

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 32760 (SUB NO. 45)

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

(Arbitration Review)

**OPPOSITION OF BROTHERHOOD OF LOCOMOTIVE
ENGINEERS AND TRAINMEN TO APPEAL
FROM ARBITRATION AWARD**

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF FACTS.....	2
Background.....	3
UP’s Hub Restructuring.....	6
UP’s 2006 Notice To Establish ID Service in the Houston Hub.....	8
Prior Related Disputes.....	10
The Kenis Award.....	11
The Binau Award.....	14
The Perkovich Award.....	15
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	17
I. This Board Lacks Jurisdiction Because UP’s Right to Seek Review of the Perkovich Award Lies Exclusively Under the Railway Labor Act.....	17
A. The Parties Elected to Proceed Under the Arbitration Procedures Established in the Railway Labor Act.....	18
B. STB Should Decline to Exercise Jurisdiction to Resolve this Post Merger Dispute.....	25
II. UP’s Appeal Does Not Raise Recurring or Otherwise Significant Issues of General Importance.....	28
III. Arbitrator Perkovich’s Award Is Soundly Based on the HHMIA and Article IX, and is thus Free of Egregious Error.....	36
A. Standard of Review.....	36
B. Arbitrator Perkovich’s Award is Based on a Straightforward and Rational Interpretation of the Parties’ Agreements.....	38
C. Arbitrator Perkovich Properly Concluded that the Relevant Language of the HHMIA was Identical to the Agreements Before Arbitrator Kenis, and Distinct From Language in the Los Angeles Agreement Before Arbitrator Binau.....	40

	Page
D. UP's Attempt to Challenge the Kenis Award Through This Proceeding is Improper.	43
E. There is No Past Practice Supporting UP's Position.	47
F. UP Cannot Escape from the Terms of the Hub Agreements it Negotiated Based on General Policy Considerations.	51
Conclusion.	52

TABLE OF AUTHORITIES

Caselaw

	Page
<i>Andrews v. Louisville & Nashville R. Co.</i> 406 U.S. 320 (1972).....	17-18
<i>Brotherhood of Locomotive Engineers v. Interstate Commerce Comm'n</i> 885 F.2d 446 (8th Cir. 1989).....	23-24, 41
<i>Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.</i> 500 F.3d 591 (7th Cir. 2007).....	14, 34, 43
<i>Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.</i> 2006 WL 2191967 (N.D.Ill. 2006).....	14
<i>CSX Transp., Inc. v. Transp. Communications Int'l Union</i> 413 F.Supp.2d 553 (D.Md. 2006) <i>aff'd on other grounds,</i> <i>CSX Transp., Inc. v. Transp. Communications Int'l Union</i> 480 F.3d 678 (4th Cir. 2007).....	20-22, 26-27
<i>Loveless v. Eastern Airlines, Inc.</i> 681 F.2d 1272 (11th Cir. 1982).....	36-37
<i>Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n</i> 499 U.S. 117 (1991).....	21
<i>Railway Labor Executives' Ass'n v. United States</i> 987 F.2d 806 (D.C. Cir. 1993).....	38
<i>Union Pacific R.R. Co. v. Price</i> 360 U.S. 601 (1959).....	17
<i>Union Pacific v. Sheehan</i> 439 U.S. 89 (1978).....	18
<i>United Steelworkers v. American Mfg. Co.</i> 363 U.S. 564 (1960).....	37
<i>United Steelworkers v. Enterprise Wheel & Car Corp.</i> 363 U.S. 593 (1960).....	37

	Page
<i>United Steelworkers v. Warrior & Gulf Navigation Co.</i> 363 U.S. 574 (1960).....	37
<i>United Transp. Union v. St. Paul Depot Co.</i> 434 F.2d 220 (8th Cir. 1970) <i>cert. denied</i> , 401 U.S. 975 (1971).	47, 50

ICC/STB Decisions

<i>American Train Dispatchers Ass'n v. CSX Transp. Inc.</i> Finance Docket No. 28905 (Sub-No. 24) 9 I.C.C.2d 1127 (1993).	30-32, 36, 40
<i>Burlington Northern Inc. and Burlington Northern R.R. Co. - Control and Merger - Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. Co.</i> Finance Docket No. 32549 (Sub-No. 23) (2002).....	25
<i>Chicago & N.W. Transp. Co.-Abandonment</i> 3 I.C.C.2d 729 (1987) <i>aff'd sub nom. International Bhd. of Elec. Workers v. ICC</i> 862 F.2d 330 (D.C. Cir. 1988).....	passim
<i>CSX Corp. -Control- Chessie Sys., Inc.</i> 1995 WL 717122 (I.C.C. 1995).....	50-51
<i>Delaware & Hudson Ry. Co.-Lease & Trackage Rights Exemption- Springfield Terminal Ry. Co.</i> 8 I.C.C.2d 839 (1992).	26-28, 32
<i>Delaware and Hudson Co. - Lease Trackage Rights - Springfield Terminal Ry. Co.</i> Finance Docket No. 30965 (Sub-No. 4), 1994 WL 464886 (I.C.C. 1994).....	29-30
<i>Grand Trunk Western R.R. Co. - Merger - Detroit and Toledo Short Line R.R. Co.</i> Finance Docket No. 29709 (Sub-No. 1) 7 I.C.C.2d 1038 (1991).	24-25
<i>Mendocino Coast Ry.-Lease and Operate-California Western R.R.</i> 354 I.C.C. 732 (1978), <i>modified</i> , 360 I.C.C. 653 (1980) <i>aff'd sub nom. Railway Labor Executives' Ass'n v. United States</i> 675 F.2d 1248 (D.C. Cir.1982).	27, 32

	Page
<i>New York Dock Ry. - Control - Brooklyn Eastern Dist.</i> 360 I.C.C. 60, <i>aff'd sub nom,</i> <i>New York Dock Ry. v. United States</i> 609 F.2d 83 (2nd Cir. 1979).....	passim
<i>Oregon Short Line R. Co. -Abandonment- Goshen</i> 360 I.C.C. 91 (1979).	37
<i>Union Pacific Corp. - Control and Merger - Southern Pacific Rail Corp.</i> Finance Docket 32760 (Sub-No. 43) (S.T.B. 2005).	13, 43
<i>Union Pacific Corp. - Control and Merger - Southern Pacific Rail Corp.</i> Finance Docket 32760 (Sub-No. 42) (S.T.B. 2006).	42
<i>Union Pacific Corp. - Control and Merger - Southern Pacific Transp. Co.</i> 1 S.T.B. 233 (1996).	6
<i>USX Corp. - Control Exemption - Transtar, Inc.</i> STB Finance Docket No. 33942 (Sub-No. 1) (S.T.B. 2002).....	42
<i>Wisconsin Central Ltd. - Purchase Exemption - Soo Line R.R. Co.</i> Finance Docket No. 31922 (Sub-No. 1) 1995 WL 226035 (I.C.C. 1995).....	31-32

Arbitration Awards

<i>BLE and UP, Art. 1, § 11 Committee</i> I.C.C. Finance Docket No. 32760 (LaRocco, 2001).	35
<i>BLE v. UP, Art. I, § 11 Committee</i> Case No. 1, Award No. 1 (LaRocco, 2003).....	49
<i>Celanese Corp. of America</i> 24 LA 168, 172 (Justin, 1954).....	48
<i>Grand Haven Stamped Prods. Co.</i> 107 LA 131 (Daniel, 1996)	48
<i>Kansas City Power & Light Co.</i> 105 LA 518 (Berger, 1995).	48

	Page
<i>Lake Erie Screw Corp.</i> 108 LA 15 (Feldman, 1997).....	48

Statutes and Regulations

Hours of Service Act 49 U.S.C. § 21102.	7
Interstate Commerce Act 49 U.S.C. § 11321(a).	201
Railway Labor Act 45 U.S.C. §153.....	passim
45 U.S.C. §153, First (q) and Second.	2, 17, 23, 25

OTHER

Elkouri & Elkouri, <i>How Arbitration Works</i> (6th Ed., 2003).	47-48
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INTRODUCTION

On June 7, 2006, Union Pacific Railroad Company (“UP”) served notice on the Brotherhood of Locomotive Engineers and Trainmen, General Committee of Adjustment (Union Pacific-Southern Region) (“BLET GCA”) of its intent to establish new interdivisional (“ID”) service from its operating hub in Houston Texas, pursuant to Article IX of the May 19, 1986 National Agreement between the Brotherhood of Locomotive Engineers¹ and the nation’s Class I rail carriers, including UP (“1986 National Agreement”), governing ID Service. Although BLET GCA engaged in discussions with UP over this proposal, the union steadfastly maintained that UP could not impose ID service as it sought under the 1986 National Agreement. Because UP’s proposal conflicted with ID service previously established in Houston under the terms of an implementing agreement reached by the parties in 1997 establishing the Houston Hub -- referred to as the Houston Hub Merger Implementing Agreement (“HHMIA”) -- UP was precluded from instituting its proposal without the agreement of the union. When the parties were unable to reach agreement over the terms by which UP would implement the proposed ID service, UP asked the National Mediation Board to appoint a neutral to decide the dispute pursuant to the dispute resolution procedures set forth in Article IX, Section 4 of the 1986 National Agreement. In turn, the NMB established Arbitration Board 589 and appointed Arbitrator Robert Perkovich to serve as the neutral member of the Board. Arbitrator Perkovich sustained BLET GCA’s position, concluding that the carrier’s ID service proposal conflicted with the HHMIA, and was therefore not procedurally proper under the 1986 National Agreement.

¹ In 2004, the Brotherhood of Locomotive Engineers (“BLE”) became the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters (“BLET”).

UP has now appealed Arbitrator Perkovich's award to this Board, arguing that the arbitrator was wrong and that the carrier is entitled under Article IX of the 1986 National Agreement to institute new ID service.² This Board, however, lacks jurisdiction to review the Perkovich Award, which was issued under Section 3 of the RLA, 45 U.S.C. § 153. The proper and exclusive forum which may entertain review of the Perkovich Award is a federal district court pursuant to 45 U.S.C. §153, First (q) and Second.

Moreover, even assuming this Board possesses jurisdiction to entertain UP's appeal, there are no "recurring or otherwise significant issues of general importance" meriting review by the Board. Finally, it is clear that Arbitrator Perkovich did nothing more than interpret the relevant agreements between the parties, and sided with BLET's position. While UP may disagree with that interpretation, it cannot establish that Perkovich's award suffers from any "egregious error." As such, the STB should decline to review that award.

STATEMENT OF FACTS

UP initiated this dispute when, by letter dated June 7, 2006 (UP Ex. 53), it notified BLET GCA of its "intent to establish new ID unassigned (pool) freight service with a home terminal at Houston, and away-from home terminals at Angleton, Freeport or Bloomington, Texas." UP asserted a unilateral right to implement such ID service pursuant to Article VIII of the 1971 National Agreement with the BLE ("1971 National Agreement") and Article IX of the 1986 Award of Arbitration Board No. 458 ("the 1986 National Agreement").

² Along with an Appeal Brief, UP has filed a two volume Appendix of Exhibits, which we will cite to as "UP Ex. ____." We will cite to additional exhibits attached hereto as "BLET GCA Ex. ____."

Background

For decades, carriers and the BLET have engaged in disputes concerning the ability of carriers to establish and adjust ID service. Whereas carriers in general have sought unilateral discretion to do so, BLET has sought a voice in such determinations to protect its members by ensuring that the carrier's profit-driven motivations for establishing ID service are not achieved by overriding the existing, bargained for interests of those members.

The UP and the operating craft unions are no strangers to such disputes. In 1950, Presidential Emergency Board No. 81 was established to investigate a rules controversy between several carriers and employees represented by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. On June 15, 1950, PEB No. 81 submitted its report and recommendations to President Harry S. Truman, excerpts of which are attached as BLET GCA Ex. 1. Within that report, the PEB included the carriers' proposal with respect to its right to establish ID service, which vested the carriers with great discretion:

The Carrier shall have the right to establish interdivisional, interseniority district, intra-divisional and intra-district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turnaround basis and through established crew terminals....

Id. at p. 111.³

The Presidential Emergency Board ultimately recommended that the carriers and the unions negotiate revisions in rules to permit interdivisional runs. This resulted in a negotiated agreement between BLE and the Eastern, Western, and Southeastern Carriers' Conference Committee ("the 1952 Agreement"), which provided a more restrictive right than the carriers had

³ Pagination is from the original report of PEB No. 81.

sought by eliminating the Carrier’s proposed language allowing for the establishment of interdivisional runs “in assigned or unassigned [service] (including extra service).” The Agreement instead provided, at Article IV, that carriers may establish “interdivisional... runs in passenger or freight service” by serving notice on BLE, negotiating in good faith, and failing successful negotiations, invoking the services of the National Mediation Board. UP Ex. 26. If mediation before the NMB was unsuccessful, the parties agreed that a National Committee would resolve the dispute under the Railway Labor Act. *Id.*

The parties then negotiated an agreement in 1971 (“1971 National Agreement”) that provided, at Article VIII, for mandatory arbitration in the event that parties to proposed ID service cannot agree to the terms by which that service will be instituted. UP Ex. 25. Moreover, the parties also amended the 1952 Agreement to define UP’s right to amend existing switching limits. That provision, Article II, 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.

Id.

In 1985, after the carriers and BLE were unable to reach agreement on the terms of a new national agreement, the parties agreed to final and binding arbitration, resulting in Arbitration Award No. 458, which became the 1986 National Agreement. Article IX of that agreement – “Interdivisional Service” – states in relevant part:

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 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.

UP Ex. 24.⁴

Article X of the 1991 BLE National Agreement added the following language as Section 4(b) of Article IX of the 1986 National Agreement:

The carrier and the organization mutually commit themselves to the expedited processing of negotiations concerning interdivisional runs, including those involving running through home terminals, and mutually commit themselves to request the prompt appointment by the National Mediation Board of an arbitrator when agreement cannot be reached.

UP Ex. 27.

⁴ All references herein to "interdivisional service" encompasses interdivisional, interseniority district, intradivisional and/or intraseniority district service.

UP's Hub Restructuring

In August 1996, the STB approved the common control and merger of the rail carriers controlled by Union Pacific Corporation (Union Pacific Railroad Company and Missouri Pacific Railroad Company) and the rail carriers controlled by Southern Pacific Rail Corporation (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company) in Finance Docket 32760 (Sub-No. 44). *Union Pacific Corp. - Control and Merger - Southern Pacific Transp. Co.*, 1 S.T.B. 233 (1996). The Board conditioned its approval of this merger by imposing the labor protective conditions set forth in *New York Dock Ry. - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60, *aff'd sub nom, New York Dock Ry. v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("*New York Dock*").

Following the merger, UP converted its operations to a "hub" system, creating a number of "hubs" across its system consolidating particular former train lines and origination and destination points. Per the requirements of *New York Dock*, UP negotiated implementing agreements with the BLE General Committees of Adjustment corresponding with each hub being created.⁵ One such hub was established in Houston, Texas. UP and the BLET committees negotiated three implementing agreements to cover the new Houston Hub operations -- the Houston Hub Standby Seniority Merger Implementing Agreement, the Merger Implementing

⁵ BLET General Committees of Adjustment have jurisdiction along former railroad property lines. Consequently, UP negotiates different implementing agreements with different GCAs dependent on the territory the implementing agreement is to cover.

Agreement for Houston Hub Zones 1 and 2, and the Merger Implementing Agreement for Houston Hub Zones 3, 4, and 5.⁶

Under the HHMIA, crews departing from Houston would run to a destination and return to Houston. If a crew was not able to return to Houston before exceeding its maximum hours of service as set forth in the Hours of Service Act, 49 U.S.C. § 21102, the carrier is obligated to transport the crew members back to Houston pursuant to existing collective bargaining agreements, in which case a second crew would be dispatched to continue the run. Upon a crew's return to Houston, existing agreements required a crew change. In other words, a crew could not run through the Houston terminal in order to reach a further destination without a crew change or additional pay. Existing agreements also imposed additional requirements on each run, such as limiting to three the number of moves permitted at a terminal or intermediate point, requiring the carrier to compensate engineers for the actual miles that service was performed, and providing that crews would work on a "first-in, first-out" basis. For example, UP could run a crew from Houston to Angleton or Freeport in turnaround service, or Houston to Bloomington/Victoria, Texas, laying over for a return trip to Houston. If the crew exceeded its hours of service on the return trip to Houston, UP would dispatch a replacement crew and transport the expired crew back to Houston.

In Article II.A. of the HHMIA ("Applicable Agreements"), the parties agreed that the terms of the HHMIA would supersede any conflicting terms in then-existing agreements:

All engineers and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect

⁶ Hereafter, unless otherwise specified, all references to the "HHMIA" are to the Merger Implementing Agreement for Zones 3, 4, and 5.

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 conflict arises, the specific provisions of this Agreement shall prevail.* None of the provisions of these agreements are retroactive.

UP Ex. 6, p. 11 (emphasis added).

The HHMIA also contained a Savings Clause (Article IV.A.) that provides “[t]he provisions of the applicable Schedule Agreement will apply *unless specifically modified herein.*”

Emphasis added. *Id.* at p. 16.

UP’s 2006 Notice To Establish ID Service in the Houston Hub

Although UP agreed to these provisions in consideration for BLET’s agreement to enter into the HHMIA, the carrier sought to override these provisions through its June 7, 2006 proposal to establish ID service within the Houston Hub. Specifically, the ID service UP proposed would run from Houston to points South, including Angleton, Freeport, and Bloomington, as well as North of Houston to Spring, Texas. The significant changes that UP proposed from existing service included, but were not limited to, the following:

- Existing pools that operate between (1) Houston and Freeport, (2) Houston and Angleton, and (3) Houston and Bloomington, would be eliminated and replaced with a single pool that could be called on to operate between Houston and any of these points, which would each become away-from-home terminals, “via any route, trackage or any combination of routes and trackage.” Article I, Section 2.A.2. and 2.B.2. UP could rely on this language to remove existing restrictions, such as the limitation of three moves at terminals and intermediate points.
- The requirement of a crew change in Houston would be eliminated, and crews could be required to run through Houston when coming from or going to Spring, Texas (or any point between Houston and Spring). Article I, Section 2.A.1., 2.B.1, and 2.B.3.

- Crews would also perform turnaround service out of the home or away-from-home terminals to any location on the territory, including multiple trips, without existing mileage limitations provided in Article 4(k) of the BLET UP Southern Region Agreement, and will be paid actual miles worked with a minimum of a basic day. Article I, Section 2.E.
- Crews would no longer necessarily receive their train at Houston or an away-from-home terminal, but could instead be transported to any location within the territory to receive their train, including Spring, Texas (or any point between Houston and Spring). Article I, Section 2.A.1. and 2.B.1.
- UP would eliminate the first-in, first-out order in which employees are called into service pursuant to Article 26(d) of the Schedule Rules, and be permitted to call employees at both the home and away-from-home terminals into service at any other location, “irrespective of other employee standings on other away-from-home terminal boards.” Article I, Section 2.D.1.
- Employees would be paid for certain trips originating from away-from-home terminals based on the actual mileage of the runs involved. Employees who are transported from one away-from-home terminal to another in order to receive their train would therefore be paid for less miles than actually traveled because the highway mileage exceeds rail mileage traveled. Article I, Section 3.B.⁷

In response to UP’s Notice, BLET GCA agreed to engage in discussions with the carrier in an attempt to reach a mutually acceptable agreement with respect to the proposed ID service. The union, however, did so while steadfastly maintaining that it was not obligated to engage in such discussions because the HHMIA, as discussed below, did not give UP the right to establish the ID service it proposed. The parties met to discuss UP’s proposal on July 17 and 26, August 14, and September 7, 2006, but were unable to reach agreement.

⁷ On page 24 of its submission to Arbitrator Perkovich, BLET GCA provided an example of how this would occur. An engineer that goes on duty in Bloomington, is deadheaded to Freeport (122 highway miles), receives his train and runs to Spring (97 rail miles), and deadheads back to Houston (24 miles) travels a total of 243 miles, but is only paid 197 miles under UP’s table on page 4 of its proposal, shorting each crew member 46 miles. UP Ex. 54, p. 24.

As a result, on September 29, 2006, UP's Director of Labor Relations S.F. Boone, wrote to BLET GCA's General Chairman Gil Gore to advise Gore that the carrier intended to pursue the matter to arbitration. On December 4, 2006, Boone wrote to Gore and provided a proposed Public Law Board agreement that would govern the arbitration proceeding. BLET GCA Ex. 2. On January 5, 2007, Boone wrote to Gore again with another proposed agreement. BLET GCA Ex. 3. On January 22, 2007, Boone wrote to the NMB, requesting the appointment of a neutral pursuant to Article IX, Section 4 of the 1986 National Agreement to decide the dispute over UP's June 7, 2006 notice to BLET. BLET GCA Ex. 4. On January 31, 2007, the NMB advised the parties that it had established Arbitration Board 589 to hear the dispute, and appointed Arbitrator Robert Perkovich to serve as the neutral member and Chairman of the Board. BLET GCA Ex. 5. The parties filed written submissions and presented oral argument before Arbitrator Perkovich at a hearing on June 18, 2007.

Prior Related Disputes

Before reviewing the award of Arbitration Board 589, it is necessary to examine several prior disputes between UP and BLET involving the interplay between existing collective bargaining agreements and hub merger implementing agreements. In one such case, Arbitration Board 581, chaired by Arbitrator Ann Kenis, held that the merger implementing agreements that established the North Little Rock/Pine Bluff, Kansas City, and St. Louis hubs precluded UP from serving a notice pursuant to Article IX of the 1986 National Agreement to establish ID service that conflicted with the respective hub agreement. UP Ex. 49 ("Kenis Award"). In a subsequent decision, Arbitration Board 590, chaired by Arbitrator John Binau, held that the Los Angeles Hub Merger Implementing Agreement ("LAHMIA") language was substantially different than

the language in the hub agreement reviewed by Kenis and did not preclude UP from serving notice pursuant to Article II of the 1971 National Agreement to extending switching limits in the LA Hub. UP Ex. 52 (“Binau Award”).

