Organization maintains that inasmuch as intraseniority district service at Kelly Lake existed at the time the 1972 agreement became effective, that service was unaffected by that agreement by virtue of Section 4 of Article XII.

The Organization points out that none of the assignments going through Kelly Lake were altered by virtue of the Carrier's attempted institution of interdivisional service under Article XII of the 1972 National Agreement. The Organization maintains that the Carrier's sole motive in instituting interdivisional service pursuant to Article XII was to eliminate Kelly Lake as a terminal where the automatic release rules apply. The Organization alleges that action violated existing agreements and contends that for this Board to approve of such action by the Carrier would constitute a change or amendment in existing agreements which is beyond the jurisdiction of this Board.

The Carrier maintains that under Article XII of the 1972 National Agreement, as well as the System I-D Agreement of June 28, 1972 specifying the conditions governing conductors and trainmen assigned to interdivisional service established under the 1972 National Agreement, the Carrier had the right to establish the service at issue in this case. The Carrier argues that the agreements contain no prohibition against establishing interdivisional service at Kelly Lake simply because it has not been a crew change point for unassigned freight service and because ore pool crews have operated into, out of and through that terminal in intraseniority district service.

The Carrier argues that one of the fundamental purposes of the 1972 National Agreement was to remove impediments, such as automatic release rules, to the establishment of new runs and new service. The Carrier emphasizes that the service established in this case was an extended run which by its nature necessarily runs through noncrew change points and retraces the route of preexisting service. The Carrier vigorously asserts that nothing in the 1972 National Agreement or the System I-D Agreement restricts the establishment of interdivisional service under these circumstances nor preserves the existence of terminals. The Carrier argues that for this Board to so rule would add to existing agreements which is beyond the jurisdiction of this Board.

The Carrier contends that in essence the Organization argues that its approval is necessary for the establishment of interdivisional service pursuant to Article XII of the 1972 National Agreement. The

Carrier characterizes such a result as absurd and points to the existence of five interdivisional runs which were established without the Organization's consent. The Carrier maintains that this Board should not hand the Organization effective veto power over the establishment of service pursuant to Article XII.

Finally, the Carrier urges that the same constructive payment sought in this case could have been obtained, if the Organization was entitled to it, from a Section 7 arbitration board as provided in the National Agreement article. Citing awards under a corresponding section of the BLE National Agreement which denied such claims, the Carrier maintains that there is no basis for such a claim as the Organization makes here. The Carrier contends that the Organization improperly seeks here what it knows it cannot obtain through a Section 7 arbitration and urges that this Board not allow the tactical maneuver to succeed.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151, et seq. The Board also finds that it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute were given due notice of the hearing in this case.

The parties recognize and are in agreement that this case turns upon Section 4 of Article XII of the 1972 National Agreement which provides

that "[I]nterdivisional, interseniority district, intradivisional or intraseniority district service in effect on the date of this Agreement is not affected by this rule."

The Carrier is quite correct that one of the major purposes of the 1972 National Agreement was to afford Carriers relief from certain restrictive and financially costly work rules. The Carrier's point is consonant with the fundamental principle of agreement interpretation that individual parts of an agreement should be interpreted in a manner consistent with its overall purpose or purposes.

However, it is an even more fundamental proposition of agreement interpretation that language in an agreement which is clear and unambiguous on its face is not subject to interpretation. We believe Section 4 of Article XII is clear and unambiguous. It provides that Article XII shall have no applicability to intraseniority district service existing on the effective date of the agreement. We find this language so clear and unambiguous that there is simply no room for interpretation.

Even if there is room for interpretation of Section 4 of Article XII, we find the Organization's interpretation of that provision more persuasive than the interpretation the Carrier would place upon it. Again, the language itself strongly supports the Organization. While the Carrier has raised several plausible arguments in the abstract, the Carrier has proffered no plausible explanation of the meaning of that language. The gravamen of the Carrier's position is that, Section 4 notwithstanding, the Carrier may establish interdivisional service under

Article XII. That position fails to give any effect to the language of Section 4. To do so would violate a basic tenant of agreement interpretation that all provisions of an agreement must be given effect. The Board believes it cannot follow this tenant and at the same time accept the Carrier's position.

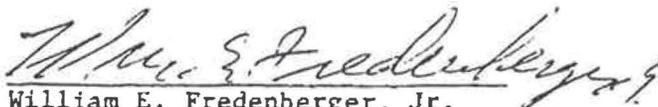
We find it significant that, as the Organization has repeatedly emphasized, the Carrier made no operational changes in the service at issue in this case when it established interdivisional service. The Carrier acknowledges that the motivation and effect of instituting such service under Article XII is to extinguish the automatic release rules applicable at Kelly Lake. We believe, as the Organization urges, that Article XII contemplates actual operational changes as part of the institution of service thereunder.

The awards relied upon by the Carrier are not persuasive. They involve arbitration of the terms and conditions applicable to the establishment of interdivisional service. Each involved the establishment of such service where none previously existed. Furthermore, each award involved actual operational changes. Accordingly, those awards are distinguishable

In the final analysis we must conclude that the Carrier's attempt to establish interdivisional service in the instant case must fail. The Carrier is precluded from establishing interdivisional service under Article XII of the 1972 National Agreement for ore pool crews and pool freight crews operating through Kelly Lake.

AWARD

Claim sustained.


William E. Fredenberger, Jr.
Chairman and Neutral Member


M. M. Winter
Employee Member


W. A. Bell
Carrier Member

attached dissent.

DATED: *April 8, 1986*

DISSENT TO

AWARD NO. 1 OF PUBLIC LAW BOARD NO. 3800

Those who oppose interdivisional service, broadly defined, will take great comfort, and find great support in this Award. It can easily be read to bar the establishment of any such service.

All service, provided by any carrier on January 27, 1972, necessarily had to fit at least one of the agreement-specified categories: "interdivisional, interseniority district, intradivisional or intraseniority district service." Yet this Award holds that Interdivisional Article "shall have no applicability to (such) service." If the Article has "no applicability" to any existing service, what can it apply to?

Thus, it would seem that, in an attempt to give effect to the language of Section 4 in the 1972 Agreement Article, the Board has developed a reading of that Section which will give no effect to all of the other provisions of the Article.

Such a result was not inevitable. First, Section 4 does not say that the Article shall have "no applicability" to "service in effect on the date of this Agreement". Instead, the actual language is "service in effect on the date of this Agreement is not affected by this rule". It is a long way from leaving existing service unaffected to saying that the Article has "no applicability" to, can never affect, existing service.

Second, under the actual, "is not affected" language of the Section, there is a perfectly plausible explanation of its meaning: existing service does not necessarily come under the ambit of the Article, does not immediately have to be renegotiated under its terms and does not automatically become subject to the various tradeoffs in the Article.

Third, under the actual, "is not affected" language of the Section, the Article could be used to reach, to alter, to change existing runs, if a Carrier chose to serve such a notice, to pursue negotiations and, possibly arbitration, and then to put the service into effect. As other Boards have recognized, there is nothing in the actual language barring such action. Under this Award, seemingly, the right to do so will have to be bought again, even though it was bought at least twice already, in both the National and the system master I-D Agreements.

The Award can also be read to require "actual operational changes" as a

April 10, 1986
Page 2

sine qua non to the establishment of service under the Article. Actually, given the fixed configuration of railroads, such changes are rare. A train still runs, just as it always has, from A through B to C. Usually, B is eliminated as a crew change point, and either a home, or an away-from-home terminal is no more.

But that is not always the case. For instance, Arbitration Board No. 368, BLE v. DRGW (Schoonover) dealt with the creation of a road switcher, taking over work formerly performed by pool freight crews. But much more to the point, there is Award No. 1 of Arbitration Board No. 446, BLE v. BN (LaRocco). That Award, treating the exact same run as in question here, recognized that the corresponding BLE Article did apply, and that the proposed service was within the scope of the Article. And it should be noted that the BLE Agreement contains the exact same Section 4 language as was at issue here.

We hope that this dissent makes the error of this Board's treatment of Section 4 quite apparent. If it does not, and if this Award is widely followed, the Interdivisional Article will have been rendered almost completely meaningless. That would hardly compare with the conceded "basic tenant of agreement interpretation that all provisions of an agreement must be given effect."



Wendell Bell
Carrier Member

SPECIAL BOARD OF ADJUSTMENT 6741
AWARD NO. 1

Parties to Dispute: THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CO.
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

Questions at Issue:

1. Does the Carrier's notice dated May 30, 2003, to establish interdivisional service between Kansas City and Wellington/Arkansas City via several routes satisfy the requirements of Sections 1 and 2 of Article IX of the May 19, 1986, BLE Arbitrated National Agreement?

2. If the answer to question no. 1 is "Yes:"

Does the agreement proposed by the Carrier to govern the establishment and operation of interdivisional service with home terminal at Kansas City to operate between Kansas City and Wellington/Arkansas City, satisfy the requirements of Sections 1 and 2 of Article IX of the May 19, 1986, BLE Arbitrated National Agreement?

If not, what conditions are deemed to be reasonable and practical?

Background:

In a letter dated February 24, 2003, the Carrier informed the Organization that under Article IX of the May 19, 1986 Award of Arbitration Board No. 458, the BNSF wanted to establish interdivisional service between Kansas City and Wellington or Arkansas City, Kansas, through the terminal of Newton, Kansas. The Organization notified the Carrier in a letter dated March 10, 2003, that the Carrier's notice was improper.

The Organization and the Carrier met in Kansas City to discuss the matter March 19-20, 2003. Following the meeting in Kansas City, the Carrier served a new proposal dated April 3, 2003. Another meeting was held to discuss this new proposal on April 29, 2003. The Carrier served the final proposal dated July 8, 2003, with the anticipation of implementing this final proposal on July 16, 2003. The Carrier implemented the service between Kansas City to

Wellington or Arkansas City via Newton on July 16, 2003. On October 10, 2003, a final edited version of the implemented proposal was sent to the Organization.

Members of the Organization began to submit time claims for violation of the Interdivisional Agreement. In response, the Organization sent a letter to the Carrier dated January 21, 2004, requesting that the Carrier agree to arbitration to settle this dispute. The Carrier agreed and this dispute is properly before this Board SBA 6741.

The two questions at issue before this Board deal with the propriety of a notice to establish interdivisional service between Kansas City and Wellington/Arkansas City through Newton and the conditions attendant to that service. It is BLE's position that since BNSF pays penalties to run crews through Newton, Kansas, then BNSF has the right to operate interdivisional service through that terminal so long as the penalty is paid. According to BLE, the proposed service is essentially a re-creation of an existing interdivisional service run. BNSF believes that the creation of the new service that eliminates the penalty proves that the service is a new service.

At issue are all of the BNSF routes between Kansas City and Wellington or Arkansas City, Kansas. There are two routes between Kansas City and Emporia (an intermediate station between the terminals): the northern route via Topeka and the southern route. There are three potential routes between Emporia and Arkansas City. Finally, there are two potential routes between Emporia and Wellington. Prior to February 24, 2003, this territory was governed by the so-called Emporia Run-through Agreement.

The Emporia Run-through Agreement provides:

Interdivisional pool freight engineers will operate between the terminals of Kansas City, Kansas, and Arkansas City, Newton, and Wellington, Kansas. Kansas City

will be the home terminal and Arkansas City, Newton, and Wellington will be the away-from-home terminals.

The Emporia Run-through Agreement established interdivisional service between Kansas City and three away-from-home terminals: Arkansas City, Wellington, and Newton. The Emporia Run-through made Newton an away-from-home terminal for Emporia Run-through engineers.

The next element of the Emporia Run-through Agreement that is pertinent is found under the section "Calling Crews:"

Engineers in interdivisional service will be called first-in, first-out at each terminal subject to their availability under the Hours of Service Law. At the home terminal, Kansas City engineers will be called first-in, first-out from two pools – a Wellington pool and an Arkansas City/Newton pool. At the away-from-home terminals, engineers will be called first-in, first out, regardless of pool designation.

The Emporia Run-through Agreement created two pools with a home terminal of Kansas City. One pool worked to Wellington; the other to either Arkansas City or Newton. Newton is a terminal and there are no provisions in the Emporia Run-through Agreement allowing BNSF to operate Kansas City crews through Newton to either Arkansas City or Wellington. The territory between Newton and either Arkansas City or Wellington belongs to Newton engineers. Contractually, if a train is to be moved in either direction between Newton and Arkansas City or Wellington, that work belongs to Newton crews.

The portion of BNSF between Wellington and Kansas City is part of BNSF's "racetrack." The racetrack is the high-speed corridor between the California shipping ports and Chicago. BNSF, under then existing agreement provisions and traditional operating initiatives, is surpassing this line's capacity, and the traffic levels continue to increase. Therefore, BNSF feels obligated to evaluate available options and prepare for increasing traffic in the existing track configuration.

BNSF contends that it needs the flexibility to operate trains between Kansas City and Wellington/Arkansas City, in either direction, over any of the available routes without penalty.

On February 24, 2003, BNSF served notice to establish interdivisional service between Kansas City and Wellington through the terminal of Newton. The Kansas City - Arkansas City/Newton pool was rearranged as was the Kansas City-Wellington pool. Engineers might have to seek their away terminals over several different routes. The Carrier implemented the final proposal on August 1, 2003. The BLE-T believes the notice is improper and that it does not meet the requirements of the National Agreement. Hence, the two questions at issue.

The Organization's Position:

The Organization contends that the Carrier's Article IX Notice of Arbitrated Award No. 458 is improper and without merit. The Organization avers that interdivisional service between Kansas City and Wellington/Arkansas City via Newton was an established interdivisional run and that the Carrier had been operating interdivisional service since 1988. The Organization contends that the Carrier is determined to get something through arbitration that they are not willing to do with bargaining.

Over the years, there were three separate interdivisional pools operating out of Kansas City. Two of the pools operated through Emporia to final destination of Wellington or Arkansas City. The other pool worked to Newton and then traded crews with the engineers with the home terminal of Newton. Trains that were run in the Kansas City to Newton pool were trains designated to run over the northern route from Newton to La Junta and down through Albuquerque and on to the transcon moving west to the coast. The Carrier was not prevented from running either the Arkansas City or Wellington Pool through Newton to the final terminal

without changing crews in Newton. Side letter number 5 of the imposed Emporia Run-through Agreement gave the Carrier the right to do so. Side letter 5 went on to say in part:

“It is understood between the parties that while ID engineers may be required to operate trains over the Kansas City Division - First Subdivision from time to time because of detours, time sensitive traffic, etc., it is not the parties' intent that ID engineers be required to regularly perform local work en route.”

By running a Kansas City to Wellington/Arkansas City crew through Newton to the distant terminal entitled the engineers to another basic day start for running through a home terminal. According to the Organization, when the Carrier uses a Wellington or Arkansas City crew to run from Kansas City to the distant terminal via Newton the actual miles are 262. But with the extra basic day start for running an established interdivisional crew through the terminal of Newton, the Carrier pays a total of 317 miles.

The Organization offered to allow the Carrier to run from Kansas City to Wellington or Arkansas City via any route they chose for the payment of 269 miles. The Organization avers that if every engineer got paid the same amount regardless of which route they took, sometimes the engineer would make a few extra dollars. If the Carrier chose to run you through Topeka with the actual miles of 279, the Carrier would benefit with the same payment. The Organization avers that this would stop the basic day penalty payments for running through Newton, and give the Carrier the right to move a train over any route.

The remedy sought by the Organization includes the following:

- A. maintain the “Over Mile” rate that was bought and paid for;
- B. maintain the basic day payment for trading trains unnecessarily;
- C. pay the 269 miles for each trip regardless of which route is taken;
- D. pay the Newton Extra Board Engineers the \$50 flat rate payment for being used to provide HOSL relief for interdivisional trains; and
- E. force the Carrier to maintain the separate pools of Kansas City/Wellington and Kansas City/Arkansas City. Regardless of where the Carrier decides to send the

train, require that depending on what pool the engineer is assigned to he be required to tie up at the correct distant terminal.

The Carrier's Position

The Carrier contends that the notice was served under the authority of Article IX of the 1986 Award of Arbitration Board No. 458, an Award commonly referred to as BLE's 1986 National Agreement, Section 1 of Article IX states:

An individual carrier seeking to establish interdivisional service shall give at least twenty days' written notice to the organization of its desire to establish service, specify the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service.

The procedures are covered by Section 3:

Upon the serving of a notice under Section 1, the parties will discuss the details of operation and working conditions of the proposed runs during a period of 20 days following the date of the notice. If they are unable to agree, at the end of the 20-day period, with respect to runs which do not operate through a home terminal or home terminals of previously existing runs which are to be extended, such run or runs will be operated on a trial basis until completion of the procedures referred to in Section 4 [arbitration]. This trial basis operation will not be applicable to runs which operate through home terminals.

According to the Carrier, the question is whether, under the provisions of Article IX, the Carrier has the right to serve notice to extend or rearrange established interdivisional service. The place to go in order to resolve this question is the Informal Disputes Committee established to interpret the 1986 Award of Arbitration Board No. 458. One of the questions submitted to this panel was "Can established interdivisional service be extended or rearranged under this Article [Article IX]?" The Carrier contends that this Committee places the questions at issue in perspective:

The threshold question is whether Carriers may extend or rearrange interdivisional service established prior to the effective date of Article IX of the 1986 Arbitrated National Agreement. It should be noted that the Article IX, Section 2 conditions attached to interdivisional service are more favorable to the Carriers than the terms

and conditions in Article VIII of the May 13, 1971 National Agreement. The second but related issue is whether the conditions under which the interdivisional service was previously established are carried forward with the extended or rearranged interdivisional service made pursuant to notice under Section 1 of Article IX.

The Carrier concludes that the question contemplated the effect Article IX has on existing interdivisional service, i.e., interdivisional service in effect prior to the 1986 Award. In addition, the question before the Informal Disputes Committee contemplated both the extension and rearrangement of a pre-1986 interdivisional run. The Carrier contends that the question is whether the Carrier can extend and/or rearrange elements of interdivisional service between Kansas City and Wellington/Arkansas City? The Carrier avers that the Informal Disputes Committee provided the following guidelines:

The Committee concludes that the parties must reach a balanced application of Article IX. The carriers have the right to establish extended or rearranged interdivisional service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement.

The Carrier concludes that existing interdivisional service can be extended or rearranged pursuant to an Article IX notice under the 1986 Award, unless the change is "designed solely to obtain the more favorable conditions in the 1986 National Agreement." The Carrier contends that the changes desired for this service contemplate a far more efficient and economical initiative designed to address a limited physical configuration in the face of exploding traffic growth.

The Carrier refers to the decision of Public Law Board 5121 wherein the test is described that must be applied when determining whether the proposed rearrangement is a substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement.

“ . . . each proposed change (rearrangement/extension) in existing interdivisional service must be subjectively measured against the recognized tests, to determine if:

- (A) The carrier’s proposed change represents a legitimate and necessary rearrangement motivated by operating exigencies?
- (B) The carrier’s proposed change is merely an opportunistic maneuver, singularly designed to take advantage of more favorable conditions in the new national agreement?”

BNSF concludes that the proposed change is driven by operating exigencies and cannot be construed to be an opportunistic maneuver designed to take advantage of any Section 2 condition.

Findings:

This Board is aware that there is a significant history of cases where carriers have desired to extend or rearrange existing interdivisional (ID) service under Article IX notice (1986 Agreement). One historic example involves the Union Pacific’s desire to modify an interdivisional run established under the 1971 Agreement that was later modified (extended - rearranged) pursuant to a second notice under the 1971 Agreement. The significant language is that there has been a recognition that existing ID runs may be modified - even if the second notice is served under the same agreement provisions that established the run initially:

The Board finds from its review of the record that there are no contractual prohibitions against the Carrier establishing an interdivisional run from Fremont to North Platte and North Platte to Fremont. Accordingly, we find no contractual defect in the Carrier’s notice dated October 2, 1984.

The Board finds from the weight of the probative evidence that the parties covenanted by virtue of the May 13, 1971 National Agreement that carriers could establish interdivisional runs at the discretion of management, subject to the organization’s right to challenge whether these runs were unreasonably long or were encompassed with burdensome conditions of work. But the entire tenor and principle thrust of the 1971 National Agreement was that no existing rules, regulations, and agreements should hereafter constitute or be a bar to a carrier establishing interdivisional runs when, in its judgment, the operating exigencies required such runs.

The Board finds no provision in the appropriate terms of the December 16, 1971 Agreement and Implementing Notice of May 1, 1972, that indicates or suggests that the Carrier could not, or was in any way prohibited from or limited in, establishing another interdivisional run within the territorial confines of Council Bluffs and North Platte, subject to the requisite Agreement provisions.

The parties should recognize that, even before the 1986 Agreement, there was recognition that new interdivisional service could be established over and in lieu of existing interdivisional service. While the above award deals with the Brotherhood of Locomotive Engineers, the same dispute was advanced by other organizations. Union Pacific took the same position with UTU. However, before the case progressed to arbitration, the 1985 National Agreement took effect. As a result, Union Pacific withdrew the pending new ID notice under the 1972 National Agreement and replaced it with a notice served under Article IX of the 1985 National Agreement. Even though UTU had previously agreed to enter into arbitration under the 1972 notice, when Union Pacific served the new 1985 notice, UTU reassessed its position and grieved. While finding in favor of Union Pacific, the Board reasoned:

Predictably, the organization re-asserted its previous position that “any” notice that proposed interdivisional service covering North Platte and Fremont was contractually improper because of the pre-existence of interdivisional service over the same general geographical area (North Platte - Council Bluffs). Ostensibly because of the chilling effect caused by the “new” proposal, there was essentially no progress in a (negotiated) resolution to the Fremont dispute.

The Board found three pivotal sub-issues involved in the dispute. Only two of these sub-issues are applicable to the case at hand. The first sub-issue addressed by the Board is:

1. Does the carrier’s existing interdivisional service operating between North Platte and Council Bluffs, which includes Fremont as an intermediate point, constitute a (per se) contractual bar (Article IX, Section 5) from any proposed re-arrangement of such existing (interdivisional) service over a portion of the same geographical area?

PLB 5121 found:

A review of past practice, the applicable contractual provisions and the cited authorities is persuasive - the preexistence of interdivisional service over a particular geographical area does not, per se, constitute an absolute contractual (procedural) bar to a carrier's proposal to rearrange such (interdivisional) service within such territorial confines.

The second applicable sub-issue addressed the re-issuance of a new notice:

3. Assuming the carrier's initially (October 2, 1984) proposed modification to the existing interdivisional service (North Platte - Council Bluffs) technically qualified as a permissible re-arrangement (i.e., not barred under the preceding National Agreements), what disqualifying effect did the summary withdrawal of such notice, and the concurrent re-issuance of a new notice on November 12, 1986 have, if any, under the provisions (expressed/implied) of Article IX of the 1985 National Agreement?

The Board found:

Clearly, had this (1986) proposal represented this carrier's first effort to reform the Fremont interdivisional operation, we might view such a proposal differently [i.e., initiated immediately after the (1985) negotiated changes in the National Agreement]. The "timing" of such proposal would have raised a rebuttable presumption that it was subterfuge - i.e., designed solely for the purpose of replacing more onerous conditions (expenses) negotiated into the existing (North Platte/Council Bluffs) interdivisional agreement, with the new (Article IX) terms and conditions. However, such a scenario is materially different from the sequence of events which precipitated this dispute.

This board is persuaded that the carrier's opportunistic maneuver [original (1984) notice withdrawal and concurrent (1986) republication], albeit admittedly done for the sole purpose of accessing the new (1985) terms and conditions, was a reasonable and predictable part of the carrier's continuing effort to rearrange the involved interdivisional service so as to make Fremont a more economically viable (crew) terminal point. Under such circumstances, we are not persuaded that the carrier's actions run afoul of the conditions recognized by the LaRocco (Disputes) Committee in their interpretation of the identical verbiage in the (arbitrated) BLE Agreement.

In the final analysis PLB 5121 found that the proposed changes were not a re-creation of an existing interdivisional run and determined that the Article IX notice was proper.

Based upon the circumstances of record and the credible evidence and arguments, this Board is persuaded that the carrier's proposed changes in interdivisional service, between North Platte and Fremont, is not a "re-creation" of existing (North Platte - Council Bluffs) interdivisional service, designed solely to access the

new (National Agreement) terms and conditions while avoiding the expense and logistical problems involving transportation of crews to/from Council Bluffs; such proposal qualifies as a permissive re-arrangement of existing interdivisional service. Therefore, we find the carrier's 1986 republished proposal to be procedurally proper.

The above award affirms that rearrangement of an existing interdivisional service run is appropriate under the 1985-86 Article IX conditions so long as it is not a substantial re-creation of existing service designed to access more favorable terms. Even under the interdivisional arrangements in place prior to 1985-86, there was recognition that the carriers had the right, under the National Agreements, to rearrange existing interdivisional service pursuant to a "new" notice. It has historically been held that the impediment to rearranging an existing interdivisional run would be to substantially recreate it in order to access benefits that are one-sided, i.e., "carrier friendly only" conditions. Bearing in mind that the idea of rearranging existing interdivisional runs is not a concept that arose after 1985-86, the following language of the Informal Disputes Committee is significant:

In addition to the Southern Pacific example, the carriers provided instances where new interdivisional service overlapped or extended existing interdivisional service pursuant to the 1971 Agreement even though Article VIII, Section 4 of the 1971 National Agreement is substantively identical to Article IX, Section 5 of the Arbitrated National Agreement. The former provision did not impose a restraint on creating new interdivisional service over territory covered by an existing interdivisional agreement. See Public Law Board No. 3765, Award No. 1 (Seidenberg). During the recent round of national bargaining, the parties were well aware of the well entrenched past practice. If they wished to deviate from the past practice, the parties would have written unequivocal language in Article IX, Section 5 to the effect that an extension or rearrangement of present interdivisional service could never be construed as new interdivisional service within the meaning of Article IX.

The parties negotiating the 1985-86 National Agreement knew there was a history of preexisting interdivisional runs being rearranged pursuant to subsequent notice under previous national accords. The Informal Disputes Committee, charged with interpreting the 1986 Award,

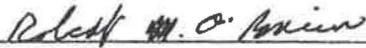
AWARD

The Agreement proposed by the Carrier to govern the establishment and operation of interdivisional freight service with home terminal at Stockton, California, to operate between Stockton and Bakersfield, California, satisfies the requirements of Section 1 and Section 2 of Article IX of the May 19, 1986 BLE Arbitrated National Agreement.

However, the following provision shall be added to that Agreement for the reasons set forth above:

"All miles in excess of the miles encompassed in the basic day shall be paid for at the conductor-only overmile rate. Car scale and weight-on-drivers additives will apply to mileage rates calculated in accordance with this provision."

The Agreement is appended hereto and incorporated into this Award.



Robert M. O'Brien, Chairman and Neutral Member



Gene L. Shire, Carrier Member



Stephen Speagle, Employee Member

Dated: *July 8, 2004*

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PARTIES TO THE DISPUTE:

UNION PACIFIC TRANSPORTATION CO.

-and-

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and TRAINMEN

QUESTIONS PRESENTED

BLE (Former CNW)

Is the Carrier's Notice dated August 24, 2000, purporting to establish dual destination Interdivisional Service between South Pekin, Illinois and Proviso/Clinton proper, in light of previously existing agreements for this service?

If the answer is in the affirmative, the next question is: "Are the terms and conditions of the proposed agreement reasonable and practical under the terms of Article IX Interdivisional Service of the 1986 Arbitration Award No. 458"?

Union Pacific Railroad Company

Did Article IX, Section 5 "Existing Interdivisional Service" of the Award of Arbitration Board No. 458 allow the Carrier to serve notice and implement interdivisional conditions over properties subject to prior interdivisional service agreements?

BACKGROUND

In this case, the employees and the Organization contest Carrier's October 1, 2000 implementation of proposed Memorandum of Agreement No. 1610010048, dated August 24, 2000, (including modifications set forth in three (3) Side Letters negotiated with BLE on or about September 18, 2000).¹

¹[In proposing MOA No. 1610010048, Carrier relied upon Article IX, § 5 of the Award of Arbitration Board No. 458. Even though related Side Letters negotiated by skilled bargainers for the Parties contained provisions more beneficial to the employees than those set forth in Article IX, § 2 of the Award of Arbitration Board, No. 458 Divisions 404 in Chicago and 848 in South Pekin voted not to ratify that proposed Interdivisional Service Agreement,].

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The dispute originated when Carrier invoked Article IX, Section 5-“Existing Interdivisional Service” of the Award of Arbitration Board No. 458, which allows the Carrier to serve notice and implement interdivisional conditions over properties subject to prior interdivisional service agreements. In that connection, in 1972 the BLE and the former C&NW had consummated two (2) agreements providing for Interdivisional service (between the Northern and Southern Zones of the former Galena seniority Division): the first for employees operating in such service between South Pekin (Peoria, Illinois; Southern Zone) and Proviso (Chicago, Illinois; Northern Zone) and the second for Interdivisional service between Clinton, Iowa and South Pekin, Illinois. Operation under these agreements continued in one form or another until 1995, when the Union Pacific Railroad Company filed an application with the STB to merge with the C&NW.

Pursuant to approval from that agency, in June 1996 the Parties entered into the BLE/C&NW-UPRR Merger Implementing Agreement. In or around September 1996, under Article H-“New Operations”, Section 6(e) of that Merger Implementing Agreement, the Carrier initiated irregular through freight pool service between the home terminal of Chicago (generally Proviso; CTC) with Clinton, Iowa and South Pekin, Illinois the dual destination away-from-home terminals. Carrier maintains that with implementation of that pool, the 1972 ID agreements referred to above were superseded in favor of the New Operations conditions set forth in the 1996 Merger Implementing Agreement.

In early August 2000, the Carrier's operating department elected to relieve congestion in the Chicago terminal by routing two manifest trains--the MPRAS and MASPR--west out of Proviso (Chicago) to Nelson, and then south through South Pekin to the destination terminal at the Alton

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Southern Railroad in East St. Louis, Illinois. Those trains formerly traversed the congested Chicago terminal (CTC) east and south through Yard Center, down the former C&EI to the Alton and Southern. Since the projected return trip would avoid Chicago as well, this new routing contemplated a redeployment of forces by Carrier from the east side of Chicago to the west. On that basis, on August 24, 2000 the Carrier served notice to both the BLE and the UTU, under Article IX of the Award of Arbitration Board No. 468, to establish interdivisional pool freight service home terminalled at South Pekin, with dual destination away-from-home terminals at Proviso (Chicago) and Clinton, Iowa. According to the Carrier, it Carrier intended to redeploy Chicago manpower back to South Pekin to protect the two manifest trains referred to above, and to protect the Irregular through freight traffic running between South Pekin and Proviso in the Now Operations dual destination pool described, *supra*.

Following initial discussion between the Parties concerning the Carrier's August 24, 2000 proposed MOA No. 1610010048, the BLE general Chairman responded by letter of August 28, 2000, as follows:

This office is in receipt of Union Pacific Director J. Albano's August 24, 2000 Notice regarding the Carrier's desire to establish a dual destination Interdivisional Freight Pool with South Pekin, Illinois as the home terminal to operate either to Chicago, Illinois or Clinton, Iowa via Nelson, Illinois.

Mr. Albano requested conditions as set forth in Article IX, Interdivisional Service, Section 2, as amended, of the 1986 Arbitration Award 458. This office considers the August 24, 2000 Notice inappropriate, as the IDR Service requested therein negates the conditions and two preexisting IDR Agreements dated July 16, 1972, Proviso to South Pekin and April 17, 1972 Clinton - South Pekin respectively.

As I am sure both of you are aware, Article II, Section B, 3, 4, and 5 of the June 6, 1996 Merger Implementing Agreement placed the CNW Lines (New Operations) under the conditions found in the Arbitration Award 458, and Public Law 102-29, PEB 219 of 1991. Article IX, Section 5 of the 1986 Arbitration Award 458 did not alter Interdivisional Service Agreements which were in effect on the date of the Arbitration Award.

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The July 16, 1972 Proviso - South Pekin IDR Agreement and the April 17, 1972 IDR Agreement were in effect prior to the 1986 Arbitration Award 458. Thus, there were and are existing IDR Agreements in effect for the IDR Service as requested in Mr. Albano's August 24, 2000 Notice to this Organization.

Article II, New Operations, Section A, Paragraph 5, Subsection D and E of the June 6, 1996 Merger Implementing Agreement established 2 Interdivisional Freight Pools. The first IDR Freight Pool established South Pekin as the home terminal and Clinton, Iowa is the away from home terminal. The second IDR Freight Pool which has dual destination, established Chicago, Illinois (CTC) as the home terminal and South Pekin and Clinton as the away from home terminals.

The Merger Implementing Agreement does not provide for IDR Service, with South Pekin as the home terminal and Chicago and Clinton as the away from home terminals. The April 17 and July 16, 1972 IDR Agreements are applicable to the IDR Service requested in the August 24, 2000 Notice.

Carrier's request to combine the South Pekin to Clinton IDR Pool Freight Service established under the Merger Implementing Agreement with a new IDR Pool Freight Service, South Pekin to Proviso, does not cancel the provisions of the previously existing agreements.

In addition, the provisions of Section 3 of Article IX of Arbitration Award 458 do not apply to runs which operate through a definite terminal. Rule I I (a) of the BLE CNW Schedule of Agreements identifies Nelson, Illinois as a definite terminal, hence the need for the 1972 IDR Agreements.

Therefore, we are not agreeable to operate the IDR Runs as identified in Mr. Albano's August 24, 2000 letter on a trial basis, as the IDR Service requested is not under the auspices of Arbitration Award 458, because of the preexisting IDR Agreements.

In light of the progress made during our negotiations on August 24, 2000 in the Carrier's Omaha, Nebraska Office, we are agreeable to further negotiations on this subject matter which are tentatively scheduled for September 7, 2000 in Chicago, Illinois.

Additional discussions between the Parties resulted in three (3) tentative Side Letters, all dated September 19, 2000, reading, in pertinent part as follows:

* * * * *

MOA #1610010048 Side Letter #1

Consistent with the NOTE at Article III, Section 1(a) of the above referenced IDR Agreement, this will confirm our understanding that the six (6) month post-implementation

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period beginning November 1, 2000 and running through April of 2001 will be used to determine whether or not an employee is "adversely affected."

This six (6) month period is being established to create a fair test period, that is unaffected by the Increase in traffic due to the closure of the Mississippi River. To be considered "adversely affected," an employee must demonstrate diminished earnings in no less than four (4) of the six (6) months.

* * *

MOA#1610010048 Side Letter No. 2

This refers to the above captioned agreement and our discussion held in conference in your office on September 13, 2000.

This will confirm our understanding that, so long as the IDR conditions set forth in MOA#1610010048 are in effect, crews working in the Chicago (CTC) to Clinton/South Pekin pool established pursuant to the "New Operations" set forth in the Mikrut Award Implementing the UP/C&NW Merger Agreement, Article 11, Section 5(d), will not be used in straight-away, through freight service between Chicago and South Pekin. This is with the further understanding that such crews will continue to operate between Chicago and Clinton under Article 11, Section 6(d) as referred to above. In the event MOA#1610010048 is suspended, cancelled, or otherwise modified in pertinent part, operations between Chicago and South Pekin will resume and be governed by Article 11, Section 6(d) as referred to above.

* * *

MOA #1610010048 Side Letter No. 3

This is in reference to the above captioned agreement and our discussions held in conference in your office on September 13, 2000, regarding relocation provisions contained in Article IV.

During our discussions, both parties agreed that it is our intent to avoid force assigning any employees to South Pekin. In an effort to avoid having to force assign, we are agreeable to treating any employees who may be required to work out of South Pekin during the initial implementation of the interdivisional service described herein, in the same manner that we have handled furloughed employees making temporary transfers.

In other words, reasonable travel expenses to the new work location will be allowed, the Carrier will absorb the cost of lodging, and a per diem allowance for meals of \$35.00 per day will be provided.

In this particular instance, the Carrier is agreeable to providing these benefits for a period of 90 days after the implementation of the ID Service to any engine service employee forced to South Pekin (for employees who do not reside in or around South Pekin). At the conclusion of that 90-day period the manpower situation at South Pekin will be evaluated and if it is still

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necessary to supplement the work force at South Pekin with employees from Chicago, the above-described benefits will be extended for a second 90-day period.

At the conclusion of the two 90-day periods (180-days), the provisions of Article IV - Protection Benefit Provisions will be applicable to any employee who is forced to relocate to South Pekin.

Again, this particular option is offered in an effort to avoid forced relocations to South Pekin, and to determine during the 180-day period whether additional manpower will be necessary at South Pekin. This will provide the Carrier with the opportunity to employ people, if necessary, at South Pekin to avoid forced relocation to the extent possible and to provide a reasonable period in which to assess manpower requirements.

* * * * *

After BLE Divisions 404 in Chicago and 848 in South Pekin refused to ratify the proposed MOA #1610010048, even as modified by the above-quoted Side Letters, the Organization reverted to the position set forth in its August 28, 2000 letter, *supra*, to which the Carrier responded by letter dated September 25, 2000, as follows:

This refers to our recent discussions concerning establishment of dual destination interdivisional service home terminated at South Pekin, Illinois and operating via Nelson to either Chicago, Illinois or Clinton, Iowa.

Pursuant to Article IX of the Award of Arbitration Board No. 458, on August 24, 2000, the Carrier served notice to establish the ED service referred to above. By letter dated August 28, 2000 you advised your position that Carrier's August 24* notice was inappropriate under Article IX, Sec. 5 of the Award of Arbitration Board No. 458, asserting that that provision "did not alter interdivisional service Agreements in effect on the dates of the respective National Agreements." In regard to operating via Nelson, you further asserted that "the provision's of [Art. IX,] Sec. 3 ... do not apply to runs which operate through a definite terminal. We disagree with both assertions.

First, Article IX, Sec. 5 of the Award of Arbitration Board No. 458 merely allowed that ID service (rather than ID service "agreements") in effect on the date those agreements became effective would not be affected by this article. Article IX, Sec. 5 does not prevent the Carrier from establishing the ID service referred to in the first paragraph since neither ID agreement to which you referred in your August 2e letter had been currently implemented, nor is the nature of the service presently contemplated substantially similar to that outlined in either preexisting agreement.

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Second, Art. IX, Sec. 3 concerns itself with operation through a "home terminal" rather than through a "definite terminal" as you've set forth. On August 24th, Nelson was not a home terminal for any crew operating in thru-freight service.

Accordingly, neither Article IX, Sec. 5 nor Art. M Sec. 3 of the Award of Arbitration Board No. 458 support your contention that the Carrier's August 24th notice was inappropriate. Because Art. IX, Sec. 3 provides for operating ID service on a trial basis after a period of 20 days following the date of the notice, please accept this as notice of the Carrier's intent to establish such ED service on October 1, 2000 under the conditions set forth in the Carrier's latest proposal tendered this date.

Failing resolution after on-property handling, the Parties referred the dispute to this Board for final and binding determination in arbitration.

POSITIONS OF THE PARTIES

BLE

The Organization takes the position that Section 5 of Article IX of the 1986 Arbitration Award No. 458 bars the Carrier from rearranging the existing service between Proviso and South Pekin and South Pekin and Clinton. Section 5-"Existing Interdivisional Service" reads as follows: *Interdivisional service in effect on the date of this Agreement is not affected by this Article.*

From 1972 until the implementation of the Union Pacific/Chicago and North Western Merger, which took place on September 16, 1996 Interdivisional Service in this territory was in effect and was covered by two Interdivisional Agreements. The proposed service is covered by existing Interdivisional Service Agreements between the Brotherhood of Locomotive Engineers and the Chicago and Northwestern Railroad. These agreements were in effect and the service was operating in 1986 at the time Arbitration Award No. 458 became effective.

The locomotive engineers at South Pekin desire that the previously existing conditions from 1972 continue as the conditions remained in effect from 1972, post 1971 National Agreement and remained in effect post-1986 Arbitration Award 458. As just an example, the meal period provisions survived because of Section 5 of the 1986 Arbitration Award No. 458 which simply did not permit the Carrier to alter existing Interdivisional Agreements. The proposed service contemplated by the Union Pacific and placed into operation by the provisions of Article IX of Arbitration Award No. 458 does not extend the runs to a more distant location. The proposed Interdivisional Service Agreement does not meet the test of an extension of the previously existing runs. The Award of Special Board of Adjustment (Procedural) between the BLE and BNSF with Chairman David P. Twomey should also apply to this case.

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UPRR

The fundamental underpinnings of the former agreements had changed by reference to the New Operations provisions of the 1996 Merger Implementing Agreement. The underlying conditions of the two 1972 agreements-regularly assigned through-freight Interdivisional service-were negotiated away by reference to the New Operations provisions of the Merger Implementing Agreement. Like others before it, that implementing agreement forever altered the nature and complexion of the operations that existed on the C&NW railroad prior to the merger. When the Carrier elected to serve ID notice, that notice was predicated upon conditions extant when the notice was served, rather the conditions extant prior to the merger. Because the New Operations became the law of the land, no ID service existed under those operating conditions. Accordingly, the union's reliance upon Article IX, Section 6 is misplaced since, by its own terms, that provision contemplates "existing" interdivisional service. The New Operations contained no "existing" Interdivisional service.

In the alternative, should the Board find that the two prior ID Agreements survived, it must still find the Carrier's notice proper under the resolution of Issue 3 or BNSF. Those awards stand for the proposition that carriers may serve notice and implement proposals for now ID service in territories subject to pre-existing ID conditions so long as the proposals contain operational changes of a gravity sufficient to indicate that the proposal was more than a mere ruse to obtain more favorable conditions under the 1986 National Agreement. The fundamental shift in traffic arising as a consequence of the merger, coupled with implementation of the New Operations (and concurrent abandonment of regularly-assigned through freight service) as an "intervening event", would more than rationalize the propriety of the Carrier's notice even under "Issue No. 3" or "BNSF standards".

The Carrier's proposal contained operational changes to comport with irregular through freight service under the New Operations as opposed to the premerger regularly assigned through freight ID service contemplated in the early agreements. These changes were necessitated by operation of a bilateral agreement, and not through any unilateral action initiated by the Carrier. The union should not now be heard to complain that the notice is improper when it negotiated over, and accepted consideration in connection with, the operational changes giving rise to the Carrier's August 24, 2000 ID service notice.

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COMPANY CASE NO. 19**

DISCUSSION

The issues in controversy in this case are not matters of first impression and the Board does not sail in uncharted waters. Following the issuance of Arbitration Award 458, the BLE/NCC 1986 National Agreement Informal Disputes Committee, (John B. LaRocco, Neutral Member), was presented by the Parties to the 1986 National Agreement with Issue No. 3 regarding the interpretation and application of Article XII: “[C]an established Interdivisional Service be extended or rearranged under this Article?” In resolving Issue No. 3, Neutral Member LaRocco traced the development of the restrictive Section 6 language to Article VIII, Section 4 of the `1971 National Agreement, finding that Art. VIII, Section 4 did not impose a restraint on new interdivisional service over territory covered by an existing Interdivisional agreement. Accordingly Mr. LaRocco found that Section 5 does not restrict the carriers from rearranging or extending existing interdivisional service (*Id.* at 3) and went on to hold (*Id.* at 4-6):

... a Carrier may not use Article IX as a pretext for taking advantage of the more favorable conditions set forth in Section 2 of Article IX Section 5 of Article IX bars a carrier from proposing only a minor modification in an existing interdivisional run with the motive of procuring the more favorable conditions.... The Carriers have the right to establish extended or rearranged interdivisional service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior Interdivisional service designed solely to obtain the more favorable conditions In the 1986 National Agreement.

Further enlightenment concerning the conditional rights of carriers described by the foregoing decision in Issue No. 3 when Neutral Member David Twomey reviewed a BNSF proposal purporting to modify a preexisting ID agreement by changing the work allocation, equity recovery format, and calling procedures. In rejecting the unilateral changes proposed by the Carrier in that case, Arbitrator

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Twomey reviewed Arbitrator LaRocco's decision in Issue No. 3 and distinguished the circumstances before him, as follows [*Id.* at 6]:

The Disputes Committee simply did not deal with a situation similar to that now before this Board where no new interdivisional service has been proposed by the Carrier. The existing interdivisional service has not been "extended or rearranged". The Carrier has proposed no extended run, or no rearrangement of the run... it has proposed changes to the existing interdivisional service agreement regarding the work allocation and equity recovery format and calling procedures. Such are conditions applicable to interdivisional service. No precedent or practice has been shown to exist which would allow the Carrier to utilize the mechanisms of Article IX to impose a change in conditions on the Employees while continuing the identical interdivisional service that existed in effect on the date of the Award No. 458. The plain language of Section 5 does not allow this.

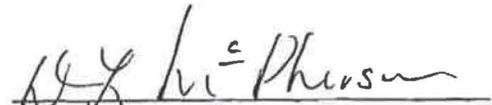
Application of the principles laid down in those authoritative precedents to the facts of record in this case leads the Board to answer all three (3) questions presented in the affirmative and to adopt the unratified agreement drafted by experienced and knowledgeable negotiators in MOA#1610010048 and the three (3) related Side Letters.

AWARD

For all the above reasons, the Board finds the August 24, 2000 notice proper and endorses the ID service proposal in MOA#1610010048 and the three (3) related Side Letters.



Dana Edward Eischen, Chair


Union Member A/B 136111
May 14 - 2008 I dissent


Company Member

Arbitration Board No. 590

Parties) Brotherhood of Locomotive Engineers and Trainmen
)
To) and
)
)
Dispute) Union Pacific Railroad Company

Organization's Question at Issue:

"shall the September 26, 2006, proposal submitted by the Company to the BLE (also extending switch limits at West Colton from Milepost 541.15 to Milepost 543.1 be adopted?"

