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May 10, 2011  
BY HAND-DELIVERY



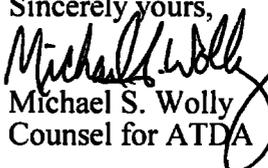
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW Suite 100  
Washington, DC 20004

RE: Finance Docket No. 33556 (Sub-No. 5)  
CANADIAN NATIONAL RAILWAY, GRAND TRUNK CORPORATION, GRAND  
TRUNK WESTERN RAILROAD COMPANY INCORPORATED – CONTROL –  
ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD  
COMPANY, etc. (Arbitration Review)

Dear Sir or Madam:

It has come to our attention that the Reply of the American Train Dispatchers Association (“ATDA”) to the Petition for Review of an Arbitration Award filed in this case April 19, 2010, refers at page 23 to an arbitration award that is not attached to the Reply as an Exhibit. To correct that inadvertent omission, please find enclosed Exhibit K to said Reply. Thank you.

Service has been made on all other parties by email and overnight delivery today.

Sincerely yours,  
  
Michael S. Wolly  
Counsel for ATDA

cc w/ encl.: Robert Hawkins, Attorney for the Carrier  
Joseph R. Mazzone, Attorney for ICTDA

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**BEFORE THE SURFACE TRANSPORTATION BOARD**



**Finance Docket No. 33556, Sub No. 6**

**CANADIAN NATIONAL RAILWAY, GRAND TRUNK CORPORATION,  
GRAND TRUNK WESTERN RAILROAD COMPANY INCORPORATED –  
CONTROL – ILLINOIS CENTRAL CORPORATION, ILLINOIS  
CENTRAL RAILROAD COMPANY, etc.**

**EXHIBIT K**

**TO REPLY OF  
THE AMERICAN TRAIN DISPATCHERS ASSOCIATION  
TO PETITION FOR REVIEW OF AN ARBITRATION AWARD**

*(CSX Transportation, Inc. and International Brotherhood of Electrical Workers and  
Transportation Communications International Union  
(NYD Article 4 Arbitration Award - Simon, April 11, 1997))*

**Michael S. Wolly  
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**Attorney for ATDA**

**May 10, 2011**

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**ARBITRATION BOARD  
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4  
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS  
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION  
IN FINANCE DOCKET NOS. 28905, 30053, 31033, 31106, 31296, 31695 AND 32020**

In the Matter of Arbitration Between:	)	
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Carrier,	)	
	)	
and	)	
	)	Radio Repair Consolidation
INTERNATIONAL BROTHERHOOD OF	)	
ELECTRICAL WORKERS and	)	
	)	
TRANSPORTATION COMMUNICATIONS	)	
INTERNATIONAL UNION,	)	
	)	
Organizations.	)	

**OPINION AND AWARD**

Date of Hearing:     March 18, 1997  
Location of Hearing:  Rosemont, Illinois  
Date of Award:     April 11, 1997

**Appearances:**

*For the Carrier:*

James B. Allred, Director, Labor Relations  
Nicholas S. Yovanovic, Esq., Assistant General Counsel  
Ronald M. Johnson, Esq., Akin, Gump, Strauss, Hauer & Feld, L.L.P.

*For the International Brotherhood of Electrical Workers:*

Glen A. Heinz, General Chairman  
Daniel L. Davis, International Vice President  
Michael S. Wolly, Esq., Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C.

*For the Transportation Communications International Union:*

L. H. Tackett, General Chairman  
Carl H. Brockett, International Vice President

**Background:** CSX Transportation, Inc. ("Carrier," "CSXT") is the result of several mergers authorized by the Interstate Commerce Commission ("Commission"), beginning with the decision on September 23, 1980, in ICC Finance Docket No. 28905, to permit CSX Corporation to control the railroad subsidiaries of Chessie System, Inc. ("Chessie") and Seaboard Coast Line Industries, Inc. ("SCLI").<sup>1</sup> At that time, the railroads controlled by Chessie included the Chesapeake & Ohio ("C&O"), the Baltimore & Ohio ("B&O") and the Western Maryland ("WM"). SCLI consisted of the Seaboard Coast Line ("SCL"), the Louisville and Nashville ("L&N"), the Clinchfield and several smaller carriers. This decision also authorized CSX Corporation to control the Richmond, Fredericksburg & Potomac ("RF&P"). In 1982, in Finance Docket No. 30053, the Commission approved the merger of L&N into SCL, with the resultant company being renamed Seaboard System Railroad. In 1987, in Finance Dockets 31033 and 31106, the Commission approved the merger of B&O into C&O, and then C&O into CSX. The Commission then approved the merger of WM into CSXT in 1988 (Finance Docket 31296, and the merger of Clinchfield into CSXT in 1990 (Finance Docket 31695). Finally, in 1992, in Finance Docket 32020, the Commission approved an agreement for CSXT to operate the properties of RF&P in the name and account of CSXT. In each of these transactions, the Commission imposed protective conditions as set forth in *New York Dock Railway — Control — Brooklyn Eastern District Terminal*, 354 I.C.C. 399 ("New York Dock").

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<sup>1</sup>CSX Corp. — *Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980).