The Kenis Award

These are the facts underlying the Kenis Award: On May 16, 2003, UP served notice on the BLET, General Committee of Adjustment (Union Pacific-Central Region), pursuant to Article IX of the 1986 National Agreement, of the railroad’s intent to establish new ID service between North Little Rock/Pine Bluff and Memphis. BLET’s General Committee objected, arguing that UP’s notice was defective because the proposed ID service conflicted with the North Little Rock/Pine Bluff hub merger implementing agreement (“North Little Rock/Pine Bluff Hub Agreement”). When the parties were unable to reach agreement on UP’s proposal, they progressed the dispute to arbitration. UP then served notice, on August 29, 2003, of its intent to also establish ID service in both the Kansas City and St. Louis hubs, which the same BLET GCA argued were defective under the applicable hub merger implementing agreements in those areas (“Kansas City Hub Agreement” and “St. Louis Hub Agreement”). The parties were unable to agree on whether the disputes should be resolved through the arbitration procedures in Article IX, Section 4 of the 1986 National Agreement, or under the *New York Dock* conditions. As a result, Arbitrator Kenis was designated to adjudicate both matters.

Kenis found that these disputes turned on several provisions that were identical in the three hub merger implementing agreements. The agreements each contained a Savings Clause that provided “[t]he provisions of the applicable Schedule Agreement will apply unless

specifically modified herein.”⁸ Each agreement also contained an article entitled “Applicable Agreements” that provided “[a]ll engineers and assignments in the territories comprehended by this Implementing Agreement will work under the Collective Bargaining Agreement currently in effect.... Where conflict arises, the specific provisions of this Agreement shall prevail....”⁹ Kenis found that based on the Savings Clause, UP did not completely extinguish its rights under Article IX of the 1986 National Agreement. However, based on the “Applicable Agreements” Article, those rights were not “unfettered.” Kenis Award, 22. Kenis explained that these provisions are “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.

Id. at 20. Kenis went on to find that a side letter incorporated into the North Little Rock/Pine Bluff Hub Agreement further supported her conclusion:

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.”

⁸ Compare, UP Ex. 10 (North Little Rock/Pine Bluff Hub Agreement, Art. VIII.A., p. 24), with UP Ex. 7 (Kansas City Hub Agreement, Art. VIII.A., p. 24), and UP Ex. 18 (St. Louis Hub Agreement, Art. VIII.A., p. 26).

⁹ Compare, UP Ex. 10 (North Little Rock/Pine Bluff Hub Agreement, Art. IV., p. 19), with UP Ex. 7 (Kansas City Hub Agreement, Art. IV.A., p. 19), and UP Ex. 18 (St. Louis Hub Agreement, Art. IV.A., p. 21).

Id. at 23.

Kenis also rejected UP's argument that there was a past practice establishing that it could implement ID service in territories covered by a merger implementing agreement without protest by the union. She held that "the parties are entitled to insist on the enforcement of the plain and unambiguous provisions of an agreement, even when a contrary practice exists." *Id.*

Accordingly, Arbitration Board No. 581 held that "the New York Dock UP/SP merger Agreement for the North Little Rock/Pine Bluff hub bar[red] Union Pacific Railroad Company from exercising its right to establish ID service pursuant to Article IX of the May 16, 1986 BLE National Agreement." Kenis Award, 26.¹⁰

UP sought this Board's review of the Kenis Award but the carrier failed to file a timely appeal. *Union Pacific Corp. - Control and Merger - Southern Pacific Rail Corp.*, Finance Docket 32760 (Sub-No. 43) (S.T.B. 2005). Unable to challenge the Award directly, UP attempted to narrow its reach by serving notice on the same BLET GCA (UP-Central Region) of its intent to establish a run between Kansas City and Labadie, Missouri, which was one of the runs it proposed establishing in the notice that was at issue in the Kenis Award. In response, the GCA filed a civil action in the U.S. District Court for the Northern District of Illinois seeking to enforce the Kenis Award and prevent UP from establishing this new run. The District Court found that the Kenis Award was ambiguous, because Board 581 may have concluded that UP's proposal to only establish the Kansas City to Labadie run may pass muster under the Kansas City

¹⁰ Kenis noted (fn. 3) that implementing agreements for the St. Louis and Kansas City Hubs had identical language but that Arbitration Board 581 lacked jurisdiction over UP notices to establish ID service in those hubs as there had not yet been any conferences over UP's notices, as required by the 1986 National Agreement.

Hub Agreement, and so remanded the case to the Board. *Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.*, 2006 WL 2191967 (N.D.Ill. 2006). BLET appealed that decision to the U.S. Court of Appeals for the Seventh Circuit, which rejected UP's arguments. It found that "there [was] nothing in the panel's opinion to suggest that the number of routes combined in a proposal has any bearing on whether requiring an engineer to travel more than 25 miles from his home terminal would violate the applicable Hub Merger Implementing Agreement. That would be a formula for evasion." *Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.*, 500 F.3d 591, 593 (7th Cir. 2007).

The Binau Award

On September 26, 2006, UP served notice on the BLET General Committee of Adjustment (Union Pacific – Western Lines) of its intent to extend switching limits in West Colton, California, which is within the Los Angeles Hub. UP served its notice pursuant to Article II of the 1971 National Agreement, discussed above at p. 4. BLET objected to UP's proposal, arguing that the terms of the LAHMIA foreclosed the Carrier's right to extend switching limits as proposed, and relied on the Kenis Award to support its position. When the parties could not resolve their differences, the dispute was submitted to arbitration.

Arbitrator Binau rejected the GCA's argument and distinguished this situation from the one that Kenis confronted:

The first factor [on which Binau based his decision] was that the Award rendered by Arbitration Board No. 581 or Kennis [sic] award does not support the Organization's position. It is clear from the award that Referee Kennis 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 Kenis Award with Article VI, Section C of the Los Angeles Hub Agreement clearly shows the phrase

“[W]here conflicts arise, the specific provisions of this Agreement shall prevail” is only in Article IV.A. and not in Article VI, Section C of the Los Angeles Agreement.

Binau Award, 21.

The Perkovich Award

Arbitrator Perkovich upheld the union’s position. UP Ex. 1 (“Perkovich Award”). He explained that under the HHMIA, UP operates four freight pools between Houston and Angleton/Freeport/Bloomington/Spring. Perkovich Award, 3. Because the Houston to Angleton/Freeport pool was a turnaround operation with no away-from-home terminals, crews would leave their trains at Houston or, if they exhausted their hours under the federal Hours of Service law, would be transported back to Houston by the carrier. *Id.* Further, he noted that the HHMIA prevented UP from operating between Spring and Angleton/Freeport/Bloomington without changing crews in Houston as UP proposed. *Id.* at 3. Perkovich found that UP’s ID proposal would create a single pool that would operate throughout these territories with Houston as the home terminal, and would allow UP to operate through Houston to Spring without changing crews. *Id.*

After making these findings, Perkovich began his analysis by briefly examining his authority under Article IX of the 1986 National Agreement. He determined that the question whether UP’s June 7, 2006 notice was “procedurally sound” under Article IX, Section 1, is a “threshold inquiry” which, if answered in the negative, could end his analysis without reaching the question of whether the terms and conditions proposed by UP are appropriate under Article IX, Section 2. *Id.*

With respect to this initial inquiry, Perkovich explained that each party relied on a separate arbitration award in support of their positions. BLET relied on the Kenis Award to argue that because UP's proposed ID service conflicted with the provisions of the HHMIA, UP's notice was defective. UP, on the other hand, relied on the Binau Award to argue that it was entitled to establish ID service under the HHMIA. Perkovich explained that the Board "carefully reviewed the parties' submissions and in particular the decisions of Arbitration Boards 581 and 590 [and found] that they can be reconciled and that... the decision of Arbitration Board 581 must govern this dispute." *Id.* at 3.

Perkovich found that the HHMIA contained the same "Applicable Agreements" provision that was in the agreements before Kenis – "Where conflicts arise the specific provisions of this Agreement shall prevail." HHMIA, Article II.A. He then found that "unlike the merger implementing agreements before Arbitration Board 590 [Binau], none of those in the record before us provide that 'the system and national collective bargaining agreements,...shall prevail.' In other words the [HHMIAs] are more like those relied on by Arbitration Board 581 [Kenis] rather than those relied upon by Arbitration Board 590." *Id.* at 4. Arbitrator Perkovich therefore determined to follow the Kenis Award – "a decision between these same parties on the very same property..." *Id.* He then completed his analysis by concluding that UP's June 7, 2006 notice of its intent to establish ID service did in fact conflict with the HHMIA:

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' agreement that the Hub Merger Implementing Agreements "shall prevail" we find, and we so order.

Id. at 4-5.

SUMMARY OF ARGUMENT

We show below that UP's request that this Board review the Perkovich Award should be denied. UP's right to seek review of the Award properly lies in federal court under the provisions of the Railway Labor Act. Even were this Board to find that it has jurisdiction, it should deny UP's request because the Award involves no "recurring or otherwise significant issues of general importance" as required by the Board's *Lace Curtain* standard of review. Moreover, the Award is based on a straightforward interpretation of agreements negotiated by these parties, and thus contain no egregious error or other fatal flaw warranting its vacatur.

ARGUMENT

I. This Board Lacks Jurisdiction Because UP's Right is to Seek Review of the Perkovich Award Lies Exclusively Under the Railway Labor Act.

There is no question that Arbitration Board 589 was created pursuant to Section 3, Second of the RLA. Section 3, First (q), 45 U.S.C. §153, First (q) establishes the jurisdictional basis for review of Section 3 arbitration boards:

If any...carrier...is aggrieved by any of the terms of an award or by the failure of the [Section 3 board] to include certain terms in such award, then such...carrier may file in any United States district court...a petition for review of the [board's] order....The court shall have jurisdiction to affirm the order of the [board] or to set it aside, in whole or in part, or it may remand the proceeding to the [board] for such further action as it may direct. On such review, the findings and order of the [board] shall be conclusive on the parties, except that the order of the [board] may be set aside, in whole or in part, or remanded to the [board], for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the [board] making the order.

The Section 3 arbitration process, with its judicial enforcement and review scheme in the federal courts, has been deemed the exclusive method for resolving disputes over the meaning of rail labor agreements. *Union Pacific R.R. Co. v. Price*, 360 U.S. 601, 612-615 (1959); *Andrews v.*

Louisville & Nashville R. Co., 406 U.S. 320 (1972). As the Supreme Court held in another case where a party tried unsuccessfully to add a new term into the Act, “[a] contrary conclusion would ignore the terms, purposes and legislative history of the [RLA].” *Union Pacific v. Sheehan*, 439 U.S. 89, 94 (1978).

Despite this longstanding principle of law, UP asks this Board to inject itself into what is essentially a contract interpretation dispute. And it does so only after consistently handling its dispute with BLET as if it were an RLA matter. At all times before UP petitioned this Board to review the Perkovich Award, UP treated this dispute as arising under a collective bargaining agreement that is subject to and governed by the provisions of the Railway Labor Act. UP has never before even suggested that this dispute should have been heard by a § 11 panel under *New York Dock*, or that review would lie with the STB. By its affirmative conduct, and failure to raise such arguments, UP has consented to resolve this dispute through the procedures set forth in the RLA, which provides no statutory predicate for this Board to review this award. UP has thus waived any right it may have had to utilize the dispute resolution procedures set forth in the *New York Dock* conditions.

A. The Parties Elected to Proceed Under the Arbitration Procedures Established in the Railway Labor Act.

By notice dated June 7, 2006, UP advised the BLET of its intent to establish ID service in its Houston Hub “Pursuant to Article IX ‘Interdivisional Service’ of the May 19, 1986 BLE National Agreement (Arbitration Award No. 458).” UP Ex. 53. Section 4(a) of that provision states that “[i]n the event the carrier and the organization cannot agree on the matters provided for in Section 1 [“Notice”] and the other terms and conditions referred to in Section 2

[“Condition”], the parties agree that such dispute shall be submitted to arbitration *under the Railway Labor Act, as amended...*” UP Ex. 24 (emphasis added). The carrier did not reference either the HHMIA or the *New York Dock* conditions associated with the HHMIA.

Following service of this Notice, the parties entered into voluntary negotiations in an attempt to agree upon terms governing UP’s proposed service changes. During those discussions, BLET made UP aware of its position that UP could not unilaterally implement the proposed ID service under Article IX of the 1986 National Agreement because the proposed service conflicted with the terms of the HHMIA. Unable to reach agreement, in letters dated December 4, 2006 and January 5, 2007, UP advised BLET of its intent to progress the dispute to arbitration pursuant to Article IX of the 1986 National Agreement – that is, pursuant to § 3, Second of the RLA. BLET GCA Exs. 3, 4. UP asked BLET to enter into an arbitration agreement to resolve this dispute “Pursuant to Section 3, Second of the Railway Labor Act, as amended by Public Law 89-456, a Public Law Board (hereinafter called “Board”) is hereby established.” *Id.* The draft agreements further provided, at paragraph (j), that “[t]he awards [issued by the Board] shall be final and binding upon both parties to the dispute, subject to the provisions of the Railway Labor Act...” *Id.*

UP did not ask to invoke arbitration under the *New York Dock* protective conditions in the instant dispute. This is particularly noteworthy given that when the parties progressed the dispute over the North Little Rock/Pine Bluff Agreement to Arbitrator Kenis, by contrast, Kenis was appointed to oversee *both* a *New York Dock* arbitration panel as well as an adjustment board

under § 3, Second of the RLA.¹¹ Based on the totality of the carrier's actions, and its failure to previously argue either that this dispute should have been resolved by a *New York Dock* panel or that review would be before the STB, UP has waived its right to now argue that this dispute should be resolved in any manner other than the dispute resolution procedures of the RLA.

In *CSX Transp., Inc. v. Transp. Communications Int'l Union*, 413 F.Supp.2d 553 (D.Md. 2006), *aff'd on other grounds*, *CSX Transp., Inc. v. Transp. Communications Int'l Union*, 480 F.3d 678 (4th Cir. 2007), the District Court provided a detailed explanation supporting its conclusion that a carrier may be deemed to have waived its right to pursue arbitration through the procedures set forth in *New York Dock*, as opposed to under the RLA. That case arose following CSXT's consolidation of its clerical functions performed at service centers throughout its system to a single location in Jacksonville, Florida, which was accomplished pursuant to a *New York Dock* implementing agreement. During the implementation of that consolidation, a number of disputes arose regarding work assignments, and whether or not clerks at the Jacksonville center, covered by the TCU-SCL agreement, were performing work that still belonged to clerks who remained at the various service centers and were covered by agreements that remained in place at those locations.

The parties submitted a first round of disputes to a Public Law Board established pursuant to § 3, Second of the RLA. That PLB sustained TCU's claims (the Dennis Awards). CSXT did not seek review of those awards. TCU then filed additional claims under the TCU-SCL

¹¹ While UP's motivation for not progressing the instant dispute to a *New York Dock* arbitration committee cannot be known, its actions raise the specter that it strategically declined to do so in hopes of achieving a better result than it did before the *New York Dock* Section 11 committee Arbitrator Kenis chaired.

agreement, which were presented to the Third Division of the NRAB, to which both parties presented written submissions and oral argument. After the NRAB announced that the majority of the claims were sustained (the Benn Awards), the carrier member of the panel filed a dissent, arguing for the first time that the disputes should have been handled pursuant to the *New York Dock* provisions, such that the NRAB lacked jurisdiction to resolve the disputes. TCU then submitted another claim to the NRAB Third Division. This time the NRAB sustained the claim over CSXT's objection that the Board lacked jurisdiction to resolve the dispute (the Wesman Award).

CSXT petitioned the federal court in two separate cases (later consolidated) to vacate the Benn and Wesman Awards. CSXT argued that the question whether the disputes should have been resolved by a *NYD* panel or a panel established under § 3 of the RLA was an issue of subject matter jurisdiction that could not be waived and could be raised at any time. The Court rejected both arguments.

The Court explained that the Interstate Commerce Act (49 U.S.C. § 11321(a)) exempted carriers from antitrust and other laws as is necessary to allow a carrier to carry out an ICC-approved transaction. The "other laws" have been found to include the RLA, as well as collective bargaining agreements made pursuant to the RLA. *Id.* at 563 (citing *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 133 (1991)). Whether or not the NRAB has jurisdiction to resolve a dispute, however, is not, as CSXT argued, a question of its subject matter jurisdiction that may not be waived, but rather more akin to personal jurisdiction or whether the carrier is immune, under the ICA, from complying with the RLA or existing collective bargaining agreements, each of which can be waived. The Court then concluded that

CSXT had waived its right to argue that the NRAB lacked jurisdiction to resolve the disputes in the Benn and Wesman Awards:

CSXT's conduct in invoking the power of the NRAB to resolve these claims, and its voluntary participation in the claim initiated by TCU, is entirely inconsistent with an assertion that it is immune from complying with the CBAs in issue. [With respect to the Wesman Award], CSXT did not raise the jurisdictional issue below at all, and [with respect to the Benn Award], raised the issue only after the entire proceeding was complete, but for a decision by the arbitrator. In short, CSXT waived any immunity it might have enjoyed.

413 F.Supp.2d at 667. That same proposition applies here.

In the instant dispute, UP proposed to institute ID service under Article IX of the 1986 National Agreement which expressly provides that disputes arising thereunder “shall be submitted to arbitration *under the Railway Labor Act, as amended....*” UP Ex. 24. When a dispute arose, UP did just that – it invoked arbitration “pursuant to § 3, Second of the RLA,” as set forth in the Arbitration Agreements it presented to BLET. BLET GCA Exs. 3, 4. UP then asked the NMB to appoint a neutral member to chair an arbitration panel under the RLA. When that panel - Board 589 - was established, UP submitted a written submission and oral argument. Because UP chose to arbitrate this dispute under the RLA, review of the Perkovich Award lies with the federal court. Only after Perkovich ruled against UP did UP change course and implicitly attempt to exert immunity from the dispute resolution procedure of the RLA by seeking review from the STB. But just as the District Court in *CSX Transp., Inc. v. Transp. Communications Int’l Union*, 413 F.Supp.2d 667, held that CSXT had waived any immunity it enjoyed from the RLA, so has UP. In short, UP arbitrated this dispute under the RLA and is now bound to the RLA’s requirement that a party “aggrieved by any of the terms of an award” must

seek review in federal court pursuant to § 3, First (q). 45 U.S.C. § 153, First (q). The federal courts, not this agency, is the exclusive forum to hear UP's appeal.

The Board's lack of jurisdiction is confirmed by the decision of the U.S. Court of Appeals in *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 885 F.2d 446 (8th Cir. 1989). There, the parties had agreed in a merger protective agreement ("MPA") prior to ICC approval of the Burlington Northern-St. Louis-San Francisco Railway merger that disputes "with respect to interpretation, application or enforcement of any provision of this Agreement" would be submitted to an arbitration board established under the provision of Section 3, Second of the RLA. The ICC accepted the MPA as a fair arrangement protective of employee interests as part of its approval of the merger. BN and BLE later established such a board pursuant to the MPA to resolve a dispute over an employee's entitlement to protective benefits. When the board rendered an award favorable to the union, BN sought ICC review. The Commission granted review and vacated the award. The Court of Appeals set aside the ICC's decision, holding that the Commission did not have jurisdiction to review the award.¹²

The Court explained that even though the Commission approved the MPA as a condition of the merger, the MPA itself "specifically adopt[ed] the procedures of the RLA, which, in turn, vest jurisdiction to review arbitral awards in the district courts. The ICC cannot now alter the terms of the parties' negotiated agreement." 885 F.2d at 449. This same proposition applies with even greater force here, as UP's proposed arbitration agreements to create the arbitration board (the 1986 BLE Agreement) and the arbitration itself were all the product of RLA

¹² The Court also held that even if the Commission had jurisdiction, it violated the *Lace Curtain* standards by substituting its opinion for that of the arbitrator on a question of fact.

bargaining outside the confines of an ICA or ICCTA transaction. The issue before the arbitrator here was whether the carrier could rely on the substantive terms of that RLA agreement to undertake a new ID run without the union's agreement. The fact that the arbitrator was required to consider the union's defense that the HHMIA superseded the RLA agreement so as to restrict UP's right to establish the new run does not change the fact that the question before the arbitrator was whether UP had the right under the RLA agreement to do what it wanted. The arbitrator answered that question in the negative and his award, like the award in *BLE v. ICC*, is subject to review only in the federal courts under RLA standards.

UP relies on two decisions that it asserts warrant this Board's determination that it possesses jurisdiction, despite the requirements of the RLA. Neither is convincing. *Grand Trunk Western R.R. Co. - Merger - Detroit and Toledo Short Line R.R. Co.*, Finance Docket No. 29709 (Sub-No. 1), 7 I.C.C.2d 1038 (1991), presented a question of benefits entitlement under an implementing agreement that was answered by an RLA Section 3, Second Public Law Board. Specifically, GTW and the UTU disagreed over whether employees hired subsequent to the effective dates of the merger and the implementing agreement were entitled to certain equity job assignments which were included in the labor protective conditions. In their implementing agreement, the parties specifically provided for a PLB dispute resolution process to resolve "claims and grievances with respect to the interpretation or application of this [implementing] Agreement." When GTW was dissatisfied with the PLB decision, it sought review by this Board. This Board found it had jurisdiction because the PLB was "established to consider a New York Dock issue... [so it] would properly operate under New York Dock procedures regardless of what it called itself." *Id.* at 1043. The *GTW* case presented a pure protective benefits dispute. "[T]he

implementing agreements in the main were intended to implement the New York Dock procedures, and copies of the New York Dock conditions are appended to each agreement and incorporated by reference.” *Id.* at 1042. Unlike the instant case where the force and effect of a collective bargaining agreement is at the heart of the dispute, the *GTW* case presented a simple matter of determining benefits eligibility under the implementing agreement alone. There was no CBA involvement whatsoever in that dispute.