Carrier's Question at Issue:

Shall Union Pacific be permitted to extend the east switching limit (Yuma line) at West Colton from Milepost 541.15 to Milepost 543.10, as set forth in its notice of September 26, 2006, and yard engineers performing service in such extended switching limits to be compensated under yard service rules and rates of pay but without additional compensation?

Background:

This dispute involves Union Pacific's notice of its intention to extend the switching limit at its West Colton, California terminal from Milepost 541.15 to Milepost 543.1, served pursuant to Article II of the May 13, 1971 BLE National Agreement. UP has a terminal at West Colton, California, which is at the east end of an area known as the Los Angeles basin. West Colton is a crew change point for crews operating in the Los Angeles basin.

UP have two routes between Colton and the western portion of the basin (the City of Los Angeles and the LAX/Long Beach harbors). The northern route is the former Southern Pacific (SP) line. The southern route is the original UP line. Since the UP/SP merger in 1996, both lines have been operated by UP. In order to minimize

the number of times trains operating on single track have to "meet" a train operating in the opposite direction, the Carrier implemented directional running in the Los Angeles basin. The predominant movement of trains on the former SP line tends to be westward and the movement of trains on the original UP line tends to be eastward. If one thinks of the UP lines in the Los Angeles basin as an oval, the primary flow of trains is counterclockwise.

A portion of the UP route between Los Angeles and Las Vegas has involved movement over BNSRF Railway via trackage rights between Riverside and Daguerre, California. Eastward trains operating on the original UP line still utilize the BNSRF trackage rights beginning at Riverside. While on the BNSRF trackage rights, the original UP route crosses the former SP route at grade within the switching limits of the West Colton terminal. Some of the eastward UP train consists on the trackage rights to Daguerre and Las Vegas. However, the majority of these eastward UP trains leave the trackage rights (i.e., turn right) within the terminal limits of Colton via a track that connects the BNSRF line to the former SP line. The distance from the start of the connector track to the east switching limits of West Colton is a little more than two miles. One train will fit comfortably in this space. If, however, two trains are moved off the BNSRF trackage rights in close succession, it is necessary to move the head end (locomotives and cars at the front) of the first train beyond the switching limit in order for the rear of the second train to move off the BNSRF line.

The UP lines in the Los Angeles basin carry a large number of trains. During the past few years, the number of carloadings has risen to an all-time high.

Additional cars cannot always be added to existing trains. The configuration of UP's physical plant, such as gradient, curvature and siding length, establishes a limit on the number of cars that can be handled in a single train. Therefore, the current level of business has resulted in an all-time high number of daily train starts.

The BNSF line over which UP operates is also a very busy piece of railroad. The BNSF track between Riverside and Colton was described as the most congested in Southern California in an Article from the Riverside Press-Enterprise. Eastward UP trains often have to wait at Riverside for a "slot" before the BNSF dispatcher will let them onto the BNSF track for the seven mile movement to where the connector track diverges. During 2006, an average of 18.5 eastward UP trains per day traveled over the BNSF track and left these tracks at Colton. When more than one eastward UP train is waiting at Riverside to enter the BNSF track, UP is faced with a decision when a "slot" becomes available. To move only the first UP train onto the BNSF track will leave the second train at Riverside subject to additional delay. To move two UP trains onto the BNSF track will result in the front of the first train being required to operate east of the switching limit at West Colton. West Colton is a cross change location for the engineers who bring the trains from Los Angeles or the harbor. Trains exiting the BNSF trackage rights at the connector track do not make a continuous movement through the West Colton terminal. They must stop to change crews.

In recent years a dispute has arisen over requiring road engineers to run through the terminal when two trains are moved over BNSF tracks and pulled into

Colton. An engineer, who operates beyond the switching limits, is paid additional compensation for being instructed to operate beyond the switching limits. The Organization contended that the movement of a train beyond the switching limits violated the agreement. In 2005 the Organization sought an injunction to prevent the Carrier from moving trains beyond the switching limits at the crew's final terminal. The Court denied the injunction and held that the dispute was minor.

On September 26, 2006, UP served BLEET with a notice stating UP's desire to move the east switching limit at Colton 1.95 miles eastward, from Milepost 541.15 to Milepost 543.1. The notice was served pursuant to Article II of the May 13, 1971 BLE National Agreement. The parties met in the office of A. C. Hallberg, UP's Director of Labor Relations on October 19. Following a conference on the proposal held on October 19, 2006, the Organization responded in writing to the Carrier by letter dated October 30, 2006. That letter recapitulated the Organization's position, which briefly was as follows:

- Article 13, Section 1 of the Collective Bargaining Agreement ("CBA") is controlling.
- "The use of Article 2 of the [1971] Agreement was never designed to change existing CBA, but to allow extension of switching limits to facilitate industries. There are absolutely no industries in the defined territory of your notice; only two railroad main tracks."
- "The specific service covered in your Notice was created through negotiations with this Committee and became effective July 1, 1991, covered under file E&F 188-138, Section 6(b) of that agreement clearly states "This service will not operate beyond the following points." *Yuma Line east of M.P. 541.15."*

- UP waived its Article II rights when it filed notice on January 13, 1998, which led to the Los Angeles Hub Agreement, in which the original switching limits were explicitly retained, and relinquished any rights it may have had thereafter when it agreed to Article V of the Los Angeles Hub Agreement.
- The Award of Arbitration Board No. 581 also served to preempt Article II.
- This presumption is supported by the Award of Arbitration Board No. 581.

The Carrier responded by letter dated November 10, 2006. The Carrier stated that it considered it advisable to extend the switching limits at West Colton in order to improve the efficiency of the outbound move from the Los Angeles basin to Yuma. They further stated that by extending the switching limits from Milepost 541.15 to Milepost 543.1 it will be possible to bring two trains at a time across the BNSF from Riverdale to Colton. They noted that the threshold for extending switching limits is that the company considers it advisable to change the switching limits. They concluded that the Company considers it advisable to change the West Colton switching limits because the terminal is not big enough to handle the necessary crew change and train staging functions. They cited numerous awards that supported their position.

The Carrier also stated that nothing in the agreements at issue include the West Colton switching limits from change by the 1971 National Agreement. They pointed out that the Western Lines Merger Implementing Agreement contained a savings clause that stated that all agreements remain in full effect unless specifically changed. They further stated that the Award of Arbitration Board No. 581 was not

applicable and applied to interdivisional runs and different merger implementing agreements. They concluded that the switching limits notice met the standards of improved service to the customer and improved rail service.

Discussion:

The Carrier's position was that the proposed switching limit change was fully supported by Article II of the May 13, 1971 BLE National Agreement. The pertinent part of that agreement provides:

"(a) Where an individual carrier not now having the right to change existing switching limits where yard crews are employed, considers it advisable to change the same, it shall give notice in writing to the General Chairman or General Chairmen of such intention, specifying the changes it proposes and the conditions, if any, it proposes shall apply in event of such change.

The Carrier stated that extending the east switching limit at the West Colton terminal would improve operational efficiency by being able to utilize one "slot" on the BNSF to move two trains, without complaint from BLET. They further stated that the proposed extension would permit two trains to fit within the West Colton terminal without moving a portion of the first train beyond switching limits. The Carrier insisted that this would improve the efficiency of UP's train operation. They concluded that nothing in the language of Article II precludes the change in switching

limits proposed by UP, and nothing in the language speaks to disqualify UP's reasons for its proposal.

The Carrier listed several benefits from the proposed change. Moving two trains at a time over the BNSF trackage rights will reduce the waiting time for eastward trains to enter the BNSF track rights at Riverdale and improve the performance of eastward trains between origin and destination. The Carrier stated that the proposed change would permit engineers to tie up and go home sooner. Finally, the Carrier stated that the proposed change will bring resolution to the dispute between BLEET and UP concerning engineers operating beyond the east switching limit at West Colton.

As stated above, an engineer instructed to operate beyond switching limits is paid additional compensation for doing so. The Organization unsuccessfully sought injunctive relief to stop this practice. The Carrier readily admits that an ancillary benefit of extending switching limits will be the elimination of such additional compensation. Although the Carrier's primary objective is improved efficiency from the reduction in delay of UP trains entering the BNSF line at Riverdale, the Carrier stated that the elimination of the penalty payment does not alter the Carrier's right to make the switching limits change. The Carrier cited Arbitration Board No. 390 in support of its position. In this award Referee Prideman held:

"Although elimination of penalty payments is not a criterion under Article VI, the fact that this may be a by-product of an appropriate extension of switching limits, does not alter Carrier's rights under Article VI to obtain the kind of change which will enhance efficiency."

The Carrier also cited several other arbitration awards to support the proposed switching limit change.

The Organization objected to the Carrier proposal on several basis. First, the Organization argued that Article 13, Section 1, of the CBA governs the instant dispute, because it is more specific than the general provision set forth in Article II. Second, the Organization stated that the Carrier is estopped from invoking Article II in this instance because its Article II rights have been preempted by the Los Angeles Hub Agreement. Third, even if Article II was available to the Carrier, it failed to comply with the requirements of the rule. And, fourth, the Carrier's claimed rationale for changing the switching limits that are the subject of the instant dispute is a sham.

The Organization stated that when Article II is read in context with other applicable contractual provisions, it becomes clear that it cannot apply in the instant dispute. It is their position that this matter is governed by Article 13, Section 1 of the CBA which provides in pertinent part as follows:

**ARTICLE 13
WHAT CONSTITUTES A TRIP**

SECTION 1. An engineer is understood to have reached the terminal of a trip when he reaches the division terminal at which engine crews are usually changed, or arrives at the established terminal of his train, as shown by assignment, and having done so and proceeding farther with same train, or being sent out on another trip or train, he is, in either case, understood to have begun another trip.

When an engineer is called for service on other than assigned runs, he will not be run through terminals except when no engineer entitled to the service is available. When

run through, he will begin another trip upon leaving such terminal.

The points shown below constitute all division terminals at which engine crews are usually changed as defined by this section:

* * *
West Colton
* * *

(Yuma-West Colton and Bakersfield-West Colton engineers only)

The Organization stated Article 13, Section 1, provides that a road engineer's trip ends upon arrival at West Colton, and that the engineer may not be sent beyond the switching limits of the terminal without beginning a new trip for pay purposes. They also pointed out that those switching limits were established by an agreement that became effective on January 5, 1995. This agreement provides in part:

Section 5:
Engineers operating in this service may operate between Los Angeles or ICTF and West Colton via any route except for the restrictions in Section 6 below.

Section 6:

(b) This service will not operate beyond the following points.

<u>Location</u>	<u>Milepost</u>
* * * Yuma Line	east of M.P. 541.15

(d) Engineers in this service used in violation of items (a), (b) or (c) above will be compensated one hundred (100) miles in addition to and without deduction for their earnings for their trip. However, in the event the violation is an engineer in this service operating west of M.P. 461.50 (Coast) and M.P. 471.20 (Valley), a new \$275.00 trip rate day will commence in lieu of the one hundred mile penalty. (Examples: 1. Engineer Jones operates west of M.P. 461.50. What is he entitled to? Answer: \$275.00 trip rate. 2. Engineer Smith operates east of M.P.

541.15 and subsequently operates west of M.P. 461.50. What is he entitled to? Answer: 100 miles and \$275.00 (tip rate.)

The Organization argued that these agreements are significant because they were negotiated a quarter of a century after Article II was written and second, the Carrier had two other opportunities to eliminate the above restrictions in the latter half of the 1990's and did not do so. The Organization concluded that the Carrier seeks to do nothing more than escape the penalty Article 13, Section 1, imposes for removing road engineers through their final terminal, a purpose not contemplated by and, indeed, inconsistent with the intent of Article II.

The Carrier answered the Organization's argument by stating that Article 13 merely lists the division terminals at which engine crews are exchanged. They stated that by expanding the eastern limit of the terminal at West Cotton to 1.95 miles, the definition of West Cotton is not changed. They further stated that this is the purpose of Article II of the 1971 National Agreement and nothing in the present agreement restricts the Carrier's right to utilize this provision.

The Organization next argued that the Los Angeles Hub was created in a period during which a Carrier implementing a merger had the ability to unilaterally change almost any collective bargaining agreement provision in nearly any fashion it chose. They stated that the main two vehicles for exercising "zero down" rights in the UP merger were the development of hub agreements and the Carrier's unilateral selection of the collective bargaining agreement that would govern a particular hub.

The Organization argued that the Carrier did not change the switching limits during these processes and thus was preempted from doing so.

The Organization noted that on November 3, 1997, in preparation for the creation of the Los Angeles Hub, the parties negotiated an agreement (hereinafter "Modification Agreement") that confirmed the former Southern Pacific Western Lines ("SP WEST") CBA then being utilized in the Los Angeles area to former Union Pacific CBAs. The Organization noted that the Modification Agreement made no changes whatsoever to either Article 13 of the CBA or to the switching limits identified in Section 1 thereof. Indeed, they noted the term "switching limits" appears nowhere in the Modification Agreement. Further, they stated the Modification Agreement included the following Savings Clause:

The parties agree that all agreements, side letters, understandings, or any other benefits of the former Southern Pacific (Western Lines) including the former El Paso and Southwestern (EP&SW) Engineer's Agreement will remain in full force and effect unless specifically changed, modified by, and/or in conflict with this Agreement, Side Letters, and Questions & Answers. If changed, modified and/or conflicting, then this Agreement shall govern. Future changes shall be subject to the Railway Labor Act as amended.

The Organization concluded that the limitation on requiring a road engineer to take his/her train beyond the terminal limits at milepost 541.15 not only survived the Modification Agreement, but it was expressly continued in full force and effect by virtue of the Savings Clause set forth in Article VIII.

The Organization argued that the second part of the merger process occurred when the Carrier served notice pursuant to New York Dock to create the Los Angeles

Hub. They stated that the Hub Agreement specifically covers the switching limits of the LA Hub. They noted that Article III of the Hub Agreement provided for the establishment of several pools with West Colton as the home terminal. Moreover, they stated, Article III, Section B, provided that "[n]one of the engineers ... shall be restricted, in or between the terminals of their assignment, as to where they may set out or pick up cars or leave or receive their train," and that the "type and amount of work shall be governed by the controlling CBA." They concluded that Article 13, Section 1 of the CBA continued to control, and road engineers could not be required to travel beyond the switching limits at West Colton without penalty.

The Organization also pointed to Article VI, Section B.1 as providing further support that the Carrier could not change switching limits. The Organization further argued that Article V, Terminal and Other Considerations, of the HUB Agreement specifically stated that the Carrier cannot enlarge the limits of the terminal. This provision provides:

V. TERMINAL AND OTHER CONSOLIDATIONS

"A. The SP LATC and UP LA East Yard shall be combined into a single terminal covering the existing terminal limits for each Carrier and the connecting trackage between the two terminals. Yard engineers shall not be restricted as to where in the terminal they can operate.

"B. The provisions of A above will not be used to enlarge or contract the current limits except to the extent necessary to combine into a unified operation.

"C. In the LA Hub, prior to this implementing Agreement, there existed several trackage rights, stations and Herber areas used by both Carriers. With the implementation of this Agreement all areas, trackage, stations and facilities in the Hub shall be common to all engineers as a single unified system. Engineers shall not be restricted in the Hub where they can operate except on the basis of CBA provisions that set forth limits of an assignment such as the radius of a road switcher.

"D. Riverside Line - When heading west, trains that pass Colton Crossing onto the Riverside line may be operated by West Colton-Basin crews as if "in the terminal". When heading East, trains that reach Streeter, a point directly south of West Colton on the Riverside line, may be operated by West Colton-Yuma or West Colton-Yuma crews as if "in the terminal". This does not apply to Milra Loma trains as those trains have separate provisions."

Finally, the Organization noted that Article VI, Section C, of the Hub

Agreement states as follows:

Engineers working in the Los Angeles Hub shall be governed, in addition to the provisions of this Agreement, by the Collective Bargaining Agreement selected by the Carrier, including all addenda and side letter agreements pertaining to that agreement and previous National Agreement/Award/Implementing Document provisions still applicable. Except as specifically provided herein the system and national collective bargaining agreements, awards and interpretations shall prevail. None of the provisions of these agreements are retroactive. The Carrier has selected the SP WEST modified BLR Agreement.

It was the Organization's position that all National agreement provisions survived except as otherwise provided by the Hub Agreement. The Organization stated contrary to the Carrier's argument, Section II of the 1971 Agreement did not survive insofar as the facts and circumstances of this case are concerned.

The Organization cited the Award rendered by Artisanian Board No. 581 to support its position that Article II of the May 13, 1971 BLR National Agreement did not apply and was preempted by the Hub Agreement. The parties in

that matter were this Carrier and another Organization General Committee with jurisdiction over a different portion of the system. At issue was an attempt by the Carrier to invoke the provisions of Article IX of the 1966 National Agreement to alter industrial rules it had established approximately five to six years earlier in a series of three hub agreements negotiated pursuant to the New York Desk process. The 581 Award held that, "Although Carrier's Article IX rights survive under the Savings Clause of the hub merger implementing agreement, their exercise is not undertaken." The Board further held:

the parties recognized ... that prior agreements would remain in effect. They also recognized, however, that circumstances might arise in which the implementing agreements would conflict with these pre-existing agreements. When that happens, the parties agreed that the implementing agreement provisions would prevail. This bargain that was struck is not ambiguous and it is entitled to enforcement.

The Organization argued that the Board in rejecting the Carrier's argument that, once implemented, a hub agreement becomes indistinguishable from any other agreement, is subverted within the whole fabric of agreements and understandings, "and is no longer a stand alone document," when it held as follows:

The parties are experienced negotiators. They must be held to have full knowledge of the provisions of the Hub Merger Implementing Agreements

and the significance of the clear and unambiguous language contained therein. Moreover, it must be presumed that they did not include language in those agreements with the understanding that the provisions would be rendered superfluous or meaningless. The Carrier and the Organization have plainly stated ... that the Hub Merger Implementing Agreements prevail when they conflict with other applicable agreements. If the Carrier's position were accepted in this case, although the parties made express promises ... to resolve conflicts in agreements in favor of the hub merger implementing agreements, the Carrier would be allowed to ignore those commitments. No such result is warranted here.

The Organization concluded that the issue decided in the 581 Award and the analysis employed by the 581 Board is absolutely on point in the instant matter.

The Carrier stated that nothing in the Hub Agreement precludes subsequent changes to switching limits. They noted that the Hub Agreement only dealt with switching limits in two places. First, in Article V (reproduced above) and again in Article VI, Section B.3, which provides for a "Twenty-Five Mile Zone" at Yuma, AZ and Yuma and West Colton, CA. The Carrier noted that the twenty-five mile zone at West Colton is not involved in the current dispute. They also stated that Article V is not applicable. They concluded that nothing in the Hub Agreement nullified the switching limits and that there is no mention of Milepost 541.1 anywhere in the agreement.

The Carrier further argued that a review of the Los Angeles Hub Agreement language supports UP's position that Article II is alive and well. Article VI, Section C of the Los Angeles Hub Agreement (reproduced above) preserves all national agreements that existed prior to the creation of the Los Angeles Hub. They concluded that if Article II of the May 13, 1971 BLE National Agreement was "still applicable" at the time the Hub Agreement became effective, it was preserved by the language of Article VI, Section C.

The Carrier also argued that the 581 Award has no application to this case. The Carrier stated that there can be no doubt Arbitrator Kasin based her decision on specific language found in the three merger implementing agreements at

issue before her (Kansas City, St. Louis and North Little Rock/Pho Shuff Merger Implementing Agreements). Specifically, she said:

"Accordingly, the provisions of the Hub Merger Implementing Agreements must prevail in accordance with Article IV.A. and the side letter set forth in full above."

Article IV.A. contained in these three merger implementing agreements reads as follows:

ARTICLE IV - APPLICABLE AGREEMENT

"A. All engineers and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect between the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers dated October 1, 1977 (reprinted October 1, 1991), including all applicable national agreements, the 'local/national' agreement of May 31, 1996, and all other side letters and addenda which have been entered into between date of last reprint and the date of this Implementing Agreement. Where conflicts arise, the specific provisions of this Agreement shall prevail. None of the provisions of these agreements are retroactive."

The Carrier noted that the key phrase in Article IV.A. for Arbitrator Keris was

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

They concluded that she emphasized this phrase in the Award and based her decision on the existence of this phrase:

They also argued that she made specific reference to Side Letter No.

20 and relied upon Side Letter No. 20 to support her decision when she said:

"Our reading of Article IV.A is supported by the express language of the side letter incorporated in each of the three hub merger implementing agreements. To dispel any doubt about the interplay between the pre-existing agreements and the implementing agreements, the side letter incorporated in the hub merger implementing agreements plainly states that, to the extent that there are other applicable collective bargaining agreements that were not expressly modified or nullified, 'they still exist and apply.' However, the parties expressly acknowledge that 'the specific provisions of the Merger Implementing Agreement, where they conflict with the basic schedule agreement, take precedence, and not the other way around.'"

The Carrier stated there can be no doubt Arbitrator Kenia based her decision on the specific language of Article IV.A and Side Letter No. 20. They noted that a comparison of the three merger implementing agreements to the Kenia Award with the Los Angeles Hub Merger Implementing Agreement reveals none of the language relied on by Arbitrator Kenia exists in the Los Angeles Hub Agreement. Finally, they stated there is no side letter to the Los Angeles Hub Agreement like Side Letter No. 20. They concluded that without the language noted above the Kenia award does not support the Organization's position.

The Organization disagreed with the Carrier's interpretation. Although Side Letter No. 20 was not contained in the Los Angeles Hub Agreement, they stated that it was the Carrier's interpretation of how Hub Implementing Agreements apply. They stated that the intent of that letter applies everywhere and not to the territories contained in the Kenia Award as the Carrier contended.

The Organization next argued that if Article II of the 1971 National Agreement was available, the Carrier is not entitled to relief from this Board because it failed to comply with the requirements of the provision. They stated Article II of the 1971 Agreement was a companion rule with Article III, governing switching service for new and other industries. They noted that the genesis for both rules was the 1952 Agreement, in which Article 6 dealt with switching service for new industries and Article 7 -- Article II's direct predecessor -- addressed switching limits. They argued that these two rules relaxed existing work rules to enable a railroad to provide more efficient services to industries that located outside switching limits, whether those switching limits were changed or not. They pointed out that the Carrier never identified any new industries that located outside the current switching limit at West Colton. Moreover, they noted that the Carrier never rebutted our statement that no new industries have located outside West Colton.

The Organization further argued that the Carrier's rationale for changing the switching limits is a sham. They argued that the Carrier conceded that its motivation was solely to escape the limitations imposed by Article 13, Section 1 of the CBA, as incorporated into the Hub Agreement. They further argued that the Carrier provided no support for its position but instead made a series of vague, unsubstantiated assertions with no data presented that would establish the veracity of its assertions. They concluded that the Carrier failed to meet its burden of proof.

The Organization cited a case that it stated was directly on point with its position that a Carrier may not automatically change switching limits simply because "the Company considers it advisable" to do so. This case involved Article II in the UTU National Agreement where Arbitration Board No. 318 held:

Nor are switching limits automatic, as appears to be suggested in Carrier's brief, simply because Carrier "considers it advisable" to do so. That consideration triggers the negotiations required in Article VI, and arbitration if negotiations are unsuccessful. Either the Organization or the Arbitrator must be persuaded what contractual standards set forth in the preamble to Article VI are being met.

Among reasons suggested by Carrier in this case for proposed changes is cost-savings on penalty claims by road crews. While this may on occasion contribute to the justification for an extension of switching limits, it is apparent that Article VI anticipated a careful case-by-case approach using the criteria it outlines.

Otherwise, any extension of switching limits which would reduce a carrier's cost of operation would have been stated as an appropriate reason. An extension of switching limits may not necessarily change the way switching service is performed and yet be a treasury-saver, as some of the Carrier's proposals indicate.

The Organization concluded that the Carrier does not have the right to extend ^X switching limits as proposed.

The Carrier disagreed with the Organization interpretation of Article II. They stated that the language of Article II permits a Carrier to serve notice to change switching limits whenever that Carrier "considers it advisable to change" switching limits. They further argued that nothing stated or implied in the language of Article II restricts its use to situations involving switching service to industries. The Carrier further noted that the UTU National Agreement is different from Article II of the 1971 BLB Agreement in that the UTU Agreement has a preamble containing the stated purpose of the Agreement:

"... to the end that efficient and adequate switching service may be provided and industrial development facilitated..."

The Carrier further argued that although the preamble to Article VI of the 1971 UTU National Agreement does refer to "switching service", various arbitrators have held that extension of switching limits under the UTU agreement is not restricted to instances where the purpose of the extension is ability to provide switching service to a particular industry or industries. They cited the decision of Arbitration Board 372 to support its position wherein Referee Brown held:

Vice President J. M. Hicks argues that the stated purpose of Section VI is to provide efficient and adequate switching service but that the avowed purpose of the L&N extension at Ravenna is to allow road crews to yard their trains at Cella - not to provide improved switching service. This is true, and the Referee has given much thought to this approach. There is no precedent apparently, and the numerous awards studied are helpful only in that they reflect uniformly liberal decisions in favor of the carriers. After much study the Referee concludes that the intent of Section VI is to allow Carriers to improve service to customers. To say that Article VI authorizes the extension of switching limits only where presently inadequate switching service is to be replaced by purely "switching" service as opposed to convenient yarding of a unit train by road crews is to adopt a narrow view that we cannot endorse."

The Carrier concluded that its notice was proper and that the switching limit extension should be granted.

Findings:

In order for the Board to determine if the Carrier may extend switching limits as proposed, it must first address the Organization's contention that the Carrier is estopped from invoking Article II in this instance because its Article II rights have been preempted by the Los Angeles Hub Agreement. Therefore, paramount to this

decision is whether the Los Angeles Hub Agreement contains any restrictions to the Carrier's right to utilize Article II of the 1971 National Agreement.

After carefully considering the entire record, the Board can not find any foundation for the Organization's claim that there is a conflict between the Los Angeles Hub Agreement and Article II of the 1971 BLEB National Agreement. The Board reached this decision based on several factors.

The first factor was that the Award rendered by Arbitration Board No. 581 or Karnis award does not support the Organization's position. It is clear from the award that Referee Karnis based her decision on specific agreement language not found in the Los Angeles Hub Agreement. The Board agrees with the Carrier that a side by side comparison of Article IV.A. in the Karnis Award with Article VI, Section C of the Los Angeles Hub Agreement clearly shows the phrase "[w]here conflicts arise, the specific provisions of this Agreement shall prevail" is only in Article IV.A. and not in Article VI, Section C of the Los Angeles Hub Agreement . . .

The Board also finds that the Organization recognizes this distinction. The Organization in a brief filed with the United States Court of Appeals for the Seventh Circuit wherein it stated:

"What is clear from the quote when put in its proper context is that the interdivisional service runs established in other territories by the Carrier were under different Hub Merger Implementing Agreements which did not contain the same language found in the three Hub Agreements which were the subject of the arbitration before Karnis (nor did the outside hub agreements have the same side agreements as the three at issue)."

It is clear the BLET Committee involved in the Kerls Award has unequivocally stated the Kerls Award is based on "the three Hub Agreements" and "the same side agreements" and other implementing agreements without the specific language of the "three Hub Agreements" and "the same side agreement" cannot be compared to the Kerls Award

The Board also disagrees with the Organization that while Side Letter No. 20 is not present in the Los Angeles Hub Agreement, it shows what the parties intended and should apply. The Board notes that the Los Angeles Hub Agreement was not a negotiated settlement but was imposed by arbitration pursuant to New York Dock. In its presentation to this Board, the Organization requested several items some of which were two side Letters dated March 8, 1996 and concerned matters not covered by Side letter No. 20. Arbitrator Mousing when imposing the agreement that failed ratification stated :

"... This conclusion is given greater substance by noting the lengthy process that led to the proposed Implementing Agreement and the experience of the individuals involved. The persons involved in this process were seasoned negotiators who have years of experience addressing and resolving complex, tough, benefit and wage issues. The evidence in the record before this Board demonstrates that the negotiators were keenly aware of the various factors that influenced and lead to successful bargaining. They clearly took into account that their efforts could not be conducted in a vacuum and that success depended upon properly based compromises."

Reference Mousing clearly felt that the adopted agreement covered all the parties' intentions. If the parties intended Side Letter No. 20 to apply, it would have been part of the failed agreement.

The Board also notes that the Organization cited the Award of Arbitration Board No. 590 to support its position that the Carrier had several opportunities to extend switching limits in Los Angeles prior to its notice under Article II of the 1971 National Agreement. This award involved a notice served on January 23, 2002 in accordance with Article IX of the May 19, 1986 BLE National Agreement. The notice proposed the establishment of three flight pools in the Los Angeles Basin with Dolores as a home terminal. The parties reached an agreement but it failed ratification. In imposing the tentative agreement the Board considered several items brought up by the Organization, none of which was the Carrier was estopped from using provisions of the 1986 National Agreement because the Los Angeles Hub Agreement preempts those provisions. This award does not support the Organization's position but confirms that National Agreements prevail over the Los Angeles Hub Agreement.

Finally, the Board finds that the Carrier has shown that Article II of the 1971 BLE National Agreement is in force on the Los Angeles Hub. Article VI, Section C of the Los Angeles Hub Agreement preserves all national agreements that existed prior to the creation of the Los Angeles Hub. Article II of the May 13, 1971 BLE National Agreement was preserved by the language of Article VI, Section C.

The Board then turns to the question of whether the September 26, 2006, proposal submitted by the Company to the BLE (sic) extending switch limits at West Colton from Milepost 541.15 to Milepost 543.1 be adopted?'. The Board agrees with the Carrier that that the language of Article II permits a Carrier to serve notices to change switching limits whenever that Carrier

"considers it advisable to change" switching limits. The Board further finds that numerous decisions of other Arbitration Boards support the Carrier's position that nothing in Article II restricts its use to situations involving switching service to industries.

The Board notes that Referee Seidenberg in Arbitration Board No. 338 held:

"The Board is also persuaded to grant the Carrier's request in view of the fact that there are no overt restrictions imposed on the Carrier by Article II. The Board would have to find substantial and material evidence in the record militating against extending the proposed new switching limits."

This Board also held:

"The Carrier's evidence reveals persuasive operating and financial reasons for extending the aforementioned yard switching limits."

This Board also agrees with the reasoning in Arbitration Board No. 337 cited above by the Carrier :

"... the intent...is to allow carriers to improve service to customers."

The Board notes that the above opinion was also endorsed by Arbitration Board No. 399 and 404

In the present case the Carrier has shown that extending the switching limits will allow two trains at a time to move over the BNSF trackage. This will reduce waiting time for eastbound trains and reduce congestion in this overcrowded corridor. While the Carrier can not point to any one

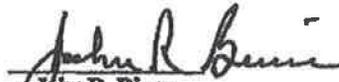
customer that will benefit, the Board believes that the change will improve customer service.

The Board also does not agree with the Organization's contention that the reduction in expense not improved customer service is the Carrier's only motivation. While Article 13 is preserved in the modification agreement and does provide penalties to engineers operating beyond switching limits, it does not limit the Carrier's ability to extend switching limits pursuant to Article II. As previously shown by the Carrier, Arbitration Board 330 has held that while the elimination of penalty payments is not a criterion for extending switching limits, it may be a by-product of an appropriate extension and does not alter the Carrier's rights under Article II. Arbitration Board No. No. 318 also found that the reduction of penalty claims would not prevent a legitimate extension of switching limits by the Carrier.

The Board finds that the Carrier has justified its reasons for wanting to extend the switching limits at the east end of West Cotton from Milepost 541.15 to Milepost 543.10. The Board finds nothing in the provisions of Article II of the 1971 BLE National Agreement that prohibits the proposed change. The change requested by the Carrier will be granted.

Award:

The Carrier's and Organization's questions are answered in the affirmative.
The Carrier shall be permitted to extend the east switching limit (Yuma line) at
West Colton from Milepost 541.15 to Milepost 543.10, as set forth in its notice
of September 26, 2006


John R. Binzu
Neutral Member

A.C. Halberg
Carrier Member

E. L. Pruitt
Organization Member

but they were unable to do so. Thus, the Carrier announced that it believed the parties were at an impasse and declared that it would invoke arbitration under Article IX, Section 4 of the parties' collective bargaining agreement. To that end the Carrier wrote to the Organization on September 29, 2006 a letter in which, *inter alia*, the Carrier proposed five neutrals to chair the arbitration board. On December 7, 2006 the Organization replied offering different proposed neutral chairs. Thereafter, on January 5, 2007, the Carrier responded, asserting that none of the neutrals proposed by the Organization were acceptable and further informing the Organization that the Carrier intended to ask the National Mediation Board (NMB) to appoint the neutral chair. On January 22, 2007 the Carrier so requested the NMB to make that appointment and on January 31, 2007 the NMB advised the parties that Referee Robert Perkovich had been appointed to chair the Arbitration Board.

On March 30, 2007 the Organization provided to the Carrier a counter proposal to its June 7, 2006 proposed Memorandum of Agreement and on April 5, 2007 the Carrier wrote to the Organization informing it that it could not agree to the counterproposal. This arbitration ensued.

POSITIONS OF THE PARTIES

As set forth in more detail below, the Organization contends that the Carrier's notice of intent to establish interdivisional service and the terms and conditions of employment to govern employees working on that service is procedurally defective and must be rejected. In the alternative, the Organization argues that the proposed Memorandum of Agreement is neither reasonable nor practical as required by Article IX, Section 4 of the parties' collective bargaining agreement. The Carrier on the other hand asserts, as set forth more fully below, that its notice of intent is procedurally sound and that its proposed Memorandum of Agreement is not only reasonable and practical but necessary for efficient operations.

FACTS

Arbitration Board No. 458 determined the terms of Article IX that govern the establishment of interdivisional service finding that a carrier may establish such service so long as it provides twenty day's written notice of its intent to do so to the Organization specifying the nature of the service and the conditions which it proposes to govern the establishment of such service. With regard to the latter, Section 2 of that Article provides, *inter alia*, that those conditions be "reasonable and practical" and that the proposed runs "be adequate for efficient operations and reasonable in regard to the miles run, hours on duty and in regard to other conditions of work." Section 2 also allows the organization and carrier to negotiate notwithstanding the proposed conditions and Section 4 provides that in the event any such negotiations do not produce an agreement, the parties shall avail themselves of arbitration to resolve the dispute.

The record reflects the circumstances that led the Carrier to propose the service in question and the proposed terms and conditions of employment to govern the proposed

service. More specifically, the Houston area contains a large network of railroad track such that ten major railroad arteries serve the area. In addition, smaller railroads originate and terminate rail traffic in the area as well. As a result, the network in question handles a record number of carloads of up to on or about 120 originating trains. Currently the Carrier has configured pools such that tree between Houston and Freeport and the return thereto, between Houston and Angleton and the return thereto, and between Spring, Texas and Angleton and the return thereto have no away-from-home terminal. Thus, crews on these pools are required to return to Houston and, if they are unable to do so within the twelve hour limitation under the Federal Hours of Service Law, an occurrence that arises frequently, a relief crew must be dispatched from Houston. Moreover, the current configuration of pools does not allow the Carrier to operate between Houston and Spring without changing crews in Houston. Thus, the Carrier's proposed service will combine all of these pools into one with a home terminal at Houston and will allow crews to operate directly between Houston and Spring.

FINDINGS AND DISCUSSION

The threshold inquiry is, of course, whether the Carrier's Notice of Intent is procedurally sound because if it is not, we may not examine whether its proposed Memorandum of Agreement may be imposed to govern conditions of employment on the proposed service.

On this issue the Organization argues that the Notice of Intent must be invalidated because it runs afoul of various provisions of the parties' Houston Hub Merger Implementing Agreements and because the parties agreed that those Agreements would prevail if conflicts with their terms should arise. Moreover, the Organization cites the decision of Arbitration Board 581 on this very property that found this argument persuasive.

The Carrier on the other hand argues that the decision of Arbitration Board 581 is distinguishable as determined by the decision of Arbitration Board 590, another decision on this very property.

We have carefully reviewed the parties' submissions and in particular the decisions of Arbitration Boards 581 and 590. We find that they can be reconciled and that, for the reasons described below, the decision of Arbitration Board 581 must govern this dispute.

In brief, Arbitration Board 581 held that although the parties' Savings Clause in their hub merger implementing agreements preserved the Carrier's right to invoke Article IX of their collective bargaining agreement, it held that the right so preserved was not "unfettered." More specifically, the Board there held that the parties' further agreement in the merger implementing agreements that "(w)here conflict arise, the specific provision of this Agreement shall prevail..." clearly and unequivocally evinced a mutual intent that compelled the conclusion that the merger implementing agreements governed

over Article IX. Finally, the Board held that statements by the Carrier in side letter further buttressed this conclusion.

As noted above another arbitration board, Board 590, has also had the opportunity to review the decision of Board 581. In its decision it concluded that the decision of Arbitration Board 581 was distinguishable because the merger implementing agreements in question preserved all national agreements that existed before those agreements, because the merger implementing agreements contained the language relied upon by Arbitration Board 581 but that it did so only in that portion of the merger implementing agreement that dealt with "Applicable Agreement" rather than other portions of the merger implementing agreement, and because the record before it did not contain any side letters expressing the parties' intent on the issue.

This Board therefore must consider the relevant language of the merger implementing agreements to determine whether they are of the type that were before Arbitration Board 581 or of the type that were relied upon by Arbitration Board 590. When we do so, we find that the decision of Arbitration Board 581 governs. The relevant language found in the applicable merger implementing agreements before us read, in relevant part, as follows:

All engineers and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect., including all applicable national agreements...Where conflicts arise the specific provisions of this Agreement shall prevail..."

There can be no doubt that the last clause of the provision cited above is identical to that relied upon by Arbitration Board 581 when it rescinded the carrier's notice of proposed service and proposed terms and conditions of employment to govern the work of those bargaining unit employees working on that service. Moreover, unlike the merger implementing agreements before Arbitration Board 590, none of those in the record before us provide that "the system and national collective bargaining agreements...shall prevail." In other words the Houston Hub Merger Implementing Agreements are more like those relied upon by Arbitration Board 581 rather than those relied upon by Arbitration Board 590. Thus, as construed by Board 581 in a decision between these same parties on the very same property, it most control and we so hold¹.

The only remaining consideration is to determine whether the Carrier's proposed Memorandum of Agreement does indeed conflict with the Hub Merger Implementing Agreements. As pointed out by the Organization it does so with respect to, *inter alia*, first-in/first-out provisions, terminal limits, and seniority rights. Thus, under the parties'

¹ Unlike Arbitration Board 590 we are not troubled by the fact that there are no side letters in the record before us that might shed further light on the parties' mutual intent when they agreed that the Houston Hub Merger Implementing Agreements "shall prevail." Rather, because Arbitration Board 581 held that such language was clear and unequivocal we feel that its reliance on the side letter was simply an adjunct to its finding.

agreement that the Hub Merger Implementing Agreements "shall prevail" we find, and we so order.

AWARD AND ORDER

Question At Issue:

Is the Carrier's June 7, 2006 notice of intent "to establish new interdivisional unassigned (pool) freight service with a home terminal at Houston and away-from-home terminals at Angleton, Freeport or Bloomington, Texas...to be governed by...the attached Memorandum of Agreement..." procedurally proper?

Answer to the Question at Issue:

No.

S. F. Boone, Carrier Member

Gil Gore, Organization Member



Robert Parkovich, Neutral Chairman

ARBITRATION BOARD NO. 581

In the Matter of the Arbitration Between:

**BROTHERHOOD OF LOCOMOTIVE
ENGINEERS,
(General Committee of Adjustment, Central
Region),
Organization,
and
UNION PACIFIC RAILROAD COMPANY,
Carrier.**

**Pursuant to Article IX, Sec. 4 of
the 1986 National Agreement**

OPINION AND AWARD

**Hearing Date: February 12, 2004
Hearing Location: Chicago, Illinois
Date of Award: March 12, 2004**

MEMBERS OF THE COMMITTEE

Neutral and Sole Member: Ann S. Kenis

ORGANIZATION'S QUESTIONS AT ISSUE:

1. Whether the Arbitrator has jurisdiction under Section 3 of the Railway Labor Act to interpret the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, the Kansas City Hub Merger Implementing Agreement, and the St. Louis Hub Merger Implementing Agreement, negotiated pursuant to the New York Dock Conditions, imposed by the Surface Transportation Board, pursuant to its authority under the Surface Transportation Act?
2. If so, whether the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, the Kansas City Hub Merger Implementing Agreement, and the St. Louis Hub Merger Implementing Agreement, negotiated pursuant to the Surface Transportation Act, can be changed by the Carrier's former rights under Article IX of the 1986 National Agreement?
3. If so, whether the parties reached impasse under Article IX of the 1986 National Agreement, as to the terms and conditions of the proposed service in the Carrier's letters of May 16, 2003, May 29, 2003, and October 1, 2003, as to the North Little Rock/Pine Bluff Hub?

Ex. A -

4. If so, what are the proper terms and conditions of the proposed service?

CARRIER'S QUESTION AT ISSUE:

What shall be the terms and conditions of the Interdivisional service between North Little Rock, Arkansas and Memphis, Tennessee, established pursuant to Union Pacific's notice dated May 16, 2003?

I. FACTUAL BACKGROUND

On May 16, 2003, the Carrier served notice in accordance with Article IX, Section 1 of the May 19, 1986 Award of Arbitration Board No. 458 (hereinafter referred to as the 1986 National Agreement) for the establishment of Interdivisional (ID) service between North Little Rock/Pine Bluff and Memphis, with North Little Rock/Pine Bluff as the home terminal. The parties met on June 24, June 25, July 17 and August 14, 2003 but did not reach agreement concerning the operation and conditions of the proposed new ID service.

In connection with its assertion that the Carrier was barred by the terms of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement from exercising its Article IX rights, the Organization wrote the National Mediation Board (NMB) on September 22, 2003, asking that a New York Dock Arbitrator be appointed to address that issue. Carrier opposed the request. At the same time, Carrier notified the NMB seeking the appointment of an Arbitrator to establish the terms and conditions for the proposed ID service. The undersigned was ultimately designated to adjudicate both matters. Hearings on February 12, 2004 were held for the New York Dock arbitration and the arbitration pursuant to Article IX, assigned as Arbitration Board No. 581. Both parties were permitted to make oral presentations at hearing. In addition, they have furnished the Board with extensive written submissions.

At the February 12, 2004 hearing, the Organization and the Carrier waived the Arbitration Board established by Section 4 of Article IX and agreed that the undersigned would act as the sole member of the Board.

II. FINDINGS

The Organization challenges the jurisdiction of the Arbitrator to consider this matter and render a decision. As a threshold matter, the Organization maintains that the proper forum for resolving this dispute is in a New York Dock proceeding.

We agree with the Organization. The question of jurisdiction was raised by the Organization in the New York Dock matter which is the companion case to this one. There, the Arbitration Committee agreed that the forum provided under Article I, Section 11 of the New York Dock Conditions was the proper one for determination as to whether the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement could be modified by Carrier's pre-existing rights under Article IX of the 1986 National Agreement. The Arbitration Committee further determined that the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, among others, could not be modified by the rights asserted by the Carrier pursuant to Article IX of the 1986 National Agreement.

Our ruling in that case is dispositive herein, both in terms of the Organization's jurisdictional challenge and its contention that the North Little Rock/Pine Bluff Hub Merger Implementing Agreement precludes the Carrier's exercise of its Article IX rights in this proceeding.

AWARD AND ORDER

ORGANIZATION'S QUESTIONS AT ISSUE:

1. Whether the Arbitrator has jurisdiction under Section 3 of the Railway Labor Act to interpret the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, the Kansas City Hub Merger Implementing Agreement, and the St. Louis Hub Merger Implementing Agreement, negotiated pursuant to the New York Dock Conditions, imposed by the Surface Transportation Board, pursuant to its authority under the Surface Transportation Act?

Answer: No.

2. If so, whether the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, the Kansas City Hub Merger Implementing Agreement, and the St. Louis Hub Merger Implementing Agreement, negotiated pursuant to the Surface Transportation Act, can be changed by the Carrier's former rights under Article IX of the 1986 National Agreement?

Answer: The answer to this question was resolved in the New York Dock proceeding and is dispositive herein.

3. If so, whether the parties reached impasse under Article IX of the 1986 National Agreement, as to the terms and conditions of the proposed service in the Carrier's letters of May 16, 2003, May 29, 2003, and October 1, 2003, as to the North Little Rock/Pine Bluff Hub?

Answer: In light of the answer to Questions 1 and 2, we do not reach this question.

4. If so, what the proper terms and conditions of the proposed service?

Answer: In light of the answer to Questions 1 and 2, we do not reach this question.

CARRIER'S QUESTION AT ISSUE:

What shall be the terms and conditions of the Interdivisional service between North Little Rock, Arkansas and Memphis, Tennessee, established pursuant to Union Pacific's notice dated May 16, 2003?

Answer: In light of the answer to Questions 1 and 2, we do not reach this question.

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:
**BROTHERHOOD OF LOCOMOTIVE
ENGINEERS,**
**(General Committee of Adjustment, Central
Region),**
Organization,
and
UNION PACIFIC RAILROAD COMPANY,
Carrier.