On January 23, 1996, pursuant to the above orders of the Commission, Carrier served notice upon the International Brotherhood of Electrical Workers ("IBEW"), the Transportation Communications International Union ("TCU"), the Brotherhood of Railroad Signalmen ("BRS") and the employees represented by these Organizations. This notice advised of the Carrier's intent to "consolidate at Louisville, Kentucky certain radio repair work which is currently being performed throughout the CSXT System and to have such work performed thereafter on a coordinated basis." According to this notice, Carrier intended to abolish a total of 44 positions at 24 different locations throughout the system and establish 17 new positions in a Centralized Radio Service Center at Louisville. The notice indicated Carrier intended this transaction to occur on or about April 22, 1996. The work involved would be the repair function for all radios with the exception of end of train devices (EOT's) and vehicle radios.

Subsequent to the service of this notice, the Carrier met with representatives of the three organizations with the objective of reaching an agreement to implement the transaction. When the parties were unable to reach agreement, the Carrier, on July 3, 1996, invoked the arbitration provisions of Article I, Section 4 of *New York Dock*. Receiving no response from the Organizations, the Carrier, by letter dated July 15, 1996, asked the National Mediation Board to appoint a neutral Referee pursuant to Section 4(1) of *New York Dock*. The National Mediation Board subsequently appointed a neutral Referee, who later found it necessary to resign the appointment. Consequently, by letter dated January 15, 1997, the National Mediation Board appointed Barry E. Simon to serve as the neutral Referee.

A hearing in this matter was scheduled for March 18, 1997, in Rosemont, Illinois. On March 13, 1997, the Carrier reached an agreement with the Brotherhood of Railroad Signalmen on this matter. It was therefore concluded that the BRS was no longer a party to this dispute. The hearing proceeded with the Carrier, the IBEW and the TCU.

**Issues Presented:**

The Carrier proposes the following Statement of Issue:

*(1) Does the Implementing Agreement proposed by the Carriers on March 26, 1996, provide an appropriate basis for the selection of forces made necessary by the transaction described in Carrier's notice of January 23, 1996?*

*(2) If the answer to (1) above is negative, then what would be the appropriate basis for the selection of forces?*

The IBEW, not taking issue with the proportional selection process for the initial filling of newly-created positions in the new Centralized Service Center as described in the Carrier's March 26, 1996, proposal, suggests the additional issue:

*What collective bargaining agreement(s) should be applicable in the newly-created Centralized Radio Service Center in Louisville?*

It is the Referee's decision that the issue proposed by the Carrier is broad enough to encompass the issue proposed by the IBEW. Accordingly, the Referee adopts the Carrier's Statement of Issue.

**Position of the Carrier:<sup>2</sup>** The Carrier notes that although the various railroads have been merged into the CSXT, the work forces on the former carriers, as well as the work they protect, have not yet been fully coordinated into a single system. It avers the continued operation of separate radio repair facilities on the former properties results in significant inefficiencies in the use of equipment, facilities and employees, impeding the Carrier's ability to provide the rail service required in today's highly competitive market. Without the coordination it seeks, Carrier asserts it is required to maintain duplicate facilities, parts inventories, tools and work benches. It contends that employees at some of these locations do not have sufficient radio repair work to keep them fully occupied, requiring them to perform other communications work during their workdays. Further, Carrier says it is required to maintain artificially inflated radio inventories due to the inconsistent and sometimes inefficient means of repairing radios and the logistical problems of having the operable radios where they are needed to run trains.

To remedy these problems, Carrier proposes to create a single radio service center that will inspect, evaluate, test and repair a wide range of radio equipment required for it to operate its transportation system. This consolidation, according to the Carrier, will permit it to repair radios more efficiently, reduce radio down time, return radios to customers on a more timely basis and allow it to reduce inventories and equipment. Carrier says its selection of Louisville as the site for this

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<sup>2</sup>To a large extent, the Carrier's submission, as well as its supplemental submission, dealt with issues that were raised only by the Brotherhood of Railroad Signalmen. To the extent that those issues were not raised by either the IBEW or the TCU, the Referee considers them no longer to be in dispute. Accordingly, this portion of the Discussion will synopsize only those issues that are still in dispute between the remaining parties.

facility will allow it to take advantage of the fact that United Parcel Service maintains its centralized distribution hub there. Any radio repaired at Louisville by 11:00 pm can be delivered to any location on the Carrier's system by the following day, according to the Carrier. These efficiencies and improvements, argues the Carrier, will enable it to reduce 27 positions. Some of these position reductions, says the Carrier, will be accomplished from blanked positions that have been vacant since the original notice was served.

The Carrier has proposed an implementing agreement that would, *inter alia*, have the effect of placing all of the radio repair positions at Louisville under the former L&N/TCU Agreement, which is the agreement currently governing radio repair work at Louisville. In this regard, the relevant provisions of the Carrier's proposed agreement, dated March 26, 1996, read as follows:

1. The work of evaluating, diagnosing and repairing of Locomotive Radios, RDUs (Receiver Display Units), Defect Detector Radios, MCPs (Mobile Communications Packages), Portable Radios, Vehicle and other Mobile Equipment Radios, except for peripheral repairs (knobs, microphones and antennas), circuit boards for BCPs (Base Communications Packages) and Base Station (Dispatcher) Radios, which is currently being performed throughout the CSXT System, will be transferred to and consolidated at Louisville, Kentucky, where such work will thereafter be performed on a coordinated CSXT basis by Carrier under the scope of the Schedule Agreement between former L&N and TCU. . . .