The Board’s decision in *Burlington Northern Inc. and Burlington Northern R.R. Co. - Control and Merger - Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. Co.*, Finance Docket No. 32549 (Sub-No. 23) (2002) did not even address this jurisdictional issue. Indeed, the parties in that case chose an arbitrator selected pursuant to *New York Dock* to resolve their dispute, which involved whether their implementing agreements should include certain terms. Not surprisingly, neither party challenged the Board’s jurisdiction in those circumstances.

B. STB Should Decline to Exercise Jurisdiction to Resolve this Post Merger Dispute.

Even if this Board determines that it has the authority to assert jurisdiction over UP’s appeal, despite UP’s waiver of its right to exert immunity from the dispute resolution procedures of the RLA as described above, it should decline to entertain the appeal. In this post-merger dispute, arising years after the creation of the Houston Hub, there is simply no reason to treat this matter as anything more than a dispute over the accommodation of two negotiated contracts. Resolution of the proper interplay between the 1986 National Agreement and the HHMIA is a matter well within the authority of an arbitration panel convened under § 3, Second of the RLA. This is perfectly consistent with the fact that the STB’s jurisdiction to resolve disputes arising

under implementing agreements is neither “timeless [nor] limitless.” *Delaware & Hudson Ry. Co.-Lease & Trackage Rights Exemption-Springfield Terminal Ry. Co.*, 8 I.C.C.2d 839, 845 (1992) (“*D & H*”).

In *CSX Transp., Inc. v. Transp. Communications Int’l Union*, 480 F.3d 678 (4th Cir. 2007), the Court recognized the limited nature of the STB’s jurisdiction to resolve post merger disputes. As explained earlier (p. 20), in 1991, CSXT and TCU entered into a *New York Dock* agreement implementing CSXT’s establishment of a centralized customer service center in Jacksonville, Florida. That Agreement provided that clerical work transfers would be progressively phased in over a 36-month period ending in March 1994, and that the transferred work would be performed under what was known as the TCU-SCL Agreement. Soon thereafter, TCU alleged CSXT was wrongly assigning to employees who had not yet transferred to the customer service center work that belonged to employees who had transferred and were working under the TCU-SCL Agreement. The parties progressed a series of disputes pursuant to the TCU-SCL Agreement under RLA Section 3 arbitration procedures to a Public Law Board and the Third Division of the NRAB. CSXT filed suit to vacate the resulting awards issued by the Third Division, arguing the NRAB lacked jurisdiction because resolution of the disputes required interpretation of the Implementing Agreement. Specifically, CSXT maintained that before addressing whether the Scope Rule was violated, it was necessary to interpret the Implementing Agreement to determine whether the positions at issue had been transferred to the centralized customer service center and thus brought under the TCU-SCL Agreement. As such, according to the railroad, the disputes should have been submitted to a *New York Dock* arbitration panel, not RLA Section 3 boards.

The Court rejected CSXT's jurisdictional argument.

[T]he STB has recognized that its exclusive jurisdiction pursuant to the Interstate Commerce Act over disputes arising from approved transactions or implementing agreements may not be “timeless and limitless.” *Del. & Hudson Ry. Co.-Lease & Trackage Rights Exemption-Springfield Terminal Ry. Co.*, 8 I.C.C.2d 839, 845, 1992 WL 46807 (1992). At some point, STB jurisdiction over the interpretation of an implementing agreement ceases, and “the parties will be required to resort to the Railway Labor Act to resolve disputes arising under the collective bargaining agreement then in effect.” *Id.* at 845-46; *see also Harris [v. Union Pac. R.R.]*, 141 F.3d [740] at 744 [7th Cir. 1998] (rejecting the railroad's understanding of 49 U.S.C. § 11341 (a), the predecessor to 49 U.S.C. § 11321(a), that the STB is ‘forever in charge of all legal disputes related to a merger.’).

Id. at 684 (footnote omitted).

The Court also noted that CSXT had not argued how having the STB, rather than the NRAB, resolve the disputes in issue, was necessary to avoid “frustrat[ing] the orderly execution of the terms of the implementing agreement.” *Id.* at 685 (quoting *Del. Hudson Ry. Co.*, 8 I.C.C.2d at 845 (footnote omitted)). As such, the Court concluded that the NRAB, rather than the STB, had properly exercised jurisdiction to resolve these disputes.

In *D & H*, the ICC recognized there were limits on its jurisdiction to resolve disputes involving protective conditions. That case involved continuing attempts by the United Transportation Union (“UTU”) to insist on RLA arbitration of disputes over provisions of an arbitration award (the Harris Award) issued pursuant to the *Mendocino Coast* labor protective conditions.¹³ UTU had argued that an “incidental work rule” and a “crew consist rule” provided in pre-existing collective bargaining agreements that had been modified in the Harris Award continued to apply. Although the Commission ordered that further disputes be resolved under

¹³ *Mendocino Coast Ry.-Lease and Operate-California Western R.R.*, 354 I.C.C. 732 (1978), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C.Cir.1982).

the arbitration provisions of the labor protective agreement, rather than the RLA, it recognized “that at some future time [its] jurisdiction [over such disputes] will cease, and the parties will be required to resort to the RLA to resolve disputes arising under the collective bargaining agreement then in effect.” *Id.* at 845-46. With respect to the Harris Award, however, the Commission asserted jurisdiction based on its findings that (1) at issue was the proper interpretation of the Harris Award; and (2) the implementing agreement there was less than two years old and thus “[t]he proximity of this dispute to the award cannot be questioned.” *Id.* at 846.

By contrast, this dispute arose nearly a decade after the implementing agreement. UP reorganized its operations into a hub and spoke system following the STB’s August 1996 approval of the UP/SP merger. To implement the reorganization in Houston, UP signed a hub agreement with BLET on April 23, 1997. UP has not, and cannot, allege that the implementation of the Houston Hub has been delayed by BLET’s objection to UP’s June 7, 2006 notice proposing to establish ID service pursuant to Article IX of the 1986 National Agreement. In this post-merger dispute, arising years after the Houston Hub was implemented, there is no sound basis for the STB to assert its discretionary jurisdiction to review the Perkovich Award. This is particularly true given that it was UP who progressed this dispute to RLA, not *NYD*, arbitration.

II. UP’s Appeal Does Not Raise Recurring or Otherwise Significant Issues of General Importance.

Under the *Lace Curtain* standard for review of an arbitration award, the ICC generally defers to an arbitration panel’s decision and limits its review to “recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions.”

Chicago & N.W. Transp. Co.-Abandonment, 3 I.C.C.2d 729, 736 (1987) (“*Lace Curtain*”), *aff’d sub nom. Int’l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C.Cir.1988). A party seeking STB review of an arbitration award bears a considerable burden in satisfying this standard. Not only must the award in question involve an issue that is not unique to agreements between two parties, it also must have an impact felt beyond that property. This generally involves a dispute over the meaning of a standardized labor protection imposed pursuant to a transaction authorized by the STB, such as the *New York Dock* conditions, as is made evident in the following decisions.

In *Delaware and Hudson Co. - Lease Trackage Rights - Springfield Terminal Ry. Co.* (“*D&H - Springfield Terminal*”), Finance Docket No. 30965 (Sub-No. 4), 1994 WL 464886 (I.C.C. 1994), the Commission agreed to review an arbitration award stemming from a dispute that arose pursuant to its approval of a series of transactions allowing Guilford Transportation Industries, Inc. (“Guilford”) to restructure its operations. This included allowing the Springfield Terminal Ry. Company (“ST”) to conduct Guilford’s rail operations, including those of the Boston and Maine Corporation (“B&M”), a Guilford subsidiary. In implementing these transactions, Guilford abolished all B&M train dispatcher positions and offered the affected employees positions as nonagreement ST train operations managers. Two of the former dispatchers refused the offered employment and filed claims for separation allowances, which the carrier denied based on its position that the employees “fail[ed] without good cause to accept a comparable position” and were thus not entitled to the allowances under Article I, section 6(b) of the Mendecino Coast conditions. *Id.* at *6, n.4.

The arbitration board (David Twomey, neutral) issued an award sustaining the claims, finding that the ST train operations manager positions were not comparable to the abolished train

dispatcher positions because although the skills and responsibilities of the two positions were comparable, the working conditions were not.

In deciding to review the award over the objection of the American Train Dispatchers Association, which represented the former B&M dispatchers, the ICC held:

We accept administrative review of this arbitration decision because it involves a dispute under the Commission's labor protective conditions imposed in D&H Lease, and raises a potentially significant issue of general importance regarding the interpretation of a labor protective condition that rarely has been addressed by the Commission. Rather than resolving any dispute about facts or evidence, arbitrator Twomey, in his decision, is interpreting the term "comparable position" in Article I, section 6(b) of the Mendocino Coast conditions. Because of the lack of a definitive Commission interpretation of the comparable employment requirement in those conditions and the paucity of arbitral decisions on the subject, it is appropriate and consistent with Lacey Curtin for the Commission to review the award under our regulations at 49 CFR 1115.8.

Id. at *4. The Commission went on to affirm the Twomey Award, concluding there was no showing of egregious error, that it did not fail to draw its essence from the labor protective conditions, or that the arbitrator exceeded the scope of his authority. *Id.* at *5.

In *American Train Dispatchers Ass'n v. CSX Transp. Inc.* ("ATDA v. CSXT"), Finance Docket No. 28905 (Sub-No. 24), 9 I.C.C.2d 1127 (1993), the Commission agreed to review an arbitration award that resolved a dispute arising out of CSXT's consolidation of its train dispatching functions following several mergers approved by the Commission and subject to the *New York Dock* protective conditions. The carrier excluded from its calculation of dispatchers' average monthly compensation "extraordinary overtime hours and associated earnings" that dispatchers received due to manpower shortages and training needs associated with the consolidation. ATDA objected and progressed the matter to an Article I, Section 11 arbitration committee. The union argued that the carrier's method of calculation violated Article I, § 5(a) of

the *New York Dock* conditions, which states a displacement allowance is to be calculated based on the “total compensation received” by the affected employee in the previous twelve months. The arbitration committee rejected ATDA’s claim based on a line of arbitral authority excluding such overtime from “total compensation,” and based on its finding that this term is “inherently ambiguous.” *Id.* at 1131. The ICC granted ATDA’s petition to review the award, agreeing with ATDA’s position that “this case is appropriate for appellate review... because of the lack of a definitive Commission interpretation of the ‘total compensation’ requirement of article I, § 5(a) and inconsistencies between arbitral decisions on the subject..” *Id.* at 1130 (footnote omitted).

In *Wisconsin Central Ltd. - Purchase Exemption - Soo Line R.R. Co.*, Finance Docket No. 31922 (Sub-No. 1), 1995 WL 226035 (I.C.C. 1995), the Board agreed to review an arbitration award interpreting a provision in the *New York Dock* conditions in a dispute that arose after Wisconsin Central Ltd. acquired Soo Line’s Ladysmith Line. The dispute involved whether a carrier must provide “test period average” earnings information to affected employees upon request, or only upon proof that an employee has been placed in a worse position as a result of the transaction. A Section 11 arbitration committee held that job abolishment alone does not mean an employee is placed in a worse position. According to the committee, only after an employee has exercised seniority and displacement rights can it be determined whether an employee was adversely affected. The Commission agreed to review the award, “find[ing] that the award involves an element potentially present in almost all transactions in which the agency’s conditions are imposed, the preparation and delivery of TPAs. Accordingly, our review of the award is proper under that aspect of our standard of review.” *Id.* at *5.

The distinctions between these decisions and the instant dispute are obvious. In each of these decisions the ICC agreed to exercise its review authority in order to interpret standard provisions in labor protection conditions imposed in many transactions, such as the “comparable provision” requirement from the *Mendocino Coast* conditions (*D&H - Springfield Terminal*), and the method of calculating TPAs and requirement to furnish TPA information under the *New York Dock* conditions, (*ATDA v. CSXT* and *Wisconsin Central*). Here by contrast, although the parties agreed that affected employees would be covered by the *New York Dock* conditions, no generally applicable provision of *NYD* is involved in the dispute. Rather, what put the parties at odds, and what Arbitrator Perkovich’s interpretation resolved, was the meaning of the “Applicable Agreements” provision the parties included in the HHMIA.

The mere fact that the “Applicable Agreements” provision of the HHMIA, which Perkovich relied on in concluding that UP’s June 7, 2006 ID notice of intent was procedurally defective, also appears in other hub merger implementing agreements negotiated between UP and BLET, does not establish a “recurring or otherwise significant dispute of general importance....” UP’s suggestion otherwise misconstrues this aspect of the *Lace Curtain* standard. *Lace Curtain* contains two distinct requirements: First, it requires a showing that an arbitration panel’s decision must involve “recurring or otherwise significant issues.” 3 I.C.C.2d at 736. Second, it requires a showing that the recurring or otherwise significant issue be of “general importance regarding the interpretation of our labor conditions.” *Id.* UP has failed to establish either prong sufficiently to warrant review.

To date, a single dispute has arisen concerning the extent of UP’s right to establish ID service under Article IX of the 1986 National Agreement in light of the HHMIA. In the

Perkovich award, UP now has guidance as to the limitations on its right to establish ID service in the area covered by the HHMIA. Should it choose to serve notice of its intent to establish other ID service in a manner that conflicts with the HHMIA, the union may raise the same response – but it may not. In the instance here, the union voluntarily conferred with UP but the terms UP proposed were not satisfactory. UP would have the Board surmise that the union will never agree in different circumstances. That is not proof of a recurring issue, it is simply speculation. A mere possibility does not establish a legitimate basis for finding a recurring dispute over which the Board should act.

Likewise, a single, unique dispute arose with respect to the Los Angeles Agreement, which Arbitrator Binau resolved in UP's favor, concluding that the specific provisions of *that* Agreement permitted UP to establish its proposed ID service under Article IX in *that* territory. The Binau Award will serve to provide guidance to the parties should UP serve an additional notice to establish ID service in the area covered by *that* agreement language.

The folly of disregarding an award resolving how a particular hub merger implementing agreement impacts UP's rights under Article IX was made quite evident when UP did just that with respect to the Kenis Award. As described above at p. 13, after the STB declined to review the Kenis Award based on UP's untimely appeal, UP served notice on BLET of its intent to establish a run between Kansas City and Labadie, Missouri, which was one of the runs it proposed establishing in the notice that was at issue in the dispute before Arbitrator Kenis. BLET responded by seeking enforcement of the Kenis Award in federal court. While the U.S. District Court for the Northern District of Illinois dismissed the union's suit based on its finding that the Kenis Award was ambiguous with respect to UP's right to establish the newly proposed

ID service, the U.S. Court of Appeals for the Seventh Circuit disagreed. *Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.*, 500 F.3d 591 (7th Cir. 2007). The Court recognized that permitting UP to establish ID service that was previously rejected in the Kenis Award created a “formula for evasion,” and therefore instructed the district court to enter an order enforcing the Kenis Award. *Id.* at 593. In short, UP’s attempt to circumvent the Kenis Award in that instance did not create a “recurring issue,” but rather was merely a transparent and illegitimate attempt to overturn the Kenis Award.

UP’s argument that it “is now confronted with a recurring dispute and an arbitral split of authority” (UP Brief, 25) between the Kenis and Perkovich Awards on the one hand and the Binau Award on the other, also lacks merit. Arbitrator Perkovich quickly disposed of this same argument when he found there was a significant distinction between the language in the implementing agreement governing Houston and that in the LA agreement that was before Arbitrator Binau. The HHMIA, as well as the hub merger implementing agreements before Arbitrator Kenis, both contain the same “Applicable Agreements” Article, providing “Where conflict arises, the specific provisions of this Agreement shall prevail”; the Los Angeles Agreement before Arbitrator Binau did not. Instead, the Los Angeles Agreement provides “except as specifically provided herein the system and national collective bargaining agreements, awards and interpretations shall prevail.” That is why Arbitrator Perkovich found, correctly, that “the decisions of Arbitration Boards 581 [Kenis] and 590 [Binau]... can be reconciled and that... the decision of Arbitration Board 581 must govern this dispute.” Perkovich Award, 3. UP’s suggestion otherwise is little more than a tactic designed to obtain a ruling from the Board that not only overturns the Perkovich Award, but also implicitly reverses the Kenis Award.

That the Perkovich Award does not contain any recurring issue warranting review is further manifested by the fact that were the Board to assert jurisdiction and set aside the Perkovich Award, that would not preclude or be dispositive with respect to disputes that may in the future arise concerning other hub implementing agreements between UP and BLET. While the existing arbitration awards may serve as guidance in the event UP proposes to establish new ID service in other hubs, those disputes would ultimately turn on the interpretation of those specific agreements and the facts and circumstances of those individual matters.

This is evident from an award issued by Arbitrator John LaRocco interpreting the provisions of the St. Louis Hub Merger Implementing Agreement. In that case, LaRocco recognized the limited relevance that the interpretation of one hub agreement has on the interpretation of another:

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.

BLE and UP, Art. 1, § 11 Committee, I.C.C. Finance Docket No. 32760 (LaRocco, 2001) (BLET GCA Ex. 6), p. 9.

UP has likewise failed to satisfy the second prong of this aspect of the *Lace Curtain* standard – that this case involves no “issues of general importance regarding the interpretation of [the Board’s] labor protective conditions.” 3 I.C.C.2d at 736. Arbitrator Perkovich’s Award provided a simple determination that UP’s rights to establish ID service under Article IX of the 1986 National Agreement were limited by the terms of the HHMIA, a determination that is, to

borrow a well worn phrase, grist for the arbitral mill that does not warrant the Board's discretionary review. Unlike in the decisions cited above in which the ICC or this Board chose to review arbitration awards that turned on the interpretation of standard labor protective conditions that have bearing on transactions between other parties in which those same conditions are imposed, the Perkovich Award merely interprets a provision unique to several agreements between UP and BLET. While that interpretation certainly is important to *these parties*, it cannot be said that it is of *general* importance, as required by *Lace Curtain*.

III. Arbitrator Perkovich's Award Is Soundly Based on the HHMIA and Article IX, and is thus Free of Egregious Error.

A. Standard of Review

Even if the Board disagrees with the BLET and concludes that the Perkovich Award encompasses "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions," there are no grounds on which to overturn the Award. Under the *Lace Curtain* standard, "[a]wards are not vacated because of substantive mistake, except when there is egregious error, when the award fails to draw its essence from the labor protective conditions, or when the arbitrator exceeds the specific limits on his authority." *ATDA v. CSXT*, 9 I.C.C.2d at 1130-31 (1993) (citing *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982)(footnote omitted)). "Egregious error means irrational, wholly baseless and completely without reason, or actually and indisputably without foundation in reason and fact." *Id.*

Moreover, under the Supreme Court’s “*Steelworkers Trilogy*” of cases¹⁴, “an arbitrator’s decision on the merits and his interpretation of the collective bargaining agreement are to be given extreme deference, even though a court could interpret an agreement differently.” *Lace Curtain*, 3 I.C.C.2d at 735 (citing *Loveless v. Eastern Airlines, Inc., supra*). The Commission concluded that its standard of review is meant to be consistent with the *Steelworkers Trilogy*. *Id.* at 736.

In *Lace Curtain*, the Commission reviewed an arbitration award to determine whether it was based on a proper interpretation of the standard employee protection conditions established in *Oregon Short Line R. Co. -Abandonment- Goshen*, 360 I.C.C. 91 (1979)(“*Oregon III*”), which were imposed in that case to protect employees affected by the Chicago and North Western Transportation Company’s abandonment of several rail lines. The IBEW maintained that a displaced electrician was entitled to compensation for three items related to moving expenses and losses incurred from the sale of his home pursuant to Article 1, Sections 9 and 12 of the *Oregon III* conditions. Finding that the displaced employee was entitled to the amounts sought, the arbitration panel sustained the IBEW’s claim, which the carrier petitioned the Commission to overturn.

After the ICC established that it had jurisdiction to review the award, and set forth what is now referred to as the *Lace Curtain* standard, the Commission upheld the award, finding that the award did not fail to draw its essence from the *Oregon III* protective conditions. The Commission specified, however, the limited nature of its review:

¹⁴ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

This is not to say that we would conclude that the Board's denial of any of these three items would be in error. Put another way, so long as the Board is interpreting and applying the *Oregon III* conditions and not dispensing its "own brand of industrial policy"... we would not object to the Board's granting *or* denying awards on these three particular issues.

3 I.C.C.2d at 736 (emphasis in original).

The U.S. Court of Appeals for the District of Columbia further elaborated on the heavy burden a party must overcome in order to establish that the agency should overturn an arbitration award under *Lace Curtain*:

Since [*Lace Curtain*] the Commission has employed a sliding scale of deference. An arbitrator's judgments about matters of evidence and causation are treated with deference. An arbitrator's interpretations of Commission regulations and views regarding transportation policy are subject to more searching review. *See, e.g., CSX Corp.-Control*, 4 I.C.C.2d 641, 648 (1988); *Lace Curtain*, 3 I.C.C.2d at 736. *See also Brotherhood of Maintenance of Way Employees v. ICC*, 920 F.2d 40, 44-45 (D.C.Cir.1990); *Employees of the Butte, Anaconda & Pacific Ry. v. United States*, 938 F.2d 1009, 1013-14 (9th Cir.1991), *cert. denied*, U.S. 112 S.Ct. 1474, 117 L.Ed.2d 618 (1992).

Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 812 (D.C. Cir. 1993).

UP's arguments amount to no more than a disagreement with how Arbitrator Perkovich interpreted provisions in the parties' Houston Hub merger agreement. That is not enough to warrant this Board setting aside the award.

B. Arbitrator Perkovich's Award is Based on a Straightforward and Rational Interpretation of the Parties' Agreements.

Arbitrator Perkovich engaged in a straightforward and rational interpretation of the HHMIA to conclude that it rendered UP's June 7, 2006 notice, served pursuant to Section IX of the 1986 National Agreement, defective because the proposed ID service would conflict with the HHMIA. The arbitrator began by examining his authority under the 1986 National Agreement, finding that his "threshold inquiry" was whether UP's notice was procedurally sound under

Article IX, Section 1. Only if it was, would he have had to examine the terms and conditions on which the proposed service would be implemented. Perkovich Award, 3.

The arbitrator then reviewed the relevant arbitral authority each party presented to him in support of their respective positions – namely the decision of Board 581 [Kenis] relied on by BLET, and the decision of Board 590 [Binau] relied on by UP. *Id.* at 3-4. He recounted that Arbitrator Kenis held the merger implementing agreements before her (from the North Little Rock/Pine Bluff, Kansas City, and St. Louis hubs) contained a Savings Clause that “preserved the Carrier’s right to invoke Article IX,” but that this right was not “unfettered” because under the HHMIA “where conflicts arise, the specific provision of [the HHMIA] prevail.” *Id.* at 3. This latter phrase “clearly and unequivocally evinced a mutual intent that compelled the conclusion that the merger implementing agreements governed over Article IX.” *Id.* at 3-4. Perkovich then summarized the Binau award, noting that Arbitrator Binau distinguished the previously decided Kenis Award based on differences in the relevant language in the implementing agreement he had to consider (the LAHMIA). *Id.* at 4.

Applying that precedent to the dispute before him, Arbitrator Petrovich determined that the relevant language of the HHMIA was identical to the provisions that Kenis relied on in rescinding an Article IX notice by UP to establish ID service and different from that relied on by Binau to uphold UP’s rights to extend switching limits under a corollary provision in the 1971 Agreement. As such, Perkovich held that Kenis’s interpretation of those provisions controlled the interpretation of the HHMIA. *Id.* at 4. He then found that because there was a conflict between UP’s proposed ID service and the HHMIA “with respect to, *inter alia*, first-in/first-out

provisions, terminal limits, and seniority rights,” the Hub Merger Implementing Agreements ‘shall prevail.’” *Id.* at 4-5.

In short, Perkovich merely determined the scope of his authority under Article IX of the 1986 National Agreement under which he was appointed, and interpreted the HHMIA in light of the parties’ arguments and relevant arbitral authority. Even if this Board were to disagree with that interpretation, or find that the Award contains a “substantive mistake,” that would not provide grounds to set it aside. Rather, the Board would need to find egregious error or determine that the award fails to draw its essence from the agreement, or find that Arbitrator Perkovich exceeded the specific limits on his authority. *See ATDA v. CSXT*, 9 I.C.C.2d at 1130-31. UP has failed to demonstrate any such flaws in the Perkovich Award.

C. Arbitrator Perkovich Properly Concluded that the Relevant Language of the HHMIA was Identical to the Agreements Before Arbitrator Kenis, and Distinct From Language in the Los Angeles Agreement Before Arbitrator Binau.

UP argues that distinctions on which Perkovich relied to distinguish the LAHMIA from the HHMIA are “[b]aseless” and “meaningless.” UP Brief, 26, 27. This is surprising, given the plain language of each agreement as well as Arbitrator Binau’s reliance on that same distinction in the award on which UP relies heavily throughout its Appeal Brief. The HHMIA contains a Savings Clause that provides: “The provisions of the applicable Schedule Agreement will apply unless specifically modified herein.” *See supra*, n.7. It also provides, however, that “[w]here conflicts arise the specific provisions of this Agreement shall prevail...” *See supra*, n.8. Perkovich followed Kenis’s lead in concluding that when interpreted together, these provisions mean that:

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.

Kenis Award, 20.

By contrast, the LAHMIA *does not* contain any parallel language stating that “[w]here conflicts arise the specific provisions of this Agreement shall prevail...” Binau relied on this key distinction when he concluded that the LAHMIA allowed UP to extend switching lines under Article II of the 1971 Agreement:

The first factor [on which Binau based his decision] was that the Award rendered by Arbitration Board No. 581 or Kennis [sic] award does not support the Organization's position. It is clear from the award that Referee Kennis 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 Kenis Award with Article VI, Section C of the Los Angeles Hub Agreement clearly shows the phrase “[W]here conflicts arise, the specific provisions of this Agreement shall prevail” is only in Article IV.A. and not in Article VI, Section C of the Los Angeles Agreement.

Binau Award, 21.

Likewise, Perkovich adopted Kenis's reasoning that it is this “Applicable Agreement” provision that “clearly and unequivocally evinced a mutual intent that compelled the conclusion that the merger implementing agreements govern over Article IX.” Perkovich Award, 3.

UP's argument that Perkovich drew a “baseless” distinction between the HHMIA and LAHMIA (UP Brief, 26-27), completely misses the point. UP suggests that Perkovich based his award on a slight distinction between the Savings Clause in the HHMIA and the three implementing agreements before Kenis, and the parallel “Agreement Coverage” language in the LAHMIA. The former provides that “[t]he provisions of the applicable Schedule Agreement will

apply unless specifically modified herein.” UP Ex. 6 (HHMIA, Article IV.A., p. 16). The latter provides “[e]xcept as specifically provided herein the system and national collective bargaining agreements, awards and interpretations shall prevail.” UP Ex. 8 (LAHMIA, Article VI.C., p. 12). BLET acknowledges the similarity between these provisions. It is clear, however, as explained above, that the distinction lies in the “Applicable Agreement” provision which is absent from the LAHMIA, but appears in exactly the same form in the agreements before Perkovich and Kenis. Accordingly, UP’s argument that Perkovich’s award should be vacated because it is based on a “meaningless difference in contract language [that is] is ‘wholly baseless’ and ‘without foundation in reason and fact’”(UP Brief, 27) is factually incorrect.

In essence, arbitrator Perkovich resolved a factual issue: whether the HHMIA “fettered” the carrier’s rights under the 1986 National Agreement. He compared the provisions of the two agreements and decided that the HHMIA had that effect. This is a traditional exercise of arbitral authority with which a reviewing body does not interfere. UP wants this Board to substitute its opinion for the arbitrator’s as to what the facts reveal. *Lace Curtain* and its progeny explicitly declare that the Board will not engage in that kind of second-guessing. *USX Corp. - Control Exemption - Transtar, Inc.*, STB Finance Docket No. 33942 (Sub-No. 1) (S.T.B. 2002); *Union Pacific Corp. - Control and Merger - Southern Pacific Rail Corp.*, Finance Docket 32760 (Sub-No. 42) (S.T.B. 2006); *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission, supra*, 885 F.2d at 450 (“The ICC erred in substituting its judgment as to factual findings.”).

D. UP's Attempt to Challenge the Kenis Award Through This Proceeding is Improper.

After Arbitrator Kenis issued her award finding that the notices UP served proposing to establish ID service in the North Little Rock/Pine Bluff Hub procedurally defective, UP failed to perfect a timely appeal before the Board, (*Union Pacific Corp. - Control and Merger - Southern Pacific Rail Corp.*, Finance Docket 32760 (Sub-No. 43) (S.T.B. 2005)) thus making that Award final and binding with respect to those agreements. As described above (pp. 13-14), UP then attempted to narrow the impact of the Kenis Award by proposing to institute ID Service (a run between Kansas City and Labadie, Missouri), that was within the proposal that was at issue before Kenis, which was rejected by the U.S. Court of Appeals for the Seventh Circuit in *Brotherhood of Locomotive Engineers & Trainmen v. Union Pacific R.R. Co.*, 500 F.3d 591, 593 (7th Cir. 2007). Unsatisfied with those results, UP now spends as much time challenging the Kenis Award as it expends seeking to set aside Arbitrator Perkovich's decision. This is readily apparent in UP's argument that "[g]iven that the differences in contract language cannot justify the split in arbitral authority [between the Kenis and Perkovich Awards], the question is whether Arbitrator Kenis's internally inconsistent reasoning, which Arbitrator Perkovich adopted, can survive this Board's review. As shown below, it cannot." UP Brief, 28.¹⁵ While this backdoor approach to challenging Kenis's Award is clever, it should not be tolerated.¹⁶ With respect to the

¹⁵ Likewise, in the final paragraph of its argument, UP argues "[i]n the end, if the Perkovich and Kenis Awards stand, the real victims will be the shippers and the public." UP Brief, 37 (emphasis added).

¹⁶ In the event that the Board concludes that Perkovich's Award suffers some fatal flaw, the Board's decision should make clear that the Kenis Award remains final and binding on the parties.

Perkovich Award, which does adopt the reasoning set forth in the Kenis Award (as well as the Binau Award, contrary to UP's assertion otherwise), a brief review of that reasoning establishes that it is entirely consistent.

UP argues that the Kenis Award is inconsistent in so far as she held that "the Merger Implementing Agreements do not modify UP's rights, but they do modify UP's rights." UP Brief, 28. This characterization is completely inaccurate. Kenis's decision that UP's notice to establish ID service under Article IX of the 1986 National Agreement was defective pursuant to the applicable hub merger implementing agreements was based on a two-part determination. Kenis summarized her decision as follows:

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.

Kenis Award, 20. This first conclusion, that the hub merger implementing agreements "were not expressly modified or nullified," is based on her interpretation of the Savings Clause included in all three merger implementing agreements before her (establishing the North Little Rock/Pine Bluff, Kansas City, and St. Louis Hubs). She relied on that Clause to reject the Organization's argument that "[those] Hub Merger Implementing Agreements should be construed as a deliberate intent to *surrender* Article IX rights under the implementing agreements." Kenis Award, 20 (emphasis added). Although Kenis made this limited finding based on the Savings Clause before analyzing the "Applicable Agreements" provision, UP cites to this portion of the Award to make the broad assertion that "[t]he Kenis Award admits that the Merger Implementing

Agreements **do not modify** UP's Article IX rights to institute new interdivisional service." UP Brief, 28 (citing Kenis Award, 20).¹⁷

UP then continues in this same vein, premising an entire section of its argument on the following blatant mischaracterization of Kenis's Award:

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 ambiguous 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.

UP Brief, 31.

UP selectively plucked these quoted phrases from this passage near the end of Kenis's Award which, when read in its entirety, exposes the carrier's intended deception:

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. ["Applicable Agreements"] and the side letter affords no other conclusion.

Kenis Award, 24-25.

The second conclusion from Kenis's summary is that "when those [Article IX] rights have been exercised in a manner that conflicts with or modifies the provisions of the hub merger

¹⁷ UP also mischaracterizes this portion of the Kenis Award on page 29 of its Brief. UP first states "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," noticeably omitting the word "expressly" before the phrase "modified or nullified." UP then states that Kenis held "the language conceived 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." UP Brief, 29 (quoting Kenis Award, 20). But UP does not refer to the qualification Kenis placed on this finding, where she stated "[h]owever, 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." Kenis Award, 20.

implementing agreements, the implementing agreements must be given precedence.” Kenis Award, 20. She based this conclusion on the “Applicable Agreements” article that was included in each of those three merger implementing agreement (the same as is included in the HHMIA), providing “[w]here conflicts arise, the specific provisions of this [merger implementing] Agreement shall prevail.” In other words, as Kenis explains, “[a]lthough Carrier’s Article IX rights survive *under the Savings Clause* of the hub merger implementing agreements, their exercise is not unfettered,” based on the Applicable Agreements Article. Kenis Award, 22.

Here too UP incorrectly argues that the Kenis Award is internally inconsistent purportedly because, despite her finding that the merger implementing agreements did not modify the Carrier’s Article IX rights (which, as established above, is itself not accurate), the *effect* of her Award is to eradicate its Article IX rights. UP based this on its contention that “[i]n all cases, new interdivisional service and extended switching limits necessarily changes existing collective bargaining agreements.” UP Brief, 28. But the extent to which UP actually retains any rights under Article IX, if any, was not at issue before Kenis. All she was called on to decide was whether the specific ID service that UP had proposed establishing in those hubs was permissible, and she concluded it was not. Whether or not UP, in negotiating the merger implementing agreements “*effectively* eliminate[d]” its Article IX rights under those Agreements (UP Brief, 30 (emphasis added)), is not a proper basis to reject Kenis’s reasoning.

Despite Kenis’s careful examination of the impact of UP’s Article IX rights under first the Savings Clause, and then the Applicable Agreements provision, UP blatantly recasts her reasoning as akin to concluding “the Merger Implementing Agreements do not modify UP’s rights, but they do modify UP’s rights.” UP Brief, 28. UP then relies on its own

mischaracterization of Kenis’s reasoning to argue “[s]uch a fundamental internal inconsistency, by its very nature, constitutes egregious error, requiring that the Award be vacated.” UP Brief, 30. When one recognizes that no such inconsistency exists, UP’s entire argument vanishes.

E. There is No Past Practice Supporting UP’s Position

UP spends considerable time supporting its right to establish ID service based on “longstanding” and “undisputed past practices.” UP Brief, 33, 35. It fails, however, to establish any such past practice. Instead, it merely lists several examples of prior negotiation and arbitration that are not relevant to the instant dispute and which fall far short of establishing a true “past practice.”

The U.S. Court of Appeals for the Eighth Circuit described what it takes to establish a “past practice” under the RLA in *United Transp. Union v. St. Paul Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971):

An “established practice” under the [Railway Labor] Act should demonstrate not only a pattern of conduct but also some kind of mutual understanding, either express or implied. *Thus, prior behavior by itself, although similar to the acts in dispute, falls short of an “established practice.”* Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute.

Id. at 222-23 (emphasis added). These factors mirror those that are required to establish a past practice, absent a written agreement, in an industrial setting outside the confines of the RLA. As recognized in Elkouri & Elkouri, *How Arbitration Works* (6th Ed., 2003), “[i]n the absence of a written agreement, ‘past practice,’ to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a

fixed, and established practice accepted by both parties. *Id.* at 608 (quoting *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954), and citing, *e.g.*, *Lake Erie Screw Corp.*, 108 LA 15, 19 (Feldman, 1997); *Grand Haven Stamped Prods. Co.*, 107 LA 131, 137 (Daniel, 1996); *Kansas City Power & Light Co.*, 105 LA 518, 523 (Berger, 1995)).

The examples discussed by UP come nowhere close to establishing a past practice. UP acknowledges that its examples include negotiations and arbitrations that arose *under agreements that are entirely different* from the 1986 National Agreement that was at issue before Kenis and Perkovich. Some involved UP proposals to extend switching limits under Article II of the 1971 National Agreement. Others involved UP proposals to enhance customer service under the 1996 Agreement. These have absolutely no bearing on whether UP can establish ID service under the 1986 National Agreement. Even those examples that did concern the establishment of ID service do not establish a past practice, involving as they did proposals that affected other hubs (or in one case a separate implementing agreement within the Houston Hub, Zones 1 and 2), under different merger implementing agreements, and/or with different BLET General Committees of Adjustment.

The fact that BLET GCAs at times entered into negotiations with UP over proposed ID service despite the existence of potentially conflicting merger implementing agreement provisions, as the Southern Region GCA did after UP served the June 7, 2006 notice initiating the instant dispute, proves nothing. A GCA in those instances may well have decided to focus on obtaining beneficial terms that would accompany resulting changes, rather than to contest the establishment of that particular ID service. That cannot properly be considered relinquishment of

the right to enforce the plain terms of the merger implementing agreements that were before Kenis and Perkovich.

The three specific examples of prior instances in which UP successfully established ID Service despite allegedly conflicting merger implementing agreements (UP Brief, 33-35) likewise do not serve to establish any past practice. In its first example, UP proposed to establish Beaumont, Texas as a home terminal though the HHMIA for Zones 1 and 2 established Houston as the home terminal. While UP now alleges this involved the “exact same” contractual language that was before Perkovich, this was merely an isolated incident that arose under a separate hub merger implementing agreement. UP similarly and unsuccessfully tried to prove the existence of a past practice based on isolated instances in *BLE v. UP*, Art. I, § 11 Committee, Case No. 1, Award No. 1 (LaRocco, 2003) (BLET GCA Ex. 7). There, BLE argued that the carrier violated the Kansas City Hub Merger Implementing Agreement when it attempted to recoup relocation benefits, paid to an engineer *in lieu of* benefits provided under the *New York Dock*. The carrier maintained that the engineer had not actually relocated as required. BLE argued UP was subjecting the engineer to disparate treatment based on evidence that other engineers in similar circumstances were allowed to keep their relocation allowances. Arbitrator LaRocco rejected that argument, concluding “one or two isolated instances where the Carrier failed to recoup improperly paid relocation allowances does not constitute a past practice permitting all engineers to keep monies that were improperly paid to them.” *Id.* at 14.

UP’s second example involved UP’s intent to extend the eastern switching limit for the Longview terminal, covered by the Longview Hub Merger Implementing Agreement, pursuant to Article II of the 1971 National Agreement. BLET agreed to extend the switching limits as UP

proposed. This example also arose under a different merger implementing agreement, after UP attempted to exercise rights under a different National Agreement. The carrier got what it wanted because BLET voluntarily agreed to the proposal. This has no bearing on UP's attempt to exercise rights under the 1986 National Agreement, with respect to the HHMIA, over BLET's objection. It falls far short of a "pattern of conduct" or "some kind of mutual understanding" between the parties. *United Transp. Union v. St. Paul Depot Co.*, 434 F.2d at 222-23. UP's last example is its proposal to establish enhanced customer service for Ameran UE, pursuant to Article IX of the 1996 Agreement, within an area covered by the St. Louis Hub Merger Implementing Agreement. That proposal remains outstanding and has yet to be resolved by the parties.

Finally, UP's reliance on *CSX Corp. -Control- Chessie Sys., Inc.*, 1995 WL 717122 (I.C.C. 1995) also is unavailing. UP's suggestions that this decision "is directly applicable in the present case" (UP Brief, 36) vastly overstates any similarities between these matters. There, CSX announced its intention to utilize Article I, § 4 of the *New York Dock* protective conditions to change the terms of an existing implementing agreement in order to carry out a new coordination. BLET and UTU argued CSX could not do so based on "boilerplate" language in those existing agreements that provided "[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. The arbitrator rejected this argument and permitted CSX to proceed under Article I, § 4. The Commission affirmed, basing its decision, in part, on the past dealings of the parties. Specifically, the ICC concluded that "awards cited by CSXT, going back over 30 years, show that neither party had any reason to view this language as restricting CSXT's ability to invoke

New York Dock to implement future operational changes....” *Id.* at *9. Likewise, the Board noted:

[i]n each of the five implementing agreement cited by CSXT, the union did not object to the expansion of the coordination of operations under *New York Dock*, notwithstanding the presence of similar language referring to the RLA in the prior implementing agreements establishing the coordinations that were expanded. The unions do not dispute CSXT’s position that they did not raise the RLA language as an objection to subsequent expansion.

Id. at *9, n. 22.

Here, by contrast, there are no similarly lengthy and consistent dealings between the parties. As described above, UP can point to no instances prior to the Perkovich Award where UP tried to establish ID service in Zones 3, 4 or 5 of the Houston Hub pursuant to the 1986 National Agreement. Other disputes in other hubs may be instructive, as illustrated by Arbitrator Perkovich’s adoption of Kenis’s interpretation of other merger implementing agreements before her, but this does not establish a past practice on which this Board can rely in considering whether the Perkovich Award should be set aside.

F. UP Cannot Escape from the Terms of the Hub Agreements it Negotiated Based on General Policy Considerations.

In a last ditch effort to evade the terms of the HHMIA, UP makes a plea on behalf of what it calls “the real victims... the shippers and the public,” arguing that if the Perkovich Award is allowed to stand, “commerce will be gravely affected.” UP Brief, 37. This argument is so lacking in merit it merits only a brief response. First, UP’s suggestion that “in four of its hubs, UP is, for the most part, forced to operate in a manner that it designed in 1997-98” (*id.*), fails to acknowledge that UP remains free to negotiate with BLET in order to establish new ID service. BLET evinced its willingness to doing so immediately after UP served its June 7, 2006 notice.

Second, UP's suggestion that "[t]he Perkovich and Kenis Awards strip UP of its ability to respond to" changes in the rail industry (*id.*) is hard to swallow given statements offered by UP's Chairman, President, and CEO Jim Young to its shareholders in the introduction of its 2007 Annual Report:

By nearly every measure, 2007 was one of the best years in our Company's history. We achieved this success by fulfilling our commitments to customers, communities, employees and our shareholders.... We increased our value to customers through improved service. Customers recognized these efforts, rewarding us with their highest satisfaction survey marks since our merger with the Southern Pacific.

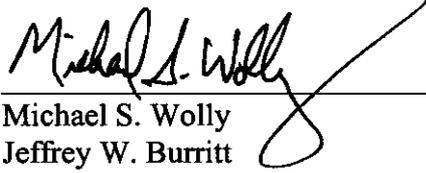
BLET GCA Ex. 8 (Excerpts).¹⁸ UP's arguments have no place here. Agency review of an arbitration award is not a forum for changing agreements or establishing policy. Having recently completed a national bargaining round with BLET under the RLA, UP is well-aware of how properly to address its labor relations concerns.

Conclusion

For these reasons, UP's appeal should be rejected on jurisdictional grounds. In the alternative, if the Board entertains UP's appeal (which it should not) the appeal should be denied as it fails to satisfy any of the *Lace Curtain* standards.