Pursuant to Article 1, Sec. 11 of
the New York Dock Conditions

U.C.C. Finance Docket 32760

OPINION AND AWARD

Hearing Date: February 12, 2004
Hearing Location: Chicago, Illinois

MEMBERS OF THE COMMITTEE

Ann S. Kenis	Neutral Member
Charles R. Rightnowar	Organization Member
Richard Meredith	Carrier Member

ORGANIZATION'S QUESTION AT ISSUE:

Whether the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement (October 9, 1997), the Kansas City Hub Merger Implementing Agreement (July 2, 1998), and the St. Louis Hub Merger Implementing Agreement (April 15, 1998), negotiated pursuant to the Surface Transportation Act, can be changed by the Carrier's former rights under Article IX of the 1986 National Agreement (May 19, 1986), negotiated pursuant to the Railway Labor Act, where the Carrier failed to expressly retain such rights in the aforementioned Hub Merger Implementing Agreements, and the specific language of each aforementioned Hub Merger Implementing Agreement otherwise prohibits such change?

CARRIER'S QUESTION AT ISSUE:

Does the New York Dock UP/SP Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub bar Union Pacific Railroad Company from exercising its right

to establish interdivisional service pursuant to Article IX of the May 16, 1086 BLE National Agreement?

I INTRODUCTION

In late 1995, the Union Pacific Corporation, including its wholly owned rail carrier subsidiaries, Union Pacific Railroad Company and the Missouri Pacific Railroad Company, announced its intent to acquire and exercise control over Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corporation, and the Denver and Rio Grande Railroad Company. The U. S. Department of Transportation, Surface Transportation Board (STB) approved the merger in Finance Docket 32760. As a condition of the merger, the STB imposed on the merged Carrier (Carrier herein) the employee protective 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).

Subsequent to the merger, the Carrier and the Organization negotiated a series of merger implementing agreements. These arrangements created centralized terminals, called hubs, with spokes going out to many points which were previously terminals or outlying points on the pre-merged railroads. Merger implementation agreements were negotiated on a hub basis. Among the implementing agreements reached pursuant to the merger were the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, dated October 9, 1997, the Kansas City Hub Merger Implementing Agreement, dated July 2, 1998, and the St. Louis Merger Implementing Agreement, dated April 15, 1998.

The dispute in this case was precipitated on May 16, 2003, when the Carrier served notice to the Organization advising of its intent to establish new interdivisional (ID) services between North Little Rock and Memphis pursuant to Article IX of the May

19, 1986 Award of Arbitration Board No. 458 (hereinafter referred to as the 1986 National Agreement). Subsequently, by letter dated August 29, 2003, Carrier served an additional notice advising of its intent to establish interdivisional service at the Kansas City and St. Louis hubs. As in its May 16, 2003 notice regarding the interdivisional run at the North Little Rock/Pine Bluff hub, Carrier indicated that the terms and conditions governing the interdivisional service operations at the Kansas City and St. Louis hubs would be in accordance with applicable Article IX National Agreement provisions.

In a letter dated September 9, 2003, the Organization protested the Carrier's proposed interdivisional service at the three hubs. The Organization asserted that the implementing agreements controlled and were not subject to modification by Article IX of the pre-existing 1986 National Agreement. In the Organization's view, "to hold otherwise, is to render the Merger negotiations, and the Agreements consummated through those negotiations, approved by the Surface Transportation Board, a complete nullity."

Carrier responded by correspondence dated September 12, 2003 and advised the Organization that there was no provision in any of the merger implementing agreements that limited or eliminated the applicability of Carrier's rights under Article IX of the 1986 National Agreement. The Carrier stated its position as follows:

There is no doubt that if the parties had specifically included language in these agreements that limited or eliminated the applicability of Article IX, UP would be bound by the language of such provisions. There is not, however, any language in the referenced merger accords which limit or eliminate application of Article IX. Absent such language, the foundation for your argument evaporates.

By letter dated September 22, 2003, the Organization requested that the National Mediation Board (NMB) provide a selection list for the assignment of a New York Dock

Arbitrator "related to the Carrier's improper attempt to change Surface Transportation Board approved Hub Merger Implementing Agreements in the St. Louis, Kansas City and Pine Bluff/North Little Rock Hubs by a conflicting superseded 1986 Railway Labor Act Agreement."

Carrier opposed the Organization's request on numerous grounds which will be discussed in further detail below. Suffice to say at this point that Carrier maintained the dispute was not within the scope of New York Dock. Instead, Carrier argued, the proper forum for arbitrating the matter was under Article IX of the 1986 National Agreement. Accordingly, Carrier requested that the NMB appoint an arbitrator to establish the terms and conditions for the new interdivisional service in the North Little Rock/Pine Bluff area.¹ The undersigned was ultimately designated to adjudicate both matters. Hearings on February 12, 2004 were scheduled for the New York Dock arbitration and the arbitration pursuant to Article IX, assigned as Arbitration Board No. 581.

By letter dated January 7, 2003, the Organization requested that only the New York Dock arbitration proceed on the scheduled hearing date. According to the Organization, Arbitration Board No. 581 would be moot if it were determined that Article IX was superseded by the hub implementing agreements. The parties were permitted to present written arguments on the subject, with Carrier opposing the request to bifurcate the proceedings. By letter dated February 1, 2004, the undersigned Neutral denied the Organization's request and stated that the issues could best be addressed at hearing. Both matters proceeded as scheduled on February 12, 2004.

¹ Carrier acknowledges that it has not yet had discussions with the Organization concerning the ID notices for the St. Louis and Kansas City Hubs as required under Article IX of the 1986 National Agreement. Therefore, Carrier's request to have the terms and conditions of the ID service imposed by arbitration is limited to the North Little Rock/Pine Bluff Hub.

II. FACTUAL BACKGROUND

A. The North Little Rock/Pine Bluff Hub Implementing Agreement

The Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub includes specific provisions governing through freight service between North Little Rock/Pine Bluff and Memphis. Under Article I, Section A(4), North Little Rock/Pine Bluff became the home terminal for all North Little Rock to Memphis and Pine Bluff to Memphis pool freight service with Memphis as the away from home terminal. In addition, engineers operating North Little Rock/Pine Bluff and Memphis were permitted to utilize any combination of the former Union Pacific and Southern Pacific tracks between those points.

However, this expansive language was restricted in Article I, Section A(5), which states:

5. Pool freight engineers in the North Little Rock/Pine Bluff-Dexter and North Little Rock/Pine Bluff-Memphis pools may not be used to handle their through freight trains, either at the beginning or the end of their trip, from North Little Rock to Pine Bluff or vice versa. Such trackage may only be used by such engineers under the 25-mile zone provisions described below.
 - a. Pool freight engineers described above may receive their train up to twenty-five (25) miles on the far side of the terminal or receive or deliver their train up to twenty-five (25) miles on the UP Monroe Subdivision between North Little Rock and Pine Bluff without claim or complaint from any other engineer.

* * *
 - c. When so used, the engineer shall be paid an additional one half (1/2) day at the basic pro rata through freight rate in addition to the district miles of the run. If the time spent beyond the terminal is greater than four (4) hours, then they shall be paid on a minute basis at the basic pro rata through freight rate.

Carrier contends that it agreed to the restrictions set forth in Paragraph 5, above, because traffic volume projections available at that time, along with expected customer demands, did not contemplate much growth in traffic or increase in service demands between North Little Rock and Memphis. Carrier further contends that, following implementation of the Hub Merger Implementing Agreement, daily train volumes through Memphis began to increase as a result of the service and operating improvements made possible by the merger. The Organization disputes this assertion. Nevertheless, in order to expedite service and relieve the congestion along these lines, Carrier determined that a "directional running" operation between North Little Rock and Memphis was in order. This concept contemplated using a combination of pre-merger routes to operate in one direction on one set of tracks from North Little Rock to Memphis and in the other direction on another set of tracks from Memphis to North Little Rock.

This operation would require operation over the White Bluff subdivision, which is now restricted by the terms contained in Article I, Section A(3) of the Merger Agreement. Consequently, Carrier determined to pursue implementation of new directional runs through Article IX of the 1986 National Agreement. In the Organization's view, Carrier should not be permitted to pursue such a change because the Hub Merger Implementing Agreement must be given precedence over the pre-existing provisions of Article IX of the National Agreement. Carrier, on the other hand, contends that its Article IX rights survived the Hub Merger Implementing Agreement and are fully enforceable.

B. The Jefferson City and Kansas City Hub Implementing Agreements

Briefly, by way of background, the Jefferson City, Missouri terminal was the home terminal for former UP engineers working in pool freight service to Kansas City,

Missouri prior to the merger. As part of the merger, Carrier contemplated that St. Louis and Kansas City would become hubs. Jefferson City was eliminated as a home terminal and St. Louis became the home terminal for engineers in pool freight service between St. Louis and Jefferson City. The trackage between Jefferson City and Kansas City was inserted into the Kansas City Hub. The parties agreed that engineers residing in Jefferson City on the date of the Carrier's notice designating Kansas City as a hub would be granted the right to reside at Jefferson City on an attrition basis.

The Kansas City Hub Merger Implementing Agreement divided the pre-merger seniority districts into four zones, with the employees of each separate zone maintaining prior rights to the work of the zones, but holding common seniority rights to the work not filled by prior rights zone employees. The Jefferson City employees were placed in zone 3. In addition to maintaining prior rights for work in zone 3, the Jefferson City employees were also afforded prior rights to all work originating in the Jefferson City terminal, including the freight pools operating between Jefferson City and Kansas City. In a New York Dock proceeding, Arbitrator La Rocco affirmed that the "...Agreements provide special, and perhaps, unique rights to engineers indefinitely maintaining their residences in Jefferson City and these rights are expressly predicated on the engineers keeping their residences in Jefferson City."²

Carrier's August 29, 2003 notice seeks to establish ID service between Kansas City terminal and Jefferson City, with Kansas City as the home terminal. In addition, the notice advises the Organization of its intent to establish ID service between Marysville, Kansas and Jefferson City, Kansas City and Labadie, Missouri, and Kansas City and St.

² See, BLE and UP, New York Dock Arbitration Committee under Article I, Section 11 of the New York Dock Conditions, L.C.C. Finance Docket No. 32760 (LaRocco, 2000).

Louis. The Organization maintains that Carrier relinquished its right to establish such ID services under the terms of the St. Louis and Kansas City Hub Merger Implementing Agreements. It asserts that the Carrier's August 29, 2003 ID service notice seeks, among other things, to abrogate the attrition rights of the employees at Jefferson City established under the Hub Merger Implementing Agreement. Carrier argues that it never affirmatively relinquished its rights under Article IX of the 1985 National Agreement and it is entitled to enforce those rights at this juncture.

C. Shared Provisions of the Hub Merger Implementing Agreements

As noted, this dispute concerns the language of the three Hub Merger Implementing Agreements and the impact of that language on Article IX of the 1985 National Agreement. There are several pertinent provisions which all three hub merger implementing agreements have in common. Each provides in Article IV.A that, if conflicts between an applicable collective bargaining agreement and an implementing agreement arise, the specific provisions of the implementing agreement prevail.

Moreover, each of the implementing agreements contains a provision at Article VIII entitled "Saving Clause." Paragraph A reads:

The provisions of the applicable Schedule Agreement will apply unless specifically modified herein."

Paragraph C states:

Nothing in this Agreement will preclude the use of any engineers to perform work permitted by other applicable agreements within the new seniority district described herein, i.e., engineers performing Hours of Service Law relief within the road/yard zone, ID engineers performing service and deadheads between terminals, road switchers handling trains within their zones, etc.

In addition, the parties entered into a side agreement to each of the three hub merger implementing agreements which is pertinent herein. Although dated on

separate occasions and numbered differently, the language is identical and states in pertinent part as follows:

During our negotiations your Organization raised some concern regarding the intent of Article VIII – Savings Clause, Item C thereof. Specifically, it was the concern of some of your constituents that the language of Item C might subsequently be cited to support a position that ‘other applicable agreements’ supersede or otherwise nullify the very provisions of the Merger Implementing Agreement were negotiated by the parties.

I assure you this concern was not valid and no such interpretation could be applied. I pointed out that Item C must be read in conjunction with Item A, which makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic schedule agreement, take precedence, and not the other way around.

The purpose of Item C was to establish with absolute clarity that there are numerous other provisions in the designated collective bargaining agreement, including national agreements, which apply to the territory involved, and to the extent such provisions were not expressly modified or nullified, they still exist and apply. It was not the intent of the Merger Implementing Agreement to either restrict or expand the application of such agreements.

In conclusion, this letter of commitment will confirm that the provisions of Article VIII- Savings Clauses may not be construed to supersede or nullify the terms of the Merger Implementing Agreement which were negotiated in good faith between the parties. I hope the above elaboration clarifies the true intent of such provisions.³

D. Additional Evidence

The Organization submitted seven additional Hub Merger Implementing Agreements which contain language stating: “New pool operations not covered in this implementing Agreement between Hubs or one Hub and non merged area will be handled per Article IX of the 1986 National Implementation Award.” This language does not appear in the three Hub Merger Implementing Agreements in this case, the Organization

³ It is designated as Side Letter No. 20 in the North Little Rock/Pine Bluff Hub Merger Implementing Agreement; Side Letter No. 9 in the Kansas City Hub Merger Implementing Agreement, and Side Letter No. 10 in the St. Louis Hub Merger Implementing Agreement. An affidavit dated February 10, 2003 from former General Chairman D.R. Purnell states that the side letter was written to prevent any pre-existing agreements from modifying or nullifying these Hub Merger Implementing Agreements.

points out. Moreover, there is no shared geographical territory between the Hubs at issue herein and those where the Carrier sought and obtained express contractual language regarding preexisting Article IX rights. On the contrary, the Organization states that each Hub has a "stand alone" agreement that was negotiated separately in time and thereafter ratified by only those voting BLE members who worked on the territory of the particular hub. The Organization also points to BLE and UP, New York Dock Arbitration Committee under Article 1, Section 11 of the New York Dock Conditions, I.C.C. Finance Docket No. 32760 (2001), wherein Arbitrator La Rocco concluded that the provisions of one hub merger implementing agreement could not be unilaterally applied to another hub where those provisions do not exist in that second hub's merger implementing agreement.

Carrier responds by saying that there are numerous interdivisional service runs that have been negotiated, arbitrated or implemented on a trial basis in territories covered by New York Dock merger implementing agreements. Of the eighteen interdivisional runs listed in Carrier's submission, Carrier states that approximately half have been instituted since the UP/SP merger. With one exception, Carrier did not encounter the arguments presented by the Organization in this proceeding during negotiations with other Organization General Committees or with UTU representatives regarding the implementation of ID runs.

The exception involved the Organization's General Committee for the SP Western Lines territory. Carrier served notice of its intent to establish new ID runs and the matter proceeded to arbitration. In Special Board of Arbitration No. 580, the Organization presented many of the same arguments seen in this case. In his May 27,

2003 Award, Arbitrator Richter proceeded directly to the merits without even addressing the alleged conflict with the merger implementing agreement.

More typical is the August 17, 1998 Article IX notice regarding the establishment of new ID runs in the Beaumont, Texas area. Pursuant to this notice, the BLR and UP negotiated five ID runs and ultimately progressed the matter to arbitration pursuant to Article IX. In *Special Arbitration Board No. 573 (2000)*, Arbitrator Muesig imposed the terms and conditions for the ID service runs. Significantly, the Organization did not argue that there was a conflict between the merger implementing agreement and Article IX. Moreover, the relevant merger implementing agreement for the Houston Hub (Zones 1 and 2) did not contain language specifically addressing Article IX.

III. THE JURISDICTIONAL ISSUE

Both the Carrier and the Organization agree that there is a threshold jurisdictional dispute.⁴ They disagree, however, on the forum for resolution of that dispute.

A. Carrier's Position

Carrier asserts that the matter is not properly jurisdictional under Article 1, Section 11 of the New York Dock conditions. Carrier maintains that the arbitration procedures contained in Section 11 are reserved specifically for arbitrating disputes centered on application of the New York Dock conditions and not on an asserted conflict between the provisions of an implementing agreement and a National Agreement. The requirements of New York Dock are simple and straightforward. If a dispute involves "...the interpretation, application or enforcement of any provision of this appendix, except

⁴ Carrier states in its submission that the question it posed at the outset does not represent an apples-to-apples comparison of its position that the matter is not properly before this tribunal. Regardless of whether the question posed by the Carrier or the Organization is used, the subject matter falls outside the jurisdictional parameters of a New York Dock Arbitrator and compels the dismissal of the case, Carrier submits.

Sections 4 and 12...” of New York Dock, then it may be referred to arbitration under the procedure set forth in Section 11. The instant matter, in the view of the Carrier, unquestionably falls outside the jurisdictional scope of a New York Dock Arbitrator under that definition.

The Organization's stated position and characterization of the dispute compels no other conclusion, the Carrier submits. The Organization has repeatedly indicated that there is a threshold conflict between two agreements. It is not mere happenstance that the Organization failed to identify any provision of New York Dock as applicable herein, Carrier argues. Neither the acts cited by the Organization (the Railway Labor Act and the Surface Transportation Act) nor the collective bargaining agreement provisions cited by the Organization (the hub implementing agreements and Article IX of the 1986 National Agreement) are, as required by Article I, Section 11 of New York Dock, “any provision of this appendix...” As the Organization itself recognizes, this a dispute based on conflicts of law or of collective bargaining agreement provisions, and, as such, it falls outside the statutory limitations for arbitration under Article I, Section 11 of New York Dock.

Furthermore, it is clear to the Carrier that the Organization's position stands in stark contrast with existing arbitral authority and past practice. In the Arbitration Award between these same parties rendered pursuant to Article I, Section of New York Dock (Finance Docket 30800) (1989), Referees Richard Kasher and Robert Peterson declined to address interdivisional service issues within the context of the New York Dock proceeding. They stated:

The Carrier desires to establish special train operations, which would essentially call for the creation of interdivisional service runs. The Carrier's intention in this regard is contained in its Operating Plan as presented to the ICC.

This Arbitration Committee has no reason to conclude that the ICC had intended that the Carrier would have a unilateral right to establish interdivisional service and circumvent agreed-upon or recognized procedures for attainment of such service. Here, it is to be noted that creation of interdivisional service is not something that the collective bargaining agreements prohibit. Rather, current agreements provide an orderly manner and reasonably expeditious means by which such service may be implemented and myriad problems resolved; such agreements include final and binding arbitration provisions should such action be necessary.

Moreover, Carrier points out that the parties have negotiated, arbitrated and/or implemented more than fourteen (14) new interdivisional service runs on territories that are covered by a New York Dock merger implementing agreement. On those runs where arbitration was necessary, not one was progressed under the provisions of New York Dock -- all were progressed in accordance with the procedure set forth in Article IX.

The foregoing factors plainly demonstrate to the Carrier that the instant matter is not one that should be arbitrated pursuant to New York Dock. That is not to say that the Organization is without recourse, however. Carrier insists that the proper forum is set forth in Article IX of the 1986 National Agreement. In this regard, the parties have specifically agreed to progress disputes over establishment of interdivisional service and the terms and conditions attendant thereto to final and binding arbitration. Section 4(a) of Article IX provides that "in the event the carrier and the organization cannot agree on the matters provided for in Section 1 and the other terms and conditions referred to in Section 2 above, the parties agree that such dispute will be submitted to arbitration under the Railway Labor Act..." (emphasis added) Thus, the Carrier asserts that the Organization is contractually bound to progress this unresolved dispute regarding

interdivisional service to final and binding arbitration under the Railway Labor Act in accordance with provisions contained in Article IX.

Since the matter in dispute is not properly before this New York Dock tribunal, it must be dismissed.

B. Organization's Position

In response to the Carrier's jurisdictional challenge, the Organization contends that the proposed questions raise issues properly within the province of a New York Dock proceeding. The hub merger implementing agreements were negotiated pursuant to the STB's authority under the Surface Transportation Act. Each contains a provision stating that such agreement supersedes any prior, conflicting agreements. Since the application of the plain language of the hub merger implementing agreements is at issue, an Arbitrator under Section 3 of the Railway Labor Act lacks jurisdiction to adjudicate the matter, the Organization submits.

That this issue is ripe for the New York Dock Arbitrator's will is fully understood by the Carrier, the Organization further argues. In a prior New York Dock proceeding involving these same parties and similar facts, the Arbitrator rejected Carrier's jurisdictional objection. See, BLB and UP, New York Dock Arbitration Committee under Article I, Section 11 of the New York Dock Conditions Award No. 1 (La Rocca, 2003). Moreover, Carrier has previously been successful in arguing that New York Dock issues are not subject to Section 3 Railway Labor Act jurisdiction. See, First Division Award No. 25418. The reasoning and logic in those cases should apply with equal force here, the Organization asserts. The instant case involves a New York

Dock issue and is properly before this Committee. Carrier's opposition on jurisdictional grounds is baseless and should be rejected.

C. Findings and Discussion

This Committee is mindful of the limits of its jurisdiction. Section 11(a) of the New York Dock Conditions states:

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 Sections 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...

The foregoing provision restricts our adjudicatory power to interpreting, applying and enforcing the New York Dock Conditions. We lack jurisdiction to interpret and apply collective bargaining agreements outside the scope of the New York Dock Conditions.

In this case, however, the focus of this dispute is the language of the three hub merger implementing agreements. Carrier's own statement of the question at issue recognizes that it is the hub merger implementing agreements which must be interpreted and applied in order to determine whether they act as a bar to the establishment of ID service pursuant to Article IX of the parties' 1986 National Agreement.

Put another way, when carefully examined, it is clear that this Committee is not being asked to interpret a collective bargaining agreement that is outside the scope of a New York Dock proceeding. Instead, our task is to construe the provisions of the hub merger implementing agreements and decide the question of whether the language therein prevents the application of Article IX under the circumstances presented. If the answer is in the affirmative, then the Article IX interdivisional service notices must be

resolved. If the answer is in the negative, then the dispute regarding the implementation of the ID service can proceed to arbitration. In either case, it is the implementing agreements which are primarily the focus of the analysis and not Article IX.

As prior New York Dock awards involving these same parties have recognized, the interpretation and application of merger implementing agreements falls within the ambit of Article 1, Section 11 of the New York Dock Conditions.⁵ Accordingly, we find that this Committee has jurisdiction over the instant dispute.

III. THE MERITS

A. The Organization's Position

The Organization contends that Carrier's Article IX rights have been superseded by the language set forth in the Little Rock/Pine Bluff Hub Merger Implementing Agreement, the Kansas City Hub Merger Implementing Agreement, and the St. Louis Hub Merger Implementing Agreement. Article IV A of those hub merger implementing agreements expressly provides that, if conflicts between the applicable collective bargaining agreement and the implementing agreement arise, the specific provisions of the implementing agreement prevail. Since the changes proposed by the Carrier's Article IX notices are in direct conflict with many of the provisions of these three hub merger implementing agreements, Carrier's Article IX rights must give way.

Assuming, *arguendo*, that the implementing agreement language is ambiguous, the Organization submits that there are two points of contract interpretation which bolster

⁵ See, BLR and UP, New York Dock Arbitration Committee under Article 1, Section 11 of the New York Dock Conditions, I.C.C. Finance Docket No. 32760 (LaRocca, 2000) (dispute concerning the interpretation and application of two merger implementing agreements falls within the jurisdiction of Article 1, Section 11 of the New York Dock Conditions); BLR and UP, New York Dock Arbitration Committee under Article 1, Section 11 of the New York Dock Conditions, I.C.C. Finance Docket No. 32760 (LaRocca, 2001) (dispute between hub merger implementing agreement did not modify a schedule rule beyond the geographical territory of the St. Louis Hub).

its position. First, the negotiating history of the side letter -- set forth in full in Section 2C of this award -- plainly demonstrates the parties intended that no preexisting Agreement would be used by the Carrier to modify or nullify the hub agreements that were negotiated after the merger. It is a well established rule of construction that an interpretation that will give effect to the clear intent of the parties is preferred to one that will nullify all or any part of their objectives. See, Fist Division Award Nos. 15013 and 17590.

Second, the Organization argues that Carrier was successful in obtaining language in various other hub merger implementing agreements preserving its authority to serve ID notices under Article IX of the 1986 Agreement. The absence of such a provision in the three hub agreements at issue in this case plainly indicates that the parties did not intend to preserve those rights under these hub agreements. If it had been intended that Article IX was to survive the hub merger implementing agreements, it would have been a simple matter to spell it out, the Organization asserts.

In sum, the specific language of the three Hub Merger Implementing Agreements cannot be changed or nullified by Carrier's former rights under Article IX of the 1986 National Agreement. Since that is precisely the effect that Carrier's ID notices will have in this case, the Organization maintains that the question it has posed in this case must be answered in the negative.

B. Carrier's Position

Carrier argues that there is no merit to the Organization's contention that the implementing agreements extinguished its Article IX rights, for several reasons.

First, there is no language in any of the three hub merger implementing agreements that eliminates or restricts Carrier's rights under Article IX of the 1986 BLE National Agreement. The Organization, which has the burden of proof in this matter, has not explained how or where Carrier lost its Article IX rights and it can point to no language that supports its position.

Second, in point of fact, the hub merger implementing agreements specifically retain Carrier's pre-existing Agreement rights, including Article IX. The Savings Clauses contained in each of the hub merger implementing agreements at issue make it clear that the parties intended that "the provisions of the applicable Schedule Agreement will apply unless specifically modified herein." (Article VIII.A) The referenced provision is a specific acknowledgement by the parties that the provisions of existing collective bargaining agreements, including National Agreements and, in particular, Article IX of the 1986 National Agreement, are retained and will continue to be applicable. The only exception is if an existing rule or National Agreement is specifically modified in the merger agreement. In this case, Carrier argues, there has been no such modification.

Third, the practice of the parties clearly supports such a conclusion. In Carrier's view, the Organization's position in this case represents a complete departure from its position and handling in previous matters progressed pursuant to Article IX. The numerous interdivisional service runs that have been implemented since the UP/SP merger, under territories covered by New York Dock merger implementing agreements, leave no doubt that Carrier possesses the right to invoke the provisions of Article IX.

Finally, the Organization's reliance upon Article IV.A of the hub merger implementing agreements is unpersuasive. In order to apply the provision, there must first be a conflict between the applicable collective bargaining agreement and the merger implementing agreement. Here, Carrier asserts, there is no conflict between the merger implementing agreements and Article IX. Carrier has the right under Article IX to modify existing collective bargaining agreements to establish new ID service runs provided the procedure outlined in Article IX is followed and adversely affected employees are provided the appropriate protections. Carrier's right to exercise its Article IX rights does not constitute a conflict with the merger agreements. Indeed, the Organization has not identified any Article IX provisions that conflict with the merger implementing agreements. For all these reasons, the Carrier contends it retains the right to proceed under Article IX.

C. Findings and Discussion

We begin our analysis of this dispute by examining the provisions of the Hub Merger Implementing Agreements at issue herein. This Committee's function in interpreting and applying the contractual provisions is to ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. If the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. We presume that the words used should be read as having their usual and ordinary meaning within the context of the overall agreement. If the language so selected by the parties leaves no doubt as to its intention, then we need not look to extrinsic evidence, and points of bargaining history or past practice become irrelevant.

After careful consideration of all contractual provisions applicable to this matter, we find that the language contained in the hub merger implementing agreements is patently clear. Carrier's Article IX rights under the 1986 National Agreement were not expressly modified or nullified under the hub merger agreements, and therefore they still exist and apply. However, when those rights have been exercised in a manner that conflicts with or modifies the provisions of the hub merger implementing agreements, the implementing agreements must be given precedence. In this case, the hub merger implementing agreements prevail.

Each of the three Hub Merger Implementing Agreements contains a Savings Clause that guarantees the continued existence of pre-existing agreements unless expressly modified. Article VIII.A states: "The provisions of the applicable Schedule Agreement will apply unless specifically modified herein." The dispute concerning this provision of the hub merger implementing agreements centers around the Organization's contention that Carrier's IX rights were eliminated by failing to incorporate those rights specifically in the hub merger implementing agreements. In other words, the Organization is arguing that the omission of reference to Article IX in the Hub Merger Implementing Agreements should be construed as a deliberate intent to surrender Article IX rights under the implementing agreements.

The Organization bases this contention on the fact that certain other hub merger implementing agreements incorporated contract language which addressed pre-existing rights under Article IX of the 1986 National Agreement. For example, the Merger Implementing Agreement for the San Antonio Hub reads, in Article III, Section G: "New pool operations not covered in this implementing Agreement between Hubs or one Hub

and a non-merged area or within a Hub will be handled per Article IX of the 1986 National Implementation Award." The Organization argues that the absence of such language in the three Hub Merger Implementing Agreements at issue constitutes a relinquishment by Carrier of its Article IX rights and thus precludes it from exercising such rights.

There are two principal difficulties with the Organization's argument, however. First, the provisions in hub merger implementing agreements other than the ones involved in this case are not particularly relevant. In a New York Dock case cited by the Organization, Arbitrator La Rocco agreed:

The parties bargained separately over the various hub merger implementing agreements and the Carrier implemented each merger implementing agreement at a different time. This bargaining process and environment strongly suggests that the parties contemplated that the provisions of each hub merger implementing agreement would pertain only to employees and property covered by the particular merger implementing agreement. Otherwise, the Carrier and the Organization would have negotiated a master hub agreement, the terms of which would pierce the boundaries of each hub.⁶

As Arbitrator LaRocco recognized, the parties intended that the terms and conditions of each hub merger implementing agreement would apply only to the territory expressly covered by the particular implementing agreement. Therefore, this Committee will not impute an intent to extinguish Article IX rights under the three Hub Merger Implementing Agreements at issue based on the language incorporated in other merger implementing agreements.

Second, and just as important, the language of the Savings Clause is not ambiguous and therefore extrinsic evidence is unnecessary to interpret the parties' intent.

⁶ BLB and UP, New York Dock Arbitration Committee under Article 1, Section 11 of the New York Dock Conditions, I.C.C. Finance Docket No. 32760 (LaRocco, 2001) (side letter to hub merger implementing agreement did not modify a schedule rule beyond the geographical territory of the St. Louis Hub).

The Savings Clause states that collective bargaining agreement provisions remain in effect unless "specifically modified" by the Hub Merger Implementing Agreements. By its own clear terms, this provision requires an affirmative expression of intention in order to modify the terms of a collective bargaining agreement. Silence is not sufficient. Thus, the mere fact that the parties failed to insert language in the three Hub Merger Implementing Agreements expressly preserving Carrier's rights under Article IX of the 1986 National Agreement does not mean that those rights were relinquished. In order to extinguish Carrier's Article IX rights, the parties would necessarily have had to include clear and unambiguous language stating that Article IX rights were no longer applicable at these Hubs. They did not do so.

That does not end our inquiry, however. Although Carrier's Article IX rights survive under the Savings Clause of the hub merger implementing agreements, their exercise is not unrestricted. Each of the three implementing agreements negotiated by the parties includes the following provision:

ARTICLE IV - APPLICABLE AGREEMENTS

- A. All engineers and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect between the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers dated October 1, 1977..., including all applicable national agreements the 'local/nations' agreement of May 31, 1996, and all other side letters and addenda which have been entered into between the date of last reprint and the date of this Implementing Agreement. Where conflicts arise, the specific provisions of this Agreement shall prevail... (emphasis added)

As the foregoing language makes clear, the parties recognized, as they did in the Savings Clause, that prior agreements would remain in effect. They also recognized, however, that circumstances might arise in which the implementing agreements would

conflict with these pre-existing agreements. When that happens, the parties agreed that the implementing agreement provisions would prevail. The bargain that was struck is not ambiguous and it is entitled to enforcement.

Our reading of Article IV.A is supported by the express language of the side letter incorporated in each of the three hub merger implementing agreements. To dispel any doubt about the interplay between the pre-existing agreements and the implementing agreements, the side letter incorporated in the hub merger implementing agreements plainly states that, to the extent that there are other applicable collective bargaining agreements that were not expressly modified or nullified, "they still exist and apply." However, the parties expressly acknowledge that "the specific provisions of the Merger Implementing Agreement, where they conflict with the basic schedule agreement, take precedence, and not the other way around."

In the face of this unambiguous language, Carrier argues in its submission:

...a merger implementing agreement becomes, upon implementation, a part of the collective bargaining agreement fabric that defines the rules, rates of pay and working conditions for engineers at a particular location. There is no question that merger agreements may be used to make specific changes in an existing collective bargaining agreement. Of course, such changes would be done in order to accomplish the economies and efficiencies of the merger. However, once in place, the merger accord becomes nothing more than a part of the existing collective bargaining agreement and no longer a stand alone document. Moreover, unless there is a specific provision to the contrary, pre-existing contract (agreement) rights accordingly apply equally to a Merger Agreement as they do to any other Agreement provision. There is nothing in New York Dock, in the governing collective bargaining agreement or in the Merger Agreement itself that places it on a higher plane than any other provision or rule or insulates it from the exercise of a pre-existing right or rule, such as Article IX.

This Committee is not persuaded by the Carrier's logic. The parties are experienced negotiators. They must be held to have full knowledge of the provisions of the Hub Merger Implementing Agreements and the significance of the clear and

unambiguous language contained therein. Moreover, it must be presumed that they did not include language in those agreements with the understanding that the provisions would be rendered superfluous or meaningless. The Carrier and the Organization have plainly stated, not once, but twice, that the Hub Merger Implementing Agreements prevail when they conflict with other applicable agreements. If the Carrier's position were accepted in this case, although the parties made express promises in Article IV.A and the side letter to resolve conflicts in agreements in favor of the hub merger implementing agreements, the Carrier would be allowed to ignore those commitments. No such result is warranted here.

Carrier has also argued that there have been numerous interdivisional service runs that have been implemented in territories where a merger implementing agreement exists and, with one possible exception, no protest has been lodged by the Organization. Generally, however, the parties are entitled to insist on the enforcement of the plain and unambiguous provisions of an agreement, even when a contrary practice exists. This established rule of contract interpretation has even greater application in this context, since it is doubtful that any "practice" on other territories can be extrapolated to the instant case. We simply do not know whether the implementing agreement language is the same or even whether the facts giving rise to the interdivisional service changes were similar to those at bar. Carrier may have been successful in instituting new interdivisional runs in other locations, but that does not preclude the Organization from relying on the express language negotiated in the three Hub Merger Implementing Agreements at issue.

To summarize thus far, we conclude that the Hub Merger Implementing Agreements retained Carrier's rights under Article IX of the 1986 National Agreement

and, further, that when those rights conflict with the provisions of the merger implementing agreements, they must give way. The plain and unambiguous language of Article IV.A and the side letter affords no other conclusion.

The remaining issue is whether the provisions of the Hub Merger Implementing Agreements in fact stand in conflict with the interdivisional service runs Carrier seeks to establish pursuant to Article IX of the 1986 National Agreement. Based on the record before this Committee, it would appear that numerous provisions of the implementing agreements governing the operations of trains, methods of compensation and home terminal locations would be nullified or modified if the new ID service runs were put into effect. Accordingly, the provisions of the Hub Merger Implementing Agreements must prevail in accordance with Article IV.A and the side letter set forth in full above.

AWARD AND ORDER

1. This Committee finds that it has jurisdiction to resolve the dispute presented.

2. ORGANIZATION'S QUESTION AT ISSUE:

Whether the provisions of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement (October 9, 1997), the Kansas City Hub Merger Implementing Agreement (July 2, 1998), and the St. Louis Hub Merger Implementing Agreement (April 15, 1998), negotiated pursuant to the Surface Transportation Act, can be changed by the Carrier's former rights under Article IX of the 1986 National Agreement (May 19, 1986), negotiated pursuant to the Railway Labor Act, where the Carrier failed to expressly retain such rights in the aforementioned Hub Merger Implementing Agreements, and the specific language of each aforementioned Hub Merger Implementing Agreement otherwise prohibits such change?

ANSWER TO THE ORGANIZATION'S QUESTION AT ISSUE

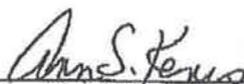
Carrier has retained its Article IX rights under the 1986 National Agreement, but the Hub Merger Implementing Agreements cannot be changed by the exercise of Carrier's Article IX rights under the circumstances presented herein.

3. CARRIER'S QUESTION AT ISSUE:

Does the New York Dock UP/SP Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub bar Union Pacific Railroad Company from exercising its right to establish interdivisional service pursuant to Article IX of the May 16, 1986 BLE National Agreement?

ANSWER TO THE CARRIER'S QUESTION AT ISSUE

In the particular case before this Committee, the answer is yes.


ANN S. KENIS
Neutral Member

Charles R. Rightmower
Organization Member

Richard Meredith
Carrier Member

Dated this day of March, 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROTHERHOOD OF LOCOMOTIVE)	
ENGINEERS AND TRAINMEN, GENERAL)	
COMMITTEE OF ADJUSTMENT,	)	CIVIL ACTION NO. 13-cv-5970
)	
Plaintiff,	)	Judge Hon. Thomas M. Durkin
)	
v.	)	Magistrate Judge Arlander Keys
)	
UNION PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	

DECLARATION OF RANDY P. GUIDRY

COMES NOW Randy P. Guidry and, based on personal knowledge and certain business records kept and maintained in the ordinary course of business by Union Pacific Railroad Company (“Union Pacific”), and pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am over the age of 18 and competent to make this Declaration.
2. I was hired by Union Pacific Railroad Company’s predecessor company in 1974 as a locomotive engineer trainee. From 1974 to 1978, I worked as a locomotive engineer. In 1978, I was promoted to the position of Manager of Operating Practices and worked in that capacity until 1982. From 1982 through the present, I have worked primarily in the Labor Relations Department of Union Pacific. My current position is General Director of Labor Relations in Omaha, Nebraska.
3. In my role as General Director of Labor Relations, one of my responsibilities is the handling of negotiations and grievances that arise between Union Pacific and the Brotherhood of Locomotive Engineers and Trainmen (“BLET”). I have knowledge of the facts relating to the complaint filed by BLET in this matter. Also in my role as General Director of

5803904



Labor Relations, I am a custodian of records relating to Union Pacific's collective bargaining agreements and grievance and arbitration files relating to certain Union Pacific employees, including locomotive engineers represented by BLET.

4. Union Pacific and BLET are parties to numerous RLA collective bargaining agreements. Some of these agreements apply only to Union Pacific; others are negotiated in multi-employer bargaining and apply to Union Pacific and other railroads.

5. One such broadly applicable CBA is Article IX of the 1986 National Agreement ("Article IX"). In exchange for large wage increases and generous protections for adversely affected employees, Article IX allows Union Pacific to create new train runs on an expedited basis. Under Article IX, Union Pacific serves notice of its desire to establish new train runs, and BLET is required to negotiate terms and conditions governing that service. Failing agreement, arbitration exists. A copy of Article IX is attached hereto as Declaration Ex. 1.

6. Article IX is entitled "Interdivisional Service," which suggests that it only applies to service that crosses between seniority districts. However, the "note" at the start of Article IX makes it clear that it applies to all new runs, i.e., interdivisional, interseniority district, intradivisional, and/or intraseniority district service.

7. In 1991, Article IX was amended to require both the railroads and unions to expedite Article IX arbitration. A copy of this amendment is attached as Declaration Ex. 2.

8. It is the practice of the industry that Article IX arbitrations take place on an expedited basis before private arbitration boards under § 3, Second, of the RLA, not before the National Railroad Adjustment Board. I have done many Article IX arbitrations since I joined the Labor Relations Department; I cannot recall even one that proceeded before the NRAB.

9. Article IX allows Union Pacific to establish its new runs on a trial basis after 20 days' notice to BLET, even prior to the completion of arbitration or negotiations. The only exception is if the new service requires engineers to operate through their home terminals. Each train run has at least one home terminal and at least one away from home terminal; if the new service would require an engineer to operate his or her train through that terminal, it cannot be started on a trial basis.

10. The ability to establish new train runs is essential for Union Pacific to operate its system efficiently. Over time, as people move, traffic patterns change, or other efficiencies dictate, Union Pacific must be able to adapt. Train runs established years earlier become obsolete or inefficient, requiring new methods of operation. Union Pacific therefore regularly uses the Article IX process to create new train runs.

11. Following the 1996 merger of Union Pacific Corporation and Southern Pacific Transportation Co., Union Pacific rearranged its operations into a "hub and spoke" system. Sixteen hubs were established. Pursuant to Article I, § 4(a), of New York Dock, Union Pacific and BLET negotiated a separate Merger Implementing Agreement for each hub between 1996 and 2001.

12. In Los Angeles, Union Pacific and BLET were unable to reach a voluntary implementing agreement. Thus, the 1998 Los Angeles Hub Agreement was imposed by an arbitrator at the conclusion of the Article I, § 4 arbitration process. A copy of this agreement is attached as Declaration Ex. 3.

13. The LA Hub Agreement set up the initial train runs in the LA Hub, but made clear that those runs could be changed under Article IX. Specifically, Side Letter 3 to the LA Hub Agreement provides that, "New pool operations not covered in this Implementing Agreement

whether between Hubs or within the Hub shall be handled per Article IX of the 1986 National Arbitration Award.” A copy of Side Letter 3 is attached as Declaration Ex. 4.

14. Thus, Union Pacific interprets Article IX and Side Letter 3 as giving it the right to create new train runs in the LA Hub whenever they are needed. In return, employees are protected from economic losses as a result for up to six years. It naturally follows that the implementation of new runs may require employees to make life changes, including relocating their homes. Article IX anticipates these changes and consequently provides financial protection, including money for house-hunting trips and protection against losses in the sale of an employee’s home.

15. Since the 16 Hub Agreements were created, Union Pacific has repeatedly invoked the Article IX process to create new pool operations. BLET has, from time to time, raised objections over those new operations; these objections have been resolved in Article IX arbitration. For example, in the LA Hub itself, the parties arbitrated Union Pacific’s creation of new pool operations from Dolores, CA, to Yermo, CA (establishing a new home terminal in Dolores). An arbitration was held before a private arbitration board under § 3, Second. In the Award of Arbitration Board No. 580, a copy of which is attached as Declaration Ex. 5, the arbitrator allowed Union Pacific to establish the new pool operation.

16. BLET and Union Pacific have also used the Article IX process where BLET’s objection to Union Pacific’s Article IX notice relates to the language of a Hub Agreement. This occurred when Union Pacific issued an Article IX notice in 2006, in the area covered by the Houston II Hub Agreement. Even though a large part of the dispute centered on the terms of an NYD implementing agreement, arbitration took place under Article IX. A copy of the first page

of the resulting award, showing that the arbitration was convened under Article IX, is attached as Declaration Ex. 6.

17. Thus, when Union Pacific wishes to implement new pool operations under Article IX, the parties' past practice has been to participate in Article IX arbitration.

18. In February 2013, in accordance with Article IX and the parties' past practices, Union Pacific announced its intention to establish new pool operations between the Los Angeles Basin Metroplex and Yermo, and between the Los Angeles Basin Metroplex and Yuma, AZ. After meeting with impacted labor unions, including BLET, Union Pacific scaled back its proposal.

19. On July 17, 2013, Union Pacific provided an Article IX notice to BLET that would only create new pool operations providing service from the home terminals of Yuma, AZ, and Yermo, CA, to the away from home terminal at West Colton, CA. A copy of this notice is attached as Declaration Ex. 7. These runs would not require engineers to run through their home terminals and, therefore, Union Pacific may institute trial runs prior to completing the expedited negotiation/arbitration process of Article IX.

20. As is true with all Article IX notices, Union Pacific's notice would change the current operations in this area. Currently, there is a pool operation with a home terminal in West Colton that provides service to the away from home terminal in Yermo, and a pool operation with a home terminal in West Colton that provides service to the away from home terminal in Yuma. But no current pool operations exist with a home terminal in Yuma or Yermo that provide service to the away from home terminal in West Colton.

21. Under Article IX, because 20 days after service of its notice has passed, Union Pacific has had the right to implement these new runs on a trial basis pending arbitration. At this

time, however, Union Pacific has not begun any trial runs; we do not actually anticipate doing so until January 2014. We have a meeting scheduled with BLET for October 15, 2013, to try to narrow the issues that need to be arbitrated.

22. In the event trial runs begin, Union Pacific has offered to and will take several steps to ameliorate or eliminate hardships to affected crew members.

A. First, Union Pacific has offered to expedite arbitration, although expedited arbitration is already required under both Article IX and under NYD. Union Pacific stands ready to select an arbitrator immediately and, barring severe conflicts, take the first available date for arbitration. Union Pacific is fully committed to expediting this process as much as possible. It would be Union Pacific's preference to have this process over by the end of 2013 before any trial run is implemented. I believe that this can be accomplished if BLET will cooperate.

B. Second, Union Pacific has verbally offered a reverse lodging arrangement to BLET. Normally, Union Pacific does not provide a hotel to engineers at the home terminal of their run, but does provide a hotel to engineers at the away from home terminal. Because many of the engineers who would operate the new pool operations live closer to West Colton than to Yuma or Yermo, Union Pacific is offering, for two years from the implementation of a trial basis operations, to provide lodging at the away from home terminals rather than the home terminals if preferred by a particular engineer.

C. Finally, Union Pacific is offering to have the regular pools for the new runs manned by LA Hub-based engineers just as the existing pools have been.

23. BLET's response to Union Pacific's July 17 Article IX notice has shifted over time. At first, BLET stated that Union Pacific could not use the Article IX process to make these changes, but was instead required to amend its collective bargaining agreement through the

major dispute process under § 6 of the RLA. A copy of the correspondence taking this position is attached as Declaration Ex. 8.

24. On July 26, Union Pacific noted its disagreement, stating that the new runs were permitted by Article IX. A copy of that correspondence is attached as Declaration Ex. 9.

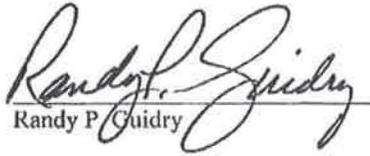
25. BLET then filed this lawsuit on August 21, 2013. I have read BLET's Complaint, which does not argue that a major dispute exists. Instead, as I understand it, BLET is contending that the creation of pool operations from Yermo and Yuma to West Colton does not constitute "new" pool operations because runs currently exist from West Colton to Yermo and Yuma, and that the creation of these pool operations would violate Side Letter 3.