2. It is further understood and agreed that the work covered by the scope and classification rules of the respective schedule agreements which is not being specifically coordinated in this Agreement will continue to [be] performed under such respective schedule agreements.

\* \* \*

4. Positions established in the coordinated shop will be initially filled according to the following procedures:

\* \* \*

(b) With respect to the IBEW represented properties (B&O, B&OCT, C&O Southern and SCL) the positions allocated to the IBEW represented employees shall be advertised to all active employees holding positions as Communications Employees on the districts listed above. The positions will be awarded to the senior qualified applicants from the applicable districts; i.e., 2 positions for the C&O Southern, 4 positions for the B&O, and 4 positions for the SCL. In the event one or all of the positions are not filled by employees from the C&O Southern, B&O or SCL respectively, the positions will be awarded to the senior qualified applicant(s) from the other IBEW represented properties, considered as a group, if any. If there are no qualified applicants the positions will be filled in accordance with paragraph (d) below.

(c) With respect to the TCU represented property (L&N) the positions allocated to the L&N represented employees shall be advertised to all active employees holding positions as Communications Employees on the former L&N. The positions will be awarded to the senior qualified applicants from the applicable district with preference being given to the incumbents of the positions abolished as a result of the coordination. In the event one or all of the positions are not filled by incumbents of the abolished positions, the positions will be awarded to the senior qualified employees making application. If there are no qualified applicants the positions will be filled in accordance with paragraph (d) below.

(d) In the event any of the positions referred to in (a),<sup>3</sup> (b) and/or (c) remain to be filled, they will be filled under the terms of the L&N TCU Communications Agreement.

\* \* \*

6. (a) Employees assigned to positions in the consolidated operation at Louisville pursuant to Section 4(a) or (b) of this agreement will have their seniority on the district on which working transferred to and dovetailed onto the former L&N System Communications Class 1 and 1-A Rosters and will have their names removed from their current district roster. Current L&N TCU Communications Employees assigned to positions in the consolidated operation at Louisville pursuant to Section 4(c) or (d), who have not previously established seniority in Class 1-A shall establish such seniority pursuant to the L&N TCU Schedule Agreement.

(b) In the event that two or more employees have the same seniority date the employee having the earlier employment date in the Communications Department with any of the CSXT affiliated carriers will be the senior of such employees in ranking for that class. If two (or more) such employees have the same employment date in the Communications

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<sup>3</sup>Section 4(a) provides for the selection of forces from BRS represented properties, and is similar in construction to Section 4(b).

Department with the Carriers, their ranking in the class will be determined by their Julian calendar date of birth.

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8. Employees who accept positions in the coordinated CSXT Radio Shop will be credited with prior service under existing agreements applicable to them prior to the coordination for purposes of annual vacations, sick leave, pass privileges, personal leave days, job stabilization and other service-related benefits under the Schedule Agreement between former L&N and TCU.

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Side Letter No. 10

It was agreed that any IBEW or BRS represented employees transferring to the coordinated operation will be given the option of remaining under the coverage of the Supplemental Sickness Benefit plans applicable to them for a period of time equal to no greater than six years following their transfer. This election will be in lieu of the sick leave benefits they would have otherwise accrued under the former L&N TCU Communications Agreement.

This election must be made in writing at the time of transfer and will be irrevocable.

The Carrier asserts this agreement would not change the terms of its agreements with either the BRS or the IBEW on the other former properties. Although those agreements would cease to apply to the work being transferred and consolidated, Carrier points out they would continue to apply to radio repair work not included in the consolidation.

Carrier alleges placing the employees at the consolidated facility under the L&N/TCU agreement would not work a significant change in most of the rules under which these employees work. According to the Carrier, many of the terms of the various former property communications agreements are either the same or very similar. Some subjects, such as vacations and health and

welfare benefits, notes the Carrier, are covered by national agreements, to which all of the non-operating crafts are a party.

Notwithstanding this fact, the Carrier argues it would be unrealistic and impractical to operate a consolidated facility while maintaining several different working agreements for all the employees working there. Because of the disparity between some of the rules in these agreements, the Carrier asserts it would effectively have separate facilities under one roof if more than one agreement were to be applied. Furthermore, the Carrier contends there would be no way to distinguish what work belonged to a particular agreement. It insists it is essential to have a single working agreement if it is to realize the economies that are anticipated when the work is centralized and coordinated.

Carrier cites the decision of Referee LaRocco in *BRS v. NW/SR/CG* (February 9, 1989), involving the consolidation of shop signal repair work from the three carriers to a single facility at Roanoke, Virginia. It quotes Referee LaRocco as follows:

When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroads. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operational efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements. The ICC has unequivocally ruled that existing collective bargaining agreements are superseded by the

necessity to implement the approved transaction. *CSX — Control — Chessie and Seaboard Cost Line*, F.D. 28905 (Sub-No. 22); ICC Decision issued June 25, 1988.

In line with the above decision, Carrier asserts that a single working agreement at the coordinated facility is plainly necessary for safe and efficient operations. It submits that its decision to propose the L&N/TCU Agreement was based upon the "controlling carrier concept," under which the work is placed within the scope of the agreement in effect at the location receiving the work. Carrier notes this concept was applied by Referee LaRocco in the above cited case. On this property, Carrier cites fifteen instances between 1985 and 1993 where employees were placed under different collective bargaining agreements when work was consolidated.