¹⁸ In that same report, UP announced a 2007 net operating profit, after taxes, of 1.86 billion dollars.

Respectfully submitted,

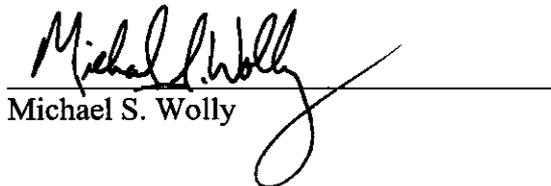


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Attorneys for Respondent BLET

Certificate of Service

I hereby certify that on the 11th day of April, 2008, I sent the foregoing Opposition, by first class mail, postage prepaid, to the attorney for the Petitioner Union Pacific, Clifford Godiner, One U.S. Bank Plaza, St. Louis, Missouri, 63101.



Michael S. Wolly

Exhibit 1

LETTER OF TRANSMITTAL

CHICAGO, ILLINOIS, June 15, 1950.

THE PRESIDENT,
The White House.

MR. PRESIDENT: The Emergency Board appointed by you on February 24, 1950, pursuant to section 10 of the Railway Labor Act, to investigate a rules controversy involving substantially a part of the Nation's railroads and certain of their employees, represented by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, has the honor to submit herewith its report and recommendations based upon its investigation of the issue in dispute.

Respectfully submitted.

ROGER I. MCDONOUGH, *Chairman.*
MART J. O'MALLEY, *Member.*
GORDON S. WATKINS, *Member.*

admittedly seeking to reduce the wages of these employees. The mileage rate for through freight service would be reduced by one-fifth or 20 percent, which means that, for example, a through freight conductor in the West who currently received a mileage rate of 12 cents, would have that rate cut to 9.6 cents (Tr. 7982).

If the instant proposal were adopted, the Organizations reiterate, the result would be the first reduction in basic rates of pay in the railroad industry since 1920, and the 30 years of steady progress for these workers would be reversed (Tr. 7984). The instant proposal would, like its companion one for the through passenger service, either require more hours of work and miles run for the same money or would pay less money for the same hours of work and miles run. The essential purpose of both of these proposals, the Organizations insist is a cut in wages of through passenger and through freight service employees (Tr. 7981).

7. *Interdivisional and Intradivisional Runs.*

(a) The Carrier shall have the right to establish interdivisional, inter-seniority district, intra-divisional and intra-district runs in assigned and unassigned service with the right to operate any such run, whether assigned or unassigned (including extra service), on either a one way or turnaround basis and through established crew terminals; under the following conditions:

(1) The Carrier shall distribute the mileage ratably as between employees from the seniority districts involved.

(2) The right to operate such runs will be free of the imposition of any restrictions as to class of traffic which may be handled or as to the origin or destination of any empty or loaded cars moving on such runs.

(3) The Carrier shall give notice to the General Chairman of its intention to establish such a run or runs whereupon the Carrier and the General Chairman shall, within 30 days, agree on such other conditions, not inconsistent with the foregoing, upon which such run or runs may be established. In the event the Carrier and the General Chairman cannot so agree on the matter, then it is agreed that the dispute will be submitted to arbitration in accordance with Sections 7 and 8 of the Railway Labor Act, as amended, with the limited authority to decide what conditions shall be met under this paragraph (3) by the Carrier if and when such runs are established.

(b) No rule, regulation, interpretation or practice shall be construed to in any way prohibit, restrict or limit the provision of paragraph (a).

(c) All rules, regulations, interpretations or practices, however established, which conflict with the above shall be eliminated, except that existing rules and practices considered by the Carrier more favorable, are preserved.

Carriers' Position. The right to establish interdivisional runs, say the Carriers, means the right to absorb constructive mileage and the right to run crews through terminals. The purpose of interdivisional runs is to avoid pay for time not worked and miles

not run and to eliminate unnecessary stops and avoidable delay for the purposes of changing crews and switching cabooses, all of which interferes with the efficiency and add to the cost of operations, the Carriers contend. The effect of the instant proposal, say the Carriers, would be to provide a means for correcting a harmful and inequitable condition with respect to the restrictions now prevailing as to the operation of runs passing across the interdivisional and interseniority district boundaries, or through designated crew terminals. On most railroads, it is stated, the current agreements prohibit the operation of such runs except where such runs have been agreed in the past by joint agreement or were inaugurated before rules restrictions existed. These prohibitions are outmoded because of improved motive power, equipment, and roadbed as well as the public's desire for expedited train schedules, the Carriers assert. Furthermore, the Carriers state, by virtue of awards of the National Railroad Adjustment Board, certain present rules which do not specifically prohibit such runs have been given an application and effect either to prohibit or restrict such runs, with the result that the right of Carriers to operate through train service has been made subject to severe and improper restrictions (Tr. 8275; Carriers' Ex. 25, pp. 1-2).

The Carriers point out that the merit of the instant proposal has been recognized by the Organizations before this Board and endorsed by Emergency Board 57. In 1947, it is stated, these Organizations agreed that where a Carrier considers it advisable to establish interdivisional runs the Organizations will enter into local negotiations for the effectuation of that result (Tr. 8276; Carriers' Ex. B, p. 490; Ex. 25, pp. 29-31). Emergency Board 57 in 1948 urged that the parties before that Board work out procedures pointing toward mutual agreement for the establishment of interdivisional runs, the Carriers remind us (Tr. 8276; Carriers' Ex. B, pp. 573-75; Ex. 25, pp. 31-32). That Board, it appears, recognized clearly the public interest involved in the instant matter. Although, the Carriers claim, the railroads have attempted to implement the provisions of the 1947 agreement, and the directive of Emergency Board 57, it has been impossible to obtain the cooperation of the Organizations to this end, consequently no progress has been made in the matter which that Board acknowledged is of public interest. The only alternative, say the Carriers, is a favorable recommendation by the present Emergency Board (Tr. 8276; Carriers' Ex. 25, pp. 29-32; Ex. B, pp. 490, 573-75; Ex. 28, pp. 32-41).

If, say the Carriers, in the exercise of the requested right to absorb constructive mileage and run trains through terminals,

the legitimate interests of employees are affected, the instant proposal provides for local negotiations covering this matter. Should such negotiations not eventuate in an agreement, the Carriers are willing to submit the dispute to arbitration (Tr. 8276-7; Carriers' Ex. 25, pp. 1-2, 49-51).

It is the contention of the Carriers that the merits of the instant proposal have been established and admitted, so that the only question before the present Board involves the mechanics of how mutual agreement shall be reached with respect to the legitimate interests of employees affected by the establishment of interdivisional runs (Tr. 8277-8; Carriers' Ex. B, pp. 573-75; Ex. 25, pp. 31-32). The Organizations' refusal to cooperate in achieving this purpose is found in the fact that, obeying their selfish interests, they have prevented extensions and consolidations of divisions in order to exact from the railroads pay for constructive miles and hours not worked, gift pay no longer earned or justified on the basis of the number of hours worked per run, say the Carriers. And behind these facts, say the Carriers, is the rivalry between employees' organizations. The rank and file of workers, the Carriers contend, prefer interdivisional runs because of the greater earnings opportunities and the proportionately greater time available to the employees at their home terminals (Tr. 8278-79; Carriers' Ex. 25, p. 53; Ex. 26, p. 3).

The Carriers contend that the instant proposal is intended to assure that through train service can be operated under fair conditions without unnecessary delay or penalty so that the benefits to the public, the employees, and the railroads, which should arise from such service, may be fully realized. Efficiency and speed of operation are increased by the elimination of terminal congestion and delay due to changing crews, and better service to the public results from handling trains on faster schedules, the Carriers point out. The fact that the older employees on the seniority rosters select these interdivisional runs is proof of their preference for such service, the Carriers insist. The essential merits of the proposal were fully recognized, the Carriers state, by Emergency Board 33 in 1946, which recognized the reasonableness of the proposal; and by Emergency Board 57 in 1948, which acknowledged the potential benefit to the carriers, the public and the employees that the proposed rule would provide (Carriers' Ex. 25, pp. 3, 53-54).

Organizations' Position. The Organizations emphasize their conclusion that in the proposal the Carriers seek completely to destroy the seniority rights of their employees, and propose what

is essentially a form of compulsory arbitration "unparalleled in modern industrial relations." The Carriers in seeking the absolute and arbitrary right and unrestricted discretion to establish interdivisional and interseniority district runs and pool cabooses completely disregard the terms of the December 12, 1947 Agreement between the Carriers and the Organizations (Tr. 8014; Employees' Rebuttal Ex. 85, p. 1).

The proposal, the Organizations contend, is exactly the same in substance as the corresponding one submitted to Emergency Board 57, and which that Board disposed of in unmistakable terms. That Board, the Organizations point out, concluded that the Carriers were asking for "the establishment of unrestricted management discretion in a matter which has been recognized for years as the appropriate subject of both collective bargaining and the application of the seniority system, and which was so recognized by the Carriers themselves in the recent settlement referred to" (December 12, 1947 Agreement). That Board doubted the wisdom and practicability of a uniform rule in the matter, but recognized the possibility of significant economies from the application of a rule mutually determined which was stressed by Emergency Board 33 in 1946. It was not without adequate reason, the Organizations say, that Emergency Board 57 recommended that the Carriers withdraw their proposal and that this matter of interdivisional runs be made the subject of joint consideration by the parties (Employees' Rebuttal Ex. 85, pp. 2-4).

The Organizations remind us that the December 12, 1947 Agreement between the parties before this Board is still in force. That joint agreement, say the Organizations, provided for mutual determination of the establishment of interdivisional and interseniority district freight and passenger runs, and the pooling of cabooses. That agreement, the Organizations point out, requires that the Carriers and the employees definitely recognize each other's fundamental rights, and, where necessary, that reasonable and fair arrangements shall be made in the interests of both parties (Employees' Rebuttal Ex. 85, pp. 5-8).

The distinguishing feature of the instant proposal, compared with the corresponding one submitted in 1948, state the Organizations, is its paragraph "(8)." This paragraph reads:

"(8) The Carrier shall give notice to the General Chairman of its intention to establish such a run or runs whereupon the Carrier and the General Chairman shall, within 30 days, agree on such other conditions, not inconsistent with the foregoing, upon which such run or runs may be established. In the event the Carrier and the General Chairman cannot so agree on the matter, then it is agreed that the dispute will be sub-

mitted to arbitration in accordance with Sections 7 and 8 of the Railway Labor Act, as amended, with the limited authority to decide what conditions shall be met under this paragraph (3) by the Carrier if and when such runs are established."

The provision of this paragraph, the Organizations contend, represents the very attitude of the Carriers against which the Organizations were so careful to protect themselves in the December 12, 1947 Agreement, and is a contravention of the recommendations of Emergency Board 57 in that it carries with it "unrestricted managerial discretion." Such a provision, say the Organizations, would emasculate the December 12, 1947 Agreement (Employees' Rebuttal Ex. 85, pp. 8-10).

In connection with the request, it is well to remember, say the Organizations, that the Carriers have been successful in negotiating interdivisional and interseniority district runs agreements. The Organizations state that where the Carriers have made sincere efforts to negotiate an agreement, it has quite generally been successful; failure has been due in many instances to management's demand for unrestricted rights to establish interdivisional runs without regard to the provisions of the December 12, 1947 Agreement (Employees' Rebuttal Ex. 85, pp. 11-13).

According to the Organizations, the establishment of interdivisional runs is no panacea for expediting train service, as the Carriers claim. Transcontinental runs often are covered by interdivisional run agreements, but most trains are not in this category, it is pointed out. Expediting runs is not the simple matter the Carriers represent it to be, the Organizations claim, since passenger trains must stop at terminal points for passengers, and freight trains seldom can be operated through a terminal without stopping. Many trains could, the Organizations admit, be expedited by the establishment of interdivisional runs (Employees' Rebuttal Ex. 85, pp. 13-15).

Finally, the Organizations contend that in the proposal the Carriers have the ulterior purposes of eliminating the men's constructive mileage, which would result in a reduction of pay for those employees whose compensation is based in part upon the factor of constructive mileage; the abandonment of employees' contractual rights, without mutual consideration; and the forcing of the men to move their homes without the benefit of collective bargaining on the subject. (Employees' Rebuttal Ex. 85, pp. 15-20).

8. Pooling Cabooses.

(a) Subject to the provisions of paragraph (b), the Carrier may pool its cabooses with the right to operate them through terminals or over two or more divisions. Such pooling may cover the entire line of railroad and all classes of runs and service or be limited to specified parts

Exhibit 2

UNION PACIFIC RAILROAD COMPANY

24125 Aldine Westfield
Spring, TX 77373



December 4, 2006

File 920.20

VIA FAX AND U.S. MAIL

Mr. Gil Gore
General Chairman, BLET
1448 Mac Arthur Ave.
Harvey, LA 70058

Dear Sir:

This refers to the Carrier's correspondence dated September 29, 2006, in connection with its notice dated June 7, 2006, advising of our intent to establish interdivisional freight service between Houston, Texas, and Angleton/Freeport/Bloomington, Texas, in accordance with the provisions of Article IX of the May 19, 1986 BLE National Agreement.

In reference to Carrier's September 29 correspondence, you will recall it was confirmed that despite several months of discussions, the parties unfortunately were unable to reach an agreement and, therefore, had reached an impasse with respect to the instant matter. As a result, you were advised the Carrier was withdrawing all previous offers and planned to exercise its right under the 1986 National Agreement to proceed to arbitration. In an effort to expedite the process, the Carrier provided a list of individuals (Messrs. Stallworth, Binau, Darby, Conway, Zusman and Vernon) to serve as arbitrator in this matter and proposed that the parties get together within the next week to discuss the selection of a Neutral member.

Per our telephone conversation on October 4, 2006, you advised you would be discussing the selection of an arbitrator with Vice President Pruitt later that day and would be responding to the Carrier, in writing, shortly thereafter. The Carrier has not received any correspondence in connection therewith. I again contacted you on November 20, 2006 concerning the September 29 letter wherein you advised you would immediately get with Vice President Pruitt and provide a written response. At the time of this writing, the Carrier still has not

received any correspondence in connection with this matter. However, during the November 20th conversation, you did convey the Organization's interest in meeting again with the understanding the parties would continue with the arbitration proceedings. In addition, you also reiterated the Organization's procedural concerns with respect to Carrier's notice and that these issues needed to be resolved prior to addressing the merits. In response to your concerns, I offered to draft a proposed "Question at Issue" for your review. Pursuant to my commitment, Union Pacific suggest the following "Question at Issue" be presented before the Board:

"Carrier's Question at Issue:

- 1) Does the Carrier's notice of June 7, 2006, served pursuant to Article IX of the May 19, 1986 BLE National Agreement, to establish interdivisional service between Houston, Texas and Angleton/Freeport/Bloomington satisfy the requirement(s) set forth in Article IX, Section 1 of the May 19, 1986 BLE National Agreement?
- 2) If Question #1, above, is answered in the affirmative, what shall be the terms and conditions for the proposed service covered by Carrier's notice dated June 7, 2006?"

As you will note, this "Question at Issue" has been incorporated in the attached Public Law Board Agreement.

In view of the above, and in light of Article IX of the May 19, 1986 BLE National Agreement, this will serve to advise that unless the parties select an arbitrator by Monday, December 11, 2006, the Carrier will, pursuant to Section 3, Second, of the Railway Labor Act, petition the National Mediation Board to appoint a Neutral member to serve on the Board proposed by the attached Board Agreement. As previously advised and consistent with the requirements set forth in Section 4 of Article IX, there is a no obligation to progress this dispute to arbitration within thirty (30) days after arbitration is requested by the Carrier. Therefore, it is the Carrier's intent to exercise the rights available to Union Pacific in order to assure that this dispute is arbitrated expeditiously.

It is understood this issue is an important one for both parties and that the various parties within your Organization, including the Vice President, have been considering this matter. For that reason, the Carrier has been willing to give the Organization some additional time to evaluate the situation. However, it is obvious the time has now come to advance the matter to resolution.

I will await your response on or before December 11, 2006 to enter into an agreement or select an arbitrator from the list provided earlier. Failing this,

the Carrier will unilaterally file for arbitration to achieve the desired operational benefits.

Yours truly,

A handwritten signature in black ink, appearing to read "S. F. Boone". The signature is written in a cursive style with a long horizontal stroke at the end.

S. F. Boone
Director - Labor Relations

Attach.

CC: Meredith/Orosco/Olin
Fritz/Workman/Scoggins

AGREEMENT

Between the

UNION PACIFIC RAILROAD COMPANY

And the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

IT IS AGREED by and on behalf of the Union Pacific Railroad Company (hereinafter called "Carrier") and the Brotherhood of Locomotive Engineers and Trainmen (hereinafter called "Organization"), as follows:

(a) Pursuant to Section 3, Second, of the Railway Labor Act, as amended by Public Law 89-456, a Public Law Board (hereinafter called "Board") is hereby established.

(b) The Partisan Members of the Board shall be as follows:

Carrier Member

Ms. S. F. Boone
Director Labor Relations
Union Pacific Railroad Company
24125 Aldine-Westfield Road
Spring, TX 77373
Telephone: (281) 350-7585
Fax: (402) 233-2241

Organization Member

Mr. L. Pruitt
Vice - President
Brotherhood of Locomotive Engineers and Trainmen
12265 Home Port Dr.
Maurepas, LA 70449
Telephone: (225) 698-3858
Fax: (225) 698-9509

(c) Either Partisan Member of the Board may be changed at any time by written notice to the other party, as well as to the Chairman & Neutral Member.

(d) The Carrier and the Organization Members have selected _____ to serve as the Chairman and Neutral member of this Board.

(e) The Board shall conduct a hearing no later than ninety (90) days subsequent to certification by the National Mediation Board unless such period is extended pursuant to Paragraphs (h) hereof, or otherwise deferred by the National Mediation Board. The Hearing may be held at Spring, Texas, at another location on the Carrier's lines or via Tele-Video Conference by mutual concurrence of all parties. The Board, with a Neutral Member as Chairman who has been selected, shall establish the rules of procedure by which it shall be governed, except as set forth in Paragraph (i). The Board shall have the authority to employ a secretary and other assistance and incur such other expenses, as it deems necessary for the proper conducting of business. The compensation and expense of the Carrier Member shall be borne by the Carrier. The compensation and expense of the Organization Member shall be borne by the Organization representing the employees. **The compensation and expenses of the Neutral Member shall be borne half by the Carrier and half by the Organization. All other expenses of the Board shall be borne half by the Carrier and half by the Organization.**

(f) The Board shall have jurisdiction only of the claims and grievances identified in **Attachment "A"** hereto. No additional claims or grievances shall be submitted to this Board and upon disposing of the one case listed on Attachment "A" the Board shall be closed.

(g) The Board shall not have jurisdiction over disputes growing out of requests for changes in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions, nor to grant new rules. The Board shall not have jurisdiction, nor render awards, on claims or grievances arising under rules set forth in national agreements wherein said national agreements contain specific provisions, or where national agreements have been entered into, for the creation of claims or disputes committees to deal with such disputes.

(h) At a mutually agreeable date prior to the hearing, but in no event later than fifteen (15) days prior thereto, the parties shall exchange two copies of their respective written submissions containing an ex parte statement of facts, supporting evidence and argument of its positions, and at the same time furnish copy to the Neutral Member. The parties may, by mutual agreement, exchange their written submissions electronically or on computer disc.

(i) The Board shall hold a hearing on the claims submitted to it identified in **Attachment "A"**. Due notice of the hearing shall be given the parties. At such hearing, the Partisan Members may be heard in person or represented by other duly designated Carrier or elected Organization representatives if they so elect. Cases being considered by the Board shall be in accordance with Circular No. 1, NRAB Organization and Certain Rules of Procedure, and other rules of the National Railroad Adjustment Board.

(j) The Board shall make findings and render an award in writing on the cases within sixty (60) days after the close of the hearing, unless such cases are withdrawn from the Board by joint request of the Carrier and the Organization. Such findings and awards shall be in writing and three (3) copies shall be furnished the respective parties, and any

two members of the Board shall be competent to render awards. The awards shall be final and binding upon both parties to the dispute, subject to the provisions of the Railway Labor Act, as amended by Public Law 89-456, and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named.

(k) In case a dispute arises involving an interpretation of any award while the Board is in existence or upon recall within thirty (30) days thereafter, the Board, upon request of either party, shall interpret the award in light of the dispute.

(l) The Board hereby established shall continue in existence until it has disposed of the claims submitted to it under this Agreement, after which it shall cease to exist, except for the interpretation of any award as above provided.

Dated this _____ day of _____, 2006.

**FOR THE BROTHERHOOD OF
LOCOMOTIVE ENGINEERS
AND TRAINMEN:**

**FOR THE UNION PACIFIC
RAILROAD COMPANY:**

General Chairman - BLET
Mr. G. L. Gore

Director - Labor Relations
Ms. S. F. Boone

NATIONAL MEDIATION BOARD

ATTACHMENT "A"

BOARD NO. _____
(Brotherhood of Locomotive Engineers and Trainmen)

Referee:
Organization Member: L. Pruitt - VP - BLET
Carrier Member: S. F. Boone - Director LR UPRR

NMB CASE NUMBER	SUBJECT MATTER	NMB SUBJ PAGE	DATE	TIME
1	<p><u>CARRIER'S QUESTION AT ISSUE:</u></p> <p>"1) Does the Carrier's notice of June 7, 2006, served pursuant to Article IX of the May 19, 1986 BLE National Agreement, to establish interdivisional service between Houston, Texas and Angleton/Freeport/Bloomington satisfy the requirement(s) set forth in Article IX, Section 1 of the May 19, 1986 BLE National Agreement?</p> <p>2) If Question #1, above, is answered in the affirmative, what shall be the terms and conditions for the proposed service covered by Carrier's notice dated June 7, 2006?"</p>			

Exhibit 3

UNION PACIFIC RAILROAD COMPANY

24125 Aldine Westfield
Spring, TX 77373

January 5, 2007

File 920.20

VIA FAX AND U.S. MAILMr. Gil Gore
General Chairman, BLET
1448 Mac Arthur Ave.
Harvey, LA 70058

Dear Sir:

This refers to the your letter of December 7, 2006, responding to my December 4, 2006 correspondence concerning the establishment of an arbitration panel to resolve a dispute between the Organization and the Carrier involving the Carrier's June 7, 2006 notice to establish interdivisional service between Houston, TX and Angleton/Freeport/Bloomington, Texas.