26. I strongly disagree. I believe that, because there currently are no pool operations from Yuma or Yermo to West Colton, the train runs contained in Union Pacific's July 17 notice are "new pool operations" within the meaning of Article IX. There is no Yuma-West Colton or a Yermo-West Colton pool.

27. BLET has not taken any steps to commence arbitration of this dispute under New York Dock. Without waiving any arguments that I might make in arbitration, I can say that, if BLET did commence arbitration, I would not refuse to arbitrate under Article I, § 11 of New York Dock. I also would not object to having a single arbitrator appointed under both Article IX and Article I, § 11 to hear the parties' dispute.

28. I understand that BLET is claiming that engineers will have to move during the trial period. Given the expedited arbitration that Union Pacific is offering and the reverse lodging arrangement, this will be unnecessary. Moreover, if someone did choose to move, Article IX requires that Union Pacific reimburse them for their moving expenses and protects them against the loss of value of their homes.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
September 20, 2013.


Randy P. Guidry

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROTHERHOOD OF LOCOMOTIVE)	
ENGINEERS AND TRAINMEN, GENERAL)	
COMMITTEE OF ADJUSTMENT,	)	CIVIL ACTION NO. 13-cv-5970
)	
Plaintiff,	)	Judge Hon. Thomas M. Durkin
)	
v.	)	Magistrate Judge Arlander Keys
)	
UNION PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	

DECLARATION OF THOMAS WILLIAMS

COMES NOW THOMAS WILLIAMS and, based on personal knowledge and certain business records kept and maintained in the ordinary course of business by Union Pacific Railroad Company ("Union Pacific"), and pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am over the age of 18 and competent to make this Declaration.
2. I was hired June 1974 by the Chicago & Northwestern Railroad ("C&NW") to perform duties as an Agent /Telegrapher working various position between St Louis and Chicago. In this position, I was a member of a labor union. I was promoted in January 1980 to the position of Train Dispatcher working at various locations on the C&NW. Between that time and in or about 1995 (when Union Pacific acquired the C&NW), I held a variety of jobs in the Chicago area. Since that time, I have held a variety of director level jobs in Nebraska, California, and Utah. My current position is Director of Transportation Services for the Los Angeles hub, a position I have held since July 2005.
3. As Director of Transportation Services my responsibilities include the overall operating transportation plan for the Los Angeles Service Unit. This includes all operations

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between Yuma, Arizona, Bakersfield, California, Yermo, California, and San Luis Obispo, California. I have knowledge of Union Pacific's July 17, 2013, notice to the Brotherhood of Locomotive Engineers and Trainmen ("BLET") under Article IX of the 1986 national agreement.

4. The changes contemplated by Union Pacific's July 17 Article IX notice are designed to allow Union Pacific to operate more efficiently into and out of the Los Angeles area, including the Ports of Los Angeles and Long Beach. Currently, we have a number of train runs with home terminals in West Colton and Los Angeles. Engineers can bid on these assignments. We have a difficult time keeping the West Colton to Yermo and West Colton to Yuma pools staffed with qualified engineers who are familiar with operating locomotives over the involved routes because other runs exist where engineers can make more money (sometimes for fewer hours of work). As a result, engineers tend to bid off these runs, in particular the West Colton – Yermo run. This often results our being required to use an engineer who may not have operated over these sections of track as often or as recently. Often, this requires the use of a "pilot," a second engineer who is qualified and familiar with operating a train on that track or route, and who rides along with the newly assigned engineer who just bid on to this pool. Both the pilot and the engineer have to be paid, raising Union Pacific's costs which must, in turn, be passed on to shippers of freight.

5. Creating new home terminals in Yermo and Yuma will decrease the frequency that this occurs. Engineers are less likely to bid on new assignments if they involve a change in their home terminal. We would also expect that, over a good deal time (especially as attrition occurs due to anticipated retirements in the Los Angeles area), employees manning these runs to live in the Yuma or Yermo areas, rather than central or urban Los Angeles. Therefore, engineers

with home terminals in Yuma or Yermo are more likely to remain on these pools if their home terminals are in those cities.

6. Having engineers with less knowledge of the specific train run also raises safety concerns. Therefore, having more stability in these pools with the home terminals in Yuma or Yermo should lead to safer operations

7. In addition, Union Pacific will be able to utilize crews to scheduled trains and operate them more effectively with the addition of home terminals in Yuma and Yermo. Most of the traffic leaving the Los Angeles area and traveling to points east comes from freight unloaded at the Ports of Los Angeles and Long Beach along with domestic container traffic in the Los Angeles area that is marketed with predictable and scheduled departures. In contrast, traffic coming from points east into Los Angeles has usually been in transit for some time – usually, several days – before arriving in Yermo and Yuma. Delays in such service are not uncommon and it is far more difficult to predict when Union Pacific will need a train to depart those cities. As a result, Union Pacific frequently has to have employees waiting for trains in those cities. This is especially true at Yuma because there is little room to leave a train sitting while we wait for a crew to become available to take the train to its destination. When an engineer is waiting to work at an away from home terminal, Union Pacific is required (after a certain number of hours) to begin to pay the engineer even though they are not working. This pay is not required at the home terminal. Having engineers with home terminals in Yuma and Yermo will decrease the amount of time spent at the away from home terminal, thereby reducing costs and improving rail competitiveness.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
September 20, 2013.


THOMAS WILLIAMS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROTHERHOOD OF LOCOMOTIVE)	
ENGINEERS AND TRAINMEN, GENERAL)	
COMMITTEE OF ADJUSTMENT,	)	CIVIL ACTION NO. 13-cv-5970
)	
Plaintiff,	)	Judge Hon. Thomas M. Durkin
)	
v.	)	Magistrate Judge Arlander Keys
)	
UNION PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	

DECLARATION OF GORDON WELLINGTON

COMES NOW Gordon Wellington and, based on personal knowledge and certain business records kept and maintained in the ordinary course of business by Union Pacific Railroad Company ("Union Pacific"), and pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am over the age of 18 and competent to make this Declaration.
2. I hold a Bachelor of Arts degree in economics from the University of Massachusetts at Boston and a Master of Business Administration degree in finance from the University of Colorado.
3. I was hired by Union Pacific in 1979 as a financial analyst. From 1979 to 1984, I performed economic analyses for a variety of railroad functions with an emphasis on transportation. In 1984, I was promoted to Assistant Manager-Carload Costing where I held supervisory responsibilities for transportation economic evaluation. Beginning in 1989, I performed capital investment economic analyses before becoming Manager-Commercial Investment in 1991. As manager, I supervised the development of economic evaluation and investment justification for locomotives, freight cars, and commercial facilities. In 1995, I was

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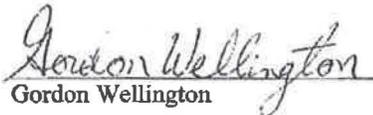


promoted to Director-Asset Management where I was responsible for the evaluation and prioritization of freight car repair, upgrade, retirement, and acquisition programs. In 1998, I was promoted to Regional Finance Director-Western Region, the position I currently hold.

4. In my role as Regional Finance Director, one of my responsibilities is leading the economic evaluation of operational changes to lower operating expenses and increase Union Pacific's operating margins. I have knowledge of Union Pacific's July 17, 2013, notice to the Brotherhood of Locomotive Engineers and Trainmen ("BLET") under Article IX of the 1986 national agreement.

5. I have looked into the cost savings involved with the establishment of new pool operations with home terminals in Yermo, California, and Yuma, Arizona, and an away from home terminal in West Colton, California. Although the exact amount of cost savings cannot be assured, my analysis is that establishment of these new pool operations will permit Union Pacific to reduce its approximately \$9.0 - \$10.0 million direct labor expenses for train crews operating in the Los Angeles - Yermo and Los Angeles - Yuma corridors by at least 2%. This cost reduction is a direct consequence of improved operating efficiencies by locating our home terminals at locations where there is reduced employee movement between engineer jobs and thus reduced training and qualification expenses. Additional cost savings are likely to flow from reduced held away from home terminal pay that must be given to engineers after they spend a certain number of hours at their away from home terminals.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 20, 2013.


Gordon Wellington

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

3	BROTHERHOOD OF LOCOMOTIVE	)	Docket No. 13 C 5970
4	ENGINEERS AND TRAINMEN, GENERAL)	
5	COMMITTEE OF ADJUSTMENT, UNION)	
6	PACIFIC WESTERN LINES AND)	
7	PACIFIC HARBOR LINES,)	
8		)	Chicago, Illinois
9	Plaintiff,	)	October 1, 2013
10		)	11:05 a.m.
11	v.)	
12)	
13	UNION PACIFIC RAILROAD COMPANY,)	
14)	
15	Defendant.)	

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

12 For the Plaintiff: DESPRES SCHWARTZ & GEOGHEGAN LTD. by
 13 MR. MICHAEL P. PERSOON
 14 MR. SEAN MORALES-DOYLE
 15 77 West Washington Street
 16 Suite 711
 17 Chicago, IL 60602

18 For the Defendant: THOMPSON COBURN LLP by
 19 MR. CLIFFORD A. GODINER
 20 505 N. 7th Street
 21 One US Bank Plaza
 22 St. Louis, MO 63101

23 Also Present: MR. PAULO TORTORICE
 24 MR. BILL HANNAH
 25 MR. RANDAL GUIDRY

26 Court Reporter: LAURA R. RENKE, CSR, RDR, CRR
 27 Official Court Reporter
 28 219 S. Dearborn Street, Room 1728
 29 Chicago, IL 60604
 30 312.435.6053
 31 laura_renke@ilnd.uscourts.gov

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Tortorice - Direct by Persoon

1 July 17th letter that's in the record at Document No. 1-1,
2 page 6 of 8. It's listed Section 5, "Overtime."

3 MR. MORALES-DOYLE: And no further questions, Judge.

4 THE COURT: Okay.

5 MR. GODINER: Nothing further from the Union Pacific.

6 THE COURT: All right. Very good. All right. Why
7 don't we take our lunch break right now, come back in about one
8 hour. Well, about 20 to 2:00 come back. Is that enough time
9 for everybody to do any business they need to do over lunch?

10 MR. PERSOON: Yes, your Honor.

11 MR. GODINER: Yes, your Honor.

12 THE COURT: All right. We'll see you at 20 to 2:00.

13 Thank you.

14 (Recess at 12:39 p.m., until 1:45 p.m.)

15 THE COURT: Okay. Please call your next witness.

16 MR. PERSOON: Plaintiffs call Paulo Tortorice.

17 THE COURT: Very good.

18 Come on up here, up to the witness stand, please.

19 Please raise your right hand.

20 (Witness duly sworn and takes the stand.)

21 THE WITNESS: I do.

22 THE COURT: Please be seated.

23 PAULO TORTORICE, PLAINTIFF'S WITNESS, SWORN

24 DIRECT EXAMINATION

25 BY MR. PERSOON:

Tortorice - Direct by Persoon

- 1 Q Mr. Tortorice, can you state your name for the Court,
2 please?
- 3 A Sure. My first name is Paulo, P-A-U-L-O. Last name is
4 Tortorice, T-O-R-T-O-R-I-C-E.
- 5 Q And where do you live?
- 6 A I live in Temecula, California.
- 7 Q And where is Temecula located?
- 8 A It's about 40 miles south of West Colton.
9 So on a map, between L.A. and San Diego if you looked.
- 10 Q So in the San Diego area generally?
- 11 A Closer to the L.A. area.
- 12 Q So in between Los Angeles and San Diego?
- 13 A Yes.
- 14 Q And what is your job?
- 15 A I'm a locomotive engineer for Union Pacific Railroad.
- 16 Q Are you also an elected union officer?
- 17 A I'm also the local chairman of Division 5, BLET, in
18 Los Angeles.
- 19 Q And what territory does Division 5 encompass?
- 20 A Santa Barbara. Well, let's see. Santa Barbara down to
21 Los Angeles to West Colton.
- 22 Q So just to be clear, you are an elected officer of the
23 plaintiff and you have a direct stake in this litigation.
- 24 A Yes, I do.
- 25 Q And how long have you been an engineer for Union Pacific?

Tortorice - Direct by Persoon

1 And when I say Union Pacific, I'm including Southern
2 Pacific, whose operations have merged in Union Pacific.

3 A Right, yes. I hired out with Southern Pacific. And then
4 when we merged, I became part of Union Pacific. But 18 years
5 as an engineer, 19 years with the company.

6 Q I'll ask you to slow down just a little bit so that the
7 court reporter can take down what you're saying.

8 And do you report for work in West Colton?

9 A Yes.

10 Q And where do you work to out of West Colton? What would
11 the away-from-home terminals be?

12 A Well, it's seniority-based, but currently it's Long Beach.
13 But I have worked Colton to Yuma.

14 Q So you have worked Colton to Yuma before?

15 A Yes.

16 Q And do you expect to work Colton to Yuma in the future?

17 A It's a possibility.

18 Q Do you hold any seniority under the Southwest hub
19 agreement?

20 A I do not.

21 Q So do you have any seniority to work runs that originate
22 from Yuma?

23 A No.

24 Q And currently under the L.A. hub agreement, do any runs
25 originate from Yuma into the L.A. hub territory?

Tortorice - Direct by Persoon

1 A They do not.

2 Q And under which hub agreement do runs that originate in
3 Yuma operate under?

4 A Ones that originate in Yuma?

5 Q Yes.

6 A Would be the Southwest hub.

7 THE COURT: I'm -- I need some clarification. If
8 the -- if you have seniority under the L.A. hub agreement,
9 wouldn't that number of years you served on the railroad
10 transfer over to the Southwest hub? And if you've got 18 years
11 on Union Pacific, does it really matter what hub you're in?
12 You might have people with more seniority.

13 MR. PERSOON: It does, your Honor. And what happened
14 was before the STB approved this merger in '96 and implemented
15 an L.A. territory in 1999, you'd have seniority to work a
16 specific run. So even if you were working for Southern Pacific
17 or Union Pacific, you may not have the seniority to effectively
18 bid on each run that they operate.

19 THE COURT: I see.

20 MR. PERSOON: So you might work on a specific one.

21 Then what they did in the hub agreements was they
22 created this hub-and-spoke model. So they got rid of ones
23 where you may work from A to B but not A to C. And they said a
24 hub like West Colton is going to be A. And everybody who had
25 any seniority in this area is going to have seniority to

Tortorice - Direct by Persoon

1 operate from West Colton out to the ends of the spokes, to B,
2 to C, to D, to E.

3 But there were a number of these hub agreements.
4 There's the Southwest hub agreement, St. Louis, Kansas City,
5 L.A. hub. So just because you have seniority in L.A. doesn't
6 mean you have that seniority in Southwest, Kansas City, all
7 these other hubs.

8 THE COURT: Well, is seniority something that's
9 based -- is it an assignment based on seniority, a Union
10 Pacific process or a union process?

11 MR. PERSOON: I think it's a union process. And
12 historically there were lots of different railroads that got
13 merged into Union Pacific, lots of different territory. So if
14 you had seniority on -- for example, in Missouri, they call it
15 the Mo-Pac line, the Missouri Pacific. You had specific
16 seniority to operate along that line that didn't translate to
17 anything else.

18 Now, when all these mergers happened, they started
19 combining the seniority districts, but that still didn't
20 translate across the Union Pacific system. It was limited to
21 that hub agreement.

22 THE COURT: But isn't that ultimately a union
23 decision? Because I'm familiar with hiring halls and issues in
24 Chicago relating to that.

25 But ultimately doesn't -- if a person has 18 years of

Tortorice - Direct by Persoon

1 service on a -- on a hub out of Los Angeles because he worked
2 various spokes, and when the railroads got combined, that all
3 transferred over so that everyone was given a fair shot.

4 But is your position -- and I know we're taking this
5 out of order a little bit, and the witness can certainly answer
6 if it's better coming from him.

7 But if a person -- if Yuma, for instance, became the
8 hub, with West Colton being the -- one of the spokes, even if
9 that was in a Southwest hub agreement, couldn't the union
10 modify that to account for experience you had in the other --
11 in the Los Angeles hub?

12 MR. PERSOON: I don't think they could unilaterally
13 your Honor. I mean, for one thing, this is in the hub
14 agreement that was imposed on them by an arbitration done under
15 the authority of the Surface Transportation Board.

16 THE COURT: Okay. All right.

17 MR. PERSOON: So it's not just -- it's not like the
18 union's bylaws where they could just amend stuff.

19 THE COURT: That's what I was getting at.

20 All right. Thank you.

21 MR. PERSOON: So this is in the L.A. hub agreement
22 itself.

23 THE COURT: Okay.

24 THE WITNESS: I could clarify it a little bit.

25 THE COURT: Sure. Go ahead.

Tortorice - Direct by Persoon

1 THE WITNESS: That's Tucson work. So there's a whole
2 another group of seniority. We don't just have a master
3 roster. Los Angeles has their seniority --

4 THE COURT: Right.

5 THE WITNESS: -- Tucson has their seniority. And so
6 it would be like encroaching on your neighbor's lawn. You
7 know, your property line is here (indicating). You don't get
8 to put a fence up over here (indicating).

9 THE COURT: Okay. Well, and my question really
10 related to -- it would seem like the union in their good
11 judgment could find -- as a membership organization could find
12 a way to accommodate their members based on this. But it
13 sounds like at least part of the seniority process and the
14 assignment process was imposed by an arbitrator. Is that what
15 you're saying?

16 MR. PERSOON: Yes, Judge.

17 THE COURT: Okay. Okay.

18 MR. PERSOON: And even if that wasn't the case, what
19 you'd be asking the union to do would be to say, "Sorry, guys
20 in Tucson with all your Tucson seniority. We're going to get
21 rid of that. We're going to ignore that to help out the guys
22 in L.A." It would, you know, from a practical perspective be a
23 problematic position.

24 THE COURT: Well, it depends on whether the -- what
25 the collective bargaining agreement, which is an agreement

Tortorice - Direct by Persoon

1 between the Union Pacific and the union, calls for in that
2 circumstance.

3 MR. PERSOON: Or the bylaws.

4 THE COURT: Well, that was my point. If the bylaws of
5 the union can be changed, it's kind of a union problem. If
6 this is something that is jointly decided by Union Pacific and
7 the union, then it is a problem that Union Pacific can cause.

8 But go ahead.

9 BY MR. PERSOON:

10 Q Paulo, can you talk to me a little bit about what a
11 workweek looks like for you when you're working out of West
12 Colton?

13 A Okay. On a pool -- I think they explained a pool to you --
14 you don't know when you're going to go to work, but it's
15 similar to a rotary board. So if there's 40 people and you're
16 number 40, they would have to call 39 trains before you come
17 up.

18 That length of time differs based on how much traffic
19 we have. So you don't really know when you're going to go, but
20 you can guesstimate. They have train lineups, not always
21 accurate, but, you know, you get an idea.

22 So you would get called for your train. As Bill
23 explained, you'd have 90 minutes to reach your destination, go
24 over your paperwork, confer with your conductor, talk about the
25 route, safety issues, do we have cars that need to be set out,

Tortorice - Direct by Persoon

1 whatever; and then get on your train, notify the dispatcher,
2 and proceed.

3 Q About how long does it take to operate a train from West
4 Colton to Yuma, Arizona?

5 A Well, it would all depend on traffic flows, train makeup.
6 There's a lot of different scenarios. But average right now is
7 probably 10½ hours, 11 hours, somewhere around there.

8 I mean, there are times that they go faster, and
9 sometimes they don't make it at all.

10 Q And then I think the phrase when you arrive at the
11 away-from-home terminal is that you, quote, "tie up." Is that
12 accurate?

13 A Correct.

14 Q And what happens when you tie up?

15 A Okay. So if we brought the train into Yuma, we have a
16 predetermined crew change point. A Tucson crew would get on.
17 We would discuss, you know, what was good, what was bad; this
18 worked, this didn't work. Maybe the speedometer wasn't good.
19 Maybe the axle count wasn't good. Whatever it may be, you
20 know, kind of a just synopsis of what they need to worry about.

21 The conductor would talk with the other conductor, and
22 then we would depart, go into the crew room -- there's a
23 computer -- and then you'd tie up.

24 And then you'd go back on this board, like you guys
25 were speaking of earlier. And you'd know, okay. There's

Tortorice - Direct by Persoon

1 14 guys ahead of you. There's 20 guys ahead of you. Go get
2 your room and get some rest.

3 Q And when you say "get your room," do you mean at the
4 away-from-home housing?

5 A Yes, at the Oak Tree in Yuma.

6 Q And can you describe that housing to me?

7 A It's a Motel 6-ish kind of room. Just one room, TV. You
8 have -- in walking distance, you have one eating place. And
9 then you could -- you know, it's pretty hot in Yuma, so
10 depending on how far you wanted to go, you could venture out
11 over the bridge and get some --

12 Q But can you approximate the dimensions of the room for me?

13 A 10 by 12, 10 by 14 maybe.

14 Q Furniture?

15 A Just a bed, dresser, you know, closet.

16 Q And once you tie up and you go to the away-from-home
17 housing, what are you able to do there?

18 A Well, first thing, you hope they have rooms. That's the
19 first thing because they a lot of times have issues with maids,
20 not having clean rooms, not having staff, whatever. You'd go
21 in assuming you had a room. And, you know, some guys may go
22 hang out, talk, whatever. If you're tired, if it's an
23 all-night trip, you go to sleep. I mean, you need to have your
24 rest to be prepared to work the next day.

25 Q And you're supposed to get how much rest before you mark

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1 back up for work?

2 A Well, the federal government requires 10 hours' rest. If
3 you exceed your 12 hours, it can be more than that. But
4 10 hours, just to keep it simple, is the minimum that you would
5 have.

6 Q And after that 10 hours, then you'd be available to work
7 the return trip back to the home terminal, in this instance,
8 West Colton. Is that correct?

9 A Correct, yes.

10 Q And I think Mr. Hannah testified about what's called HAT
11 time.

12 A Right.

13 Q Can you just tell us again what HAT time is?

14 A It's held away from home terminal. And you go back on --
15 the company starts paying you after 16 hours, not 16½ hours.

16 So, yeah. 16 hours they pay you. And a lot of times
17 the company, they want to -- they're motivated to not pay you
18 to not, you know --

19 Q So Union Pacific has an incentive to limit the time you're
20 held at the away-from-home terminal in order to cap its
21 liability for HAT time?

22 A Absolutely.

23 Q And in your experience, does it try to cap its liability
24 for HAT time?

25 A Oh, yes. They'll call you for trains that are three hours

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1 out of Yuma just to now put you on a train just to get you off
2 HAT time. So then you'll sit at the crew change, which kind of
3 exacerbates the problem because now you have hours against you
4 before the train arrives, and then, you know, you deal with the
5 trip as it comes. But taking two hours off the front end
6 doesn't necessarily help you.

7 Q Prior to the Union Pacific/Southern Pacific merger which
8 was approved in 1996 and implemented in Los Angeles basin in
9 1999, did you have seniority to work all the routes that's
10 currently under the L.A. hub agreement?

11 A No, we gained additional routes when we merged with Union
12 Pacific because they had lines that maybe mirrored ours or went
13 other places. So I was an -- originally a Southern Pacific
14 engineer. I could only work what we covered. Union Pacific
15 had its own crews and routes and everything else.

16 Q And when you say you gained routes, that also means that
17 Union Pacific gained the right to assign you to work different
18 routes, right?

19 A Yes, correct.

20 Q So prior to the merger, your employer was limited to where
21 it could assign you to work.

22 A Yes.

23 Q And after the merger, it gained much more flexibility in
24 where it could assign you to work.

25 A Yes.

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1 Q Have you read the declaration of I think it's Thomas
2 Williams in this case?

3 A Yes, I have.

4 MR. PERSOON: Permission to approach the witness,
5 Judge?

6 THE COURT: You may.

7 MR. PERSOON: Do you need a copy, your Honor?

8 THE COURT: I have it.

9 BY MR. PERSOON:

10 Q I've presented you with the declaration of Thomas Williams.
11 And I want to direct your attention to page 2, paragraph 4.

12 And on page 2, paragraph 4, of his declaration, Thomas
13 Williams states, quote: "We have a difficult time keeping the
14 West Colton to Yermo and West Colton to Yuma pools staffed with
15 qualified engineers who are familiar with operating locomotives
16 over the involved routes because other runs exist where
17 engineers can make money, sometimes for fewer hours of work."

18 Did I read that correctly?

19 A Yes.

20 Q To your belief, to your knowledge, has Union Pacific ever
21 been unable to staff the West Colton to Yermo run?

22 A No.

23 Q To your knowledge, has Union Pacific ever been unable to
24 staff the West Colton to Yuma run?

25 A No.

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1 Q And why is that?

2 A Because as an organization, we're required to, like Bill
3 said, police our own agreements. So if a vacancy comes
4 available and nobody bids it, the local chairman is required to
5 find out who the junior guy is and, whether he wants it or not,
6 he's on it. He's force-assigned.

7 Q So under the parties' various collective bargaining
8 agreements, the union actually has an obligation to make sure
9 that all work is covered. Is that what you're saying?

10 A That is correct.

11 Q And it's never been the case that one of these runs has not
12 been staffed, to your knowledge?

13 A No.

14 Q So what do you think Mr. Williams is really saying in this?

15 A Well, I think he's saying that they have engineers that
16 aren't qualified on the territory, so they require pilots.
17 That's what he's saying in here.

18 Q But there must be a lot of qualified engineers to work this
19 run.

20 A Oh, yeah.

21 Q So why aren't they working this run?

22 A Because it's the lowest-paid run in Los Angeles.

23 THE COURT: Well, does the union have an obligation to
24 staff -- to police the operations or the agreement themselves,
25 to put on qualified engineers so there's no requirement of

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1 using a pilot?

2 THE WITNESS: Well, you can't restrict their seniority
3 as to where they can move about. It's the most dangerous
4 territory that we have. It's a 3.2 percent grade. It's
5 multiple tracks. It's a foreign railroad. There's a lot of
6 ways to get yourself in trouble.

7 THE COURT: What do you mean by "foreign railroad"?

8 THE WITNESS: Well, we run on Burlington Northern
9 Santa Fe. We have joint trackage rights on part of it.

10 THE COURT: I understand.

11 THE WITNESS: So, you know, you can't tell them where
12 to go, but the risk is certainly not worth the reward, I would
13 say, in my opinion.

14 THE COURT: All right. But the -- by seniority --
15 senior people being able to bid out and junior people who may
16 not be experienced in that run going on, it is costing the
17 company more money to have a pilot there -- is that correct? --
18 because you've got two engineers.

19 THE WITNESS: On some of the trains, yes, you do.

20 THE COURT: Okay. Okay.

21 BY MR. PERSOON:

22 Q Is that ability for more-senior engineers to bid out on to
23 a better run a direct by-product of the L.A. hub agreement put
24 in place by the Surface Transportation Board?

25 A Yes.

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1 Q So the Surface Transportation Board, as a condition of
2 approving the merger of Union Pacific and Southern Pacific,
3 specifically allowed more-senior engineers to say, "I'm not
4 going to work these cheap, low-paying runs, and I'm going to
5 work a different one"?

6 A Yes, that's correct.

7 Q And you were telling the judge a little bit ago about the
8 conditions -- the operational conditions on the West Colton to
9 Yermo run, right? And how many tracks are there?

10 A Well, there's three BN tracks and one of our tracks.

11 Q So one track that Union Pacific owns and three tracks that
12 BNSF owns. Is that correct?

13 THE COURT: Is that Yermo or Yuma?

14 MR. PERSON: What?

15 THE COURT: Is that the Yermo run or the Yuma?

16 THE WITNESS: Yermo.

17 THE COURT: Yermo. Okay. Well, why -- sorry to
18 interrupt again. But Yermo is -- well, it's 84 miles from
19 Colton, at least on one of these figures. It may be longer, I
20 guess, on the road.

21 THE WITNESS: Right.

22 THE COURT: But if you're paid by number of miles, why
23 is this the least attractive run financially?

24 THE WITNESS: Well, Mr. Hannah actually had this
25 fixed. They had this at a higher rate, and all the senior guys

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1 were there and no pilots. UP didn't want that. They wanted
2 the lower rates and the senior guys.

3 THE COURT: Well, I thought the rates were based on
4 miles, not based on the difficulty of the track. Or maybe
5 I'm -- I think I'm confused on this, but --

6 THE WITNESS: Well, there's different -- I mean, we
7 have different -- you know, we can always bargain on something,
8 and they would -- they at one time had wanted Mr. Hannah -- he
9 could probably speak to this better -- to get rid of the pilot
10 issue. And they had put guys on there that were senior, and
11 they were paying them a liveable wage. But it didn't work for
12 them, for whatever reason. So ...

13 MR. PERSOON: Maybe if I can take the direct on this
14 point, Judge.

15 THE COURT: Go ahead. Go ahead.

16 BY MR. PERSOON:

17 Q Are there some routes that pay -- some runs that pay more
18 than the West Colton to Yermo run?

19 A Oh, absolutely.

20 Q Can you name one for me?

21 A Sure. The basin pool, L.A. basin pool.

22 Q What's the home terminal on that run?

23 A West Colton.

24 Q And what's the away-from-home terminal?

25 A Long Beach.

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1 Q And what does that pay?

2 A \$477.

3 Q What does the run from West Colton to Yermo pay?

4 A West Colton to Yermo pays about \$230. It's give or take
5 based on engine weight.

6 Q And that's based on the difference in mileage, correct?

7 A Well, no. That -- the basin rate was established with all
8 the arbitraries rolled into it. It's -- it's actually less
9 miles than it is from there to Yermo. So like I'm saying, it's
10 not all -- not all of it's factored in miles. Some --

11 THE COURT: That's what I figured, if you're saying
12 from this Long Beach -- West Colton to Long Beach is -- appears
13 to be --

14 THE WITNESS: 72 miles.

15 THE COURT: -- much smaller difference -- or somewhat
16 smaller difference than Yermo and a much smaller distance than
17 Yuma.

18 THE WITNESS: Right.

19 BY MR. PERSOON:

20 Q So an engineer with a lot of seniority could decide, "I've
21 got one opportunity to work today," right? And he could
22 decide, "I'm going to work on the run that pays me \$400, or I'm
23 going to work on the run that pays me \$200," right?

24 A Correct. I mean, this all goes back to time away from your
25 family. I mean, if you're going to work one day for 12 hours,

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1 wouldn't you want twice the pay for one day? I mean, you would
2 almost have to work two days on the Yermo pool, a round-trip,
3 to make the same thing you'd make on the basin pool. So ...

4 Q And getting back to the operational conditions on the West
5 Colton to Yermo run. We said that there's three BNSF tracks,
6 right?

7 A West Colton to Yermo, right?

8 Q Yes.

9 A Okay. Yes.

10 Q And to your knowledge, does BNSF have conditions upon its
11 leasing of that trackage to Union Pacific?

12 A They require qualifications.

13 Q So that's a matter of contract between Union Pacific and
14 BNSF, not Union Pacific and the BLET, correct?

15 A It actually even stems with the FRA because -- because it's
16 heavy grade territory, you're required to have more runs so
17 they know that you're not going to have a runaway or some
18 catastrophic event, which they've had these kind of issues
19 there in the past.

20 Q And the FRA is the Federal Railroad Administration --

21 A That's correct.

22 Q -- located in Washington, D.C?

23 A Yes.

24 Q And when you talk about grade, you mean the changes in
25 elevation?

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1 A Right. A 3.2 percent grade is scary on a train, to say the
2 least. On a 10,000-ton train, you don't want a guy who doesn't
3 know what he's doing running that train.

4 Q Are you familiar with the Union Pacific's plans to switch
5 the home terminal at West Colton to the current away-from-home
6 terminals at Yermo and Yuma?

7 A I am.

8 MR. PERSOON: Permission to approach, Judge?

9 THE COURT: You may.

10 BY MR. PERSOON:

11 Q I'm presenting you the letter dated July 17th, 2013, to
12 Mr. D.W. Hannah, the general chairperson of the BLET, from
13 D.B. Foley, director of labor relations at Union Pacific
14 Railroad. And this is the document that's attached to the
15 complaint as Exhibit 1. It's Docket No. 1-1.

16 MR. PERSOON: I have a copy if your Honor would like.

17 THE COURT: I have one.

18 BY MR. PERSOON:

19 Q Now, do you understand this to be the Article IX notice
20 that we've been talking about in this case?

21 A Yes.

22 Q And I want you to turn to page 3. There's a section
23 called, in bold and underlined, "New Interdivisional Service."

24 And can you tell me what the first, quote, "new
25 interdivisional service" run is?

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- 1 A No. 1 says "Yermo, California-West Colton, California."
2 Q And can you tell me what the second listed, quote, "new
3 interdivisional service" run is?
4 A No. 2 says "Yuma, Arizona-West Colton, California."
5 Q Looking at that first one, Yermo to West Colton. What's
6 the length of the run?
7 A 130 miles.
8 Q To your knowledge, what's the current length of the run for
9 the existing West Colton to Yermo run?
10 A 130 miles.
11 Q So it's exactly the same?
12 A Yes.
13 Q Does it cover exactly the same territory?
14 A Yes.
15 Q Does anything in this proposed, quote, "new interdivisional
16 service" suggest that they're going to run past West Colton?
17 A No.
18 Q Does anything suggest that they're going to run past Yermo?
19 A No.
20 Q So it's just operating on the same track, just switching
21 where you start from?
22 A Just changing the on-duty points, as far as I can tell.
23 Q And looking at that second, quote, "new interdivisional
24 service" from Yuma, Arizona, to West Colton, California, what's
25 the length of the run?

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1 A 198 miles.

2 Q And is there currently a run from West Colton to Yuma?

3 A Yes.

4 Q What's the length of that run?

5 A 198 miles.

6 Q And is there anything in this proposed, quote, "new
7 interdivisional service" that suggests that trains operating
8 from Yuma will run past West Colton?

9 A No.

10 Q In your opinion, does this create any new service?

11 A Absolutely not.

12 Q From an operational perspective, does it create any new
13 service?

14 A If I'm an engineer, I run this every day. I've just gone
15 to a different point. I mean, same as we have.

16 Q So why do you think Union Pacific is proposing this and
17 calling it new interdivisional service?

18 A I would guess to gain some kind of monetary advantage from
19 us. I have no idea why.

20 Q Can you tell me about your family, Paulo?

21 A Sure. I'm married. My wife is Stacy. Been married for
22 seven years. I have three kids: a son Mateo, who is 6; a
23 middle daughter, Ella, who is 3; and my youngest, Mia, who is
24 2.

25 I don't know. We're kind of like everybody else. I

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1 mean, you know, good days and bad days for sure. So we do all
2 the family things. We spend a lot of time together. You know,
3 my wife is a teacher, and, you know, it's very important to us
4 to spend time together and bond.

5 Q And how many nights a week do you get to spend with your
6 family now?

7 A Now, probably about four nights a week.

8 Q And that's when you're working, for example, from the West
9 Colton home terminal?

10 A Right. It would depend on what I'm working, obviously.

11 Q About how long does it take you to get to the West Colton
12 terminal from your home in Temecula?

13 A Well, it's between 45 minutes and an hour, somewhere around
14 there.

15 Q And how long would it take you to get from your home in
16 Temecula to your new away-from-home terminal in Yuma, Arizona?

17 A Oh, five and a half, six hours.

18 Q Would you be able to continue living at your home in
19 Temecula if you had to show up for work every day in Yuma,
20 Arizona?

21 A No. We have a 90-minute call. That's impossible.

22 Q So when you say a 90-minute call, it means Union Pacific
23 will contact you and say, "You've got to show up for work in
24 90 minutes," right?

25 A A computer voice calls you and says, "You're on." They

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1 butcher my name pretty good: "P. Tortorice, you're on duty on
2 the" -- whatever the train symbol may be at -- you know, you
3 know what run you're on at whatever time. If it's 12:00,
4 usually it's, you know, 1:45 or 2:00. They have a little --
5 little bit of fluctuation, but not six hours.

6 Q So when you're in a window of where it's likely you're
7 going to be called for work, you basically need to be within
8 90 minutes of your home terminal, right?

9 A Right. It's -- you kind of get a little more alert. We
10 call it being first out. First out means you're the guy --
11 you're the next guy. Now, sometimes that train doesn't get
12 called for a while, but you had better be in a place where you
13 have your stuff, you have your lunch, you've got everything
14 where you're ready to go to work.

15 Q So to use a baseball analogy, you know when you're on deck
16 and when you're in the hole?

17 A That's right. You'd be on deck.

18 Q So if your home terminal is flipped from the current home
19 terminal at West Colton to, for example, an away-from-home
20 terminal at Yuma, Arizona, how many nights a week do you think
21 you'd get to spend with your family?

22 A Zero. I mean, how am I going to go from six hours away to
23 there into a one-room hotel? I mean, three kids and a wife,
24 that's not going to work.

25 Q Well, let's talk about that a little bit. Why do you say

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1 zero?

2 A Well, because my family -- my family's not going to uproot.
3 You know, when I got married, our kids were very important to
4 us. Education is very important to us. My wife has a master's
5 in education. When we moved to Temecula, part of the reason we
6 moved there is because they have great schools.

7 California's ranking system on school is called an
8 API. All of the schools that are within anyplace where my kids
9 would go are -- you know, 1,000 is the highest. They're all in
10 the 900s. So it wasn't happenstance that we ended up there.
11 This is something that we talked about. It's where we
12 purchased our house. It's where we want to raise our family.

13 You know, Yuma is not the nicest area in the world. I
14 work there enough. I wouldn't want to raise my family there.

15 Q Have you done any research into the quality of life in
16 Yuma?

17 A We have. We've done research as far as computer research,
18 and there are very high crime statistics there. Property
19 values are very depressed. The schools are horrific. The
20 schools are in the bottom third of Arizona, so that's a deal
21 breaker for me.

22 Q So you said the property values are depressed, right?

23 A Yes.

24 Q So houses are cheap.

25 A Yes.

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1 Q So Union Pacific has said, "There won't be any harm because
2 we have to pay for housing allowances, and people are protected
3 from the effects," right?

4 A Right.

5 Q So it wouldn't really cost them anything if you had to move
6 from sunny Southern California, Temecula, to the desert in
7 Yuma, right?

8 A Right. I mean, it's no comparison. You would -- I could
9 not find my house in Yuma, Arizona, and the houses are already
10 cheaper because it's a -- you know, without calling it
11 something it's not, it's just not a nice area. So houses are
12 significantly cheaper.

13 Q So if these changes were put into place, would your family
14 move to Yuma?

15 A I'll tell you what my wife said. I'll be living in a
16 trailer in the parking lot in Yuma, and my family will be
17 there. So, no, they wouldn't move.

18 And it would create a -- it would be unbearable.
19 Let's put it that way. I mean, you know, I'm a hands-on dad.
20 I like to go to baseball practice. I like to go to ballet. I
21 like to do all that stuff. And when I can do it, tired or not,
22 I make it. Well, that's out of the equation living six hours
23 away. So ...

24 Q So let's look at one example. You said that you'd -- if
25 you had to move, you'd go from spending four nights a week with

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1 your family to zero nights a week with your family, right?

2 A Correct.

3 Q Now, let's say that -- you're Catholic, right?

4 A Yes.

5 Q So let's say that your 6-year-old son Mateo has his First
6 Communion on a Sunday. And you're scheduled to work and were
7 going to be at the home terminal in Yuma. Is there any way
8 that you'd be able to take time off or make it to Temecula to
9 see your son's First Communion?

10 A Well, that's a double-edged sword there. Number one, it's
11 a weekend, and God forbid you lay off on the weekend.
12 Uncompensated time on the weekend, you run into an attendance
13 issue because they have a very stringent attendance issue where
14 they don't want you laying off.

15 Q Well, let me unpack that for a second. You talked about
16 laying off. What does that mean in the railroad setting?

17 A It's an uncompensated leave, so you're off for 24 hours.
18 You call a crew dispatcher and say, "Lay me off."

19 You would also miss the opportunity to make those
20 earnings as well because that rotary board continues to go. So
21 if you're this guy, you're number one, you lay off, when you
22 mark back up, you go to the bottom. So --

23 Q So if I understand it correctly, because of, as we've
24 heard, the railroad requires its engineers to be on call 24/7,
25 365 days a year, there's mechanisms for them to call up to CMS,

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1 the crew management services, and say, "I'm taking an
2 uncompensated personal day."

3 A You ask. They sometimes don't grant them, but, yes, you
4 ask. And if they give you the time off, then they do. But
5 it's not a guarantee.

6 Q And then you went on to say that there's problems using
7 this.

8 A Well, you mean as far as laying off?

9 Q Yes.

10 A Well, laying off creates an issue amongst -- you know, you
11 have an absenteeism. They have an attendance policy that they
12 expect you to uphold, which is constantly changing, which is
13 top-secret. You don't get the parameters of what you're
14 expected to do. And that's for another day probably, but
15 that's --

16 Q So if I understand you, Union Pacific could discipline you
17 if they -- for taking that day off to see Mateo's First
18 Communion?

19 A Can and will. There's no ifs, ands, or buts.

20 Q And you've suggested that that discipline oversight is
21 heightened on the weekends?

22 A Yes.

23 Q And what does Union Pacific consider a weekend?

24 A They consider Thursday night -- well, Friday morning at
25 0001 till Monday is a weekend.

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1 Q So 12:00 a.m. -- or 12:01 a.m. Friday morning to
2 12:00 midnight Sunday?

3 A Right.

4 Q And what's your understanding of their discipline policy
5 for taking time off during those days?

6 A Well, they keep track of how many days off, and that's a --
7 it's a weighted system. And any holiday layoffs, weekend
8 layoffs, anything like that, counts against your attendance
9 more than a Wednesday, let's say.

10 Q But they must tell you how many days you can take off like
11 this.

12 A They do not.

13 Q So they don't tell you how many days you can take off
14 without discipline?

15 A That is correct.

16 Q So if you took one day off on a Sunday to come from your
17 new away-from-home terminal in Yuma back to your home in
18 Temecula to see Mateo's First Communion, Union Pacific would
19 claim the right to discipline you?

20 A Well, it would depend on the time of the month. Obviously,
21 sometimes they -- sometimes they'll discipline you --
22 there's -- it's not really set in stone. And it's up to the
23 judgment of the managers. But, as opposed to, say, "Here. You
24 can lay off five days a month," or "You can lay off no days a
25 month," whatever it is. But we're not given that, so --

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1 Q But they won't tell you how many --

2 A They will not tell you. That's correct.

3 Q So if you -- if these changes were made and your home
4 terminal was now Yuma -- so you had to be within the 90-mile
5 radius of Yuma so you could report to work on time and you
6 couldn't stay with your family in Temecula -- how would you get
7 any time with your family?

8 A I wouldn't. I would have no time. I mean, the only way I
9 would do it is if I laid off and went home. I mean, it's not
10 leaving you much of an option.

11 Q Well, what about when you're at the new away-from-home
12 terminal at West Colton?

13 A Well, yeah, I guess. When you're there and you have your
14 16 hours off and you're on 10 hours' undisturbed rest and then
15 from that terminal you've got to get to your house, which is an
16 hour away -- which, by the way, there's no vehicle to get you
17 there. So you could call your wife at 2:00 a.m. and pack up
18 the kids, have her pick you up and then take you home, I mean,
19 that's probably not the -- you're not going to get Husband of
20 the Year if you do that. So it would be pretty close to
21 impossible.

22 And, I mean, you do have to rest at some point in time
23 too because we don't want engineers falling asleep. I mean,
24 that's priority is get your rest.

25 Q So if I'm hearing you right, once you got to the

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1 away-from-home terminal at West Colton -- which is, of course,
2 currently the home terminal -- you'd have roughly 16 hours
3 before Union Pacific would want to get you back on a train to
4 avoid paying HAT time, right?

5 A Correct.

6 Q And in that 16 hours, you'd need to get about the 10 hours
7 of rest that you're federally required to have before you
8 operate a train again for safety reasons, right?

9 A Correct.

10 Q And then in that six -- other six hours, your wife would
11 have to come and get you, drive you back home, and then drive
12 you back to the terminal, right?

13 A Correct.

14 Q And do you know what time your train is going to get in to
15 the terminal at West Colton?

16 A You never know. I mean --

17 Q Could it be midnight?

18 A Could be 2:00 a.m.; could be 3:00 a.m. It's usually not
19 going to be a convenient time. So then you limit those
20 opportunities based on is it daylight? Are they home? Are
21 they at school? I mean, there's a lot of different factors.

22 Q Are you aware that Union Pacific may be willing to provide
23 housing at Yermo and Yuma under its current proposal, at least
24 for two years?

25 A I read it in this thing that, yes, they were going to

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1 provide reverse lodging.

2 Q But you've sat here in the courtroom with us today, right?

3 A Yes.

4 Q And you've heard Union Pacific say, "We want to arbitrate
5 this fast," right?

6 A Yes.

7 Q And Union Pacific, you've heard them here today say, "We
8 want to get this done."

9 We don't expect that we'd have to implement these
10 trial runs before the arbitration could get done, right?

11 A Yes.

12 Q Can you tell me why they'd need to have this housing for
13 two years if this could all be done in four months?

14 A Well, obviously, they don't expect it to be done in four
15 months, and they're -- they've got a backup plan, obviously,
16 because why else would you provide that?

17 Q What would it mean to you to basically live in that
18 10-by-10 hotel room you told me about for two years or more
19 while waiting for an arbitrator to decide the case, waiting for
20 the Surface Transportation Board to hear that appeal, and
21 waiting for another appeal of that case?