Carrier further cites the decision of Referee Ables in *CSX v. American Train Dispatchers Association* (November 11, 1988), in which Carrier was authorized to consolidate power distribution work at Jacksonville, Florida, with the work being performed by managerial employees. This decision, notes the Carrier, was affirmed by the Commission<sup>4</sup> and the Court of Appeals.<sup>5</sup>

Carrier also cites the decision of Referee O'Brien wherein this Carrier sought to combine the employees of various properties onto single seniority rosters of the Brotherhood of Locomotive Engineers and the United Transportation Union under the agreements applicable to the former B&O. While Referee O'Brien found the changes proposed by the Carrier were necessary to attain the public transportation benefits of the authorized transactions, he left it to the Commission to determine

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<sup>4</sup>*CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 23).

<sup>5</sup>*American Train Dispatchers Association v. I.C.C.*, 26 F.3d 1157 (D.C. Cir. 1994).

whether the proposed changes would be contrary to the condition that "rights, privileges and benefits" shall be preserved. Carrier asserts the Commission authorized the consolidation of rosters under single agreements,<sup>6</sup> and was upheld by the Court of Appeals.<sup>7</sup>

Carrier distinguishes this case from *Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company v. Brotherhood of Locomotive Engineers - ATDD Division*, (Referee Suntrup, May 25, 1994), cited by the IBEW. While Referee Suntrup found the work was being coordinated at a new dispatching center, Carrier denies it is proposing to build a new facility. It insists the existing facility for the radio repair shop at Osborn Yard on the former L&N at Louisville has been remodeled to handle the increased work and employees at that location. Carrier also avers Referee Suntrup's Award involved unique facts not present in the instant case. In particular, Carrier notes the SP train dispatchers who were going to the new facility were represented by the American Train Dispatchers Department of the BLE, while the DRGW dispatchers had been represented by an independent union, which had lost its status as representative when the National Mediation Board found that the SP and the DRGW constituted a single carrier and certified the ATDD as representative of all dispatchers. Carrier asserts Referee Suntrup was reluctant to put all dispatchers under the DRGW Agreement when the union had lost its status as representative. Carrier suggests Referee Suntrup's reluctance also came from

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<sup>6</sup>*CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995).

<sup>7</sup>*United Transportation Union v. Surface Transportation Board*, D.C. Cir., March 21, 1997.

his apparent belief that the SP was attempting to obtain an unfair bargaining advantage over the ATDD by forcing it to succeed to the independent union's non-traditional collective bargaining agreement.

Carrier argues that its proposed change meets the standard set by the Commission that it be necessary to realize the efficiencies of the approved merger. It submits the consolidation could not be accomplished if it had to continue repairing the radios on the former properties, or to have multiple sets of radio repairmen under one roof working under separate agreements.

Finally, the Carrier avers its offer of enhanced protective benefits, e.g., separation allowances, moving expenses, etc., is contingent upon the work being coordinated under a single collective bargaining agreement. Otherwise, argues the Carrier, the Referee has no authority to grant protective benefits in excess of those contained in the *New York Dock Conditions*.

**Position of the IBEW:** The IBEW argues that employees it represents who transfer to Louisville should continue to be covered by their IBEW Agreements. It notes that 61% of the 44 jobs to be abolished (27 jobs) are held by IBEW members, and that 59% of the 17 new jobs (10 jobs) will be held by IBEW maintainers. It avers their average hourly wage is \$16.48<sup>e</sup> plus a 65¢ per hour skill differential. It further says they enjoy significant protection against subcontracting and are covered by a supplemental sickness plan in lieu of sick leave. The IBEW concludes, therefore, that

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<sup>e</sup>\$16.46 on the C&O, \$16.48 on the B&O and B&OCT, and \$16.51 on the SCL. At the hearing the IBEW acknowledged that the current IBEW rate of pay is lower than the TCU rate of pay.

these employees stand to lose much in the way of rights, privileges and benefits by not continuing to work under the IBEW Agreements. The IBEW insists there is nothing in its Agreements that could not be applied to their continued performance of radio repair work at the new location.

The IBEW disputes the Carrier's contention that the consolidation will take place at an existing facility. It submits the Centralized Radio Service Center is being created especially for this transaction, and currently has neither employees nor a collective bargaining agreement to cover work at the Center. It contends the building to be used could not accommodate the new facility without major modifications. It notes all of the current Louisville jobs will be abolished and all of the positions at the new facility are identified by Carrier as "new positions." It cites Carrier's submission as saying Carrier proposes "to create a single radio service center" and locate it at Louisville. This language, says the IBEW, is evidence the Center has not existed prior to this transaction.

The IBEW states the Carrier proposes to apply the L&N/TCU Agreement solely on the basis of geography, but the fact that the Center will be located within the confines of what was once the L&N is pure fortuity. It notes the L&N has not existed for years and that the work to be performed by the BRS and IBEW employees has not been done before on the L&N. It suggests allowing mere location to govern the terms and conditions of employment would enable the Carrier to manipulate its labor relations by relocating assignments across former property lines to avoid dealing with certain unions.