Specifically, you indicate your notes reflect one final meeting was to be scheduled following the August 14 meeting in Omaha in an attempt to reach an agreement. As you will recall, and as confirmed in Carrier's September 29 correspondence, Carrier advised during the August 14 meeting that the parties had reached impasse and Carrier intended to proceed to arbitration accordingly. However, the Carrier agreed to continue discussions regarding the proposal during the arbitration proceedings. Subsequent to the August 14 meeting, Asst. Vice President - Labor Relations, Rene Orosco, and UTU Vice President Mike Futhey had several discussions in connection with the proposed agreement.

As a result, and at the request of Vice President Futhey, a revised proposal was presented to the UTU, which was also rejected. You also received a copy of the revised proposal from UTU General Chairman Larry Bumpurs. While it is the Carrier's objective to always reach a compromise agreement and, hence, continue discussions, our position with respect to arbitration was clearly set forth during the August 14 meeting and confirmed in the September 29 correspondence.

In response to Carrier's September 29 and December 4, 2006 correspondence, you offer the names of several individuals for consideration to

serve as the Neutral member (i.e., Ann Kenis, David P. Twomey, Joseph A. Cassidy, Dana Eischen and Martin Malin). In addition, your Committee asserts that Union Pacific's proposal is "unreasonable" for several reasons stated therein and also advise you are not agreeable to the question Carrier proposed in the arbitration agreement. Also, you point out that Article IX of the BLET National Agreement does not provide for the sharing of cost as provided in the proposed board agreement.

First, in reference to the list of names you provide for consideration as the Neutral member, by the submission of an alternate list of names you have tacitly acknowledged that you do not find the Carrier's list of proposed arbitrators acceptable. With respect to the names you have submitted, Carrier is not agreeable to using any of your suggested referees. I find it interesting that you would suggest a referee who has retired and one who is presently barred by the NMB from accepting additional cases due to a failure to render awards on a timely basis. Thus, the Carrier suggest the parties mutually request the prompt appointment by the NMB of an arbitrator consistent with the terms set forth in Article IX, Section 4 of the May 19, 1986 National Agreement, as amended. Specific reference is made from Article IX of the 1991 National Agreement as follows:

"The carrier and the organization mutually commit themselves to the expedited processing of negotiations concerning interdivisional runs, including those involving running through home terminals, and mutually commit themselves to request the prompt appointment by the National Mediation Board of an arbitrator when agreement cannot be reached." (Emphasis added)

Also, and in connection therewith, attached is a "revised" agreement governing the arbitration of the instant matter. While you indicate the Organization does not agree to the Carrier's proposed "Question at Issue", the Organization did not offer any suggested question as an alternative. Since you have not to date provided a proposed question to submit to the Board, I again invite you to do so. A place has been reserved in Attachment 'A' to the proposed agreement for the Organization's proposed "Question at Issue".

Second, contrary to the Organization's position, the Carrier asserts its proposed interdivisional service between Houston and Angleton/Freeport/Bloomington, Texas is reasonable and practical. The proposed interdivisional service will reduce congestion in one of its most densely populated operational areas - Houston - in America. Thus, it is the Carrier's position that not only is the proposed interdivisional service reasonable, practical, and the efficiencies of its operations enhanced between Houston and Angleton/Freeport/Bloomington, but other train operations into and out of Houston will be improved as well. It is the Carrier's belief that such noted aspects of improved service will be beneficial to both the Carrier and affected

engineers. While the Carrier agrees that the business of railroading makes it difficult to obtain precise train lineups, there is no evidence on the record that the establishment of the proposed interdivisional service would create an unreasonable or unsafe operation.

You further aver that the proposed interdivisional service is unlike any that has ever been proposed under Article IX of the BLET National Agreement and exceeds the rights granted to the Carrier therein (i.e., multiple away from home terminals, running through the terminal to Spring, etc.). However, Article IX as well as several negotiated and/or arbitrated agreements covering interdivisional service speak to the contrary. There is nothing in the conditions of the May 16, 1986 National Agreement relating to movement through a terminal more than once nor bars the operations contemplated by the Carrier. Section 2 conditions do not specify, constrain or limit such movements. In fact, it is erroneous for the Organization to conclude the proposed interdivisional service is defective because it does not conform to conventional interdivisional runs. This position was found to be wanting by Dr. Seldenberg in an Article IX arbitration involving CSX and the UTU, who held in part:

"The Panel finds it error for the Organization to conclude that interdivisional runs are defective if they do not conform to the conventional pattern that they are solely designed to carry freight between two points that have to cross one or more seniority districts. This is undoubtedly true of many railroad interdivisional runs, especially those which operate over vast territories. However, all railroads covered by Article IX are not of the same shape, form or size. There is nothing in Article IX to suggest or indicate that it was intended to apply only to railroads that traverse large geographic areas but was not intended to apply to smaller railroads which operate within circumscribed or limited territory. Article IX by its terms applies to the C&O division of CSX as well as to the Burlington Northern or the Union Pacific Railroad.

This Carrier is contractually entitled to establish interdivisional service that conforms to its own contours and topography based on its legitimate business needs, subject of course to the terms and conditions of Section 2...."

In essence, the above-cited Award finds that Article IX holds no constraints to the establishment of unconventional or new types, sizes and shapes of interdivisional service. Therefore, unconventionality is not a bar to Carrier's right to have interdivisional service and such proposed service is not, as you indicate, in conflict with Issue 3 of the Informal Disputes Committee. In fact, according to the Committee's opinion, the Carrier has the right to establish such extended or rearranged service (and implicitly have such terms and conditions of such interdivisional service governed by Article IX) unless two conditions apply:

1) it is a substantial recreation of the prior interdivisional service and 2) it is designed solely to obtain the more favorable conditions of the 1986 National Agreement. The burden is upon the Organization to prove the existence and application of both of these conditions; which, the Organization has not nor cannot meet such burden in this instance. The Carrier contends it has the right to establish the proposed service and such service is not in conflict with the runs established in the Houston Hub as the Organization alleges.

Turning to the enhancements sought by the Organization, which you contend provide a *"fair and safe form of the service requested at substantially reduced costs"*. Such enhancements are not only costlier, but would also make the service uneconomical to operate. It is the Carrier, not the Organization, who determines its operational needs. As previously stated, the Carrier's proposed interdivisional service represents a legitimate and necessary run motivated by operating exigencies which meet the conditions of Article IX, Section 2, of the 1986 National Agreement. Accordingly, the Carrier is under no obligation to accept the Organization's costlier proposal and, therefore, was not unreasonable in its rejection of such proposal.

The Organization also disputes the Carrier's proposed payment of one-way miles to crews who operate to Spring and are subsequently transported back to Houston. The Organization contends the payment of such transport miles between Spring and Houston should also be allowed, citing Article II, Paragraph D, of the Houston Hub as support for their position. Contrary to your assertion, such payments are neither required nor warranted under Article IX and your pursuit of such monies for employees who are not even operating a train is both outlandish and irresponsible. There is no merit to this claim and is yet another attempt to gain additional unwarranted compensation in connection with the proposed interdivisional agreement. Article II, Paragraph D of the Houston Hub, as cited, provides for the payment of miles to crews who operate those miles on a locomotive. It was never the intent of Article II, Paragraph D, to allow miles to crews being transported between the point where the road trip ends, i.e. final terminal delay point, and the point when finally relieved. The fact that the one-way mileage to Spring has already been included in Carrier's proposal indicates that your request for additional payment on return to the point where relieved is moot. Since the Carrier's proposal provides for payment for actual miles run, no additional monies would be due. In any event, the Carrier's proposed pay structure, which provides for additional one-way miles to Springs, would allow a crew operating pursuant to the proposed interdivisional provisions to achieve overtime payment in a more advantageous manner. Therefore, the Carrier's interdivisional proposal is already enhanced and addresses many of your concerns.

In summary, this confirms the Carrier's proposed Article IX notice is proper, required negotiations have occurred without success and it is now time for both parties to accept and implement the mutual commitment they made in

Article IX of the 1991 National Agreement. In order to facilitate the appointment of an arbitrator and the establishment of an arbitration panel, I have enclosed a suggested letter to the National Mediation Board and have modified the Agreement governing arbitration of this matter. I am requesting that you sign the letter to the NMB and return it as quickly as possible (please note that I have dated this letter January 12 and would appreciate receiving the signed copy by that date). Also, as previously requested, please provide your "Question at Issue" in the place reserved in the modified Attachment 'A'.

Finally and consistent with our earlier indications, I will be contacting your office in the near future to discuss the potential for implementing on a trial basis, pursuant to Section 3 of Article IX, this new interdivisional service.

Yours truly,



S. F. Boone
Director - Labor Relations

Attach.

CC: Meredith/Orosco/Olin
Fritz/Workman/Scoggins

AGREEMENT

Between the

UNION PACIFIC RAILROAD COMPANY

And the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

IT IS AGREED by and on behalf of the Union Pacific Railroad Company (hereinafter called "Carrier") and the Brotherhood of Locomotive Engineers and Trainmen (hereinafter called "Organization"), as follows:

(a) Pursuant to Section 3, Second, of the Railway Labor Act, as amended by Public Law 89-456, a Public Law Board (hereinafter called "Board") is hereby established.

(b) The Partisan Members of the Board shall be as follows:

Carrier Member

Ms. S. F. Boone
Director Labor Relations
Union Pacific Railroad Company
24125 Aldine-Westfield Road
Spring, TX 77373
Telephone: (281) 350-7585
Fax: (402) 233-2241

Organization Member

Mr. E. L. Pruitt
Vice - President
Brotherhood of Locomotive Engineers and Trainmen
12265 Home Port Dr.
Maurepas, LA 70449
Telephone: (225) 698-3858
Fax: (225) 698-9509

(c) Either Partisan Member of the Board may be changed at any time by written notice to the other party, as well as to the Chairman & Neutral Member.

(d) The Carrier and the Organization Members have selected _____ to serve as the Chairman and Neutral member of this Board.

(e) The Board shall conduct a hearing no later than ninety (90) days subsequent to certification by the National Mediation Board unless such period is extended pursuant to Paragraphs (h) hereof, or otherwise deferred by the National Mediation Board. The

Hearing may be held at Spring, Texas, at another location on the Carrier's lines or via Tele-Video Conference by mutual concurrence of all parties. The Board, with a Neutral Member as Chairman who has been selected, shall establish the rules of procedure by which it shall be governed, except as set forth in Paragraph (l). The Board shall have the authority to employ a secretary and other assistance and incur such other expenses, as it deems necessary for the proper conducting of business. The compensation and expense of the Carrier Member shall be borne by the Carrier. The compensation and expense of the Organization Member shall be borne by the Organization representing the employees. **The compensation of the Neutral Member shall be set by the National Mediation Board. All other expenses of the Board shall be borne half by the Carrier and half by the Organization.**

(f) The Board shall have jurisdiction only of the matter identified in **Attachment "A"** hereto. No additional matters shall be submitted to this Board and upon disposing of the matter listed on Attachment "A" the Board shall be closed.

(g) The Board shall not have jurisdiction over disputes growing out of requests for changes in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions, nor to grant new rules. The Board shall not have jurisdiction, nor render awards, on matters arising under rules set forth in national agreements wherein said national agreements contain specific provisions, or where national agreements have been entered into, for the creation of claims or disputes committees to deal with such disputes.

(h) At a mutually agreeable date prior to the hearing, but in no event later than fifteen (15) days prior thereto, the parties shall exchange two copies of their respective written submissions containing an ex parte statement of facts, supporting evidence and argument of its positions, and at the same time furnish copy to the Neutral Member. The parties may, by mutual agreement, exchange their written submissions electronically or on computer disc.

(i) The Board shall hold a hearing on the question(s) submitted to it identified in **Attachment "A"**. Due notice of the hearing shall be given the parties. At such hearing, the Partisan Members may be heard in person or represented by other duly designated Carrier or elected Organization representatives if they so elect. The matter being considered by the Board shall be in accordance with Circular No. 1, NRAB Organization and Certain Rules of Procedure, and other rules of the National Railroad Adjustment Board.

(j) The Board shall make findings and render an award in writing on the matter within sixty (60) days after the close of the hearing, unless such matter is withdrawn from the Board by joint request of the Carrier and the Organization. Such findings and awards shall be in writing and three (3) copies shall be furnished the respective parties, and any two members of the Board shall be competent to render awards. The awards shall be final and binding upon both parties to the dispute, subject to the provisions of the Railway Labor Act, as amended by Public Law 89-456, and if in favor of the petitioner, shall direct the

other party to comply therewith on or before the day named.

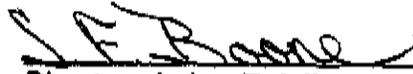
(k) The Board hereby established shall continue in existence until it has disposed of the matter submitted to it under this Agreement, after which it shall cease to exist, except for the interpretation of any award as above provided.

Dated this _____ day of _____, 2007.

**FOR THE BROTHERHOOD OF
LOCOMOTIVE ENGINEERS
AND TRAINMEN:**

**FOR THE UNION PACIFIC
RAILROAD COMPANY:**

General Chairman - BLET
Mr. G. L. Gore



Director - Labor Relations
Ms. S. F. Boone

NATIONAL MEDIATION BOARD

ATTACHMENT "A"

BOARD NO. _____
(Brotherhood of Locomotive Engineers and Trainmen)

Referee:

Organization Member: E. L. Pruitt - VP - BLET

Carrier Member: S. F. Boone - Director LR UPRR

NMB CASE NUMBER	SUBJECT MATTER	NMB SUB CODE	ORGAN CASE NO	CARRIER CASE NO
1	<p><u>CARRIER'S QUESTION AT ISSUE:</u></p> <p>"What shall be the terms and conditions for the new interdivisional serve between Houston, Texas and Angleton/Freeport/Bloomington, Texas contemplated by Carrier's notice dated June 7, 2006?"</p> <p><u>ORGANIZATION'S QUESTION AT ISSUE:</u></p>			

UNION PACIFIC RAILROAD COMPANY

24125 Aldine Westfield
Spring, TX 77373



January 12, 2007

File 920.20

Mr. Roland Watkins
Director Arbitration Services
National Mediation Board
1301 K Street NW, Suite 250-E
Washington, D. C. 20005

Re: Request for Appointment of a Neutral pursuant to Article IX, of the
1991 BLE National Agreement.

Dear Sir:

On June 7, 2006, Union Pacific Railroad (UP) served due notice to representatives of the Brotherhood of Locomotive Engineers and Trainmen (BLET) under Article IX, Section 1 of the May 19, 1986 BLET National Agreement, as amended, to establish Interdivisional Service between Houston, Texas and Angleton/Freeport/Bloomington, Texas. Notwithstanding several months of discussions, the Carrier and Organization cannot agree on matters provided for in Section 1 and the other terms and conditions referred to in Section 2 thereof.

Therefore, pursuant to the terms set forth in Article IX of the 1991 BLE National Agreement, the parties request the prompt appointment of a Neutral for arbitration of this matter.

Thanking you in advance for assistance in this matter. If you or your staff have any questions, please do not hesitate to contact my office at (281) 350-7585 or General Chairman Gil Gore at (504) 371-4760.

Respectfully,

General Chairman - BLET
Mr. G. L. Gore


Director - Labor Relations
Ms. S. F. Boone

Exhibit 4

UNION PACIFIC RAILROAD COMPANY

24125 Aldine Westfield
Spring, TX 77373



January 22, 2007

File 920.20

Mr. Roland Watkins
Director Arbitration Services
National Mediation Board
1301 K Street NW, Suite 250-E
Washington, D. C. 20005

Re: Request for Appointment of a Neutral pursuant to Article IX, of the
1991 BLE National Agreement.

Dear Sir:

On June 7, 2006, Union Pacific Railroad (UP) served due notice to representatives of the Brotherhood of Locomotive Engineers and Trainmen (BLET) under Article IX, Section 1 of the May 19, 1986 BLET National Agreement, as amended, to establish Interdivisional Service between Houston, Texas and Angleton/Freeport/Bloomington, Texas. Notwithstanding several months of discussions, the Carrier and Organization cannot agree on matters provided for in Section 1 and the other terms and conditions referred to in Section 2 thereof.

Therefore, pursuant to the terms set forth in Article IX of the 1991 BLE National Agreement, the Carrier request the prompt appointment of a Neutral for arbitration of this matter with the Brotherhood of Locomotive Engineers and Trainmen.

Thanking you in advance for assistance in this matter. If you or your staff have any questions, please do not hesitate to contact my office at (281) 350-7585.

Respectfully,

(Original Signed)
S. F. Boone
Director – Labor Relations

BLE&T Southern Region
5805
JAN 24 2007

EXHIBIT 7 PAGE 1 OF 2

CC: Mr. Gil Gore, General Chairman, BLET

Exhibit 5



NATIONAL MEDIATION BOARD
Washington, DC 20572

January 31, 2007

Mr. S. F. Boone
Director-Labor Relations
Union Pacific Railroad Company
24125 Aldine Westfield
Spring, TX 77373

Re: Arbitration Board No. 589 – Union Pacific Railroad Company
And the Brotherhood of Locomotive Engineers & Trainmen

Dear Mr. Boone:

The National Mediation Board (NMB) is in receipt of your letter requesting the appointment of a Neutral pursuant to Article IX of the 1991 BLE National Agreement, to hear a dispute involving the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers and Trainmen.

For administrative purposes, this request has been docketed as Arbitration Board No. 589.

As requested by the parties, the NMB has appointed Mr. Robert Perkovich to serve as the neutral member of this board. Mr. Perkovich's certificate of appointment has been issued.

Sincerely,

A handwritten signature in cursive script that reads "Roland Watkins".

Roland Watkins
Director, Office of Arbitration Services

Copies to:

Mr. Gil Gore
General Chairman, BLET

BLE&T Southern Region
5841
FEB 05 2007

Exhibit 6

ARBITRATION COMMITTEE

In the Matter of the) Pursuant to Article 1, § 11 of
Arbitration between:) the New York Dock Conditions
)
BROTHERHOOD OF LOCOMOTIVE)
ENGINEERS,)
)
Organization,) I.C.C. Finance Docket No. 32760
)
and)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Carrier.)
_____)
)

OPINION AND AWARD

Hearing Date: November 10, 2000
Hearing Location: Sacramento, California
Date of Award: January 26, 2001

MEMBERS OF THE COMMITTEE

Neutral and Sole Member: John B. LaRocco

QUESTIONS AT ISSUE

ORGANIZATION'S QUESTION AT ISSUE

Does Side Letter No. 24 of the St. Louis Hub Merger Implementing Agreement modify the MPUL Laying Off and Leave of Absence Schedule Rule beyond the geographical territory of the St. Louis Hub?

CARRIER'S QUESTION AT ISSUE

Did the April 15, 1998 letter agreement amending the "Laying Off and Leave of Absence" rule dated October 22, 1952 and contained on Page 250 of the current Collective Bargaining Agreement apply only to the St. Louis Hub or does it apply to all of the MPUL committee?

[St. Louis Hub SL24.NYD]

OPINION OF THE COMMITTEE

I. INTRODUCTION

The United States Surface Transportation Board (STB) approved the application of the Union Pacific Railroad Company (Former UP) to control and merge with the Southern Pacific Transportation Company (SPT) and its subsidiaries. [Finance Docket No. 32760.] The former Missouri Pacific Railroad was one of the properties comprising the former UP. As a condition of the merger, the STB imposed on the merged Carrier (UP) 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) ("New York Dock Conditions") pursuant to the relevant enabling statute.

At the November 10, 2000 hearing, the Organization and Carrier waived the tripartite Arbitration Committee established by Section 11(a) of the New York Dock Conditions.¹ They agreed that the undersigned neutral would act as the sole member of the Arbitration Committee. At the neutral member's request, the parties waived the 45-day time limitation for issuing this decision as set forth in Section 11(c) of the New York Dock Conditions.

II. BACKGROUND AND SUMMARY OF THE FACTS

Following the merger, the Organization and the Carrier entered into several important merger implementing agreements predicated on dividing much of the UP into a hub and spoke operating system. Two of these hubs were at St. Louis, Missouri and North Little Rock, Arkansas.² The North

¹ Unless indicated otherwise, all sections of the New York Dock Conditions cited herein appear in Article 1.

² St. Louis and North Little Rock are both points on the Missouri Pacific-Upper Lines territory.

Little Rock/Pine Bluff Hub Merger Implementing Agreement went into effect on February 1, 1998.

The St. Louis Hub Merger Implementing Agreement went into effect on November 1, 1998.

Both of these merger implementing agreements had a savings clause defining the relationship between the merger implementing agreements and the applicable schedule agreements. Article VIII(A) of the St. Louis Hub Merger Implementing Agreement reads:

The provisions of the applicable Schedule Agreement will apply unless specifically modified herein.

Identical language appears in Article VIII(A) of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement.