22 A Well, it would just be -- it would change my life as I know
23 it, obviously.

24 You know, one of the things is growing up, I had -- my
25 parents were divorced young. So I played a lot of sports, did

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1 a lot of things. But my mom was constantly working.

2 So when I had kids and when I was married, my wife and
3 I talked about this. And, you know, I had told you guys this
4 before, but it's very important to me to be a big part of my
5 kids' lives.

6 And I do whatever I can to try to be there and do
7 stuff. And it would just make it undoable. I mean, you
8 could -- how do you do that? I mean, you're 260 miles away
9 from your house. You come home -- the quality of life would be
10 zero, you know.

11 What would happen is you would want to see your kids,
12 and then you wouldn't be rested to get on the train. And I'll
13 just tell you that's what would happen because you would want
14 to see them. You're there; you're excited to see them; they're
15 excited to see you.

16 I mean, you don't get this time back. You know, when
17 they're that age, 2, 3, and 6, I mean -- anyway.

18 Q And if I remember, this is all so that you can work a
19 train -- the same trains from Yuma to West Colton instead of
20 from West Colton to Yuma, right?

21 A The way I understand it, yes. It's currently the run that
22 we've had since I've been with the railroad.

23 Q The same territory, exact same miles over the exact same
24 tracks.

25 A Exact. It will be the same train IDs, the same everything.

Tortorice - Cross by Godiner

1 Q Now, if I had a checkbook here and it had said Union
2 Pacific on it, do you think that I could come up here and write
3 a number with a bunch of zeros on it in order to compensate you
4 for losing two years with your family?

5 A Well, no, not with me. I mean, what price do you put on
6 memories and all -- you know, all the things that you miss out
7 on? I mean, there's -- there's no amount of money -- and
8 they're not offering any money. But there is no amount of
9 money to take -- take the place of that, I mean.

10 MR. PERSOON: Nothing further at this time, Judge.

11 THE COURT: All right. Cross-examination.

12 CROSS-EXAMINATION

13 BY MR. GODINER:

14 Q Mr. Tortorice, let me begin with this First Communion
15 story. That could happen today, right?

16 A Yes, it could.

17 Q Let's talk about what you just were saying is that you
18 currently operate -- I think you said you actually work from --
19 I'm sorry. I -- somewhere to Long -- West Colton to Long
20 Beach? Do I have that right?

21 A Yes. Everything is fluid based on your seniority. That's
22 what we were trying to explain to the judge.

23 Q Okay. But --

24 A If you're a senior man and you want my position and you
25 have a bump, you displace me and I find the next job.

Tortorice - Cross by Godiner

1 Q Well, and I wasn't -- I was just trying to understand
2 what -- trying to remember what you said at the beginning of
3 your testimony. I thought you said it was -- your current
4 assignment is what?

5 A Colton to Long Beach.

6 Q Okay. Is there a run from Long Beach to Yuma?

7 A Well, there's one that zeroed out. UP has a lot of runs
8 that are zeroed out that they don't use, but, yes, there is
9 one.

10 Q So UP has a run like that; they're just not using it right
11 now?

12 A Correct.

13 Q They could, right?

14 A Yes, they could.

15 Q And then all this stuff you just got done telling the judge
16 will happen in this situation would happen to you the exact
17 same way, right?

18 A No, my home terminal would be Long Beach. I can make it
19 from Long Beach to Temecula.

20 Q Okay. And but Union Pacific could also serve -- or Union
21 Pacific has Article IX rights in your -- in this zone, right?

22 A I guess they do.

23 Q And they could serve an Article IX notice right now that
24 creates new service between two points that doesn't exist right
25 now, one far away in Yuma and one close in to Los Angeles, and

Tortorice - Cross by Godiner

1 you'd be in the exact same spot, wouldn't you?

2 A Well, maybe. You lost me there because --

3 Q Okay.

4 A -- they're creating a run that does exist. They're just --

5 Q Okay. But let's say --

6 A -- changing the home terminals.

7 Q Let me -- I'm just -- and we've -- we're not going to
8 debate whether it's new or not. I'm not going there with you.
9 We've done that.

10 But Union Pacific could establish service now that
11 runs from Yuma to some point in the Los Angeles area that it
12 doesn't currently have a run to, correct?

13 A In my limited understanding of Article IX, yes.

14 Q Okay. And the same thing that you just told the Court
15 would happen here would happen to you if they did that?

16 A I just -- yeah, I guess it could. I'm just curious where
17 the run would be because we have established runs everyplace.
18 I mean, would you -- in the middle of desert or -- I mean, I'm
19 just kind of --

20 Q It's possible, right?

21 A Yeah, okay.

22 Q Now, you spoke about this very personally. When is the
23 last time, sir, that you actually worked the West Colton to
24 Yuma run?

25 A It's been a while.

Tortorice - Cross by Godiner

1 Q In fact, you work about -- please tell me if I'm wrong, but
2 my understanding is you actually work about two or three times
3 a month. Is that right?

4 A Well, since I've taken over this local chairman job, we do
5 have a lot of investigations which -- frivolous, but that's a
6 different matter for --

7 Q Well, in fact, you lay off union business the vast majority
8 of the time, correct?

9 A I am off union business a lot, yes, sir.

10 Q So this stuff you're talking about isn't going to happen to
11 you personally.

12 A It absolutely could. I mean, what -- is UP never going to
13 stop with the charge letters? I mean, at some point -- I do
14 have to work because I do have to provide money for my family,
15 so yeah.

16 Q But you only work, I think you said, two or three days a
17 month.

18 A Well, the union compensates me for different days that I
19 don't work, so ...

20 Q Okay. And your seniority would determine what assignment
21 that you were able to hold, correct?

22 A That is correct.

23 Q And you can't tell the Court that you would be required to
24 go to Yuma, to the Yuma to West Colton pool, can you?

25 A Well, I don't know that, if I would or wouldn't.

Tortorice - Cross by Godiner

1 Q You don't know, right.

2 A Yeah, I don't know for sure. No, I do not know that.

3 Q It sounds to me like you're saying this would be a less
4 desirable run, Yuma to West Colton with Yuma as the home
5 terminal and West Colton as the away-from-home terminal?

6 A Well, for people that like their families it would be less
7 desirable, yeah, I would say.

8 Q And so the junior people would be the ones who would be
9 probably forced there. Is that fair?

10 A I mean, that's an assumption. I mean, when we had a Yuma
11 run before, senior guys did bid on it, but I can't tell where
12 they're going to bid.

13 Q So some people -- some senior people might actually choose
14 this run; they might actually prefer it?

15 A We had a town hall meeting -- it could be. I don't know.
16 It's hard for me to predict what another engineer wants to do.

17 Q Sure. And the junior engineers are the ones who right now
18 get forced to whatever assignment nobody else wants, correct?

19 A That is correct.

20 Q You understand that during the -- if there is a trial run
21 here of the Yuma to West Colton pool, you understand that Union
22 Pacific is planning on staffing that with Los Angeles hub
23 engineers, don't you?

24 A I believe that's what Mr. Guidry told us in our last
25 meeting.

Tortorice - Cross by Godiner

1 Q Okay. So if that's true, then at least in terms of the
2 number of assignments the Los Angeles hub engineers will have,
3 there will be jobs available for them on the Yuma to West
4 Colton run.

5 A If they move to Yuma, you mean?

6 Q They wouldn't lose those to the Southwest hub engineers
7 under Union Pacific's trial run proposal, right?

8 A Okay. Well, I don't -- that's a matter --

9 MR. PERSON: Objection.

10 THE WITNESS: -- to discuss with Bill.

11 THE COURT: What's the objection?

12 MR. PERSON: Can we get a little bit more foundation
13 on this? I'm not aware of these negotiations or agreements
14 that are being discussed.

15 THE COURT: Well, that's for the witness to say. If
16 he's unaware of it, he can say that. If he is --

17 THE WITNESS: I mean, the southwest hub is the end of
18 our territory. So historically Yuma has not been -- the jobs
19 that went on duty in Yuma were Tucson's work. So --

20 BY MR. GODINER:

21 Q Well, I'm -- you know, look. The Court's only -- the only
22 thing that we're here to talk about is this possible trial run
23 period. We're not talking about it permanently. That's for
24 another forum. And I'm just -- during the trial run period,
25 it's going to be staffed by L.A. -- Los Angeles hub engineers,

Tortorice - Redirect by Person

1 correct?

2 A Right. If you say so, yes, okay.

3 Q That's your understanding of what --

4 A That's my understanding.

5 Q -- Mr. Guidry said?

6 A That's how it was explained to me by Mr. Guidry, yes.

7 MR. GODINER: Nothing else, your Honor.

8 THE COURT: Okay.

9 MR. PERSON: Redirect, your Honor.

10 THE COURT: Go ahead.

11 REDIRECT EXAMINATION

12 BY MR. PERSON:

13 Q Paulo, is there anything unique to your life as an engineer
14 apart from -- that distinguishes you from your peers, from your
15 brothers?

16 A Well, I'm a local chairman, so among my duties of running
17 trains, like the counselor pointed out, we have a discipline
18 system where you're required to represent your members when
19 they get charge letters. And lately Union Pacific has a lot of
20 charge letters. So he is correct that I do have to lay off
21 union business, not necessarily because I want to, but because
22 there's issues that we have. So ...

23 Q So if you weren't laying off union business, you'd be
24 working a lot more than three days a month for Union Pacific,
25 right?

Tortorice - Redirect by Persoon

1 A I would have to, yes.

2 Q And the things you told me about the operational and
3 practical considerations for an engineer living in Temecula or
4 the surrounding area, really anywhere in Southern California
5 proximate to West Colton, having to deal with having their home
6 terminal changed to Yuma, is there anything unique to you?

7 A No. I would still be forced to move. I mean ...

8 Q And talking about the home terminals and away-from-home
9 terminals, could you tell me what split of time you spend at
10 the home terminal versus the away-from-home terminal, roughly?

11 A It's probably 70 percent home/30 away.

12 Q So currently when you're working, you spend about
13 70 percent of your time at the West Colton terminal close to
14 your home, right?

15 A Correct.

16 Q And if that was flipped, the home terminal, away-from-home
17 terminal were flipped, then you'd spend the 70 percent of your
18 time at Yuma, right?

19 A That is correct.

20 MR. PERSOON: May I have one second, your Honor?

21 THE COURT: Sure.

22 (Counsel conferring.)

23 BY MR. PERSOON:

24 Q Now, Paulo, does the L.A. hub agreement, in setting up the
25 service from West Colton to Yuma, does that include Yuma

Tortorice - Exam by the Court

1 itself?

2 A No. It's up to Yuma.

3 Q So it specifically excludes Yuma, right?

4 A That is correct.

5 Q And is Yuma itself covered under the Los Angeles hub
6 agreement?

7 A It is not.

8 Q And do you hold seniority to work from Yuma?

9 A I do not.

10 Q So Mr. Godiner was just asking you if Union Pacific created
11 new service under its Article IX power starting a run from a
12 home terminal in Yuma, would you hold any seniority to work
13 that run?

14 A I do not currently.

15 Q That sounds like a pretty big change to me.

16 MR. PERSON: Nothing further at this time, Judge.

17 THE COURT: I'm a little confused.

18 Do you have any more?

19 MR. GODINER: No. No, go ahead, your Honor.

20 EXAMINATION

21 BY THE COURT:

22 Q Just a little confused again.

23 I take it West Colton -- there are a number of runs,
24 not just Yuma and Yermo, that can be made from West Colton. Is
25 that correct?

Tortorice - Exam by the Court

- 1 A Yes.
- 2 Q All right. What happens to those? I mean, if --
- 3 A They haven't served us Article IX on those yet.
- 4 Q All right. But you -- when you're not attending to union
5 business, you said many of your runs are from West Colton to
6 Long Beach.
- 7 A Right.
- 8 Q Which is a relatively short -- well, relatively short run
9 compared to --
- 10 A Yeah. Timewise it can be similar, but yeah.
- 11 Q All right. Because of the congestion in the area?
- 12 A It's the end of the line, so, you know, you've got to put
13 the train away and --
- 14 Q Okay. But what would happen if -- what I'm confused about
15 is when Mr. Hannah testified, he said that there are about 44
16 engineers in the Colton to Yuma run and 12 -- 10 to 12
17 engineers in the Colton to Yermo run. But are there additional
18 engineers who typically do the West Colton to Long Beach run,
19 or there are other runs --
- 20 A Yes.
- 21 Q -- besides just that, correct?
- 22 A Yes.
- 23 Q All right. And whether -- so if Yuma and Yermo became the
24 home base, what would happen to people who do the West
25 Colton-Long Beach run? Would they have to do it from Yuma or

Tortorice - Exam by the Court

1 Yermo?

2 A Well --

3 Q Or is that unclear under the proposal?

4 A What's unclear is Mr. Guidry had said at one of our
5 meetings that -- we had asked him, "Well, how many people would
6 it be?" "Well, at this time, it would be this many people."
7 But we were never given any indication that it couldn't become
8 more. I mean, under this proposal, I don't know what the
9 number could ultimately end up.

10 Q All right. Well, it just -- okay. Well, maybe it will be
11 cleared up. I'm just a little confused about who gets
12 affected.

13 THE COURT: And if there's additional questions of
14 this witness, you can address it in argument, or when the
15 defendants call their witness, maybe we can clear it up that
16 way.

17 Okay. Any additional questions by the parties?

18 MR. GODINER: No, your Honor.

19 MR. PERSON: Nothing further, Judge.

20 THE COURT: All right. Sir, you're excused. Thank
21 you.

22 THE WITNESS: Thank you.

23 THE COURT: All right. Any additional witnesses by
24 the plaintiff?

25 MR. PERSON: Nothing further. No further witnesses,

Tortorice - Exam by the Court

1 Judge.

2 THE COURT: All right. Defendants have any witnesses?

3 MR. GODINER: Yes, we have one, your Honor.

4 THE COURT: Go ahead.

5 MR. GODINER: Can we please get -- Mr. Guidry passed
6 me a note asking if we could get a restroom break.

7 THE COURT: Sure. Let's do it right now. We'll break
8 for about -- until a quarter to 3:00, about a seven-minute
9 break.

10 MR. GODINER: Thank you.

11 THE COURT: Sure.

12 (Recess at 2:39 p.m., until 2:53 p.m.)

13 THE CLERK: All rise.

14 THE COURT: All right. Please call your next witness.

15 MR. GODINER: Randy Guidry, your Honor.

16 THE COURT: Or your first witness. Sorry.

17 THE CLERK: Please step up to the witness stand over
18 here, please. Raise your right hand.

19 (Witness duly sworn and takes the stand.)

20 THE WITNESS: I do.

21 THE CLERK: You may be seated.

22 MR. GODINER: Your Honor, before I begin questioning
23 Mr. Guidry, I realize I used Defendant's Exhibit 6 and 7 with
24 Mr. Hannah and then didn't offer them into evidence. So I'd
25 like to do that at this time.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

October 21, 2013

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROTHERHOOD OF LOCOMOTIVE	)	Docket No. 13 C 5970
ENGINEERS AND TRAINMEN, GENERAL)	
COMMITTEE OF ADJUSTMENT, UNION)	
PACIFIC WESTERN LINES AND)	
PACIFIC HARBOR LINES,)	
)	
Plaintiff,	)	Chicago, Illinois
	)	October 1, 2013
v.	)	11:05 a.m.
)	
UNION PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

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MR. BILL HANNAH
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Guidry - Direct by Godiner

1 THE COURT: Any objection to their being admitted?

2 MR. PERSON: No objection, your Honor.

3 THE COURT: They're admitted without objection.

4 (Defendant's Exhibits 6 and 7 admitted in evidence.)

5 RANDAL P. GUIDRY, DEFENDANT'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. GODINER:

8 Q Why don't you tell the Court your name and spell your last
9 name, please.

10 A Randal Guidry, G-U-I-D-R-Y.

11 Q And, Randy, are you employed?

12 A Yes, sir, I am.

13 Q By who?

14 A Union Pacific Railroad.

15 Q And what's your job at Union Pacific?

16 A I'm the general director of labor relations in the labor
17 relations department.

18 Q What are your job duties as general director of labor
19 relations?

20 A I'm responsible for the negotiation and arbitration with
21 the operating crafts.

22 Q Does that include the BLET?

23 A Yes, sir, it does.

24 Q Do your duties include the service of notices to establish
25 new pool operations under Article IX of the 1986 National

Guidry - Direct by Godiner

1 Agreement?

2 A It would as well, yes, sir.

3 Q And negotiations and grievance handling under *New York*
4 *Dock*?

5 A It would.

6 Q How long have you been with the railroad?

7 A I was employed by predecessor company, Southern Pacific,
8 much like Mr. Tortorice, in 1974.

9 Q And what was your first position?

10 A I was a locomotive engineer trainee.

11 Q Were you a locomotive engineer?

12 A Yes.

13 Q For how long?

14 A From 1974 to 1978.

15 Q Were you a member of the BLET?

16 A Yes, sir, I was; still am. And like Mr. Tortorice, I was a
17 local chairman as well.

18 Q Can you briefly give the Court an overview of your career
19 at Union Pacific since 1978.

20 A I held various management positions from '78 to 1982, at
21 which time I went into Southern Pacific's labor relations
22 department and came to Union Pacific by way of the Union
23 Pacific/SP merger and entered the Union Pacific labor relations
24 department in about 1999.

25 Q And have you been personally involved in the Article IX

Guidry - Direct by Godiner

1 notice that we're here to talk about today?

2 A Yes, sir, I have.

3 Q What do locomotive engineers do, Mr. Guidry?

4 A They operate locomotives.

5 Q How are they assigned to particular jobs?

6 A It's a seniority-based system. The job preference is based
7 on their longevity.

8 Q What kinds of assignments can they hold?

9 A Various assignments: yard assignments, road switchers or
10 locals, and through-freight service.

11 Q And what's the difference between those?

12 A Yard engineers essentially operate locomotives. They put
13 cars together and make up the train for the outbound trips.
14 Locals or road switchers will go out to the industrial base and
15 gather those cars or distribute those cars to those customers
16 and bring them into the yard.

17 Q Okay. Slow down just a little bit. I'm having trouble.

18 A Sorry.

19 Q That's okay. Go ahead.

20 A And then your through-freight engineers will operate from a
21 home terminal to an away-from-home terminal, as we previously
22 discussed here.

23 Q And which ones are we talking about in this matter?

24 A Here we're speaking of through-freight engineers.

25 THE COURT: Are they all in the same union, or is

Guidry - Direct by Godiner

1 there a separate union for each one of those three categories?

2 THE WITNESS: The locomotive engineers would -- of the
3 BLE would represent all engineers for --

4 THE COURT: All three --

5 THE WITNESS: Yes, sir, they would.

6 THE COURT: -- groups you just described.

7 THE WITNESS: Yes, sir, they would.

8 THE COURT: Okay.

9 BY MR. GODINER:

10 Q How does the seniority bidding system work for the
11 through-freight engineers?

12 A I believe, as Mr. Hannah mentioned, there's a pool of
13 engineers that operate between specified points, and they would
14 bid on those assignments based upon their seniority or
15 longevity as an engineer.

16 Q And each pool has a home terminal and an away-from-home
17 terminal?

18 A It has a -- has a home terminal, and some occasions,
19 they'll have more than one away-from-home terminal. But they
20 always will have a home and an away-from-home, yes, sir.

21 Q I want to spend just a few minutes talking to you about
22 Article IX and make sure that we're -- the Court understands
23 how that operates. You've worked with Article IX before?

24 A Yes, sir, I have.

25 Q For how long?

Guidry - Direct by Godiner

1 A Since the '86 agreement came about.

2 Q And it's called Article IX of the 1986 National Agreement,
3 "national" meaning what?

4 A The national agreement is a product of the carriers
5 conference where the various carriers in the nation will
6 collectively bargain with the international of the various
7 organizations and have an agreement, national agreement, that
8 applies to several carriers.

9 Q So Article IX exists on other carriers besides Union
10 Pacific.

11 A Yes, sir, it does.

12 Q Let's talk about just a quick overview of what Article IX
13 is and what it generally does.

14 A When a -- when a carrier decides to establish a new
15 operation, it will serve notice on the organization to outline
16 what those changes would be and the terms and conditions that
17 would apply for the new service.

18 Q Okay. Let's do this. Maybe we -- I can make it just a
19 little bit easier for you.

20 MR. GODINER: Your Honor, what I'm going to do is give
21 Mr. Guidry a copy of Article IX.

22 THE COURT: Sure.

23 MR. GODINER: Now, that is already in the record. If
24 you want a copy, I have one for you.

25 THE COURT: Yeah, if you have one, it'll be something

Guidry - Direct by Godiner

1 else I can keep my notes on. Thank you.

2 BY MR. GODINER:

3 Q Since I've marked it and given it to everybody, you've been
4 handed what's been marked as Defendant's Exhibit 1. What is
5 that?

6 A It is Article IX. It's contained in the 1986 BLE National
7 Agreement.

8 Q Okay. And you just talked about how the process begins
9 with a notice, and I just want you to point that out to the
10 Court where that is.

11 A Yes, sir. Under Section 1, Notice Requirements, it
12 stipulates that "Individual carrier seeking to establish
13 interdivisional service shall give at least 20 days' written
14 notice to the organization of its desire to establish service,
15 specify the service it proposes to establish and the
16 conditions, if any, which it proposes shall govern in the
17 establishment of that service."

18 Q Okay. And then after you served the notice, what happens?

19 A We will meet with the organizations and attempt to secure
20 an agreement.

21 Q And where is that covered in the -- in Article IX?

22 A Section 3 of Article IX outlines the bargaining procedures
23 that we follow in that process.

24 Q Okay. And that's, I guess, the page -- it's page 2 of
25 Exhibit -- Defendant's Exhibit 1. I'm sorry. Page 3 of

Guidry - Direct by Godiner

1 Defendant's Exhibit 1, correct? It's got the number 18 at the
2 top.

3 A Yes, sir, it has the number 18. It's page 18 of that
4 agreement.

5 Q Can BLET veto a new pool operation under Article IX?

6 A No, sir.

7 Q So you give the notice, and you meet with them to
8 negotiate. Does Section 3 say anything about the railroad's
9 right to implement the new runs prior to reaching an agreement?

10 A It does, yes, sir.

11 Q And what does it provide? You don't have to read it; just
12 generally tell the Court what it provides.

13 A If we're unable to agree, then we may implement on a trial
14 basis on those runs that do not operate through a home
15 terminal.

16 Q Okay. Do -- we're here, obviously, to talk about two
17 specific runs, Yermo to West Colton, Yuma to West Colton. Do
18 either one of those run through a home terminal?

19 A No, sir, they do not.

20 Q Are the negotiations with the union under Article IX always
21 successful?

22 A No, sir, they're not.

23 Q What happens if you can't reach an agreement?

24 A If we're unable to reach an agreement, we would proceed to
25 arbitration under Section 4 of Article IX.

Guidry - Direct by Godiner

1 Q Okay. And this provision says that if you can't reach an
2 agreement, the parties agree that the dispute will be submitted
3 to arbitration under the Railway Labor Act, as amended, within
4 30 days after arbitration is requested. That's what you're
5 pointing to?

6 A Yes, sir, that's correct.

7 Q Have you been involved in Article IX arbitrations?

8 A Yes, sir, I have.

9 Q How many times?

10 A Six, eight, ten over the years, I would suppose.

11 Q And where do those get arbitrated?

12 A It's been my experience they're arbitrated before a board
13 of arbitration, much like we discussed earlier in the Richter
14 case.

15 Q Okay. So some kind of special board that's set up?

16 A Special board. Yes, sir, they would.

17 Q Is there a timetable for arbitration beyond the it shall be
18 submitted within 30 days that we looked at in Section 4(a)?

19 A In addition to these time lines, the parties have mutually
20 committed themselves under the '91 National Agreement to
21 expedite both the process of negotiation and arbitration.

22 MR. GODINER: And, your Honor, I'll just note for the
23 record to save some time that the provision from the 1991
24 agreement is an attachment to Mr. Guidry's declaration.

25 THE COURT: Is the -- when you said there's an

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1 agreement under -- or the '91 National Agreement you agree to
2 expedite, does agreeing to expedite carry with it a specific
3 date? Can you actually commit an arbitrator to rendering a --
4 to render a decision within a particular amount of time under
5 that agreement?

6 THE WITNESS: We would ask the arbitration to issue a
7 decision as quickly as he could, especially in a case like this
8 where is there is some concern by the organization.

9 THE COURT: But parties ask me to render decisions all
10 the time, and I get to it when I get to it, so -- because I
11 have other cases.

12 Now, with an arbitrator, can you under this agreement,
13 by mutual agreement, tell the arbitrator, "You shall reach a
14 decision by X date"?

15 THE WITNESS: We cannot mandate it, no.

16 THE COURT: You cannot.

17 THE WITNESS: No, sir.

18 THE COURT: All right. Thank you.

19 MR. GODINER: I suppose we could ask. We could try,
20 but he wouldn't have to do it.

21 THE COURT: Right, no. Well, I mean, the agreement
22 to -- I'll comment the reason I say that the agreement to --
23 and this doesn't get to jurisdictional issues, which are
24 important. But the agreement to expedite is only as good as --
25 it makes no difference if the arbitrator doesn't want to

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1 expedite; or even if he says, "I'll expedite," his idea of it
2 and the parties' idea of it may be two different things.

3 MR. GODINER: No one is going to dispute that we can't
4 force the arbitrator to do anything.

5 THE COURT: Okay. No, I'm familiar with --

6 MR. GODINER: Yes.

7 THE COURT: -- with many an arbitration, though, where
8 under the rules of arbitration that the parties contract with
9 the arbitrator. They have set days where they will render a
10 decision. All the attorneys here have done this, where you
11 have an arbitrator who commits and is required to render a
12 decision within a certain number of days. You're paying him
13 for the service, and part of that service is a decision within
14 X number of days.

15 MR. GODINER: Does the -- maybe I can ask Mr. Guidry
16 this just to follow up.

17 BY MR. GODINER:

18 Q Does the National Mediation Board have a standard in this
19 regard?

20 A They do, yes.

21 Q What is that?

22 A The arbitrators are obligated under the mediation board
23 standards to issue their decision within six months, or they're
24 not allocated any additional days.

25 THE WITNESS: I would say, your Honor, that when we --

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1 when I've asked arbitrators to accommodate us or when we've
2 mutually asked arbitrators to accommodate us, they have when --
3 where they could.

4 THE COURT: Okay.

5 BY MR. GODINER:

6 Q Okay. Let's -- just very briefly, we talked about this
7 before, or I did, and I just want to make sure we get it in the
8 record from a witness.

9 Section 7 of Article IX is referred -- is entitled
10 "Protection." And can you just explain how that operates.

11 A Yes, sir. Section 7 is "Employee Protection." That grants
12 wage loss protection for employees adversely affected by the
13 new run. It also provides for moving household goods,
14 relocation allowance, as well as loss on the sale of a home at
15 the --

16 Q How long --

17 A -- excuse me -- at the former location.

18 Q How long are the wage protection benefits good for?

19 A Up to six years. It depends upon how many years of service
20 a person actually has, but if they have six or more years, they
21 would receive 100 percent full wage protection for up to those
22 six-year period.

23 Q Does Union Pacific use its Article IX rights frequently?

24 A We do, yes, sir.

25 Q How often?

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1 A It -- you can go for a year or so and there not be any
2 request or notices for new runs. However, it's not unusual to
3 have two or three in operation in a given year.

4 THE COURT: And new run typically -- I know there's
5 controversy over this one, whether these are really new runs or
6 not. But a new run is typically a -- the train running
7 either -- running a longer period, on a longer period of track,
8 where you're going from one destination to another destination
9 that is different than the one that was originally there,
10 just -- is it as simple as it's just a different destination
11 from where it went before?

12 THE WITNESS: Your Honor, the history of Article IX
13 involves extension of runs. It involves changing of runs. It
14 involves rearranged runs.

15 A lot of what is -- is -- history of Article IX does
16 call a lot of what we're calling now a new run a new run in
17 this instance as well.

18 THE COURT: All right. Okay.

19 BY MR. GODINER:

20 Q So let's talk, Mr. Guidry, now about Los Angeles. And
21 we've heard today about the Los Angeles hub agreement. Can you
22 tell the Court what that is and how it came to be?

23 A As Mr. Hannah indicated, it's a product of the *New York*
24 *Dock* transaction where UP and SP merged their properties.

25 Q Did the -- or does the Los Angeles hub agreement set up the

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1 initial pool operations for that hub?

2 A Yes, sir. It sets up both the seniority boundaries, as
3 well as the pool operations, within that hub.

4 Q Does the Los Angeles hub agreement say anything about Union
5 Pacific's right to change those operations in the future?

6 A Yes, sir, it does.

7 Q And where is that?

8 A That would be, I believe, in side letter 3 that we spoke
9 about earlier.

10 Q Mr. Guidry, you've been handed Defendant's Exhibit 3. Do
11 you recognize Exhibit 3?

12 A Yes, sir.

13 Q What is that?

14 A That is side letter 3 from the L.A. hub merger implementing
15 agreement.

16 Q And the language that you -- that we were just speaking of,
17 can you just direct the Court to where that is?

18 A Yes, sir. The bottom of the first page of side letter 3,
19 that paragraph headed "New Pools Created After This Agreement."

20 Also, I'd like to point out that Article IX is also
21 referenced in situations where we are rearranging locals inside
22 the hub and outside the hub as well in the previous paragraphs.

23 MR. GODINER: Your Honor, let me offer Defendant's
24 Exhibits 1 and 3 into evidence.

25 THE COURT: Any objection?

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1 MR. PERSON: No objection.

2 THE COURT: They're admitted without objection.

3 (Defendant's Exhibits 1 and 3 admitted in evidence.)

4 BY MR. GODINER:

5 Q Let's talk now, Randy, about the notice of July 17, 2013,
6 that underlies this case. Was that the first notice that you
7 served in 2013 on BLET regarding Union Pacific's Los Angeles
8 operations?

9 A No, sir, it was not.

10 Q When was the first one?

11 A We served an initial notice, I believe, in February of 2013
12 that had a little more complex service requirement allocated
13 and described in that notice.

14 Q Why were you making or why are you making changes in
15 Los Angeles?

16 A We're making significant capital improvements in L.A. -- I
17 believe Mr. Hannah has stipulated that as well -- that will
18 facilitate the velocity and capacity within that -- that line
19 or corridor.

20 Q And so you served this first notice, and what happened?

21 A We -- according to the procedure, we met with the
22 organization. We discussed the proposed service. They made
23 some -- they expressed their concerns. They made some very
24 good comments with respect to the notice we had proposed. And
25 we rethought our position and served the July 17th notice.

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1 Q The July 17th notice, can you tell us what it does?

2 A It's a much simpler notice, in our view. It withdrew the
3 February notice, and it established two new pools: one pool
4 with a home terminal in Yermo, which operate to the
5 away-from-home terminal in West Colton; and a new pool that
6 would operate with a home terminal from Yuma to away-from-home
7 terminal at West Colton.

8 Q Do you believe those are new pool operations within the
9 meaning of side letter 3?

10 A Yes, sir, I do.

11 Q Please explain to the Court why you feel that way.

12 A Excuse me. I didn't hear the last part of your question.

13 Q Yeah. Please explain to the Court why you feel that way,
14 why you think these are new pool operations.

15 A Well, your Honor, we currently do not have a pool that
16 operates with a home terminal out of Yuma to West Colton, and
17 we currently do not have a pool that operates with a home
18 terminal from Yermo to West Colton. In fact, if you were -- if
19 engineers were to pull up advertisements or bid on particular
20 assignments, they would not find those runs in the
21 advertisements.

22 Q And so to establish these new runs, you would have to have
23 new advertisements?

24 A That's correct, yes.

25 Q And so you believe these are new in that -- new pool

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1 operations?

2 A Yes. We would first have to receive the -- obtain the
3 agreement, but eventually, yes, we would have to advertise
4 those as new runs.

5 Q You understand BLET disagrees with your position, correct?

6 A Yes, sir, I do.

7 Q And you're prepared to arbitrate to resolve that dispute?

8 A Yes, sir, we are.

9 Q We heard a little bit of discussion today about the
10 Southwest hub agreement. Do you know what that is?

11 A Yes, sir.

12 Q And what is that?

13 A Like the L.A. hub, the Southwest hub is a product of the
14 merger implementing agreement. And Yuma is the dividing point
15 between the L.A. and Southwest hubs.

16 Q Does it contain language like side letter 3 about -- that
17 preserves Union Pacific's Article IX rights?

18 A Yes, sir, it does. I believe that's in side letter 2 of
19 that document.

20 MR. GODINER: Okay. And I'd just note for the record,
21 your Honor, that was filed by the plaintiff, I believe, with
22 the complaint. I believe it's an exhibit to the complaint.

23 THE COURT: All right.

24 BY MR. GODINER:

25 Q Now, when you establish -- if you establish these new pool

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1 operations, and specifically the one from -- with a home
2 terminal in Yuma and an away-from-home terminal in West Colton,
3 who do you plan to have -- what engineers do you have planned
4 to staff those pools?

5 A We plan to have L.A. hub engineers staff those pools.

6 Q And you think -- and why do you think you're allowed to do
7 that?

8 A Because the majority of the trackage that those trains will
9 operate over is within the Los Angeles hub. And, in my view,
10 it's fair to have those employees retain that work.

11 Q Do you believe the language of the side letter which you --
12 side letter 2 to the Southwest agreement supports that view?

13 A Yes, sir, I do.

14 Q Is it unusual, Mr. Guidry, to have disputes with BLET over
15 these Article IX notices that you serve?

16 A No, sir. We do have disputes fairly often.

17 Q Are you familiar with a dispute about an Article IX notice
18 that arose between Union Pacific and BLET in the Houston area
19 in or about 2006?

20 A Yes, sir.

21 Q Can you explain what happened there?

22 A In that case, much like we have here, the BLE contended
23 that our notice for interdivisional service in that hub
24 violated the merger implementing agreement for the Houston hub.

25 Q And did the Houston hub agreement, by the way, have any

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1 Language that preserved Article IX rights like the L.A. hub
2 agreement does, like side letter 3?

3 MR. PERSOON: Objection. Judge, I just want to
4 clarify for the record that that's a different part of BLET.
5 There's different regions, similar to there being different
6 locals in a more Teamsters-union-style union. The Houston one
7 is not this BLET. That's a different one.

8 THE COURT: Oh, it's not -- well, it's not part of
9 the -- it's not a different -- well, local, is --

10 MR. PERSOON: We were talking about Teamsters
11 Local 205 --

12 THE COURT: Right.

13 MR. PERSOON: -- and Teamsters Local 305. They're all
14 part of the IBT, but they're different.

15 MR. GODINER: Well, wait a minute. That -- now, there
16 we have a real legal dispute. Under the Railway Labor Act,
17 Section 2(9), the BLET has to represent -- if we're going to
18 have a union, it's craftwise -- craftwise.

19 It's not like what you're talking about with Teamsters
20 where they organize one plant and then another plant and then
21 another plant. You cannot do that under the Railway Labor Act.

22 THE COURT: All right.

23 MR. PERSOON: The clarification, Judge, is for
24 purposes of trying to show if there's any sort of party
25 practice. This is a different party with a different contract,

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1 a different STB agreement.

2 THE COURT: All right. Well, the -- ultimately,
3 the -- any decision, should I decide to have -- exercise
4 jurisdiction of this case, decisions made in other areas of the
5 country using similar language, it has limited utility, and I
6 understand your argument that it's different -- may be a
7 different BLET unit that is being involved.

8 But it is of some utility for me to know what has been
9 done in other cases where there's been objections to an
10 Article IX change of -- change of operation.

11 MR. PERSOON: I just didn't want any confusion.

12 THE COURT: No, I appreciate the clarification.

13 Go ahead.

14 MR. GODINER: Okay. I'm trying to remember. Did
15 you -- I do not remember exactly where I was, so I'll go to the
16 next question.

17 THE COURT: As to the dispute.

18 BY MR. GODINER:

19 Q Did you arbitrate that dispute?

20 A Yes, sir, that dispute was arbitrated.

21 Q What kind of arbitration board did that dispute take
22 place --

23 A It was an Article IX arbitrated, board of arbitration.

24 Excuse me. Let me clarify. It was a board of
25 arbitration established pursuant to Article IX of the 1986

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1 National Agreement.

2 Sir, also I believe you asked whether the hub
3 agreement contains similar language. I don't know if I -- I
4 can't remember if I answered that question or not. Or is it --
5 should I answer it?

6 Q Okay. Yeah. Let's go back to that because I'm not -- like
7 I said, I lost my place when we started to have the colloquy.

8 So does the Houston hub agreement have language like
9 the side letter 3 language preserving Union Pacific's
10 Article IX rights?

11 A No, sir, it does not.

12 Q So now take a look at Defendant's Exhibit 8. Tell me if
13 you recognize Defendant's Exhibit 8.

14 A Yes, sir. That was the award that was issued in the
15 Houston dispute.

16 Q The caption there, it doesn't talk about a specific general
17 committee of adjustment for the BLET, does it?

18 A It speaks to the matter between the Brotherhood of
19 Locomotive Engineers and Trainmen, which is -- would be this
20 organization here as well.

21 Q And where does it tell us that it's an Article IX board?

22 A Again, in the heading, it -- it stipulates that it is
23 pursuant to Article IX, Section 4, of the 1986 National
24 Agreement.

25 Q Who won that arbitration?

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1 A The BLE prevailed in that case, sir.

2 Q Was there an appeal?

3 A Yes, sir, there was.

4 Q And where did that go?

5 A To the Surface Transportation Board.

6 MR. GODINER: Okay. I'll offer Exhibit 8, Defendant's
7 Exhibit 8, into evidence, your Honor.

8 THE COURT: Any objection?

9 MR. PERSOON: No objection.

10 THE COURT: It will be admitted without objection.

11 (Defendant's Exhibit 8 admitted in evidence.)

12 BY MR. GODINER:

13 Q You recognize, Mr. Guidry, and we've talked about this
14 dispute that exists here and your willingness to arbitrate it.
15 Recognizing that we're not asking the judge to decide this, but
16 what kind of board do you believe this should be arbitrated
17 before?

18 A I believe it should be a board established pursuant to
19 Article IX of the 1986 National Agreement, like in the Houston
20 case, as well as in the case that Mr. Hannah dealt with, the
21 Dolores case, the Richter award you mentioned earlier in his
22 testimony.

23 MR. GODINER: Okay. And that was Defendant's
24 Exhibit 7, your Honor, that also references Article IX in the
25 caption.

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1 THE COURT: All right.

2 THE WITNESS: And --

3 BY MR. GODINER:

4 Q Go ahead.

5 A And also I feel that section -- side letter 3 stipulates
6 that's where it's to be arbitrated as well.

7 Q And where do you see that? Explain that to the Court,
8 please.

9 MR. GODINER: This is Defendant's Exhibit 3.

10 THE WITNESS: The -- again, sir -- new pools created
11 after this agreement, it says, shall be handled per Article IX
12 of the 1986 arbitration award, which is the national agreement.
13 In my mind, that's where the arbitration of that dispute would
14 belong.

15 THE COURT: And is the dispute -- and this is more for
16 the attorneys, really, whether this is a new pool operation.
17 Is this part of the dispute, the words "new pool operation" in
18 side letter 3? Is that something that, I take it, the
19 plaintiffs are disputing and the defendants believe this is a
20 new pool operation; the plaintiffs believe it isn't?

21 MR. PERSON: Absolutely, your Honor.

22 THE COURT: Okay. All right.

23 MR. GODINER: Yeah, I think that's very clear.

24 THE COURT: Okay. Is there any other language then in
25 side letter 3 that goes to that issue? Is there a definition

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1 of "new pool operations"? Is it a defined term in either --
2 elsewhere in the side letter or in the L.A. hub agreement or in
3 the 1986 National Agreement?

4 MR. GODINER: No. I cannot tell the Court that there
5 is anything that says "new pool operation means X."

6 THE COURT: Okay.

7 MR. GODINER: And I think --

8 MR. MORALES-DOYLE: Judge, just very quick. I agree
9 with that, but I would say that it says "new pool" -- the whole
10 phrase is "new pool operations not covered by this agreement,"
11 and there is a section of the hub implementing agreement that
12 is called "Pool Operations," Article III of the hub merger
13 implementing agreement, that sets forth a number of pool
14 operations, which includes the West Colton to Yermo and West
15 Colton to Yuma pools.

16 So while there's not a definition, I would say that's
17 sort of where you'd look for some guidance on what this is
18 referring to.

19 MR. GODINER: And I agree with that, and I would just
20 note that it establishes what the home terminal is and the
21 away-from-home terminal for each pool. And so that's different
22 here. And that's the nub of the dispute, your Honor, as you
23 know.

24 THE COURT: The substantive dispute that ultimately --

25 MR. GODINER: Yes.

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1 THE COURT: -- an arbitrator --

2 MR. GODINER: Right.

3 THE COURT: -- is likely going to have to decide.

4 MR. GODINER: Right.

5 THE COURT: And I think there is no challenge that
6 that issue is ultimately for an arbitrator to decide, correct?

7 MR. PERSOON: No dispute, your Honor.

8 THE COURT: All right. How do I get there? And I
9 hate to interrupt witnesses like this, but I might as well do
10 it while it's on my mind. How do I get to deciding likelihood
11 of success on the merits -- and maybe I'm looking at the wrong
12 issue of what the merits are -- without me determining whether
13 I think the plaintiffs are right or the defendants are right on
14 this issue of whether the change in the home base constitutes a
15 new pool operation?

16 It seems as if you're inviting me, if you want a
17 restraining order, to do what I have to do when I'm deciding
18 that, which is weigh whether or not there is a -- what the
19 likelihood of success would be on the merits.

20 Or am I deciding a different issue on likelihood of
21 success of the merits, not the new pool issue?

22 MR. PERSOON: I think it's both, Judge. It's kind of
23 a tricky conundrum that the Supreme Court answered in *M-K-T*
24 when it looked at a grant of an injunction in a similar
25 instance where engineers were going to be dislocated from their

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1 homes.

2 And it said this examination of the nature of the
3 dispute is so unlike that which the adjustment board will make
4 of the merits of the same dispute and is for such a dissimilar
5 purpose that it could not interfere with the later
6 consideration of the grievance by the adjustment board.

7 So in this instance, there they were talking about the
8 National Railroad Adjustment Board. Because this is under the
9 authority of the Surface Transportation Board, we'd be talking
10 about arbitration by a *New York Dock* arbitrator, ultimately
11 appealable to the Surface Transportation Board, other than a
12 *Lace Curtain* review or some standard like that.

13 And what I read the Supreme Court as saying is we can
14 issue an injunction because we're not actually precluding the
15 arbitrator from deciding the merits.

16 THE COURT: How did -- it was Chief Justice Warren who
17 wrote that. How did he decide the issue of whether or not -- I
18 think he wrote it. How did he decide the issue of whether the
19 district judge appropriately weighed the likelihood of success
20 on the merits? It seems as if I have to -- under -- what
21 you're suggesting is, it would appear, I have to jump into that
22 thicket of interpreting side letter 3 and using past
23 experience, intent of the parties when they negotiated it, any
24 arguable definitions that I can glean from other documents.

25 MR. PERSON: I might be incorrectly remembering a

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1 standard of review from administrative law, so somebody please
2 tell me if I'm wrong. But I think it could be akin to
3 something like a quick-peek review where you can kind of --
4 kind of look at what's going on, but because you're not
5 actually deciding it, it's okay, because --

6 THE COURT: Yeah, I'm not --

7 MR. PERSOON: -- you issuing the injunction preventing
8 Union Pacific from early implementation would not frustrate the
9 authority of the arbitrator to decide to the contrary and, you
10 know, really preserve the ability to issue -- of that
11 arbitrator to issue full relief for the BLET.

12 THE COURT: All right. Well, maybe -- go ahead.

13 MR. GODINER: Well, I'll just say a couple words about
14 *M-K-T*, your Honor. Let's remember what *M-K-T* is. It is a case
15 where a union threatened to go on strike. The carrier said
16 this is a minor dispute that has to go to an arbitration before
17 the National Railroad Adjustment Board. And that's what we
18 talked about early this morning, about the *Conrail* case and
19 that not-frivolous standard.

20 And so the likelihood of success on the merits was the
21 railroad coming to court and asking for a strike injunction.
22 And in that situation, your job on likelihood of success on the
23 merits would be to say, is there a nonfrivolous argument here?
24 And then you're done.

25 And *M-K-T* is about if you issued a strike

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1 injunction -- and I don't -- nobody's asking you to issue a
2 strike -- Union Pacific is not asking for any relief from this
3 Court -- then can you condition that on the railroad's
4 maintaining the status quo.

5 And so they didn't look at likelihood of success on
6 the merits in that case because it was the railroad as the
7 moving party. And the Supreme Court's holding is that when you
8 ask for a strike injunction under the Railway Labor Act, then
9 the Court can issue that condition. It is the real exception;
10 it is not the rule, and the subsequent cases have all said
11 that.

12 But it is you -- when you issue an injunction, your
13 Honor, you always have equitable powers to condition it. And
14 that's what the Supreme Court said in *M-K-T*. I don't think
15 it's -- I think it's apples and oranges with the issue that
16 you're grappling with now.

17 THE COURT: Okay.

18 MR. PERSON: Judge, we do think it's apples and
19 apples. It might be Granny Smith and Red Delicious, but it's
20 still all apples.

21 And if you remember, in the *Panoramic* case, the
22 7th Circuit -- I think it was *Panoramic* -- was very clear that
23 there's two sides to a coin in injunctions because when an
24 employer wants to enjoin a union from striking, striking is the
25 union's form of self-help. Well, what's the employer's form of

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1 self-help? It's unilateral implementation.