The IBEW argues Section 2 of *New York Dock* requires the existing IBEW Agreements setting forth "rates of pay, rules, working conditions and all collective bargaining and other rights,

privileges and benefits" be applied to the IBEW represented employees at the new facility. Citing *Railway Labor Executives' Assn. v. U.S.*<sup>9</sup> ("*Executives*"), the IBEW asserts §11347 of the Interstate Commerce Act (as well as its successor, §11326(a) of the ICC Termination Act) "clearly mandates that 'rights, privileges, and benefits' afforded employees under existing CBAs be preserved."<sup>10</sup> The IBEW concludes that *Executives* holds that a *New York Dock* Referee is prohibited from modifying those parts of collective bargaining agreements which establish "rights, privileges or benefits" for labor and allows the modification of other parts of agreements only when "necessary to effectuate a transaction."<sup>11</sup>

The IBEW argues Carrier is required to prove that the purported benefits of the proposed consolidation cannot be achieved unless the existing agreements are overridden. Absent such a showing of necessity, says the IBEW, the Carrier's position that those agreements should no longer apply to its members must be rejected. In support of its position, the IBEW cites *Norfolk & Western Railway Co. v. ATDA*.<sup>12</sup> That case, says the IBEW, also requires that any "decision to override the carriers' obligations [must be] consistent with the labor protective requirements of §11347."

The IBEW denies that the issue of which collective bargaining agreement will apply is a representation issue. It notes the National Mediation Board has distinguished its jurisdiction over the

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<sup>9</sup>987 F.2d 806 (D.C. Cir. 1993).

<sup>10</sup>*Id.* at 814.

<sup>11</sup>*Id.* at 814-815.

<sup>12</sup>499 U.S. 117 (1991).

resolution of jurisdictional issues from questions of continuing contract application. It concludes, therefore, that resort to the Mediation Board is not the appropriate forum for determining the continuing application of the collective bargaining agreements to the transferred positions.

The IBEW asks the Referee to ensure that transferred employees will have their "rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges and benefits . . . under . . . existing collective bargaining agreements or otherwise" preserved as required by Section 2 of *New York Dock*. This, says the IBEW, is the Referee's prime responsibility. Insofar as the Carrier's intent, argues the IBEW, is to subject the transferring employees to terms and conditions of employment inferior to those they now enjoy by virtue of agreement or otherwise, the Referee is authorized by Section 4 of *New York Dock* to direct preservation of the superior terms and conditions for these employees as a condition for implementation of the transaction.

The IBEW cites the decision of Referee Suntrup in *Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company v. Brotherhood of Locomotive Engineers - ATDD Division*, (May 25, 1994), wherein the employees, under the Carrier's plan, would have been covered by an agreement with the Dispatchers Steering Committee, which had represented dispatchers on the former Denver & Rio Grande Western Railroad. As in the instant case, says the IBEW, the dispatchers transferring to Denver, constituted the majority of the consolidated workforce and were working under the agreement with the American Train Dispatchers Association. The IBEW quotes Referee Suntrup, noting he was

far from convinced . . . that sustaining the company's position on this matter would produce reasonable, harmonious labor relations. . . . [T]he SPL suggests that all dispatchers fall under a contract which the BLE-ATDD argues is either no contract at all [fn. omitted] and/or which was negotiated for a minority of the dispatchers at a location which is not even the dispatching location where the new dispatching center will be. For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver. . . .

The IBEW urges the Referee to follow the same approach as did Referee Suntrup, *i.e.*, direct that the existing agreements remain in effect, continuing to cover the employees they covered prior to the coordination until the parties reach a single collective bargaining agreement to cover all employees at the coordinated facility. According to the IBEW, a facility with joint union representation is not unprecedented on this property. It cites IBEW and TCU represented employees working side-by-side, performing essentially the same work, at Atlanta.

The IBEW further objects to the Carrier's proposal that would have all future vacancies arising at the new facility being filled through the L&N/TCU Agreement, which would foreclose other IBEW represented employees from opportunities for this work. Instead, the IBEW proposes that the implementing agreement provide that new positions that are created and vacancies that occur after the initial transaction be filled in a manner that retains the ratio of BRS/IBEW/TCU workers that existed initially. It suggests that openings that occur due to the retirement, separation or transfer of a former C&O, B&O, C&OCT or SCL maintainer be first bulletined to other IBEW-represented employees on that former property and, if not filled by that process, then be offered to other IBEW employees elsewhere on the system before being bulletined to other crafts.

The IBEW also asks that the implementing agreement ensure that in the event the Carrier has underestimated the amount of work to be performed at the new facility, work that cannot be done at the Center be performed on the property rather than contracted to outside vendors. If the Carrier has more work for the facility than the number of jobs it initially creates can do, the IBEW desires the Carrier to be obliged to either create additional positions in the same ratio as the original positions, or have the work revert to the locations where it formerly would have been done by the positions to which it formerly would have been assigned. It argues that work should in no event be contracted out, absent agreement of the union representing the affected employees at that former location.

**Position of the TCU:** The TCU supports the Carrier in its adoption of the "controlling carrier" principle. It avers that the Commission and the courts have long held that the Carrier is contractually obligated to assign work to the class and craft performing such work by virtue of the scope of the collective bargaining agreement in effect on the property to which the work is being assigned. The TCU cites several Referee decisions pursuant to *New York Dock* applying this principle. It concludes that the Referee must follow the Commission's authority, arbitral precedence and established jurisdictional/representational boundaries by placing all of the coordinated work under the collective bargaining agreement already in place at Louisville.