This dispute concerns to what extent a side letter attached to the St. Louis Hub Merger Implementing Agreement modifies or supersedes the Missouri Pacific-Upper Lines Schedule Agreement which is the working agreement at another hub. The Laying Off and Leave of Absence Rule on the Missouri Pacific-Upper Lines, which was originally adopted on or about October 22, 1952, provides employees with a 30-day buffer period (except in cases of illness or injury) before employees are required to obtain a formal leave of absence or forfeit their seniority. More specifically, Section 1 of the Laying Off and Leave of Absence Rule in the Schedule Agreement provides:

When employees in engine service are permitted to lay off, they must not be absent in excess of 30 days, except in case of sickness or injury, without having formal leave in writing, granted in accordance with the provisions of this agreement.

Side Letter No. 24 of the St. Louis Hub Merger Implementing Agreement, which is dated April 15, 1998, states:

This refers to the Merger Implementing Agreement for the St. Louis Hub entered into this date.

During our negotiations of this Hub, the Carrier requested a modification of certain existing rules. To address that issue we agreed to the following:

The current rule entitled "Laying Off and Leave of Absence" dated October 22, 1952, and contained on Page 250 of the current Collective Bargaining Agreement will be amended as follows:

"ITEM 1. "When employees in engine service are permitted to layoff, they must not be absent in excess of 15 days, except in the case of sickness or injury, without having formal leave in writing, granted in accordance with the provisions of this Agreement."

The remainder of the rule remains unchanged.

This Memorandum Letter of Agreement is made with the understanding it is without prejudice to the positions of the respective parties and it will not be cited by any party in any other negotiation or proceeding.

If the foregoing adequately and accurately describes our agreement in this matter, please so indicate by signing in the space provided for that purpose below.

There is not any provision either in the body of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement or in a side letter attached thereto, that is identical or similar to the terms of Side Letter No. 24 to the St. Louis Hub Merger Implementing Agreement.

The parties concur that Side Letter No. 24 modifies the Schedule Rule on lay offs and leave of absences by changing the applicable period of absence from 30 days to 15 days. The parties disagree on the breadth of the modification. The Carrier contends that the Schedule Rule was modified wherever it applied, that is, wherever the Missouri Pacific-Upper Lines agreement has been

adopted as the working agreement for a particular hub. On the other hand, the Organization argues that the modification applied only to the territory covered by the terms of the St. Louis Hub Merger Implementing Agreement.

During Summer and Fall, 2000, the Carrier sought to apply the 15-day limitation period to engineers working under the Missouri Pacific-Upper Lines Schedule Agreement within the ambit of the North Little Rock/Pine Bluff Hub. The Carrier's application of the 15-day limitation period to lay offs and leave of absences by engineers at the North Little Rock/Pine Bluff Hub precipitated the instant controversy.

From the Organization's perspective, the negotiating history of Side Letter No. 24 is critical to its interpretation. According to the November 7, 2000 affidavit of Dennis E. Penning, who was the former General Chairman on the UP Eastern Region and a signatory to Side Letter No. 24, the Organization was faced with a dilemma. Penning declared that the Carrier threatened to apply the Chicago & Eastern Illinois Schedule Agreement, a labor contract which the Organization deemed inferior to other applicable schedule agreements, to the entire St. Louis Hub territory. Penning further attested that the Carrier had the authority to choose any one of the schedule agreements applicable to any territory covered by the St. Louis Hub Merger Implementing Agreement pursuant to a recent New York Dock arbitration decision. *United Transportation Union and Union Pacific Railroad Company*, NYD § 4 Arb (Yost; 4/14/97). Penning explained that the Organization agreed to modify the laying off and leave of absence schedule rule to obviate the Carrier's threat to adopt the Chicago & Eastern Illinois Schedule Agreement. Penning stressed that inasmuch as Chicago & Eastern Illinois employees were only involved in the St. Louis Hub, the Carrier could not select the

Chicago & Eastern Illinois Schedule Agreement as the working agreement for any other Hub. Lastly, Penning also attested that while he agreed to the modification of the Schedule Rule, he insisted on the paragraph in Side Letter No. 24 that the modification not be cited in any other negotiation and be accomplished without prejudice.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Side Letter No. 24 and the St. Louis Hub Merger Implementing Agreement, when read together, demonstrate that the amendment to the laying off and leave of absence schedule rule applies only to the employees and territories covered by the St. Louis Hub Merger Implementing Agreement. The second paragraph of Side Letter No. 24 states that "... during our negotiations of this Hub, the Carrier requested a modification" This language proves that the negotiations on the modification were confined to the St. Louis Hub. In addition, the preamble to the St. Louis Hub Merger Implementing Agreement sets forth the territory of the consolidated Hub which excludes the territory covered by other hub merger implementing agreements, including the North Little Rock/Pine Bluff Hub Merger Implementing Agreement.

Furthermore, as former General Chairman Penning related in his affidavit, the penultimate paragraph of Side Letter No. 24 unambiguously provides that the change to the Schedule Rule was without prejudice to the positions of either party and the parties were barred from citing the change in any other negotiation. If the modification to the Schedule Rule was made without prejudice, then the original laying off and leave of absence rule endures at those points not covered by the St. Louis

Hub Merger Implementing Agreement. If Side Letter No. 24 changed the Schedule Agreement everywhere, there would be no reason for the parties to insert a non-referable clause in the side letter.

The BLE Committee membership who are subject to the terms of the St. Louis Hub Merger Implementing Agreement ratified the Agreement by an 84.1 percent vote. However, only those engineers working at points encompassed by the St. Louis Hub Merger Implementing Agreement voted in the ratification canvass. Conversely, those employees at other locations on the Missouri Pacific-Upper Lines did not vote on the terms and conditions in the St. Louis Hub Merger Implementing Agreement. The constitution and bylaws of the International Organization provide that a change in a schedule rule is not effective unless ratified by employees who are subject to the rule. More specifically, Sections 43(a) and 43(b) of the International Constitution and Bylaws bar the Organization's officers from entering into an agreement that changes a rule governing the wages and working conditions of engineers without ratification by the affected membership.³ Since the Organization Committee members at the North Little Rock/Pine Bluff Hub did not vote on the St. Louis Hub Merger Implementing Agreement, the laying off and leave absence rule remains unchanged at North Little Rock. *Division 48, International Brotherhood of Locomotive Engineers v. Windham*, Civ. Action 86-2313-C-2 (E.D. MO 1986).

Assuming *arguendo*, that Side Letter No. 24 is unclear or ambiguous, the negotiating history supports the Organization's interpretation. The former General Chairman iterated in his affidavit that the Organization only agreed to reduce the 30-day limitation period to 15 days in the Schedule Rule to short circuit the Carrier's very real threat of applying an inferior Schedule Agreement to the

³ Section 33(a)(1) of the Constitution and Bylaws of the International Organization provide a similar mandatory ratification process for merger agreements.

entire St. Louis Hub territory. However, that inferior agreement could not have been selected by the Carrier in any other Hub touching on the Missouri Pacific-Upper Lines territory. Therefore, it is illogical that the General Chairman and the Organization would agree to modify the Schedule Rule beyond the St. Louis Hub inasmuch as the Chicago & Eastern Illinois Schedule Agreement could not be adopted beyond that Hub.

Furthermore, each merger implementing agreement was negotiated separately and became effective at different times. The parties clearly intended that the terms and conditions of each merger implementing agreement would only apply to the territory expressly covered by the particular implementing agreement.

Article VIII(A) of the St. Louis Hub Merger Implementing Agreement and identical clauses in the other implementing agreements, including Article VIII(A) of the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, demonstrate that the schedule rules are saved unless expressly modified by the Merger Implementing Agreement. Nothing in Side Letter No. 24 suggests that the parties were modifying the laying off and leave of absence rule for the entire property covered by the Schedule Agreement. The savings clause in the North Little Rock/Pine Bluff Hub Merger Implementing Agreement limits the application of Side Letter No. 24 to the territories within the scope of the St. Louis Hub Merger Implementing Agreement.

B. The Carrier's Position

Side Letter No. 24 amended the laying off and leave of absence schedule rule across the Missouri Pacific-Upper Lines. Stated differently, the amended rule is expansive. It pertains to more

territory than just the St. Louis Hub. The schedule rule was modified wherever the Missouri Pacific-Upper Lines schedule agreement is the applicable working agreement.

Nowhere in Side Letter No. 24 is there any language restricting the change in the Laying Off and Leave of Absence Rule to the St. Louis Hub. The absence of such language is a direct contrast to the presence of limiting language on other side letters. For example, Side Letter No. 26 to the St. Louis Hub Merger Implementing Agreement, which amended Schedule Rule 26(D), expressly states that the revision applies only to the St. Louis Hub. Similarly, Side Letter No. 23 to the St. Louis Hub Merger Implementing Agreement contains verbiage restricting the breadth of the rule change so that the amended rule is effective only at certain locations. The language in these two side letters demonstrates that the parties knew how to write restrictive terms. If the parties did not intend for Side Letter No. 24 to completely and entirely modify the Schedule Rule they would have inserted limiting language in the side letter.

Next the express language of Side Letter No. 24 conclusively demonstrates that the change in the rule went beyond the St. Louis Hub. The third paragraph of Side Letter No. 24 states that the current rule will be amended but does not restrict the amendment to the St. Louis Hub. The second paragraph reveals that the Carrier requested modification to existing rules. It would be senseless for the Carrier to ask for a change to a rule and then agree to a bifurcated application of the amendment whereby employees within the St. Louis Hub are treated differently from employees outside the St. Louis Hub.

Lastly, the words in Side Letter No. 24 constitute specific language. It is axiomatic in the interpretation of contracts that specific provisions control over general provisions. The Article

VIII(A) savings clause in the St. Louis Hub Merger Implementing Agreement is a broad and general provision. Side Letter No. 24 is a very specific and detailed provision that supersedes Article VIII(A). Thus, the savings clause is irrelevant.

IV. DISCUSSION

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 Organization would have negotiated a master hub agreement, the terms of which would pierce the boundaries of each hub.

In this particular case, the North Little Rock/Pine Bluff Hub Merger Implementing Agreement became effective many months before the Carrier implemented the St. Louis Hub Merger Implementing Agreement. The employees subject to the North Little Rock/Pine Bluff Hub Merger Implementing Agreement understood the changes in working conditions brought about by the terms of their hub merger implementing agreement. Of course, these employees were not privy to the terms and conditions of the separately negotiated merger agreement governing the St. Louis Hub. It is noteworthy that the North Little Rock/Pine Bluff Hub Agreement does not contain a side letter equivalent to Side Letter No. 24 of the St. Louis Hub Merger Implementing Agreement.

Therefore, the North Little Rock/Pine Bluff Hub employees were not subject to any terms of the St. Louis Hub Agreement or, put differently, that they were not suddenly subject to a modification of their working conditions when the St. Louis Hub Agreement became effective nine

months later. It would be incongruous that, for a nine-month period, the North Little Rock/Pine Bluff Hub engineers would be subject to the 30-day limitation period in the Schedule Rule and then, on November 1, 1998, the more stringent 15-day limitation period would suddenly be imposed on these engineers.

In sum, the context in which the Hub Agreements were negotiated strongly supports the Organization's construction of Side Letter No. 24.

In addition, the express language of Side Letter No. 24 buttresses the Organization's position. As the Organization persuasively argues, the second paragraph of Side Letter No. 24 refers to "... negotiations of this Hub ..." which clearly announces that the parties were bargaining over terms and conditions applicable to the territory covered by the St. Louis Hub Merger Implementing Agreement. The language does not state during negotiations of "all Hubs" or, during negotiations of "Hubs attendant to the Missouri Pacific-Upper Lines." It logically follows that the outcome of those negotiations pertained exclusively to the St. Louis Hub.

Absent any language showing that the breadth of the change in the laying off and leave of absence rule extended beyond the demarcation of the St. Louis Hub, the clear language of Side Letter No. 24 restricts the modification to employees subject to the terms and conditions of the St. Louis Hub Merger Implementing Agreement.

Inasmuch as the terms of Side Letter No. 24 of the St. Louis Hub Merger Implementing Agreement did not extend beyond the territory covered by the St. Louis Hub, Article VIII(A) of North Little Rock/Pine Bluff Hub Merger Implementing Agreement preserved (saved) the

unmodified schedule rule on laying off and leave of absence for territory covered by the North Little Rock Hub.

AWARD AND ORDER

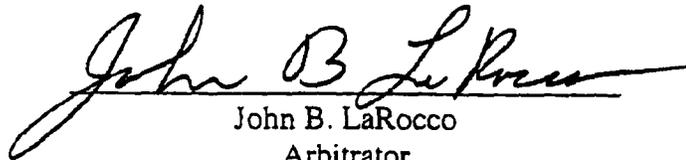
Organization's Question at Issue: Does Side Letter No. 24 of the St. Louis Hub Merger Implementing Agreement modify the MPUL Laying Off and Leave of Absence Schedule Rule beyond the geographical territory of the St. Louis Hub?

Answer to Organization's Question at Issue: No.

Carrier's Question at Issue: Did the April 15, 1998 letter agreement amending the "Laying Off and Leave of Absence" rule dated October 22, 1952 and contained on Page 250 of the current Collective Bargaining Agreement apply only to the St. Louis Hub or does it apply to all of the MPUL committee?

Answer to Carrier's Question at Issue: For the reasons more fully stated in this Opinion, Side Letter No. 24 applies only to employees and territory subject to the terms and conditions of the St. Louis Hub Merger Implementing Agreement.

Date: January 26, 2001



John B. LaRocco
Arbitrator

Neutral and Sole Committee Member

Exhibit 7

ARBITRATION COMMITTEE



In the Matter of the Arbitration Between: BROTHERHOOD OF LOCOMOTIVE ENGINEERS, Organization, and UNION PACIFIC RAILROAD COMPANY, Company.

Pursuant to Article 1, § 11 of the New York Dock Conditions Case No. 1, Award No. 1 Engineer M. O. Coats

OPINION AND AWARD

Hearing Date: February 6, 2003
Hearing Location: Sacramento, California
Date of Award: May 19, 2003

MEMBERS OF THE COMMITTEE

Neutral and Sole Member: John B. LaRocco

ORGANIZATION'S QUESTIONS AT ISSUE

- 1. Whether the Carrier may unilaterally relocate the Claimant from Kansas City, Missouri, to Jefferson City, Missouri? If not, what is the remedy?
2. Whether the Carrier may stop payment of the Reverse Held-Away-From-Home Allowance at Jefferson City, Missouri? If not, what is the remedy?
3. Whether the Carrier may recollect Relocation Allowances paid to Claimant from Claimant's Test Period Average Earnings Allowances? If not, what is the remedy?
4. Whether the Carrier may cease Reverse Lodging Allowances and Benefits? If not, what is the remedy?
5. Without waiver of the Organization's position as to any of the above, should the Carrier prevail, arguendo, but incorrectly, what is the proper accounting of funds recollected? If funds have been recollected improperly, or to excess, what is the remedy?

CARRIER'S QUESTIONS AT ISSUE

- 1. Did M. O. Coats (Claimant) actually relocate from Jefferson City, Missouri to Kansas City, Missouri, pursuant to the Kansas City Hub Implementing Agreement?
2. Is New York Dock the proper forum for this case to be adjudicated?

APPENDIX "A"

OPINION OF THE COMMITTEE

I. INTRODUCTION

The United States Surface Transportation Board (STB) approved the application of the Union Pacific Railroad Company (former UP) to control and merge with the Southern Pacific Transportation Company (SPT) and its subsidiaries. [Finance Docket 32760] One of the SPT's subsidiaries was the St. Louis South Western Railway (SSW). As a condition of the merger, the STB imposed on the merged Carrier (UP) 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) ("New York Dock Conditions") pursuant to the relevant enabling statute.

Subsequent to the merger, the Brotherhood of Locomotive Engineers (BLE or Organization) and the UP (Carrier) negotiated a number of implementing agreements. This dispute centers on the proper interpretation and application of provisions contained in the Kansas City Hub Merger Implementing Agreement.

At the February 6, 2003 hearing, the Organization and Carrier waived the tripartite arbitration committee set forth in Article I, § 11(a) of the New York Dock Conditions. The parties stipulated that the undersigned act as the Neutral and Sole Member of this Committee. At the Neutral Member's request, the parties waived the 45-day time limitation, specified in Article I, Section 11(c) of the New York Dock Conditions, for issuing this decision.

II. BACKGROUND AND SUMMARY OF THE FACTS

Subsequent to the merger, the Carrier and the Organization negotiated a series of merger hub 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.

The Organization and the Carrier signed the Kansas City Hub Merger Implementing Agreement on July 2, 1998. The Implementing Agreement became effective on January 16, 1999.

Article VII(B) of the Kansas City Hub Merger Implementing Agreement reads:

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, an employee 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 within 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.

NOTE: All requests for relocation allowances must be submitted on the appropriate form.

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.

5. Under no circumstances shall an engineer be permitted to receive more than one (1) "in lieu of" relocation allowance under this Implementing Agreement.
6. 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.

Claimant is a former SSW Engineer who resided and had his home terminal at Jefferson City, Missouri. Claimant is among the engineers listed on Attachment D to the Kansas City Hub Merger Implementing Agreement.

As an Attachment D Engineer, Claimant held certain valuable, superior and prior rights to work at Jefferson City so long as he indefinitely resided at Jefferson City. Pursuant to Side Letter No. 7 and other provisions of the Kansas City Hub Merger Implementing Agreement, engineers like Claimant, could voluntarily relocate to Kansas City and collect the *in lieu of* relocation benefits described in Article VII(B). Engineers performing service in the Kansas City pool were afforded reverse lodging expenses and home away from home terminal (HAHT) privileges at Jefferson City.

On or about March 31, 2000, Claimant submitted an application for *in lieu of* relocation benefits attesting that he was moving his residence from Jefferson City to Kansas City. On the application form, Claimant checked options two and three which provided:

Option 2: I am a homeowner and accept a \$20,000 allowance in lieu of New York Dock relocation benefits.

If I have accepted Option 1 or 2, I understand that I must submit "proof of actual relocation" in order to receive the "in lieu of" allowance.

Option 3: I am a homeowner and having sold my home, accept a \$10,000 allowance in addition to the \$20,000 allowance I shall receive under Option 2, for a total of a \$30,000 allowance.

Claimant also promised that, by completing the form, he would, if his seniority permitted, remain at Kansas City for at least two years.¹

The Carrier approved Claimant's relocation benefit application. It paid Claimant a \$30,000 relocation allowance in accord with Options 2 and 3 of Article VII(B).²

Claimant evidently sold his home located on Indian Meadow Road in Jefferson City on or about August 14, 1998, approximately a year and a half prior to the submission of his relocation benefit application. According to Side Letter No. 14 to the Kansas City Hub Merger Implementing Agreement, an engineer was still eligible for relocation benefits even if he sold his home prior to the actual implementation of the merger provided the residence sale occurred after the date (July 2, 1998) of the signing of the Kansas City Hub Merger Implementing Agreement. When he received relocation benefits, Claimant owned a residence on County Road 490 in New Bloomfield, Missouri, a town about 11 miles from Jefferson City.³

On April 5, 2000, Claimant signed a six-month lease for an apartment located on East 28th Terrace in Independence, Missouri, a city within the Kansas City metropolitan area. The lease term started on May 5, 2000. Claimant asserted that he occupied the apartment without commuting between Independence and New Bloomfield. Claimant submitted copies of paid utility bills from the City of Independence. Claimant vacated the apartment on October 31, 2000.

By correspondence dated June 2, 2000, the Carrier demanded that Claimant repay the \$30,000 relocation allowance on the grounds that an audit of Carrier records revealed that Claimant

¹ The two-year minimum relocation period is set forth in Article VII(B)(6) of the Kansas City Hub Merger Implementing Agreement.

² The Carrier paid Claimant a net amount.

³ The record does not reveal when Claimant purchased this property.

did not truly relocate from Jefferson City to Kansas City. The pertinent portion of the Carrier's June 2, 2000 letter reads:

Carrier records indicate that you did not relocate to Kansas City. Instead, you have relocated back to the Jefferson City vicinity. The relocation allowance was not intended to be paid for employees who were not truly relocating their residence to Kansas City. As you have failed to comply with the conditions under which you were granted the relocation allowance, I have enclosed a repayment agreement for you to repay the net amount of \$20,700.00 as you have failed to relocate in accordance with the agreement. Due to this, your payment of reverse held-away benefits will cease immediately.⁴

Claimant responded to the Carrier's demand for repayment of the relocation allowance by letter dated June 12, 2000, contending that the demand was an "error." Claimant wrote:

I would like to know which Carrier records indicate that I did not relocate to Kansas City per the provisions of the Kansas City Hub. I furnished your office with a signed lease on an apartment in Kansas City along with my relocation request. The lease is a valid document as per the provisions of the Kansas City Hub agreement. It was for a period of six months and renewable thereafter. I received payment denoted in your letter on April 27, 2000, and my lease period began on May 15, 2000.⁵

* * * *

It was my intent to totally relocate to Kansas City in the future. However, I could not complete this move totally within the prescribed two-year period denoted in the "in lieu of" section pertaining to relocation allowance due to the above.

On June 14, 2000, the Carrier sent a second letter to Claimant asserting that his telephone number on record with the Carrier had a 573 area code which is the area code for Jefferson City. The

⁴ The Director of Labor Relations, who wrote the demand letter, did not explain how the net amount was calculated but, presumably, the Carrier had withheld some funds for tax purposes.

⁵ The record is unclear whether the lease term began on May 5 or May 15 but the 10-day discrepancy is immaterial.

Carrier also charged that renting an apartment at Kansas City and commuting to and from New Bloomfield did not constitute a relocation.

In a letter dated June 17, 2000, Claimant denied that he was commuting between New Bloomfield and Kansas City. He also asserted that his telephone numbers were irrelevant to determining whether or not he had moved to Kansas City. Nonetheless, Claimant intimated that the telephone number was for a cellular telephone.