2 And that's what we're asking to be enjoined. We're
3 asking you to enjoin a unilateral implementation of the change
4 in working conditions.

5 And if you're able to enjoin a strike, you're able to
6 enjoin a unilateral change in working conditions. That's what
7 *Lever Brothers* says when they approve the so-called reverse
8 *Boys Markets* injunctions of the injunction of an employer
9 notwithstanding the bar of Norris-LaGuardia. And that's why
10 it's exactly the same apples to apples here.

11 THE COURT: Okay. Well, please proceed.

12 Ultimately, I want to get to the practical issue that
13 may -- that I want the parties to consider, obviously, which is
14 if you're agreeing to -- well, we'll get to whether the Union
15 Pacific's agreeing to arbitrate the *New York Dock* situation.

16 MR. GODINER: Well, and, actually, that was my next
17 topic with Mr. Guidry, so that's perfect --

18 THE COURT: I'll let you go ahead --

19 MR. GODINER: -- perfect said way.

20 THE COURT: -- and I'll stop interrupting. Go ahead.

21 MR. GODINER: We couldn't have planned that better.

22 BY MR. GODINER:

23 Q Now, you understand, Mr. Guidry, BLET is saying that we
24 should arbitrate under *New York Dock*.

25 A I understand, yes, sir.

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1 Q And you understand that process?

2 A Yes, sir.

3 Q First we should do this. Has this process started? Has
4 that *New York Dock* arbitration process begun here?

5 A No, sir.

6 Q Why not?

7 A Mr. Hannah hasn't initiated it.

8 Q Could he have done that by now?

9 A Yes, sir, he could.

10 Q When could he have begun the process?

11 A Could have done it 21 days after the July 17th notice.

12 Q And that's a *New York Dock*, Article I, Section 11?

13 A Yes, sir.

14 Q So that would have been, what, early August, I guess, he
15 could have begun it?

16 A Yes.

17 Q If BLET did commence *New York Dock* arbitration, would you
18 refuse to arbitrate there?

19 A I don't think we could refuse to arbitrate, much like I
20 don't feel Mr. Hannah could refuse my exercising options under
21 Article IX.

22 Q In saying that you wouldn't -- would not refuse to
23 arbitrate under *New York Dock*, are you conceding that *New York*
24 *Dock* is the appropriate place to arbitrate?

25 A No, sir, I'm not.

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1 Q And is there a way to avoid having two arbitrations here?

2 A We could have one arbitrator decide both issues.

3 Q Both under Article IX and *New York Dock*?

4 A Yes, sir.

5 Q And you're willing to do that?

6 A Yes, sir.

7 Q Let's talk about the Union Pacific's intent now with regard
8 to these runs and establishing them on a trial basis.

9 THE COURT: Before you get there, what would be the
10 difference? Is there any difference in the standard of review,
11 in the evidence that can be heard as between an Article IX
12 arbitration and a *New York Dock* arbitration?

13 MR. GODINER: Well, here's the way I would answer
14 that, your Honor. See, our thought is this. Wanting to get
15 this dispute resolved quickly, our thought would be that you
16 have one arbitrator, and he answers I think first, logically,
17 their question: Is this a new pool operation so that you're
18 allowed to do this under the Los Angeles hub agreement?

19 There's probably a more artful way to state that
20 issue, but that's the basic issue.

21 Issue No. 2 would be if you agree with UP that they
22 can do this, then what are the conditions of the service, the
23 things that Article IX talked about? That would allow
24 Mr. Hannah to raise his overtime issue that he talked about
25 earlier. You can't change the overtime rules under Article IX,

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1 he says. All of that would be in Question 2.

2 The thing I like about this, and the reason that we
3 like this idea is why do we want to do the *New York Dock*
4 arbitration. And let's say if they win, we're done. I mean,
5 that's clear. But if we win, then we have to start another
6 arbitration process.

7 And so our idea that we think makes a lot of sense and
8 we're willing to do and I don't -- I'm not going to say we can
9 force BLET to do this, but I would propose it to them -- and
10 they're in here asking you for relief, so it seems to me they
11 ought to be agreeable to this -- would be to have one person --
12 he or she gets the case, answers the first question. Maybe
13 they're done after the first question, or maybe they're not.

14 And then you're totally done. Because, as
15 Mr. Guidry -- one of the questions I'm going to ask him is does
16 he want to do this on a trial basis, and you'll hear he
17 doesn't.

18 THE COURT: Okay. Well, continue with the questions
19 then.

20 MR. GODINER: Okay.

21 BY MR. GODINER:

22 Q So could you start the trial runs now? Just looking at
23 Article IX, could you do that?

24 A Technically, under the agreement, we could. But in a
25 practical sense, we would not.

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1 Q Okay. And what's the problem -- when are you thinking
2 about starting them now? Let's get that out.

3 A Well, in my deposition and confirming here, I don't think
4 we'll be in a position to implement until mid- or later
5 January.

6 Q Of 2014?

7 A 2014, yes, sir.

8 Q And why is that?

9 A Well, there's -- there's capital improvement projects that
10 need to be completed and to facilitate the operation into and
11 out of the L.A. basin.

12 Q And --

13 THE COURT: What are they?

14 MR. GODINER: Go ahead. Go ahead, your Honor.

15 THE COURT: What are they?

16 THE WITNESS: Yes, sir. We -- I believe Mr. Hannah
17 mentioned the flyover, which is an overpass. That has -- that
18 has been completed.

19 During our previous discussions from the previous
20 notice, the -- actually, it was the BLE that pointed out that
21 we have double track extensions, which we're going to add
22 additional track into the L.A. basin. That's going to
23 facilitate -- improve velocity and improve the capacity of
24 trains.

25 Actually, they pointed out to us that we would be

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1 better served to wait until those projects were completed.
2 They're going to be in segments. I believe we're going to have
3 a line segment completed in November or December. So by the
4 time you could get everything processed, it would be, at the
5 earliest, January.

6 Then we have another project, double track project,
7 that will be completed, I think, next year or in the ensuing
8 years. That will complement the operations end of the hubs.
9 Things are going to change based on those improvements alone,
10 sir.

11 BY MR. GODINER:

12 Q Can you tell the Court what double track was just so we're
13 not using railroad jargon?

14 A Two tracks side by side. The flow of traffic on one track
15 is in one direction, and the flow of traffic -- much like an
16 interstate highway to where you have no stoplights. The trains
17 are much more fluid in that operation.

18 THE COURT: And when it's -- I've always wondered, but
19 when it's a single track, I take it there are spurs and signals
20 where one train is coming, and the other train has to get off
21 to the side?

22 THE WITNESS: Yes, sir. There's sidings, and they'll
23 enter the siding and they'll wait until the train that they're
24 meeting or passing will get by them before they're able to
25 commence another movement.

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1 THE COURT: Okay. Thanks.

2 BY MR. GODINER:

3 Q So do you want, though, to establish these runs ever on a
4 trial basis?

5 A My preference is not to establish them on a trial basis,
6 no, sir.

7 Q And explain to the Court why not.

8 A Well, the employees should know what working conditions
9 they're going to work under. We would -- an agreement, if we
10 could reach an agreement, or if we arbitrated, it would
11 eliminate that uncertainty for the employees.

12 Also, too, for the company, it would benefit us by not
13 having to undo an operation that we already put into place.

14 Q Now, is it possible, Randy, to get the arbitration done by
15 mid- to late January of 2014?

16 A If Mr. Hannah would cooperate and work with us on moving
17 the process along, we'd certainly make every effort we could to
18 make that happen, yes, sir.

19 Q And what would the parties have to do to do that?

20 A We'd have to discuss and agree upon an arbitrator, enter
21 into a board agreement, prepare briefs for the arbitrator to
22 consider, make our presentation, and then wait for the
23 arbitrator to issue his decision.

24 Q So first thing I think you said is we'd have to pick an
25 arbitrator?

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- 1 A Yes, sir, that's correct.
- 2 Q And are you prepared to do that today?
- 3 A Yes.
- 4 Q Mr. Hannah testified earlier he was going to call Cleveland
5 and talk about arbitrators. Has he given you any names?
- 6 A Not as yet, no, sir.
- 7 Q Are you -- after you pick the arbitrator, the next thing
8 you have to do is what?
- 9 A We would enter into a border agreement and become joined on
10 the question that needed to be submitted to the arbitrator to
11 decide. If we were unable to decide on a joint question, the
12 company would propose their question, and then the BLE
13 certainly could propose a question they felt was appropriate.
- 14 Q Okay. And can that be done quickly?
- 15 A Yes.
- 16 Q What about getting a date for the arbitration?
- 17 A Whoever we were able to agree upon, we'd contact that
18 arbitrator and take the first date they had available.
- 19 Q You're willing to take the first date?
- 20 A Yes.
- 21 Q The judge kind of raised this question, and I'll just --
22 what's the best way to get the arbitrator to rule quickly?
- 23 A Well, during the -- during the present -- verbal
24 presentation, we would ask the arbitrator to render the
25 decision as quickly as he or she could.

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1 Q Could you ask the arbitrator in advance -- tell the
2 arbitrator in advance that you were going to need a quick
3 decision?

4 A We would -- we would, in all probability, have that
5 discussion with the arbitrator when we made the first contact
6 to schedule the date.

7 Q Do you believe you can get this done before mid-January,
8 three and a half months from now?

9 A There's no guarantees, but we would certainly do what was
10 necessary to do it.

11 THE COURT: Would you modify the beginning of the
12 trial run to accommodate a decision by an arbitrator should the
13 parties cooperate on an arbitrator, asking for an expedited
14 ruling, filing expedited briefs? And say the arbitrator
15 doesn't come in in mid-January, but comes in at a date later,
16 with possibly a cutoff date. Would you agree on behalf of
17 Union Pacific to hold off on the trial runs until there was a
18 decision by the arbitrator?

19 THE WITNESS: As long as we were -- we felt that the
20 process was moving along expeditiously, we would -- we would
21 certainly have to think -- acting unilaterally, we would not.
22 But there are accommodations that Mr. Hannah and I can make
23 jointly if we would engage in discussion that would alleviate
24 some of the hardship that may be caused if a trial run were
25 necessary.

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1 But, sir, I can't emphasize enough we would not -- we
2 would prefer not to implement a trial basis -- on a trial
3 basis.

4 THE COURT: Well, and if you'd prefer not to implement
5 on a trial basis, one way to avoid that is to wait for an
6 arbitrator's decision because if it's an arbitrator's decision
7 and it allows these runs, there's no trial about it; it just
8 happens. And if the arbitrator refuses it, then you may have
9 appellate processes, but at that point if the arbitrator says
10 it can't happen, then it shouldn't be able to happen
11 presumably.

12 Am I missing the procedures?

13 MR. GODINER: No, I don't think you're missing the
14 procedure. You know, I would say this, your Honor. Like I
15 said, in -- when I began, you can slow-walk arbitration if you
16 want to. If we tell them we're never going to implement on a
17 trial basis, we'll be back here a year from now talking to you
18 about this. Okay?

19 So I'm not going to speak for Mr. Guidry. He can --
20 you know, if --

21 BY MR. GODINER:

22 Q Let me just ask you, Mr. Guidry. If it was a two-week or
23 three- or four-week delay -- let's just go up to four weeks --
24 would you be willing to agree to that?

25 A No, if we could get a decision within four weeks or six

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1 weeks from the implementation, we would certainly -- it's in
2 our interest to wait for the decision. We're just too close to
3 a decision to act arbitrarily.

4 MR. GODINER: I just want to be clear, your Honor,
5 that I'm not in any way -- I can't in any way say we would pull
6 totally off the table the option of ever doing that.

7 THE COURT: And it's a little unfair because this is
8 more of a settlement discussion than a question for a hearing.
9 But I --

10 Let's go off the record for a minute.

11 (Off-the-record discussion.)

12 THE COURT: We're back on the record.

13 Go ahead.

14 BY MR. GODINER:

15 Q And was the -- I really had only one more question,
16 Mr. Guidry.

17 MR. GODINER: And I think it was a question that you
18 asked before, your Honor, and I wanted him to clarify this.

19 BY MR. GODINER:

20 Q So I don't know if you remember, Randy, the Court was
21 addressing you're going to make these new pools at home
22 terminal Yuma, home terminal Yermo, away-from-home terminal
23 West Colton; and we right now have runs with West Colton as the
24 home terminal going to other places.

25 Does the notice that you're talking about change the

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1 other runs in West Colton? Does it change their home terminals
2 in any way?

3 A No, sir, it does not.

4 THE COURT: Well, how does that affect, for instance,
5 Mr. Tortorice, who does a West Colton to Long Beach run? How
6 would this affect -- who does the West Colton to Long Beach run
7 if the trial run -- if trial runs occur as you propose?

8 THE WITNESS: I'm sorry, your Honor. I don't
9 understand the question.

10 THE COURT: And that's probably because I don't
11 understand it either.

12 MR. GODINER: Well, let me try to help.

13 THE COURT: Go ahead. If you know what I'm trying to
14 ask him --

15 BY MR. GODINER:

16 Q And, please, Randy, if I misstate, we need to make a clear
17 record with the Court.

18 So there are runs in and out of West Colton right now,
19 and the engineers bid on them. And Mr. Tortorice, although he
20 really doesn't work very much, but he did -- he does testify
21 his current --

22 THE COURT: He doesn't work much on the railroad. He
23 does a lot of work for the union.

24 MR. GODINER: Right.

25 THE COURT: So let's be clear.

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1 MR. GODINER: And so we've got -- yes. I misspoke.

2 Thank you.

3 THE COURT: All right.

4 MR. GODINER: So but he's on that West Colton to Long
5 Beach run.

6 THE COURT: All right.

7 MR. GODINER: And that run is going to continue to
8 exist. And so the L.A.-based engineers will all be able to bid
9 on the jobs, and that would include that run, and it would
10 include any other pool operations that they have in that area.

11 And I don't know what they all are. There is this one
12 to what they call the basin, but down into towards Long Beach,
13 whatever the other runs are.

14 Now, it is seniority bidding, to be really clear, and
15 it means -- and I think Mr. Tortorice said this -- somebody
16 could come along, a senior engineer tonight could go on and
17 say, "I'm tired of doing the run I'm doing now. I want to do
18 something else."

19 THE COURT: How long when you bid and get a run do
20 you -- are you on that run? Is it a daily change, or is it
21 something for six months or a year? Maybe that's my --

22 MR. GODINER: And why don't you answer that, if you
23 don't mind.

24 THE WITNESS: They're able to hold it, your Honor, as
25 long as your seniority would preclude someone else with more

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1 seniority from displacing you on that. So you could hold an
2 assignment for years without being displaced.

3 THE COURT: Okay. All right. That actually clears up
4 a lot for me. Thank you.

5 MR. GODINER: Okay. That's my last question.

6 THE COURT: Okay.

7 For the plaintiff.

8 CROSS-EXAMINATION

9 BY MR. PERSOON:

10 Q Mr. Guidry, are you ready and willing to submit this matter
11 to the authority of a *New York Dock* arbitration acting under
12 the authority of the Surface Transportation Board?

13 A We would not refuse to arbitrate that issue. However, we
14 feel that the proper venue is Article IX.

15 Q Is that a yes?

16 A Excuse me, sir.

17 Q Is --

18 A I believe my answer was we would not refuse to address that
19 issue through an Article IX forum.

20 Q So you are ready and willing to submit this matter to the
21 authority of a *New York Dock* arbitrator?

22 A I guess I'm -- there would -- it would be a -- a joint
23 arbitrator. He would address the *New York Dock* issue, but it
24 would also be an arbitration --

25 Q Well, I'm not talking about a joint arbitrator.

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1 THE COURT: Let him finish.

2 Go ahead.

3 He wasn't finished.

4 THE WITNESS: It would also be an arbitration process
5 established under Article IX. I'm saying that both issues
6 could be addressed.

7 BY MR. PERSOON:

8 Q My question isn't about a joint arbitrator. My question
9 is, are you ready and willing to submit this matter to the
10 authority of a *New York Dock* arbitrator?

11 A We would -- we would not refuse. We could not refuse
12 Mr. Hannah's moving on that. However, we would also pursue an
13 Article IX arbitration as well based on what our view of the
14 proper venue would be.

15 Q So you are ready and willing to submit this matter to the
16 authority of a *New York Dock* arbitrator?

17 THE COURT: I think he's answered it twice.

18 MR. PERSOON: Okay.

19 THE COURT: And I understand why answers like this
20 have to be carefully phrased. So I'm -- I understand what his
21 answer is.

22 BY MR. PERSOON:

23 Q The Surface Transportation Board has primary jurisdiction
24 over hub agreements, doesn't it?

25 MR. GODINER: Objection, your Honor. We're asking him

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1 to testify as a lawyer. I mean, this is a legal question.

2 THE COURT: Well, again, I'll -- it's a legal
3 question, but it involves interpretation of a contract that the
4 witness is very familiar with. If he wants to, as other
5 witnesses have, defer to counsel on this, he should feel free.

6 But as the -- basically the head labor guy for Union
7 Pacific, if you have your own view of what a contract says,
8 you're free to answer the question.

9 THE WITNESS: If I have to, I'll defer to counsel.
10 But could I have your question again, please?

11 BY MR. PERSOON:

12 Q Sure. The Surface Transportation Board has primary
13 jurisdiction over hub agreements, doesn't it?

14 A Not always, no, sir.

15 Q In what instances doesn't it?

16 A Well, in the Houston instance, the organization contended
17 there was a violation of the hub agreement there, and that
18 matter was submitted to an Article IX arbitration. Mr. Hannah
19 files time claims routinely under the application of a hub
20 agreement, and those are handled under the collective
21 bargaining agreement.

22 So it's gray as to where they would -- they would go.
23 But the history with Article IX -- my history with Article IX,
24 sir, is that it would be an Article IX arbitration process.

25 Q But I wasn't asking about Article IX, was I?

Guidry - Cross by Persoon

1 A I'm trying to answer your question, sir.

2 Q I'm just asking about hub agreements.

3 A And I think -- I think I've answered that, that not in
4 all -- not in all cases do those disputes go to a *New York Dock*
5 arbitrator.

6 Q I'm going to ask you to look at what your attorney gave you
7 marked as Defendant's Exhibit 3. And this is side letter No. 3
8 dated November 6th, 1998. And it's a side letter 3 to the L.A.
9 hub agreement.

10 And when you were talking about this agreement
11 earlier, I think you left out a few words. Under the bottom of
12 what's marked as page 29, the heading says, quote: "New Pools
13 Created After This Agreement." And, if I remember correctly,
14 you said, "New pool operations shall be handled per Article IX
15 of the 1986 national arbitration award."

16 Do you remember saying that?

17 A Yes, sir.

18 Q But that's not all that paragraph says, is it?

19 A Would you like for me to read the paragraph? I mean,
20 what --

21 Q That's not all the paragraph says, is it?

22 A "New pool operations not covered in this implementing
23 agreement, whether between hubs or within the hub, shall be
24 handled per Article IX of the 1986 national arbitration award."

25 Q So earlier you specifically omitted the phrase "not covered

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1 in this implementing agreement." Isn't that correct?

2 A I didn't specifically eliminate it for any particular
3 reason. I was focused on how it should be handled.

4 MR. PERSOON: Permission to approach, your Honor?

5 THE COURT: You may.

6 (Counsel conferring.)

7 MR. PERSOON: I'm short a copy, your Honor. There
8 were some two-sided documents that got copied one-sided.

9 THE COURT: What document were you going to be using?

10 MR. PERSOON: This is the merger implementing
11 agreement for the Los Angeles hub. It's Docket No. 1-2,
12 Exhibit 2 to the complaint.

13 THE COURT: Okay.

14 MR. GODINER: I may have that. Or I know I do,
15 actually. But let me -- if it's okay with you and the Court,
16 I'll just stand here and make sure I'm following along.

17 MR. MORALES-DOYLE: I found another copy.

18 MR. GODINER: Oh. Thank you very much.

19 BY MR. PERSOON:

20 Q Mr. Guidry, I'm going to direct your attention to page 5.
21 Section III, Pool Operations/Assigned Service. If you can let
22 me know when you've located that section.

23 A On page 5?

24 Q Yes.

25 A Item III. Yes, sir.

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1 Q Can you tell me what pool operations are listed in
2 Section A there?

3 A West Colton-Yermo, West Colton-Yuma.

4 Q It's true, isn't it, that this section establishes service
5 between West Colton and Yermo and West Colton and Yuma?

6 A Yes, sir, it does.

7 Q And it's true also that service between West Colton and
8 Yermo and West Colton and Yuma is covered in this implementing
9 agreement, isn't it?

10 A Yes.

11 Q And it's your position that because you flipped those and
12 you say this is -- this isn't service from West Colton to
13 Yermo; this is service from Yermo to West Colton, isn't it your
14 position that that is service that's not covered by this
15 implementing agreement?

16 A Our position, that a run from Yuma with a home terminal at
17 Yuma to West Colton and a home terminal from Yermo to West
18 Colton does not currently exist. And to establish that would
19 be new service, yes, sir. That's my position.

20 Q So it's -- it's your testimony that that service from Yermo
21 to West Colton that you seek to implement is not covered in
22 this implementing agreement?

23 A Not as stipulated in this implementing agreement, no, sir.
24 It would be new service; would be a new pool operation.

25 Q And that's because it's a different home terminal and a

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1 different away-from-home terminal, right?

2 A That's correct.

3 Q Even though it's on the same track, right?

4 A That's correct.

5 Q Even though it's the same mileage, right?

6 A That's correct.

7 MR. PERSOON: Permission to approach?

8 THE COURT: You may.

9 BY MR. PERSOON:

10 Q I've presented you with a letter of July 17th, 2013.

11 MR. PERSOON: I guess, like Mr. Godiner, I'll take
12 this time to try to introduce some exhibits, Judge.
13 Previously, in the deposition of Paulo, I introduced the
14 declaration of Thomas Williams and this July 17th letter, and I
15 move to enter them into evidence.

16 THE COURT: Any objection?

17 MR. GODINER: No, your Honor.

18 THE COURT: They're both admitted without objection.

19 (Plaintiff's exhibits as described admitted in evidence.)

20 BY MR. PERSOON:

21 Q Now, I want to direct your attention to the second page.
22 There's a long paragraph continued from the first page. And
23 about two-thirds of the way down, it says:

24 "For example, over the last four years alone, UP has
25 spent over \$360 million constructing over 93 miles of second

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1 main track between Los Angeles, California, and El Paso, Texas.
2 The result of these expenditures is more efficient and
3 competitive route between Los Angeles and eastern markets, with
4 approximately 72 percent of the route now equipped with double
5 track. UP plans to spend nearly \$590 million more over the
6 next five to six years to complete the double track between
7 Los Angeles and El Paso."

8 Did I read that correct?

9 A Yes, sir.

10 Q And in the next paragraph, does this letter continue to
11 talk about the money that UP spent to build the Colton flyover?

12 A Yes, sir, that paragraph does contain that description.

13 Q And what is the Colton flyover?

14 A It is a --

15 THE WITNESS: Judge, it's an overpass where the -- one
16 train can operate over the other so that the two trains don't
17 have to be delayed when meeting on intersecting tracks.

18 BY MR. PERSOON:

19 Q And where is the Colton flyover located?

20 A It's at West Colton. It would be east of West Colton, but
21 within the facility there, yes, sir.

22 Q So what's the significance of the Colton flyover in this
23 case?

24 A I just mentioned that trains are able to -- to -- it
25 provides uninterrupted movement on those line segments without

Guidry - Cross by Persoon

1 any delay whatsoever in the two trains trying to use that
2 intersecting track. So your capacity and velocity is increased
3 as a result of that improvement.

4 Q Which line segments?

5 A Sir?

6 Q Which line segments does it improve velocity on?

7 A It can -- the line segments over the Burlington Northern
8 and the Union Pacific.

9 Q Can you use home terminal and away-from-home terminals for
10 me?

11 A It's primarily the El Paso route, the Sunset route
12 between --

13 Q So what -- what would --

14 A -- Los Angeles and El Paso, yes.

15 Q Excuse me. So what would the home terminal be of a route
16 that had improved velocity as a result of the Colton flyover?

17 A I'm sorry. I don't understand your question, sir.

18 Q There's various routes that will have improved efficiency
19 as a result of the Colton flyover, correct?

20 A Yes, sir, that's correct.

21 Q And those routes will each have a home terminal and an
22 away-from-home terminal, correct?

23 A Yes, sir, that's correct.

24 Q For any one of those routes, what's the home terminal?

25 A Well, there's several operations into and out of the

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1 Los Angeles basin. You have an operation out of Dolores that
2 will be improved with the flyover. This movement from the new
3 pool from Yuma to West Colton will be improved as well because
4 it improves the velocity of the terminal overall not only for
5 Union Pacific but Burlington Northern as well.

6 Q What does this have to do with the velocity of trains
7 running between West Colton and Yermo, California?

8 A The flyover, you mean?

9 Q Yes.

10 A The overall velocity improvement is going to improve the
11 train capacity and the velocity of those trains. You'll be
12 able to operate more trains, and those more trains, hopefully
13 with increased market share, we'll be able to increase the
14 number of jobs available to engineers in the basin as a whole.

15 Q But if I'm wrong -- if I'm right, you just told me the
16 Colton flyover is located at West Colton, right?

17 A Yes.

18 Q And this change that's necessary for Union Pacific to get
19 all these great efficiencies only involves this 130 miles of
20 track, is it, between West Colton and Yermo --

21 A No, sir.

22 Q -- right?

23 A No, sir.

24 Q Well --

25 A I mentioned that --

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1 Q -- maybe explain to me why I'm wrong.

2 A -- that it -- I gave you the Dolores example. The trains
3 that operate out of the port out of Dolores will also use that
4 flyover to improve velocity for those movements further into
5 the basin into the Ports of Los Angeles.

6 Q Maybe I'm missing something. But how does this relate to
7 switching terminals, home and away-from-home terminals, between
8 West Colton and Yermo?

9 A Yes, sir, absolutely. The -- the Yuma to Colton pool
10 underpins the operation as a whole. You have trains that
11 operate out of the -- out of the ports that are a high priority
12 movement. They're intermodal traffic off of boats and what
13 have you. They certainly have a much higher priority than the
14 traffic that originates and terminates at West Colton.

15 And our ability to have the terminal at Yuma and Yermo
16 into West Colton will better facilitate and mesh with the
17 overall operation into the basin as a whole. That was one
18 reason that we served the initial notice that was much more
19 complex, which we ultimately rethought after we had our
20 discussions with the BLE and the UTU as well.

21 Q And how --

22 A And a lot of -- and a lot of what our rethinking was
23 precipitated based on some of the I feel good suggestions that
24 Mr. Hannah made at the time.

25 Q How will having engineers report to service at Yermo

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1 instead of at West Colton lead to any of those things if,
2 assuming -- and if I'm correct -- you're not saying that these
3 engineers are going to work through West Colton, are you?

4 A No, sir, there's not what we're saying.

5 Q So they're only working from Yuma -- from Yermo,
6 California, to West Colton, right?

7 A Correct.

8 Q They're not operating any further than West Colton?

9 A That's correct, yes, sir.

10 Q And the Colton flyover is located at Colton, right?

11 A Yes, sir, that's correct.

12 Q So maybe you can tell me how that's going to be more
13 efficient for them to report to work at Yermo.

14 A I think we've touched on it somewhat with Mr. Hannah and
15 Mr. Tortorice's testimony. Obviously, having one locomotive
16 engineer on a train instead of two is more efficient. I don't
17 think anyone would dispute that.

18 Likewise, the held-away-from-home terminal issues that
19 they were complaining about we think with the repositioning of
20 the new pool at Yuma and Yermo will help eliminate some of that
21 given how those trains are going to have to mesh with the
22 overall transcontinental operation.

23 Q So you identified two efficiencies to me -- right? --
24 eliminating a pilot and limiting held-away-from-home time.
25 Right?

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- 1 A Those were efficiencies that were discussed earlier, and I
2 wouldn't disagree with those.
- 3 Q Can you identify any other efficiency?
- 4 A The fact that they're going to mesh better with the overall
5 and transcontinental operation of the trains that are operating
6 out of the port that are given a higher priority through
7 Colton.
- 8 Q But we're not talking about any service going south or west
9 of Colton, right? We're only talking about service that ends
10 at Colton. Am I wrong?
- 11 A No, sir, you're not wrong.
- 12 Q So what are those -- those other efficiencies other than
13 eliminating a pilot and limiting HAT time?
- 14 A You can't look at it in a vacuum. I'm saying that the
15 operation better meshes with the overall transportation plan
16 into and out of Colton by having the home terminals at Yuma and
17 Yermo.
- 18 Q If --
- 19 A I'm not an expert on the operations, but given what the
20 operating -- the operating managers have told me based on their
21 depositions, I have to take them at their word. Beyond that, I
22 don't know that I can expand on that any more.
- 23 Q Can you tell me how those operating efficiencies will mesh
24 better, in your own words?
- 25 A I think an operating person could better -- could better

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1 answer that. I'm taking what they're telling me at their word.

2 Q So but they're not here to testify today, are they?

3 A Well, no, sir, they're not.

4 Q So we've talked about two and maybe a half efficiencies:
5 eliminating the use of a pilot, limiting HAT time, and meshing
6 better with operations, despite the fact that none of these
7 engineers are going to be working south of West Colton, right?

8 A Based on Mr. Hannah and Mr. Tortorice's testimony, I don't
9 think that is insignificant. Those efficiencies are there
10 based upon what their testimony is.

11 Q Is limiting HAT time an operational efficiency or a labor
12 relations method for saving money?

13 A It's both, as they said, a quality of life issue. They --
14 I think he mentioned -- Mr. Tortorice said it's blood money.
15 So any effort we can make to eliminate that or improve that
16 would be a quality of life improvement. But as well, it's a
17 dollar-and-cents improvement because of the
18 held-away-from-home-terminal payments that are made in
19 conjunction with having to wait at the away-from-home terminal
20 a longer period of time.

21 Q And there's a collective bargaining agreement that requires
22 Union Pacific to pay held-away-from-home time, right?

23 A If they're required to stay beyond the 16th hour. We're
24 hoping to have employees out of the away-from-home terminal
25 before that.

Guidry - Cross by Persoon

1 Q But that right comes about in a collective bargaining
2 agreement, right?

3 A Yes, sir, that's correct.

4 Q And one of the two and a half efficiencies you've
5 identified for me is saying "The efficiency that we want to
6 gain is limiting our contractual obligation to pay engineers
7 money." Is that correct?

8 A As well as the quality of life issue, as well as it meshing
9 better with the overall operation. We think that meshing
10 properly will improve the velocity and capacity overall for all
11 trains coming into and out of the basin.

12 Q But so -- just so we're clear, the efficiency that you've
13 identified that justifies switching the home terminals is to
14 minimize your contractual obligation to pay engineers money.

15 A These are the efficiencies that Mr. Hannah and
16 Mr. Tortorice mentioned. I don't disagree with those. Matter
17 of fact, I do agree with those.

18 Q So you agree.

19 A Yes, sir, I do.

20 MR. PERSOON: Permission to approach?

21 THE COURT: You may.

22 BY MR. PERSOON:

23 Q Presented you the declaration of Thomas Williams, which has
24 been admitted into evidence and was submitted by Union Pacific
25 in opposition to BLET's motion. Have you had the chance to

Guidry - Cross by Persoon

1 review this declaration prior to today?

2 A I've skimmed it, not in detail, no, sir.

3 Q And who is Mr. Williams?

4 A Mr. Williams is the director of I believe terminal
5 operations in Los Angeles. But he is a director-level --
6 director-level manager in the Los Angeles service unit.

7 Q And I'm going to direct your attention to the same language
8 in paragraph 4 that we went over before. And I'll read it for
9 you.

10 Quote: "We" -- and that means Union Pacific -- "have
11 a difficult time keeping the West Colton to Yermo and West
12 Colton to Yuma pools staffed with qualified engineers who are
13 familiar with operating locomotives over the involved routes
14 because other runs exist where engineers can make more money,
15 sometimes for fewer hours of work."

16 Did I read that incorrectly?

17 A No, sir, you did not.

18 Q Now, what I'd like you to do is go back to that letter of
19 July 17th, 2013. And just looking at it, that was issued by
20 D.B. Foley, right?

21 A Yes, sir.

22 Q And who is D.B. Foley?

23 A Mr. Foley is a director who reports to me.

24 Q So he's your subordinate?

25 A Yes, sir, he is.

Guidry - Cross by Persoon

1 Q Did he issue this letter with your approval and authority?

2 A Yes, sir, he did.

3 Q What I'd like you to do is look through this letter and
4 tell me if anywhere in it there's any mention of this problem
5 that Mr. Williams talks about, about having a difficult time
6 keeping the West Colton to Yermo and West Colton to Yuma pools
7 staffed with qualified engineers.

8 And just let me know --

9 A I don't think it makes reference to that specifically, no,
10 sir. It refers to general efficiencies and the reason that we
11 would need to have the new service established.

12 Q It doesn't make any reference to this, does it?

13 A This letter? No, sir, it does not.

14 Q Maybe you can point me to something else in Mr. Williams's
15 declaration that does show up as one of the justifications in
16 this July 17th letter.

17 THE COURT: Well, is there a requirement in the
18 July 17th letter that the entirety of any justification has to
19 be put in? July 17th letter is ultimately just a notice
20 letter. Isn't that correct?

21 MR. PERSOON: Yes. But part of what it's getting on,
22 Judge, is the *New York Dock* versus Article IX issue because if
23 you look at all the arguments that are made in the July 17th
24 letter, they're all the arguments that you make for what we
25 call a *Dock on Dock*, which is where you're seeking to change

Guidry - Cross by Persoon

1 *New York Dock* conditions because you've had a subsequent change
2 in the operational efficiencies that you need to actualize.

3 THE COURT: Okay. Fair enough. Go ahead. I thought
4 something else -- the questions were for some other reason. So
5 go ahead.

6 THE WITNESS: Your question, sir?

7 BY MR. PERSOON:

8 Q I'll just stay with the justification offered in the
9 declaration of Thomas Williams for the necessity of this flip
10 in the home and away-from-home terminals doesn't show up in
11 Union Pacific's notice, does it?

12 A It does not. And the notice meets the Article IX
13 requirements.

14 Q And going back to the July 17th letter, turning to the
15 attachment, draft 1, page 2, Section 5 --

16 A Excuse me.

17 Q -- "Overtime."

18 A Excuse me. Which?

19 Q The July 17th letter.

20 A Okay.

21 Q There's an attachment to it.

22 A Yes, sir.

23 Q And looking at page 5 of that attachment -- or page 2 of
24 that attachment, Section 5, "Overtime."

25 A Yes.

Guidry - Cross by Persoon

1 Q Is this an attempt to change overtime rules on certain runs
2 in the L.A. basin?

3 A It is compliant with Article IX. The overtime provisions
4 are always subject to negotiations. We had similar issues and
5 discussions in a previous interdivisional operation, namely,
6 between Tucson, Santa Teresa, and El Paso. And that issue was
7 resolved through negotiation.

8 Q So this isn't part of the Article IX. You're not asserting
9 a right under Article IX to make these overtime changes, are
10 you?

11 A I'm saying that Article IX stipulates what the overtime
12 provisions are. We have included the Article IX provisions in
13 our proposal. Beyond that, it's certainly subject to
14 negotiation or even arbitration in the final agreement.

15 Q Are you claiming a right to unilaterally implement this
16 section?

17 A I'm not relinquishing those rights. We did meet with the
18 BLE, I think, in August. We had that discussion, and that --
19 that question was posed directly. And I believe I stipulated
20 precisely what was in my deposition, that while we didn't plan
21 on doing it immediately, we certainly were not in a position to
22 relinquish our right to implement.

23 Q Well, let me redirect your attention back to Defendant's
24 Exhibit 3. This was side letter No. 3 to the L.A. hub
25 agreement. And I want to look at the same language that says:

Guidry - Cross by Persoon

1 "New Pools Created After This Agreement: New pool operations
2 not covered in this implementing agreement, whether between
3 hubs or within the hub, shall be handled per Article IX of the
4 1986 national arbitration award."

5 I read that correctly, didn't I?

6 A Yes, sir.

7 Q Does anything in this section talk about changing rates of
8 pay?

9 A If you're going to issue a notice pursuant to Article IX,
10 Article IX within the body of that article stipulates what
11 basic conditions are going to be. That notice meets the
12 requirements of the Article IX notice.

13 Particularly, I believe it's Section 2 of Article IX.
14 It stipulates what the conditions are going to be. And that
15 agreement provision certainly meet or exceeds the requirements
16 contained in the notice requirements. That's simply a starting
17 point, sir, and we'll have discussions, and that may not be the
18 final product.

19 MR. PERSOON: Permission to approach, your Honor?

20 THE COURT: You may.

21 BY MR. PERSOON:

22 Q I've presented you with your own declaration offered by
23 Union Pacific in opposition to this brief. And I'd like to
24 direct your attention to paragraph 10.

25 Paragraph 10 reads, quote: "The ability to establish

Guidry - Cross by Persoon

1 new train runs is essential for Union Pacific to operate its
2 system efficiently."

3 It continues: "Train runs established years earlier
4 become obsolete or inefficient, requiring new methods of
5 operation."

6 Is that your sworn statement, Mr. Guidry?

7 A Along with the sentence: "Over time, as people move,
8 traffic patterns change, or other efficiencies dictate, Union
9 Pacific must be able to adapt."

10 That's part of the declaration, yes, sir.

11 Q Has the train run from West Colton to Yermo become
12 obsolete?

13 A Once the track improvements have been completed, it would
14 become obsolete, yes, sir.

15 Q How would it be obsolete?

16 A Because it will facilitate the operations out of Dolores.
17 And as I mentioned earlier, that having the new pools
18 established at Yuma and West Colton would facilitate that
19 overall operation. So, yes, that run would become obsolete as
20 we know it today, and it was necessary to establish those new
21 runs.

22 Q I hate to beat a dead horse, but I'm having trouble seeing
23 how a run that ends at West Colton -- and it's not going to
24 extend past West Colton, right?

25 A No, sir, that's correct.

Guidry - Cross by Persoon

1 Q So we're only talking about whether engineers are going to
2 be running trains from West Colton to Yermo or from Yermo to
3 West Colton, right?

4 A That's correct.

5 Q I'm having trouble just understanding how -- what's going
6 on in -- what's the other hub you were talking about, the other
7 terminal? Is it Dolores?

8 A Dolores, which would be Long Beach, ICT, yeah.

9 Q How are the changes there going to impact the obsolescence
10 or non-obsolescence of trains running back and forth between
11 Yuma -- or between Yermo, California, and West Colton,
12 California?

13 MR. GODINER: Your Honor, I think he's asked that
14 question three or four times, and Mr. Guidry's answered it the
15 same way the last two or three times. I object it's been asked
16 and answered.

17 THE COURT: It does sound like -- I think you even
18 started the questioning by saying, "I hate to beat a dead
19 horse."

20 MR. PERSOON: Well, I meant -- I'm having trouble --
21 I'm getting a vague answer of --

22 THE COURT: Well --

23 MR. PERSOON: -- operational efficiencies from
24 Dolores. And when I ask for any explanation, it's not
25 forthcoming.

Guidry - Cross by Persoon

1 THE COURT: All right. Well, this will be the last
2 question.

3 The question was: How are the changes that were going
4 to impact the obsolescence or non-obsolescence of trains
5 running back and forth between Yuma or between Yermo,
6 California, and West Colton.

7 I'm not sure that's -- that's how it was phrased. I'm
8 not sure it's a proper question. But ask your question one
9 more time, and then we'll move on.

10 BY MR. PERSOON:

11 Q Do you want me to restate the question, Mr. Guidry?

12 A Please, if you would.

13 Q How will the operational efficiencies you say will come
14 from the new developments in Dolores and other places make the
15 run from West Colton to Yermo, California, obsolete?

16 THE WITNESS: I want to preface it I'm not an
17 operating expert, your Honor, but I'll try to answer again as
18 best I can.

19 The traffic that's going to operate between Yuma and
20 West Colton is of lesser priority than the traffic that
21 originates out of the ports of Los Angeles. The intermodal
22 traffic is extremely competitive; it's extremely
23 time-sensitive.

24 And having the ability to have a home terminal at
25 Yuma, for example, is going to allow us to mesh those less

Guidry - Cross by Persoon

1 priority trains into the -- into the rush-hour traffic, which
2 is constant out of the ports.

3 So the fact that the trains that are coming
4 eastwardly -- or westwardly that are terminated at Colton are
5 of lesser priority so, again, with held away, those trains,
6 there's going to be fewer of those trains that are going to
7 arrive at Yuma. And it's going to actually increase the amount
8 of time, in my view, that the crews are going to stay at home
9 at Yuma.

10 Doing so, it will, likewise, in our view, address the
11 held-away-from-home terminal issues that the organization
12 complained about.

13 Also, too, you've got track space at Colton that --
14 where you can time and slot those lower-priority trains into
15 the operation eastbound.

16 So that's what I'm trying to explain when I say it
17 meshes favorably with the overall operation. You can't look at
18 this in a vacuum.

19 BY MR. PERSOON:

20 Q So we agree that these changes would result in engineers
21 spending more time at Yuma?

22 A Their home terminal, yes, they would spend there, yes.

23 Q Now, about Yuma. Yuma is not included in the Los Angeles
24 hub agreement, is it?

25 A Yuma is part of the Southwest hub, yes, sir.

Guidry - Cross by Persoon

1 Q So it's not part of the Los Angeles hub agreement.

2 A It is not. It's -- it is not.

3 Q So who -- which engineers hold seniority to work on trains
4 originating from Yuma?

5 A Based on the operation as proposed in an Article IX venue,
6 it's not unusual to have the L.A. hub engineers contend that
7 that's their work because the route miles operate primarily
8 within the L.A. hub.

9 Q Is it not unusual for the engineers in Tucson to claim that
10 it's their work?

11 A Again, with a history of Article IX, it would be unusual,
12 yes, because the work has always flowed and the BLE has argued
13 time and time again that when you're talking about equity
14 sharing that the line miles that are attributed to a particular
15 seniority district should stay with that seniority district.
16 And that's what we're attempting to do here is leave the work
17 with the seniority district that currently has it.

18 Q But the contract language says something different, doesn't
19 it?

20 A The contract language as it exists in the hub agreement
21 applies, in my view, to the assignments outlined in that hub
22 agreement. When you serve a new notice, the Article IX process
23 will take you through an agreement that may alter that.

24 Q So you'd be using the Article IX process to change a *New*
25 *York Dock* agreement.

Guidry - Cross by Persoon

1 A We're using Article IX like it's always been used, sir.

2 Q But in this instance, whether you've always used it that
3 way or not, in this instance, it would be to change a *New York*
4 *Dock* agreement.

5 A I disagree with that. That's something an arbitrator would
6 have to answer. But given side letter 3, I think the parties
7 are specifically focused to use Article IX.

8 Q Well, let's look at facts. The L.A. hub agreement is a *New*
9 *York Dock* agreement, isn't it?

10 A Yes, sir, it is.

11 Q Southwest hub agreement is a *New York Dock* agreement, isn't
12 it?

13 A Yes, sir, it is.

14 Q Do either of those agreements allow engineers in the L.A.
15 hub to have seniority for work out of Yuma?

16 A Without this Article IX new run being established, that
17 would be correct.

18 Q So no, correct? Engineers working in the L.A. hub
19 agreement do not have seniority under Yuma, correct?

20 A They do not.

21 Q And there's nothing in those two contracts that says they
22 do, is there?

23 A They do not -- again, we'd have to have conversation with
24 Mr. Hannah as to what his membership's priority was. But if he
25 were to tell me that all of that work should go to the

Guidry - Cross by Person

1 Southwest hub, that would certainly be part of the discussions.

2 I mean, if he wanted to give that work to another hub --

3 Q So --

4 A -- we would consider that. But given my history with
5 Article IX and with Mr. Hannah in particular on previous
6 arbitration runs, I don't think that's going to be the case.

7 Q So part of your plan requires a change to the terms of both
8 the L.A. hub agreement and the Southwest hub agreement,
9 correct?

10 A I'm sorry. I didn't hear your first part of the question.

11 Q Part of your plan requires changes to the contractual
12 language of the L.A. hub agreement and the Southwest hub
13 agreement.

14 A No, sir, I don't think it does. I think it applies
15 language that's contained within the hub agreement itself,
16 specifically side letter 3.

17 Q You said it's not unusual to have Article IX disputes with
18 BLET, right?

19 A We've had several with BLET and the other operating
20 organization, UTU as well.

21 Q And they don't usually come into federal court asking for
22 an injunction, do they?

23 A Not under Article IX. Normally we follow the process as we
24 did in Houston, as we did in the Richter decision. This is a
25 surprise to me.

Guidry - Cross by Persoon

1 Q So they must think it's a pretty extraordinary overreach of
2 your power --

3 MR. GODINER: Objection.

4 BY MR. PERSOON:

5 Q -- in order to step out of the normal practice.

6 MR. GODINER: No foundation, your Honor.

7 THE COURT: Sustained. Sustained.

8 BY MR. PERSOON:

9 Q It's not usual for the BLET to seek injunctions against
10 your Article IX notices, is it?

11 A One more time, please.

12 Q It's not usual for the BLET to seek injunctions barring you
13 from acting on your Article IX notices, is it?

14 A They have not done it in the past. They've always
15 arbitrated under Article IX. It's unusual in that respect that
16 we're not following what the practice has always been.