The TCU, at the hearing, raised objections to certain parts of Carrier's March 26, 1996, proposed implementing agreement. Specifically, it asserted Section 6(b) should determine ranking

of employees who have the same employment date in the Communications Department based upon date of birth, including year of birth. The TCU also objects to the requirement in Paragraph 5 of Side Letter No. 2 that the monthly dismissal allowance be reduced by \$500 for each month needed by the employee to reach age 61.

At the hearing, the Carrier addressed three other objections raised by the TCU and reached a settlement with both Organizations. Specifically, Carrier agreed to delete the phrase "however no such claim for protective benefits shall be honored beyond ninety (90) days from the time specified in Sub-section (c) of this Section" from Section 7(e) in return for the TCU's waiver of its objection to Section 7(d). Additionally, Carrier and the Organizations agreed to delete the parenthetical phrase "except promotion to a non-contract position" from Section 9.

**Findings:** Neither the IBEW nor the TCU dispute the Carrier's right and need to consolidate the work of radio repair pursuant to the various ICC orders relied upon by Carrier, nor do they challenge the Carrier's selection of Louisville as the appropriate location for such consolidation. Additionally, they concur in the Carrier's formula for the allocation of personnel at the consolidated facility. The TCU further concurs with the Carrier's proposal to apply the L&N/TCU Agreement to all work and employees at the consolidated facility, although the IBEW does not. The TCU raises several objections to miscellaneous provisions of the implementing agreement, on which the IBEW was silent.

Accordingly, the Referee finds that the consolidation of radio repair work at Louisville constitutes a transaction pursuant to the various orders of the Interstate Commerce Commission within the meaning of Article I, Section 1(a) of the *New York Dock* Conditions. Carrier has complied with the notice requirements of Article I, Section 4, and has properly invoked arbitration. The Referee thus finds he has jurisdiction over the matter before him.

The issue dividing the IBEW and the Carrier is whether the Carrier's proposal to place all employees at the consolidated facility under the scope of the L&N/TCU Agreement is necessary to effectuate the transaction. The IBEW further suggests Section 2 of *New York Dock* places limitations upon the Referee, namely that he must preserve the rights, privileges and benefits existing under the collective bargaining agreements. This second point requires the Referee to consider what is meant by the Section 2 requirement.

It is the Referee's conclusion the Commission's intent in Section 2 has now been clarified.

In *Railway Labor Executives' Assn v. U.S.*, the Court of Appeals wrote:

The statute clearly mandates that "rights, privileges, and benefits" afforded employees under existing CBAs be preserved. Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor — an obviously absurd proposition — § 565 (and hence § 11347) does seem to contemplate that the ICC may modify a CBA.

At that level of generality, at least, the ICC's interpretation seems eminently reasonable, indeed indisputable. The Commission has not, however, addressed the meaning, and thus the scope, of those "rights, privileges, and benefits," that must be preserved, nor has it determined specifically whether the CBA provisions at issue here are entitled to statutory protection under that rubric. We thus remand for the ICC to make that determination in the first instance.

Regardless of how the ICC may read the above provision, however, it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission

provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary to effectuate a covered transaction. CSX, 6 I.C.C.2d 715 (1990) ("We assume that any changes in CBAs will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute"). We agree that whatever else a "fair arrangement" entails, the modification of a CBA must at a minimum be necessary to effectuate a transaction. [ footnotes omitted]<sup>13</sup>

In that case, Referee Kasher awarded an implementing agreement that required the Springfield Terminal Railway Company, in operating leased lines, to apply the rates of pay, rules and working conditions contained in the lessor carriers' collective bargaining agreements. The Commission, finding that the preservation of the lessor carriers' rates of pay and work rules would effectively foreclose the transaction, stayed the Kasher Award and remanded that issue to the parties. Unable to reach agreement, the parties submitted the dispute to Referee Harris, whose Award modified the lessor carriers' agreements.

The Commission discussed the definitions of "rights, privileges and benefits" in its review of the Award of Referee O'Brien in the dispute involving this Carrier, the United Transportation Union and the Brotherhood of Locomotive Engineers. Because the Commission had not yet rendered a ruling on the remand in *Executives*, Referee O'Brien declined to rule on the issue of whether the Carrier's proposed changes would be contrary to existing "rights, privileges and benefits." The Commission then wrote:

The history of the phrase "rights, privileges, and benefits" indicates that it has traditionally meant what it implies – the incidents of employment, ancillary emoluments or fringe benefits – as opposed to the more central aspects of the work itself – pay, rules and

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<sup>13</sup>*Railway Labor Executives' Assn. v. U.S.*, 987 F.2d 806, 814 (D.C. Cir 1993).

working conditions. The genesis of section 405 of the Amtrak Act was the Urban Mass Transit Act of 1962 (UMTA), which authorized federal financial assistance to state and local governments for the improvement of urban mass transit systems. Section 13(c) of that Act (now codified as 49 U.S.C. 5333(b)) required the Secretary of Labor to certify as "fair and equitable" arrangements to protect affected employees. The first requirement of section 13(c) for a "fair and equitable" arrangement was "the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise."