In a June 26, 2000 letter to Claimant, the Carrier alleged that the telephone number was a land line to Bloomfield Hills. The Carrier pointed out that Claimant had written at least one of his prior letters on letterhead containing both his New Bloomfield address and his Independence address. Moreover, the Carrier specified that the return address on Claimant's envelope was his New Bloomfield address. In the final paragraph of the June 26, 2000 letter, the Carrier wrote:

As delineated above, I must find that you violated the terms of your relocation agreement and the hub agreement. As a result, your job will remain headquartered at Jefferson City. Furthermore, you should note that this situation has its genesis in the New York Dock Conditions and the hub agreement. Therefore, should you wish to pursue this matter, the proper forum for resolution of this issue is New York Dock arbitration.

On July 19, 2000, Claimant again wrote a letter to the Carrier with letterhead bearing his New Bloomfield address, and immediately below, his Independence address. In the letter, Claimant stated that his primary telephone number was different than the number specified in the Carrier's June 14, 2000 correspondence. Claimant also declared that the Carrier could not prohibit him from continuing to have an address in Jefferson City as well as an address in the Kansas City area. Claimant charged that the Carrier was unilaterally attempting to move his home terminal from

Kansas City to Jefferson City in violation of several Agreements. In one paragraph of his July 19, 2000 letter, Claimant wrote:

As stated in previous correspondence to your office, I still represent Engineers on this property and maintain numerous files regarding this representation as well as an office and office equipment at 3017 County Road 490 New Bloomfield, MO. 65063. I receive correspondence, not only from your office but also the BLE and various BLE Representatives around the country at this address. Being able to maintain this office until such time as I can complete my move to the Kansas City area makes my job as BLE Representative much easier. That is why I am grateful that your office continues to send correspondence regarding these Union matters to said address. Until such time as I can complete my move to Kansas City (which you are making unduly difficult) I will continue to send and receive said BLE and Labor Relations correspondence from said address.

In an August 3, 2000 letter, the Carrier reiterated that Claimant's home telephone number in New Bloomfield was his telephone number of record with the Carrier. The Director of Labor Relations again asserted that the dispute between the Carrier and Claimant was governed by the New York Dock Conditions. More specifically, the Director of Labor Relations wrote:

This matter is clearly governed by the dispute resolution mechanisms of the New York Dock Conditions. The entirety of your relocation and allowance has its genesis in the Hub Agreement created due to the Surface Transportation Board's decision in Finance Docket 32760, which applied New York Dock Conditions to the Union Pacific/Southern Pacific merger.

Thereafter, the Carrier commenced a setoff against Claimant's test period earnings to recoup the monies that, according to the Carrier, it had improperly paid Claimant. In the Carrier's view, Claimant had never relocated from Jefferson City to Kansas City.

Claimant submitted into the record 401(k) plan statements that the Carrier mailed to him at his Independence address. Claimant also submitted the dates and times that the Carrier purportedly

deprived him of HAHT pay. Claimant seeks reimbursement of \$12,129.29 covering the period from June 4, 2000 through January 11, 2001.

On or about July 15, 2002, Claimant requested an accounting regarding the amounts that the Carrier had deducted from his test period average earnings for recollection of the *in lieu of* relocation allowance. On August 5, 2002, the Carrier sent Claimant a spread sheet showing an original balance due of \$28,245.40 as of June 2000 and a balance due of \$4,472.44 as of May 2002 with amounts it had recovered during the intervening months.

Claimant is presently assigned to Jefferson City and is evidently receiving away from home terminal time and pay when he is ensconced at Kansas City on pool turns.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Carrier wrongly reclaimed *in lieu of* relocation benefits from Claimant even though he relocated from Jefferson City to Kansas City. Claimant tendered irrefutable evidence that he sold his home in Jefferson City. The Carrier improperly attempted to unilaterally relocate Claimant from Kansas City back to the Jefferson City which denigrates Claimant's right to make the voluntary move to Kansas City pursuant to the Kansas City Hub Merger Implementing Agreement.

Claimant actually relocated from Jefferson City to Kansas City. Claimant not only sold his Jefferson City home but he entered into an apartment lease at Independence, Missouri. Claimant occupied the apartment since he used and paid for utilities.

Claimant made a very important decision. He forewent valuable employment rights to move to the Kansas City Hub. Claimant would not lightly decide to leave Jefferson City. It logically

follows that Claimant must have wanted to genuinely move to Kansas City otherwise, he would not have surrendered the special rights afforded to Claimant and other Jefferson City engineers.

Employees are not barred from having multiple residences. Engineers may relocate to Kansas City and keep their homes in Jefferson City by selecting Option 2 of Article VII(B). The parties contemplated that engineers could maintain homes in Jefferson City and still relocate their residences to Kansas City. Thus, Claimant could own property in New Bloomfield while he resided in Independence.

The Organization submits that Claimant was the victim of disparate treatment. The Organization proffered evidence that another Jefferson City engineer received a relocation allowance for moving from Jefferson City to Kansas City even though the engineer did not purchase a home at Kansas City. The Organization presented another example of an engineer who moved to a new work location in Illinois and the Carrier allowed this engineer to keep his relocation allowance even though his wife resided in a Florida home. Last, the Organization identified a conductor who moved from Jefferson City to Kansas City. Although the Carrier initially denied the conductor an *in lieu of* relocation allowance, it eventually paid the benefit to the conductor because he signed a three-month lease for living at Kansas City, one-half the duration of Claimant's lease.

In response to the Carrier's argument that this dispute is not properly before a New York Dock Arbitration Committee, the Organization argues that the Carrier is estopped from asserting that this Committee lacks jurisdiction over the claim given the Director of Labor Relations declarations in her letters to Claimant that the dispute was governed by the New York Dock Conditions. In addition, the Organization avers that the *in lieu of* relocation benefits grow out of the New York

Dock Conditions and are found in a merger implementing agreement. Any controversy about the benefits are within the jurisdiction of this Committee.

B. The Carrier's Position

The Carrier contends that an Arbitration Committee formed under the New York Dock Conditions is not the proper forum for adjudicating this dispute. The *in lieu of* relocation benefits in the Kansas City Hub Merger Implementing Agreement supersede the New York Dock provisions for moving expenses and real estate losses. Therefore, when an engineer elects the *in lieu of* relocation allowance, the option is a benefit outside the ambit of the New York Dock Conditions. Although the Carrier's Director of Labor Relations initially stated that the dispute might be subject to the New York Dock Conditions, later correspondence on the property shows that the Carrier properly took the position that a New York Dock Arbitration Committee cannot resolve disputes involving *in lieu of* relocation payments to engineers. In sum, this Committee lacks authority to decide this claim.

Claimant did not actually relocate from Jefferson City to Kansas City and so, he was not entitled to *in lieu of* relocation benefits. To be entitled to those benefits, Claimant must have permanently changed his place of residence. Claimant rented an apartment in the Kansas City area but he did not really relocate. After receiving the relocation allowance, Claimant quickly retreated to his home in New Bloomfield near Jefferson City. In his correspondence dated June 12, Claimant admitted that he had not relocated to Kansas City. Claimant only asserted, without any support, that he would relocate to Kansas City at some time in the future. By his own writings, Claimant conceded that he did not truly move his residence to Kansas City. Also, Claimant merely established

a mailing address at Independence. He still listed his New Bloomfield home telephone number, with area code 573, as his main telephone number, of record with the Carrier.

Since Claimant did not relocate from Jefferson City to Kansas City, the Carrier properly recouped the allowance by withholding monies from his test period average earnings. The Carrier accounted for these deductions in August, 2002. Moreover, the Carrier properly ceased paying Claimant's HAHT at Jefferson City because Claimant never moved from Jefferson City to Kansas City.

IV. DISCUSSION

The *in lieu of* relocation allowances are a direct substitute for the benefits that engineers are otherwise entitled to receive under the New York Dock Conditions. [*See Article I, Sections 9 and 12 of the New York Dock Conditions.*] Stated differently, the parties negotiated the *in lieu of* provisions predicated on the compulsion contained in the New York Dock Conditions, that engineers are entitled to protection from certain real estate losses and moving expenses. The *in lieu of* relocation benefits are a natural outgrowth of the benefits in the New York Dock Conditions. The *in lieu of* allowances are simply designed to streamline the administration of the moving and home benefits having their genesis in the New York Dock Conditions. [*Transportation Communications International Union and Kansas City Southern Railway, NYD § 11 Arb. (Muessig, 2000).*] Therefore, this Committee has jurisdiction over the instant dispute.

To conclusively effect a relocation from an employee's old work point to the employee's new work point, the employee must actually move from the old work point to the new work point and then evince the present intent to maintain the employee's principal and permanent place of residence at the new work location. [*Special Board of Adjustment: Allied Services Division,*

Transportation Communications International Union and Union Pacific Railroad Company (Suntrup, 2000).] The Special Board of Adjustment enumerated several factors that are used to determine whether an employee truly relocates and intends to establish a permanent residence at the new work location including: where the family resides; registration of personal property; what ties the employee has to the community; what payments the employee makes to vendors in the community; and, whether the employee commutes to the new work location. In a philosophical sense, the Board aptly observed that home is where the employee's heart resides. Whether an employee has relocated and permanently resides at the employee's new work location must be decided on a case-by-case basis by examining the surrounding circumstances.

In this case, Claimant admitted, in two of his letters, that he did not actually relocate from Jefferson City to Kansas City. In his June 12, 2000 letter, Claimant wrote that he planned to relocate to Kansas City in the future. To be eligible for the relocation allowance, an engineer must physically move to Kansas City with the present intent to reside there permanently. Moreover, in the same letter, Claimant admitted that he did "... not complete this move" which is an acknowledgment that he never left Jefferson City. Indeed, Claimant's telephone number of record with the Carrier coincided with the area code for Jefferson City. Even though Claimant received some other items at his Independence address, Claimant left his New Bloomfield telephone number as the paramount number for reaching him which confirms his intent to keep his residence at New Bloomfield. Paying utilities at Independence is only a modicum of evidence of a relocation since renting an apartment entails some utility charges. Claimant did not submit other documents, such as a driver's license having the Independence address, which would be more probative towards proving a relocation than utility bills.

In his correspondence dated July 19, 2000, Claimant conceded that he kept an office, which is a very important attachment to the Jefferson City area, at his New Bloomfield address “. . . until such time as I can complete my move to the Kansas City area” Claimant’s statement demonstrates that he had not yet moved to Kansas City even though he had received the relocation allowance. Moving his office to Kansas City would have showed substantial ties to his new work location. Conversely, by keeping the office in Jefferson City, Claimant manifested an intent to maintain his residence at Jefferson City.

In sum, based on Claimant’s admission, as corroborated by Carrier records, this Committee finds that Claimant did not relocate from Jefferson City to Kansas City. Inasmuch as Claimant never moved, he could not possibly have had the intent to establish a primary and permanent residence at Independence.

This Committee observes that engineers need not sell their homes in Jefferson City. They are not barred from owning multiple parcels of real property, including parcels in both Kansas City and Jefferson City. This Committee merely emphasizes that to be eligible for the *in lieu of* relocation benefits, the engineer must actually move from Jefferson City to Kansas City with the present intent to maintain a permanent residence at Kansas City for a minimum, seniority permitting, of two years. If an engineer from Jefferson City relocates to Kansas City and then maintains his principal place of residence at Kansas City, the engineer may continue to own whatever real estate the engineer so desires in the Jefferson City area, including the home in which he resided prior to the relocation.

Next, the Committee concludes that Claimant was not the victim of disparate treatment. The examples raised by the Organization are distinguishable from Claimant’s situation. The engineer who maintained a second home in Florida for his wife was a unique circumstance but nonetheless,

the engineer proved, with sufficient evidence, that he maintained his primary and permanent residence in Illinois. The other engineer and conductor who relocated from Jefferson City to Kansas City may or may not have been properly entitled to *in lieu of* relocation allowances.⁶ We merely find insufficient evidence in the record that the facts surrounding their relocations precisely mirrored Claimant's situation. Moreover, one or two isolated instances where the Carrier failed to recoup improperly paid relocation allowances does not constitute a past practice permitting all engineers to keep monies that were improperly paid to them.

While the issue of Claimant's continuing status is not directly before this Committee, we simply observe that the Carrier should realize that there may be ramifications flowing from the Carrier's decision to treat Claimant like he never relocated, i.e., Claimant remains as a Jefferson City engineer. The Committee is confident that the parties understand these potential ramifications.

On or about August 5, 2002, the Carrier provided Claimant with a spread sheet delineating certain deductions from his test period earnings and an original balance due of \$28,245.40. While the spread sheet shows a series of deductions, the Carrier did not state a source for its figures or adequately explain the interaction between the original payment, the net amount due and amounts originally withheld for taxes. Also, from Claimant's perspective, there may be tax consequences arising out of the recollection or changes in taxation for the year in which Claimant received the allowance. Since the Carrier recouped the improperly paid allowance without a repayment agreement, the Carrier must give a fuller accounting of the balance due, the amounts deducted and any known tax consequences including the sources and calculations underlying these figures.

⁶ The Committee does not express any opinion as to whether the Carrier properly paid them *in lieu of* relocation allowances.

Therefore, this Committee will direct the Carrier to provide Claimant with a full and complete accounting concerning the Carrier's recoupment of the relocation benefits.

AWARD AND ORDER

ORGANIZATION'S QUESTION AT ISSUE NO. 1

Whether the Carrier may unilaterally relocate the Claimant from Kansas City, Missouri, to Jefferson City, Missouri? If not, what is the remedy?

ANSWER TO THE ORGANIZATION'S QUESTION AT ISSUE NO. 1

The Carrier properly recouped the *in lieu of* relocation allowance from Claimant. It must provide Claimant with a full and complete accounting within 60 days of the date stated below.

* * * *

ORGANIZATION'S QUESTION AT ISSUE NO. 2

Whether the Carrier may stop payment of the Reverse Held-Away-From-Home Allowance at Jefferson City, Missouri? If not, what is the remedy?

ANSWER TO THE ORGANIZATION'S QUESTION AT ISSUE NO. 2

The Committee observes that the Carrier should realize that there may be ramifications from its decision to recoup the relocation allowance effectively keeping Claimant assigned at Jefferson City.

* * * *

ORGANIZATION'S QUESTION AT ISSUE NO. 3

Whether the Carrier may recollect Relocation Allowances paid to Claimant from Claimant's Test Period Average Earnings Allowances? If not, what is the remedy?

ANSWER TO THE ORGANIZATION'S QUESTION AT ISSUE NO. 3

The Carrier properly recouped the *in lieu of* relocation allowance from Claimant provided the Carrier provides Claimant with a full and complete accounting within 60 days of the date stated below.

* * * *

ORGANIZATION'S QUESTION AT ISSUE NO. 4

Whether the Carrier may cease Reverse Lodging Allowances and Benefits? If not, what is the remedy?

ANSWER TO THE ORGANIZATION'S QUESTION AT ISSUE NO. 4

The Committee observes that the Carrier should realize that there may be ramifications from its decision to recoup the relocation allowance effectively keeping Claimant assigned at Jefferson City.

* * * *

ORGANIZATION'S QUESTION AT ISSUE NO. 5

Without waiver of the Organization's position as to any of the above, should the Carrier prevail, *arguendo*, but incorrectly, what is the proper accounting of funds recollected? If funds have been recollected improperly, or to excess, what is the remedy?

ANSWER TO THE ORGANIZATION'S QUESTION AT ISSUE NO. 5

The Carrier properly recouped relocation benefits from Claimant. It must provide Claimant with a full and complete accounting within 60 days of the date stated below.

* * * *

CARRIER'S QUESTION AT ISSUE NO. 1

Did M. O. Coats (Claimant) actually relocate from Jefferson City, Missouri to Kansas City, Missouri, pursuant to the Kansas City Hub Implementing Agreement?

ANSWER TO THE CARRIER'S QUESTION AT ISSUE NO. 1

No. Claimant did not actually relocate to from Jefferson City to Kansas City pursuant to the requirements set forth in the Kansas City Hub Merger Implementing Agreement.

* * * *

CARRIER'S QUESTION AT ISSUE NO. 2

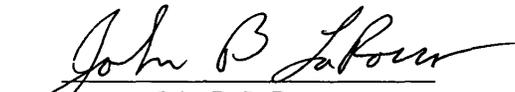
Is New York Dock the proper forum for this case to be adjudicated?

ANSWER TO THE CARRIER'S QUESTION AT ISSUE NO. 2

Yes. This New York Dock Arbitration Committee has jurisdiction to adjudicate this dispute.

This Committee retains jurisdiction over this dispute for a period of one year from the date stated below to resolve any dispute about the interpretation or application of its decision herein; provided, the parties may mutually agree to extend the Committee's retention of jurisdiction beyond the one year period.

Dated: May 19, 2003



John B. LaRocco
Neutral and Sole Member

Exhibit 8



BUILDING AMERICA®

UNION PACIFIC CORPORATION
2007 ANNUAL REPORT

Fellow Shareholders:

By nearly every measure, 2007 was one of the best years in our Company's history. We achieved this success by fulfilling our commitments to customers, communities, employees and our shareholders.

- We operated a safer railroad for our customers, employees and communities.
- We overcame the challenges of a weaker economy and record-high diesel fuel prices to set numerous financial records.
- We increased our value to customers through improved service. Customers recognized these efforts, rewarding us with their highest satisfaction survey marks since our merger with the Southern Pacific.
- We contributed to the communities where we operate by offering good jobs and supporting economic development and community organizations.

The progress we made in these areas enabled us to deliver strong shareholder returns. During 2007, Union Pacific's stock price appreciated nearly 37 percent, dividends increased 47 percent, and shareholders received \$1.5 billion through share repurchases.

We expect 2008 will be another record year. Although we will be challenged by economic softness and volatile diesel fuel prices, we expect to offset these issues as the long-term initiatives we began a few years ago continue to pay off.

America's transportation infrastructure needs capacity investment. Union Pacific has pledged to do its part by investing for growth as we improve our financial returns. The "proof statement" can be seen in our actions. We invested a record \$3.1 billion during 2007, as we earned record profits and improved our return on invested capital. Our plans for 2008 are similar - generate record profits, increase returns and invest an additional \$3.1 billion for safety, service, growth and efficiency.

Union Pacific plays a critical role in our nation's pursuit of energy independence and environmental responsibility. Railroads are the most fuel efficient, environmentally friendly mode of ground freight transportation, moving one ton more than 790 miles on a gallon of diesel fuel. In addition, our numerous technology and process innovations are driving even greater conservation, already having saved nearly 21 million gallons of diesel fuel in 2007. One example is a new switch locomotive that reduces emissions as much as 80 percent and is at least 15 percent more fuel efficient.

The men and women of Union Pacific are the driving force behind our success as a company. They are prepared to handle the challenges ahead as we recruit, train and develop one of the nation's most productive workforces. The Union Pacific team is dedicated to continuing the strong tradition built over the past 146 years, and we look forward to a very successful future.



Chairman, President and
Chief Executive Officer

Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations

The following discussion should be read in conjunction with the Consolidated Financial Statements and applicable notes to the Financial Statements and Supplementary Data, Item 8, and other information in this report, including Risk Factors set forth in Item 1A and Critical Accounting Policies and Cautionary Information at the end of this Item 7.

The Railroad, along with its subsidiaries and rail affiliates, is our one reportable operating segment. Although we analyze revenue by commodity group, we analyze the net financial results of the Railroad as one segment due to the integrated nature of our rail network.

EXECUTIVE SUMMARY

2007 Results

- **Safety** – We operated a safer railroad in 2007, improving safety for our employees, customers, and the public. The employee injury incident rate per 200,000 man-hours declined to its lowest level. A continued focus on derailment prevention in 2007 resulted in a 14% reduction in incidents, with associated costs declining 13%. In the area of public safety, we closed 482 grade crossings to reduce our exposure incidents, and we installed additional video cameras in our road locomotives. As a result of this installation work, we now have camera-equipped locomotives in the lead position of over 85% of our road trains. These video cameras allow us to better analyze grade crossing incidents, thereby increasing safety for our employees and the public. The number of grade crossing incidents decreased 9% during the year, despite the combination of increasing highway traffic and urban expansion. Also, through extensive trespass reduction programs, we were able to reduce trespasser incidents by 21%. All of these improvements are the result of comprehensive efforts to enhance employee training, increase public education, make capital investments, and take proactive steps to reduce safety risks.
- **Financial Performance** – In 2007, we generated record operating income of \$3.4 billion despite lower volume. Yield increases, network management initiatives, and improved productivity drove the 17% increase in operating income. Our operating ratio was 79.3% for the year, a 2.2 point improvement compared to 2006. Net income of \$1.86 billion also exceeded our previous milestone, translating into earnings of \$6.91 per diluted share.
- **Commodity Revenue** – Our commodity revenue grew 4% year-over-year to \$15.5 billion, the highest level in our history. We achieved record revenue levels in five of our six commodity groups, driven primarily by better pricing and fuel surcharges. Since 2004, we have repriced approximately 75% of our business. Volume decreased 1% in 2007 due to softening markets for some of our commodities and adverse weather conditions.
- **Network Operations** – In 2007, we significantly improved the fluidity and efficiency of our transportation network. Continued focus on increasing velocity, eliminating work events, improving asset utilization, and expanding capacity were key drivers of our operational improvement. We reduced average terminal dwell time by 8%, improved car utilization by 7%, and increased average train speed by 2% with ongoing enhancements to our Unified Plan (an ongoing program that streamlines segments of our transportation plan) and implementation of initiatives to make train processing at our terminals more efficient. We completed implementation of Customer Inventory Management System, an operational productivity initiative that complements the Unified Plan by reducing the number of rail cars in our terminals without adding capacity. We also expanded capacity and continued to use industrial engineering techniques to further improve network fluidity, ease capacity constraints, and improve asset utilization. Our customer satisfaction improved during 2007, an indication that efforts to improve network operations translated into better customer service.