17 THE COURT: I think Mr. Hannah said he had sharp
18 counsel on this one.

19 BY MR. PERSOON:

20 Q Are you going to eliminate any runs as a result of
21 implementing your Article IX proposal?

22 A Eliminate any runs in what respect, sir?

23 Q Any pool operations.

24 A I -- the -- that's dictated by the traffic patterns. I
25 can't say whether there will be an increase or a decrease in

Guidry - Cross by Person

1 the number of trains operated. We hope with the efficiencies
2 that we're going to obtain there will be an increase in the
3 number of trains and, correspondingly, an increase in the
4 number of assignments that are available to engineers.

5 Q So if I understand you correctly, a direct result of you
6 implementing your changes proposed in Article IX could be that
7 you'd eliminate some existing service.

8 A It could be that we would increase service.

9 Q But it could be that you'd eliminate some.

10 A I'm trying to think of a circumstance. Nothing comes to
11 mind.

12 Q But you're not denying that.

13 A I'm just struggling to understand what service would be
14 discontinued given the volume of traffic staying the same. If
15 we have a recession and the number of trains reduce, obviously,
16 the -- either the seasonal fluctuation of business or an
17 increase in business is going to affect the number of pool jobs
18 that are operated. I can't -- I can't speak to that. I don't
19 think that this agreement itself is going to eliminate a
20 significant number of assignments, no.

21 Q Now, Mr. Guidry, you talked a little bit about arbitrators.
22 Would you agree to have this issue arbitrated under *New York*
23 *Dock* conditions by James Nash?

24 A I'd have to consider that. We've used Mr. Nash in the
25 past.

Guidry - Cross by Persoon

1 Q Would you agree to have this dispute arbitrated under the
2 *New York Dock* conditions by Joe Cassidy?

3 A I don't know Mr. Cassidy. But what I would agree to do is
4 to consider arbitrators that we're currently using with
5 Mr. Hannah now, such as Mr. Benn, Ed Benn, who is from Chicago.
6 He's a well-respected arbitrator, has a lot of experience in
7 the industry.

8 Mr. Zusman, Marty Zusman as well. He is someone that
9 we've used in the past that we could agree to and move things
10 along.

11 Being that we're using them now, I don't see that the
12 BLE would be opposed to considering them. I don't want to
13 speak for Mr. Hannah. I don't know whether or not he would use
14 them.

15 But I would certainly recommend that we offer up
16 initially, to move things along, arbitrators that we're
17 currently using, not arbitrators that both of us have rejected
18 in the past, like Mr. Camp -- I mean, Mr. Hannah rejects
19 Mr. Camp. These other arbitrators, we may not use them as
20 well.

21 But the best thing, in my view, to move things along
22 would be to offer up names that we're currently using in
23 arbitration now and that we have used over several years to
24 hear the dispute.

25 MR. PERSOON: Nothing further at this time, your

Guidry - Cross by Persoon

1 Honor.

2 THE COURT: All right. Any redirect?

3 MR. GODINER: No redirect, your Honor.

4 THE COURT: All right. Any additional testimony
5 either side wants to present?

6 MR. GODINER: I have one last thing I want to do, your
7 Honor.

8 THE COURT: All right.

9 MR. GODINER: And I probably should put an exhibit
10 sticker on this, and I can if the Court needs me to.

11 Oh, I do have one on there. What do you know?
12 Here, let me give you one.

13 THE COURT: What number would this be?

14 MR. GODINER: And let's make it -- I don't think I've
15 had a 4. So let's make it 4, your Honor.

16 And I just wanted to ask the Court to take judicial
17 notice of this document. It's a document I pulled off the
18 Court's PACER system. And I'll just note that Defendant's
19 Exhibit 4, your Honor, is another lawsuit that was filed by
20 Mr. Persoon's law firm and is -- it is the BLET General
21 Committee of Adjustment, Central Region.

22 And the only reason that this one is relevant, your
23 Honor, is you'll note that on page 1 in paragraph 1, and then
24 on the last page of the complaint, in paragraph C there,
25 Mr. Persoon's law firm asks -- in this case Judge Zagel, I

Guidry - Cross by Persoon

1 think. I'm trying to remember -- asked him to issue an
2 injunction requiring that the parties complete arbitration --
3 complete it -- within 30 days.

4 And I assume Mr. Persoon wouldn't -- and his law firm
5 would not have asked a judge here to issue an injunction that
6 was impossible to comply with and you couldn't arbitrate
7 something within 30 days.

8 This complaint, they sought an injunction under the
9 Railway Labor Act, a status quo injunction pending arbitration,
10 and they said, "Let's get it arbitrated within 30 days." They
11 asked for that court order.

12 And so that's the only thing -- that's why I wanted to
13 bring Exhibit 4 to the Court's attention and offer it into
14 evidence.

15 THE COURT: Any objection?

16 MR. PERSOON: Judge --

17 THE COURT: I'm not sure there's an objection.

18 MR. PERSOON: We do object to it being entered into
19 evidence. My law firm is not a party to this litigation. What
20 position that I've taken for other clients in other litigation
21 is of no matter to this court.

22 THE COURT: Yeah, I'll admit it --

23 MR. PERSOON: We're not hesitant to say that we oppose
24 the principle of having expedited arbitration, but I just can't
25 have my law firm or arguments that we made for other clients in

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

October 21, 2013

INFORMAL DISPUTES COMMITTEE

In the Matter of:)
)
BROTHERHOOD OF LOCOMOTIVE) Pursuant to Article XVI
ENGINEERS,) of the May 19, 1986
) Arbitrated National
Organization,) Agreement
)
and)
)
THE NATIONAL CARRIERS') ISSUES ONE THROUGH
CONFERENCE COMMITTEE,) SEVEN
)
)
Carriers.)

MEMBERS OF THE COMMITTEE

Organization's Member: Larry D. McFather
Carriers' Member: Charles I. Hopkins, Jr.
Neutral Member: John B. LaRocco

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INTRODUCTION

The parties established an Informal Disputes Committee pursuant to Article XVI of the May 19, 1986 Award of Arbitration Board No. 458. This Committee was duly constituted in accord with Article XVI as well as the Carriers' correspondence of December 9, 1986 and the Organization's January 22, 1987 response. The Committee resolved many questions arising under the May 19, 1986 Arbitrated National Agreement but some issues have been referred to arbitration pursuant to the second paragraph of Article XVI which reads:

"If the Committee is unable to resolve a dispute, it may consider submitting the dispute to arbitration on a national basis for the purpose of ensuring a uniform application of the provisions of this Agreement."

The Informal Disputes Committee convened in Washington, D.C. on January 29, 1987 and March 18, 1987 to consider seven issues regarding the interpretation and application of the 1986 Arbitrated National Agreement.

The Committee notes that although the 1986 National Agreement was consummated through binding interest arbitration, most if not virtually all, the provisions were originally drafted by the Carrier and Organization negotiators. Thus, the parties' intent and the negotiating history are critical to properly interpreting the terms of the Agreement.

ISSUE NO. 3

Can established Interdivisional Service be extended or rearranged under this Article?

Pertinent Agreement Provisions

ARTICLE IX - SECTIONS 1, 3 AND 5 - INTERDIVISIONAL SERVICE

"Section 1 - Notice

"An individual carrier seeking to establish interdivisional service shall give at least twenty days' written notice to the organization of its desire to establish service, specify the service it proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such service.

* * * *

"Section 3 - Procedure

"Upon the serving of a notice under Section 1, the parties will discuss the details of operation and working conditions of the proposed runs during a period of 20 days following the date of the notice. If they are unable to agree, at the end of the 20-day period, with respect to runs which do not operate through a home terminal or home terminals of previously existing runs which are to be extended, such run or runs will be operated on a trial basis until completion of the procedures referred to in Section 4. This trial basis operation will be applicable to runs which operate through home terminals.

* * * *

"Section 5 - Existing Interdivisional Service

"Interdivisional service in effect on the date of this Agreement is not affected by this Article."

Discussion

The threshold question is whether Carriers may extend or rearrange interdivisional service established prior to the effective date of Article IX of the 1986 Arbitrated National

Agreement. It should be noted that the Article IX, Section 2 conditions attached to interdivisional service are more favorable to the Carriers than the terms and conditions in Article VIII of the May 13, 1971 National Agreement. The second but related issue is whether the conditions under which the interdivisional service was previously established are carried forward with the extended or rearranged interdivisional service made pursuant to notice under Section 1 of Article IX.

The record contains, as an example, a dispute which has arisen on the Southern Pacific Transportation Company. Although the Southern Pacific dispute is pending before Arbitration Board No. 468, the proceeding has apparently been held in abeyance until this Committee can provide the parties with some necessary guidance. Under the auspices of Article VIII of the 1971 Agreement, the Southern Pacific established interdivisional service between San Antonio and Ennis through the away from terminal Hearne on March 26, 1986. Ennis and San Antonio are home terminals. This elongated interdivisional service had been superimposed on preexisting interdivisional service between San Antonio and Flatonia and between Flatonia and Hearne. Now, under the auspices of Article IX of the 1986 Agreement, the Southern Pacific seeks to establish interdivisional service between Dallas and San Antonio and between Fort Worth and San Antonio. The Southern Pacific proposes a two pronged extension of the existing interdivisional service through home terminal Ennis.

In addition to the Southern Pacific example, the Carriers provided other instances where new interdivisional service

overlapped or extended existing interdivisional service pursuant to the 1971 Agreement even though Article VIII, Section 4 of the 1971 National Agreement is substantively identical to Article IX, Section 5 of the 1986 Arbitrated National Agreement. The former provision did not impose a restraint on creating new interdivisional service over territory covered by an existing interdivisional agreement. See Public Law Board No. 3695, Award No. 1 (Seidenberg). During the recent round of national bargaining, the parties were aware of the well entrenched past practice. If they wished to deviate from the past practice, the parties would have written unequivocal language in Article IX, Section 5 to the effect that an extension or rearrangement of present interdivisional service could never be construed as new interdivisional service within the meaning of Article IX. Moreover, Article IX, Section 3 clearly evinces the parties' intent that the Carriers could legitimately extend existing interdivisional service. Section 3 refers expressly to "...previously existing runs which are to be extended..." The parties would not have set up a trial basis procedure for implementing an extended run if the Carriers, in the first instance, lacked the authority to propose an extended interdivisional service. Thus, Section 5 of Article IX does not restrict the Carriers from rearranging or extending existing interdivisional service.

The second question is what shall be the terms and conditions that apply to interdivisional service which is extended or rearranged pursuant to Article IX. The Carriers

argue that Section 5 only applies to interdivisional service which remains absolutely intact. The Organization stresses that the conditions in the existing interdivisional service agreement must be preserved and automatically apply to the extended or rearranged service. In our view, the Carriers' construction of Article IX, Section 5 is too narrow while the Organization seeks an overly broad interpretation of Section 5.

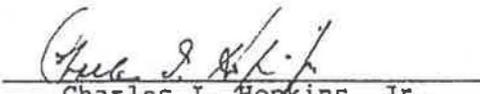
Article IX, like its predecessor contract provision, grants a Carrier the right to serve a notice seeking to establish interdivisional service. The Carrier may subsequently establish or refrain from establishing the proposed service. An arbitrated interdivisional run agreement might apply conditions so onerous the Carrier is deterred from instituting the interdivisional service. Since the discretion is vested in the Carrier, a Carrier may not use Article IX as a pretext for taking advantage of the more favorable conditions set forth in Section 2 of Article IX. Section 5 of Article IX bars a Carrier from proposing only a minor modification in an existing interdivisional run with the motive of procuring the more favorable conditions. Thus, Section 5 preserves conditions on existing interdivisional runs or any proposed extended run that is substantially the same as the existing run where the purposeful objective of the extension is to procure the more beneficial conditions in Article IX, Section 2. In resolving the Southern Pacific dispute, Arbitration Board No. 468 should examine the surrounding circumstances and apply Article IX, Section 5 in a manner consistent with our Opinion.

The Committee concludes that the parties must reach a balanced application of Article IX. The Carriers have the right to establish extended or rearranged interdivisional service and it constitutes new service within the meaning of Article IX unless it is a substantial re-creation of the prior interdivisional service designed solely to obtain the more favorable conditions in the 1986 National Agreement.

Answer to Issue No. 3: Yes to the extent consistent with the Committee's Opinion.

DATED: March 31, 1987


Larry D. McFather
Organization's Member


Charles I. Hopkins, Jr.
Carriers' Member

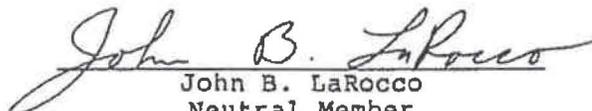

John B. LaRocco
Neutral Member

Exhibit C

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760, SUB-FILE 45

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

(Arbitration Review)

APPEAL FROM ARBITRATION AWARD

Respectfully submitted,

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INTRODUCTION

Beginning in 1971, Union Pacific Railroad Company ("UP") and the nation's other major railroads bargained for critical rights to change train runs and terminal switching limits to enhance the efficient movement of freight. New national agreements were negotiated with labor organizations today known as the Brotherhood of Locomotive Engineers and Trainmen ("BLET") and the United Transportation Union ("UTU"), permitting UP to make these operational changes without union consent. Instead, under these agreements, UP simply serves notice of its desire to change train runs or extend switching limits, and the unions are required to negotiate terms and conditions governing that service. Most important, failing agreement, an arbitrator imposes terms and conditions for the extended switching limits or the modified train runs (referred to in these national agreements as "interdivisional service").

Since 1971, these rights have become more and more critical to UP. The ability to extend switching limits and to alter train runs allows UP to respond to changing traffic patterns and to efficiently operate its rail system. Thus, in 1986, a new national agreement was negotiated that accelerated UP's right to create new interdivisional service. Under current agreements (Article IX of the 1986 Agreement for interdivisional service and Article II of the 1971 Agreement for extending switching limits), UP can quickly implement these changes, often with 20 days notice. Absent such rights, UP would be forced to gain union consent for all of these changes through the "almost interminable" major dispute resolution process of the Railway Labor Act ("RLA"). Detroit & Toledo S.L.R.R. v. United Transp. Union, 396 U.S. 142, 149 (1969).¹ The public interest in the efficient movement of goods in commerce would be threatened.

¹ Specifically, UP would be required to serve a § 6 notice on BLET and UTU. The parties would then engage in a lengthy series of negotiations, both direct and mediated. If no agreement was reached, a Presidential Emergency Board could be convened to make recommendations to resolve the dispute. In the end, the parties would either

This appeal presents a significant and recurring question of whether UP voluntarily gave up these critical rights when it entered into 16 New York Dock (“NYD”) Merger Implementing Agreements with BLET following UP’s merger with the Southern Pacific Transportation Company (“SP”).² Each Merger Implementing Agreement governs a different “hub” in UP’s transportation system. Each Merger Implementing Agreement sets forth UP’s original post-merger operating system in that hub, establishing train runs that engineers operate over, creating pools of engineers who operate those runs, detailing how seniority is established for each pool, establishing home and away-from-home terminals for those runs, and setting terminal switching limits within the hub. Each Merger Implementing Agreement also provides that prior national collective bargaining agreements remain in effect except as specifically modified therein.

Consistent with long-standing practice, BLET understood that the Merger Implementing Agreements did not modify or nullify UP’s rights to establish new interdivisional service and to extend switching limits. Indeed, following execution of the Merger Implementing Agreements, UP repeatedly used the expedited procedures contained in the 1986 and 1971 Agreements to establish new interdivisional service and to extend switching limits. See Table 1, *infra*, at 13-15. In each instance, the negotiated or arbitrated agreement modified some provision of a Merger Implementing Agreement.

In March 2004, however, Arbitrator Ann Kenis issued an award (the “Kenis Award”) under Article I, § 11, of NYD that dramatically threatens UP’s ability to efficiently move freight

reach an agreement, or UP would be required to endure a strike if it wished to implement new interdivisional service or to extend switching limits. 396 U.S. at 149 n.14. Thus, the relevant national agreements not only serve the purpose of allowing the railroad to operate efficiently, they avoid the specter of work stoppages that would have devastating impacts on commerce.

² Also at issue is a Merger Implementing Agreement entered into following UP’s merger with the Chicago & N.W. Ry. Co.

through its system. In an inherently self-contradictory award, Arbitrator Kenis first found that the Merger Implementing Agreements for the North Little Rock, Kansas City, and St. Louis hubs **did not** modify or nullify UP's Article IX rights. In the next paragraph, however, Arbitrator Kenis found that the Merger Implementing Agreements **did** modify those rights, in that they precluded UP from using the expedited procedures of Article IX to establish new interdivisional service that would change any provision of any Merger Implementing Agreement.

These findings are inconsistent and cannot be reconciled. UP's fundamental "right" under Article IX is the right to an expedited procedure to change existing agreements to establish new interdivisional service. UP has used these expedited procedures numerous times to change Merger Implementing Agreements it has entered into with BLET. Arbitrator Kenis' finding that UP could not use the expedited procedures of Article IX to change a Merger Implementing Agreement to establish interdivisional service modified that right, and therefore directly contradicts her earlier finding that the Merger Implementing Agreements did not modify UP's rights under Article IX. Moreover, because every new interdivisional service will modify some provision of the affected Merger Implementing Agreement, the Kenis Award effectively nullified UP's Article IX rights altogether. Thus, regardless of the needs of commerce, UP is not allowed, under the Kenis Award, to change its operations to more efficiently move freight.

In the immediate aftermath of the Kenis Award, BLET took the position that the Kenis Award's logic only applied in three specific hubs, and not on the rest of the UP system. Not only did BLET advance this argument to this Board, it continued to enter into agreements with UP to establish new interdivisional service that modified existing Merger Implementing Agreements. BLET also argued for a narrow application of the Kenis Award in a brief filed with the Seventh Circuit Court of Appeals in a case against UP.

Recently, however, BLET's position has radically changed. In 2007, BLET argued in two separate arbitrations that the Kenis Award should be applied broadly throughout the UP system. First, BLET argued that the Kenis Award precluded UP from extending switching limits under Article II of the 1971 Agreement in the Los Angeles hub. Shortly thereafter, in another arbitration, BLET argued again that, per the Kenis Award, UP was precluded from establishing new interdivisional service in its Houston hub.

These arbitrations resulted in inconsistent awards. Arbitrator John Binau, interpreting the Los Angeles Merger Implementing Agreement, concluded that the Agreement did not modify or nullify UP's right to make changes to that agreement and extend switching limits under the 1971 Agreement. Thus, Arbitrator Binau permitted UP to change the terminal limits set forth in the Los Angeles Merger Implementing Agreement. BLET has not appealed the Binau Award. In contrast, Arbitrator Robert Perkovich, relying on the Kenis Award, concluded that UP was prohibited from establishing new interdivisional service in its Houston hub.

UP now respectfully asks this Board to review the Perkovich Award (attached hereto as Exhibit 1) and to resolve the conflicting positions taken by these arbitrators regarding the meaning of the various Merger Implementing Agreements. While their exact language may differ slightly, all of the Merger Implementing Agreements in effect between UP and the BLET recognize that the 1971 and 1986 Agreements (and other national agreements) continue to apply unless specifically modified by the relevant Merger Implementing Agreement. As a result, BLET has objected, and undoubtedly will continue to object, to any proposal by UP to extend switching limits, establish interdivisional service, or make any other operational changes permitted by national agreements in all territories covered by any of the Merger Implementing

Agreements. Board resolution is necessary to resolve this important issue and to insure that UP is able to efficiently move freight throughout its rail system.

FACTS

A. The Merger Implementing Agreements

In August 1996, the Surface Transportation Board (the "Board") approved the merger of the Union Pacific Corporation and its affiliated carriers, and the Southern Pacific Transportation Co. and its affiliated carriers. Union Pac. Corp. – Control and Merger – Southern Pac. Transp. Co., 1 S.T.B. 233 (1996). As required by 49 U.S.C. § 11326, the Board's approval mandated that employees adversely affected by this merger receive the protections of NYD, set forth in New York Dock Ry. – Control – Brooklyn E. Dist., 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979).

Following the UP/SP Merger, UP rearranged its operations into a "hub and spoke" system. A series of hubs were established, with runs (spokes) emanating from each hub. Pursuant to Article I, § 4, of NYD, UP and BLET negotiated 16 separate Merger Implementing Agreements for these hubs between 1996 and 2001.³ In addition, UP and BLET are parties to a NYD Merger Implementing Agreement imposed by arbitration following the merger of the UP and Chicago & North Western Railway Company ("CNW"), which is still largely applicable in the Chicago area and in other parts of the upper Midwest. A complete list of the Merger Implementing Agreements in effect at this time is attached hereto as Appendix A; the relevant sections of these Agreements are attached hereto as Exhibits 2-18.

³ UP is also party to a Merger Implementing Agreement with the UTU for each of these hubs.

1. The Relevant Language of the Merger Implementing Agreements

As discussed above, the Merger Implementing Agreements between UP and BLET set forth the original post-merger operations for that hub, including the runs that engineers would operate over, the home and away-from-home terminal locations, and the switching limits for that hub's terminals. E.g., Ex. 3, at 2-16; Ex. 4, at 2-8. In addition, each Merger Implementing Agreement identifies which pre-existing collective bargaining agreements, sometimes called "system" or "schedule" agreements, continue to apply to the engineers at that hub. E.g., Ex. 3, at 20; Ex. 4, at 8. While the specific agreements that govern the engineers differs from hub to hub, all of the Merger Implementing Agreements between the UP and BLET recognize that national agreements (including the 1986 and 1971 Agreements) continue to apply, except where specifically modified by the Merger Implementing Agreement.

The idea that the national agreements continue in force except where specifically modified by the Merger Implement Agreement is stated in two different ways in the 16 UP/SP Merger Implementing Agreements. Nine of the 16 Merger Implementing Agreements provide for this result in a provision entitled "Agreement Coverage," which states:

Engineers [or, in some cases, employees] working in [this] Hub shall be governed, in addition to provisions of this Agreement, by the Collective Bargaining Agreement selected by the [UP], including all addenda and side letter agreements pertaining to that agreement and previous National Agreement/Award/Implementing Document provisions still applicable. Except as specifically modified herein, the system and national collective bargaining agreements, awards and interpretations shall prevail.⁴

The remaining seven Merger Implementing Agreements use different language to reach the same result. First, these Agreements contain a "Savings Clause," which states that "[t]he

⁴ As shown in Appendix B, this language appears in the Dallas/Ft. Worth ("DFW"), Denver, Los Angeles, Roseville, Salt Lake City, San Antonio, and Southwest Hub Merger Implementing Agreements, as well as both Portland Merger Implement Agreements. Exs. 3, 4, 8, 11, 12, 13, 15, 16, 17 (emphasis added).

provisions of the applicable Schedule Agreement will apply unless specifically modified herein.”

Second, these seven Agreements contain the following provision entitled “Applicable Agreements”:

All engineers [or, in some cases, employees] and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect between the [UP] and the [BLET] dated [appropriate date] . . . including all applicable national agreements, the “local/national” agreement of May 31, 1996, and all other side letters and addenda which have been entered into between the date of last reprint and the date of this Implementing Agreement. Where conflicts arise, the specific provisions of this Agreement shall prevail.⁵

A table summarizing the relevant language of each Merger Implementing Agreement is attached hereto as Appendix B.

Although these two formulations use different words, they express the same concept: the selected pre-existing collective bargaining agreements, including the 1971 and 1986 Agreements, remain in effect except where specifically modified by the Merger Implementing Agreement. Thus, these provisions accomplish a fairly straightforward purpose, insuring that claims were not forwarded by employees under the prior surviving agreements that were inconsistent with specific terms of the new Merger Implementing Agreements. However, except where specifically modified, the prior agreements remained in effect.

2. *The History of Conflict Language in Merger Implementing Agreements*

Similar language is found in other Merger Implementing Agreements between UP and the BLET. In 1986, following the merger of UP and Missouri Pacific Railroad, UP and BLET entered into several NYD Implementing Agreements that contain language very similar to that

⁵ As shown in Appendix B, this language appears in the Kansas City, Longview, Salina, North Little Rock, and St. Louis Hub Merger Implementing Agreements, as well as both Houston Merger Implementing Agreements. Exs. 5, 6, 7, 9, 10, 14, 18 (emphasis added). In addition, similar language is found in the UP/CNW Merger Implementing Agreement, Ex. 2, at 29.

found in the Merger Implementing Agreements at issue herein. For example, Article XI(a)(1) of the August 3, 1983, UP/MP Merger Implementing Agreement for the Omaha/Council Bluffs terminal, Ex. 19, at 6, provided: "Savings Clause. Where the rules of the UP/BLE Schedule Agreement conflict with this Agreement, this Agreement shall apply." Likewise, Article V of the July 19, 1984 UP/MP Merger Implementing Agreement for the Hastings, Nebraska, terminal, Ex. 20, at 4, provided that: "Savings Clause. Where the rules of the UP/BLE Schedule Agreement conflict with this Agreement, this Agreement shall apply." See also Article XI(a)(1) of the August 3, 1983 UP/MP Merger Implementing Agreement for the Kansas City terminal, Ex. 21, at 7; Article V of the January 17, 1985 UP/MP Merger Implementing Agreement for the Beloit, Kansas, terminal, Ex. 22, at 4.

Similar agreements were also negotiated following UP's merger with the Missouri-Kansas-Texas Railroad ("MKT"). For instance, Article V of the December 9, 1988, UP/BLE Merger Implementing Agreement, Ex. 23, at 14, provides: "Savings Clause: Where the rules of the Schedule Agreement conflict with this Agreement, this Agreement shall apply." Like the UP/SP Merger Implementing Agreements and the UP/CNW Merger Implementing Agreement, these agreements recognize that selected pre-existing collective bargaining agreements, including the 1971 and/or 1986 Agreements, remain in effect except where specifically modified by the Merger Implementing Agreement.

B. The 1986 and 1971 National Agreements

This appeal involves provisions in two national agreements between the UP and BLET that continue to apply to engineers: Article IX of the May 19, 1986, BLET National Agreement ("1986 Agreement"), Ex. 24, and Article II of the May 13, 1971, BLET National Agreement ("1971 Agreement"), Ex. 25. These provisions create an expedited process through negotiation

and (if necessary) arbitration, allowing UP to modify existing agreements to establish new interdivisional service (the 1986 Agreement) or to extend terminal switching limits (the 1971 Agreement). The history underlying these important carrier rights is set forth below.

I. The History of Interdivisional Service and Extending Switching Limits

In 1952, BLET entered into agreements with the nation's railroads creating a procedure for the negotiation of new interdivisional service and extensions of terminal switching limits. Articles IV and VII of the May 23, 1952, BLE National Agreement (the "1952 Agreement"), Ex. 26. The 1952 Agreement, however, proved to be ineffective. With regard to new interdivisional service, the 1952 Agreement did not contain a self-enforcing mechanism to permit the carriers to establish new service without union consent. *Id.* at 8-9. And, while there was an arbitral mechanism for extending switching limits, that procedure was only available after lengthy, mediated negotiations. *Id.* at 9.

The 1971 Agreement cured these deficiencies, establishing an arbitral mechanism to settle disputes over new interdivisional service, and eliminating the lengthy mediated negotiations previously required to extend switching limits. Under the 1971 Agreement, if a carrier wishes to make either of these kinds of operational changes, it serves notice of its desire to do so, and the parties then meet on an expedited basis to negotiate the terms and conditions of that new service. Failing prompt agreement, however, an arbitrator imposes terms and conditions for the new service. Ex. 25, at 4, 12.

These rights quickly became extremely important to UP and the railroad industry. As a result, UP (and the other carriers) negotiated to expedite the process for establishing new interdivisional service. The result was Article IX of the 1986 Agreement, which shortens the

timelines for negotiating new interdivisional service agreements and permits railroads to implement new interdivisional service on a trial basis in certain circumstances. Ex. 24, at 18.⁶

Of course, UP's right to establish new interdivisional service and extend switching limits did not come cheaply. Both the 1971 and 1986 Agreements provided generous wage increases and cost-of-living adjustments to BLET-represented employees in exchange for UP's right to modify existing collective bargaining agreements through expedited negotiation and arbitration rather than the process set forth in the RLA. Ex. 28. Moreover, adversely affected engineers were entitled to certain protective conditions (i.e., their wages are protected for a number of years against reductions caused by the new service). Ex. 24, at 18-19. Finally, the proposed service has to be reasonable in terms of mileage and hours of work. Ex. 24, at 17.

Thus, the 1971 and 1986 Agreements achieve a balance. UP is entitled to modify existing agreements to create new interdivisional service or to extend terminal switching limits through a process of expedited negotiation and arbitration. In exchange, employees received large wage increases. Moreover, UP cannot insist upon unreasonable service, and must protect employees against compensation reductions for a period of years following the implementation of these changes.

2. *The Purpose of These Agreements*

All new interdivisional service and switching limits extensions conflict with, and seek to modify, some provisions of the relevant Merger Implementing Agreements. The extension of switching limits necessarily modifies existing terminal limits set forth in those Agreements, and the establishment of interdivisional service necessarily modifies the existing routes, home and

⁶ In 1991, § 4 of Article IX was amended to add § 4(b), which provides that the carrier and union commit themselves to expedite the negotiation and arbitration process to allow the swift creation of new interdivisional services. Ex. 27, at 23.

away-from-home terminal assignments, and/or pool assignments set forth in those Agreements. These changes in existing agreements are specifically permitted by the 1971 and 1986 Agreements.

The purpose of these Agreements permitting UP to quickly implement new interdivisional service and to extend switching limits is well-established: railroads must be able to make expeditious changes to current operations established in existing collective bargaining agreements to improve efficiency. These rights exist not for the protection of the railroads, but for the protection of the public's interest in the efficient movement of goods in interstate commerce. In its 1962 Report, the Presidential Review Commission ("PRC") specifically recognized that:

The efficient expeditious movement of trains requires as a matter of public interest that machinery be derived under which carriers will be able to propose and eventually secure definitive judgment with respect to the establishment of interdivisional runs.

Ex. 29, at 301 (emphasis added). Similarly, with respect to the extension of switching limits, the PRC's 1962 Report recognized that extending switching limits has been used by carriers to "conform to the needs of the service," and provide carriers with a "degree of flexibility in the use of yard crews to service new industries." Ex. 29, at 321-23.

Consistent with the PRC's 1962 Report, arbitrators have repeatedly recognized that new interdivisional service and switching limit extensions are necessary if railroads are to remain efficient, meet customer demands, and remain competitive with other transportation options. For instance, in Public Law Board No. 1679, Award No. 1, Referee A.T. Van Wart, held that:

The Board finds that the May 13, 1971 BLE National Agreement was designed, in exchange for large wage increases, to remove certain artificial contractual barriers as reflected by the various Rules agreed to therein and to merely improve the efficiency of Carrier's operation.

Ex. 30, at 11. Similarly, in Arbitration Board No. 586, Referee B. E. Simon ruled that:

The entire purpose for establishing interdivisional assignments was to permit carriers to improve the efficiency of their operations by expanding the nature of work that may be performed by road crews and the territory over which they operate.

Ex. 31, at 7.

To meet these market realities and to keep commerce moving efficiently, UP's rights under these agreements are very broad. Although the term "interdivisional service" suggests that it applies only to new operations between divisions (hubs, in UP parlance), the 1971 and 1986 Agreements show that the term has a far broader meaning. For purposes of those Agreements, the term "interdivisional service" includes both interdivisional and intradivisional service (service within a single hub), as well as inter-seniority district and intra-seniority district service.

Ex. 24, at 1. Thus, essentially any new train run that UP wishes to establish will fall within the ambit of Article IX of the 1986 Agreement, allowing UP to efficiently operate its transportation system as required by the needs of shippers and commerce.

Although not directly addressed in the arbitration awards at issue, UP also obtained the right to modify existing collective bargaining agreements through an expedited process of negotiation and arbitration in Article IX of the May 31, 1996, BLET National Agreement ("1996 Agreement"), attached as Ex. 32. Under Article IX of the 1996 Agreement, UP can alter starting times, yard limits, calling rules, on/off duty points, seniority boundaries, and class of service restrictions in existing agreements through this expedited process in response to a customer request, or where needed to attract or retain customers. Id. at 18. Like interdivisional service, these changes, known as "enhanced customer service," may be implemented on a trial basis for

six months. If the parties cannot agree on the service after the trial period expires, the matter is submitted to mandatory arbitration for resolution. *Id.* at 18-19.

C. *UP's Establishment of New Interdivisional and Enhanced Customer Service and Extension of Switching Limits in Territories Covered by Merger Implementing Agreements*

Consistent with and pursuant to the 1971, 1986, and 1996 National Agreements, UP has repeatedly modified its Merger Implementing Agreements to establish new interdivisional service, implement enhanced customer service, and/or extend switching limits to enhance the efficiency of its operations, and/or attract and retain customers. Such changes have typically arisen in rapidly growing traffic areas, and in hubs that have experienced increasing delays. On some occasions, UP and BLET have been able to negotiate the terms of the new service or limits. On other occasions, the matter was submitted to arbitration. Finally, in some instances, UP simply implemented its proposed service pursuant to a notice as permitted by the applicable national agreement.

Table 1 lists many of the new interdivisional services, enhanced customer services, and/or switching limit extensions established through negotiation, arbitration, or implementation in a territory covered by a Merger Implementing Agreements, explaining how each of these 16 operational changes modified the existing Merger Implementing Agreement.

TABLE 1

Interdivisional Service/Enhanced Customer Service/Switching Limit Extension	Merger Implementing Agreement	Modification to Implementing Agreement
Dallas, TX – Sweetwater, TX (Aug. 26, 2005 Agreement) (Ex. 33)	DFW	Modified Art. III(A)(1) & (2) by establishing a run directly from Dallas to Sweetwater, with Dallas as the home terminal

Mason City, IA – Sioux City, IA (July 27, 2004 Agreement) (Ex. 34)	UP/CNW	Modified Art. II(A)(5)(b) by establishing runs from Mason City to Sioux City and St. James
Mason City, IA – St. James, IA (March 8, 2006 Agreement) (Ex. 35)	UP/CNW	Modified Art. II(A)(5)(a) by establishing runs from Twin Cities to Mason City, Iowa Falls, Boone, Sioux City, and Des Moines, IA
Portland, OR – Kalama, WA (Nov. 14, 2002 Agreement) (Ex. 36)	Portland Zone 1 & 2	Modified Art. III(A) by establishing a new run from Portland to Kalama and creating a new away-from-home terminal in Kalama (if needed)
Longview, TX Switching Limit Extension (March 16, 1998 Agreement) (Ex. 37)	Longview	Modified Art. I(B)(8) by extending the eastern switching limit for the Longview terminal from Milepost 88.5 to Milepost 85
Salt Lake City Intermodal Facility Enhanced Customer Service (October 19, 2006 Agreement) (Ex. 38)	Salt Lake City	Modified Art. III by permitting UP to run engineers through the Salt Lake City terminal to the Salt Lake City Intermodal facility without switching crews at the Salt Lake City terminal
Toyota Motor Company Enhanced Customer Service (October 19, 2006 Agreement) (Ex. 39)	San Antonio	Modified Art. III by permitting UP to run engineers through the San Antonio terminal to Toyota's facility without switching crews in San Antonio
Chicago, IL – Minneapolis, MN (Jan. 19, 2005 Award) (Ex. 40)	UP/CNW	Modified Art. II(A)(5) by establishing new runs from Chicago, IL to Minneapolis, MN
South Morrill, NE – Bill, WY (Sept. 29, 1998 Award) (Ex. 41)	UP/CNW	Modified Art. II by establishing new runs from South Morrill, NE, to various coal mines in southern Wyoming
Dolores/ICTF, CA – Yermo, CA (May 27, 2003 Award) (Ex. 42)	Los Angeles Hub	Modified Art. III(A) by establishing a run from Dolores to Yermo, and creating a new home terminal at Dolores

Beaumont, TX – Livonia, LA (Feb. 25, 2000 Award) (Ex. 43)	Houston Zones 1 & 2	Modified Art. I by establishing Beaumont as new home terminal; modified Art. I by creating new pools for Beaumont service; modified Art. II(B) by changing meal allowance rules
Ft. Worth, TX – Halstead, TX (June 1, 2005 Award) (Ex. 44)	DFW	Modified Art. III(A)(1) by establishing a run directly from Ft. Worth to Halstead (a new away-from-home terminal)
El Paso, TX – Pecos, TX (May 16, 2000 Notice) (Ex. 45)	Southwest/DFW	Modified Art. III of the Southwest Hub Agreement by establishing a run directly between El Paso and Pecos (a new away-from-home terminal)
South Pekin, IL – Chicago, IL (Aug. 17, 2000 Notice) (Ex. 46)	UP/CNW	Modified Art. II(A)(5)(d) & (e) by establishing a run directly between South Pekin and Chicago
West Colton – El Centro (July 20, 2005 Notice) (Ex. 47)	Los Angeles	Modified Art. III by establishing a run directly between West Colton and El Centro (a new away-from-home terminal)
AmerenUE Enhanced Customer Service (June 27, 2001 Notice) (Ex. 48)	St. Louis	Modified Art. 1(C)(4) by changing the terminal limits for the consolidated St. Louis terminal-De Soto subdivision

D. BLET's Objections to UP's Interdivisional Service and Switching Limit Extension Notices

Despite this well-established past practice, BLET has recently taken the position in three arbitrations that UP voluntarily gave up its rights to use the expedited procedures contained in these agreements when it entered into the Merger Implementing Agreements. Two arbitrators, Arbitrators Kenis and Perkovich, concluded that the Merger Implementing Agreements effectively nullified UP's Article IX rights by precluding UP from establishing any new interdivisional service that would require modification of the Merger Implementing Agreement. Arbitrator Binau reached the opposite result, concluding that the Merger Implementing

Agreement did not modify or nullify UP's right to extend switching limits set in the Merger Implementing Agreements. A review of these three decisions is set forth below.

I. The Kenis Award

Following the UP/SP merger, UP's daily train traffic through Memphis, Tennessee, nearly doubled. To address the resulting congestion, UP served notice of its intent to establish new interdivisional service between North Little Rock and Memphis in 2003.⁷ When the parties could not reach an agreement to establish the new service, UP submitted the matter to arbitration under Article IX of the 1986 Agreement. BLET responded that the matter involved a dispute under Article I, § 11, of NYD, and Arbitrator Kenis was appointed to arbitrate the matter. Kenis Award, Ex. 49, at 2-4.

Despite the clear past practice of establishing new interdivisional service in territories covered by the Merger Implementing Agreements, BLET argued that UP had relinquished its right to establish new interdivisional service when it entered into those Agreements. BLET based this argument on the Savings Clause and Applicable Agreement provisions of the North Little Rock, St. Louis, and Kansas City Merger Implementing Agreements, which provide that "the provisions of the applicable Schedule Agreement will apply unless specifically modified herein," and that, where conflicts arise between the Schedule Agreements and the Merger Implementing Agreement, the "specific provisions of [the Merger Implementing Agreement] shall prevail."⁸ Ex. 49, at 16-17. BLET contended that, because all new interdivisional service

⁷ For similar reasons, UP also sought to establish new interdivisional service in its Kansas City and St. Louis hubs.

⁸ BLET also relied on side letters that provided that the Savings Clause "makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic Schedule Agreement, take precedence and not the other way around." Ex. 7, Side Letter 6; Ex. 10, Side Letter 20; Ex. 18, Side Letter 10. These side letters go on to provide that "there are numerous other provisions in the designated collective bargaining agreement, including national agreements, which apply to the territory involved, and to the extent such provisions were not expressly modified or nullified, they still exist and apply. It was not the intent of the Merger Implementing Agreement to

would cause a change in some provision of the Merger Implementing Agreements, UP had voluntarily given up its right to establish new interdivisional service by entering into those Agreements. Id.

UP disagreed. UP argued that its pre-existing rights under national agreements were only eliminated where “specifically modified” by the Merger Implementing Agreements. Because the Merger Implementing Agreements did not specifically modify its Article IX rights to establish new interdivisional service, UP argued that those rights, which necessarily included the ability to change existing collective bargaining agreements such as the Merger Implementing Agreements through expedited negotiations and arbitration, continued to exist. Id. at 17-19.

After a hearing, Arbitrator Kenis issued an inherently contradictory award. First, she agreed with UP and ruled that “we find the language contained in the merger implementing agreements is patently clear. [UP]’s Article IX rights under the 1986 National Agreement were not expressly modified or nullified under the hub merger implementing agreement, and therefore they still exist and apply.” Id. at 20. However, relying on the exact same contractual provisions, Arbitrator Kenis then reached the exact opposite conclusion: the Merger Implementing Agreements did modify UP’s Article IX rights, in that UP could not exercise those rights to establish any interdivisional service that somehow changed any provision of the Merger Implementing Agreements. Id. at 22-24. Of course, the ability to modify existing collective bargaining agreements is the fundamental right granted by Article IX. Indeed, because all new interdivisional service necessarily changes some provision of the existing Agreement, Arbitrator

either restrict or expand the application of such agreements.” Id. Thus, the side letters reiterate the language in the Savings Clause and do not change the meaning of the Agreements.

Kenis' decision de facto eliminated UP's right to establish new interdivisional service or expand switching limits altogether.⁹

The Kenis Award was appealed to this Board; however, due to illness of counsel, UP's appeal was filed out of time. In its opposition to Board review, BLET argued that the Kenis Award was limited to the North Little Rock, Kansas City, and St. Louis Merger Implementing Agreements, and that the Kenis Award therefore did not raise recurring and significant issues requiring Board resolution. Ex. 50, at 1-2. The Board did not reach the merits of UP's appeal, but instead refused to grant UP leave to file its appeal out of time. Union Pac. Corp. – Control and Merger – Southern Pac. R. Corp., Finance Docket 32760, Sub. 43 (Arbitration Review) (Jan. 21, 2005).

2. *The Binau Award*

Following the Kenis Award, UP continued to exercise its right to establish new interdivisional service and extend switching limits in the territories governed by other Merger Implementing Agreements. See Table 1. For over two years, BLET did not object. Indeed, in a brief filed with the Seventh Circuit, BLET continued to take the position that the Kenis Award was limited to the North Little Rock, St. Louis and Kansas City hubs. Ex. 51, at 16-17.

In 2006, however, BLET changed its position. In September of that year, UP served notice pursuant to Article II of the 1971 Agreement of its intent to extend the east switching limit at West Colton, California, by approximately 2 miles to address increased traffic in that terminal. This proposal modified the Los Angeles Merger Implementing Agreement, which had

⁹ Two of the Merger Implementing Agreements contain express reference to UP's Article IX rights. Before Arbitrator Kenis, BLET argued that these provisions meant that UP had waived its Article IX rights at hubs governed by the other Agreements. Arbitrator Kenis rejected this argument, Ex. 49 at 21-22, and BLET did not raise it before Arbitrators Binau or Perkovich.

established the switching limits of that terminal. Ex. 8, at 8-9. The Los Angeles Merger Implementing Agreement, like the North Little Rock, Kansas City, and St. Louis Agreements, contains language stating that conflicts between prior agreements and the Merger Implementing Agreement are resolved in favor of the Merger Implementing Agreement. See Appendix B. UP and BLET could not agree on terms for the extended switching limits, and the matter was submitted to Arbitrator John Binau.

Backing away from its prior position, BLET argued that the logic of the Kenis Award applied with equal force in the Los Angeles hub. Binau Award, attached as Ex. 52, at 8-10. Specifically, BLET contended that the Agreement Coverage provision in the Los Angeles Merger Implementing Agreement, which provides “[e]xcept as specifically provided [in this Merger Implementing Agreement], the system and national [agreements] shall prevail,” meant the same thing as the Savings Clause and Applicable Agreement provisions of the St. Louis, North Little Rock, and Kansas City Agreements. Thus, BLET argued that the Agreement Coverage provision of the Los Angeles Agreement precluded UP from using Article II to modify the Los Angeles Merger Implementing Agreement, which specifically established the terminal limits at West Colton. Id.

Arbitrator Binau declined to follow the Kenis Award, finding that there was no language in the Los Angeles Merger Implementing Agreement that specifically modified UP’s Article II right to change the switching limits provided in the Merger Implementing Agreement. Ex. 52, at 20-23. Arbitrator Binau rejected BLET’s argument that the Agreement Coverage provision precluded UP from using the expedited procedures of Article II process to modify the Los Angeles Merger Implementing Agreement, and he permitted UP to extend the terminal limits in West Colton. Id.

3. *The Perkovich Award*

Around the same time it was seeking to extend the switching limits in West Colton, UP served notice of its intent to establish new interdivisional service between Houston and three Texas cities: Angleton, Freeport, and Bloomington. Ex. 53. UP's proposed new service was necessary because of the great rail congestion in the Houston area. Under the relevant Merger Implementing Agreement (called the Houston Zones 3, 4, and 5 Merger Implementing Agreement), many UP crews in the Houston hub operate in turnaround pools, *i.e.*, they depart their home terminal, take a train to a certain destination, and then pick up another train and return to the terminal from which they started. Ex. 6. Under the Hours of Service Law, however, these crews are limited to 12 hours of work, and once the 12-hour mark is reached, the crew must pull the train over at the next siding even if they have not completed their trip, and a relief crew must be driven to the train to complete the trip. 48 U.S.C. §§ 21101 *et seq.*

While this method of operation worked for several years, it no longer allows for the efficient movement of freight. As a result of the growth of rail traffic in Houston and the resulting congestion, the majority of crews are no longer able to complete the turnaround service within 12 hours. To address the resulting rampant delays, UP proposed new interdivisional service runs. Ex. 53. After unsuccessful attempts to negotiate an agreement under Article IX of the 1986 Agreement, UP's proposal was submitted to arbitration before Arbitrator Perkovich. Arbitrator Perkovich reviewed the language of the Houston Zones 3, 4, and 5 Merger Implementing Agreement and found that it was more like the language of the North Little Rock, Kansas City, and St. Louis Merger Implementing Agreements interpreted by Arbitrator Kenis than the Los Angeles Merger Implementing Agreement interpreted by Arbitrator Binau. Ex. 1, at 4. For this and no other reason, Arbitrator Perkovich adopted Arbitrator Kenis' decision, and

concluded that the Houston Zones 3, 4, and 5 Merger Implementing Agreement, while not expressly modifying or nullifying UP's Article IX rights, precluded UP from establishing new interdivisional service in the territory covered by that Agreement. Id.