Since no UMTA financing could be completed without the Secretary of Labor's section 13(c) certification, a model protective agreement was developed to permit rapid and dependable processing of applications. The current regulations of the Department of Labor provide that the Secretary will certify pursuant to section 13(c) if the parties adopt the Model Agreement. 29 CFR 215.6. Paragraph 10 of the Model Agreement sets forth the type of rights, privileges, and benefits that are "preserved" (emphasis added):

(10) No employee receiving a dismissal or displacement allowance shall be deprived during his protection period, of any rights, privileges, or benefits attaching to his employment, including without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions so long as such benefits continue to be accorded to other employees of the bargaining unit, inactive [*etc*] service or furloughed as the case may be.

We believe that this is compelling evidence that the term "rights, privileges, and benefits" means the "so-called incidents of employment or fringe benefits," Southern Ry. Co. - Control - Central of Georgia Ry. Co., 317 I.C.C. 557, 566 (1962), and does not include scope or seniority provisions.

In any event, the particular provisions at issue here do not come within "rights, privileges, or benefits" because they have consistently been modified in the past in connection within consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions. The ATDA court looked to past conduct in consolidations when it ruled that scope rules were not among those provisions protected as "rights, privileges, and benefits." 26 F.3d at 1163. The court relied, in part, on CSX Corporation - Control - Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 I.C.C.2d 715, 736, 742 (1990) (Carmen II), and its recitation

of the power of arbitrators under the Washington Job Protection Agreement of 1936 and pre-1976 labor conditions.

Seniority provisions have also been historically modified with regularity by arbitrators in connection with consolidations. See Carmen II, 6 I.C.C.2d at 721, 736-737, 742, 742, and 746 n.22. Thus, both scope rules and seniority provisions have historically been changed without RLA bargaining and, accordingly, are not eligible for protection as "rights, privileges, and benefits."

The unions argue that section 2 of New York Dock gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the B&O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd. – Exemption Acquisition and Operation – Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), slip op. at 7. Therefore, we find that the issue of which union is to represent WM engineers or receive them as dues-paying members does not involve a right that must be preserved under section 2 of New York Dock.<sup>14</sup>

The Commission's interpretation was found by the Court of Appeals to be reasonable and "exactly what was intended by Congress."<sup>15</sup> The Referee concludes, therefore, that the Carrier's proposed implementing agreement does not abrogate rights, privileges and benefits that Section 2 of New York Dock requires be preserved. The proposed agreement, in Side Letter 10, permits IBEW represented employees to elect to retain their coverage under the Supplemental Sickness Benefit plan during the protective period. The IBEW has cited no other "right, privilege or benefit," as those terms are applied, that might be abrogated by the proposed agreement.

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<sup>14</sup>CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc., Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995) slip op. at 14-15.

<sup>15</sup>United Transportation Union v. Surface Transportation Board, D.C. Cir, March 21, 1997, at 10.

As the IBEW notes, the Carrier must demonstrate that its proposed changes are necessary to effectuate the transaction. The standard of "necessity" was defined in *Executives* as follows:

What, then, does it mean to say that it is necessary to modify a CBA in order to effectuate a proposed transaction? In this case the Commission reasonably interpreted this standard to mean "necessary to effectuate the purpose of the transaction." If the purpose of the lease transaction were merely to abrogate the terms of a CBA, however, then "necessity" would be no limitation at all upon the Commission's authority to set a CBA aside. We look therefore to the purpose for which the ICC has been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the "necessity" for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease).<sup>16</sup>

As noted above, the Organizations here have not disputed the necessity of consolidating the work. Obviously, Carrier will realize greater efficiency by centralization, as evidenced by the fact that it will be able to use only 17 employees in the single facility while it requires 44 employees currently. Additionally, economies will be realized by maintaining only one facility and one inventory. Finally, turnaround time will be enhanced by the proximity to the United Parcel Service hub.

What Carrier must also demonstrate is the necessity of operating this facility under a single collective bargaining agreement, rather than multiple agreements as urged by the IBEW. The record reflects that there are three IBEW Agreements covering these employees, one of which covers only two of the employees. In this regard, Carrier convincingly cites the LaRocco Award, wherein the Referee wrote:

When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal

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<sup>16</sup>*Railway Labor Executives' Assn. v. U.S.* 987 F.2d 806, 815 (D.C. Cir. 1993).

devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroad. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the Organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR Schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operation efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements.

In this case, as well, Carrier avers there would be no way to distinguish what work belonged to a particular agreement. It also notes there are significant differences in some of the basic rules of the agreements. The Referee concurs that it would hamper the efficiency and economy of the consolidation if Carrier were to be required to manage 17 employees under four (or even two<sup>17</sup>) different collective bargaining agreements. Carrier should be allowed to utilize the employees in the facility without being restricted by the artificial barriers imposed by different agreements. This is one of the objectives of the consolidation. The Referee finds it significant that the IBEW was unable to cite a single case, other than the Suntrup Award, discussed below, under *New York Dock* or any other protective condition where a Referee has imposed more than one collective bargaining agreement upon a consolidated work force. Thus, it is the Referee's conclusion that the adoption of a single collective bargaining agreement at the consolidated facility is necessary to effectuate the transaction.

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<sup>17</sup>The IBEW has, in fact, asked that the B&O/IBEW Agreement be applicable to all ten IBEW jobs because it covers the majority of the IBEW jobs affected.