Thus, there are now three arbitration awards that reach inconsistent conclusions. UP respectfully asks this Board to resolve this split in arbitral authority and to find that it has not given up its critical rights to establish new interdivisional service and extend switching limits. Thus, UP requests that the Board vacate the Perkovich Award.

ARGUMENT

A. This Board Has Jurisdiction to Review the Perkovich Award Because it is Based Solely on the Interpretation of a New York Dock Implementing Agreement

Pursuant to 49 C.F.R. § 1115.8, the Board reviews decisions of NYD arbitrators under its Lace Curtain standard of review first announced in Chicago & N.W. Transp. Co. – Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. International Bhd. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). The Board's assertion of jurisdiction over such awards has been repeatedly upheld by the courts. Association of Am. R.R. v. STB, 162 F.3d 101 (D.C. Cir. 1998). This is so because the Board, by using arbitration under NYD, has effectively delegated decisionmaking thereunder to arbitrators. United Transp. Union v. Norfolk & W. Ry. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987) (NYD arbitrator awards are orders of the Board). The Board, however, administers NYD and therefore has the authority to review the decisions of its delegates (the NYD arbitrators). International Bhd. of Elec. Workers, 862 F.2d 330.

Normally, the Board reviews decisions of arbitrators specifically appointed under Article I of NYD. Although his decision undeniably involves interpretation of a NYD Merger Implementing Agreement, Arbitrator Perkovich was technically appointed under Article IX of

the 1986 Agreement. Board precedent proves that this fact does not stand as an impediment to its review of the Perkovich Award.

In Grand Trunk W.R.R. Co. – Merger – Detroit & Toledo Shore Line R.R. Co., 7 I.C.C.2d 1038 (1991), the Interstate Commerce Commission (“ICC”) addressed the issue of whether it had jurisdiction to review an arbitration award issued by a Public Law Board (“PLB”) established under § 3, Second, of the RLA, 45 U.S.C. § 153, Second. The dispute arose after Grand Trunk Western (“GTW”) and UTU had entered into two NYD implementing agreements following the merger of the GTW and two other carriers. Both implementing agreements incorporated the terms of prior “equity assignment” agreements. When a dispute arose regarding UTU’s rights under the implementing agreement and the incorporated equity assignment agreements, a PLB was created to resolve the dispute. The PLB found in favor of the UTU, and GTW appealed to the ICC. 7 I.C.C.2d at 1039.

UTU argued that the ICC had no jurisdiction because the award was issued by a PLB established pursuant to § 3, Second of the RLA, and that review was therefore available only in federal district court pursuant to RLA § 3, First (q), 45 U.S.C. § 153, First (q). The ICC rejected UTU’s argument, concluding that NYD procedures (including review by the ICC) applied to NYD matters, while RLA procedures (including review by federal district courts) applied to RLA matters. Id. at 1043. The fact that the arbitration board had been set up as a PLB did not block ICC jurisdiction because “an arbitration panel established to consider a New York Dock issue . . . would properly operate under New York Dock procedures regardless of what it called itself.” Id. Because the subject of the challenged award involved the meaning of NYD implementing agreements, the ICC had jurisdiction to review the PLB’s award. Id.

Since Grand Trunk, this Board has reaffirmed that disputes regarding the meaning of NYD implementing agreements are resolved by arbitration “subject to appeal to the agency” Burlington N. Inc. & Burlington N.R.R. Co. – Control and Merger – Santa Fe Pac. Corp. & Atchison, T.&S.F. Ry. Co., (Arbitration Review), STB Finance Docket No. 32549 (Sub. No. 23) (Sept. 23, 2002). BLET has embraced this position, arguing to this Board that “disputes involving the interpretation of any terms of [a UP] Hub Implementing Agreement” are subject to arbitration and review by the Board under NYD. Ex. 43, at 18-19.

Here, Arbitrator Perkovich (like Arbitrator Kenis) was presented with the threshold question of whether the relevant Merger Implementing Agreement precluded UP from establishing its proposed new interdivisional service. While Arbitrator Perkovich did not discuss whether this issue arises under NYD or the RLA, both Arbitrator Kenis and the BLET have acknowledged that it arises under NYD. In her Award, Arbitrator Kenis concluded that resolution of this threshold issue focused primarily on an analysis of the implementing agreements, as opposed to the 1986 Agreement, and that “the interpretation and application of merger implementing agreements falls within the ambit of Art. I, § 11 of the NYD conditions.” Ex. 49, at 15. Similarly, BLET stated in its submission to Arbitrator Perkovich that the dispute does not “come under the purview” of the RLA unless and until it is first determined that UP could establish new interdivisional service in a territory covered by a NYD Merger Implementing Agreement. Ex. 54, at 11.

Arbitrator Perkovich resolved this threshold issue in favor of BLET, concluding that the Houston Zones 3, 4, and 5 Merger Implementing Agreement precluded UP from establishing its proposed new interdivisional service. He based his decision entirely on his interpretation and application of a NYD Merger Implementing Agreement, never reaching the question of whether

UP's proposed new interdivisional service was proper under Article IX of the 1986 Agreement. Thus, under Grand Trunk, because the Perkovich Award is based on an interpretation of a NYD implementing agreement, it is subject to appeal to this Board.

B. This Appeal Raises Significant Issues of General Importance Regarding the Interpretation of New York Dock Implementing Agreements

Under its Lace Curtain standard, this Board reviews NYD arbitration awards that raise "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." 3 I.C.C.2d at 735. The Perkovich Award clearly qualifies for review under this standard.

In Burlington N., Inc. – Control and Merger – St. L.S.F. Ry. Co., 6 I.C.C.2d 351 (1990), the Board recognized that review is appropriate where an arbitrator has misinterpreted an implementing agreement, the same misinterpretation has occurred in the past, and it "may reoccur." Id. at 353. In contrast, the Board typically does not review awards interpreting non-standard implementing agreements that are limited to a single location, and involve circumstances not likely to recur. Grand Trunk, 7 I.C.C.2d at 1044.

As discussed above, BLET initially argued against Board review of the Kenis Award under this standard. BLET contended that the issue would not repeat itself because:

The issue raised by UP involves only three of 16 [sic] Hub Implementing Agreements in effect on the UP as a result of the UP/SP merger. And those Agreements contain certain contractual provisions which are not in the remaining Hub Implementing Agreements or such agreements in general. The issue has not risen since the merger or the creation of the Little Rock/Pine Bluff, Kansas City and St. Louis Hubs by UP and, as we show later, is not likely to arise in those Hubs or elsewhere after.

Ex. 50, at 1.

BLET's forecast was, at best, wrong. BLET now takes the position that the Kenis Award should apply under all Merger Implementing Agreements, whether they contain the Agreement Coverage language, or the Savings Clause/Applicable Agreement language. Not only has BLET pressed this position with regard to new interdivisional service, it has expanded this argument to include extending switching limits. Ex. 52, at 8-10; Ex. 56 at 21-24. Thus, the issue raised herein implicates every Merger Implement Agreement throughout the entire UP system.

Moreover, resolution of the issue to date has resulted in an arbitral split. Arbitrators Kenis and Perkovich found that, although the applicable Merger Implementing Agreements did not modify or nullify UP's right to establish new interdivisional service under Article IX, they effectively did so because UP could not use Article IX to implement any new interdivisional service that conflicted with the Merger Implementing Agreements. Arbitrator Binau, on the other hand, found that language having the same meaning in a different Merger Implementing Agreement did not affect UP's right to extend switching limits under Article II of the 1971 Agreement. As a result, UP is now confronted with a recurring dispute and an arbitral split of authority over the meaning of the Merger Implementing Agreements in effect between it and BLET. This is precisely the type of recurring and significant issue subject to Board review under Lace Curtain.

C. *Arbitrator Perkovich's Ruling that UP Gave Up its Right to Establish the Interdivisional Service at Issue Constitutes Egregious Error*

Under its Lace Curtain standard, the Board must vacate any arbitration award "when there is egregious error." American Train Dispatchers Ass'n v. CSX Transp., Inc., 9 I.C.C.2d 1127, 1130-31 (1993). In Union Pac. R.R. Co. v. STB, 358 F.3d 31 (D.C. Cir. 2004), the D.C. Circuit explained that an arbitrator commits "egregious error" whenever the award is "irrational,

wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact.” *Id.* at 37. While this standard sounds quite high, precedent establishes that Lace Curtain requires a searching review to determine if the award at issue is actually supported by the record. Thus, in Union Pac. R.R. Co. v. STB, the Court vacated a NYD arbitration award under this standard because the evidence deemed “pivotal” by the arbitrator did not actually support his conclusion. *Id.*

The same is true here. Arbitrator Perkovich’s conclusion that the Houston Zones 3, 4, and 5 Merger Implementing Agreement eliminated UP’s rights to establish new interdivisional service is completely unsupported by the language of or the parties’ past practices under that Agreement. Specifically: (1) the Award draws an irrational and baseless distinction between the Agreement Coverage provision (found in the Merger Implementing Agreement before Arbitrator Binau) and the Savings Clause/Applicable Agreement provisions (found in the Merger Implementing Agreements before Arbitrators Kenis and Perkovich); (2) the Award adopts internally inconsistent reasoning from the Kenis Award stating that UP both had and had not modified its rights under the 1986 and 1971 Agreements by entering into the Merger Implementing Agreements; and (3) the Award grossly misinterprets the contract language, as evidenced by the parties’ past practices thereunder. For these reasons, the Perkovich Award should be set aside.

1. The Perkovich Award Draws a Baseless Distinction Between the Language of the Los Angeles and the Houston Zones 3, 4, and 5 Merger Implementing Agreements

Arbitrator Perkovich was well aware that Arbitrators Kenis and Binau had reached different conclusions in the cases that had been presented to them. As noted above, his Award followed the Kenis Award. His sole rationale: that the language in the Merger Implementing

Agreements before him was more like the language before Arbitrator Kenis than the language before Arbitrator Binau. Ex. 1, at 4.

Arbitrator Perkovich's reliance on these alleged differences in contract language constitutes egregious error. While there are wording differences between the relevant agreements, it is impossible to conclude that the two variations of the language at issue were intended to have different meanings. Nine of the Merger Implementing Agreements, including the one before Arbitrator Binau, contain the "Agreement Coverage" language, which provides that "[e]xcept as specifically provided herein, the system and national collective bargaining agreements, awards and interpretations shall prevail." The other seven Agreements, including those before Arbitrators Kenis and Perkovich, contain the "Savings Clause," which provides that "the provisions of the applicable Schedule Agreement will apply unless specifically modified herein," and the "Applicable Agreement" clause, which provides that "[w]here conflicts arise, the specific provisions of this Implementing Agreement shall prevail."

These provisions cannot rationally be read to mean different things. One says that "except as specifically provided herein," the 1986 and 1971 Agreements remain in effect. The other says that the 1986 and 1971 Agreements remain in effect "unless specifically modified herein." These are two different ways of saying the exact same thing. Indeed, even BLET, in its written submission to Arbitrator Binau, specifically stated that these two different versions of the Merger Implementing Agreements meant the exact same thing. Ex. 55, at 21-24. Arbitrator Perkovich's attempt to justify his decision based on this meaningless difference in contract language is "wholly baseless" and "without foundation in reason and fact." Under Lace Curtain, the Perkovich Award must therefore be vacated.

2. *Arbitrator Perkovich Egregiously Erred By Adopting the Internally Inconsistent Reasoning of the Kenis Award*

Given that the differences in contract language cannot justify the split in arbitral authority, the question is whether Arbitrator Kenis' internally inconsistent reasoning, which Arbitrator Perkovich adopted, can survive this Board's review. As shown below, it cannot.

The Perkovich and Kenis Awards purport to be based on the language of the Merger Implementing Agreements. That language, quoted above, simply provides that the 1986 and 1971 Agreements continue to apply "except as specifically modified" by the Merger Implementing Agreement. The Kenis Award admits that the Merger Implementing Agreements **do not modify** UP's Article IX rights to institute new interdivisional service. Ex. 49, at 20. However, after making this finding, the Award then turns around and inconsistently states that those Agreements **do modify** UP's right to establish any new interdivision service that would require a change to any provision of the Merger Implementing Agreements. Ex. 49, at 22-25.

This internally inconsistent analysis (the Merger Implementing Agreements do not modify UP's rights, but they do modify UP's rights) suffers from a fatal flaw: it ignores the very nature of the rights UP obtained under these national agreements. In all cases, new interdivisional service and extended switching limits necessarily changes existing collective bargaining agreements. The fundamental right established by the 1986 and 1971 Agreements is the right to modify existing collective bargaining agreements establishing routes, home and away-from-home terminals, and terminal limits, through an expedited process of negotiation and (if necessary) arbitration, so that these operational changes can be quickly made.

In fact, UP has repeatedly utilized its Article IX and Article II rights to change the Merger Implementing Agreements numerous times, including Agreements containing the exact

same language as those before Arbitrators Kenis and Perkovich. Table 1 above sets out numerous examples of these actions. For instance, in 1998, UP used Article II of the 1971 Agreement to extend terminal switching limits set by the Longview Merger Implementing Agreement, even though that Agreement contains the exact same Applicable Agreement and Savings Clause provisions contained in the Houston Zones 3, 4 & 5 Merger Implementing Agreement. Compare Ex. 9, Arts. V(a) and IX(a), with Ex. 6, Arts. II(a) and VI(a). In 2000 and 2001 respectively, UP used Article IX of the 1986 Agreement to modify the Houston Zones 1 & 2 Merger Implementing Agreement and the St. Louis Merger Implementing Agreement, both of which again contain the exact same Applicable Agreement and Savings Clause provisions at issue before Arbitrators Kenis and Perkovich. Compare Ex. 5, Arts. II(a) and VI(a), and Ex. 18, Arts. IV(a) and VIII(a), with Ex. 6, Arts. II(a) and VI(a).

Consistent with this past practice, the Kenis Award (adopted by Arbitrator Perkovich) directly concluded that UP's Article IX rights were not modified or nullified by the Merger Implementing Agreements. Specifically, Arbitrator Kenis held: "we find the language contained in the merger implementing agreements is **patently clear**. [UP]'s Article IX rights under the 1986 National Agreement were not expressly modified or nullified under the hub merger implementing agreement, and therefore they still exist and apply." Ex. 49, at 20 (emphasis added). Of course, the fundamental right UP has under Article IX is the ability to modify existing Merger Implementing Agreements through expedited negotiation and (if necessary) arbitration. Thus, Arbitrator Kenis' conclusion was that UP's right to alter those Agreements had not been specifically modified or nullified.

This should have been the end of the analysis. The Applicable Agreement/Savings Clause provisions of the Merger Implementing Agreements state that the 1986 and 1971

Agreements continue in effect except where “specifically modified” by the Merger Implementing Agreements. Once Arbitrator Kenis concluded that those rights were “not expressly modified or nullified,” those rights necessarily continued to exist.

However, Arbitrator Kenis did not end her analysis at that point. Instead, she went on to directly contradict her earlier finding that the Merger Implementing Agreements **did not** modify UP’s Article IX rights, finding that those Agreements **did** modify UP’s Article IX rights where the new interdivisional service would change any provision of a Merger Implementing Agreement. Ex. 49, at 22-25. It is impossible to reconcile these inherently contradictory conclusions. On page 20 of her Award, Arbitrator Kenis specifically found that the Merger Implementing Agreements did not “modify or nullify” UP’s Article IX rights. Those non-modified rights necessarily include the right to change existing Merger Implementing Agreements; indeed, the ability to change existing agreements through expedited negotiations and (if necessary) arbitration is the fundamental right granted to UP under Article IX. Thus, the finding (Ex. 49, at 20) that UP **had not** “modified or nullified” that right, is completely inconsistent with the finding (*id.* at 22-25) that UP **had** nullified its right to use the expedited process of Article IX to change Merger Implementing Agreements. Indeed, because every new interdivisional service will violate some provision of a Merger Implementing Agreement, just as every extended switching limit will violate some provision of a Merger Implementing Agreement, the internally inconsistent conclusion of the Kenis Award effectively eliminates UP’s crucial rights to make those operational changes under any Merger Implementing Agreement.

Such a fundamental internal inconsistency, by its very nature, constitutes egregious error, requiring that the Award be vacated. General Chem. Corp. v. U.S., 817 F.2d 844, 855 (D.C. Cir.

1987) (internal inconsistencies in ICC ruling requires vacating decision); HRH Const., L.L.C. v. Local No. 1, Int'l Union of Elevator Constructors, 2005 WL 31948, at *6 (S.D.N.Y. 2005) (recognizing that an inherently contradictory award should not be confirmed, even under the extraordinarily deferential standard applied in reviewing labor arbitration awards); Air Line Pilots Ass'n v. FAA, 3 F.3d 449, 450 (D.C. Cir. 1993) (Department of Transportation's decision that certain employees did not lose their jobs as a result of deregulation pursuant to the Airline Deregulation Act, and were thus not eligible for certain unemployment benefits vacated because it was "internally inconsistent").

3. *Arbitrators Perkovich and Kenis Egregiously Erred in Interpreting the Merger Implementing Agreements and Ignoring the Parties' Past Practices Thereunder*

In an apparent attempt to explain her inconsistent award, as well as her decision to ignore the parties' past practices, Arbitrator Kenis found that the "plain and unambiguous language" of the Merger Implementing Agreements "affords no other conclusion" than that UP intended to give up its rights under Article IX to modify a Merger Implementing Agreement. Ex. 49 at 25. Arbitrator Kenis offered no explanation for concluding that the language was unambiguous except to state that the language is unambiguous. Arbitrator Perkovich, in adopting the Kenis Award, made no attempt to support this finding.

An agreement is legally ambiguous whenever it is "admitting of two or more meanings [or] of being understood in more than one way" International Union, United A.A. & A.I.W. v. Mack Trucks, Inc., 917 F.2d 107, 111 (3rd Cir. 1990) (internal citations omitted). The "words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings" must be considered to determine whether "the terms of the contract are susceptible of different meanings." Id. (internal citations omitted).

Under this standard, the conclusion of the Perkovich and Kenis Awards that UP unambiguously gave up its Article IX rights is “wholly baseless” and “without reason in fact or law.” As quoted above, the Merger Implementing Agreements (in both iterations of the relevant language) provide that UP’s Article IX and Article II rights continue to exist except as “specifically” modified or provided in the Merger Implementing Agreements. In her Award (Ex. 49, at 20), Arbitrator Kenis concedes that UP’s Article IX rights “were not expressly modified or nullified” by the Merger Implementing Agreements. Despite this conclusion, Arbitrator Kenis then finds that UP **unambiguously** gave up its ability to exercise its Article IX rights where to do so would modify a Merger Implementing Agreement. This conclusion again ignores the fact that the fundamental right that UP has under Article IX is the power to use expedited negotiation and (if necessary) arbitration to modify existing agreements to establish new interdivisional service. It also again ignores that fact that every new interdivisional service will modify some provision of a Merger Implementing Agreement. Given these facts and the fact that the Merger Implementing Agreements do not “specifically modify” UP’s Article IX and Article II rights, these contractual provisions are certainly susceptible to the interpretation given them by UP. The finding that the only reasonable way to read the Merger Implementing Agreements is to waive these crucial rights is wholly baseless, and therefore egregiously wrong.

In fact, UP’s interpretation of the Merger Implementing Agreements as permitting it to continue to exercise its Article IX and Article II rights is the only reasonable one. The Merger Implementing Agreements (in both iterations of the crucial language) provide that UP’s rights under the 1986 and 1971 Agreements continue except as “specifically modified” or “specifically provided” in the Merger Implementing Agreement. Even Arbitrator Kenis (Ex. 49, at 20) concedes that no such specific language exists.

Even if the language of the Merger Implementing Agreements were not clear enough, the past practices of the parties under those Agreements completely eliminate any potential doubt about their intent. Indeed, one of the most egregious errors of the Kenis Award (adopted by Arbitrator Perkovich) is that it fails to address those undisputed past practices. The law is clear that a past practice can become a term of the parties' collective bargaining agreement. Detroit & T.S.L.R.R., 396 U.S. at 149 (where a practice has continued for a sufficient amount of time with the knowledge and acquiescence of the parties, it becomes an implied term of the parties' agreement). This basic principle of labor contract interpretation applies equally to RLA collective bargaining agreements, Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 655 F.2d 155, 157 (8th Cir. 1981) (established past practice by the parties involves a "continuity, interest, purpose, and understanding which elevates a course of action to an implied contractual status"), and to NYD implementing agreements. CSX Corp. - Control - Chessie Sys., Inc., 1995 WL 717122 (ICC Dec. 7, 1995).

Here, Table 1 lists a large number of negotiated or arbitrated agreements establishing new interdivisional or enhanced customer service, and extending switching limits. All of them involved the use of the 1986 and 1971 Agreements (as well as the 1996 enhanced customer service agreement) to alter the terms of a Merger Implementing Agreement; many involve actions taken under Agreements containing the **exact same language** as those before Arbitrators Kenis and Perkovich. While all of these examples are meaningful (and some are discussed above), UP will address three additional examples herein.

First, on August 17, 1998, UP served notice of its intent to establish interdivisional service under Article IX of the 1986 Agreement from a new home terminal at Beaumont, Texas. This portion of the UP operates under the Houston Zones 1 and 2 Merger Implementing

Agreement, Ex. 5, which contains the **exact same** contractual language that was at issue in the Perkovich Award. As is true in the present dispute, UP's proposed interdivisional service conflicted with the terms of the relevant Merger Implementing Agreement. Specifically, the new service modified Article I of that Merger Implementing Agreement by establishing Beaumont as a home terminal, Ex. 43, at 1, whereas the Merger Implementing Agreement established Houston as the home terminal. Indeed, this same type of conflict – establishing new runs and moving home terminals – was the basis for Arbitrators Kenis' and Perkovich's rejections of the new interdivisional services at issue in those cases. Ex. 1, at 4-5; Ex. 49, at 25.

Notwithstanding this conflict, UP and BLET submitted the proposed interdivisional service to arbitration under Article IX of the 1986 National Agreement. In the arbitration, BLET made a crucial admission: that "pursuant to Article IX and a long line of Arbitral Awards, the Carrier has the right to establish new interdivisional train service." Ex. 43, at 1.¹⁰ At no point in these proceedings did BLET ever suggest that the Merger Implementing Agreement in any way limited UP's Article IX rights. In the end, the arbitrator imposed the terms and conditions for interdivisional service proposed by UP in the first instance. Those terms directly conflicted with, and therefore modified, the Houston Zones 1 and 2 Merger Implementing Agreement.

Second, in 1998, UP served notice of its intent to extend the eastern switching limit for the Longview terminal pursuant to Article II of the 1971 Agreement. The Longview Merger Implementing Agreement, Ex. 9, again contains the **exact same** contractual language as the Merger Implementing Agreements before Arbitrators Kenis and Perkovich. UP's proposed switching limit extension clearly conflicted with the terms of the Longview Merger

¹⁰ The fact that BLET itself interpreted the Merger Implementing Agreements to permit UP to utilize Article IX to modify those Agreements provides further proof that Arbitrator Kenis' finding that those Agreements unambiguously took away that right is egregiously wrong.

Implementing Agreement. Specifically, UP proposed to extend the eastern switching limit of the Longview termination to Mile Post 85. Ex. 37. However, Article I(B)(8) of the Longview Merger Implementing Agreement provided that the “terminal limits of Longview shall extend between Mile Post 88.5 and 96.2” Ex. 9, at 7. Notwithstanding this conflict, BLET agreed to extend the switching limit. Ex. 37. At no time did BLET contend that UP was prohibited from making this change.

Finally, in 2005 (after the Kenis Award was issued), UP served notice of its intent to establish enhanced customer service for Ameren UE pursuant to Article IX of the 1996 Agreement. This portion of the UP operates under the St. Louis Merger Implementing Agreement, Ex. 18, which was one of the Merger Implementing Agreements specifically addressed in the Kenis Award. As is true in the present dispute, UP’s proposed enhanced customer service conflicted with the terms of the relevant Merger Implementing Agreement. Article I(C)(4) of the St. Louis Merger Implementing Agreement provided that terminal limits for the consolidated St. Louis terminal are at Mile Post 10.8 for the DeSoto subdivision. Ex. 18, at 16. UP’s proposal, however, modified that provision and extended the terminal limit to Mile Post 17.4. Ex. 48, at 1. Initially, BLET objected to the proposal, but eventually withdrew its opposition. Accordingly, UP continues to operate this enhanced customer service today.

Arbitrators Perkovich and Kenis completely ignore and fail to explain why this long-standing past practice, occurring under Agreements containing the identical language to the Agreements before them, is not controlling. The ICC’s decision in CSX Corp. – Control – Chessie Sys., Inc., 1995 WL 717122 (ICC Dec. 7, 1995), illustrates the egregious nature of this error. In that case, the Board looked to past practice despite a seemingly clear contractual provision. The parties had entered into a NYD implementing agreement that provided that

“[t]his agreement shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.” Id. at *8. Subsequently, CSX attempted to utilize the procedures of Article I, § 4, of NYD to attempt to change that agreement so that it could carry out a later ICC-approved control transaction. The affected unions objected, claiming that CSX had given up its right to change the implementing agreement through NYD. Despite the seemingly clear contract language requiring changes to be made only through RLA procedures, CSX pointed out it had entered into “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.” Id. In each of these cases, “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 were expanded.” Id. at *13 n.22.

The ICC ruled for CSX. Specifically relying on the parties’ past practice to interpret the plain language of the implementing agreement, the ICC held that the five implementing agreements cited by CSX showed the union’s interpretation of that provision to be incorrect. Id. at *9. The fact that the text of the agreement indicated a different result did not matter; the past practice revealed the true intent of the parties.

CSX is directly applicable in the present case. Indeed, it is the parties’ past practice that makes the intent of the Merger Implementing Agreements most clear. If the parties intended the Merger Implementing Agreements to eliminate UP’s rights (as held by Arbitrators Kenis and Perkovich), this past practice would not have occurred. As in CSX, the parties’ intent in entering into the Merger Implementing Agreements is revealed by the fact that, after those Agreements were implemented, UP and BLET repeatedly negotiated and arbitrated the terms of new

interdivisional service and new switching limits, despite the fact that the new interdivisional service changed the terms of those Merger Implementing Agreements. The failure of Arbitrators Kenis and Perkovich to recognize this fact constitutes egregious error. The Perkovich Award must therefore be vacated.

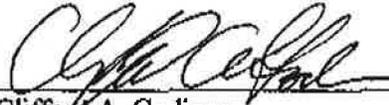
In the end, if the Perkovich and Kenis Awards stand, the real victims will be the shippers and the public. As it stands now, in four of its hubs, UP is, for the most part, forced to operate in a manner that it designed in 1997-98. Not surprisingly, over the past decade, traffic patterns and other market conditions have changed. Demand for rail service has grown tremendously. The Perkovich and Kenis Awards strip UP of its ability to respond to these events, robbing UP of its ability to move freight efficiently. If these Awards are expanded to the entire UP system (or a larger part of it), commerce will be gravely affected. As stated above, this is the reason that the PRC recommended that interdivisional service be established through expedited negotiation and arbitration, rather than by traditional collective bargaining. Arbitrator Perkovich (like Arbitrator Kenis) ignores this crucial fact. As a result, his decision should be vacated.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, UP respectfully requests that the Board grant review of and vacate Arbitrator Perkovich's Award.

Respectfully submitted,

THOMPSON COBURN LLP

By  _____

Clifford A. Godiner
Rodney A. Harrison
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000

Attorneys for Carrier

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon Gilbert Gore, 1448 MacArthur Avenue, Harvey, Louisiana 70058, by Federal Express overnight delivery, this 21st day of February 2008.

 _____

APPENDIX A

MERGER IMPLEMENTING AGREEMENTS IN EFFECT BETWEEN THE UP AND BLET

- CNW Merger Implementing Agreement (June 6, 1996) (Ex. 2)¹¹
- Dallas/Ft. Worth Hub Merger Implementing Agreement (Apr. 29, 1999) (Ex. 3)
- Denver Hub Merger Implementing Agreement (Apr. 8, 1997) (Ex. 4)
- Houston Zones 1 & 2 Hub Merger Implementing Agreement (Jan. 17, 1997) (Ex. 5)
- Houston Zones 3, 4, & 5 Hub Merger Implementing Agreement (Apr. 23, 1997) (Ex. 6)
- Kansas City Hub Merger Implementing Agreement (July 2, 1998) (Ex. 7)
- Los Angeles Hub Merger Implementing Agreement (Nov. 18, 1998) (Ex. 8)
- Longview Hub Merger Implementing Agreement (May 14, 1997) (Ex. 9)
- North Little Rock Hub Merger Implementing Agreement (Oct. 9, 1997) (Ex. 10)
- Portland Zone 1 Hub Merger Implementing Agreement (Aug. 13, 1998) (Ex. 11)
- Portland Zones 2 & 3 Hub Merger Implementing Agreement (Feb. 28, 2001) (Ex. 12)
- Roseville Hub Merger Implementing Agreement (Feb 24, 1998) (Ex. 13)
- Salina Hub Merger Implementing Agreement (July 22, 1998) (Ex. 14)
- Salt Lake City Hub Merger Implementing Agreement (April 9, 1997) (Ex. 15)
- San Antonio Hub Merger Implementing Agreement (Jan. 6, 1999) (Ex. 16)
- Southwest Hub Merger Implementing Agreement (June 15, 1999) (Ex. 17)
- St. Louis Hub Merger Implementing Agreement (Apr. 15, 1998) (Ex. 18)

¹¹ Given the length of the Merger Implementing Agreements, only the relevant sections are attached.

APPENDIX B

**CONFLICT LANGUAGE CONTAINED IN
MERGER IMPLEMENTING AGREEMENTS IN
EFFECT BETWEEN THE UP AND BLET**

	<u>Agreement Coverage</u> Except as specifically provided [in this Merger Implementing Agreement], the system and national [agreements] shall prevail.	<u>Applicable Agreements</u> Where conflicts arise, the specific provisions of this [Merger] Implementing Agreement shall prevail	<u>Savings Clause</u> The provisions of the applicable Schedule Agreement will apply unless specifically modified herein	<u>Side Letter</u> [The Savings Clause] makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic Schedule Agreement, take precedence and not the other way around.
Dallas/Ft. Worth	Art. VI.F			
Denver	Art. IV.C			
Houston Zones 1 & 2		Art. II.A	Art. VI.A	
Houston Zones 3, 4, & 5		Art. II.A	Art. VI.A	
Kansas City		Art. IV.A	Art. VIII.A	Side Letter No. 9
Los Angeles	Art. VI.C			
Longview		Art. V.A	Art. IX.A	
North Little Rock		Art. IV.A	Art. VIII.A	Side Letter No. 20

	<u>Agreement Coverage</u> Except as specifically provided [in this Merger Implementing Agreement], the system and national [agreements] shall prevail	<u>Applicable Agreements</u> Where conflicts arise, the specific provisions of this [Merger] Implementing Agreement shall prevail	<u>Savings Clause</u> The provisions of the applicable Schedule Agreement will apply unless specifically modified herein	<u>Side Letter</u> [The Savings Clause] makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic Schedule Agreement, take precedence and not the other way around
Portland Zone 1	Art. VI.C			
Portland Zones 2 & 3	Art. VI.C		Art. X.A ¹²	
Roseville	Art. VI.C			
Salina		Art. IV.A	Art. VII.A	Side Letter No. 7
Salt Lake City	Art. IV.C			
San Antonio	Art. VI.F			
Southwest	Art. VI.C			
St. Louis		Art. IV.A	Art. VIII.A	Side Letter No. 10
Chicago		Art. VIII ¹³		

¹² The Savings Clause in the Portland Zones 2 & 3 Hub Merger Implementing Agreement contains a slightly modified Savings Clause, which provides "[i]n the event the provisions of this Agreement conflict with existing collective bargaining agreement provisions, rules and/or practices, the provisions of this Agreement shall prevail."

¹³ The provision in the UP/CNW Merger Implementing Agreement contains a slightly modified Applicable Agreement provision, which provides "[s]hould the provisions of any BLE Collective Bargaining Agreement conflict with the terms and intent of this Agreement, this Agreement will apply."

The majority opinion is directly contrary to the controlling precedent of the LaRocco Issue 3 Interpretation, which clearly held that the conditions imposed may be so “onerous” that the Carrier would choose to forego the changes. The majority opinion would foreclose the possibility of that ever occurring.

The majority also ignores the plain contractual language in Section 2, which provides that the “reasonable and practical conditions” imposed *are not limited to* the conditions listed. The majority opinion does the exact opposite and acts as a limit.

Exhibit D

UNION PACIFIC RAILROAD COMPANY

Gary Taggart
Director – Labor Relations



BUILDING AMERICA

24125 Aldine Westfield Rd.
Spring, Texas 77373
Office: (281) 350-7585

VIA REGISTERED MAIL AND E-MAIL

March 6, 2013

Mr. J. W. Dent
General Chairman
Brotherhood of Locomotive Engineers
and Trainmen
607 West Harwood Road
Hurst, TX 76054

Dear Mr. Dent:

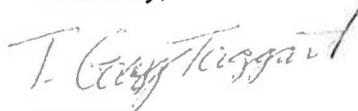
The U.S. Department of Transportation's Surface Transportation Board ("STB") approved the merger of Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively referred to as "UP") and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis-Southwestern Railroad Company and Denver and Rio Grande Western Railroad Company (collectively referred to as "SP") in its decision in Finance Docket No. 32760. In connection therewith, the STB imposed the labor protective conditions set forth in York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) ("New York Dock").

Pursuant to Article I, Section 4 of New York Dock, notice is hereby given to implement and effect changes to the coordination and consolidation of UP and SP operations, facilities and employees in the territories covered by and identified in Exhibit "A", attached. As you will note from reviewing Exhibit "A", this transaction will affect both former UP and SP operations, facilities and employees and will require modification of incompatible agreements so as to ensure a smooth transition of these necessary coordinations and consolidations. More specifically, the purpose of these changes is expressly directed at further achievement of more streamlined, efficient and safe operations and service, consistent with the objectives underlying the STB's approval in Finance Docket No. 32760.

In accordance with the requirements of Article I, Section 4 of New York Dock, a copy of this notice is being posted on bulletin boards convenient to interested employees.

Finally, and consistent with procedure set forth in Article I, Section 4, we suggest our first negotiating session regarding this matter be held at our **Southern Region Headquarters, located at 24125 Aldine Westfield Road in Spring, Texas, on Wednesday, March 20, 2013, commencing at 8:30 AM.**

Sincerely,

A handwritten signature in cursive script that reads "T. Gary Taggart".

T. Gary Taggart
Director- Labor Relations

Enclosure

cc: Mr. T. L. Johnson -- UTU
Mr. M. D. Twombly -- BLET

Mr. W. R. Turner
Mr. A. T. Olin
Mr. M. D. Phillips
Mr. L. M. Fritz – Mail Stop #1180
Mr. R. S. Blackburn – Mail Stop #1180
Mr. G. D. Workman – Spring, TX
Mr. M. D. Brazytis – San Antonio, TX
Mr. R. D. Lambeth, Jr. -- Livonia, LA
Mr. T. A. Lischer – Spring, TX
Mr. K. H. Hunt – HDC
Ms. J. S. Jordan – CMS (HDC)
Mr. F. C. Johnson – Mail Stop #1755

Exhibit E



*L. R. Bumpurs, General Chairman
R. Dumas, Chairman (UP-Road)
C. C. Goodrum, Chairman (UP-Yard)
J. L. Moffitt, Chairman (BNSF)
R. E. Davis, Secretary-GO 577*

**GENERAL COMMITTEE OF ADJUSTMENT - GO 577
UNION PACIFIC RAILROAD - Houston Hub & BNSF RAILWAY - HBT
400 Randal Way, Suite, 102 - Spring, Texas 77388
(281) 651-6577 (office) - (281) 288-5577 (fax)
LarryBumpurs@utugo577.comcastbiz.net**

Refer

to: NYD Section 4 Notice

June 17, 2013

Mr. T. G. Taggart
Director Labor Relations
Union Pacific Railroad
2425 Aldine Westfield Rd.
Spring, TX. 77373

Dear Sir,

This will acknowledge receipt of your correspondence dated May 06, 2013 in response to our letter dated May 02, 2013.

After carefully reviewing your correspondence and the material referenced, it is obvious the Carrier has grossly misinterpreted the position of the Organization.

On November 30, 1995, Union Pacific Railroad Company filed application with the U. S. Department of Transportation's Surface Transportation Board (STB) to acquire the Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St Louis-Southwestern Railroad Company and Denver and Rio Grande Western Railroad Company (Collectively Referred to as SP).

The Carrier, in the application to the STB presented a detailed operating plan to merge, consolidate and coordinate the former SP and UP rail operations into a single carrier operation.

The STB in Finance Docket No. 32760, approved the transaction and the carrier's operating plan. In connection therewith the STB imposed labor protective conditions prescribed by New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock) which mandated an implementing agreement or arbitration decision before changes in the operation could be effectuated.

Subsequent to the STB approval of UP's application to acquire the SP, the Union Pacific served Article I Section 4 notices to the Organization pursuant to New York Dock to effectuate the transaction. Both the Union Pacific and the Organization, through joint negotiation and arbitration completed final and conclusive implementing agreements, successfully consolidating, coordinating and integrating all former UP – SP dual operations into a single operating entity, the Union Pacific Railroad Company.

In 2001, at a meeting of the STB UP/SP Merger Oversight Committee the Union Pacific documented that the public benefits and operational efficiencies of the UP/SP merger, envisioned by the applicants and the STB, had been achieved. The Oversight Committee agreed and saw no need to continue formal scheduled oversight meetings.

Thereafter, the Union Pacific Corporation reported to US governmental agencies that the UP/SP merger was completed in 2001.

Union Pacific has repeatedly stated over the years since the completion of the merger that the public benefits, economies and operational efficiencies envisioned by the applicants and the STB have not only been achieved but have been exceeded in most cases.

In fact, Union Pacific Executive Vice President of Operations Lance Fritz in a STB hearing opens his overview with the following statement:

“Union Pacific is operating at record high levels of safety and service, providing greater value to its customers than ever before.”

At the same STB hearing Executive Vice President of Operations Fritz continues:

“We are driven to provide customer value, and our service levels are as high as they have been since Congress enacted Staggers in 1980, improving steadily since 2005.”

Further, Mr. Fritz states:

“Since 1980, we have consolidated six (6) railroads into an efficient system, removing bottlenecks and inefficient operations, including unnecessary interchanges, and increasing single-line service. Although we stumbled in getting here, Union Pacific today is more effective than the sum of the individual merged railroads. We have been able to provide safer, better, and expanded service because of our ability to leverage the economics of consolidation.”

(Emphasis added)

As recent as the March/April 2013 edition of Union Pacific “Inside Track”, CEO Jack Koresleski characterized the 2012 railroad performance as delivering amazing results, specifically in Union Pacific’s Southern Region:

“During 2012, Union Pacific encountered a variety of obstacles, including: Dramatic market shift that impacted the Southern Region, with surging volumes that included 90 million barrels of oil and 15 million tons of frac sand. Despite the uncertainty, Union Pacific delivered its best performance in history, emerging with record employee safety, better service, faster cycle times, a lower operating ratio and higher customer satisfaction, Koralesski said.”

In spite of the record operating ratio, record employee safety, faster cycle times and higher customer satisfaction, on March 6, 2013 Union Pacific served notice involving the territories of the Southern Region referred to in the above quote, allegedly under the auspices of “New York Dock”, and the original STB authorization in Finance Docket No. 32760 to segregate and deconsolidate territories previously consolidated and coordinated as mandated by STB FD No. 32760 and the imposed New York Dock labor protective conditions.

In the Carrier’s March 06, 2013 correspondence serving notice allegedly pursuant to Article 1, Section 4 of New York Dock, the Carrier acknowledges the territories and the workforce had been previously and completely merged. Stating succinctly:

“UP and SP initially coordinated and consolidated operations, facilities and employees in Louisiana, and Texas into entities commonly known as the Houston, Longview, Dallas – Fort Worth and San Antonio Hubs.”

Now, in the face of the railroads best performance in history, record employee safety, better service, faster cycle times, a lower operating ratio and higher customer satisfaction, experienced just 3 months prior to the date of the Carrier's alleged section 4 NYD notice and reported at the time the alleged section 4 notice was served, the carrier alleges:

“Subsequent changes in the transportation marketplace, including traffic flows and competitive options, and the structure of those initial consolidations and coordination’s have ultimately hampered realization of the intended service improvements, economies and efficiencies for shippers in the impacted areas.”

(Emphasis added)

Boards of Arbitration have long held that rail carriers bear the burden of establishing this causal relationship and cannot universally apply it to every action taken subsequent to a merger authorization. In fact, in a 1981 arbitration case involving Dispatchers and the Missouri Pacific Railroad, Referee Nicholas H. Zumas held that there must be a direct connection between the merger and the alleged transaction stating succinctly:

“Every action initiated subsequent to a merger cannot be considered, ipso facto, to be ‘pursuant to’ the merger. There must be a causal connection. As it relates to the applicability of New York Dock II to a merger, such nexus is implicit in the term ‘pursuant to.’.... It is the absence of any such causal nexus in this case that defeats the application of the term transaction.”

(Emphasis added)

Union Pacific simply cannot directly or indirectly “connect the dots” causally between the wholly invalid March 6, 2013 Notice declaring a proposed “transaction” and the original STB authorization under Finance Docket No. 32760. Therefore, in the absence of a direct causal nexus, the Carrier cannot invoke proceedings under section four (4) of the New York Dock Provisions rendering the March 6, 2013, notice procedurally flawed and invalid.

Union Pacific’s notice has nothing to do with unrealized public benefits, operational efficiencies, economies or hampered service, nor does it have any connection whatsoever with the UP/SP merger, as evidenced by statements made by some of the Carrier’s top operating officers. The facts are quite obvious from the verified statements of the Union Pacific’s top officers, that because of the UP/SP merger, the railroad has experienced an era of profitability, customer satisfaction, employee safety, employee productivity and operational efficiency unrivaled by any other time period in its 150-year history.

The real driver behind the Carrier’s unlawful and improper attempt to serve notice under auspices of New York Dock is the desire to abrogate and circumvent the Rail Way Labor Act.

The STB authority granted by FD 32760 ended when the merger, coordination and consolidation of UP-SP dual railroad operations was completed. In Union Pacific’s own words, supported by data and material they submitted to U. S. governmental agencies, **the consolidation and coordination of the UP – SP merger was completed in 2001.**

Under the Carrier’s theory the authority granted the Carrier to implement the UP/SP merger/acquisition would last into perpetuity. If there are changes in the transportation marketplace, then the carrier would simply serve notice under Article 1, Section 4 of New York Dock and force an agreement or decision in an atmosphere where the Carrier is exempt from all law (existing labor agreements and seniority agreements) in lieu of the parties recognition of each other’s interest and the give and take at the negotiating table. The Railway Labor Act would become meaningless, irrelevant and rendered mute.

It is the position of the Organization that the Carrier’s proposed territory re-alignment does not meet the definition of a transaction in 49 U.S.C. Section 11323, that the carrier does not have STB authority to utilize the provisions of the New York Dock Labor protection provision to force an agreement or arbitration decision to

effectuate a territory re-alignment disguised as a STB transaction and that in the absence of STB authority the provisions of 49 U.S.C. Section 11321 are not applicable in the carrier's improper and unlawful attempts to abrogate agreements and seniority.

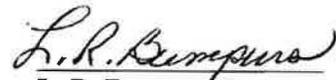
Finally, the carrier attempts to imply that UTU GO-577 is the only UTU entity that has stated that the purported New York Dock notice served on March 6, 2013 was fatally flawed and invalid are incorrect. At the last meeting held in Fort Worth, May 8 and 9, 2013 the organization, both GO 577 and GO 927 as represented by UTU International Vice Presidents Robert Kerley and Troy Johnson, made it clear that our presence was not to be seen as acceptance of, nor agreement with the Carrier's erroneous New York Dock Notice. The position of both respective committees was unambiguous and clearly unified - - **the notice is fundamentally flawed, procedurally illegal and wholly invalid.**

The Union Pacific is simply trying to rewrite a history, for which it is uniquely responsible, by attempting to "cheat" the future through the inappropriate use of New York Dock Protective conditions instead of correctly engaging the Organization in good faith negotiations pursuant to the Railway Labor Act.

Therefore, the purported New York Dock Section 4 Notice dated March 6, 2013, should be withdrawn in its entirety.

It would be appreciated if the Carrier would promptly advise its decision in this regard.

Sincerely,



L. R. Bumpurs
General Chairperson, UTU

LRB/bpp

CC electronically only:

Mr. M. B. Futhey Jr., UTU, SMART Transportation Division President

Mr. Robert Kerley, UTU

Mr. Troy Johnson, UTU

Mr. W. R. Turner, UPRR

Mr. A. T. Olin, UPRR

Mr. R. S. Blackburn, UPRR

Mr. G. D. Workman, UPRR

Mr. S. M. Simpson, UTU

Mr. M.D. Phillips, UPRR