The remaining question is whether the L&N/TCU Agreement is the appropriate agreement to apply. While the Referee is sensitive to the IBEW's concerns for its membership, the question must be addressed objectively. If one single agreement is going to apply, there must be some basis for selecting that agreement. The mere fact that the majority of the employees in the consolidated facility come from the IBEW craft is not persuasive. Because those ten employees are covered by three different agreements, it is evident that no single agreement covers a significant number of the employees relative to any of the others. In fact, the agreement covering the largest number of employees (five) is the L&N/TCU Agreement.

Nor is it appropriate to make qualitative judgments about the different agreements. First of all, that would not be possible in this case as the agreements were not put into evidence. Even if they were, it would be an impossible task to determine which agreement, taken in its entirety, is "the best." Some "better" provisions of one agreement may be outweighed by "better" provisions on different matters in another agreement. Furthermore, what may be beneficial for one employee may be immaterial to another. Even on the issue of sub-contracting, which was of particular concern to the IBEW, it is impossible to determine which agreement affords the greater protection to the employees because of the different factors involved.

It is apparent that the generally accepted practice among referees is to adopt the "controlling carrier" principle. In this case, the L&N is the controlling carrier as the consolidated facility is an expansion of an existing facility already subject to the L&N/TCU Agreement. This is not a new facility, as argued by the IBEW. While Carrier might have to perform substantial work to make it

ready, the fact remains that radio repair has long been performed at this site. Carrier may have been inartful in its choice of words in some of its notices, but this does not change the fact that there already is a radio repair facility at Louisville and Carrier is transferring more jobs there.

The Award of Referee Suntrup must be distinguished from the facts herein. In that case, the Referee clearly was faced with unique circumstances not present here. The Referee does not reject the principle of "controlling carrier." Instead, he wrote:

... For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver despite good faith promises by the company about a future contract which have been made before, but are not properly before, this forum and which, yet on the other hand, have not been tested in an actual Section 6 set of negotiations. To accept the SPL's arguments before this forum would be tantamount to nullifying the labor agreements which it has negotiated with about 85 percent of its dispatchers, with the collective bargaining agent which now represents one hundred per cent of its dispatchers, in favor of an agreement which it has with the other 15 percent under an arrangement with a collective bargaining agent which has lost any and all representation rights.

In the instant case, there is no evidence Carrier selected the Louisville site for any reasons other than those it has stated, namely that it is centralized within the system and that it can take advantage of the United Parcel Service hub. There is no suggestion that the applicable agreement was a consideration, or that the agreement is more advantageous to the Carrier than any of the others. There is, therefore, no basis for the Referee to reject the "controlling carrier" principle.

In reaching the conclusion to apply the L&N/TCU Agreement to the entire facility, the Referee need not address the issue of representation. In Finance Docket No. 28905 (Sub-No. 27),

the Commission held this was a matter for the National Mediation Board acting under the Railway Labor Act.<sup>18</sup>

The Referee is not satisfied there is a necessity to forever preclude IBEW employees from bidding on subsequent vacancies at the consolidated facility. Employees holding IBEW seniority on the respective districts as of the date of the transaction should be able to bid on the positions that will be filled by IBEW represented employees when those positions become vacant on a permanent basis. Additionally, a proportional number of new positions at the facility should be available to current IBEW employees through the exercise of seniority. Not giving these employees prior rights to such positions would make it possible for the Carrier to restore the remaining 27 abolished positions and make them available only to TCU represented employees. This would not be equitable. To afford the parties an opportunity to draft their own agreement to extend such prior rights, the Referee remands this issue to the Carrier and the IBEW. The Referee, however, shall retain jurisdiction over this matter and should the parties fail to reach agreement within sixty days following the date of this Award, either party may invoke arbitration.

Turning to the TCU's objections to the Carrier's proposed agreement, the Referee finds that the Carrier's Section 6(b) reference to Julian date as a basis for "breaking the tie" when two employees have the same seniority date is a fair procedure. Using birth date, without the year of birth, essentially yields a random number which is totally unbiased. Using the year of birth, as

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<sup>18</sup>CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc., Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995) slip op. at 15.

suggested by the TCU, may expose the Carrier to liability under age discrimination laws. Therefore, such a provision would not be appropriate.

With respect to the TCU's request that dismissal allowances under a plan that permits an employee to maintain insurance coverage should not be reduced by \$500 per month, the Referee finds he has no authority to grant the relief sought by the TCU. Even with the \$500 per month reduction, the allowance to be paid is an enhancement to the benefits required under *New York Dock*. To eliminate the reduction would effectively further enhance the benefit. The TCU has not shown the Referee has the authority to grant any protective benefits above and beyond those required by *New York Dock*. Accordingly, the TCU's request must be denied.

**Award:** To the extent it is consistent with the above Findings, the Implementing Agreement proposed by the Carrier on March 26, 1996, with agreed upon modifications, provides an appropriate basis for the selection of forces made necessary by the transaction described in Carrier's notice of January 23, 1996. The issue of prior rights for IBEW represented employees is remanded to Carrier and the IBEW. The Referee retains jurisdiction over this issue and either party may invoke arbitration after sixty days following the date of this Award.

  
Barry E. Simon, Referee

Dated: April 14, 1997  
Arlington Heights, Illinois